

First Amendment to the Draft Environmental Impact Report

**San José Flea Market
General Plan Amendment &
Planned Development Rezoning
(GP06-04-01 & PDC03-108)
SCH# 2005042070**

City of San José

March 2007

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PREFACE

This document, together with the December 2006 Draft Environmental Impact Report (Draft EIR) for the San José Flea Market General Plan Amendment and Planned Development Rezoning constitutes the Final Environmental Impact Report (Final EIR) for the proposed project. Under the California Environmental Quality Act (CEQA), the Final EIR is an informational document prepared by the Lead Agency that must be considered by the decision-makers before approving the proposed project. CEQA Guidelines Section 15132 specifies that a Final EIR shall consist of the following:

- The Draft EIR or a revision of the draft;
- Comments and recommendations received on the Draft EIR either verbatim or in summary;
- A list of persons, organizations, and public agencies commenting on the Draft EIR;
- The responses of the Lead Agency to the significant environmental points raised in the review and consultation process; and
- Any other information added by the Lead Agency.

In conformance with the CEQA Guidelines, the Final EIR provides objective information regarding the environmental consequences of the proposed project. The Final EIR also examines mitigation measures and alternatives to the project intended to reduce or eliminate significant environmental impacts. The Final EIR will be used by the City and other Responsible Agencies in making decisions regarding the project. The CEQA Guidelines require that, while the information in the Final EIR does not control the agency's ultimate discretion on the project, the agency must respond to each significant effect identified in the Final EIR by making written findings for each of those significant effects before it approves a project.

According to Section 21081 of the California Public Resources Code, no public agency shall approve or carry out a project for which an EIR has been certified which identifies one or more significant environmental effects on the environment that would occur if the project is approved or carried out unless both of the following occur:

- (A) The public agency makes one or more of the following findings with respect to each significant effect:
 - (1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment.
 - (2) Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency.
 - (3) Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the EIR.

- (B) With respect to significant effects which were subject to a finding under paragraph (3) of subdivision (A), the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment.

The Final EIR will be made available to the public and commenting public agencies 10 days prior to the EIR certification hearing.

All documents referenced in this EIR are available for public review at the Department of Planning, Building, and Code Enforcement, located at 200 East Santa Clara Street, San José, California, on weekdays during normal business hours.

SECTION 1 LIST OF AGENCIES AND INDIVIDUALS RECEIVING THE DRAFT EIR OR NOTICE OF AVAILABILITY OF THE DRAFT EIR

State of California (via State Clearinghouse)

- Resources Agency
- Regional Water Quality Control Board, Region 2
- Department of Fish and Game, Region 3
- Department of Water Resources
- Department of Transportation (Caltrans, District 4)
- Department of Toxic Substances Control

Federal Agencies

- U.S. Army Corps of Engineers
- U.S. Fish & Wildlife Service

County and Regional Agencies

- Alameda County Planning Department
- Association of Bay Area Governments
- Bay Area Air Quality Management District
- Santa Clara County Planning Department
- Santa Clara County Historic Heritage Commission
- Santa Clara County Park & Recreation Department
- Santa Clara County Roads and Airports Department
- Santa Clara Valley Transportation Authority
- Santa Clara Valley Water District
- Metropolitan Transportation Commission (MTC)

Local Governments

- City of Campbell
- City of Cupertino
- City of Fremont
- City of Gilroy
- Town of Los Gatos
- City of Milpitas
- City of Morgan Hill
- City of Santa Clara
- City of Saratoga
- City of Sunnyvale

School Districts

- Berryessa Unified School District
- East Side Union High School District

Organizations, Companies, and Individuals

- Pacific Gas and Electric
- San José Water Company
- Union Pacific Railroad
- Pacific Bell
- N.W. Information Center, Sonoma State University
- Adams, Broadwell, Joseph & Cardozo
- Preservation Action Council of San Jose
- Sierra Club
- Audubon Society
- CA Native Plant Society
- Greenbelt Alliance
- Guadalupe Coyote – Resource Conservation District
- Open Space Authority

The Draft EIR was also on file and available for review at the City of San José Planning Division, Educational Park Branch Library, and Dr. Martin Luther King Jr. Main Library and was available for review on the City of San José web site at www.sanjoseca.gov/planning/eir/eir.asp.

SECTION 2 LIST OF AGENCIES AND INDIVIDUALS COMMENTING ON THE DEIR

<u>Comment Received From</u>	<u>Date of Letter</u>	<u>Response on Page</u>
Federal Agencies		
A. National Marine Fisheries Service	February 5, 2007	7
B. U.S. Army Corps of Engineers	February 5, 2007	8
State Agencies		
C. Public Utilities Commission	January 16, 2007	10
D. Department of Transportation (Letter 1)	February 1, 2007	11
E. Department of Transportation (Letter 2)	February 8, 2007	12
F. Regional Water Quality Control Board	February 2, 2007	14
County and Regional Agencies		
G. County of Santa Clara Department of Parks and Recreation	February 5, 2007	20
H. County of Santa Clara Department of Roads and Airports	January 30, 2007	25
I. Santa Clara Valley Water District	January 25, 2007	26
J. Santa Clara Valley Transportation Authority	February 13, 2007	33
Local Governments		
K. City of San José Historic Landmark Commission	February 22, 2007	37
Businesses		
L. Norcal Waste Systems, Inc.	January 11, 2007	38
Persons		
M. Yanmu Huang	January 8, 2007	39
N. Wilson Lee	January 22, 2007	40
School Districts		
O. Berryessa Union School District	February 23, 2007	43

SECTION 3 RESPONSES TO COMMENTS RECEIVED ON THE DEIR

The following section includes all of the comments requiring responses contained in letters received during the noticed 45-day review period by the City of San José regarding this DEIR. The comments are organized under headings containing the source of the letter and its date. The specific comments have been excerpted from the letters and are presented as “comment” with each response directly following. Each of these letters submitted to the City of San José is contained in its entirety in Section 5 of this document. One letter was received after the end of the review period. While a written response to a late comment is not required by CEQA, the City chose to respond to that letter. The response is included in Section 3.

A. RESPONSES TO COMMENTS ON THE DRAFT EIR FROM THE NATIONAL MARINE FISHERIES SERVICE DATED FEBRUARY 5, 2007

COMMENT A-1: (1) The DEIR notes the presence of Federally-threatened Central California Coast (CCC) steelhead Distinct Population Segment (*Oncorhynchus mykiss*) and designated critical habitat in Coyote and Upper Penitencia creeks, but minimizes the importance of these streams in the project area. The document states “. . . these creeks adjacent to the project site are likely only used as rearing habitat for juveniles and as migration routes for adults . . .” (DEIR page 167). As an anadromous species, steelhead spend a portion of their life history in freshwater and a portion in the marine environment. Their freshwater phase is critical to their life history and the role of the stream segments adjacent to the San Jose Flea Market should not be dismissed lightly.

RESPONSE A-1: The comment is noted.

COMMENT A-2: (2) NMFS has been working actively with the Santa Clara Valley Water District (SCVWD) and the Army Corps of Engineers (Corps) in the development of the Upper Penitencia Creek Flood Control Project. The proposed San Jose Flea Market is located within the 100-year Federal Emergency Management Agency (FEMA) flood hazard zone. The goal of this flood project is to remove areas, including the flea market property, in the Upper Penitencia Creek watershed from the 100-year floodplain. Due to extensive urban development in the area, alternatives for flood control are limited. In coordination with the SCVWD, Corps, California Department of Fish and Game, U.S. Fish and Wildlife Service, NMFS, Regional Water Quality Control Board, and City of San Jose’s Environmental Services Division, an alternative has been developed for the lower reach of Upper Penitencia Creek that will convey the 100-year flood and provide habitat for terrestrial and aquatic species, including threatened CCC steelhead. However, this flood control alternative may require a larger set back from Upper Penitencia Creek than proposed by the City in the DEIR. The preferred alternative which was endorsed by the above agencies requires approximately 205 feet of right-of-way that measures from the north side of Upper Penitencia Creek to the flea market property south of the creek. NMFS strongly encourages the City to reserve this right-of-way for future flood project planning.

RESPONSE A-2: The project proposes a 100-foot setback from the riparian habitat of Upper Penitencia and Coyote Creeks. The project proposes a 100-foot setback from the riparian habitat of Upper Penitencia and Coyote Creeks. Measured from the top of the north bank of Upper Penitencia Creek, the 100-foot riparian setback provides an average right-of-way width of approximately 185 feet, with maximum of approximately 210 feet and a minimum of approximately 165 feet of right-of-way.

B. RESPONSES TO COMMENTS ON THE DRAFT EIR FROM THE U.S. ARMY CORPS OF ENGINEERS DATED FEBRUARY 5, 2007

COMMENT B-1: Flood Control Study

The US Army Corps of Engineers is concerned that the action proposed in the EIR will foreclose the most viable flood control measures now under study by the Corps, measures also supported by the environmental regulatory agencies.

As noted in the Environmental Impact Report (EIR), the U.S. Army Corps of Engineers (Corps) and the Santa Clara Valley Water District (District) are conducting a flood control feasibility study for Upper Penitencia Creek, including the section of creek within and adjoining the location of the proposed action. The proposed land use change would affect all alternatives under consideration in the flood control feasibility study. The flood study has included considerable coordination and collaboration with numerous other agencies including the Regional Water Quality Control Board, National Marine Fisheries Service, California Department of Fish and Game, U. S. Environmental Protection Agency, and U. S. Fish and Wildlife Service, which must agree to the final design of flood control measures before the flood damage reduction project is built.

Page 182 of the EIR states that we will complete the feasibility study in December 2007 and the EIS/EIR in June 2007. The draft feasibility report and draft EIS/R are now scheduled for release in 2008.

RESPONSE B-1: Page 184 of the Draft EIR has been revised to indicate that the environmental impact report/environmental impact statement would be completed in 2008 (refer to *Section 4 Revisions to the Text of the DEIR* in this document).

COMMENT B-2: Corps and District Flood Control Study Alternatives

The land use action proposed by this EIR would foreclose the alternative considered most viable for flood damage reduction - widening the Upper Penitencia Creek channel from King Road to Coyote Creek. Several widening alternatives are under consideration, although the Corps would normally recommend an alternative that would protect against the 100-year flood.

The Corps and the District initially considered an underground bypass channel to convey flood flows from King Road downstream to Coyote Creek. The underground bypass channel would run under Salamoni Court, continue under an adjacent property, and extend under the parking lot on the south side of the flea market. Although this alternative will remain in consideration until the project is approved, it is not favored by the regulatory agencies and the District staff. The Corps is working to present a plan to Congress that the District and the regulatory agencies can support.

Several regulatory agencies expressed concern the possible effects of the underground bypass channel on stream resources, including the steelhead trout which is protected under the Endangered Species Act. As a result, the study is now considering the widening the creek channel from King Road downstream to Coyote Creek in order to reduce biological impacts and

allow their mitigation. All flood damage reduction alternatives would widen only the south side of the creek because of limited space between Berryessa Road and the creek - that is, the widening alternatives along Berryessa Road would occur toward and into the current Flea Market property.

Required Stream Right-of-Way for Flood Damage Reduction

Corps study determined that a right-of-way extending 170 feet south from the creek centerline would be required to convey a 100-year flood through this section of creek. Plans call for an additional 20 feet of right-of-way for a maintenance road, for a total width of 190 feet measured from the creek centerline or 205 feet from the top of the north bank.

The Flea Market EIR is not consistent about the width of the proposed riparian setback along Upper Penitencia Creek. On page 169 it proposes only a 100-foot riparian setback along the creek measured from the edge of the riparian forest, Page 184 states that the width needed for the floodplain plan would be 200 feet measured from Berryessa Road.

The 205-foot right-of-way requirement determined by Corps study would not be satisfied by page 184's 200 foot right-of-way south from Berryessa Road. Starting the channel widening at Berryessa Road would require widening both sides of the channel along much of the length of the flea market property, which is discouraged by the regulatory agencies due to excessive environmental impacts - this constrained right-of-way for the flood control measures would deepen (and make more unstable) the flood flow channel, increase mitigation costs, and undermine the emerging consensus for the flood control project.

Recommended Action

The U.S. Army Corps of Engineers, San Francisco District recommend that 205 feet of right-of-way south of Upper Penitencia Creek be reserved for this flood control project, measured from the top of the north bank.

RESPONSE B-2: The proposed project will coordinate with the USACE and the District to the greatest extent feasible. Pages 186 and 188 of the Draft EIR have been revised to clarify that the District staff preferred alternative would require an approximately 205-foot wide corridor, measured from the north bank of Upper Penitencia Creek (refer to *Section 4 Revisions to the Text of the DEIR* in this document). The project proposes a 100-foot setback from the riparian habitat of Upper Penitencia and Coyote Creeks. Measured from the top of the north bank of Upper Penitencia Creek, the 100-foot riparian setback provides an average right-of-way width of approximately 185 feet, with maximum of approximately 210 feet and a minimum of approximately 165 feet of right-of-way.

C. **RESPONSES TO COMMENTS ON THE DRAFT EIR FROM THE STATE OF CALIFORNIA PUBLIC UTILITIES COMMISSION DATED JANUARY 16, 2007**

COMMENT C-1: As the state agency responsible for rail safety within California, we recommend that any development projects planned adjacent to or near the rail corridor in the City be planned with the safety of the rail corridor in mind. New developments may increase traffic volumes not only on streets and at intersections, but also at at-grade highway-rail crossings. This includes considering pedestrian circulation patterns/destinations with respect to railroad right-of-way.

RESPONSE C-1: The comment does not raise any issues regarding the adequacy of the Draft EIR. No further response is required.

COMMENT C-2: The project as proposed is based upon being constructed adjacent to BART however because BART tracks are grade-separated we do not have safety concerns with the project as proposed.

RESPONSE C-2: The comment is noted.

COMMENT C-3 Of chief concern is that approval of the project be contingent upon the BART-to-San Jose project receiving full funding and being built as planned. As planned the BART system utilizes a restricted access closed-corridor design with no at-grade street or pedestrian crossings. However, full funding for the project has not been secured and is in no way guaranteed. It is quite possible that if full funding for the project is not secured an alternative of heavy rail Caltrain-style heavy rail service or an extension of the Valley Transportation Authority's (VTA) light rail system could be instituted on the rail corridor, utilizing the existing at-grade highway-rail crossings. The San Jose Flea General Plan Amendment & Planned Development Draft Environmental Impact Report does consider a "No BART Alternative", but does not consider the project with a heavy or light rail alternative to BART. Such alternatives would satisfy the basic goals of the project in regards to satisfying the minimum housing requirements of a transit station "node" for Federal Transit Authority funding, and could conceivably justify the project.

Impacts created by such a transit alternative include:

- General safety concerns of exposure for vehicles and pedestrians at at-grade crossings. Each crossing must be evaluated by a diagnostic team consisting of representatives of the local road agency, railroad and CPUC.
- Level of Service Impacts from railroad crossing gates blocking traffic. As an example, VTA generally runs on 7 to 15 minute headways. This can cause streets which already have poor Levels of Service to fall to unacceptable levels.
- Installation of vandal-resistant fencing to discourage trespassing onto the railroad right-of-way (ROW). Even with vandal-resistant fencing, the at-grade highway-rail crossings at Berryessa and Mabury Roads could provide access to the ROW. The ROW could be an attractive destination for children living in the adjacent high density housing.
- For the major collector proposed between Berryessa and Mabury Roads, the proposed intersection on Mabury Road is shown to be very closely located to the rail crossing. Such designs have inherent safety deficiencies, so the proposed street should be built as far from

the rail crossing as possible. Specific design elements needed should be determined by a diagnostic team.

- CPUC regulations require railroad crossing automatic devices be equipped and sound their bells as trains approach and pass through an at-grade crossing. Furthermore, state and federal rules require trains (including light rail vehicles) sound their on-board audible device as they approach and pass through an at-grade crossing. Grade-separated crossings are not subject to these requirements. These factors should be considered in the noise impact assessment sections of any environmental review documents, especially when considering the alternatives of at-grade versus grade-separated crossing.

The above-mentioned safety improvements should be considered when approval is sought for the new development. Working with Commission staff early in the conceptual design phase will help improve the safety to motorists and pedestrians in the City.

RESPONSE C-3: The proposed project supports BART, but is not completely dependent on transit. BART was not assumed for purposes of traffic analysis, therefore, project construction does not need to wait for BART funding.

An alternative scenario that replaces the planned BART use of the rail corridor adjacent to the project site with another form of mass transit is speculative and, therefore, not evaluated in the EIR. As reflected in this comment itself, numerous variables could apply, and there is currently no way to predict what the likelihood is of any of them happening.

Use of the rail corridor adjacent to the project site for a mass transit project other than the currently planned BART to San José project would require its own separate environmental review. The issues raised in the above comment may be addressed in the environmental review document prepared for any unidentified mass transit project.

COMMENT C-4 Finally, the California Public Utilities Code requires CPUC approval for any project to construct or modify highway-rail crossings. Therefore, in your project timeline we advise you also consider CPUC application review and approval times.

RESPONSE C-4: The proposed project does not require the construction and/or modification of highway-rail crossings.

D. RESPONSES TO COMMENTS ON THE DRAFT EIR FROM THE DEPARTMENT OF TRANSPORTATION (LETTER 1), DATED FEBRUARY 1, 2007

COMMENT D-1: Traffic

The proposed Mitigation and Avoidance Measures involving the intersection of US-101/Oakland Road will require the Department's Project Management and/or Permit branch review and approval.

RESPONSE D-1: The comment is acknowledged. At the time of final design, plans for improvements to the US-101/Oakland Road intersection will be provided to Caltrans for review and approval.

COMMENT D-2: Please be advised that any work or traffic control within the State right-of-way (ROW) will require an encroachment permit from the Department. To apply for an encroachment permit, submit a completed encroachment permit application, environmental documentation, and five (5) sets of plans which clearly indicate State ROW to the following address:

Mr. Michael Condie, District Office Chief
Office of Permits
California Department of Transportation, District 04
P. O. Box 23660
Oakland, Ca 94623-0660

An encroachment permit application and instructions can be located at the following web address.
<http://www.dot.ca.gov/ha/traffops/developserv/permits/applicatons/index.html>

RESPONSE D-2: The comment is acknowledged. Any encroachment into the State ROW determined necessary at the time of final site design will be subject to all applicable permits.

COMMENT D-3: HQ Structures/Design

Although this project appeared to have minimal impacts on our state bridges as presented we have the following comments:

1. Please have the project proponent's Engineer of Record (EOR) submit a letter to the Department, bearing a wet seal and signature indicating that there will be no adverse effects on any of the state's structures.
2. We recommend that the design of the bridges over public roads be based on Caltrans bridge design standards as Caltrans is mandated to inspect and rate bridges after construction. This will prevent future reduction of load ratings by Caltrans Engineers.
3. We recommend that the applicant request Caltrans local agency bridge numbers and include this on all bridge plans. Caltrans bridge numbers can be obtained by contacting the Office of Structures Maintenance, at the following telephone number, 916-227-8843. A bridge number is required if the structure is to carry traffic over a public road or is built over a public road.
4. Please have the project proponent's EOR forward drainage and hydraulic calculations as well as complete plans of the proposed project site to our office when available.

RESPONSE D-3: The comment is acknowledged and has been provided to the project applicant. At the time of final design, plans will be provided to Caltrans for review and approval.

E. RESPONSES TO COMMENTS ON THE DRAFT EIR FROM THE DEPARTMENT OF TRANSPORTATION (LETTER 2) DATED FEBRUARY 8, 2007

COMMENT E-1: Forecasting

Table 18, pages 109 and 110: please clarify the daily and peak hour traffic as weekday, weekend, or 7 day traffic. If it is weekday traffic, the existing Saturday count can not be subtracted as this would underestimate the project trip generation.

RESPONSE E-1: The count identified in the table was mislabeled. The count of the existing site was completed on June 14, 2001 (i.e., a Thursday) and subtracted from the weekday trip estimate. The text of the Draft EIR has been revised to correct this mistake (refer to *Section 4 Revisions to the Text of the DEIR* in this document).

COMMENT E-2: Traffic Systems

The DEIR summary of significant environmental impacts on page 8 states that there are significant impacts on up to 18 freeway segments on State Route (SR) 87, US 101, I 280, I 680 and I 880. Furthermore, the DEIR asserts, "There is no feasible mitigation for these impacts."

The list of immediate actions to be taken to reduce the project freeway impacts to less than significant levels, identified in Appendix D of the Draft Countywide Deficiency Plan are not included in the DEIR. Please submit the identified information for review and comment.

RESPONSE E-2: The comment is not clear. As stated on page 126 of the Draft EIR under the heading "Proposed Mitigation for Freeway Impacts", the proposed project includes all relevant items identified in Appendix D of the Draft Countywide Deficiency Plan, including sidewalks, crosswalks, multi-use paths, and bicycle lanes. The EIR concludes, however, that these measures will not reduce the project's impact to freeway segments to a less than significant level. A copy of Appendix D of the Draft Countywide Deficiency Plan is included in *Section 4 Revisions to the Text of the DEIR* in this document.

COMMENT E-3: The Department commonly employs freeway Traffic Operating Systems (TOSs) and Ramp Metering Systems (RMSs) to mitigate the impact of increased traffic. The potential advantage of adding TOS/RMS elements are congestion relief and decreased delay; protection of the level of service (LOS); and response to freeway incidents. Currently, the Department has TOS/RMS elements on SR 87, US 101, I 280, I 680 and I 880.

Contrary to the DEIR conclusions, the expansion and update of the existing ramp metering, systems can mitigate the impact of increased traffic from the proposed development. Performance of the existing ramp metering systems can be improved by increasing vehicle storage and/or adding preferential high occupancy lanes (HOVs) at the on-ramps. Storage can be increased, by adding additional ramp storage lanes, increasing ramp lengths, and constructing additional storage pockets on local roads.

RESPONSE E-3: While a metering system typically reduces congestion on the highways, metering at a single ramp does not always mitigate a freeway segment impact. Metering can also cause unexpected impacts to local streets, if traffic from meters causes queuing onto surface streets. Ramp metering should be done on a system-wide approach to maximize the benefits of metering. This system-wide approach should be completed by Caltrans in coordination with all jurisdictions that would be affected.

The US 101/Oakland Road interchange improvements identified in the Draft EIR will include modifications to the ramps to help ease congestion in the area. It is anticipated that as part of the design process, ramp metering will be incorporated and included in the design.

COMMENT E-4: Please ensure the operation of the following ramp metering equipment during all phases of construction.

- NB 101/Oakland Rd. diagonal on-ramp (2 lane meter at the limit line, 5:30 AM to 9:00 AM, Monday through Friday.
- NB 101/McKee Rd. diagonal on-ramp (2 lane meter at the limit line, 5:30 AM to 9:00 AM, Monday through Friday.

RESPONSE E-4: Because all improvements to the freeway ramps will be coordinated with Caltrans, operation of the metering equipment will be maintained.

COMMENT E-5: Highway Operations

- Please provide the geometric plan and turning movements for the proposed signalization of Berryessa Rd. and Mabury Rd. access roadways to the project site.

RESPONSE E-5: The TIA (Appendix A) provides the proposed lane geometries and volumes under Project Conditions (Figure 9E of the TIA, page 52). Detailed geometric plans of these improvements are currently not completed and will be under the jurisdiction of the City of San Jose.

COMMENT E-6:

- Under the Project Freeway Segment LOS tables, please explain what the correlation is of the Existing Conditions density and LOS when compared to the Project Conditions with added project trips. Based on the Percent Impact, it is not clear why both conditions have the same LOS.

RESPONSE E-6: The percent impact is presented in the table shows the ratio of project trips to the capacity of the segment. The LOS is based on the density of the segment. In most cases the density does not change with the addition of project traffic. Therefore, the LOS does not change.

COMMENT E-7:

- Please explain why the Background Conditions with added traffic impacts to LOS from other developments as shown in Table 6 are better than the Existing Conditions. Will roadway improvements be made to these facilities?

RESPONSE E-7: Yes, roadway improvements will be made to these facilities. The planned roadway improvements assumed to be completed under background conditions are listed on Page 81 of the Draft EIR.

F. RESPONSES TO COMMENTS ON THE DRAFT EIR FROM THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD DATED FEBRUARY 2, 2007

COMMENT F-1: *Comment I, Pages 27 and 33, Public Park/Open Space:*

The DEIR states that the Project does not propose to design or construct any facilities in the approximately 18 acres of riparian setback along Upper Penitencia and Coyote Creeks but the areas are designated as "Public Park/Open Space", which can include development such as restrooms, playgrounds, visitor's centers and parking areas. The DEIR further states that any city parks and open space use established in the riparian setback areas would be passive use that would not impact

the riparian area. Water Board staff recognize and appreciate the intention to protect riparian resources and strongly encourage both the Project proponents and the City of San Jose to take this very seriously when considering any plans near or within the setback areas.

RESPONSE F-1: The comment is noted. As stated on page 165 and 166 of the Draft EIR, future development on the project site would be subject to existing laws, regulations, and policies, including the City of San José Riparian Corridor Study Policy. The Riparian Corridor Study Policy is designed to minimize impacts to riparian resources and help protect riparian habitat.

COMMENT F-2: Since early 2001, the Water Board; California Department of Fish and Game (CDFG), U.S. Environmental Protection Agency (USEPA), U.S. Army Corps of Engineers (USACE), U.S. Fish and Wildlife Service (USFWS), and National Marine Fisheries Service (NMFS) have been working with the USACE and Santa Clara Valley Water District (District) on alternatives for the Upper Penitencia Flood Protection Project. Several discussions resulted in District staff supporting a floodplain restoration along this reach of creek instead of an underground bypass, as originally planned. Reasons for supporting the floodplain alternative included improving degraded riparian and geomorphic conditions, improving instream habitat for federally and state listed steelhead trout (*Oncorhynchus mykiss*), and preventing passage impacts and incidental take of steelhead that could result from the bypass alternative. As described in the Upper Penitencia Creek Limiting Factors Analysis, (Stillwater Sciences 2006) Upper Penitencia Creek is one of the few South Bay streams to support steelhead and it is considered to have the best habitat. Any planned use in the riparian setback areas should take this into account. To protect these resources, priority use for the riparian setback areas should include maximizing riparian vegetation and establishing adequate wildlife buffers while avoiding or minimizing the development of structural facilities.

RESPONSE F-2: The comment is noted. As stated on page 165 and 166 of the Draft EIR, future development on the project site would be subject to existing laws, regulations, and policies, including the City of San José Riparian Corridor Study Policy. The Riparian Corridor Study Policy is designed to minimize impacts to riparian resources and help protect riparian habitat.

COMMENT F-3: *Comment 2, Page 165, Table 29 Regulation of Biological Resources:* The summary of regulations in Table 29 should be expanded to clarify that the Water Board has regulatory authority over wetlands and waterways under both the Federal Clean Water Act (CWA) and the State of California's Porter-Cologne Water Quality Control Act (California Water Code, Division 7). Under the CWA, the Water Board has regulatory authority over actions in waters of the United States, through the issuance of water quality certifications (certifications) under Section 401 of the CWA, which are issued in combination with permits issued by the USACE, under Section 404 of the CWA. When the Water Board issues Section 401 certifications, it simultaneously issues general Waste Discharge Requirements (WDRs) for the project, under the Porter-Cologne Water Quality Control Act. Activities in areas that are outside of the jurisdiction of the USACE (e.g., isolated wetlands, vernal pools, or stream banks above the ordinary high water mark) are regulated by the Water Board, under the authority of the Porter-Cologne Water Quality Control Act. Activities that lie outside of USACE jurisdiction may require the issuance of either individual or general waste discharge requirements from the Water Board.

RESPONSE F-3: Table 29, Regulation of Biological Resources, in the Draft EIR has been revised to include the Porter-Cologne Water Quality Control Act and the authority it provides the RWQCB to preserve, enhance and restore the quality of the State's water resources (refer to *Section 4 Revisions to the Text of the DEIR* in this document).

COMMENT F-4: *Comment 3, Page 169, Replacement Bridges and Road Widening:*
The DEIR describes two replacement bridges and widening of Berryessa Road from two to three lanes in both directions. Bridge construction typically requires a permit from the Water Board as well as the USACE and CDFG. The Water Board will assess whether impacts have been adequately avoided, minimized and mitigated pursuant to the Federal Clean Water Act and Porter Cologne. Because bridges have an impact on streams and riparian areas, the Project proponent should assess the need for two bridge crossings and consider whether one bridge would be sufficient to provide access from Berryessa Road to the Project. In addition, proposed bridges should not impede flood flow capacity of the future flood project on Upper Penitencia Creek.

RESPONSE F-4: Because of the project size, future traffic volumes require both the relocation and widening of both bridge structures. This accommodates the proposed project and the future BART hub. Any modification of the bridges will trigger compliance with the current design standards and codes. All bridge improvement plans will require review and approval from all affected agencies.

COMMENT F-5: Widening of Berryessa Road could encroach on the north side of Upper Penitencia Creek. The current alignment of Berryessa Road governs the plan form of the creek and is in very close proximity. To the extent possible, road widening should be to the north and away from the existing creek alignment.

RESPONSE F-5: The project proposes to widen Berryessa Road from two to three lanes in each direction along the project site's frontage to a maximum right-of-way width of 130 feet. This is consistent with the General Plan designation of this segment of Berryessa Road as an Arterial (115-130 feet wide). The proposed widening of Berryessa Road will be to the north and will not impact Upper Penitencia Creek.

COMMENT F-6: Consideration should be given to the current capacity of the Berryessa Road Bridge over Coyote Creek in anticipation of the future Mid-Coyote Flood Protection Project being planned by the District. Close coordination should be undertaken with the District to assess anticipated cross-sectional area requirements of the flood project corridor and whether the current culvert should be redesigned to accommodate flood capacity and ecological services.

RESPONSE F-6: The project does not propose to modify the existing Berryessa Road Bridge over Coyote Creek.

COMMENT F-7: *Comment 4, Page 169, Riparian Setback on Coyote Creek:*
The DEIR describes a 100-foot setback along Coyote Creek with the exception of a 40 to 100-foot setback south of Mabury Road due to the location of an existing major connector road. The District is in the planning phase for the Mid-Coyote Flood Protection Project between Interstate 280 and Montague Expressway, which includes the reach of Coyote Creek adjacent to the Project area. The

Project proponent should provide ample riparian setback in all locations and not constrain the flood project cross-section in this location. Relocation of the major connector road should be considered. Coyote Creek is a confined channel but the flood project has the potential to widen and improve the existing cross-section in order to increase flood conveyance and riparian habitat. Water Board staff recognize that the Mid-Coyote Project has not been designed and that a cross-section in the Project reach is undetermined but at the same time, it is critical that all parties coordinate and not preclude an environmentally superior alternative.

RESPONSE F-7: The high volume of traffic generated by the proposed project together with the BART project requires efficient design of new streets and effective integration with the existing streets in the area. As stated on page 51 of the Draft EIR, the project includes a 100-foot setback on the project site from the edge of the riparian habitat of both Coyote Creek and Upper Penitencia Creek, except at the south end of the project site immediately upstream of Mabury Road. At this location, the project proposes to retain the existing riparian setback, which is approximately 40 feet from the edge of the existing riparian habitat. Keeping the existing 40-foot riparian setback at the south end of the project site allows the project's access from Mabury Road to line up with the access to the San José Maintenance Yard across Mabury Road, which is necessary for this intersection to operate safely.

COMMENT F-8: *Comment 5, Page 170, Biological and Water Quality Impacts:*
The DEIR describes construction activities in and near the live stream that could impact steelhead or western pond turtle (*Clemmys marmoratu*) as well as water quality. The Project proponent will very likely be required to dewater Upper Penitencia Creek and Coyote Creek in the work areas to avoid impacts. In the event that this is required, a dewatering plan should be submitted with the stormwater pollution prevention plan as part of the permit application to the Water Board. Consultation with Water Board staff is recommended in advance.

RESPONSE F-8: As stated in mitigation measure 4.6-22 on page 175 of the Draft EIR, a small diversion dam may be required during demolition of the existing upstream bridge because it contains a footing within the creek. The recommendation in this comment will be communicated to the project developer, who will be required to obtain all appropriate permits.

COMMENT F-9: *Comment 6, Page 170, Outfalls:*
Three outfalls are described with two draining to Coyote Creek and one to Upper Penitencia Creek. No detail is provided. Outfall designs typically call for hardscape on the channel banks and increased direct discharge resulting in increased erosion and pollutants in streams. The Project proponent should minimize hardscape and identify alternative locations for these features. Outfalls should be located outside of the active channel and instead, should drain to the floodbench area where flows can infiltrate into the soil.

RESPONSE F-9: The proposed outfalls will be designed to minimize erosion and pollutant discharge. To the extent feasible, construction of the proposed project will be coordinated with Upper Penitencia Creek Flood Control Project, including the location and design of outfalls. For example, if construction of the proposed project precedes the flood control project, interim outfalls could be operated

until permanent outfalls are constructed in coordination with the flood control project.

COMMENT F-10: *Comment 7, Page 1 71 and 174, Tree Replacement:*

Some of the tree replacement ratios in Table 32 appear to be in error. Native trees with a diameter of 12- 18 inches are described as "none". Does this mean that no native trees in this size range are identified for removal or does it mean they will not be mitigated? If it means they will not be mitigated, this will need to be revised so that they are. The table proposes to mitigate native and non-native trees less than 12 inches in diameter 1: 1.

RESPONSE F-10: As stated at the bottom of page 169 in the Draft EIR, there are only two native trees on the site. One is less than 12 inches in diameter and the other is greater than 18 inches in diameter. If these native trees are removed by the project, they will be replaced. Per the City of San José's standard tree replacement ratios, native trees less than 12 inches in diameter are replaced at a 1:1 tree replacement to tree removal ratio. For the purpose of clarification, Table 31 in the Draft EIR has been revised (refer to *Section 4 Revisions to the Text of the DEIR* in this document).

COMMENT F-11: This is low for native trees. Typically, native trees are mitigated 3:1 and non-native trees are mitigated 1:1. Ratios are prescribed on a case-by-case basis. The mitigation proposed would ultimately need to adequately replace the habitat value that is lost and compensate for the temporal loss between the time of unavoidable impacts and regrowth of planted vegetation. The Project proponent is encouraged to work with Water Board staff and CDFG to develop an appropriate mitigation plan.

RESPONSE F-11: The tree replacement ratios identified in Table 32 are for trees located on the project site that are not within the riparian habitat of Upper Penitencia or Coyote Creeks. As stated on page 174 of the Draft EIR, riparian habitat permanently impacted by the proposed project will be replaced with native plantings at a level that ensures no net loss of habitat functions and values.

COMMENT F-12: The location of the riparian mitigation is proposed for the 100-foot setback area. The Project proponent should work with the USACE and the District to ensure that there is adequate room in the riparian setback areas to accommodate riparian mitigation of the flood projects on Upper Penitencia and Coyote Creeks as well as the mitigation for the Project without reducing flood conveyance capacity.

RESPONSE F-12: The proposed project would be coordinated with the USACE and the District to the greatest extent feasible.

COMMENT F-13: *Comment 8, Pages 185-1 86, Upper Penitencia Creek Riparian Setback:*

The DEJR describes the USACE/District Upper Penitencia Creek Flood Protection Project needing a 200-foot wide corridor to accommodate the preferred alternative and states that the Project is "generally consistent" with the preferred alternative. The DEIR describes the 200-foot wide corridor as measured from the south side of Berryessa Road. Water Board staff understand that the USACE and District need a 205-foot wide setback measured from the top of the north bank of Upper Penitencia Creek. These two descriptions may not be consistent. Water Board staff recommend the Project proponent continue to work with the District to confirm the setback width

and location relative to the creek in order to provide sufficient right of way to accommodate the USACE/District Upper Penitencia Creek Flood Protection Project floodplain alternative.

RESPONSE F-13: It is acknowledged on page 186 of the Draft EIR that minor modifications to the proposed project (i.e., additional right-of-way) may be required to accommodate the Upper Penitencia Creek Flood Protection Project. The proposed project will coordinate with the USACE and the District to the greatest extent feasible. Refer to Response B-2.

COMMENT F-14: *Comment 9, Pages 189-191, Mitigation and Avoidance Measures for Hydrology and Water Quality Issues:*

Water Board staff recommend the revision of one of the bullet items in Mitigation Measure 4.8-7, and the addition of another bullet item to this mitigation measure.

The seventh bullet lists "hydromodification separators" as a post-construction best management practice (BMP) for stormwater runoff. The following text should be added to this bullet, "These devices are appropriate if used in combination with BMPs that are capable of removing the fine particulate matter that is not amenable to removal by hydrodynamic separators, and in combination with filter media that permanently absorbs hydrocarbons."

Water Board staff recommend that a bullet be added to this mitigation measure stating that bioretention cells may be used as a post-construction BMP. These treatment devices may require less surface area than standard bioswales or infiltration basins.

RESPONSE F-14: Mitigation measure 4.8-7 in the Draft EIR has been revised as requested in the comment (refer to *Section 4 Revisions to the Text of the DEIR* in this document).

COMMENT F-15: *Comment 10, Page 191, Mitigation and Avoidance Measures for Hydrology and Water Quality Issues, Mitigation Measure 4.8-9:*

Water Board staff recommend including the potential use of bioretention cells in this mitigation measure (see previous comment). In addition, the mitigation measure should note that treatment BMPs upstream of any new outfalls to Coyote or Upper Penitencia Creeks will also require review by the Water Board. The Water Board requires that all runoff discharged from outfalls that require either CWA Section 401 water quality certification or WDRs meet Clean Water Act maximum extent practicable (MEP) treatment standards.

RESPONSE F-15: The potential use of bioretention cells is included in Mitigation Measure 4.8-7 (see previous response) and, therefore, is included by reference in Mitigation Measure 4.8-9. The measure has been revised to include RWQCB review for BMPs upstream of any new outfalls to Upper Penitencia and/or Coyote Creeks (refer to *Section 4 Revisions to the Text of the DEIR* in this document).

G. RESPONSES TO COMMENTS ON THE DRAFT EIR FROM THE COUNTY OF SANTA CLARA DEPARTMENT OF PARKS AND RECREATION

COMMENT G-1: Upon reviewing the DEIR, we noted that many of the earlier comments we submitted in response to the Notice of Preparation (NOP) for this project were not addressed in the DEIR.

RESPONSE G-1: All applicable comments were addressed in the DEIR.

COMMENT G-2: The County Parks and Recreation Department is focused on potential significant impacts related to the Santa Clara County Countywide Trails Master Plan routes, and with potential impacts to the biological resources and hydrology within or adjacent to the riparian corridor of Upper Penitencia and Coyote Creeks. Two of the City of San Jose's stated objectives for the proposed project (Section 1.4 of the DEIR), "to create a safe, walkable environment.. ." and "to provide appropriate riparian setbacks.. ." appear to support our concerns for trail development and riparian corridor protection.

RESPONSE G-2: The comment is noted. No specific impacts to County trail routes are identified in this comment.

COMMENT G-3: *Consistency with the Santa Clara County Countywide Trails Master Plan Update* Section 3 of the DEIR (Consistency with Plans and Policies) should acknowledge the policies and guidelines of the Santa Clara County Countywide Trails Master Plan Update (Countywide Trails Master Plan), which the County Board of Supervisors approved in November 1995 as part of the Parks and Recreation Element of the County of Santa Clara's General Plan (1995-2010).

RESPONSE G-3: CEQA Guidelines state an EIR should discuss inconsistencies with applicable general plans. The county's General Plan and related plans and policies apply to unincorporated county land. The project site is within the city limits of San José and subject to the City of San José General Plan policies, which are generally consistent with the county's General Plan and other county plans and policies. Therefore, a discussion of the project's consistency with the Santa Clara County General Plan and related plans and policies is not included in the Draft EIR.

COMMENT G-4: *Consistency with the Joint Use Agreement for the Penitencia Creek Park Chain* Section 3 of the DEIR should acknowledge the Joint Use Agreement (JUA) for the development of the Penitencia Creek Park Chain among Santa Clara County, the City of San Jose, and Santa Clara Valley Water District, as the proposed project site lies within one-half mile of existing County parklands (Penitencia Creek County Park).

RESPONSE G-4: **Section 5 Availability of Public Services** in the Draft EIR includes a discussion of Penitencia Creek County Park and planned creek trails adjacent to Coyote and Upper Penitencia Creeks in the project area.

COMMENT G-5: **Consistency with the Countywide Habitat Conservation Plan 1 Natural Community Conservation Plan** The City of San Jose, County of Santa Clara, City of Morgan Hill,

City of Gilroy, Santa Clara Valley Water District and Santa Clara Valley Transportation Authority are collaborating on a Countywide Habitat Conservation Plan (HCP) Natural Community Conservation Plan (NCCP) project. The project site lies within the project area of the HCP/NCCP; therefore, Section 3 of the DEIR should assess the consistency of the proposed project with the goals and objectives of the HCP/NCCP.

RESPONSE G-5: The Countywide Habitat Conservation Plan (HCP) Natural Community Conservation Plan (NCCP) has not been completed or adopted and, therefore, is not discussed in the Draft EIR. The project was not reviewed by the HCP partners through the HCP/NCCP Interim Referral Process, because the project was filed in 2003 prior to the agreement date (September 2005).

COMMENT G-6: Trail Routes

Section 4.1 of the DEIR (Land Use) should address Santa Clara County General Plan policies on countywide trails, given the location of trail routes within and immediately adjacent to the proposed project site, and should describe the following countywide trail routes within the vicinity of the proposed Flea Market project:

Coyote Creek/Llagas Sub-regional Trail (Route S5) - Designated as trail route within other public lands for hiking, on and off road cycling. This trail route lies within the southwest boundary of project parcel APN 241-04-007 and parallel to Coyote Creek.

Bay Area Ridge Trail: El Sombroso/Penitencia, (Route R5-C) - Designated as trail route within other public lands for hiking, off road cycling, and equestrian use. This trail route lies adjacent to the projects southeast boundary and parallels Penitencia Creek.

RESPONSE G-6: The county's General Plan and related plans and policies apply to unincorporated county land. The project site is within the city limits of San José and subject to the City of San José General Plan other relevant plans and policies, which are generally consistent with the county's General Plan and other county plans and policies. Therefore, a discussion of the project's consistency with the Santa Clara County General Plan and related plans and policies is not included in the Draft EIR. A discussion of the project's consistency with the City of San José General Plan Trails and Pathways Policies and the City of San José's Greenprint, a 20-Year Strategic Plan for Parks, Community Facilities and Programs is included on page 47 and page 70 of the Draft EIR.

COMMENT G-7: The above trail routes connect to the Coyote Creek Trail system, a regional trail route, with segments designated as the Northern Retracement Route of the Juan Bautista de Anza National Historic Trail. The County Department of Parks and Recreation Parks should be included in discussions of proposed trail alignments identified in the Countywide Trails Master Plan that potentially affect the continuity of regional trails.

RESPONSE G-7: It is the City's policy to work with the County and other affected agencies on regional trail planning.

COMMENT G-8: Both of these trails are also identified in the City of San Jose's Greenprint. The City is in the process of master planning a reach of the regional trail alignment along Coyote

Creek - between Story Road and Highway 101. It has also secured partial funding to plan and construct the trail between Highway 101 and Montague Expressway, but has yet to commence that planning effort. Once fully developed the regional Coyote Creek Trail System will link the County's trail from Morgan Hill to the Highway 237 Bikeway, at the San José/Milpitas border – offering nearby access to the San Francisco Bay Trail. It should be noted that the Greenprint is a visionary document that shows general trail alignments, but does not indicate the actual locations of alignments for trail projects.

RESPONSE G-8: The comment is noted.

COMMENT G-9: Thus, the assertion under Section 3.1.4.10 of the DEIR that the proposed trail along Coyote Creek would be on the opposite side of the creek from the project site per the Greenprint is not accurate. Until the City prepares a Master Plan to determine trail alignments in the project area, the DEIR should not state that the specific trail alignment has already been determined.

RESPONSE G-9: The Draft EIR correctly states in Section 3.1.4.10 that the Greenprint shows a proposed trail on the west side of Coyote Creek. Although the Draft EIR accurately cites the Greenprint as identifying the future trail location on the west side of Coyote Creek in the vicinity of the Flea Market project, the location of the trail may actually be on the east bank. The Greenprint does not function as a master plan. All trail projects must have their own master plans and environmental documentation in order to proceed with construction documents. The Greenprint only serves to identify priorities and offer the vision for a 100-mile trail network. The text on page 47 and page 70 of the Draft EIR has been revised per the above discussion (refer to *Section 4 Revisions to the Text of the DEIR* in this document).

COMMENT G-10: Land Use

Section 3 (Consistency With Plans and Policies) and Section 4.1 (Land Use) of the DEIR should consider the goals, policies and implementation measures in the Santa Clara County General Plan related to the provision of countywide trails (Parks and Recreation Element) and protection of natural resources (Resource Conservation Element) for Penitencia Creek and Coyote Creek.

RESPONSE G-10: The county's General Plan and related plans and policies apply to unincorporated county land. The project site is within the city limits of San José and subject to the City of San José General Plan policies, which are generally consistent with the county's General Plan and other county plans and policies. Therefore, a discussion of the project's consistency with the Santa Clara County General Plan and related plans and policies is not included in the Draft EIR.

COMMENT G-11: The DEIR should also address the increased recreational demands that would be created as a result of the increased residential population from the proposed 2,818 residential units as well as from the proposed commercial and retail development. The housing density is appropriate in part because of the proposed Bay Area Rapid Transit alignment located nearby the proposed project.

RESPONSE G-11: A discussion of increased demands upon recreational facilities that would result from the project is provided in **Section 5 – Availability of Public Services** of the Draft EIR.

COMMENT G-12: Hydrology and Water Quality

Section 4.8.2 of the DEIR discusses the proposed project in reference to the Upper Penitencia Creek Flood Protection Project (A partnership between the U.S. Army Corps of Engineers and the Santa Clara Valley Water District) that is currently under development.

RESPONSE G-12: It is acknowledged that the U.S. Army Corps of Engineers and the Santa Clara Valley Water District are working to complete the EIS/EIR for the Upper Penitencia Creek Flood Control Project by the year 2008, after which construction and implementation could occur.

COMMENT G-13: The Penitencia Creek Park Master Plan, prepared on July 18, 1977 at the request of the Santa Clara County Board of Supervisors, indicates a future trail alignment within the Penitencia Creek flood control area under Santa Clara Valley Water District (SCVWD) jurisdiction. In a comment letter dated April 12, 2000 regarding File No. PDCCO-0-3-022, an opportunity for an alternative trail alignment that continued to the southerly side of the Flea Market was identified as a future major connection to the Coyote Creek Trail System in conjunction with the implementation of the SCVWD's proposed bypass flood control channel. The current project may affect this earlier alternate alignment; however, the Parks Department encourages the City of San Jose's Department of Planning, Building and Code Enforcement to work with the City of San Jose's Department of Public Works (DPW), Department of Parks, Recreation, and Neighborhood Services (PRNS) in developing a trail easement dedication within the proposed development, and to include County Parks in discussions on the existing and proposed trails alignments that may be affected by the Upper Penitencia Creek Flood Control Project.

RESPONSE G-13: It is the City's policy and practice to work with the County and Water District on trail development adjacent to creeks within the City.

COMMENT G-14: There is a need to re-align the existing confluence of Penitencia Creek and Coyote Creek within the project area. Improper alignment of the meeting point of the two creeks would impact flood control efforts, and would also impact the design of the intersection of two regional trail networks (Penitencia Creek Trail and Coyote Creek Trail).

RESPONSE G-14: The project does not propose to re-align the existing confluence of Upper Penitencia Creek and Coyote Creek.

COMMENT G-15: Riparian Corridor Setbacks and Protection

In addition to the Section 3.3 discussion of City of San Jose riparian corridor policies, the DEIR should consider the goals, policies and implementation measures in the County of Santa Clara's General Plan (Resource Conservation Element) related to riparian corridor protection for Penitencia Creek and Coyote Creek.

RESPONSE G-15: The county's General Plan and related plans and policies apply to unincorporated county land. The project site is within the city limits of San José and subject to the City of San José General Plan policies, which are generally consistent with the county's General Plan and other county plans

and policies. Therefore, a discussion of the project's consistency with the Santa Clara County General Plan and related plans and policies is not included in the Draft EIR.

COMMENT G-16: The proposed project site is adjacent to the Penitencia Creek and Coyote Creek riparian corridors. Project impacts, including potential cumulative impacts, on critical habitat and on species of special concern within the riparian corridors should be evaluated, given the proximity of the project site to these creeks. These riparian corridors serve as important connectors for wildlife species, and the project should consider the identification of minimum widths for urban wildlife travel at different times of the year and during different life stages.

RESPONSE G-16: **Section 4.6 Biological Resources** in the Draft EIR evaluates the biological impacts of the proposed project. Specifically, impacts from the project as proposed on riparian corridors of both creeks are addressed on the pages 168 thru 170. The project will introduce a significant improvement overall for both creeks, because existing setbacks range from minimal to nonexistent. The intrusions into the riparian habitat that would occur are also discussed in this section, and the mitigation is identified on pages 173 thru 176. **Section 7 Cumulative Impacts** evaluates the biological cumulative impacts of the proposed project on page 245.

COMMENT G-17: Section 4.6.3 of the DEIR includes further discussion of the project's consistency with the City of San Jose's Riparian Corridor Policy Study, given a proposed 100-foot setback from the riparian habitats of Coyote and Upper Penitencia creeks. The exception to the proposed 100-foot setback is an area at the south end of the project site along Coyote Creek just upstream of Mabury Road. The DEIR states that the existing 40-100-foot variable setback at this location would not be altered. Narrow setback dimensions of less than 100 feet are not in the spirit of the City of San Jose's riparian corridor guidelines, and potentially limit the ability to build a continuous trail system along Coyote Creek. The 40-foot setback area near Mabury Avenue may prevent future trail development and result in a discontinuous trail system, as such a narrow setback may limit the ability to provide for both riparian protection and passive recreational use. The proposed project should be considered an opportunity to re-design the trail alignment and or other elements within this area in order to bring the entire project site into consistency with the recommended 100-foot riparian setback.

RESPONSE G-17: The reason for the proposal to not widen the setback (i.e., an existing street) is discussed at the bottom of page 51 in the Draft EIR.

COMMENT G-18: Transportation

The project would increase vehicular traffic along Berryessa and Mabury Roads, and may impact park circulation patterns, particularly as the primary vehicular access to Penitencia Creek Park is off Berryessa Road. Traffic and circulation impacts may also impact the designated regional trail routes and nearby parklands. These potential impacts should be assessed in Section 4.2 of the DEIR.

RESPONSE G-18: The traffic impact analysis has been performed for this project per the City of San Jose Transportation Policy and the project is proposing to mitigate traffic impacts identified per the City's transportation policies. Traffic impacts were not identified along the park, trail access points.

The project is required to build out the General Plan streets along their frontages, particularly Berryessa Road and Mabury Road. The arterial roadway system is designed to provide capacity for long-term City uses. Locating public facilities along major arterials is not only beneficial to the projects but also desired from a land use plan perspective, because local residents as well as citywide residents are provided with adequate access.

In addition, this project will be required to pay park fees for all residential development, which will be used for parks in the area. The developers will have the option to construct trails in order to reduce the park fee.

COMMENT G-19: The DEIR should address multi-modal transportation alternatives, such as bicycle commuting, which could be achieved by improving bicycle commuter, and bicycle transit opportunities. Countywide trails offer opportunities for non-motorized transportation connections with the surrounding neighborhoods, parks and open space areas.

RESPONSE G-19: **Section 4.2 Transportation and Traffic** of the Draft EIR evaluates the pedestrian and bicycle facilities proposed by the project and their ability to connect to existing and planned pedestrian and bicycle facilities in the project area, including the trail and pathway corridors provided by Coyote and Upper Penitencia Creeks (pages 71 thru 73 and 121 thru 122).

COMMENT G-20: Because the project site has been identified as a potential location for a BART transit station, pedestrian bicycle connections and connections to the trail routes should be evaluated in the DEIR. The juxtaposition of high density housing and alternate rapid transit should provide for comprehensive alternative transportation opportunities by including adequate space along Coyote Creek and Penitencia Creek for the planned regional trails.

RESPONSE G-20: **Section 4.2 Transportation and Traffic** of the Draft EIR evaluates the pedestrian and bicycle facilities proposed by the project and their ability to connect to existing and planned pedestrian and bicycle facilities in the project area, including the trail and pathway corridors provided by Coyote and Upper Penitencia Creeks (pages 71 thru 73 and 121 thru 122).

H. RESPONSES TO COMMENTS ON THE DRAFT EIR FROM THE COUNTY OF SANTA CLARA ROADS AND AIRPORTS DEPARTMENT DATED DECEMBER 6, 2006.

COMMENT H-1: 1. The background conditions of your Draft Environmental Impact Report on page 29 under 1a, 2a, and 2b for Montague Expressway as identified in background roadway improvements in the Comprehensive County Expressway Planning Study are incorrect. The improvements as identified in the Expressway Planning Study have not been implemented due to the absence of funding. These improvements should not be used for background traffic analysis.

RESPONSE H-1: The background condition for the proposed project includes the traffic and mitigation that would occur under Phase I of the North San José Development Area, which includes funding to complete the improvements 1a, 2a, and 2b listed on page 29 of the Traffic Impact Analysis (October 2006) included in Appendix A of the Draft EIR.

COMMENT H-2: 2. Please recalculate the background Level of Service for Montague Expressway intersections in the Final Transportation Impact Analysis (OCT 2006) based on the revised background assumption as stated in comment #1 above and include Montague Expressway intersection analysis in the Traffic Impact Study Amendment (DEC 2006).

RESPONSE H-2: As stated in Response H-1, the background condition evaluated in the Draft DEIR is correct. The December 2006 General Plan Traffic Impacts Analysis is a long-term macro-analysis used to evaluate the traffic impacts of the General Plan amendments proposed by the project, based on link volumes, vehicle miles traveled, and vehicle hours traveled. This macro-analysis does not include individual intersections, including Montague Expressway intersections, and is consistent with City procedures for reviewing General Plan amendments for over 25 years.

COMMENT H-3: 3. Developer should pay fair share on the widening of Montague Expressway.

RESPONSE H-3: The Transportation Impact Analysis completed for the proposed project did not identify any impacts that required the widening of Montague Expressway.

COMMENT H-4: 4. Please provide us a copy of your Final Environmental Impact Report for our review and comment.

RESPONSE H-4: A copy of the Final Environmental Impact Report will be provided to the Santa Clara County Department of Roads and Airports.

I. RESPONSES TO COMMENTS ON THE DRAFT EIR FROM THE SANTA CLARA VALLEY WATER DISTRICT

COMMENT I-1: The San Jose Flea Market is located within the 100-year FEMA flood hazard zone. The proposed development within the existing floodplain should not increase the 100-year water surface elevation on surrounding properties nor should it increase existing flooding. The site grading must be designed to allow for the passage and storage of flood water within the site.

RESPONSE I-1: As stated in **Section 4.8.4.1 Floodplain Mitigation Measures**, the proposed project will be designed to allow sheet flow through the project site.

COMMENT I-2: A flood plain analysis will need to be prepared to delineate the post development floodplain depth and lateral extent.

RESPONSE I-2: As stated in **Section 4.8.4.1 Floodplain Mitigation Measures**, a letter of map revision will be obtained by the proposed project prior to the issuance of a building permit, which would include the preparation of a flood plain analysis.

COMMENT I-3: To prevent pollutants from construction activity, including sediments, from reaching Coyote Creek and Upper Penitencia Creek, please follow the Santa Clara Urban Runoff Pollution Prevention Program's recommended Best Management Practices for construction activities, as contained in "Blueprint for a Clean Bay," and the "California Storm Water Best Management Practice Handbook for Construction."

RESPONSE I-3: As stated in **Section 4.8.4.3 Post-construction Mitigation Measures**, the project would include Best Management Practices and other post-construction treatment measures to ensure compliance with the City of San José's NPDES permit and the SCVURPPP.

COMMENT I-4: The District is working in partnership with the Corps on a flood protection project to remove areas, including the flea market property, in the Upper Penitencia Creek watershed out of the 100-year floodplain. The District and Corps are working to complete the feasibility study and environmental impact study/environmental impact report (EIS/EIR) in 2008.

Currently, District staff's preferred alternative in this reach of the project between the confluence with Coyote Creek and King Road is the 100-year widened channel and floodplain alternative. This alternative would require approximately 205 feet of right-of-way that measures from the north bank of Upper Penitencia Creek to the flea market property south of the creek. This alternative has been endorsed by City staff in the Environmental Services Division and representatives from regulatory agencies including the National Marine Fisheries Service, Regional Water Quality Control Board, U.S. Fish and Wildlife Service, Department of Fish and Game, and U.S. Environmental Protection Agency.

Page 33 - South of Berryessa, Public Park/Open Space: Specific designs for trails and other passive recreational uses within the riparian setback areas designated as Public Park/Open Space will continue to be coordinated between the City, the District and Corps to ensure that the floodplain alternative is incorporated.

RESPONSE I-4: The comment is noted. See Response B-2.

COMMENT I-5: Page 33, 6th paragraph states, "The project does not propose to design or construct any specific improvements on the land designated for Public Park/Open Space uses." This appears to be in conflict with the two proposed drainage outfalls (page 190, figure 24) that are located on the bank of Coyote Creek.

RESPONSE I-5: The text of the Draft EIR on pages 31 and 33 of the DEIR has been revised to state that except for three outfalls and two bridges the project does not propose to design and construct any specific improvements on land designated for Public Park/Open Space uses. (refer to *Section 4 Revisions to the Text of the DEIR* in this document).

COMMENT I-6: Page 34 - Bridges: The proposed clearspan bridges should not impede flood flows within the Corps proposed future floodplain and should provide adequate access for vehicles to monitor and maintain the creek after the flood protection project is constructed.

RESPONSE I-6: As stated in **Section 4.8.3 Hydrology and Water Quality Impacts**, the proposed clearspan bridges would not impede flood flows. The proposed clearspan bridges would be designed and constructed in coordination with the future flood control project to the greatest extent feasible.

COMMENT I-7: Page 47, 3rd paragraph: The 40' riparian corridor offset (instead of 100 feet as per the City's policy) will limit flood protection opportunities near Mabury Road. The District recommends maintaining the 100 foot offset.

RESPONSE I-7: The 40-foot offset is an existing condition that the project is proposing to maintain.

COMMENT I-9: Portions of the project are inconsistent with the City of San Jose's Riparian Corridor Policy Study; therefore a less than significant impact is not the appropriate assessment for purposes of avoiding or mitigating an environmental effect pursuant to the requirements of CEQA.

RESPONSE I-9: As stated in **Section 3.3 City of San José Riparian Corridor Policy Study** of the Draft EIR, the project includes a 100-foot setback from the edge of the riparian habitat of both Coyote Creek and Upper Penitencia Creek, except at the south end of the project site immediately upstream of Mabury Road. At this location, the project proposes to retain the existing riparian setback, which is approximately 40 feet from the edge of the existing riparian habitat.

Compared to existing conditions, the proposed project would vastly increase riparian setback areas on the project site. As stated on page 169, in the context of the overall project, retaining the existing riparian habitat setback near the south end of the project site is not a significant impact.

COMMENT I-10: Furthermore, the riparian corridor would greatly benefit from an additional separation from such a dense development proposal.

Page 51, 7th paragraph: The District requests the relocation of the San Jose Maintenance Yard driveway and the proposed intersection to maintain the 100 foot riparian corridor offset.

RESPONSE I-10: The recommendation is noted.

COMMENT I-11: Page 58 - South of Berryessa, Pipelines/Rights-of-Ways: The District's right of way contains Central Pipeline, a 66-inch diameter high pressure raw water supply pipeline, not storm drain as noted in the document. The right of way is owned in fee title by the District rather than an easement. The project proponent should discuss site layout alternatives early in the design process to determine acceptable uses of the pipeline's right of way.

RESPONSE I-11: The text of the Draft EIR on page 58 has been revised to state the District's right-of-way contains a 66-inch diameter high pressure raw water supply pipeline (refer to *Section 4 Revisions to the Text of the DEIR* in this document).

COMMENT I-12: Page 60, 6th bullet: Please clarify if there is any conflict with any habitat conservation plan (HCP). The document does not assess the consistency of the proposed project with the goals and objectives of the Santa Clara County Habitat Conservation Plan (HCP)/Natural Community Conservation Plan (NCCP).

RESPONSE I-12: The Countywide Habitat Conservation Plan (HCP) Natural Community Conservation Plan (NCCP) has not been completed or adopted and, therefore, is not discussed in the Draft EIR. See also Response G-5.

COMMENT I-13: Page 61, 4th paragraph states, "This Major Collector roadway would be located entirely within the boundaries of the project site and would not affect existing surrounding land uses." This Major Collector is responsible for the reduced riparian corridor offset (from 100 feet to 40 feet) and as a result changes adjacent open space land use.

RESPONSE I-13: Alignment of the proposed street with the existing driveway for the City of San José Maintenance Yard, dictates the alignment of the proposed Major Collector. The proposed project will not reduce the existing 40-foot riparian corridor setback near the south of the project site and does not, therefore, cause a change in the adjacent open space uses.

COMMENT I-14: Page 165, Table 29, Regulation of Biological Resources: The project should be consistent with the 'Guidelines and Standards for Land Use Near Streams.'(G&S) developed by the Water Resources Protection Collaborative.

RESPONSE I-14: Table 29 on page 165 of the Draft EIR summarizes many of the laws/regulations designed to protect biological resources. The *Guidelines and Standards for Land Use Near Streams* is not a law or a regulation. In 2003 the City of San Jose joined Santa Clara County, 14 other cities in the County, the Santa Clara Valley Water District, and other public and non-governmental organizations to form the Santa Clara Valley Water Resources Protection Collaborative. Among the goals of the Collaborative was developing Guidelines and Standards for streamside developments that focus on local control of the permitting process for these lands. The *Guidelines & Standards for Land Use Near Streams* (Guidelines & Standards), published August 2005, are the product of the Santa Clara Valley Water Resources Protection Collaborative (Collaborative) efforts to identify the best practices to protect stream resources in the context of land use and development approvals. As part of the Collaborative, each jurisdiction within Santa Clara County committed to determine the appropriate application of the Guidelines & Standards in their processes. On February 13, 2007 the City Council adopted Resolution No. 73644 affirming that the City's current land use requirements, policies, and practices are consistent with the Guidelines & Standards. The City will continue to implement the General Plan, policies, ordinances and design guidelines in the review and permitting of land uses near streams with the goals of protecting water quality and riparian habitat and reducing damage from runoff from streamside properties.

COMMENT I-15: Page 166, Special Status Species: The District conducted a biological resource assessment in 2006 that includes this portion of the riparian corridor. Several special status species were noted as having moderate potential to occur adjacent to this development but appear to be missing as part of this assessment. They are White-tailed Kite (*Elanus leucurus*), Yellow Warbler (*Dendroica petechia*) and Pallid Bats (*Antrozous pallidus*). A special status species list should be developed from querying CNDDDB database and reviewing previous biological resource assessments for Coyote Creek that documents the presence of sensitive species within and adjacent to the project area.

RESPONSE I-15: As stated at the beginning of **Section 4.6 Biological Resources**, the discussion of biological resources in the riparian corridor is based on a

biological resources assessment completed by a qualified biological firm. Completion of the biological resources assessment included a CNDDDB query and site visits completed by a plant ecologist and a wildlife ecologist.

COMMENT I-16: Page 168, Habitat Loss: The riparian habitat in the project vicinity is described on page 167 as being of 'medium quality'. This instream work described under habitat loss (page 168) could have a substantial effect on the riparian habitat yet the conclusion was this is a less than significant impact. Riparian habitats in California are considered ecologically important areas because of the level of species diversity this type of community supports. This is in direct conflict with the 'Significant Impact' determination made under riparian habitat heading for the same work that is described under both headings (i.e. construction of three outfalls and two bridges).

RESPONSE I-16: The Draft EIR states on page 167 that the riparian habitat provided by Coyote Creek in the vicinity of the project site is of moderate quality and the riparian habitat provided by Upper Penitencia Creek is lower quality riparian habitat.

The statement on page 168 of the Draft EIR refers to the “substantial loss of any ecologically important habitat.” The project will not result in the substantial loss of any important habitat. The project’s incremental impacts to riparian habitat from instream work are discussed in Section 4.6.3 Riparian Habitat, which concludes that project impacts to riparian habitat are significant.

COMMENT I-17: Page 170, Interference with Movement of Wildlife: Coyote Creek corridor is critical to the continued local survival of a number of common and sensitive wildlife species and is one of the last remaining continuous corridors in the South Bay. While the riparian corridor is constrained by urban development, the corridor is continuous from the baylands to the higher quality habitats of Upper Penitencia and the upper reaches of Coyote Creek. Fragmentation of the corridor in itself is a significant impact and therefore should be evaluated as such.

RESPONSE I-17: The comment is unclear. The project will not result in any fragmentation. **Section 4.6.3 Interference with Movement of Wildlife** states that the riparian setback proposed by the project is sufficient to protect the existing wildlife corridors adjacent to the project site.

COMMENT I-18: Page 170, 2nd and 3rd paragraph: The District will need to review the designs for the drainage outfalls to the creeks. They should comply with the G&S.

RESPONSE I-18: It is the City’s policy to refer outfall designs for District facilities to the District.

COMMENT I-19: Page 171, Table 31, Tree Replacement Requirements: Add note to clarify that the large box tree sizes [24-inch and 15 gallon] are not requirements for any habitat mitigation plants or native tree species in the landscape. Those should be contract-grown local natives and hence are typically provided in small, specialized revegetation containers [dee pots, 1 gallon or 2 gallon tree pots]. Unless this relaxation of the tree replacement requirements occurs, local natives will essentially be excluded from the riparian setback area which is inconsistent with the intent of creating setbacks.

RESPONSE I-19: The tree replacement requirements shown in Table 31 are for trees on the project site that are not within the riparian corridor. Impacts to riparian habitat would be mitigated with local grown native plants and trees. Mitigation measure 4.6-2 of the Draft EIR has been revised for clarification (refer to *Section 4 Revisions to the Text of the DEIR* in this document).

COMMENT I-20: Page 172, Tree Protection: Add reference to the tree-specific [by species & age] tree protection setback distances found in 'Calculating Recommended Tree Protection Zones [TPZ's]' in the Guidelines and Standards and incorporate into this section and add a TPZ for each tree to be retained as part of the tree inventory, MM 4.6-5.

RESPONSE I-20: As stated in mitigation measures 4.6-5 through 4.6-14, a certified arborist will inventory the trees on the project site and the tree protection measures recommended by the City Arborist or consulting arborist will be implemented for all trees to remain on the project site.

COMMENT I-21: Page 174, Riparian Habitat Replacement, MM 4.6-21 Edit text to state that only **local** native plants contract-grown from propagules collected from wild parent plants in the Upper Penitencia/Coyote Watershed will be installed inside the 100-foot setback area.

RESPONSE I-21: Mitigation measure 4.6-21 of the Draft EIR has been revised to clarify that impacts to riparian habitat would be mitigated with local grown native plants and trees (refer to *Section 4 Revisions to the Text of the DEIR* in this document).

COMMENT I-22: Please submit a copy of the Mitigation and Monitoring Plan to the District when available for review.

RESPONSE I-22: The District will be provided a copy of the Mitigation and Monitoring Plan.

COMMENT I-23: Page 182, 3rd paragraph: ". . . Stormwater runoff is collected on-site by an underground storm drain system and discharge directly to both Upper Pen and Coyote Creeks. Portion of the site also drain overbank into the creeks. . . "

RESPONSE I-23: This statement from the Draft EIR describes existing hydrology and water quality conditions on the project site.

COMMENT I-24: Any drainage outfalls to the creeks should be designed and maintained to minimize bank erosion.

RESPONSE I-24: Page 186 of the Draft EIR has been revised to clarify that all proposed drainage outfalls to Coyote and Upper Penitencia Creeks will be designed and maintained to minimize bank erosion. (refer to *Section 4 Revisions to the Text of the DEIR* in this document).

COMMENT I-25: The Flooding and Drainage Evaluation acknowledges the project poses an unresolved potential conflict with the District's flood protection project. The EIR and/or subsequent PD should address this conflict by accommodating the necessary area for adequate flood protection.

RESPONSE I-25: As stated in Section 4.8.3 Planned USACE Flood Control Project, the proposed project is generally consistent with the preferred flood control project. The proposed project would coordinate with the SCVWD to the greatest extent feasible to accommodate the flood protection project on the project site.

COMMENT I-26: Page 182-184, Flood Protection Project: The Corps will not complete the feasibility study and environmental impact report/environmental impact statement by December 2007 and June 2007, respectively. These documents will be completed in 2008.

RESPONSE I-26: Page 184 of the Draft EIR has been revised to indicate that the environmental impact report/environmental impact statement would be completed in 2008 (refer to *Section 4 Revisions to the Text of the DEIR* in this document).

COMMENT I-27: The widened Upper Penitencia Creek channel and floodplain alternative is currently staff's preferred alternative and has not been approved by the District's Board of Directors or Corps. The alternative requires a 205-foot wide corridor, not 200 feet.

RESPONSE I-27: Pages 186 and 188 of the Draft EIR have been revised to clarify that the District staff preferred alternative would require an approximately 205-foot wide corridor, measured from the north bank of Upper Penitencia Creek (refer to *Section 4 Revisions to the Text of the DEIR* in this document).

COMMENT I-28: Page 186 – 1st paragraph: The Upper Penitencia Creek Flood Protection Project will need an additional 5 feet of right of way.

RESPONSE I-28: Refer to Response I-27.

COMMENT I-29: Botanical comments:

- Was a vegetation survey conducted? Please include survey results.

RESPONSE I-29: As stated on page 4 of the biological impact assessment completed for the project site (Appendix E of the Draft EIR), the entire project site was surveyed on foot by a plant ecologist in March 2005. Based on this survey, it is the professional opinion of the surveying plant ecologist that no special status plant species are expected to occur on the project site. This is supported by the fact that except for the creek channels, the riparian setback area on the south end of the project site, and the scattered landscape strips along Mabury and Berryessa Roads, the project site is paved. The riparian habitat on the project site is moderate to moderately low quality and the existing riparian setback area on the project site is mostly non-native grassland with some ruderal habitat. Lastly, most of the special status plant species in Santa Clara County require serpentine or alkali soils, neither of which are present on the project site.

COMMENT I-30:

- Was a sensitive plant survey conducted? Please include survey results.
- If no sensitive plant species were thought to occur on site, this should be documented by a plant species list and CNDDDB search results. There are historic occurrences of *Centromadia*

parryi ssp. congdonii and Chorizanthe robusta var. robusta that overlap the proposed project site (CNDDDB 2006). The DEIR and Biological Impact Assessment should contain language that references the literature review and subsequent decision criteria used to arrive at a conclusion that no sensitive plants were expected to occur, or were found to occur, on site.

- A plant species list should have been prepared as part of a vegetation and rare plant field survey in order to document absence of potential impacts to sensitive plant species.

There does not appear to be any vegetation information, literature review, or a plant species list, therefore unresponsive to the conclusion that no significant impacts to vegetation or sensitive plant species are expected to occur as a result of the proposed project.

RESPONSE I-30: Refer to Response I-29.

COMMENT I-31: Revegetation/mitigation should be consistent with the applicable guides contained in the G&S. A copy of the guidelines can be located at the following: [http://www.valleywater.org/Water/Watersheds-streams and floods/taking care- of streams/Guidelines & standards/Guidelines & Standards.shtm](http://www.valleywater.org/Water/Watersheds-streams-and-floods-taking-care-of-streams/Guidelines%20and-standards/Guidelines%20and-standards.shtm).

For plant related information, please refer to Chapter 4 - Design Guides, Guides 1 to 5 on pages 4.2 thru 4.12.

RESPONSE I-31: The comment does not raise any issues regarding the adequacy of the Draft EIR. No further response is required.

COMMENT I-32: The Notice of Preparation responses to comments were not included in Appendix I.

RESPONSE I-32: Notice of Preparation responses to comments was not prepared. The CEQA Guidelines do not require the Lead Agency to prepare Notice of Preparation responses to comments.

J. RESPONSES TO COMMENTS ON THE DRAFT EIR FROM THE SANTA CLARA VALLEY TRANSPORTATION AUTHORITY DATED JANUARY 5, 2007.

COMMENT J-1: Santa Clara Valley Transportation Authority (VTA) staff have reviewed the Draft EIR (DEIR) for a General Plan change to Transit Corridor Residential (20+ du/ac) with a Flexible Land Use Boundary on 24.3 acres on both sides of Berryessa Road. Our comments focus on encouraging the application of VTA's Community Design and Transportation (CDT) guidelines, which encourages alternative transportation modes, and supporting the highest usage/ridership of the BART extension to Milpitas, San Jose, and Santa Clara.

RESPONSE J-1: The San José City, through Council resolution, has stated it is the policy of the City to consider the concepts, principles, practices, and actions conveyed in the CDT Manual of Best Practices for Integrating Transportation and Land Use in its planning, public works, and redevelopment projects, and in its project development, review, and approval processes.

COMMENT J-2: Coordination with BART Extension Project Southern Portion of the Flea Market Site. As specified in the certified FEIR for BART

Extension to Milpitas, San Jose and Santa Clara, issued in November 2004 and DSEIR released in January 2007, the southern end of the San Jose Flea Market Site is needed for parking, ancillary facilities and/or construction staging to construct and operate the BART project.

RESPONSE J-2: The proposed project has been and will continue to be coordinated with the BART Extension Project to the greatest extent feasible.

COMMENT J-3: Land uses mix. Mixed land uses promote activity centers that support both peak and off-peak ridership, which is crucial for maximizing transit use. VTA recommends inclusion of commercial and retail land uses in the proposed land use plan.

RESPONSE J-3: As stated in Section 2 Description of the Proposed Project, the proposed project includes 6.6 acres of *Combined Industrial/Commercial* land uses and 82.9 acres of *Transit Corridor Residential* land uses. The Transit Corridor Residential land use designation allows for ground floor retail uses. The proposed project would allow up to 215,622 square feet of commercial uses on the project site north of Berryessa and up to 150,000 square feet of commercial uses south of Berryessa.

COMMENT J-4: Minimum Residential Densities. The VTA Board of Directors adopted the Community Design and Transportation (CDT) Program in November 2002 as its primary program for integrating transportation and land use, and the City of San Jose, through Council resolution has endorsed the CDT Program and its guiding principles. As specified in Appendix D of the Community Design and Transportation (page D-3), the flea market site is considered a regional station area and should have a minimal residential density of 55 du/ac. The minimum densities in the proposed land use plan are less than 55 du/ac. The manual also provides guidance on site planning, building design, street design, preferred pedestrian environment, intersection design and parking requirements which is applicable to the project area.

RESPONSE J-4: Please refer to Response J-1 regarding the CDT program. It is acknowledged that residential densities up to 16 dwelling units per acre are proposed on the north boundary of the project site adjacent to the existing single-family residences to avoid land use conflicts. However, as stated in *Section 3 Consistency with Adopted Plans* and in other sections of the document, the project proposes a minimum overall average density of 55 dwelling units per acre on the project site.

COMMENT J-5: Coordination with City of San Jose's Master Street Network. The City of San Jose's proposed master street network for the flea market site to support transit-oriented development and the BART project is not reflected in the proposed land use plan. An appropriate level of traffic analysis should be conducted to evaluate whether the proposed land use in addition to future planned projects in the area including the BART project, can be supported by the master street network.

RESPONSE J-5: The master street network for all of the City of San José is the Land use/Transportation Diagram of the adopted General Plan. Changes proposed to the Land Use/Transportation Diagram are described on pages 24 thru 28 of the Draft EIR, and the adequacy of the proposed street network to serve the proposed amount of development is discussed in *Section 4.2 Transportation and Traffic*. The City developed a circulation and access master plan for

major roadways for the site to accommodate both Development and BART. Refinements to the local roadway system necessary to serve BART will be developed as specific project design when the BART system design is finalized.

COMMENT J-6: Analysis of impacts to transit systems. Evaluation should be conducted to identify how both the Flea Market, Planned BART system and VTA bus service could go forward. This information needed for VTA to plan for sufficient transit service to support TOD and maximize transit ridership.

RESPONSE J-6: This comment does not specify how such analysis would differ from that done to date, or what additional information is needed. No response can be provided.

COMMENT J-7: Riparian setback assumptions. On page 47 it appears that the developer is assuming a riparian setback of 100 feet where as the BART project assumes 150 or greater based on guidance from the Santa Clare Valley Water District.

RESPONSE J-7: As stated in the Draft EIR, setbacks are provided consistent with City General Plan policies.

COMMENT J-8: On page 64 the railroad right-of-way is assumed to be 75 feet. However, the actual width is 60 feet. These design assumptions should be clarified in the document.

RESPONSE J-8: The text on page 64 of the Draft EIR has been revised to reflect the correct width of the railroad right-of-way (refer to *Section 4 Revisions to the Text of the DEIR* in this document).

COMMENT J-9: Reduction Rates. A thirty five percent (35%) reduction for Live/Work units was used in the DEIR citing data from the Metropolitan Transportation Commission (MTC). Please provide back-up information from the MTC study that supports the reduction rate used in the DEIR. Although the VTA TIA Guidelines do not include trip reduction strategies for Live/Work units, ongoing work to update the guidelines could add such strategies. Any backup information that can be provided will be useful for the addition of trip reduction strategies for Live-Work units in the next update of the TIA Guidelines.

RESPONSE J-9: The MTC documents do not state a 35% reduction for live-work units. We used the MTC, Caltrans and NCHRP reports listed below to guide our assumptions. The MTC reports show that the existing regional travel patterns could yield ~25 percent reduction for live-work units. However, we expect the residence of live-work units to be a unique sub-demographic that justifies a higher trip reduction of ~35 percent:

- 1) Elimination of the home-based work trip (reduction of 10% during daily and peak-hour).
- 2) Residence leverage their freedom to conduct trips during the off-peak (reduction of 10% during daily and peak-hour).
- 3) Fewer school age children will live in these units, which means fewer home-based school trips (reduction of 15% during daily and peak-hour).

(References: Metropolitan Transportation Commission. San Francisco Bay Area Travel Survey 2000: Regional Travel Characteristics Report. Oakland, CA: MTC, August 2004; Metropolitan Transportation Commission. Travel Forecasts for the San Francisco Bay Area 1990-2030. Oakland, CA: MTC, January 2005; Caltrans. 2000-2001 California Statewide Travel Survey: Weekday Travel Report. Sacramento, CA: Caltrans, June 2003; Martin, W.A. and N.A. McGuckin. NCHRP Report 365: Travel Estimation Techniques for Urban Planning. Transportation Research Board: Washington DC, 1998.)

COMMENT J-10: Proposed Mitigation for Freeway Impacts. Page 122 of the DEIR states that the results of the freeway level of service analysis indicate that the proposed project would create a significant impact on I8 freeway segments on four freeways in the project area. Currently there are two auxiliary lane improvement projects on US 101 identified in Valley Transportation Plan 2030 (VTP 2034) within the study area. As such, VTA recommends fair share contribution by the developer to the auxiliary lane improvements on US 101. It is recommended that the amount of the contribution be jointly decided in coordination with the Lead Agency (City of San Jose) and Caltrans.

RESPONSE J-10: If there was a planned freeway improvement along any of the impacted segments that included a construction schedule, full project description, and construction plans along with a defined procedure for determining a projects contribution to the cost of construction, this project could be conditioned to contribute. However, absent of any “real or programmed project”, this project cannot be conditioned to contribute toward undefined improvements.

COMMENT J-11: Bicycle and Pedestrian Facilities. Please note that Mabury Avenue is a designated Cross County Corridor in the 2000 Countywide Bicycle Plan and remains one in the update-in progress.

RESPONSE J-11: The text on page 71 of the Draft EIR has been revised to state that Mabury Road is a Cross County Corridor (refer to *Section 4 Revisions to the Text of the DEIR* in this document).

COMMENT J-12: The amendment should also discuss the project's consistency with the County Trail Master Plan.

RESPONSE J-12: Please refer to Response F-3

COMMENT J-13: The project should construct the multi-use trails that border the project within the setback they are providing along Coyote Creek and Penitencia Creek.

RESPONSE J-13: As stated on page 33 of the Draft EIR, the project does not propose to design or construct any specific improvements on land designated *Public Park/Open Space* other than the outfall and bridge replacements needed to serve the project.

COMMENT J-14: The discussion on page 121 of the DEIR on bicycle facilities is too vague regarding the description of bicycle facilities and improvements. It does not indicate how bikes and

pedestrian access the future Coyote Creek trail and Penitencia Trails within the site. Please elaborate on the section that begins: Important bicycle design elements include crossings of the new full access signalized intersections, the Upper Penitencia Creek multi-use path crossings of the new public streets, and the crossing at Mabury Road and Mabury Yard".

RESPONSE J-14: The bicycle facility discussion on page 121 of the DEIR has been revised as requested in the comment (refer to *Section 4 Revisions to the Text of the DEIR* in this document).

COMMENT J-15: Since the site is bounded by Coyote Creek on the west, the railroad tracks and future BART tracks on the east and is bisected by Penitencia Creek, bicycle/pedestrian bridges over these barriers are essential to the success of this project in promoting and attracting bicycle and pedestrian trips.

RESPONSE J-15: The proposed project includes two full-access intersections on Berryessa Road. Each of these full-access intersections include bridge crossings over Upper Penitencia Creek that will provide both pedestrian and bicycle access in addition to vehicular access to the project site south of Berryessa. The project does not propose any crossings of Coyote Creek or the future BART tracks.

K. RESPONSES TO COMMENTS ON THE DRAFT EIR FROM THE CITY OF SAN JOSÉ HISTORIC LANDMARK COMMISSION DATED FEBRUARY 22, 2007

COMMENT K-1: Commissioners noted that archaeological mitigation measures MM 4.5-1 through 4.5-4 do not include monitoring. Given the location of the site in an area of high archaeological sensitivity, the Commission recommends archeological monitoring mitigation measures be required.

RESPONSE K-1: Mitigation Measure 4.5-1 has been revised to include preparation of a mitigation program by the consulting archaeologist after completion of the presence/absence testing. If determined necessary by the consulting archaeologist, construction monitoring would be required (refer to *Section 4 Revisions to the Text of the DEIR* in this document).

COMMENT K-2: While commissioners expressed some disagreement between themselves regarding the documentation supporting the conclusions in the Archival Research Report, the Commission specifically voted 5-2-0 (Lavelle and Thacker absent) to support the North Only alternative, which avoids significant impacts to the cultural resource and is environmentally superior to the proposed project.

RESPONSE K-2: The recommendation is noted.

COMMENT K-3: Mitigation Measure MM 4.5-6 includes other measures that would mitigate the loss of the San Jose Flea Market, but are not proposed by the project including the on-site preservation of the original market use, or relocation of the use to another permanent site of comparable size within the region that is accessible to the communities that currently serve as vendors, customers, and other patrons of the market and is supported by permanent support facilities. The Commission noted further that the document does not adequately evaluate an alternative for

relocation of the Flea Market to another site within the region that is accessible to the communities that currently serve as vendors, customers, and other patrons, and again voted 5-2-0 (Lavelle and Thacker absent) to recommend that a relocation alternative be included in the document.

RESPONSE K-3: MM 4.5-6 on page 164 of the Draft EIR has been revised to better describe and evaluate the relocation of the San José Flea Market (refer to *Section 4 Revisions to the Text of the DEIR* in this document).

L. RESPONSES TO COMMENTS ON THE DRAFT EIR FROM NORCAL WASTE SYSTEMS DATED JANUARY 11, 2007

COMMENT L-1: We are writing on behalf of NorCal Waste Systems of San Jose Inc. (NWSSJ), which collects garbage, recycling, bulky goods and yard waste, and provides residential street sweeping service for approximately 150,000 homes in the City of San Jose. NWSSJ's base of operations is at 1120 Berryessa Road, near the site (1590 Berryessa) that is the subject of the Draft Environmental Impact Report for the San Jose Flea Market for a General Plan Amendment and Planned Development Rezoning. The change in land use designation from Combined Industrial/Commercial to Transit Corridor Residential and the proposed 120-foot residential building heights are a concern to NWSSJ and other viable industrial firms in the vicinity. NWSSJ has occupied its site for many years - as have most of the industrial firms located nearby.

RESPONSE L-1: The EIR addresses the relationship between the proposed project and the nearby industrial uses, including the provision of a buffer that ranges from 250 to 400 feet between the proposed residential and the existing industrial uses (refer to pages 60 thru 64). The analysis found that the physical separation between the proposed residential uses and the existing industrial uses would reduce impacts from this interface to a less than significant level. The text on page 64 of the Draft EIR has been revised to clarify the amount of separation that would exist between the existing industrial uses and the proposed residential uses (refer to *Section 4 Revisions to the Text of the DEIR* in this document).

COMMENT L-2: All of these industrial firms provide essential services and goods to the San Jose and California economies and may not be compatible with new adjacent residential uses, as noted in the EIR. While we commend The City and applicants for the creation of a 200- foot+/- buffer between the proposed housing and existing industry, the City is proposing to permit housing up to ten stories, or 120 feet, overlooking the industrial areas. This effectively grants residents of highrise housing oversight of the industrial activities within their viewshed. Hereafter, any permit renewal or other discretionary action by the City for any industrial use could be stalled or denied by complaints from the highrise NIMBY's on the flea market site. They could decide they don't (or think they won't) like what they see from their windows and create roadblocks to retaining the industrial uses.

RESPONSE L-2: Being able to see industrial activities, when the industrial activities are present before a resident moves in is not necessarily a significant environmental impact. As stated on page 64 of the Draft EIR, the combination of the minimum width of the Coyote Creek riparian habitat (approximately 100 feet), the proposed 100-foot riparian habitat setback, and the proposed frontage road adjacent to the riparian habitat setback (at least 50

feet wide) will provide a minimum separation of approximately 250 feet. This minimum separation distance between the residential uses proposed by the project and the existing industrial will reduce land use conflicts along this interface to a less than significant level.

COMMENT L-3: To reduce the resulting risk of this project driving productive industrial firms out of the City, we request that a mitigation measure be added to the DEIR. The measure should require that a "NOTICE OF INDUSTRIAL NEIGHBORHOOD" be recorded against the residentially-zoned land, providing as follows:

NOTICE OF INDUSTRIAL NEIGHBORHOOD

This Notice is to inform all persons contemplating the acquisition of any interest in [describe the affected property, defined as the Subject Property] that (1) there are long-standing pre-existing industrial uses of other property in the neighborhood of the Subject Property, (2) prior to acquiring any interest in the Subject Property, such persons should investigate and consider the effects of such industrial uses - and reasonably foreseeable future modifications of such uses - on the owners and occupants of the Subject Property, and (3) acquisition of the Subject Property will be deemed to constitute consent to such effects.

This does not prohibit the new residents from complaining about industry but it documents that the industrial uses pre-dated their development of the new housing. It also provides some modest assurance to the nearby industries that the normal conduct of their businesses is known and acceptable to the City.

Please provide such a mitigation measure or provide an explanation on the record why such a measure is not recommended. Thank you for your consideration of these concerns.

RESPONSE L-3: The proposed notice is unlikely to actually reduce any impact, but might reduce the likelihood of complaints. The suggestion may be considered by the City Council in their action on the project.

M. RESPONSES TO COMMENTS ON THE DRAFT EIR FROM YANMU HUANG DATED JANUARY 8, 2007

COMMENT M-1: This is to comment on the EIR report of the Berryessa Flea Market re-zoning project, file No: PDC03-108, District: 04, Quad No: 5 1,67.

The report does not address the traffic impact on Bellemeade Street of the project after Sierra Road is extended and connected to Berryessa Road.

RESPONSE M-1: As discussed in the Draft EIR in Section 4.2 Transportation and Traffic, a traffic impact analysis (TIA) was prepared for the proposed project to identify all traffic impacts that would result from the proposed project. The TIA is included as Appendix A of the Draft EIR. Given that Bellemeade Street is a less direct route than Sierra Road itself, the City found that it would be highly unlikely that anyone would use Bellemeade Street other than residents that live on the street itself.

COMMENT M-2: Currently, residents on both sides of Valleycrest Drive have three choices to access Sierra Rd: north part of Bellemeade St., Briarcrest Dr., and Royalcrest Dr. After Sierra Rd is connected to Berryessa Rd, the south part of Bellemeade will be the shortest path to highway 101, those people will tend to take the south part of Bellemeade Street to access Sierra Road at the intersection of Sierra & Bellemeade & Chessington. They will in addition be pushed to do so by the fact that Sierra Rd is downgraded to a two lane connector and will be crowded by traffic from Flickinger and Lundy.

RESPONSE M-2: The proposed project would not result in a traffic impact at the intersection of Sierra and Bellemeade and Chessington (see response M-3). The neighborhood streets in question are typical neighborhood streets which are not designed or do not function as collector streets. Although downgraded to a two-lane collector on the City's General Plan, Sierra Road north of the project site will remain physically unchanged. Through the project site, Sierra Road would be a narrow street in a residential neighborhood and would attract less traffic than a four-lane arterial, as it is currently shown on the General Plan. Additionally, the purpose of downgrading Sierra Road to a two-lane collector is to allow Sierra Road to be constructed circuitously through the project site (i.e., with a roundabout or other less direct design).

COMMENT M-3: Proper signals or signs shall be set at the intersection of Bellemeade St. & Valleycrest Dr to prevent traffic on westbound Valleycrest from making left turn onto Bellemeade in the mornings, and to prevent traffic on north-bound Bellemeade from making right turns onto Valleycrest in the evenings.

RESPONSE M-3: The proposed project would not result in a traffic impact at the intersection of Bellemeade Street and Valleycrest Drive. The volume of traffic that will want to use Bellemeade Street given its circuitous route and narrow width will be very small.

N. RESPONSES TO COMMENTS ON THE DRAFT EIR FROM WILSON LEE DATED JANUARY 22, 2007

COMMENT N-1: I represent approximately 110 households and 400+ residents in the California Colony and Encore housing developments directly north of the Flea Market parking lot (Chessington Dr. and Bellemeade St.), east of Coyote Creek, and bisected by Sierra Rd.

I would like to assert, on behalf of our informal neighborhood association, that noise mitigation MM 4.3-5 in the Flea Market EIR GP/GPT06-04-01/PDC03-108 (Pg 141) will not be sufficient to eliminate the exposure of those residents affected by Graniterock to noise levels in less than 55dBA (reference: Figure 18, Pg 136). The singular effective mitigation will be to require that Graniterock cease nighttime operations.

RESPONSE N-1: As discussed in the Draft EIR in Section 4.3 Noise, an acoustical analysis was prepared for the proposed project that included daytime and nighttime noise measurements on the project site. The acoustical analysis is included as Appendix B of the Draft EIR. The acoustical analysis specifically measured noise generated by Graniterock. The analysis concluded that with the incorporation of noise mitigation measures (e.g. forced air/mechanical

ventilation and soundwalls), residences within 1,000 feet of Graniterock would not be exposed to noise levels above City standards or state law requirements. The noise mitigation measures recommended in the acoustical analysis are proposed by the project and listed on page 141 of the Draft EIR.

COMMENT N-3: Year-round, residents in the neighborhoods above, including those on Maybury Rd. well beyond a 1000 radius of Graniterock, can report hearing the whirring of the asphalt turbine, the impact of railroad car coupling, and the hissing of other heavy industrial machinery.

RESPONSE N-3: The ability to hear sounds does not constitute a significant noise impact. Please refer to the thresholds of significance list on page 134 of the Draft EIR.

COMMENT N-4: The mitigation that "windows may be kept closed ... to control intrusive intermittent noises" is not a reasonable recommendation from a quality of life standpoint. Likewise, sixfoot high soundwalls are insufficient to reduce noise in multi-story dwellings where bedroom windows would typically be on upper floors.

RESPONSE N-4: The provision of forced air, mechanical ventilation to allow windows to be kept closed at the discretion of the occupant is a standard noise mitigation measure accepted by the state of California to meet the requirements of Chapter 12 of the State Building Code. Soundwalls would reduce noise exposure at ground-level indoor and outdoor uses (e.g., yards and common open space).

COMMENT N-5: Moreover, the dust effects of Mitigated Negative Declaration, CP00-03-009, Graniterock Crushing Facility, are not factored into the scope and content of the Flea Market General Plan EIR --

RESPONSE N-5: This analysis does address dust from adjacent uses. Impacts to the proposed project from dust generating activities on adjacent existing industrial uses are discussed on page 150 of the Draft EIR. The Draft EIR found that dust generated by existing industrial uses in the project area would not result in a significant impact, given that the typical wind direction is from north to south and the distances involved.

COMMENT N-6: The CP00-03-009 permit was originally denied 7-0 in Aug 2003 by the SJ Planning Commission on health and welfare grounds. Direct transcripts from the Planning Commission audio recording:

- "Our industrial design guidelines indicate that new development creating . . . noise, dust, traffic, odor, ... hazardous materials should not, should not be located in proximity to residential. Yet [Graniterock] is trying to do just that in direct opposition to [San Jose's] industrial design guidelines. I honestly am not sold on the idea. I think there's going to be a lot of damage to the neighborhood from this. And the design guidelines that we are given to go by, just fly in the face of this project." Commissioner James, Planning Commission Chairman

- It is totally unbelievable why we are letting it pass without a full EIR This lot is inappropriate for expansion they should look for expansion some other place." Commissioner Dillon"
- The project adversely affects the peace, health, safety, morals, and welfare of persons in the surrounding area [due to] adverse impacts from noise and dust." Commissioner Zito

Four hundred residents signed a petition supporting the Planning Commission's decision. Unfortunately, Graniterock appealed this decision and had the Planning Commission's vote overturned by the City Council in Jan 2004.

Nevertheless, the Planning Commission's statements remain true to this day and the presence of hundreds more dwelling units in the vicinity of Graniterock will exacerbate the problem manifold. We implore city staff to reconsider the negative health, safety, welfare, and quality of living problems that Graniterock imposes on the thousands of present and future residents of housing within a one-half mile radius of their operation. **In conclusion, we request that the next draft of the EIR: i) consider ceasing Graniterock nighttime operations as a requirement of Mitigation MM 4.3-5, and ii) factor in the dust impact from CP00-03-**

RESPONSE N-6: Please refer to Responses N-2 thru N-5. The Draft EIR found that the existing industrial uses west of the project site, across Coyote Creek, would not result in significant noise and dust impacts upon the proposed project given the design and location of the proposed project.

It should be noted that the City could not legally impose any restrictions or limitations on an adjacent property or business as a condition of approving a project on a different property.

The following comment letter was received after the close of the comment period on the Draft EIR. CEQA does not require that a lead agency respond to comments received after the close of the comment period. The letter is from the Berryessa Union School District.

As a general response to the letter, the City notes that legislation enacted in 1998 has significantly limited the application of CEQA with regard to the treatment of school impacts and mitigation. In November 1998, California voters passed Proposition 1A, a \$9.2 billion statewide school bond measure which was linked to the approved legislation. Specifically, the legislation, California Government Code Sections 65995-65998, sets forth provisions for the payment of school impact fees by new development as the exclusive means of “considering and mitigating impacts on school facilities that occur as a result of any legislative or adjudicative act, or both, by an state or local agency involving, but not limited to the planning, use or development of real property.” [§65996(a)] The legislation goes on to say that the payment of school impact fees are “hereby deemed to provide full and complete school facilities mitigation” under CEQA. [§65996(b)].

O. RESPONSES TO COMMENTS ON THE DRAFT EIR FROM THE BERRYESSA UNION SCHOOL DISTRICT DATED FEBRUARY 23, 2007

COMMENT O-1: This letter provides comments on behalf of Berryessa Union School District (“School District” or “District”) on the Draft Environmental Impact Report (“DEIR”) prepared for the San Jose Flea Market General Plan Amendment and Planned Development Rezoning Project (“Project”).

The Project proposes amendments to the City of San Jose General Plan and rezoning that would, among other things, allow for the future development of up to 2,818 residential units at the Project site. In response to the Notice of Preparation (“NOA”) for the DEIR, the School District stated that if such an increase in residential units within the School District occurs, the School District will need to construct a new school to accommodate the students generated by that development. The DEIR fails to adequately consider these issues.

RESPONSE O-1: The DEIR does identify the letter sent to the City by the School District in response to the Notice of Preparation (DEIR page 230). The letter does not identify where or if the District is proposing a school and the project does not include a specific school or school site. While the construction of a new school would be an impact on the physical environment triggering a CEQA analysis, no information is now known about where such a school might be located. Evaluating the impacts of the construction and operation of a future school at an unknown location is highly speculative. The uncertainty involved in doing so is discussed on page 230 of the Draft EIR. Negotiations are occurring outside the CEQA process and State Government Code requirements. Should a school be proposed on the project site, subsequent review would be required under CEQA if the school would result in any impacts different or more significant than those evaluated in the EIR.

COMMENT O-2: General Failure to Address Impacts on Schools

Although the DEIR provides in-depth analysis of certain impacts of the Project, including a 63-page evaluation of transportation and traffic impacts, a 9-page analysis of impacts on cultural resources and a 12-page assessment of the impacts on biological resources, it devotes only a relatively rote 1 ½

pages to the impact on public schools, and fails entirely to identify the impact on schools as one of the impacts of the Project. The DEIR also essentially disregards the District's response to the Notice of Preparation, in which the District, as a responsible agency, informed the City that a new school would have to be constructed to accommodate the project.

RESPONSE O-2: The length of a discussion required about one particular area of impact does not indicate the appropriate quantity or level of analysis that should be set forth for another subject. As stated above in Response O-1, the District's letter is discussed on page 230 of the Draft EIR. Since the District's letter does not identify a prospective school site nor any other specifics regarding the school that the District believes it may decide to construct, the Draft EIR could not evaluate the environmental impacts of constructing the new school. Aside from asserting that a new school will need to be constructed somewhere, which is acknowledged in the Draft EIR, the District has not identified any additional environmental related specifics that could be analyzed or disclosed at this time.

COMMENT O-3: Instead, while acknowledging that the School District's existing schools that would serve the Project area are at or beyond capacity and that the Project would generate approximately at least 175 new students who would attend School District schools (a figure that the School District contests; see below), the DEIR dismisses the need to construct a new school to serve such students, instead stating "[t]here are a number of methods that can be used to accommodate the increased numbers of students that do not require that new schools be built" and proceeds to list such alleged alternatives (including "the provision of portable or relocatable classrooms" and "the conversion to year-round schools with a four-track schedule") without further analysis (DEIR 5.3).

RESPONSE O-3: This comment is incorrect. The DEIR does not "dismiss" the need to construct a new school. Instead, the DEIR expressly acknowledges the need for a new school and explains that it is the absence of information about such a school, including a lack of information about its location, that precludes the ability to analyze the impacts of a new school in any accurate or meaningful detail. It is acknowledged that construction of a new school may be warranted and this construction will require subsequent CEQA review.

Because the District has not stated that a new school is currently proposed, nor that the District has taken any action to approve a new school, the DEIR acknowledges that other options may be pursued by the District in lieu of or prior to a new school being constructed.

COMMENT O-4: The DEIR also notes that state law "specifies an acceptable method of offsetting a project's effect on the adequacy of school facilities as the payment of a school impact fee prior to issuance of a building permit", but acknowledges that "The school impact fees and the school districts' methods of implementing measures specified by Government Code 65996 would partially offset project-related increases in student enrollment." (DEIR 5.3; emphasis added.) Finally, the DEIR dismisses the need for further analysis of the impacts of increased student population, stating "Further discussion at this time of the impacts that might result from building one or more schools in the project area at an unknown location would be speculative." (DEIR 5.3.)

RESPONSE O-4: This information is, to the best of the City’s knowledge, accurate. Since the phrase “partially offset” is misleading, it has been deleted from the Draft EIR text (refer to *Section 4 Revisions to the Text of the DEIR* in this document).

COMMENT O-5: It is the District’s position that the DEIR is inadequate regarding schools and actual impacts on schools. The preparer of an EIR must make a genuine effort to obtain and disseminate information necessary to the understanding of impacts of project implementation. (See CEQA Guidelines § 15151; *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1236.) Additionally, an EIR must set forth a reasonable, detailed and accurate description of existing environmental settings, including both natural and man-made conditions, such as public facilities. (See CEQA Guideline §§ 15125 (c) & 15360.)

The DEIR does not meet its informational purpose. The DEIR merely concedes that there will be an increased demand on educational services within the School District, but does not provide an analysis of impacts including but not limited to fiscal impacts (e.g. the School District’s ability to obtain developer fees, whether these fees will result in a surplus or deficit of funding for the School District, and what the effects will be on staffing and curriculum). For instance, it provides no information regarding the School District’s fiscal health, funding sources available to the School District to maintain existing and to build new facilities, school overcrowding or future population projections. No consideration or analysis was given whatsoever to the feasibility or effectiveness of the six suggested “methods” to accommodate students identified in the DEIR. As an example, bussing is mentioned, but there is no consideration of whether sufficient capacity exists at other District schools. Additionally, the District does not currently provide bussing (except for special education students), and has no funds available to provide such bussing; developer fees may only be used for school construction and reconstruction (Ed. Code §§ 17620, et seq.), and there are no available general funds within the District’s budget.

RESPONSE O-5: It is not clear from this comment what is intended by the reference to Guidelines §15125(c), which section refers to the regional setting critical to assessment of environmental impacts, with special emphasis on environmental resources that are rare or unique to the region. The DEIR does not identify the capacity in local schools, which is not typically considered part of the regional setting. An analysis of the District’s fiscal health or potential fiscal impacts on the District is not required by any part of CEQA or the CEQA Guidelines. The reference in the DEIR to various methods for accommodating students are for informational purposes and are neither prescriptive nor are they intended as suggestions for the District’s use of developers’ fees.

As stated previously, the DEIR also includes the District’s comment that a new school will be needed to accommodate students generated by the proposed project.

COMMENT O-6: Without knowing the extent and nature of the impact on school, readers of the DEIR and agencies including the School District are unable adequately to assess the actual impact. Similarly, without knowing more about the specific impacts, it is impossible to formulate meaningful mitigation measures.

RESPONSE O-6: The DEIR provides all of the information presently available that is relevant to an environmental analysis of the proposed project under CEQA, including the number of children anticipated to be generated by the proposed project, the current status of the District's (and other) schools, and the District's own comment that a new school would be required. The Draft EIR constitutes an analysis of environmental impacts, not educational impacts, so may not provide information needed to ascertain scholastic program impacts, as noted by the comment.

COMMENT O-7: Specific Failure of DEIR to Examine All Potential Impacts Related to School Facilities

The DEIR failed to provide a thorough examination of all potential impacts related to school facilities, as set forth below.

1. DEIR Does Not Provide an Adequate Description of Existing Facilities or of Student Generation Rates

The DEIR does not provide an adequate description of the existing conditions within the School District, on a school-by-school basis, including size, location and capacity. Instead the DEIR limits its review to stating, without citation, that the School District's "elementary and middle school student generation rates are 0.046 and 0.016 students, respectively." Using these rates (which the School District contests) the DEIR calculates that the Project "would generate approximately 130 students that would attend Vinci Park Elementary School and 45 students that would attend Piedmont Middle School" but goes on to acknowledge that during the 2004-2005 school year Vinci Park Elementary School was at capacity and that the School District has already added portable classrooms to accommodate overflow at Piedmont Middle School. In fact, the student generation rates selected by the City are woefully low. The District has determined that a one-year-old development within the School District similar in size to the Project has had an actual student generation rate of approximately 0.11 students per residence. If this rate is applied, the estimated increase of students generated by the Project doubles, to approximately 350 students. The District's schools in the vicinity lack capacity for portables sufficient to house so many students. The DEIR must analyze the location, size, capacity and structure of existing School District Facilities as well as providing reasoned data and analysis regarding student generation rates before reaching an educated conclusion regarding the existence and significance of any impacts on the School District from the Project. In fact, the School District does not have adequate facilities to house the students who will eventually reside in the increased residential units generated by the Project.

RESPONSE O-7: As acknowledged in this comment, the DEIR identifies the physical conditions at the local schools most likely to be attended by students generated by the proposed project, under existing conditions. The EIR is not required to provide a description of all of the District's facilities on a "school-by-school basis, including size, location and capacity". The DEIR identifies the schools most likely to be used by students from the proposed project, identified their current status based on information provided by the District. It is not clear from this comment what useful information would be provided by detailing conditions at schools unlikely to be utilized by students from this project, particularly since the EIR states that the project will trigger the need for a new school.

It would not be appropriate in an EIR to rely on a single generation study as the basis of determining impacts. The student generation rates used in the DEIR were supplied by Enrollment Generation Consultants, a consulting firm that was working for the School District at the time. Even if the higher enrollment rate identified by the District from the single development were utilized in the analysis, it would not negate the DEIR's conclusion (based on the District's statement) that a new school would be triggered by the project's students.

COMMENT O-8: 2. DEIR Does Not Adequately Describe Enrollment Trends

The DEIR does not adequately describe the School District's past and present enrollment trends. While the DEIR does state the enrollment for each school affected by the Project, it does not discuss whether enrollment has been increasing, decreasing or sustaining. As a result, the DEIR cannot adequately evaluate the projected future impact the students from the Project will have on the schools over time. In fact, as acknowledged by the DEIR, the affected elementary school (Vinci Park) is already at capacity. Also, all of the School District's middle schools are nearing full capacity, with the affected middle school (Piedmont) already overcrowded with an enrollment greater than 1,100 students.

RESPONSE O-8: Enrollment and population trends are appropriately used by the City and the District for planning purposes. The CEQA Guidelines, however, advise that an EIR "should normally limits its examination to changes in the existing physical conditions in the affected area as they exist at the time the notice of preparation is published". It would be inappropriate for an impact analysis to compare a project to conditions in the past or a hypothetical future scenario.

COMMENT O-9: 3. DEIR Fails to Identify the Cost of Providing Capital Facilities to Accommodated Students on a Per-Pupil Basis

The DEIR does not identify the cost of providing capital facilities to accommodate students on a per-student basis. Specifically, it does not address the situation of whether the additional students from the Project are going to require additional classrooms which would not otherwise be required absent the Project, resulting in a higher "per-pupil cost." For instance, if a school had three third grade classes, all at capacity, and the Project generated four third graders, the school could have to open an entirely new class to accommodate four students. The cost associated with the capital facilities to accommodate those four students should be assessed on a per-pupil basis because, without the Project, there would be no need for the additional facilities.

RESPONSE O-9: CEQA does not require an analysis of the cost of mitigation, per se. Mitigation for school impacts is identified and set forth by state law, as stated on page 230 of the DEIR, and it is defined as a fee. The School District itself, in its response to the Notice of Preparation, states that physical accommodation of the students generated by this project will require a new elementary school, which would be an impact on the physical environment. The EIR does not question that determination.

COMMENT O-10: 4. DEIR Does Not Assess the School District's Present and Projected Capital Facility, Operation and Personnel Costs.

The DEIR does not assess the School District's present and projected capital facility, operations and personnel costs. Without this information, the City cannot make an adequate assessment of whether or not the school services will actually be impacted or can be provided.

RESPONSE O-10: It is not the role of an EIR under CEQA to enable a lead agency to determine whether or not another government agency can provide services. In the case of impacts on schools and the mitigation for such impacts, the lead agency is specifically directed in its analysis by CEQA and the state government code. Nothing in either law requires that a lead agency determine and evaluate the costs of running a school district.

COMMENT O-11: 5. DEIR Does Not Identify Any Specific Expected Fiscal Impacts on the School District

The DEIR does not identify any specific expected fiscal impacts on the School District, including an assessment of projected cost of land acquisition, school construction, and other facilities needs. For instance, the potential cost to the School District of acquiring property for the construction of new school facilities within the Project area may be prohibitive. In fact, the School District projects that developer fees will be inadequate to offset the potential fiscal impacts of the Project.

RESPONSE O-11: CEQA does not require an analysis of fiscal impacts on the District. A CEQA analysis is required (as explained on page 227 of the DEIR) when the project might trigger the need for a new or physically altered facility. The DEIR does identify the need for a new school and concludes that the construction of "one or more schools on land in the vicinity of the proposed project and/or on the project site would contribute incrementally to the impacts of development identified for the project as a whole, but is not expected by itself to have new or substantially different significant adverse environmental impacts." [page 230 of the DEIR]

COMMENT O-12: 6. DEIR Does Not Assess Cumulative Impacts

The DEIR does not assess the cumulative impacts on schools resulting from additional development already approved or pending. Under CEQA Guidelines 15355, et seq., the City must analyze the cumulative impacts of a proposed project. Cumulative impacts refer to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts. (Guidelines § 15355.) The individual effects may be changes resulting from a single project or a number of separate projects. (Id. at 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 probably future projects. (Id. at 15355(b).) In this case, the DEIR does not address the cumulative impact to the School District of this Project.

RESPONSE O-12: The DEIR does address the cumulative impact to schools on page 286. As stated there, impacts to school facilities would be mitigated through the methods directed by State law, such as payment of impact fees by each of the projects. If new schools are necessary, the construction of multiple schools are not themselves anticipated to result in significant cumulative impacts.

COMMENT O-13: Specific Failure of DEIR to Analyze Impacts to Schools Other than Facilities
In addition to the impacts on school facilities, CEQA requires an evaluation of Project impacts on all school related services. The DEIR focuses only on the facilities requirements. Specifically, the DEIR should address the following issues related to public school services.

1. DEIR Does Not Provide a Description of Projected Staffing Requirements

The DEIR does not provide a description of projected teacher/staffing requirements based on anticipated population growth and existing State and School District policies. This information is critical for the City to assess whether the Project impacts staffing requirements by necessitating additional teachers. Like the capital facilities assessment described in the preceding section, this assessment must be completed on a per-pupil basis.

2. DEIR Does Not Analyze Whether the Project Has Any Impact on Curriculum

The DEIR fails to analyze whether there is any impact on curriculum as a result of anticipated population growth. Specifically, the DEIR should have addressed whether additional programs would now be required (including but not limited to special education and specific general education courses) as a result of the influx of students from the Project.

3. DEIR Does Not Assess Each School District's Present and Projected Capital Facility, Operation and Personnel Costs

The DEIR does not assess the School District's present and projected capital facility, operations and personnel costs. Without this information, the City cannot make an adequate assessment of whether or not the school services will actually be impacted.

RESPONSE O-13: As stated previously above and on page 227 of the DEIR, CEQA involves a discussion of environmental impacts of a proposed project; CEQA does not require an analysis of fiscal or scholastic program or curriculum impacts. The cost of providing staffing or curriculum changes, or increased operational costs are fiscal impacts that do not raise physical, environmental impacts.

COMMENT O-14: 4. DEIR Does Not Assess Foreseeable Impacts on Traffic

To the extent that students in the project would have to be transported to other areas for school, it is foreseeable that traffic and pedestrian safety impacts would arise. The DEIR fails to take into account this foreseeable impact.

RESPONSE O-14: No information is provided by the District as to the pattern or amount of busing that might be required or provided by the District, or what other schools might be utilized in this event. Since the District states that a new school will be required to serve the students, it is assumed that the District believes that a new school would be constructed proximate to the project site, requiring minimum travel. While busing may remain an option for the District, no specific programs have been identified by the District.

COMMENT O-15: DEIR's Inadequacy Regarding Mitigation Measures

Based on the deficiencies of the DEIR described above, along with the fact that the DEIR does not identify the expected shortfall or excess between estimated development fees to be generated by the Project and the cost for provision of capital school facilities, it is the School District's position that the DEIR's failure to identify the impact on schools as an environmental impact of the Project is inadequate. Under the Government Code, the City has a duty to coordinate with the School District to provide effective school site planning. The City should consider alternative mitigation measures, such as those proposed below, to fulfill that duty.

State Law Does Not Limit School Impact Mitigation to Developer Fees

The DEIR notes that "State law (Government Code Section 65996) specifies an acceptable method of offsetting a project's effect on the adequacy of school facilities as the payment of a school impact fee prior to issuance of a building permit". This statement is conclusory and without merit.

In fact, Government Code section 65996 does not relieve a city or county from analyzing the impact on schools of a proposed project, concluding that there are significant impacts that may remain unmitigated and further analyzing whether a mitigation measure is available to adequately mitigate the impacts. The Project cannot be approved unless the City either imposes mitigation measures adequate to mitigate identified impacts to a level of less-than-significant or the City adopts an applicable statement of overriding consideration. (Public Resources Code § 21002; CEQA Guidelines §§ 15021 (a) (2), 15091 (a) & 15096 (g); see *Sierra Club v. Gilroy City Council* (1990) 222 Cal.App. 3d 30.) The developer fees cited by the DEIR were never intended to supplant other mitigation, nor would it necessarily mitigate all impacts of this development. Additionally, the DEIR concedes that developer fees would only "partially offset project-related increases in student enrollment" but fails to explore other measures that would alleviate the impact of those increases in student enrollment.

RESPONSE O-15: The statement in the first paragraph of this comment referring to the DEIR reference to state law as being conclusory and without merit, is itself inaccurate and misleading. The DEIR analysis does not simply paraphrase the government code, the DEIR (on page 230) quotes the actual law, including the provision that payment of school impact fees "are hereby deemed to provide full and complete school facilities mitigation" [§65996(b)].

The opinion of the letter writer that the state law does not limit a lead agency's responsibility for identifying and requiring other kinds and methods of mitigation is not supported by any case law, regulation, or other legal justification in the public record. The City is required by state law to consider school impact fees as the exclusive means of "considering and mitigating impacts on school facilities that occur or might occur as a result of any legislative or adjudicative act, or both, by any state or local agency involving, but not limited to, the planning, use or development of real property...." [CGC §65996(a)] The requested entitlement addressed in this EIR is a rezoning, which is a legislative act under California law.

The use of the words “partially offset” in the DEIR are misleading and have been deleted from the Draft EIR text (refer to *Section 4 Revisions to the Text of the DEIR* in this document).

COMMENT O-16: The Legislature Intended Coordinated Planning for School Sites

Government Code sections 65352 and 65352.2 (all subsequent code sections refer to the Government Code unless otherwise specified) require local cities and counties to coordinate planning of school facilities with school districts. The Legislature confirmed that the parties are meant to coordinate “options for the siting of new schools and whether or not the local city or counties existing land use element appropriately reflects the demand for public school facilities, and ensures that new planned development reserves location for public schools in the most appropriate locations.”

The Legislature recognized that new planned development should take into consideration and even “reserve” where schools would be located to serve the development because schools are as integral a part of planning for new development as is any other public service, such as fire, police, water and sewer. As it relates to this case, the intent behind sections 65350, et seq., supports the District’s position that the City must analyze whether the current size of District schools is adequate to accommodate both its existing population and the new development (which it is not), particularly in light of the cumulative factors addressed in this letter. The City can help the District provide adequate facilities resulting from the impact of the Project, which are not addressed by developer fees, by requiring alternative mitigation measures to assure that there is an adequate site to accommodate school facilities.

RESPONSE O-16: The letter writer’s interpretation of the legislature’s “intent” behind §65350 is not supported by any factual information that has been provided to the City. The City is prepared to cooperate with the District in planning for future schools, including analyzing alternative school sites, if the District identifies what alternative sites are under consideration. The opinion in this comment, that planning for new schools requires “alternative mitigation measures” identified, contrary to state law, in CEQA documents, is not supported by the government code section referenced.

COMMENT O-17: Alternative Mitigation Measures

Land Dedication

One possible mitigation measure would be for the City to consider adopting findings requiring any developer building residential units on the Project site to dedicate land and/or funding pursuant to Government Code sections 65970 et seq., which permit the City to require a developer to dedicate land to a School District. Section 65974 specifically states that “for the purpose of establishing an interim method of providing classroom facilities where overcrowded conditions exist, . . . a city, county, or city and county may, by ordinance, require the dedication of land, or the payment of fees in lieu thereof, or a combination of both, for classroom and related facilities for elementary or high schools as a condition to the approval of a residential development.”

A land dedication requirement would be good public planning benefiting all residents of the community, including future residents of the Project. As development occurs, land suitable for new school sites grows scarcer. Under Government Code sections 65352 and 65352.2, the City has a duty to help plan for adequate services to their residents by ensuring that future sites are set aside for

schools. Failure to do so leads to inadequate services, future controversies, and the potential need for a school district to exercise its rights under eminent domain to displace existing residents.

Finally, land dedication is a permissible mitigation measure under Government Code sections 65995, et seq., which are cited by the DEIR. Section 65995, subdivision (a), specifically states that “except for a fee, charge, dedication, or other requirement authorized under Section 17620 of the Education Code, or pursuant to Chapter 4.7 (commencing with Section 65970), a fee, charge, dedication or other requirement for the construction or reconstruction of school facilities may not be levied” Section 65995 expressly excludes Chapter 4.7, inclusive of section 65974, from this limitation, thus permitting a city to address conditions of overcrowding in school facilities or inadequately sized school sites by requiring, for example, the dedication of land.

Further, the City is authorized by section 66478 of the Subdivision Map Act to require dedication of elementary school sites when needed to address development. Nothing in Government Code sections 65995, et seq., precludes such a requirement.

Land dedication is particularly important in the project’s vicinity given the lack of available vacant land for school facilities.

Phasing

Another method by which the City can work cooperatively with the School District within all legal constraints to ensure adequate school facilities with regard to new development is by requiring development to be phased and not permitted prior to availability of school facilities. Timing development so as to balance the availability of school facilities with new development can significantly aid the School District in its attempt to provide for the additional students generated by new development.

Cooperative Use

The City and the School District can also work together to ensure adequate school facilities to serve the residential units contemplated by the Project by entering into a partnership to jointly use school and park land for recreation and educational purposes. It is desirable for both public entities to have land set aside for both school and park use so that a single joint use facility of ten or more acres would be available to both the School District and residents within the Project site.

RESPONSE O-17: These various methods for creating and efficiently managing school sites and other public uses are acknowledged as viable future approaches for planning purposes. Since state law precludes the City from considering in a CEQA document methods other than payment of school impact fees as mitigation of CEQA impacts, these alternative ideas are more appropriately explored in a planning process, through consultation between the City, School District, and the affected private property owners.

COMMENT O-18: Conclusion

It is the District’s position that the DEIR does not adequately analyze the Project’s potential impacts to schools. The DEIR must address with greater specificity the impacts on school facilities and services. The District encourages the City to work cooperatively with the District and consider alternative measures, such as phasing or land dedication, which can adequately mitigate the impacts on the District’s schools.

RESPONSE O-18: The DEIR identifies the likely impacts on the environment which could be created by the project's generation of students that would be served by the Berryessa Union School District. Within the parameters of CEQA and other relevant state law, the DEIR also identifies the appropriate method for mitigating the environmental impacts likely to result from the project.

The District's interests in working with the City to coordinate planning for school sites will be addressed by the City Council and City staff outside the CEQA process.

SECTION 4 REVISIONS TO THE TEXT OF THE DEIR

The following section contains revisions to the text of the Draft Environmental Impact Report, San José Flea Market General Plan Amendment and Planned Development Rezoning, dated December 2006. Revised or new language is underlined. All deletions are shown ~~with a line through the text~~.

Page 33 Section 2 – Description of the Proposed Project, Paragraph 1; **revise** the following text:

Except for the stormwater outfall to Coyote Creek, the project does not propose to design or construct any specific improvements on any of the land described as *Public Park/Open Space*. Therefore, this EIR does not evaluate the environmental impacts of any particular design or specific park uses, nor is the “floating” park assumed in any particular location.

Page 33 Section 2 – Description of the Proposed Project, Paragraph 6; **revise** the following text:

Except for a stormwater outfall to Coyote Creek, and two bridges over and one stormwater outfall to Upper Penitencia Creek, the project does not propose to design or construct any specific improvements on the land designated for *Public Park/Open Space* uses. Therefore, this EIR does not evaluate the environmental impacts of any particular design or specific park uses, and no specific location is proposed for any park south of Berryessa other than the areas within the riparian setbacks.

Page 47 Section 3 – Consistency with Adopted Plans and Policies, paragraph 3; **add** the following text:

Consistency: The proposed project is consistent with this Trails and Pathways Policy. The proposed project does not include development that would encroach into designated Trails and Pathways Corridors. The City of San José’s Greenprint, a 20-Year Strategic Plan for Parks, Community Facilities and Programs, shows a proposed trail on the project site along Upper Penitencia Creek and a proposed trail along Coyote Creek on the opposite side of the project site. Although the proposed trail is shown on the west side of Coyote Creek in the City of San José’s Greenprint, a 20-Year Strategic Plan for Parks, Community Facilities and Programs, the trail could be located on the east side of Coyote Creek. Coyote and Upper Penitencia Creek are both designated on the General Plan Scenic Routes and Trails Diagram as Trail and Pathway Corridors. The project includes a 100-foot setback on the project site from the edge of the riparian habitat of both Coyote Creek and Upper Penitencia Creek, except along Coyote Creek at the south end of the project site immediately upstream of Mabury Road. The existing setback from the edge of the riparian habitat of Coyote Creek at this location ranges from 40 to 100 feet would remain as is with the proposed project.

Page 55 Section 3 – Consistency with Adopted Plans and Policies; **add** the following discussion to the end of Section 3:

3.9 COMMUNITY DESIGN & TRANSPORTATION PROGRAM

The Santa Clara Valley Transportation Authority (VTA) Community Design & Transportation (CDT) Program is an active partnership between the VTA and the cities and county of Santa Clara. The CDT is designed to inspire new thinking about the form and function of viable transportation choices, and make the most efficient use of transportation and other resources in the county. The program includes establishing a long-range vision for growth and change in the county that enhances the quality of life for residents and workers. The Manuel of Best Practices for Integrating Transportation and Land Use supports the CDT Program by illustrating its vision, documenting its tenets, and presenting best practices and strategies for planning, design and implementation. Four key concepts underlie the CDT Program effort: Place-Making, Access by Proximity, Interconnection, and Choice.

Consistency: The proposed project is consistent with CDT Program. The proposed project includes a mix of land uses (residential, commercial, and office) that would create a cohesive community, rather than individual buildings. The complementary land uses proposed by the project would allow trips to be combined or even cancelled. The land uses would be interconnected with pedestrian, mass transit, and bicycle facilities. The mix of land uses proposed by the project and interconnected by pedestrian, mass transit, and bicycle facilities would provide choices to the project’s residents and workers, including transit, occupation, and residence choices. As recommended in Appendix D of the Manuel of Best Practices for Integrating Transportation and Land Use, the development density of the proposed project would average at least 55 dwelling units per acre.

Page 58 Section 4.1 – Land Use, Paragraph 3; **revise** the following text:

The SCVWD right-of-way contains a 66-inch ~~storm drain~~ diameter high pressure raw water supply pipeline. Accessibility to the pipeline and vaults within the right-of-way along with clearance above and to the sides to allow for the use of heavy equipment for future maintenance is required by the SCVWD.

Page 64 Section 4.1 – Land Use, Paragraph 1; **add** the following text:

Existing industrial uses are located west, south, and east of the project site south of Berryessa (refer to Figure 5). The project site south of Berryessa is also the planned location of the Berryessa BART station. The project proposes to develop the project site south of Berryessa with high density residential uses and local-serving commercial uses that would be compatible with and would support the planned Berryessa BART station. The industrial uses west of the project site, across Coyote Creek, are a mix of heavy and light industry. The heavy industry is located towards Berryessa Road and the light industry is located towards Mabury Road. To maintain compatibility with these existing industrial uses west of Coyote Creek, the project proposes a 100-foot setback from the edge of the riparian habitat of Coyote Creek. The combination of the minimum width of the riparian habitat of Coyote Creek along

this portion of the site (i.e., approximately 100 feet) and the proposed 100-foot riparian setback would provide approximately 200 feet of separation between the existing industrial uses located west of the project site and the proposed development of the project site south of Berryessa with residential uses. Consistent with the Residential Design Guidelines, the project proposes a frontage road along the riparian setback. This frontage road will provide at least an additional 50 feet of separation. Therefore, the total separation provided between the existing industrial uses and the proposed residential uses will be at least 250 feet. The separation provided by the riparian habitat, riparian habitat setback, and the frontage road will reduce land use conflicts along this interface to a less than significant level. **[Less than Significant Impact]**

Page 64 Section 4.1 – Land Use, Paragraph 2; **revise** the following text:

The residential uses proposed by the project south of Berryessa would be a minimum distance of 100 feet from the existing industrial park located east of the project site, across the existing railroad right-of-way. The existing railroad right-of-way provides ~~75~~ 60 feet of separation between the project site and the existing industrial park. In addition, the proposed project includes a minimum 25-foot setback from the existing railroad right-of-way. This separation will reduce land use conflicts along this interface to a less than significant level. **[Less than Significant Impact]**

Page 70 Section 4.2 Transportation and Traffic, Paragraph 10; **revise** as follows:

The City of San José’s Greenprint, a 20-Year Strategic Plan for Parks, Community Facilities and Programs, shows a proposed trail on the project site along Upper Penitencia Creek and a proposed trail along Coyote Creek on the side opposite the project site. Although the proposed trail is shown on the west side of Coyote Creek in the City of San José’s Greenprint, a 20-Year Strategic Plan for Parks, Community Facilities and Programs, the trail could be located on the east side of Coyote Creek. Coyote and Upper Penitencia Creek are both designated on the General Plan Scenic Routes and Trails Diagram as Trail and Pathway Corridors.

Page 71 Section 4.2 Transportation and Traffic, Paragraph 10; **revise** as follows:

Mabury Road has bicycle lanes from US 101 to White Street. West of US 101, Mabury Road becomes Taylor Street and is a designated bicycle route. The Mabury Road overpass has a separate bicycle and pedestrian facility to bypass the narrow motor vehicle travel way. Mabury Avenue is a designated Cross County Corridor in the 2000 Countywide Bicycle Plan.

Page 111 Section 4.2 – Transportation and Traffic, Table 18 – Project Trip Generation Rates and Estimates, Footnote 1; **revise** as follows:

¹Existing trip generation from driveway counts completed on ~~June 9 and June 16~~ June 14, 2001. The estimated gross combined AM and PM peak hour retail volume represents approximately 11 percent of the daily traffic volume. Thus, the daily traffic volume for the existing flea market was estimated using a 11 percent factor.

The existing San José Flea Market is open Wednesday through Sunday from dusk till dawn.

Page 121 Section 4.2 – Transportation and Traffic, Paragraph after Bicycle Facilities Heading; revise as follows:

The proposed network of on-street bicycle lanes and off-street multi-use paths (shown on Figure 16) will encourage bicycle travel, provide appropriate linkages to the existing bicycle lanes on Berryessa Road and Mabury Road, and connect with future multi-use paths along Coyote Creek and Upper Penitencia Creek. As shown on Figure 16, important bicycle design elements include the crossings of the new full-access signalized intersections, the Upper Penitencia Creek multi-use path crossings of the new public streets, and the crossing at Mabury Road and Mabury Yard. The proposed project includes two full-access signalized intersections on Berryessa Road and one full-access signalized intersection on Mabury Road that will provide safe crossing points for bicyclists. The two full-access signalized intersections on Berryessa Road will provide bridge crossing over Upper Penitencia Creek and connections to the Penitencia Creek multi-use path. The full-access signalized intersection on Mabury Road will provide connection to the future Coyote Creek multi-use path south of Mabury Road. Overall, the project will enhance bicycle travel and will not conflict with any existing or planned facilities and operations. The project will not adversely impact bicycle facilities. [**Less than Significant Impact**]

Page 129 Section 4.2 – Transportation and Traffic, Paragraph 2; **add** the following heading prior to Paragraph 2

**Proposed Rezoning
Transportation and Traffic Impacts**

Page 129 Section 4.2 – Transportation and Traffic, Paragraph 2; **add** the following heading prior to the last paragraph;

**Proposed General Plan Amendment
Transportation and Traffic Impacts**

Page 155 Section 4.4 – Air Quality; **add** the following heading prior to the first paragraph:

Proposed Rezoning Air Quality Impacts

Page 163 Section 4.5 – Cultural Resources; **add** the following text to MM 4.5-1:

MM 4.5-1 Mechanical subsurface presence/absence testing will be completed for the project site as the Flea Market is abandoned and parcels are considered for development. Testing will consist of backhoe testing for suspected prehistoric deposits, combined with selected stripping of soils to search for the smaller, more discrete historic deposits which may exist near the former farm residences known to have existed on the site. Where possible, stripping would be confined to the

immediate environment of the former building sites. If no resources are discovered during the presence/absence testing, the consulting archaeologist will decide if archaeological monitoring during construction is warranted and will submit the recommendations to the Director of Planning, Building, and Code Enforcement.

Page 164

Section 4.5 – Cultural Resources; **add** the following text to MM 4.5-6:

MM 4.5-6 Other measures that would mitigate the loss of the San José Flea Market, but are not proposed by the project include the following:

- The on-site preservation of the original market use, or relocation of the use to another permanent site of comparable size within the region that is accessible to the communities that currently serve as vendors, customers, and other patrons of the market and is supported by permanent support facilities.
- Similar to the existing original flea market site (refer to Figure 20), relocation would require an approximately 30-acre site that could provide permanent support facilities and an open-air market. In addition to the approximately 30-acre site, parking for the merchants and patrons of the relocated flea market would need to be provided. Depending on the location of the 30-acre site and the demographics of the existing flea market merchants and patrons, parking could be partially provided by mass transit.
- In order for the relocated flea market to fully mitigate the loss of the existing San José Flea Market, the relocated flea market would need to be economically sustainable. If the relocated flea market is not economically sustainable (e.g., ceases operation soon after relocation), it would not mitigate the loss of the existing San José Flea Market.
- The relocation of the San José Flea Market would require a collaborative effort to identify and retain the values of the market. Its relocation within the region (i.e., a site that is accessible to the communities that currently serve as vendors, customers, and other patrons of the market) would require participation in site selection and possibly advice from members of the varied ethnic cultural and economic groups that now utilize the San José Flea Market. Because the San José Flea Market is currently a vital economic operation, rather than simply an artifact of past social forces, the current participants would have to decide what is required to maintain the patterns, processes, and interactions that have developed at the existing San José Flea Market and now define its character.

Page 164 Section 4.5 – Cultural Resources; **add** the following heading prior to the third paragraph:

Proposed Rezoning Cultural Resource Impacts

Page 165 Section 4.6 Biological Resources, Table 29 Regulation of Biological Resources; **add the following row to Table 29:**

<u>Porter-Cologne Water Quality Control Act</u>	<u>Preserve, enhance and restore the quality of the State's water resources.</u>	<u>RWQCB</u>
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Page 171 Section 4.6 – Biological Resources. MM 4.6-2; **revise** the mitigation measure as follows:

MM 4.6-2 In locations where preservation of existing trees is not feasible due to site constraints, trees to be removed by the project that are not within the riparian habitat of Coyote or Upper Penitencia Creeks shall be replaced at the ratios shown in Table 31.

Page 171 Section 4.6 – Biological Resources. MM 4.6-2, Table 31 Tree Replacement Requirements; **replace** Table 31 with the following Table:

<u>Table 31</u>			
<u>Tree Replacement Requirements</u>			
<u>Type</u>	<u>Diameter</u>	<u>Replacement Ratio</u>	<u>Minimum Replacement Size</u>
<u>Native</u>	<u>18 inches or greater</u>	<u>5:1</u>	<u>24-inch box</u>
	<u>12 - 18 inches</u>	<u>3:1</u>	<u>24-inch box</u>
	<u>Less than 12 inches</u>	<u>1:1</u>	<u>15-gallon container</u>
<u>Non-Native</u>	<u>18 inches or greater</u>	<u>4:1</u>	<u>24-inch box</u>
	<u>12 - 18 inches</u>	<u>2:1</u>	<u>24-inch box</u>
	<u>Less than 12 inches</u>	<u>1:1</u>	<u>15-gallon container</u>
<u>x:x = tree replacement to tree removal ratio</u>			

Page 174 Section 4.6 – Biological Resources, MM4.6-21; **revise** as follows.

MM 4.6-21: Riparian habitat that will be permanently impacted by removal/construction of bridges and stormwater outfalls, or indirectly affected by setback encroachment, will be replaced with locally grown native plantings at a level that will ensure no net loss of habitat functions and values. All mitigation sites will be protected in perpetuity.

Page 182 Section 4.8-Hydrology and Water Quality, Paragraph 7; **revise** the following text:

The USACE is continuing to evaluate alternatives that would provide cost-effective flood protection in an environmentally sensitive nature. The Corps is currently preparing a feasibility study and environmental impact report/environmental impact statement, which are scheduled for completion by 2008. ~~December 2007 and June 2007, respectively.~~ Over the past year, San José and SCVWD staff have been meeting with local, state and federal agencies, as well as other interested stakeholders, and have developed recommendations for future actions in the Upper Penitencia project area.

Page 184 Section 4.8 – Hydrology and Water Quality, Paragraph 1; **revise** the following text:

The currently preferred alternative is a widened Upper Penitencia Creek channel and floodplain with floodwalls to control the peak flow of a 100-year flood event. The preferred alternative would require an approximately 2050-foot wide corridor, measured from the north bank of Upper Penitencia Creek south edge of Berryessa Road.

Page 184 Section 4.8 – Hydrology and Water Quality, Paragraph 3; **revise** the following text:

As The project site south of Berryessa Road is subject to the City’s Post-construction HMP Policy (City Council Policy 8-14), which requires that post-project runoff volume, velocity, and duration does not exceed pre-project conditions (i.e., existing conditions). Compared to existing conditions, the proposed project will reduce the amount of impervious surfaces on the project site by over 25 percent. The existing paved parking lots on the project site will be replaced with over 34 acres of public park and open space uses. As a result, the volume, velocity, and duration of stormwater discharged from the project site will substantially decrease. This is specifically consistent with adopted HMP criteria. All proposed drainage outfalls to Coyote and Upper Penitencia Creeks will be designed and maintained to minimize bank erosion. Therefore, post-project stormwater discharges will not increase erosion or cause other adverse effects in local streams. **[Less Than Significant Impact]**

Page 189 Section 4.8 – Hydrology and Water Quality, MM 4.8-7; **revise** the following text:

- Hydromodification Separators – flow through structures with a settling or separation unit that removes sediments and other pollutants. These devices are appropriate if used in combination with BMPs that are capable of removing the fine particulate matter that is not amenable to removal by hydrodynamic separators, and in combination with filter media that permanently absorbs hydrocarbons. Media Filtration Devices – two chamber system including a pretreatment settling basin and a filter bed.
- Green Roofs – vegetated roof systems that retain and filter storm water prior to drainage off building rooftops.
- Bioretention Cells- small landscaped, graded areas that are constructed with a special soil mix that can absorb and filter runoff.

Page 191 Section 4.8 – Hydrology and Water Quality, MM 4.8-9; **revise** the following text:

MM 4.8-9 The final design of all BMPs, including but not limited to locations, sizes, depths, infiltration rates, and side slopes, shall require review by the City and approval by the Director of Planning, Building & Code Enforcement, prior to issuance of a Building Permit. This will ensure that the final design not only meets the requirements of City Council Policies 6-29 and 8-14, but also addresses related issues such as groundwater protection, dual use, safety, visual and aesthetic considerations, vector control, the capacity of receiving pipelines, and provisions for emergency release of water. BMPs upstream of any new outfalls to Coyote or Upper Penitencia Creeks will also require review by the RWQCB. The project applicant shall defer to the California Stormwater Quality Association’s Stormwater Best Management Practice Handbook for New Development and Redevelopment (January 2003) for the design and sizing of extended detention basins. Basin depths should optimally range from two to five feet with side slopes of 4:1 (horizontal:vertical) or flatter for dual park use purposes.

Page 207 Section 4.9 – Hazards and Hazardous Materials, Paragraph 5; **add** the following heading prior to Paragraph 5:

Proposed Rezoning
Hazards and Hazardous Materials Impacts

Page 223 Section 4.12 – Energy, Paragraph 6; **add** the following heading prior to Paragraph 6:

Proposed Rezoning Energy Impacts

Page 230 Section 5 – Availability of Public Services, Paragraph 4; **revise** the following text:

State law (Government Code Section 65996) specifies an acceptable method of offsetting a project’s effect on the adequacy of school facilities as the payment of a school impact fee prior to issuance of a building permit. California Government Code Sections 65995-65998, sets forth provisions for the payment of school impact fees by new development as the exclusive means of “considering and mitigating impacts on school facilities that occur or might occur as a result of any legislative or adjudicative act, or both, by any state or local agency involving, but not limited to, the planning, use, or development of real property.” [§65996(a)]. The legislation goes on to say that the payment of school impact fees “are hereby deemed to provide full and complete school facilities mitigation” under CEQA. [§65996(b)]. The school district is responsible for implementing the specific methods for mitigating school impacts under the Government Code. The school impact fees and the school districts’ methods of implementing measures specified by Government Code 65996 would ~~partially offset~~ mitigate project-related increases in student enrollment.

Page 291 Section 9 – Significant Unavoidable Impacts, Paragraph 1, add the following text after the first paragraph:

SECTION 9.1 PROPOSED REZONING

The following significant unavoidable impacts would result from the rezoning proposed by the project:

➤ ~~Land Use~~ As discussed in ~~Section 4.1~~, the residential development proposed by the project along the east project boundary north of Berryessa would not be compatible with the existing industrial uses that are adjacent to the east boundary. If the pending General Plan Amendment (GP-03-04-08) for the property adjacent to the east boundary is approved, then it is likely that the property would redevelop with residential uses that are compatible with the proposed project.

Page 291 Section 9 – Significant Unavoidable Impacts, Paragraph 7, **add** the following text after the last bullet item:

SECTION 9.2 PROPOSED GENERAL PLAN AMENDMENTS

The following significant unavoidable impacts would result from the General Plan amendments proposed by the project:

Transportation and Traffic – The General Plan level analysis of the proposed land use and network changes determined that the changes would result in significant traffic impacts both individually (e.g., land use changes only) and combined. There is no feasible mitigation to reduce these impacts to a less than significant level.

Volume II Appendix A – Transportation and Traffic; **Add** the following information:

Congestion Management Program
Deficiency Plan Guidelines
Immediate Implementation Action List
November 18, 1992

A. Bicycle and Pedestrian Actions

A-2 Bike Lockers, Racks, and Facilities at Transit Centers

A-3 Improve Roadside Bicycle Facilities

A-4 Improve Pedestrian Facilities

B. Public Transit

B-3 Shuttle

B-8 Bus Stop Improvements

C. Carpooling, Bus Pooling, Van Pooling, Taxi Pooling

D. High Occupancy Vehicle (HOV) Facilities

E. Transportation Demand Management (TDM) Programs

E-2 Public Information Programs

F. Traffic Flow Improvements

F-2 Peak-Hour Parking and Delivery Restrictions

F-3 Traffic Signal Timing and Synchronization Program

F-4 Traffic Flow Improvements in Urban Areas

I. Site Design Guidelines for New Development

I-1 HOV Parking Preference Program

I-2 Bike Facilities at Development Projects

I-3 Building Orientation Placement at Employment Sites

I-4 Pedestrian Circulation System

I-5 Bike Storage at Residential Development Projects

I-6 Shuttle Service (New Development)

I-7 Transit Stop Improvements

I-8 Multi-Tenant Complex TDM Program

H. Land-Use Program

SECTION 5 COPIES OF COMMENT LETTERS

The original comment letters received on the DEIR are provided on the following pages.



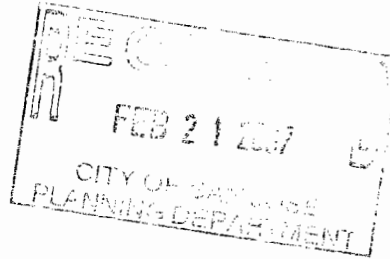
Arnold Schwarzenegger
Governor

STATE OF CALIFORNIA
Governor's Office of Planning and Research
State Clearinghouse and Planning Unit



Cynthia Bryant
Director

February 9, 2007



Janis Moore
City of San Jose
801 N. First Street
San Jose, CA 95110-1795

Subject: Flea Market General Plan Amendment/Planned Development Rezoning File No. GP/GPT06-04-01/PDC03-108
SCH#: 2005042070

Dear Janis Moore:

The State Clearinghouse submitted the above named Draft EIR to selected state agencies for review. On the enclosed Document Details Report please note that the Clearinghouse has listed the state agencies that reviewed your document. The review period closed on February 8, 2007, and the comments from the responding agency (ies) is (are) enclosed. If this comment package is not in order, please notify the State Clearinghouse immediately. Please refer to the project's ten-digit State Clearinghouse number in future correspondence so that we may respond promptly.

Please note that Section 21104(c) of the California Public Resources Code states that:

"A responsible or other public agency shall only make substantive comments regarding those activities involved in a project which are within an area of expertise of the agency or which are required to be carried out or approved by the agency. Those comments shall be supported by specific documentation."

These comments are forwarded for use in preparing your final environmental document. Should you need more information or clarification of the enclosed comments, we recommend that you contact the commenting agency directly.

This letter acknowledges that you have complied with the State Clearinghouse review requirements for draft environmental documents, pursuant to the California Environmental Quality Act. Please contact the State Clearinghouse at (916) 445-0613 if you have any questions regarding the environmental review process.

Sincerely,

Terry Roberts
Director, State Clearinghouse

Enclosures
cc: Resources Agency

**Document Details Report
State Clearinghouse Data Base**

SCH# 2005042070
Project Title Flea Market General Plan Amendment/Planned Development Rezoning File No.
Lead Agency GP/GPT06-04-01/PDC03-108
San Jose, City of

Type EIR Draft EIR

Description Applicant proposes to change the General Plan Land Use/Transportation Diagram designations from Combined Industrial/Commercial on approximately 24.3 acres to Transit Corridor Residential (20+ du/ac) with a Flexible Land Use Boundary; increase building height from 120 ft. to 150 ft. on the portion of the site south of Berryessa Road; and add a Major Collector roadway through the project site between Mabury and Berryessa Roads. The Medium Density Residential (8-16 du/ac) on 8 acres and the Public Park/Open Space on 22.8 acres will remain unchanged. The project also proposes to rezone the site from A(PD) Planned Development Zoning District, IP Industrial Park Zoning District and A Agriculture Zoning District to A(PD) Planned Development Zoning District to allow the development of up to 2,818 residential units and up to 365,622 sq. ft. of combined/industrial/office uses.

Lead Agency Contact

Name Janis Moore
Agency City of San Jose
Phone (408) 277-4576 **Fax**
email
Address 801 N. First Street
City San Jose **State** CA **Zip** 95110-1795

Project Location

County Santa Clara
City San Jose
Region
Cross Streets Both sides of Berryessa Road, north of Mabury Road
Parcel No. 241-03-020; 241-04-006 and 007, 254-17-007, 052, 053, 084, and 095
Township **Range** **Section** **Base**

Proximity to:

Highways 87, 101, 680, 880
Airports
Railways LRT, UPRR
Waterways Coyote and Penitencia Creeks
Schools Berryessa USD, East Side Union HSD
Land Use Flea Market / A(PD) Planned Development Zoning District for commercial uses (100 ac), IP - Industrial Park Zoning District (20 ac), and A - Agriculture Zoning District (0.3 ac) / Combined Industrial/Commercial (31 ac); Transit Corridor Residential (20+ cu/ac) (58.5 ac); Medium Density Residential (8-16 du/ac) (8 ac); Public Park/Open Space (22.8 ac along creeks); with Floating Park designation along north edge of site.

Project Issues Aesthetic/Visual; Agricultural Land; Air Quality; Archaeologic-Historic; Cumulative Effects; Drainage/Absorption; Flood Plain/Flooding; Geologic/Seismic; Growth Inducing; Landuse; Noise; Other Issues; Population/Housing Balance; Public Services; Recreation/Parks; Schools/Universities; Sewer Capacity; Soil Erosion/Compaction/Grading; Solid Waste; Toxic/Hazardous; Traffic/Circulation; Vegetation; Water Quality; Water Supply; Wetland/Riparian; Wildlife

Reviewing Agencies Resources Agency; Regional Water Quality Control Board, Region 2; Department of Parks and Recreation; Native American Heritage Commission; Integrated Waste Management Board; Department of Housing and Community Development; Office of Historic Preservation; Department of Health Services; Department of Fish and Game, Region 3; Department of Water Resources; Department of Conservation; California Highway Patrol; Caltrans, District 4; Caltrans, Division of

Note: Blanks in data fields result from insufficient information provided by lead agency.

**Document Details Report
State Clearinghouse Data Base**

Transportation Planning; Public Utilities Commission

Date Received 12/26/2006 ***Start of Review*** 12/26/2006 ***End of Review*** 02/08/2007



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Southwest Region
777 Sonoma Ave., Room 325
Santa Rosa, CA 95404-6528

February 5, 2007

Ms. Janis Moore
Department of Planning, Building, and Code Enforcement
City of San Jose
200 East Santa Clara Street, 3rd Floor
San Jose, California 95113

Dear Ms. Moore:

Thank you for the opportunity to comment on the Draft Environmental Impact Report (DEIR) for the San Jose Flea Market General Plan Amendment and Planned Development Rezoning – File No. GP/GPT06-04-01/PDC03-108. NOAA's National Marine Fisheries Service (NMFS) has reviewed the DEIR and offers the following comments:

- (1) The DEIR notes the presence of Federally-threatened Central California Coast (CCC) steelhead Distinct Population Segment (*Oncorhynchus mykiss*) and designated critical habitat in Coyote and Upper Penitencia creeks, but minimizes the importance of these streams in the project area. The document states "... these creeks adjacent to the project site are likely only used as rearing habitat for juveniles and as migration routes for adults ..." (DEIR page 167). As an anadromous species, steelhead spend a portion of their life history in freshwater and a portion in the marine environment. Their freshwater phase is critical to their life history and the role of the stream segments adjacent to the San Jose Flea Market should not be dismissed lightly.
- (2) NMFS has been working actively with the Santa Clara Valley Water District (SCVWD) and the Army Corps of Engineers (Corps) in the development of the Upper Penitencia Creek Flood Control Project. The proposed San Jose Flea Market is located within the 100-year Federal Emergency Management Agency (FEMA) flood hazard zone. The goal of this flood project is to remove areas, including the flea market property, in the Upper Penitencia Creek watershed from the 100-year floodplain. Due to extensive urban development in the area, alternatives for flood control are limited. In coordination with the SCVWD, Corps, California Department of Fish and Game, U.S. Fish and Wildlife Service, NMFS, Regional Water Quality Control Board, and City of San Jose's Environmental Services Division, an alternative has been developed for the lower reach of Upper Penitencia Creek that will



convey the 100-year flood and provide habitat for terrestrial and aquatic species, including threatened CCC steelhead. However, this flood control alternative may require a larger set back from Upper Penitencia Creek than proposed by the City in the DEIR. The preferred alternative which was endorsed by the above agencies requires approximately 205 feet of right-of-way that measures from the north side of Upper Penitencia Creek to the flea market property south of the creek. NMFS strongly encourages the City to reserve this right-of-way for future flood project planning.

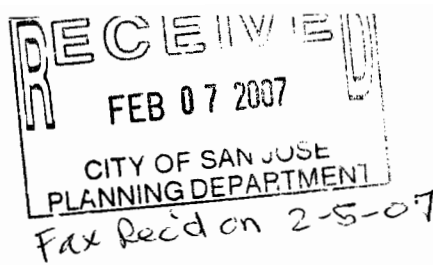
If you have questions concerning these comments, please contact Mr. Gary Stern of my staff at 707-575-6060.

Sincerely,

A handwritten signature in black ink, appearing to read "Dick Butler", written in a cursive style.

Dick Butler
Santa Rosa Area Office Supervisor
Protected Resources Division

cc: Russ Strach, NMFS-Sacramento
Theodore Hipol, SCVWD-San Jose
MaryEllen Dick, City of San Jose, Environmental Services Division
Bill DeJager, Corps-San Francisco
Paul Amato, RWQCB-Oakland
Tami Schane, DFG-Yountville
Ryan Olah, FWS-Sacramento



5 February 2007

City of San Jose
Attn: Ms. Janis Moore
Department of Planning, Building & Code Enforcement
200 East Santa Clara Street
San Jose, CA 95113-1905

Dear Ms. Moore:

RE: Draft Environmental Impact Report for San Jose Flea Market General Plan Amendment and Planned Development Rezoning

Attached please find comments from US Army Corps of Engineers project staff on subject Draft EIR. Point of contact is Mr Bill DeJager, Environmental Section, 415-977-8670.

Thank you,

A handwritten signature in black ink that reads "James S. Miller". The signature is written in a cursive style.

James S. Miller, AICP
Project Manager, Upper Penitencia Creek Flood Damage Reduction Project
US Army Corps of Engineers San Francisco District
333 Market Street
San Francisco, CA 94105

**U.S. Army Corps of Engineers, San Francisco District**

ATTN: CESPN-PM-A
333 Market Street Room 923
San Francisco, CA 94105-2195

FAX: 415-977-8431

FROM: **James S. Miller, AICP, Project Manager** 5 February 2007
PHONE: 415-977-8447
PAGES: 3 (including this header page)

TO: **Janis Moore** FAX: **408-292-6055**
LOCATION: Department of Planning, Building & Code Enforcement
200 East Santa Clara Street
San Jose, CA 95113-1905

SUBJECT: **Draft Environmental Impact Report for San Jose Flea Market General Plan
Amendment and Planned Development Rezoning**

Attached please find comments from Upper Penitencia Creek Flood Damage Reduction project staff (US Army Corps of Engineers) on subject Draft EIR. Separate copy is in the mail today. Point of contact is Mr Bill DeJager, Environmental Section, 415-977-8670.

Thank you,

A handwritten signature in cursive script that reads "James S. Miller".

James S. Miller, AICP
Project Manager
US Army Corps of Engineers San Francisco District
333 Market Street
San Francisco, CA 94105

Flood Control Study

The US Army Corps of Engineers is concerned that the action proposed in the EIR will foreclose the most viable flood control measures now under study by the Corps, measures also supported by the environmental regulatory agencies.

As noted in the Environmental Impact Report (EIR), the U.S. Army Corps of Engineers (Corps) and the Santa Clara Valley Water District (District) are conducting a flood control feasibility study for Upper Penitencia Creek, including the section of creek within and adjoining the location of the proposed action. The proposed land use change would affect all alternatives under consideration in the flood control feasibility study. The flood study has included considerable coordination and collaboration with numerous other agencies including the Regional Water Quality Control Board, National Marine Fisheries Service, California Department of Fish and Game, U.S. Environmental Protection Agency, and U.S. Fish and Wildlife Service, which must agree to the final design of flood control measures before the flood damage reduction project is built.

Page 182 of the EIR states that we will complete the feasibility study in December 2007 and the EIS/EIR in June 2007. The draft feasibility report and draft EIS/R are now scheduled for release in 2008.

Corps and District Flood Control Study Alternatives

The land use action proposed by this EIR would foreclose the alternative considered most viable for flood damage reduction – widening the Upper Penitencia Creek channel from King Road to Coyote Creek. Several widening alternatives are under consideration, although the Corps would normally recommend an alternative that would protect against the 100-year flood.

The Corps and the District initially considered an underground bypass channel to convey flood flows from King Road downstream to Coyote Creek. The underground bypass channel would run under Salamoni Court, continue under an adjacent property, and extend under the parking lot on the south side of the flea market. Although this alternative will remain in consideration until the project is approved, it is not favored by the regulatory agencies and the District staff. The Corps is working to present a plan to Congress that the District and the regulatory agencies can support.

Several regulatory agencies expressed concern the possible effects of the underground bypass channel on stream resources, including the steelhead trout which is protected under the Endangered Species Act. As a result, the study is now considering the widening the creek channel from King Road downstream to Coyote Creek in order to reduce biological impacts and allow their mitigation. All flood damage reduction alternatives would widen only the south side of the creek because of limited space between Berryessa Road and the creek – that is, the widening alternatives along Berryessa Road would occur toward and into the current Flea Market property.

Required Stream Right-of-Way for Flood Damage Reduction

Corps study determined that a right-of-way extending 170 feet south from the creek centerline would be required to convey a 100-year flood through this section of creek. Plans call for an additional 20 feet of right-of-way for a maintenance road, for a total width of 190 feet measured from the creek centerline or 205 feet from the top of the north bank.

The Flea Market EIR is not consistent about the width of the proposed riparian setback along Upper Penitencia Creek. On page 169 it proposes only a 100-foot riparian setback along the creek measured from the edge of the riparian forest. Page 184 states that the width needed for the floodplain plan would be 200 feet measured from Berryessa Road.

The 205-foot right-of-way requirement determined by Corps study would not be satisfied by page 184's 200 foot right-of-way south from Berryessa Road. Starting the channel widening at Berryessa Road would require widening both sides of the channel along much of the length of the flea market property, which is discouraged by the regulatory agencies due to excessive environmental impacts – this constrained right-of-way for the flood control measures would deepen (and make more unstable) the flood flow channel, increase mitigation costs, and undermine the emerging consensus for the flood control project.

Recommended Action

The U.S. Army Corps of Engineers, San Francisco District recommend that 205 feet of right-of-way south of Upper Penitencia Creek be reserved for this flood control project, measured from the top of the north bank.

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



January 16, 2007

Janis Moore
City of San José
801 North First Street
San Jose, CA 95110-1795

RE: Flea Market General Plan Amendment/Planned Development Rezoning.
SCH# 2005042070

Dear Ms. Moore:

As the state agency responsible for rail safety within California, we recommend that any development projects planned adjacent to or near the rail corridor in the City be planned with the safety of the rail corridor in mind. New developments may increase traffic volumes not only on streets and at intersections, but also at at-grade highway-rail crossings. This includes considering pedestrian circulation patterns/destinations with respect to railroad right-of-way.

The project as proposed is based upon being constructed adjacent to BART, however because BART tracks are grade-separated we do not have safety concerns with the project as proposed.

Of chief concern is that approval of the project be contingent upon the BART-to-San Jose project receiving full funding and being built as planned. As planned, the BART system utilizes a restricted access closed-corridor design with no at-grade street or pedestrian crossings. However, full funding for the project has not been secured and is in no way guaranteed. It is quite possible that if full funding for the project is not secured, an alternative of heavy rail Caltrain-style service, or an extension of the Valley Transportation Authority's (VTA) light rail system could be instituted on the rail corridor, utilizing the existing at-grade highway-rail crossings. The San Jose Flea Market General Plan Amendment & Planned Development Draft Environmental Impact Report does consider a "No BART Alternative", but does not consider the project with a heavy or light rail alternative to BART. Such alternatives would satisfy the basic goals of the project in regards to satisfying the minimum housing requirements of a transit station "node" for Federal Transit Authority funding, and could conceivably justify the project.

Impacts created by such a transit alternative include:

- o General safety concerns of exposure for vehicles and pedestrians at at-grade crossings. Each crossing must be evaluated by a diagnostic team consisting of representatives of the local road agency, railroad and CPUC.
- o Level of Service Impacts from railroad crossing gates blocking traffic. As an example, VTA generally runs on 7 to 15 minute headways. This can cause streets which already have poor Levels of Service to fall to unacceptable levels.

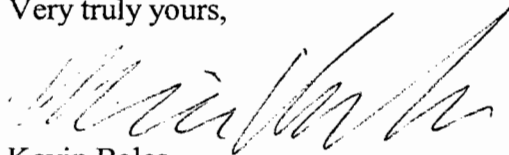
- Installation of vandal-resistant fencing to discourage trespassing onto the railroad right-of-way (ROW). Even with vandal-resistant fencing, the at-grade highway-rail crossings at Berryessa and Mabury Roads could provide access to the ROW. The ROW could be an attractive destination for children living in the adjacent high density housing.
- For the major collector proposed between Berryessa and Mabury Roads, the proposed intersection on Mabury Road is shown to be very closely located to the rail crossing. Such designs have inherent safety deficiencies, so the proposed street should be built as far from the rail crossing as possible. Specific design elements needed should be determined by a diagnostic team.
- CPUC regulations require railroad crossing automatic devices be equipped and sound their bells as trains approach and pass through an at-grade crossing. Furthermore, state and federal rules require trains (including light rail vehicles) sound their on-board audible device as they approach and pass through an at-grade crossing. Grade-separated crossings are not subject to these requirements. These factors should be considered in the noise impact assessment sections of any environmental review documents, especially when considering the alternatives of at-grade versus grade-separated crossing.

The above-mentioned safety improvements should be considered when approval is sought for the new development. Working with Commission staff early in the conceptual design phase will help improve the safety to motorists and pedestrians in the City.

Finally, the California Public Utilities Code requires CPUC approval for any project to construct or modify highway-rail crossings. Therefore, in your project timeline we advise you also consider CPUC application review and approval times.

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

Very truly yours,



Kevin Boles
Environmental Specialist
Rail Crossings Engineering Section
Consumer Protection and Safety Division

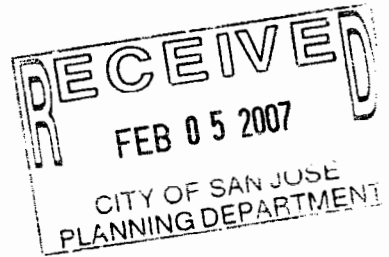
cc: John Donahue, VTA
Darren Gee, VTA

DEPARTMENT OF TRANSPORTATION

P. O. BOX 23660
OAKLAND, CA 94623-0660
(510) 286-4444
(510) 286-4454 TDD



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February 1, 2007

SCL-101-37.41
SCL101802
SCH2005042070

Ms. Janis Moore
City of San José
801 N. First Street
San José, CA 95110-1795

Dear Ms. Moore:

**San José Flea Market General Plan Amendment & Planned Development Rezoning
Draft Environmental Impact Report (DEIR)**

Thank you for including the California Department of Transportation in the environmental review process for the proposed project. We have reviewed the DEIR and have the following comments to offer.

Traffic

The proposed Mitigation and Avoidance Measures involving the intersection of US-101/Oakland Road will require the Department's Project Management and / or Permit branch review and approval.

Please be advised that any work or traffic control within the State right-of-way (ROW) will require an encroachment permit from the Department. To apply for an encroachment permit, submit a completed encroachment permit application, environmental documentation, and five (5) sets of plans which clearly indicate State ROW to the following address:

Mr. Michael Condie, District Office Chief
Office of Permits
California Department of Transportation, District 04
P. O. Box 23660
Oakland, Ca 94623-0660

An encroachment permit application and instructions can be located at the following web address: <http://www.dot.ca.gov/hq/traffops/developserv/permits/applications/index.html>

HQ Structures / Design

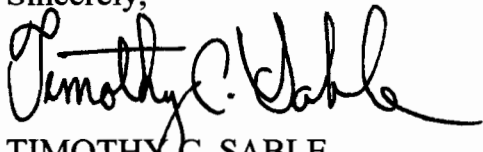
Although this project appeared to have minimal impacts on our state bridges as presented we have the following comments:

1. Please have the project proponent's Engineer of Record (EOR) submit a letter to the Department, bearing a wet seal and signature indicating that there will be no adverse effects on any of the state's structures.
2. We recommend that the design of the bridges over public roads be based on Caltrans bridge design standards as Caltrans is mandated to inspect and rate bridges after construction. This will prevent future reduction of load ratings by Caltrans Engineers.
3. We recommend that the applicant request Caltrans local agency bridge numbers and include this on all bridge plans. Caltrans bridge numbers can be obtained by contacting the Office of Structures Maintenance, at the following telephone number, 916-227-8843. A bridge number is required if the structure is to carry traffic over a public road or is built over a public road.
4. Please have the project proponent's EOR forward drainage and hydraulic calculations as well as complete plans of the proposed project site to our office when available.

Additional comments, if any, from our other functional review units will be forwarded as soon as they are received.

Should you require further information or have any questions regarding this letter, please call José L. Olveda of my staff at (510) 286-5535.

Sincerely,



TIMOTHY C. SABLE
District Branch Chief
IGR/CEQA

c. Scott Morgan (State Clearinghouse)

DEPARTMENT OF TRANSPORTATION

P. O. BOX 23660
OAKLAND, CA 94623-0660
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(510) 286-4454 TDD



*Flex your power!
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February 8, 2007

SCL-101-37.41
SCL101802
SCH2005042070

Ms. Janis Moore
City of San José
801 N. First Street
San José, CA 95110-1795

Dear Ms. Moore:

**San José Flea Market General Plan Amendment & Planned Development Rezoning
Draft Environmental Impact Report (DEIR)**

Thank you for including the California Department of Transportation in the environmental review process for the proposed project. We have reviewed the DEIR and have the following additional comments to offer.

Forecasting

Table 18, pages 109 and 110: please clarify the daily and peak hour traffic as weekday, weekend or 7 day traffic. If it is weekday traffic, the existing Saturday count can not be subtracted as this would underestimate the project trip generation.

Traffic Systems

The DEIR summary of significant environmental impacts on page 8 states that there are significant impacts on up to 18 freeway segments on State Route (SR) 87, US 101, I 280, I 680 and I 880. Furthermore, the DEIR asserts, "There is no feasible mitigation for these impacts."

The list of immediate actions to be taken to reduce the project freeway impacts to less than significant levels, identified in Appendix D of the Draft Countywide Deficiency Plan, was not included in the DEIR. Please submit the identified information for our review and comment.

The Department commonly employs freeway Traffic Operating Systems (TOSs) and Ramp Metering Systems (RMSs) to mitigate the impact of increased traffic. The potential advantage of adding TOS/RMS elements are congestion relief and decreased delay; protection of the level of service (LOS); and response to freeway incidents.

Currently, the Department has TOS/RMS elements on SR 87, US 101, I 280, I 680 and I 880.

Contrary to the DEIR conclusions, the expansion and update of the existing ramp metering systems can mitigate the impact of increased traffic from the proposed development. Performance of the existing ramp metering systems can be improved by increasing vehicle storage and/or adding preferential high occupancy lanes (HOV's) at the on-ramps. Storage can be increased, by adding additional ramp storage lanes, increasing ramp lengths, and constructing additional storage pockets on local roads.

Please ensure the operation of the following ramp metering equipment during all phases of construction.

- NB 101/Oakland Rd. diagonal on-ramp (2 lane meter at the limit line, 5:30 AM to 9:00 AM, Monday through Friday.
- NB 101/McKee Rd. diagonal on-ramp (2 lane meter at the limit line, 5:30 AM to 9:00 AM, Monday through Friday.

Highway Operations

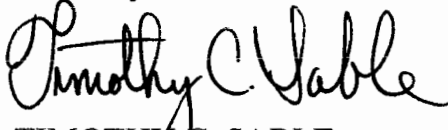
- Please provide the geometric plan and turning movements for the proposed signalization of Berryessa Rd. and Mabury Rd. access roadways to the project site.
- Under the Project Freeway Segment LOS tables, please explain what the correlation is of the Existing Conditions density and LOS when compared to the Project Conditions with added project trips. Based on the Percent Impact, it is not clear why both conditions have the same LOS.
- Please explain why the Background Conditions with added traffic impacts to LOS from other developments as shown in Table 6 are better than the Existing Conditions. Will roadway improvements be made to these facilities?

Additional comments, if any, from our other functional review units will be forwarded as soon as they are received.

Ms. Janis Moore
February 8, 2007
Page 3

Should you require further information or have any questions regarding this letter, please call José L. Olveda of my staff at (510) 286-5535.

Sincerely,

A handwritten signature in black ink that reads "Timothy C. Sable". The signature is written in a cursive style with a large, prominent initial 'T'.

TIMOTHY C. SABLE
District Branch Chief
IGR/CEQA

c. Scott Morgan (State Clearinghouse)



California Regional Water Quality Control Board

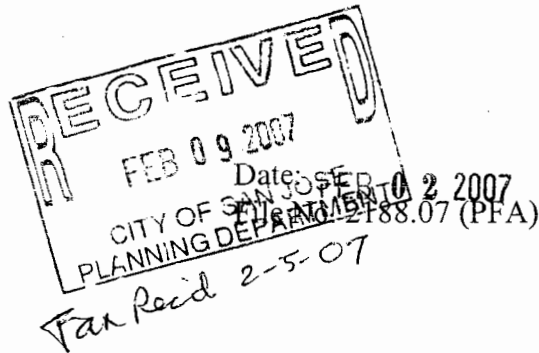
San Francisco Bay Region



Linda S. Adams
Secretary for
Environmental Protection

1515 Clay Street, Suite 1400, Oakland, California 94612
(510) 622-2300 • Fax (510) 622-2460
<http://www.waterboards.ca.gov/sanfranciscobay>

Arnold Schwarzenegger
Governor



Ms. Janis Moore
Department of Planning, Building,
and Code Enforcement
City of San Jose
200 East Santa Clara Street, 3rd Floor
San Jose, CA 95113

Subject: Draft Environmental Impact Report for the San Jose Flea Market General Plan Amendment and Planned Development Rezoning – File No. GP/GPT06-04-01/PDC03-108

Dear Ms. Moore:

San Francisco Bay Regional Water Quality Control Board (Water Board) staff has reviewed the Draft Environmental Impact Report for the San Jose Flea Market General Plan Amendment and Planned Development Rezoning (DEIR), which assess environmental impacts of future development of residential, combined industrial/commercial, and commercial uses on the project site (Project). The Water Board received the DEIR on December 27, 2006, and submits the following comments for your consideration.

Comment 1, Pages 27 and 33, Public Park/Open Space:

The DEIR states that the Project does not propose to design or construct any facilities in the approximately 18 acres of riparian setback along Upper Penitencia and Coyote Creeks but the areas are designated as “Public Park/Open Space”, which can include development such as restrooms, playgrounds, visitor’s centers and parking areas. The DEIR further states that any city parks and open space use established in the riparian setback areas would be passive use that would not impact the riparian area. Water Board staff recognize and appreciate the intention to protect riparian resources and strongly encourage both the Project proponents and the City of San Jose to take this very seriously when considering any plans near or within the setback areas. Since early 2001, the Water Board, California Department of Fish and Game (CDFG), U.S. Environmental Protection Agency (USEPA), U.S. Army Corps of Engineers (USACE), U.S. Fish and Wildlife Service (USFWS), and National Marine Fisheries Service (NMFS) have been working with the USACE and Santa Clara Valley Water District (District) on alternatives for the Upper Penitencia Flood Protection Project. Several discussions resulted in District staff

supporting a floodplain restoration along this reach of creek instead of an underground bypass, as originally planned. Reasons for supporting the floodplain alternative included improving degraded riparian and geomorphic conditions, improving instream habitat for federally and state listed steelhead trout (*Oncorhynchus mykiss*), and preventing passage impacts and incidental take of steelhead that could result from the bypass alternative. As described in the Upper Penitencia Creek Limiting Factors Analysis, (Stillwater Sciences 2006) Upper Penitencia Creek is one of the few South Bay streams to support steelhead and it is considered to have the best habitat. Any planned use in the riparian setback areas should take this into account. To protect these resources, priority use for the riparian setback areas should include maximizing riparian vegetation and establishing adequate wildlife buffers while avoiding or minimizing the development of structural facilities.

Comment 2, Page 165, Table 29 Regulation of Biological Resources:

The summary of regulations in Table 29 should be expanded to clarify that the Water Board has regulatory authority over wetlands and waterways under both the Federal Clean Water Act (CWA) and the State of California's Porter-Cologne Water Quality Control Act (California Water Code, Division 7). Under the CWA, the Water Board has regulatory authority over actions in waters of the United States, through the issuance of water quality certifications (certifications) under Section 401 of the CWA, which are issued in combination with permits issued by the USACE, under Section 404 of the CWA. When the Water Board issues Section 401 certifications, it simultaneously issues general Waste Discharge Requirements (WDRs) for the project, under the Porter-Cologne Water Quality Control Act. Activities in areas that are outside of the jurisdiction of the USACE (e.g., isolated wetlands, vernal pools, or stream banks above the ordinary high water mark) are regulated by the Water Board, under the authority of the Porter-Cologne Water Quality Control Act. Activities that lie outside of USACE jurisdiction may require the issuance of either individual or general waste discharge requirements from the Water Board.

Comment 3, Page 169, Replacement Bridges and Road Widening:

The DEIR describes two replacement bridges and widening of Berryessa Road from two to three lanes in both directions. Bridge construction typically requires a permit from the Water Board as well as the USACE and CDFG. The Water Board will assess whether impacts have been adequately avoided, minimized and mitigated pursuant to the Federal Clean Water Act and Porter Cologne. Because bridges have an impact on streams and riparian areas, the Project proponent should assess the need for two bridge crossings and consider whether one bridge would be sufficient to provide access from Berryessa Road to the Project. In addition, proposed bridges should not impede flood flow capacity of the future flood project on Upper Penitencia Creek.

Widening of Berryessa Road could encroach on the north side of Upper Penitencia Creek. The current alignment of Berryessa Road governs the plan form of the creek and is in very close proximity. To the extent possible, road widening should be to the north and away from the

existing creek alignment. Consideration should be given to the current capacity of the Berryessa Road Bridge over Coyote Creek in anticipation of the future Mid-Coyote Flood Protection Project being planned by the District. Close coordination should be undertaken with the District to assess anticipated cross-sectional area requirements of the flood project corridor and whether the current culvert should be redesigned to accommodate flood capacity and ecological services.

Comment 4, Page 169, Riparian Setback on Coyote Creek:

The DEIR describes a 100-foot setback along Coyote Creek with the exception of a 40 to 100-foot setback south of Maybury Road due to the location of an existing major connector road. The District is in the planning phase for the Mid-Coyote Flood Protection Project between Interstate 280 and Montegue Expressway, which includes the reach of Coyote Creek adjacent to the Project area. The Project proponent should provide ample riparian setback in all locations and not constrain the flood project cross-section in this location. Relocation of the major connector road should be considered. Coyote Creek is a confined channel but the flood project has the potential to widen and improve the existing cross-section in order to increase flood conveyance and riparian habitat. Water Board staff recognize that the Mid-Coyote Project has not been designed and that a cross-section in the Project reach is undetermined but at the same time, it is critical that all parties coordinate and not preclude an environmentally superior alternative.

Comment 5, Page 170, Biological and Water Quality Impacts:

The DEIR describes construction activities in and near the live stream that could impact steelhead or western pond turtle (*Clemmys marmorata*) as well as water quality. The Project proponent will very likely be required to dewater Upper Penitencia Creek and Coyote Creeks in the work areas to avoid impacts. In the event that this is required, a dewatering plan should be submitted with the stormwater pollution prevention plan as part of the permit application to the Water Board. Consultation with Water Board staff is recommended in advance.

Comment 6, Page 170, Outfalls:

Three outfalls are described with two draining to Coyote Creek and one to Upper Penitencia Creek. No detail is provided. Outfall designs typically call for hardscape on the channel banks and increased direct discharge resulting in increased erosion and pollutants in streams. The Project proponent should minimize hardscape and identify alternative locations for these features. Outfalls should be located outside of the active channel and instead, should drain to the floodbench area where flows can infiltrate into the soil.

Comment 7, Page 171 and 174, Tree Replacement:

Some of the tree replacement ratios in Table 32 appear to be in error. Native trees with a diameter of 12-18 inches are described as "none". Does this mean that no native trees in this size range are identified for removal or does it mean they will not be mitigated? If it means they will not be mitigated, this will need to be revised so that they are. The table proposes to mitigate native and non-native trees less than 12 inches in diameter 1:1. This is low for native trees.

Typically, native trees are mitigated 3:1 and non-native trees are mitigated 1:1. Ratios are prescribed on a case-by-case basis. The mitigation proposed would ultimately need to adequately replace the habitat value that is lost and compensate for the temporal loss between the time of unavoidable impacts and regrowth of planted vegetation. The Project proponent is encouraged to work with Water Board staff and CDFG to develop an appropriate mitigation plan.

The location of the riparian mitigation is proposed for the 100-foot setback area. The Project proponent should work with the USACE and the District to ensure that there is adequate room in the riparian setback areas to accommodate riparian mitigation of the flood projects on Upper Penitencia and Coyote Creeks as well as the mitigation for the Project without reducing flood conveyance capacity.

Comment 8, Pages 185-186, Upper Penitencia Creek Riparian Setback:

The DEIR describes the USACE/District Upper Penitencia Creek Flood Protection Project needing a 200-foot wide corridor to accommodate the preferred alternative and states that the Project is “generally consistent” with the preferred alternative. The DEIR describes the 200-foot wide corridor as measured from the south side of Berryessa Road. Water Board staff understand that the USACE and District need a 205-foot wide setback measured from the top of the north bank of Upper Penitencia Creek. These two descriptions may not be consistent. Water Board staff recommend the Project proponent continue to work with the District to confirm the setback width and location relative to the creek in order to provide sufficient right of way to accommodate the USACE/District Upper Penitencia Creek Flood Protection Project floodplain alternative.

Comment 9, Pages 189-191, Mitigation and Avoidance Measures for Hydrology and Water Quality Issues:

Water Board staff recommend the revision of one of the bullet items in Mitigation Measure 4.8-7, and the addition of another bullet item to this mitigation measure.

The seventh bullet lists “hydromodification separators” as a post-construction best management practice (BMP) for stormwater runoff. The following text should be added to this bullet, “These devices are appropriate if used in combination with BMPs that are capable of removing the fine particulate matter that is not amenable to removal by hydrodynamic separators, and in combination with filter media that permanently absorbs hydrocarbons.”


Water Board staff recommend that a bullet be added to this mitigation measure stating that bioretention cells may be used as a post-construction BMP. These treatment devices may require less surface area than standard bioswales or infiltration basins.

Comment 10, Page 191, Mitigation and Avoidance Measures for Hydrology and Water Quality Issues, Mitigation Measure 4.8-9:

Water Board staff recommend including the potential use of bioretention cells in this mitigation measure (see previous comment). In addition, the mitigation measure should note that treatment BMPs upstream of any new outfalls to Coyote or Upper Penitencia Creeks will also require review by the Water Board. The Water Board requires that all runoff discharged from outfalls that require either CWA Section 401 water quality certification or WDRs meet Clean Water Act maximum extent practicable (MEP) treatment standards.

Thank you again for the opportunity to review the DEIR and provide comments. We look forward to your response. If you have any questions, please contact Paul Amato at (510) 622-2429, or via e-mail at pamato@waterboards.ca.gov, or Brian Wines at (510) 622-5680, or via email at bwines@waterboards.ca.gov.

Sincerely,



Dale C. Bowyer
Supervisor,
South and East Bay Section

CC:

Mr. Theodore Hipol, SCVWD - San Jose

Mr. Steve Bui, SCVWD - San Jose

Ms. Maryellen Dick, City of San Jose, Environmental Services Division

Ms. Tami Schane, CDFG - Yountville

Mr. Bill DeJager, USACE - San Francisco

Ms. Luisa Valiela, USEPA - Region 9

Mr. Gary Stern, NOAA Fisheries - Santa Rosa

Mr. Ryan Olah, USFWS - Sacramento

County of Santa Clara

Parks and Recreation Department

298 Garden Hill Drive
Los Gatos, California 95032-7669
(408) 355-2200 FAX 355-2290
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February 5, 2007

City of San Jose
Plan Implementation Division
Planning, Building and Code Enforcement
Attn: Janis Moore
200 East Santa Clara Street, Tower, 3rd Floor
San Jose, CA 95113-1905

SUBJECT: Draft Environmental Impact Report (DEIR) for the Flea Market General Plan Amendment and Planned Development Rezoning

PROJECT APPLICANT: The Flea Market, Inc

FILE NO: GPT06-04-01 and PDC03-108

APN: 241-04-006, 241-04-007, 241-03-020, 254-17-007, 254-17-052, 254-17-053, 254-17-084, 254-17-095

Dear Ms. Moore:

The Santa Clara County Parks and Recreation Department has reviewed the Draft Environmental Impact Report (DEIR) for the Flea Market Planned Development Rezoning and General Plan Amendment, and submits the following comments. Upon reviewing the DEIR, we noted that many of the earlier comments we submitted in response to the Notice of Preparation (NOP) for this project were not addressed in the DEIR. For your reference, a copy of our response letter to the NOP, dated March 29, 2006, is attached.

The County Parks and Recreation Department is focused on potential significant impacts related to the Santa Clara County Countywide Trails Master Plan routes, and with potential impacts to the biological resources and hydrology within or adjacent to the riparian corridor of Upper Penitencia and Coyote Creeks. Two of the City of San Jose's stated objectives for the proposed project (Section 1.4 of the DEIR), "to create a safe, walkable environment..." and "to provide appropriate riparian setbacks..." appear to support our concerns for trail development and riparian corridor protection.

Consistency with the *Santa Clara County Countywide Trails Master Plan Update*

Section 3 of the DEIR (Consistency with Plans and Policies) should acknowledge the policies and guidelines of the *Santa Clara County Countywide Trails Master Plan Update (Countywide Trails Master Plan)*, which the County Board of Supervisors approved in November 1995 as part of the Parks and Recreation Element of the County of Santa Clara's General Plan (1995-2010).



Consistency with the Joint Use Agreement for the Penitencia Creek Park Chain

Section 3 of the DEIR should acknowledge the Joint Use Agreement (JUA) for the development of the Penitencia Creek Park Chain among Santa Clara County, the City of San Jose, and Santa Clara Valley Water District, as the proposed project site lies within one-half mile of existing County parklands (Penitencia Creek County Park).

Consistency with the Countywide Habitat Conservation Plan / Natural Community Conservation Plan

The City of San Jose, County of Santa Clara, City of Morgan Hill, City of Gilroy, Santa Clara Valley Water District and Santa Clara Valley Transportation Authority are collaborating on a Countywide Habitat Conservation Plan (HCP) / Natural Community Conservation Plan (NCCP) project. The project site lies within the project area of the HCP/NCCP; therefore, Section 3 of the DEIR should assess the consistency of the proposed project with the goals and objectives of the HCP / NCCP.

Trail Routes

Section 4.1 of the DEIR (Land Use) should address Santa Clara County General Plan policies on countywide trails, given the location of trail routes within and immediately adjacent to the proposed project site, and should describe the following countywide trail routes within the vicinity of the proposed Flea Market project:

- ***Coyote Creek/Llagas Sub-regional Trail*** (Route S5) - Designated as trail route within other public lands for hiking, on and off road cycling. This trail route lies within the southwest boundary of project parcel APN 241-04-007 and parallel to Coyote Creek.
- ***Bay Area Ridge Trail: El Sombroso/Penitencia***, (Route R5-C) - Designated as trail route within other public lands for hiking, off road cycling, and equestrian use. This trail route lies adjacent to the projects southeast boundary and parallels Penitencia Creek.

The above trail routes connect to the Coyote Creek Trail system, a regional trail route, with segments designated as the Northern Retracement Route of the Juan Bautista de Anza National Historic Trail. The County Department of Parks and Recreation Parks should be included in discussions of proposed trail alignments identified in the Countywide Trails Master Plan that potentially affect the continuity of regional trails.

Both of these trails are also identified in the City of San Jose's Greenprint. The City is in the process of master planning a reach of the regional trail alignment along Coyote Creek - between Story Road and Highway 101. It has also secured partial funding to plan and construct the trail between Highway 101 and Montague Expressway, but has yet to commence that planning effort. Once fully developed the regional Coyote Creek Trail System will link the County's trail from Morgan Hill to the Highway 237 Bikeway, at the San Jose/Milpitas border - offering nearby access to the San Francisco Bay Trail

It should be noted that the Greenprint is a visionary document that shows general trail alignments, but does not indicate the actual locations of alignments for trail projects. Thus, the assertion under Section 3.1.4.10 of the DEIR that the proposed trail along Coyote Creek would be on the opposite side of the creek from the project site per the Greenprint is not accurate. Until the City prepares a Master Plan to determine trail alignments in the project area, the DEIR should not state that the specific trail alignment has already been determined. Master plans to the north and south of the project site are under development, and it appears likely at this time that the future trail alignment could be on the east bank of the creek adjacent to the development. Because of this, 40-foot setback areas near Mabury Avenue (see discussion below under Riparian Corridor Setbacks heading) could present a potentially serious impediment to future trail development.

Land Use

Section 3 (Consistency With Plans and Policies) and Section 4.1 (Land Use) of the DEIR should consider the goals, policies and implementation measures in the Santa Clara County General Plan related to the provision of countywide trails (Parks and Recreation Element) and protection of natural resources (Resource Conservation Element) for Penitencia Creek and Coyote Creek.

The DEIR should also address the increased recreational demands that would be created as a result of the increased residential population from the proposed 2,818 residential units as well as from the proposed commercial and retail development. The housing density is appropriate in part because of the proposed Bay Area Rapid Transit alignment located nearby the proposed project.

Hydrology and Water Quality

Section 4.8.2 of the DEIR discusses the proposed project in reference to the Upper Penitencia Creek Flood Protection Project (A partnership between the U.S. Army Corps of Engineers and the Santa Clara Valley Water District) that is currently under development.

The Penitencia Creek Park Master Plan, prepared on July 18, 1977 at the request of the Santa Clara County Board of Supervisors, indicates a future trail alignment within the Penitencia Creek flood control area under Santa Clara Valley Water District (SCVWD) jurisdiction. In a comment letter dated April 12, 2000 regarding File No. PDC00-0-3-022, an opportunity for an alternative trail alignment that continued to the southerly side of the Flea Market was identified as a future major connection to the Coyote Creek Trail System in conjunction with the implementation of the SCVWD's proposed bypass flood control channel.

The current project may affect this earlier alternate alignment; however, the Parks Department encourages the City of San Jose's Department of Planning, Building and Code Enforcement to work with the City of San Jose's Department of Public Works (DPW), Department of Parks, Recreation, and Neighborhood Services (PRNS) in developing a trail easement dedication within the proposed development, and to include County Parks in discussions on the existing and proposed trails alignments that may be affected by the Upper Penitencia Creek Flood Control Project.

There is a need to re-align the existing confluence of Penitencia Creek and Coyote Creek within the project area. Improper alignment of the meeting point of the two creeks would impact flood control efforts, and would also impact the design of the intersection of two regional trail networks (Penitencia Creek Trail and Coyote Creek Trail).

Riparian Corridor Setbacks and Protection

In addition to the Section 3.3 discussion of City of San Jose riparian corridor policies, the DEIR should consider the goals, policies and implementation measures in the County of Santa Clara's General Plan (Resource Conservation Element) related to riparian corridor protection for Penitencia Creek and Coyote Creek.

The proposed project site is adjacent to the Penitencia Creek and Coyote Creek riparian corridors. Project impacts, including potential cumulative impacts, on critical habitat and on species of special concern within the riparian corridors should be evaluated, given the proximity of the project site to these creeks. These riparian corridors serve as important connectors for wildlife species, and the project should consider the identification of minimum widths for urban wildlife travel at different times of the year and during different life stages.

Section 4.6.3 of the DEIR includes further discussion of the project's consistency with the City of San Jose's Riparian Corridor Policy Study, given a proposed 100-foot setback from the riparian habitats of Coyote and Upper

Penitencia creeks. The exception to the proposed 100-foot setback is an area at the south end of the project site along Coyote Creek just upstream of Mabury Road.

The DEIR states that the existing 40-100-foot variable setback at this location would not be altered. Narrow setback dimensions of less than 100 feet are not in the spirit of the City of San Jose's riparian corridor guidelines, and potentially limit the ability to build a continuous trail system along Coyote Creek. The 40-foot setback area near Mabury Avenue may prevent future trail development and result in a discontinuous trail system, as such a narrow setback may limit the ability to provide for both riparian protection and passive recreational use. The proposed project should be considered an opportunity to re-design the trail alignment and/or other elements within this area in order to bring the entire project site into consistency with the recommended 100-foot riparian setback..

Transportation

The project would increase vehicular traffic along Berryessa and Mabury Roads, and may impact park circulation patterns, particularly as the primary vehicular access to Penitencia Creek Park is off Berryessa Road. Traffic and circulation impacts may also impact the designated regional trail routes and nearby parklands. These potential impacts should be assessed in Section 4.2 of the DEIR.

The DEIR should address multi-modal transportation alternatives, such as bicycle commuting, which could be achieved by improving bicycle commuter, and bicycle/transit opportunities. Countywide trails offer opportunities for non-motorized transportation connections with the surrounding neighborhoods, parks and open space areas. Because the project site has been identified as a potential location for a BART transit station, pedestrian/bicycle connections and connections to the trail routes should be evaluated in the DEIR. The juxtaposition of high-density housing and alternate rapid transit should provide for comprehensive alternative transportation opportunities by including adequate space along Coyote Creek and Penitencia Creek for the planned regional trails.

The Parks and Recreation Department appreciates the opportunity to review and submit comments on the draft EIR for the Flea Market Planned Development, Zoning and General Plan Amendment. If you have any questions regarding these comments, please contact me at (408) 355-2230 or by email at Alice.Daly@prk.sccgov.org.

Sincerely,



Alice Daly
Park Planner

Attachment: Response Letter re Flea Market, Inc. NOP, dated March 29, 2006

cc: Mark Frederick, *Planning & Development Program Manager, County Parks and Recreation*

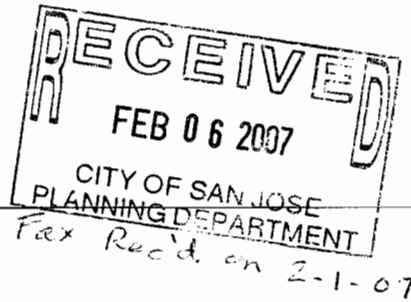
Yves Zsutty, *City of San Jose Dept of Parks, Recreation and Neighborhood Services Program Manager*

Project File: PDC03-108

County of Santa Clara

Roads and Airports Department

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



January 30, 2007

Ms. Janis Moore
City of San Jose
Department of Planning, Building and Code Enforcement
200 East Santa Clara Street
San Jose, CA 95113-1905

Subj: Draft Environmental Impact Report for San Jose Flea Market General Plan Amendment
And Planned Development Rezoning
City File No: GP/GPT06-04-01 & PDC03-108; SCH NO. 2005042070

Dear Ms. Moore:

We have received and reviewed your Draft Environmental Impact Report (DEIR) for San Jose Flea Market. The following are our comments:

1. The background conditions of your Draft Environmental Impact Report on page 29 under 1a, 2a, and 2b for Montague Expressway as identified in background roadway improvements in the Comprehensive County Expressway Planning Study are incorrect. The improvements as identified in the Expressway Planning Study have not been implemented due to the absence of funding. These improvements should not be used for background traffic analysis.
2. Please recalculate the background Level of Service for Montague Expressway intersections in the Final Transportation Impact Analysis (OCT 2006) based on the revised background assumption as stated in comment #1 above, and include Montague Expressway intersection analysis in the Traffic Impact Study Amendment (DEC 2006).
3. Developer should pay fair share on the widening of Montague Expressway.
4. Please provide us a copy of your Final Environmental Impact Report for our review and comment.

Thank you for the opportunity to review and comment on this project. Please call me at (408) 573-2462 for any questions.

Sincerely,

Felix Lopez
Project Engineer

cc: MA, AP, NC, MLG, WRL, RN, file



Fax Rec'd on 2/5/07

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AN EQUAL OPPORTUNITY EMPLOYER

File: 29014
Coyote Creek

January 25, 2007

Ms. Janis Moore
Department of Planning, Building, and Code Enforcement
City of San Jose
200 East Santa Clara Street, 3rd Floor
San Jose, CA 95113

Subject: Draft Environmental Impact Report for the San Jose Flea Market General Plan Amendment and Planned Development Rezoning – File No. GP/GPT06-04-01/PDC03-108

Dear Ms. Moore:

The Santa Clara Valley Water District (District) has reviewed the subject document received on December 26, 2006.

General Comments

The San Jose Flea Market is located within the 100-year FEMA flood hazard zone. The proposed development within the existing floodplain should not increase the 100-year water surface elevation on surrounding properties nor should it increase existing flooding. The site grading must be designed to allow for the passage and storage of flood water within the site. A flood plain analysis will need to be prepared to delineate the post development floodplain depth and lateral extent.

To prevent pollutants from construction activity, including sediments, from reaching Coyote Creek and Upper Penitencia Creek, please follow the Santa Clara Urban Runoff Pollution Prevention Program's recommended Best Management Practices for construction activities, as contained in "Blueprint for a Clean Bay," and the "California Storm Water Best Management Practice Handbook for Construction."

The District is working in partnership with the Corps on a flood protection project to remove areas, including the flea market property, in the Upper Penitencia Creek watershed out of the 100-year floodplain. The District and Corps are working to complete the feasibility study and environmental impact study/environmental impact report (EIS/EIR) in 2008.



Currently, District staff's preferred alternative in this reach of the project between the confluence with Coyote Creek and King Road is the 100-year widened channel and floodplain alternative. This alternative would require approximately 205 feet of right-of-way that measures from the north bank of Upper Penitencia Creek to the flea market property south of the creek. This alternative has been endorsed by City staff in the Environmental Services Division and representatives from regulatory agencies including the National Marine Fisheries Service, Regional Water Quality Control Board, U.S. Fish and Wildlife Service, Department of Fish and Game, and U.S. Environmental Protection Agency.

Comments to Specific Sections:

Page 33 – South of Berryessa, Public Park/Open Space:

Specific designs for trails and other passive recreational uses within the riparian setback areas designated as *Public Park/Open Space* will continue to be coordinated between the City, the District and Corps to ensure that the floodplain alternative is incorporated.

Page 33, 6th paragraph states, "The project does not propose to design or construct any specific improvements on the land designated for Public Park/Open Space uses."

This appears to be in conflict with the two proposed drainage outfalls (page 190, figure 24) that are located on the bank of Coyote Creek.

Page 34 – Bridges:

The proposed clearspan bridges should not impede flood flows within the Corps proposed future floodplain and should provide adequate access for vehicles to monitor and maintain the creek after the flood protection project is constructed.

Page 47, 3rd paragraph:

The 40' riparian corridor offset (instead of 100 feet as per the City's policy) will limit flood protection opportunities near Mabury Road. The District recommends maintaining the 100 foot offset. Portions of the project are inconsistent with the City of San Jose's Riparian Corridor Policy Study; therefore a less than significant impact is not the appropriate assessment for purposes of avoiding or mitigating an environmental effect pursuant to the requirements of CEQA. Furthermore, the riparian corridor would greatly benefit from an additional separation from such a dense development proposal.

Page 51, 7th paragraph:

The District requests the relocation of the San Jose Maintenance Yard driveway and the proposed intersection to maintain the 100 foot riparian corridor offset.

Page 58 – South of Berryessa, Pipelines/Rights-of-Ways:

The District's right of way contains Central Pipeline, a 66-inch diameter high pressure raw water supply pipeline, not storm drain as noted in the document. The right of way is owned in fee title by the District rather than an easement. The project proponent should discuss site layout alternatives early in the design process to determine acceptable uses of the pipeline's right of way.

Page 60, 6th bullet:

Please clarify if there is any conflict with any habitat conservation plan(HCP). The document does not assess the consistency of the proposed project with the goals and objectives of the Santa Clara County Habitat Conservation Plan (HCP)/ Natural Community Conservation Plan (NCCP).

Page 61, 4th paragraph states, "This Major Collector roadway would be located entirely within the boundaries of the project site and would not affect existing surrounding land uses." This Major Collector is responsible for the reduced riparian corridor offset (from 100 feet to 40 feet) and as a result changes adjacent open space land use.

Page 165, Table 29, Regulation of Biological Resources:

The project should be consistent with the 'Guidelines and Standards for Land Use Near Streams.'(G&S) developed by the Water Resources Protection Collaborative.

Page 166, Special Status Species:

The District conducted a biological resource assessment in 2006 that includes this portion of the riparian corridor. Several special status species were noted as having moderate potential to occur adjacent to this development but appear to be missing as part of this assessment. They are White-tailed Kite (*Elanus leucurus*), Yellow Warbler (*Dendroica petechia*) and Pallid Bats (*Antrozous pallidus*). A special status species list should be developed from querying CNDDDB database and reviewing previous biological resource assessments for Coyote Creek that documents the presence of sensitive species within and adjacent to the project area.

Page 168, Habitat Loss:

The riparian habitat in the project vicinity is described on page 167 as being of 'medium quality'. This instream work described under habitat loss (page 168) could have a substantial effect on the riparian habitat yet the conclusion was this is a less than significant impact. Riparian habitats in California are considered ecologically important areas because of the level of species diversity this type of community supports. This is in direct conflict with the 'Significant Impact' determination made under riparian habitat heading for the same work that is described under both headings (i.e. construction of three outfalls and two bridges).

Ms. Janis Moore
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Page 170, Interference with Movement of Wildlife:

Coyote Creek corridor is critical to the continued local survival of a number of common and sensitive wildlife species and is one of the last remaining continuous corridors in the South Bay. While the riparian corridor is constrained by urban development, the corridor is continuous from the baylands to the higher quality habitats of Upper Penitencia and the upper reaches of Coyote Creek. Fragmentation of the corridor in itself is a significant impact and therefore should be evaluated as such.

Page 170, 2nd and 3rd paragraph:

The District will need to review the designs for the drainage outfalls to the creeks. They should comply with the G&S.

Page 171, Table 31, Tree Replacement Requirements:

Add note to clarify that the large box tree sizes [24-inch and 15 gallon] are not requirements for any habitat mitigation plants or native tree species in the landscape. Those should be contract-grown local natives and hence are typically provided in small, specialized revegetation containers [dee pots, 1 gallon or 2 gallon tree pots]. Unless this relaxation of the tree replacement requirements occurs, local natives will essentially be excluded from the riparian setback area which is inconsistent with the intent of creating setbacks.

Page 172, Tree Protection:

Add reference to the tree-specific [by species & age] tree protection setback distances found in 'Calculating Recommended Tree Protection Zones [TPZ's]' in the Guidelines and Standards and incorporate into this section and add a TPZ for each tree to be retained as part of the tree inventory, MM 4.6-5.

Page 174, Riparian Habitat Replacement, MM 4.6-21

Edit text to state that only **local** native plants contract-grown from propagules collected from wild parent plants in the Upper Penitencia/Coyote Watershed will be installed inside the 100-foot setback area.

Please submit a copy of the Mitigation and Monitoring Plan to the District when available for review.

Page 182, 3rd paragraph:

"...Stormwater runoff is collected on-site by an underground storm drain system and discharge directly to both Upper Pen and Coyote Creeks. Portion of the site also drain overbank into the creeks..."

Any drainage outfalls to the creeks should be designed and maintained to minimize bank erosion. The Flooding and Drainage Evaluation acknowledges the project poses an unresolved potential conflict with the District's flood protection project. The EIR and/or subsequent PD should address this conflict by accommodating the necessary area for adequate flood protection.

Ms. Janis Moore
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Page 182-184, Flood Protection Project:

The Corps will not complete the feasibility study and environmental impact report/environmental impact statement by December 2007 and June 2007, respectively. These documents will be completed in 2008. The widened Upper Penitencia Creek channel and floodplain alternative is currently staff's preferred alternative and has not been approved by the District's Board of Directors or Corps. The alternative requires a 205-foot wide corridor, not 200 feet.

Page 186 – 1st paragraph:

The Upper Penitencia Creek Flood Protection Project will need an additional 5 feet of right of way.

Botanical comments:

- Was a vegetation survey conducted? Please include survey results.
- Was a sensitive plant survey conducted? Please include survey results.
- If no sensitive plant species were thought to occur on site, this should be documented by a plant species list and CNDDDB search results. There are historic occurrences of *Centromadia parryi* ssp. *congdonii* and *Chorizanthe robusta* var. *robusta* that overlap the proposed project site (CNDDDB 2006). The DEIR and Biological Impact Assessment should contain language that references the literature review and subsequent decision criteria used to arrive at a conclusion that no sensitive plants were expected to occur, or were found to occur, on site.
- A plant species list should have been prepared as part of a vegetation and rare plant field survey in order to document absence of potential impacts to sensitive plant species.

There does not appear to be any vegetation information, literature review, or a plant species list, therefore unresponsive of the conclusion that no significant impacts to vegetation or sensitive plant species are expected to occur as a result of the proposed project.

Revegetation/mitigation should be consistent with the applicable guides contained in the G&S. A copy of these guidelines can be located at the following:

[http://www.valleywater.org/Water/Watersheds -
streams and floods/Taking care of streams/ Guidelines & standards/Guidelines &
Standards.shtm](http://www.valleywater.org/Water/Watersheds_-_streams_and_floods/Taking_care_of_streams/Guidelines_&_standards/Guidelines_&_Standards.shtm)

For plant related information, please refer to Chapter 4 - Design Guides, Guides 1 to 5 on pages 4.2 thru 4.12

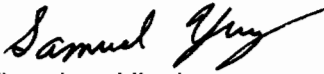
The Notice of Preparation responses to comments were not included in Appendix I.

Ms. Janis Moore
Page 6
February 5, 2007

These comments should be addressed and plans for this project should be submitted to the District, when available, for our review. Please reference District File No. 29014 on further correspondence regarding the project.

Should you have any questions, please give me a call at (408) 265-2607, extension 2494.

Sincerely,


for

Theodore Hipol
Assistant Engineer
Community Projects Review Unit

cc: County of Santa Clara
Attn: Ms. Alice Daly
Parks and Recreation Department
298 Garden Hill Drive
Los Gatos, CA 95032

S. Tippetts, S. Yung, T. Hipol, S. Bui, S. Katric, B. Mendenhall, K. Sibley, Z. Shao,
J. Castillo, J. Hillman, M. Moore, L. Spahr, M. Klemencic, File(2)

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February 13, 2007

City of San Jose
Department of Planning and Building
200 East Santa Clara Street
San Jose, CA 95113

Attention: Janis Moore

Subject: City File No. GPT06-04-01 / Flea Market Draft EIR

Dear Ms. Moore:

Santa Clara Valley Transportation Authority (VTA) staff have reviewed the Draft EIR (DEIR) for a General Plan change to Transit Corridor Residential (20+ du/ac) with a Flexible Land Use Boundary on 24.3 acres on both sides of Berryessa Road. Our comments are focused on encouraging the application of VTA's Community Design and Transportation (CDT) Guidelines, which encourages alternative transportation modes, and supporting the highest usage/ridership of the BART extension to Milpitas, San Jose, and Santa Clara.

Coordination with BART Extension Project

- Southern portion of the Flea Market Site. As specified in the certified FEIR for the BART Extension to Milpitas, San Jose and Santa Clara, issued in November 2004 and DSEIR released January 2007, the southern end of the San Jose Flea Market Site is needed for parking, ancillary facilities and/or construction staging to construct and operate the BART project.
- Land uses mix. Mixed land uses promote activity centers that support both peak and off-peak ridership, which is crucial to maximizing transit use. VTA recommends inclusion of commercial and retail land uses in the proposed land use plan.
- Minimum residential densities. The VTA Board of Directors adopted the Community Design and Transportation (CDT) Program in November 2002 as its primary program for integrating transportation and land use, and the City of San Jose, through Council resolution has endorsed the CDT Program and its guiding principles. As specified in Appendix D of the Community Design and Transportation Manual (page D-3), the flea market site is considered a regional station area and should have a minimal residential density of 55 du/ac. The minimum densities in the proposed land use plan are less than 55 du/ac. The manual also provides guidance on site planning, building design, street design, preferred pedestrian environment, intersection design and parking requirements which is applicable to the project area.

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Page 2

- Coordination with City of San Jose's Master Street Network. The City of San Jose's proposed master street network for the flea market site to support transit-oriented development and the BART project is not reflected in the proposed land use plans. An appropriate level of traffic analysis should be conducted to evaluate whether the proposed land use in addition to future planned projects in the area, including the BART project, can be supported by the master street network.
- Analysis of impacts to transit systems. Evaluation should be conducted to identify how both the Flea Market and planned BART system and VTA bus service could go forward. This information is needed for VTA to plan for sufficient transit services to support TOD and maximize transit ridership.
- Riparian setback assumptions. On page 47 it appears that the developer is assuming a riparian setback of 100 feet whereas the BART project assumes 150 feet or greater based on guidance from the Santa Clara Valley Water District. On page 64 the railroad right-of-way is assumed to be 75 feet. However, the actual width is 60 feet. These design assumptions should be clarified in the document.

Transportation Impact Analysis Review

- Trip Reduction Rates. A thirty five percent (35%) reduction for Live/Work units was used in the DEIR citing data from the Metropolitan Transportation Commission (MTC). Please provide back-up information from the MTC study that supports the reduction rate used in the DEIR. Although the VTA *TIA Guidelines* do not include trip reduction strategies for Live-Work units, on-going work to update these guidelines could add such strategies. Any back-up information that can be provided could be useful for the addition of trip reduction strategies for Live-Work units in the next update of the *TIA Guidelines*.
- Proposed Mitigation for Freeway Segments. Page 121 of the DEIR states that the results of the freeway level of service analysis indicate that the proposed project would create a significant impact on 18 freeway segments on four freeways in the project area. Currently, there are two auxiliary lane improvement projects on US 101 identified in Valley Transportation Plan 2030 (VTP 2030) within the study area. As such, VTA recommends fair share contribution by the developer towards the auxiliary lane improvements on US 101. It is recommended that the amount of the contribution be jointly decided in coordination with the Lead Agency (City of San Jose) and Caltrans.

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Page 3


- Bicycle and Pedestrian Facilities. Please note that Mabury Avenue is a designated Cross County Corridor in the 2000 Countywide Bicycle Plan and remains one in the update-in progress. The amendment should also discuss the project's consistency with the County Trail Master Plan. The project should construct the multi-use trails that border the project within the setback they are providing along Coyote Creek and Penitencia Creek.

The discussion on Page 121 of the DEIR on bicycle facilities is too vague regarding the description of bicycle facilities and improvements. It does not indicate how bikes and pedestrian access the future Coyote Creek trail and Penitencia Trails within the site. Please elaborate on the section that begins: "important bicycle design elements include the crossings of the new full access signalized intersections, the Upper Penitencia Creek multi-use path crossings of the new public streets, and the crossing at Mabury Road and Mabury Yard".

Since the site is bounded by Coyote Creek on the west, the railroad tracks and future BART tracks on the east and is bisected by Penitencia Creek, bicycle/pedestrian bridges over these barriers are essential to the success of this project in promoting and attracting bicycle and pedestrian trips.

For further information, please contact Roy Molseed at (408) 321-5784.

Sincerely,



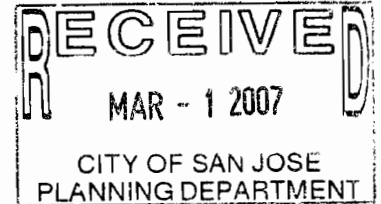
Carolyn M. Gonot
Chief Development Officer

CMG:RM:kh

cc: Henry Servin, San Jose DOT
Rich Buikema, San Jose Planning
Ebrahim Sohrabi, San Jose Development Services

February 21, 2007

Janis Moore
Department of Planning, Building and Code Enforcement
200 East Santa Clara Street
San Jose, CA 95112



RE: DRAFT ENVIRONMENTAL IMPACT REPORT (DEIR) for the San Jose Flea Market General Plan Amendment & Planned Development Rezoning (GP06-04-01 & PDC03-108)

Dear Ms. Moore:

At the February 21, 2007 Historic Landmarks Commission special meeting, the Commission discussed the Draft Environmental Impact Report for the San Jose Flea Market General Plan Amendment & Planned Development Rezoning. In a 5-0-2 (Lavelle and Thacker absent) decision, the Commission voted to forward this comment letter, signed by the Chair, for submittal to the Director of Planning, Building and Code Enforcement.

Consistency with Plans and Policies

It should be noted that the document clearly states that the project would not be consistent with the purpose and intent of the *City Council Policy on the Preservation of Historic Landmarks*, which states that "Every effort should be made to incorporate existing landmark structures into future development plans." In particular, the proposal to demolish the Flea Market fails to provide a comprehensive economic evaluation of adaptive reuse or relocation of this culturally significant resource.

Cultural Resources

The original San Jose Flea Market site (approximately 45 years old) was evaluated in an Archival Research Report (Appendix D), prepared by historical consultants Archives and Architecture: Heritage Resource Partners, last revised November 1, 2006. The Report concludes that the Flea Market appears to qualify for the California Register of Historical Resources under Criterion 1, and as a Candidate City Landmark, for its association with patterns of events that have made a significant contribution to the broad patterns of the history and cultural heritage of California.

The report included information that the San Jose Flea Market serves as an alternative city center for a large proportion of the citizens of San Jose and adjacent cities. The site acts as a major regional commercial destination, providing shopping, entertainment, and exterior gathering places. Its low, densely packed, open-air shopping aisles provide an extraordinary spatial experience that is unequaled in the region. The provision of physical service buildings, and open physical space arranged into rectangular grids of parallel pathways with major cross streets, have provided a framework that allows a distinctive economic and social culture to flourish within the City. The original flea market site (1960-1980) reflects a unique pattern of development in San Jose, Santa Clara Valley that has made a significant contribution to the broad patterns of local and regional history through the maintenance of a successful commercial culture outside the mainstream venues.

The document also includes information that the project site is situated in an area of high archaeological sensitivity, and contains one recorded historic site and several other areas that could yield significant information pertaining to early development of San Jose.

Mitigation Measures and Alternatives

Commissioners noted that archaeological mitigation measures MM 4.5-1 through 4.5-4 do not include monitoring. Given the location of the site in an area of high archaeological sensitivity, the Commission recommends archeological monitoring mitigation measures be required.

While commissioners expressed some disagreement between themselves regarding the documentation supporting the conclusions in the Archival Research Report, the Commission specifically voted 5-2-0 (Lavelle and Thacker absent) to support the North Only alternative, which avoids significant impacts to the resource and is environmentally superior to the proposed project.

Mitigation Measure MM 4.5-6 includes other measures that would mitigate the loss of the San Jose Flea Market, but are not proposed by the project including the on-site preservation of the original market use, or relocation of the use to another permanent site of comparable size within the region that is accessible to the communities that currently serve as vendors, customers, and other patrons of the market and is supported by permanent support facilities. The Commission noted further that the document does not adequately evaluate an alternative for relocation of the Flea Market to another site within the region that is accessible to the communities that currently serve as vendors, customers, and other patrons, and again voted 5-2-0 (Lavelle and Thacker absent) to recommend that a relocation alternative be included in the document.

Conclusion

The Landmarks Commission opposes the wholesale demolition of the San Jose Flea Market due to its economic and cultural significance and the potential feasibility of mitigation measures not proposed by the project, including partial on-site preservation and/or relocation within the City.

Thank you for the opportunity to comment on this document.

Sincerely,



Edward Janke, AIA, Chair
San Jose Historic Landmarks Commission

C: San Jose Historic Landmarks Commission



People • Service • Environment
NORCAL WASTE SYSTEMS, INC.

January 11, 2007

Ms. Janis Moore
Department of Planning, Building and Code Enforcement
200 East Santa Clara Street, 3rd Floor
San Jose, CA 95113

Re: San Jose Flea Market Project EIR

Dear Ms. Moore,

We are writing on behalf of NorCal Waste Systems of San Jose Inc. (NWSSJ), which collects garbage, recycling, bulky goods and yard waste, and provides residential street sweeping service for approximately 150,000 homes in the City of San Jose. NWSSJ's base of operations is at 1120 Berryessa Road, near the site (1590 Berryessa) that is the subject of the Draft Environmental Impact Report for the San Jose Flea Market for a General Plan Amendment and Planned Development Rezoning. The change in land use designation from Combined Industrial/Commercial to Transit Corridor Residential and the proposed 120-foot residential building heights are a concern to NWSSJ and other viable industrial firms in the vicinity. NWSSJ has occupied its site for many years - as have most of the industrial firms located nearby.

All of these industrial firms provide essential services and goods to the San Jose and California economies and may not be compatible with new adjacent residential uses, as noted in the EIR. While we commend The City and applicants on the creation of a 200-foot+/- buffer between the proposed housing and existing industry, the City is proposing to permit housing up to ten stories, or 120 feet, overlooking the industrial areas. This effectively grants residents of highrise housing oversight of the industrial activities within their viewshed. Hereafter, any permit renewal or other discretionary action by the City for any industrial use could be stalled or denied by complaints from the highrise NIMBY's on the flea market site. They could decide they don't (or think they won't) like what they see from their windows and create roadblocks to retaining the industrial uses.

To reduce the resulting risk of this project driving productive industrial firms out of the City, we request that a mitigation measure be added to the DEIR. The measure should require that a "NOTICE OF INDUSTRIAL NEIGHBORHOOD" be recorded against the residentially-zoned land, providing as follows:

NOTICE OF INDUSTRIAL NEIGHBORHOOD

This Notice is to inform all persons contemplating the acquisition of any interest in [describe the affected property, defined as the "Subject Property"] that (1) there are long-standing pre-existing industrial uses of other property in the neighborhood of the Subject Property, (2) prior to acquiring any interest in the Subject Property, such persons should investigate and consider the effects of such industrial uses – and reasonably foreseeable future modifications of such uses – on the owners and occupants of the Subject Property, and (3) acquisition of the Subject Property will be deemed to constitute consent to such effects.

This does not prohibit the new residents from complaining about industry but it documents that the industrial uses pre-dated their development of the new housing. It also provides some modest assurance to the nearby industries that the normal conduct of their businesses is known and acceptable to the City.

Please provide such a mitigation measure or provide an explanation on the record why such a measure is not recommended. Thank you for your consideration of these concerns.

Please note that on February 5, 2007 I contacted Ms. Janis Moore to confirm that comments sent in on February 6, 2007 would be accepted. Ms. Moore confirmed that she would accept this late submittal.

Sincerely,

A handwritten signature in cursive script, appearing to read "Rachel Oster".

Rachel Oster
Planning Coordinator

Moore, Janis

From: Yanmu Huang [huangyanmu@yahoo.com]
Sent: Monday, January 08, 2007 10:46 PM
To: janis.moore@sanjoseca.gov
Subject: Comments on EIR report #PDC03-108

This is to comment on the EIR report of the Berryessa Flea Market re-zoning project, file No: PDC03-108, District: 04, Quad No: 51, 67.

The report does not address the traffic impact on Bellemeade Street of the project after Sierra Road is extended and connected to Berryessa Road.

Currently, residents on both sides of Valleycrest Drive have three choices to access Sierra Rd: north part of Bellemeade St., Briarcrest Dr., and Royalcrest Dr.

After Sierra Rd is connected to Berryessa Rd, the south part of Bellemeade will be the shortest path to highway 101, those people will tend to take the south part of Bellemeade Street to access Sierra Road at the intersection of Sierra & Bellemeade & Chessington. They will in addition be pushed to do so by the fact that Sierra Rd is downgraded to a two-lane connector and will be crowded by traffic from Flickinger and Lundy.

Proper signals or signs shall be set at the intersection of Bellemeade St. & Valleycrest Dr to prevent traffic on west-bound Valleycrest from making left turn onto Bellemeade in the mornings, and to prevent traffic on north-bound Bellemeade from making right turns onto Valleycrest in the evenings.

Thank you,

A resident

San Jose, CA

1/10/2007

Moore, Janis

From: Wilson Lee [wilsonlee_98@yahoo.com]
Sent: Monday, January 22, 2007 6:18 PM
To: Janis Moore
Cc: coyote-creek@yahoogroups.com
Subject: Comment from Public - Flea Market Rezoning File # GP/GPT06-04-01/PDC03-108

Dear City of San Jose Planning Staff:

I represent approximately 110 households and 400+ residents in the California Colony and Encore housing developments directly north of the Flea Market parking lot (Chessington Dr. and Bellemeade St.), east of Coyote Creek, and bisected by Sierra Rd.

I would like to assert, on behalf of our informal neighborhood association, that noise mitigation MM 4.3-5 in the *Flea Market EIR GP/GPT06-04-01/PDC03-108* (Pg 141) will not be sufficient to eliminate the exposure of those residents affected by Graniterock to noise levels in less than 55dBA (reference: Figure 18, Pg 136). The singular effective mitigation will be to require that Graniterock cease nighttime operations.

Year-round, residents in the neighborhoods above, including those on Maybury Rd. well beyond a 1000 radius of Graniterock, can report hearing the whirring of the asphalt turbine, the impact of railroad car coupling, and the hissing of other heavy industrial machinery. The mitigation that "windows may be kept closed...to control intrusive intermittent noises" is not a reasonable recommendation from a quality of life standpoint. Likewise, six-foot high soundwalls are insufficient to reduce noise in multi-story dwellings where bedroom windows would typically be on upper floors.

Moreover, the dust effects of Mitigated Negative Declaration, CP00-03-009, Graniterock Crushing Facility, are not factored into the scope and content of the Flea Market General Plan EIR --

The CP00-03-009 permit was originally denied 7-0 in Aug 2003 by the SJ Planning Commission on health and welfare grounds. Direct transcripts from the Planning Commission audio recording:

- o "Our industrial design guidelines indicate that new development creating ... noise, dust, traffic, odor,...hazardous materials should not, should not be located in proximity to residential. Yet [Graniterock] is trying to do just that in direct opposition to [San Jose's] industrial design guidelines. I honestly am not sold on the idea. I think there's going to be a lot of damage to the neighborhood from this. And the design guidelines that we are given to go by, just fly in the face of this project." *Commissioner James, Planning Commission Chairman*
- o It is totally unbelievable why we are letting it pass without a full EIR....This lot is inappropriate for expansion....they should look for expansion some other place." *Commissioner Dillon*
- o "The project adversely affects the peace, health, safety, morals, and welfare of persons in the surrounding area [due to] adverse impacts from noise and dust." *Commissioner Zito*

Four hundred residents signed a petition supporting the Planning Commission's decision. Unfortunately, Graniterock appealed this decision and had the Planning Commission's vote overturned by the City Council in Jan 2004.

Nevertheless, the Planning Commission's statements remain true to this day and the presence of hundreds more dwelling units in the vicinity of Graniterock will exacerbate the problem manifold. We implore city staff to reconsider the negative health, safety, welfare, and quality of living problems that Graniterock imposes on the thousands of present and future residents of housing within a one-half mile radius of their operation. **In conclusion, we request that the next draft of the EIR: i) consider ceasing Graniterock nighttime operations as a requirement of Mitigation MM 4.3-5, and ii) factor in the dust impact from CP00-03-**

2/8/2007

009.

Wilson Lee

1267 Littleton Dr.
San Jose, CA 95131

408-492-5776

Have a burning question? Go to [Yahoo! Answers](#) and get answers from real people who know.

Dear City of San Jose Planning Staff:

8:00? 8:25? 8:40? [Find a flick](#) in no time
with the [Yahoo! Search movie showtime shortcut](#).

2/8/2007



February 23, 2007

Ms. Janis Moore
Department of Planning, Building & Code Enforcement, City of San Jose
200 East Santa Clara Street
San Jose, CA 95113-1905

Re: Draft Environmental Impact Report for San Jose Flea Market General
Plan Amendment and Planned Development Rezoning

Dear Ms. Moore:

This letter provides comments on behalf of Berryessa Union School District ("School District" or "District") on the Draft Environmental Impact Report ("DEIR") prepared for the San Jose Flea Market General Plan Amendment and Planned Development Rezoning Project ("Project").

The Project proposes amendments to the City of San Jose General Plan and rezoning that would, among other things, allow for the future development of up to 2,818 residential units at the Project site. In response to the Notice of Preparation ("NOA") for the DEIR, the School District stated that if such an increase in residential units within the School District occurs, the School District will need to construct a new school to accommodate the students generated by that development. The DEIR fails to adequately consider these issues.

General Failure to Address Impacts on Schools

Although the DEIR provides in-depth analysis of certain impacts of the Project, including a 63-page evaluation of transportation and traffic impacts, a 9-page analysis of impacts on cultural resources and a 12-page assessment of the impacts on biological resources, it devotes only a relatively rote 1 ½ pages to the impact on public schools, and fails entirely to identify the impact on schools as one of the impacts of the Project. The DEIR also essentially disregards the District's response to the Notice of Preparation, in which the District, as a responsible agency, informed the City that a new school would have to be constructed to accommodate the project.

Instead, while acknowledging that the School District's existing schools that would serve the Project area are at or beyond capacity and that the Project

Ms. Janis Moore

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Department of Planning, Building & Code Enforcement, City of San Jose
February 23, 2007
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would generate approximately at least 175 new students who would attend School District schools (a figure that the School District contests; see below), the DEIR dismisses the need to construct a new school to serve such students, instead stating “[t]here are a number of methods that can be used to accommodate the increased numbers of students that do not require that new schools be built” and proceeds to list such alleged alternatives (including “the provision of portable or relocatable classrooms” and “the conversion to year-round schools with a four-track schedule”) without further analysis (DEIR 5.3).

The DEIR also notes that state law “specifies an acceptable method of offsetting a project’s effect on the adequacy of school facilities as the payment of a school impact fee prior to issuance of a building permit”, but acknowledges that “The school impact fees and the school districts’ methods of implementing measures specified by Government Code 65996 would *partially* offset project-related increases in student enrollment.” (DEIR 5.3; emphasis added.) Finally, the DEIR dismisses the need for further analysis of the impacts of increased student population, stating “Further discussion at this time of the impacts that might result from building one or more schools in the project area at an unknown location would be speculative.” (DEIR 5.3.)

It is the District’s position that the DEIR is inadequate regarding schools and actual impacts on schools. The preparer of an EIR must make a genuine effort to obtain and disseminate information necessary to the understanding of impacts of project implementation. (See CEQA Guidelines § 15151; Sierra Club v. State Board of Forestry (1994) 7 Cal.4th 1215, 1236.) Additionally, an EIR must set forth a reasonable, detailed and accurate description of existing environmental settings, including both natural and man-made conditions, such as public facilities. (See CEQA Guideline §§ 15125 (c) & 15360.)

The DEIR does not meet its informational purpose. The DEIR merely concedes that there will be an increased demand on educational services within the School District, but does not provide an analysis of impacts including but not limited to fiscal impacts (e.g. the School District’s ability to obtain developer fees, whether these fees will result in a surplus or deficit of funding for the School District, and what the effects will be on staffing and curriculum). For instance, it provides no information regarding the School District’s fiscal health, funding sources available to the School District to maintain existing and to build new facilities, school overcrowding or future population projections. No consideration or analysis was given whatsoever to the feasibility or effectiveness of the six suggested “methods” to accommodate students identified in the DEIR. As an example, bussing is mentioned, but there is no consideration of whether sufficient capacity exists at other District

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schools. Additionally, the District does not currently provide bussing (except for special education students), and has no funds available to provide such bussing; developer fees may only be used for school construction and reconstruction (Ed. Code §§ 17620, et seq.), and there are no available general funds within the District's budget.

Without knowing the extent and nature of the impact on school, readers of the DEIR and agencies including the School District are unable adequately to assess the actual impact. Similarly, without knowing more about the specific impacts, it is impossible to formulate meaningful mitigation measures.

Specific Failure of DEIR to Examine All Potential Impacts Related to School Facilities

The DEIR failed to provide a thorough examination of all potential impacts related to school facilities, as set forth below.

1. DEIR Does Not Provide an Adequate Description of Existing Facilities or of Student Generation Rates

The DEIR does not provide an adequate description of the existing conditions within the School District, on a school-by-school basis, including size, location and capacity. Instead the DEIR limits its review to stating, without citation, that the School District's "elementary and middle school student generation rates are 0.046 and 0.016 students, respectively." Using these rates (which the School District contests) the DEIR calculates that the Project "would generate approximately 130 students that would attend Vinci Park Elementary School and 45 students that would attend Piedmont Middle School" but goes on to acknowledge that during the 2004-2005 school year Vinci Park Elementary School was at capacity and that the School District has already added portable classrooms to accommodate overflow at Piedmont Middle School. In fact, the student generation rates selected by the City are woefully low. The District has determined that a one-year-old development within the School District similar in size to the Project has had an actual student generation rate of approximately 0.11 students per residence. If this rate is applied, the estimated increase of students generated by the Project doubles, to approximately 350 students. The District's schools in the vicinity lack capacity for portables sufficient to house so many students. The DEIR must analyze the location, size, capacity and structure of existing School District Facilities as

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well as providing reasoned data and analysis regarding student generation rates before reaching an educated conclusion regarding the existence and significance of any impacts on the School District from the Project. In fact, the School District does not have adequate facilities to house the students who will eventually reside in the increased residential units generated by the Project.

2. DEIR Does Not Adequately Describe Enrollment Trends

The DEIR does not adequately describe the School District's past and present enrollment trends. While the DEIR does state the enrollment for each school affected by the Project, it does not discuss whether enrollment has been increasing, decreasing or sustaining. As a result, the DEIR cannot adequately evaluate the projected future impact the students from the Project will have on the schools over time. In fact, as acknowledged by the DEIR, the affected elementary school (Vinci Park) is already at capacity. Also, all of the School District's middle schools are nearing full capacity, with the affected middle school (Piedmont) already overcrowded with an enrollment greater than 1,100 students.

3. DEIR Fails to Identify the Cost of Providing Capital Facilities to Accommodated Students on a Per-Pupil Basis

The DEIR does not identify the cost of providing capital facilities to accommodate students on a per-student basis. Specifically, it does not address the situation of whether the additional students from the Project are going to require additional classrooms which would not otherwise be required absent the Project, resulting in a higher "per-pupil cost." For instance, if a school had three third grade classes, all at capacity, and the Project generated four third graders, the school could have to open an entirely new class to accommodate four students. The cost associated with the capital facilities to accommodate those four students should be assessed on a per-pupil basis because, without the Project, there would be no need for the additional facilities.

4. DEIR Does Not Assess the School District's Present and Projected Capital Facility, Operation and Personnel Costs.

The DEIR does not assess the School District's present and projected capital facility, operations and personnel costs. Without this information, the City cannot make an adequate assessment of whether or not the school services will actually be impacted or can be provided.

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5. DEIR Does Not Identify Any Specific Expected Fiscal Impacts on the School District

The DEIR does not identify any specific expected fiscal impacts on the School District, including an assessment of projected cost of land acquisition, school construction, and other facilities needs. For instance, the potential cost to the School District of acquiring property for the construction of new school facilities within the Project area may be prohibitive. In fact, the School District projects that developer fees will be inadequate to offset the potential fiscal impacts of the Project.

6. DEIR Does Not Assess Cumulative Impacts

The DEIR does not assess the cumulative impacts on schools resulting from additional development already approved or pending. Under CEQA Guidelines 15355, *et seq.*, the City must analyze the cumulative impacts of a proposed project. Cumulative impacts refer to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts. (Guidelines § 15355.) The individual effects may be changes resulting from a single project or a number of separate projects. (*Id.* at 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 probably future projects. (*Id.* at 15355(b).) In this case, the DEIR does not address the cumulative impact to the School District of this Project.

Specific Failure of DEIR to Analyze Impacts to Schools Other than Facilities

In addition to the impacts on school facilities, CEQA requires an evaluation of Project impacts on all school related services. The DEIR focuses only on the facilities requirements. Specifically, the DEIR should address the following issues related to public school services.

1. DEIR Does Not Provide a Description of Projected Staffing Requirements

The DEIR does not provide a description of projected teacher/staffing requirements based on anticipated population growth and existing State and School District policies. This information is critical for the City to assess

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whether the Project impacts staffing requirements by necessitating additional teachers. Like the capital facilities assessment described in the preceding section, this assessment must be completed on a per-pupil basis.

2. DEIR Does Not Analyze Whether the Project Has Any Impact on Curriculum

The DEIR fails to analyze whether there is any impact on curriculum as a result of anticipated population growth. Specifically, the DEIR should have addressed whether additional programs would now be required (including but not limited to special education and specific general education courses) as a result of the influx of students from the Project.

3. DEIR Does Not Assess Each School District's Present and Projected Capital Facility, Operation and Personnel Costs

The DEIR does not assess the School District's present and projected capital facility, operations and personnel costs. Without this information, the City cannot make an adequate assessment of whether or not the school services will actually be impacted.

4. DEIR Does Not Assess Foreseeable Impacts on Traffic

To the extent that students in the project would have to be transported to other areas for school, it is foreseeable that traffic and pedestrian safety impacts would arise. The DEIR fails to take into account this foreseeable impact.

DEIR's Inadequacy Regarding Mitigation Measures

Based on the deficiencies of the DEIR described above, along with the fact that the DEIR does not identify the expected shortfall or excess between estimated development fees to be generated by the Project and the cost for provision of capital school facilities, it is the School District's position that the DEIR's failure to identify the impact on schools as an environmental impact of the Project is inadequate. Under the Government Code, the City has a duty to coordinate with the School District to provide effective school site planning. The City should consider alternative mitigation measures, such as those proposed below, to fulfill that duty.

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State Law Does Not Limit School Impact Mitigation to Developer Fees

The DEIR notes that “State law (Government Code Section 65996) specifies an acceptable method of offsetting a project’s effect on the adequacy of school facilities as the payment of a school impact fee prior to issuance of a building permit”. This statement is conclusory and without merit.

In fact, Government Code section 65996 does not relieve a city or county from analyzing the impact on schools of a proposed project, concluding that there are significant impacts that may remain unmitigated and further analyzing whether a mitigation measure is available to adequately mitigate the impacts. The Project cannot be approved unless the City either imposes mitigation measures adequate to mitigate identified impacts to a level of less-than-significant or the City adopts an applicable statement of overriding consideration. (Public Resources Code § 21002; CEQA Guidelines §§ 15021 (a) (2), 15091 (a) & 15096 (g); see Sierra Club v. Gilroy City Council (1990) 222 Cal.App. 3d 30.) The developer fees cited by the DEIR were never intended to supplant other mitigation, nor would it necessarily mitigate all impacts of this development. Additionally, the DEIR concedes that developer fees would only “*partially* offset project-related increases in student enrollment” but fails to explore other measures that would alleviate the impact of those increases in student enrollment.

The Legislature Intended Coordinated Planning for School Sites

Government Code sections 65352 and 65352.2 (all subsequent code sections refer to the Government Code unless otherwise specified) require local cities and counties to coordinate planning of school facilities with school districts. The Legislature confirmed that the parties are meant to coordinate “[o]ptions for the siting of new schools and whether or not the local city or counties existing land use element appropriately reflects the demand for public school facilities, and ensures that new planned development reserves location for public schools in the most appropriate locations.”

The Legislature recognized that new planned development should take into consideration and even “reserve” where schools would be located to serve the development because schools are as integral a part of planning for new development as is any other public service, such as fire, police, water and sewer. As it relates to this case, the intent behind sections 65350, et seq., supports the District’s position that the City must analyze whether the current size of District schools is adequate to accommodate both its existing population

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and the new development (which it is not), particularly in light of the cumulative factors addressed in this letter. The City can help the District provide adequate facilities resulting from the impact of the Project, which are not addressed by developer fees, by requiring alternative mitigation measures to assure that there is an adequate site to accommodate school facilities.

Alternative Mitigation Measures

Land Dedication

One possible mitigation measure would be for the City to consider adopting findings requiring any developer building residential units on the Project site to dedicate land and/or funding pursuant to Government Code sections 65970 et seq., which permit the City to require a developer to dedicate land to a School District. Section 65974 specifically states that “for the purpose of establishing an interim method of providing classroom facilities where overcrowded conditions exist, . . . a city, county, or city and county may, by ordinance, require the dedication of land, or the payment of fees in lieu thereof, or a combination of both, for classroom and related facilities for elementary or high schools as a condition to the approval of a residential development.”

A land dedication requirement would be good public planning benefiting all residents of the community, including future residents of the Project. As development occurs, land suitable for new school sites grows scarcer. Under Government Code sections 65352 and 65352.2, the City has a duty to help plan for adequate services to their residents by ensuring that future sites are set aside for schools. Failure to do so leads to inadequate services, future controversies, and the potential need for a school district to exercise its rights under eminent domain to displace existing residents.

Finally, land dedication is a permissible mitigation measure under Government Code sections 65995, et seq., which are cited by the DEIR. Section 65995, subdivision (a), specifically states that “[e]xcept for a fee, charge, dedication, or other requirement authorized under Section 17620 of the Education Code, or pursuant to Chapter 4.7 (commencing with Section 65970), a fee, charge, dedication or other requirement for the construction or reconstruction of school facilities may not be levied” Section 65995 expressly excludes Chapter 4.7, inclusive of section 65974, from this limitation, thus permitting a city to address conditions of overcrowding in school facilities or inadequately sized school sites by requiring, for example, the dedication of land.

Further, the City is authorized by section 66478 of the Subdivision Map Act to

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Ms. Janis Moore
Department of Planning, Building & Code Enforcement, City of San Jose
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require dedication of elementary school sites when needed to address development. Nothing in Government Code sections 65995, et seq., precludes such a requirement.

Land dedication is particularly important in the project's vicinity given the lack of available vacant land for school facilities.

Phasing

Another method by which the City can work cooperatively with the School District within all legal constraints to ensure adequate school facilities with regard to new development is by requiring development to be phased and not permitted prior to availability of school facilities. Timing development so as to balance the availability of school facilities with new development can significantly aid the School District in its attempt to provide for the additional students generated by new development.

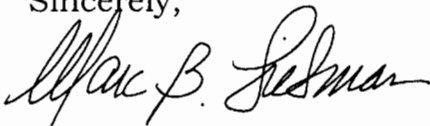
Cooperative Use

The City and the School District can also work together to ensure adequate school facilities to serve the residential units contemplated by the Project by entering into a partnership to jointly use school and park land for recreation and educational purposes. It is desirable for both public entities to have land set aside for both school and park use so that a single joint use facility of ten or more acres would be available to both the School District and residents within the Project site.

Conclusion

It is the District's position that the DEIR does not adequately analyze the Project's potential impacts to schools. The DEIR must address with greater specificity the impacts on school facilities and services. The District encourages the City to work cooperatively with the District and consider alternative measures, such as phasing or land dedication, which can adequately mitigate the impacts on the District's schools.

Sincerely,



Marc B. Liebman, Ph.D.
Superintendent

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