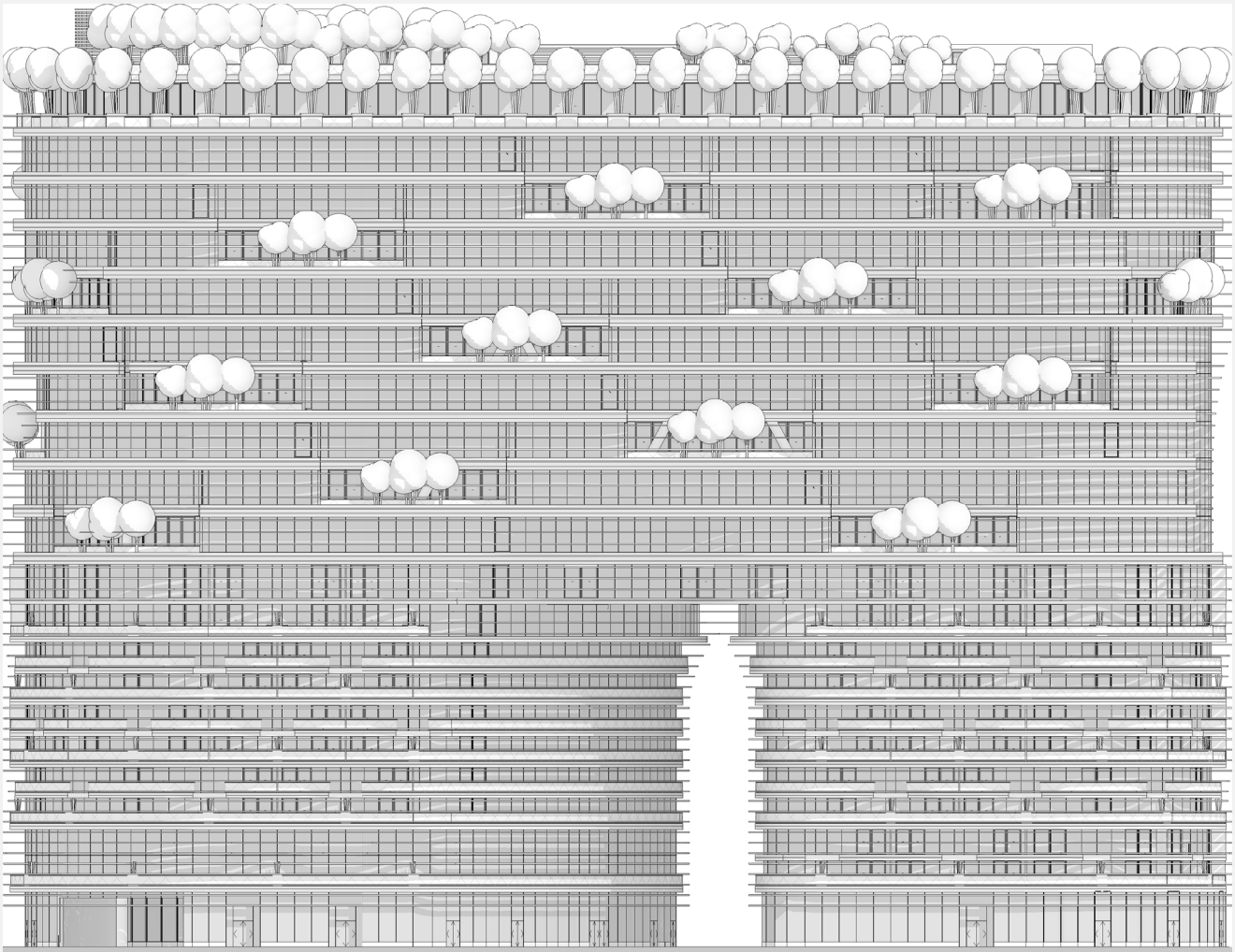
First Amendment to the Draft SEIR

San José Fountain Alley Mixed-Use

File Nos. H20-037 & ER20-242



Prepared by

CITY OF SAN JOSE

CAPITAL OF SILICON VALLEY

In Consultation with

50 YEARS EST. 1972 DAVID J. POWERS & ASSOCIATES, INC.

ENVIRONMENTAL CONSULTANTS & PLANNERS

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SECTION 1.0 INTRODUCTION

This First Amendment, together with the Draft Supplemental Environmental Impact Report (SEIR), constitute the Final SEIR for the San José Fountain Alley Mixed-Use project.

1.1 PURPOSE OF THE FINAL SEIR

In conformance with the California Environmental Quality Act (CEQA) and CEQA Guidelines, the Final SEIR provides objective information regarding the environmental consequences of the proposed project. The Final SEIR also examines mitigation measures and alternatives to the project intended to reduce or eliminate significant environmental impacts. The Final SEIR is intended to be used by the City of San José in making decisions regarding the project.

Pursuant to CEQA Guidelines Section 15090(a), prior to approving a project, the Lead Agency shall certify that:

(1) The Final EIR has been completed in compliance with CEQA;
(2) The Final EIR was presented to the decision-making body of the Lead Agency, and that the decision-making body reviewed and considered the information contained in the Final EIR prior to approving the project; and
(3) The Final EIR reflects the Lead Agency's independent judgment and analysis.

1.2 CONTENTS OF THE FINAL EIR

CEQA Guidelines Section 15132 specify that the Final SEIR shall consist of:

a) The Draft SEIR or a revision of the Draft;
b) Comments and recommendations received on the Draft SEIR either verbatim or in summary;
c) A list of persons, organizations, and public agencies commenting on the Draft SEIR;
d) The Lead Agency's responses to significant environmental points raised in the review and consultation process; and
e) Any other information added by the Lead Agency.

1.3 PUBLIC REVIEW

In accordance with CEQA and the CEQA Guidelines (Public Resources Code Section 21092.5[a] and CEQA Guidelines Section 15088[b]), the City shall provide a written response to a public agency on comments made by that public agency at least 10 days prior to certifying the EIR. The Final SEIR and all documents referenced in the Final SEIR are available for review on the City's website: https://www.sanjoseca.gov/active-eirs/.

SECTION 2.0 DRAFT SEIR PUBLIC REVIEW SUMMARY

The Draft SEIR for the San José Fountain Alley Mixed-Use project, dated June 2022, was circulated to affected public agencies and interested parties for an extended 45-day review period from June 17, 2022 through August 5, 2022. The City undertook the following actions to inform the public of the availability of the Draft SEIR:

- The Notice of Availability of Draft SEIR was published on the City's website, in the San José Mercury News and Post Record, and with the County of Santa Clara's Clerk Recorder;
- The Notice of Availability of the Draft SEIR was mailed to neighboring cities, tribal contacts, organizations, and individual members of the public who had indicated interest in the project or requested notice of projects in the City;
- The Notice of Availability was sent to members of the public who signed up for City notices via *Newsflash;*
- The Draft SEIR was delivered to the State Clearinghouse on June 22, 2022, which forwarded the Draft SEIR to various governmental agencies and organizations, (see *Section 3.0* for a list of agencies and organizations that received the Draft SEIR); and
- Copies of the Draft SEIR were made available on the City's website.

SECTION 3.0 DRAFT SEIR RECIPIENTS

CEQA Guidelines Section 15086 requires that a local lead agency consult with and request comments on the Draft SEIR prepared for a project of this type from responsible agencies (government agencies that must approve or permit some aspect of the project), trustee agencies for resources affected by the project, adjacent cities and counties, and transportation planning agencies.

The following agencies received a copy of the Draft SEIR via the State Clearinghouse:

- California Air Resources Board
- California Department of Fish and Wildlife, Bay Delta Region 3
- California Department of Housing and Community Development
- California Native American Heritage Commission
- California Regional Water Quality Control Board, San Francisco Bay Region 2
- Department of Toxic Substances Control
- Office of Historic Preservation
- San Francisco Bay Area Conservation & Development Committee

Copies of the Notice of Availability for the Draft SEIR were sent by mail and/or email to the organizations, businesses, and individuals who expressed interest in the project, in addition to the following:

- Karen Grellas
- Richard Goss

SECTION 4.0 RESPONSES TO DRAFT SEIR COMMENTS

In accordance with CEQA Guidelines Section 15088, this document includes written responses to comments received by the City of San José on the Draft SEIR.

Comments are organized under headings containing the source of the letter and its date. The specific comments from each of the letters and/or emails are presented with each response to that specific comment directly following. Copies of the letters and emails received by the City of San José are included in their entirety in Attachment A of this document. Comments received on the Draft EIR are listed below.

Comment Letter and Commenter **Page of Response**

REGIONAL AND LOCAL AGENCIES

A. Valley Water (August 2, 2022)

Comment A.1: The Santa Clara Valley Water District (Valley Water) has received the Notice of Availability of a Supplemental Environmental Impact Report (SEIR) for the proposed Fountain Alley Mixed-Use Project located along Second Street, between East Santa Clara Street and West San Fernando Street, on June 17, 2022.

In our review of the Notice of Preparation for this SEIR, Valley Water commented that a Water Supply Assessment (WSA) would be required, based on the revised number of residential dwelling units and the square footage of office space being proposed for the project. A copy of the WSA was not included as part of this SEIR. The City of San Jose will need to request that the San Jose Water Company prepare a WSA consistent with the requirements of SB610.

> **Response A.1:** A WSA for the project was prepared and approved by San Jose Water in July 2021. The Environmental Project Manager, Kara Hawkins, forwarded the commenter a copy of the WSA prepared for the project on August 3, 2022. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no further response or recirculation of the Draft SEIR is required.

Comment A.2: Walley Water agrees with the recommendations made in the Geotechnical Investigation report prepared by Langan Engineering and Environmental Services for the Fountain Alley project with regards to waterproofing the basement walls and foundation. Valley Water further recommends that the waterproofing be designed in such a way that avoids the need for permanent dewatering. Valley Water also recommends that a detailed analysis of construction dewatering be conducted, including estimating dewatering volumes/durations and evaluating related impacts. A construction dewatering system should be designed such that the volume and duration of dewatering are minimized to the greatest extent possible.

> **Response A.2:** The commenter agrees with the recommendations made in the Geotechnical Investigation and has provided additional recommendations. The additional recommendation for dewatering will be provided to the City Council for consideration. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no further response or recirculation of the Draft SEIR is required.

Comment A.3: Valley Water does not have any right of way or facilities at the project site; therefore, in accordance with Valley Water's Water Resources Protection Ordinance, a Valley water encroachment permit is not required for the proposed improvements.

> **Response A.3:** The commenter confirms that an encroachment permit is not required. This comment did not raise any further environmental issues under CEQA and, therefore, no specific response is required.

Comment A.4: The San Francisco Bay Regional Water Quality Control Board Municipal Regional Permit (MRP) was re-issued on 05/11/2022 and became effective on 07/01/2022. Page 58 of the Initial Study should be revised to reference the current MRP.

We appreciate the opportunity to comment on the SEIR document. Please let me know if you have any questions.

> **Response A.4:** The Municipal Regional Permit Provision C.3 section, page 58 of Appendix A of the Draft SEIR, has been revised (refer to Section 5.0 of this document for the text revision). This comment does not identify new or greater identified environmental impacts under CEQA and; therefore, no further response or recirculation of the Draft SEIR is required.

B. Valley Water (August 8, 2022)

Comment B.1: Thank you for sending over the WSA. We have reviewed the WSA and have the following comment:

The EIR concludes that the project is consistent with Downtown Strategy which determined that there are adequate water supplies to support development through 2040. The Downtown Strategy makes assumptions regarding the expansion of water conservation efforts throughout Santa Clara County to ensure there are adequate water supplies. To ensure that water conservation goals are met in the future, the City needs to require all available water conservation and demand management measures for the project. Potential opportunities to minimize water and associated energy use include requiring water conservation measures from the Model Water Efficient New Development Ordinance, which include:

- Require installation of separate submeters to each unit to encourage efficient water use - *studies have shown that adding submeters can reduce water use 15 to 30 percent*
- Require dedicated landscape meters where applicable
- Weather- or soil-based irrigation controllers.

Please let me know if you have any questions.

> **Response B.1:** A copy of the WSA was sent to the commenter and an additional comment letter was submitted to the City on August 8, 2022 after review of the WSA. The City will include these conditions separately from the Green Building Ordinance conformance requirement in the project permit conditions. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no further response or recirculation of the Draft SEIR is required.

C. Adams Broadwell Joseph & Cardozo (August 2, 2022)

We are writing on behalf of Silicon Valley Residents for Responsible Development ("Silicon Valley Residents" or "Commenters"), to provide comments on the Draft Supplemental Environmental Impact Report ("DSEIR") prepared by the City of San José ("City") for the San José Fountain Alley Mixed-Use Project ("Project") proposed by Westbank Corp, dba Project Fountain Alley, LLC ("Applicant"). We are writing on behalf of Silicon Valley Residents for Responsible Development ("Silicon Valley Residents" or "Commenters"), to provide comments on the Draft Supplemental Environmental Impact Report ("DSEIR") prepared by the City of San José ("City") for the San José Fountain Alley Mixed-Use Project ("Project") proposed by Westbank Corp, dba Project Fountain Alley, LLC ("Applicant").

The Project proposes to develop a 21-story curvilinear mixed-use building containing 194 residential units, 31,259 square feet of ground floor retail and 405,924 square feet of office space. The building would have a maximum height of 267 feet to the roof and 289 feet to the top of the mechanical penthouse. The Project would contain 22,500 square feet of public open space area. The Project proposes to develop four below-grade level parking with up to 292 parking spaces. The Project site is 1.25-acres located at 35 South 2nd Street, San José, California, 95113, west of Second Street, between East Santa Clara Street and West San Fernando Street, in the Fountain Alley area of downtown San José, Assessor Parcel Number ("APN") 467-22-121.

The Project tiers from the Downtown Strategy 2040 Final Environmental Impact Report ("Downtown Strategy 2040 FEIR"). The Downtown Strategy 2040 FEIR tiers off the 2040 General Plan EIR ("General Plan EIR"). The Project requires a Site Development Permit (File No. H20-037), Vesting Tentative Map, Demolition, Grading, and Building Permits, and other Public Works clearances. The Project includes removal of twelve trees within the Project site. The Project is within the Downtown General Plan land use designation and Downtown Commercial (DC) zoning district and the Downtown Employment Priority Area Overlay. The Project is within the Downtown Commercial National Register District.

We prepared our comments with the assistance of technical experts, including air quality, GHG emissions, and geologic hazards experts Matt Hagemann, P.G., C.Hg., and Paul E. Rosenfeld, Ph.D., at Soil / Water / Air Protection Enterprise ("SWAPE") whose technical comments and curriculum vitae are attached as Exhibit A.

1. STATEMENT OF INTEREST

Silicon Valley Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards, and the environmental and public service impacts of the Project. Residents includes San José residents Edmundo Escarcega, Ryan Jones, Johnny Bahr, the International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, along with their members, their families, and other individuals who live and work in the City of San José.

Individual members of Silicon Valley Residents live, work, recreate, and raise their families in the City and in the surrounding communities. Accordingly, they would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist on site.

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

II. LEGAL STANDARD

CEQA requires public agencies to analyze the potential environmental impacts of their proposed actions in an environmental impact report ("EIR") (except in certain limited circumstances). The EIR is a critical informational document, the very heart of CEQA. "The foremost principle in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR 'protects not only the environment but also informed self-government.'" The EIR has been described as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." As the CEQA Guidelines explain, "[t]he EIR serves not only to protect the environment but also to demonstrate to the public that it is being protected."

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

While the courts review an EIR using an "abuse of discretion" standard, "the reviewing court is not to 'uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference." As the courts have explained, "a prejudicial abuse of discretion occurs "if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process."

Where, as here, a program EIR has been prepared that could apply to a later project, CEQA requires the lead agency to conduct a two-step process to examine the later project to determine whether additional environmental review is required. First, the agency must consider whether the project will result in environmental effects that were not examined in the program EIR. Second, if the agency finds the activity would have environmental effects that were not examined in the program EIR, it must then prepare an initial study to determine whether to prepare an EIR or negative declaration to address those effects. A later EIR is required when the initial study or other analysis finds that the later project may cause significant effects on the environment that were not adequately addressed in the prior EIR.

Here, the City does not provide substantial evidence to support its conclusions regarding impacts from hazardous materials, air quality and greenhouse gas emissions from the Project. At most, it suggests that compliance with the Downtown Strategy 2040 FEIR and General Plan EIR's mitigation measures absolves the City of its responsibility to mitigate the Project's air quality and public health impacts, analysis which the City promised the public would be performed after the DSEIR was certified. This is antithetical to the purpose of CEQA Guidelines Section 15168's tiered review. A program EIR is prepared to simplify later environmental review, "rather than to obviate further review." The DSEIR's reliance on tiering from the prior EIRs attempts to obviate further review and mitigation of significant Project impacts. As demonstrated below and supported by substantial evidence, the Project may result in significant unmitigated impacts to air quality, greenhouse gas ("GHG"), and public health impacts specific to its development that were not analyzed or mitigated by the DSEIR, the Downtown Strategy 2040 EIR, nor the General Plan EIR.

Furthermore, tiering under CEQA Guidelines Sections 15168 and 15152 is limited to situations where the project is consistent with the general plan and zoning of the city or county in which the project is located. Here, the Project is inconsistent with the zoning due to its nonconformance with the 2003 Historic District Design Guidelines and is inconsistent with the General Plan for the same reasons, as well as the failure to mitigate the Project's greenhouse gas emissions pursuant to the General Plan's Greenhouse Gas Reduction Strategies. Therefore, the DSEIR improperly tiers from the Downtown Strategy 2040 EIR and a revised and recirculated project-level EIR must be prepared which adequately addresses the Project's significant impacts.

The DSEIR has not demonstrated through substantial evidence that the significant and unmitigated Project impacts are infeasible to mitigate or that specific economic, legal, social, technological, or other considerations, including provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or project alternatives identified in the EIR. The City must circulate an EIR which adequately analyzes and mitigates the Project's significant environmental impacts.

Response C.1: As stated in Section 1.1 of the Draft SEIR (page 1), the City of San José prepared the Draft SEIR for the referenced project in compliance with the requirements of CEQA and the CEQA Guidelines [Guidelines Section 15121(a) and Public Resource Code Section 21083]. Recirculation of an EIR is required when significant new information is added to the EIR (CEQA Guidelines Section 15088.5). As discussed in the responses to specific comments on the Draft SEIR below, the comments raised in this letter do not identify any new or more significant impacts, or new feasible project alternatives or mitigation measures considerably different than

identified in the Draft SEIR. For these reasons, the Draft SEIR does not require recirculation. This comment does not raise any specific issues about the adequacy of the Draft SEIR. No further response is required.

Comment C.2: III. THE DSEIR FAILS TO DISCLOSE AND MITIGATE POTENTIALLY SIGNIFICANT IMPACTS FROM HAZARDS

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

Response C.2: This comment does not raise any specific issues about the adequacy of the Draft SEIR. See Responses C.3-C.38 below for responses to specific comments.

Comment C.3: A. The DSEIR Fails to Adequately Analyze the Project's Hazardous Materials Impacts

The Project site was occupied by a coffee roaster business from 1930 to 1955. Per the Phase I Environmental Site Assessment ("ESA"), tetrachloroethene (PCE/PERC) was historically used to decaffeinate coffee beans until the 1970s, when it was banned for food preparation and pharmaceutical operations. PCE/PERC can accumulate in soil and soil gas and migrate to groundwater and was identified by the Phase I ESA as a recognized environmental condition (REC). The site may contain significant levels of PCE/PERC, and potential residual petroleum hydrocarbon contamination.

The DSEIR does not provide adequate disclosure of existing contamination or the additional impacts associated with mitigation to remediate the contamination, nor can it do so absent a Phase II ESA. SWAPE concluded that if PCE is found at the Project site through sampling, excavation and offsite transport of contaminated soil may be necessary. Installation of a soil vapor extraction system may also be necessary. These activities, through use of excavation equipment and trucks, would emit air pollutants and air toxins unaccounted for in the DSEIR. If a mitigation measure would cause a significant impact in addition to those caused by the project itself, the effects of such mitigation must be discussed in the EIR. The City's failure to allow for public review of a Phase II ESA in the DSEIR constitutes impermissibly deferred analysis in violation of CEQA.

By deferring environmental assessment to a future date, the DSEIR runs counter to CEQA's requirement of environmental review at the earliest feasible stage in the planning process. In Bozung v. Local Agency Formation Commission the Supreme Court of California approved "the principle that the environmental impact should be assessed as early as possible in government planning." A study conducted after approval of a project will inevitably have a diminished influence on decisionmaking. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA. The DSEIR recognized that "[c]onstruction associated with the proposed project could expose construction workers and nearby land uses to soil and/or groundwater contamination

(e.g., tetrachloroethene) from the former coffee roaster business." But, the DSEIR failed to adequately analyze the full extent of the contamination in a Phase II ESA for public review and scrutiny, in violation of CEQA Guidelines Section 15126.2 subdivision (a). The City must circulate an adequate EIR to adequately address impacts associated with hazardous contamination and impacts associated with such cleanup.

Response C.3: The Phase I Environmental Site Assessment (ESA) does not identify petroleum hydrocarbons as a potential recognized environmental condition (REC). The only reference to petroleum contamination is in the explanation of how RECs are defined (Section 3.4.1.4, page 77 of the Draft SEIR). As mentioned on page 77 of the Draft SEIR and correctly stated by the commenter, tetrachloroethene (PCE/PERC) was historically used to decaffeinate coffee beans until the 1970s. PCE/PERC can accumulate in soil and soil gas and migrate to groundwater and was identified by the Phase I ESA as an REC.

The proposed mitigation on pages 79-80 of the Draft SEIR properly identifies the necessary testing required and, if remediation is deemed necessary, the actions and regulatory oversight required which includes regulation of excavation and transport of contaminated soil, exposure of contaminated groundwater, soil vapor remediation, and worker safety protocols. In addition, the mitigation identifies performance standards which must be met before the project would be issued any grading permits needed to commence construction. The information regarding the existing REC and the level of mitigation required to allow the project to proceed in accordance with adopted thresholds for residential occupation is sufficient for the lead agency to make an informed decision. Recirculation of the Draft SEIR is not required.

Comment C.4: B. The DSEIR Fails to Adequately Mitigate the Project's Hazardous Materials Impacts

The DSEIR relies on Mitigation Measures HAZ-1.1 and HAZ-1.2 to purportedly reduce hazardous materials impacts to less than significant, but these measures constitute impermissibly deferred mitigation under CEQA. "By deferring environmental assessment to a future date, the conditions run counter to that policy of CEQA which requires environmental review at the earliest feasible stage in the planning process." CEQA Guidelines § 15126.4(a)(1)(B) provides that formulation of mitigation measures shall not be deferred until some future time. The specific details of a mitigation measure, however, may be developed after project approval when it is impractical or infeasible to include those details during the project's environmental review provided that the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will considered, analyzed, and potentially incorporated in the mitigation measure. Compliance with a regulatory permit or other similar process may be identified as mitigation if compliance would result in implementation of measures that would be reasonably expected, based on substantial evidence in the record, to reduce the significant impact to the specified performance standards". "An EIR is inadequate if '[t]he success or failure of mitigation efforts ... may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR.'"

Here, the Site Management Plan, Removal Action Workplan, and Health and Safety Plans called for by MM HAZ-1.2 would require additional analysis and establish mitigation measures that should have been included for public review in the DSEIR. The DSEIR fails to identify the types of measures that may be included to mitigate the Project's potentially significant hazardous material impacts including measures that may be included in the Removal Action Plan and the Health and Safety Plan. Without first assessing the extent of the potential PCE/PERC contamination and then providing details about the mitigation measures, the efficacy of mitigation measures HAZ-1.1 and HAZ-1.2 cannot be determined to be effective. The DSEIR fails as an informational document for impermissibly deferred analysis and mitigation.

Response C.4: See Response C.3.

Comment C.5: The DSEIR does not state why specifying these performance standards was impractical or infeasible at the time the DSEIR was drafted. In Preserve Wild Santee v. City of Santee, the city impermissibly deferred mitigation where the EIR did not state why specifying performance standards for mitigation measures "was impractical or infeasible at the time the EIR was certified." The court determined that although the City must ultimately approve the mitigation standards, this does not cure these informational defects in the EIR. Further, the court in Endangered Habitats League, Inc. v. County of Orange, held that mitigation that does no more than require a report to be prepared and followed, or allow approval by a county department without setting any standards is inadequate.

Here, the fact that the Site Management Plan will be approved later by the Santa Clara County Department of Environment Health or State Department of Toxic Substances Control does not cure the informational defects in this DSEIR. The City must circulate an adequate EIR which provides complete analysis and mitigation of the Project's hazardous materials impacts before the Project can be approved.

Response C.5: As noted in Response C.3, the mitigation has defined thresholds for cleanup (if necessary based on testing) and requires more than the preparation and approval of a report. Specifically, Mitigation Measure HAZ-1.2 (pages 79-80 of the Draft SEIR) states that the Site Management Plan (SMP) shall be reviewed and approved prior to issuance of grading permits and commencement of cleanup activities. This is consistent with procedural requirements for the City of San Jose's Environmental Services Department (ESD), the Santa Clara County Department of Environmental Health (SCCDEH), and the Department of Toxic Substances and Control (DTSC), who would be the primary oversight agencies. In addition, the Mitigation Measures HAZ-1.1 and HAZ-1.2 states that the approved SMP shall do the following:

1. detail procedures and protocols for management of soil containing environmental contaminants during site development activities,
2. any further investigation and remedial actions must be performed under regulatory oversight to mitigate the contamination and make the site suitable for the proposed residential development, and
3. the SCCDEH or DTSC shall provide documentation of completed cleanup activities to the City prior to the issuance of permits.

Therefore, based on the above response, the Draft SEIR adequately analyzed the hazards and hazardous materials impacts and no recirculation is required.

Comment C.6: **IV. THE DSEIR FAILS TO DISCLOSE AND MITIGATE POTENTIALLY SIGNIFICANT AIR QUALITY IMPACTS**

A. The DSEIR Fails to Adequately Analyze the Project's Air Quality Impacts

The DSEIR's operational air emissions analysis is not supported by substantial evidence. The failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA. Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency's factual conclusions. In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will "determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements."

Even when the substantial evidence standard is applicable to agency decisions to certify an EIR and approve a project, reviewing courts will not uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.'"

Response C.6: See Responses C.7 through C.9 below.

Comment C.7: *i. Backup Generator Usage*

The DSEIR states that the Project's "generators would be operated during periods of emergency and for maintenance and testing purposes with a maximum of 50 hours per year." The City's conclusion that the backup generators ("BUGs") will be operated only 50 hours per year is flawed and results in an underestimation of the Project's operational air emissions.

The DSEIR's air quality analysis failed to include the substantial increase in operational emissions from BUGs in the Air Basin due to unscheduled events, including but not limited to Public Safety Power Shutoff (PSPS) events and extreme heat events. Extreme heat events are defined as periods where in the temperatures throughout California exceed 100 degrees Fahrenheit. The total duration of the PSPS events lasted between 141 hours to 154 hours in 2019. In 2021, the Governor of California declared that during extreme heat events the use of stationary generators shall be deemed an emergency use under California Code of Regulations (CCR), title 17, section 93115.4 sub. (a) (30) (A)(2). The number of Extreme Heat Events is likely to increase in California with the continuing change in climate the State is currently undergoing.

According to the California Public Utilities Commission ("CPUC") de-energization report in October 2019, there were almost 806 PSPS events that impacted almost 973,000 customers (~7.5% of households in California) of which ~854,000 of them were residential customers, and the rest were commercial/industrial/medical baseline/other customers. CARB's data also indicated that on average each of these customers had about 43 hours of power outage in October 2019. Using the actual emission factors for each diesel BUG engine in the air district's stationary BUGs database, CARB staff calculated that the 1,810 additional stationary generators (like those proposed for the Project) running during a PSPS in October 2019 generated 126 tons of NOx, 8.3 tons or particulate matter,

and 8.3 tons of diesel particulate matter ("DPM"). DPM has been identified as a toxic air contaminant, composed of carbon particles and numerous organic compounds, including over forty known cancer-causing organic substances. The majority of DPM is small enough to be inhaled deep into the lungs and make them more susceptible to injury. For every PSPS or Extreme Heat Event (EHE) triggered during the operational phase of the project, significant concentrations of DPM will be released.

The City must circulate an adequate EIR to include an analysis of the additional operation of the BUGs that will occur at the Project site that is not accounted for in the current air quality and GHG analyses.

Response C.7: The commenter claims that the Draft SEIR fails to account for emissions during power outages when generators would operate. As discussed in the Air Quality Assessment on page 6 of Appendix B of the Draft SEIR, per direction from the Bay Area Air Quality Management District (BAAQMD), only emissions from routine testing and maintenance were considered in the analysis. The procedure is in accordance with BAAQMD Regulation 2, Rule 5 and the number of non-emergency operation hours per year, which is limited to 50 hours annually per the Airborne Toxic Control Measure for Stationary Toxic Compression Ignition Engines (Section 93115, Title 17 CCR). BAAQMD's procedure for permitting emergency generators is to consider operation of the generators for up to 50 hours per year.

The Draft SEIR provides a reasonable worst-case assessment of emissions factoring generator use of less than 50 hours per year per the California Air Resources Board's (CARB's) Airborne Toxic Control Measure which is administered by BAAQMD (refer to Appendix B of the Draft SEIR). Testing schedules are typically 30 minutes or less biweekly per generator under no load when emissions are much lower. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no recirculation of the Draft SEIR is required.

Comment C.8: *ii. Tier 4 Emissions Standards*
The DSEIR relies on air emissions modeling that assumes the use of Tier 4 Final emissions standards, but the DSEIR does not require the use of Tier 4 Final engines. The DSEIR requires only Tier 4 engines, which may include Tier 4 Interim equipment which has higher emissions than Tier 4 Final equipment. SWAPE concluded that the reliance on Tier 4 Final standards in the DSEIR's air quality modeling results in an underestimation of the Project's air quality and health risk impacts. The air quality and health risk analysis in the DSEIR is therefore not supported by substantial evidence. The DSEIR must be revised and recirculated to accurately reflect the air emissions associated with Project construction.

Response C.8: As noted by the commenter, the Air Quality Assessment (refer to Appendix B of the Draft SEIR) included Tier 4 Final Emissions Standards when calculating the effectiveness of the mitigation proposed by the project to address toxic air contaminants (TACs) during construction. The mitigation did not specifically note that the project would use Tier 4 *Final* Emissions Standards, but that was the intent as that is required to mitigation the project impacts. The Air Quality Assessment (Appendix B of the Draft SEIR) and the Draft SEIR have been revised to clarify the

equipment type required. See Section 5.0 and Attachment B of this document for the text revisions. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no further response or recirculation of the Draft SEIR is required.

Comment C.9: B. The DSEIR Fails to Mitigate the Project's Air Quality Impacts

CEQA's purpose is to "[p]revent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when the governmental agency finds the chances to be feasible." CEQA requires public agencies to avoid or reduce environmental damage when "feasible" by requiring "environmentally superior" alternatives and all feasible mitigation measures.

"CEQA establishes a duty for public agencies to avoid or minimize environmental damage where feasible." A public agency cannot approve a project if there are feasible alternatives or mitigation measures available that would substantially lessen any significant effects that the project would have on the environment. CEQA defines "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors."

"The core of an EIR is the mitigation and alternatives sections." The CEQA Guidelines define mitigation as a measure which (1) avoids the impact altogether by not taking a certain action or parts of an action, (2) minimizes the impact by limiting the degree or magnitude of the action and its implementation, (3) rectifies the impact by repairing, rehabilitating, or restoring the impacted environment, (4) reduces or eliminates the impact overtime by preservation and maintenance operations during the life of the action, and (5) compensates for the impact by replacing or providing substitute resources or environments. "In deciding whether changes in a project are feasible, an agency may consider specific economic, environmental, legal, social, and technological factors."

Findings as to mitigation measures must be supported by substantial evidence. Substantial evidence means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." Substantial evidence "shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts," but it should not include "[a]rgument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment."

The DSEIR fails to incorporate all feasible mitigation measures to avoid or substantially lessen air emissions impacts, especially with respect to cumulative annual PM2.5 emissions. The City must circulate an adequate EIR which incorporates all feasible measures recommended by Commenters to mitigate construction-related air emissions, including:

- For all construction equipment larger than 25 horsepower used at the site for more than two continuous days or 20 hours total, use equipment that meet U.S. Environmental Protection Agency (EPA) *Tier 4 Final emission standards* for particulate matter (PM10 and PM2.5)

- If Tier 4 ***Final*** equipment is not available, all construction equipment larger than 25 horsepower used at the site for more than two continuous days or 20 hours total shall meet U.S. EPA emission standards for Tier ***4 Interim*** engines and include particulate matter emissions control equivalent to CARB Level 3 verifiable diesel emission control devices that altogether achieve a 70 percent reduction in particulate matter exhaust in comparison to uncontrolled equipment.
- Ensure the cleanest possible construction practices and equipment are used. This includes eliminating the idling of diesel-powered equipment and providing the necessary infrastructure (e.g., electrical hookups) to support zero and near-zero equipment and tools.
- Implement, and plan accordingly for, the necessary infrastructure to support the zero and near-zero emission technology vehicles and equipment that will be operating on site. Necessary infrastructure may include the physical (e.g., needed footprint), energy, and fueling infrastructure for construction equipment, on-site vehicles and equipment, and medium-heavy and heavy-heavy duty trucks.
- In construction contracts, include language that requires all off-road equipment with a power rating below 19 kilowatts (e.g., plate compactors, pressure washers) used during project construction be battery powered.
- In construction contracts, include language that requires all heavy-duty trucks entering the construction site during the grading and building construction phases be model year 2014 or later. All heavy-duty haul trucks should also meet CARB's lowest optional low-oxides of nitrogen (NOx) standard.
- Include contractual language in tenant lease agreements that requires tenants to use the cleanest technologies available, and to provide the necessary infrastructure to support zero-emission vehicles and equipment that will be operating on site.
- Include contractual language in tenant lease agreements that requires all loading/unloading docks and trailer spaces be equipped with electrical hookups for trucks with transport refrigeration units (TRU) or auxiliary power units. This requirement will substantially decrease the amount of time that a TRU powered by a fossil-fueled internal combustion engine can operate at the project site. Use of zero-emission all-electric plug-in TRUs, hydrogen fuel cell transport refrigeration, and cryogenic transport refrigeration are encouraged and should also be included in lease agreements.
- Include contractual language in tenant lease agreements that requires all TRUs entering the project-site be plug-in capable.
- Include contractual language in tenant lease agreements that requires future tenants to exclusively use zero-emission light and medium-duty delivery trucks and vans.
- Include contractual language in tenant lease agreements that requires all service equipment (e.g., yard hostlers, yard equipment, forklifts, and pallet jacks) used within the project site to be zero-emission. This equipment is widely available and can be purchased using incentive funding from CARB's Clean Off-Road Equipment Voucher Incentive Project (CORE).
- Include contractual language in tenant lease agreements that requires all heavy-duty trucks entering or on the project site to be model year 2014 or later, expedite a transition to zero-emission vehicles, and be fully zero-emission beginning in 2023. A

list of commercially available zero-emission trucks can be obtained from the Hybrid and Zero-emission Truck and Bus Voucher Incentive Project (HVIP).

- Include contractual language in tenant lease agreements that requires the tenant to be in, and monitor compliance with, all current air quality regulations for on-road trucks including CARB's Heavy-Duty (Tractor-Trailer) Greenhouse Gas Regulation, Advanced Clean Trucks Regulation, Periodic Smoke Inspection Program (PSIP), and the Statewide Truck and Bus Regulation.
- Include contractual language in tenant lease agreements restricting trucks and support equipment from idling longer than two minutes while on site.
- Include rooftop solar panels for each proposed building to the extent feasible, with a capacity that matches the maximum allowed for distributed solar connections to the grid.
- Include contractual language in tenant lease agreements, requiring the installing of vegetative walls or other effective barriers that separate loading docks and people living or working nearby to help mitigate noise impacts, air quality, health risk, and greenhouse gas emissions.
- Include contractual language in tenant lease agreements, requiring all emergency generators to be powered by a non-diesel fuel.
- The project should be constructed to meet CalGreen Tier 2 green building standards, including all provisions related to designated parking for clean air vehicles, electric vehicle charging, and bicycle parking.

The above mitigation measures should be discussed and adopted in a recirculated EIR.

Response C.9: As discussed in the Air Quality Assessment (Appendix B of the Draft SEIR), CalEEMod was used to compute emissions associated with this mitigation measure (Mitigation Measure AIR-1.1) assuming that all equipment met U.S. EPA Tier 4 Final engines standards, electric stationary cranes were used, and enhanced BAAQMD best management practices for construction were included. With these implemented, the project's construction cancer risk levels (assuming infant exposure) and annual $PM_{2.5}$ concentrations would be reduced by 84 and 78 percent to 5.11 per million and 0.10 $\mu g/m^3$, respectively, and would no longer exceed the BAAQMD single-source significance thresholds. This would reduce the cumulative cancer risk and $PM_{2.5}$ concentration risk to less than 94.62 per million and less than 2.04 $\mu g/m^3$, which still exceeds the $PM_{2.5}$ concentration cumulative threshold.

Mitigation Measure AIR-1.1 represents the best available measures to reduce project construction period emissions. The $PM_{2.5}$ concentration from existing sources alone exceeds the cumulative threshold at 1.94 $\mu g/m^3$. Cumulative risks exceed the $PM_{2.5}$ concentration threshold because of the overwhelming influence of the potentially simultaneous nearby developments at the maximum exposed individuals (MEIs). The project's mitigated $PM_{2.5}$ concentration only represents five percent of the total mitigated cumulative concentration. In addition, according to BAAQMD, health risks would be less than significant at the MEIs if the risks from the project are reduced

below the single-source thresholds.[1] Therefore, the project would not substantially contribute to the total cumulative $PM_{2.5}$ concentration. The project would not be cumulatively considerable, and no additional mitigation would be required on the part of the project to mitigate the exceedance of the cumulative source threshold for annual $PM_{2.5}$ concentration. Note that the project would apply best practices in reducing construction emissions, including those of $PM_{2.5}$. Therefore, based on the above response, the Draft SEIR provided adequate cumulative air quality analysis pursuant to CEQA, and no recirculation of the Draft SEIR is required.

Text edits have been made to clarify that the project's contribution to existing cumulative impacts from cumulative construction sources would not be cumulatively considerable. See Section 5.0 for the text revisions. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, recirculation of the Draft SEIR is not required.

Comment C.10: V. THE DSEIR FAILS TO DISCLOSE AND MITIGATE POTENTIALLY SIGNIFICANT GREENHOUSE GAS EMISSIONS IMPACTS

The DSEIR includes measures that purportedly reduce the Project's GHG emissions, but the measures are not binding mitigation and may be removed from the Project altogether. Including unenforceable mitigation is a violation of CEQA because the DEIR's GHG analysis assumes implementation of these mitigation measures in its underlying GHG emissions calculations, thus failing to disclose the severity of the Project's GHG impacts prior to mitigation, as required by CEQA.

Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments. Failure to include enforceable mitigation measures is considered a failure to proceed in the manner required by CEQA. In order to meet this requirement, mitigation measures must be incorporated directly into the EIR to be enforceable.

The court in *Lotus v. Department of Transportation* held that "[b]y compressing the analysis of impacts and mitigation measures into a single issue, the EIR disregards the requirements of CEQA. The EIR in that case was inadequate because "[t]he DEIR also contains other measures that should be listed as mitigation but which will only be done at the discretion of the contractor. These need to be measurable and enforceable and listed as mitigations."

Response C.10: The commenter is asserting that the City's Greenhouse Gas Reduction Strategy (GHGRS) checklist is intended to outline mitigation for a proposed project, which is a mischaracterization of the intent and purpose of the GHGRS checklist. The City of San José has an adopted, qualified reduction strategy (https://www.sanjoseca.gov/your-government/department-directory/planning-building-code-enforcement/planning-division/environmental-planning/greenhouse-gas-reduction-strategy). As discussed on pages 50-51 and 53 of the Draft SEIR, projects which are consistent with the General Plan Land Use Assumptions need to

[1] Correspondence with Areana Flores, MSc, Environmental Planner, BAAQMD, February 23, 2021.

show compliance with applicable City policies through use of the GHGRS checklist. Compliance is based on design features and other factors proposed by or required (through regulatory requirements) of the project. If the City does not find a project to be compliant with the policies outlined in the checklist, based on all available project information, then the project would need to be revised or an impact would be identified requiring mitigation. As discussed on pages 53-54 of the Draft SEIR, the project would implement all applicable GHGRS consistency options intended to reduce GHG emissions. Refer to the Appendix H of the Draft SEIR for the GHGRS checklist. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no further response or recirculation of the Draft SEIR is required.

Comment C.11: Here, the DSEIR utilizes design features to purportedly reduce Project impacts. SWAPE determined that the DSEIR relies on unenforceable measures to artificially reduce the significance of Project GHG impacts. For example, the City relies on the use of recycled water, low water requirements, and onsite solar panels to support its conclusion that the Project conforms with the City's 2030 Greenhouse Gas Reduction Strategy. SWAPE concluded that, as a result of the reliance on these and other unenforceable measures, the DSEIR's analysis regarding GHG emissions and conformance with the General Plan GHG Reduction Strategy is not supported by substantial evidence. The City must circulate an adequate EIR which adequately analyzes and mitigates the Project's potentially significant GHG emissions impacts.

Response C.11: Design features and regulatory requirements included in the project are enforceable because they are part of the project description, would be required to be shown on site plans and other permit check documents prior to receiving grading, building, and occupancy permits, and are required as part of compliance with permit conditions. As such, the commenters opinion that these features are unenforceable because they are not characterized as mitigation is incorrect. No impact was identified; therefore, there is no nexus for requiring mitigation. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no further response or recirculation of the Draft SEIR is required.

Comment C.12: **VI. THE DSEIR FAILS TO ANALYZE FEASIBLE ALTERNATIVES**
CEQA Guidelines Section 15126.6(b) requires consideration of alternatives capable of eliminating or reducing significant environmental effects even though they may "impede to some degree the attainment of the project objectives, or would be more costly". The Court of Appeals determined in *Citizens of Goleta Valley v. Board of Supervisors*, "[t]he fact that an alternative may be more expensive or less profitable is not sufficient to show that the California Public Utilities Commission alternative is financially infeasible. What is required is evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project."

The DSEIR fails to adequately analyze Project Alternatives. The Reduced Height (Four-Stories), Two Buildings Alternative would substantially reduce impacts to the Historic District. Under this alternative, the above-grade construction timeframe would be reduced from 34 to 28 months. This would reduce air quality, health risk, and greenhouse gas emissions associated with Project construction. Additionally, this is the only Project alternative under which the Project can adequately

tier from the 2040 Downtown Strategy EIR.

Likewise, the DSEIR fails to demonstrate that the Reduced Height (Four-Stories), Two Buildings Alternative is infeasible. The requirement that EIRs identify and discuss alternatives to the project stems from the fundamental CEQA policy that public agencies should require implementation of feasible alternatives or feasible mitigation measures to reduce the project's significant impacts. A public agency cannot approve a project if there are feasible alternatives or mitigation measures available that would substantially lessen any significant effects that the project would have on the environment. CEQA defines "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors."

Here, the environmentally superior alternative is the Reduced Height (Four-Stories), Two Buildings Alternative, which is feasible and would reduce the Project's significant impacts. The DSEIR must be revised and recirculated to adequately analyze the feasibility of this alternative.

Response C.12: The only alternative that was considered and rejected is the location alternative (Section 7.3.1.1, page 114 of the Draft SEIR). The Draft SEIR identified and analyzed a No Project alternative (Section 7.3.1.2, page 115 of the Draft SEIR) and two Reduced Height alternatives (Section 7.3.1.3, pages 115-124 of the Draft SEIR). Nowhere in the analysis does the Draft SEIR state that the No Project or Reduced Height alternatives are infeasible and the Reduced Height (Four-Stories), Two Buildings Alternative was identified as the Environmentally Superior Alternative. The commenter is incorrect in their assertions and no recirculation is required.

Comment C.13: VII. THE PROJECT FAILS TO COMPLY WITH GENERAL PLAN, ZONING, AND LOCAL REGULATION

A. The Project Fails to Conform with the Historic District Requirements

The DSEIR states that the project would not be compatible with the height, corner element, size, scale, proportion, massing, façades, rear façades, setbacks and stepbacks of the 2003 Historic District Design Guidelines. The Historic District consists of one- to three-story commercial buildings (except for the Bank of Italy building which is 14 stories tall). The proposed building would be 21 stories tall with a maximum height of 267 feet to the top of the roof. The contributor buildings within the district have rectilinear footprints that occupy the entire width of their lots which create a continuous street wall. The proposed building would be curvilinear at the northern and southern ends and would be set back from the western and southern property lines. Additionally, the proposed building would not step down in height on all sides. The building façades would not be broken up into elements consistent with the scale of the adjacent historic buildings. The proposed building would overwhelm the adjacent historic buildings. For these reasons, the proposed project is not consistent with Standard 9 of the Secretary of the Interior's Standards, which provide that "new additions, exterior alterations or related new construction will not destroy historic materials, features, and spatial relationships that characterize the property. The new work shall be differentiated from the old and will be compatible with the historic materials, features, size, scale and proportion, and massing to protect the integrity of the property and its environment." The DSEIR explicitly provides

that the Project does not conform to the Historic District requirements.

Response C.13: The commenter is correct that the Draft SEIR fully discloses the impacts to the historic district from the proposed project. This comment does not speak to the adequacy of the Draft SEIR and no further response is required.

Comment C.14: B. The Project's Failure to Conform with the Historic District Results in a Failure to Conform with the Zoning Code

The San Jose Zoning Code provides that "Any project within a historic district shall conform to applicable guidelines adopted, and as amended by the city council." The DSEIR explicitly states that the Project does not conform with the character of the historic district as required by General Plan and Zoning Code. The failure to conform to the zoning code constitutes a significant impact under CEQA. Additionally, as shown above, the failure to conform with the Zoning Code precludes the City from relying on a tiered Supplemental EIR for the Project. Tiering under CEQA Guidelines Sections 15168 and 15152 are limited to situations where the project is consistent with the general plan and zoning of the city or county in which the project is located. The City must circulate an adequate project-level EIR which adequately analyzes the Project's nonconformance with the Zoning Code.

Response C.14: As discussed on pages 69-70 and 110, the project would have a significant unavoidable impact on the San José Downtown Commercial Historic District (Historic District). If the City Council were to approve the proposed project, in compliance with CEQA Guidelines Section 15093, a Statement of Overriding Considerations must be adopted with findings that the specific economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits, of a proposed project outweigh the unavoidable adverse environmental effects. The commenter is incorrect in their interpretation of CEQA Guidelines Sections 15152 and 15168. Section 15152(e) states:

> "Tiering under this section shall be limited to situations where the project is consistent with the general plan and zoning of the city or county in which the project is located, except that a project requiring a rezone to achieve or maintain conformity with a general plan may be subject to tiering."

This is in reference to the actual general plan and zoning land use designations, not individual policies or ordinances as jurisdictions often have conflicting policies and ordinances, such as economic development and historic preservation.

CEQA Guidelines Section 15168 relates specifically to Program EIRs and refers back to Section 15152. No additional restrictions for tiering are identified. As discussed on page 1 of the Draft SEIR, the SEIR prepared tiers from the Downtown Strategy 2040 FEIR because the project was included in the overall development that was analyzed for that document at a program-level. In addition, the project is consistent with the General Plan land use designation and zoning district; therefore, the use of an SEIR is appropriate for this project. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no further response or recirculation

of the Draft SEIR is required.

Comment C.15: C. The Project Fails to Comply with the General Plan

CEQA requires the agency to determine whether the Project would "[c]ause a significant environmental impact due to a conflict with any land use plan, policy, or regulation adopted for the purpose of avoiding or mitigating an environmental effect." The Project conflicts with the San Jose 2040 General Plan.

General Plan Policy LU-13.7 provides that projects must reduce or avoid impacts related to cultural resources by "Designing new development, alterations, and rehabilitation/remodels within a designated or candidate Historic District to be compatible with the character of the Historic District and conform to the Secretary of the Interior's Standards for the Treatment of Historic Properties, appropriate State of California requirements regarding historic buildings and/or structures (including the California Historic Building Code) and to applicable historic design guidelines adopted by the City Council." The Project admittedly fails to conform with the Historic District Design Guidelines, and therefore violates the General Plan. The failure to conform with the General Plan constitutes a significant impact under CEQA and precludes the City from relying on a tiered Supplemental EIR for the Project. Tiering under CEQA Guidelines Sections 15168 and 15152 are limited to situations where the project is consistent with the general plan and zoning of the city or county in which the project is located. The City must circulate an adequate project-level EIR which adequately analyzes the Project's nonconformance with the General Plan.

The Project also conflicts with the Downtown Strategy 2040 EIR. The Downtown Strategy 2040 EIR provides that "[a]t the time future actions are proposed, the City will review the future actions for consistency with the assumptions in this EIR (including conformance with the 2040 General Plan policies and measures included in the project)." The Project's nonconformance with the General Plan results in a violation of the Downtown Strategy 2040 EIR as well. The City must revise and recirculate the DSEIR to adequately analyze the Project's significant impacts resultant from its nonconformance with local plans.

Response C.15: Page 111 of the Integrated Final EIR for the Downtown Strategy 2040 explains that even with implementation of the measures included in the EIR, individual projects could result in significant unavoidable impacts to historic resources. In such cases, the EIR states that additional project-level environmental review will be required to evaluate the feasibility of mitigation measures and alternatives that conform with the Secretary of the Interior's Standards and avoid significant impacts. Therefore, while the Downtown Strategy 2040 Integrated Final EIR concluded a less than significant impact for resources which could be addressed at a programmatic level, it acknowledges that future projects under the Downtown Strategy 2040 could result in a significant unavoidable impact. The Downtown Strategy 2040 Integrated Final EIR also identified a significant unavoidable cumulative impact on historic resources from implementation of the Downtown Strategy 2040.

The commenter's opinion that inconsistency with General Plan Policy LU-13.7 precludes the project from tiering from the Downtown Strategy 2040 Integrated Final

EIR is incorrect. While the project is not consistent with all General Plan policies, in practice and in the law, it is recognized that it is nearly impossible for a project to be in conformity with each and every policy in the applicable plan, nor is such consistency required for the decision-maker. (See e.g., *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1510-1511.) If the City Council approves the proposed project, a Statement of Overriding Considerations, pursuant to CEQA Guidelines, Section 15093, is required to address a project's nonconformance with any General Plan policies and any significant unavoidable impacts. In addition, refer to Response C.14. The Statement of Overriding Considerations will be presented to the City Council. Based on the analysis in the Draft SEIR, project impacts have been identified and alternatives have been developed, pursuant to CEQA. No recirculation of the Draft SEIR is required. See Response C.14.

Comment C.16: D. The Project Fails to Conform with Local Ordinance

The City of San Jose's Park Impact Ordinance and Parkland Dedication Ordinance requires that residential developments provide three acres of parkland for every 1,000 new residents added by the project. The City of San Jose Department of Parks, Recreation, and Neighborhood Services concluded that the Project is required to dedicate 0.87 acres for a public park, or pay an park-impact in lieu fee of $2,832,400. The DSEIR is silent as to the inclusion of a 0.87 acre park or a payment of the requisite fee as part of the Project. The dedication of a new park requires analysis under CEQA. An adequate EIR must be circulated to clarify whether a park will be dedicated as required by local law.

Response C.16: Section 4.15.2, page 84 of Appendix A of the Draft SEIR discusses the potential impacts to local park facilities resulting from the project. The analysis outlines the on-site recreational amenities proposed by the project and states:

> "The proposed project would be required to pay the applicable PDO/PIO fees, the proposed project's PDO/PIO fees would be used for neighborhood serving elements (such as playgrounds/tot-lots and basketball courts) within 0.75 mile of the project site, and/or community serving elements (such as soccer fields and community gardens) within a three-mile radius of the project site, consistent with General Plan Policies PR-2.4 and PR-2.5."

The project does not propose dedication of a new park which is why the Draft SEIR does not address a new park and instead identifies the requirement to pay the park fees. The ordinance required dedication of land *or* the payment of fees. Therefore, the project is consistent with the Park Impact Ordinance and Parkland Dedication Ordinance. No recirculation of the Draft SEIR is required.

Comment C.17: VIII. THE PROJECT FAILS TO COMPLY WITH THE SUBDIVISION MAP ACT

The DSEIR lacks substantial evidence to support the Subdivision Map Act's required factual findings to approve the Tentative Map, which require the City to find that a proposed subdivision is consistent with the general plan/specific plan, and does not have any detrimental environmental or public health effects.

The purpose of the Subdivision Map Act is to regulate and control design and improvement of subdivisions with proper consideration for their relation to adjoining areas, to require subdividers to install streets and other improvements, to prevent fraud and exploitation, and to protect both the public and purchasers of subdivided lands. Before approving a tentative map, the Subdivision Map Act requires the agency's legislative body to make findings that the proposed subdivision map, together with the provisions for its design and improvement, is consistent with the general plan and any specific plan. The Subdivision Map Act also requires the agency's legislative body to deny a proposed subdivision map in any of the following circumstances:

> (a) the proposed map is ***not consistent with applicable general and specific plans*** as specified in Section 65451.
> (b) the design or improvement of the proposed subdivision is ***not consistent with applicable general and specific plans***.
> (c) the site is not physically suitable for the type of development.
> (d) the site is not physically suitable for the proposed density of development.
> (e) the design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat.
> (f) ***the design of the subdivision or type of improvements is likely to cause serious public health problems.***
> (g) ***the design of the subdivision or the type of improvements will conflict with easements, acquired by the public at large, for access through or use of, property within the proposed subdivision***. In this connection, the governing body may approve a map if it finds that alternate easements, for access or for use, will be provided, and that these will be substantially equivalent to ones previously acquired by the public. This subsection shall apply only to easements of record or to easements established by judgment of a court of competent jurisdiction and no authority is hereby granted to a legislative body to determine that the public at large has acquired easements for access through or use of property within the proposed subdivision.

As discussed above, there is substantial evidence demonstrating that the Project is likely to have new and more severe impacts on air quality, public health, and greenhouse gas emissions than previously analyzed in the Downtown Strategy 2040 FEIR, and which are not adequately mitigated in the DSEIR. In addition, the Project does not conform with the General Plan because it is inconsistent with the Historic District Design Guidelines. As a result,, the Project fails to comply with mandatory Subdivision Map Act requirements and the City cannot make the requisite findings to approve the Project's Tentative Map.

> **Response C.17:** No Vesting Tentative Map is required for this project; therefore, the proposed project would not conflict with any easements. The references to the Vesting Tentative Map have been deleted (refer to Section 5.0 of this document for the text revision).
>
> The Draft SEIR and Final SEIR evaluated impacts of the project to the environment. The majority of impacts identified in the Draft SEIR would be reduced to less than significant levels with implementation of the identified mitigation measures and Standard Permit Conditions. As mentioned on page 109 of the Draft SEIR, the project would have a significant and unavoidable impact to cultural resources because the

proposed project would impact the overall integrity of the Historic District, meaning that the project would require the City Council to adopt a Statement of Overriding Considerations that would outlining certain project benefits in light of the identified significant and unavoidable impacts. Note that the Draft SEIR identified a cumulative significant unavoidable impact; however, text edits have been made in the First Amendment to clarify that the project's contribution to existing cumulative impacts from cumulative construction sources would not be cumulatively considerable (refer to Section 5.0 of this document for the text revisions). The significant unavoidable cultural resources impact will be presented to the City Council. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no further response or recirculation of the Draft SEIR is required.

Comment C.18: IX. CONCLUSION

"'[T]he ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA.' The error is prejudicial 'if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process.'"

For the reasons set forth herein, we urge the City of San José to fulfill its responsibilities under CEQA by withdrawing the DSEIR and preparing a legally adequate, project-level EIR to address the potentially significant impacts described in this comment letter and the attached expert comments. An EIR is necessary to allow the decision-makers and public to ensure that the Project's significant environmental impacts are mitigated to less than significant levels.

Response C.18: See Responses C.1 through C.17.

Exhibit A – Memo from SWAPE

Comment C.19: We have reviewed the June 2022 Draft Supplemental Environmental Impact Report ("DSEIR") for the San José Fountain Alley Mixed-Use Project ("Project") located in the City of San José ("City"). The Project proposes to remove an existing parking lot and construct a mixed-use building with 194 dwelling units, 31,959-square-feet ("SF") of retail space, 405,924-SF of office space, and 292 parking spaces on the 1.25-acre site.

Our review concludes that the DSEIR fails to adequately evaluate the Project's hazards, hazardous materials, air quality, health risk, and greenhouse gas impacts. As a result, emissions and health risk impacts associated with construction and operation of the proposed Project are underestimated and inadequately addressed. A revised EIR should be prepared to adequately assess and mitigate the potential air quality, health risk, and greenhouse gas impacts that the Project may have on the environment. Furthermore, the Reduced Height (Four-Stories), Two Buildings Alternative and the Reduced Height (17-Stories and 20-Stories), Two Buildings Alternative should be considered as environmentally superior options that would substantially lessen the proposed Project's impacts.

Response C.19: See Responses C.1 through C.17, and C.20 through C.38.

Comment C.20: Hazards and Hazardous Materials
Inadequate Disclosure and Analysis of Impacts

The DSEIR discloses that the Project site was occupied by a coffee roaster business from 1930 to 1955. The DSEIR states:

> "[T]etrachloroethene (PCE/PERC) was historically used to decaffeinate coffee beans until the 1970s, when it was banned for food preparation and pharmaceutical operations. PCE/PERC can accumulate in soil and soil gas and migrate to groundwater and was identified by the Phase I ESA as a recognized environmental condition (REC)" (p. 77).

The DSEIR calls for the following mitigation to address the potential for construction worker exposure to PCE contamination in soil and groundwater, stating:

> "MM HAZ-1.1: Prior to the issuance of any demolition or grading permit(s), the project applicant shall retain a qualified environmental professional to conduct a Phase II soil, soil gas and/or groundwater investigation to determine if the soil, soil gas, and groundwater from former uses of the site have contaminants in concentrations above established construction/trench worker and residential or commercial Regional Water Quality Control Board Environmental Screening Levels (ESLs). If the Phase II results indicate soil, soil gas and/or groundwater contamination above regulatory environmental screen levels, the project applicant must enter into the Santa Clara County Department of Environment Health (SCCDEH) Site Cleanup Program (SCP) to obtain regulatory oversight from SCCDEH. Any further investigation and remedial actions must be performed under regulatory oversight to mitigate the contamination and make the site suitable for the proposed residential development.
>
> MM HAZ-1.2: If soil, soil gas, or groundwater contamination is identified, the project applicant shall implement appropriate management procedures, such as removal of the contaminated soil and implementation of a Site Management Plan (SMP), Removal Action Workplan (RAP), or equivalent document under regulatory oversight from the SCCDEH or State Department of Toxic Substances Control (DTSC)" (p. 79).

This mitigation is inadequate because it defers disclosure of conditions at the Project site which may be significant and warrant specific mitigation measures. A revised EIR needs to be prepared to include the results of a Phase II Environmental Site Assessment ("ESA") to be completed before Project approval.

The Phase II ESA is necessary to provide for adequate disclosure of contamination that may exist, and impacts associated with mitigation to remediate the contamination. For example, if PCE is found at the Project site through sampling, excavation and offsite transport of contaminated soil may be necessary. Installation of a soil vapor extraction system may also be necessary. These activities, through use of excavation equipment and trucks, would emit air pollutants and air toxins unaccounted for in the DSEIR.

Response C.20: See Responses C.3, C.4, and C.5.

Comment C.21: Air Quality

Unsubstantiated Input Parameters Used to Estimate Project Emissions

The DSEIR's air quality analysis relies on emissions calculated with CalEEMod.2016.3.2 (p. 27). CalEEMod provides recommended default values based on site-specific information, such as land use type, meteorological data, total lot acreage, project type and typical equipment associated with project type. If more specific project information is known, the user can change the default values and input project-specific values, but the California Environmental Quality Act ("CEQA") requires that such changes be justified by substantial evidence. Once all of the values are inputted into the model, the Project's construction and operational emissions are calculated, and "output files" are generated. These output files disclose to the reader what parameters are utilized in calculating the Project's air pollutant emissions and make known which default values are changed as well as provide justification for the values selected.

When reviewing the Project's CalEEMod output files, provided in Fountain Alley Project Air Quality Assessment ("AQ Assessment") as Appendix B to the DSEIR, we found that several model inputs were not consistent with information disclosed in the DSEIR. As a result, the Project's construction and operational emissions are underestimated. As such, a revised EIR should be prepared to include an updated air quality analysis that adequately evaluates the impacts that construction and operation of the Project will have on local and regional air quality.

Response C.21: See Responses C.22 and C.23 below.

Comment C.22: *Underestimated Number of Saturday and Sunday Operational Vehicle Trip*

According to the DSEIR:

> "The proposed project was estimated to generate up to 4,215 net new daily trips" (p. 33).

As such, the Project's model should have included trip rates that reflect the estimated number of average daily vehicle trips. However, review of the CalEEMod output files demonstrates that the "Fountain Alley, San Jose" model includes only 2,130.58 Saturday and 1,138 Sunday operational vehicle trips (see excerpt below) (Attachment B, pp. 94).

	Average Daily Trip Rate		
Land Use	Weekday	Saturday	Sunday
Apartments High Rise	473.36	560.66	411.28
Enclosed Parking with Elevator	0.00	0.00	0.00
General Office Building	2,727.78	608.88	259.79
Strip Mall	1,013.13	961.04	466.94
Total	4,214.27	2,130.58	1,138.00

As demonstrated above, the Saturday and Sunday vehicle trips are underestimated by approximately 2,084- and 3,077-trips, respectively. As such, the trip rates inputted into the model are underestimated and inconsistent with the information provided by the DSEIR.

These inconsistencies present an issue, as CalEEMod uses the operational vehicle trip rates to

calculate the emissions associated with the operational on-road vehicles. Thus, by including underestimated operational daily vehicle trips, the model underestimates the Project's mobile-source operational emissions and should not be relied upon to determine Project significance.

Response C.22: The commenter is incorrect that the vehicle trips inputted into the model are underestimated. The standard methodology for estimating trip generation is to calculate weekday trips with a focus on peak hour trips. The Air Quality Assessment (Appendix B of the Draft SEIR) used the correct trip generation rates for the proposed project. As described in the Air Quality Assessment prepared for the project (page 18 of Appendix B of the Draft SEIR), the weekday rates were adjusted for Saturday and Sundays per the ratios assigned by CalEEMod, as the traffic analysis does not provide estimates for weekends or holidays. The number of weekday trips used is consistent with the projects Transportation Analysis. This comment does not identify new or greater identified environmental impacts under CEQA and; therefore, no further response or recirculation of the Draft SEIR is required.

Comment C.23: *Unsubstantiated Changes to Wastewater Treatment System Percentages*
Review of the CalEEMod output files demonstrates that the "Fountain Alley, San José" model includes several changes to the default wastewater treatment system percentage (see excerpt below) (Appendix B, pp. 71).

Table Name	Column Name	Default Value	New Value
tblWater	AerobicPercent	87.46	100.00
tblWater	AerobicPercent	87.46	100.00
tblWater	AerobicPercent	87.46	100.00
tblWater	AerobicPercent	87.46	100.00
tblWater	AnaerobicandFacultativeLagoonsPercent	2.21	0.00
tblWater	AnaerobicandFacultativeLagoonsPercent	2.21	0.00
tblWater	AnaerobicandFacultativeLagoonsPercent	2.21	0.00
tblWater	AnaerobicandFacultativeLagoonsPercent	2.21	0.00

As demonstrated in the excerpt above, the model assumes that the Project's wastewater would be treated 100% aerobically. As previously mentioned, the CalEEMod User's Guide requires any changes to model defaults be justified. According to the "User Entered Comments & Non-Default Data" table, the justification provided for these changes is:

> "WWTP 100% Aerobic" (Appendix B, pp. 51).

However, these changes remain unsupported. The IS, provided as Appendix A to the DSEIR, indicates that "[w]astewater treatment in San José is provided by the San José-Santa Clara Regional Wastewater Facility" (p. 107). Review of the San José-Santa Clara Regional Wastewater Facilities treatment process reveals the use of anaerobic bacteria in the digesters phase of treatment. As such, the assumption that the Project's wastewater would be treated 100% aerobically is incorrect.

These unsubstantiated changes present an issue, as each type of wastewater treatment system is

associated with different GHG emission factors, which are used by CalEEMod to calculate the Project's total GHG emissions. Thus, by including unsubstantiated changes to the default wastewater treatment system percentages, the model may underestimate the Project's GHG emissions and should not be relied upon to determine Project significance.

Response C.23: The commenter asserts that changes to the CalEEMod default assumptions associated with wastewater are incorrect. CalEEMod predicts only GHG emissions from wastewater treatment. The treatment of wastewater does not affect air pollutant emissions, which CalEEMod was used to predict, because GHG emissions are no longer quantified to determine project compliance applicable thresholds. As discussed on page 53 of the Draft SEIR, if a project is consistent with the City's adopted GHGRS, it can be presumed that the project would not have significant GHG emissions under CEQA. The CalEEMod model provides three options to enter for wastewater treatment: (1) through septic systems, (2) anerobic treatment, and (3) facultative lagoons. Septic systems and facultative lagoons are aerobic treatment techniques that typically occur in rural areas and not in San José. The project plans do not include this treatment type and project generated wastewater would be sent to the San José Wastewater Treatment plant.

The commenter is correct that biosolids removed from the wastewater treatment would be processed using anaerobic digesters, but the treatment plant would capture these emissions. Nevertheless, the modeling of wastewater treatment emissions does not affect the findings contained in the Draft SEIR since GHG emissions are not quantified and the proposed project would comply with the City's adopted GHGRS as discussed above. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no further response or recirculation of the Draft SEIR is required.

Comment C.24: *Incorrect Application of Tier 4 Final Mitigation*
Review of the CalEEMod output files demonstrates that the "Fountain Alley, San Jose" model assumes that the Project's off-road construction equipment fleet would meet Tier 4 Final emissions standards (see excerpt below) (Appendix B, pp. 52).

Table Name	Column Name	Default Value	New Value
tblConstEquipMitigation	Tier	No Change	Tier 4 Final
tblConstEquipMitigation	Tier	No Change	Tier 4 Final
tblConstEquipMitigation	Tier	No Change	Tier 4 Final
tblConstEquipMitigation	Tier	No Change	Tier 4 Final
tblConstEquipMitigation	Tier	No Change	Tier 4 Final
tblConstEquipMitigation	Tier	No Change	Tier 4 Final
tblConstEquipMitigation	Tier	No Change	Tier 4 Final
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tblConstEquipMitigation	Tier	No Change	Tier 4 Final
tblConstEquipMitigation	Tier	No Change	Tier 4 Final
tblConstEquipMitigation	Tier	No Change	Tier 4 Final
tblConstEquipMitigation	Tier	No Change	Tier 4 Final

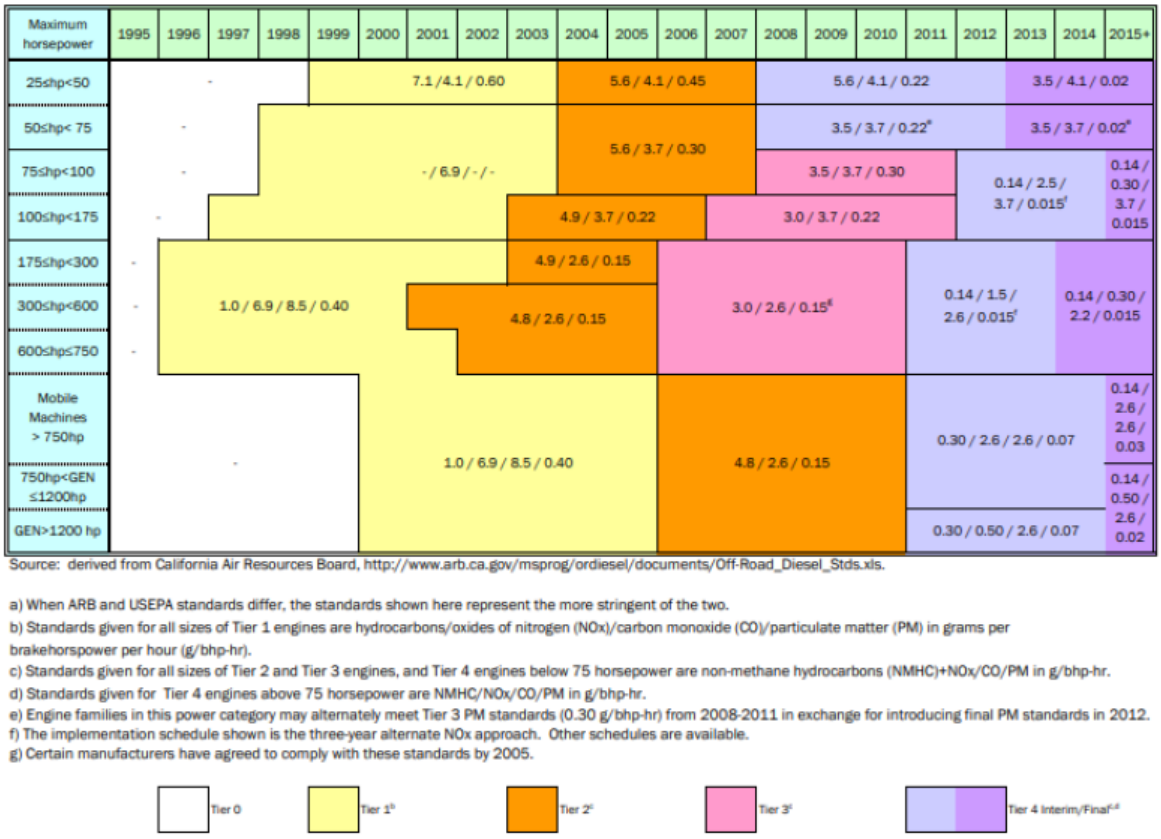
As previously mentioned, the CalEEMod User's Guide requires any changes to model defaults be justified. According to the "User Entered Comments & Non-Default Data" table, the justification provided for the inclusion of Tier 4 Final mitigation is:

> "Enhanced BMPs, Tier 4 final engines, electric cranes mitigation" (Appendix B, pp. 51).

Furthermore, the DSEIR includes Mitigation Measure ("MM") AQ-1, which states:

> "MM AIR-1.1: Prior to the issuance of any demolition, grading and/or building permits (whichever occurs earliest), the project applicant shall prepare and submit a construction operations plan [...] The plan shall be accompanied by a letter signed by a qualified air quality specialist, verifying that the equipment included in the plan meets the standards set forth below.
>
> - For all construction equipment larger than 25 horsepower used at the site for more than two continuous days or 20 hours total, use equipment that meet U.S. Environmental Protection Agency (EPA) ***Tier 4 emission standards*** for particulate matter (PM10 and PM2.5)" (emphasis added) (p. 5).

However, the inclusion of Tier 4 Final emissions standards remains unsupported. As demonstrated above, the DSEIR fails to discuss the more efficient Tier 4 ***Final*** emission standards. The United States Environmental Protection Agency ("U.S. EPA") has slowly adopted more stringent standards to lower the emissions from off-road construction equipment. Since 1994, Tier 1, Tier 2, Tier 3, Tier 4 Interim, and Tier 4 Final construction equipment have been phased in over time. Tier 4 Final represents the cleanest burning equipment and therefore has the lowest emissions compared to other tiers, including Tier 4 Interim equipment (see excerpt below):



Source: derived from California Air Resources Board, http://www.arb.ca.gov/msprog/ordiesel/documents/Off-Road_Diesel_Stds.xls.

a) When ARB and USEPA standards differ, the standards shown here represent the more stringent of the two.
b) Standards given for all sizes of Tier 1 engines are hydrocarbons/oxides of nitrogen (NOx)/carbon monoxide (CO)/particulate matter (PM) in grams per brakehorspower per hour (g/bhp-hr).
c) Standards given for all sizes of Tier 2 and Tier 3 engines, and Tier 4 engines below 75 horsepower are non-methane hydrocarbons (NMHC)+NOx/CO/PM in g/bhp-hr.
d) Standards given for Tier 4 engines above 75 horsepower are NMHC/NOx/CO/PM in g/bhp-hr.
e) Engine families in this power category may alternately meet Tier 3 PM standards (0.30 g/bhp-hr) from 2008-2011 in exchange for introducing final PM standards in 2012.
f) The implementation schedule shown is the three-year alternate NOx approach. Other schedules are available.
g) Certain manufacturers have agreed to comply with these standards by 2005.

As demonstrated in the figure above, Tier 4 Interim equipment has higher emission levels than Tier 4 Final equipment. Therefore, by modeling construction emissions assuming a full Tier 4 Final equipment fleet, the DSEIR fails to account for higher emissions that may occur as a result of the use of Tier 4 Interim equipment. Since the DSEIR fails to specify whether the Project would use Tier 4 Interim or Tier 4 Final equipment, it is incorrect to model emissions assuming that the more efficient Tier 4 Final equipment would be implemented. Until a revised EIR is prepared requiring Tier 4 Final engines during all phases of construction, and not Tier 4 Interim equipment, the model should not be relied upon to determine Project significance.

Response C.24: See Responses C.8 and C.9.

Comment C.25: *Incorrect Application of Energy-Related Operational Mitigation Measure*
Review of the CalEEMod output files demonstrates that the "Fountain Alley, San Jose" model includes the following energy-related mitigation measure (see excerpt below) (Appendix B, pp. 95):

5.1 Mitigation Measures Energy

Percent of Electricity Use Generated with Renewable Energy

As previously mentioned, the CalEEMod User's Guide requires any changes to model defaults be justified. According to the "User Entered Comments & Non-Default Data" table, the justification provided for this inclusion is:

"SJCE 100% renewable no carbon electricity" (Appendix B, pp. 51).

However, this justification remains insufficient, as the above-mentioned energy-related mitigation measure refers to renewable energy generation on-site. As such, electricity from the grid is not applicable and the inclusion of the energy-related operational mitigation measure in the model is incorrect. By incorrectly including an operational mitigation measure, the model overestimates the reduction to the Project's operational emissions and should not be relied upon to determine Project significance.

Response C.25: The comment states that CalEEMod overestimated the reduction to the project's operational emissions and that justification provided in the CalEEMod output files is insufficient. At the time of modeling and to account for the San José Climate Smart goal of zero net energy by 2030 and GHGRS Action 1 goal of 98 percent participation in San José Clean Energy (SJCE) with 100 percent carbon-free energy for projects operational by 2030, the on-site renewable energy generation was input as mitigation in CalEEMod as a method to account for SJCE providing 100 percent carbon free electricity in the future.[1] This was the only option available in CalEEMod that accounted for 100 percent carbon free electricity. The model output resulted in the same emissions that would occur with the project receiving carbon-free electricity from an energy provider, or in this case be consistent with all buildings using SJCE TotalGreen. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no further response or recirculation of the Draft SEIR is required.

Comment C.26: Diesel Particulate Matter Emissions Inadequately Evaluated
The DSEIR concludes that the proposed Project would result in a less-than-significant health risk impact based on a quantified construction and operational health risk assessment ("HRA"). Specifically, the DSEIR estimates that the maximum incremental cancer risk posed to nearby, existing residential sensitive receptors associated with exposure to toxic air contaminant ("TAC") emissions during Project construction and operation would be 5.11 in one million, which would not exceed the BAAQMD significance threshold of 10 in one million (see excerpt below) (p. 33-34, Table 3.1-7).

Table 3.1-7: Construction and Operation Risk Impacts at Off-Site MEI

Source	Cancer Risk (per million)	Annual $PM_{2.5}$ ($\mu g/m^3$)	Hazard Index
Total/Maximum Project Impact (Years 0-30) Mitigated	5.11 (infant)	0.10	<0.01
BAAQMD Single-Source threshold	*>10.0*	*>0.3*	*>1.0*
Exceed Threshold? Mitigated	No	No	No

However, the DSEIR's evaluation of the Project's potential health risk impacts, as well as the subsequent less-than-significant impact conclusion, is incorrect because the DSEIR's construction

[1] Reyff, James. Illingworth & Rodkin, Inc. Personal communication. August 2022.

HRA relies upon emissions estimates from a flawed air model. The DSEIR states:

> "A health risk assessment was completed to evaluate potential health effects to nearby sensitive receptors (within 1,000 feet of the project site) from construction emissions of DPM and PM2.5. The CalEEMod and EMFAC2021 models were used which provides total annual PM10 exhaust emissions (DPM) for the off-road construction equipment and on-road vehicles" (p. 30).

As previously discussed, when we reviewed the Project's CalEEMod output files, provided in the AQ Assessment as Appendix B to the DSEIR, we found that several of the values inputted into the model are not consistent with information disclosed in the DSEIR. Specifically, the model incorrectly accounts for the more efficient Tier 4 Final emissions standards and overestimates the expected reduction to the Project's potential emissions. As such, the HRA utilizes an underestimated diesel particulate matter ("DPM") concentration to calculate the health risk associated with Project construction. As a result, the DSEIR's construction HRA and resulting cancer risk should not be relied upon to determine Project significance.

Response C.26: See Responses C.8, C.9, and C.24.

Comment C.27: Greenhouse Gas
Failure to Adequately Evaluate Greenhouse Gas Impacts

The IS, provided as Appendix A to the DSEIR, relies upon the Project's consistency with the City's 2030 Greenhouse Gas Reduction Strategy ("GHGRS") in order to conclude that the Project would result in a less-than-significant greenhouse gas ("GHG") impact (p. 59-60). However, review of Table A: General Plan Consistency and Table B: 2030 Greenhouse Gas Reduction Strategy Compliance within the Compliance Checklist, provided as Appendix H to the DSEIR, reveals that the Project is inconsistent with numerous measures, including but not limited to those listed below:

GHGRS Project Compliance Checklist	
Table A: General Plan Consistency	
Implementation of Green Building Measures	
MS-2.2: Encourage maximized use of on-site generation of renewable energy for all new and existing buildings.	Here, the Compliance Checklist states: "PV arrays to be implemented on the roof and horizontal louvers of the building. Based on the area, it could provide up to 17% of the building's electricity. See 100%SD Sustainability Report for further details (Appendix B, p. 5). However, this response is insufficient for two reasons. First, by simply stating that solar panels would be implemented on the roof and horizontal louvers, the Project commits to the bare minimum requirements. As such, the Compliance Checklist fails to demonstrate how the Project would

	encourage ***maximized*** use of on-site renewable energy for all new and existing buildings. As previously discussed, the use of on-site renewable energy is not included as a formal mitigation measure. This is incorrect, as according to the AEP CEQA Portal Topic Paper on mitigation measures: "While not "mitigation", a good practice is to include those project design feature(s) that address environmental impacts in the mitigation monitoring and reporting program (MMRP). Often the MMRP is all that accompanies building and construction plans through the permit process. If the design features are not listed as important to addressing an environmental impact, it is easy for someone not involved in the original environmental process to approve a change to the project that could eliminate one or more of the design features without understanding the resulting environmental impact. As you can see in the excerpts above, project design features are not mitigation measures and may be eliminated from the Project's design. Here, as the DSEIR fails to require the Project to include solar panels on the rooftop of the Project, we cannot guarantee that this measure would be implemented, monitored, and enforced on the Project site. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.

Response C.27: General Plan Policy MS-2.2 states "Encourage maximized use of on-site generation of renewable energy for all new and existing buildings." The commenter states that "the project commits to the bare minimum requirements," but does not provide information on how that determination was made. The GHGRS Checklist (refer to Appendix H of the Draft SEIR) notes that up to 17 percent of the building's electricity usage could be met with rooftop solar and provides reference to support documentation which is part of the public record.

As written, the policy *encourages* but does not mandate or enforce any requirements for on-site renewable energy generation. The project is consistent with the intent of this policy. In addition, any substantive changes to the project after project approval will require supplemental environmental review. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no further

response or recirculation of the Draft SEIR is required.

Comment C.28:

GHGRS Project Compliance Checklist	
Table A: General Plan Consistency	
Implementation of Green Building Measures	
MS-16.2: Promote neighborhood-based distributed clean/renewable energy generation to improve local energy security and to reduce the amount of energy wasted in transmitting electricity over long distances.	Here, the Compliance Checklist states: "Solar panels are incorporated onto the roof to improve energy security. All exccess power generated will be sent back to the grid for distribution" (Appendix H, p. 2). However, this response is insufficient, as simply stating that the Project applicant would send excess power back to the grid fails to indicate any Project-specific measures that would encourage the promotion of neighborhood-based distributed clean energy. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.

Response C.28: General Plan Policy MS-16.2 states "Promote neighborhood-based distributed clean/renewable energy generation to improve local energy security and to reduce the amount of energy wasted in transmitting electricity over long distances." The inclusion of solar panels will directly power the project site and, when overproducing, put clean/renewable energy back into the local grid, as discussed in Appendix H of the Draft SEIR.

As written, the policy *promotes* but does not mandate or enforce any requirements for neighborhood based clean/renewable energy generation. The project is consistent with the intent of this policy. In addition, any substantive changes to the project after project approval will require supplemental environmental review. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no further response or recirculation of the Draft SEIR is required.

Comment C.29:

GHGRS Project Compliance Checklist	
Table A: General Plan Consistency	
Water Conservation and Urban Forestry Measures	
MS-3.1 Require water-efficient landscaping, which conforms to the State's Model Water Efficient Landscape Ordinance, for all new commercial, institutional, industrial and developer-installed residential development unless for recreation needs or other area functions.	Here, the Compliance Checklist states: "We are still working on developing our water strategy but we are targeting a 50% reduction in potable water use for landscape irrigation and 40% reduction in potable water use for indoor fixtures and cooling" (Appendix H, p. 8).

	However, this response is insufficient as the Compliance Checklist clearly states that the water strategy has yet to be developed. Furthermore, the DSEIR and associated documents fail to mention the Model Water Efficient Landscape Ordinance (MWELO) whatsoever. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.

Response C.29: A planting schedule is provided in the project plan set which shows the plant species to be planted on-site. The ability of the project to meet this policy requirement would be confirmed when the City reviews the project for consistency with all applicable regulations, including the California Building Code (CALGreen) and the City's Green Building Ordinance, during the building permit stage. In addition, any substantive changes to the project after project approval will require supplemental environmental review. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no further response or recirculation of the Draft SEIR is required.

Comment C.30:

GHGRS Project Compliance Checklist	
Table A: General Plan Consistency	
Water Conservation and Urban Forestry Measures	
MS-3.2: Promote the use of green building technology or techniques that can help reduce the depletion of the City's potable water supply, as building codes permit. For example, promote the use of captured rainwater, graywater, or recycled water as the preferred source for non-potable water needs such as irrigation and building cooling, consistent with Building Codes or other regulations.	Here, the Compliance Checklist states: "We are still working on developing our water strategy but we are targeting a 50% reduction in potable water use for landscape irrigation and 40% reduction in potable water use for indoor fixtures and cooling" (Appendix H, p. 8). However, this response is insufficient as the Compliance Checklist clearly states that the water strategy has yet to be developed. Furthermore, the DSEIR and associated documents fail to consider the feasibility or incorporate the use of captured rainwater, graywater, or recycled water as the preferred source for non-potable water needs (such as irrigation and building cooling) into the Project design. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.

Response C.30: The GHGRS checklist (Appendix H of the Draft SEIR) states that the project is targeting a 50 percent reduction in potable water use for outdoor

water use and a 40 percent reduction in indoor water use. The project is proposing the use of blackwater. Further potable water reductions would be achieved through plant selection for the landscaping, irrigation design, and low-flow water fixtures. The ability of the project to meet or exceed these targets would be confirmed when the City reviews the project for consistency with all applicable regulations, including the California Building Code (CALGreen) and the City's Green Building Ordinance, during the building permit stage. As with other code related requirements, the City would verify that the project is consistent with the requirements of this policy.

As written, the policy *promotes* but does not mandate or enforce any requirements for reduction in potable water use. The project is consistent with the intent of this policy. In addition, any substantive changes to the project after project approval will require supplemental environmental review. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no further response or recirculation of the Draft SEIR is required.

Comment C.31:

GHGRS Project Compliance Checklist	
Table A: General Plan Consistency	
Water Conservation and Urban Forestry Measures	
MS-19.4: Require the use of recycled water wherever feasible and cost-effective to serve existing and new development.	Here, the Compliance Checklist states: "We are still working on developing our water strategy but we are targeting a 50% reduction in potable water use for landscape irrigation and 40% reduction in potable water use for indoor fixtures and cooling (Appendix H, p. 9). Again, this response is insufficient as the Compliance Checklist clearly states that the water strategy has yet to be submitted. Furthermore, the DSEIR fails to explicitly require the use of recycled water wherever feasible and cost-effective to serve existing and new development in a formal mitigation measure. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.

Response C.31: As stated in Response C.30, above, the GHGRS checklist states that the project is targeting a 50 percent reduction in potable water use for outdoor water use and a 40 percent reduction in indoor water use. The project is proposing the use of blackwater as discussed in the GHGRS checklist (refer to Appendix H of the Draft SEIR). The ability of the project to meet or exceed the use targets of non-potable water would be confirmed when the City reviews the project for consistency with all applicable regulations, including the California Building Code (CALGreen) and the City's Green Building Ordinance, during the building

permit stage. As with other code related requirements, the City would verify that the project is consistent with the requirements of this policy "wherever feasible and cost-effective". In addition, any substantive changes to the project after project approval will require supplemental environmental review. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no further response or recirculation of the Draft SEIR is required.

Comment C.32:

GHGRS Project Compliance Checklist	
Table A: General Plan Consistency	
Water Conservation and Urban Forestry Measures	
MS-21.3: Ensure that San José's Community Forest is comprised of species that have low water requirements and are well adapted to its Mediterranean climate. Select and plant diverse species to prevent monocultures that are vulnerable to pest invasions. Furthermore, consider the appropriate placement of tree species and their lifespan to ensure the perpetuation of the Community Forest.	Here, the Compliance Checklist states: "The landscape design is still being developed but all species will have low water requirements and be adapted to the Mediterranean climate (Appendix H, p. 9). However, this response is insufficient as the Compliance Checklist clearly states that the landscape design strategy has yet to be developed. Furthermore, the DSEIR and associated documents fail to elaborate on the claim that the Project would feature plant species with low water requirements adapted to the Mediterranean climate. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.

Response C.32: As stated above in Response C.30, the project would reduce potable water use through plant selection for the landscaping and irrigation design. A planting schedule is provided in the project plan set (refer to sheets L-104 and L-106 of the plan set). In addition, an illustrative landscape plan is shown on sheet L-204 of the plan set. The ability of the project to meet this policy requirement would be confirmed when the City reviews the project for consistency with all applicable regulations, including the California Building Code (CALGreen) and the City's Green Building Ordinance, during the building permit stage. In addition, any substantive changes to the project after project approval will require supplemental environmental review. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no further response or recirculation of the Draft SEIR is required.

Comment C.33:

GHGRS Project Compliance Checklist	
Table A: General Plan Consistency	
Water Conservation and Urban Forestry Measures	
MS-26.1: As a condition of new development, require the planting and maintenance of both street trees and trees on private property to achieve a level of tree coverage in compliance with and that implements City laws, policies or guidelines.	Here, the Compliance Checklist states: "During construction the project will preserve existing trees along S 2nd Street. Only one existing tree will need to be removed to provide access to the site. There will be additional trees within the new Paseo and along the network alleys. The intermittent terraces and the two roof terraces will also have trees planted to provide shade and mitigate a heat island effect" (Appendix H, p. 9). However, this response is insufficient. Simply stating that the Project would include trees that provide shade and mitigate a heat island effect does not provide substantial evidence that this measure would be implemented, monitored, and enforced on the Project site. Furthermore, the DSEIR fails to explicitly require the planting and maintenance of both street trees and trees on private property to achieve a level of tree coverage in compliance with all City policies in a formal mitigation measure. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.

Response C.33: As discussed in Section 3.2.2.1, pages 49-50 of the Draft SEIR, the project would remove both on-site trees and street trees. As a Standard Permit Condition (consistent with the San José Tree Protection Ordinance, Municipal Code, and General Plan) the project will be required to replace all trees removed. As stated on page 50 of the Draft SEIR, "The species of trees to be planted would be determined in consultation with the City Arborist and the Department of Planning, Building and Code Enforcement." The removal and replanting of trees is a permitted process within the City and would be fully enforced by the City. Because the City makes the determination of the species of trees to be planted and has permit oversight of the removal and replanting, the project would meet the requirements of this policy. In addition, any substantive changes to the project after project approval will require supplemental environmental review. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no further response or recirculation of the Draft SEIR is required.

Comment C.34:

GHGRS Project Compliance Checklist	
Table A: General Plan Consistency	
Water Conservation and Urban Forestry Measures	
ER-8.7: Encourage stormwater reuse for beneficial uses in existing infrastructure and future development through the installation of rain barrels, cisterns, or other water storage and reuse facilities.	Here, the Compliance Checklist states: "Stormwater reuse is not proposed. However, the project propose a media filter system to discharge storm water" (Appendix H, p. 10). However, this response is insufficient as the Compliance Checklist clearly states that stormwater reuse is not proposed. Furthermore, simply stating that the Project would include a media filter system does not excuse or justify the failure to install rain barrels, cisterns, or other water storage facilities on the Project site. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.

Response C.34: The GHGRS Checklist states that no stormwater reuse is proposed for the project (refer to Appendix H of the Draft SEIR). This is not a violation of the policy because the policy *encourages* but does not mandate the reuse of stormwater. The project would, however, comply with the required water reuse policies as discussed in Responses C.30 through C.32. In addition, any substantive changes to the project after project approval will require supplemental environmental review. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no further response or recirculation of the Draft SEIR is required.

Comment C.35:

GHGRS Project Compliance Checklist	
Table B: 2030 Greenhouse Gas Reduction Strategy Compliance	
PART 2: RESIDENTIAL AND NON-RESIDENTIAL PROJECTS	
Renewable Energy Development • Install solar panels, solar hot water, or other clean energy power generation sources on development sites, or • Participate in community solar programs to support development of renewable energy in the community, or • Participate in San José Clean Energy at the Total Green level (i.e., 100% carbon-free electricity) for electricity accounts associated with the project. Supports Strategies: GHGRS #1, GHGRS #3.	Here, the Compliance Checklist states: "The proposed project includes solar photovolatic panels on the louvers surrounding the facade of the building and on the rooftop for on-site energy generation. The project would procure 100% green power beyond what the on-site photovolatics can provide. In addition, the project would pursue ILFI Zero Carbon Certification, which requires all electric buildings and 100% renewable energy" (Appendix H, p. 11). However, this response is insufficient for two reasons. First, the DSEIR and associated

	documents fail to provide substantial evidence indicating that the Project would actually be required to procure 100% green power beyond what the on-site photovoltaics would provide. Second, as the Compliance Checklist states that the Project would only "pursue" ILFI Zero Carbon Certification. As such, the Project may or may not become Zero Carbon certified. Thus, the Project's purported ILFI Zero Carbon Certification does not satisfy this measure. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.

Response C.35: The project would utilize solar panels as shown on the project plan set and in the GHGRS checklist (Appendix H of the Draft SEIR). As a result, the project would be consistent with this requirement. The text of the Draft SEIR has been edited to clarify the proposed energy use of the site. See Section 5.0 of this document. In addition, any substantive changes to the project after project approval will require supplemental environmental review. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no further response or recirculation of the Draft SEIR is required.

Comment C.36:

GHGRS Project Compliance Checklist	
Table B: 2030 Greenhouse Gas Reduction Strategy Compliance	
PART 2: RESIDENTIAL AND NON-RESIDENTIAL PROJECTS	
Zero Waste Goal • Provide space for organic waste (e.g., food scraps, yard waste) collection containers, and/or • Exceed the City's construction & demolition waste diversion requirement. Supports Strategies: GHGRS #5	Here, the Compliance Checklist states that the project would implement both consistency options (Appendix H, p. 12) However, the Compliance Checklist fails to provide any information regarding the strategies that the Project would implement to support the Zero Waste Goal. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.

Response C.36: The proposed project would be required to comply with the GHGRS checklist to have a less than significant GHG emissions impact. Compliance with the GHGRS checklist will be included as a project permit condition. The GHGRS checklist has been revised (refer to Attachment C of this document) to provide additional detail of project compliance with the Zero Waste Goal. As shown in the revised GHGRS checklist, the project will implement a wet/dry system for handling its commercial waste. Materials would be source separated post-collection and the two-stream system would be compliant with state recycling and compost mandates. In addition, landscape yard waste would be hauled away by the building

landscape contractor. The project's compliance with the organic waste collection strategy would be confirmed when the City reviews the project for consistency with all applicable regulations, including the California Building Code (CALGreen) and the City's Green Building Ordinance, during the building permit stage. As with other code related requirements, the City would verify that the project is consistent with the requirements of this policy. Proof that construction and demolition waste was recycled, and the amount recycled is required as part of the building permit and will be verified by the City during the construction process. In addition, any substantive changes to the project after project approval will require supplemental environmental review. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no further response or recirculation of the Draft SEIR is required.

Comment C.37: As the above table indicates, the DSEIR fails to provide sufficient information and analysis to determine Project consistency with all of the measures required by the GHGRS. As a result, we cannot verify that the Project is consistent with the GHGRS, and the DSEIR's less-than-significant GHG impact conclusion should not be relied upon. We recommend that a revised EIR include further information and analysis demonstrating the Project's consistency with the GHGRS.

Response C.37: See Responses C.27 through C.36.

Comment C.38: Disclaimer

SWAPE has received limited discovery regarding this project. Additional information may become available in the future; thus, we retain the right to revise or amend this report when additional information becomes available. Our professional services have been performed using that degree of care and skill ordinarily exercised, under similar circumstances, by reputable environmental consultants practicing in this or similar localities at the time of service. No other warranty, expressed or implied, is made as to the scope of work, work methodologies and protocols, site conditions, analytical testing results, and findings presented. This report reflects efforts which were limited to information that was reasonably accessible at the time of the work, and may contain informational gaps, inconsistencies, or otherwise be incomplete due to the unavailability or uncertainty of information obtained or provided by third parties.

Response C.38: The commenter provided a disclaimer that their letter is based on information that was accessible at the time and may contain informational gaps or inconsistencies. This comment does not speak to the adequacy of the Draft SEIR. No response is required.

D. Preservation Action Council of San José (August 2, 2022)

Comment D.1: The Preservation Action Council of San Jose (PAC*SJ) appreciates the opportunity to provide Comment on the SEIR for the proposed Fountain Alley Mixed Use Project located in the Fountain Alley area of downtown San Jose (1.25-acre Assessor Parcel Number 467-22-121) in the center of the National register listed San Jose Downtown Commercial Historic District. As currently described, the developer proposes to build one massive 21-story curvilinear mixed-use building with up to 194 dwelling units, ~31,959 sq. ft. of ground floor retail, and 405,924 sq. ft. of office space.

The height of the proposed project is 289' at the roof top and 289' at the top of the mechanical structure. Below grade parking with 292-stalls is proposed.

As was noted in PAC*SJ's Scoping Comments for this project, PAC*SJ (in general) supports infill development within downtown San Jose as described with the Envision 2040 Plan for the provision of commercial, retail, and residential space. And, that support may include new projects that are within historic districts as long as the projects do not directly or indirectly damage the setting, integrity, prominence, public view, access, landmark eligibility, operational viability of historic buildings and districts. As you know, PAC*SJ supports the preservation of building and districts that enable its citizens to enjoy a unique sense of place that pays tribute to San Jose's unique architecture and culture. PAC*SJ seeks to ensure that buildings are not only preserved but activated as this ensures a stewardship of our history and culture that would not otherwise be possible.

> **Response D.1:** While the commenter's understanding of the project is correct, some of the details cited in the comment are incorrect. The building would have a maximum height of 267 feet to the top of the roof and 289 feet to the top of the mechanical penthouse as mentioned in Section 2.2, Project Description, of the Draft SEIR. This comment does not provide new information that would change the project's impact or provide new information that would result in new significant impacts or mitigation measures than those analyzed and disclosed in the Draft SEIR

Comment D.2: PAC*SJ is opposed to the project as currently proposed. The City's own report concludes:
"The proposed project would impact the overall integrity of the San Jose Downtown Commercial Historic District (Historic District) as it does not comply with: the 2003 Historic District Design Guidelines (e.g., building height, corner element, massing, façades, rear façades, and setbacks and stepbacks) and the 2019 Guidelines and Standards. • And, that the Project's ground disturbing activities could result in a substantial adverse change in the significance of unknown archaeological resources."

The SEIR Report for this project includes an analysis by TreanorHL that references National, State and local guidelines and standards that point back to the same overarching and still unanswered question: "Was a project of this magnitude truly contemplated within the City's last and only Commercial Historic District by the City prior to this project, or is this a project that is so inconsistent with standards and guidelines that it should be reconsidered altogether. If not, what example of a project can be cited as being rejected based on the project's lack of compliance with the City's published guidelines and standards

> **Response D.2:** The commenter is opposed to the project as currently proposed. To provide further clarification, TreanorHL concluded that while the proposed project would diminish the integrity of design, setting (partial), and feeling (partial), the San José Downtown Commercial Historic District (Historic District) would still retain its overall historic character that qualifies it for listing as a historic resource. TreanorHL also concluded that because the project site is located at the center of the Historic District and would not block any existing visual connections between the district contributors, the proposed project would have a less than significant impact on the Historic District. As mentioned on pages 69-70 of the Draft SEIR, the City disclosed

a disagreement of expert opinion and concluded that the project would impact the overall integrity of the Historic District. The City's General Plan identified "Focused Growth" as a major strategy and the downtown area is designated as a Growth Area which promotes intensification of downtown. The General Plan also includes "Destination Downtown" as a major strategy and supports focused growth in the downtown. Ambitious job and housing growth capacity is planned for the downtown and would support for regional transit systems and the development of downtown as a regional job center. The Downtown Strategy 2040 FEIR concluded that intensification of the downtown could result in the demolition of historic resources and build out of the Downtown Strategy 2040 FEIR could result in a cumulative impact. The significant impact of the project on the Historic District is analyzed in the Draft SEIR to disclose project-specific impacts. CEQA requires the decision-makers to balance, as applicable, the economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits, of a proposed project against its unavoidable environmental risks when determining whether to approve the project. If the specific economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits, of a proposed project outweigh the unavoidable adverse environmental effects, the adverse environmental effects may be considered "acceptable" and the City Council may adopt a Statement of Overriding Consideration. Therefore, the commenter raises policy questions that are decided by the City Council and do not relate to the adequacy of the analysis included the Draft SEIR.

Comment D.3: As for the Report's analysis of the project's success in meeting the Secretary of the Interior's Standards, here is the complete quote from the report with a highlighting of key conclusions that evidence TreanorHL's understanding of the project's lack of compliance with key standards:

"The parcel (a parking lot) was identified as a noncontributing site within the National Register listed San Jose Downtown Commercial Historic District. As such the proposed project would not cause direct impacts to any built historic resources within the boundaries of the subject parcel. Even though the project site does not include any built historic resources, the proposed project entails constructing a new building within the boundaries of the National Register-listed San Jose Downtown Commercial Historic District (a historic resource). A review of project conformance with the Standards was undertaken, because generally, a project that has been determined to conform with the Standards can be considered to be a project that will not cause a significant impact per CEQA. In summary the Standards analysis for the proposed project showed that Standards 1-7 are not applicable to the proposed project. Standard 8 is related to archaeological resources and is beyond the scope of this report. The project does not comply with Standard 9 since the building is not compatible with the historic district in terms of features, size, scale, proportion, and massing. The building is only compatible in terms of materials. …… Since this project does not fully conform with the Standards, TreanorHL subsequently conducted an integrity analysis of the San Jose Downtown Commercial District to assess possible impacts. To be listed in the NRHP, a property must not only be shown to be significant under the NRHP criteria, but it also must maintain sufficient integrity in order to convey its historic significance. The historic district and multiple district contributors adjacent to the project site could be indirectly affected by the proposed project as a result of the alteration of their immediate surroundings and thereby, potentially to their historic integrity.

Although the proposed project would diminish the integrity of design, setting (partial), and feeling (partial) of the historic district, it would retain its overall historic character that qualifies it for listing as a historic resource. The impact of the proposed project to the San Jose Downtown Commercial Historic District would be less-than-significant."

PAC*SJ does not necessarily agree or disagree with the TreanorHL report's conclusion as to the likely impact of this project, but notes that it does not state its underlying assumptions for their conclusion regarding the significance of the impacts of this project. In short, the risk of losing the integrity of the Historic District is not a matter to be taken lightly.

Response D.3: As noted in Response D.2, while TreanorHL concluded in its report that the project would have a less than significant impact on the historic district, the City did not concur. Analysis of the project resulted in a disagreement among experts regarding the level of impact to the Historic District. Ultimately, the City concluded that the project would have a significant unavoidable impact on the district. Because the proposed project would impact the overall integrity of the Historic District, two reduced height alternatives were analyzed. Please refer to Section 7.3, pages 111-125 of the Draft SEIR for the alternatives discussion. As mentioned in Responses C.14 and D.2, CEQA requires the decision-making agency to balance, as applicable, the economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits, of a proposed project against its unavoidable environmental risks when determining whether to approve the project. If the specific economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits, of a proposed project outweigh the unavoidable adverse environmental effects, the adverse environmental effects may be considered "acceptable" and the City Council may adopt a Statement of Overriding Consideration.

Comment D.4: As for achieving the projects objectives, PAC*SJ has noted that the City only evaluated the following Project Options:

- Location Alternative
- No Project – No Development Alternative and Development under Downtown General Plan Designation
- Reduced Height (Four-Stories), Two Buildings Alternative
- Reduced Height (17-Stories and 20-Stories), Two Buildings Alternative

While these may be reasonable alternatives in isolation, it is very concerning that the City may accept significant impacts without even a consideration of alternatives to the design of the building itself, designs that could minimize the impact of the project.

Response D.4: An EIR is required to identify alternatives to the project that "would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project". In addition, an EIR shall describe a reasonable range of alternatives and does not need to consider every conceivable alternative to the project (CEQA Guidelines Section 15126.6). The range

of alternatives in an EIR is governed by a "rule of reason" that requires an EIR to set forth only those alternatives necessary to permit a reasonable choice.

As described on page 116 of the Draft SEIR, since the project is a mix of residential, retail, and office land uses, there would be a substantive number of possible development scenarios. Under CEQA, alternatives do not need to be described or analyzed at the same level of detail as the proposed project; however, they need to be described in enough detail to allow a comparative analysis of the alternatives against the proposed project. Therefore, two redesign alternatives were chosen and evaluated which assume substantial or partial compliance with the Historic District design standards and guidelines. As part of the decision-making process for projects involving the preparation of an EIR, the City Council will evaluate and compare the environmental impacts of alternatives to the proposed project. The ultimate determination whether an alternative is actually feasible will be made by the City Council as part of its findings. The City Council may make a recommendation, approval, or denial of any of the alternatives as analyzed. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no further response or recirculation of the Draft SEIR is required.

Comment D.5: PAC*SJ has repeatedly requested that the design of the Fountain Alley Project reflect the Historic District's buildings all the way down to street level. PAC*SJ provided the following comments within its Scoping Comments:

"In terms of the impact of this project, its mass and scale is immense and totally disproportionate to the Historic District. It is a project that will shadow and overwhelm everything else around it. It will be the focal point of the entire District, not due to its intrinsic design, but by its sheer mass alone and completely . The City has made clear though its recently updated Downtown Design Guidelines what they deem appropriate for the people of San Jose as noted in Section 4.2.4 of the Guidelines regarding Massing Standards & Historic Adjacency

a. Relate Podium Level building massing to the scale of Historic Context buildings by breaking a large building into masses of similar scale to Historic Context buildings.
b. Design buildings with rectilinear rather than curved and diagonal forms where rectilinear forms are typical of the Historic Context buildings.

Given the dissonance of the current curvilinear design (versus rectilinear) and massive, unbroken/unarticulated bases along 2nd Street, and many other design differences with the existing historic district's elements, there was clearly limited to no effort by the project's architect to do anything but ignore these guidelines altogether.

Response D.5: The commenter is opposed to the project design because of its mass and scale when compared to the historic district. This comment does not raise any issues under CEQA or with the adequacy of the Draft SEIR; therefore, no further response is required.

Comment D.6: PAC*SJ requested that the scope and content of the analysis of the cultural and historic impact of this project include massing, shadowing, parking, vehicle and pedestrian traffic volume, and any other items that might cause direct and indirect impacts to a historic building's or district's historic status, physical integrity and economic impact. These comments were not substantially addressed within the report. Even if some would argue this is beyond CEQA's scope, PAC*SJ believes that this analysis needed to take into account anything that would affect operational viability of a historic resource. For example, if a retail building is preserved within the project boundary, but removes customer parking, the delivery of materials critical to the business, or other resources that are vital to meeting the establishment's ability to host customers, those impacts need to be forecast and analyzed with just as much importance as the physical impact to the structural integrity of a building.

As noted in PAC*SJ's Scoping Comments, this SEIR should also include a detailed analysis of the direct and indirect impact of the proposed development on other nearby/adjacent historic structures and potential Districts as a whole, along with a detailed analysis of multiple alternatives that eliminate or substantially reduce the impact of this project on San Jose's historic resources. The Report includes a summary of adjacent off-site impacts that includes a listing of individual properties, but the current Report is lacking in its coverage of the impact to these building individually and in aggregate.

The Project SEIR does not adequately address the cumulative impact of this project in the context of all other projects currently underway or envisioned in the immediate vicinity of the Fountain Alley Mixed Use Project.

Section 15130(b) of the State CEQA Guidelines defines consideration of the following two elements as necessary to provide an adequate discussion of cumulative impacts: (A) a list of past, present, and reasonably anticipated future projects producing related or cumulative impacts, including those projects outside the control of the Agency, or (B) a summary of projections contained in a local, regional or statewide plan, or related planning document, that describes or evaluates conditions contributing to the cumulative effect.

Projects that should be taken into account in a revision of the Fountain Alley Mixed Use Project SEIR include but should not be limited to the SuZaCo, ICON/ECHO, Tower 27, Bank of Italy, and any other Project(s) that the City has already reviewed or reasonably anticipates. All of these projects are within the Land Use Control of the City of San Jose. It is worth noting that VTA has provided scoping comments that suggest the need for an evaluation of the impact of construction and operation of planned VTA/BART projects on San Jose's historic fabric. As required by CEQA, a list of development and transportation projects should be added to and reconciled with the conclusions of this Project Report.

Response D.6: As described in CEQA Guidelines Section 15121(a), an EIR is an informational document that assesses potential environmental impacts of a proposed project, as well as identifies mitigation measures and alternatives to the proposed project that could reduce or avoid adverse environmental impacts (CEQA Guidelines 15121(a)). The Draft SEIR analyzes project impacts based on the CEQA Guidelines and adopted thresholds and regulatory requirements. The analysis provided in the Draft SEIR assessed the proposed project's impact to historic resources consistent

with the requirements of the City of San José, the state of California, and national standards. There are no thresholds or mechanisms to provide the additional analysis requested by the commenter.

The cumulative project list is provided in Section 3.0, Table 3.0-1 on pages 15-18 of the Draft SEIR. The Draft SEIR analyzes the cumulative historic impact of the project in Section 3.3.2.2, page 73 of the Draft SEIR. Per the analysis, even with the changes to the district over time, including four recently approved projects, the district has thus far retained its historic significance. The Draft SEIR discloses that the proposed project would in fact have a significant unavoidable project-level impact on the integrity of the San José Commercial District which is the historic resource analyzed in the document. The Draft SEIR concludes that there would be no cumulative impact on historic resources in the downtown. In addition, the SuZaCo Mixed-Use Project Draft SEIR concluded that the project would have a significant impact on the individual City Landmark building located at 142-150 East Santa Clara Street because it would demolish the majority of the building. However, the Draft SEIR for the SuZaCo Mixed-Use Project concluded that it would not have a significant impact on the San José Commercial District since the SuZaCo Mixed-Use Project would retain the majority of the character-defining features of the north and east façades of the contributing building and they would remain as a visually prominent part of the East Santa Clara Street streetscape. Through use of contemporary materials and design vocabulary, new elements would be clearly differentiated from the remaining north and east walls of the building. The Draft SEIR analysis of the Icon-Echo Mixed-Use Project concluded that because the proposed Northern Tower would not substantially comply with the Secretary of the Interior's Standards for Rehabilitation or relevant local historic preservation regulations, construction of the Northern Tower would impair the overall historic integrity of the St. James Square City Landmark District and would have a significant impact on the St. James Square City Landmark District, a historical resource under CEQA. The cumulative impacts of each of these projects was analyzed in their respective project Draft SEIRs. The Icon-Echo Mixed-Use Project did identify a cumulative impact to the St. James Square City Landmark District. For all other projects on the cumulative list, the individual analyses concluded that the project's would not demolish or materially alter in an adverse manner those physical characteristics that convey the historic significance and integrity of any historic context building or adjacent San José City Landmarks or Candidate City landmarks, or properties listed on or eligible for listing on the CRHR or NRHP located outside the San José Commercial District and the St. James Square City Landmark District.

All projects listed by the commenter are included in the cumulative list on pages 15-18 of the Draft SEIR (refer to Section 3.0, Table 3.0-1 of the Draft SEIR) except for the Bank of Italy project which did not require any land use entitlement permits. A Historic Preservation Permit was issued for the project and a Categorical Exemption was prepared which outlined how the project would be consistent with the Secretary of the Interior's Standards for Rehabilitation and required findings of the Historic Preservation Ordinance. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no recirculation of the Draft SEIR is

required.

Comment D.7: In the TreanorHL DESIGN GUIDELINES AND STANDARDS COMPLIANCE REVIEW, the author notes that the proposed project represents a risk to the integrity of one of San Jose's most significant historic district as follows: "The activities related to the physical undertaking of the project….have the potential to physically damage the adjacent historic resources (district contributors and designated City Landmarks), which could cause a substantial adverse change in the significance of historic resources and therefore require mitigation measures." As a result, TreanorHL recommends four measures (Measures 1a through 1d) for evaluating and mitigating potential construction-related project impacts to "identified" historic resources as a key step towards reducing impacts to less-than-significant. Please see the following summary of those recommended Mitigation Measures:

1a. If pile-driving is to be included as part of the construction, then the adjacent historic resources should first be surveyed to determine the existing condition.

1b. A professional with expertise in ground vibration and its effect on existing structures, shall prepare a study of the potential of vibrations caused by excavation and construction activities.

1c. Prepare and implement a Historical Resources Protection Plan (HRPP) to protect the historic building fabric of the adjacent historic resources from direct or indirect impacts during construction activities (i.e., due to damage from operation of construction equipment, staging, and material storage).

1d. A team of at least one qualified historical architect and one qualified structural engineer shall monitor the mitigation measures.

The Report notes that if substantial adverse impacts to the historic resource related to construction activities are found during construction, the monitoring team shall inform the project's sponsor, as well as the City's HPO, or equivalent, and the project sponsor shall adhere to the monitoring team's recommendations for corrective measures, including potentially halting construction in situations where construction activities would imminently endanger the historic resources. The project sponsor shall ensure that if repairs occur, in the event of damage to the historic resources during construction, repair work shall comply with the Secretary of the Interior's Standards for the Treatment of Historic Properties and shall restore the character-defining features in a manner that does not affect their historic status.

PAC*SJ believes the City should not minimize the significance of the potential risk to the City's Historic District by this project and should ensure that the Mitigation Measures recommend in its SEIR be unquestionably established prior to, not after entitlement

Response D.7: Mitigation Measure 1a identified in TreanorHL's Design Guidelines and Standards Compliance Review (Appendix D of the Draft SEIR) is not applicable to the project because pile driving is not proposed as stated on page 69 of the Draft SEIR. Project construction could, however, generate perceptible vibration when heavy equipment or impact tools are used. Per General Plan Policy EC-2.3, a continuous vibration limit of 0.08 inch/sec Peak Particle Velocity (PPV) will be used

to minimize the potential for cosmetic damage to sensitive historic structures, and a continuous vibration limit of 0.2 inch/sec PPV will be used to minimize damage at buildings of normal conventional construction. Construction activities on-site would include demolition, site preparation, grading/excavation, trenching/foundation, building (superstructure/exterior/cores/elevators), and site work. The Downtown Strategy 2040 FEIR recognized that construction vibration for future projects in the downtown area could exceed these thresholds and included mandatory measures to be implemented by future projects to reduce vibration impacts. Therefore, Mitigation Measures NOI-2.1 to NOI-2.3 (Section 3.5.2.1, pages 100-103 of the Draft SEIR) have been identified as required by the project and are included in the Mitigation Monitoring and Reporting Program. The measures include multiple actions required by the applicant to prove compliance with the mitigation to the City. Issuance of various construction and occupancy permits for the project are dependent on the verification of implementation of the mitigation. This comment does not identify new or greater identified environmental impacts under CEQA; therefore, no recirculation of the Draft SEIR is required.

Comment D.8: In summary, the SEIR for this project confirms that the project doesn't meet the Guidelines & Standards that have been established for the good of the people and that the project (as currently proposed) will have a significant but potentially mitigated impact on the Historic District within which it is located. The SEIR asserts, without substantial evidence, that despite these admissions of impact to the integrity of the district, that it will not cause it (the Historic District) to be ineligible for listing on the National Registry. PAC*SJ respectfully asks the City for high level (not HABs) documentation of the District before the project is started to fully address the anticipated impact of the project in the hope of putting forward a project alternative that meets the majority of the project objectives without so terribly impacting the Historic District to the degree currently anticipated.

Finally, a robust summary of financial and physical mitigation measures applicable to this project should be provided in advance of project consideration should the City decide to approve this project via a statement of overriding consideration to justify any aspect of this project. PAC*SJ is particularly interested as to how the historic fabric in the vicinity of this proposed project will be preserved and how San Jose will be able to fund the protection of its historic fabric as it simultaneously seeks to meet it Envision 2040 Program Goals on a project-by-project basis. If the City determines that negative impacts are unavoidable, PAC*SJ asks that mitigation funding be provided to the City by the Project Developer for preservation projects within the District and perhaps beyond.

Response D.8: The commenter is incorrect that the project would have a significant, but mitigatable impact on the San José Commercial District. As discussed in Response D.6 and on page 69 of the Draft SEIR, the project would have a significant unavoidable project-level impact on the integrity of the San José Commercial District. The project applicant would be required to obtain a qualified architectural historian to create a permanent interpretive program, exhibit or display of the history of the Historic District to reduce identified impacts. Refer to Section 5.0 of this document for the text amendment which includes a Condition of Approval for the commemoration. Even with inclusion of the Condition of Approval, the proposed

project would continue to have a significant unavoidable impact on the Historic District. There is no mitigation to reduce the significant unavoidable impact to the Historic District as the project site is currently developed with a surface parking lot. CEQA requires lead agencies to impose feasible mitigation measures. Redesign cannot be a mitigation measure because it would defer its implementation and require additional analysis; therefore, two redesign alternatives were evaluated which assume substantial or partial compliance with the Historic District design standards and guidelines (refer to Section 7.3.1.3 of the Draft SEIR).

The commenter is also requesting that a robust summary of financial and physical mitigation measures applicable to the project be provided in advance of project consideration and for mitigation funding be provided for preservation projects. A list of the mitigation measures is provided on pages iv to xvi of the Draft SEIR. Per *California Native Plant Society v. County of El Dorado, 170 Cal. App. 4th 1026 (3rd Dist. 2009)*, impact fees are only acceptable when established through a fee program which has undergone review under CEQA. The City has no formal fee program to require fees from new development projects to preserve buildings within the City not impacted by the proposed project. Furthermore, there is no direct nexus between the payment of fees for the preservation of buildings not associated with the project and the impact of the project itself. Therefore, the City cannot require a project to provide financial contributions to support preservation of other buildings within the City as mitigation under CEQA.

As mentioned in Responses C.14, C.17, D.2, and D.3, if the City Council were to approve the proposed project, in compliance with CEQA Guidelines Section 15093, a Statement of Overriding Considerations must be adopted with findings that the specific economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits, of a proposed project outweigh the unavoidable adverse environmental effects.

SECTION 5.0 DRAFT EIR TEXT REVISIONS

This section contains revisions to the text of the San José Fountain Alley Mixed-Use Project Draft SEIR dated June 2022. Revised or new language is underlined. All deletions are shown with a ~~line through the text~~.

Draft SEIR, Summary, Page iv

The following text will be **ADDED** to the first bullet of Mitigation Measure AIR-1.1 as follows:

- For all construction equipment larger than 25 horsepower used at the site for more than two continuous days or 20 hours total, use equipment that meet U.S. Environmental Protection Agency (EPA) Tier 4 Final emission standards for particulate matter (PM10 and PM2.5).

Draft SEIR, Section 2.2, Page 12

The following text will be **ADDED** under the Green Building Measures heading as follows:

The project would be required to be built in accordance with the California Building Code (CALGreen) requirements which includes design provisions intended to minimize wasteful energy consumption. The proposed development would be constructed in compliance with the City's Council Policy 6-32 and the City's Green Building Ordinance. The proposed development would be designed to achieve Leadership in Energy and Environmental Design Core & Shell (LEED C&S) Platinum certification and International Living Future Institute's (ILFI) Zero Carbon Certification[2]. The project proposes to procure 100 percent green power beyond what the on-site photovoltaic (PV) can provide. Solar panels are proposed on the roof and horizontal louvers of the building. Additionally, the project proposes green roofs and green walls to contribute to pollution control, reduce the City's ambient temperature, retain rainwater, and act as a carbon dioxide (CO_2) sink. To reduce potable water use, the project is proposing the use of blackwater. Further potable water reductions would be achieved through plant selection for the landscaping, irrigation design, and low-flow water fixtures.

Draft SEIR, Section 2.4, Page 13

The following bullet will be **DELETED** under the USES OF THE EIR heading as follows:

- Site Development Permit
- ~~Vesting Tentative Map~~

[2] The ILFI Zero Carbon Certification requires all electric buildings and 100 percent renewable energy.

- Demolition, Grading, and Building Permit(s)
- Other Public Works Clearances

Draft SEIR, Section 3.1.2, Page 24

The last sentence under the Impact Discussion heading will be **DELETED** as follows:

Similar to the capacity build out evaluated in the Downtown Strategy 2040 FEIR, the proposed project would not result in a significant project-level impact due to construction-related emissions of criteria pollutants or expose sensitive receptors to a significant risk associated with TACs or odors. The Downtown Strategy 2040 FEIR did, however, identify a significant unavoidable cumulative regional air quality impact, as discussed below. ~~The proposed project would result in a cumulative $PM_{2.5}$ concentration impact, as discussed below.~~

Draft SEIR, Section 3.1.2, Page 32

The following text will be **ADDED** to the first bullet of Mitigation Measure AIR-1.1 as follows:

- For all construction equipment larger than 25 horsepower used at the site for more than two continuous days or 20 hours total, use equipment that meet U.S. Environmental Protection Agency (EPA) Tier 4 Final emission standards for particulate matter (PM10 and PM2.5).

Draft SEIR, Section 3.1.2.3, Page 38

The following paragraph will be **REVISED** as follows:

As shown in the table above, the cancer risk and annual $PM_{2.5}$ concentration, without mitigation, would exceed the BAAQMD threshold for cumulative sources. Implementation of Mitigation Measure AIR-1.1 and Standard Permit Conditions would reduce the cancer risk to less than 94.62 cases per one million which would be below BAAQMD's cumulative cancer risk significance threshold of 100 cases per one million.

BAAQMD CEQA Guidelines state that in instances where a pre-existing cumulative health risk impact exists, the project's individual contribution to that cumulative impact should be analyzed.[3] If project health risks would be reduced to below the single-source thresholds with best available mitigation measures, the project's contribution to pre-existing

[3] BAAQMD. 2017 CEQA Guidelines. May 2017. Page 5-16. https://www.baaqmd.gov/~/media/files/planning-andresearch/ceqa/ceqa_guidelines_may2017-pdf.pdf?la=en

cumulative impacts would not be cumulatively considerable. [4]

Even with implementation of Mitigation Measure AIR-1.1 and the identified Standard Permit Conditions, the cumulative $PM_{2.5}$ concentration would continue to exceed the BAAQMD significance threshold of 0.8 $\mu g/m^3$ for $PM_{2.5}$. As shown in Table 3.1-8, existing $PM_{2.5}$ sources would be 1.94 $\mu g/m^3$ alone which already exceeds the BAAQMD cumulative threshold of 0.8 $\mu g/m^3$. However, the project's annual $PM_{2.5}$ concentration would be 0.10 (with mitigation) which is well below BAAQMD single-source threshold of 0.3 $\mu g/m^3$. The project's mitigated $PM_{2.5}$ concentration only represents five percent of the total mitigated cumulative concentration. Therefore, the project's contribution to existing cumulative impacts from cumulative construction sources would not be cumulatively considerable. **[~~New Significant Unavoidable~~ Same Impact as Approved Project (Less Than Significant Cumulative Impact)]**

Draft SEIR, Section 3.3.2.1, Page 69

The following text and Condition of Approval will be **ADDED** before the last sentence of the Historic Integrity Analysis subheading as follows:

As mentioned previously, the site has been identified as a non-contributing property within the Historic District. Nevertheless, the project applicant would be required to implement the identified Condition of Approval below.

Condition of Approval:

• **Commemoration:** A qualified architectural historian shall create a permanent interpretive program, exhibit, or display of the history of the San José Downtown Commercial Historic District (Historic District) including, but not limited to, historic and current condition photographs, interpretive text, drawings, video, interactive media, or oral histories. Any exhibit or display shall be placed in a suitable publicly accessible location on the project site. The final design of the commemorative interpretive program, exhibit, or display shall be determined in coordination with the City's Historic Preservation Officer. The project applicant shall provide evidence that the commemorative interpretive program, exhibit, or display was created to the Director of Planning, Building and Code Enforcement or the Director's designee prior to the certificate of occupancy.

[4] Illingworth & Rodkin, Inc. I*con-Echo Mixed-Use Towers Air Quality Cumulative Memo*. September 23, 2021.

~~For these reasons~~Even with inclusion of the Condition of Approval, the proposed project would have a significant unavoidable impact on the Historic District.

Draft SEIR, Section 3.3.2.1, Page 70

The impact numbering will be **REVISED** as follows:

Impact CUL-~~3~~1: Project ground disturbing activities could result in a substantial adverse change in the significance of unknown archaeological resources.

Draft SEIR, Section 5.0, Page 109

The third paragraph will be **REVISED** as follows:

The City of San José encourages the use of building materials that include recycled materials and makes information available on those building materials to developers. The project would be built to current codes, which require insulation and design to minimize wasteful energy consumption. Additionally, the proposed project would be designed to achieve LEED C&S Platinum certification and ILFI Zero Carbon Certification and constructed in compliance with CALGreen requirements, the City's Council Policy 6-32 and the City's Green Building Ordinance. In addition, the project proposes to procure 100 percent ~~renewable electricity through a portfolio scale power purchase agreement or participation in SJCE at the TotalGreen level (100 percent renewable energy)~~green power beyond what the on-site PV can provide. The project would be constructed consistent with City Council Policy 6-29 and the RWQCB Municipal Regional Stormwater NPDES46F to avoid impacts to waterways. The project site is located in the downtown area which would provide future residents, employees, and patrons access to existing transportation networks and other downtown services. Therefore, the proposed project would facilitate a more efficient use of resources over the lifetime of the project. For these reasons, the project would not result in significant and irreversible environmental changes to the project site.

Draft SEIR, Section 6.0, Page 110

The first bullet will be **DELETED** as follows:

- ~~Cumulative Air Quality: Even with implementation of Mitigation Measure AIR-1.1 and the identified Standard Permit Conditions, the cumulative PM2.5 concentration would continue to exceed the BAAQMD significance~~

~~threshold 0.8 µg/m^3 .~~

Draft SEIR, Section 7.2, Page 112

The second bullet will be **DELETED** as follows:

- ~~**Cumulative Air Quality:** Even with implementation of Mitigation Measure AIR-1.1 and the identified Standard Permit Conditions, the cumulative PM2.5 concentration would continue to exceed the BAAQMD significance threshold 0.8 µg/m^3 .~~

Draft SEIR, Section 7.3.1.3, Page 116

The first paragraph will be **REVISED** as follows:

Since the project is a mix of residential, retail, and office land uses, there would be a substantive number of possible development scenarios. Therefore, two redesign alternatives were chosen and evaluated which assume substantial or partial compliance with the Historic District design standards and guidelines. Based on TreanorHL's review of the two height alternatives presented below, the *Reduced Height (Four-Stories), Two Buildings Alternative* would substantially reduce impacts to the Historic District.[5] TreanorHL found that the other alternative would not reduce impacts to the Historic District to a less than significant level. This analysis is discussed below and in Appendix D. Any development scenario with a smaller project would involve a shorter construction timeframe, which would lessen the construction air quality and noise impacts. ~~Even with implementation of the identified measures and Standard Permit Conditions, it is reasonable to assume that the cumulative $PM_{2.5}$ concentration would still be significant and unavoidable.~~ Under these two design alternatives, impacts from ground disturbance and tree removal would be comparable to the proposed project for impacts related to biological resources and hazards and hazardous materials

Appendix A, Section 2.7, Page 3

The following bullet will be **DELETED** under the USES OF THE EIR heading as follows:

- Site Development Permit
- ~~Vesting Tentative Map~~
- Demolition, Grading, and Building Permit(s)
- Other Public Works Clearances

[5] TreanorHL. *Fountain Alley Project Design Alternatives Memorandum*. May 9, 2022

Appendix A, Section 3.1.2, Page 12	The following text will be **ADDED** under the Green Building Measures heading as follows: The project would be required to be built in accordance with the California Building Code (CALGreen) requirements which includes design provisions intended to minimize wasteful energy consumption. The proposed development would be constructed in compliance with the City's Council Policy 6-32 and the City's Green Building Ordinance. The proposed development would be designed to achieve Leadership in Energy and Environmental Design Core & Shell (LEED C&S) Platinum certification and International Living Future Institute's (ILFI) Zero Carbon Certification[6]. The project proposes to procure 100 percent green power beyond what the on-site photovoltaic (PV) can provide. Solar panels are proposed on the roof and horizontal louvers of the building. Additionally, the project proposes green roofs and green walls to contribute to pollution control, reduce the City's ambient temperature, retain rainwater, and act as a carbon dioxide (CO_2) sink. To reduce potable water use, the project is proposing the use of blackwater. Further potable water reductions would be achieved through plant selection for the landscaping, irrigation design, and low-flow water fixtures.
Appendix A, Section 4.10.1.1, Page 58	The first sentence under the Municipal Regional Permit Provision C.3. will be **REVISED** as follows: The San Francisco Bay RWQCB re-issued the Municipal Regional Stormwater NPDES Permit (MRP) ~~in 2015~~ on May 11, 2022 and became effective as of July 1, 2022. ~~to regulate stormwater discharges from municipalities and local agencies (co-permittees) in Alameda, Contra Costa, San Mateo, and Santa Clara Counties, and the cities of Fairfield, Suisun City, and Vallejo.~~[7]
Appendix B	Appendix B will be **UPDATED** to specifically note that the project would use Tier 4 *Final* Emissions Standards.
Appendix H	Appendix H will be **UPDATED** to clarify the project's compliance with the 2030 GHGRS. See Attachment C of this document for the revised GHGRS checklist.

[6] The ILFI Zero Carbon Certification requires all electric buildings and 100 percent renewable energy.
[7] ~~MRP Number CAS612008~~