

APPENDIX C

Riparian Habitat Evaluation

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Huffman-Broadway Group, Inc.

ENVIRONMENTAL REGULATORY CONSULTANTS

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October 8, 2020

Ms. Juliet Martin
Project Manager
Circlepoint
46 South First Street
San Jose, CA 95113

Subject: Updated Riparian Habitat Evaluation for 1936 Alum Rock Avenue, San Jose, California

Dear Ms. Martin:

This letter and its attachments provide an evaluation of the riparian habitat of Lower Silver Creek in the vicinity of the property at 1936 Alum Rock Avenue in San Jose, California, and the implications of development of a mixed-use project at the site in the vicinity of the nearby riparian zone.

1.0 PROJECT BACKGROUND

Pacific West Communities, Inc. is proposing development of a mixed-use project at the parcel at 1936 Alum Rock Avenue in the City of San Jose. The location of the Project Site is shown in Figure 1. The 1.49-acre parcel at 1936 Alum Rock Avenue is located in an urbanized area of San Jose and can be accessed from Alum Rock Avenue. This urban site has been previously developed and disturbed, is almost entirely hardscape and has been used for a variety of commercial and residential land uses. Although business and residences at the site were vacant prior to demolition of commercial and residential buildings in 2018, land uses in operation over the last few years at 1936 Alum Rock Avenue included Martin's Plastering (commencing in February of 2014), Blue Lagoon Aquarium sales (commencing in March 2010), and several residences including someone with a recycling operation that was living in an RV.

The property at 1936 Alum Rock Avenue is surrounded by a variety of commercial and residential land uses. The adjacent property to the east at 1948 Alum Rock Avenue is a parcel of approximately 1.0 acre that fronts onto Lower Silver Creek. Established land uses on this property include an ongoing commercial enterprise (Outdoor Solutions, a landscaping and gardening supply outlet in operation since February of 2015), occupying the entirety of the lot including the area up to the fence line bordering Lower Silver Creek. Until recently, the parcel at 1948 Alum Rock Avenue housed the Delta Health Center, a medical marijuana dispensary that had been in operation since December of 2015. Past land uses at 1948 Alum Rock Avenue

include an auto wrecking yard. An aerial photograph showing the onsite land uses and the Lower Silver Creek corridor can be found in Figure 2.

The Project Site Plan is shown in Figure 3. The project entails construction of a 6-story mixed-use structure providing 3,000 square feet of commercial space, 194 affordable housing units, and a 39,640 square foot parking garage providing 97 residential parking spaces, 7 of which would be tandem spaces, and 12 dedicated commercial spaces and 5 guest parking spaces. The ground floor would contain the parking level and commercial space with a frontage on Alum Rock Avenue. Five stories of residential units would provide a combination of studios, 1-bedroom, 2-bedroom, and 3-bedroom units. The proposed project would also include a fitness area, a recreational area, bike lockers, and two landscaped courtyards accessible to the residents. The maximum structure height would be 80 feet. Site access would be provided via a right-turn-only driveway on Alum Rock Avenue and a secondary driveway on Tierra Encantada Way. Emergency access would be provided from Tierra Encantada Way. Construction would begin in 2021 and the project would be operational in 2023. The excavation and grading period would last two months, and the project would remove approximately 2,318 cubic yards of soil.

Huffman-Broadway Group, Inc. (HBG) was retained by Pacific West Communities, Inc. in 2017 to assist them in evaluating ecological constraints to development of the Project Site that includes possible setback requirements from the riparian habitat of Lower Silver Creek. In early 2017, HBG evaluated a previous development plan for Pacific West Communities, Inc. consisting of a charter school and affordable housing project that encompassed the parcels at 1948 and 1936 Alum Rock Avenue. Results of that evaluation were reported in a Riparian Habitat Evaluation dated February 15, 2017. City staff determined that the plan proposed at that time could not provide a setback from the creek that would satisfy the riparian corridor policies of the City and recommended that a project be proposed solely within the parcel at 1936 Alum Rock Avenue. In 2019, HBG evaluated a revised charter school/affordable housing project at 1936 Alum Rock Avenue and issued an updated Riparian Habitat Evaluation dated March 12, 2019. The Riparian Habitat Evaluation contained herein evaluates a project at 1936 Alum Rock Avenue but for the revised land use as described above.

The analysis contained herein first describes the Project Site and the ecological characteristics of Lower Silver Creek in the reach that borders the adjacent parcel at 1948 Alum Rock Avenue. The report then describes the City of San Jose criteria for assessing constraints that may apply based on the presence of a riparian habitat in the vicinity of proposed land uses, including criteria for determining the limits of riparian habitat (including an evaluation to determine the location of the top of bank of Lower Silver Creek and the limits of riparian canopy vegetation) and the potential setback that may be required between the proposed development and the identified riparian limits. Based on the ecological assessment of the nature of the riparian corridor and the City's evaluation criteria, this report evaluates the Project in consideration of the riparian corridor policies of the City of San Jose.

2.0 EXISTING BIOLOGICAL SETTING

The Project Site is located within an urbanized area of San Jose. The property at 1936 Alum Rock Avenue is an urban site that has been previously developed and disturbed and is almost completely hardscape and, up until demolition of buildings in 2018, supported structures that had been used for a variety of commercial and residential land uses. The adjacent property to the east is also paved and a landscaping and gardening supply outlet occupies the site. To the east of the parcel at 1948 Alum Rock Avenue is the riparian corridor of Lower Silver Creek. The Santa Clara Valley Water District (SCVWD) is the landowner of the reach of Lower Silver Creek which forms the northeastern border of the property at 1948 Alum Rock Avenue. Pedestrian and vehicle access to the SCVWD property and the entirety of Lower Silver Creek is precluded by a 6-foot chain-link fence and locked gates. Access is allowed with an approved encroachment permit from SCVWD. The chain-link fence was installed just beyond the top of bank on both sides of the stream and prevents pedestrian and vehicle access to Lower Silver Creek.

The Project Site at 1936 Alum Rock Avenue is of flat topography at an elevation of approximately 96 feet msl. The site has been previously developed but based on review of the U.S. Department of Agriculture Natural Resources Conservation Service Web Soil Survey the underlying soils are Urbanland-Clear Lake complex 0 to 2% slopes throughout the site (NRCS 2017). Mapping by the Federal Emergency Management Agency (FEMA) (see Figure 4) shows that the Lower Silver Creek segment adjacent to the parcel at 1948 Alum Rock Avenue will contain a 100-year flood within the channel.

A Phase 2 Environmental Site Investigation was prepared by RNC Environmental, LLC in September 2016 to report on the process and results of the activities conducted to remediate soil contamination previously recorded at the Project Site. A Phase 1 Environmental Site Assessment was prepared December 9, 2019, to document conditions subsequent to remediation activities conducted at the Project Site. This report found that no further remediation was required for the leaking underground storage tank and that the site was eligible for closure. An Investigation Case Closure letter from Santa Clara County dated March 4, 2020 shows that the necessary remediation has been successfully completed.

Lower Silver Creek flows north along the adjacent parcel at 1948 Alum Rock Avenue under the Alum Rock Bridge and eventually flows north and west into Coyote Creek and the San Francisco Bay. Lower Silver Creek has a history of being channelized within the subject stream reach. Adjacent to the property at 1948 Alum Rock Avenue the creek forms a more or less trapezoidal channel, with a mostly earthen vegetated bank along the east edge of that parcel. The opposite side of the creek (north and east side) has been modified to support an SCVWD access roadway running parallel to the stream and that was constructed within the bank. The remainder of the bank on the east side of the stream is improved with gabions and other permanent erosion

control features. Representative photos of the creek vicinity in Attachment 2 show the adjacent parcel at 1948 Alum Rock Avenue, the existing land uses, and the configuration of the riparian habitat of Lower Silver Creek on the opposite side of the chain link fence from the adjacent property at 1948 Alum Rock Avenue.

Gary Deghi, Senior Environmental Scientist and Wildlife Biologist with HBG, conducted a field review of the site at 1936 Alum Rock Avenue on February 28, 2018 and conducted a review of the site at 1948 Alum Rock Avenue and the riparian corridor of Lower Silver Creek adjacent to 1948 Alum Rock Avenue on December 14, 2016. The site at 1936 Alum Rock Avenue in San Jose is a developed urban site that until recently, prior to demolition of buildings in 2018, was used for various residential and commercial uses. The ground surface at the site is primarily hardscape so little vegetation occurs on the site. Five planted non-native trees occurring on the property in the area of a private residence include two privet trees (*Ligustrum sinense*), two avocado trees (*Persea* sp.), a Japanese loquat (*Eriobotrya japonica*), and an additional unidentified fruit tree. The southwest border of the property is a line of planted elm trees (*Ulm* sp.) with tangles of Himalaya blackberry (*Rubus armeniacus*). A London plane tree (*Platanus* sp.) is found along the street frontage. Vegetation throughout the remainder of the site consists of sparse growth of mostly non-native, ruderal herbaceous plants and grasses. The habitat type at the site would be classified as Urban, with only weedy species present between areas of hardscape.

The Project Site at 1936 Alum Rock Avenue is not adjacent to Lower Silver Creek. Lower Silver Creek runs adjacent to and east of the property at 1948 Alum Rock Avenue, which is east of the property at 1936 Alum Rock Avenue. In the area adjacent to and east of 1948 Alum Rock Avenue, Lower Silver Creek supports riparian vegetation, mostly along the west and south bank closest to the adjacent parcel at 1948 Alum Rock Avenue. Canopy riparian vegetation is primarily willows, including arroyo willow (*Salix lasiolepis*) and sandbar willow (*Salix exigua*), that is rooted close to the edge of the wetted portion of the stream. Additional riparian trees are uncommon, but those present are typically found further up the bank, and include several Coast live oak (*Quercus agrifolia*), a couple of valley oak (*Q. lobata*), and one sycamore (*Platanus racemosa*). Several non-native Privet (*Ligustrum sinense*) trees are also present along the west bank of the stream. Other vegetation found along the bank include a number of grasses, herbaceous species such as California blackberry (*Rubus ursinus*), wild radish (*Raphanus sativa*), bristly ox-tongue (*Helminthotheca echioides*), and a number of shrubs including coyote brush (*Baccharis pilularis*), California rose (*Rosa californica*), California sage (*Artemisia californica*), and white snowberry (*Symphoricarpos albus*). Additional vegetation observed growing within the wetted portion of the stream included curly dock (*Rumex crispus*), and broadleaf cattail (*Typha latifolia*).

The riparian habitat along the subject stretch of Lower Silver Creek is such that it can provide shelter and cover for a variety of wildlife species such as amphibians and reptiles, birds and mammals adapted for life in urban environments. Canopy riparian trees and other vegetation

provide nesting substrates for a number of bird species as well as foraging areas for both migratory and resident species. As with many riparian systems, the creek at this location provides a movement corridor for wildlife adapted to urban environments such as those found in the project area. A number of wildlife species were observed during the field review conducted by HBG on December 14, 2016, including bird species identified along the riparian corridor such as great egret (*Ardea alba*), California gull (*Larus californicus*), Anna's hummingbird (*Calypte anna*), black phoebe (*Sayornis nigricans*), ruby-crowned kinglet (*Regulus calendula*), and yellow-rumped warbler (*Setophaga coronata*). Also observed were introduced rock pigeon (*Columba livia*) and house sparrow (*Passer domesticus*).

HBG completed a biological evaluation to determine the limits of riparian habitat along Lower Silver Creek adjacent to the property at 1948 Alum Rock Avenue as defined by the habitat protection policies of the City of San Jose, including the City's *Riparian Policy Study*, the City Council Policy on *Riparian Corridor Protection and Birdsafe Design*, and the *Santa Clara Valley Habitat Plan* (see a discussion of these policies in Section 3). The limit of riparian habitat is defined by the top of bank of the stream or the limit of riparian vegetation (defined as the drip line of riparian trees), whichever is greater. The top of bank of Lower Silver Creek is easily determined as the location where the topography accelerates downward towards the stream and drops off forming the stream bank. The topographic contour forming the top of bank was determined from the topographic survey prepared by Bellecci and Associates as about the 96 foot NAVD 88¹ contour line. For much of the property at 1948 Alum Rock Avenue, the top of bank of the stream is located from 5 to 10 feet beyond (east of) the chain-link fence installed along the property boundary. For most of the length of Lower Silver Creek bordering the parcel at 1948 Alum Rock, the top of bank forms the limit of riparian habitat, but at several locations the limit of riparian habitat is widened to include the drip line of riparian canopy trees, including several oak trees and one California sycamore rooted on the west side of the chain link fence on the property at 1948 Alum Rock Avenue. At these locations the limit of riparian vegetation was determined by HBG biologists in the field as the drip line of the trees and employing interpretation of aerial photography. A map showing the limit of riparian habitat in the vicinity of the Project Site is shown in Figure 5.

3.0 CITY RIPARIAN CORRIDOR AND SETBACK POLICY

To address the City's riparian habitat and setback questions, HBG reviewed four documents that currently define the City of San Jose's riparian corridor policy: (i) the City's August 23, 2016 *Riparian Corridor Protection and Bird-Safe Design Policy*; (ii) the City's 1999 *Riparian Corridor Policy Study*, (iii) the *Santa Clara Valley Habitat Plan* (the "*Habitat Plan*"), and (iv) *Envision San Jose 2040 General Plan*, the City's current General Plan (the "*2040 Plan*").

¹ NAVD 88: North American Vertical Datum of 1988.

The following describes the four documents on which the City bases its riparian corridor policies. A discussion of the extent to which the Project Site, based on its location and other characteristics, would be subject to a riparian setback is included in Section 4.

3.1 Riparian Corridor Protection and Bird-Safe Design

<https://www.sanjoseca.gov/DocumentCenter/View/60393>

The City's policy of protecting riparian corridors is summarized in the August 23, 2016 City Council Policy *Riparian Corridor Protection and Bird-Safe Design* (Policy Number 6-34). The riparian protection policies are based on the 1999 Riparian Corridor Policy Study that established a standard of a 100-foot riparian corridor setback, with an exception for projects where no significant environmental impact will occur.

The Policy states that "riparian projects should be designed and implemented to minimize intrusion into riparian corridors. Land use related operational issues that could affect riparian corridors may need to be addressed through conditions in Development Permits." The Policy establishes the guideline for setbacks from riparian corridors for new buildings in existing urban infill areas and for new residential or commercial/institutional buildings, parking facilities and roads (all elements of the proposed project) at 100 feet. The Policy indicates that:

- 2) A reduced setback may be considered under limited circumstances, such as:
 - a. Developments located within the boundaries of the Downtown area, as those boundaries are defined in the General Plan.
 - b. Urban infill locations where most properties are developed and are located on parcels that are equal to or less than one (1) acre.
 - c. Sites adjacent to small lower order tributaries whose riparian influences do not extend to the 100-foot setback.
 - d. Sites with unique geometric characteristics and/or disproportionately long riparian frontages in relation to the width of the minimum Riparian Corridor setback.
 - e. Pre-existing one- or two-family residential lots, or typical yard area, but only where a frontage road is infeasible to buffer Riparian Corridors from these and the Building Setbacks are consistent with all Riparian Corridor setback requirements.
 - f. Sites that are being redeveloped with uses that are similar to the existing uses or are more compatible with the Riparian Corridor than the existing use, and where the intensity of the new development will have significantly less environmental impacts on the Riparian Corridor than the existing development.

- g. Instances where implementation of the project includes measures that can protect and enhance the riparian value more than the minimum setback.
 - h. Recreational facilities deemed to be a critical need and for which alternative site locations are limited.
 - i. Utility or equipment installations or replacements that involve no significant disturbance to the Riparian Corridor during construction and operation, and generate only incidental human activity.
 - j. The existence of legal uses within the minimum setback.
 - k. The extent to which meeting the required setback would result in demonstrable hardship (i.e. denies an owner any economically viable use of the land or adversely affects recognized real property interest).
 - l. The extent to which meeting the minimum setback would require deviations from, exception to or variances from other established policies, legal requirements, or standards.
- 3) Applicants requesting reduction in setbacks may be required to submit a report by a qualified biologist, stream hydrologist and/or other appropriate qualified professional certifying the existence of some or all of the following conditions:
- a. There is no reasonable alternative for the proposed Riparian Project that avoids or reduces the encroachment into the Setback Area.
 - b. The reduced setback will not significantly reduce or adversely impact the Riparian Corridor.
 - c. The proposed uses are not fundamentally incompatible with riparian habitats (see Chapter 3, Section IB Incompatible Land Uses of the Policy Study).
 - d. There is no evidence of stream bank erosion or previous attempts to stabilize the stream banks that could be negatively affected by the proposed development within the Setback Area.
 - e. The granting of the exception will not be detrimental or injurious to adjacent and/or downstream properties.
- 4) Materials and Lighting
- a. New development should use materials and lighting that are designed and constructed to reduce light and glare impacts to Riparian Corridors. For example, the

use of bright colors, and glossy, reflective, see through or glare-producing Building and material finishes is discouraged on Buildings and Structures.

b. Lighting should not be directed into Riparian Corridors.

- 5) Restoration and rehabilitation of Riparian Corridors are strongly encouraged to be included in Riparian Project design and implementation.
- 6) Project design and implementation should include erosion-control measures in conformance with the City Council Policies 6-29 and 8-14 (Stormwater Policies) to avoid soil erosion and to minimize runoff. Projects that are not subject to the Stormwater Policies should incorporate basic site-design measures such as limiting disturbances of Riparian Corridor areas, conserving natural areas through the protection or planting of riparian-compatible vegetation, minimizing impervious surfaces, directing runoff to areas outside of and away from Riparian Corridors, and locating trash storage away from Riparian Corridors.

3.2 Riparian Corridor Policy Study (1999)

<https://www.sanJoseca.gov/DocumentCenter/Home/View/376>

The *Riparian Corridor Policy Study* ("Study") analyzed streams and riparian corridors within the City and addressed in detail how development should protect and preserve these corridors. Following its completion, the recommendations and guidance in the Study have been implemented through the development review process to include, generally, a 50- to 100-foot setback for new development adjacent to a riparian corridor, lighting that is compatible with habitats in riparian corridors, and measures to protect water quality and fish and wildlife habitats.

The Study defined "riparian corridor" as follows

For purposes of this study, a riparian corridor includes any defined stream channels including the area up to the bank full-flow line, as well as all riparian (streamside) vegetation in contiguous adjacent uplands. Characteristic woody riparian vegetation species could include (but are not limited to): willow, *Salix* sp.; alder, *Alnus* sp.; box elder, *Acer negundo*; Fremont cottonwood, *Populus fremontii*; bigleaf maple, *Acer macrophyllum*; western sycamore, *Platanus racemosa*; and oaks, *Quercus* sp. Stream channels include all perennial and intermittent streams shown as a solid or dashed blue line on USGS topographic maps, and ephemeral streams or "arroyos" with well-defined channels and some evidence of scour or deposition. (Study, page 3)

The "Riparian Values" section of the Study includes the following, which emphasizes the natural vegetated and wildlife habitat aspects of a riparian habitat:

The streams within the City of San Jose are a valuable natural resource supporting a diversity of habitats and a great variety of aquatic and terrestrial resources. Several distinct habitats occur along the stream corridors, such as riparian, freshwater marsh, salt-brackish water marsh, and transitional upland habitats. Numerous species of plants, fish, and wildlife occur within the riparian corridors, including several species identified as sensitive by State and Federal resource agencies. Streams and riparian corridors are also a valuable visual/aesthetic resource, open space and recreational resources, and often are the City's densest urban forest resources.

Riparian systems provide very important habitat for aquatic invertebrates, fish, amphibians, birds and mammals. A number of species are dependent on a healthy riparian community for survival. Riparian habitat widths are necessary to maintain some breeding bird populations. (Study, page 2)

Development Guideline 1C, "Setback Areas," finds that "Development adjacent to *riparian habitats* generally should be set back 100 feet from the outside edge of the riparian habitat (or top of bank, whichever is greater) to reduce anticipated impacts to riparian biotic communities and hydrologic regimes" (Study, page 31). Further, the setback guideline explains:

The riparian setback area is intended to protect riparian habitat values from direct and indirect human -induced impacts. The setback area should be sufficient to preserve/create the "edge effect" attribute of the habitat, buffer the impacts of adjacent human activities, and provide avenues for wildlife dispersal. (Study, page 31).

All buildings, other structures (with the exception of bridges and minor interpretative node structures), impervious surfaces, outdoor activity areas (except for passive or intermittent activities) and ornamental landscaped areas should be separated a minimum of 100 feet from the edge of the riparian corridor (or top of bank, whichever is greater). Exceptions to the 100-foot setback may be considered in some limited circumstances as long as basic riparian habitat protection objectives are achieved. Circumstances which may warrant consideration of setbacks less than 100 feet were discussed in the 1999 Riparian Corridor Policy Study and were codified as policy in the August 23, 2016 Riparian Corridor Protection and Bird-Safe Policy (Policy 6-34).

3.3 Santa Clara Valley Habitat Plan (2012) **<http://scv-habitatagency.org/178/Final-Habitat-Plan>**

The *Santa Clara Valley Habitat Plan* (*Habitat Plan*; ICF International 2012) is both a habitat conservation plan (HCP) intended to fulfill the requirements of the federal Endangered Species Act and a natural community conservation plan to fulfill the requirements of the California

Natural Community Conservation Planning Act (NCCP Act). The plan was prepared by ICF in a collaborative effort by the “Local Partners”: County of Santa Clara (County), the Santa Clara Valley Water District, the Santa Clara Valley Transportation Authority (VTA) and the cities of Gilroy, Morgan Hill, and San Jose. The San José City Council adopted the *Habitat Plan* on January 29, 2013.

The *Habitat Plan* provides a framework for promoting the protection and recovery of natural resources, including endangered species, while streamlining the permitting process for planned development, infrastructure, and maintenance activities. The *Habitat Plan* allows the Local Partners to receive endangered-species permits for activities and projects they conduct and for those under their jurisdiction. Eighteen animal and plant species are covered by the *Habitat Plan*. The Santa Clara Valley Habitat Agency (Habitat Agency) is the agency primarily responsible for executing the requirements of the *Habitat Plan*, federal and state endangered species permits, and the Implementing Agreement (the legal document between the Wildlife Agencies and Co-Permittees to implement the Plan). The City of San Jose, among others, is responsible for *Habitat Plan* compliance with respect to private development projects within its jurisdiction and for ensuring that its own public projects are carried out in conformance with the Plan.

The *Santa Clara Valley Habitat Plan* defines “riparian habitat” as follows: “Riparian habitat or riparian vegetation. Riparian vegetation is associated with river, stream, or lake banks and floodplains. Riparian vegetation is also defined by USFWS (2009) as plant communities contiguous to and affected by surface and subsurface hydrologic features of perennial or intermittent lotic and lentic water bodies (i.e., rivers, streams, lakes, or other watercourses). Riparian areas have one or both of the following characteristics: 1) distinctively different vegetation than adjacent areas, 2) species similar to adjacent areas but exhibiting more vigorous or robust growth forms due to the greater availability of surface and subsurface water.” (*Habitat Plan*, page 6-46)

Condition 11, Stream and Riparian Setbacks, is described in Section 6.6 of the *Habitat Plan*. The Plan states: “This condition applies to all covered activities that may impact streams. This includes all development inside the urban service area where a stream or the stream setback overlaps any portion of the parcel on which a covered activity is being implemented.” (*Habitat Plan*, page 6-44)

Streams require an appropriate stream setback. The point from which a stream setback is measured is, in general, the top of bank or the edge of riparian vegetation, whichever is greater. The *Habitat Plan* in Table 6-7 notes that all distances in its setback table are measured from top of bank; however, the note in the table explains that “for Category 1 streams, if the edge of riparian vegetation extends beyond setback, the riparian edge becomes the setback plus a 35-foot buffer from riparian edge inside or outside the Urban Service Area.” Similarly, the *City’s Riparian Corridor Policy Study* states: “Development adjacent to riparian habitats generally should be set back 100 feet from the outside edge of the riparian habitat (or top of

bank, whichever is greater) to reduce anticipated impacts to riparian biotic communities and hydrologic regimes. The “riparian edge” is the outer boundary of existing riparian vegetation; for trees, the dripline is the outer boundary.” (*Riparian Corridor Policy Study*, page 31)

The *Habitat Plan* states (page 6-45) that, “Stream setbacks will be required for all covered activities occurring near streams and riparian areas to minimize effects on covered species...” Additionally, “All covered activities must adhere to both the applicable existing local regulations and the requirements of the [*Habitat*] *Plan*.” Because approved development proposals in the City that are deemed “covered” projects in the *Habitat Plan* are subject to the its requirements and conditions, and because the City is currently considering a Riparian Corridor Ordinance or a Riparian Corridor Policy update, this section uses the criteria in the *Habitat Plan* to address the setback issue, although all three documents require riparian setbacks from the edge of the riparian corridor or top of bank, whichever is greater.

There are two types of streams as defined in the *Habitat Plan*. A Category 1 stream has sufficient flow to support covered species and riparian habitat. These streams include perennial streams and some intermittent streams. These streams are typically larger than ephemeral drainages and support movement of covered species along the length of the stream. The ability of these streams to also support healthy riparian habitats bolsters the ecological value of the stream. Inside the Urban Service Area, the *Habitat Plan* states that “... the setback for Category 1 streams is 100 feet, although for parcels with slopes greater than 30 percent the setback is increased by 50 feet, and if the site supports riparian vegetation, the setback “is equal to either the riparian edge plus a 35-foot buffer or the setback as defined above, whichever is greater” (page 6-52).

The *Habitat Plan* recognizes exceptions to its mandated 100-foot setback: “Regardless of project location, stream setback exceptions may not reduce a Category 1 stream setback to less than a distance of 50 feet for new development or 35 feet for existing or previously developed sites with legal buildings and uses.” (page 6-54).

For all proposed exceptions to the stream setbacks (inside or outside the urban service area), exceptions will be considered based on the following factors (page 6-54):

1. The existence of legal uses within the setback.
2. The extent to which meeting the required setback would result in a demonstrable hardship (i.e., denies an owner any economically viable use of his land or adversely affects recognized real property interests) for the applicant.
3. The extent to which meeting the required setback would require deviation from, exceptions to, or variances from other established policies,

ordinances or standards regarding grading, access, water supply, wastewater treatment, disposal systems, geologic hazards, zoning, or other established code standards.

4. The stream setback exception does not preclude achieving the biological goals and objectives of the Habitat Plan or conflict with other applicable requirements of the Habitat Plan and local policies.

3.4 Envision San Jose 2040 General Plan (2011) **<https://www.sanjoseca.gov/index.aspx?nid=1737>**

The Envision San Jose 2040 General Plan (2040 Plan) includes a Goal, Policies, and Actions to protect and enhance riparian corridors in the City. The Goal for Riparian Corridors (ER-2) in Chapter 3, Environmental Leadership, of the 2040 Plan is to “preserve, protect, and restore the City’s riparian resources in an environmentally responsible manner to protect them for habitat value and recreational purposes.”²

The 2040 Plan seeks to ensure that new development projects “adjacent to riparian corridors in San José are consistent with the City’s *Riparian Corridor Policy Study* and any adopted Santa Clara Valley Habitat Conservation Plan/Natural Communities Conservation Plan (HCP/NCCP)” (Policy ER-2.1). The 2040 Plan recommends “... that a 100-foot setback from riparian habitat is the standard to be achieved in all but a limited number of instances, only where no significant environmental impacts would occur” (Policy ER-2.2). The 2040 Plan also advises that new development projects are to be designed to protect adjacent riparian habitat from the biological impacts of “lighting, exotic landscaping, noise, and toxic substances into the riparian zone” (Policy ER-2.3), and endorses restoration of riparian habitat through planting of native plants and removal of exotic/invasive species (Policy ER-2.5).

4.0 RIPARIAN HABITAT POLICY EVALUATION

The Project Site is a previously developed site and, prior to demolition in 2018, contained legal buildings and uses that were located in the vicinity of Lower Silver Creek, a Category 1 stream as defined by the *Santa Clara Valley Habitat Plan*. Lower Silver Creek contains riparian canopy vegetation in the area adjacent to (east of) the parcel that is between Lower Silver Creek and the Project Site. The limit of riparian habitat is shown in Figure 5. The Project Site is not adjacent to Lower Silver Creek as there is an intervening legal lot (1948 Alum Rock Avenue) located between the Project Site and Lower Silver Creek. The Project Site is a previously developed parcel that is nearly entirely hardscape and, prior to demolition in 2018, was occupied with structures that until recently supported a variety of commercial and residential land uses.

At the adjacent property that abuts Lower Silver Creek (1948 Alum Rock Avenue), the operations of an existing landscape and gardening business extend to the fence line which is 5 to 10 feet from the top of bank of the stream and at the edge of the riparian canopy at a couple of locations. The existing uses at 1948 Alum Rock Avenue do not occur within the riparian canopy with the exception of a single sycamore tree rooted on the parcel side of the fence. The limit of the riparian corridor was extended to include the drip line of this tree, and the various activities associated with the landscaping and gardening supplier occur within the drip line of the tree. The chain link fence between the existing uses and the creek, installed by SCVWD, prevents access to the stream to all but SCVWD staff and those entities who have obtained an encroachment permit to access the area of the creek.

The applicant intends to construct a mixed-use project within the Project Site at 1936 Alum Rock Avenue. As shown in Figure 6, even though the Project Site is not adjacent to the Lower Silver Creek riparian corridor, developed land uses encroach to within 48 feet of the edge of the identified riparian habitat. The riparian canopy location that is 48 feet from the Project footprint is the site of the sycamore tree at the east edge of the parcel at 1948 Alum Rock Avenue. If this one tree (which was likely planted at this location) was not included in the riparian corridor, the narrowest riparian corridor setback width for the Proposed Project would be approximately 56 feet. Figure 6 shows the varying setback widths between the Project and the limit of the Lower Silver Creek riparian corridor. The setback from the Project would be approximately 80 feet along the Alum Rock Avenue street frontage, and the setback would exceed 100 feet for over half of the length of the Project Site parcel. The configuration of the riparian corridor in the vicinity of the Project Site satisfies criteria of the City of San Jose and the *Habitat Plan* for an exception to the setback requirements to protect riparian corridors as discussed below.

4.1 City of San Jose City Council Riparian Corridor Protection and Bird Safe Design Policy

An evaluation of the project with respect to the criteria for a setback reduction in the City's Riparian Corridor Policy follows. The City Council's Riparian Corridor Policy is spelled out in the August 23, 2016 Riparian Corridor Protection and Bird-Safe Design (Policy Number 6-34). The City Council's Riparian Corridor Policy indicates that all buildings, other structures (with the exception of bridges and minor interpretative node structures), impervious surfaces, outdoor activity areas (except for passive or intermittent activities) and ornamental landscaped areas should be separated a minimum of 100 feet from the edge of the Riparian Corridor (or top of bank, whichever is greater). Exceptions to the 100-foot setback may be considered in some limited circumstances as long as basic riparian habitat protection objectives are achieved. Circumstances which may warrant consideration of setbacks less than 100 feet were listed in Section 3.1 and are evaluated below.

2) A reduced setback may be considered under limited circumstances, such as:

a. Developments located within the boundaries of the Downtown area, as those boundaries are defined in the General Plan.

The Project Site at 1936 Alum Rock Avenue is within an urbanized area of San Jose, although the site is not included within the Downtown boundaries as defined in the General Plan. Nevertheless, Alum Rock Avenue has supported a variety of commercial and residential land uses, and the Project Site and adjacent parcel between the Project Site and Lower Silver Creek have a history of supporting developed land uses as described under Criteria 2.b below. The site is readily accessible via the Alum Rock Avenue interchange with U.S. Highway 101. Driving distance from 1936 Alum Rock Avenue to the San Jose City Hall is exactly 3.0 miles.

- Although the Project Site is in an urban area, the site is not within the Downtown area as defined in the General Plan. Under a strict interpretation, this criterion would not be applicable to the Project.

b. Urban infill locations where most properties are already developed and are located on parcels that are equal to or less than one (1) acre.

The Project Site at 1936 Alum Rock Avenue would be considered an urban infill site as all parcels in the immediate vicinity are developed with legal land uses. Both the Project Site and the adjacent property at 1948 Alum Rock Avenue are developed with legal land uses. The site at 1936 Alum Rock Avenue is mostly hardscape and has been used for a variety of commercial and residential land uses. The Project Site, however, is not equal to or less than one acre in size.

Although onsite structures were demolished in 2018, land uses in operation over the last few years at 1936 Alum Rock Avenue included Martin's Plastering (commencing in February of 2014), Blue Lagoon Aquarium sales (commencing in March 2010), and several residences including someone with a recycling operation that was living in an RV. Established land uses on within the parcel at 1948 Alum Rock Avenue (which borders Lower Silver Creek) include an ongoing commercial enterprise (Outdoor Solutions, a landscaping and gardening supply outlet in operation since February of 2015), occupying the entirety of the lot including the area up to the fence line bordering Lower Silver Creek. The parcel at 1948 Alum Rock Avenue until recently also included Delta Health Center, a medical marijuana dispensary that had been in operation since December of 2015. Past land uses at 1948 Alum Rock Avenue include an auto wrecking yard. Various commercial land uses are also present to the west of 1936 Alum Rock Avenue and across Alum Rock Avenue to the north.

- The Project Site is located within an urban infill location where most properties are already developed. Although located in an urban infill location this exception would not apply to the 1.5-acre proposed Project Site as it is only applicable to parcels equal to or less than one acre in size.

c. Sites adjacent to small lower order tributaries whose riparian influences do not extend to the 100-foot setback.

Although Lower Silver Creek would not be considered a lower order tributary (Lower Silver Creek is classified as a Category 1 stream in the Santa Clara Valley Habitat Plan), there is not a strong riparian influence on the Project Site at 1936 Alum Rock due to active land uses on the adjacent parcel and past developed land uses on the Project Site. The Project Site is not even adjacent to the creek as the creek runs along the boundary of the adjacent property to the east at 1948 Alum Rock Avenue. The entire parcel at 1948 Alum Rock Avenue, located between the Project Site and Lower Silver Creek, is paved, and the operations of the existing landscape and gardening business extend to the fence line at the border of the property which is just landward of the edge of the riparian limits. Much of the Project Site at 1936 Alum Rock Avenue is 100 feet or greater from the riparian corridor of Lower Silver Creek (see Figure 6), although the proposed project encroaches to within 48 feet of the riparian limits of the creek at its closest point. The area within this 48-foot zone between the Project and the creek is a paved area that includes the active land uses of the gardening and landscape supplier within the parcel at 1948 Alum Rock Avenue. These active land uses do not allow any extension of the riparian influence of Lower Silver Creek beyond the chain link fence positioned about five feet from the Lower Silver Creek riparian limits. Little to none of the riparian influence extends beyond the creek onto the property at 1936 Alum Rock Avenue, or even onto the property adjacent to the creek at 1948 Alum Rock Avenue.

- Although not a lower order stream, the riparian influence does not extend to the Project Site. This criterion would be applicable to the project if not for the fact that Lower Silver Creek is a Category 1 stream. Technically, this criterion is not applicable as a basis for an exception to the City's Riparian Corridor setback policy for this reason.

d. Sites with unique geometric characteristics and/or disproportionately long riparian frontages in relation to the width of the minimum Riparian Canopy setback.

Although the Project Site is not an unusual site in terms of the site geometry, adhering to the 100-foot setback would leave only an approximately 80-footwide area, which would not allow for adequate width for a building and driveway access. The adjacent parcel at 1948 Alum Rock Avenue that is adjacent to Lower Silver Creek does display unusual geometrics. The southern portion of the parcel at 1948 Alum Rock Avenue is a standard lot size but the portion of this parcel located closest to Alum Rock Avenue is narrow and constrained solely due to presence of the Lower Silver Creek riparian corridor that passes through the northern end of the parcel. This anomaly brings the riparian corridor closer to the north end of the developable lot at 1936 Alum Rock Avenue where any development along the Alum Rock Avenue frontage of 1936 Alum Rock Avenue (including access to the site from Alum Rock Avenue) would be constrained and complicated by the 100-foot setback limits of the San Jose Riparian Corridor Policy. Development of the lot at 1936 Alum Rock Avenue as currently contemplated by the applicant could only be accomplished with an exception to the Riparian Corridor Policy.

- This criterion may apply as a basis for an exception to the City's Riparian Corridor setback policy.

e. Pre-existing one or two-family residential lots, or typical yard area, but only where a frontage road is infeasible to buffer Riparian Corridors from these and the building setbacks are consistent with all Riparian Corridor setback requirements.

- The Project Site is not considered a one or two-family residential lot. This criterion does not apply to the proposed Project Site.

f. Sites that are being redeveloped with uses that are similar to the existing use or are more compatible with the Riparian Corridor than the existing use and where the intensity of the new development will have significantly less environmental impacts on the Riparian Corridor than the existing development.

The Project Site is currently completely developed and, prior to demolition in 2018, supported past legal land uses. The Proposed Project is planned to affect the entire site. The Proposed Project is proposed to include a 6-story commercial building and 5 stories of residential units and would, therefore, be of greater height and mass than recently-demolished structures. However, as explained in item 2.g below, the Proposed Project provides certain benefits in terms of environmental cleanup and plans for landscaping with riparian species such that the riparian corridor located one property away from the

Project Site would receive some benefit in terms of water quality and habitat improvements that are not provided by the existing land uses. Although the structures proposed as part of the Project may be of larger scale than existing uses, the net result would be that the property is developed with uses that are potentially more compatible with the Riparian Corridor than the current situation.

- This criterion may be applicable as a basis for an exception to the City's Riparian Corridor setback policy.

g. Instances where implementation of the project includes measures that can protect and enhance the riparian value more than the minimum setback.

Measures are included in the Proposed Project that will enhance the value of the riparian influence of Lower Silver Creek beyond that of the existing land uses. Although it is not possible to provide habitat improvements or environmental cleanup in the area immediately adjacent to the stream as that parcel is not part of the Project Site, measures can be employed with respect to the Proposed Project to enhance the riparian area to the extent possible.

A Phase 1 Environmental Site Assessment was prepared December 9, 2019, to document conditions subsequent to remediation activities conducted at the Project Site. This report found that no further remediation was required for the leaking underground storage tank and that the site was eligible for closure. An Investigation Case Closure letter from Santa Clara County dated March 4, 2020 shows that the necessary remediation related to the underground storage tank at 1936 Alum Rock Avenue been successfully completed. While the Project Site does not include 1948 Alum Rock Avenue and therefore would not remediate contamination on that parcel, Pacific West Communities recent remediation of the soil contamination resulting from a leaking underground storage tank at the Project Site will result in an incremental improvement in the quality of water draining into Lower Silver Creek.

In addition, a review of the site plan in Figure 3 shows that there is a narrow band up to six feet wide between the property line and the proposed private drive that is intended to be planted with landscaping. To the extent possible, the applicant intends to plant this area with riparian species that could extend the riparian influence of Lower Silver Creek beyond the property at 1948 Alum Rock Avenue (that is completely lacking in habitat) to include the Project Site. It may not be possible to plant large riparian trees such as sycamores or valley oaks within this landscaped strip, but smaller riparian trees or shrubs common to riparian ecosystems are possible. The applicant intends to provide a landscaping plan prepared by a licensed landscape architect that includes planting of riparian trees and/or shrubs within this strip.

The environmental cleanup of the contaminated Project Site soils and the planting of riparian trees and/or shrubs within the linear strip along the eastern Project Site boundary (the boundary closest to Lower Silver Creek) will improve both riparian habitat and water quality conditions in the vicinity of Lower Silver Creek and will also extend the riparian influence of Lower Silver Creek beyond the intervening site at 1948 Alum Rock Avenue that is developed with land uses that do not support the riparian influence of the adjacent stream corridor.

Although the Proposed Project is not proposed on the parcel adjacent to Lower Silver Creek, the water quality of runoff entering the stream will improve now that remediation of contaminated soils has been completed and some riparian habitat is expected to be planted along the boundary of the Project Site closest to the stream. These measures can protect and enhance the riparian value of the corridor more than could a 100-foot setback from Lower Silver Creek.

- This criterion would apply as a basis for an exception to the City's Riparian Corridor setback policy.

h. Recreational facilities deemed to be a critical need and for which alternative site locations are limited.

The project does not propose recreational facilities beyond limited facilities intended solely for residents of the project. This criterion would not be applicable to the project.

i. Utility or equipment installations, or replacements that involve no significant disturbance to the Riparian Corridor during construction and operation, and generate only incidental human activity.

The project is not specifically a utility or equipment installation or replacement project. However, all installations of utility infrastructure to support the Proposed Project would be installed on site. None would utilize the adjacent parcel at 1948 Alum Rock Avenue that is adjacent to Lower Silver Creek. As pointed out in item 2.c above, due to the disturbed nature of the adjacent property and the continuation of the activities of the landscaping and gardening business throughout the site, very little, if any, of the riparian influence of Lower Silver Creek extends to the Project Site.

- The project is not a utility installation or replacement project, therefore this criterion would not be applicable to the project.

j. The existence of legal uses within the setback.

Both the Project Site and the adjacent property at 1948 Alum Rock Avenue (which is adjacent to Lower Silver Creek) are developed with legal land uses. A 100-foot setback from the riparian corridor would encompass nearly all of the parcel at 1948 Alum Rock Avenue and a portion (northeast corner) of the Project Site at 1936 Alum Rock Avenue, as shown in Figure 6. The site at 1936 Alum Rock Avenue is almost entirely hardscape and has been used for a variety of commercial and residential land uses. Although onsite structures were demolished in 2018, land uses in operation over the last few years at 1936 Alum Rock Avenue included Martin's Plastering (commencing in February of 2014), Blue Lagoon Aquarium sales (commencing in March 2010), and several residences including someone with a recycling operation that was living in an RV. The parcel at 1948 Alum Rock Avenue also recently included Delta Health Center, a medical marijuana dispensary that had been in operation since December of 2015. Past land uses at 1948 Alum Rock Avenue include an auto wrecking yard. These land uses are legal uses, and other previous legal land uses were established long before there was a City riparian setback policy or implementation of the *Habitat Plan*.

- Legal uses are present within the Riparian Corridor setback. This criterion may be applicable to the project as a basis for an exception to the City's Riparian Corridor setback policy.
- k. The extent to which meeting the required setback would result in a demonstrable hardship (i.e., denies an owner any economically viable use of the land or adversely affects recognized real property interest).

The Project Site is not adjacent to Lower Silver Creek. The entire parcel at 1948 Alum Rock Avenue, located between the Project Site and Lower Silver Creek, is paved, and the operations of the existing landscape and gardening business extend to the fence line at the border of the property which is just landward of the edge of the riparian limits. Much of the Project is 100 feet or greater from the riparian corridor of Lower Silver Creek, although the 100-foot setback extends into the northeast corner of the Project Site where commercial uses, a private drive and landscaping are proposed. The proposed project encroaches to within 48 feet of the riparian limits of the creek in the northeast corner of the site as shown in Figure 6. The area within this 48-foot zone between the Project and the creek is a paved area that consists of the active land uses of the gardening and landscape supplier within the parcel at 1948 Alum Rock Avenue.

In addition, the configuration of the parcel at 1948 Alum Rock Avenue provides a significant constraint to any development at the Project Site at 1936 Alum Rock Avenue. The southern portion of the parcel at 1948 Alum Rock Avenue is a standard lot size but the portion of that parcel located closest to Alum Rock Avenue is narrow and constrained solely due to presence the Lower Silver Creek riparian corridor that passes through the northern end of the parcel. This anomaly brings the riparian corridor closer

to the north end of the developable lot at 1936 Alum Rock and ensures that any development along the Alum Rock Avenue frontage of 1936 Alum Rock Avenue would need to be accomplished within the 100-foot setback limit. The primary access to the project is proposed through a private drive along the east edge of the Project Site off of Alum Rock Avenue that would need to be developed in an area encroaching as close as about 50 feet to the riparian limits of Lower Silver Creek. Secondary and emergency access is at the western edge of the site from Tierra Encantata Way in the portion of the site furthest from the Riparian Corridor.

Because of the above considerations, the implementation of the full 100-foot setback would deny the new owner of the parcel at 1936 Alum Rock Avenue the use of much of the site and would require a burden for a new landowner and new land use not required of the current owner or ongoing use.

- This criterion would be applicable to the project as a basis for an exception to the City's Riparian Corridor setback policy.

I. The extent to which meeting the minimum setback would require deviations from, exception to, or variances from other established policies, legal requirements or standards.

Development of the Project as proposed, with a riparian setback reduced to as little as 48 feet at one location, would not compromise the ability of the Project to satisfy all other established policies, ordinances or standards including those related to grading, access, water supply, wastewater treatment, disposal systems, geologic hazards, zoning or any other established code standards.

- This criterion would not be applicable to the Project as a basis for an exception to the City's Riparian Corridor setback policy.

It is the opinion of HBG that an exception to the City of San Jose Riparian Policy requiring a 100-foot riparian corridor setback could be granted in this case as the Project satisfies the following criteria for an exception:

- Criterion 2.g - The Project includes measures that can protect and enhance the riparian value of the Riparian Corridor more than could a 100-foot setback from Lower Silver Creek.
- Criterion 2.k- The required setback would result in a demonstrable hardship.

If at least one of the criteria listed in the 2016 Riparian Corridor Protection and Bird-Safe Design (Policy Number 6-34) for an exception to the 100-foot riparian setback are satisfied, the reduced setback could be applied if only one of several additional circumstances are apparent.

The reduced setback could apply because all of the following are true (not just one) with respect to the Proposed Project.

- 3) Applicants requesting reduction in setbacks may be required to submit a report by a qualified biologist, stream hydrologist and/or other appropriate qualified professional certifying the existence of some or all of the following conditions:
 - a. There is no reasonable alternative for the proposed Riparian Project that avoids or reduces the encroachment into the setback area.

Pacific West Communities, Inc. original plan for the Proposed Project consisted of a larger project that encompassed the parcels at 1948 and 1936 Alum Rock Avenue. The implications of such a project on the riparian corridor were reported in a technical letter report prepared by HBG dated February 15, 2017. The project proposed for the combined properties included plans to develop a charter school and affordable housing and also to provide plantings of riparian canopy trees adjacent to Lower Silver Creek and remediate existing soil contamination within the parcel adjacent to the creek at 1948 Alum Rock Avenue as well as the parcel at 1936 Alum Rock Avenue. As indicated in a preliminary review meeting of the applicant's development team with City of San Jose staff on August 2, 2017, although this plan was anticipated to enhance the riparian corridor compared with existing land uses, City staff determined that the plan proposed at that time could not provide a setback from the creek that would satisfy the riparian corridor policies of the City. A subsequent plan for a smaller charter school and affordable housing project recommended solely for the parcel at 1936 Alum Rock Avenue was rejected by City staff in favor of the currently proposed mixed-use project.

The development of any alternatives to the applicant's site plan are constrained and complicated by the unusual geometrics of the adjacent parcel in relation to the Lower Silver Creek stream corridor, and the implications of this with respect to the location of the Riparian Corridor setback on the Project Site at 1936 Alum Rock Avenue. The southern portion of the parcel at 1948 Alum Rock Avenue is a standard lot size but the portion of this parcel located closest to Alum Rock Avenue is narrow and constrained solely due to presence of the Lower Silver Creek riparian corridor that passes through the northern end of the parcel. This anomaly brings the riparian corridor closer to the north end of the developable lot at 1936 Alum Rock where any development along the Alum Rock Avenue frontage of 1936 Alum Rock Avenue (including access to the site from Alum Rock Avenue) would be complicated by the 100-foot setback limits of the San Jose Riparian Corridor Policy. The primary access into the project is proposed through a private drive along the east edge of the site off of Alum Rock Avenue that would need to be developed in an area encroaching as close as about 50 feet to the riparian limits of Lower Silver Creek. Proposed secondary and emergency access for the project is at the western edge of the site from Tierra Encantata Way in the portion of the site furthest

from the Riparian Corridor.

The applicant considered an alternative design to construct the primary access along the western border of the Project Site, within the area designated in the site plan (Figure 3) as "Open Space." This open space area, however, is proposed along the western boundary because it is within the required setback between the 6-story building proposed as part of the project and the property line of the neighboring 4-story apartment building. Construction of primary access to the project at this location would not be feasible.

b. The reduced setback will not significantly reduce or adversely impact the Riparian Corridor.

As discussed in response to criterion 2.c above, the riparian influence of Lower Silver Creek does not significantly extend onto the property at 1936 Alum Rock Avenue. Due to active intervening land uses at 1948 Alum Rock Avenue, the property at 1936 Alum Rock Avenue does not even border the creek. As the active land uses on the adjacent parcel include activity extending up to the fenceline just landward of the edge of the riparian limits of the creek, there is also little influence of Lower Silver Creek on the adjacent property at 1948 Alum Rock Avenue, the property that borders the creek zone.

Much of the Project Site at 1936 Alum Rock Avenue is 100 feet or greater from the riparian corridor of Lower Silver Creek. However, the proposed project encroaches to within 48 feet of the riparian limits of the creek at its closest point at the northeastern portion of the site where commercial uses, a private drive and landscaping are proposed. The area within the 48-foot zone between the Project and the creek is a paved area that includes the active land uses of the gardening and landscape supplier within the parcel at 1948 Alum Rock Avenue. These active land uses do not allow any extension of the riparian influence of Lower Silver Creek beyond the chain link fence positioned about five feet from the Lower Silver Creek riparian limits. Little to none of the riparian influence extends beyond the creek onto the property at 1936 Alum Rock Avenue, or even onto the property adjacent to the creek at 1948 Alum Rock Avenue.

Given the above considerations, there is little chance that a reduced setback of a minimum of approximately 50 feet from Lower Silver Creek could have any effect on the Riparian Corridor.

c. The proposed uses are not fundamentally incompatible with riparian habitats (see Chapter 3, Section 1B Incompatible Land Uses of the Policy Study).

According to the 1999 Riparian Corridor Policy Study (Chapter 3, Section 1B Incompatible Land Uses), "Incompatible land uses include the following: land uses which typically generate littering and/or dumping; off-road vehicle use; removal of native vegetation; and those uses that create noxious odors, or use, store or create toxic materials (including fertilizer, herbicides and pesticides) or generate high volumes of vehicular traffic."

There is nothing included with respect to the Proposed Project that would encourage littering or dumping, off-road vehicle use, removal of native vegetation (there is no native vegetation), or that would create noxious odors or use, store or create toxic materials. In fact, the Proposed Project includes provisions to clean up toxic materials that are currently known to occur in onsite soils. Although the project uses would generate traffic, the trip generation is not as high as many other land uses.

The type and location of onsite land uses would not be considered incompatible with the Riparian Corridor based on Chapter 3, Guideline 1B.

- d. There is no evidence of stream bank erosion or previous attempts to stabilize the stream banks that could be negatively affected by the proposed development within the setback area.

The Project Site at 1936 Alum Rock Avenue is not adjacent to Lower Silver Creek. The stream bank runs along the adjacent parcel at 1948 Alum Rock Avenue, not the Project Site.

- e. The granting of the exception will not be detrimental or injurious to adjacent and/or downstream properties.

The granting of an exception to the Riparian Corridor setback will have absolutely no effect on adjacent or downstream properties. The adjacent property at 1948 Alum Rock Avenue is adjacent to Lower Silver Creek and has unusual geometrics, especially nearest to Alum Rock Avenue, and would not be able to be developed without its own exception to the Riparian Corridor setback policy. As the project is not even adjacent to Lower Silver Creek, there will not be any water quality issues downstream related to contaminants in stormwater runoff or due to erosion issues.

In addition, the Project satisfies other stated objectives of the City's Riparian Corridor Policy: (i) the Project involves no infringement into the riparian corridor, (ii) the Project Site is not

adjacent to Lower Silver Creek so there are no issues of streambank erosion, (iii) the water quality of Project Site drainage will improve now that remediation of onsite soils has been completed, (iv) a setback of 100 feet is provided for much of the Project but the minimum setback of approximately 50 feet is well in excess of the minimum reduced setback of 30 feet allowed by the City under certain circumstances.

4) Materials and Lighting

- a. New development should use materials and lighting that are designed and constructed to reduce light and glare impacts to Riparian Corridors. For example, the use of bright colors, and glossy, reflective, see through or glare-producing Building and material finishes is discouraged on Buildings and Structures.

The applicant intends to comply with these design requirements related to materials and lighting. It should be noted that the development along the east edge of the property includes a private drive, landscaping and a parking garage, all portions of the project requiring less lighting than would the commercial and residential portions of the project which are located in the middle to western portions of the parcel and away from the Riparian Corridor. Given that building heights of 5 and 6-story are proposed, it is important that final building design include features to reduce bird collisions with buildings including limits on reflective building materials so buildings appear less transparent, limitations on night lighting, and design features such as patterned or fritted glass.

- b. Lighting should not be directed into Riparian Corridors.

The applicant intends to comply with requirements related to direction of lighting. The lighting nearest to the Riparian Corridor will be lighting required along the private drive access to the project, lighting that will be directed onto the roadway and not in the direction of the Riparian Corridor.

5) Restoration and rehabilitation of Riparian Corridors are strongly encouraged to be included in Riparian Project design and implementation.

Pacific West Communities, Inc. original plan for the Proposed Project consisted of a larger project that encompassed the parcels at 1948 and 1936 Alum Rock Avenue. The project proposal for the combined properties included plans to develop a charter school and affordable housing and also to provide plantings of riparian canopy trees adjacent to Lower Silver Creek and remediate existing soil contamination within the parcel adjacent to the creek at 1948 Alum Rock Avenue as well as the parcel at 1936 Alum Rock Avenue. As indicated in a preliminary review meeting of the applicant's development team with City of San Jose staff on August 2, 2017, although this plan was anticipated to enhance the riparian

corridor compared with existing land uses, City staff determined that the plan proposed at that time could not provide a setback from the creek that would satisfy the riparian corridor policies of the City.

Once the City relegated the project solely to the parcel at 1936 Alum Rock Avenue, the possibilities for creek restoration became decidedly more limited. Nevertheless, the currently proposed project includes elements of restoration to the extent possible given the site constraints. The currently Proposed Project includes recently-completed remediation of soil contamination at 1936 Alum Rock Avenue that will improve water quality of runoff ultimately making its way to the creek and the project also includes plantings of riparian species of trees (or more likely shrubs) within a landscaped strip of up to six feet wide between the property line and the proposed private drive. To the extent possible, the applicant intends to plant this area with riparian species that could extend the riparian influence of Lower Silver Creek beyond the property at 1948 Alum Rock Avenue, an area that is completely lacking in habitat and includes the Project Site.

- 6) Project design and implementation should include erosion-control measures in conformance with the City Council Policies 6-29 and 8-14 (Stormwater Policies) to avoid soil erosion and to minimize runoff. Projects that are not subject to the Stormwater Policies should incorporate basic site-design measures such as limiting disturbances of Riparian Corridor areas, conserving natural areas through the protection or planting of riparian-compatible vegetation, minimizing impervious surfaces, directing runoff to areas outside of and away from Riparian Corridors, and locating trash storage away from Riparian Corridors.

The applicant intends to comply with these requirements related to erosion control, limiting disturbances in Riparian Corridors, planting of riparian vegetation, minimizing impervious surfaces, direction of runoff, and location of trash storage areas.

4.2 Santa Clara Valley Habitat Plan

Because approved development proposals in the City that are deemed “covered” projects in the *Habitat Plan* are subject to its requirements and conditions, this section uses the criteria in the *Habitat Plan* to address the setback issue. According to the *Habitat Plan*, all proposed exceptions to the stream setbacks (inside or outside the urban service area), will be considered based on four factors as described in Section 3. The first three exemption criteria are the same as criteria 2.j, 2.k, and 2.l in the City’s Riparian Corridor setback policy. See discussion under the City policy for these three criteria. The 4th criterion is discussed below.

- 4) The stream setback exception does not preclude achieving the biological goals and objectives of the *Habitat Plan* or conflict with other applicable requirements of the *Habitat Plan* and local policies. No special status species or sensitive habitats covered by the *Habitat Plan* occur on the Project Site. No special status species or sensitive habitats are found on

the adjacent parcel which is adjacent to lower Silver Creek or within Lower Silver Creek itself. The land cover type, consisting of impermeable surfaces on both the Project Site and the parcel adjacent to Lower Silver Creek, according to the *Habitat Plan*, provides no habitat value. In addition, no jurisdictional waters regulated by the US Army Corps of Engineers, Regional Water Quality Control Board, or California Department of Fish and Wildlife occur at the Project Site, and regulated waters within the creek (located one parcel away) would not be impacted.

Allowing for a stream setback exception does not preclude achieving the biological goals and objectives of the *Habitat Plan*, or conflict with other applicable requirements of the *Habitat Plan* and local policies to protect biological and habitat resources including the San Jose Riparian Corridor Protection Policy. The applicant's recent remediation of contaminated soils at the Project Site because of a leaking underground storage tank will provide incremental improvement of the quality of water entering Lower Silver Creek through runoff from the site. The Project also includes planting of vegetation known from riparian situations (small tree and/or riparian shrubs) within an approximately six-foot strip of proposed landscaping along the eastern project boundary (the boundary closest to Lower Silver Creek). The result of the environmental cleanup of the contaminated Project Site soils and the planting of riparian trees and/or shrubs within the linear strip nearest to Lower Silver Creek will be an improvement of both riparian habitat conditions and water quality conditions in the vicinity of Lower Silver Creek. These measures can protect and enhance the riparian value of the corridor more than could a 100-foot setback from Lower Silver Creek.

It is therefore practical for the new development on the site to be designed with a reduced setback requirement and improve riparian habitat conditions and also provide protection of the adjacent riparian habitat from the biological impacts of night lighting, exotic landscaping, noise, trash, and release of toxic substances, consistent with the Habitat Plan for this existing developed site.

5.0 SUMMARY

It is the professional opinion of HBG that, based on a review of the technical information and relevant policy documents described above and observations at the Project Site and its vicinity, that the applicant's plans for the property, already developed with legal land uses, would not result in a biological impact to the adjacent riparian area of Lower Silver Creek. Based on review criteria contained within the City of San Jose Riparian Corridor Policy, it is the opinion of HBG that the Project could be developed with a riparian setback of as little as approximately 50 feet and not result in significant impacts to the Lower Silver Creek Riparian Corridor.

Juliet Martin
Circlepoint
October 8, 2020
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If you have any questions, please feel free to contact me (650-208-8711 or gdeghi@h-bgroup.com) or Terry Huffman (415-385-1045 or thuffman@h-bgroup.com).

Sincerely,



Gary Deghi
Vice President/Senior Environmental Scientist

Attachments: Attachment 1. Figures
Attachment 2. Representative Photos

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- City of San Jose. 1999. *Riparian Corridor Policy Study*. Prepared by: The Habitat Restoration Group and Jones and Stokes Associates, Inc. San José, California.
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- ICF International. 2012. *Final Santa Clara Valley Habitat Plan*. August. <http://scv-habitatagency.org/178/Final-Habitat-Plan>. Prepared for: City of Gilroy, City of Morgan Hill, City of San Jose, County of Santa Clara, Santa Clara Valley Transportation Authority, and Santa Clara Valley Water District.

ATTACHMENT 1

FIGURES

Figure 1. Location of the Project Site

Figure 2. Aerial Photograph of the Project Site

Figure 3. Project Site Plan

Figure 4. FEMA Map of the 100-year Floodplain

Figure 5. Limit of the Riparian Corridor

Figure 6. Riparian Corridor Setback Distances Between Project Development and the Riparian Corridor Limit of Lower Silver Creek

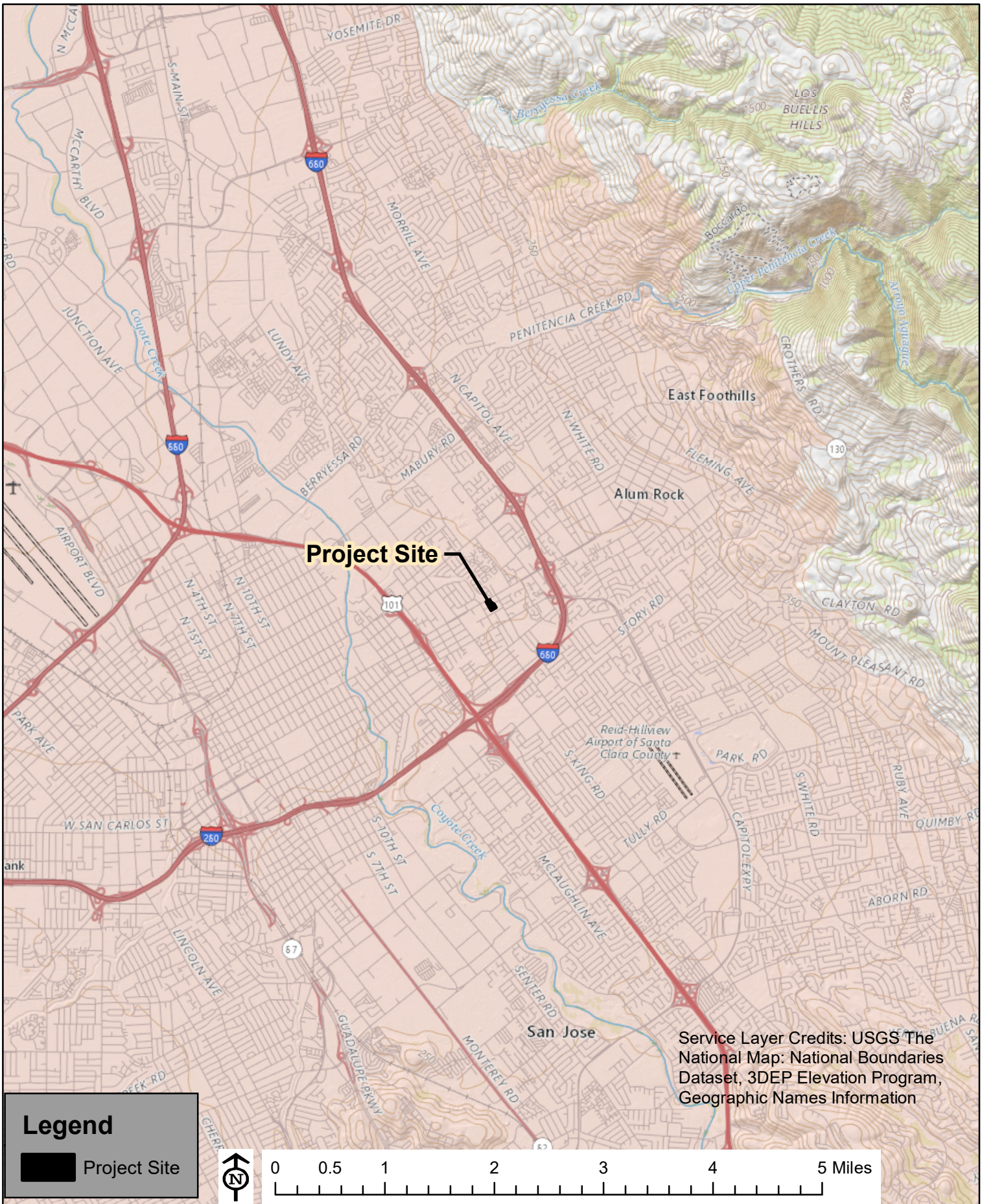




Figure 1. Location of Project Site

1936 Alum Rock Avenue, San Jose, Santa Clara County, California



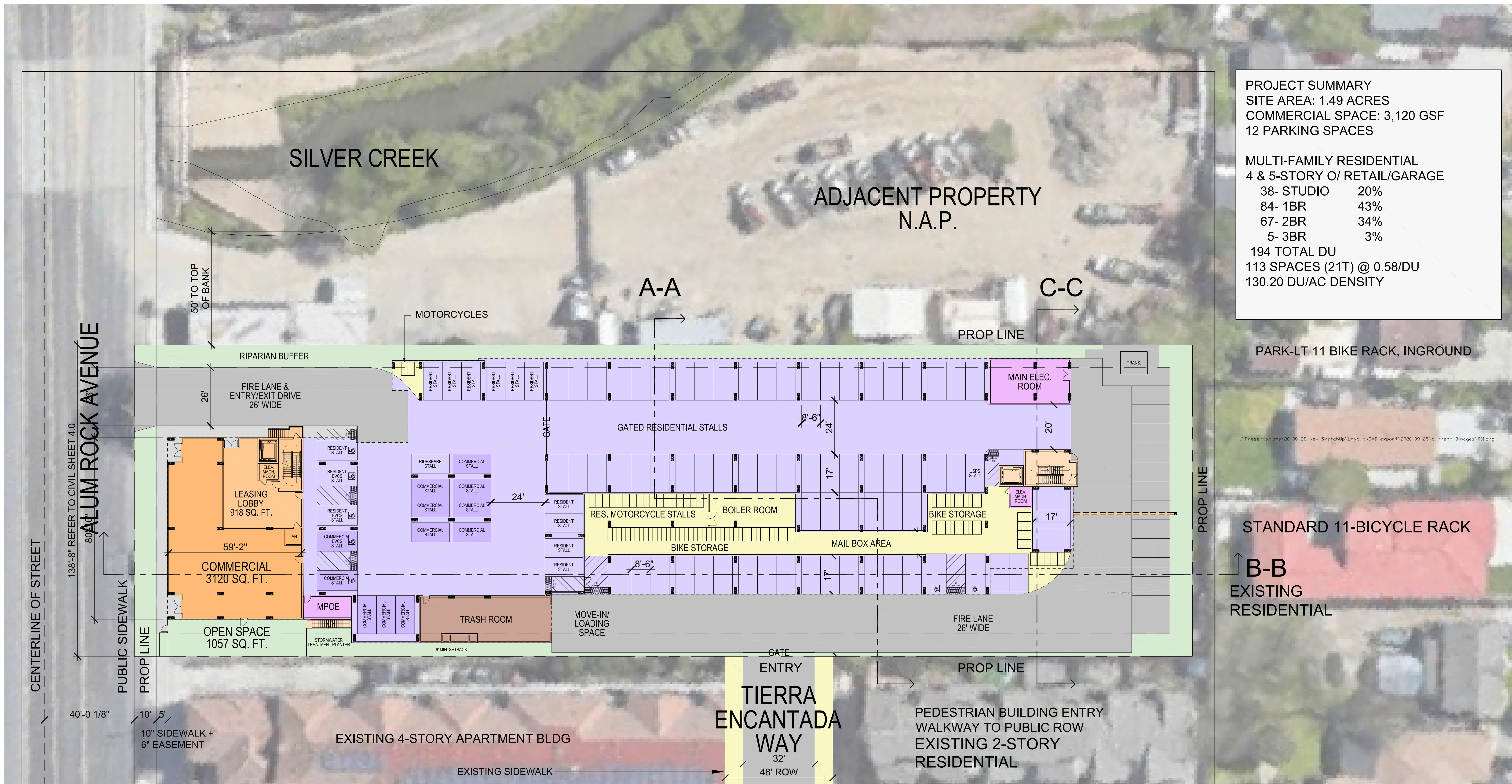
Legend

 Project Site

 0 50 100 150 200 Feet

Aerial Imagery: February 2015 USGS HRO

Figure 2. Aerial Photograph of the Project Site
1936 Alum Rock Avenue, San Jose, Santa Clara County, California



PROJECT SUMMARY
 SITE AREA: 1.49 ACRES
 COMMERCIAL SPACE: 3,120 GSF
 12 PARKING SPACES

MULTI-FAMILY RESIDENTIAL
 4 & 5-STORY O/ RETAIL/GARAGE

38- STUDIO	20%
84- 1BR	43%
67- 2BR	34%
5- 3BR	3%

194 TOTAL DU
 113 SPACES (21T) @ 0.58/DU
 130.20 DU/AC DENSITY

PARK-LT 11 BIKE RACK, INGROUND

STANDARD 11-BICYCLE RACK

B-B
 EXISTING
 RESIDENTIAL

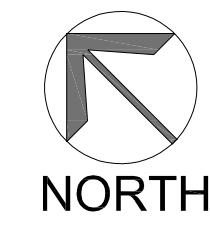
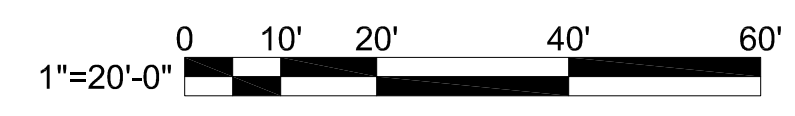
NOTE: THIS EXHIBIT IS CONCEPTUAL ONLY AND WILL BE VERIFIED WITH THE DESIGN TEAM IN FUTURE DEVELOPMENT PHASES

VILLA DEL SOL MIXED-USE RESIDENTIAL

SAN JOSE, CA

THE PACIFIC COMPANIES
 430 EAST STATE ST., SUITE 100, EAGLE, ID 83616
 (208) 461-0022

GROUND LEVEL SITE PLAN - COLORED



A3.0a

DATE: 10-16-20
 JOB NO.: 2017-044

AO ARCHITECTS
 144 NORTH ORANGE ST., ORANGE, CA 92866
 (714) 639-9860



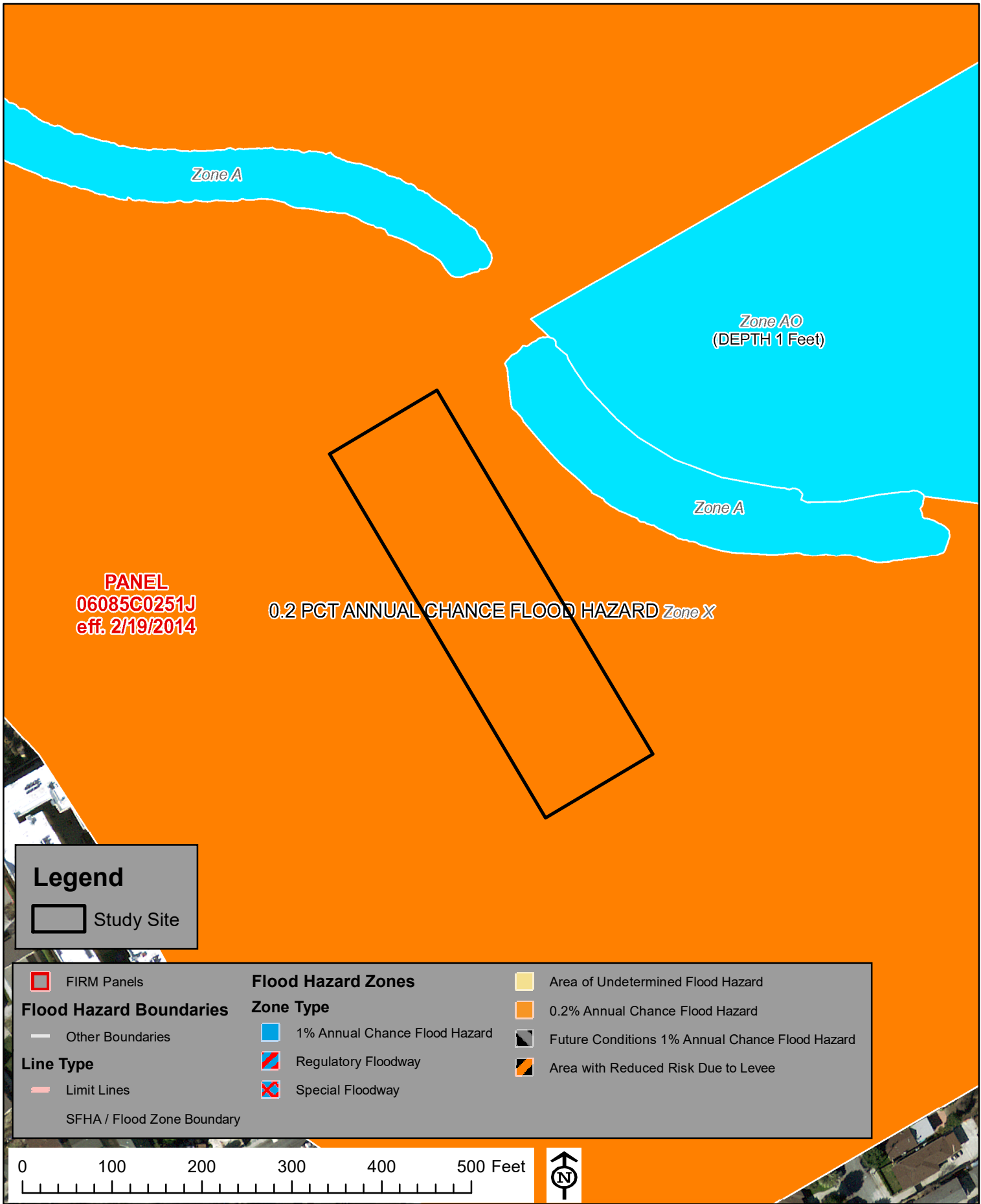


Figure 4. FEMA Map of 100-Year Floodplain
1936 Alum Rock Avenue, San Jose, Santa Clara County, California



Figure 5. Limit of Riparian Corridor
 1936 Alum Rock Avenue, San Jose, Santa Clara County, California



Figure 6. Riparian Corridor Setback Distances Between Project Development and the Riparian Corridor Limit of Lower Silver Creek
 1936 Alum Rock Avenue, San Jose, Santa Clara County, California

ATTACHMENT 2

REPRESENTATIVE PHOTOS



View of Lower Silver Creek from Alum Rock Avenue



Activities of the existing on-site land use prior to demolition extended to the fence line near the edge of riparian corridor



View of the bank of Lower Silver Creek from the property at 1948 Alum Rock Avenue



View of the east bank of Lower Silver Creek from Alum Rock Avenue