

FIRST AMENDMENT TO ENVIRONMENTAL IMPACT REPORT
(RESPONSES TO COMMENTS)

BRANDENBURG MIXED USE PROJECT/
NORTH SAN PEDRO HOUSING SITES
ENVIRONMENTAL IMPACT REPORT

STATE CLEARINGHOUSE #2003012046

GP 03-03-01

January 2004

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I. INTRODUCTION

A. PURPOSE OF THE FIRST AMENDMENT

This document has been prepared in the form of an amendment to the Draft Environmental Impact Report (Draft EIR) prepared for the Brandenburg Mixed Use Project/North San Pedro Housing Sites Project. The Draft EIR identifies the likely environmental consequences associated with the implementation of the proposed project, and recommends mitigation measures to reduce potentially significant impacts. This First Amendment provides responses to comments on the Draft EIR and makes revisions to the Draft EIR, as necessary, in response to these comments or to clarify any errors, omissions, or misinterpretations of material in the Draft EIR. This document, together with the Draft EIR, constitutes the Final EIR for the proposed project.

B. ENVIRONMENTAL REVIEW PROCESS

According to CEQA, lead agencies are required to consult with public agencies having jurisdiction over a proposed project, and to provide the general public with an opportunity to comment on the Draft EIR.

The Draft EIR for the Brandenburg Mixed Use Project/North San Pedro Housing Sites Project was made available for public review on August 27, 2003 and distributed to local and State responsible and trustee agencies. The public was notified of the availability of the Draft EIR through an advertisement in the *San Jose Mercury News* and through an announcement posted on the City of San Jose website. The Draft EIR was posted electronically on the City's website and a hard copy was available for public review at the City of San Jose Planning Department and at the Dr. Martin Luther King, Jr. Library of the San Jose Library system.

The CEQA-mandated 45-day public comment period was initially set to end on October 13, 2002. However, that closure date was extended by seven days to October 20, 2003. The City received a total of nine comment letters from State, regional and local agencies during this period. Five comment letters were received from community organizations and individuals. Copies of all written comments received on the Draft EIR during the comment period are contained in Chapter III of this First Amendment.

In addition, one letter was received (December 10, 2003) from a community organization after the close of the comment period.

The Final EIR will be presented to the Planning Commission at a public hearing on February 9, 2004 during which the Commission may certify the Final EIR as a full disclosure of the potential environmental effects of the proposed project.

C. DOCUMENT ORGANIZATION

This First Amendment consists of the following chapters:

- *Chapter I: Introduction.* This chapter discusses the purpose and organization of this First Amendment.
- *Chapter II: List of Commenting Agencies and Individuals.* This chapter contains a list of all agencies, organizations, and persons who submitted written comments on the Draft EIR during the public review period.
- *Chapter III: Comments and Responses.* This chapter contains reproductions of all comment letters received on the Draft EIR. A written response for each CEQA-related comment received during the public review period is provided. Each response is keyed to the preceding comments.
- *Chapter IV: Draft EIR Text Revisions.* Corrections to the Draft EIR necessary in light of the comments received and comments provided, or necessary to clarify any errors, omissions, or misinterpretation, are contained in this chapter. Text in underline represents language that has been added to the EIR; text with ~~strikeout~~ has been deleted from the EIR. Revisions to figures are also provided, where appropriate. A copy of the revised Draft EIR summary table is also included in this chapter. As mentioned previously, this document is an amendment to the Draft EIR; the Final EIR consists of this amendment and the August 2003 Draft EIR.
- *Chapter V: Mitigation Monitoring and Reporting Plan.* This chapter contains the mitigation monitoring and reporting plan for the project, a legal requirement under CEQA.

II. LIST OF COMMENTING AGENCIES, ORGANIZATIONS, AND INDIVIDUALS

This chapter presents a list of each letter received during the public review period and describes the organization of the letters and comments that are included in Chapter III of this document.

A. ORGANIZATION OF COMMENT LETTERS AND RESPONSES

Chapter III includes a reproduction of each letter received on the Draft EIR. The written comments are grouped by the affiliation of the commentor, as follows: federal agencies (A); State agencies (B); local and regional agencies (C); organizations (D); and individuals (E).

The comment letters are numbered consecutively following the A, B, C, D, and E designation. The letters are annotated in the margin according to the following code:

Federal Agencies:	A1-#
State Agencies:	B1-#
Local and Regional Agencies:	C1-#
Organizations:	D1-#
Individuals:	E1-#

The number following the letter refers to the letter number and the number following the hyphen refers to the comment number within that letter.

B. LIST OF AGENCIES AND INDIVIDUALS COMMENTING ON THE DRAFT EIR

The following written comment letters were submitted to the City during the public review period.

Comment Received From	Date of Letter	Response Required
State Agencies		
B-1 California Public Utilities Commission	September 5, 2003	Yes
B-2 California Regional Water Quality Control Board	October 1, 2003	Yes
B-3 Department of Transportation Division of Aeronautics	October 6, 2003	Yes
B-4 Department of Transportation	October 8, 2003	Yes
Local and Regional Agencies		
C-1 County of Santa Clara	September 24, 2003	Yes
C-2 Santa Clara Valley Water District	October 3, 2003	Yes
C-3 San Jose Historic Landmarks Commission	October 8, 2003	Yes
C-4 Santa Clara Valley Transportation Authority	October 10, 2003	Yes
C-5 Dana Peak, Airport Land Use Commission	October 22, 2003	Yes

Organizations		
D-1 Pacific Gas and Electric Company	October 10, 2003	Yes
D-2 Adams Broadwell Joseph & Cardozo	October 20, 2003	Yes
Individuals		
E-1 Douglas Korten	October 7, 2003	Yes
E-2 Tina Morrill	October 13, 2003	Yes
E-3 Mark Gerhardt	October 13, 2003	Yes

In addition, one letter was received (December 10, 2003) from a community organization after the close of the comment period.

III. COMMENTS AND RESPONSES

Written responses to each comment letter received on the Draft EIR are provided in this chapter. All letters received during the public review period on the Draft EIR are provided in their entirety. Each letter is immediately followed by responses keyed to the specific comments. The letters are grouped by the affiliation of the commenting entity as follows: federal agencies (A); State agencies (B); local and regional agencies (C); organizations (D); and individuals (E).

A. FEDERAL AGENCIES

No comments were received from any federal agencies.

B. STATE AGENCIES

Letter
B1

STATE OF CALIFORNIA
PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

RECEIVED
SEP 08 2003
CITY OF SAN JOSE
PLANNING DEPARTMENT

GRAY DAVIS, Governor



September 5, 2003

File No.183-43
SCH # 2003012046

Susie Pineda
City of San Jose
801 North First Street, Room 400
San Jose, CA 95110

RE: Notice of Completion for ~~Woodlands Specific Plan~~ *Brandenburg Mixed Use Project*
RE 9-11-03

Dear Ms. Pineda:

As the State Agency Responsible for rail safety within California, we recommend that any proposed development in the vicinity take into account pedestrian circulation patterns/destinations with respect to the Union Pacific Railroad right-of-way, and be designed to safely accommodate these patterns through appropriate fencing to channel the pedestrians to the crossing(s).

If no circulation pattern over the railroad is foreseen, vandal-resistant fencing should be utilized in the area to deter trespassers. In either case, please forward preliminary plans to this office for comments.

If you have any questions in this matter, please call me at (415) 703-2795.

Very truly yours,

Kevin Boles
Utilities Engineer
Rail Crossing Engineering Section
Consumer Protection and Safety Division

cc: Patrick Kerr, Union Pacific Railroad
Jay Thorstensen, City of San Jose

COMMENTOR B1

Kevin Boles, Utilities Engineer, Rail Crossing Engineering Section, Consumer Protection and Safety Division, California Public Utilities Commission
September 5, 2003

Comment B1-1: As the State Agency Responsible for rail safety within California, we recommend that any proposed development in the vicinity take into account pedestrian circulation patterns/destinations with respect to the Union Pacific Railroad right-of-way, and be designed to safely accommodate these patterns through appropriate fencing to channel the pedestrians to the crossing(s).

If no circulation pattern over the railroad is foreseen, vandal-resistant fencing should be utilized in the area to deter trespassers. In either case, please forward preliminary plans to this office for comments.

Response to Comment B1-1: The comment is noted. The City of San Jose will refer subsequent specific development applications and plans to the CPUC for review and comment. Decisions related to fencing would be made in the context of the City's review of subsequent development applications.



Winston H. Hickox
Secretary for
Environmental
Protection

California Regional Water Quality Control Board San Francisco Bay Region

Internet Address: <http://www.swrcb.ca.gov>
1515 Clay Street, Suite 1400, Oakland, California 94612
Phone (510) 622-2300 FAX (510) 622-2460

RECEIVED
OCT 01 2003



Gray Davis
Governor

CITY OF SAN JOSE
PLANNING DEPARTMENT

Date:
File No. 2188.05 (BKW)

Ms. Susie Pineda
Department of Planning, Building & Code Enforcement
City of San Jose
801 North First Street
San Jose, CA 95110-1795

Re: Draft Environmental Impact Report for the Brandenburg Mixed Use / North
San Pedro Housing Sites Project (File No. GP03-03-01), City of San Jose;
SCH # 2003012046

Dear Ms. Pineda:

Regional Water Quality Control Board (Regional Board) staff have reviewed the *Draft Environmental Impact Report (DEIR) for the Brandenburg Mixed Use / North San Pedro Housing Sites Project* (File No. GP03-03-01). The DEIR describes the potential environmental impacts associated with a General Plan amendment to allow a mixed use project on a 12.4-acre site located east of State Route 87 in San Jose. Mixed uses will include residential dwelling units, commercial uses, and a public park. Regional Board staff have the following comments on the DEIR.

Comment 1

Chapter IV, A. Regional Plans and Policies, 2. Santa Clara Valley Urban Runoff Pollution Prevention Program. Page 46. Text in the first paragraph of page 46 states, "The Project will qualify for a waiver from the new C.3 requirements under several categories of the waiver program, as described in Chapter V, L. Hydrology and Flooding." Please note that there is currently no waiver program from the C.3 requirements and San Jose has not yet submitted a waiver program for review. Until a waiver program is approved and implemented, the Project should continue to be designed for full compliance with the C.3 requirements.

1

Comment 2

Chapter V, L. Hydrology and Flooding, 2. Impacts and Mitigation Measures, Impact HYD-1 (2) Operation Period Impacts. Page 201. Text in the third paragraph of page 201 states, "The design of the project has not been fully developed and therefore, it is not possible to determine whether the hydraulic sizing requirements would apply. It appears, however, that this project would provide water quality benefits, as set forth above, and would not exceed the storm water impacts of the existing property. Therefore, the treatment and peak run-off flow requirements of Provision C.3 would not apply." Regional Board staff have reviewed the text of the DEIR and have not seen any basis for exempting the Project from the need to comply with the requirements of provision C.3.

2

Since the Project is still being designed, the project proponent should incorporate C.3 compliance measures into the design of the Project.

Regional Board staff strongly encourage the use of landscape-based stormwater treatment measures, such as biofilters and vegetated swales or detention basins, to manage runoff from project sites. Since landscape-based stormwater treatment measures require that some of the site surface area be set aside for their construction, the proper sizing and placement of these features should be evaluated early in the design process to facilitate incorporation of the features into the site landscaping. The use of detention basins may be especially appropriate at the Project site, since the receiving water body, the Guadalupe River, is vulnerable to flooding in significant rain events. Other developments in the South Bay Area have designed contoured lawns to serve as both stormwater detention basins that meet the NPDES sizing criteria and as flood storage basins during major storm events.

In addition to the stormwater quality protection ideas presented in *Start at the Source*, which may be obtained from the Santa Clara Valley Urban Runoff Pollution Prevention Program's website (www.scvurppp.org) or by e-mailing a request to the e-mail address in the last paragraph of this letter, additional innovative techniques for incorporating structural stormwater best management practices (BMPs) into urban design, such as infiltration planter boxes, can be found in Portland, Oregon's *2002 Stormwater Management Manual*, which can be obtained at www.cleanrivers-pdx.org/tech_resources/2002_swmm.htm.

Comment 3

Chapter V, L. Hydrology and Flooding, 2. Impacts and Mitigation Measures, Impact HYD-1, Specific and detailed BMPs designed to mitigate construction-related pollutants. Page 202. The list of BMPs includes the use of hay bales. Regional Board staff have found that hay bales are ineffective for removing suspended soil particles in runoff from the fine, clay soils in the San Jose area. Please substitute straw wattles for hay bales.

Comment 4

Chapter V, L. Hydrology and Flooding, 2. Impacts and Mitigation Measures, Impact HYD-4, Dewatering effluent may contain contaminants and if not properly managed could cause impacts to construction workers or the environment. Page 204. Please note that the project will require written authorization to discharge dewatering effluent, if the effluent is discharged to the storm sewer system, which discharges to the Guadalupe River. Authorization for discharges to the storm sewer system will require, at a minimum, compliance with the following conditions:

1. The discharged water shall not exceed 110 percent of the ambient stream turbidity of the receiving water that the storm drain discharges to, if the receiving water is a

2
cont.

3

4

flowing stream with turbidity greater than 50 NTU, or 5 NTU above ambient turbidity for ambient turbidities that are less than or equal to 50 NTU. If the storm drain discharges to a dry streambed, the discharged water shall not exceed 50 NTUs. Turbidity shall be monitored every 15 minutes during the first hour of operation of any sedimentation or filtration device used to meet the discharge limitation and once every two hours thereafter.

2. The pH of the discharged water shall be in the range of 6.5 to 8.5. pH shall be measured once per day of discharge.
3. A log of the monitoring results shall be maintained.
4. The discharge shall not cause pollution, contamination, or nuisance. The discharge shall cause no scouring or erosion at the point of discharge into the receiving water.
5. If a sheen is visible on the surface of extracted groundwater, the groundwater shall be tested for petroleum hydrocarbons and Regional Board staff shall be notified immediately of the presence of the sheen. The groundwater shall not be discharged to the storm drain system until a treatment method has been approved by Regional Board staff.
6. Self-Monitoring Reports shall be submitted no later than 30 days following the last day of each month in which the discharges occur. These reports shall summarize turbidity measurements, pH measurements, and approximate volumes of the discharges. An explanatory cover letter transmitting legible copies of field notes is an acceptable format for the self-monitoring reports.

4
cont.

If you have any questions, please contact me at (510) 622-5680 or by e-mail at bkw@rb2.swrcb.ca.gov.

Sincerely,



Brian Wines
Water Resources Control Engineer
Alameda-Santa Clara Watershed Section

cc State Clearinghouse, P.O. Box 3044, Sacramento, CA 95812-3044
Santa Clara Valley Water Control District, Attn: Vince Stephens, Community
Projects Review Unit, 5750 Almaden Expressway, San Jose, CA 95118-3686

COMMENTOR B2

**Brian Wines, Water Resources Control Engineer, Alameda-Santa Clara Watershed Section
California Regional Water Quality Control Board, San Francisco Bay Region
Date Received: October 1, 2003**

Comment B2-1: *Chapter IV, A. Regional Plans and Policies, 2. Santa Clara Valley Urban Runoff Pollution Prevention Program. Page 46.* Text in the first paragraph of page 46 states, "The Project will qualify for a waiver from the new C.3 requirements under several categories of the waiver program, as described in Chapter V, L. Hydrology and Flooding." Please note that there is currently no waiver program from the C.3 requirements and San Jose has not yet submitted a waiver program for review. Until a waiver program is approved and implemented, the Project should continue to be designed for full compliance with the C.3 requirements.

Response to Comment B2-1: The City of San Jose has adopted a waiver program. The C.3 Order does not require Regional Water Quality Control Board approval of the waiver program. The City's waiver program was sent to the RWQCB for comment, however, no comments were received. A copy of San Jose's adopted policy on post construction run-off which includes the waiver program is included as an appendix to this First Amendment.

The Draft EIR is revised as follows in the last sentence in the first paragraph of page 46:

The Santa Clara Valley Urban Runoff Pollution Prevention Program (SCVURPPP) was developed in accordance with the requirements of the 1986 San Francisco Bay Basin Water Quality Control Plan, for the purpose of reducing water pollution associated with urban stormwater runoff. This program was also designed to fulfill the requirements of Section 304(1) of the Federal Clean Water Act, which mandated that the Federal Environmental Protection Agency (EPA) develop National Pollutant Discharge Elimination System (NPDES) Permit application requirements for various stormwater discharges, including those from municipal storm drain systems and construction sites. The City of San Jose has adopted policies to comply with these requirements. ~~The Project will qualify for a waiver from the new C.3 requirements under several categories of the waiver program, as described in Chapter V, L. Hydrology and Flooding.~~

Comment B2-2: *Chapter V, L. Hydrology and Flooding, 2. Impacts and Mitigation Measures, Impact HYD-1 (2) Operation Period Impacts. Page 201.* Text in the third paragraph of page 201 states, "The design of the project has not been fully developed and therefore, it is not possible to determine whether the hydraulic sizing requirements would apply. It appears, however, that this project would provide water quality benefits, as set forth above, and would not exceed the storm water impacts of the existing property. Therefore, the treatment and peak run-off flow requirements of Provision C.3 would not apply." Regional Board staff have reviewed the text of the DEIR and have not seen any basis for exempting the Project from the need to comply with the requirements of provision C.3

Since the project is still being designed, the project proponent should incorporate C.3 compliance measures into the design of the Project.

Regional Board staff strongly encourage the use of landscape-based stormwater treatment measures, such as biofilters and vegetated swales or detention basins, to manage runoff from project sites. Since landscape-based stormwater treatment measures require that some of the site surface area be set aside for their construction, the proper sizing and placement of these features should be evaluated early in the design process to facilitate incorporation of the features into the site landscaping. The use of detention basins maybe especially appropriate at the Project site, since the receiving water body, the Guadalupe River, is vulnerable to flooding in significant rain events. Other developments in the South Bay Area have designed contoured lawns to serve as both stormwater detention basins that meet the NPDES sizing criteria and as flood storage basins during major storm events.

In addition to the stormwater quality protection ideas presented in *Start at the Source*, which may be obtained from the Santa Clara Valley Urban Runoff Pollution Prevention Program's website (www.scvurppp.org) or by e-mailing a request to the e-mail address in the last paragraph of this letter, additional innovative techniques for incorporating structural stormwater best management practices (BMPs) into urban design, such as infiltration planter boxes, can be found in Portland, Oregon's 2002 Stormwater Management Manual, which can be obtained at www.cleanrivers-pdx.org/techresources/2002_swmm.htm.

Response to Comment B2-2: The Draft EIR has been revised in Chapter V, Setting Impacts and Mitigation Measures, Section L. Hydrology and Flooding, page 201, in the third paragraph as follows:

The design of the project has not been fully developed and therefore, it is not possible to determine whether the hydraulic sizing requirements would apply. It appears, however, that this project would provide water quality benefits as ~~set forth above~~ described in Paragraph 2(a)(2) above. Therefore, water quality impacts from the proposed development and would not likely exceed the storm water impacts of maintaining the existing property in its existing condition. Therefore, the treatment and peak run-off flow requirements of Provision C.3 would not apply.

The City of San Jose has revised and update it's Stormwater Runoff Policy to incorporate the provisions of C.3. This policy will apply to the project which will be reviewed at the time a specific design is submitted. A copy of the policy is included as an appendix to this First Amendment.

Comment B2-3: *Chapter V, L. Hydrology and Flooding, 2. Impacts and Mitigation Measures, Impact HYD-1, Specific and detailed BMPs designed to mitigate construction-related pollutants. Page 202.* The list of BMPs includes the use of hay bales. Regional Board staff have found that hay bales are ineffective for removing suspended soil particles in runoff from the fine, clay soils in the San Jose area. Please substitute straw wattles for hay bales.

Response to Comment B2-3: The following text substitution is hereby made to the Draft EIR in Chapter V, Hydrology and Flooding, Subsection 2, Mitigation Measure HYD-1 on page 201:

Best Management Practices (BMPs) designed to reduce erosion of exposed soil may include, but are not limited to: soil stabilization controls, watering for dust control, perimeter silt fences, placement of ~~hay bales~~ straw wattles, and sediment basins...

Comment B2-4: *Chapter V, L. Hydrology and Flooding, 2. Impacts and Mitigation Measures, Impact HYD-4, Dewatering effluent may contain contaminants and if not properly managed could cause impacts to construction "workers or the environment. Page 204.* Please note that the project will require written authorization to discharge dewatering effluent, if the effluent is discharged to the storm sewer system, which discharges to the Guadalupe River. Authorization for discharges to the storm sewer system will require, at a minimum, compliance with the following conditions:

1. The discharged water shall not exceed 110 percent of the ambient stream turbidity of the receiving water that the storm drain discharges to, if the receiving water is a flowing stream with turbidity greater than 50 NTU, or 5 NTU above ambient turbidity for ambient turbidities that are less than or equal to 50 NTU. If the storm drain discharges to a dry streambed, the discharged water shall not exceed 50 NTUs. Turbidity shall be monitored every 15 minutes during the first hour of operation of any sedimentation or filtration device used to meet the discharge limitation and once every two hours thereafter.
2. The pH of the discharged water shall be in the range of 6.5 to 8.5. pH shall be measured once per day of discharge.
3. A log of the monitoring results shall be maintained.
4. The discharge shall not cause pollution, contamination, or nuisance. The discharge shall cause no scouring or erosion at the point of discharge into the receiving water.
5. If a sheen is visible on the surface of extracted groundwater, the groundwater shall be tested for petroleum hydrocarbons and Regional Board staff shall be notified immediately of the presence of the sheen. The groundwater shall not be discharged to the storm drain system until a treatment method has been approved by Regional Board staff.
6. Self-Monitoring Reports shall be submitted no later than 30 days following the last day of each month in which the discharges occur. These reports shall summarize turbidity measurements, pH measurements, and approximate volumes of the discharges. An explanatory cover letter transmitting legible copies of field notes is an acceptable format for the self-monitoring reports.

Response to Comment B2-4: The requirement that written authorization from the RWQCB be obtained for any discharge of dewatering effluent where the effluent would eventually use the storm sewer system to reach the Guadalupe River is hereby noted. The detailed conditions listed in the comment are also noted, but not incorporated into the EIR, as they are the subject of an ongoing regulatory program operated by the Regional Board.

DEPARTMENT OF TRANSPORTATION

DIVISION OF AERONAUTICS - M.S.#40

1120 N STREET

P. O. BOX 942873

SACRAMENTO, CA 94273-0001

PHONE (916) 854-4959

FAX (916) 653-9631



*Flex your power!
Be energy efficient!*

October 6, 2003

Ms. Susie Pineda
City of San Jose
801 North First Street
San Jose, CA 95110-1795

Dear Ms. Pineda:

Re: *City of San Jose's Draft Environmental Impact Report (DEIR) for the Brandenburg Mixed Use Project; SCH# 2003012046*

The California Department of Transportation, Division of Aeronautics (Division), reviewed the above-referenced document with respect to airport-related noise and safety impacts and regional aviation land use planning issues pursuant to CEQA. The Department has strong concerns regarding this proposal as stated in our February 11, 2003 comment letter (included in this DEIR, Appendix A-Notice of Preparation and Comment Letters). We offer the following comments concerning this DEIR.

1. This proposal is for a General Plan Amendment to allow a mixed-use project including 1,501 dwelling units, 100,000 square feet of commercial uses and a 1.28-acre park on a 12.4-acre site located east of State Route 87, south of the Union Pacific Railroad line, north of West St. James Street and west of Market Street. The project site is located approximately one and one-half miles southeast of the San Jose International/Norman Y. Mineta Airport just outside the extended centerline for Runway 12L-30R. Structural heights will be a maximum of 173 feet above ground level (AGL). 1
2. The project site is within the Santa Clara County Airport Land Use Commission (ALUC) Referral Boundary for San Jose International Airport. We concur with the concerns expressed by the ALUC in their February 10, 2003 comment letter (included in Appendix A-Notice of Preparation and Comment Letters). The proposal must be submitted to the ALUC for a consistency determination. 2
3. The project as currently designed will result in construction of new residential uses within the existing and future 65 dB Community Noise Equivalent Level (CNEL) contour for San Jose International Airport. New residential within the 65 dB CNEL is considered an incompatible use. The Airport Noise Standards (Title 21, Subchapter 6, Sec 5012) states the "standard for the acceptable level of aircraft noise for persons living in the vicinity of airports is hereby established to be a community noise equivalent level of 65 decibels." 3
4. San Jose International Airport is classified as a "noise problem airport" and is currently operating with a State Noise Variance. The airport is working to resolve its existing noise impact area. New incompatible uses, such as residential, should be discouraged from locating within the 65 dB CNEL. This proposal will further increase the number of residences within the airport's 65 dB CNEL. 4

Mrs. Susie Medina
October 6, 2003
Page 2

- 5
5. In our February 11, 2003 comment letter we stated that a thorough airport-related noise analysis must be included in the DEIR, that "if residential is ultimately allowed, an aviation easement for aircraft noise should be attached to each residence so the airport is not forced further out of compliance with the Noise Standards." According to the DEIR pg. 17, NOI-1c, the property owner(s) shall grant an aviation easement to the City of San Jose "providing for acceptance of aircraft noise impacts." Requiring an aviation easement be attached to each resident will satisfy the compliance criteria of the state Noise Standards. The easement, however, will not change the noise levels and may not alleviate the annoyance future homeowners and tenants will likely experience.
- 6
6. The DEIR states on pg. 118 under Impact NOI-1 that, "Aircraft noise levels would represent a significant adverse impact on project and park users." The DEIR states that with the windows open "there is a potential that these residential units would experience interior noise higher than the 45 dBA CNEL standard (65 dBA - 15 = 50 dBA)." According to the DEIR, to achieve a 45 dB CNEL interior noise level, some form of mechanical ventilation "would be required for the proposed on-site residential units to ensure that windows can remain closed for prolonged periods of time and achieve the interior noise standard." The DEIR proposes that outdoor activity areas (if proposed) such as patios, balconies and common recreation areas should be "situated as much as possible on the east side of buildings so that structures will provide some noise shielding from aircraft activities at San Jose International Airport." These measures will not reduce noise impacts to a level of insignificance.
- 7
7. Another major concern is structural height. Penetration of the Federal Aviation Administration (FAA), Federal Aviation Regulations (FAR) Part 77 airport approach surfaces or navigable airspace by any structure could result in a hazard to flight. In reviewing the FAA's FAR Part 77 Obstruction Chart for San Jose International Airport (see enclosed excerpt from the Santa Clara County ALUC Land Use Plan for Areas Surrounding Santa Clara County Airports), the project appears to be within the 206-foot above mean sea level (MSL) height restriction area. According to the "Preliminary Geotechnical Investigation North Market and West Julian Site" (DEIR, Appendix D), ground surface elevations across the site measure at between 75 and 83 feet MSL. It appears that the proposed 173-foot AGL structures will actually be between 248 and 256 feet above MSL. If this is the case, the buildings may exceed FAR Part 77 height restriction criteria. Regardless of the actual heights, a Notice of Proposed Construction or Alteration (Form 7460-1) must be submitted to the FAA for this proposal. For further information, please refer to the FAA's Air Traffic and Airspace Management web page at <http://www1.faa.gov/ats/ata/ATA400/ocaaa.html>.
- 8
8. As stated in our February 11, 2003 letter, CEQA, Public Resources Code 21096, requires the Department's Airport Land Use Planning Handbook (Handbook) must be utilized as a resource in the preparation of environmental documents for projects within an airport land use compatibility plan boundaries or if such a plan has not been adopted, within two nautical miles of an airport. The Handbook is a resource that should be applied to all public use airports. The Handbook is published on-line at <http://www.dot.ca.gov/hq/planning/aeronaut/htmlfile/landuse.html>. The Handbook identifies six airport safety zones based on risk levels. The project site appears to be within Safety Zone 4 (Outer Approach/Departure Zone) according to the Handbook. Safety Zone 4 is situated along the extended runway centerline beyond Safety Zone 3. Approaching aircraft are usually at less than traffic pattern altitude. The potential severity of an off-airport aircraft accident is highly dependent upon the nature of the land use at the accident site. Protecting people and property on the ground from the potential consequences of near-airport aircraft accidents is a fundamental land use compatibility-planning objective.

Mrs. Susie Pineda
October 6, 2003
Page 3

9. We recommend revising the site plan to locate residential uses (Parcels A, C, G, M and portions of J) outside the 65 CNEL. We also recommend that structural heights be revised to comply with FAR Part 77 criteria.

9

10. The need for compatible and safe land uses near airports in California is both a local and a state issue. We strongly feel that the protection of airports from incompatible land use encroachment is vital to California's economic future. Airport land use commissions and airport land use compatibility plans, however, are key to protecting an airport and the people residing and working in the vicinity of an airport.

10

These comments reflect the areas of concern to the Department's Division of Aeronautics with respect to airport-related noise and safety impacts and regional airport land use planning issues. We advise you to contact our district office concerning surface transportation issues.

Thank you for the opportunity to review and comment on this proposal. If you have any questions, please call me at (916) 654-5314.

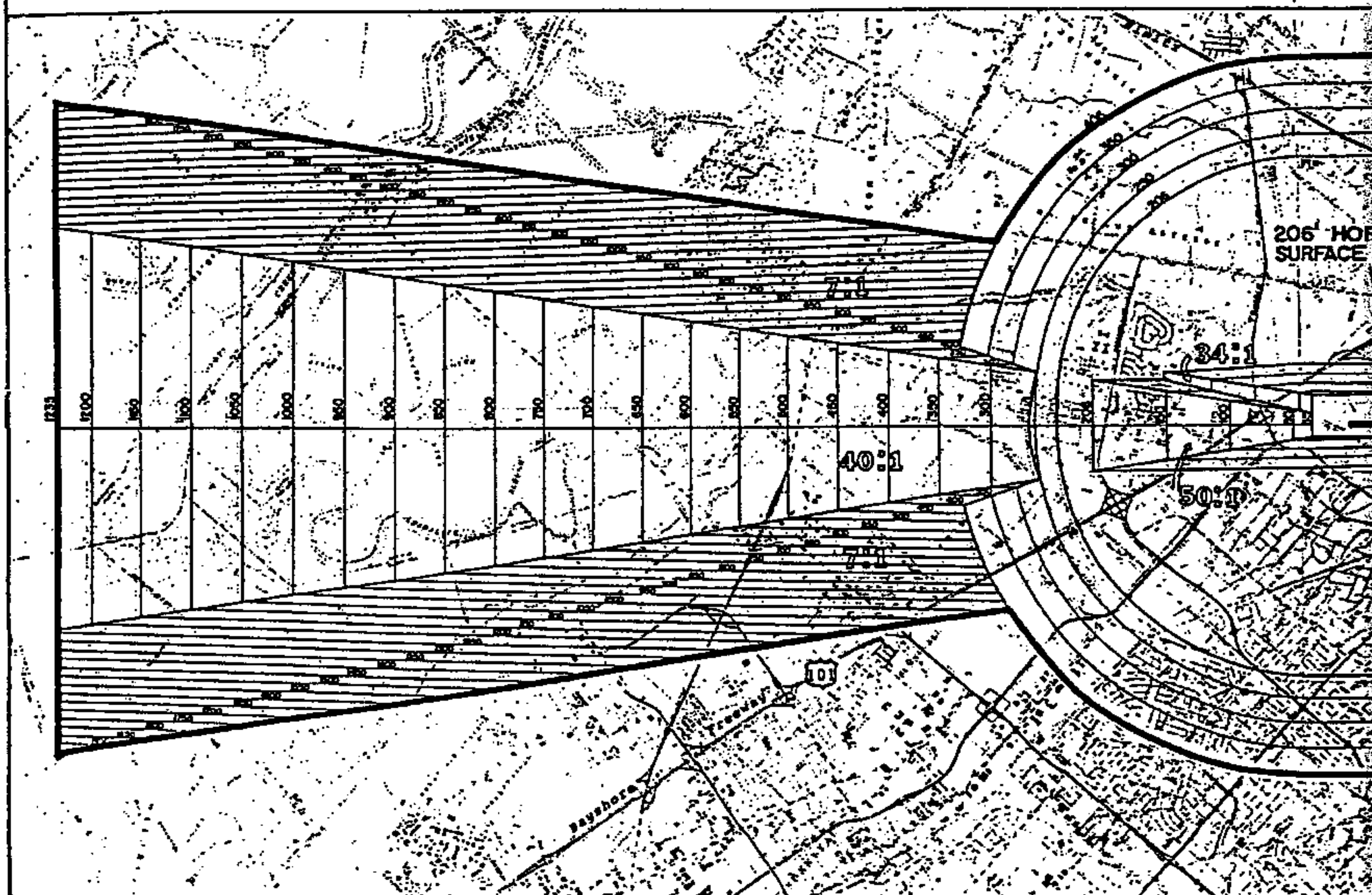
Sincerely,


SANDY HESNARD
Aviation Environmental Planner

c: State Clearinghouse
Cary Greene-San Jose International Airport
Jaime Locquiao, Airport Noise Management Officer-San Jose International Airport
Santa Clara County ALUC
FAA, Western-Pacific Region-San Francisco ADO
FAA, Western-Pacific Region-AWP-520

ALL ELEVATIONS ARE
ABOVE MEAN SEA LEVEL
(U.S. GEOLOGICAL SURVEY- 1968)

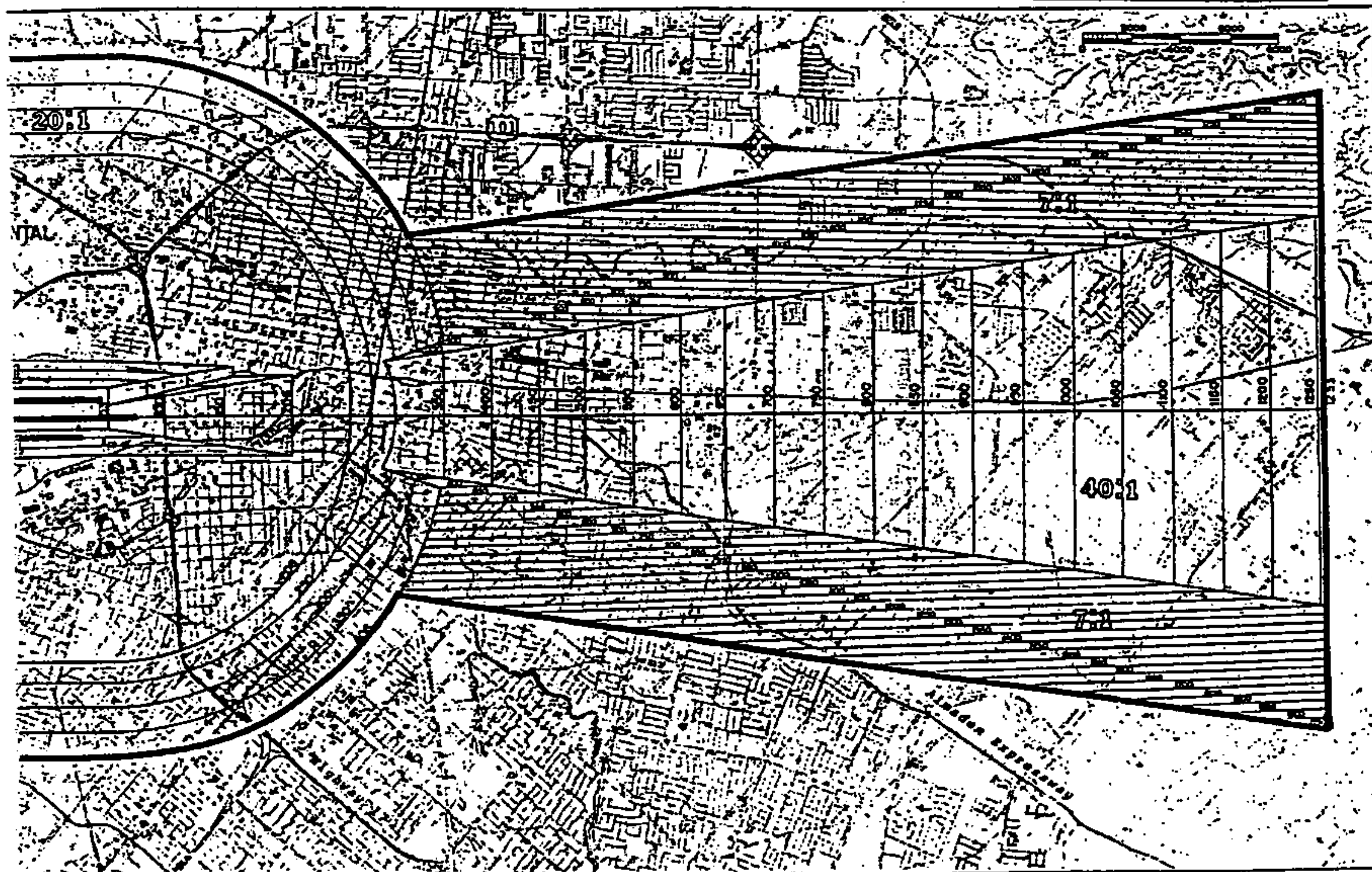
ALUC HEIGHT RES
SAN JOSE MU



OBSTRUCTION BOUNDARY

MUNICIPAL AIRPORT

FAR PART 77	
OBSTRUCTION CHART	
SAN JOSE MUNICIPAL AIRPORT	
AIRPORT DEPARTMENT	DATE OF SURVEY
SAN JOSE, CALIFORNIA	1960
NAME OF CHART	CHART NO.
10000	10000
DATE OF SURVEY	DATE OF SURVEY
1960	1960
DATE OF SURVEY	DATE OF SURVEY
1960	1960



Please Type or Print on This Form

Form Approved OMB No. 2120-0001

U.S. Department of Transportation Federal Aviation Administration		Failure To Provide All Requested Information May Delay Processing of Your Notice		FOR FAA USE ONLY Aeronautical Study Number	
Notice of Proposed Construction or Alteration					
1. Sponsor (person, company, etc. proposing this action):				9. Latitude: _____ ° _____ ' _____ " _____ "	
Attn. of: _____				10. Longitude: _____ ° _____ ' _____ " _____ "	
Name: _____				11. Datum: ☐ NAD 83 ☐ NAD 27 ☐ Other _____	
Address: _____				12. Nearest City: _____ State: _____	
City: _____ State: _____ Zip: _____				13. Nearest Public-use (not private-use) or Military Airport or Heliport: _____	
Telephone: _____ Fax: _____				14. Distance from #13. to Structure: _____	
2. Sponsor's Representative (if other than #1):				15. Direction from #13. to Structure: _____	
Attn. of: _____				16. Site Elevation (AMSL): _____ ft.	
Name: _____				17. Total Structure Height (AGL): _____ ft.	
Address: _____				18. Overall Height (#16. + #17.) (AMSL): _____ ft.	
City: _____ State: _____ Zip: _____				19. Previous FAA Aeronautical Study Number (if applicable): _____ - OE	
Telephone: _____ Fax: _____				20. Description of Location: (Attach a USGS 7.5 minute Quadrangle Map with the precise site marked and any certified survey.)	
3. Notice of: ☐ New Construction ☐ Alteration ☐ Existing					
4. Duration: ☐ Permanent ☐ Temporary (____ months, ____ days)					
5. Work Schedule: Beginning _____ End _____					
6. Type: ☐ Antenna Tower ☐ Crane ☐ Building ☐ Power Line ☐ Landfill ☐ Water Tank ☐ Other _____					
7. Marking/Painting and/or Lighting Preferred:					
☐ Red Lights and Paint ☐ Dual - Red and Medium Intensity White					
☐ White - Medium Intensity ☐ Dual - Red and High Intensity White					
☐ White - High Intensity ☐ Other _____					
8. FCC Antenna Structure Registration Number (if applicable): _____					
21. Complete Description of Proposal:				Frequency/Power (kW)	
Notice is required by 14 Code of Federal Regulations, part 77 pursuant to 49 U.S.C., Section 44718. Persons who knowingly and willingly violate the notice requirements of part 77 are subject to a civil penalty of \$1,000 per day until the notice is received, pursuant to 49 U.S.C., Section 46301 (a).					
I hereby certify that all of the above statements made by me are true, complete, and correct to the best of my knowledge. In addition, I agree to mark and/or light the structure in accordance with established marking & lighting standards as necessary.					
Date		Typed or Printed Name and Title of Person Filing Notice		Signature	

NOTICE OF PROPOSED CONSTRUCTION OR ALTERATION

§77.13 Construction or alteration requiring notice.

(a) Except as provided in §77.15, each sponsor who proposes any of the following construction or alteration shall notify the Administrator in the form and manner prescribed in §77.17:

(1) Any construction or alteration of more than 200 feet in height above the ground level at its site.

(2) Any construction or alteration of greater height than an imaginary surface extending outward and upward at one of the following slopes:

(i) 100 to 1 for a horizontal distance of 20,000 feet from the nearest point of the nearest runway of each airport specified in paragraph (a) (5) of this section with at least one runway more than 3,200 feet in actual length, excluding heliports.

(ii) 50 to 1 for a horizontal distance of 10,000 feet from the nearest point of the nearest runway of each airport specified in paragraph (a) (5) of this section with its longest runway no more than 3,200 feet in actual length, excluding heliports.

(iii) 25 to 1 for a horizontal distance of 5,000 feet from the nearest point of the nearest landing and takeoff area of each heliport specified in paragraph (a) (5) of this section.

(3) Any highway, railroad, or other traverse way for mobile objects, of a height which, if adjusted upward 17 feet for an Interstate Highway that is part of the National System of Military and Interstate Highways where overcrossings are designed for a minimum of 17 feet vertical distance, 15 feet for any other public roadway, 10 feet or the height of the highest mobile object that would normally traverse the road, whichever is greater, for a private road, 23 feet for a railroad, and for a waterway or any other traverse way not previously mentioned, an amount equal to the height of the highest mobile object that would normally traverse it, would exceed a standard of paragraph (a) (1) or (2) of this section.

(4) When requested by the FAA, any construction or alteration that would be in an instrument approach area (defined in the FAA standards governing instrument approach procedures) and available information indicates it might exceed a standard of Subpart C of this part.

(5) Any construction or alteration on any of the following airports (including heliports):

(i) An airport that is available for public use and is listed in the Airport Directory of the current Airman's Information Manual or in either the Alaska or Pacific Airman's Guide and Chart Supplement.

(ii) An airport under construction, that is the subject of a notice or proposal on file with the Federal Aviation Administration, and except for military airports, it is clearly indicated that that airport will be available for public use.

(iii) An airport that is operated by an armed force of the United States.

(b) Each sponsor who proposes construction or alteration that is the subject of a notice under paragraph (a) of this section and is advised by an FAA regional office that a supplemental notice is required shall submit that notice on a prescribed form to be received by the FAA regional office at least 48 hours before the start of construction or alteration.

(c) Each sponsor who undertakes construction or alteration that is the subject of a notice under paragraph (a) of this section shall, within 5 days after that construction or alteration reaches its greatest height, submit a supplemental notice on a prescribed form to the FAA regional office having jurisdiction over the region involved, if —

(1) The construction or alteration is more than 200 feet above the surface level of its site; or

(2) An FAA regional office advises him that submission of the form is required.

§77.15 Construction or alteration not requiring notice.

No person is required to notify the Administrator for any of the following construction or alteration:

(a) Any object that would be shielded by existing structures of a permanent and substantial character or by natural terrain or topographic features of equal or greater height, and would be located in the congested area of a city, town, or settlement where it is evident beyond all reasonable doubt that the structure so shielded will not adversely effect safety in air navigation.

(b) Any antenna structure of 20 feet or less in height except one that would increase the height of another antenna structure.

(c) Any air navigation facility, airport visual approach or landing aid, aircraft arresting device, or meteorological device, of a type approved by the Administrator, or an appropriate military service on military airports, the location and height of which is fixed by its functional purpose.

(d) Any construction or alteration for which notice is required by any other FAA regulation.

§77.17 Form and time of notice.

(a) Each person who is required to notify the Administrator under §77.13 (a) shall send one executed form set of FAA Form 7460-1, Notice of Proposed Construction or Alteration, to the Manager, Air Traffic Division, FAA Regional Office having jurisdiction over the area within which the construction or alteration will be located. Copies of FAA Form 7460-1 may be obtained from the headquarters of the Federal Aviation Administration and the regional offices.

(b) The notice required under §77.13 (a) (1) through (4) must be submitted at least 30 days before the earlier of the following dates —

(1) The date the proposed construction or alteration is to begin.

(2) The date an application for a construction permit is to be filed.

However, a notice relating to proposed construction or alteration that is subject to the licensing requirements of the Federal Communications Act may be sent to the FAA at the same time the application for construction is filed with the Federal Communications Commission, or at any time before that filing.

(c) A proposed structure or an alteration to an existing structure that exceeds 2,000 feet in height above the ground will be presumed to be a hazard to air navigation and to result in an inefficient utilization of airspace and the applicant has the burden of overcoming that presumption. Each notice submitted under the pertinent provisions of this part 77 proposing a structure in excess of 2,000 feet above ground, or an alteration that will make an existing structure exceed that height, must contain a detailed showing, directed to meeting this burden. Only in exceptional cases, where the FAA concludes that a clear and compelling showing has been made that it would not result in an inefficient utilization of the airspace and would not result in a hazard to air navigation, will a determination of no hazard be issued.

(d) In the case of an emergency involving essential public services, public health, or public safety that requires immediate construction or alteration, the 30 day requirement in paragraph (b) of this section does not apply and the notice may be sent by telephone, telegraph, or other expeditious means, with an executed FAA Form 7460-1 submitted within five (5) days thereafter. Outside normal business hours, emergency notices by telephone or telegraph may be submitted to the nearest FAA Flight Service Station.

(e) Each person who is required to notify the Administrator by paragraph (b) or (c) of §77.13, or both, shall send an executed copy of FAA Form 7460-2, Notice of Actual Construction or Alteration, to the Manager, Air Traffic Division, FAA Regional Office having jurisdiction over the area involved.

ADDRESSES OF THE REGIONAL OFFICES

Alaska Region

AK
Alaskan Regional Office
Air Traffic Division, AAL-530
222 West 7th Avenue
Anchorage, AK 99513
Tel: 907-271-5893

Central Region

IA, KS, MO, NE
Central Regional Office
Air Traffic Division, ACE-520
60 East 12th Street
Kansas City, MO 64106
Tel: 816-426-3408 or 3409

Eastern Region

DC, DE, MD, NJ, NY, PA, VA, WV
Eastern Regional Office
Air Traffic Division, AEA-520
JFK International Airport
Fitzgerald Federal Building
Jamaica, NY 11430
Tel: 718-553-2616

Great Lakes Region

IL, IN, MI, MN, ND, OH, SD, WI
Great Lakes Regional Office
Air Traffic Division, AGL-520
2300 East Devon Avenue
Des Plaines, IL 60018
Tel: 847-294-7568

New England Region

CT, MA, ME, NH, RI, VT
New England Regional Office
Air Traffic Division, ANE-620
12 New England Executive Park
Burlington, MA 01803-5299
Tel: 781-238-7520

Northwest Mountain Region

CO, ID, MT, OR, UT, WA, WY
Northwest Mountain Regional Office
Air Traffic Division, ANM-520
1601 Lind Avenue, SW
Renton, WA 98055-4056
Tel: 425-227-2520

Southern Region

AL, FL, GA, KY, MS, NC, PR, SC, TN, VI
Southern Regional Office
Air Traffic Division, ASO-520
1701 Columbia Avenue
College Park, GA 30337
Tel: 404-305-5585

Southwest Region

AR, LA, NM, OK, TX
Southwest Regional Office
Air Traffic Division, ASW-520
2601 Meacham Boulevard
Fort Worth, TX 76137-0520
Tel: 817-222-5531

Western Pacific Region

HI, CA, NV, AZ, GU
Western-Pacific Regional Office
Air Traffic Division, AWP-520
15000 Aviation Boulevard
Hawthorne, CA 90260
Tel: 310-725-6557

COMMENTOR B3

Sandy Hesnard, Aviation Environmental Planner, Department of Transportation, Division of Aeronautics
October 6, 2003

Comment B3-1: This proposal is for a General Plan Amendment to allow a mixed-use project including 1,501 dwelling units, 100,000 square feet of commercial uses and a 1.28-acre park on a 12.4-acre site located east of State Route 87, south of the Union Pacific Railroad line, north of West St. James Street and west of Market Street. The project site is located approximately one and one-half miles southeast of the San Jose International/Norman Y. Mineta Airport just outside the extended centerline for Runway 12L-30R. Structural heights will be a maximum of 173 feet above ground level (AGL).

Response to Comment B3-1: The comment summarizes information provided in the Draft EIR at various locations and does not raise any issue related to the adequacy of the report. It therefore does not require further response.

Comment B3-2: The project site is within the Santa Clara County Airport Land Use Commission (ALUC) Referral Boundary for San Jose International Airport. We concur with the concerns expressed by the ALUC in their February 10, 2003 comment letter (included in Appendix A-Notice of Preparation and Comment Letters). The proposal must be submitted to the ALUC for a consistency determination.

Response to Comment B3-2: The comment is consistent with information provided in the Draft EIR and does not raise any issue related to the adequacy of the report. It therefore does not require further response.

Comment B3-3: The project as currently designed will result in construction of new residential uses within the existing and future 65 dB Community Noise Equivalent Level (CNEL) contour for San Jose International Airport. New residential within the 65 dB CNEL is considered an incompatible use. The Airport Noise Standards (Title 21, Subchapter 6, Sec 5012) states the "standard for the acceptable level of aircraft noise for persons living in the vicinity of airports is hereby established to be a community noise equivalent level of 65 decibels."

Response to Comment B3-3: The comment is consistent with information provided in the Draft EIR and does not raise any issue related to the adequacy of the report. It therefore does not require further response.

Comment B3-4: San Jose International Airport is classified as a "noise problem airport" and is currently operating with a State Noise Variance. The airport is working to resolve its existing noise impact area. New incompatible uses, such as residential, should be discouraged from locating within

the 65 dB CNEL. This proposal will further increase the number of residences within the airport's 65 dB CNEL.

Response to Comment B3-4: The comment is noted but does not require further response.

Comment B3-5: In our February 11, 2003 comment letter we stated that a thorough airport-related noise analysis must be included in the DEIR, that "if residential is ultimately allowed, an aviation easement for aircraft noise should be attached to each residence so the airport is not forced further out of compliance with the Noise Standards." According to the DEIR pg. 17, NOI-1c, the property owner(s) shall grant an aviation easement to the City of San Jose "providing for acceptance of aircraft noise impacts." Requiring an aviation easement be attached to each resident will satisfy the compliance criteria of the state Noise Standards. The easement, however, will not change the noise levels and may not alleviate the annoyance future homeowners and tenants will likely experience.

Response to Comment B3-5: Comment is noted. The impact to which the comment refers reads as follows: "Aircraft noise levels would represent a significant adverse impact on project residents and park users." A three-part mitigation measure is recommended to address this significant impact. In summary, the measure includes implementation of the City's General Plan Policies (seven of which are found in the Noise element and three of which are found in the Urban Design element), implementation of the City's Residential Design Guidelines and Commercial Design Guidelines, and lastly, the granting of aviation easements providing for acceptance of aircraft noise impacts. While the easements themselves would not reduce noise levels experienced by new residents in the area, implementation of the other policies and guidelines – many of which involve site planning, building design, construction materials, and noise attenuation techniques – would do so.

Comment B3-6: The DEIR states on pg. 118 under Impact NOI-1 that, "Aircraft noise levels would represent a significant adverse impact on project and park users." The DEIR states that with the windows open "there is a potential that these residential units would experience interior noise higher than the 45 dBA CNEL standard (65 dBA - 15 = 50 dBA)." According to the DEIR, to achieve a 45 dB CNEL interior noise level, some form of mechanical ventilation "would be required for the proposed on-site residential units to ensure that windows can remain closed for prolonged periods of time and achieve the interior noise standard." The DEIR proposes that outdoor activity areas (if proposed) such as patios, balconies and common recreation areas should be "situated as much as possible on the east side of buildings so that structures will provide some noise shielding from aircraft activities at San Jose International Airport." These measures will not reduce noise impacts to a level of insignificance.

Response to Comment B3-6: The commentator's opinion that the placement of outdoor activity areas (if proposed) on the east side of buildings so that structures will provide some noise shielding from aircraft activities would not reduce noise impacts to a less than significant level is noted. It is not consistent with the City's General Plan policies or design guidelines, which aim to achieve a reduction in noise levels through just this type of site planning and design. It should also be noted that this reference in the Draft EIR is to a textual discussion of the impact itself and not to a part of the above-mentioned three-part mitigation measure. No further response is necessary.

Letter
B4

RECEIVED
OCT 16 2003

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY

GRAY DAVIS, Governor

DEPARTMENT OF TRANSPORTATION

111 GRAND AVENUE
P. O. BOX 23660
OAKLAND, CA 94623-0660
PHONE (510) 286-5505
FAX (510) 286-5513
TTY (800) 735-2929

CITY OF SAN JOSE
PLANNING DEPARTMENT



*Flex your power!
Be energy efficient!*

October 8, 2003

SCL-87-6.10
SCL087084
SCH 2003012046

Ms. Suzie Pineda
City of San Jose
Department of Planning and Code Enforcement
801 North First Street, Room 400
San Jose, CA 95110-1795

Dear Ms. Pineda:

Brandenburg Mixed Use / North San Pedro Housing Sites- Draft Environmental Impact Report (DEIR)

Thank you for including the California Department of Transportation (Department) in the environmental review process for the proposed project. We have examined the above-referenced document and have the following comments.

1. The excavation and transport of more than 9 million square feet of dirt during construction of the project will have a significant traffic impact on the State Route (SR) 87 / St. James Street interchange. The Department would like to review the construction and traffic control plans for each stage of the project. 1
2. Was the Market Street (SR 82) on-ramp to the southbound Interstate 280 analyzed for this report? Please forward this analysis to the Department for review. 2
3. The trip generation rates for AM and PM peak hour are very low compared to the Institute of Transportation Engineers (ITE) Trip Generation Manual – 6th Edition. 3
 - The Department requests further justification for the 25 percent reduction for residential trips and 50 percent reduction in commercial trips to account for transit / walk trips. A mixed-use development such as this may have slightly reduced vehicle trip rates, but the trip rates used in the EIR are extraordinarily low. The footnote refers to the "City of San Jose Interim Guidelines for Traffic Impact Analysis for Land Developments..." March 1994. Please provide further information and explanation for the lower trip rates and high reduction factors or re-analyze the traffic impacts based on more realistic trip production rates.

S. Pineda
October 9, 2003
Page 2

4. Page 86 3.d Background Freeway Segment Level of Service:

- The document states that per City of San Jose CMP requirement an analysis of freeway segment level of service for background conditions is not required. Why is less analysis required for State Highways than for local roads and streets?

4

5. Traffic generated by this project will have a significant impact to both regional and local transportation facilities. The state highway system will be impacted on SR 82, 87, and Interstates 280 and 880.

5

- The DEIR analysis shows significant impacts to the SR 87 from Julian Street to I-280 (southbound PM peak) and on Route 87 from Julian Street to Coleman (northbound AM peak)

6. Mitigation:

- Significant mitigation measures should be provided to reduce impacts to the regional transportation system. The DEIR states, "The mitigation necessary to reduce impacts on these freeway segments to a level of insignificance is the widening of the freeway. Widening is not feasible because of the significant right-of-way acquisitions with many homes and businesses that would need to be demolished. These impacts are therefore considered significant and unavoidable." These improvements may not be feasible. However, there are wide ranges of measures, such as developer fees to fund future freeway and interchange improvements and for improving parallel arteries. These could partially mitigate impacts from this project.
- As listed on p. 83 and p. 85, Table V-B-5, most of the freeway segments in the project study area are operating under unacceptable LOS. The developer should be required to contribute fair share mitigation. Fair share mitigation to the highway system is not limited to capacity improvements. Improvements may include left turn pockets, ramp metering, increased ramp storage, and frontage roads between interchanges.

6

7

S. Pineda
October 9, 2003
Page 3

Should you require further information or have any questions regarding this letter, please call Tom Holley, of my staff at (510) 622-8706.

Sincerely,



TIMOTHY C. SABLE
District Branch Chief
IGR/CEQA

c: (State Clearinghouse)

COMMENTOR B4

Timothy Sable, District Branch Chief, IGR/CEQA, Department of Transportation
October 8, 2003

Comment B4-1: The excavation and transport of more than 9 million square [sic] feet of dirt during construction of the project will have a significant traffic impact on the State Route (SR) 87/St. James Street interchange. The Department would like to review the construction and traffic control plans for each stage of the project.

Response to Comment B4-1: Excavation of these soils, from various locations throughout the multiple-block site, would occur over the total buildout period of the project. At present, no phasing schedule has been proposed for development on the site. It is reasonable to project that construction and absorption of this many dwelling units would occur over a number of years.

The comment incorrectly references the two-dimensional *square* feet as the unit of measurement, whereas the Draft EIR refers to "...9,202,337 *cubic* feet of surface soils..." (Draft EIR, p. 43). This volume of soils, excavated and hauled from the site, would require approximately 22,700 standard size dump truck trips to accomplish.¹ The average daily increase in truck trips to and from the site as a result of this off-hauling would depend on the phasing of construction. For example, in the unlikely event that completion of construction on all 14 parcels were to take place in only two years, the average daily increase in truck trips to and from the site would be 35-40 trips per day (or 3-3½ additional trips per hour over a 12-hour work day). If project construction (again, hypothetically) were phased over eight years, the average increase would be 8-11 trips per day (or less than 1 additional trip per hour). This level of increased truck traffic would not represent a significant adverse impact under any of the City's criteria of significance.

Comment B4-2: Was the Market Street (SR 82) on-ramp to the southbound Interstate 280 analyzed for this report? Please forward this analysis to the Department for review.

Response to Comment B4-2: Development on the project site would add only a negligible amount of traffic to the Market Street (SR 82) on-ramp at this location. Traffic destined for eastbound (southbound) I-280 was assumed to use SR 87 to I-280.

Comment B4-3: The trip generation rates for AM and PM peak hour are very low compared to the Institute of Transportation Engineers (ITE) Trip Generation Manual – 6th Edition.

- The Department requests further justification for the 25 percent reduction for residential trips and 50 percent reduction in commercial trips to account for transit / walk trips. A mixed-use development such as this may have slightly reduced vehicle trip rates, but the trip rates used in the EIR are extraordinarily low. The footnote refers to the "City of San Jose Interim Guidelines for Traffic

¹ 9,202,337 cubic feet, or 340,827 cubic yards (cy), divided by an average capacity of 15 cy per truck = 22,722 truck trips.

Impact Analysis for Land Developments..." March 1994. Please provide further information and explanation for the lower trip rates and high reduction factors or re-analyze the traffic impacts based on more realistic trip production rates.

Response to Comment B4-3: The unadjusted trip generation rates used for the proposed residential and retail uses are those recommended by the City of San Jose (Interim Guidelines for Traffic Impact Analysis for Land Developments, "Common Vehicular Trip Generation Rates for the San Jose Area," June 1994). These rates are based on surveys done at comparable developments in San Jose. Trip generation rates for the existing (office) uses on the site were obtained from the results of a Downtown San Jose trip generation survey conducted by Parsons Transportation Group, Inc. and approved by the City of San Jose.

Travel patterns for residential development within the Downtown area are known to be substantially different from similar development outside the Downtown area. This is due to the wide variety and capacity of transit service and the proximity of employment and other services. The residential trip reduction rate used for the study was derived based on a survey conducted at the Villa Torino apartments on Julian Street at First Street. Apartment residents were surveyed in the year 2000. The survey showed that approximately 25 percent of the trips are made by means other than driving.

Retail shops within the Downtown area include a variety of services, such as restaurants, office supply stores, convenience stores, small super markets, dry cleaning, and others. These shops offer goods and services that can be found throughout the City. Thus, there is no reason for customers to travel into the Downtown to patronize these businesses. The primary market for Downtown retail businesses is Downtown office and residential developments. Customers can and do walk to these businesses. A reduction much higher than 50 percent probably would be justified. However, to be conservative, only a 50 percent reduction was taken.

VTa Traffic Impact Analysis guidelines say: "*a reduction in vehicle trips can be taken off the smaller trip generator of the project in an amount not to exceed thirteen percent (13%) unless special circumstances are justified in the project's TIA.*" In this case, as explained above, the project's location justifies the use of a higher reduction for both the residential and retail components of the project.

Comment B4-4: Page 86 3.d Background Freeway Segment Level of Service:

- The document states that per City of San Jose CMP requirement an analysis of freeway segment level of service for background conditions is not required. Why is less analysis required for State Highways than for local roads and streets?

Response to Comment B4-4: Background analysis of freeway segments would not yield any useful information against which to judge project impacts. Project impacts are evaluated relative to the freeway capacity, which is based on the physical design of the facility, and not on the background traffic levels. Significant impacts are designated for freeway segments where the project would add traffic of more than one percent of the freeway capacity.

Comment B4-5: Traffic generated by this project will have a significant impact to both regional and local transportation facilities. The state highway system will be impacted on SR 82, 87, and Interstates 280 and 880.

- The DEIR analysis shows significant impacts to the SR 87 from Julian Street to I-280 (southbound PM peak) and on Route 87 from Julian Street to Coleman (northbound AM peak).

Response to Comment B4-5: The comment's reference to SR 87 from Julian Street to I-280 (southbound PM peak) and Route 87 from Julian Street to Coleman (northbound AM peak) is shown in Table V.B-10 in the Draft EIR (pages 98-100). The comment is noted, but does not relate to the adequacy of the Draft EIR. No further response is necessary.

Comment B4-6: "... These impacts are therefore considered significant and unavoidable." These improvements may not be feasible. However, there are wide ranges of measures, such as developer fees to fund future freeway and interchange improvements and for improving parallel arteries. These could partially mitigate impacts from this project.

Response to Comment B4-6: Collecting funds from development projects would not mitigate adverse environmental impacts unless identified programs or other mechanisms are in place that could use the money to implement mitigation measures aimed at reducing impacts from those development projects. In San Jose, there are no approved capital projects in place for which a funding mechanism has been established that includes "fair share contributions" by individual developments. Additionally, CEQA stipulates that the mitigation required must be "roughly proportional" to the impacts of the project; in the absence of an established program to implement the freeway expansions necessary to mitigate the impacts from this project, and a funding plan that would allow calculation of a "fair share" contribution, collecting unspecified fees from a development project such as this one would not mitigate any of the impacts identified in the DEIR.

Comment B4-7: As listed on p. 83 and p. 85, Table V-B-5, most of the freeway segments in the project study area are operating under unacceptable LOS. The developer should be required to contribute fair share mitigation. Fair share mitigation to the highway system is not limited to capacity improvements. Improvements may include left turn pockets, ramp metering, increased ramp storage, and frontage roads between interchanges.

Response to Comment B4-7: Please see Response to Comment B4-6.

C. LOCAL AND REGIONAL AGENCIES

Letter
C1

County of Santa Clara

Roads and Airports Department

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

RECEIVED
SEP 26 2003
CITY OF SAN JOSE
PLANNING DEPARTMENT



September 24, 2003

Ron Eddow
Senior Planner
Department of Planning
City of San Jose
801 North First Street, Room-400
San Jose, CA 95110-1795

Subject: Draft Environmental Impact Report (EIR) for the Brandenburg Mixed Use
Project/North San Pedro Housing Sites
File No: GP03-03-01 - SCH # 2003012046

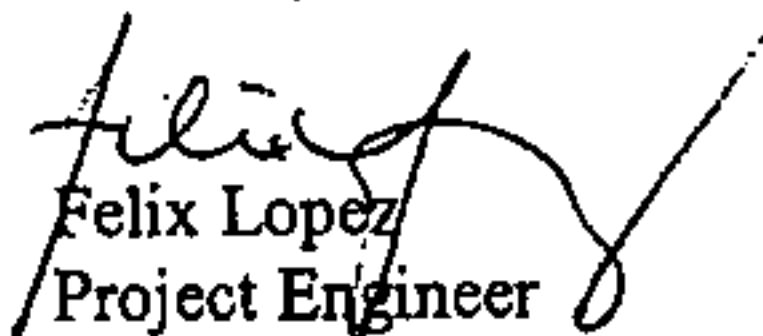
Dear Mr. Eddow:

Your August 2003 Draft Environmental Impact Report for the above subject has been reviewed. The following are our comments:

1. Include trip distribution to SR 87 via Almaden Expressway in your EIR, and address traffic impacts and mitigation measures for Almaden Expressway.

Thank you for the opportunity to review and comment on this project. If you have more questions, please call me at 573-2462.

Sincerely,


Felix Lopez
Project Engineer

cc: MA, TH, DEC, WRL, RN, file

COMMENTOR C1

**Felix Lopez, Project Engineer, County of Santa Clara, Roads and Airports Department
September 24, 2003**

Comment C1-1: Include trip distribution to SR 87 via Almaden Expressway in your EIR, and address traffic impacts and mitigation measures for Almaden Expressway.

Response to Comment C1-1: The Almaden Expressway intersection with SR 87 is far south of the project site (approximately 3.5 miles). Because estimating traffic volumes from a proposed project at a distance this far from the project site would be highly speculative, it was not undertaken in the Draft EIR. Nevertheless, a rough analysis was performed for this First Amendment to the Draft EIR. The project trip distribution assigns 5 percent and 9 percent of the residential and retail project traffic, respectively, onto SR 87 south of I-280. This equates to approximately 34 AM peak hour and 38 PM peak hour net project trips on this segment of SR 87 in both directions. If 50 percent of these trips were assigned to Almaden Expressway, approximately 17 AM and 19 PM peak hour trips would occur there. This is less than 10 trips per lane, which is below the CMP threshold for identifying study intersections. Thus, it can be stated that the project would not have a significant impact at this location.

Santa Clara Valley
Water District



RECEIVED
OCT 09 2003
CITY OF SAN JOSE
PLANNING DEPARTMENT

5750 ALMADEN EXPWY
SAN JOSE, CA 95118-3686
TELEPHONE (408) 265-2600
FACSIMILE (408) 266-0271
www.valleywater.org
AN EQUAL OPPORTUNITY EMPLOYER

File: 28222
Guadalupe River

October 3, 2003

Ms. Susie Pineda
Department of Planning, Building, and Code Enforcement
801 North First Street, Room 400
San Jose, CA 95110

Subject: Brandenburg Mixed Use Project/North San Pedro Housing Sites Draft
Environmental Impact Report

Dear Ms. Pineda:

The Santa Clara Valley Water District (District) has reviewed the Brandenburg Mixed Use Project/North San Pedro Housing Sites Draft Environmental Impact Report (DEIR), dated August 2003 and submitted to the District on August 28, 2003, by the City of San Jose (City).

The proposed project site is not located adjacent to any District facilities and does not require a District permit. We do have the following comments regarding the DEIR however:

1. Please note that District records indicate that the portions of the project site located in the Federal Emergency Management Agency flood hazard zone D are currently subject to flooding of less than one foot in depth.
2. The discussion of the impacts of the project on storm water quality (pages 200-202) and the proposed mitigation is not clear and consistent throughout.

On page 201 the third paragraph states that because the project has not been fully developed it can't be determined at this time whether the numeric sizing criteria required in provision C.3 of the newly revised National Pollutant Discharge Elimination System (NPDES) permit for the City apply to the project. However, on page 202 in the discussion of the mitigation measures, the document states, "the project shall include measures designed to mitigate potential water quality degradation of runoff from all portions of the completed development." It goes on further to state that "the selected measures must meet the hydraulic sizing criteria specified in the most current NPDES municipal stormwater permit issued to the City of San Jose." The discussion of the impacts and proposed mitigation is confusing and inconsistent.

Later in the same paragraph on page 201, the document states that the project will provide water quality benefits, through remediation of groundwater and soil



Ms. Susie Pineda
Page 2
October 3, 2003

contamination and the changing of the zoning from industrial, and "would not exceed the storm water impacts of the existing property"; therefore, "the treatment and peak run-off flow requirements of Provision C.3 would not apply." Remediation of the site may provide some benefit to storm water quality, though the primary purpose is to remove contaminants from the groundwater basin and from the overlying soil that may migrate into the groundwater basin potentially contaminating the water supply. The goal of Provision C.3 is to provide measures into new and redevelopment projects that protect storm water quality from the myriad of nonpoint source pollutants that are generated at all sites, from industrial to residential. It is our understanding that remediation of a site would not exclude a project from meeting the new NPDES requirements, as remediation for soil and groundwater contamination is regulated separately. It appears that the project will be required to comply with the new Provision C.3 as stated on page 203 of the document.

2
cont.

Redevelopment of this site provides the opportunity to improve the quality of storm water entering the Guadalupe River, though for such efforts to be successful the use of storm water quality measures must be included early in the planning/design process.

This section of the document should be revised for clarity and consistency between the discussion of impacts and the required mitigation measures. In addition, the discussion surrounding compliance with Provision C.3 and its relationship to site remediation for groundwater and soil contamination should be revised for clarity and accuracy in regards to the existing regulations.

3. On page 203, the following changes should be made to the discussion about the upcoming changes to the Federal Insurance Rate Map panel for this area:

- In the second to last sentence on the page, the word "fully" should be replaced by "Federally" so that the end of the sentence reads "is possible for Federally funded projects that are 50% complete."
- In the last sentence on the page, the anticipated date for the change from zone AH to zone A99 should be changed from "August 2004" to "fall 2004."

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4. District records show five active wells within the project site (Assessor' Parcel Nos. 259-32-054, 259-32-056, 259-32-044, and 259-32-068). In accordance with District Ordinance 90-1, the owner should show any existing well(s) on the plans. The well(s) should be properly registered with the District and either be maintained or destroyed in accordance with the District's standards. Property owners or their representative should contact the District Wells and Water Production Unit at (408) 265-2607, extension 2660, for more information.

5

Please forward a copy of the final Environmental Impact Report when available. Reference District File No. 28222 on further correspondence regarding this project.

Letter

C2

cont.

Ms. Susie Pineda
Page 3
October 3, 2003

If you have any questions or need further information, you can reach me at (408) 265-2607, extension 2322.

Sincerely,



Colleen Haggerty, P.E.
Assistant Civil Engineer
Community Projects Review Unit

cc: S. Tippetts, V. Stephens, D. Chesterman, C. Haggerty, File (2)
ch:jl
1003d-pl.doc

COMMENTOR C2

Colleen Haggerty, P.E., Assistant Civil Engineer, Community Projects Review Unit, Santa Clara Valley Water District
October 3, 2003

Comment C2-1: Please note that District records indicate that the portions of the project site located in the Federal Emergency Management Agency flood hazard zone D are currently subject to flooding of less than one foot in depth.

Response to Comment C2-1: The comment is consistent with information provided in the Draft EIR and does not raise any issue related to the adequacy of the report. It therefore does not require further response.

Comment C2-2: The discussion of the impacts of the project on storm water quality (pages 200-202) and the proposed mitigation is not clear and consistent throughout.

On page 201 the third paragraph states that because the project has not been fully developed it can't be determined at this time whether the numeric sizing criteria required in provision C.3 of the newly revised National Pollutant Discharge Elimination System (NPDES) permit for the City apply to the project. However, on page 202 in the discussion of the mitigation measures, the document states, "the project shall include measures designed to mitigate potential water quality degradation of runoff from all portions of the completed development." It goes on further to state that "the selected measures must meet the hydraulic sizing criteria specified in the most current NPDES municipal stormwater permit issued to the City of San Jose." The discussion of the impacts and proposed mitigation is confusing and inconsistent.

Later in the same paragraph on page 201, the document states that the project will provide water quality benefits, through remediation of groundwater and soil contamination and the changing of the zoning from industrial, and "would not exceed the storm water impacts of the existing property"; therefore, "the treatment and peak run-off flow requirements of Provision C.3 would not apply." Remediation of the site may provide some benefit to storm water quality, though the primary purpose is to remove contaminants from the groundwater basin and from the overlying soil that may migrate into the groundwater basin potentially contaminating the water supply. The goal of Provision C.3 is to provide measures into new and redevelopment projects that protect storm water quality from the myriad of nonpoint source pollutants that are generated at all sites, from industrial to residential. It is our understanding that remediation of a site would not exclude a project from meeting the new NPDES requirements, as remediation for soil and groundwater contamination is regulated separately. It appears that the project will be required to comply with the new Provision C.3 as stated on page 203 of the document.

Redevelopment of this site provides the opportunity to improve the quality of storm water entering the Guadalupe River, though for such efforts to be successful the use of storm water quality measures must be included early in the planning/design process.

This section of the document should be revised for clarity and consistency between the discussion of impacts and the required mitigation measures. In addition, the discussion surrounding compliance with Provision C.3 and its relationship to site remediation for groundwater and soil contamination should be revised for clarity and accuracy in regards to the existing regulations.

Response to Comment C2-2: Please see Responses to Comments B2-2 and B2-3.

Comment C2-3: On page 203, in the second to last sentence on the page, the word "fully" should be replaced by "Federally" so that the end of the sentence reads "is possible for Federally funded projects that are 50 percent complete."

Response to Comment C2-3: The Draft EIR is hereby revised on page 203, in the last paragraph, in the second to last sentence, to be consistent with the correction suggested by the comment:

Designation as Zone 99, which carries no elevation requirement, is possible for ~~fully~~ federally funded projects that are 50 percent complete.

Comment C2-4: On page 203, in the last sentence on the page, the anticipated date for the change from zone AH to zone A99 should be changed from "August 2004" to "fall 2004."

Response to Comment C2-4: The Draft EIR is hereby revised on page 203, in the last paragraph, in the last sentence, to be consistent with the correction suggested by the comment:

This redesignation from AH to A99 is projected to be filed and approved by FEMA by ~~August~~ Fall 2004.

Comment C2-5: District records show five active wells within the project site (Assessor Parcel Nos. 259-32-054, 259-32-056, 259-32-044, and 259-32-068). In accordance with District Ordinance 90-1, the owner should show any existing well(s) on the plans. The well(s) should be properly registered with the District and either be maintained or destroyed in accordance with the District's standards. Property owners or their representative should contact the District Wells and Water Production Unit at (408) 265-2607, extension 2660, for more information.

Response to Comment C2-5: The comment is noted, but does not relate to the adequacy of the Draft EIR. The required Development Permit for a project on the site would include a condition requiring that existing wells be destroyed or closed per District standards prior to issuance of any Building Permit.

October 8, 2003

Ron Eddow
Department of Planning, Building and Code Enforcement
801 N. First Street, Room 400
San Jose, CA 95110-1795

RE: DRAFT ENVIRONMENTAL IMPACT REPORT FOR THE BRANDENBURG
MIXED USE/NORTH SAN PEDRO HOUSING SITES

Dear Mr. Eddow:

At the October 1, 2003 Historic Landmarks Commission meeting, the Commission discussed the Draft Environmental Impact Report for the Brandenburg Mixed Use/North San Pedro Housing Sites. In a 5-0-2 decision (Commissioners Paim and Janke absent), the Commission voted to forward this comment letter, signed by the Chair, to the Director of Planning, Building and Code Enforcement and to the Planning Commission.

The Historic Landmarks Commission supports the historic resource mitigation measures included in the DEIR, and also recommends that the building at 181 Devine Street be retained and reused or adaptively used in order to preserve the historic building.

Thank you for the opportunity to comment on this important issue.

Sincerely,



Gloria Sciara, Chair
San Jose Historic Landmarks Commission

C: San Jose Historic Landmarks Commission

COMMENTOR C3

Gloria Sciara, Chair, San Jose Historic Landmarks Commission
October 8, 2003

Comment C3-1: The Historic Landmarks Commission supports the historic resource mitigation measures included in the DEIR, and also recommends that the building at 181 Divine Street be retained and reused or adaptively used in order to preserve the historic building.

Response to Comment C3-1: The comment is noted. It should also be noted that the structure at 181 Devine Street was determined to be "non-significant" under the City's Historic Evaluation Procedure (see Draft EIR, page 169).



October 10, 2003

City of San Jose
Department of Planning and Building
801 North First Street
San Jose, CA 95110

Attention: Susie Pineda

Subject: City File No. GP03-03-01 / Brandenburg Mixed Use

Dear Ms. Pineda:

Santa Clara Valley Transportation Authority (VTA) staff have reviewed the Draft EIR for construction of 1,501 residential units and 60,000 square feet of commercial uses on 12.40 acres located east of State Route 87, west of Market Street. We have no comments.

1

Thank you for the opportunity to review this project. If you have any questions, please call me at (408) 321-5784.

Sincerely,

A handwritten signature in black ink, appearing to read "Roy Molseed", is written over a horizontal line.

Roy Molseed
Senior Environmental Planner

RM:rm

cc: Ebrahim Sohrabi, San Jose Public Works Department

COMMENTOR C4

**Roy Molseed, Senior Environmental Planner, Santa Clara Valley Transportation Authority
October 10, 2003**

Comment C4-1: Santa Clara Valley Transportation Authority (VTA) staff have reviewed the Draft EIR for construction of 1,501 residential units and 60,000 square feet of commercial uses on 12.40 acres located east of State Route 87, west of Market Street. We have no comments.

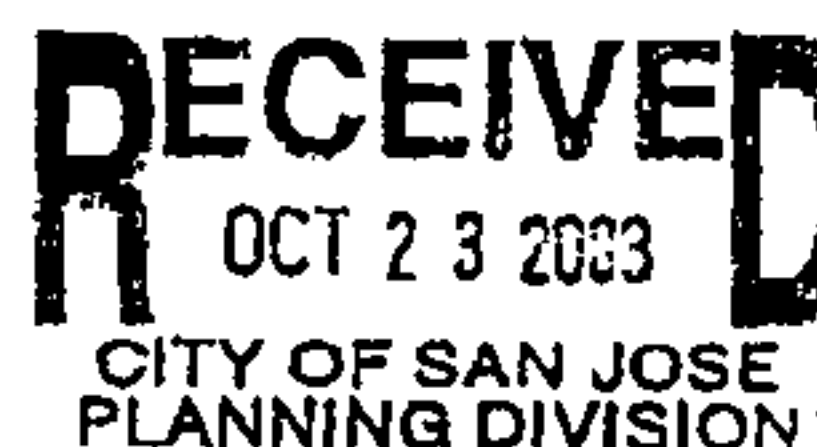
Response to Comment C4-1: This letter from the VTA confirms receipt and review of the Draft EIR and notes that the Authority has no comments.



Airport Land Use Commission

County Government Center, East Wing, 70 West Hedding Street, 7th Floor, San Jose, California 95110
(408) 299-2521 • FAX (408) 279-8537

October 22, 2003



Ms. Susie Pineda
City of San Jose
Department of Planning, Building and Code Enforcement
801 N. First St., Room 400
San Jose, CA 95110-1795

**Re: City of San Jose File No. GP03-03-01: Draft Environmental Impact Report for the
Brandenburg Mixed Use/North San Pedro Housing Sites Project (SCH# 2003012046)**

Dear Ms. Pineda:

Thank you for the opportunity to comment on the Draft Environmental Impact Report (DEIR) for the above-referenced project. The project site lies within the Airport Land Use Commission's (ALUC) referral boundary for San Jose International Airport and is subject to a determination of consistency with the policies as defined in the *ALUC Land Use Plan for Areas Surrounding Santa Clara County Airports*. ALUC staff offers the following comments for your consideration.

Land Use/Noise Impacts

The project proposes to construct new residential uses within the existing and projected 65 CNEL noise contour for San Jose International Airport. According to the policies in the *Land Use Plan*, residential uses within this area are considered incompatible unless they can be classified as infill projects of no more than 25 units on a maximum project size of one acre. In its discussion of consistency with relevant plans and policies on page 47, the DEIR states that the project is intended to be consistent with the *ALUC Land Use Plan* based on the subsequent referrals of the General Plan Amendments and rezones to the ALUC for a determination of consistency. Since the project proposes housing within the 65 CNEL contour beyond the infill classification described above, it would be inconsistent with the land use and noise policies in the *Land Use Plan*.

Airport Compatibility

The project site is located within a height-restricted area, and any resultant development would be subject to specific height limits established by the FAA and listed in the *Land Use Plan*. The DEIR discusses mitigation measures to ensure conformance with all FAA and ALUC height surfaces as Mitigation Measure LU-3. This includes dedication of aviation easements to the City of San Jose for San Jose International Airport and FAA Determinations of No Hazard for any proposed structure that would exceed the FAA Part 77 Imaginary Surface of 208 feet at the project site. ALUC staff finds these proposed mitigation measures consistent with the *Land Use Plan*, and incorporation of these measures would reduce any potential airport compatibility impacts to a less-than-significant level.

City of San Jose
Page 2

ALUC staff requests a copy, when available, of the Final EIR, and requests that the City of San Jose refer the General Plan Amendment and rezoning applications to the ALUC when available. If you have any questions, please call me at (408) 299-5798.

3

Sincerely,



Dana Peak
ALUC Staff Coordinator

cc: Cary Greene, San Jose International Airport
Sandy Hesnard, CalTrans Division of Aeronautics

COMMENTOR C5

**Dana Peak, ALUC Staff Coordinator, Airport Land Use Commission Santa Clara County
October 22, 2003**

Comment C5-1: The project proposes to construct new residential uses within the existing and projected 65 CNEL noise contour for San Jose International Airport. According to the policies in the *Land Use Plan*, residential uses within this area are considered incompatible unless they can be classified as infill projects of no more than 25 units on a maximum project size of one acre. In its discussion of consistency with relevant plans and policies on page 47, the DEIR states that the project is intended to be consistent with the ALUC *Land Use Plan* based on the subsequent referrals of the General Plan Amendments and rezones to the ALUC for a determination of consistency. Since the project proposes housing within the 65 CNEL contour beyond the infill classification described above, it would be inconsistent with the land use and noise policies in the *Land Use Plan*.

Response to Comment C5-1: The comment's observation regarding the policies of the ALUC Land Use Plan for residential uses is noted. As described on page 47 of the draft EIR, the final determination of consistency will be addressed when the General Plan Amendments and rezoning actions are referred to the ALUC. It should be noted that the Draft EIR recommends mitigation measures (NOI-1a and NOI-1b, on pages 118 and 119) for structures within the 65 CNEL contour to address the physical noise impact of their location.

Comment C5-2: The project site is located within a height-restricted area, and any resultant development would be subject to specific height limits established by the FAA and listed in the *Land Use Plan*. The DEIR discusses mitigation measures to ensure conformance with all FAA and ALUC height surfaces as Mitigation Measure LU-3. This includes dedication of avigation easements to the City of San Jose for San Jose International Airport and FAA Determinations of No Hazard for any proposed structure that would exceed the FAA Part 77 Imaginary Surface of 208 feet at the project site. ALUC staff finds these proposed mitigation measures consistent with the *Land Use Plan*, and incorporation of these measures would reduce any potential airport compatibility impacts to a less-than-significant level.

Response to Comment C5-2: Comment is consistent with the findings of the Draft EIR. No further response is necessary.

Comment C5-3: ALUC staff requests a copy, when available, of the Final EIR, and requests that the city of San Jose refer the General Plan Amendment and rezoning applications to the ALUC when available.

Response to Comment C5-3: At the request of the ALUC, a copy of the Final EIR will be forwarded to the Commission's staff representative. As a matter of standard practice, the Department of Planning, Building and Code Enforcement will refer the General Plan amendment and rezoning applications to the ALUC, when they are available.

D. ORGANIZATIONS

Letter
D1



*Pacific Gas and
Electric Company*

RECEIVED
OCT 14 2003
CITY OF SAN JOSE
PLANNING DEPARTMENT

111 Almaden Boulevard
P.O. Box 15005
San Jose, CA 95115-0005

October 10, 2003

Department of City Planning
City of San Jose
801 N. First Street, Rm. 400
San Jose, CA 95110
Attn: Ron Eddow

RE: Draft Environmental Impact Report
For General Plan Amendment, dated August 22, 2003
City: GP03-03-01
SCH No. 2003012046
East of SR 87, s/o Union Pacific Railroad, n/o St. James St. and w/o Market St., San Jose
PG&E File : 40228169-y03-MR -171

Dear Mr. Eddow,

Thank you for the opportunity to review the Draft Environmental Impact Report,
for General Plan Amendment at the above referenced location.

PG&E has the following comments to offer:

PG&E owns and operates gas and electric facilities which are located within and adjacent to the proposed project. To promote the safe and reliable maintenance and operation of utility facilities, the California Public Utilities Commission (CPUC) has mandated specific clearance requirements between utility facilities and surrounding objects or construction activities. To ensure compliance with these standards, project proponents should coordinate with PG&E early in the development of their project plans. Any proposed development plans should provide for unrestricted utility access and prevent easement encroachments that might impair the safe and reliable maintenance and operation of PG&E's facilities.

The developers will be responsible for the costs associated with the relocation of existing PG&E facilities to accommodate their proposed development. Because facilities relocation's require long lead times and are not always feasible, the developers should be encouraged to consult with PG&E as early in their planning stages as possible.

1

2



*Pacific Gas and
Electric Company*

111 Almaden Boulevard
P.O. Box 15005
San Jose, CA 95115-0005

Relocations of PG&E's electric transmission and substation facilities (50,000 volts and above) could also require formal approval from the California Public Utilities Commission. If required, this approval process could take up to two years to complete. Proponents with development plans which could affect such electric transmission facilities should be referred to PG&E for additional information and assistance in the development of their project schedules.

3

We would also like to note that continued development consistent with City's General Plans will have a cumulative impact on PG&E's gas and electric systems and may require on-site and off-site additions and improvements to the facilities which supply these services. Because utility facilities are operated as an integrated system, the presence of an existing gas or electric transmission or distribution facility does not necessarily mean the facility has capacity to connect new loads.

4

Expansion of distribution and transmission lines and related facilities is a necessary consequence of growth and development. In addition to adding new distribution feeders, the range of electric system improvements needed to accommodate growth may include upgrading existing substation and transmission line equipment, expanding existing substations to their ultimate buildout capacity, and building new substations and interconnecting transmission lines. Comparable upgrades or additions needed to accommodate additional load on the gas system could include facilities such as regulator stations, odorizer stations, valve lots, distribution and transmission lines.

5

We would like to recommend that environmental documents for proposed development projects include adequate evaluation of cumulative impacts to utility systems, the utility facilities needed to serve those developments and any potential environmental issues associated with extending utility service to the proposed project. This will assure the project's compliance with CEQA and reduce potential delays to the project schedule.

6

We also encourage the Planning Office of the City to include information about the issue of electric and magnetic fields (EMF) in environmental documents. It is PG&E's policy to share information and educate people about the issue of EMF.

Electric and Magnetic Fields (EMF) exist wherever there is electricity--in appliances, homes, schools and offices, and in power lines. There is no scientific consensus on the actual health effects of EMF exposure, but it is an issue of public concern. If you have questions about EMF, please call your local PG&E office. A package of information which includes materials from the California Department of Health Services and other groups will be sent to you upon your request.

7



*Pacific Gas and
Electric Company*

111 Almaden Boulevard
P.O. Box 15005
San Jose, CA 95115-0005

PG&E remains committed to working with City to provide timely, reliable and cost effective gas and electric service to the planned area. We would also appreciate being copied on future correspondence regarding this subject as this project develops.

8

The California Constitution vests in the California Public Utilities Commission (CPUC) exclusive power and sole authority with respect to the regulation of privately owned or investor owned public utilities such as PG&E. This exclusive power extends to all aspects of the location, design, construction, maintenance and operation of public utility facilities. Nevertheless, the CPUC has provisions for regulated utilities to work closely with local governments and give due consideration to their concerns. PG&E must balance our commitment to provide due consideration to local concerns with our obligation to provide the public with a safe, reliable, cost-effective energy supply in compliance with the rules and tariffs of the CPUC.

Should you require any additional information or have any questions, please call me at (408) 282-7401.

Sincerely,

A handwritten signature in cursive script that reads "Alfred Poon".

Alfred Poon
Land Agent
Corporate Real Estate
South Coast Area, San Jose

COMMENTOR D1

Alfred Poon, Land Agent, Corporation Real Estate, South Coast Area, San Jose, Pacific Gas and Electric Company
October 10, 2003

Comment D1-1: PG&E owns and operates gas and electric facilities which are located within and adjacent to the proposed project. To promote the safe and reliable maintenance and operation of utility facilities, the California Public Utilities Commission (CPUC) has mandated specific clearance requirements between utility facilities and surrounding objects or construction activities. To ensure compliance with these standards, project proponents should coordinate with PG&E early in the development of their project plans. Any proposed development plans should provide for unrestricted utility access and prevent easement encroachments that might impair the safe and reliable maintenance and operation of PG&E's facilities.

Response to Comment D1-1: The comment's suggestion regarding refinement of project plans and the maintenance and operation of PG&E's facilities is noted. Because it does not relate directly to the adequacy of the Draft EIR, no further response is necessary.

Comment D1-2: The developers will be responsible for the costs associated with the relocation of existing PG&E facilities to accommodate their proposed development. Because facilities relocation's require long lead times and are not always feasible, the developers should be encouraged to consult with PG&E as early in their planning stages as possible.

Response to Comment D1-2: The comment's suggestion related to the costs and timing of facility relocation is noted. Because it does not relate directly to the adequacy of the Draft EIR, no further response is necessary.

Comment D1-3: Relocations of PG&E's electric transmission and substation facilities (50,000 volts and above) could also require formal approval from the California Public Utilities Commission. If required, this approval process could take up to two years to complete. Proponents with development plans which could affect such electric transmission facilities should be referred to PG&E for additional information and assistance in the development of their project schedules.

Response to Comment D1-3: The comment's suggestion regarding substation facilities (50,000 volts and above) is noted. Because it does not relate directly to the adequacy of the Draft EIR, no further response is necessary.

Comment D1-4: We would also like to note that continued development consistent with City's General Plans will have a cumulative impact on PG&E's gas and electric systems and may require on-site and off-site additions and improvements to the facilities which supply these services. Because utility facilities are operated as an integrated system, the presence of an existing gas or electric

transmission or distribution facility does not necessarily mean the facility has capacity to connect new loads.

Response to Comment D1-4: The comment regarding capacity to connect new loads to the integrated system for natural gas and electricity is noted. The potential cumulative impacts of the proposed project in combination with other cumulative growth in San Jose are analyzed in the Draft EIR in Chapter VI, Cumulative Impacts, section 14. Energy (p. 224). In addition, the City's 2020 General Plan EIR addressed this issue at the citywide level in terms of growth allowed by the General Plan in Chapter III, section P, Energy (pp.246-248).

Comment D1-5: Expansion of distribution and transmission lines and related facilities is a necessary consequence of growth and development. In addition to adding new distribution feeders, the range of electric system improvements needed to accommodate growth may include upgrading existing substation and transmission line equipment, expanding existing substations to their ultimate buildout capacity, and building new substations and interconnecting transmission lines. Comparable upgrades or additions needed to accommodate additional load on the gas system could include facilities such as regulator stations, odorizer stations, valve lots, distribution and transmission lines.

Response to Comment D1-5: The comments detailed description of the types of distribution and transmission lines and related facilities that may be needed in order to accommodate growth such as the proposed project is noted. However, it does not raise any issue related to the adequacy of the report and therefore does not require further response.

Comment D1-6: We would like to recommend that environmental documents for proposed development projects include adequate evaluation of cumulative impacts to utility systems, the utility facilities needed to serve those developments and any potential environmental issues associated with extending utility service to the proposed project. This will assure the project's compliance with CEQA and reduce potential delays to the project schedule.

Response to Comment D1-6: The Draft EIR addresses potential cumulative impacts of the proposed project combination with other proposed, planned or approved projects on energy supplies and distribution in Chapter VI, on page 224. In addition, the environmental impact report prepared for the City's General Plan analyzed this issue in terms of the levels of future growth allowed under the General Plan at the citywide level in Chapter III, section P, Energy (pp.246-248).

Comment D1-7: We also encourage the Planning Office of the City to include information about the issue of electric and magnetic fields (EMF) in environmental documents. It is PG&E's policy to share information and educate people about the issue of EMF.

Electric and Magnetic Fields (EMF) exist wherever there is electricity—in appliances, homes, schools and offices, and in power lines. There is no scientific consensus on the actual health effects of EMF exposure, but it is an issue of public concern. If you have questions about EMF, please call your local PG&E office. A package of information which includes materials from the California Department of Health Services and other groups will be sent to you upon your request.

Response to Comment D1-7: The comment, which provides information about electric and magnetic fields, is noted. Because this comment does not address the adequacy of the Draft EIR for this project no further response is necessary.

Comment D1-8: PG&E remains committed to working with City to provide timely, reliable and cost effective gas and electric service to the planned area. We would also appreciate being copied on future correspondence regarding this subject as this project develops.

Response to Comment D1-8: PG&E will be provided with a copy of these responses to the company's comments on the Draft EIR. At the time that a specific developer comes forward with a proposal for the North San Pedro Housing sites, PG&E would again be contacted as outlined above in Responses to Comments D1-1 through D1-3.

ADAMS BROADWELL JOSEPH & CARDOZO

DANIEL L. CARDOZO
RICHARD T. DRURY
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
MARC D. JOSEPH
SUMA PEESAPATI

OF COUNSEL
THOMAS R. ADAMS
ANN BROADWELL

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
851 GATEWAY BOULEVARD, SUITE 900
SOUTH SAN FRANCISCO, CA 94080

TEL: (650) 589-1860
FAX: (650) 589-5062
speesapati@adamsbroadwell.com

SACRAMENTO OFFICE
1029 K STREET, SUITE 37
SACRAMENTO, CA 95814
TEL: (916) 444-6201
FAX: (916) 444-6209

October 20, 2003

RECEIVED
OCT 20 2003
CITY OF SAN JOSE
PLANNING DIVISION

VIA MESSENGER

Ron Eddow, Senior Planner
Department of Planning, Building and Code Enforcement
801 N. First Street, Room 400
San Jose, CA 95110

Re: Comments on The Draft Environmental Impact Report ("DEIR") for
the Brandenburg Mixed Use Project /North San Pedro Housing Sites

Dear Mr. Eddow:

We are writing on behalf of the Plumbers and Steamfitters Union Local 393, the International Brotherhood of Electrical Workers Local 332, the Sheetmetal Workers Local 104, Loyd Williams, Gary Kendall and Mitchell Austin with regard to the Draft Environmental Impact Report ("DEIR") prepared by the City of San Jose for the Brandenburg Mixed Use Project /North San Pedro Housing Sites ("the Project"). As explained more fully below, the DEIR for the Project does not comply with the requirements of the California Environmental Quality Act ("CEQA").¹ The City may not approve the Project or grant any permits for the Project until an adequate DEIR is prepared and re-circulated for public review and comment.

The members of Locals 393, 332, and 104 construct and maintain commercial, residential and industrial projects in San Jose, California. They are concerned with sustainable land use and development in the County. Poorly planned and environmentally detrimental projects may jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live here. Continued degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities. Additionally, the members live in the communities that suffer the impacts of

¹ Public Resources Code §§ 21000 *et seq.*
1469a-004

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environmentally detrimental projects. Union members breathe the same polluted air that others breathe and suffer the same health and safety impacts. Finally, union members are concerned about projects that carry serious environmental risks without providing countervailing employment and economic benefits to local workers and communities. Locals 393, 332, and 104 therefore have a strong interest in enforcing environmental laws to protect their members.

Lloyd Williams is a member of Plumbers and Steamfitters Local 393; Gary Kendall and Mitchell Austin are members of Sheetmetal Workers Local 104. All of these individuals live in San Jose and are concerned about the effects of the Project on themselves, their families and their community. These individuals also share the concerns of their locals identified above.

I. INTRODUCTION

CEQA has two basic purposes, neither of which the DEIR satisfies. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. (14 Cal. Code Regs. ("CEQA Guidelines") § 15002(a)(1).) The EIR is the "heart" of this requirement. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84 [118 Cal.Rptr. 34].) 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." (*County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810 [108 Cal.Rptr. 377].)

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures. (CEQA Guidelines § 15002(a)(2) and (3). *See also Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 [276 Cal.Rptr. 410, 416]; *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal.3d 376, 400 [253 Cal.Rptr. 426, 436].)

The DEIR fails to satisfy these purposes by: failing to ensure future, tiered environmental review of the Project; failing to disclose all potentially significant environmental impacts of the Project; failing to accurately describe the Project; failing to provide adequate mitigation measures to avoid impacts; improperly deferring the identification of mitigation measures; and failing to analyze cumulative impacts. As a result, the DEIR fails to inform the public or decision

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makers about the Project's significant impacts or propose adequate mitigation measures.

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cont.

We have prepared these comments with the assistance of several technical experts, including Ms. Schuyler Fishman, Mr. Matt Hagemann, Dr. James Hindery and Mr. Dan Smith. The comments of each of these experts along with their *curriculum vitae* are appended hereto as Attachments 1, 2 and 3. Please note that these experts' comments supplement the issues addressed below and should be addressed and responded to separately.

II. THE CITY FAILED TO HAVE ALL SUPPORTING DOCUMENTS ACCESSIBLE DURING THE ENTIRE COMMENT PERIOD

CEQA section 21092(b)(1) requires that the CEQA notice for an EIR must include "the address where copies of the proposed EIR and *all documents referenced therein* are available for review and readily accessible during the agency's normal working hours." As noted by leading CEQA commentators, Remy and Thomas:

The above-referenced section [21092(b)(1)] requires the agency to notify the public of the address at which "all documents referenced in a draft EIR" can be found (and presumably read) . . . seems to require agencies to make available for public review all documents on which agency staff or consultants expressly rely in preparing a draft EIR. In light of case law emphasizing the importance of ensuring that the public can obtain and review documents on which agencies rely for the environmental conclusions (see, e.g., *Emmington v. Solano County Redevel. Agency*, 195 Cal.App.3d 491, 502-503 (1987)), agencies should ensure that they comply literally with this requirement.

Remy, Thomas and Moose, *Guide to the California Environmental Quality Act*, p. 293 (Solano Press, 1999). The courts have held that the failure to provide even a few pages of a CEQA document for a portion of the CEQA review period invalidates the entire CEQA process. *Ultramar v. South Coast Air Quality Man. Dist.*, 17 Cal.App.4th 689 (1993).

By letter dated September 11, 2003, we made a written request to the City for specific documents referenced in the DEIR. See Attachment 4. After nearly two weeks of footdragging, on September 22, 2003 the City provided us with a letter agreeing to provide us access to the requested documents in approximately 14 days

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after the date of that letter. See Attachment 5. On October 6, 2003, 14 days after we received the City's letter, we attempted to make an appointment with City staff to send a copy service to the agency to copy the requested documents. City staff informed us that the documents were still unavailable for our review and copying. The City did not provide us access to the requested documents until Friday, October 10, 2003. Obviously, the City's failure to provide us access to documents referenced in the EIR until a few days before the comment deadline expires violates CEQA's mandate that those documents be readily accessible during the entire comment period. Cal. Pub. Res. Code § 21092(b)(1).

3

On Friday, October 10, 2003, we also informed City staff that Appendix C was missing from the copy of the DEIR provided to us by the City. This is virtually identical to the facts of the Ultramar case cited above, where the Court invalidated the agency's entire CEQA review process due to the failure to have a few pages of the CEQA document available for the entire comment period. *Ultramar v. South Coast Air Quality Man. Dist.*, 17 Cal.App.4th 689 (1993).

Based on the inaccessibility of these documents, we made a written request for an extension of the comment deadline until 45 days after the documents became accessible to us. The City did not grant our request, and instead provided us with a mere 7 day extension, thereby depriving us of adequate time to review the documents and provide informed comments, both fundamental elements of the CEQA statute. We therefore file these comments under protest and reserve the right to supplement these comments once we have an opportunity to fully review all the relevant documents related to this Project.

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III. THE DEIR FAILS TO ACCURATELY DESCRIBE THE PROJECT

An accurate, stable and finite project description is the *sine qua non* of an informative and legally adequate EIR. (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192 [139 Cal.Rptr. 396, 401].) Without it, CEQA's objective of fostering public disclosure and informed environmental decision-making is stymied. As one analyst has noted:

The adequacy of an EIR's project description is closely linked to the adequacy of the EIR's analysis of the project's environmental effects. If the description is inadequate because it fails to discuss the complete project, the environmental analysis will probably reflect the same

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mistake. (Kostka and Zischke, "Practice Under the California Environmental Quality Act," p. 474 (8/99 update).)

Here, the Project description is unclear and inconsistent. As explained below, the DEIR provides no explanation of what phase of the Project is currently being proposed by the Redevelopment Agency, no explanation of the sequence of approval actions that the City will take, and no detailed description of the claimed "project."

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A. The Scope of the Proposed Project is Inconsistent and Incoherent

Under the Heading, "Project Under Review," Page 5 of the DEIR claims that: "Three General Plan amendments are proposed." This statement is followed by a list of three proposed amendments to the General Plan including land use changes, roadway realignment and redefinition of downtown core area boundaries. This list indicates that the currently proposed actions on the Project merely involve amendments to the General Plan. Yet, later on in the document, under the heading "Project Description," the DEIR states that the "Proposed Project" includes General Plan Amendments, Rezoning, Public Improvements, formation of a community facilities district, Acquisition, Assembly and Disposition of Property, Site Clearance, and Mixed Use Development (including the construction of approximately 1,801,317 square feet of residential space and 60,000 square feet of commercial space). DEIR, p. 34-43. The scope of the proposed Project is further obscured by the litany of items listed under the subheading "Uses of the EIR" under the Project Description. DEIR, p. 43-44. There are over 24 categories of approval actions provided under that subheading. Although the DEIR claims that "it may be used" for all 24 categories of discretionary actions necessary to implement the Project as proposed, the vast majority of those proposed actions do not yet exist. In other words, it appears that the DEIR is attempting to act as a project-specific, comprehensive document aimed at full disclosure of impacts and mitigation while the Project is still conceptual in its form.² Either the DEIR must disclose the nature of the Project with greater specificity or, as explained below, present the DEIR as a programmatic document that will be supplemented by tiered environmental review as the Project details unfold.

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² The actual development proposed for the site has no specific form aside from an approximate square footage that will occupy each parcel of land. The DEIR admits to the fact that its description of the project is limited to a "discussion describ[ing] the proposed project's concepts" and a discussion of the type of development "envisioned" by the Redevelopment Agency. DEIR, p.41.
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B. The DEIR Fails To Reveal Which Phases of the Project Will Be Undertaken and Financed by the City and Redevelopment Agency

The DEIR does not clearly state which specific actions on the Project the City and Redevelopment Agency are proposing to take at this time. Because we are writing these comments without the benefit of any of the documents underlying the Project, including any pending applications from the Redevelopment Agency, the public has no way of knowing which actions the City is currently proposing to take. The DEIR must be revised to clearly and accurately disclose the specific approval actions the DEIR is evaluating.

Furthermore, the DEIR must reveal the sequence of future phases of the Project, including which phases of the Project will be undertaken by the Redevelopment Agency. From our conversations with Agency staff, it is our understanding that although the current Project proponent is the Redevelopment Agency, a private developer is expected to administer the bulk of the Project. The DEIR does not reveal this fact, nor reveal the specific phases of the Project that will be proposed and funded by the Redevelopment Agency. These are important aspects of the Project that must be disclosed in a revised DEIR circulated for public review and comment.

C. The Project Description Lacks the Sufficient Information for a Project-Level Air Quality Impact Analysis

According to air quality expert Schuyler Fishman in her attached comments, a detailed construction equipment inventory and a construction schedule are necessary predicates to a proper estimate of construction-related emissions. Neither one of these two informational requirements is provided in the DEIR. Furthermore, there is so little information regarding the Project's proposed realignment of Julian Avenue that it is impossible to conduct a construction-related air quality impact analysis of that part of the Project. Therefore, the project description is inadequate for purposes of project-level air quality analysis.

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IV. THE DEIR IS A PROGRAMMATIC-LEVEL EIR, NOT A PROJECT-LEVEL EIR

Program EIRs are mandatory when "individual projects are, or a phased project is, to be undertaken and where the total undertaking comprises a project with significant environmental effect." CEQA Guidelines § 15165. The purpose of a program EIR is to provide a general overview of a Project, to allow decisionmakers the opportunity to consider the wisdom in pursuing the project in its proposed form as early in the process as possible. In a recent case involving the expansion of the Port of Los Angeles, the Court explained that:

The CEQA process is intended to be a careful examination, fully open to the public, of the environmental consequences of a given project covering the entire project, from start to finish. This examination is intended to provide the fullest information reasonably available upon which the decision makers and the public they serve can rely in determining whether or not to start the project at all, not merely to decide whether to finish it. The EIR is intended to furnish both the road map and the environmental price tag for a project, so that the decision maker and the public both know, before the journey begins, just where the journey will lead, and how much they -- and the environment -- will have to give up in order to take that journey. As our Supreme Court said in *Bozung v. Local Agency Formation Com.* (1975) 13 Cal. 3d 263, 283, 118 Cal. Rptr. 249, 529 P.2d 1017, "the purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind."

Natural Resources Defense Council v. City of Los Angeles, (2002) 103 Cal. App. 4th 268, 271. In that case, the Court found that even though a programmatic EIR had been prepared contemplating expansion of certain berths at the Port of Los Angeles, once the three-phased site specific project materialized, the City was required to prepare a tiered EIR to address any new impacts related to the project in its more recent and more detailed form. In short, the City could not rely on the programmatic analysis to avoid CEQA review of the later activities that were necessary for the project to become manifest. *Id.*

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While we support the City's effort to begin environmental review of the Brandenburg Mixed Use Project as early in the planning process as possible, the preliminary nature of the development makes project-level analysis impossible at this time. Unfortunately, the DEIR is so ambiguous in the scope of the Project that it would avoid environmental review of future phases of the Project as they begin to take form. This type of obfuscation of CEQA's disclosure requirements is not consistent with CEQA law. For example, the DEIR proclaims itself to be a project-level analysis "designed to *fully* inform City of San Jose decisionmakers, other responsible agencies, and the general public of the proposed project and the potential consequences of its approval." DEIR, p.1 (emphasis added). Of course, the DEIR cannot fully inform the decisionmakers of the project-level environmental consequences of the Brandenburg Mixed Use Project because the specific development plan for the Project has yet to materialize. The DEIR must be revised to make clear that it is a programmatic document that must be revisited during each phase.

The anemic analysis caused by the nascence of the Project is apparent on page 67 where it states that "the realignment Julian Street . . . would not appear to create incompatibilities between established and proposed uses within or adjacent to the project site. *Once a specific development project (or projects) is proposed*, the precise site planning relationship between the new development and existing office land use northwest of Pellier Park . . . would be refined." (Emphasis added). As this quotation makes explicit, the full impacts of the Project cannot be determined at this time because no *specific development project* exists for the site.

As explained by CEQA's implementing regulations, the time at which the agency may make a determination of whether or not impacts were fully analyzed in the program EIR is once subsequent activities take place. In short, adequacy of disclosure of environmental impacts is not a preemptive determination, but one that must be revisited during each phase of the Project. "Subsequent activities in the program must be examined in the light of the program EIR to determine whether an additional environmental document must be prepared." CEQA Guidelines § 15168(c). The DEIR must be revised to make clear that it is a programmatic document that must be analyzed for sufficiency at each phase of the Project approval process.

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V. THE DEIR FAILS TO DISCLOSE OR ANALYZE ALL POTENTIALLY SIGNIFICANT IMPACTS

An EIR must disclose all potentially significant adverse environmental impacts of a project. (Pub. Res. Code § 21100(b)(1).) As explained by a recent CEQA decision:

"The EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental context." (Guidelines, § 15125, subd. (c).) We interpret this Guideline broadly in order to "afford the fullest possible protection to the environment." (*Kings County Farm Bureau, supra*, 221 Cal. App. 3d 692, 720.) In so doing, we ensure that the EIR's analysis of significant effects, which is generated from this description of the environmental context, is as accurate as possible. (See also Remy et al., Guide to the Cal. Environmental Quality Act (CEQA) (10th ed. 1999), pp. 374-376.)

Friends of the Eel River v. Sonoma County Water Agency, (2003) 108 Cal. App. 4th 859, 874.

The DEIR for this Project fails to provide the legally required disclosure. Among other things, the DEIR fails to adequately describe: baseline conditions from which to evaluate environmental impacts, significant and potentially significant impacts to human health due to exposure to hazardous materials; significant air quality and public health impacts from construction exhaust; significant impacts to water supply and water quality; significant impacts to traffic; potentially significant impacts related to seismic activity and liquefaction; and potentially significant impacts on parks and public services.

The DEIR should be revised to address these impacts and re-circulated for public review. CEQA requires re-circulation of an EIR when significant new information is added to the EIR following public review but before certification. (Pub. Res. Code § 21092.1.) The Guidelines clarify that new information is significant if "the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project" including, for example, "a disclosure showing that ... [a] new significant environmental impact would result from the project." (CEQA Guidelines § 15088.5.)

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The following new, significant environmental impacts would result from the Project and must be addressed in a revised DEIR that is re-circulated for public review.

A. Use Of Inaccurate Baseline Improperly Skews The DEIR's Impact Analysis

The environmental setting establishes the baseline physical conditions against which a lead agency can determine whether an impact is significant. (CEQA Guidelines § 15125(a).) Under CEQA, knowledge of the regional setting is critical to an assessment of environmental impacts. (*Id.* at § 15125(c).) "[T]he impacts of the project must be measured against the 'real conditions on the ground.'" *Save Our Peninsula Committee v. Monterey Board of Supervisors* (2001) 87 Cal.App.4th 99, 121. While the absence of information in an EIR does not per se constitute a prejudicial abuse of discretion, "a prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1355. Here, the DEIR does not correctly describe the existing physical conditions related to traffic, water quality and hazardous waste.

1. The DEIR Employs An Inaccurate View on Baseline Conditions From Which to Measure Traffic Impacts

Traffic expert Dan Smith explains in his attached comments that the DEIR's traffic baseline relies on traffic counts mostly conducted in the period from September through November, 2002. Because of the economic recession, counts taken in that period tend to be considerably lower than traffic counts taken in the recent past. Smith opines that when economic recovery takes place, the project traffic will be superimposed on a higher existing traffic base and the project will consequently have considerably greater impacts than estimated in the DEIR. Had the project been analyzed in the context of base traffic counts from year 2000, project traffic would be found to have more deleterious effects on conditions than disclosed in the DEIR. Basing the analysis on traffic counts from a period of time when traffic volumes are temporarily depressed does not provide a fair and accurate estimate of potential traffic impacts. The DEIR must be revised to provide correct traffic baseline conditions and recirculated for public review and comment.

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2. The DEIR Improperly Avoids Disclosure of Current Status of Project Site With Respect to Hazardous Materials

As explained below, there are many parcels of land on the Project site that have or had detectable levels of hazardous materials. For at least 6 parcels of land on the Project site, the DEIR claims that "further investigation is required." DEIR at 181. The City's failure to investigate the existing level of contamination on those parcels of land before preparing the DEIR directly conflicts with the CEQA mandate that "the EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental context." CEQA Guidelines, § 15125, subd. (c). All parcels of land on the Project site must be fully investigated and current levels of contamination disclosed in a draft DEIR circulated for public review and comment.

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For at least one other parcel, 355 North San Pedro Street, the DEIR admits the applicability of a Water Board approved remediation plan, yet admits that that remediation plan has yet to be fully realized, due to the impracticality of some aspects of remediation. Despite this admission of incomplete cleanup of the site, the DEIR does not indicate any follow up investigation or provide the public with the current status of that site with respect to the presence of hazardous materials and the potential health risk that any remaining contamination poses to public health. The DEIR must be revised to evaluate the existing levels of contamination on all parcels of land and a full health assessment of such contamination in a revised document that is circulated for public review and comment.

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For yet another category of parcels, 129-149 West Julian Street, although the DEIR admits the presence of benzene in the shallow sources of groundwater, the DEIR does not follow up this disclosure with a health risk assessment that provides the public with a full understanding of the level of contamination on site and the public health risk posed by such contamination. Such an assessment must be part of a revised DEIR circulated for public review and comment.

15

For a final parcel of contaminated land on the Project site, 153 Julian Street, the DEIR indicates that a health risk assessment has been performed, but neither the assessment nor the full results contained therein are provided as part of the DEIR. As explained below, this violates CEQA's disclosure requirements. For the purpose of impacts analysis, however, the DEIR's failure to fully inform the public

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of the level of contamination and the public health risks of developing the Project site results in an inaccurate depiction of baseline conditions in the area.

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cont.

3. Baseline Water Quality Impact from Runoff Is Inadequately Disclosed In the DEIR

The water quality impacts of past and continuing runoff from the Project site have not been disclosed in the DEIR. Of particular concern, as explained below, is the impact of such runoff on the nearby Guadalupe River. The DEIR must be revised to reveal the current condition of the Guadalupe River and the effect of past and current runoff from the Project site on that body of water.

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B. Public Health Impacts Associated With Development of 153 Julian Street Are Not Adequately Disclosed

One of the parcels of land involved in this project, 153 Julian Street, is a Superfund site. This means that it is one of the most contaminated sites in the United States. As explained by Mr. Hagemann and Dr. Hindery in their attached comments, the health risk assessment prepared for the property was not included in the DEIR. As such, it is impossible to accurately gauge the currently existing health risk that would result from development of this parcel of land. It is also impossible to determine whether the DEIR's proposed mitigation is sufficient to offset those impacts. The EIR must be "a compilation of all relevant data into a single formal report . . . which would facilitate both public input and the decisionmaking process." *Russian Hill Improvement Association v. Board of Permit Appeals*, (1975) 44 Cal.App.3d 158, 168. A copy of the assessment or a thorough explanation of its results must be included in the EIR to allow the public an opportunity to comment on it. The health risk assessment for 153 Julian Street must be included in the DEIR to effectuate full disclosure of health impacts from the Project.

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Dr. Hindery and Mr. Hagemann also note that the existing health risk assessment addresses health impact through evaluation of vapor intrusion from contaminated soil to indoor environments. Since the time that initial assessment, the health risk assessment mentioned in the DEIR, was prepared for 153 Julian Street, there is a new guidance for evaluating the vapor intrusion pathway developed by the U.S. EPA. As such, the health risk assessment should be revised to comport with the EPA's most recent guidance on measuring vapor intrusion and included in a new DEIR circulated for public review and comment.

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C. Public Health Impacts Associated With Development of 129-149 West Julian Street Are Not Adequately Disclosed

The DEIR notes that benzene has been detected at significant levels in groundwater under this parcel of land. Benzene is a potent carcinogen. As Dr. Hindery and Mr. Hagemann explain in their attached comments, the presence of benzene at concentrations up to 710 ppb in such a shallow groundwater source likely poses a significant health risk to future residents via the vapor intrusion pathway. Yet, the DEIR does not provide a health risk assessment that discloses the public health impact of benzene contamination on the site. The significant public health impact of benzene on this parcel of land must be fully disclosed and mitigated in a revised DEIR circulated for public review.

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D. Public Health Impacts Associated with Incomplete Remediation of 355 North San Pedro Street Remain Undisclosed

The DEIR reveals significant public health impacts related to hydrocarbon-contaminated soil on this parcel of land. As mitigation, the DEIR mentions remedial action approved by the Regional Water Quality Control Board. That order involves the removal of 100 cubic yards of contaminated soil. The DEIR admits, however, that full remediation has not occurred due to alleged inaccessibility of a portion of the 100 cubic yards of soil to be removed. As explained by Dr. Hindery and Mr. Hagemann, the DEIR must disclose the public health impact resulting from incomplete remediation of the contaminated site. The DEIR must be revised to reveal the results of such investigation.

21

E. Public Health Impacts Associated with Closed Sites Remain Undisclosed

There are a number of parcels of land that housed Underground Storage Tanks ("USTs") and are considered "closed" from a regulatory perspective. Hindery and Hagemann point out that residual concentrations of metal and lead are known to occur on "closed sites." Given this possibility, all sites, regardless of individual regulatory status, should be inventoried and cumulatively assessed for risk to human health in a comprehensive, project wide risk assessment in a revised DEIR circulated for public review and comment.

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F. The Existence Of and Public Health Impact From All Hazardous Materials On Site Must Be Fully Investigated and Disclosed At This Time

The DEIR provides a list of 6 parcels of land that "require further investigation." DEIR at 181. The basis of the need for further investigation includes the potential presence of "petroleum products, heavy metals, and solvents, and polynuclear aromatic compounds" on those parcels of land. The DEIR later admits that "potential hazardous materials issues at several of the project site properties have not been fully evaluated. . . . If significant hazardous materials releases have occurred at those properties, construction workers and future workers and residents at the project site could be exposed to potentially harmful concentrations of hazardous materials." DEIR, p. 182. The potentially significant, even grave, public health concerns raised by the potential presence of hazardous materials coupled with the DEIR's half-hearted attempt at disclosure is cause for concern.

Indeed, this is precisely the type of situation CEQA cautions lead agencies against. Environmental problems should be considered at a point in the planning process "where genuine flexibility remains." (*Mount Sutro Defense Committee v. Regents of University of California* (1978) 77 Cal.App.3d 20, 34 [143 Cal.Rptr. 365].) "A study conducted after approval of a project will inevitably have a diminished influence on decision making. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA." *Sundstrom*, 202 Cal.App.3d at 307 [248 Cal.Rptr. at 358].

The City must perform the requisite investigation for full disclosure of the public health threat from these sites now, not at some later yet-undetermined time. The DEIR must be revised to discuss the results of full investigation of the potential presence of hazardous materials on these parcels of land and fully mitigate the impacts that may be revealed from that investigation.

G. The DEIR Does Not Accurately Disclose Impacts Related to Seismic Activity in the Vicinity of the Project

According to Hagemann and Hindery, the project is located in an area of "Very Strong" shaking potential from a magnitude 7.9 earthquake along the entire San Andreas Fault. They go on to explain that damage resulting from an

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earthquake with an intensity of VIII (Very Strong) includes: "considerable damage in ordinary substantial buildings with partial collapse. Damage great in poorly built structures. Fall of chimneys, factory stacks, columns, monuments, walls. Heavy furniture overturned" (<http://neic.usgs.gov/neis/general/mercalli.html>). The DEIR's bare statement that "ground shaking at the project site is a potentially serious hazard" does not accurately describe the potential impacts of an earthquake, as detailed by the Association of Bay Area Governments ("ABAG"). The DEIR should be revised to fully disclose the level and type of seismic hazards that exist in the Project area. As feasible mitigation for this impact, Hagemann and Hindery indicate that construction should follow codes developed by the International Code Council (<http://www.iccsafe.org/>).

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H. The DEIR Does Not Accurately Disclose the Risk of Liquefaction on the Project Site

According to criteria provided by ABAG, the risk of liquefaction hazards on the Project site is "moderate." The DEIR does not disclose this impact. For this impact Hagemann and Hindery again indicate that construction should follow codes developed by the International Code Council (<http://www.iccsafe.org/>).

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I. The DEIR Fails to Disclose the Potentially Significant Impacts on Water Quality From Commercial Uses of the Site

The DEIR neither describes the types of operations that would be developed in the commercial area nor the environmental impacts such operations would generate. Assuming that operations such as dry cleaning and gasoline service stations may occur on the commercial element of the Project, Hagemann and Hindery explain that there may be significant adverse impacts on the area's water resources. Specifically, this requires the DEIR to assess the impact of water drainage from the site that finds its way to Guadalupe River, located a half mile west of the proposed development, paying special attention to household gardening and landscaping and past activities within the site. A variety of contaminants are common to urban area storm water and irrigation run-off. As the DEIR admits, some of the contaminants used during past activities are agricultural chemical, petroleum hydrocarbons, heavy metals, pesticides, lead and asbestos. The potential impacts of past and future run-off from the Project site should be addressed in a revised DEIR circulated for public review.

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Our experts also note that the Guadalupe River is listed as an impaired water body for diazinon by the State of California. In listing diazinon as a high priority for TMDL development, the State identifies the source for diazinon as "urban runoff/storm sewers." The construction of at least 1,500 houses for the project, as well as commercial areas and parks, may incrementally impact water quality through potential discharge of pesticides, including diazinon, to the Guadalupe River. A revised DEIR should be prepared to adequately assess and mitigate the potential addition of diazinon on Guadalupe River from operation of the Project.

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J. The DEIR Fails to Disclose the Potentially Significant Impacts on Water Supply Due to Operation of the Project

The DEIR significantly underestimates the impacts of the Project on the area's water supply. Hindery and Hagemann estimate residential interior water needs range from 426 to 1,216 AFY (assuming an average of 3.62 people per residential unit). Residential landscaping needs total 17 AFY (assuming the total acreage of residential irrigated landscape is 50 percent of the residential developable acreage). Therefore, residential interior and landscaping water needs combined range from 443 to 1,233 AFY.

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In addition to 1,500 multi-family units the Brandenburg project also includes parking facilities (2,302 spaces), commercial space (60,000 sq. ft.), satellite community centers (10,000 to 20,000 square feet), small recreation buildings, the addition of an 0.86-acre park, and renovation of the 0.42 Pellier Park (DEIR, pp. 31, 41, 191). Water consumption from these operations should also be incorporated into estimates of water demand. CEQA requires that the DEIR be modified to incorporate revised estimates of water use in light of the above expert opinion and should compare the revised rates of consumption to available supply.

K. The DEIR Erroneously Describes Impacts to Parks As "Less Than Significant"

The DEIR admits that the Project would create "a shortfall of 11.16 acres of parkland when compared to the City's level of service benchmarks for neighborhood/community serving parklands." DEIR at 192. Yet, the DEIR erroneously labels this public service impacts as "less than significant."

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The City's General Plan calls for the provision of 3.5 acres of parkland per 1,000 residents. DEIR, p.191. Under the City's General Plan, the proposed project has a parkland obligation of 12.02 acres, yet provides only 0.86 acres. The level of service benchmark of 3.5 acres per 1,000 residents is known under CEQA as a "threshold of significance."

A "threshold of significance" for a given environmental effect is simply that level at which the lead agency finds the effects of the project to be significant; the term may be defined as a quantitative or qualitative standard, or set of criteria, pursuant to which the significance of a given environmental effect may be determined. . . . [U]se of existing environmental standards in determining the significance of a project's environmental impacts is an effective means of promoting consistency in significance determinations and integrating CEQA environmental review activities with other environmental program planning and regulation.

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cont.

Communities for a Better Environment v. California Resources Agency, (2002) 103 Cal. App. 4th 98, 110-111 (internal citations omitted). In other words, using the City's own threshold of significance, the impact the development will have on the ratio of residents to parkland is significant and must be mitigated through the creation of open park space for future residents of the Brandenburg development. The DEIR must be revised to disclose and mitigate this impact before it is recirculated for public review and comment.

L. The DEIR Erroneously Describes Impacts to Libraries As "Less Than Significant"

The DEIR admits that the City and County library system is "inadequate to serve current needs due to recent population growth." DEIR, p.193. The DEIR further admits that "six new branch libraries are in the planning stages" as the basis for finding "no significant adverse physical impact would result." DEIR at 193. This turns CEQA's impact disclosure requirements on its head. The new libraries are being constructed, in part, to accommodate the population increase created by the Project. As such, the environmental impact of construction of additional library resources necessary to accommodate the population increase caused by the Project must be disclosed. Specifically, a revised DEIR must provide a ratio of existing library resources to population and disclose how that ratio would be affected by the population increase created by the Project. Finally, the DEIR

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must disclose the impact resulting from creating sufficient library space to meet the City's level of service for libraries.

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cont.

M. The DEIR Fails To Adequately Disclose Traffic Impacts From The Project

As explained by traffic expert, Mr. Dan T. Smith, in his attached comments, the traffic analysis in the DEIR is severely deficient. The stated baseline conditions are inaccurate, thereby skewing the impact analysis. Other issues, such as construction-related impacts, are ignored altogether. Unfortunately, these deficiencies in the DEIR not only render the traffic analysis deficient, but render other areas of analysis deficient as well. Smith explains that to the extent that the DEIR understates Project traffic generation and impacts, the DEIR also understates air quality and noise impacts.

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By way of example, Smith finds the air quality analysis appears completely illogical, crediting this large development project with decreasing, rather than increasing, traffic in the immediate project area. As a consequence, the DEIR claims that the Project will improve, rather than degrade, air quality conditions in the downtown area. Nothing in the traffic study reports presented in the DEIR and its appendices indicates the project would result in the localized reductions in traffic in the immediate project area claimed in the air quality analysis. The DEIR must be revised to provide an accurate traffic analysis, including special consideration of the issues that follow.

1. The Traffic Impact Analysis Employs Faulty Assumptions that Skew the Impact Analysis

In its traffic analysis, the DEIR assumes that 25 percent of the trips generated by the Project would not be made by motor vehicles, but by foot or by public transit. The DEIR also assumes that 50 percent of the project's retail traffic would be walk trips or attracted passers-by rather than new auto trips. According to Mr. Smith in his attached comments, these assumptions are grossly inflated and therefore incorrect. Standard analysis for traffic engineering demonstrates that only 2-3 percent of the trips generated by the residential component of the Project would be made by foot or transit. The traffic analysis must be corrected to use a reasonable trip generation assumption for the residential portion of the Project.

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With respect to the commercial portion of the project, under the Valley Transportation Authority's own guidelines, internal trip generation made by foot accounts for only 12-13 percent of the total trip generation, not the 50 percent assumption used in the DEIR. As such, the traffic analysis is flawed and must be corrected to use a reasonable motor vehicle trip generation assumption for the commercial portion of the Project. The DEIR must be revised to disclose and mitigate any significant impacts revealed through the application of reasonable trip generation assumptions.

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2. The Project Will Have Significant Unmitigated Impacts on Intersection 3013 87/Julian E

As explained by traffic engineer, Mr. Smith, due to the DEIR's failure to provide accurate baseline conditions, impacts at this intersection are underestimated. According to Mr. Smith's analysis, traffic impacts at this intersection will fall under traffic conditions designated by the City as "LOS E." By the City's own thresholds, this is a significant traffic impact. DEIR, p.88-90. Mr. Smith further notes that his analysis of this one specific intersection is illustrative of the problem that infects the traffic analysis as a whole. He explains that, as a general matter, the DEIR's radical assumptions in favor of the project (assumptions minimizing the project's trip generation) result in a failure to disclose the full extent of the project's likely impacts. The DEIR must be revised to disclose and mitigate the significant traffic impact the Project will have on State Route 87 and Julian Street East.

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3. The Traffic Impact Analysis Does Not Account for the Conversion of Certain One-Way Streets in the Downtown Area to Two-Way Streets

Mr. Smith explains that the anticipated conversion of certain pairs of one-way streets in the downtown area to two-way streets is not addressed in the DEIR. This conversion carries the potential for significant traffic impacts in light of the proposed Project. The DEIR must be revised to disclose and mitigate all such impacts.

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4. The DEIR Fails to Address Significant Impacts Identified in the City's Own Traffic Study

The City's traffic study of the project, included as an appendix to the DEIR, shows that in both circulation alternatives for the Project, significant impacts would result, either in the form of inconsistency with the residential quality desired for the Project or in the form of unacceptable level of service conditions at two intersections. See DEIR, Appendix B.1, pages *viii*, 53 and 54. As explained by Mr. Smith in his attached comments, the traffic study supporting the DEIR finds that the project would have a significant traffic impact whichever way the circulation system internal to the site was configured. This fact must be disclosed in the text of the DEIR, along with proposed mitigation for such impacts.

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5. The DEIR Improperly Ignores Traffic Impacts From Construction

As Mr. Smith explains, the DEIR contains absolutely no analysis of the impacts of the Project's construction traffic or of the impacts of the Project's construction activity on normal traffic operations. Since the Project sits astride of significant traffic routes to and from the Downtown and includes realignment and reconstruction of a major Downtown-serving traffic route, the consequences of Project construction impacts on traffic could be significant. The DEIR must be revised to disclose and mitigate any significant impacts caused by construction-related traffic.

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6. The DEIR Improperly Ignores Impacts To Parking

The DEIR is devoid of analysis of the parking impacts of the Project. This is of particular concern in this case because the Project site functions as a parking reservoir for neighboring areas in the Downtown. In his attached comments, Mr. Smith finds that the Project will displace Downtown-supporting parking on the site and, in all likelihood, Project-related residential parking use will displace street parking in the downtown area. The DEIR provides no quantification of the existing parking use, no indication of how the displaced parking will be accommodated or what impacts the displaced parking will have elsewhere. A complete analysis of potential parking impacts must be performed in a revised DEIR circulated for public review and comment.

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**N. The DEIR Fails to Disclose Significant Air Quality Impacts
Related To Construction**

As explained by air quality expert Schuyler Fishman in her attached comments, the DEIR concludes, with no analysis, that proposed mitigation measures would reduce demolition and construction-related air quality impacts to a less than significant level (DEIR, p. 111). However, it is impossible to conclude that site-specific impacts have been fully mitigated without performing an appropriate numerical analysis. Such an analysis would include estimating emissions in pounds per day and tons per year of each criteria pollutant using current emissions factors or appropriate modeling software and then comparing the emissions to the significance thresholds. If the significance thresholds have been exceeded, this would require imposing mitigation strategies, then estimating the controlled emissions, and comparing the controlled emissions to the significance thresholds. The DEIR comes to the conclusion that demolition and construction emissions are not significant if mitigation measure AQ-1 (DEIR, p.110) is adopted, without performing any quantitative analysis.

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In fact, according to Fishman's quantitative analysis, there are two sources of construction emissions, diesel exhaust from construction equipment and fugitive dust. Fishman's analyses demonstrate that emissions from both types of sources from the construction of this Project will result in highly significant air quality and public health impacts, after implementation of the mitigation proposed in the DEIR.

Construction of the Project would require up to about 9,202,337 cubic feet ("ft³") of earthmoving (DEIR, p. 41) for various surface-grading activities. The equipment used to move this amount of earth would emit substantial amounts of diesel PM10, as well as carbon monoxide ("CO"), nitrogen oxides ("NOx"), and reactive organic gases ("ROG"). These emissions would cause or contribute to violations of state and federal ambient air quality standards and result in significant public health impacts. The DEIR must be revised to disclose and mitigate the air quality impacts detailed below.

**1. The DEIR Severely Underestimates Construction-Related
Emissions**

Fishman's review of estimated emissions of NOx from construction equipment used for grading activities shows that those emissions are significant under the thresholds provided by the Bay Area Air Quality Management District

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(80 lbs/day), by the Sacramento Metropolitan Air Quality Management District (85 lbs/day) and by the South Coast Air Quality Management District for construction (100 lbs/day). See Fishman comments; attached at Tables I.2.A and I.2.B 3.3-3. These significant air quality impacts due to NOx from construction equipment must be disclosed and mitigated in a revised DEIR that is circulated for public review.

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cont.
(see below)

During construction, the large volume of construction traffic may impact local intersections and worsen traffic conditions. This could increase traffic congestion and vehicle emissions from increased idle times, which will also contribute to construction emissions. The DEIR does not quantify or mitigate the impacts from these sources. A traffic analysis should evaluate traffic impacts from construction traffic and propose proper mitigation if necessary.

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Table I-3 of Fishman's attached comments shows PM10, ROG, NOx, and CO emissions from all phases of construction exceed the BAAQMD threshold of 80 lbs/day. Project emissions exceed both the SMAQMD significance thresholds for NOx and ROG (85 lbs/day) and SCAQMD construction emission significance thresholds of 75 lbs/day for ROG, 100 lbs/day for NOx, and 550 lbs/day for CO. Aside from failing to provide any quantitative analysis of construction-related emissions, the DEIR's general reference to compliance with the BAAQMD CEQA Guidelines (see Attachment 6) does not reduce these impacts to less than significant. These air quality impacts must be disclosed and mitigated in a revised DEIR circulated for public review and comment.

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It should be noted that NOx and ROG are ozone precursors. They combine in the presence of heat to form ozone, the primary component of smog. Because the Bay Area is out of attainment of federal ozone standards, any potential increase in a nonattainment pollutant must be evaluated for significance in an EIR. As explained by the 5th District Court of Appeals:

"The significance of an activity depends on the setting. (Guidelines, §15064, subd.(b).) *The relevant question* to be addressed in the EIR is not the relative amount of precursors emitted by the project when compared with preexisting emissions, but whether *any* additional amount of precursor emissions should be considered significant in light of the serious nature of the ozone problems in [the] air basin." *Kings County Farm Bureau v. City of Hanford*, (1990) 221 Cal.App.3d 692, 718.

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This *Kings County* analysis was recently reaffirmed in the cumulative impacts discussion in *Communities for a Better Environment v. California Resources Agency*, (2002) 103 Cal.App.4th 98, 116. Here, in violation of CEQA, the DEIR fails to discuss the potential impact of the Project's addition of ozone to the environment due to increased NOx emissions from construction, which, as Fishman explained in her attached comments, is significant.

Increased ozone levels are deleterious to public health. EPA summarized the effects of ozone on public health:

"A large body of evidence shows that ozone can cause harmful respiratory effects, including chest pain, coughing and shortness of breath, which affect people with compromised respiratory systems most severely. When inhaled, ozone can cause acute respiratory problems; aggravate asthma; cause significant temporary decreases in lung function of 15 to over 20 percent in some healthy adults; cause inflammation of lung tissue, produce changes in lung tissue and structure; may increase hospital admissions and emergency room visits; and impair the body's immune system defenses, making people more susceptible to respiratory illnesses." (66 Fed. Reg. 5002, 5012 (Jan. 18, 2001).)

Moreover, ozone is not an equal opportunity pollutant, striking hardest the most vulnerable segments of our population: children, the elderly, and people with respiratory ailments. (*Id.*) Children are at greater risk because their lung capacity is still developing, because they spend significantly more time outdoors than adults – especially in the summertime when ozone levels are the highest, and because they are generally engaged in relatively intense physical activity that causes them to breathe more ozone pollution. (*Id.*)

Given the public health concerns associated with ozone coupled with Fishman's finding of significant impact on air quality due to NOx and ROG emissions, the DEIR must be revised to address and mitigate this impact. As explained by Fishman, there are many feasible mitigation measures currently available to offset ozone increases caused by the Project.

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cont.

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2. The DEIR Completely Ignores the Significant Air
Quality Impact of PM 2.5 Emissions From
Construction

The DEIR reports that 9,202,337 ft³ of soil (p. 41) would be disturbed. This earthmoving requires the use of diesel equipment such as dozers, loaders, graders, and compactors, which all emit diesel exhaust. For the purposes of this analysis, Fishman assumed that construction would take place over 3 years, and grading would take place within the first 3 months as is typical for such projects. For the purposes of comparison, she also calculated emissions assuming a yearlong grading period.

Based on Fishman's air quality modeling for PM 2.5 pollution from construction exhaust and fugitive emissions, those emissions carry the potential for a significant impact despite the proposed mitigations in the DEIR. As Fishman explains, Project emissions from all phases of construction will violate both the state and federal 24-hour and annual standard. This is a significant impact (CEQA Guidelines, Appendix G; BAAQMD CEQA Guidelines, p.12; (see Attachment 6)) that is not discussed in the DEIR. These new impacts must be fully analyzed and mitigated in a subsequent DEIR for the Project.

New scientific information regarding PM pollution has surfaced showing that "the inhalation of particulate matter, particularly the smallest particles, causes a variety of health effects, including premature mortality, aggravation of respiratory (e.g., cough, shortness of breath, wheezing, bronchitis, asthma attacks) and cardiovascular disease, declines in lung function, changes to lung tissues and structure, altered respiratory defense mechanisms, and cancer, among others. (U.S. EPA 4/96; 61 FR 65638.³) A recent article linked long-term exposure to combustion-related fine particulate air pollution to cardiopulmonary and lung cancer mortality.⁴ Particulate matter is a non-threshold pollutant, which means that there is some possibility of an adverse health impact at any concentration. See *American Trucking v. EPA: Unjustified Revival of the Nondelegation Doctrine*, 23-SPG

³ National Ambient Air Quality Standards for Particulate Matter: Proposed Decision, Federal Register, v. 61, no. 241, December 13, 1996, pp. 65638-65675.

⁴ A.A. Pope and others, Lung Cancer, Cardiopulmonary Mortality, and Long-term Exposure to Fine Particulate Air Pollution, *Journal of the American Medical Association*, v. 287, no. 9, pp. 1132-1141. 1469a-004

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Environs Envtl. L & Pol'y J. 17, 26. In response to this new information, both the federal and state EPAs have created new standards for the smaller PM pollution.⁵

Given the information about the harmful effects of diesel exhaust on public health, a new draft EIR would be required to assess health impacts from construction emissions. In this case, however, the DEIR does not conduct this public health impact analysis. Nor does the DEIR address any mitigation measures to reduce what is most likely a significant public health risk. In light of the undisputed potential adverse health effects that can result from PM2.5 emissions, the DEIR should have evaluated the potential impacts of PM2.5. (See *In the Matter of Uprose v. Power Authority of State of New York*, 2001 NY App. Div. (Sup. Ct. of NY, A.D., 2nd Dept. July 23, 2001), holding that the state had to perform an EIR because of the undisputed potential of adverse health effects from PM2.5.)

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**3. The DEIR Fails to Discuss the Significant
Impacts of Diesel Exhaust on Public Health**

As Atmospheric Scientist Fishman discusses in her attached comments, the State of California (California Air Resources Board) listed diesel exhaust as a toxic air contaminant on August 27, 1998.⁶ In CARB's initial statement of reasons identifying diesel exhaust as a Toxic Air Contaminant, CARB recognized that diesel exhaust is linked to a range of serious health problems, including an increase in respiratory disease, lung damage, cancer, and premature death. Also, In December 1999, the BAAQMD modified its CEQA Guidelines (BAAQMD 12/99) (see Attachment 6) to acknowledge the impact of diesel exhaust:

Because of the potential public health impacts,...the District strongly encourages Lead Agencies to consider the issue and address potential impacts based on the best information available at the time the analysis is prepared. Particular attention should be paid to projects that might result in sensitive receptors being exposed to high levels of diesel exhaust. This applies to situations where a new or modified

⁵ On July 17th, 1997, the Environmental Protection Agency (EPA) announced new standards for particulate matter (PM) under the national ambient air quality standards (NAAQS). In June of 2002, the California ARB adopted new, revised PM standards for outdoor air, lowering the annual PM10 standard from 30 µg/m³ to 20 µg/m³ and establishing a new annual standard for PM2.5 of 12 µg/m³. A summary of the Federal and State Standards is provided in Table I.1 of the Fishman comments.

⁶ California Air Resources Board (CARB), Initial Statement of Reasons for Rulemaking, Proposed Identification of Diesel Exhaust as a Toxic Air Contaminant, Staff Report, June 1998.
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source of emissions is proposed near existing receptors and to new receptors locating near an existing source. (p. 47.)

Based on basic screen level modeling provided below as well as comparison with other projects of the same size in Contra Costa County, Fishman's expert opinion is that these emissions will pose a significant health risk from diesel emissions. Fishman found the excess cancer risk from the Project to be 10 in a million 2,325 meters (1.44 miles) from the Project site. Although the DEIR acknowledges the presence of sensitive receptors near the Project site (east of Market Street), the DEIR does not reveal the exact distance of these sensitive receptors. This basic public health information must be revealed in a revised DEIR.

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Thus, diesel emissions from Project construction would result in a significant cancer risk to a number of individuals in the surrounding region. The DEIR made no attempt to evaluate the significant public health impacts of diesel exhaust, a potent carcinogen. As such, the DEIR must be revised to include a discussion of the public health impacts from exposure to diesel exhaust. Those impacts, especially to surrounding sensitive receptors identified in the DEIR, must be mitigated and the DEIR recirculated for public review.

4. Uncontrolled Fugitive PM10 Emissions from Construction Are Significant and Unmitigated

The BAAQMD's significance threshold for PM10 is 80 lbs/day. In her attached analysis, Fishman only considered site preparation emissions. Assuming a typical 10-hour workday, Fishman estimates uncontrolled fugitive dust emissions at 509 lbs/day, which substantially exceeds the BAAQMD PM10 significance threshold of 80 lbs/day. This level of emissions also exceeds construction-specific PM10 emission thresholds of other air districts, 150 to 275 lbs/day (SMAQMD 94; SCAQMD 4/93). Thus, uncontrolled fugitive dust emissions are a significant impact that must be disclosed and mitigated in a revised DEIR circulated for public review and comment.

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5. "Controlled" Fugitive PM10 Emissions Remain Significant

According to Fishman, even with the mitigation provided in the DEIR, PM10 emissions from Project construction, at an estimated 105 lbs per day, remain significant. In light of Fishman's substantial evidence that PM10 emissions from

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construction will be significant even after mitigation, the DEIR must be revised to fully and accurately disclose PM10 emissions caused by construction of the Project. The DEIR must further mitigate those excess emissions to a level of insignificance.

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cont.

O. The DEIR Does Not Disclose All Significant Operational Air Quality Impacts

As explained below, Project-related cumulative emissions from operational and area sources after the Project is built considerably exceed the BAAQMD significance thresholds for ROG, NOx and PM10. These significant impacts must be disclosed and mitigated in a revised DEIR circulated for public review and comment.

1. Area Source ROG Emissions

The DEIR fails to acknowledge or even discuss other operational area source emissions, including: landscape maintenance; parking lot sweeping; garbage and trash pickup; outgassing of ROG used in coatings and sealants throughout the buildings; outgassing of ROG from periodic maintenance of building coatings and sealants; ROG emissions from cleaning fluids used for maintenance; and emissions from any emergency diesel generators. As Fishman demonstrates, this project will generate 99 tons/year of ROG from area emissions sources. This exceeds the BAAQMD significance threshold of 80 lbs/day. This significant impact must be disclosed and mitigated in a revised DEIR.

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2. Emissions from Fireplaces and Wood Stoves

Based on Fishman's expert analysis, the largest source of area emissions associated with this development would be smoke from wood-burning fireplaces and wood stoves. Wood smoke constitutes a major source of urban air pollution in winter months. The BAAQMD is presently urging the public to help reduce nighttime air pollution by cutting back the use of wood-burning fireplaces.⁷ In addition to toxic air contaminants, wood smoke contains large amounts of carbon monoxide, nitrogen dioxide, volatile organic compounds and inhalable particulate matter, pollutants regulated by state and federal regulations because of their

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⁷ Bay Area Air Quality Management District, Woodburning Handbook, <http://www.sparetheair.org/wbh/wbh001.htm>, accessed February 23, 2003.

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known adverse health effects. Potentially significant air quality impacts from these sources should be disclosed and mitigated in the next draft of the DEIR.

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cont.

3. Operational Vehicle Emissions Are Significant and Unmitigated

The Project will generate total operational emissions from traffic of 19 tons/year of ROG that exceed the BAAQMD significance threshold of 15 tons per year. Even with the DEIR's proposed mitigation measures to reduce ROG emissions by 18 tons/year, operational vehicle emissions from traffic will contribute to and exacerbate the region's air quality problem. Although the DEIR claims that all feasible measures have been included in the project, and this impact is significant and unavoidable, Fishman finds that many additional feasible mitigation measures, as described below, could be imposed in the DEIR.

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4. The DEIR Must Disclose and Analyze the Impact of the Heat Island Effect on Local Air Quality

The DEIR for the Project does not discuss the heat island effect. As explained by Fishman in her attached comments, the heat island effect indirectly increases ozone (the primary component of smog) by replacing open space with blacktop, such as parking lots. Blacktop increases heat levels in the area. Heat facilitates the reaction between the compounds that create ozone (ozone precursors). In areas with high levels of ozone precursors, heat increases the formation of ozone and regional smog. Fishman found that due to the heat island effect, the Project will have a significant adverse impact on air quality.

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The DEIR must analyze the significance of the heat island effect on local air quality because the Bay Area has been identified as a non-attainment area for ozone (1-hour standard). As discussed above, any potential increase in a nonattainment pollutant must be evaluated for significance in an EIR. *Kings County Farm Bureau v. City of Hanford*, (1990) 221 Cal.App.3d 692, 718. A new EIR must be prepared to discuss this air quality impact and to mitigate that impact.

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VI. THE DEIR FAILS TO DISCUSS INCONSISTENCIES WITH SAN JOSE'S GENERAL PLAN REQUIREMENT TO PROVIDE PARKLAND AND LIBRARY SERVICES

Under California law, a general plan serves as a "charter for future development" (*Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531,54), and embodies "fundamental land use decisions that guide the future growth and development of cities and counties." (*City of Santa Ana v. City of Garden Grove* (1979) 100 Cal.App.3d 521,532.) The General Plan has been aptly described as "the constitution for all future developments" within a city or county. (*Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors of El Dorado County* (1998) 62 Cal.App.4th 1334, 1335.) The "propriety of virtually any local decision affecting land use and development depends upon consistency with applicable general plan and its elements." (*Citizens of Goleta Valley v. Board of Supervisors of County of Santa Barbara* (1990) 52 Cal.3d 553, 570.) The consistency doctrine has been described as the "linchpin of California's land use and development laws; it is the principal which infuses the concept of planned growth with the force of law." (*Corona-Norco Unified School District v. City of Corona*, (1993) 17 Cal.App.4th 985, 994). Land use decisions, including zoning changes, of general law cities must be consistent with a city's general plan. (*Id.*; Gov. Code § 65860(a).)

Furthermore, CEQA requires an adequate description of the environmental setting and an assessment of any inconsistencies between the Project and applicable general plans and regional plans. (CEQA Guidelines § 15125(a), (d).) A significant impact on land use and planning would occur if the Project would "[c]onflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect." (CEQA Guidelines Appendix G, section IX(b).) "Environmental effects" include direct and indirect impacts to aesthetics, agricultural resources, air quality, biological resources, cultural resources, geology and soils, hazards and hazardous materials, hydrology and water quality, land use and planning, mineral resources, noise, population and housing, public services, recreation, transportation and traffic, and utilities and service systems. (*Id.*) Thus, under CEQA, a project results in a significant effect on the environment if the project is inconsistent with an applicable land use plan, policy or regulation adopted for the purpose of avoiding or mitigating one or more of these environmental effects.

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In *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* ("Berkeley Jets") (2001) 91 Cal.App.4th 1344 [111 Cal.Rptr.2d 598], the petitioners contended that the City of Oakland's EIR for an expansion of Oakland airport omitted an adequate analysis of the project's inconsistencies with the air quality objectives set forth in the State Implementation Plan ("SIP"), as part of the project's "environmental setting" (Guidelines, § 15125(d)), and failed to propose feasible mitigation for these impacts. The Court recognized that CEQA requires an analysis of the project's inconsistencies with applicable plans and policies, but found that the EIR discussed the project's inconsistencies with the SIP.

In *C.L.P.A., Inc. v. City of Los Angeles*, No. B161510 (June 10, 2003) (unpublished opinion), the petitioners claimed that a residential project was inconsistent with the General Plan's policy of preserving horsekeeping in the area. The Court found that Appendix G of the CEQA Guidelines only asks whether there are conflicts with any land use plans "adopted for the purpose of avoiding or mitigating an environmental effect." (*Id.*, citing Guidelines, Appendix G, § IX(b).) The Court noted that the petitioners did not contend, and the Court did not find, that the City's policy of preserving horsekeeping relates to avoiding or mitigating environmental effects.

On the other hand, the court suggested that if a General Plan or other policy is adopted for the purpose of avoiding or mitigating an environmental effect, then an inconsistency with that policy would constitute a significant impact. As explained by the *C.L.P.A.* Court:

While there is authority for the proposition that consistency with a general plan is not enough, by itself, to show the absence of adverse environmental effects (*Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 881-882), that does not mean that inconsistency by itself is enough to require an EIR. Just as there may be instances where a consistent use has the potential for adverse environmental impacts (*Id.* at p. 882 (use of drilling technique within noise limits of general plan did not mean the noise had no environmental impact)), we can imagine scenarios where an inconsistent use in fact benefits the environment, such as placing a nature preserve in an area designated for commercial or high-density residential use. The true focus, we believe, should be on the project at issue, and whether or not there is sufficient evidence of an adverse environmental effect under CEQA. (*Id.*)

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Thus, the determining factor is whether the plan, policy or regulation was adopted to avoid or mitigate an environmental effect. If so, an inconsistency with the plan, policy or regulation constitutes a significant environmental impact under CEQA.

A. Inadequate Parkland Provided

The DEIR admits that the General Plan creates an obligation of 12.02 acres of parkland. DEIR, p.191. The DEIR also admits that the project offers only 0.86 acres of parkland. *Id.* The DEIR does not, however, identify this shortfall of parkland as an inconsistency with the San Jose General Plan, nor does it find this shortfall to be a significant impact, as discussed above. Failure to ensure adequate parkland to support the Project violates the City's legal obligation to make land use decisions that are consistent with the General Plan. Gov. Code § 65860(a).

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Furthermore, because the General Plan's parkland requirement is rooted in mitigating the environmental effects of developments, this inconsistency is a significant impact under CEQA. *C.L.P.A., Inc. v. City of Los Angeles*, No. B161510 (June 10, 2003) (unpublished opinion).

B. Inadequate Provision of Library Resources

The DEIR's analysis of Library space is undeveloped. Specifically, the DEIR states that the City's General Plan sets a goal of 10,000 square feet of library space per 36,000 residents, 18.3 weekly service hours per 10,000 residents and an annual acquisition rate of one volume per six residents. DEIR, p. 190. Rather than provide a quantitative analysis of the amount of library space per 10,000 residents under the Project's full build-out scenario, the DEIR merely states that a "representative of the libraries has said that the branch library system is currently inadequate to serve current needs due to recent population growth." DEIR, p. 190. The obvious conclusion is the Project will only exacerbate an already inadequate library system as measured by General Plan criteria. Yet, again the DEIR fails to identify the shortage of library space as an inconsistency with the General Plan, or as a significant impact under CEQA. These defects must be corrected in the DEIR and mitigation proposed.

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VII. THE DEIR FAILS TO DISCUSS INCONSISTENCIES WITH THE APPLICABLE CLEAN AIR PLAN

The CEQA Guidelines direct that "[t]he EIR *shall discuss* any inconsistencies between the proposed project and applicable general plans and regional plans." (CEQA Guidelines § 15125(d) (emphasis added).) An "applicable" plan is a plan that has been adopted and thus legally applies to a project. (*Chaparral Greens v. City of Chula Vista* (1996) 50 Cal. 4th 1134, 1145, note 7 [58 Cal. Rptr.2d 152, 158-59].) Nevertheless, the DEIR fails to discuss inconsistencies between the Brandenburg Project and the Revised 2001 Clean Air Plan, the applicable Plan for the region.

For example, this Revised Clean Air Plan assumes the use of certain controls on construction equipment to reduce ozone precursors, including the use of new, low-emission engines in construction equipment, low-emission pick-up trucks, and the use of natural gas and LPG in off-road equipment. Yet, the DEIR does not identify these controls as mitigation measures. In fact, the DEIR does not identify any mitigation for ozone precursor emissions.

Rather than discuss the Revised 2001 Clean Air Plan, the DEIR discusses consistency with the 1982 Bay Area Air Quality Plan and the 2000 Clean Air Plan. Putting aside the fact that no "2000 Clean Air Plan" appears to exist for the Bay Area, neither of these air quality plans articulates the most recent expression of air quality planning for the region. As a result, the DEIR fails to disclose to decision makers and the public the many ways in which the Project will not meet and, in fact, may impede the region's long-term air quality planning goals. The DEIR should be modified to discuss the Project's inconsistency with the applicable CAP before it is re-circulated for public review and comment.

VIII. THE DEIR FAILS TO INCORPORATE FEASIBLE MEASURES TO MITIGATE ENVIRONMENTAL IMPACTS TO LESS THAN SIGNIFICANT

A. The DEIR Must Describe Effective Mitigation Measures for Each Significant Environmental Impact

The DEIR identifies numerous potentially significant environmental impacts that would be caused by construction and operation of the Project. (See generally DEIR, Table II-1.) An EIR must propose and describe mitigation measures

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sufficient to minimize the significant adverse environmental impacts identified in the EIR. (Pub. Res. Code §§ 21002.1(a), 21100(b)(3)). Also, mitigation measures must be designed to minimize, reduce or avoid an identified environmental impact or to rectify or compensate for that impact. (CEQA Guidelines § 15370.) Where several mitigation measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. (*Id.* at § 15126.4(a)(1)(B).) A lead agency may not make the required CEQA findings unless the administrative record clearly shows that all uncertainties regarding the mitigation of significant environmental impacts have been resolved.

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In particular, CEQA requires the lead agency to adopt feasible mitigation measures that will substantially lessen or avoid the Project's potentially significant environmental impacts (Pub. Res. Code §§ 21002, 21081(a)) and describe those mitigation measures in the DEIR. (Pub. Res. Code § 21100(b)(3); CEQA Guidelines § 15126.4.) A public agency may not rely on mitigation measures of uncertain efficacy or feasibility. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation measure because no record evidence existed that replacement water was available).) "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors. (CEQA Guidelines § 15364.) Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments. (*Id.* at § 15126.4(a)(2).)

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Here, the DEIR lacks effective mitigation for the following categories of impacts: traffic impacts, public health impacts from hazardous materials, and air-quality related impacts. Additional mitigation measures must be included in a revised DEIR recirculated for public review.

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B. The DEIR Erroneously Finds Mitigation for Traffic Impacts To Be Infeasible

Under CEQA, significant impacts may be found to be unavoidable only in circumstances where there are no feasible mitigation measures or where feasible mitigation measures cannot reduce the impacts to less than significant. CEQA Guidelines §§ 15126(b), 15126.2(b).

Here, the DEIR finds significant traffic impacts at the intersections of Coleman Avenue with Hedding Street and Coleman Avenue with Taylor Street due

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to the Project. As mitigation, the DEIR states that Coleman Avenue would require widening to six lanes for several blocks. Then, the DEIR avoids implementation of this mitigation measure by claiming that such mitigation would be beyond the Project's financial capacity. This infeasibility finding is directly refuted by the DEIR's underlying traffic study, which anticipates the widening of Coleman Avenue with or without the Project. DEIR (Appendix B.1) includes the following additional observation on page 41. *"The City is in the process of developing a new Downtown Plan and EIR. Transportation improvements in the plan are likely to include widening Coleman Avenue."* (Emphasis added.) Either these contradictory findings must be resolved or the widening of Coleman Avenue must be listed as a feasible mitigation measure in a revised DEIR circulated for public review and comment.

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cont.

Next, according to Mr. Smith in his attached comments, this analytical sequence is fundamentally flawed. Smith's analysis finds that the Project's significant impacts to the intersections of Coleman with Taylor and with Hedding could be mitigated by lane additions just on the approaches to each intersection without widening the whole length of Coleman to six lanes. Smith further finds that the costs of such roadway improvement would comprise only a small portion of the Project's fair share contribution to the City. As such, the DEIR's conclusion of infeasibility is without merit. The DEIR must be revised to require the alternative feasible mitigation measure offered by Mr. Smith in his attached comments.

59

C. Mitigation for Hazardous Materials Is Inadequate

1. HazMat-2b

The DEIR admits that a number of parcels of land on the Project site are currently contaminated. DEIR, p. 22-23. Although the listed mitigation for the contaminated sites includes certification of completion of the remedial action required by the Regional Water Quality Control Board, the DEIR admits that for at least one parcel of land (below Basset Street), full remediation was not achieved because of alleged inaccessibility of approximately seven cubic yards of contaminated soil. Because partial compliance with the remedial action plan is of unknown efficacy, mitigation measure HazMat -2b is inadequate under CEQA.

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2. HazMat -1b

Mitigation Measure HAZMAT-1b only requires a "subsurface investigation" prior to issuance of a grading, demolition, or building permit at properties where

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Phase I activities have identified a potential hazardous materials issue that has not yet been evaluated in a Phase II investigation. As explained above, the results of this investigation must be disclosed as part of the EIR's impact analysis. Disclosure of impacts is not a mitigation measure. Further, reference to a "subsurface investigation" is inadequate without specifying the scope of such investigation. Most critical is the assessment of human health risk using accepted protocol under Superfund and RCRA regulation. Because the outcome of this measure is unknown, it similarly fails CEQA's test of efficacy and, as explained below, represents an illegal deferral of mitigation.

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cont.

D. Mitigation for Geologic Hazards Is Inadequate

The DEIR admits that seismic hazards and potential damage to structures or property due to earthshaking hazards are significant impacts. DEIR, p. 18-19. As mitigation for these impacts, the DEIR proposes a "design-level geotechnical investigation" to determine whether the proposed development "fully complies with the California Building Code" and whether "unacceptable settlements may occur." DEIR, p. 18-19. First, because no specific mitigation is offered, this proposal is of uncertain efficacy and noncompliant with CEQA. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727. The public has no assurance that an "investigation" will result in actual mitigation. And, more importantly, the public is removed from the process of determining whether the eventual mitigation, if any, is adequate. The proposed mitigation must be revised to offer a remedy for the impact, not simply provide further evaluation of the impact. As explained below, this measure constitutes illegal deferral of mitigation.

Second, the proposed mitigation has no specific criteria by which to measure its performance. When the agency is unable to provide a specific mitigation measure, CEQA requires the articulation of performance criteria at the time of project approval. *Sacramento Old City Association v. City Council of Sacramento* (1991) 229 Cal.App.3d 1011, 1028-1029. The proposed mitigation must be revised to offer greater specificity or be accompanied by specific performance criteria.

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Finally, as Mr. Hagemann and Dr. Hindery discuss in their attached comments, there are feasible mitigation measures not identified or addressed in the DEIR. Specifically, these hazardous materials experts cite to construction codes developed by the International Code Council (<http://www.iccsafe.org/>) as necessary to ensure that the project minimizes vulnerability to ground shaking. The DEIR must be revised to include compliance with applicable International Code Council

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construction codes to minimize the potential for structural damage caused by groundshaking.

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cont.

E. Inadequate Mitigation for Impacts to Water Quality

The DEIR finds that stormwater runoff from the Project site could have a significant impact on the water quality in the Guadalupe River and the Bay. DEIR, p.25. The DEIR mentions possible use of landscape-based biofilters and swales to reduce stormwater impacts; however, specific placement and designs for these mitigation measures should be included in a revised DEIR. The DEIR mentions "The final design team for the project should review *Start at the Source, Design Guidance Manual for Stormwater Quality Protection*." (p. 202.) However, requiring the design team to merely review this manual is insufficient. The revised DEIR should explicitly require the team to implement measures described in this manual. Due to the ambiguous nature of this measure and the questionable efficacy resulting from that ambiguity, this mitigation measure fails CEQA's adequacy requirements. Also, as explained below, the measure represents an illegal deferral of mitigation. The DEIR must be revised to provide the public with a specific, feasible, and effective measure to mitigate the significant water quality impacts associated with construction and operation of the Project.

63

F. Additional Air Quality Mitigation Measures Are Required

In her attached comments, Fishman finds that Project construction impacts and cumulative air quality impacts are significant. Even as mitigated in the DEIR, construction and operation of the Project will result in a number of significant impacts that were not disclosed. These impacts include (1) ROG, NOx, and CO construction emissions that exceed thresholds of significance; (2) potential new violations of federal and state ambient air quality standards on both PM10 and PM2.5; and (3) significant cancer risks from diesel exhaust. Thus, the DEIR must include all feasible mitigation measures that will substantially lessen or avoid those impacts. Pub. Res. Code §§ 21002, 21081(a)); Pub. Res. Code § 21100(b)(3); CEQA Guidelines § 15126.4.). Fishman provides a list of feasible mitigation measures described below that must be included in the next draft of the DEIR that is circulated for public review and comment.

64

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**1. The DEIR Fails To Include All Feasible Mitigation
for Diesel Exhaust**

Because diesel exhaust from construction equipment will be significant, as explained above, the City must impose all feasible mitigation to reduce the impacts of diesel emissions to a level of insignificance. (Pub. Res. Code §§ 21002.1(a), 21100(b)(3)). Also, mitigation measures must be designed to minimize, reduce or avoid an identified environmental impact or to rectify or compensate for that impact. (CEQA Guidelines § 15370.) Where several mitigation measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. (*Id.* at § 15126.4(a)(1)(B).) A lead agency may not make the required CEQA findings unless the administrative record clearly shows that all uncertainties regarding the mitigation of significant environmental impacts have been resolved. In her attached comments, Fishman provides at least 9 examples of feasible mitigation measures as recommended by the BAAQMD CEQA Guidelines (see Attachment 6). The DEIR must be revised to include these mitigation measures as recommended by BAAQMD.

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Fishman further points to a number of mitigation measures that are currently feasible, but not included in the DEIR. These additional mitigation measures include: (1) ultra low sulfur diesel; (2) alternative diesel formulations; (3) California Air Resources Board ("CARB")-certified construction equipment; and (4) post-combustion controls. These measures must be evaluated in a revised DEIR for the Project.

**2. The DEIR Fails to Include All Feasible Operational
Mitigation Measures**

As discussed below, cumulative air quality impacts after the Project is built are significant for CO, ROG, NOx, and PM10. According to Fishman in her attached comments, these significant impacts are not mitigated and additional mitigation measures should be imposed.

a. Motor Vehicle and Traffic-Related Mitigation

Aside from the BAAQMD CEQA Guidelines (see Attachment 6), Fishman points to additional feasible mitigation for traffic-related air quality impacts. For example, she identifies the following: replacement or repowering of school/transit

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buses with cleaner vehicles; the construction of satellite work stations; funding of a program to buy and scrap older, high-emission vehicles; contribute to an off-site TDM fund; repair of smog-check waived vehicles. The DEIR must be revised to include each one of these mitigation measures along with any other feasible mitigation measures available to reduce this impact to less than significant.

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cont.

b. Operational Area Emission Mitigation Measures

In order to mitigate the significant air quality impacts from the project after construction, Fishman points to dozens of feasible mitigation measures that would reduce the cumulative air quality impacts caused by the Project. Each of these measures must be addressed in a revised DEIR circulated for public review.

67

G. The DEIR Fails to Include Any Mitigation of the Significant Increase in Ozone Pollution Due to the Heat Island Effect

As feasible mitigation measures to reduce the impact of the heat island effect, Fishman identifies the reduction of standard paving by 20% and the installation of light-colored, reflective roof products as feasible mitigation measures. These feasible mitigation measures must be discussed in the next draft of the DEIR circulated for public review and required as part of the Project.

68

H. The DEIR Is Replete With Ambiguous Mitigation Measures

As explained above, mitigation measures must be specific and of certain efficacy. Here, many of the DEIR's proposed mitigation measures are voluntary rather than mandatory. Because they are not mandatory conditions for the project, it is unclear whether any of those proposed mitigation measures will be followed. Without a clear understanding of whether a mitigation measure will be implemented, it is impossible to determine its efficacy. The most common example of unnecessary ambiguity in the DEIR's proposed mitigation is the use of "should" rather than "shall."

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For example, the first mitigation measure proposed on page 9 of the document (LU-1a) states that, "new residential development *should* be oriented and designed to protect residents from any potential conflicts with adjacent land uses." (Emphasis added.) Aside from the lack of performance criteria by which to evaluate the effectiveness of design and orientation in protecting residents from potential land use conflicts, it is unclear whether this measure will be implemented at all.

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The remaining two policies in this mitigation proposal are similarly defective in their lack of performance criteria and their voluntary nature. The following is a list of other improper mitigation measures that are voluntary rather than mandatory, making them devoid of performance criteria and of questionable efficacy:

71

LU – 1b; “The City shall continue to implement Counsel Policy 4-3 which *encourages* the use of low-pressure sodium lighting for outdoor uses.” (Emphasis added.)

72

LU-2; “new residential development *should* be oriented and designed to protect residents from any potential conflicts with adjacent land uses.” (Emphasis added.) The three remaining policies cited under this measure also use the word “should.”

73

LU-3; “the following actions *should* be accomplished” (emphasis added).
AQ –1; “watering *should* be used,” “Use dust proof chutes to lead debris into trucks whenever feasible,” “replant vegetation in disturbed areas as quickly as possible.”

74

AQ-2; “The following are considered to be feasible and effective in further reducing vehicle trip generation and resulting emissions from the project”

75

NOI-1a; “The following policies . . . serve to reduce significant noise impacts,” “the City should require appropriate site and building design . . .” Each of the 7 policies listed under this measure employ the word “should.”

76

NOI-1b; “Implementation of the City’s . . . Guidelines . . . , as applicable, would help ensure that new development is compatible with existing and planned uses,” “adherence to these policies is encouraged by the General Plan.” Although the proposal proceeds to list specific measures to mitigate noise, the last two measures use voluntary language such as “should,” “as much as possible” and “could.”

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NOI-3; “All stationary noise generating construction equipment, . . . , will be located *as far as practical* from existing residences.” (Emphasis added.) The italicized statement must be replaced with specific performance criteria.

78

GEO-2; “the designers of the proposed building foundations and improvements . . . shall *consider* these conditions.” (Emphasis added.)

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HAZMAT- 1a; "the Plan should establish soil and groundwater mitigation" and "should also include procedures for managing soils and groundwater removed from the site." Aside from using voluntary language, this measure illegally defers mitigation as explained below. **80**

HAZMAT-1b; "if significant releases of hazardous materials are discovered during Phase II activities, additional investigation [and] remediation . . . *may be required* prior to development of the parcels." (Emphasis added.) This measure suffers from the same defects as HAZMAT-1a. **81**

HAZMAT-3; "A Site Safety Plan/Soil and Groundwater Management Plan *should be prepared* . . ." (Emphasis added.) **82**

HAZMAT-4; "an asbestos and lead paint survey should be performed. . . . the materials *should* be abated," "worker health and safety regulations *should* be followed," "If loose or peeling lead-based paint are identified, they *should* be removed . . ." (Emphasis added.) **83**

SVCS-1a; each of the four General Plan policies listed in this measure use "should" language. **84**

SVCS-1b; "The City *should* implement a system of signal light preemption by emergency vehicles . . ." (Emphasis added.) **85**

HYD-1; "An important component of the storm water quality protection effort will be the education of the site supervisors and workers." This measure has no performance criteria. **86**

"City of San Jose and RWQCB personnel may make unannounced site inspections and are empowered to levy considerable fines if it is determined that the SWPPP has not been properly prepared and implemented." This aspect of the measure contains no performance criteria. **87**

"Best Management Practices (BMPs) designed to reduce erosion of exposed soil *may* include . . ." (emphasis added). This measure also fails CEQA's adequacy requirements because it illegally defers mitigation, as explained below. **88**

HYD-2; "All structures shall be built so that potential injuries to project occupants and property damage are *minimized* in the event of a flood." (Emphasis added.) **89**

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This measure lacks quantitative or qualitative performance criteria by which to evaluate its effectiveness.

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cont.

Each of the measures listed above must be corrected to require a specific strategy or require specific performance criteria. Also, any and all language that is non-mandatory in nature must be corrected to be unambiguously mandatory in a revised DEIR circulated for public review and comment.

90

I. CEQA Requires Analysis Of Significant New Effects Caused By Mitigation Measures

"If the inclusion of a mitigation measure would itself create new significant effects, these too, must be discussed, though in less detail than required for those caused by the project itself." (*Sacramento Old City*, 229 Cal.App.3d at 1027; *see also Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986, 995-996.) Many of the mitigation measures deferred by the DEIR to future studies are likely to themselves cause significant new impacts. For example, the implementation of a signal light preemption system may cause currently undisclosed traffic impacts. The DEIR fails to discuss these potentially significant new impacts, as it must. These impacts must be analyzed in the DEIR, and effective measures must be identified and implemented to reduce their impacts to less than significant levels.

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IX. THE CITY MAY NOT DEFER DEVELOPMENT AND IMPLEMENTATION OF EFFECTIVE MITIGATION MEASURES UNTIL AFTER COMPLETION OF THE EIR

The DEIR fails to identify mitigation measures for many potentially significant impacts. Instead, it defers identifying specific mitigation measures to future plans and studies. The DEIR's approach is impermissible for three reasons. First, CEQA precludes deferring mitigation measures when there is considerable uncertainty as to the ultimate efficacy of the measures. Second, CEQA precludes deferring the identification of mitigation measures when the deferral would transfer authority for reviewing and approving the measures from the proper decision maker to some other entity. Third, CEQA precludes deferring the identification of mitigation measures when the deferral would prevent the DEIR from disclosing the potentially significant impacts of those measures. The DEIR suffers from each of these problems.

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A. CEQA Does Not Allow Deferral When The Ultimate Success Of
The Mitigation Measure Is Questionable

CEQA does not allow deferring the formulation of mitigation measures to post-approval studies. (CEQA Guidelines § 15126.4(a)(1)(B); *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309.) An agency may only defer the formulation of mitigation measures when it possesses "meaningful information" reasonably justifying an expectation of compliance." (*Sundstrom* at 308; see also *Sacramento Old City Association v. City Council of Sacramento* (1991) 229 Cal.App.3d 1011, 1028-29 (mitigation measures may be deferred only "for kinds of impacts for which mitigation is known to be feasible").) A lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation because there was no evidence that replacement water was available).) This approach helps "insure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug." (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.)

Moreover, by deferring the development of specific mitigation measures, the DEIR has effectively precluded public input into the development of those measures. CEQA prohibits this approach. As explained by the *Sundstrom* court:

An EIR ... [is] subject to review by the public and interested agencies. This requirement of "public and agency review" has been called "the strongest assurance of the adequacy of the EIR." The final EIR must respond with specificity to the "significant environmental points raised in the review and consultation process." . . . Here, the hydrological studies envisioned by the use permit would be exempt from this process of public and governmental scrutiny. (*Sundstrom*, 202 Cal.App.3d at 308.)

The post-EIR surveys, studies and plans required in the DEIR would suffer from the same fatal flaw. Interested parties would be precluded from commenting on their adequacy, even though CEQA requires that they be permitted to do so. Furthermore, they constitute an illegal delegation of the City Council's duties as the final decisionmaking body in the EIR process. As explained by the *Sundstrom*

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court, 202 Cal.App.3d at 302-308, only the ultimate decision maker may grant final approval of mitigation:

the conditions improperly delegate the County's legal responsibility to assess environmental impact by directing the applicant himself to conduct the hydrological studies subject to the approval of the Planning Commission staff. Under CEQA, the EIR or negative declaration must be prepared "directly by, or under contract to" the lead agency. The implementing regulations explicitly provide: "The draft EIR which is sent out for public review must reflect the independent judgment of the lead agency." Moreover, the EIR must be presented to the decision making body of the agency. In *Kleist v. City of Glendale* (1976) 56 Cal.App.3d 770, 779, 128 Cal.Rptr. 781, the court held that the city council cannot delegate responsibility for considering the EIR to a planning board. By necessary inference, the Board of Supervisors cannot delegate the responsibility to the staff of the Planning Commission. (*Id.* at 307 (citations omitted).)

Here, in striking similarity to the *Sundstrom* case, the DEIR contains deferred mitigation measures that fail to meet the threshold tests set forth in CEQA. Specifically, the following measures do not impose specific mitigation at this time, but rather defer mitigation until after post-approval studies have been performed or until after a specific mitigation plan is developed:

GEO-1: "a design-level geotechnical investigation shall be prepared and submitted to the City of San Jose Public Works Department for review and confirmation that the proposed development fully complies with the California Building Code. . . . All mitigation measures, design criteria and specifications set forth in the geotechnical and soils report shall be met." This is precisely the type of deferred mitigation, subject to final approval by a lesser body than the City Council, struck down in the *Sundstrom* case, cited above. GEO-2 and GEO-3 also improperly rely on this post-approval geotechnical investigation as mitigation for impacts from property related shrink-swell potential and dewatering-related subsidence and earth movements associated with temporary shoring systems.

HAZMAT-1a; "a Site Safety Plan/Soil and Groundwater Management Plan (Plan) should be prepared." The measure explicitly defers the specification of performance criteria for clean up of contaminated soil, claiming that such criteria will be part of the Plan. For example, it states, "[a]t a minimum, the Plan should establish soil

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and groundwater mitigation and control specifications for grading and construction activities." Again, this is exactly the type of post-approval analysis and mitigation struck down by the *Sundstrom* court. HAZMAT-3 also improperly relies on this Plan as mitigation for potential release of hazardous substances from improper use or transport of hazardous materials during construction activities.

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HAZMAT -1b; "at properties where Phase I activities have identified a potential hazardous material, a subsurface investigation should be conducted at the project site by a qualified environmental professional If significant releases of hazardous materials are discovered during Phase II activities, additional investigation, remediation, and/or coordination with regulatory agencies may be required. . ." Again, this measure lacks performance criteria, illegally defers mitigation to post-approval study, and illegally delegates the City Council's duty to review and approve the EIR in its final form.

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HAZMAT-4; "an asbestos and lead-based paint survey should be performed" as a condition of approval for any demolition or permit for a structure known or suspected to have been constructed prior to 1985. Again, this proposal illegally defers disclosure and specific mitigation strategies for public health impacts from exposure to asbestos and lead until after the EIR is approved. Under the *Sundstrom* case, this is inadequate.

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HYD-1; "The applicant shall prepare a Storm Water Pollution Prevention Plan (SWPPP) designed to reduce potential impacts to surface water quality through the construction and life of the project." Because the DEIR does not mandate specific performance criteria as part of the SWPPP, this mitigation is of questionable efficacy. It is also invalid under *Sundstrom* due to its deferral of mitigation until after final approval of the DEIR, as explained above.

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X. THE CUMULATIVE IMPACTS ANALYSIS IS INADEQUATE

An EIR must discuss significant cumulative impacts. CEQA Guidelines section 15130(a). This requirement flows from CEQA section 21083, which requires a finding that a project may have a significant effect on the environment if "the possible effects of a project are individually limited but cumulatively considerable. . . 'Cumulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." "Cumulative impacts" are defined as "two or more individual effects which, when

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considered together, are considerable or which compound or increase other environmental impacts." CEQA Guidelines section 15355(a). "[I]ndividual effects may be changes resulting from a single project or a number of separate projects." CEQA Guidelines section 15355(a).

"The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." *Communities for a Better Environment v. Cal. Resources Agency* ("CBE v. CRA"), (2002) 103 Cal.App.4th 98, 117. A legally adequate cumulative impacts analysis views a particular project over time and in conjunction with other related past, present, and reasonably foreseeable probable future projects whose impacts might compound or interrelate with those of the project at hand. "Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." CEQA Guidelines § 15355(b).

As the court recently stated in *CBE v. CRA*, 103 Cal. App. 4th at 114:

Cumulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.

(Citations omitted).

In *Kings County Farm Bureau v. City of Hanford*, 221 Cal.App.3d at 718, the court concluded that an EIR inadequately considered an air pollution (ozone) cumulative impact. The court said: "The [] EIR concludes the project's contributions to ozone levels in the area would be immeasurable and, therefore, insignificant because the [cogeneration] plant would emit relatively minor amounts of [ozone] precursors compared to the total volume of [ozone] precursors emitted in Kings County. The EIR's analysis uses the magnitude of the current ozone problem in the air basin in order to trivialize the project's impact." The court concluded:

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"The relevant question to be addressed in the EIR is not the relative amount of precursors emitted by the project when compared with preexisting emissions, but whether any additional amount of precursor emissions should be considered significant in light of the serious nature of the ozone problems in this air basin."⁸ The *Kings County* case was recently reaffirmed in *CBE v. CRA*, 103 Cal.App.4th at 116, where the court rejected cases with a narrower construction of "cumulative impacts."

Similarly, in *Friends of Eel River v. Sonoma County Water Agency*, (2003) 108 Cal. App. 4th 859, the court recently held that the EIR for a project that would divert water from the Eel River had to consider the cumulative impacts of the project together with other past, present and reasonably foreseeable future projects that also divert water from the same river system. The court held that the EIR even had to disclose and analyze projects that were merely proposed, but not yet approved. The court stated, CEQA requires "the Agency to consider 'past, present, and probable future projects producing related or cumulative impacts'" (Guidelines, § 15130, subd. (b)(1)(A).) The Agency must interpret this requirement in such a way as to "afford the fullest possible protection of the environment." *Id.*, at 867, 869. The court held that the failure of the EIR to analyze the impacts of the project together with other proposed projects rendered the document invalid. "The absence of this analysis makes the EIR an inadequate informational document." *Id.*, at 872.

The court in *Citizens to Preserve the Ojai v. Bd. of Supervisors*, 176 Cal.App.3d 421 (1985), held that an EIR prepared to consider the expansion and modification of an oil refinery was inadequate because it failed to consider the cumulative air quality impacts of other oil refining and extraction activities combined with the project. The court held that the EIR's use of an Air District Air Emissions Inventory did not constitute an adequate cumulative impacts analysis. The court ordered the agency to prepare a new EIR analyzing the combined impacts of the proposed refinery expansion together with the other oil extraction projects.

⁸ *Los Angeles Unified v. City of Los Angeles*, 58 Cal.App.4th at 1024-1026 found an EIR inadequate for concluding that a project's additional increase in noise level of another 2.8 to 3.3 dBA was insignificant given that the existing noise level of 72 dBA already exceeded the regulatory recommended maximum of 70 dBA. The court concluded that this "ratio theory" trivialized the project's noise impact by focusing on individual inputs rather than their collective significance. The relevant issue was not the relative amount of traffic noise resulting from the project when compared to existing traffic noise, but whether any additional amount of traffic noise should be considered significant given the nature of the existing traffic noise problem.

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A. The DEIR Fails to Address the Cumulative Risk to Public Health From Contamination on the Property

As explained by Mr. Hagemann and Dr. Hindery in their attached comments, the DEIR fails to provide the public with a cumulative risk assessment of the contamination on the site. Instead, the DEIR proposes a piecemealed investigation and risk assessment that analyzes public health impact on a property-specific basis. This is improper under CEQA.

Hagemann and Hindery note that most assessments in the DEIR have been Phase I investigations, with the following stated purpose: "to identify potential environmental liabilities (principally soil and groundwater impacts) resulting from the use, storage, disposal and/or releases of hazardous materials within the project area" (Appendix F.9). Since many hazardous waste sites exist in the project area, these experts opine that there is an unquantified cumulative potential for future residents to come into direct contact with hazardous materials and waste. This potential should be assessed in a project-wide human health risk assessment prior to granting any regulatory determination.

Specifically, risks to future residents from all contaminants associated with each of the individual properties should be assessed using RCRA and Superfund protocol to ensure protection of human health.⁹ The DEIR must be revised to provide a cumulative health risk assessment from contamination on the Project site.

B. The DEIR Provides An Inaccurate View Of Cumulative Air Quality Impacts

According to the BAAQMD CEQA Guidelines,¹⁰ "cumulative impact should be based on an evaluation of the consistency of the project with the local general plan and of the general plan with the regional air quality plan (2001 CAP)" (BAAQMD 12/99 p. 19). If the general plan is not consistent with the CAP, then the

⁹ According to Hindery and Hagemann, an appropriate risk assessment would follow the procedures found in the "Risk Assessment Guidance for Superfund, 1989

(<http://www.epa.gov/superfund/programs/risk/ragsa/>); and in the "California Preliminary Endangerment Assessment Guidance, 1994

(http://www.dtsc.ca.gov/SiteCleanup/SMP_REP_PEA_CH1.pdf).

¹⁰ Bay Area Air Quality Management District ("BAAQMD"), BAAQMD CEQA Guidelines, April 1996, Revised December 1999 (see Attachment 6).

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cumulative impact analysis should consider all the past, present, and reasonably foreseeable future projects. On page 45, the DEIR reports that this development would create an "increase in opportunities for housing and the permitted density of development in the area which are not reflected in the 2000 CAP. As a result, the project would conflict with the assumptions of the CAP." In a later conflicting statement, the DEIR goes on to report that because the project is an "infill project," it is consistent with the goals of the Clean Air Plan. It should be noted that an agency's good intentions are not sufficient to avoid full evaluation of impacts under CEQA review. *Dunn -Edwards v. BAAQMD*, (1992) 9 Cal.App.4th 644, 658 (finding an EIR necessary to review environmental impacts of an air district regulation aimed at reducing air quality impacts from house paints). The DEIR must be revised to remove this inconsistency, which improperly attempts to minimize the effect of disclosing the Project's inconsistency with the Clean Air Plan. For example, the DEIR must present an inventory of all control measures for construction equipment assumed in the Plan which are not included as mitigation for the Project.

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The City dismisses the importance of addressing cumulative air quality impacts by claiming "no additional mitigation measures, beyond those identified for the proposed project (see Chapter V.C, Air Quality) would be available." (DEIR p. 222.) It is obvious from the data provided that the cumulative impacts far exceed the significance threshold and need to be mitigated. Fishman lists many potential mitigation strategies that will help reduce the impacts of this project. Therefore a new EIR needs to be completed and circulated for review.

XI. CONCLUSION

The DEIR fails to satisfy CEQA's fundamental mandates of informing the public and decision makers of the potentially significant environmental impacts of a

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*Letter
D2
cont.*

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project, and imposing all feasible measures to mitigate those impacts to less than significant. The DEIR should be revised to address the shortcomings described above and in the attached documents and re-circulated for public review.

**100
cont.**

Sincerely,

A handwritten signature in black ink, appearing to be "Marc D. Joseph", written over a horizontal line.

Marc D. Joseph
Suma Peesapati

SP:bh

COMMENTOR D2

Marc D. Joseph, Suma Peesapati, Adams Broadwell, Joseph & Cardozo, Attorneys at Law
October 20, 2003

Comment D2-1: . . . As explained more fully below, the DEIR for the Project does not comply with the requirements of the California Environmental Quality Act ("CEQA"). The City may not approve the Project or grant any permits for the Project until an adequate DEIR is prepared and re-circulated for public review and comment.

Response to Comment D2-1: In many instances, the 49-page comment letter (with attached technical studies and source materials) contains introductory and summary comments that are presented in greater detail elsewhere in the letter. In such instances, the reader will be directed to specific response(s) that address the broader introductory or summary comment(s).

This comment represents one of the most basic ones offered by the commentors. For reasons that are presented in the Responses to Comments below, the City of San Jose respectfully disagrees with the assertion that the Draft EIR does not comply with the requirements of CEQA. In addition, the City disagrees that re-circulation of a revised Draft EIR is necessary.

Comment D2-2: The DEIR fails to satisfy these purposes by: failing to ensure future, tiered environmental review of the Project; failing to disclose all potentially significant environmental impacts of the Project; failing to accurately describe the Project; failing to provide adequate mitigation measures to avoid impacts; improperly deferring the identification of mitigation measures; and failing to analyze cumulative impacts. As a result, the DEIR fails to inform the public or decision makers about the Project's significant impacts or propose adequate mitigation measures.

Response to Comment D2-2: This comment describes a variety of asserted shortcomings of the Draft EIR, all of which are presented again in the comments and responses that follow. The City of San Jose respectfully disagrees with each asserted inadequacy as set forth in the following responses.

Comment D2-3: Obviously, the City's failure to provide us access to documents referenced in the EIR until a few days before the comment deadline expires violates CEQA's mandate that those documents be readily accessible during the entire comment period. Cal. Pub. Res. Code § 21092(b)(1).

Response to Comment D2-3: The Draft EIR (Volume 1 of 2) and its Technical Appendices (Volume 2 of 2) were made available for public review on August 27, 2003. Consistent with the standard practice of the City of San Jose for EIRs, these documents are intended to provide all of the underlying analysis that would be needed by interested readers in order to understand the potential environmental impacts of the proposed project. The documents are, respectively, 252 pages and 650 pages in length for a total of over 900 pages of descriptive and analytical material. The City assembles all of the key materials into a one- or two-volume stand alone document so as to facilitate public participation and comment.

The "documents referenced in the EIR" to which the commentor is referring in this comment are those reference materials cited in the Draft EIR's bibliography (Draft EIR, Chapter XII, References and Contacts).

In a letter from the City to the commentor on September 22, 2003, the City affirmed that the materials referred to were available for inspection or photocopying upon payment of the cost of copying. In addition, a large number of the bibliographic sources have been available on various agency websites since before the publication of the Draft EIR.

It should be noted that the commentor had sufficient time and information to prepare and submit a comment letter of 49 pages, along with technical background materials of 158 pages.

Comment D2-4: Based on the inaccessibility of these documents, we made a written request for an extension of the comment deadline until 45 days after the documents became accessible to us. The City did not grant our request, and instead provided us with a mere 7 day extension, thereby depriving us of adequate time to review the documents and provide informed comments, both fundamental elements of the CEQA statute. We therefore file these comments under protest and reserve the right to supplement these comments once we have an opportunity to fully review all the relevant documents related to this Project.

Response to Comment D2-4: The City acknowledges this comment but notes that the Draft EIR was published on August 27, 2003 and the comment period closed on October 20, 2003 allowing 54 days for comment. Commentor's 49-page letter with several technical appendices suggests that sufficient materials were available to understand and discuss the subject matters within the EIR. In addition, the City notes that no subsequent submittal by this commentor has been received as of January 9, 2004.

Comment D2-5: Here, the Project description is unclear and inconsistent. As explained below, the DEIR provides no explanation of what phase of the Project is currently being proposed by the Redevelopment Agency, no explanation of the sequence of approval actions that the City will take, and no detailed description of the claimed "project."

Response to Comment D2-5: This comment introduces the three major points raised in regard to the project description presented in the Draft EIR. As such, it requires no further response. Please see Responses to Comments D2-6, D2-7, and D2-8.

Comment D2-6: Under the Heading, "Project Under Review," Page 5 of the DEIR claims that: "Three General Plan amendments are proposed." This statement is followed by a list of three proposed amendments to the General Plan including land use changes, roadway realignment and redefinition of downtown core area boundaries. This list indicates that the currently proposed actions on the Project merely involve amendments to the General Plan. Yet, later on in the document; under the heading "Project Description," the DEIR states that the "Proposed Project" includes General Plan Amendments, Rezoning, Public Improvements, formation of a community facilities district, Acquisi-

tion, Assembly and Disposition of Property, Site Clearance, and Mixed Use Development (including the construction of approximately 1,801,317 square feet of residential space and 60,000 square feet of commercial space). DEIR, p. 34-43. The scope of the proposed Project is further obscured by the litany of items listed under the subheading "Uses of the EIR" under the Project Description. DEIR, p. 43-44. There are over 24 categories of approval actions provided under that subheading. Although the DEIR claims that "it may be used" for all 24 categories of discretionary actions necessary to implement the Project as proposed, the vast majority of those proposed actions do not yet exist. In other words, it appears that the DEIR is attempting to act as a project-specific, comprehensive document aimed at full disclosure of impacts and mitigation while the Project is still conceptual in its form. Either the DEIR must disclose the nature of the Project with greater specificity or, as explained below, present the DEIR as a programmatic document that will be supplemented by tiered environmental review as the Project details unfold.

Response to Comment D2-6: The comment refers to Chapter II, Summary of the Draft EIR. The format for this Summary is one that has been used by the City of San Jose on numerous previous occasions. It should be noted that the Summary – by definition and intention – does not provide as much detail as the Project Description chapter (Chapter III). In fact, Section A. Project Under Review, concludes with the following sentence: "A more detailed description of the proposed project is provided in Chapter III, Project Description." In no way is the summary listing of the three General Plan amendments intended to indicate that the proposed project merely involves amendments to the General Plan.

The comment is correct that Chapter III, Project Description, includes a list of many "Uses of the EIR" and that the majority of those proposed actions do not yet exist. We find no contradiction between CEQA or the *CEQA Guidelines* and the inclusion of a comprehensive a list of potential future uses.

The EIR is not a program level analysis. The Draft EIR analyzes the proposed project as described in Chapter III at the project-specific level. In fact, a project level EIR is required for the amendments to a general plan (*CEQA Guidelines* Sec. 15378.(a)(1)). Ultimately, the level of specificity of an EIR is determined by the nature of the project and the "rule of reason" rather than any semantic label accorded to the EIR (*Al Larson Boat Shop v. Board of Harbor Commissioner*, 18 Cal.App. 4th 729, 741-742).

Please see Response to Comment D2-9 regarding the potential need for subsequent or supplemental environmental review at the time that specific entitlements are sought for development of the site.

Comment D2-7: The DEIR does not clearly state which specific actions on the Project the City and Redevelopment Agency are proposing to take at this time. Because we are writing these comments without the benefit of any of the documents underlying the Project, including any pending applications from the Redevelopment Agency, the public has no way of knowing which actions the City is currently proposing to take. The DEIR must be revised to clearly and accurately disclose the specific approval actions the DEIR is evaluating.

Furthermore, the DEIR must reveal the sequence of future phases of the Project, including which phases of the Project will be undertaken by the Redevelopment Agency. From our conversations with

Agency staff, it is our understanding that although the current Project proponent is the Redevelopment Agency, a private developer is expected to administer the bulk of the Project. The DEIR does not reveal this fact, nor reveal the specific phases of the Project that will be proposed and funded by the Redevelopment Agency. These are important aspects of the Project that must be disclosed in a revised DEIR circulated for public review and comment.

Response to Comment D2-7: As noted in the Draft EIR, no developer or specific development project has been identified for the project site. It is not yet known whether eventual development of the site would be phased and, if so, how many phases of how long a duration would be implemented. Speculation on such matters is discouraged by CEQA. The comment is correct that a private developer would be expected to design, propose, and construct a project at this site; the San Jose Redevelopment Agency would probably not serve in that capacity and no "revelation" of that fact is necessary in order to ensure an adequate discussion of potential physical environmental effects. The Draft EIR discloses all impacts of the project described and no recirculation is called for.

Comment D2-8: According to air quality expert Schuyler Fishman in her attached comments, a detailed construction equipment inventory and a construction schedule are necessary predicates to a proper estimate of construction-related emissions. Neither one of these two informational requirements is provided in the DEIR. Furthermore, there is so little information regarding the Project's proposed realignment of Julian Avenue that it is impossible to conduct a construction-related air quality impact analysis of that part of the Project. Therefore, the project description is inadequate for purposes of project-level air quality analysis.

Response to Comment D2-8: Nothing in the CEQA statutes nor the CEQA Guidelines suggests the need for "a detailed construction equipment inventory and a construction schedule" in a Draft EIR. Most often – even when a specific project is under design and detailed plans are available – such details are simply unknown. As explained in Response to Comment D2-40 below, neither of these details about the construction process for a project is necessary in order to adequately analyze potential construction-period air quality impacts. Nothing about the proposed realignment of Julian Street (referred to as Julian Avenue in the comment) changes this condition. The level of detail provided in the project description adequately discloses the potential environmental impacts of this project.

Comment D2-9: While we support the City's effort to begin environmental review of the Brandenburg Mixed Use Project as early in the planning process as possible, the preliminary nature of the development makes project-level analysis impossible at this time. Unfortunately, the DEIR is so ambiguous in the scope of the Project that it would avoid environmental review of future phases of the Project as they begin to take form. This type of obfuscation of CEQA's disclosure requirements is not consistent with CEQA law. For example, the DEIR proclaims itself to be a project-level analysis "designed to *fully* inform City of San Jose decisionmakers, other responsible agencies, and the general public of the proposed project and the potential consequences of its approval." DEIR, p. 1 (emphasis added). Of course, the DEIR cannot fully inform the decisionmakers of the project-level environmental consequences of the Brandenburg Mixed Use Project because the specific development plan for the Project has yet to materialize. The DEIR must be revised to make clear that it is a programmatic document that must be revisited during each phase.

The anemic analysis caused by the nascence of the Project is apparent on page 67 where it states that "the realignment Julian Street . . . would not appear to create incompatibilities between established and proposed uses within or adjacent to the project site. *Once a specific development project (or projects) is proposed*, the precise site planning relationship between the new development and existing office land use northwest of Pellier Park . . . would be refined." (Emphasis added). As this quotation makes explicit, the full impacts of the Project cannot be determined at this time because no *specific development project* exists for the site.

As explained by CEQA's implementing regulations, the time at which the agency may make a determination of whether or not impacts were fully analyzed in the program EIR is once subsequent activities take place. In short, adequacy of disclosure of environmental impacts is not a preemptive determination, but one that must be revisited during each phase of the Project. "Subsequent activities in the program must be examined in the light of the program EIR to determine whether an additional environmental document must be prepared." *CEQA Guidelines* §15168(c). The DEIR must be revised to make clear that it is a programmatic document that must be analyzed for sufficiency at each phase of the Project approval process.

Response to Comment D2-9: As noted above (Response to Comment D2-7), a project-specific analysis of the project described in the Draft EIR is an appropriate level of review. The scope of the project is spelled-out clearly in Chapter III, Project Description, across 13 pages of text, 2 tables, and 8 graphical figures. The project description includes descriptions of the following aspects of the project: General Plan amendments; rezoning; public improvements; formation of an assessment district; acquisition, assembly and disposition of property; site clearance; and detailed characteristics of the mixed use development that would occur. The mixed use development is described in terms of specific parcels, their location and acreages; square footages of development by land use category; maximum building heights; densities; roadway realignments; parking provision; parks and open space by location and acreage; and an estimate of the maximum exportation of excavated soils.

Once a developer proposes a specific development project for all or part of the 11-acre site, the City would evaluate the project to determine if it could lead to greater, or different, adverse environmental impacts than those set forth in this EIR. At that time, the City would determine whether a supplemental or subsequent CEQA document would be required pursuant to the *CEQA Guidelines*, §15162. Such evaluations are routinely undertaken by the City's Department of Planning, Building and Code Enforcement.

Comment D2-10: The DEIR for this Project fails to provide the legally required disclosure. Among other things, the DEIR fails to adequately describe: baseline conditions from which to evaluate environmental impacts, significant and potentially significant impacts to human health due to exposure to hazardous materials; significant air quality and public health impacts from construction exhaust; significant impacts to water supply and water quality; significant impacts to traffic; potentially significant impacts related to seismic activity and liquefaction; and potentially significant impacts on parks and public services.

Response to Comment D2-10: This comment introduces the fifteen points raised in regard to the analysis of potentially significant impacts which are raised in the comment letter. As such, it requires no further response. Please see Responses to Comments D2-12 through D2-51.

Comment D2-11: The DEIR should be revised to address these impacts and re-circulated for public review. . . .

Response to Comment D2-11: Please see Response to Comment D2-1.

Comment D2-12: Traffic expert Dan Smith explains in his attached comments that the DEIR's traffic baseline relies on traffic counts mostly conducted in the period from September through November, 2002. Because of the economic recession, counts taken in that period tend to be considerably lower than traffic counts taken in the recent past. Smith opines that when economic recovery takes place, the project traffic will be superimposed on a higher existing traffic base and the project will consequently have considerably greater impacts than estimated in the DEIR. Had the project been analyzed in the context of base traffic counts from year 2000, project traffic would be found to have more deleterious effects on conditions than disclosed in the DEIR. Basing the analysis on traffic counts from a period of time when traffic volumes are temporarily depressed does not provide a fair and accurate estimate of potential traffic impacts. The DEIR must be revised to provide correct traffic baseline conditions and recirculated for public review and comment.

Response to Comment D2-12: City of San Jose traffic impact analysis guidelines require that, when analyzing new development, the count data must be less than one year old. This is an effort to analyze the most accurate and up-to-date existing conditions scenario, as traffic conditions are continually changing. The use of 2002 count data was in response not only to the City's guidelines, but to changing travel patterns in the area due to the construction of the Guadalupe freeway. Around the year 2000, major construction on SR 87 was taking place, limiting access to the Downtown area from SR 87. Drivers were forced to look for alternative routes into and out of the Downtown area. Thus, use of 2002 count data was chosen to avoid the unusual traffic patterns caused by Guadalupe freeway construction activities.

In response to this comment, an analysis comparing the count data used in the analysis for this EIR with older 2000-2001 count data was performed. The comparison shows that at 10 study intersections traffic decreased in 2002, at 4 intersections traffic increased, and at 7 intersections the traffic volume changes were mixed (AM increased, PM decreased, or vice versa.) Thus, it is not accurate to say that traffic volumes in 2002 were "temporarily depressed" or "inaccurate." Furthermore, when traffic impacts were analyzed using 2000 counts, as suggested in the comment, the results showed that there would be no additional impacts other than those that were identified in the DEIR.

Comment D2-13: As explained below, there are many parcels of land on the Project site that have or had detectable levels of hazardous materials. For at least 6 parcels of land on the Project site, the DEIR claims that "further investigation is required." DEIR at 181. The City's failure to investigate the existing level of contamination on those parcels of land before preparing the DEIR directly conflicts with the CEQA mandate that "the EIR must demonstrate that the significant environmental

impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental context." CEQA Guidelines, § 15125, subd. (c). All parcels of land on the Project site must be fully investigated and current levels of contamination disclosed in a draft DEIR circulated for public review and comment.

Response to Comment D2-13: In the Phase I reports for properties owned by the Redevelopment Agency (Azure Environmental, 2 September 1999 and 5 January 2000), all sites were evaluated on their historical uses and potential hazardous material issues were identified. These potential hazardous materials issues were evaluated in the report, *Results of Phase II Soil and Groundwater Investigations* (Azure Environmental, 10 May 2000), with the exception of six parcels where access was not available prior to preparation of this DEIR. The findings of the Phase I environmental investigations at these six parcels were summarized in the DEIR, and the classes of hazardous materials associated with land uses at the parcels were identified. Mitigation was included in the DEIR (HAZMAT-1b) to ensure that the potential presence of hazardous substances associated with current and historic land uses are fully investigated, and, if warranted, that additional investigation, remediation, and/or coordination with regulatory agencies is performed to mitigate potential public health impacts. Mitigation Measure HAZMAT-1b requires regulatory oversight for future potential remediation of sites that have not been investigated. Remediation conducted in accordance with the requirements of regulatory agencies is considered appropriate mitigation for parcels that have not been investigated to date.

Comment D2-14: For at least one other parcel, 355 North San Pedro Street, the DEIR admits the applicability of a Water Board approved remediation plan, yet admits that that remediation plan has yet to be fully realized, due to the impracticality of some aspects of remediation. Despite this admission of incomplete cleanup of the site, the DEIR does not indicate any follow up investigation or provide the public with the current status of that site with respect to the presence of hazardous materials and the potential health risk that any remaining contamination poses to public health. The DEIR must be revised to evaluate the existing levels of contamination on all parcels of land and a full health assessment of such contamination in a revised document that is circulated for public review and comment.

Response to Comment D2-14: A Corrective Action Plan (Azure Environmental, 27 November 2001) and Addendum (22 May 2003), that was submitted to and approved by the RWQCB, presents the results of a risk-based analysis and development of soil remediation goals at the site. During remedial activities, it was discovered that some hydrocarbon-affected soil located beneath the Bassett Street right-of-way could not be safely removed due to encountering an underground gas line. The *Corrective Action Closure Report* (Azure Environmental, 4 August 2003), submitted to RWQCB, presents the results of the corrective actions performed in June 2003 at the site. The report presents details and photographs of the inaccessible hydrocarbon-affected soil that was left-in place due to safety concerns. This approach was approved by the RWQCB in their letter dated 19 August 2003, when they approved the *Corrective Action Closure Report*.

A site characterization investigation and/or a health risk assessment is not required for inclusion in an EIR. This DEIR presents a summary of the status of investigations and the likely contaminants at the project site. To mitigate potential significant impacts related to the presence of hazardous substances in the subsurface, the DEIR recommends regulatory agency approval of remediation. This is an appropriate mitigation because it requires cleanup to levels that will protect the public health and the

environment according to standards determined by the regulatory agency with oversight of this project.

Comment D2-15: For yet another category of parcels, 129-149 West Julian Street, although the DEIR admits the presence of benzene in the shallow sources of groundwater, the DEIR does not follow up this disclosure with a health risk assessment that provides the public with a full understanding of the level of contamination on site and the public health risk posed by such contamination. Such an assessment must be part of a revised DEIR circulated for public review and comment.

Response to Comment D2-15: The *Corrective Action Plan* for this site (Azure Environmental, 21 January 2003), submitted to and approved by the RWQCB, presents the results of a risk-based analysis, including evaluation of potential exposure pathways, and developed specific remedial cleanup goals to protect human health and the environment. A summary of the plan and a description of the hazardous material issues at the site were included in the DEIR analysis. The remedial actions performed at the site from June through August 2003, as documented in the *Corrective Action Closure Report* for the site (Azure Environmental, 19 August 2003) included removal of soil and groundwater at the site greater than that required by the RWQCB. The *Corrective Action Closure Report* was approved by the RWQCB in their letter dated 21 August 2003. No additional action is required to protect public health at the site.

Comment D2-16: For a final parcel of contaminated land on the Project site, 153 Julian Street, the DEIR indicates that a health risk assessment has been performed, but neither the assessment nor the full results contained therein are provided as part of the DEIR. As explained below, this violates CEQA's disclosure requirements. For the purpose of impacts analysis, however, the DEIR's failure to fully inform the public of the level of contamination and the public health risks of developing the Project site results in an inaccurate depiction of baseline conditions in the area.

Response to Comment D2-16: The health risk assessment (HRA) is a technical document that was prepared to assist in the design of remedial alternatives for the 153 Julian Street site. The Final Remediation Plan (Azure Environmental, 13 August 1999), submitted to and approved by the RWQCB, provides the results of both human and groundwater HRAs which were used to establish remedial goals used as a basis for site cleanup, and the actions that were designed to meet those goals. The Remedial Action Completion Report (Azure Environmental, June 2003) was submitted to the RWQCB and was approved in their letter dated 17 July 2003, confirming that site cleanup goals had been achieved. The DEIR analysis provides sufficient existing and historical conditions and identification of potential impacts related to hazardous material releases from the 153 Julian Street site. Inclusion of the complete HRA as an appendix to the DEIR would not further inform the public as to potential health risks associated with the project.

Comment D2-17: The water quality impacts of past and continuing runoff from the Project site have not been disclosed in the DEIR. Of particular concern, as explained below, is the impact of such runoff on the nearby Guadalupe River. The DEIR must be revised to reveal the current condition of the Guadalupe River and the effect of past and current runoff from the Project site on that body of water.

Response to Comment D2-17: Please see Response to Comment D2-28.

Comment D2-18: One of the parcels of land involved in this project, 153 Julian Street, is a Superfund site. This means that it is one of the most contaminated sites in the United States. As explained by Mr. Hagemann and Dr. Hindery in their attached comments, the health risk assessment prepared for the property was not included in the DEIR. As such, it is impossible to accurately gauge the currently existing health risk that would result from development of this parcel of land. It is also impossible to determine whether the DEIR's proposed mitigation is sufficient to offset those impacts. The EIR must be "a compilation of all relevant data into a single formal report . . . which would facilitate both public input and the decisionmaking process." *Russian Hill Improvement Association v. Board of Permit Appeals*, (1975) 44 Cal.App.3d 158, 168. A copy of the assessment or a thorough explanation of its results must be included in the EIR to allow the public an opportunity to comment on it. The health risk assessment for 153 Julian Street must be included in the DEIR to effectuate full disclosure of health impacts from the Project.

Response to Comment D2-18: Please see Response to Comment D2-16.

Comment D2-19: Dr. Hindery and Mr. Hagemann also note that the existing health risk assessment addresses health impact through evaluation of vapor intrusion from contaminated soil to indoor environments. Since the time that initial assessment, the health risk assessment mentioned in the DEIR, was prepared for 153 Julian Street, there is a new guidance for evaluating the vapor intrusion pathway developed by the U.S. EPA. As such, the health risk assessment should be revised to comport with the EPA most recent guidance on measuring vapor intrusion and included in a new DEIR circulated for public review and comment.

Response to Comment D2-19: The HRA prepared for the site included evaluation of vapor intrusion, and was conducted with oversight from RWQCB and in accordance with EPA guidance documents. The remedial action for the site, which included placement of a barrier layer to protect against vapor intrusion, has been successfully completed in accordance with the requirements of the RWQCB. The remedial action has effectively removed vapor intrusion as a potential human exposure pathway. Therefore, no additional analysis of this pathway would appear to be warranted. It should be noted that the guidance document apparently referred to by the commentor (Draft Guidance for Evaluating the Vapor Intrusion to Indoor Air Pathway from Groundwater and Soils) has not been finalized and does not apply to San Jose.

Comment D2-20: The DEIR notes that benzene has been detected at significant levels in groundwater under this parcel of land. Benzene is a potent carcinogen. As Dr. Hindery and Mr. Hagemann explain in their attached comments, the presence of benzene at concentrations up to 710 ppb in such a shallow groundwater source likely poses a significant health risk to future residents via the vapor intrusion pathway. Yet, the DEIR does not provide a health risk assessment that discloses the public health impact of benzene contamination on the site. The significant public health impact of benzene on this parcel of land must be fully disclosed and mitigated in a revised DEIR circulated for public review.

Response to Comment D2-20: Please see Response to Comment D2-15 for a discussion of the investigation and assessment of the hazardous materials issues at this parcel. It should be noted that the elevated concentration of benzene in groundwater measured at the site (0.71 parts per million) that was reported in the DEIR and repeated in the letter, was removed during remedial activities at the site, performed from June to August 2003.

Comment D2-21: The DEIR reveals significant public health impacts related to hydrocarbon-contaminated soil on this parcel of land. As mitigation, the DEIR mentions remedial action approved by the Regional Water Quality Control Board. That order involves the removal of 100 cubic yards of contaminated soil. The DEIR admits, however, that full remediation has not occurred due to alleged inaccessibility of a portion of the 100 cubic yards of soil to be removed. As explained by Dr. Hindery and Mr. Hagemann, the DEIR must disclose the public health impact resulting from incomplete remediation of the contaminated site. The DEIR must be revised to reveal the results of such investigation.

Response to Comment D2-21: Please see Response to Comment D2-14 for a discussion of the investigation and remedial activities at this site. A description of the hazardous material issues at the site and a summary of the Corrective Action Plan designed to address the issues were included in the DEIR analysis.

Comment D2-22: There are a number of parcels of land that housed Underground Storage Tanks ("USTs") and are considered "closed" from a regulatory perspective. Hindery and Hagemann point out that residual concentrations of metal and lead are known to occur on "closed sites." Given this possibility, all sites, regardless of individual regulatory status, should be inventoried and cumulatively assessed for risk to human health in a comprehensive, project wide risk assessment in a revised DEIR circulated for public review and comment.

Response to Comment D2-22: All former USTs at the project site have been closed, requiring no further remedial action or agency oversight. In the Phase I reports for the project site (Azure Environmental, 2 September 1999 and 5 January 2000), all sites were evaluated on their historical uses and those sites where past uses could have potentially have resulted in impacts to soil and groundwater were subsequently investigated and reported in Results of Phase II Soil and Groundwater Investigations (Azure Environmental, 10 May 2000). No evidence was identified in previous investigations suggesting that there may be unremediated, potentially hazardous concentrations of metals at the former UST sites. Therefore, additional investigation of this issue does not appear warranted, and the DEIR analysis is appropriate.

Comment D2-23: The DEIR provides a list of 6 parcels of land that "require further investigation" DEIR at 181. The basis of the need for further investigation includes the potential presence of "petroleum products, heavy metals, and solvents, and polynuclear aromatic compounds" on those parcels of land. The DEIR later admits that "potential hazardous materials issues at several of the project site properties have not been fully evaluated. . . . If significant hazardous materials releases have occurred at those properties, construction workers and future workers and residents at the project site could be exposed to potentially harmful concentrations of hazardous materials." DEIR, p. 182.

The potentially significant, even grave, public health concerns raised by the potential presence of hazardous materials coupled with the DEIR's half-hearted attempt at disclosure is cause for concern.

Indeed, this is precisely the type of situation CEQA cautions lead agencies against. Environmental problems should be considered at a point in the planning process "where genuine flexibility remains." (*Mount Sutro Defense Committee v. Regents of University of California* (1978) 77 Cal.App.3d 20, 34 [143 Cal.Rptr. 365].) "A study conducted after approval of a project will inevitably have a diminished influence on decision making. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA." *Sundstrom*, 202 Cal.App.3d at 307 [248 Cal.Rptr. at 358].

The City must perform the requisite investigation for full disclosure of the public health threat from these sites now, not at some later yet-undetermined time. The DEIR must be revised to discuss the results of full investigation of the potential presence of hazardous materials on these parcels of land and fully mitigate the impacts that may be revealed from that investigation.

Response to Comment D2-23: Please see Response to Comment D2-13.

Comment D2-24: The DEIR's bare statement that "ground shaking at the project site is a potentially serious hazard" does not accurately describe the potential impacts of an earthquake, as detailed by the Association of Bay Area Governments ("ABAG"). The DEIR should be revised to fully disclose the level and type of seismic hazards that exist in the Project area.

Response to Comment D2-24: The comment omits the first three words of the quotation from the Draft EIR (found at the conclusion to a three-paragraph description of the environmental setting with regard to Ground Shaking within the larger section on Seismic Conditions. The full sentence in the Draft reads as follows:

"This level of ground shaking at the project site is a potentially serious hazard".

This concluding sentence is preceded by the description of the potential ground shaking conditions experienced in the vicinity of the site. That descriptive text begins by explaining what ground shaking is, how it is measured, and how its likely future occurrence is predicted. This setting section on ground shaking then concludes by stating:

...The expected peak horizontal acceleration (with a 10 percent chance of being exceeded in the next 50 years) generated by any of the seismic sources potentially affecting the area, including the project site, is estimated by the California Division of Mines and Geology as greater than 0.5 to 0.6g.² This level of ground shaking at the project site is a potentially serious hazard.

Please note that the source of this information is the California Division of Mines and Geology as expressed in a publication from the California Geological Survey. The text also refers to Table V.H-1, Modified Mercalli Scale, which lists and compares measurements of seismic activity from the least noticeable to the most catastrophic. The conditions that could occur on the project site (an

² California Geological Survey, 2003, Probabilistic Seismic Hazards, San Jose 1 x 2 Degree Sheet.

expected peak horizontal acceleration of 0.5 to 0.6g) fit into the sixth of twelve Modified Mercalli Scale categories. The textual description in the table of what ground shaking of this magnitude would be like, in physical terms, reads as follows:

Felt by all. Many frightened and run outdoors. Persons walk unsteadily. Windows, dishes, glassware broken. Knickknacks, books, etc., off shelves. Pictures off walls. Furniture moved or overturned. Weak plaster and masonry D cracked. Small bells ring (church, school). Trees, bushes shaken (visibly, or heard to rustle).

Therefore, far from being a "bare statement," the Draft EIR fully describes existing conditions related to ground shaking.

The comment's argument that this partial sentence does not "accurately describe the potential impacts of an earthquake..." appears to misunderstand that the text to which the comment refers is found in the Setting (not Impacts) discussion. The impacts discussion is clearly labeled and begins on page 152 of the Draft EIR. There, the text describes the potential impacts related to ground shaking in Impact GEO-1, in the following language:

Impact GEO-1: Occupants of the project, dwelling units, and commercial space would be subject to seismic hazards. (S)

All structures in the Bay Area and their occupants are at risk of damage or injury from ground shaking in the event of an earthquake. The amount of ground shaking would depend on the magnitude of the earthquake, the distance from the epicenter, and the type of earth materials in between. Very strong to violent ground shaking will occur at the project site during expected earthquakes on the Hayward and other regional faults. This level of seismic shaking could cause extensive non-structural damage in buildings at the site. In addition, limited structural damage may occur.

This impact would be reduced to a less-than-significant level through the implementation of its associated mitigation measure:

Mitigation Measure GEO-1: Prior to the issuance of any site-specific grading or building permits, a design-level geotechnical investigation shall be prepared and submitted to the City of San Jose Public Works Department for review and confirmation that the proposed development fully complies with the California Building Code. The report shall determine the project site's surface geotechnical conditions and address potential seismic hazards such as liquefaction and subsidence. The report shall identify building techniques appropriate to minimize seismic damage. In addition, the following requirement for the geotechnical and soils report shall be met:

- Analysis presented in the geotechnical report shall conform with the California Division of Mines and Geology recommendations presented in the "Guidelines for Evaluating Seismic Hazards in California."

All mitigation measures, design criteria, and specifications set forth in the geotechnical and soils report shall be followed.

It is acknowledged that seismic hazards cannot be completely eliminated even with site-specific geotechnical investigation and advanced building practices (as provided in the mitigation measure above). However, exposure to seismic hazards is a generally accepted part of living in the San Francisco Bay Area and therefore the mitigation measures described above reduces the potential hazards associated with seismic activity to a less-than-significant level.

Comment D2-25: As feasible mitigation for this impact, Hagemann and Hindery indicate that construction should follow codes developed by the International Code Council (<http://www.iccsafe.org/>).

Response to Comment D2-25: As described in Response to Comment D2-24, the description of the existing setting, analysis of potential impacts, and recommendation of mitigation for ground shaking are presented in the Draft EIR. The required design-level geotechnical report review by Public Works and compliance with the California Building Code represents a standard and entirely adequate means of addressing such risks to new development on the project site.

Comment D2-26: According to criteria provided by ABAG, the risk of liquefaction hazards on the Project site is "moderate." The DEIR does not disclose this impact. For this impact Hagemann and Hindery again indicate that construction should follow codes developed by the International Code Council (<http://www.iccsafe.org/>).

Response to Comment D2-26: The comment is not correct.

The Draft EIR describes the existing conditions at the site in terms of liquefaction in Chapter V, Setting, Impacts and Mitigation Measures, Section H. Geology, page 151 in the paragraph titled "Liquefaction". The text is shown below:

(3) **Liquefaction.** Liquefaction is the temporary transformation of loose, saturated granular sediments from a solid state to a liquefied state as a result of seismic ground shaking. In the process, the soil undergoes transient loss of strength, which commonly causes ground displacement or ground failure to occur. Since saturated soils are a necessary condition for liquefaction, soil layers in areas where the groundwater table is near the surface have higher liquefaction potential than those in which the water table is deep. The depth to groundwater at the project site varies between approximately 15 and 22 feet below the ground surface. The preliminary geotechnical report indicates that most of the unconsolidated sediments underlying the site are not susceptible to liquefaction. However, several discontinuous 1- to 3-foot thick layers of saturated medium dense sand and silty sand and a 5-foot thick layer of medium dense silty sand identified in the CPT logs may be susceptible to liquefaction and could cause settlements at the surface of up to 1 inch.

While the Draft EIR text cited above does not reference information that may be provided in published documentation or on a website operated by the Association of Bay Area Governments (ABAG), it relies on a much more detailed and site-specific source, the preliminary geotechnical report prepared by the firm of Treadwell and Rollo for the previous office developers of the site (Legacy Partners) in 2001.

Potential risks associated with liquefaction on any of the parcels contained within the project site are addressed in Impact GEO-1 (page 152), which addresses several seismic-related impacts associated with the proposed project. Mitigation measure GEO-1 states that "Prior to the issuance of any grading or building permit, a design-level geotechnical investigation shall be prepared and submitted to the City of San Jose Public Works Department for review and confirmation that the proposed development fully complies with the California Building Code. The report shall... address potential seismic hazards such as liquefaction and subsidence" [emphasis added]. The measure then concludes by requiring that "[a]ll mitigation measures, design criteria, and specifications set forth in the geotechnical and soils report shall be followed".

This description of the existing setting, analysis of potential impacts, and recommendation of mitigation fully discloses the potential environmental impacts of the project and represents a standard and appropriate means of addressing the risks associated with liquefaction as required by CEQA.

Comment D2-27: The DEIR neither describes the types of operations that would be developed in the commercial area nor the environmental impacts such operations would generate. Assuming that operations such as dry cleaning and gasoline service stations may occur on the commercial element of the Project, Hagemann and Hindery explain that there may be significant adverse impacts on the area's water resources. Specifically, this requires the DEIR to assess the impact of water drainage from the site that finds its way to Guadalupe River, located a half mile west of the proposed development, paying special attention to household gardening and landscaping and past activities within the site. A variety of contaminants are common to urban area storm water and irrigation run-off. As the DEIR admits, some of the contaminants used during past activities are agricultural chemical, petroleum hydrocarbons, heavy metals, pesticides, lead and asbestos. The potential impacts of past and future run-off from the Project site should be addressed in a revised DEIR circulated for public review.

Response to Comment D2-27: Chapter III, Project Description, of the Draft EIR describes the commercial development that is included as part of the proposed project as being located on seven parcels fronting N. San Pedro Street, between Bassett and Devine Streets, and totaling approximately 60,000 square feet of space. Table III-2 shows how this commercial space would be distributed across the parcel composing the site. At the present time, it is not known what kinds of commercial operations would occur on these sites. Potential effects of the proposed project on the water quality in the Guadalupe River and the San Francisco Bay are analyzed in Chapter V, Setting, Impacts and Mitigation Measures, Section L. Hydrology and Flooding (pages 200-202).

Specifically, the first impact called-out in the Hydrology and Flooding section and the mitigation measure recommended to address the impact directly covers the project's impacts on water quality. The impact and its multiple-part mitigation measure are reproduced below:

Impact HYD-1: Construction activities and post-construction operation of the project could result in degradation of water quality in the Guadalupe River and the Bay by reducing the quality of storm water runoff. (S)

(1) **Construction-Period Impacts.** Construction and grading within the project site would require temporary disturbance of surface soils and removal of vegetative cover. Over 9

million cubic yards of soil would be excavated from the project site as part of the construction of below-ground parking. During the construction period, grading and excavation activities would result in exposure of soil to runoff, potentially causing erosion and entrainment of sediment in the runoff. Soil stockpiles and excavated parcels on the project site would be exposed to runoff and, if not managed properly, the runoff could cause erosion and increased sedimentation in water courses at or away from the project site. The accumulation of sediment could result in blockage of flows, potentially resulting in increased localized ponding or flooding.

The potential for chemical releases is present at most construction sites. Once released, substances such as fuels, oils, paints, and solvents could be transported to nearby surface waterways and/or groundwater in storm water runoff, wash water, and dust control water, potentially reducing the quality of the receiving waters.

(2) **Operation-Period Impacts.** To facilitate any possible redevelopment of this project site, the Agency developed a Remedial Action Plan in conjunction with the Regional Water Quality Board. As part of these remedial efforts, a total of approximately 9,300 cubic yards of volatile organic compound impacted soil, approximately 2,085 cubic yards of petroleum hydrocarbon impacted soil, and approximately 2 cubic yards of lead impacted soil have been excavated and removed. Additionally, approximately 5,162,840 gallons of volatile organic compound impacted groundwater have been remediated at the project site.

The project proposed in this EIR would further improve the water quality at the site by converting its land use from Industrial/Commercial uses to Residential Support for the Urban Core Area. This change in land use signifies a substantial reduction in potential surface water pollutants for the site. While more vehicles may be at the site due to its increased density, the vehicles will be cars, not industrial trucks. In addition, the project would be built within .14 miles of a rail station providing the opportunity for fewer vehicular trips. Most significantly, the current surface parking which can contribute to fuel leaks, lubricants, tire wear, and fallout from exhaust contribute petroleum hydrocarbons, heavy metals, being transported to receiving waters will be converted to underground parking eliminating this type of runoff. In addition, the potential for an increase in peak run-off flow is minimal to nonexistent because this is an infill project which will be constructed within a highly developed watershed. Therefore, the likelihood of increased erosion or other impacts is minimal.

The design of the project has not been fully developed and therefore, it is not possible to determine whether the hydraulic sizing requirements would apply. It appears, however, that this project would provide water quality benefits, as set forth above. Therefore, water quality impacts would not likely exceed the storm water impacts of maintaining the property in its existing condition. The City of San Jose has revised and updated its Stormwater Runoff Policy to incorporate the provisions of C.3. This policy will apply to the project which will be reviewed at the time a specific design is submitted. A copy of the policy is included as an appendix to this First Amendment.

Mitigation Measure HYD-1: The applicant shall prepare a Storm Water Pollution Prevention Plan (SWPPP) designed to reduce potential impacts to surface water quality through the construction and life of the project. The SWPPP would act as the overall

program document designed to provide measures to mitigate potential water quality impacts associated with implementation of the project. The SWPPP shall include:

- **Specific and detailed BMPs designed to mitigate construction-related pollutants.** These controls shall include practices to minimize the contact of construction materials, equipment, and maintenance supplies (e.g., fuels, lubricants, paints, solvents, adhesives) with storm water. The SWPPP shall specify properly designed centralized storage areas that keep these materials out of the rain.

An important component of the storm water quality protection effort will be the education of the site supervisors and workers. To educate on-site personnel and maintain awareness of the importance of storm water quality protection, site supervisors shall conduct regular tailgate meetings to discuss pollution prevention. The frequency of the meetings and required personnel attendance list shall be specified in the SWPPP.

The SWPPP shall specify a monitoring program to be implemented by the construction site supervisor, and must include both dry and wet weather inspections. City of San Jose and RWQCB personnel may make unannounced site inspections and are empowered to levy considerable fines if it is determined that the SWPPP has not been properly prepared and implemented.

Best Management Practices (BMPs) designed to reduce erosion of exposed soil may include, but are not limited to: soil stabilization controls, watering for dust control, perimeter silt fences, placement of hay bales, and sediment basins. The potential for erosion is generally increased when grading occurs during the rainy season, as disturbed soil can be exposed to rainfall and storm runoff. If grading must be conducted during the rainy season, the primary BMPs selected shall focus on erosion control, that is, keeping sediment on the site. End-of-pipe sediment control measures (e.g., basins and traps) shall be used only as secondary measures. Access to and egress from the construction site shall be carefully controlled to minimize off-site tracking of sediment (this BMP is particularly important since much of the earthwork will involve loading trucks for off-site transport of soil excavated or the below-ground parking structures). Vehicle and equipment wash down facilities shall be designed to be accessible and functional both during dry and wet conditions.

- **Measures designed to mitigate post construction-related pollutants.** The project shall include measures designed to mitigate potential water quality degradation of runoff from all portions of the completed development, including roof and sidewalk runoff. The final design team for the project should review *Start at the Source*, Design Guidance Manual for Stormwater Quality Protection.³ The selected permanent stormwater treatment measures may include biofilters and grassy swales; and the selected measure must meet the hydraulic sizing criteria specified in the most current NPDES municipal stormwater permit issued to the City of San Jose, unless the developer demonstrates that it is impracticable to meet the criteria; and the project includes an alternative method for treating an equivalent pollutant loading or quantity of stormwater runoff, or provides another equivalent water quality benefit.

³ Bay Area Stormwater Management Agencies Association, 1999, *Start at the Source*, Design Guidance Manual for Stormwater Quality Protection

Implementation of this mitigation measure would reduce this impact to a less-than-significant level. (LTS)

For the reasons presented above, the City of San Jose respectfully disagrees with the assertion that re-circulation of a revised Draft EIR is necessary.

Comment D2-28: Our experts also note that the Guadalupe River is listed as an impaired water body for diazinon by the State of California. In listing diazinon as a high priority for TMDL development, the State identifies the source for diazinon as "urban runoff/storm sewers." The construction of at least 1,500 houses for the project, as well as commercial areas and parks, may incrementally impact water quality through potential discharge of pesticides, including diazinon, to the Guadalupe River. A revised DEIR should be prepared to adequately assess and mitigate the potential addition of diazinon on Guadalupe River from operation of the Project.

Response to Comment D2-28: The commentor is correct in stating that the Guadalupe River is listed as impaired on the Clean Water Act 303(d) list for diazinon. However, it is unlikely that the proposed project would contribute to diazinon loading of the Guadalupe River because diazinon has been banned for residential use. In December 2000, the US EPA announced an agreement to phase-out diazinon, one of the most widely used pesticides in the United States, for indoor uses, beginning in March 2001, and for all lawn, garden and turf uses by December 2003. If the proposed project is implemented, it would be completed well after the complete ban on non-agricultural use of diazinon has become effective. Therefore, it is not anticipated that the proposed project would contribute diazinon to the Guadalupe River.

Comment D2-29: The DEIR significantly underestimates the impacts of the Project on the area's water supply. Hindery and Hagemann estimate residential interior water needs range from 426 to 1,216 AFY (assuming an average of 3.62 people per residential unit). Residential landscaping needs total 17 AFY (assuming the total acreage of residential irrigated landscape is 50 percent of the residential developable acreage). Therefore, residential interior and landscaping water needs combined range from 443 to 1,233 AFY.

In addition to 1,500 multi-family units the Brandenburg project also includes parking facilities (2,302 spaces), commercial space (60,000 sq. ft.), satellite community centers (10,000 to 20,000 square feet), small recreation buildings, the addition of an 0.86-acre park, and renovation of the 0.42 Pellier Park. Water consumption from these operations should also be incorporated into estimates of water demand. CEQA requires that the DEIR be modified to incorporate estimates of water use in light of the above expert opinion and should compare the revised rates of consumption to available supply.

Response to Comment D2-29: The commentors estimate a substantially higher water demand than that shown in the Draft EIR (page 209) and appear to result from a substantial overestimation of the increase in population resulting from the project as well as a per-capita water consumption estimate that exceeds San Jose's experience by a factor of 2-3 times. It should be noted that the relatively high density housing type proposed on the Brandenburg site would have average household sizes and average daily water consumption levels that would be well below the median for the City of San Jose.

As acknowledged in the Draft EIR, the proposed Project would increase the demand for water. Future demand will be met through water conservation programs as well as supplemental imported water supplies. The Santa Clara Valley Water District (SCVWD) has also updated its water supply master plan in order to determine potential future water deficiencies and examine options for meeting these deficiencies, including the addition of local storage capacity for imported water supplies and wastewater reclamation.

Comment D2-30: The DEIR admits that the Project would create “a shortfall of 11.16 acres of parkland when compared to the City’s level of service benchmarks for neighborhood/community serving parklands.” DEIR at 192. Yet, the DEIR erroneously labels this public service impacts as “less than significant.”

The City’s General Plan calls for the provision of 3.5 acres of parkland per 1,000 residents. DEIR, p. 191. Under the City’s General Plan, the proposed project has a parkland obligation of 12.02 acres, yet provides only 0.86 acres. The level of service benchmark of 3.5 acres per 1,000 residents is known under CEQA as a “threshold of significance.”

A “threshold of significance” for a given environmental effect is simply that level at which the lead agency finds the effects of the project to be significant; the term may be defined as a quantitative or qualitative standard, or set of criteria, pursuant to which the significance of a given environmental effect may be determined. . . . [U]se of existing environmental standards in determining the significance of a project’s environmental impacts is an effective means of promoting consistency in significance determinations and integrating CEQA environmental review activities with other environmental program planning and regulation.

Communities for a Better Environment v. California Resources Agency, (2002) 103 Cal. App. 4th 98, 110-111 (internal citations omitted). In other words, using the City’s own threshold of significance, the impact the development will have on the ratio of residents to parkland is significant and must be mitigated through the creation of open park space for future residents of the Brandenburg development. The DEIR must be revised to disclose and mitigate this impact before it is recirculated for public review and comment.

Response to Comment D2-30: The comment confuses the concept of an environmental “threshold of significance” (i.e., the point beyond which an adverse environmental effect would be said to create a “significant” impact) and a simple inconsistency with an existing plan or policy. As explicitly stated on pages 191 and 192 of the Draft EIR, in the subsection titled “Criteria of Significance,” the following two criteria relate to parks:

- Substantially increase demand for neighborhood parks, regional parks, or recreational facilities that would accelerate their physical deterioration, or decrease the quality of the facilities or users’ experience; or
- Result in the removal of a neighborhood park or open space area.

It is these two criteria against which the proposed project should be compared. The Draft EIR then (page 193) goes on to conclude as follows:

The 1,500 units of the proposed project would add new population (approximately 3,435 persons) to the downtown area and would provide approximately 0.86 acres of new parkland, leaving a shortfall of 11.16 acres when compared to the City's level of service benchmarks for neighborhood/community serving parklands. However, while the increased population of the proposed project would result in increased use of existing parks and trails, such use is not expected to be substantial enough to cause these facilities to deteriorate and no significant adverse physical impact would result.

One point left unsaid is the conclusion that no neighborhood park or open space area would be removed by the proposed project.

In addition to reiterating the City's significance criteria for potential parks impacts, it should also be noted that the City's own policies allow for the payment of fees in-lieu of park land dedication or development (City of San Jose Municipal Code, Chapter 19.38). For a proposed project on the North San Pedro Housing sites, of the densities envisioned in the project description, with several existing parks nearby, in-lieu payments may be determined to be a more effective means of creating and maintaining parks facilities for project residents and employees. The following parks are located near the site, within the distances indicated: Guadalupe Gardens (1,800 feet); Los Gatos Creek/Guadalupe River Trails (1,500 feet); St. James Park (1,500 feet); and Ryland Park (1,100 feet). According to Redevelopment Agency staff, once the proposed park space on the site is developed, over \$9.0 million in parks fees could be generated.

For the reasons cited above, the City disagrees with the comment's suggestion that the Draft EIR requires revising and recirculation in order to fix the alleged shortcomings.

Comment D2-31: The DEIR admits that the City and County library system is "inadequate to serve current needs due to recent population growth." DEIR, p.193. The DEIR further admits that "six new branch libraries are in the planning stages" as the basis for finding "no significant adverse physical impact would result." DEIR at 193. This turns CEQA's impact disclosure requirements on its head. The new libraries are being constructed, in part, to accommodate the population increase created by the Project. As such, the environmental impact of construction of additional library resources necessary to accommodate the population increase caused by the Project must be disclosed. Specifically, a revised DEIR must provide a ratio of existing library resources to population and disclose how that ratio would be affected by the population increase created by the Project. Finally, the DEIR must disclose the impact resulting from creating sufficient library space to meet the City's level of service for libraries.

Response to Comment D2-31: The City does not have a quantitative threshold of significance for library facilities. A quantitative presentation of the relatively small change in the "ratio of existing library resources to the population and...how that ratio would be affected by the population increase caused by the proposed project" would not be helpful to the conclusion that no impacts would result, nor would it change that conclusion. Similar to the project's effect on parks, new residents would use the City and County library system, which has six new branch libraries in the planning stages. Partial funding for those facilities is available from the proceeds of a bond measure that was passed in November 2000. Beyond the six branch libraries that are being planned, the new Martin Luther King, Jr. Library is located at 150 E. San Fernando Street, approximately $\frac{2}{3}$ mile from the project site. This

innovative joint venture between the City of San Jose and San Jose State University includes approximately 500,000 square feet of library, café, bookstore and learning space. At this location, it would provide new residents of the proposed project with one of the finest library experiences available in Northern California. No significant adverse physical impact would result.

Comment D2-32: As explained by traffic expert, Mr. Dan T. Smith, in his attached comments, the traffic analysis in the DEIR is severely deficient. The stated baseline conditions are inaccurate, thereby skewing the impact analysis. Other issues, such as construction-related impacts, are ignored altogether. Unfortunately, these deficiencies in the DEIR not only render the traffic analysis deficient, but render other areas of analysis deficient as well. Smith explains that to the extent that the DEIR understates Project traffic generation and impacts, the DEIR also understates air quality and noise impacts.

By way of example, Smith finds the air quality analysis appears completely illogical, crediting this large development project with decreasing, rather than increasing, traffic in the immediate project area. As a consequence, the DEIR claims that the Project will improve, rather than degrade, air quality conditions in the downtown area. Nothing in the traffic study reports presented in the DEIR and its appendices indicates the project would result in the localized reductions in traffic in the immediate project area claimed in the air quality analysis. The DEIR must be revised to provide an accurate traffic analysis, including special consideration of the issues that follow.

Response to Comment D2-32: This comment introduces the seven major points raised in regard to the analysis of potential impacts to traffic. It also mentions air quality and noise in the same introductory way, but then introduces and comments on those issues in greater detail in the comments that follow these. As such, this comment requires no further response. Please see Responses to Comments D2-33 through D2-39.

Comment D2-33: In its traffic analysis, the DEIR assumes that 25 percent of the trips generated by the Project would not be made by motor vehicles, but by foot or by public transit. The DEIR also assumes that 50 percent of the project's retail traffic would be walk trips or attracted passers-by rather than new auto trips. According to Mr. Smith in his attached comments, these assumptions are grossly inflated and therefore incorrect. Standard analysis for traffic engineering demonstrates that only 2-3 percent of the trips generated by the residential component of the Project would be made by foot or transit. The traffic analysis must be corrected to use a reasonable trip generation assumption for the residential portion of the Project.

Response to Comment D2-33: The unadjusted trip generation rates used for the proposed *residential* and *retail* uses are those recommended by the City of San Jose (Interim Guidelines for Traffic Impact Analysis for Land Developments, "Common Vehicular Trip Generation Rates for the San Jose Area," June 1994). These rates are based on surveys done at comparable developments in San Jose. Trip generation rates for the existing (*office*) uses on the site were obtained from the results of a Downtown San Jose trip generation survey conducted by Parsons Transportation Group, Inc. and approved by the City of San Jose.

Travel patterns for residential development within the Downtown area are known to be substantially different from similar development outside the Downtown area. This is due to the wide variety and

capacity of transit service and the proximity of employment and other services. The comment states that standard traffic engineering analysis demonstrates that only 2-3 percent of the trips generated by the residential component of the project would be made by foot or transit. However, the comment presents no evidence that would demonstrate that this percentage is applicable to this project in its Downtown setting. As noted in the Draft EIR, the residential trip reduction rate used for the study was derived based on a survey conducted at the Villa Torino apartments on Julian Street at First Street. Apartment residents were surveyed in the year 2000. The survey showed that approximately 25 percent of the trips involve modes other than the automobile.

Retail shops within the Downtown area include a variety of services, such as restaurants, office supply stores, convenience stores, small super markets, dry cleaning, and others. These shops offer goods and services that can be found throughout the City. Thus, there is no reason for customers to travel into the Downtown to patronize these businesses. The primary market for Downtown retail businesses is Downtown office and residential developments. Customers can and do walk to these businesses. A reduction much higher than 50 percent probably would be justified. However, to be conservative, only a 50 percent reduction was taken.

VTa Traffic Impact Analysis guidelines say: *"a reduction in vehicle trips can be taken off the smaller trip generator of the project in an amount not to exceed thirteen percent (13%) unless special circumstances are justified in the project's TIA."* In this case, as explained above, the project's location justifies the use of a higher reduction for both the residential and retail components of the project.

Comment D2-34: With respect to the commercial portion of the project, under the Valley Transportation Authority's own guidelines, internal trip generation made by foot accounts for only 12-13 percent of the total trip generation, not the 50 percent assumption used in the DEIR. As such, the traffic analysis is flawed and must be corrected to use a reasonable motor vehicle trip generation assumption for the commercial portion of the Project. The DEIR must be revised to disclose and mitigate any significant impacts revealed through the application of reasonable trip generation assumptions.

Response to Comment D2-34: Please see Response to Comment B4-3. No revisions to the Draft EIR are necessary.

Comment D2-35: As explained by traffic engineer, Mr. Smith, due to the DEIR's failure to provide accurate baseline conditions, impacts at this intersection are underestimated. Traffic impacts at this intersection will fall under traffic conditions designated by the City as "LOS E." By the City's own thresholds, this is a significant traffic impact. DEIR, p. 88-90. Mr. Smith further notes that his analysis of this one specific intersection is illustrative of the problem that infects the traffic analysis as a whole. He explains that, as a general matter, the DEIR's radical assumptions in favor of the project (assumptions minimizing the project's trip generation) result in a failure to disclose the full extent of the project's likely impacts. The DEIR must be revised to disclose and mitigate the significant traffic impact the Project will have on State Route 87 and Julian Street East.

Response to Comment D2-35: This comment claims that significant impacts would be found if the year 2000 counts were used versus the 2002 counts. This statement is not accurate. Year 2000 and 2002 count data at the intersection of SR 87 and Julian Street (E) were compared. The year 2002

count is higher than the 2000 count data. Therefore, using the 2000 count as the baseline would result in a better LOS than has been reported in the DEIR. See also Response to Comment D2-12.

Comment D2-36: Mr. Smith explains that the anticipated conversion of certain pairs of one-way streets in the downtown area to two-way streets is not addressed in the DEIR. This conversion carries the potential for significant traffic impacts in light of the proposed Project. The DEIR must be revised to disclose and mitigate all such impacts.

Response to Comment D2-36: The conversions of numerous existing one-way streets to two-way streets within the Downtown area were not included in the analysis because they are not funded projects. Even though the conversions are proposed, their accomplishment and the timing of their implementation is speculative.

Comment D2-37: The City's traffic study of the project, included as an appendix to the DEIR, shows that in both circulation alternatives for the Project, significant impacts would result, either in the form of inconsistency with the residential quality desired for the Project or in the form of unacceptable level of service conditions at two intersections. See DEIR, Appendix B.I, pages *viii*, 53 and 54. As explained by Mr. Smith in his attached comments, the traffic study supporting the DEIR finds that the project would have a significant traffic impact whichever way the circulation system internal to the site was configured. This fact must be disclosed in the text of the DEIR, along with proposed mitigation for such impacts.

Response to Comment D2-37: These are impacts that would occur under cumulative conditions. These impacts are described as significant on page 103 of the Draft EIR. As explained there, although there is no mitigation yet identified, at the time a specific development application is submitted, a traffic impact study would identify any current condition deficiencies that would need to be mitigated to meet level of service policies.

Comment D2-38: As Mr. Smith explains, the DEIR contains absolutely no analysis of the impacts of the Project's construction traffic or of the impacts of the Project's construction activity on normal traffic operations. Since the Project sits astride of significant traffic routes to and from the Downtown and includes realignment and reconstruction of a major Downtown-serving traffic route, the consequences of Project construction impacts on traffic could be significant. The DEIR must be revised to disclose and mitigate any significant impacts caused by construction-related traffic.

Response to Comment D2-38: The project site is located in an area of downtown San Jose that is underutilized. While it is true that the "S" curve of Julian Street cuts through the site for two blocks, most of the site's acreage is located north and west of this roadway. The multiple blocks composing the site that are located north and west of Julian Street would provide for large expanses of land on which construction activities could be staged and materials stored. Parking for construction-related vehicles and equipment could make use of these land areas. Furthermore, Bassett Street, Terraine Street, Devine Street and West Julian Street (west of San Pedro Street) would all allow some on-street parking of construction vehicles and equipment, as the traffic volumes on these streets are relatively low at present. It should also be noted that the City of San Jose has policies (addressing parking,

proposed lane closures, and off-hauling) that would ensure that no off-site construction period impacts would occur. Therefore no construction-period impacts related to traffic would occur.

Comment D2-39: The DEIR is devoid of analysis of the parking impacts of the Project. This is of particular concern in this case because the Project site functions as a parking reservoir for neighboring areas in the Downtown. In his attached comments, Mr. Smith finds that the Project will displace Downtown-supporting parking on the site and, in all likelihood, Project-related residential parking use will displace street parking in the downtown area. The DEIR provides no quantification of the existing parking use, no indication of how the displaced parking will be accommodated or what impacts the displaced parking will have elsewhere. A complete analysis of potential parking impacts must be performed in a revised DEIR circulated for public review and comment.

Response to Comment D2-39: Based on field observations, on-street parking within the project site is minimal, and it is generated by the existing uses on-site. There are two small parking lots within the project site. These parking lots also serve existing uses on-site that would be replaced with the proposed project. There is no evidence that existing parking lots within the project site serve the greater Downtown area. The proposed new development would provide sufficient parking to match the proposed project's anticipated parking demand. Thus, there would be no impacts to off-site parking lots or on-street parking.

Comment D2-40: As explained by air quality expert Schuyler Fishman in her attached comments, the DEIR concludes, with no analysis, that proposed mitigation measures would reduce demolition and construction-related air quality impacts to a less than significant level (DEIR, p. 111). However, it is impossible to conclude that site-specific impacts have been fully mitigated without performing an appropriate numerical analysis. Such an analysis would include estimating emissions in pounds per day and tons per year of each criteria pollutant using current emissions factors or appropriate modeling software and then comparing the emissions to the significance thresholds. If the significance thresholds have been exceeded, this would require imposing mitigation strategies, then estimating the controlled emissions, and comparing the controlled emissions to the significance thresholds. The DEIR comes to the conclusion that demolition and construction emissions are not significant if mitigation measure AQ-1 (DEIR, p. 110) is adopted, without performing any quantitative analysis.

In fact, according to Fishman's quantitative analysis, there are two sources of construction emissions, diesel exhaust from construction equipment and fugitive dust. Fishman's analyses demonstrate that emissions from both types of sources from the construction of this Project will result in highly significant air quality and public health impacts, after implementation of the mitigation proposed in the DEIR.

Construction of the Project would require up to about 9,202,337 cubic feet ("ft³") of earthmoving (DEIR, p. 41) for various surface-grading activities. The equipment used to move this amount of earth would emit substantial amounts of diesel PM10, as well as carbon monoxide ("CO"), nitrogen oxides ("NOx"), and reactive organic gases ("ROG"). These emissions would cause or contribute to violations of state and federal ambient air quality standards and result in significant public health impacts. The DEIR must be revised to disclose and mitigate the air quality impacts detailed below,

Response to Comment D2-40: As stated at the beginning of the air quality section of Chapter V of the Draft EIR, the analysis was prepared using the methodologies and assumptions recommended in the document entitled *BAAQMD CEQA Guidelines* published by the Bay Area Air Quality Management District (BAAQMD). Use of the guidelines is appropriate, as the project is located within the 9-county District. Appendix G of the *CEQA Guidelines* provide that "the significance criteria established by the applicable air quality management or air pollution control district may be relied upon to make"... determinations of significance.

The stated purpose of the *BAAQMD CEQA Guidelines* is to:

"...assist Lead Agencies, as well as consultants, project proponents and other interested parties in evaluating air quality impacts of projects and plans proposed in the San Francisco Bay Area. Specifically, these guidelines explain the procedures that the Bay Area Air Quality Management District recommends be followed during environmental review processes required by the California Environmental Quality Act (CEQA)." (Page 1)

The *BAAQMD CEQA Guideline* include the District's recommended thresholds of significance to be used in CEQA documents. These thresholds of significance were described on page 108 of the DEIR. With respect to construction emissions, the BAAQMD significance threshold is based on the appropriateness of construction dust controls rather than a mass-emission threshold in pounds per day. The guidelines further state that, with respect to construction emissions:

"...the District emphasizes implementation of effective and comprehensive control measures rather than detailed quantification of construction emissions. The District urges Lead Agencies to consider the size of the construction area and the nature of the activities that will occur, and require the implementation of all feasible control measures (indicated in Table 2.)"

Consistent with these guidelines and the BAAQMD significance threshold, the DEIR on pages 110-111 identifies appropriate and feasible control measures recommended by the BAAQMD and, consistent with the BAAQMD threshold of significance, concludes that construction period impacts would be reduced to a less-than-significant level. This analysis and suggested mitigation measures focused on PM₁₀ due to its potential for local air quality effects and potential for nuisance.

Construction emissions of other pollutants such as CO and ozone precursors (ROG and NOx) are not considered to represent new emissions. The *BAAQMD CEQA Guidelines* (page 12) state:

"Construction equipment emits carbon monoxide and ozone precursors. However, these emissions are included in the emission inventory that is the basis for regional air quality plans, and are not expected to impede attainment or maintenance of ozone and carbon monoxide standards in the Bay Area."

The BAAQMD has not recommended mass-emissions thresholds of significance applicable to construction activities. The *BAAQMD CEQA Guidelines* suggest that if a Lead Agency wants to quantify construction emissions they may, but the guidelines provide no mass-emission thresholds of significance for construction. The guidelines identify mitigation measures for construction equipment exhaust (Page 53), but these are not identified as needed to reduce a significant impact, but are recom-

mended for consideration by "Lead Agencies seeking to reduce emissions from construction equipment."

The comment refers to an analysis of construction emissions performed by Schuyler Fishman. This analysis suggests that construction emissions would be significant based on the BAAQMD threshold for operational vehicular emissions, which is not a construction significance threshold. This analysis also cites construction period thresholds of the South Coast Air Quality Management District and out-of-date thresholds for the Sacramento Metropolitan Air Quality Management District.⁴

None of the above thresholds are an appropriate means of determining the significance of construction impacts for projects in the Bay Area. The BAAQMD operational impacts thresholds represent permanent emissions specifically from motor vehicle use. The construction thresholds for the South Coast AQMD and Sacramento AQMD are of no relevance. Each air district establishes air quality impact thresholds of significance that they deem appropriate within their jurisdiction, and there is considerable variation among the thresholds of each district since they reflect varying natural conditions, air quality problems, and attainment status.

The Fishman report contains two estimates of construction emissions. The first is based on gross amounts of soil to be excavated. A second analysis utilizes the URBEMIS-2002 program to analyze construction emissions. The URBEMIS-2002 program contains information specific to the air basin where a project is located. If the project is located in the San Francisco Bay Area URBEMIS-2002 will set various parameters to reflect not only the vehicle mix, temperature and other factors appropriate for that region but the source categories specified by the respective air district. The regulatory defaults for the URBEMIS-2002 program result in quantification of only operational mobile-source emissions. In order for URBEMIS-2002 to calculate construction emissions the default settings for the program would have had to be overridden.

The commenter cites *Kings County Farm Bureau v. City of Hanford (1990)*. In that case the court said that the EIR improperly concluded the project's contribution to ozone levels in the area would be immeasurable and, therefore, insignificant because the project would emit relatively minor amounts of ozone precursors compared to the total volume of ozone precursors emitted in Kings County. The commenter further cites *Communities for a Better Environment v. California Resources Agency (2002)*, a case that challenged revisions to the CEQA Guidelines adopted by the Resources Agency in 1998. Neither *Kings County Farm Bureau v. City of Hanford (1990)* nor *Communities for a Better Environment v. California Resources Agency (2002)* (which is purported to reaffirm the first case) are relevant to the air quality analysis presented in the DEIR. The DEIR does not argue that air quality impacts would be less than significant because they are relatively small compared to pre-existing conditions – the issue presented in the two cited cases. What is more relevant is that *Communities for a Better Environment v. California Resources Agency (2002)* upheld the validity of Guidelines section 15064.7 on the use of thresholds of significance. Section 15064.7 provides:

"Each public agency is encouraged to develop and publish thresholds of significance that the agency uses in the determination of the significance of environmental effects. A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular

⁴ On March 28, 2002 the SMAQMD revised its significance criteria. The mass-emission thresholds for ROG and PM₁₀ eliminated, but the NO_x threshold of 85 pounds per day was retained.

environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant.”

The DEIR appropriately addresses construction emissions and impacts using the published thresholds of significance of the appropriate public agency. The project, according to BAAQMD thresholds of significance, would not have a significant impact on ozone, as construction ozone precursor emissions are included in the emission inventory that is the basis for regional air quality plans and, according to the *BAAQMD CEQA Guidelines*, are not expected to impede attainment or maintenance of ozone standards in the Bay Area. Since construction emissions of ozone precursors would not have a significant impact, no mitigation measures for these emissions are required.

Comment D2-41: Fishman’s review of estimated emissions of NOx from construction equipment used for grading activities shows that those emissions are significant under the thresholds provided by the Bay Area Air Quality Management District (80 lbs/day), by the Sacramento Metropolitan Air Quality Management District (85 lbs/day) and by the South Coast Air Quality Management District for construction (100 lbs/day). See Fishman comments, attached at Tables I.2.A and I.2.B 3.3-3. These significant air quality impacts due to NOx from construction equipment must be disclosed and mitigated in a revised DEIR that is circulated for public review.

Table 1-3 of Fishman’s attached comments shows PM10, ROG, NOx, and CO emissions from all phases of construction exceed the BAAQMD threshold of 80 lbs/day. Project emissions exceed both the SMAQMD significance thresholds for NOx and ROG (85 lbs/day) and SCAQMD construction emission significance thresholds of 75 lbs/day for ROG, 100 lbs/day for NOx, and 550 lbs/day for CO. Aside from failing to provide any quantitative analysis of construction-related emissions, the DEIR’s general reference to compliance with the BAAQMD CEQA Guidelines (see Attachment 6) does not reduce these impacts to less than significant. These air quality impacts must be disclosed and mitigated in a revised DEIR circulated for public review and comment.

It should be noted that NOx and ROG are ozone precursors. They combine in the presence of heat to form ozone, the primary component of smog. Because the Bay Area is out of attainment of federal ozone standards, any potential increase in a nonattainment pollutant must be evaluated for significance in an EIR. As explained by the 5th District Court of Appeals:

“The significance of an activity depends on the setting. (Guidelines, §15064, subd.(b).) *The relevant question* to be addressed in the EIR is not the relative amount of precursors emitted by the project when compared with preexisting emissions, but whether *any* additional amount of precursor emissions should be considered significant in light of the serious nature of the ozone problems in [the] air basin.” *Kings County Farm Bureau v. City of Hanford*, (1990) 221 Cal.App.3d 692, 718.

This *Kings County* analysis was recently reaffirmed in the cumulative impacts discussion in *Communities for a Better Environment v. California Resources Agency*, (2002) 103 Cal.App.4th 98, 116. Here, in violation of CEQA, the DEIR fails to discuss the potential impact of the Project’s addition of ozone to the environment due to increased NOx emissions from construction, which, as Fishman explained in her attached comments, is significant. Increased ozone levels are deleterious to public

health. EPA summarized the effects of ozone on public health: "A large body of evidence shows that ozone can cause harmful respiratory effects, including chest pain, coughing and shortness of breath, which affect people with compromised respiratory systems most severely. When inhaled, ozone can cause acute respiratory problems; aggravate asthma; cause significant temporary decreases in lung function of 15 to over 20 percent in some healthy adults; cause inflammation of lung tissue, produce changes in lung tissue and structure; may increase hospital admissions and emergency room visits; and impair the body's immune system defenses, making people more susceptible to respiratory illnesses." (66 Fed. Reg. 5002, 5012 (Jan. 18, 2001).)

Moreover, ozone is not an equal opportunity pollutant, striking hardest the most vulnerable segments of our population: children, the elderly, and people with respiratory ailments. (*Id.*) Children are at greater risk because their lung capacity is still developing, because they spend significantly more time outdoors than adults – especially in the summertime when ozone levels are the highest, and because they are generally engaged in relatively intense physical activity that causes them to breathe more ozone pollution. (*Id.*) Given the public health concerns associated with ozone coupled with Fishman's finding of significant impact on air quality due to NOx and ROG emissions, the DEIR must be revised to address and mitigate this impact. As explained by Fishman, there are many feasible mitigation measures currently available to offset ozone increases caused by the Project.

Response to Comment D2-41: See Response to Comment D2-40. The *BAAQMD CEQA Guidelines* do not require a quantitative analysis of construction emissions. The analysis by Ms. Fishman estimates construction emissions and compares them to inappropriate and irrelevant thresholds of significance. The BAAQMD significance threshold of 80 pounds per day is not a construction mass-emission threshold, it is an operational mobile-source (automobile) emissions threshold. The BAAQMD has not established nor does it recommend any mass-emission thresholds for construction. Mass-emission thresholds recommended by the Sacramento Metropolitan AQMD, South Coast AQMD or any other AQMD or APCD are irrelevant to the present case because they are not targeted at this specific geographic area.

Comment D2-42: During construction, the large volume of construction traffic may impact local intersections and worsen traffic conditions. This could increase traffic congestion and vehicle emissions from increased idle times, which will also contribute to construction emissions. The DEIR does not quantify or mitigate the impacts from these sources. A traffic analysis should evaluate traffic impacts from construction traffic and propose proper mitigation if necessary.

Response to Comment D2-42: Please see Responses to Comments B4-1 and D2-38 regarding potential construction period traffic impacts. Those responses explain why the potential effects would be small and how incorporating the City's standard conditions into the project would preclude construction-period impacts.

The BAAQMD CEQA Guidelines do not require a quantitative analysis of construction emissions. Even if the BAAQMD recommended a quantitative analysis in their CEQA Guidelines, construction-related vehicle delay would be a very minor source of emissions whose quantification would be highly speculative. The URBEMIS-2002 emissions program, which has an extensive construction module, does not identify construction-related delay on roads and streets as an emission source.

Comment D2-43: The DEIR reports that 9,202,337 ft³ of soil (p. 41) would be disturbed. This earthmoving requires the use of diesel equipment such as dozers, loaders, graders, and compactors, which all emit diesel exhaust. For the purposes of this analysis, Fishman assumed that construction would take place over 3 years, and grading would take place within the first 3 months as is typical for such projects. For the purposes of comparison, she also calculated emissions assuming a yearlong grading period.

Based on Fishman's air quality modeling for PM 2.5 pollution from construction exhaust and fugitive emissions, those emissions carry the potential for a significant impact despite the proposed mitigations in the DEIR. As Fishman explains, Project emissions from all phases of construction will violate both the state and federal 24-hour and annual standard. This is a significant impact (CEQA Guidelines, Appendix G; BAAQMD CEQA Guidelines, p. 12, (see Attachment 6)) that is not discussed in the DEIR. These new impacts must be fully analyzed and mitigated in a subsequent DEIR for the Project.

Response to Comment D2-43: Suspended particulate matter (PM) is a complex mixture of tiny particles that consists of dry solid fragments, solid cores with liquid coatings, and small droplets of liquid. These particles vary greatly in shape, size and chemical composition, and can be made up of many different materials such as metals, soot, soil, and dust. "Inhalable" PM consists of particles less than 10 microns in diameter, and is defined as "suspended particulate matter" or "PM₁₀". Fine particles are less than 2.5 microns in diameter (PM_{2.5}). PM_{2.5}, by definition, is included in PM₁₀.

The referenced study by Ms. Fishman reports results from two modeling efforts: one for diesel particulate and one for PM₁₀. Only the SCREEN-3 model output for the diesel particulate was attached. The modeling effort purports to show that construction dust will cause overwhelming violations of the 24-hour and annual standards for PM₁₀. Although not modeled, a similar claim is made for PM_{2.5}. This analysis by Ms. Fishman contains multiple errors and inappropriate assumptions:

- The conclusion that a significant impact would occur is based on the SCREEN-3 results. As a screening procedure, the SCREEN-3 model cannot, by definition, determine that an impact is significant, only that it is not significant. Screening models are simplified, very conservative procedures whose purpose is to "eliminate from further analysis those sources that clearly will not cause or contribute to ambient concentrations in excess of short-term air quality standards or allowable increments."⁵ If one wanted to produce reasonable estimates of concentration from an area source, another model (the ISCST-3 model) would be an appropriate choice, run on one or more years of actual weather data. The BAAQMD has available multiple years of weather data for several locations in San Jose. The claim in the Fishman report that weather data is not currently available is inaccurate.
- The modeling considered the emission as occurring within a 3-acre parcel while the project site exceeds 12 acres. Construction emissions from all 12 acres were assumed to occur within this limited space, an inaccuracy that clearly will artificially elevate the resulting estimates of concentration.
- The modeling was based on the output of the URBEMIS-2002 program. The URBEMIS-2002 calculates and reports the maximum daily emissions from the sum of a number of discrete sources

⁵ U.S. Environmental Protection Agency, Screening Procedures for Estimating the Air Quality Impact of Stationary Sources, Revised, October 1992, EPA-454/R-92-019.

based on an assumed phasing of construction activities. The maximum reported is the highest value for the year, and may only occur for a short time. Using the URBEMIS-2002 output as input to the model is the same as assuming that the maximum calculated emissions occur 365 days in the year. This results in a gross overestimation of emissions.

- The modeling used the URBEMIS-2002 program PM₁₀ output without accounting for emissions that occur away from the site. URBEMIS-2002 calculates emissions both on and off-site. Off-site emissions include those from truck traffic and worker commute trips. The inclusion of these substantial off-site emissions in the model emission factor is an inaccuracy that further overestimates emissions.
- Without explanation or justification, the modeling guidance of the Santa Barbara County Air Pollution Control District was used, and the 1987 version of the document cited was not the latest version, the latest version being published in 1996.⁶ The Santa Barbara APCD document, is irrelevant given that the BAAQMD has its own modeling guidance document that is specific to conditions within its boundaries.

For all the above reasons, the Fishman report cannot be used to support the claim that PM₁₀ or PM_{2.5} emissions would remain significant after mitigation, nor would more accurate estimates of concentrations be useful, since the BAAQMD threshold of significance is qualitative. The DEIR concluded that the project's construction impacts would be potentially significant but would be mitigated to a less-than-significant level based on the BAAQMD's construction particulate threshold of significance.

Comment D2-44: Given the information about the harmful effects of diesel exhaust on public health, a new draft EIR would be required to assess health impacts from construction emissions. In this case, however, the DEIR does not conduct this public health impact analysis. Nor does the DEIR address any mitigation measures to reduce what is most likely a significant public health risk. In light of the undisputed potential adverse health effects that can result from PM_{2.5} emissions, the DEIR should have evaluated the potential impacts of PM_{2.5}. (See *In the Matter of Uprose v. Power Authority of State of New York*, 2001 NY App. Div. (Sup. Ct. of NY, A.D., 2nd Dept. July 23, 2001), holding that the state had to perform an EIR because of the undisputed potential of adverse health effects from PM_{2.5}.)

Response to Comment D2-44: Please see Response to Comment D2-43. For the reasons cited therein, the City of San Jose respectfully disagrees with the assertion that a new Draft EIR is necessary.

Comment D2-45: Based on basic screen level modeling provided below as well as comparison with other projects of the same size in Contra Costa County, Fishman's expert opinion is that these emissions will pose a significant health risk from diesel emissions. Fishman found the excess cancer risk from the Project to be 10 in a million 2,325 meters (1.44 miles) from the Project site. Although the DEIR acknowledges the presence of sensitive receptors near the Project site (east of Market Street),

⁶ Santa Barbara County Air Pollution Control District, Modeling Guidelines for Air Quality Impact, June 1996.

the DEIR does not reveal the exact distance of these sensitive receptors. This basic public health information must be revealed in a revised DEIR.

Thus, diesel emissions from Project construction would result in a significant cancer risk to a number of individuals in the surrounding region. The DEIR made no attempt to evaluate the significant public health impacts of diesel exhaust, a potent carcinogen. As such, the DEIR must be revised to include a discussion of the public health impacts from exposure to diesel exhaust. Those impacts, especially to surrounding sensitive receptors identified in the DEIR, must be mitigated and the DEIR recirculated for public review.

Response to Comment D2-45: The analysis of cancer risk cited in the comment and undertaken by Ms. Fishman uses the SCREEN-3 program. See Response D2-43 regarding the inappropriateness of using this model for such analyses and the erroneous assumptions on which the analysis was based. With regard to the Fishman analysis of cancer risks, the following observations are made:

- The SCREEN-3 emission input is the URBEMIS-2002 output for exhaust PM₁₀. Aside from the inappropriateness of using the unmodified URBEMIS-2002 output as an input to a modeling effort (See Response D2-43), the URBEMIS-2002 output includes exhaust particulate that neither derives from diesel engines (worker auto trips and gasoline powered equipment) and nor would occur on the site (worker trips, on-road truck trips). Perhaps most importantly, the URBEMIS-2002 model run is described as including 600,000 square feet of office space, something that is not part of the project description. Because the Fishman report only includes the URBEMIS-2002 summary report, it is not possible to determine how much error in the project description inputs exaggerates on-site emissions. It can be calculated, however, that the SCREEN-3 assumed emission rate of 1.05 gram/second is equal to about 200 pounds per day. Emissions of that magnitude would be equivalent to the emissions from 363 excavators, 312 graders or 689 tractors/loaders/backhoes, an error of one or two orders of magnitude.⁷
- The risk assessment fails to account for the temporary, finite nature of the emission. The risk calculation is based on a unit risk factor (URF) based on a 70-year exposure. Risks should be adjusted downward to reflect the actual length of exposure, or else the source is defined to be *permanent* rather than *temporary*.
- By using the unadjusted EMFAC-20002 output, the analysis failed to account for the fact that construction operations do not operate 7 days per week.
- The risk assessment in the Fishman report calculates the risk associated with operation of 300-600 diesel vehicles operating 365 days per year continuously for 70 years on a 3-acre site. Not surprisingly, the reported calculated is very high (4,200 in one million maximum), but this is a gross exaggeration of risk, as demonstrated in the following paragraph.
- With a more reasonable estimate of on-site emissions, the SCREEN-3 modeling conducted by Ms. Fishman could provide very rough risk estimates so long as one understands the limitations of the SCREEN-3 model. Under the assumption that the peak of on-site emissions would occur during excavation, that at any given time the excavation operation would affect a 3-acre site, and might involve the following number and types of equipment during the peak period:

10 excavators

⁷ Based on year 2003 emission factors from Appendix H of the URBEMIS-2002 User's Guide.

10 graders
10 tractors, loaders or backhoes

the annual-average daily on-site emission of diesel particulate can be estimated at 8.96 pounds per day or 0.047 grams per second.⁸ If it is further assumed that this peak emission would occur for a period of 1 year, the resulting risk estimate is 2.69 per million, calculated as follows:

$$(0.047\text{grams/sec}/1.05\text{ grams/sec}) \times (1/70) \times 4,200\text{ per million} = 2.69\text{ per million}$$

where the 1.05 grams per second is the SCREEN-3 emission input and 4,200 is the maximum calculated risk in the Fishman report. Because SCREEN-3 is a screening model, actual risk would be substantially below this level.

Comment D2-46: The BAAQMD's significance threshold for PM10 is 80 lbs/day. In her attached analysis, Fishman only considered site preparation emissions. Assuming a typical 10-hour workday, Fishman estimates uncontrolled fugitive dust emissions at 509 lbs/day, which substantially exceeds the BAAQMD PM10 significance threshold of 80 lbs/day. This level of emissions also exceeds construction-specific PM10 emission thresholds of other air districts, 150 to 275 lbs/day (SMAQMD 94; SCAQMD 4/93). Thus, uncontrolled fugitive dust emissions are a significant impact that must be disclosed and mitigated in a revised DEIR circulated for public review and comment.

Response to Comment D2-46: See Response to Comment D2-41.

Comment D2-47: According to Fishman, even with the mitigation provided in the DEIR, PM10 emissions from Project construction, at an estimated 105 lbs per day, remain significant. In light of Fishman's substantial evidence that PM10 emissions from construction will be significant even after mitigation, the DEIR must be revised to fully and accurately disclose PM10 emissions caused by construction of the Project. The DEIR must further mitigate those excess emissions to a level of insignificance.

Response to Comment D2-47: See Response to Comment D2-41.

Comment D2-48: The DEIR fails to acknowledge or even discuss other operational area source emissions, including: landscape maintenance; parking lot sweeping; garbage and trash pickup; outgassing of ROG used in coatings and sealants throughout the buildings; outgassing of ROG from periodic maintenance of building coatings and sealants; ROG emissions from cleaning fluids used for maintenance; and emissions from any emergency diesel generators. As Fishman demonstrates, this project will generate 99 tons/year of ROG from area emissions sources. This exceeds the BAAQMD significance threshold of 80 lbs/day. This significant impact must be disclosed and mitigated in a revised DEIR.

⁸ Emission rates for these types of equipment, in 2003, were taken from Appendix H of the URBEMIS-2002 User's Guide.

Response to Comment D2-48: The Draft EIR has been revised on page 111, as part of the discussion of Impact AQ-2, to include the following additional paragraph:

For indirect sources (facilities that attract or generate vehicle trips) motor vehicles traveling to or from the project represent the primary source of air pollutant emissions from project operation. The project would also be an area source of emissions, primarily from the combustion of natural gas for space and water heating from water heaters, and consumer products. Since the threshold of significance contained in the BAAQMD CEQA Guidelines for project operational regional impacts is based on indirect mobile sources, area sources are not included in Table IV.C-4.

The Fishman report cited contains the summary report of emissions from an URBEMIS-2002 model run but no input information that would allow evaluation of the reasonableness of the assumptions. It is clear that the model inputs used by Fishman include 600,000 square feet of office space (p. 29), whereas the project includes no office space. The erroneous addition of 600,000 square feet of office space not included in the project, of course, greatly exaggerates the resulting emissions estimates.

The use of the URBEMIS-2002 program for this purpose would require overriding the air district setting inherent in the model. Whatever the value of *area source* emissions, it cannot be compared to the BAAQMD threshold of 80 pounds per day, which is the mass-emission threshold for *mobile source* emissions.

Comment D2-49: Based on Fishman's expert analysis, the largest source of area emissions associated with this development would be smoke from wood-burning fireplaces and wood stoves. Wood smoke constitutes a major source of urban air pollution in winter months. The BAAQMD is presently urging the public to help reduce nighttime air pollution by cutting back the use of wood-burning fireplaces. In addition to toxic air contaminants, wood smoke contains large amounts of carbon monoxide, nitrogen dioxide, volatile organic compounds and inhalable particulate matter, pollutants regulated by state and federal regulations because of their known adverse health effects. Potentially significant air quality impacts from these sources should be disclosed and mitigated in the next draft of the DEIR.

Response to Comment D2-49: The proposed project would be subject to the City of San Jose Municipal Code, Chapter 9.10, §9.10.820 and Chapter 9.11, §9.11.010 et seq., which limit wood burning appliances to U.S. EPA certified wood heaters or pellet-fueled fireplaces meeting a certain air-to-fuel ratio. If the project is designed and constructed to include wood burning appliances, they must be of these specified types. The City has determined that implementation of this regulation will significantly reduce the increase in particulate emissions from future growth in the City.

Comment D2-50: Although the DEIR claims that all feasible measure have been included in the project, and this impact is significant and unavoidable, Fishman finds that many additional feasible mitigation measures, as described below, could be imposed in the DEIR.

Response to Comment D2-50: See Response to Comment D2-48 regarding ROG. See also Response to Comment D2-66 and D2-67.

Comment D2-51: The DEIR for the Project does not discuss the heat island effect. As explained by Fishman in her attached comments, the heat island effect indirectly increases ozone (the primary component of smog) by replacing open space with blacktop, such as parking lots. Blacktop increases heat levels in the area. Heat facilitates the reaction between the compounds that create ozone (ozone precursors). In areas with high levels of ozone precursors, heat increases the formation of ozone and regional smog. Fishman found that due to the heat island effect, the Project will have a significant adverse impact on air quality.

The DEIR must analyze the significance of the heat island effect on local air quality because the Bay Area has been identified as a non-attainment area for ozone (1-hour standard). As discussed above, any potential increase in a nonattainment pollutant must be evaluated for significance in an EIR. *Kings County Farm Bureau v. City of Hanford*, (1990) 221 Cal.App.3d 692, 718. A new EIR must be prepared to discuss this air quality impact and to mitigate that impact.

Response to Comment D2-51: As described in Chapter V, section A. Land Use, pages 59-60, and illustrated in the photographs that follow (pp. 61-65), the site is located in a part of San Jose that is almost completely developed as streets, sidewalks, parking lots, or buildings. A very small proportion of the existing site acreage is covered by unpaved dirt or a weedy landscape. While the proposed project would involve the removal of some mature trees that are currently located with the site boundaries, it does not propose an increase in buildings or pavement at the expense of open space or landscaped areas. Mitigation measure VEG-1 requires the replanting of ordinance-sized trees at a ratio of 4:1. The project would therefore have no measurable heat-island effect and no related impact on ozone formation.

Comment D2-52: The DEIR admits that the General Plan creates an obligation of 12.02 acres of parkland. DEIR, p. 191. The DEIR also admits that the project offers only 0.86 acres of parkland. *Id.* The DEIR does not, however, identify this shortfall of parkland as an inconsistency with the San Jose General Plan, nor does it find this shortfall to be a significant impact, as discussed above. Failure to ensure adequate parkland to support the Project violates the City's legal obligation to make land use decisions that are consistent with the General Plan. Gov. Code § 65860(a).

Furthermore, because the General Plan's parkland requirement is rooted in mitigating the environmental effects of developments, this inconsistency is a significant impact under CEQA. *C.L.P.A., Inc. v. City of Los Angeles*, No. B161510 (June 10, 2003) (unpublished opinion).

Response to Comment D2-52: See Response to Comment D2-30.

Comment D2-53: The DEIR's analysis of Library space is undeveloped. Specifically, the DEIR states that the City's General Plan sets a goal of 10,000 square feet of library space per 36,000 residents, 18.3 weekly service hours per 10,000 residents and an annual acquisition rate of one volume per six residents. DEIR, p. 190. Rather than provide a quantitative analysis of the amount of library

space per 10,000 residents under the Project's full build-out scenario, the DEIR merely states that a "representative of the libraries has said that the branch library system is currently inadequate to serve current needs due to recent population growth." DEIR, p. 190. The obvious conclusion is the Project will only exacerbate an already inadequate library system as measured by General Plan criteria. Yet, again the DEIR fails to identify the shortage of library space as an inconsistency with the General Plan, or as a significant impact under CEQA. These defects must be corrected in the DEIR and mitigation proposed.

Response to Comment D2-53: See Response to Comment D2-31.

Comment D2-54: The CEQA Guidelines direct that "[t]he EIR shall discuss any inconsistencies between the proposed project and applicable general plans and regional plans." (CEQA Guidelines § 15125(d) (emphasis added).) An "applicable" plan is a plan that has been adopted and thus legally applies to a project. (*Chaparral Greens v. City of Chula Vista* (1996) 50 Cal. 4th 1134, 1145, note 7 [58 Cal. Rptr.2d 152, 158- 59].) Nevertheless, the DEIR fails to discuss inconsistencies between the Brandenburg Project and the Revised 2001 Clean Air Plan, the applicable Plan for the region.

For example, this Revised Clean Air Plan assumes the use of certain controls on construction equipment to reduce ozone precursors, including the use of new, low-emission engines in construction equipment, low-emission pick-up trucks, and the use of natural gas and LPG in off-road equipment. Yet, the DEIR does not identify these controls as mitigation measures. In fact, the DEIR does not identify any mitigation for ozone precursor emissions.

Rather than discuss the Revised 2001 Clean Air Plan, the DEIR discusses consistency with the 1982 Bay Area Air Quality Plan and the 2000 Clean Air Plan. Putting aside the fact that no "2000 Clean Air Plan" appears to exist for the Bay Area, neither of these air quality plans articulates the most recent expression of air quality planning for the region. As a result, the DEIR fails to disclose to decision makers and the public the many ways in which the Project will not meet and, in fact, may impede the region's long-term air quality planning goals. The DEIR should be modified to discuss the Project's inconsistency with the applicable CAP before it is re-circulated for public review and comment.

Response to Comment D2-54: *BAAQMD CEQA Guidelines*, page 18, provide that, in the case of projects that do not have a significant operational impact, the determination of significant cumulative impact should be based on an evaluation of the consistency of the project with the local general plan and consistency of the general plan with the regional air quality plan. This provision does not apply to the proposed project, which would have a significant impact individually (Impact AQ-2, page 111) and cumulatively (page 221).

The comment is also incorrect in suggesting "that no '2000 Clean Air Plan' appears to exist for the Bay Area..." and that a "Revised 2001 Clean Air Plan" should be used. The 2000 CAP can be viewed at <http://www.baaqmd.gov/pln/Plans/2kfincap.pdf>. No "Revised 2001 CAP" exists.

Comment D2-55: Where several mitigation measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. (*Id.* at §

15126.4(a)(1)(B).) A lead agency may not make the required CEQA findings unless the administrative record clearly shows that all uncertainties regarding the mitigation of significant environmental impacts have been resolved.

Response to Comment D2-55: This comment, which is introductory to the more detailed comments that follow it, is noted. However, its broad nature doesn't apply to any specific alleged inadequacy of the Draft EIR. Therefore no further response is necessary. Please see the numerous Responses to Comments which follow, many of which relate to specific mitigation measures.

Comment D2-56: In particular, CEQA requires the lead agency to adopt feasible mitigation measures that will substantially lessen or avoid the Project's potentially significant environmental impacts (Pub. Res. Code §§ 21002, 21081(a)) and describe those mitigation measures in the DEIR. (Pub. Res. Code § 21100(b)(3); CEQA Guidelines § 15126.4.)

Response to Comment D2-56: As shown in Chapter II, Summary, of the Draft EIR (pp. 9-30), approximately 36 mitigation measures are recommended to address significant adverse impacts of the proposed project. Each of these recommended mitigation measures is described in the context of the setting and impacts for its associated environmental topic in Chapter V, Setting, Impacts and Mitigation Measures. In addition, the Mitigation Monitoring and Reporting Program for these measures is published as part of this First Amendment to the Draft EIR as Chapter V.

Comment D2-57: Here, the DEIR lacks effective mitigation for the following categories of impacts: traffic impacts, public health impacts from hazardous materials, and air quality-related impacts. Additional mitigation measures must be included in a revised DEIR recirculated for public review.

Response to Comment D2-57: This comment introduces three major points raised in regard to the adequacy of mitigation measures presented in the Draft EIR. (The more detailed claims presented in comments that follow address more than just these three topics, however.) As such, it requires no further response, other than to reiterate that the City disagrees with the comment's suggestion that the Draft EIR requires revising and recirculation in order to fix the alleged shortcomings. Please see Responses to Comments D2-58 through D2-68.

Comment D2-58: Here, the DEIR finds significant traffic impacts at the intersections of Coleman Avenue with Hedding Street and Coleman Avenue with Taylor Street due to the Project. As mitigation, the DEIR states that Coleman Avenue would require widening to six lanes for several blocks. Then, the DEIR avoids implementation of this mitigation measure by claiming that such mitigation would be beyond the Project's financial capacity. This infeasibility finding is directly refuted by the DEIR's underlying traffic study, which anticipates the widening of Coleman Avenue with or without the Project. DEIR (Appendix B.1) includes the following additional observation on page 41. "*The City is in the process of developing a new Downtown Plan and EIR. Transportation improvements in the plan are likely to include widening Coleman Avenue.*" (Emphasis added.) Either these contradictory findings must be resolved or the widening of Coleman Avenue must be listed as a feasible mitigation measure in a revised DEIR circulated for public review and comment.

Response to Comment D2-58: The cost for widening Coleman Avenue to six lanes is at least \$20 million, which is well beyond the financial capability of this project. In addition, this project must bear the cost of realigning Julian Street, which reduces the project's ability to support other transportation improvements. Finally, the widening of Coleman Avenue cannot be assumed for the purpose of claiming it is mitigation because it is not a presently funded project.

Comment D2-59: Next, according to Mr. Smith in his attached comments, this analytical sequence is fundamentally flawed. Smith's analysis finds that the Project's significant impacts to the intersections of Coleman with Taylor and with Hedding could be mitigated by lane additions just on the approaches to each intersection without widening the whole length of Coleman to six lanes. Smith further finds that the costs of such roadway improvement would comprise only a small portion of the Project's fair share contribution to the City. As such, the DEIR's conclusion of infeasibility is without merit. The DEIR must be revised to require the alternative feasible mitigation measure offered by Mr. Smith in his attached comments.

Response to Comment D2-59: See Response to Comment D2-58. In addition, the City does not support spot improvements at the Coleman Avenue intersections because they would be overlapped and/or replaced when the full widening project was undertaken. It is not possible to make the spot improvements in such a way that they would be reusable for the widening project. The inconvenience, cost, and coordination necessary for such a temporary improvement could conflict with a full resolution of the impacts which would be the widening of Coleman Avenue to six lanes.

Comment D2-60: The DEIR admits that a number of parcels of land on the Project site are currently contaminated. DEIR, p. 22-23. Although the listed mitigation for the contaminated sites includes certification of completion of the remedial action required by the Regional Water Quality Control Board, the DEIR admits that for at least one parcel of land (below Basset Street), full remediation was not achieved because of alleged inaccessibility of approximately seven cubic yards of contaminated soil. Because partial compliance with the remedial action plan is of unknown efficacy, mitigation measure HazMat-2b is inadequate under CEQA.

Response to Comment D2-60: Please refer to Response to Comment D2-14.

Comment D2-61: Mitigation Measure HAZMAT-1b only requires a "subsurface investigation" prior to issuance of a grading, demolition, or building permit at properties where Phase I activities have identified a potential hazardous materials issue that has not yet been evaluated in a Phase II investigation. As explained above, the results of this investigation must be disclosed as part of the EIR's impact analysis. Disclosure of impacts is not a mitigation measure. Further, reference to a "subsurface investigation" is inadequate without specifying the scope of such investigation. Most critical is the assessment of human health risk using accepted protocol under Superfund and RCRA regulation. Because the outcome of this measure is unknown, it similarly fails CEQA's test of efficacy and, as explained below, represents an illegal deferral of mitigation.

Response to Comment D2-61: The potential hazardous materials issues at these parcels were identified during Phase I investigations of these parcels. Mitigation measure HAZMAT-1b specifies that the subsurface investigation should be completed by a qualified environmental professional in accord-

ance with the recommendations in the 2001 Brown and Caldwell summary report for the project, which is included in Appendix F of the DEIR, and that the results of this investigation may lead to remediation in accordance with regulatory agency requirements. This is an appropriate mitigation measure and will ensure that remediation will occur in accordance with the requirements of the regulatory agency.

Comment D2-62: The DEIR admits that seismic hazards and potential damage to structures or property due to earthshaking hazards are significant impacts. DEIR, p. 18-19. As mitigation for these impacts, the DEIR proposes a "design-level geotechnical investigation" to determine whether the proposed development "fully complies with the California Building Code" and whether "unacceptable settlements may occur." DEIR, p. 18-19. First, because no specific mitigation is offered, this proposal is of uncertain efficacy and noncompliant with CEQA. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727. The public has no assurance that an "investigation" will result in actual mitigation. And, more importantly, the public is removed from the process of determining whether the eventual mitigation, if any, is adequate. The proposed mitigation must be revised to offer a remedy for the impact, not simply provide further evaluation of the impact. As explained below, this measure constitutes illegal deferral of mitigation.

Second, the proposed mitigation has no specific criteria by which to measure its performance. When the agency is unable to provide a specific mitigation measure, CEQA requires the articulation of performance criteria at the time of project approval. *Sacramento Old City Association v. City Council of Sacramento* (1991) 229 Cal.App.3d 1011, 1028-1029. The proposed mitigation must be revised to offer greater specificity or be accompanied by specific performance criteria.

Finally, as Mr. Hagemann and Dr. Hindery discuss in their attached comments, there are feasible mitigation measures not identified or addressed in the DEIR. Specifically, these hazardous materials experts cite to construction codes developed by the International Code Council (<http://www.iccsafe.org>) as necessary to ensure that the project minimizes vulnerability to ground shaking. The DEIR must be revised to include compliance with applicable International Code Council construction codes to minimize the potential for structural damage caused by groundshaking.

Response to Comment D2-62: The preparers of the DEIR disagree with the commentor that no performance standards are specified in the mitigation measures for geologic hazards. The primary performance standard for all residential and commercial construction within the City is the Uniform Building Code (UBC). The UBC is a widely accepted standard for development. In addition, the mitigation measures included in the DEIR require that design-level geotechnical investigations be conducted for the project site and that the recommendations included in the geotechnical reports be followed. This latter requirement mandates the participation and oversight of the site investigation and building design by State-licensed professional geologists and engineers.

The process of site-specific geotechnical evaluation, foundation and structure design, and adherence to UBC is not a new approach to the evaluation and mitigation of potential geologic hazards. This process has been used by nearly every major project in every city in the Bay Area for over 20 years. It would be speculative and inappropriate for the DEIR to require specific mitigation for a project during the preliminary design phase before site specific geotechnical work has been completed and final building designs have been determined.

Comment D2-63: The DEIR finds that stormwater runoff from the Project site could have a significant impact on the water quality in the Guadalupe River and the Bay. DEIR, p.25. The DEIR mentions possible use of landscape-based biofilters and swales to reduce stormwater impacts; however, specific placement and designs for these mitigation measures should be included in a revised DEIR. The DEIR mentions "The final design team for the project should review *Start at the Source, Design Guidance Manual for Stormwater Quality Protection*." (p. 202.) However, requiring the design team to merely review this manual is insufficient. The revised DEIR should explicitly require the team to implement measures described in this manual. Due to the ambiguous nature of this measure and the questionable efficacy resulting from that ambiguity, this mitigation measure fails CEQA's adequacy requirements. Also, as explained below, the measure represents an illegal deferral of mitigation. The DEIR must be revised to provide the public with a specific, feasible, and effective measure to mitigate the significant water quality impacts associated with construction and operation of the Project.

Response to Comment D2-63: The DEIR specifies a range of choices that the developer may include in the project to meet the performance standards that have already been established by Regional Water Quality Control Board Order No.01-024. Some of the requirements of this order are described in the setting section of the Hydrology and Flooding section (Draft EIR, pages 197-198). The complete text of the order is available for viewing at the Regional Board's website: <http://www.swrcb.ca.gov/rwqcb2/OrderNum/01-024.doc>

The City of San Jose, as a participant in the countywide stormwater program, is required to enforce the provisions of this Regional Board order. Order 01-024 requires site-specific structural BMPs for new development, regional water quality monitoring, evaluation and analysis of the monitoring data, and re-evaluation and modification of program components if monitoring indicates increasing degradation. Therefore, the mitigation measure presented in the DEIR would be expected to reduce this potential impact to a less than significant level.

Comment D2-64: In her attached comments, Fishman finds that Project construction impacts and cumulative air quality impacts are significant. Even as mitigated in the DEIR, construction and operation of the Project will result in a number of significant impacts that were not disclosed. These impacts include (1) ROG, NOx, and CO construction emissions that exceed thresholds of significance; (2) potential new violations of federal and state ambient air quality standards on both PM10 and PM2.5; and (3) significant cancer risks from diesel exhaust. Thus, the DEIR must include all feasible mitigation measures that will substantially lessen or avoid those impacts. Pub. Res. Code §§21002, 21081(a); Pub. Res. Code § 21100(b)(3); CEQA Guidelines § 15126.4.). Fishman provides a list of feasible mitigation measures described below that must be included in the next draft of the DEIR that is circulated for public review and comment.

Response to Comment D2-64: Please see Responses to Comments D2-40 through D2- 49. For all of the reasons cited there, no mitigation measures to supplement those recommended in the Draft EIR are warranted.

Comment D2-65: Because diesel exhaust from construction equipment will be significant, as explained above, the City must impose all feasible mitigation to reduce the impacts of diesel emissions to a level of insignificance. (Pub. Res. Code §§ 21002.1(a), 21100(b)(3)). Also, mitigation

measures must be designed to minimize, reduce or avoid an identified environmental impact or to rectify or compensate for that impact. (CEQA Guidelines § 15370.) Where several mitigation measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. (*Id.* at § 15126.4(a)(1)(B).) A lead agency may not make the required CEQA findings unless the administrative record clearly shows that all uncertainties regarding the mitigation of significant environmental impacts have been resolved. In her attached comments, Fishman provides at least 9 examples of feasible mitigation measures as recommended by the BAAQMD CEQA Guidelines (see Attachment 6). The DEIR must be revised to include these mitigation measures as recommended by BAAQMD.

Fishman further points to a number of mitigation measures that are currently feasible, but not included in the DEIR. These additional mitigation measures include: (1) ultra low sulfur diesel; (2) alternative diesel formulations; (3) California Air Resources Board ("CARB")-certified construction equipment; and (4) post-combustion controls. These measures must be evaluated in a revised DEIR for the Project.

Response to Comment D2-65: Please see Response to Comment D2-45. The Draft EIR does not require revisions to address this comment.

Comment D2-66: Aside from the BAAQMD CEQA Guidelines (see Attachment 6), Fishman points to additional feasible mitigation for traffic-related air quality impacts. For example, she identifies the following: replacement or repowering of school/transit buses with cleaner vehicles; the construction of satellite work stations; funding of a program to buy and scrap older, high-emission vehicles; contribute to an off-site TDM fund; repair of smog-check waived vehicles. The DEIR must be revised to include each one of these mitigation measures along with any other feasible mitigation measures available to reduce this impact to less than significant.

Response to Comment D2-66: The construction of satellite telecommute centers in large residential developments is identified by the Bay Area Air Quality Management District's *BAAQMD CEQA Guidelines*, but it noted that this measure is most effective if the project is located far from employment centers. This measure, which is aimed at reducing long distance commutes from remote areas, was considered ineffective for the proposed project which is an infill project located in close proximity to a large number of employment opportunities.

The other proposed mitigations are all examples of off-site offsets, i.e., monetary payments to purchase or develop "offsets" from sources unrelated to the project's impact. Offsets are required for stationary sources when a new proposed source exceeds certain thresholds, but there is currently no requirement or program for similar offset requirements from indirect sources (such as the proposed project) at the state, regional or local level. Imposing offset requirements for indirect sources would require adoption of new Transportation Control Measure (TCM), enacting legislation at the air district level, or adoption of similar local ordinances by local governments within the region.

Comment D2-67: In order to mitigate the significant air quality impacts from the project after construction, Fishman points to dozens of feasible mitigation measures that would reduce the cumulative

air quality impacts caused by the Project. Each of these measures must be addressed in a revised DEIR circulated for public review.

Response to Comment D2-67: See Response to Comment D2-66. The City disagrees with the comment's suggestion that the Draft EIR requires revising and recirculation.

Comment D2-68: As feasible mitigation measures to reduce the impact of the heat island effect, Fishman identifies the reduction of standard paving by 20 percent and the installation of light-colored, reflective roof products as feasible mitigation measures. These feasible mitigation measures must be discussed in the next draft of the DEIR circulated for public review and required as part of the Project.

Response to Comment D2-68: See Response to Comment D2-51. The City disagrees with the comment's suggestion that the Draft EIR requires revising and recirculation.

Comment D2-69: As explained above, mitigation measures must be specific and of certain efficacy. Here, many of the DEIR's proposed mitigation measures are voluntary rather than mandatory. Because they are not mandatory conditions for the project, it is unclear whether any of those proposed mitigation measures will be followed. Without a clear understanding of whether a mitigation measure will be implemented, it is impossible to determine its efficacy. The most common example of unnecessary ambiguity in the DEIR's proposed mitigation is the use of "should" rather than "shall."

Response to Comment D2-69: As described below, the City of San Jose is willing to undertake the requested word change from "should" to "shall" for the mitigation measures listed. See Responses to Comments D2-70, D2-72, D2-73, D2-74, D2-76, D2-82, D2-83, D2-84, and D2-85.

Comment D2-70: For example, the first mitigation measure proposed on page 9 of the document (LU-1a) states that, "new residential development *should* be oriented and designed to protect residents from any potential conflicts with adjacent land uses." (Emphasis added.) Aside from the lack of performance criteria by which to evaluate the effectiveness of design and orientation in protecting residents from potential land use conflicts, it is unclear whether this measure will be implemented at all.

Response to Comment D2-70: The following General Plan policies would be implemented, but cannot be changed as a mitigation measure for this specific project:

Mitigation Measure LU-1a: The City shall continue to implement the following 2020 General Plan goals and policies that relate to the land use compatibility aspects of light and glare:

- New Residential development should be oriented and designed to protect residents from any potential conflicts with adjacent land uses.
- *Urban Design Policy 1* – The City should continue to apply strong architectural and site controls on all types of development for the protection and development of neighborhood character and for the proper transition between areas with different types of land uses.

- *Urban Design Policy 22* – Design guidelines adopted by the City Council should be followed in the design of development projects.

Comment D2-71: The remaining two policies in this mitigation proposal are similarly defective in their lack of performance criteria and their voluntary nature. The following is a list of other improper mitigation measures that are voluntary rather than mandatory, making them devoid of performance criteria and of questionable efficacy:

Response to Comment D2-71: Please see Response to Comments D2-72 and D2-73.

Comment D2-72: LU-1b; "The City shall continue to implement Counsel Policy 4-3 which *encourages* the use of low-pressure sodium lighting for outdoor uses." (Emphasis added.)

Response to Comment D2-72: The encouragement fostered through the implementation of this permissive (as opposed to mandatory) policy is only part of the total mitigation package that would reduce the potential impact expressed as LU-1 (project buildings of greater than 173 feet above ground level resulting in light spillover onto adjacent properties) to a less than significant level. Low pressure sodium lighting has had a positive effect on light spillover in the City of San Jose and, where the policy could be implemented within the 16-parcel project site, it would continue to have such an effect. The three-part mitigation measure LU-1a would also assist in mitigating this impact through orientation of buildings, architectural and site planning controls, and design guidelines.

Comment D2-73: LU-2; "new residential development *should* be oriented and designed to protect residents from any potential conflicts with adjacent land uses." (Emphasis added.) The three remaining policies cited under this measure also use the word "should."

Response to Comment D2-73: The following General Plan policies would be implemented, but cannot be changed as a mitigation measure for this specific project:

Mitigation Measure LU-2: The City shall continue to implement the following 2020 General Plan goals and policies that relate to the land use compatibility and design aspects of nearby roads, freeways and railroad rights-of-way:

- New Residential development should be oriented and designed to protect residents from any potential conflicts with adjacent land uses.
- *Urban Design Policy 1* – The City should continue to apply strong architectural and site controls on all types of development for the protection and development of neighborhood character and for the proper transition between areas with different types of land uses.
- *Urban Design Policy 22* – Design guidelines adopted by the City Council should be followed in the design of development projects.
- *Parks and Recreation Policy 2* – Public parks, open space lands and other similar public areas should be located, oriented and designed in such a way as to facilitate their security and policing.

Comment D2-74: LU-3; “the following actions *should* be accomplished” (emphasis added). AQ-1; “watering *should* be used,” “Use dust proof chutes to lead debris into trucks whenever feasible,” “replant vegetation in disturbed areas as quickly as possible.”

Response to Comment D2-74: The Draft EIR is revised as follows on pages 10 and 70:

Mitigation Measure LU-3: Prior to the issuance of a building permit for any project structures that would exceed the FAA imaginary surface applicable to the project site, the following actions ~~should~~ shall be accomplished:

- The applicant shall comply with the notification requirements of Federal Aviation Regulations, Part 77, and receive a “Determination of No Hazard” from the FAA.
- Conditions set forth in the required FAA determination of No Hazard regarding roof-top lighting or marking shall be incorporated into the final design of the structure.
- Avigation easements (recognizing that the property is subject to aircraft noise impacts and specified height restrictions) shall be dedicated to the City of San Jose.

The Draft EIR is revised as follows on pages 11 and 110:

Mitigation Measure AQ-1: Consistent with guidance from the BAAQMD, the following measures shall be required of construction contracts and specifications for the project.

Demolition. The following controls shall be implemented during demolition:

- Watering ~~should~~ shall be used to control dust generation during demolition of structures and break-up of pavement.

Comment D2-75: AQ-2; “The following are considered to be feasible and effective in further reducing vehicle trip generation and resulting emissions from the project.”

Response to Comment D2-75: The commentor appears to not understand that these standard BAAQMD mitigation measures are recommended to be applied to the proposed project. The Draft EIR is revised in Chapter V, Section G, Air Quality, mid-way down page 111, as follows:

Mitigation Measure AQ-2: The *BAAQMD CEQA Guidelines* document identifies potential mitigation measures for various types of projects. The following are considered to be feasible and effective in further reducing vehicle trip generation and resulting emissions from the project and shall be implemented for the proposed project:

Comment D2-76: NOI-1a; “The following policies . . . serve to reduce significant noise impacts,” “the City should require appropriate site and building design . . .” Each of the 7 policies listed under this measure employ the word “should.”

Response to Comment D2-76: The Draft EIR refers to policies in the City's 2020 General Plan. The EIR authors do not believe it necessary to amend the language of the General Plan in order for these policies to have a mitigatory effect.

Comment D2-77: NOI-1b; "Implementation of the City's . . . Guidelines . . . , as applicable, would help ensure that new development is compatible with existing and planned uses," "adherence to these policies is encouraged by the General Plan." Although the proposal proceeds to list specific measures to mitigate noise, the last two measures use voluntary language such as "should," "as much as possible" and "could."

Response to Comment D2-77: The encouragement fostered through the implementation of this part (NOI-1b) of the overall three-part mitigation measure (NOI-1a, NOI-1b, and NOI-1c) is a portion of the total mitigation package that would reduce the impact expressed as NOI-1 (aircraft noise levels affecting residents and park users) to a less than significant level. Implementation of all three elements of the measure (detailed on pages 118-120) that would ensure a less-than-significant outcome.

Comment D2-78: NOI-3; "All stationary noise generating construction equipment, . . . , will be located *as far as practical* from existing residences." (Emphasis added.) The italicized statement must be replaced with specific performance criteria.

Response to Comment D2-78: The cited phrase is one of six elements of Mitigation Measure NOI-3, each of which plays a partial role in mitigating the significant impact. The term "as far as practical" is used intentionally to indicate that some in-the-field discretion is allowed the construction contractor for this element of the multi-part measure. It should be noted that even the closest edge of the project site is approximately 120 feet (and on the other side of the Market Street/Coleman Avenue overpass) from the nearest existing residence that would experience construction period noise. By the time the proposed project is under construction, residential uses immediately north of the project site may be closer, but would still be on the other side of the Union Pacific Railroad right-of-way.

Comment D2-79: GEO-2; "the designers of the proposed building foundations and improvements... shall *consider* these conditions." (Emphasis added.)

Response to Comment D2-79: The mitigation measure from which this phrase was extracted includes the following details:

Mitigation Measure GEO-2: In locations underlain by expansive soils and/or non-engineered fill, the designers of proposed building foundations and improvements (including sidewalks, roads, and utilities) shall consider these conditions. The design-level geotechnical investigation (required by Mitigation Measure GEO-1) shall include measures to ensure that potential damage related to expansive soils and non-uniformly compacted fill are minimized. Options to address these conditions may range from removal of the soils and replacement, as needed, with properly conditioned and compacted fill, to design and construction of improvements to withstand the forces exerted during the expected shrink-swell cycles and settlements.

In the context of the full measure, its reference to the requirement in Mitigation Measure GEO-1 for a design-level geotechnical investigation, and the requirement there that "all design criteria and specifications set forth in the geotechnical and soils report shall be followed", the use of the word "consider" seems appropriate here.

Comment D2-80: HAZMAT-1a; "the Plan should establish soil and groundwater mitigation" and "should also include procedures for managing soils and groundwater removed from the site." Aside from using voluntary language, this measure illegally defers mitigation as explained below.

Response to Comment D2-80: Please see Response to Comment D2-94 below.

Comment D2-81: HAZMAT-1b; "if significant releases of hazardous materials are discovered during Phase II activities, additional investigation [and] remediation . . . *may be required* prior to development of the parcels." (Emphasis added.) This measure suffers from the same defects as HAZMAT-1a.

Response to Comment D2-81: Please see Response to Comment D2-95 below.

Comment D2-82: HAZMAT-3; "A Site Safety Plan/Soil and Groundwater Management Plan *should be prepared* . . ." (Emphasis added.)

Response to Comment D2-82: The Draft EIR is revised as follows on pages 24 and 184:

Mitigation Measure HAZMAT-3: A Site Safety Plan/Soil and Groundwater Management Plan ~~should~~ shall be prepared, which will address emergency procedures and the management and disposal of contaminated soils and groundwater (see Mitigation Measure HAZMAT-1a, above). Use, storage, disposal, and transport of hazardous materials during construction activities shall be performed in accordance with existing local, State, and federal hazardous materials regulations. No additional mitigation is required.

Comment D2-83: HAZMAT-4; "an asbestos and lead paint survey should be performed. . . the materials *should* be abated," "worker health and safety regulations *should* be followed," "If loose or peeling lead-based paint are identified, they *should* be removed..." (Emphasis added.)

Response to Comment D2-83: The Draft EIR is revised as follows on pages 24 and 184:

Mitigation Measure HAZMAT-4: As a condition of approval for any demolition or permit for a structure known or suspected to have been constructed prior to 1985, an asbestos and lead-based paint survey ~~should~~ shall be performed. If asbestos-containing materials are determined to be present, the materials ~~should~~ shall be abated by a certified asbestos abatement contractor in accordance with the regulations and notification requirements of the Bay Area Air Quality Management District. If lead-based paint are identified, then federal and State construction worker health and safety regulations ~~should~~ shall be followed during renovation or demolition

activities. If loose or peeling lead-based paint are identified, they ~~should~~ **shall** be removed by a qualified lead abatement contractor and disposed of in accordance with existing hazardous waste regulations.

Comment D2-84: SVCS-1a; each of the four General Plan policies listed in this measure use “should” language.

Response to Comment D2-84: The Draft EIR refers to policies in the City’s 2020 General Plan. The EIR authors do not believe it necessary to amend the language of the General Plan in order for these policies to have a mitigatory effect.

Comment D2-85: SVCS-1b; “The City *should* implement a system of signal light preemption by emergency vehicles . . .” (Emphasis added.)

Response to Comment D2-85: The Draft EIR is revised as follows on pages 25 and 193:

Mitigation Measure SVCS-1b: The City ~~should~~ **shall** implement a system of signal light preemption by emergency vehicles along key emergency response travel routes so as to expedite emergency through the Downtown Core Area.

Comment D2-86: HYD-1; “An important component of the storm water quality protection effort will be the education of the site supervisors and workers.” This measure has no performance criteria.

Response to Comment D2-86: Please see Response to Comment D2-97 below.

Comment D2-87: “City of San Jose and RWQCB personnel may make unannounced site inspections and are empowered to levy considerable fines if it is determined that the SWPPP has not been properly prepared and implemented.” This aspect of the measure contains no performance criteria.

Response to Comment D2-87: The mitigation measure from which the cited sentence was extracted is approximately one page (over 500 words) in length. The cited text appears in the detailed description of Best Management Practices (BMPs) required in the SWPPP called for in the measure. The main proscriptive part of the measure is reproduced below:

Mitigation Measure HYD-1: The applicant shall prepare a Storm Water Pollution Prevention Plan (SWPPP) designed to reduce potential impacts to surface water quality through the construction and life of the project. The SWPPP would act as the overall program document designed to provide measures to mitigate potential water quality impacts associated with implementation of the project. The SWPPP shall include:

As such, the descriptive text need not include “performance criteria”.

Comment D2-88: “Best Management Practices (BMPs) designed to reduce erosion of exposed soil *may* include . . .” (emphasis added). This measure also fails CEQA’s adequacy requirements because it illegally defers mitigation, as explained below.

Response to Comment D2-88: Again, as with Comment D2-87 above, the cited text appears as part of a descriptive list of BMP examples. Preparation of an adequate SWPPP (making use of some or all of such BMPs, or still other BMPs not comprehensively listed) would ensure that Impact HYD-1 would be reduced to a less-than-significant level.

Comment D2-89: HYD-2; “All structures shall be built so that potential injuries to project occupants and property damage are *minimized* in the event of a flood.” (Emphasis added.) This measure lacks quantitative or qualitative performance criteria by which to evaluate its effectiveness.

Response to Comment D2-89: The cited sentence begins the mitigation measure but, as with Comments D2-87 and D2-88, omits the detail that follows. Here is the measure in its entirety. Compliance with the standards in San Jose Municipal Code, Title 17, Chapter 17.08, as well as the design and construction of the below-grade parking structures to avoid flooding during the base flood by grade control or construction of berms would reduce the impact to a less-than-significant level.

Mitigation Measure HYD-2: All structures shall be built so that potential injuries to project occupants and property damage are minimized in the event of a flood. Specifically, and in accordance with the San Jose Municipal Code, Title 17, Chapter 17.08, the lowest finished floor of each structure shall be elevated to or above the inundation elevation specified on the Flood Insurance Rate Map. In addition, below-ground parking structures shall be designed and constructed so that the base flood would not inundate these areas. Flood protection of below-ground parking could be achieved either by grade control and/or berms.

Note: Below grade parking is only allowed in FEMA 100-year flood hazard zones if the structure above the below grade parking is 100 percent non-residential (in use) or mixed use (residential and non-residential). This project is 100 percent residential (in use) and the outcome of the upcoming Santa Clara County Water District (SCVWD) Interim Designation Letter of Map Revision from Zone AH to Zone A99 will determine if any below grade parking will be allowed.

Comment D2-90: Each of the measures listed above must be corrected to require a specific strategy or require specific performance criteria. Also, any and all language that is non-mandatory in nature must be corrected to be unambiguously mandatory in a revised DEIR circulated for public review and comment.

Response to Comment D2-90: Please see Responses to Comments D2-69 through D2-90, which provide detailed responses to the basic theme of this comment. For all the reasons cited therein, the City does not agree with the argument that a revised Draft EIR needs to be circulated for review and comment.

Comment D2-91: Many of the mitigation measures deferred by the DEIR to future studies are likely to themselves cause significant new impacts. For example, the implementation of a signal light preemption system may cause undisclosed traffic impacts. The DEIR fails to discuss these potentially significant new impacts, as it must. These impacts must be analyzed in the DEIR, and effective measures must be identified and implemented to reduce their impacts to less than significant levels.

Response to Comment D2-91: As noted in earlier responses, once a developer proposes a specific development project for all or part of the 11-acre site, the City would evaluate the project to determine if it could lead to greater, or different, adverse environmental impacts than those set forth in this EIR. At that time, the City would determine whether a supplemental or subsequent CEQA document would be required pursuant to the *CEQA Guidelines*, §15162. The City disagrees with the argument that any of the mitigation measures that allow some discretion in the specific terms of their implementation represent inappropriate deferral. The mitigation measures recommended in the Draft EIR would not create adverse environmental impacts of a type or scale that would be significant when judged against the established significance criteria presented throughout the Draft EIR. This is particularly true in the case of the single example cited (that of signal light preemption for emergency vehicles); such preemption would greatly benefit emergency vehicles, but would occur so infrequently that it would have no measurable effect at all on intersection levels of service.

Comment D2-92: Specifically, the following measures do not impose specific mitigation at this time, but rather defer mitigation until after post-approval studies have been performed or until after a specific mitigation plan is developed:

Response to Comment D2-92: After citing several legal cases and outlining the commentor's interpretation of those cases, this comment introduces the five comments that follow. Please see Responses to Comments D2-93, D2-94, D2-95, D2-96 and D2-97 for detailed responses.

Comment D2-93: GEO-1: "a design-level geotechnical investigation shall be prepared and submitted to the City of San Jose Public Works Department for review and confirmation that the proposed development fully complies with the California Building Code. . . . All mitigation measures, design criteria and specifications set forth in the geotechnical and soils report shall be met." This is precisely the type of deferred mitigation, subject to final approval by a lesser body than the City Council, struck down in the *Sundstrom* case, cited above. GEO-2 and GEO-3 also improperly rely on this post-approval geotechnical investigation as mitigation for impacts from property related shrink-swell potential and dewatering-related subsidence and earth movements associated with temporary shoring systems.

Response to Comment D2-93: The primary performance standard for all residential and commercial construction within the City is the Uniform Building Code (UBC). The UBC is a widely accepted standard for development. The mitigation measures included in the DEIR require that design-level recommendations included in the required geotechnical reports be followed. This latter requirement mandates the participation and oversight of the site investigation and building design by State-

licensed professional geologists and engineers. The process of site-specific geotechnical evaluation, foundation and structure design, and adherence to UBC is not a new approach to the evaluation and mitigation of potential geologic hazards. It is a process that has been used by nearly every major project in every city in the Bay Area for over 20 years. It would be speculative and inappropriate for the DEIR to require specific mitigation for a project during the preliminary design phase before site specific geotechnical work has been completed and final building designs have been determined.

Comment D2-94: HAZMAT-1a; "a Site Safety Plan/Soil and Groundwater Management Plan (Plan) should be prepared." The measure explicitly defers the specification of performance criteria for clean up of contaminated soil, claiming that such criteria will be part of the Plan. For example, it states, "[a]t a minimum, the Plan should establish soil and groundwater mitigation and control specifications for grading and construction activities." Again, this is exactly the type of post-approval analysis and mitigation struck down by the *Sundstrom* court. HAZMAT-3 also improperly relies on this Plan as mitigation for potential release of hazardous substances from improper use or transport of hazardous materials during construction activities.

Response to Comment D2-94: As with Response to Comment D2-93, the process of requiring a detailed plan to address site safety issues as well as soil and groundwater management during construction is a well-established one in California. In the case of the parcels comprising the Project area, a substantial amount of investigation and remediation has already been accomplished. The sites that remain to be addressed (see Table V.J-3, page 181 of the Draft EIR) total six. Even so, trying to use a Draft EIR as the documentational vehicle for the details of such remaining steps would lead to an inappropriately detailed, confusing and lengthy document. Throughout the HAZMAT Mitigation Measures, reference is made to the existence of parallel regulatory processes and applicability of their regulations. The Site Safety Plan/Soil and Groundwater Management Plan called for in HAZMAT-1a and HAZMAT-3 would need to be consistent with those regulations.

Comment D2-95: HAZMAT-1b; "at properties where Phase I activities have identified a potential hazardous material, a subsurface investigation should be conducted at the project site by a qualified environmental professional.... If significant releases of hazardous materials are discovered during Phase II activities, additional investigation, remediation, and/or coordination with regulatory agencies may be required. . ." Again, this measure lacks performance criteria, illegally defers mitigation to post-approval study, and illegally delegates the City Council's duty to review and approve the EIR in its final form.

Response to Comment D2-95: Please see Response to Comment D2-61.

Comment D2-96: HAZMAT-4; "an asbestos and lead-based paint survey should be performed" as a condition of approval for any demolition or permit for a structure known or suspected to have been constructed prior to 1985. Again, this proposal illegally defers disclosure and specific mitigation strategies for public health impacts from exposure to asbestos and lead until after the EIR is approved. Under the *Sundstrom* case, this is inadequate.

Response to Comment D2-96: This mitigation measure is a standard approach to addressing the potential for asbestos and lead-based paint in existing buildings. What the comment omits is that portion of the measure that sets forth the remedial steps to be undertaken in the event that asbestos or lead-based paints are determined to be present. Monitoring of the result(s) of the required survey is easily accomplished. Implementation of these remedial steps is straight-forward and would fully eliminate the impact:

...If asbestos-containing materials are determined to be present, the materials should be abated by a certified asbestos abatement contractor in accordance with the regulations and notification requirements of the Bay Area Air Quality Management District. If lead-based paint are identified, then federal and State construction worker health and safety regulations should be followed during renovation or demolition activities. If loose or peeling lead-based paint are identified, they should be removed by a qualified lead abatement contractor and disposed of in accordance with existing hazardous waste regulations.

Comment D2-97: HYD-1; "The applicant shall prepare a Storm Water Pollution Prevention Plan (SWPPP) designed to reduce potential impacts to surface water quality through the construction and life of the project." Because the DEIR does not mandate specific performance criteria as part of the SWPPP, this mitigation is of questionable efficacy. It is also invalid under *Sundstrom* due to its deferral of mitigation until after final approval of the DEIR, as explained above.

Response to Comment D2-97: Please see Responses to Comments D2-87 and D2-88. The mitigation measure is approximately one page in length and includes a detailed description of Best Management Practices (BMPs) required in the SWPPP.

Comment D2-98: As explained by Mr. Hagemann and Dr. Hindery in their attached comments, the DEIR fails to provide the public with a cumulative risk assessment of the contamination on the site. Instead, the DEIR proposes a piecemealed investigation and risk assessment that analyzes public health impact on a property-specific basis. This is improper under CEQA.

Hagemann and Hindery note that most assessments in the DEIR have been Phase I investigations, with the following stated purpose: "to identify potential environmental liabilities (principally soil and groundwater impacts) resulting from the use, storage, disposal and/or releases of hazardous materials within the project area" (Appendix F.9). Since many hazardous waste sites exist in the project area, these experts opine that there is an unquantified cumulative potential for future residents to come into direct contact with hazardous materials and waste. This potential should be assessed in a project-wide human health risk assessment prior to granting any regulatory determination.

Specifically, risks to future residents from all contaminants associated with each of the individual properties should be assessed using RCRA and Superfund protocol to ensure protection of human health. The DEIR must be revised to provide a cumulative health risk assessment from contamination on the Project site.

Response to Comment D2-98: A “cumulative health risk assessment” is not required for inclusion in an EIR. This DEIR presents a summary of the status of investigations and the likely contaminants at the project site. To mitigate potential significant impacts related to the presence of hazardous substances in the subsurface, the DEIR recommends a performance standard that consists of regulatory agency approval of remediation. This is an appropriate mitigation since it requires cleanup to levels that will protect the public health and the environment.

Comment D2-99: On page 45, the DEIR reports that this development would create an “increase in opportunities for housing and the permitted density of development in the area which are not reflected in the 2000 CAP. As a result, the project would conflict with the assumptions of the CAP.” In a later conflicting statement, the DEIR goes on to report that because the project is an “infill project,” it is consistent with the goals of the Clean Air Plan. It should be noted that an agency’s good intentions are not sufficient to avoid full evaluation of impacts under CEQA review. *Dunn-Edwards v. BAAQMD*, (1992) 9 Cal. App. 4th 644, 658 (finding an EIR necessary to review environmental impacts of an air district regulation aimed at reducing air quality impacts from house paints). The DEIR must be revised to remove this inconsistency, which improperly attempts to minimize the effect of disclosing the Project’s inconsistency with the Clean Air Plan. For example, the DEIR must present an inventory of all control measures for construction equipment assumed in the Plan which are not included as mitigation for the Project.

The City dismisses the importance of addressing cumulative air quality impacts by claiming “no additional mitigation measures, beyond those identified for the proposed project (see Chapter V.C, Air Quality) would be available.” (DEIR p. 222.) It is obvious from the data provided that the cumulative impacts far exceed the significance threshold and need to be mitigated. Fishman lists many potential mitigation strategies that will help reduce the impacts of this project. Therefore a new EIR needs to be completed and circulated for review.

Response to Comment D2-99: No inconsistency between the two conclusions exists. The first citation refers to *assumptions* of the CAP, and further clarifies this point by emphasizing that the GPA for the proposed Project “would be considered technically inconsistent” with the CAP (emphasis added). The second citation refers to the *goals* of the CAP, with which a high-density, in-fill residential project located near employment opportunities clearly is consistent.

See Response to Comment D2-66 regarding Fishman’s suggested mitigation measures.

Comment D2-100: The DEIR fails to satisfy CEQA’s fundamental mandates of informing the public and decision makers of the potentially significant environmental impacts of a project, and imposing all feasible measures to mitigate those impacts to less than significant. The DEIR should be revised to address the shortcomings described above and in the attached documents and re-circulated for public review.

Response to Comment D2-100: For reasons that are presented in all of the responses to this comment letter, the City of San Jose respectfully disagrees with the assertion that the Draft EIR does not comply with the requirements of CEQA and with the assertion that re-circulation of a revised Draft EIR is necessary.

E. INDIVIDUALS



October 7, 2003

STEPHEN M. HAASE, AICP, DIRECTOR
Ron Eddow, Senior Planner
Department of Planning, Building and Code Enforcement
801 North First Street, Room #400
San Jose, Ca 95110

Re: Response to Draft Environmental Impact Report
Amendment File no. Gp03-03-01
Brandenburg Mixed Use Project
North San Pedro Housing Sites

After review of the Draft Environmental Impact Report under date of August 22, 2003, we agree with the conclusion of the report that "the Alternate Location alternative would be the environmentally superior alternative", p 236. In other words, the Draft Report recommends that the proposed project be constructed elsewhere to avoid the resulting major adverse impacts in the San Pedro, Julian area, including, but not limited to, the following:

1. An unacceptable increase in traffic through a dense residential neighborhood;
2. Construction of residential units in an area where noise levels exceed the City's standards, p. 225;
3. Significant negative traffic level of service impacts at intersections and to freeway segments of State Route 87;
4. Significant contribution to regional flooding and noise and air pollution;
5. Significant exposure of a new residential population to the dangers of frequent and close air traffic;
6. Significant increase in safety hazards to air traffic resulting from high rise and full time densely populated residential buildings in close proximity to the airport and its air traffic approach;

7. An unacceptable increase in traffic congestion and safety hazards directly resulting from the "straightening of Julian Street";

8. An unacceptable increase in traffic congestion and safety hazards directly resulting from the project itself.

1
cont.

As noted in the Draft Report (p 31), in April of 2001, the same general area and the same general proposed project was the subject of a Draft EIR for General Plan amendments. Our Response to that 2001 Report pointed out the adverse impacts which would have resulted from the implementation of that project and our related objections. Because the project suggested in the 2001 Report and the project suggested in this Draft Report are very nearly identical, including the related data, arguments and skew, a copy of our response to the 2001 report (including photos) is attached hereto and incorporated herein as an objection to the same basic project again being proposed.

2

In proposing recent projects in this area, it is obvious that the realignment of Julian Street is a major goal of both the City of San Jose and of the Redevelopment Agency. It is equally obvious that the realignment of Julian Street will create major traffic congestion, the very traffic congestion that was eliminated when the "S" curve was added to Julian Street years ago. These same concerns are expressed by the State of California, Department of Transportation in their letters dated February 10, 2003 and February 11, 2003, both attached as exhibits in Appendix "A" of the Report. And although it seems impossible to properly assess the future realignment of Julian Street (removal of the present "S" curve) without a complete review of the data supporting the prior addition of the present "S" curve, no such review appears to have been included in the present Draft Report. There is no doubt that the original data would support leaving Julian Street in its present condition and would not support its realignment. Our objection to the realignment of Julian Street is set out in our prior objections dated June 11, 2001 and attached hereto.

3

Our objections then and now are the same. As pointed out in our prior objections attached hereto, the present project 1) will subject the numerous residential units and buildings to major related safety hazards from air traffic, noise and air pollution and the resulting substantial traffic increase in the entire surrounding area; 2) includes straightening Julian street which will only multiply these major adverse impacts both immediately and in the future; and 3) requires the unconstitutional taking of private property.

4

The present Draft report is strangely silent on references to the real property located at 181 Devine Street, San Jose, CA in an obvious attempt to ignore the present building located on that property. All photos included in the Draft Report exclude the Devine Street property; and the Report simply discards the building as, "non-significant", attaching to it a 28 (27.54) point "rating", just 5 points lower than the 33 points designated for preservation. We make specific objection to the treatment of the real property located at 181 Devine Street, San Jose, CA by the Report, to the classification of that property as "non-significant" by the Report, it's drafters, and agents and to the position of the Report that the

5

"Redevelopment Agency may acquire properties" from unwilling owners in the proposed project area. A more thorough discussion, along with photos of the building omitted from this Draft Report, is set out in our prior objections dated June 11, 2001 and attached hereto (additional new photos are also attached).

In the early 1980's, the 181 Devine Street real property was completely restored and remodeled with the blessing of the City of San Jose (who issued the permits) and every attempt was made to retain the building's original integrity and character. The intended use of the rehabilitated building as offices with on site parking was then touted by the City as a conforming and welcome use and as offices, it still fits into the present, proposed plan discussed by the Draft Report.

The original map of the present proposed project included a parcel of real property owned by Mr. Charles W. Davidson and used as a parking lot for his adjacent building. By letter dated February 6, 2003 (included in Appendix "A" of the Report), Mr. Davidson was apparently successful in removing his parking lot from the proposed project area as it has been, in fact, removed. Therefore, as the owner of 181 Devine Street, I now make the same request in the same language: "I would appreciate it if you would remove my property from your E.I.R. I have no desire to make any changes with this property."

I again express my objection to the project discussed in the Report and express the above concerns and those noted by the State of California, Department of Transportation in their letters dated February 10, 2003 and February 11, 2003, both attached as exhibits in Appendix "A" of the Report. The "Rule of Reason", as referred to in the Draft Report, demands that if the project proceeds at all, it must proceed at the alternated location discussed in the Report.

We agree with the conclusion of the report that "the Alternate Location alternative would be the environmentally superior alternative. Of the six possibilities, the proposed project and the five alternatives, the proposed project results in the most major and lasting adverse impacts and must, for that reason, be abandoned.

Respectfully submitted,

DOUGLAS R. KORTEN, ESQ.
Owner, 181 Devine Street
San Jose, Ca 95110

Letter
E1
Attach. 1



JULIAN STREET VIEW

DEVINE STREET INTERSECTS AT LEFT

DATE: June 11, 2001

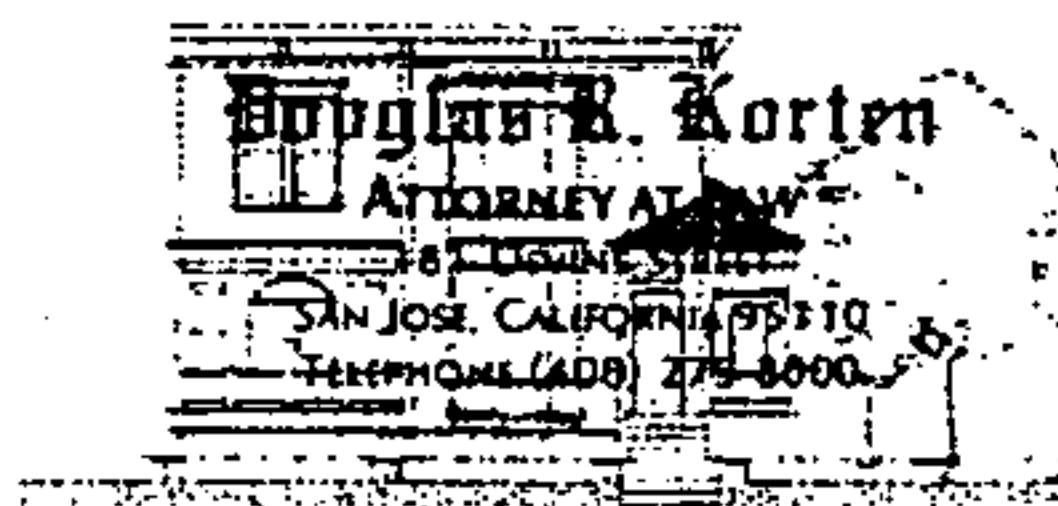
TO: James R. Derryberry
Director of Planning,
Building & Code Enforcement
801 North First Street, Room #400
San Jose, Ca 95110

RESPONSE TO:

Draft Environmental Impact Report:
West Julian Revitalization Project,
City File Nos. PDC 00-12-128, GP 01-03-09, GP 01-T-16

FROM: DOUGLAS R. KORTEN, ESQ
REAL PROPERTY OWNER:
181 DEVINE STREET
SAN JOSE, CA 95110

THE
VICTORIAN LAW OFFICES



June 11, 2001

James R. Derryberry
Director of Planning, Building & Code Enforcement
801 North First Street, Room #400
San Jose, Ca 95110

Re: Response to Draft Environmental Impact Report: West
Julian Revitalization Project, City File Nos. PDC 00-12-
128, GP 01-03-09, GP 01-T-16

Pursuant to "Notice" and after review of the Draft Environmental Impact Report under date of April 25, 2001, we oppose the proposed development, feel the report deficient and submit the following comments related thereto:

1. Allowing an increase in height limitations by SIXTY (60) feet increases risk of exposure to injury and/or damage:

A. The proposed height limitation increase of an additional SIXTY (60) feet to one hundred eighty (180) feet, allowing for eleven story buildings, will directly increase exposure to risk of physical and mental damage to not only occupants of the proposed development, but also to airlines, their employees and passengers, to private aircraft and passengers and to all persons who expose themselves to this risk by entering the subject area.

B. The proposed project would allow the construction of additional high-rise structures in the immediate vicinity of both the approach and take-off areas of the San Jose International Airport thereby restricting emergency and other possible ingress and egress to the airport while limiting the effective field of view in case of emergencies related to aircraft. Tall buildings constructed around airport approach and departure corridors, such as at the San Diego Airport, always present safety hazards; buildings constructed an additional SIXTY (60) feet in height in these areas will only increase and magnify these safety hazards and concerns, exposing all persons in the area to these increased risks.

2. Increase in and disruption of traffic:

A. Increase in traffic on surrounding streets created by occupants of the proposed development will result in:

a. Increased traffic related noise;

b. Increased traffic related pollution;
c. Increased safety hazards created by increased traffic directly resulting from the proposed development, including ingress and egress from proposed and existing parking facilities. The proposed development will significantly increase traffic on Terraine street thereby exposing persons entering and/or exiting from present, existing parking facilities to be retained under the proposed development.

B. Disruption of traffic flowing on Julian Street created by occupants of the proposed development:

a. Ingress and egress of occupants from the parking facilities of the proposed development will disrupt the flow of traffic on both Julian and Terraine streets causing even greater traffic delays, traffic jams and the resulting accidents.

C. Increase in traffic flowing on Julian Street created by occupants of the proposed development will result in:

a. Increased traffic related noise;
b. Increased traffic related pollution;
c. Increased safety hazards created by increased traffic directly resulting from the proposed development, including ingress and egress from proposed and existing parking facilities. The proposed development will significantly increase traffic on Julian and Terraine streets thereby exposing persons entering and/or exiting from present existing parking facilities to be retained by the proposed development.

D. The addition of four new traffic lights on San Pedro, Julian, Terraine and Devine streets as set forth on Figure 6 of the Report, will all but terminate the free flow of traffic in this area causing continuous traffic jams and obstructing the thousands of vehicles now using Julian street as a means of entering and leaving Downtown San Jose thereby creating substantial safety, pollution and other hazards and adversely affecting the marketability of the development and surrounding areas:

a. The traffic now using Julian Street will be forced to use other streets, thereby creating and not just increasing, traffic, safety, pollution and other hazards on these related, spill-over streets and areas;

b. The increased traffic in the immediate area and the resulting spill-over onto the related connecting streets would have a major, detrimental impact on the marketability of the proposed development both as to the residential portion as well as to the commercial portion of the development area and all surrounding "spill-over" areas.

It is difficult to understand how a proposal with such disastrous traffic and related negative consequences would or could even be submitted to the City of San Jose for consideration.

E. Increase in traffic on the Guadalupe corridor (SR 87):

a. The proposed development will cause a substantial traffic increase on SR 87 from highway 101 to highway 280 in excess of permitted capacity standards directly resulting from vehicle trips of the occupants of the proposed development;

b. It is totally unreasonable to believe that any of the occupants of the office portion of the proposed development would reside in the residential portion of the development, thereby leading to the indisputable conclusion that traffic will be increased by the total number of occupants of the proposed development, including both the residential and office portions of the proposed development. This substantial increase in traffic would be the direct result of additional vehicle trips made by the occupants, visitors and customers or clients of businesses located in the proposed project.

F. The proposed project would cause traffic to exceed interchange (SR 87) capacity in both the North and South directions, FOR WHICH THERE IS NO MITIGATION.

a. The Draft Environmental Report incorrectly suggests that the substantially stressed Southbound interchange capacity could be reduced by the addition of a Southbound HOV lane. The obvious fallacy of this position is that, at best, the number of proposed development occupants who would, or even could, car pool is minimal, if not completely non-existent;

b. The Draft Environmental Report fails to address the cost burden of the construction of a Southbound HOV lane, but appears to place the total expense upon the taxpayers while relieving the developers from all related cost and expense;

c. The Draft Environmental Report correctly admits that there is NO POSSIBLE MITIGATION for the substantially stressed Northbound interchange capacity directly resulting from the proposed development but offers the weak suggestion of implementing Transportation Demand Management (TDM) to reduce the resulting over-capacity status of the interchange. The obvious fallacy of this position is two-fold: first, that TDM could not be applied to the residential portion of the proposed development, where a major portion of the ongoing, around-the-clock occupant vehicle trips would originate and terminate; and second, that, at best, the number of proposed development commercial occupants who would, or even could, be subjected to TDM is at best speculative. Forced TDM would have a major, detrimental impact on the marketability of the proposed development.

G. Increase in traffic of more than ONE (1%) percent to each of TEN freeway segments FOR WHICH THERE IS NO POSSIBLE MITIGATION:

a. The proposed development will cause a DIRECT increase in traffic of an unacceptable ONE (1%) percent on each of TEN freeway segments for which, as correctly noted in the Draft Environmental Report, THERE IS NO POSSIBLE MITIGATION.

H. The increased traffic in the immediate area and upon the related TEN freeway segments which will directly result from the proposed development would have a major, detrimental impact on the marketability of the proposed development both as to the residential portion as well as to the commercial portion:

a. Customers and clients now complain of the difficulty of reaching and leaving Downtown San Jose and at the difficulty of finding and the cost of parking in the downtown area. The proposed development will multiply these problems and complaints, making the downtown even more unfriendly to residents and potential business people, driving them to other areas and thereby reducing substantially the marketability of the proposed development. One only need look at the undisputed failure of the original downtown retail marketing area and the "Pavilion" to recognize the great detriment which will result to this area from the increased traffic congestion and parking problems necessarily created by the proposed development. The failure of both the "Pavilion", as well as all of the original "Downtown Retail Marketing" businesses, were the direct result of restricted traffic flow and lack of accessible, free parking; both killed off by shopping centers providing easy access and free parking. People will go where they can easily get to and freely park their cars. In fact, the most important two elements to the success of any business are accessibility by personal vehicle and convenient, free parking. Why else would private enterprise incur such enormous expense in the continued construction of new, easily accessible and free parking at the Valley Fair Shopping Center. The original downtown retail shopping area would have continued to be successful had easy access by private personal vehicle and free accessible parking been provided, as would have the Pavilion. Simply stated, it is a natural law that if people cannot get there in their private car, they will not go; if they cannot find easily accessible and free parking when they get there, they will not go, period! Because of this natural law, the proposed development will have the same negative and detrimental effect on the surrounding area for the same reasons;

b. The increased difficulty of reaching and leaving the proposed development area created by the proposed development will have the same substantial and detrimental effect on all of the surrounding, existing and established businesses and residential developments; the result will be to substantially reduce the marketability of the entire area, established and proposed.

I. The proposed Legacy project will cause traffic on Julian Street and SR87 to deteriorate to LOS E or more, even without any realignment of Julian Street:

a. The Draft EIR notes that even without any realignment of Julian Street, the intersection of Julian Street and SR87 would deteriorate to LOS E during the AM peak hours under the project, indicating near jammed traffic conditions below the acceptable level of service, as set by the City of San Jose. The Draft EIR then totally dismisses this resulting jamming of traffic under the proposed Legacy project citing that the intersection is "located within the Downtown Core Area, which is exempt from the City's level of service policy". In affect, the Draft EIR totally ignores the traffic jams which will result from the proposed project while admitting that the

project will result in unacceptable traffic congestion and related safety, pollution and other hazards;

b. While it is obvious, and the EIR admits, that the realignment of Julian Street and the addition of four area traffic lights as proposed by the Legacy project will all but bring traffic to a virtual stop, the Draft EIR dismisses these detrimental effects and conditions, apparently on the basis that it too would be "located within the Downtown Core Area, which is exempt from the City's level of service policy";

3. Resulting increased parking problem: Substantial increase in vehicles and substantial decrease in parking availability:

A. The proposed Legacy project requires a variance from the present parking requirements for buildings in the area of the proposed project. Presently, one parking space is required for each 250 square feet of office space. The Legacy project proposal includes only 2970 parking spaces which is deficient by 1,430 parking spaces, a forty-eight (48%) percent, or nearly a FIFTY (50%) PERCENT parking space deficiency.

B. The proposed Legacy project fails to provide parking for ONE THOUSAND FOUR HUNDRED THIRTY (1,430) additional vehicles, all of which will need to find and will park somewhere other than in space provided for by the proposed Legacy project. These vehicles will attempt to park on the surrounding streets and will substantially add to the traffic congestion, present parking problems in the area and will create substantial safety, pollution and other hazards in the immediate area of the development and in surrounding areas. In addition, there will be a significant increase in competition for all parking spaces on the streets, in existing parking facilities and in all neighborhoods adjoining the proposed project.

C. The nearly fifty (50%) percent deficiency in adequate parking and the increase in the number of vehicles in the immediate area directly resulting from the proposed Legacy project together with the resulting spill-over onto the related connecting streets would have a major, detrimental impact on the marketability of the proposed development both as to the residential portion as well as to the commercial portion of the development area and in all surrounding "spill-over" areas.

D. The Draft EIR notes as a "Project Objective" the providing of "adequate parking facilities" while totally avoiding the issue of the nearly fifty (50%) percent deficiency in adequate parking provided for by the proposed Legacy project.

E. The nearly fifty (50%) percent deficiency in adequate parking provided for by the proposed Legacy project is more than a substantial deficiency and should alone result in a complete rejection of the proposed Legacy project. The nearly fifty (50%) percent deficiency in adequate parking provided for by the proposed Legacy project and the resulting increase in the number of vehicles in the immediate area each constitute a substantial environmental impact, both left completely unaddressed by the Draft EIR.

4. Occupant exposure to excessive noise and safety conditions:

A. The occupants of the proposed development would be exposed to excessive noise from aircraft in excess of allowable standards which cannot be abated or mitigated, as correctly noted in the Draft Environmental Report.

B. The occupants of the proposed development would be exposed to a high risk of safety hazards and accidents resulting from the increased flow of traffic necessarily caused by the proposed development and the restructuring and straightening of Julian Street with the addition of four traffic lights and a NINETY (90) degree turn onto Terraine street as part of the proposal.

C. The proposed development is situated along a railroad right-of-way lending to possible future increased noise and pollution exposure to both occupants of the proposed development and to the proposed development itself.

5. The proposed Legacy project will result in a significant increase in vehicle-related air pollution for which there is no mitigation:

A. As correctly noted in the Draft EIR, completion of the project will result in a significant increase in vehicle-related air pollution for which "There is no mitigation available to reduce the project's regional air quality impact to a less than significant level. Therefore the project's regional air quality impacts would remain significant."

6. Risk of flooding:

A. The entire proposed development is situated in a geographical flood area susceptible to substantial flooding as demonstrated on at least two (2) occasions within the last TEN (10) years when the Guadalupe River overflowed its banks. During the last such flooding incident, the water flooded parts of West Julian, Terraine and Devine Streets, entering adjoining parking facilities and nearly damaging buildings located in the proposed project area. This actual flooding and the strong possibility of similar future flooding results in substantial exposure and risk of damage to the entire proposed Legacy project, it's underground parking facilities and to it's occupants from flooding, flowing and standing water.

7. The proposed Legacy project will substantially increase demand for police protection, fire protection, the need for additional schools and related other public services and substantially increase the demand for all utilities, all without solutions:

A. The Report admits that the proposed project will "consume significant amounts of energy based upon the size of the development", and then unbelievably concludes that the proposed Legacy project will not result in a significant increase in demand for utility services simply because "the project would only increase demand for utility services incrementally". Similarly, the Report goes on to conclude that although the project will consume significant amounts of energy, the project will be designed to be energy efficient and hence the project "will not result in wasteful or

unnecessary consumption of energy", in affect, concluding that "it matters not that there will be a substantial increase in the demand for electricity and all other utilities since there will be no wasteful or unnecessary consumption of energy". (emphasis added). This unbelievable justification is offered during a period of "rolling blackouts" created by energy shortages throughout the City of San Jose and the entire State of California due to an already overly excessive demand and a greatly inadequate supply of energy, a condition which will only be exacerbated by additional increase in such demands caused by the proposed Legacy project.

B. The Report also admits that the proposed project would "increase the demand for police and fire services", that "Emergency access to the project areas is limited", that "Buildout of the project, which adds to the traffic congestion could reduce emergency access to the project site", all of which "could result in significant safety impacts to future residents or employees in the event of emergency".

C. Noting all of the above, the Report offers no solutions but rather simply notes that the "project's point of egress, ingress, and service roads would be designed to be of adequate width to allow access to allow access to emergency fire fighting equipment", and ignores the balance of the negative impact of the proposed Legacy project.

D. The major issue of the resulting substantial increases in the demand for electricity, gas, police and fire services, the resulting need for additional schools and other related public services, all go without solutions, all of which have a significant negative unaddressed impact on the environment, all during "rolling blackouts", energy shortages and a generally depressed economy.

8. Violation of Constitutional rights of private property owners:

A. It appears that the developers of the proposed development are suggesting the acquisition of real property by eminent domain in an attempt to obtain sufficient real property on which to construct their private development. In other words, the developer (Legacy) is attempting to acquire real property without direct purchase from the private property owners by requesting the City Council to find need and/or a necessity to take private real property for the sole purpose of furthering the business interests of the private developer, Legacy. By such a procedure, the constitutional rights of the involved private real property owners are being subjected to irreparable damage and to a violation of constitutional rights, all being fueled by the enticing prospect of a substantial increase in the real property tax basis and resulting significant additional tax revenue increase flowing to the City. City planning must be directed toward improving the City while preserving it's heritage and the constitutional rights of it's present property owners rather than haphazardly permitting development doomed to negatively affect the entire area for the mere sake of furthering the economic benefit of private developers and substantially increasing the tax basis and resulting cash flow to the City.

B. Legacy is proposing this project strictly for it's own continuing monetary gain and is the sole continuing economic beneficiary of it's proposed project

(excepting the resulting increased tax revenue flowing to the City noted above). Legacy, and not area property owners or the public at large, should bare ALL economic burden related to it's project, including the acquisitions of any and all necessary real property. It is unconscionable to force area landowners to lose their property or to force local area San Jose residents to bare ANY of the burden of a project formulated strictly for the continued economic benefit of Legacy.

C. The proposed taking of any such private property for sole and continuing financial benefit of Legacy and for the furtherance of the proposed Legacy project results in significant and substantial environmental impacts left completely unaddressed by the Draft EIR.

9. Unjustified Support for the Realignment of Julian Street to its historic configuration:

The Draft Environmental Impact Report assumes without substantiation that the realignment of Julian Street to its historic configuration by the removal of it's present "S" configuration will somehow lessen vehicle and pedestrian safety risks.

Earlier San Jose City planners thought differently and wisely provided for the present "S" configuration of Julian Street West from Market Street to the Highway 87 underpass, allowing the free flow of thousands of vehicles presently traveling that route. It was obvious then and even more obvious now that without this "S" configuration, the present free flow of traffic will be severely hindered, causing traffic delays and resulting safety hazards for not only those travelers on Julian Street but also for those attempting to enter or exit Julian.

Even with the present three lane configuration of Julian Street, the flow of traffic is restricted at peak hours, causing back-ups reaching from the highway 87 exchange to Market Street and beyond. This highly unfavorable condition will only be exacerbated with the removal of one of the three lanes and the addition of a ninety degree left hand turn onto Terraine Street as is presently required by the proposed Development and noted in the Draft Environmental Impact Report. The proposed addition of traffic lights will only add to the delays, flaring tempers and safety hazards caused by the re-configuration of Julian Street under the proposed Legacy development.

The appeal and marketability of the Downtown area of San Jose in which the proposed development is located, is directly related to the free flow of traffic, the ease of entering and leaving the flow of traffic and the ease, availability and cost of convenient, accessible parking. One only need look to the success of the Valley Fair and other shopping centers compared with the total downtown retail business collapse and Pavilion failures, both due entirely to the lack of a free flow of traffic and the ease, availability and cost of convenient, accessible parking.

Substantially restricting the flow of traffic on Julian, the undeniable result of the proposed Legacy development, will drastically and derogatorily affect the economic appeal of the entire proposed development area and will spill over into all

other areas of the downtown itself. The resulting deterioration of the purposed development area will further depress the area's economic conditions, especially in light of the loss of the dot-com businesses and the questionable present sluggish economic environment.

The original decision of the San Jose City planners to reconstruct Julian Street from Market Street to the Highway 87 exchange in it's present "S" configuration is even more logical, sound and safe today then it was when originally planned. City planning must be directed toward improving the City while preserving it's heritage rather than haphazardly permitting development doomed to negatively affect the entire area for the mere sake of development, the economic enhancement of private developers and substantially increasing the tax basis. That a proposal with such disastrous traffic and related negative consequences would be supported in any Environmental Impact Report let alone submitted to the City of San Jose for consideration is hard to understand.

10. Unsupported Conclusion that Realignment of Julian Street to its historic configuration would result in improved safety for vehicles and pedestrians:

On numerous occasions throughout the Draft Environmental Impact Report, the Report justifies it's support for the proposed Legacy development project by flatly accepting the theory that the realignment of Julian Street to its historic configuration would result in improved safety for vehicles and pedestrians and for the entire area. The Report also uses this unsupported theory for it's rejection of four of the five alternatives it purports to analyze in the Report's Summary of Alternatives, alternative #'s 1, 2, 3, (under which Julian Street may or may not be realigned) & 4, all of which appear far superior to the proposed Legacy project.

The Report fails to support the claim that a realignment of Julian Street would result in any improvement in the flow of traffic, in safety or in anything whatsoever; rather, the Report merely, and incorrectly, assumes such to be the case when necessary to justify it's conclusions. In fact, just the opposite is true as clearly pointed out in these objections to the Report, it's conclusions and the grounds of it's conclusions.

The Report itself admits that the proposed project would "increase the demand for police and fire services", that "Emergency access to the project areas is limited", that "Buildout of the project, which adds to the traffic congestion could reduce emergency access to the project site", all of which "could result in significant safety impacts to future residents or employees in the event of emergency" (emphasis added). These admissions nullify all claims of the Report that a return of Julian Street to its historic configuration, the elimination of the present "S" configuration and the completion of the proposed Legacy project would have anything but a grossly negative effect on the entire surrounding environment and substantially increase traffic congestion on all surrounding roads and highways. Buildout of the proposed Legacy project would be an obvious environmental disaster.

It is hard to believe that a proposal with such disastrous traffic and related negative consequences would or could even be submitted to the City of San Jose, let alone be supported in any Environmental Impact Report.

11. Incorrect Report claim that no Historic Buildings would be Demolished: The proposed development would require the demolition of at least one historic building thereby reducing significantly that building's reflection of San Jose's past:

The Draft Environmental Impact report alludes to the fact that the proposed project would not require the demolition of any building determined to be a significant historic resource eligible for listing in the National Register and/or the California Register, or as a Candidate City Landmark.

However, the proposed project requires the demolition of the building referred to in the Draft Environmental Impact Report as the "Heimat Building" located at 181 Devine Street. This building was originally constructed in ca. 1872 and modified over the years with its final remodeling occurring in 1981 resulting in it's present configuration. The 1981 remodeling was completed in compliance with the Uniform Building Code and all City requirements including precautions against seismic hazards. Not only did the remodeling bring the structure up to Uniform Building Code standards but the original character, design and features of the structure were meticulously maintained while being substantially improved upon and amplified.

The building presently contains eleven and twelve foot ceilings, eight foot solid wooden panel doors outfitted with original antique hardware, a twenty-two step oak staircase, bathrooms which utilize antique fixtures while others emulate similar originals, ornate inlaid oak floors, ornate wood and tin panel ceilings, extensive woodwork and moldings throughout and numerous bay windows, some decorated with imported fabrics matching original movie theater drapes and all decorated with appropriate period window coverings. Antique lighting fixtures adorn the entire structure while the outside is covered with overlapping, eight-inch cedar siding milled in the traditional configuration used on many structures of the late 1800's. These features are all illustrated by the accompanying eleven (11) photographs.

The 1981 rehabilitation, preservation, restoration and change of occupancy was meticulously completed in a detailed manner to preserve the historic structure's original and restored architectural elements and features. The rehabilitation was completed in compliance with the intent of the California State Historical Building Code while exceeding those requirements by meeting the requirements of the Uniform Building Code. The building encourages energy conservation, provides for occupant safety and facilitates access for people with disabilities by providing an electric lift for easy access to the elevated first floor and first floor meeting facilities and disability friendly restrooms. In addition, the building is parking independent, providing all necessary on-site parking to occupants and visitors alike with easy and safe access to and from Devine Street.

The 181 Devine Street building provides offices to the legal profession and provides easy "walking distance" access from the premises to the many court

facilities in the area, minimizing the need for driving and parking. The building meets or exceeds all of the standards set for a significant historic resource eligible for listing in the National Register and/or the California Register, or as a Candidate City Landmark. The building was rehabilitated, preserved and restored in accordance with the express intent of the California State Historical Building Code, encourages energy conservation, provides for occupant safety, facilitates access for people with disabilities and meets or exceeds all standards for such structures including those restored under the State Historical Building Code.

The building was rehabilitated in accordance with the goals of the City of San Jose with an eye towards the preservation of a portion of it's history. Substantial time, energy and resources were consumed in the project resulting in a structure of historic nature which adds greatly to the area in which it is located and to the City as a whole. The building survived a great earthquake on two occasions not to mention other such events of lesser degrees and now proudly stands as a monument to San Jose's past. It would be nothing short of a disaster for it now to be destroyed.

Yet the proposed development would require the demolition of the 181 Devine Street Historic building while the Draft Environmental Impact Report fails to adequately address and only briefly comments on the issue of the Historic nature of this building, it's contribution to San Jose's past and the building's future reflection of that past.

While the Draft Environmental Impact Report clearly states that the "Redevelopment of the project area would not demolish any building determined to be a significant historic resource eligible for listing in the National Register and/or the California Register, or as a Candidate City Landmark", the Draft Environmental Impact Report vigorously supports the demolition of the Devine Street building, without the slightest, meaningful investigation into the Historic and present nature of the Devine Street structure.

The Draft Environmental Impact Report seems to once again, blindly support the proposed development while totally failing to respond to any of the many significant negative and adverse long-term effects which necessarily result from allowing the ill-conceived proposed Legacy development project.

The demolition of the 181 Devine Street building condoned by the Draft Environmental Impact Report is not supported by any evidence or investigation whatsoever and remains an unsupported and blind conclusion in support of the proposed Legacy development.

The Draft Environmental Impact Report concludes, without any investigation, that the "building has lost its architectural integrity because it was extensively remodeled in the 1980's. It no longer contains detailing and ornamentation typical of the Italianate style. The building is painted with dark brown strips contrasting with a light mocha base coat that give it an almost half-timbered look which is not Victorian in character. The modifications make it ineligible for the National Register, California Register, or as a City Landmark." These conclusions are faulty and

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incorrect and were made upon only the most cursory of observations, without any detailed investigation or observations and totally omitting any investigation of the building's interior.

At the same time, the Draft Environmental Impact Report notes, however, that "The "Victorian Law Offices," located at 181 Devine Street (APN 359-24-20) is listed on the City's Historic Resources Inventory as an "Identified Structure" for which further evaluation of the historic or architectural significance should be undertaken". Such further evaluation and investigation must be undertaken and pursuant thereto, City Council members and interested parties are invited and encouraged to tour the building by appointment. Note: several phone calls have been made to both the office of San Jose City Councilwoman Ms. Cindy Chavez and to the office of Ms. Susan Shick, Executive Director of the Redevelopment Agency of the City of San Jose, and neither office has yet to respond.

12. The proposed development does not require the demolition of real property located at 181 Devine Street as discussed paragraph number 9 above:

Although Legacy's proposal includes the taking of the 181 Devine Street real property by the Redevelopment Agency, the subsequent transfer of the property by the Redevelopment Agency to Legacy and Legacy's later demolition of the present building, the proposed plans included in the Draft Environmental Impact Report clearly show that the taking and demolition of this property is not a necessary element of the project:

A. Figure # 6 of the Draft EIR clearly indicated that the 181 Devine Street real property is located in an area not required for the construction of the buildings presently proposed by Legacy.

B. The 181 Devine Street is clearly indicated on Figure # 6 to be in an area remaining undeveloped and to the South of Legacy's proposed "Plaza", a fact confirmed on all related Figures attached to the Draft EIR.

13. Unsupported and alleged improvements resulting to Pellier Park from the proposed Legacy development:

On numerous occasions throughout the Draft Environmental Impact Report, the Report justifies its support for the proposed Legacy development project by blindly accepting the theory that a small land addition to Pellier Park resulting from the proposed development would "improve" the park itself and/or enhance the safety of park patrons. These alleged "improvements" result from the addition of a small portion of land obtained from the ill-conceived return of Julian Street to its historic configuration and the elimination of the present "S" as noted in these objections to the Draft Environmental Impact Report.

The Report provides no support whatsoever for these conclusions. On the contrary, after the completion of the proposed project the park would remain just what is now: a crime area, a habitat for derelicts and completely inaccessible to the

general public. These present conditions would continue after the proposed Legacy project as they do now, resulting in the continued present day padlocking of the entire park twenty-four hours a day, seven days a week as has been done since the park's creation.

This past and present condition of Pelier Park will remain unchanged in the future with or without the proposed Legacy development and require the continued locking and denial of access to all persons. Vehicle access to the park is now highly restricted resulting from the enormous flow of one-way traffic on all sides of the park and the total lack of accessible, convenient and affordable area parking. In any event, the park itself is not esthetically appealing or conducive to visits. The present enormous flow of traffic on all sides of the park will only increase in the event the proposed project is completed, further enhancing the inaccessibility to the park.

The conclusion of the Draft Environmental Impact Report that Pelier Park would be improved and that visitor safety would be enhanced as a result of the proposed Legacy development is unsupported, completely unjustified and simply untrue. Issues associated with the park, noted above, are totally ignored by the Report while the Report uses the park, simply because it is a "park" to justify and sell the proposed Legacy development. The correct and obvious conclusion is that any affect that the proposed Legacy development would have on the "park" would be minuscule and totally irrelevant to the overall area.

14. The Report itself supports the identified alternatives over the proposed Legacy proposal:

A careful reading and analysis of the Report reveals that the Report itself actually concludes that the first four identified alternatives to the proposed Legacy project are environmentally superior to the Legacy project; the fifth being simply a watered-down version of the present proposed Legacy project. These alternatives are generally found to be "environmentally superior to the proposed project" but are discounted by the Report based upon the erroneous and unsupported conclusions that these alternatives would not provide:

a). the improvements to Pelier Park resulting from the realignment of Julian Street to its historic configuration contained in the proposed Legacy development (a fallacious theory as noted above, even then adding only a very small portion of real property while changing little, if anything else. The park would remain locked twenty-four hours a day just as it is now, thereby completely denying all public access, just as is being denied now);

b). improved safety for vehicles and pedestrians again resulting from the realignment of Julian Street to its historic configuration (but admitted by the Report itself to be completely erroneous); and

c). that each alternative fails to meet "Applicant's"/ Legacy's goals and/or fails to support the proposed Legacy project (which in fact is not a valid consideration and certainly not legal grounds for rejecting other possible development proposals;

contained in the Report based upon Legacy's goals and desires are totally unjustified and completely inappropriate.

17. The sole purpose of an Environmental Impact Report is to determine, impartially, the "actual" and "factual" result a proposed action will have on and to the affected environment, in this case the proposed Legacy development project area. It is obvious from simply reading the report itself and from all of the above objections to the conclusions of the Report and to the basis of those conclusions, that the Report has either minimized or ignored each of the following negative results, among others. The following results flow directly from completion of the proposed Legacy project, all of which have a substantially negative and adverse effect on the related environment and each of which must be thoroughly and accurately addressed by the EIR:

1. Increase in height limitations by SIXTY (60) feet results in an increased risk of exposure to injury and/or damage;
2. Increase in and disruption of all traffic;
3. Resulting increased parking problem: Substantial increase in vehicles and substantial decrease in parking availability;
4. Occupant exposure to excessive noise and safety conditions and hazards;
5. The proposed Legacy project will result in a significant increase in vehicle-related air pollution for which there is no mitigation;
6. Risk of flooding and related safety risks and damage;
7. Immediate and substantial Increase in demand for public services and utilities at public expense;
8. Violation of Constitutional rights of private property owners;
9. Realignment of Julian Street to its historic configuration will:
 - a. Increase traffic congestion in the area causing lengthy traffic jams in the immediate area during peak and off peak hours;
 - b. Increase the risk of safety hazards to vehicles and pedestrians alike.
10. Unsupported Conclusion that realignment of Julian Street to its historic configuration would result in improved safety for vehicles and pedestrians;
11. Incorrect Report claim that no Historic Buildings would be Demolished: The proposed development would require the demolition of at least one historic building thereby reducing significantly the building's reflection of San Jose's past;
12. The proposed development does not require the demolition of real property located at 181 Devine Street as discussed in paragraph number 12 above;
13. Unsupported conclusions that there are resulting improvements to Pellier Park from the proposed Legacy development of benefit to the public;
14. Formation of an Assessment District to relieve Legacy from substantial development costs and pass these expenses on to the general public;
15. Unjustified intention and attempt of the Report to support and meet "Applicant's"/Legacy's goals and support the proposed Legacy project while ignoring all of the resulting negative impacts set forth above and their effect on the City and people of San Jose;

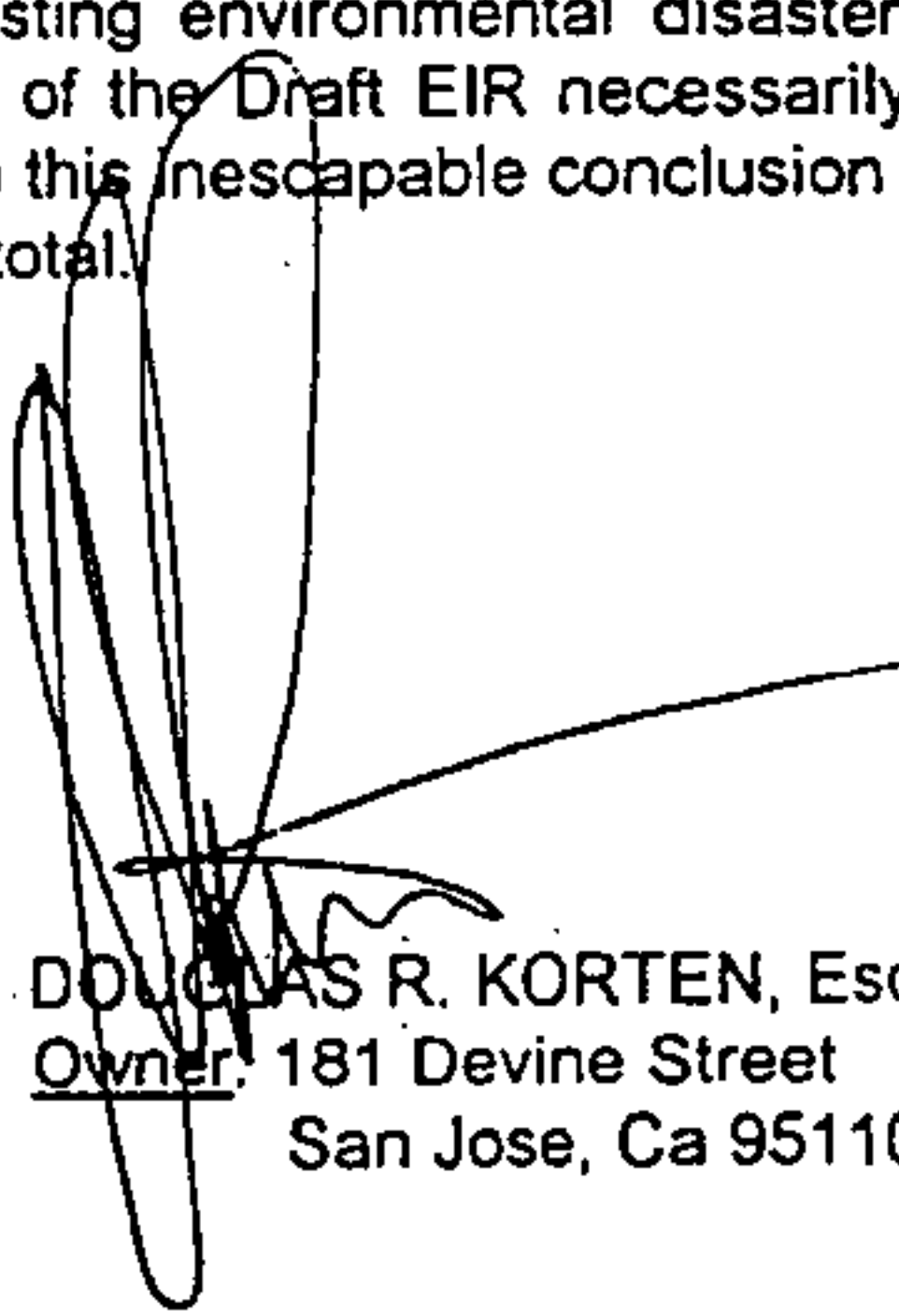
16. The immediate, substantial and detrimental marketing and economic effect on the entire project and surrounding area.

The Report itself supports the identified alternatives to the proposed Legacy proposal and many, many other alternative development proposals are possible which would avoid most of the environmental problems and substantially mitigate others directly created by the proposed Legacy development. At least four such alternatives are identified in the Report itself.

Conclusion:

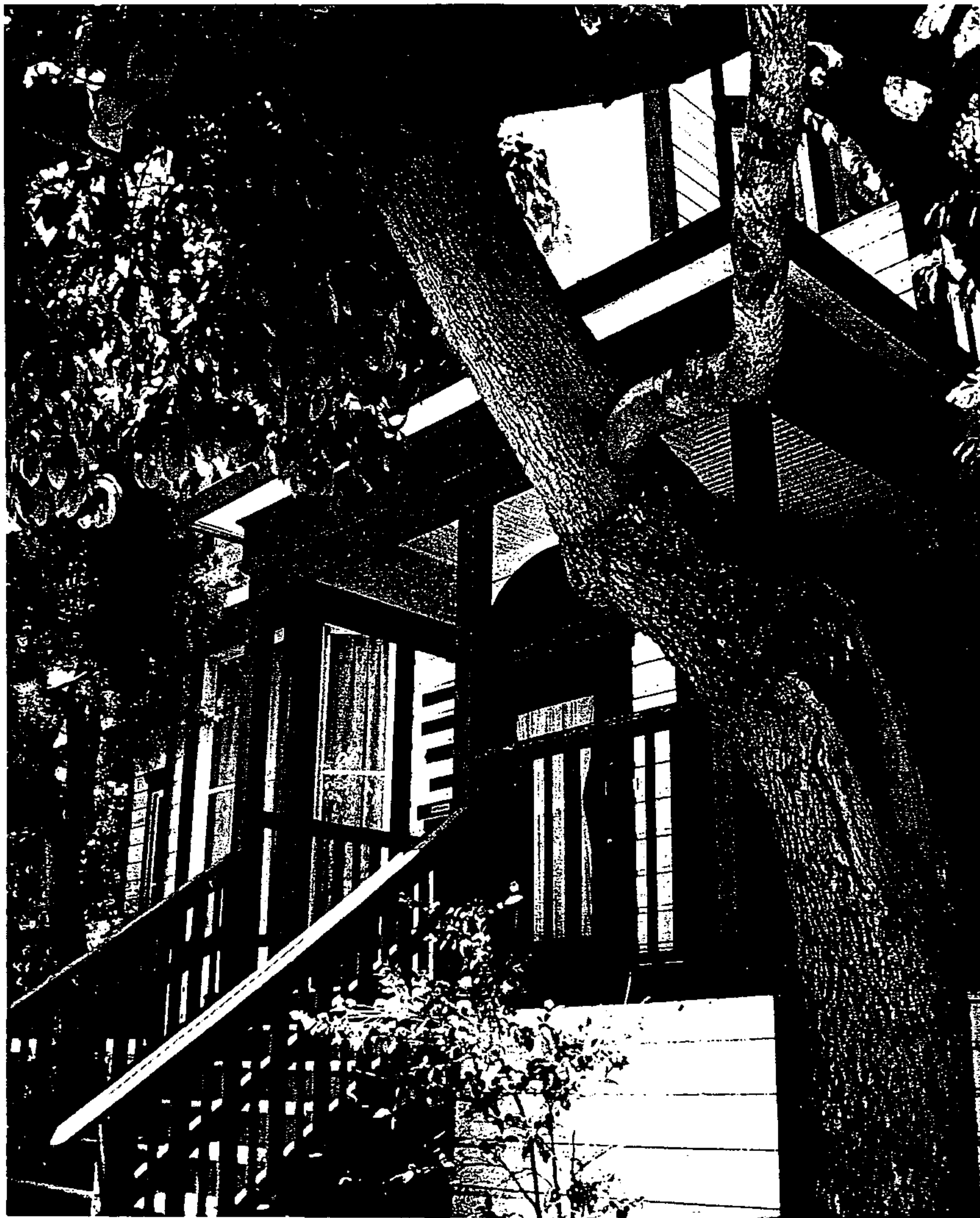
For all of the reasons set forth above, a Buildout of the proposed Legacy project would be an obvious and lasting environmental disaster. A thorough and careful reading, review and analysis of the Draft EIR necessarily leads all but the prejudiced and predisposed reader to this inescapable conclusion and therefore, the proposed project must be rejected in total.

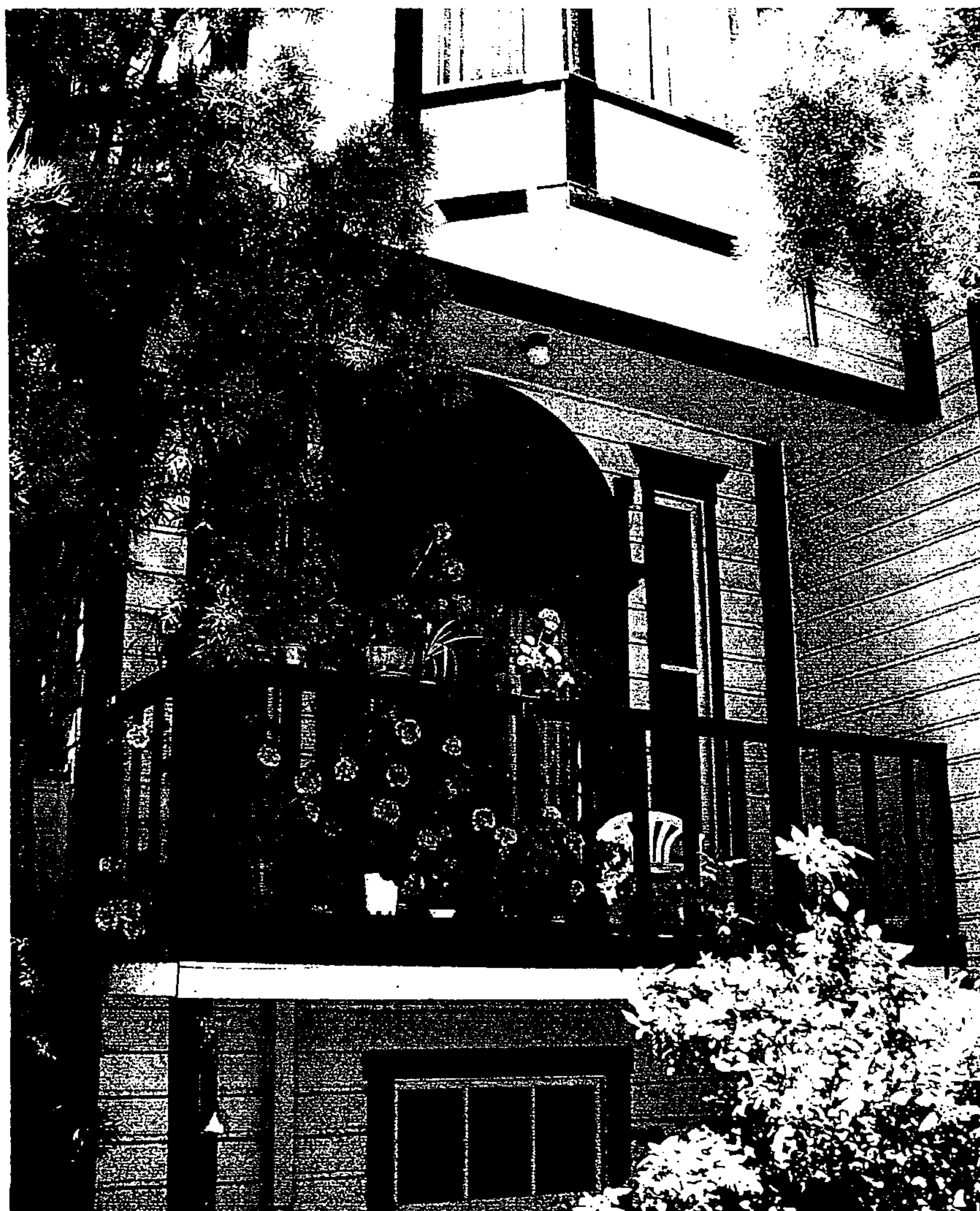
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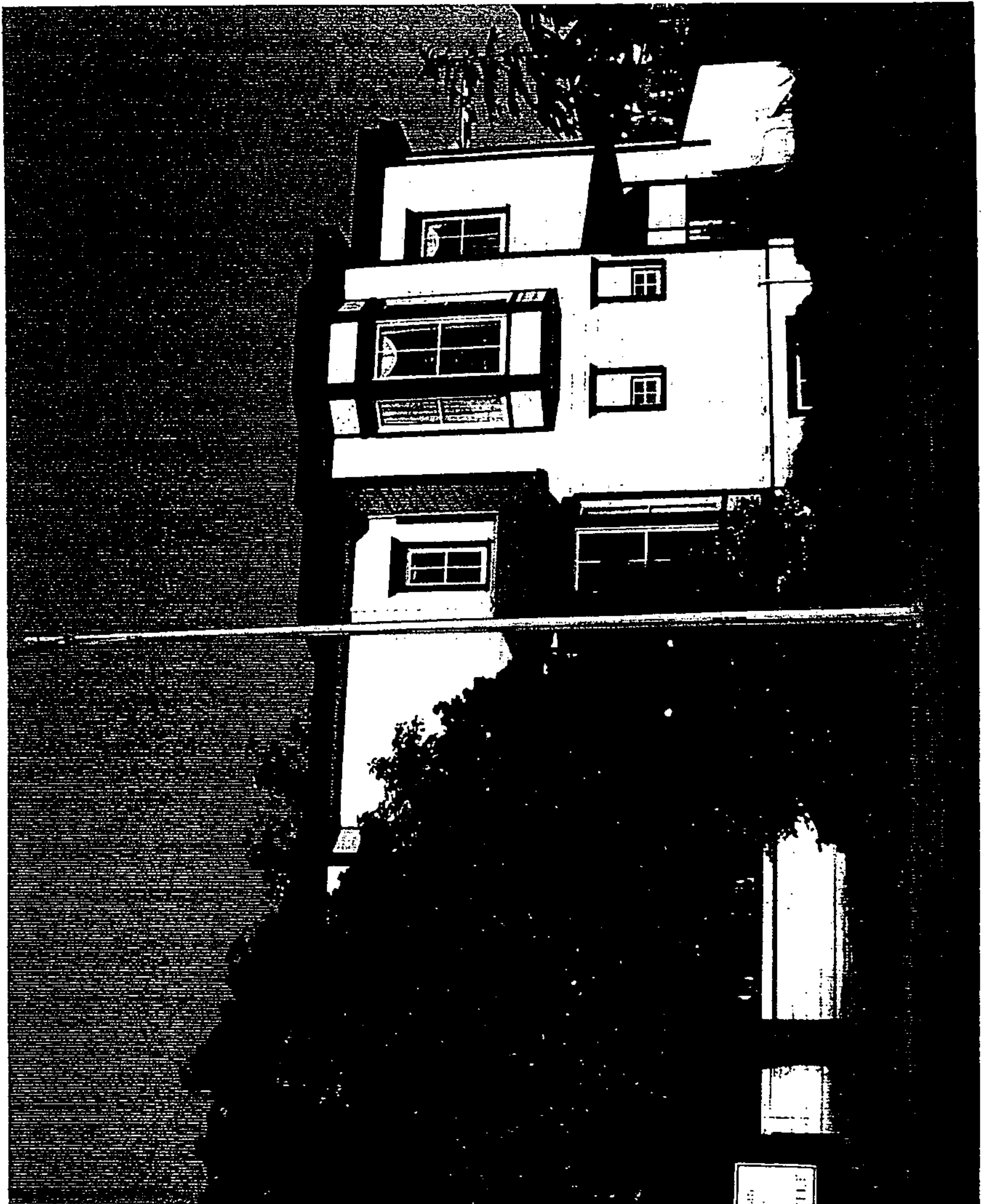


DOUGLAS R. KORTEN, Esq.
Owner, 181 Devine Street
San Jose, Ca 95110



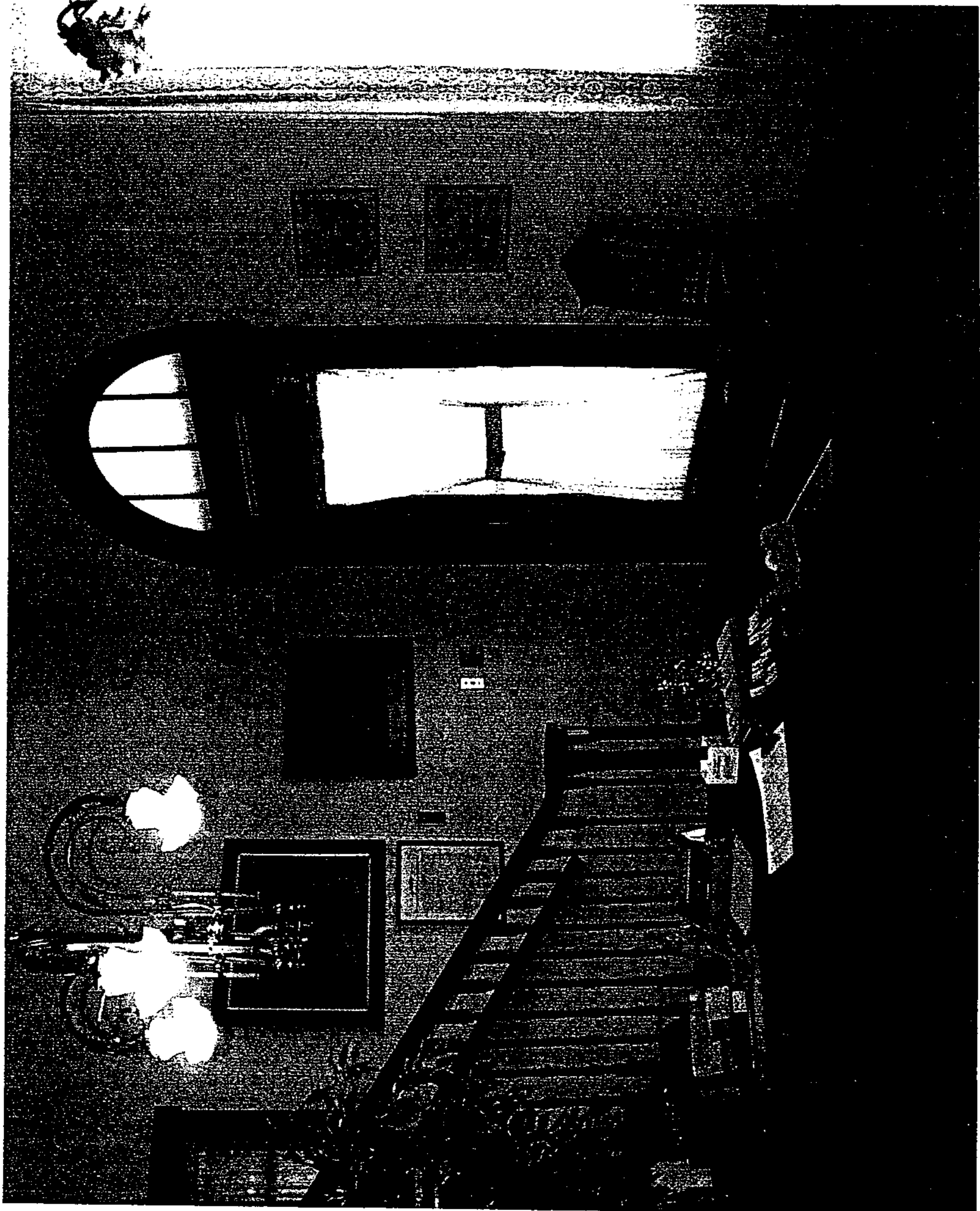






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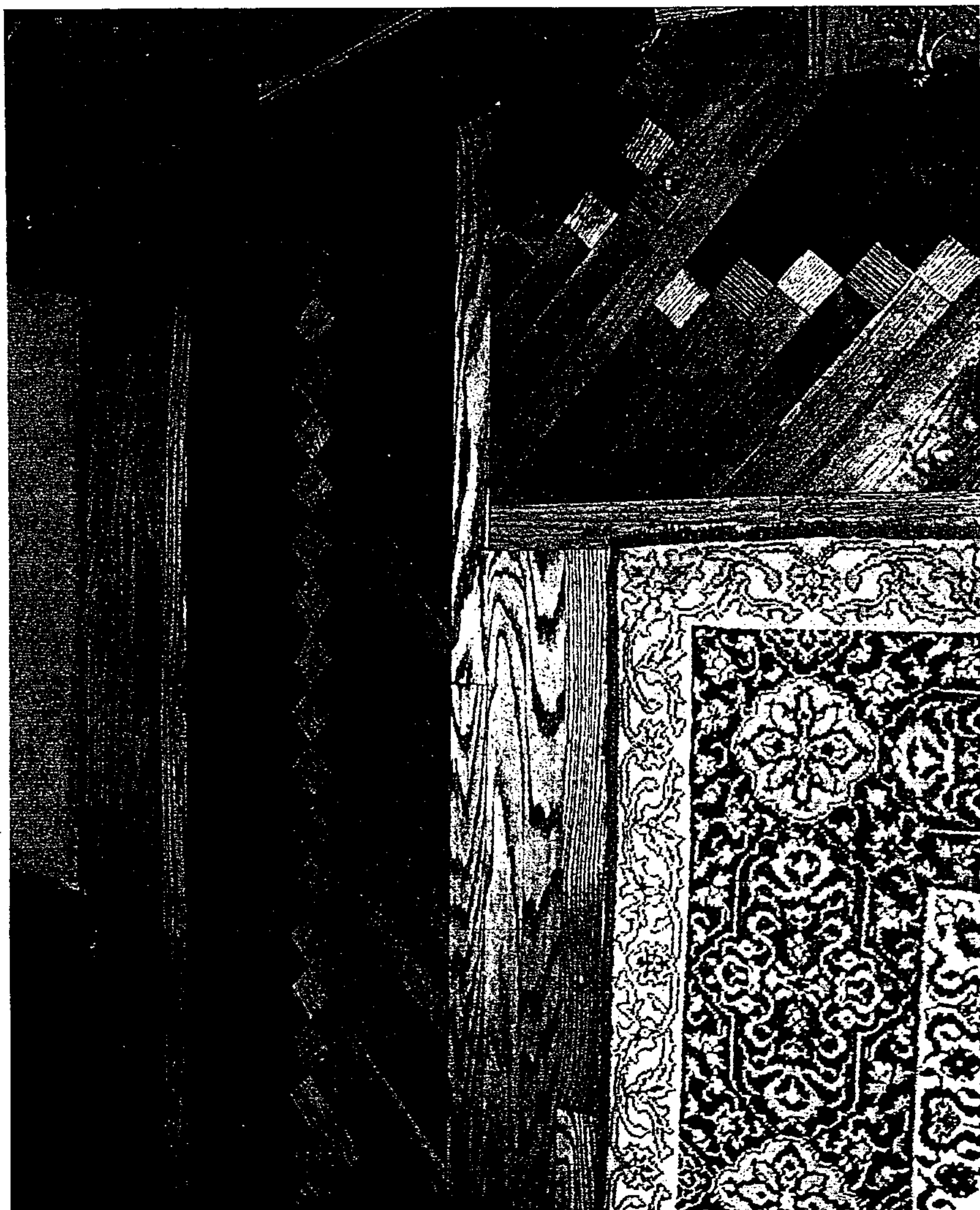
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COMMENTOR E1

Douglas Korten
October 7, 2003

Comment E1-1: After review of the Draft Environmental Impact Report under date of August 22, 2003, we agree with the conclusion of the report that "the Alternate Location alternative would be the environmentally superior alternative", p. 236. In other words, the Draft Report recommends that the proposed project be constructed elsewhere to avoid the resulting major adverse impacts in the San Pedro, Julian area, including, but not limited to, the following:

1. An unacceptable increase in traffic through a dense residential neighborhood;
2. Construction of residential units in an area where noise levels exceed the City's standards, p. 225;
3. Significant negative traffic level of service impacts at intersections and to freeway segments of State Route 87;
4. Significant contribution to regional flooding and noise and air pollution;
5. Significant exposure of a new residential population to the dangers of frequent and close air traffic;
6. Significant increase in safety hazards to air traffic resulting from high rise and full time densely populated residential buildings in close proximity to the airport and its air traffic approach;
7. An unacceptable increase in traffic congestion and safety hazards directly resulting from the "straightening of Julian Street";
8. An unacceptable increase in traffic congestion and safety hazards directly resulting from the project itself.

Response to Comment E1-1: The premise of this comment is not accurate in two ways: (1) it grossly overstates the extent to which the Alternate Location alternative could lead to fewer or less severe adverse impacts than the proposed project; and (2) it fails to take note of the conclusion in the Draft EIR that the Alternate Location alternative would fail to achieve any of the project's objectives. For both those reasons, the Alternate Location alternative should be rejected.

In order to make clear this conclusion (which the authors understand may have been expressed in too subtle a manner in the Draft EIR, the Draft EIR is revised to include the following supplemental language in Chapter VII, Alternatives, as a new last sentence in the last paragraph on page 236:

It is the conclusion of this EIR that in the strict sense of numbers of impacts and severity of impacts, the Alternate Location alternative would be the environmentally superior alternative. However, the distinctions that can be drawn between that alternative and the proposed project are relatively small and, for that reason, not entirely clear without a more detailed analysis of the Alternate Location. It is important to note that while this alternative could be environmentally superior in the technical sense that contribution to these aforementioned impacts would not occur, the Alternate Location alternative would fail to achieve any of the project's objectives. The creation of high quality, high density, residential development and adequate

parking facilities in this underutilized area would be foregone, as would the new open-space proposed as part of the project. In addition, the realignment of Julian Street and reestablishment of the historic rectangular grid system would not be realized. For these reasons relating to its failure to achieve any of the project's objectives, the Alternate Location alternative should be rejected.

Comment E1-2: As noted in the Draft Report (p. 31), in April of 2001, the same general area and the same general proposed project was the subject of a Draft EIR for General Plan amendments. Our Response to that 2001 Report pointed out the adverse impacts which would have resulted from the implementation of that project and our related objections. Because the project suggested in the 2001 Report and the project suggested in this Draft Report are very nearly identical, including the related data, arguments and skew, a copy of our response to the 2001 report (including photos) is attached hereto and incorporated herein as an objection to the same basic project again being proposed.

Response to Comment E1-2: The proposed project that was the subject of a separate environmental impact analysis in 2001 was an entirely different project than the Brandenburg /North San Pedro Housing Sites project. That earlier project, known as the West Julian Revitalization Project (or Legacy Partners Office project) proposed office and retail land uses of over 1,120,000 square feet. As noted in this comment, the 2001 document was circulated as a Draft EIR; however, it was never certified by the lead agency (City of San Jose). Its analysis and findings were undertaken by a different consultant team than those who assisted the City of San Jose with the preparation of this EIR. It is not possible to respond to the commentor's comments on the 2001 EIR by somehow cross-comparing those comments against the text of this EIR.

Comment E1-3: In proposing recent projects in this area, it is obvious that the realignment of Julian Street is a major goal of both the City of San Jose and of the Redevelopment Agency. It is equally obvious that the realignment of Julian Street will create major traffic congestion, the very traffic congestion that was eliminated when the "S" curve was added to Julian Street years ago. These same concerns are expressed by the State of California, Department of Transportation in their letters dated February 10, 2003 and February 11, 2003, both attached as exhibits in Appendix "A" of the Report. And although it seems impossible to properly assess the future realignment of Julian Street (removal of the present "S" curve) without a complete review of the data supporting the prior addition of the present "S" curve, no such review appears to have been included in the present Draft Report. There is no doubt that the original data would support leaving Julian Street in its present condition and would not support its realignment. Our objection to the realignment of Julian Street is set out in our prior objections dated June 11, 2001 and attached hereto.

Response to Comment E1-3: The S curve in Julian Street was built over 30 years ago and no records exist that show the original analysis. Even if the records were available, the analysis and decision about realignment must be made based on current and projected future conditions. Those conditions are set forth in the Draft EIR in Chapter V, section B. Transportation and Circulation (pages 71-104). The comment is incorrect that the realignment of Julian Street would create major traffic congestion. The General Plan amendment to realign Julian Street is specifically addressed beginning on page 101 and extending through page 103.

Comment E1-4: Our objections then and now are the same. As pointed out in our prior objections attached hereto, the present project 1) will subject the numerous residential units and buildings to major related safety hazards from air traffic, noise and air pollution and the resulting substantial traffic increase in the entire surrounding area; 2) includes straightening Julian street which will only multiply these major adverse impacts both immediately and in the future; and 3) requires the unconstitutional taking of private property.

Response to Comment E1-4: This multi-part comment is noted. However, the opinions expressed herein are only partially drawn from the environmental analysis presented in the Draft EIR. Furthermore, they focus more on the project's merits than on the adequacy of the Draft EIR. No further response is necessary.

Comment E1-5: The present Draft report is strangely silent on references to the real property located at 181 Devine Street, San Jose, CA in an obvious attempt to ignore the present building located on that property. All photos included in the Draft Report exclude the Devine Street property; and the Report simply discards the building as, "non-significant", attaching to it a 28 (27.54) point "rating", just 5 points lower than the 33 points designated for preservation. We make specific objection to the treatment of the real property located at 181 Devine Street, San Jose, CA by the Report, to the classification of that property as "non-significant" by the Report, its drafters, and agents and to the position of the Report that the "Redevelopment Agency may acquire properties" from unwilling owners in the proposed project area. A more thorough discussion, along with photos of the building omitted from this Draft Report, is set out in our prior objections dated June 11, 2001 and attached hereto (additional new photos are also attached).

In the early 1980's, the 181 Devine Street real property was completely restored and remodeled with the blessing of the City of San Jose (who issued the permits) and every attempt was made to retain the building's original integrity and character. The intended use of the rehabilitated building as offices with on site parking was then touted by the City as a conforming and welcome use and as offices, it still fits into the present, proposed plan discussed by the Draft Report.

Response to Comment E1-5: At the present time, the proposed project would demolish or relocate the structure at 181 Devine Street. As noted in the comment this building was determined to be "non-significant" under the City's Historic Evaluation Procedure (see Draft EIR, page 169). The commentator's claim that the City granted permits for remodeling of the building in the early 1980s has no bearing on its current significance under the City's standards for historic resources. No further response is necessary.

Comment E1-6: The original map of the present proposed project included a parcel of real property owned by Mr. Charles W. Davidson and used as a parking lot for his adjacent building. By letter dated February 6, 2003 (included in Appendix "A" of the Report), Mr. Davidson was apparently successful in removing his parking lot from the proposed project area as it has been, in fact, removed. Therefore, as the owner of 181 Devine Street, I now make the same request in the same language: "I would appreciate it if you would remove my property from your E.I.R. I have no desire to make any changes with this property."

Response to Comment E1-6: Comment noted. However, such a request is not relevant to the adequacy of the EIR and no further response is necessary.

Comment E1-7: I again express my objection to the project discussed in the Report and express the above concerns and those noted by the State of California, Department of Transportation in their letters dated February 10, 2003 and February 11, 2003, both attached as exhibits in Appendix "A" of the Report. The "Rule of Reason", as referred to in the Draft Report, demands that if the project proceeds at all, it must proceed at the alternated location discussed in the Report.

We agree with the conclusion of the report that "the Alternate Location alternative would be the environmentally superior alternative." Of the six possibilities, the proposed project and the five alternatives, the proposed project results in the most major and lasting adverse impacts and must, for that reason, be abandoned.

Response to Comment E1-7: Please see Response to Comment E1-1 regarding the Alternate Location alternative. The commentor is mistaken in his usage of the term "rule of reason"; in the context of a EIR Alternatives chapter, that term refers to the Courts' expectation that only a reasonable number and type of alternatives will be examined in order to permit a decision making body to weigh the advantages and disadvantages of the proposed project and feasible alternatives.

October 13, 2003

Ms. Susie Pineda
Department of Planning, Building and Code Enforcement
801 N. First St., Room 400
San Jose, CA 95110

RE: GP03-03-01 DEIR Brandenburg Mixed Use/North San Pedro Housing Sites Project

Dear Ms. Pineda:

I am a resident of the Vendome neighborhood located north of the proposed Brandenburg Mixed Use project, and am writing in response to the public comment solicitation of the DEIR for the proposed development. I appreciate the opportunity to provide comments to this sizeable development as it is so close to our neighborhood, and will have impact to us. (I'd like to note I had quite a bit of difficulty in reading the DEIR report as it is written using terms and phrases not common to most neighborhood residents like me.)

While overall I support the project as a step toward enhancing downtown and encouraging an influx of new residents, I have a few concerns listed below. Detail about my concerns and following comment or suggestion is expanded on within this letter. (Please note these concerns follow the listing in the summary, but are of equal concern to me.)

- Traffic level of service
- Urban design policy
- Air quality
- Vegetation
- Public services
- Parkland

Traffic Level of Service

The study takes into account existing and projected traffic patterns, however I did not see anything specific to a new development further north (Taylor Towers project) which has the potential to add 600+ cars onto city streets. Because some of Taylor Towers traffic will potentially flow southbound onto First St., I believe there will be increased impact on peripheral side streets directly off of First (in order to cut through traffic by getting onto San Pedro); this is already a problem now without either development. I also believe there may be more impact than what is projected on First/Bassett and First/Julian. *Suggestion: Implement additional traffic studies to measure impact along side streets (George, Hobson, Rankin, Ayer, Hawthorne, Clayton, Fox) as physical traffic mitigation measures may need to be explored. Implement additional traffic studies on First Street at the intersections of Bassett and also Julian. Both of the above studies must use the appropriate assumptions of additional traffic.*

1

Urban design policy 1

There was mention in the study on the "Protection and development of neighborhood character" – under LU2 Mitigation measure. *Comment: I heartily support the design of the building and surrounding accoutrements (lighting and fencing specifically) to compliment the existing neighborhoods.*

2

Air Quality

The report makes suggestion for appropriate construction controls. The Vendome neighborhood has suffered numerous instances of construction trucks exhibiting high speed levels through our residential neighborhood (mostly along San Pedro Street); these trucks are being utilized in current developments (Pulte and Legacy). It would be a shame to have other neighborhoods suffer through the same conditions. *Suggestion: Construction crews arriving to and leaving from the job site be continuously reminded about speed limits on residential streets.*

3

Project related regional emissions will exceed city approved guidelines. *The following suggestion is not offered as a solution; it is however in line with the City's General Plan which encourages high density building along transportation corridors in order to encourage public transit participation. Suggestion: Residents be provided with incentive to utilize light rail and other VTA sponsored options by making available subsidized Ecopasses, as was done for the Taylor Towers project (a recommendation to council from Council member Cindy Chavez).*

4

Vegetation

22 mature trees were noted in the study – these trees were found to meet the City's standard for protection. Although it was noted that removal of said trees would not have a significant impact, I disagree. *Suggestion: Every reasonable effort be made to protect as many of these mature trees as possible. (I understand smaller, immature trees would be planted in the mature trees place, but if possible the mature ones be given adequate protection.)*

5

Fire and Emergency medical services

With the advent of additional, taller structures resulting from this project, I have a concern about adequate personnel and equipment to respond to additional emergency assistance requests. I noted that currently (without the new structures and residents) the response time was lower (68%) than the city's goal of 80% response time in under 4 minutes.

Suggestion: The City include in their budget planning the provision of additional personnel and equipment so city response time falls within the goal of 4 minutes.

6

Parkland

District 3 has a shortfall of parkland, and it doesn't appear there will be adequate land provided for within the project to meet the City's standard. The project will have existing parks to share with currently existing residents. I disagree with the report's statement that increased use of existing parks would not have substantial impact on the physical deterioration of said park. As it is now, Ryland Park, contained within the Vendome Neighborhood suffers from City resources being stretched thin due to budget constraints. *Suggestion: Every effort be made to allocate adequate resources to keep existing and new parks at peak operating efficiency. "In lieu of" fees from developer going directly to Ryland Park would be a step in the right direction. Additionally, developer in lieu of fees be used to construct either an extension of the park or a public gathering area separate from but adjacent to the park – along Ryland Park drive and the corner of San Pedro Street.*

7

Thank you again for the opportunity to provide comment about the DEIR.

Sincerely,

Tina Morrill

Resident and member of the Vendome Neighborhood Association

COMMENTOR E2

Tina Morrill
October 13, 2003

Comment E2-1: The study takes into account existing and projected traffic patterns, however I did not see anything specific to a new development further north (Taylor Towers project) which has the potential to add 600+ cars onto city streets- Because some of Taylor Towers traffic will potentially flow southbound onto First St., I believe there will be increased impact on peripheral side streets directly off of First (in order to cut through traffic by getting onto San Pedro); this is already a problem now without either development. I also believe there may be more impact than what is projected on First/Bassett and First/Julian. *Suggestion: Implement additional traffic studies to measure impact along side streets (George, Hobson, Rankin, Ayer, Hawthorne, Clayton, Fox) as physical traffic mitigation measures may need to be explored. Implement additional traffic studies on First Street at the intersections of Bassett and also Julian. Both of the above studies must use the appropriate assumptions of additional traffic.*

Response to Comment E2-1: The Taylor Towers project is included in the background scenario of the traffic analysis. No further impacts beyond those outlined in the Draft EIR are expected; no additional studies or mitigations would be appropriate.

Comment E2-2: There was mention in the study on the "Protection and development of neighborhood character" — under LU2 Mitigation measure. *Comment: I heartily support the design of the building and surrounding accoutrements (lighting and fencing specifically) to compliment the existing neighborhoods.*

Response to Comment E2-2: The comment refers to one component of Mitigation Measure LU-2. That component is an existing City policy from the 2020 General Plan, which states:

- *Urban Design Policy 1* – The City should continue to apply strong architectural and site controls on all types of development for the protection and development of neighborhood character and for the proper transition between areas with different types of land uses.

Commentor's support for this policy is noted.

Comment E2-3: The report makes suggestion for appropriate construction controls. The Vendome neighborhood has suffered numerous instances of construction trucks exhibiting high speed levels through our residential neighborhood (mostly along San Pedro Street); these trucks are being utilized in current developments (Pulte and Legacy). It would be a shame to have other neighborhoods suffer through the same conditions. *Suggestion: Construction crews arriving to and leaving from the job site be continuously reminded about speed, limits on residential streets.*

Response to Comment E2-3: The Air Quality section of Chapter V sets forth Mitigation Measure AQ-1 to address demolition and construction period dust, exhaust, and organic emissions (pp. 109-

110 of the Draft EIR). The suggestion in this comment that construction period truck traffic exhibits high rates of speed and that drivers should be reminded of the speed limits on residential streets is one that would be addressed in the Transportation and Circulation section. However, the EIR authors do not believe that requiring such a mitigation measure is warranted. Ensuring compliance with vehicular speed limits throughout the City is an ongoing task of the Police Department. Data on the frequency of traffic accidents in the Downtown area in recent years does not suggest that this phenomenon is any more prevalent or severe in the vicinity of the project site than elsewhere where large scale redevelopment is occurring.

Comment E2-4: Project related regional emissions will exceed city approved guidelines. *The following suggestion is not offered as a solution, it is however in line with the City's General Plan which encourages high density building along transportation corridors in order to encourage public transit participation. Suggestion: Residents be provided with incentive to utilize light rail and other VTA sponsored options by making available subsidized Ecopasses, as was done for the Taylor Towers project (a recommendation to council from Council member Cindy Chavez).*

Response to Comment E2-4: To clarify a point made in the comment: Project-related regional emissions would exceed the Bay Area Air Quality Management District (not City of San Jose) thresholds of significance for ozone precursors.

In response to this comment, the Draft EIR is revised as follows on pages 13 and 112 (as part of Mitigation Measure AQ-2) to incorporate a requirement that residents be provided with Ecopasses. The following new bullet point is added to the series of measures aimed at reducing vehicle trip generation and the resulting air emissions from the proposed Project:

- Provide a subsidized Ecopass for each resident of the proposed Project.

Comment E2-5: 22 mature trees were noted in the study — these trees were found to meet the City's standard for protection. Although it was noted that removal of said trees would not have a significant impact, I disagree. *Suggestion: Every reasonable effort be made to protect as many of these mature trees as possible. (I understand smaller, immature trees would be planted in the mature trees place, but if possible the mature ones be given adequate protection.)*

Response to Comment E2-5: The Vegetation and Wildlife section of Chapter V finds one significant impact, as follows:

Impact VEG-1: Construction of the proposed project would result in the removal of existing mature trees.

The discussion that follows this impact statement notes that 22 ordinance-sized trees could be removed during redevelopment of the property and that such a loss is considered significant when judged against the City's standards. It also emphasizes that none of the trees are native or particularly fine specimens. In the past, when faced with similar impacts, the City has required 4:1 (planted trees to removed trees) mitigation to off-set the loss of ordinance-sized trees. In this case, the recommended mitigation measure is as follows:

Mitigation Measure VEG-1: For trees that cannot be incorporated into new landscaping, a City of San Jose Tree Removal Permit shall be obtained prior to removal of trees from the site. Loss of ordinance size trees will be mitigated by implementation of landscaping plans approved by the City of San Jose, in conformance with the City of San Jose landscaping guidelines and City of San Jose Planning Department specifications. The City of San Jose requires tree replacement for those trees greater than 18 inches in diameter at a ratio of 4:1 (trees planted to trees removed).

Implementation of this mitigation measure would fully compensate for the loss of the 22 ordinance-sized trees, based on City policy.

Comment E2-6: With the advent of additional, taller structures resulting from this project, I have a concern about adequate personnel and equipment to respond to additional emergency assistance requests. I noted that currently (without the new structures and residents) the response time was lower (68%) than the city's goal of 80 percent response time in under 4 minutes. *Suggestion: The City include in their budget planning the provision of additional personnel and equipment so city response time falls within the goal of 4 minutes.*

Response to Comment E2-6: Analysis of Fire and Emergency Services occurs in the Public Facilities and Services section of Chapter V. As correctly noted in the comment (for fiscal year 2001-2002) the overall performance of the Fire Department for all emergencies was 68 percent within four minutes or less travel time, substantially lower than the Fire Department's goal of 80 percent. The analysis presented the following impact related to this topic:

Impact SVCS-1: The increasing traffic congestion that the downtown area will face in coming years could adversely affect the ability of both the Police Department and the Fire Department to respond in a timely manner to emergency calls.

It should be noted that the cause of this potential impact is not related to the construction of *additional taller* structures (as suggested in the comment), but rather that traffic congestion and delays that may result from a higher level of residential population and employment in the Downtown area. The Draft EIR goes on to recommend a two-part mitigation measure that would ensure that impacts related to police and fire services would be reduced to a less-than-significant level.

Mitigation Measure SVCS-1a: The City shall continue to implement the following 2020 General Plan goals and policies that relate to public facilities and services:

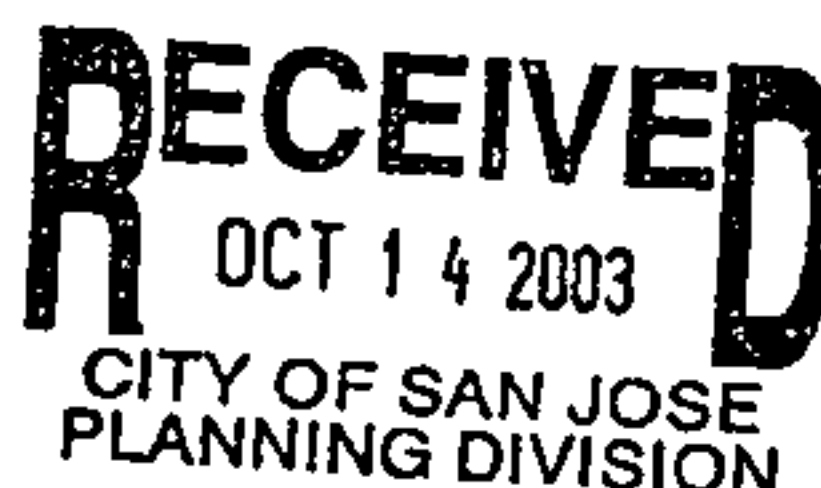
- *Other Services Policy 18* – Fire service facilities should be located so that essential services can be most efficiently provided.
- *Fire Hazards Policy 2* – All new development should be constructed at a minimum, to the fire safety standards contained in the San Jose Building Code.
- *Fire Hazards Policy 3* – Anticipated fire response times and fire flow should be taken into consideration as part of the Development Review process.
- *Fire Hazards Policy 6* – New development should provide adequate access for emergency vehicles, particularly fire fighting equipment, as well as provide secure evacuation routes for the inhabitants of the area.

Mitigation Measure SVCS-1b: The City should implement a system of signal light preemption by emergency vehicles along key emergency response travel routes so as to expedite emergency through the Downtown Core Area.

Implementation of this two-part mitigation measure would reduce this potential impact to a less than significant level. The comment's suggestion that the City include in its budget planning the provision of additional personnel and equipment aimed at meeting the 4-minute response goal is descriptive of the current budget process.

Comment E2-7: District 3 has a shortfall of parkland, and it doesn't appear there will be adequate land provided for within the project to meet the City's standard. The project will have existing parks to share with currently existing residents. I disagree with the report's statement that increased use of existing parks would not have substantial impact on the physical deterioration of said park. As it is now, Ryland Park, contained within the Vendome Neighborhood suffers from City resources being stretched thin due to budget constraints. *Suggestion: Every effort be made to allocate adequate resources to keep existing and new parks at peak operating efficiency. "In lieu of" fees from developer going directly to Ryland Park would be a step in the right direction. Additionally, developer in lieu of fees be used to construct either an extension of the park or a public gathering area separate from but adjacent to the park — along Ryland Park drive and the corner of San Pedro Street.*

Response to Comment E2-7: Please see Response to Comment D2-30.



October 13, 2003

Ms. Susie Pineda
Department of Planning, Building and Code Enforcement
801 N. First St., Room 400
San Jose, CA 95110

RE: GP03-03-01 DEIR Brandenburg Mixed Use/North San Pedro Housing Sites Project

Dear Ms. Pineda:

I have reviewed the Draft Environmental Impact Report ("DEIR") for the Brandenburg Mixed Use Project as a member of the Vendome Neighborhood Association and a Director of the College Park Home Owners Association Board. The Vendome Neighborhood is located directly north of the project area and bounded by First Street, Taylor Street, Guadalupe Parkway and the Union Pacific Railroad tracks. College Park is the residential development located immediately to the north-east of the proposed project site. I support a mixed-use project on the 11.11-acre site located south of my neighborhood and the proposed realignment of Julian Street between Market and Saint James Streets. However, I have concerns regarding adequacy of the circulation and open space components of the DEIR.

1

I have two concerns regarding the adequacy of the circulation analysis. Firstly, the DEIR analysis of the surrounding neighborhood did not study and fails to take into account the traffic impacts at the intersection of Bassett Street and First Street because it is not currently signalized. This impact is compounded because the DEIR makes optimistic assumptions regarding transit usage. Secondly, the transportation and circulation analysis assumes that Highway 880-bound traffic will use Coleman Avenue thereby causing unacceptable impacts at the Hedding and Taylor intersections. As the Coleman Avenue intersections will be either at LOS D or LOS F it is likely that Highway 880 bound traffic will use the alternate (First Street via Bassett Street) entrance to Highway 880. The parking lot access points for six of the Brandenburg buildings are located on Bassett Street. It is more likely that this traffic seeking to get on north-bound Highway 880 will use the First Street freeway entrance. All of this will create a significant traffic increase at the intersection of Bassett and First Street as a result of this project. A signal warrant analysis at the intersection of Bassett and First Street should be required upon completion of the Brandenburg project as a condition of development.

2

3

The Redevelopment Agency proposes to realign Julian Street between Market and Saint James Streets as part of restoration of the City street grid. I welcome this proposal which will result in elimination of the existing "S" curve and the dangerous fast moving traffic that is a hazard to pedestrians from my neighborhood seeking to walk downtown. Residents in our residential area support a more accessible Julian Street as a two-lane roadway with signalized intersections for pedestrian access/safety with wider sidewalks. We believe that the Julian Street Variant 2 alignment will reduce neighborhood traffic impacts and slow traffic in residential areas. Whereas, the Julian Street Variant 1

4

alignment would put significant amounts of traffic in a primarily residential neighborhood.

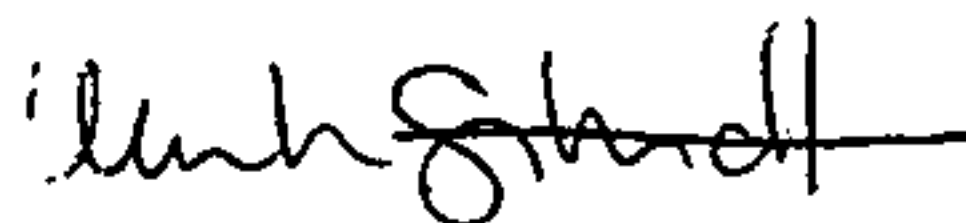
4
cont.

The open space component of the DEIR details that parcels P1 and P2 are to be developed as public park spaces because residential projects with 50 or more units are required to dedicate land in accordance with the City's policy of providing 3.0 acres for every 1,000 new residents. According to the DEIR analysis, this project would have a parkland obligation of 12.02 acres. A total of 1.07 acres of parks and open space (parcels P1 and P2) are included in the proposed project. According to the Parkland Dedication Ordinance the project may also satisfy another 50 percent of its parkland obligation by paying in-lieu fees. Assuming these in-lieu fees are paid to the City, this leaves the project with a deficiency of 4.94 acres in open space. This is especially noteworthy when considering that District 3, as stated in the DEIR, has the lowest number of parkland acres of any Council District. To partially mitigate this deficiency in parkland, I would suggest a street vacation on a portion of San Pedro Street be used to add a 3rd park in the area north of Bassett Street, east of the proposed Building B, and west of the Market-Coleman ramp. This additional parkland can easily be created by moving the parking access point for Building B from San Pedro Street to Bassett Street. It should also be required that in-lieu fees paid by developers of this project be used to upgrade the adjacent St. James, Ryland, Guadalupe River, and Pellier Parks which will be most impacted by this intensive new development.

5

Thank you for the opportunity to review and comment on this DEIR. Should you have any questions regarding this letter, please do not hesitate to contact me at (408) 287-4987.

Sincerely,



Mark Gerhardt
68 Ryland Park Drive
San Jose, CA 95110

COMMENTOR E3

Mark Gerhardt
October 13, 2002

Comment E3-1: I support a mixed-use project on the 11.11-acre site located south of my neighborhood and the proposed realignment of Julian Street between Market and Saint James Streets. However, I have concerns regarding adequacy of the circulation and open space components of the DEIR.

Response to Comment E3-1: The commentor's general support for a mixed-use project at the project site and support for the proposed realignment of Julian Street between Market Street and St. James Street is noted for the record. Concerns over the circulation and open space components of the Draft EIR are set forth and responded to below.

Comment E3-2: I have two concerns regarding the adequacy of the circulation analysis. Firstly, the DEIR analysis of the surrounding neighborhood did not study and fails to take into account the traffic impacts at the intersection of Bassett Street and First Street because it is not currently signalized. This impact is compounded because the DEIR makes optimistic assumptions regarding transit usage.

Response to Comment E3-2: The comment is correct that the City's level of service policy does not apply to the intersection of Bassett Street and First Street since the intersection is unsignalized. The City monitors traffic at unsignalized intersections and puts intersections on a list for future signalization if and when traffic signal warrants are met.⁹ The city does not call for the signalization of any intersections in advance of the warrants being met.

At First Street & Bassett Street, the proposed project would add 44 trips during the AM peak hour and 51 trips during the PM peak hour. These trips would be comprised of traffic accessing First Street to travel to or from the north. Based on field observations of that intersection during peak hours by the EIR team's transportation specialists (Hexagon Transportation Consultants), this modest level of additional trips would not change the intersection's operations.

In regard to "optimistic assumptions" about transit usage, the traffic analysis uses data from a survey of residents at Villa Torino (a similar residential development across Coleman Street) regarding transit and walk trips versus auto trips and, as such, represents real world results as to transit usage by downtown residents who are provided with similar choices.

Comment E3-3: Secondly, the transportation and circulation analysis assumes that Highway 880-bound traffic will use Coleman Avenue thereby causing unacceptable impacts at the Hedding and

⁹ Traffic signal warrants are criteria established by Caltrans and local communities to determine when traffic signals are justified at a given intersection. Common measurements include vehicle volumes, interruption of traffic flow, pedestrian volumes, and accident experience.

Taylor intersections. As the Coleman Avenue intersections will be either at LOS D or LOS F it is likely that Highway 880 bound traffic will use the alternate (First Street via Bassett Street) entrance to Highway 880. The parking lot access points for six of the Brandenburg buildings are located on Bassett Street. It is more likely that this traffic seeking to get on north-bound Highway 880 will use the First Street freeway entrance. All of this will create a significant traffic increase at the intersection of Bassett and First Street as a result of this project. A signal warrant analysis at the intersection of Bassett and First Street should be required upon completion of the Brandenburg project as a condition of development.

Response to Comment E3-3: Access to I-880 from downtown using First Street is very slow. Even assuming increased congestion on Coleman Street in coming years, that route will remain a much faster route to I-880 than First Street. Also, the city is planning to widen Coleman Avenue to emphasize its role as the primary corridor to downtown from I-880. See Response to Comment E3-2 above regarding ongoing monitoring of unsignalized intersections to determine if traffic warrants are met.

Comment E3-4: The Redevelopment Agency proposes to realign Julian Street between Market and Saint James Streets as part of restoration of the City street grid. I welcome this proposal which will result in elimination of the existing "S" curve and the dangerous fast moving traffic that is a hazard to pedestrians from my neighborhood seeking to walk downtown. Residents in our residential area support a more accessible Julian Street as a two-lane roadway with signalized intersections for pedestrian access/safety with wider sidewalks. We believe that the Julian Street Variant 2 alignment will reduce neighborhood traffic impacts and slow traffic in residential areas. Whereas, the Julian Street Variant 1 alignment would put significant amounts of traffic in a primarily residential neighborhood.

Response to Comment E3-4: The first point of the comment (favorable reaction to the proposed realignment of Julian Street) is noted. No further response is called for.

The second point of the comment, an expressed preference for the so-called "Variant 2" of that realignment proposal (discussed in the Transportation Impact Analysis, a technical background report prepared by Hexagon Transportation Consultants and provided as Appendix B.1 to the Draft EIR) is also noted. The proposed project analyzed in the Draft EIR main text involves a directional and geometric proposal for this realignment that is referred to as "Variant 1" in the Transportation Impact Analysis. A final decision as to which variant of the proposed Julian realignment may not be made until a specific development is proposed for the site. Analysis of the two variants presented in the Transportation Impact Analysis shows that Variant 1 would lead to significant intersection level of service impacts at two intersections, whereas Variant 2 would affect adversely those same two intersections plus one additional intersection (for a total of three intersections).

Comment E3-5: The open space component of the DEIR details that parcels PI and P2 are to be developed as public park spaces because residential projects with 50 or more units are required to dedicate land in accordance with the City's policy of providing 3.0 acres for every 1,000 new residents. According to the DEIR analysis, this project would have a parkland obligation of 12.02 acres. A total of 1.07 acres of parks and open space (parcels PI and P2) are included in the proposed project. According to the Parkland Dedication Ordinance the project may also satisfy another 50

percent of its parkland obligation by paying in-lieu fees. Assuming these in-lieu fees are paid to the City, this leaves the project with a deficiency of 4.94 acres in open space. This is especially noteworthy when considering that District 3, as stated in the DEIR, has the lowest number of parkland acres of any Council District. To partially mitigate this deficiency in parkland, I would suggest a street vacation on a portion of San Pedro Street be used to add a 3rd park in the area north of Bassett Street, east of the proposed Building B, and west of the Market- Coleman ramp. This additional parkland can easily be created by moving the parking access point for Building B from San Pedro Street to Bassett Street. It should also be required that in-lieu fees paid by developers of this project be used to upgrade the adjacent St. James, Ryland, Guadalupe River, and Pellier Parks which will be most impacted by this intensive new development.

Response to Comment E3-5: The proposed Project's obligation under the City's Parkland Dedication Ordinance (PDO) can be satisfied in several ways: (1) dedication of land; (2) payment of in-lieu fees; (3) credit for improvement costs to parkland; and/or (4) credit for qualifying private recreation amenities in the project (up to 50 percent of the obligation). In the case of the proposed Project, the obligation would be satisfied through a combination of several means, including: (1) dedication of 1.07 acres of land; (2) payment of an as yet unspecified fee (with the eventual amount to be based on the unit count of the project); (3) credit for qualifying private recreational amenities (to be determined based on project design); and (4) potential credit for the cost of improving the 1.07 acres being dedicated. There is no reason to believe that this combination of sources would result in a deficiency in the Project's compliance with the PDO.

IV. DRAFT EIR TEXT REVISIONS

Chapter IV presents specific changes to the text of the Draft EIR that are being made to clarify any errors, omissions, or misinterpretation of materials in the Draft EIR, in response to comments received during the public review period. A revised summary table (Table IV-1) would conventionally be included here to finalize all mitigation measures and impacts related to the proposed project following revisions to the Draft EIR. However, in the case of the Brandenburg Mixed Use Project/North San Pedro Housing Sites EIR, no revisions to the summary table are necessary. Where revisions to the main text are called for, the page and paragraph are set forth, followed by the appropriate revision. Added text is indicated with underlined text. If text had been deleted from the Draft EIR, it would have been shown with ~~strikeout~~; no deletions were needed, however. Pages numbers correspond to the page numbers of the Draft EIR.

Pages 10 and 70 are revised as follows:

Mitigation Measure LU-3: Prior to the issuance of a building permit for any project structures that would exceed the FAA imaginary surface applicable to the project site, the following actions ~~should~~ shall be accomplished:

- The applicant shall comply with the notification requirements of Federal Aviation Regulations, Part 77, and receive a "Determination of No Hazard" from the FAA.
- Conditions set forth in the required FAA determination of No Hazard regarding roof-top lighting or marking shall be incorporated into the final design of the structure.
- Avigation easements (recognizing that the property is subject to aircraft noise impacts and specified height restrictions) shall be dedicated to the City of San Jose.

Pages 11 and 110 are revised as follows:

Mitigation Measure AQ-1: Consistent with guidance from the BAAQMD, the following measures shall be required of construction contracts and specifications for the project.

Demolition. The following controls shall be implemented during demolition:

- Watering ~~should~~ shall be used to control dust generation during demolition of structures and break-up of pavement.

Pages 13 and 112 are revised as follows:

The following new bullet point is added to Mitigation Measure AQ-2:

- Provide a subsidized Ecopass for each resident of the proposed Project.

Pages 22 and 174 are revised as a result of a staff-initiated change that refines Mitigation Measure CUL-1c:

CUL-1c: Applications for development within ~~the project area~~ 300 feet of the historically significant structure at 151 St. James Street shall be referred to the Historic Landmarks Commission prior to approval.

Pages 24 and 184 are revised as follows:

Mitigation Measure HAZMAT-3: A Site Safety Plan/Soil and Groundwater Management Plan ~~should~~ shall be prepared, which will address emergency procedures and the management and disposal of contaminated soils and groundwater (see Mitigation Measure HAZMAT-1a, above). Use, storage, disposal, and transport of hazardous materials during construction activities shall be performed in accordance with existing local, State, and federal hazardous materials regulations. No additional mitigation is required.

Pages 24 and 184 are revised as follows:

Mitigation Measure HAZMAT-4: As a condition of approval for any demolition or permit for a structure known or suspected to have been constructed prior to 1985, an asbestos and lead-based paint survey ~~should~~ shall be performed. If asbestos-containing materials are determined to be present, the materials ~~should~~ shall be abated by a certified asbestos abatement contractor in accordance with the regulations and notification requirements of the Bay Area Air Quality Management District. If lead-based paint are identified, then federal and State construction worker health and safety regulations ~~should~~ shall be followed during renovation or demolition activities. If loose or peeling lead-based paint are identified, they ~~should~~ shall be removed by a qualified lead abatement contractor and disposed of in accordance with existing hazardous waste regulations.

Pages 25 and 193 are revised as follows:

Mitigation Measure SVCS-1b: The City ~~should~~ shall implement a system of signal light preemption by emergency vehicles along key emergency response travel routes so as to expedite emergency through the Downtown Core Area.

Page 46, first paragraph, the last sentence is deleted, as shown:

The Santa Clara Valley Urban Runoff Pollution Prevention Program (SCVURPPP) was developed in accordance with the requirements of the 1986 San Francisco Bay Basin Water Quality Control Plan, for the purpose of reducing water pollution associated with urban stormwater runoff. This program was also designed to fulfill the requirements of Section 304(1) of the Federal Clean Water Act, which mandated that the Federal Environmental Protection Agency (EPA) develop National Pollutant Discharge Elimination System (NPDES) Permit application requirements for various stormwater discharges, including those from municipal storm drain systems and construction sites. ~~The Project will qualify for a waiver from the new C.3 requirements under several categories of the waiver program, as described in Chapter V, L. Hydrology and Flooding.~~

Page 111, is supplemented with the following new paragraph:

For indirect sources (facilities that attract or generate vehicle trips) motor vehicles traveling to or from the project represent the primary source of air pollutant emissions from project operation. The project would also be an area source of emissions, primarily from the combustion of natural gas for space and water heating from water heaters, and consumer products. Since the threshold of significance contained in the BAAQMD CEQA Guidelines for project operational regional impacts is based on indirect mobile sources, area sources are not included in Table IV.C.4.

Page 111, is revised to include the following phrase in Mitigation Measure AQ-2:

Mitigation Measure AQ-2: The BAAQMD CEQA Guidelines document identifies potential mitigation measures for various types of projects. The following are considered to be feasible and effective in further reducing vehicle trip generation and resulting emissions from the project and shall be implemented for the proposed project:

Page 111, part of the discussion of Impact AQ-2 is revised to include the following additional paragraph:

For indirect sources (facilities that attract or generate vehicle trips) motor vehicles traveling to or from the project represent the primary source of air pollutant emissions from project operation. The project would also be an area source of emissions, primarily from the combustion of natural gas for space and water heating from water heaters, and consumer products. Since the threshold of significance contained in the BAAQMD CEQA Guidelines for project operational regional impacts is based on indirect mobile sources, area sources are not included in Table IV.C.4.

Page 201, third paragraph, is revised as follows:

The design of the project has not been fully developed and therefore, it is not possible to determine whether the hydraulic sizing requirements would apply. It appears, however, that this project would provide water quality benefits as set forth above described in Paragraph 2(a)(2) above. Therefore, water quality impacts from the proposed development and would not likely exceed the storm water impacts of maintaining the existing property in its existing condition. Therefore, the treatment and peak run-off flow requirements of Provision C.3 would not apply.

Page 201, Mitigation Measure HYD-1, is revised as follows:

Best Management Practices (BMPs) designed to reduce erosion of exposed soil may include, but are not limited to: soil stabilization controls, watering for dust control, perimeter silt fences, placement of hay bales straw wattles, and sediment basins...

Page 203, last paragraph, second to last sentence, is revised as follows:

Designation as Zone 99, which carries no elevation requirement, is possible for fully-federally funded projects that are 50% complete.

Page 203, last paragraph, in the last sentence, is revised as follows:

This redesignation from AH to A99 is projected to be filed and approved by FEMA by August Fall 2004.

Page 236, last paragraph, is revised as follows:

It is the conclusion of this EIR that in the strict sense of numbers of impacts and severity of impacts, the Alternate Location alternative would be the environmentally superior alternative. However, the distinctions that can be drawn between that alternative and the proposed project are relatively small and, for that reason, not entirely clear without a more detailed analysis of the Alternate Location. It is important to note that while this alternative could be environmentally superior in the technical sense that contribution to these aforementioned impacts would not occur, the Alternate Location alternative would fail to achieve any of the project's objectives. The creation of high quality, high density, residential development and adequate parking facilities in this underutilized area would be foregone, as would the new open-space proposed as part of the project. In addition, the realignment of Julian Street and reestablishment of the historic rectangular grid system would not be realized. For these reasons relating to its failure to achieve any of the project's objectives, the Alternate Location alternative should be rejected.

V. MITIGATION MONITORING AND REPORTING PROGRAM

This Mitigation Monitoring and Reporting Program (MMRP) has been formulated based upon the findings of the August 2003 Draft Environmental Impact Report (Draft EIR) for the proposed Brandenburg Mixed Use Project/North San Pedro Housing Sites project and Responses to Comments. The MMRP lists mitigation measures recommended in the EIR for the proposed project and identifies mitigation monitoring requirements. These requirements are provided only for mitigation measures that would avoid or reduce significant impacts of the program.

Table V-1 presents the mitigation measures identified for the proposed project. Each mitigation measure is numbered with a symbol indicating the topical section to which it pertains, a hyphen, and the impact number. For example, CUL-3 is the third mitigation measure identified in the Cultural Resources analysis.

The first and second columns of Table V-1 provide the significant impacts and corresponding mitigation measure(s) as identified in Chapter IV of the Draft EIR for the proposed project. The third column, "Implementation Responsibility," identifies the party(ies) responsible for carrying out the required action(s) and approximate time period over which the action will be implemented. The fourth column, "Oversight Responsibility," identifies the party(ies) ultimately responsible for ensuring that the mitigation measure is implemented and outlines the steps for monitoring the action identified in the mitigation measure and the approximate timeframe for the oversight agency to ensure implementation of the mitigation measure.

Table V-1: Mitigation Monitoring and Reporting Program

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
A. LAND USE			
LU-1: The introduction of new buildings on 14 of the 16 parcels composing the project site, at heights of up to 173 feet above ground level, has the potential to result in light spillover onto adjacent properties and increased reflected glare.	LU-1a: The City shall continue to implement the following 2020 General Plan goals and policies that relate to the land use compatibility aspects of light and glare: • New Residential development should be oriented and designed to protect residents from any potential conflicts with adjacent land uses. • <i>Urban Design Policy 1</i> – The City should continue to apply strong architectural and site controls on all types of development for the protection and development of neighborhood character and for the proper transition between areas with different types of land uses. • <i>Urban Design Policy 22</i> – Design guidelines adopted by the City Council should be followed in the design of development projects.	The City shall require that project proponents incorporate appropriate design guidelines and standards to maintain land use compatibility.	The Director of Planning, Building, and Code Enforcement ^a (PBCE) shall ensure that the specified General Plan goals and policies are implemented in the design of the proposed project.
	LU-1b: The City shall continue to implement Council Policy 4-3 which encourages the use of low-pressure sodium lighting for outdoor uses.	The City shall require the implementation of Council Policy 4-3 in the project's design.	The Director of PBCE shall ensure that the specified Council Policy is implemented in the design of the proposed project.
	LU-2: Developing housing near the two elevated roadways and adjacent to the railroad line could expose future residents to land use incompatibilities.	LU-2: The City shall continue to implement the following 2020 General Plan goals and policies that relate to the land use compatibility and design aspects of nearby roads, freeways and railroad rights-of-way: • New Residential development should be oriented and designed to protect residents from any potential conflicts with adjacent land uses.	The City shall require that project proponents incorporate appropriate design guidelines and standards to maintain land use compatibility.

^a Wherever the Director of Planning, Building and Code Enforcement (PBCE) is charged with oversight responsibility, an officially-designated representative of PBCE could fulfill this role.

Table V-1 continued

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
LU-2 cont'd	- Urban Design Policy 1 – The City should continue to apply strong architectural and site controls on all types of development for the protection and development of neighborhood character and for the proper transition between areas with different types of land uses. - Urban Design Policy 22 – Design guidelines adopted by the City Council should be followed in the design of development projects. - Parks and Recreation Policy 2 – Public parks, open space lands and other similar public areas should be located, oriented and designed in such a way as to facilitate their security and policing.		
LU-3: Construction of buildings at heights that would exceed the FAA's imaginary surface restriction of 208 feet above mean sea level (which includes any buildings reaching 173 feet above ground level) could result in hazards to safe operation of the San Jose International Airport.	LU-3: Prior to the issuance of a building permit for any project structures that would exceed the FAA imaginary surface applicable to the project site, the following actions shall be accomplished - The applicant shall comply with the notification requirements of Federal Aviation Regulations, Part 77, and receive a "Determination of No Hazard" from the FAA. - Conditions set forth in the required FAA determination of No Hazard regarding roof-top lighting or marking shall be incorporated into the final design of the structure. - Avigation easements (recognizing that the property is subject to aircraft noise impacts and specified height restrictions) shall be dedicated to the City of San Jose.	Project proponents shall be responsible for seeking FAA determination of No Hazard, fulfilling the conditions set out therein and dedicating avigation easements to the City.	The Director of PBCE shall ensure the FAA has been notified and its regulations complied with. The Director of PBCE shall ensure that avigation easements are dedicated to the City.
B. TRANSPORTATION AND CIRCULATION			
TRANS-1: The intersections of Coleman Avenue and Hedding Street and Coleman Avenue and Taylor Street would continue to experience unacceptable levels of service.	TRANS-1: Mitigation for the impacts at the intersections of Coleman/Hedding and Coleman/Taylor would be to widen Coleman Avenue to six lanes, south of I-880. However, an improvement of this magnitude is beyond the financial capability of this development. Therefore, these intersection impacts should be considered significant and unavoidable.	N/A (No specific mitigation measure is available for this impact.)	N/A

Table V-1 *continued*

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
TRANS-2: The peak-hour volume warrant would be satisfied at two of the unsignalized intersections (Terraine Street and Devine Street, and Market Street and Devine Street).	TRANS-2: At the time that a specific development project is proposed, the City shall ensure that signals are constructed at Terraine Street and Devine Street, and Market Street and Devine Street.	Project proponents shall construct signals at Terraine Street and Devine Street prior to occupation of the project.	The Director of PBCE shall ensure that signals are constructed at Terraine Street and Devine Street, and Market Street and Devine Street prior to occupation of the project.
TRANS-3: State Route 87 would experience a significant impact from project traffic along two of the analyzed segments.	TRANS-3: The mitigation necessary to reduce impacts upon these freeway segments to less-than-significant levels is the widening of the freeway. However, widening is not considered feasible because of significant right-of-way acquisition with many homes and businesses that would need to be demolished. These impacts are therefore considered significant and unavoidable.	N/A (No specific mitigation measure is available for this impact.)	N/A
C. AIR QUALITY			
AQ-1: Demolition and construction period activities could generate significant dust, exhaust, and organic emissions.	AQ-1: Consistent with guidance from the BAAQMD, the following measures shall be required of construction contracts and specifications for the project. Demolition. The following controls shall be implemented during demolition: • Watering shall be used to control dust generation during demolition of structures and break-up of pavement. • Cover all trucks hauling demolition debris from the site. • Use dust-proof chutes to load debris into trucks whenever feasible. Construction. The following controls shall be implemented at all construction sites: • Water all active construction areas at least twice daily and more often during windy periods; active areas adjacent to existing land uses shall be kept damp at all times, or shall be treated with non-toxic stabilizers or dust palliatives;	The City shall require that project proponents and construction contractors develop a construction workplan and be responsible for implementing the control measures throughout the construction period.	The Director of PBCE shall ensure the control measures are included in construction workplans prior to the start of demolition, site preparation, or grading activities. The Department of PBCE shall periodically monitor the site so as to ensure that all control measures are properly followed during the construction period.

Table V-1 *continued*

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
AQ-1 <i>cont'd</i>	• Cover all trucks hauling soil, sand, and other loose materials or require all trucks to maintain at least 2 feet of freeboard; • Pave, apply water three times daily, or apply (non-toxic) soil stabilizers on all unpaved access roads, parking areas, and staging areas at construction sites; • Sweep daily (with water sweepers) all paved access roads, parking areas, and staging areas at construction sites; water sweepers shall vacuum up excess water to avoid runoff-related impacts to water quality; • Sweep streets daily (with water sweepers) if visible soil material is carried onto adjacent public streets; • Apply non-toxic soil stabilizers to inactive construction areas; • Enclose, cover, water twice daily, or apply non-toxic soil binders to exposed stockpiles (dirt, sand, etc.); • Limit traffic speeds on unpaved roads to 15 mph; • Install sandbags or other erosion control measures to prevent silt runoff to public roadways; • Replant vegetation in disturbed areas as quickly as possible. • Install wheel washers for all exiting trucks, or wash off the tires or tracks of all trucks and equipment leaving the site; and • Suspend excavation and grading activity when winds (instantaneous gusts) exceed 25 mph.		

Table V-1 *continued*

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
<u>AQ-2:</u> Project-related regional emissions would exceed the BAAQMD thresholds of significance for ozone precursors.	<u>AQ-2:</u> The <i>BAAQMD CEQA Guidelines</i> document identifies potential mitigation measures for various types of projects. The following are considered to be feasible and effective in further reducing vehicle trip generation and resulting emissions from the project and shall be implemented for the proposed project: • Provide neighborhood-serving shops and services within or adjacent to residential development. • Provide transit facilities (e.g., bus bulbs/turnouts, benches, shelters). • Provide shuttle service to regional transit system or multimodal center. • Provide shuttle service to major destinations such as employment centers, shopping centers and schools. • Provide bicycle land and/or paths, connected to community-wide network. • Provide sidewalks and/or paths, connected to adjacent land uses, transit stops, and/or community-wide network. • Provide satellite telecommunication centers in large residential developments. • Provide secure and conveniently located bicycle and storage for residents. • Wire each housing unit to allow use of emerging electronic communication technology. • Implement feasible TDM measures including a ride-matching program, coordination with regional ridesharing organizations and provision of transit information. • Provide a subsidized Ecopass for each resident of the proposed Project.	The City shall require that project proponents include as many of the following measures as would be feasible in order to reduce vehicle trip generation and resulting emissions from the project.	The Director of PBCE shall review project plans to ensure the inclusion of feasible and effective measures such as those listed.

Table V-1 continued

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
D. NOISE <u>NOI-1</u>: Aircraft noise levels would represent a significant adverse impact on project residents and park users.	<u>NOI-1a</u>: The following policies contained in the City's 2020 General Plan serve to reduce significant noise impacts: • <u>Noise Policy 1</u>: The City's acceptable noise level objectives are 55 dBA L_{dn} as the long-range exterior noise quality level, 60 dBA L_{dn} as the short-range exterior noise quality level, 45 dBA L_{dn} as the interior noise quality level, and 76 dBA L_{dn} as the maximum exterior noise level necessary to avoid significant adverse health effects. These objectives are established for the City, recognizing that the attainment of exterior noise quality levels in the environs of the San Jose International Airport, the Downtown Core Area, and along major roadways may not be achieved. To achieve the noise objectives, the City should require appropriate site and building design, building construction, and noise attenuation techniques in new residential development. • <u>Noise Policy 8</u>: The City should discourage the use of outdoor appliances, air conditioners, and other consumer products that generate noise levels in excess of the City's exterior noise standards. • <u>Noise Policy 9</u>: Construction operations should use available noise suppression devices and techniques. • <u>Noise Policy 11</u>: When located adjacent to existing or planned noise sensitive residential land or public/quasi-public land use, nonresidential land uses should mitigate noise generation to meet the 55 dBA L_{dn} guidelines at the property line.	Design teams shall incorporate appropriate site and building design, building construction, and noise attenuation techniques into development plans.	The Director of PBCE shall ensure appropriate site and building design, building construction, and noise suppression devices/techniques are included in the project design and development plans prior to project approval.

Table V-1 *continued*

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
NOI-1 <i>cont'd</i>	- Urban Design Policy 1: The City should continue to apply strong architectural and site design controls on all types of development for the protection and development of neighborhood character and for the proper transition between areas with different types of land uses. - Urban Design Policy 21: To promote safety and minimize noise impacts in residential and working environments, development that is proposed adjacent to railroad lines should be designed to provide the maximum separation between the rail line and dwelling units, yards, or common open space areas; offices and other job locations; facilities for the storage of toxic or explosive materials; and the like. To the extent possible, areas of development closest to an adjacent railroad line should be devoted to parking lots, public streets, peripheral landscaping, the storage of nonhazardous materials, and so forth. - Urban Design Policy 22: Design guidelines adopted by the City Council should be followed in the design of development projects.	The City shall require that project proponents implement site-specific design measures to screen incompatible uses at the time of project proposal.	The Director of PCBE shall ensure that incompatible uses are screened and that State Title 24 requirements are met.
	NOI-1b: Implementation of the City of San Jose's Residential Design Guidelines and Commercial Design Guidelines by the City, the Redevelopment Agency, or individual property owners, as applicable, would help ensure that new development is compatible with existing and planned land uses. Potential impacts resulting from conflicts between future housing and adjacent commercial development and the railroad would be reduced through site-specific design measures such as setbacks, landscape buffers, noise attenuation, building orientations, and appropriate design features to screen incompatible uses. As indicated in Urban Design Policy 22, above, adherence to these policies is encouraged by the General Plan.		

Table V-1 continued

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
NOI-1 <i>cont'd</i>	At the time future residential projects are proposed, the following measures shall be required: • Preparation of a site-specific noise analysis by an acoustical consultant to determine specific design measures to reduce interior noise levels to conform to State Title 24 requirements. An outside-to-inside noise level reduction of at least 20 dBA should be used as a basis for achieving an interior noise level of 45 dBA L_{dn}. Design features that may be required could include the following: (1) use of sound-rated windows and exterior doors, (2) chimney caps on fireplaces, (3) stucco or cement plaster exterior construction as opposed to wood siding, and (4) air-conditioning or mechanical ventilation so that windows and door may remain closed. • In order to reduce aircraft-related noise impacts, outdoor activity areas (e.g., patios, balconies, common recreation areas) should be situated as much as possible on the east side of buildings so that the residential structures could provide some noise shielding. • Train noise impacts could be reduced by the construction of a sound wall, building orientation, building noise attenuation, and mechanical ventilation systems to reduce interior noise levels to acceptable levels.		
	<u>NOI-1c:</u> Prior to the issuance of building permits for development, the property owner(s) shall grant an aviation easement to the City of San Jose (in compliance with the ALUC Plan and City General Plan Aviation Policy #40), providing for acceptance of aircraft noise impacts.	Project proponents shall be responsible for ensuring that aviation easements are properly granted.	The Director of PBCE shall ensure that property owners grant the City an aviation easement, prior to the issuance of building permits.

Table V-1 *continued*

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
<u>NOI-2:</u> Whereas project-generated traffic noise would not represent a significant impact, the effect of existing and future traffic noise on project use would be significant.	<u>NOI-2a:</u> In the event that the proposed housing units are designed to include outdoor active uses, such as patios, backyards, or balconies, the following areas would require some form of sound attenuation feature in order to meet the City's short-range 60 dBA CNEL exterior noise standard. • Within 77 feet of Terraine Street centerline for Parcels A, B, C, D, and G • Within 99 feet of Terraine Street centerline for Parcel J • Within 55 feet of San Pedro Street centerline for Parcels K, L1, and L2 • Within 294 feet of Market Street centerline for Parcels F and H • Within 305 feet of Market Street centerline for Parcels L1 and L2 • Within 277 feet of Julian Street centerline for Parcel G • Within 82 feet of Julian Street centerline for Parcels J, K, and N • Within 133 feet of Julian Street centerline for Parcels H and L1 • Within 1,214 feet of SR 87 centerline for Parcels A, C, G, J, and M	Project proponents shall implement sound attenuation features in order to meet the City's short-range 60 dBA CNEL exterior noise standard.	The Director of PBCE shall ensure that project plans include sound attenuation features for the listed parcels, prior to the issuance of building permits.
<u>NOI-2b:</u> All proposed residential buildings within the areas listed above would require air-conditioning systems to meet the City's short-range 60 dBA CNEL exterior noise standard.		The City shall require that project proponents include air-conditioning systems as part of project plans for the parcels listed.	The Director of PBCE shall ensure that project plans include air-conditioning units for the parcels listed.

Table V-1 *continued*

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
NOI-2 <i>cont'd</i>	NOI-2c: Development in the following areas that would experience traffic noise exceeding 70 dBA CNEL would require additional building facade upgrades, such as double-paned windows with a minimum sound transmission class (STC) rating of STC-30, which is higher than what the standard residential construction provides: • Within 68 feet of Market Street centerline for Parcels F and H • Within 70 feet of Market Street centerline for Parcels L1 and L2 • Within 64 feet of Julian Street centerline for Parcel G • Within 264 feet of SR 87 centerline for Parcels A, C, and G	The City shall require that project plans include additional building facade upgrades in areas where traffic noise exceeds 70 dBA CNEL.	The Director of PBCE shall ensure that additional building facade upgrades are installed in areas where traffic noise exceeds 70 dBA CNEL, prior to the issuance of building permits.
NOI-3: Construction period activities could create significant short-term noise impacts.	NOI-3: Implementation of the following multi-part measure would reduce potential construction period noise impacts to less-than-significant levels: • Construction activities will be limited to daytime hours (7 a.m. to 7 p.m. weekdays) for any construction within 500 feet of a residence. • All internal combustion engines for construction equipment used on the site will be properly muffled and maintained. • In the event that pile driving is proposed, nearby residents will be notified of the schedule for its use while it is in use. Portable acoustical barriers will be installed around pile driving equipment. • A name, address, and phone number of a contact person will be posted on the site to handle noise complaints. • Unnecessary idling of internal combustion engines will be prohibited. • All stationary noise generating construction equipment, such as air compressors and portable power generators, will be located as far as practical from existing residences.	Construction contractors shall use all of the listed noise suppression devices and techniques throughout the construction period.	The Director of PBCE shall ensure that the listed noise suppression devices and techniques are incorporated into the construction work-plan prior to permit issuance.

Table V-1 continued

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
E. SHADE AND SHADOW			
<i>No significant adverse impacts related to aesthetics would result from the proposed project.</i>			
F. AESTHETICS			
<i>No significant adverse impacts related to aesthetics would result from the proposed project.</i>			
G. VEGETATION AND WILDLIFE			
VEG-1: Construction of the proposed project would result in the removal of existing mature trees.	VEG-1: For trees that cannot be incorporated into new landscaping, a City of San Jose Tree Removal Permit shall be obtained prior to removal of trees from the site. Loss of ordinance size trees will be mitigated by implementation of landscaping plans approved by the City of San Jose, in conformance with the City of San Jose landscaping guidelines and City of San Jose Planning Department specifications. The City of San Jose requires tree replacement for those trees greater than 18 inches in diameter at a ratio of 4:1 (trees planted to trees removed).	Project proponents shall obtain a City of San Jose Tree Removal Permit prior to removal of trees from the site and shall adhere to the City's mitigation standards associated with loss of ordinance size trees.	The Director of PBCE shall ensure that a City of San Jose Tree Removal Permit is obtained prior to project approval. Additionally, the Director shall ensure that City of San Jose landscaping guidelines and City of San Jose Planning Department specifications concerning landscaping and tree replacement are adhered to during the construction period.
H. GEOLOGY			
GEO-1: Occupants of the project, dwelling units, and commercial space would be subject to seismic hazards.	GEO-1: Prior to the issuance of any site-specific grading or building permits, a design-level geotechnical investigation shall be prepared and submitted to the City of San Jose Public Works Department for review and confirmation that the proposed development fully complies with the California Building Code. The report shall determine the project site's surface geotechnical conditions and address potential seismic hazards such as liquefaction and subsidence. The report shall identify building techniques appropriate to minimize seismic damage. In addition, the following requirement for the geotechnical and soils report shall be met: Analysis presented in the geotechnical report shall conform with the California Division of Mines and Geology recommendations presented in the "Guidelines for Evaluating Seismic Hazards in California."	Project proponents retain a certified geologist to prepare and submit a design-level geotechnical investigation as described in the mitigation measure.	The Director of PBCE shall ensure that a design-level geotechnical investigation is submitted to the City of San Jose Public Works Department prior to project approval.

Table V-1 *continued*

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
GEO-1 <i>cont'd</i>	All mitigation measures, design criteria, and specifications set forth in the geotechnical and soils report shall be followed.		
GEO-2: Damage to structures or property related shrink-swell potential and/or settlements of project soils could occur.	GEO-2: In locations underlain by expansive soils and/or non-engineered fill, the designers of proposed building foundations and improvements (including sidewalks, roads, and utilities) shall consider these conditions. The design-level geotechnical investigation (required by Mitigation Measure GEO-1) shall include measures to ensure that potential damage related to expansive soils and non-uniformly compacted fill are minimized. Options to address these conditions may range from removal of the problematic soils and replacement, as needed, with properly conditioned and compacted fill, to design and construction of improvements to withstand the forces exerted during the expected shrink-swell cycles and settlements.	Project proponents retain a certified geologist to prepare and submit a design-level geotechnical investigation that considers underlying expansive soils and/or non-engineered fill conditions and includes measures to ensure that potential damage related to expansive soils and non-uniformly compacted fill are minimized.	The Director of PBCE shall ensure that the design-level geotechnical investigation considers underlying expansive soils and/or non-engineered fill conditions and includes measures to ensure that potential damage related to expansive soils and non-uniformly compacted fill are minimized prior to project approval.
GEO-3: Dewatering-related subsidence and potential earth movements associated with the temporary shoring systems could cause settlement and damage to existing structures, roadways, and/or utilities.	GEO-3: The design-level geotechnical investigation (required by Mitigation Measure GEO-1) shall evaluate the consolidation properties of the underlying sediments to determine the potential for settlements associated with dewatering and other potential earth movements. If it is determined that unacceptable settlements may occur with either active or passive dewatering systems, then alternative groundwater control systems that do not require continuous groundwater removal (e.g. slurry wall) shall be required.	Project proponents retain a certified geologist to prepare and submit a design-level geotechnical investigation that evaluates the consolidation properties of the underlying sediments to determine the potential for settlements associated with dewatering and other potential earth movements.	The Director of PBCE shall ensure that the design-level geotechnical investigation evaluates the consolidation properties of the underlying sediments to determine the potential for settlements associated with dewatering and other potential earth movements prior to project approval.

Table V-1 continued

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
I. CULTURAL RESOURCES			
<u>CUL-1</u> : Development of residential and commercial uses of the project site could adversely impact cultural resources.	<u>CUL-1a</u>: A qualified archaeologist, meeting the Professional Qualifications Standards of the <i>Secretary of the Interior's Standards and Guidelines</i>, shall monitor all ground disturbing activity within the project area. This monitoring shall continue until, in the archaeologist's judgment, a depth has been reached at which cultural resources are not likely to be encountered by project-related activities. If deposits of archaeological materials are encountered during project activities, all work within 50 feet of the discovery shall be redirected until the monitor has evaluated the finds and made recommendations regarding their disposition. If such cultural resources are found to be significant, in accordance with CEQA and the California Register, they should be avoided by project activities. If avoidance is not feasible, adverse effects to such resources shall be mitigated. Project personnel shall not collect or move any cultural material. Fill soils that may be used for construction purposes shall not contain archaeological materials. Upon completion of archaeological monitoring, a report shall be prepared documenting the methods, results, and recommendations of the monitoring archaeologist.	Project proponents shall retain a qualified archaeologist to monitor all ground disturbing activity within the project area, as described in the mitigation measure.	The Director of PBCE shall ensure that the archaeologist has been retained prior to ground-disturbing activities and that appropriate reporting occurs in the event cultural resources are uncovered.

Table V-1 continued

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
CUL-1 cont'd	<u>CUL-1b</u>: Prior to construction activities in parcels L1/L2, K, J, and M, a qualified structural engineer shall conduct a study of the building at 151 West St. James Street to identify any structural problems that may exist and that may be exacerbated by project-related vibration. If such structural problems are identified, a structural engineer, in conjunction with a qualified architectural historian meeting the professional qualifications standards of the Secretary of the Interior's Standards and Guidelines, shall develop a plan for the prevention or reduction of potential vibration damage to the building at 151 West St. James Street. If no structural problems exist with the building at 151 West St. James Street, the structural engineer shall (1) determine baseline limits to establish an acceptable range of vibration levels that may result from project-related construction; (2) install vibration sensors on the building at 151 West St. James Street before the start of project-related construction within the identified parcels (L1/L2, K, J, and M); and (3) monitor sensor data during project construction within the identified parcels to identify project-related vibration that exceeds the baseline limits. If baseline vibration limits are exceeded due to project-related construction, all construction in parcels L1/L2, J, K, and M shall halt while a structural engineer determines if damage has occurred to the building. Damage could include, but would not be limited to, positional movement, loss of structural integrity, and loss of contributing decorative elements (e.g., decorative moldings or carved wood panels). If damage has occurred as a result of project activities, the source of the vibration shall be identified and removed, and an architectural historian shall then develop, in conjunction with structural engineers, a treatment plan for repairing the vibration damage and preventing further damage to elements of the building that contribute to its historical significance and integrity.	Project proponents shall retain a qualified structural engineer to conduct the study, provide site-specific mitigation measures, and monitor the effects on the building at 151 West St. James Street. If a vibration damage treatment or prevention plan is required, the project proponents shall submit the report as described in the mitigation measure.	The Director of PBCE shall ensure that the engineering study has been conducted and vibration sensors installed (prior to construction) and sensor data monitored (during construction). The Director of PBCE shall also ensure the proper transmittal of any needed damage treatment or prevention plan(s).

Table V-1 *continued*

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
CUL-1 <i>cont'd</i>	If a vibration damage treatment or prevention plan is required, the architectural historian shall prepare a report documenting the methods and findings of the plan. This report shall be submitted to the NWIC, the Director of Planning, Building and Code Enforcement, and the Historic Preservation Officer of the City of San Jose. <u>CUL-1c</u>: Applications for development within 300 feet of the historically significant structure at 151 St. James Street shall be referred to the Historic Landmarks Commission prior to approval. <u>CUL-1d</u>: If human remains are encountered during construction, work within 50 feet of the discovery should be redirected and the County Coroner notified immediately. At the same time, an archaeologist should be contacted to evaluate the situation. If the human remains are of Native American origin, the Coroner must notify the Native American Heritage Commission within 24 hours of this identification. The Native American Heritage Commission will identify a Native American Most Likely Descendant to inspect the site and provide recommendations for the proper treatment of the remains and associated grave goods. If human remains are encountered during construction, the archaeologist contracted to evaluate the situation should prepare a report documenting the methods and findings of the investigation. This report should be submitted to the NWIC.	The City shall require the project proponents to submit applications for development to the Historic Landmarks Commission prior to project approval. Project proponents shall retain the appropriate personnel and follow appropriate procedures upon encountering human remains on site.	The Director of PBCE shall ensure the Historic Landmarks Commission has received project proponents' application for development prior to project approval. The Director of PBCE shall ensure that appropriate personnel are consulted and appropriate procedures followed upon the discovery of human remains on site.

Table V-1 continued

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
J. HAZARDS HAZMAT-1: Development of the project could expose construction workers and/or the public to hazardous materials from known residual soil and groundwater contamination or previously undiscovered contamination during construction activities.	HAZMAT-1a: Prior to the issuance of any grading, demolition, or building permits for the project, a Site Safety Plan/Soil and Groundwater Management Plan (Plan) should be prepared. At a minimum, the Plan should establish soil and groundwater mitigation and control specifications for grading and construction activities, including health and safety provisions for monitoring exposure to construction workers, procedures to be undertaken in the event that previously unreported contamination is discovered, and emergency procedures and responsible personnel. The Plan should also include procedures for managing soils and groundwater removed from the site to ensure that any excavated soils and/or dewatered groundwater with contaminants are stored, managed, and disposed of in accordance with applicable regulations.	Project proponents shall prepare and submit a Site Safety Plan/Soil and Groundwater Management Plan to the Director of PBCE as described in the mitigation measure.	The Director of PBCE shall ensure that a Site Safety Plan/Soil and Groundwater Management Plan is prepared and submitted, and shall review the Plan to ensure that it meets the specifications set forth in the mitigation measure.
	HAZMAT-1b: Prior to the issuance of any grading, demolition, or building permits at properties where Phase I activities have identified a potential hazardous materials issue that has not yet been evaluated in a Phase II investigation, a subsurface investigation should be conducted at the project site by a qualified environmental professional, in accordance with recommendations in the Brown and Caldwell summary report. Properties (and landowners) where the summary report recommended an additional Phase II investigation include • 229-249 Bassett Street (State of California) • 201-225 Bassett Street (Brandenburg) • 199 Bassett Street (Trenka) • 361 North San Pedro Street (Leon) • Union Pacific Railroad Company Property • 331-341 Terraine Street (State of California)	Project proponents shall conduct a subsurface investigation which meets the requirements listed in the mitigation measure where applicable. If significant releases of hazardous materials are discovered during Phase II activities, additional investigation, remediation, and/or coordination with regulatory agencies may be required prior to redevelopment of the parcels.	The Director of PBCE shall ensure that the required investigations have been conducted and that further investigation is conducted as appropriate.

Table V-1 *continued*

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
HAZMAT-1 <i>cont'd</i>	If significant releases of hazardous materials are discovered during Phase II activities, additional investigation, remediation, and/or coordination with regulatory agencies may be required prior to redevelopment of the parcels.		
HAZMAT-2: Development at sites currently under remediation could expose future residents and workers to hazardous concentrations of contaminants and/or could hinder remedial activities.	HAZMAT-2a: Prior to the issuance of any permits for grading, demolition, or construction at the 153 West Julian Street property, the City shall require certification of completion of the remedial action required by RWQCB Order 99-088.	Project proponents shall obtain certification of completion of the remedial action required by RWQCB Order 99-088 prior to the issuance of permits.	The Director of PBCE shall ensure that certification of completion of the remedial action required by RWQCB Order 99-088 is obtained by project proponents prior to the issuance of permits.
	HAZMAT-2b: Prior to the issuance of permits for grading, demolition, or construction at the 129-149 West Julian and 355 North San Pedro properties, the City shall require certification of completion of the Corrective Action Plans for those sites by RWQCB.	Project proponents shall obtain certification of completion of the Corrective Action Plans for those sites by RWQCB prior to the issuance of permits.	The Director of PBCE shall ensure that certification of completion of the Corrective Action Plans is obtained by project proponents prior to the issuance of permits.
HAZMAT-3: Improper use or transport of hazardous materials during construction activities could result in releases affecting construction workers and the general public.	HAZMAT-3: A Site Safety Plan/Soil and Groundwater Management Plan should be prepared, which will address emergency procedures and the management and disposal of contaminated soils and groundwater (see Mitigation Measure HAZMAT-1a, above). Use, storage, disposal, and transport of hazardous materials during construction activities shall be performed in accordance with existing local, State, and federal hazardous materials regulations. No additional mitigation is required.	Project proponents shall prepare a Site Safety Plan/Soil and Groundwater Management Plan for the site that meets the requirements outlined in the mitigation measure.	The Director of PBCE shall ensure that a Site Safety Plan/Soil and Groundwater Management Plan is prepared prior to the issuance of permits.

Table V-1 continued

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
HAZMAT-4: Demolition of any buildings containing lead-based paint and asbestos-containing building materials could release airborne lead and asbestos particles, which may affect construction workers and the public.	HAZMAT-4: As a condition of approval for any demolition or permit for a structure known or suspected to have been constructed prior to 1985, an asbestos and lead-based paint survey shall be performed. If asbestos-containing materials are determined to be present, the materials shall be abated by a certified asbestos abatement contractor in accordance with the regulations and notification requirements of the Bay Area Air Quality Management District. If lead-based paint is identified, then federal and State construction worker health and safety regulations shall be followed during renovation or demolition activities. If loose or peeling lead-based paint is identified, it shall be removed by a qualified lead abatement contractor and disposed of in accordance with existing hazardous waste regulations.	Project proponents retain a certified hazardous materials technician to conduct a survey, when necessary (i.e. when a hazard is suspected), to determine if lead-based paint is present at the project site where structures meet the 1985 age criterion. If lead-based paint is identified, project proponents shall develop a workplan to remove and dispose of any loose or peeling lead-based paint.	The Director of PBCE shall ensure that the survey has been conducted, and a workplan prepared (prior to demolition), and the materials properly disposed of prior to project occupancy.
K. PUBLIC FACILITIES AND SERVICES			
SVCS-1: The increasing traffic congestion that the downtown area will face in coming years could adversely affect the ability of both the Police Department and the Fire Department to respond in a timely manner to emergency calls.	SVCS-1a: The City shall continue to implement the following 2020 General Plan goals and policies that relate to public facilities and services: • <i>Other Services Policy 18</i> – Fire service facilities should be located so that essential services can be most efficiently provided. • <i>Fire Hazards Policy 2</i> – All new development should be constructed at a minimum, to the fire safety standards contained in the San Jose Building Code. • <i>Fire Hazards Policy 3</i> – Anticipated fire response times and fire flow should be taken into consideration as part of the Development Review process. • <i>Fire Hazards Policy 6</i> – New development should provide adequate access for emergency vehicles, particularly fire fighting equipment, as well as provide secure evacuation routes for the inhabitants of the area.	The City shall require project proponents incorporate goals and policies that relate to public facilities and services.	The Director of PBCE shall ensure that project proponents follow 2020 General Plan goals and policies that relate to public facilities and services and incorporate them into the project.

Table V-1 *continued*

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
SVCS-1 <i>cont'd</i>	SVCS-1b: The City shall implement a system of signal light preemption by emergency vehicles along key emergency response travel routes so as to expedite emergency through the Downtown Core Area.	The City's Department of Transportation (DOT) shall design and implement such a system.	The Director of PBCE shall ensure that DOT implements such a system prior to occupancy of the project.
L. HYDROLOGY AND FLOODING			
<u>HYD-1</u> : Construction activities and post-construction operation of the project could result in degradation of water quality in the Guadalupe River and the Bay by reducing the quality of storm water runoff.	<u>HYD-1</u> : The applicant shall prepare a Storm Water Pollution Prevention Plan (SWPPP) designed to reduce potential impacts to surface water quality through the construction and life of the project. The SWPPP would act as the overall program document designed to provide measures to mitigate potential water quality impacts associated with implementation of the project. The SWPPP shall include: • Specific and detailed BMPs designed to mitigate construction-related pollutants. These controls shall include practices to minimize the contact of construction materials, equipment, and maintenance supplies (e.g., fuels, lubricants, paints, solvents, adhesives) with storm water. The SWPPP shall specify properly designed centralized storage areas that keep these materials out of the rain. <i>Fire Hazards Policy 3</i> – Anticipated fire response times and fire flow should be taken into consideration as part of the Development Review process. An important component of the storm water quality protection effort will be the education of the site supervisors and workers. To educate on-site personnel and maintain awareness of the importance of storm water quality protection, site supervisors shall conduct regular tailgate meetings to discuss pollution prevention. The frequency of the meetings and required personnel attendance list shall be specified in the SWPPP.	Project proponents shall prepare and implement a Storm Water Pollution Prevention Plan (SWPPP) that includes specific and detailed Best Management Practices (BMPs). The SWPPP shall specify a monitoring program to be implemented by the construction site supervisor.	The Director of PBCE shall ensure that project proponents have prepared and implemented a SWPPP which includes specific and detailed Best Management Practices (BMPs). The Director of PBCE shall ensure a monitoring program is implemented by the construction site supervisor.

Table V-1 continued

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
HYD-1 <i>cont'd</i>	The SWPPP shall specify a monitoring program to be implemented by the construction site supervisor, and must include both dry and wet weather inspections. City of San Jose and RWQCB personnel may make unannounced site inspections and are empowered to levy considerable fines if it is determined that the SWPPP has not been properly prepared and implemented. Best Management Practices (BMPs) designed to reduce erosion of exposed soil may include, but are not limited to: soil stabilization controls, watering for dust control, perimeter silt fences, placement of hay bales, and sediment basins. The potential for erosion is generally increased when grading occurs during the rainy season, as disturbed soil can be exposed to rainfall and storm runoff. If grading must be conducted during the rainy season, the primary BMPs selected shall focus on erosion control, that is, keeping sediment on the site. End-of-pipe sediment control measures (e.g., basins and traps) shall be used only as secondary measures. Access to and egress from the construction site shall be carefully controlled to minimize off-site tracking of sediment (this BMP is particularly important since much of the earthwork will involve loading trucks for off-site transport of soil excavated or the below-ground parking structures). Vehicle and equipment wash down facilities shall be designed to be accessible and functional both during dry and wet conditions.		

Table V-1 *continued*

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
HYD-1 <i>cont'd</i>	Measures designed to mitigate post construction-related pollutants. The project shall include measures designed to mitigate potential water quality degradation of runoff from all portions of the completed development, including roof and sidewalk runoff. The final design team for the project should review <i>Start at the Source</i>, Design Guidance Manual for Stormwater Quality Protection. The selected permanent stormwater treatment measures may include biofilters and grassy swales; and the selected measure must meet the hydraulic sizing criteria specified in the most current NPDES municipal stormwater permit issued to the City of San Jose, unless the developer demonstrates that it is impracticable to meet the criteria; and the project includes an alternative method for treating an equivalent pollutant loading or quantity of stormwater runoff, or provides another equivalent water quality benefit. <i>Fire Hazards Policy 3</i> – Anticipated fire response times and fire flow should be taken into consideration as part of the Development Review process.		
HYD-2: Portions of the project site are located in the 100-year flood hazard zone and could be inundated during extreme storm events, potentially flooding below-ground parking structures.	HYD-2: All structures shall be built so that potential injuries to project occupants and property damage are minimized in the event of a flood. Specifically, and in accordance with the San Jose Municipal Code, Title 17, Chapter 17.08, the lowest finished floor of each structure shall be elevated to or above the inundation elevation specified on the Flood Insurance Rate Map. In addition, below-ground parking structures shall be designed and constructed so that the base flood would not inundate these areas. Flood protection of below-ground parking could be achieved either by grade control and/or berms.	Project proponents shall design the project so as to implement all flood protection measures described in the mitigation measure.	The Director of PBCE shall ensure that project proponents incorporate all flood protection measures described in the mitigation measure into the project.

Table V-1 continued

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
HYD-2 cont'd	Note: Below grade parking is only allowed in FEMA 100-year flood hazard zones if the structure above the below grade parking is 100 percent non-residential (in use) or mixed use (residential and non-residential). This project is 100 percent residential (in use) and the outcome of the upcoming Santa Clara County Water District (SCVWD) Interim Designation Letter of Map Revision from Zone AH to Zone A99 will determine if any below grade parking will be allowed.		
HYD-3: The below-ground parking structures associated with the residential-only development proposed for parcels A, B, C, and D would not comply with the City Special Flood Hazard Regulations.	HYD-3a: The proposed residential-only use for parcels A, B, C and D shall be allowed only after designation as Zone A99 by FEMA, which carries no elevation requirement in anticipation of a pending map change to the existing floodplain and after adoption of the Zone A99 designation into the City of San Jose's Special Flood Hazard Ordinance, flood proofing requirements shall be in accordance with the ordinance. Otherwise only commercial uses shall be allowed on the ground floor with flood proofing per City of San Jose Special Flood Hazard Ordinance requirements. HYD-3b: No building permit shall be issued for the proposed construction on parcels A, B, C and D prior to designation as Zone A99 of these parcels by FEMA and adoption of the Zone A99 designation into the Special Flood Hazard Ordinance or the approval of a Letter of Map Revision by FEMA that shows that the specified parcels are no longer in the FEMA 100-year flood hazard zone.	Project proponents shall limit ground floor uses on parcels A, B, C, and D to commercial unless designated as Zone A99 by FEMA. Project proponents shall be denied building permits for parcels A, B, C and D unless the stipulations put forth in mitigation measure are in place.	The Director of PBCE shall ensure that ground floor uses on parcels A, B, C, and D are limited to commercial unless designated as Zone A99 by FEMA. The Director of PBCE shall ensure that building permits are withheld unless stipulations put forth in the mitigation measure are in place.

Table V-1 *continued*

Environmental Impacts	Mitigation Measures	Implementation Responsibility	Oversight Responsibility
HYD-4: Dewatering effluent may contain contaminants and if not properly managed could cause impacts to construction workers and the environment.	HYD-4: The SWPPP shall include provisions for the proper management of dewatering effluent. At minimum, all dewatering effluent will be contained prior to discharge to allow the sediment to settle out, and filtered, if necessary, to ensure that only clear water is discharged to the storm or sanitary sewer system. In areas of suspected groundwater contamination (i.e., underlain by fill or near sites where chemical releases are known or suspected to have occurred), groundwater will be analyzed by a State-certified laboratory for the suspected pollutants prior to discharge. Based on the results of the analytical testing, the applicant will work with the RWQCB and/or the local wastewater treatment plant to determine appropriate disposal options.	Project proponent shall properly manage dewatering effluent based on provisions in the SWPPP, as specified in the mitigation measure. The project proponent shall procure the appropriate permits needed for the discharge of dewatering effluent.	The Director of PBCE shall ensure that the SWPPP includes provisions for the proper management of dewatering effluent. The Director of PBCE shall ensure project proponents work with the RWQCB and/or the local wastewater treatment plant to determine appropriate disposal options.
M. UTILITIES AND SERVICE SYSTEMS			
<i>No significant adverse impacts related to utilities and service systems would result from the proposed project</i>			
N. ENERGY			
<i>No significant adverse impacts related to energy would result from the proposed project</i>			

Source: LSA Associates, Inc., 2003.

APPENDIX A

CITY COUNCIL POLICY ON
POST-CONSTRUCTION URBAN RUNOFF MANAGEMENT

City of San José, California

CITY COUNCIL POLICY

TITLE	PAGE 1 of 10	POLICY NUMBER 6-29
POST-CONSTRUCTION URBAN RUNOFF MANAGEMENT	EFFECTIVE DATE February 3, 1998	REVISED DATE 10/07/2003
APPROVED BY COUNCIL ACTION February 3, 1998, Item 9d.; October 7, 2003, Item 7.3;		

BACKGROUND

The Federal Clean Water Act requires local municipalities to implement measures to control pollution from their storm sewer systems to the maximum extent practicable. Under the auspices of the Clean Water Act, as well as other Federal and State legislation since 1990, the San Francisco Regional Water Quality Control Board (RWQCB) has issued and reissued an area-wide National Pollutant Discharge Elimination System (NPDES MS4) Permit to the fifteen Co-permittees of the Santa Clara Valley Urban Runoff Pollution Prevention Program (SCVURPPP) for the discharge of storm water from urban areas in Santa Clara County. The fifteen SCVURPPP Co-permittees are the City of San Jose, twelve other municipalities within the Santa Clara Basin watershed area, the County of Santa Clara, and the Santa Clara Valley Water District.

Under the provisions of the SCVURPPP Permit, each of the co-permittees, including the City of San Jose, is required to implement control measures/best management practices (BMPs) to reduce storm water pollution from new development or redevelopment projects to the maximum extent practicable. In October 2001, SCVURPPP Permit Provision C.3 (New and Redevelopment Performance Standards) was revised to require that certain types of new and redevelopment projects include storm water runoff treatment control measures; that the treatment measures be designed to treat a specified volume or flow of storm water runoff from the project site; and that the measures be maintained for the life of the project.

PURPOSE

It is the purpose of this policy to establish an implementation framework, consistent with current SCVURPPP NPDES MS4 Permit requirements, for incorporating storm water runoff pollution control measures into new development and redevelopment projects to reduce storm water runoff pollution from new development and redevelopment projects to the maximum extent practicable.

DEFINITIONS

Brownfields Project: A project located on abandoned, idle, or under-utilized property where expansion or redevelopment is complicated by real or perceived environmental contamination.

Expansion Projects: Projects involving a Land Use of Concern (see below) and proposing expansion of fifty percent (50%) or more of the previously existing built development, site area, or use. An Expansion Project may also include a change of use on an existing site when no new buildings or pavement are proposed if that change results in the potential for increases in the deposition of Pollutants of Concern on the site. New uses that require an increase in on-site surface parking or result in an increase in on-site vehicular traffic would meet this criterion. Changes of use to any of the major Land Uses of Concern described in this Policy may also be considered an Expansion Project. A Major Expansion is an Expansion Project that creates one acre (43,560 square feet) or more of impervious surface area.

Impervious Surface: Any surface on or above ground that prevents the infiltration or passage of water into the soil. Impervious surfaces include, but are not limited to, non-absorbent rooftops, paved or covered patios, driveways, parking lots, paved walkways, compacted soil or rock, and streets. This category includes streets, roads, highways, and freeways that are under the City of San Jose's jurisdiction and that create one acre (43,560 square feet) or more of new impervious surface and any newly constructed paved surface used primarily for the transportation of automobiles, trucks, motorcycles, and other motorized vehicles. Excluded from this category are public sidewalks, bicycle lanes, trails, bridge accessories, guardrails, and landscape features.

Land Uses of Concern: Uses that have the greatest potential to contribute high levels of pollutant loading from Pollutants of Concern, including, but not limited to: gas stations, auto wrecking yards, loading docks, heavy automotive uses, and various other heavy industrial and commercial uses.

Major Impervious Surface Area: One acre (43,560 square feet) or more of impervious surface area.

Major Project: New development projects that create one acre (43,560 square feet) or more of impervious surface area; new streets, roads, highways and freeways built under

the City's jurisdiction that create one acre (43,560 square feet) or more of impervious surface area; and Significant Redevelopment Projects.

One Single-Family Home: A project or project expansion consisting of one single-family home that is not part of a larger common plan of development. One single-family home is excluded from the requirement to implement appropriate storm water runoff treatment control measures. An equivalent water quality benefit should be provided by the maintenance of at least one street tree or by complying with section 20.30.440 of the City of San Jose Municipal Code, which provides limitations on the amount of paved surface in front setback areas.

Pollutants of Concern: Identified Pollutants of Concern in the SCVURPPP Permit include certain heavy metals (copper, nickel and mercury), excessive sediment production from erosion due to anthropogenic activities, petroleum hydrocarbons from sources such as used motor oil, microbial pathogens of domestic sewage origin from illicit discharges, the pesticides diazinon, chlordane, dieldrin and DDT, excessive nutrient loads which may cause or contribute to the depletion of dissolved oxygen and/or toxic concentrations and dissolved ammonia, and other pollutants which may cause aquatic toxicity in the receiving waters.

Post-Construction Best Management Practice (BMP): A method, activity, maintenance procedure, or other management practice designed to reduce the amount of stormwater pollutant loading from a site. Examples of Post-Construction BMPs include proper materials storage and housekeeping activities, public and employee education programs, and storm inlet maintenance and stenciling.

Post-Construction Treatment Control Measure: A site design measure, landscape characteristic or permanent storm water pollution prevention device, installed and maintained as part of a new development or redevelopment project, that is designed to reduce storm water pollutant loading from a site; is installed as part of a new development or redevelopment project; and is maintained in place after construction has been completed. Examples of runoff treatment control measures include infiltration devices (e.g., vegetative swales/biofilters, insert filters, and oil/water separators) or detention/retention measures (e.g., detention/retention ponds). Post-Construction Treatment Control Measures are a category of BMPs.

Regional BMP or Treatment Control Measure: Regional or municipal storm water detention/treatment facilities, or land acquisition/conservation programs that protect or enhance water quality/beneficial uses, or other specific projects/programs (or designated functions/components of projects/programs) that protect or enhance water quality/beneficial uses in a manner equivalent to that which would be provided by the installation of on-site measures, and that are specifically identified as eligible alternative compliance options in the annual Workplan submitted by the City pursuant to the SCVURPPP Permit.

Significant Redevelopment Projects: A project on a previously developed site that results in addition and/or replacement of one acre (43,560 square feet) or more of impervious surface. Interior remodel, routine maintenance or repair, and exterior surface replacement or repaving are expressly excluded from this definition. Excluded from this category are interior remodels and routine maintenance or repair. Excluded routine maintenance and repair includes roof or exterior surface replacement, pavement resurfacing, repaving and road pavement structural section rehabilitation within the existing footprint, and any other reconstruction work within a public street or road right-of-way where both sides of that right-of-way are developed.

Smart Growth Projects: A Smart Growth Project may be any one or a combination of the following:

- a. Transit Oriented Project;
- b. Project within the Urban Core;
- c. Project within a redevelopment project area, adopted pursuant to the Community Redevelopment Law, (Health & Safety Code §§ 33000 *et seq.*)
- d. Low-income, moderate-income, or senior housing project, meeting one of the criteria of Government Code Section 65915(b)(1) or 65915(b)(2);
- e. Brownfields Project.

Total Project Cost: Includes the construction (labor) and materials cost of the physical improvements proposed; but does not include land, transaction, financing, permitting, demolition or off-site mitigation costs.

Transit Oriented Project: A project located within 2,000 feet of an existing or planned light rail or bus station (not including simple bus stops that are not stations), terminal, project-dedicated van or bus shuttle service station, or major transfer point, or within 3,000 feet of an existing or planned BART, heavy rail, or intermodal station, or a project supplying less than one-half parking space per residential dwelling unit, or ninety percent (90%) or less of the parking required by Tables 20-190, 20-200, and 20-210 of Title 20 of the City of San Jose Municipal Code where the City makes findings that a limited parking supply is justified by existing or planned transit opportunities.

Trees Eligible for Post-Construction Treatment Control Measure Credit: New trees planted within 30 feet of impervious surfaces are eligible for Post-Construction Treatment Control Measure Credit. 100 square feet of Credit may be given for each new deciduous tree, and 200 square feet of Credit may be given for each new evergreen tree (see minimum sizes below). Post-Construction Treatment Control Measure Credits also apply to existing trees kept on a site if the trees' canopies are within 20 feet of impervious surfaces. The Credit is the square-footage equal to one-half of the existing tree canopy. No more than 25% of a site's impervious surface can be treated through the use of trees. Trees required by the City of San Jose for tree removal mitigation will not count toward Post-Construction Treatment Control Measure Credit. Trees required by the

City of San Jose to fulfill the requirements of street trees will not count toward Post-Construction Treatment Control Measure Credit. The trees selected shall be suitable species for the site conditions and the design intent. Trees should be relatively self-sustaining and long-lived.

To receive Post-Construction Treatment Control Measure Credit, new deciduous trees must be at least 24-inch box in size and at least 2 inches in diameter as measured 2 feet above finished grade and new evergreen trees must be at least 24-inch box in size and at least 6 feet tall as measured from finished grade. Trees planted to meet storm water treatment facility planting requirements will not also receive Post-Construction Treatment Control Measure Credit.

The Post-Construction Treatment Control Measure Credit applies to existing trees of 4-inch diameter or greater as measured 2 feet above finished grade. Credit is based on one half of the square footage of the tree canopy. Protection during construction shall be in the form of minimizing disruption of the root system.

Urban Core: Projects that are (1) infill development of vacant or underutilized land within areas that are already developed with urban uses and served with urban infrastructure (e.g., sanitary sewers, water, etc.) and are not located on the urban fringe; or (2) any area designated on the San Jose General Plan Land Use/Transportation Diagram for Transit Corridor Residential (20+ DU/AC), Residential Support for the Core (25+ DU/AC), Core Area, Neighborhood Business District, or Transit-Oriented Development Corridor; or (3) commercial or industrial development at a floor area ratio greater than 1; or (4) residential development at a density of not less than eight dwelling units per acre and within one-half mile of existing development meeting any of the three criteria above. The Urban Core includes all "Transit Oriented Projects" and designated Redevelopment Areas (*see* Health and Safety Code §§ 25000, et seq.).

POLICY

This Policy establishes that Major Projects will be required to install Post-Construction Treatment Control Measures meeting specified hydraulic sizing criteria, according to the following schedule, except where impracticable:

- * October 15, 2003 - Major Projects requiring a permit or other direct approval from the RWQCB, including Major Projects requiring RWQCB certification under Section 401 of the Clean Water Act, and Major Projects involving Land Uses of Concern;
- * February 15, 2005 - all other Major Projects.

This Policy also establishes the criteria for establishing impracticability and for evaluating Alternative Compliance Measures.

This Policy further establishes that projects that are not subject to Post-Construction Treatment Control Measure requirements should include specific measures for reducing storm water pollution to the maximum extent practicable if the project incorporates new Major Impervious Surface Area or Major Expansion of a use or built development. In addition, the policy establishes general guidelines and minimum BMPs for Land Uses of Concern. Finally, it requires that all Post-Construction Treatment Control Measures must be maintained to operate effectively.

NUMERIC SIZING CRITERIA FOR POST-CONSTRUCTION TREATMENT CONTROL MEASURES

Except as specified below, Major Projects shall include a Post-Construction Treatment Measure that incorporates, at a minimum, the following hydraulic sizing design criteria to treat storm water runoff from the impervious surface area of the Project. Where a Significant Redevelopment Project results in an increase, or replacement, of more than fifty percent (50%) of the impervious surface of a previously existing development, which was not subject to storm water control measures, the entire impervious area of the project site must be included in the application of the sizing criteria. Where a Significant Redevelopment Project results in an increase, or replacement, of not more than fifty percent (50%) of the impervious surface of a previously existing development, which was not subject to storm water control measures, only the net new impervious surface area must be included in the application of the sizing criteria.

- i. **Volume Hydraulic Design Basis:** Treatment control measures whose primary mode of action depends on volume capacity, such as detention/retention units or infiltration devices (biofilters /vegetative swales, insert filters and oil/water separators), shall be designed to treat storm water runoff equal to:
 - a. the maximized storm water quality capture volume for the area, based on historical rainfall records, determined using the formula and volume capture coefficients set forth in *Urban Runoff Quality Management, WEF Manual of Practice No. 23/ ASCE Manual of Practice No. 87, (1998)*, pages 175-178 (e.g., approximately the 85th percentile 24-hour storm runoff event); or
 - b. the volume of annual runoff required to achieve 80 percent or more capture, determined in accordance with the methodology set forth in Appendix D of the *California Stormwater Best Management Practices Handbook, (1993)*, using local rainfall data.
- ii. **Flow Hydraulic Design Basis:** Treatment control measures whose primary mode of action depends on flow capacity, such as vegetative swales, sand filters, or wetlands, shall be sized to treat:

- a. 10% of the 50-year peak flow rate; or
- b. the flow of runoff produced by a rain event equal to at least two times the 85th percentile hourly rainfall intensity for the applicable area, based on historical records of hourly rainfall depths; or
- c. the flow of runoff resulting from a rain event equal to at least 0.2 inches per hour intensity.

Project applicants will be responsible for verifying the rainfall data used to meet the above criteria and for providing engineering certification that the criteria have been met.

LIMITATIONS ON USE OF INFILTRATION TREATMENT MEASURES - INFILTRATION AND GROUNDWATER PROTECTION

In order to protect groundwater from pollutants that may be present in urban runoff, treatment control measures that function primarily as direct infiltration devices (such as infiltration trenches and infiltration basins) must meet, at a minimum, the following conditions:

- i. Pollution prevention and source control BMPs shall be implemented at a level appropriate to protect groundwater quality at sites where infiltration devices are to be used;
- ii. Use of infiltration devices shall not cause or contribute to degradation of groundwater water quality objectives;
- iii. Infiltration devices shall be adequately maintained to maximize pollutant removal capabilities;
- iv. The vertical distance from the base of any infiltration device to the seasonal high groundwater mark shall be at least 10 feet.
- v. Unless storm water is first treated by a means other than infiltration, infiltration devices shall not be recommended for areas of industrial or light industrial activity; areas subject to high vehicular traffic (25,000 or greater average daily traffic on main roadway or 15,000 or more average daily traffic on any intersecting roadway); automotive repair shops; car washes; fleet storage areas (bus, truck, etc.); nurseries; or any other land use or activity which may pose a high threat to groundwater quality, as designated by the City;
- vi. Infiltration devices shall be located a minimum of 100 feet horizontally from any water supply wells.

ALTERNATIVES TO INSTALLATION OF POST-CONSTRUCTION TREATMENT CONTROL MEASURES

At the City's discretion, projects may provide an Alternative Measure, as defined below, in lieu of demonstrating compliance with the numeric sizing criteria, where installation of Post-Construction Treatment Control Measures are impracticable.

- i. **Impracticability** - installation of a Post-Construction Treatment Control Measure may be found impracticable if any one of the following conditions is shown to exist:
 - a. Inadequate space or soil conditions for an on-site treatment control measure;
 - b. Limitations on the ability of a treatment control measure to address pollutants of concern;
 - c. The site is within an area where infiltration would not be permitted and another type of treatment is impracticable;
 - d. Projected costs of the required measure (cost of labor and materials for the treatment measure, plus the cost of dedicating land to the treatment measures in lieu of otherwise allowable use) would exceed two percent (2%) of Total Project Costs;
 - e. The project is a Smart Growth Project, or a publicly funded or sponsored project determined by the City to have community or environmental benefits, including senior or child care centers or similar projects;
 - f. Installation of measures would result in the inability of the project sponsor or City to comply with other regulatory requirements at the federal, state and local levels (for example, seismic building code requirements); or
 - g. Maintenance, inspection and/or monitoring measures would impose an undue burden on the project sponsor or City.
- ii. **Alternative Measures** - Major Projects which are not required to install Post-Construction Treatment Control Measures on-site must provide equivalent protection or enhancement of water quality/beneficial uses through one of the following Alternative Measures:
 - a. **Regional Solution** - Participation in a Regional Project or Program that has capacity/credit to address storm water impacts equivalent to the impacts produced by the subject Major Project. Where feasible, the Regional Project must discharge to/address the receiving waters affected by the subject Major Project.
 - b. **Water Quality Benefit Project** - In its discretion, the City may find that all Smart Growth Projects provide equivalent water quality benefit. For other projects, Alternative Measures may be found by the City to exist where the project sponsor documents that the development of the site itself, the nature of the site design, its location in the watershed and/or the proposed change in use protects/enhances water quality/beneficial uses such that post-project water

quality/beneficial uses conditions are likely to equal or exceed pre-project conditions.

- c. **Equivalent Project** - The project provides treatment for a pollutant loading or volume of storm water runoff that is equivalent to the treatment that would be provided by the otherwise required Post-Construction Control Treatment Measure. Equivalent projects may include off-site treatment, stream restoration or other activities that limit or mitigate impacts from excessive erosion or sedimentation.

GENERAL PROVISIONS FOR ALL LAND USES

All new multi-family residential and non-residential projects including new Major Impervious Surface Areas or projects proposing Major Expansion should include Post-Construction Treatment Control Measures to the maximum extent practicable. For all projects with suitable landscape areas, vegetative swales or other biofilters are recommended because they are relatively economical and require limited maintenance. If these measures are not feasible or adequate to treat the volume or flow of runoff required for Major Projects, other post-construction BMPs/treatment control measures should be incorporated.

MINIMUM BMPs FOR MAJOR LAND USES OF CONCERN

Gas Stations or Equipment Fueling Facilities: All new fueling stations or expansion of such uses should include the following BMPs. 1) Install and maintain a treatment control measure. 2) Pave the fueling area floors with an impermeable surface (i.e., portland cement concrete or equivalent smooth impervious surface). 3) Cover the fueling areas with a canopy or cover that extends a minimum of ten feet in each direction from each pump. Alternatively, cover the fueling areas with a canopy or cover that has minimum dimensions equal to or greater than the area within the grade break or fuel dispensing area. (The fuel dispensing area is defined as the area extending a minimum of 6.5 feet from the corner of each fuel dispenser or the length at which the hose and nozzle assembly may be operated plus a minimum of one foot, whichever is greater. In no case should the canopy or cover drain onto the fueling area.) 4) Grade the fuel area to prevent water draining toward the fueling area. 5) Grade the fuel area with the minimum slope necessary to prevent ponding. 6) Separate the fueling area from the rest of the site by a grade break that prevents run-on of storm water to the maximum extent practicable. 7) Dry sweep the fueling area routinely. 8) Stencil all on-site storm drains in conformance with the City's requirements. 9) Prepare a spill cleanup plan in conformance with the City of San Jose Fire Code.

Auto Wrecking Yards: All new auto wrecking yards or major expansion of such uses should include the following: 1) install and maintain a treatment control measure; 2) pave all outside vehicle storage areas; 3) cover fluids drainage areas; 4) pave fluids drainage areas with impermeable materials; 5) construct a berm around fluids drainage areas and grade the site to prevent water draining toward this working area; 6) remove and store

batteries in conformance with the City Fire Code; and 7) prepare and execute the spill prevention plan in conformance with the City Fire Code.

Loading Docks: All new loading docks or major expansion of such uses should include the following: 1) pave the loading dock floor with an impermeable surface; 2) cover the loading dock; 3) grade the site to minimize run-on to and runoff from the loading area; 4) position roof downspouts to direct storm water away from the loading area; 5) drain water from the loading dock areas to the sanitary sewer, or divert and collect the water for ultimate discharge to the sanitary sewer; 6) equip loading dock areas draining directly to the sanitary sewer with a spill control valve or equivalent device that is kept closed during periods of operation; 7) install door skirts between the trailers and the building to prevent exposure of loading activities to rain.

Other Unenumerated Uses of Concern: Other Land Uses Of Concern not enumerated in this policy generating equivalent amounts of heavy pollutants may need to include specific BMPs to treat storm water pollutants. Those BMPs would be determined in conjunction with the development permit for the project.

OPERATION AND MAINTENANCE

All Post-Construction Treatment Control Measures included in new projects must be installed, operated, and maintained by qualified personnel. On-site inlets must be stenciled in conformance with City requirements; and cleaned out at least once per year, prior to the wet season.

The property owner/site manager must keep a maintenance and inspection schedule and record to ensure that the treatment control measures continue to operate effectively. Copies of this schedule and record must be provided to the City upon request, and must be made available for inspection at the site at all times.

Trees approved for Post-Construction Control Measure Credit shall be maintained and protected on the site after construction and for the life of the development (until any approved redevelopment occurs in the future). During the life of the development, trees approved for Post-Construction Treatment Control Measure Credit shall not be removed without approval from the City. Trees that are removed or die shall be replaced within six (6) months with species approved by the City of San Jose.