



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Kerrie Romanow

SUBJECT: SEE BELOW

DATE: November 21, 2022

Approved

Date

11/30/22

SUBJECT: AGREEMENT WITH SANTA CLARA VALLEY HABITAT AGENCY ESTABLISHING A 201-ACRE CONSERVATION EASEMENT AS LAND-IN-LIEU OF FEES FOR THE BURROWING OWL HABITAT AT THE SAN JOSE-SANTA CLARA REGIONAL WASTEWATER FACILITY

RECOMMENDATION

Approve a Conservation Easement-In-Lieu of Fees agreement with Santa Clara Valley Habitat Agency that establishes an approximate 201-acre conservation easement over the Western Burrowing Owl Habitat at the San José-Santa Clara Regional Wastewater Facility as land-in-lieu of paying development fees for certain projects in the Capital Improvement Program and the corresponding Conservation Easement Agreement.

OUTCOME

This Conservation Easement Agreement (Easement) and Conservation Easement-In-Lieu of Fees Agreement (collectively referred to as Conservation Agreement) with the Santa Clara Valley Habitat Agency (SCVHA) ensures that the Western Burrowing Owl Habitat (Habitat) at the San José-Santa Clara Regional Wastewater Facility (RWF) will be protected and managed in perpetuity to grow the region's largest and most successful burrowing owl population. It will save the RWF \$3,455,390 by preserving land-in-lieu of paying permit-required development fees to SCVHA. The cost of managing the Habitat will remain with SCVHA.

BACKGROUND

The Western Burrowing Owl is listed as a Federal and State Species of Special Concern, with significant population decreases over the past several decades. It is a small owl, about nine inches tall, and is typically migratory throughout much of its range, although many birds reside year-round in California. They live and nest in burrow-like structures such as pipes, crevices in

rocks, or burrows dug by other animals which they claim as their own. Western Burrowing Owls have been documented to nest in the southerly open grasslands of the RWF, also known as the bufferlands, for over a decade. Owl numbers had declined in this area until the City of San José (City), as administrator of the RWF, initiated habitat improvements in 2012. The improvement activities were based on measures in the Bufferlands Interim Burrowing Owl Management Plan until the Plant Master Plan (PMP) Environmental Impact Report (EIR) was certified. City Council certified the PMP EIR on November 19, 2013. As part of the PMP's goal to improve habitat and minimize impacts to the local and global environment, it designated 180 acres in the bufferlands as burrowing owl habitat. In 2014, Cisco Systems donated 21.4 acres of land to the City adjacent to the existing owl Habitat. The addition of this land to the original designated 180 acres brought the total acreage of the owl Habitat up to approximately 201 acres (Attachment A). Improving and protecting the habitat quality at the bufferlands have increased the number of nesting owls and promoted reproductive success, two goals the RWF sought to achieve.

SCVHA leads implementation of the Santa Clara Valley Habitat Plan (Habitat Plan), which was developed by the Santa Clara Valley Transportation Authority, Valley Water, County of Santa Clara, and the cities of Gilroy, Morgan Hill, and San José. The Habitat Plan is a 50-year regional plan to protect endangered species and natural resources while allowing for future development in its coverage area of about two-thirds of Santa Clara County. SCVHA provides a streamlined approach to issuing state and federal Incidental Take Permits from the Federal Fish and Wildlife Service and California Department of Fish and Wildlife (collectively the Wildlife Agencies) for public and private projects, rather than requiring developers to seek separate permits from each of those agencies. This is an effective way to address project impacts on endangered and threatened species and their habitats and increases certainty of permit timelines and associated fees for projects occurring in the Habitat Plan area. However, SCVHA's most significant role is to acquire and manage a system of land that will serve as mitigation for project impacts and contribute to the recovery of the species covered by the Habitat Plan. These lands get enrolled into the SCVHA Owl Habitat Reserve System (Reserve System).

In April 2016, the City submitted a letter of intent (Attachment B) stating its intention to enter into a land-in-lieu of fees arrangement with SCVHA, by enrolling 72 acres belonging to the RWF into the Reserve System due to four Capital Improvement Program projects that were known at the time as being required to pay fees to construct. However, there was a long-term intention to have the entire 201 acres of owl habitat covered by a conservation easement and enrolled into the Reserve System once there was stronger certainty of all projects at the RWF that would be included in the land-in-lieu arrangement with the remaining land. The letter also initiated the transfer of habitat management activities and costs to the SCVHA. The responsibilities were later solidified in a management agreement with SCVHA that continues these services through June 2026.

On December 20, 2021, the City submitted a new letter of intent (Attachment C) that replaces the 2016 letter of intent. It updates the Easement acreage and land-in-lieu fees of the proposed Conservation Agreement to include the New Headworks Project as the fifth covered project and enroll the entire 201 acres into the Reserve System.

Additional assessments by Capital Improvement Program and operations staff at the RWF have been conducted for any future project needs, and none have been identified other than the five projects already included. After several years of extensive review, edits, and negotiation with the SCVHA and the Wildlife Agencies over the agreement language to ensure that interests are protected while still providing benefit to the environment, the City is now formalizing the commitment of enrolling the full 201 acres and seeking approval of the Conservation Agreement for the respective agencies.

ANALYSIS

The PMP EIR includes protection and maintenance of the owl habitat and establishing a permanent conservation easement at the RWF as a required mitigation measure. City Council Policy 6-31 also supports the use of RWF bufferlands to provide direct benefit to habitat lands supporting Federal Department of Fish and Wildlife and California Department of Fish and Wildlife Species of Special Concern. These both align with the Habitat Plan's ultimate purpose to conserve natural communities at the ecosystem scale while accommodating compatible land uses. Further, per the PMP, the 201 acres designated may not be developed.

For the past five years, the owl habitat at the RWF has experienced one of the highest population densities of burrowing owls when compared to other breeding sites in the county. But like the rest of the county, owl populations at this site have declined since a peak in 2017. Still, the RFW and SCVHA hold hope for the species locally. It is being managed for optimal conditions with extra efforts being put forth, representing the firm belief of local burrowing owl biologists that this site holds the best potential to stabilize the population and even provide additional offspring that can be translocated to help other breeding sites become stronger. These actions seem to be paying off since owls continue to use this site for breeding and foraging, with modest increases in population. Establishing this Easement further solidifies the commitment to ensure the population of owls at this site are protected in perpetuity.

The proposed Conservation Agreement and enrolling these lands into the Reserve System also ensures the SCVHA will continue carrying out the needed activities and adaptive management practices it has conducted since 2016. The RWF would maintain ownership of the land and may provide optional services such as soil transport or creation of prey refuge, among others if deemed applicable and feasible.

As described in the 2021 letter of intent (Attachment C), including the five projects in the Conservation Agreement saves the RWF money; otherwise, it would owe \$3,455,390 in development fees immediately without this land-in-lieu deal. These fees were not allocated in the Capital Improvement Program budget since this Easement Agreement had been planned, and an unexpected increase to the budget for an unplanned expense would negatively impact rate payers. Having SCVHA maintain management of the site and take on the associated costs also saves the RWF money and resources. Taken together, this action is consistent with the goals of the PMP and provides monetary benefits to the RWF.

Language in the Conservation Agreement considers the future needs of the RWF and other regional entities who have entitlements in the owl habitat area. It describes allowed uses that exist in easement area that may be continued or newly conducted with the prior written approval of the SCVHA and Wildlife Agencies, including access, maintenance, replacement, enlargement, relocation, or removal of existing utilities and structural or natural resources in the area. Approval of such activities would not be unreasonably withheld, conditioned, or delayed by the Wildlife Agencies or SCVHA if the work will not diminish the habitat. The Conservation Agreement also includes a reservation for an additional utility easement for future development of RWF lands and a planned third-party project.

Taking this action to adopt this Conservation Agreement is favorable to the RWF, SCVHA, ratepayers, and other regional stakeholders for its environmental and economic benefits.

CONCLUSION

The Western Burrowing Owl is a protected Special Species of Concern that successfully resides in the grasslands of the RWF due to the many actions the City and its partners have taken to protect this species. Under this Conservation Agreement, SCVHA would continue managing the Habitat and its future adaptive management practices, and City staff will continue coordinating activities, as needed.

This Conservation Agreement and enrollment of land into the Reserve System is a way for the RWF to meet permit requirements, provide land-in-lieu of paying \$3,455,390 in development fees for the five covered Capital Improvement Program projects, set aside a small bank of credits for a future project, align with the goals of the PMP, and meet requirements of the EIR. To not enroll that land would make the RWF non-compliant and immediately owe fees to the SCVHA. The City proposes approval of this Conservation Agreement to protect the habitat of the Western Burrowing Owl and be a fiscally responsible service provider to the community.

EVALUATION AND FOLLOW-UP

The Conservation Agreement will go for approval to the City Council of the city of Santa Clara as co-owner of the RWF. SCVHA's Governing Board will enroll the land in the Reserve System. SCVHA and its subcontractors will continue to manage the Habitat and report on the performance and issues through monthly and annual summary reports.

CLIMATE SMART SAN JOSE

The recommendation in this memorandum has no effect on Climate Smart San José energy, water, or mobility goals.

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PUBLIC OUTREACH

Three annual program reports regarding the burrowing Habitat have been made to both the Transportation and Environment Committee and Treatment Plant Advisory Committee dating back to 2013.

This memorandum will be presented at the December 8, 2022 Treatment Plan Advisory Committee meeting. The item will also be noticed by the SCVHA Governing Board and city of Santa Clara City Council for their respective meeting agendas once scheduled in January 2023.

COORDINATION

This memorandum has been coordinated with the City Manager's Budget Office, Office of Economic Development and Cultural Affairs, the Planning, Building, Code, and Enforcement Department, and the City Attorney's Office.

COMMISSION RECOMMENDATION/INPUT

This memorandum is scheduled to be heard at the December 8, 2022 Treatment Plan Advisory Committee meeting. A supplemental memorandum with the committee's recommendation will be included in the January 10, 2023 City Council meeting agenda.

COST SUMMARY/IMPLICATIONS

The amendment to the agreement with SCVHA will not result in any additional cost to the City on behalf of the RWF.

CEQA

Categorically Exempt, File No.22-249, CEQA Guidelines Section 15308, Actions by Regulatory Agencies for Protection of the Environment.

/s/
KERRIE ROMANOW
Director, Environmental Services

For questions, please contact Jennifer Voccola Brown, Sustainability and Compliance Manager, at (408) 975-2594.

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Attachments:

Attachment A: Map of the Western Burrowing Owl Habitat at the RWF

Attachment B: 2016 Letter of Intent for a BUOW Conservation Easement

Attachment C: 2021 Letter of Intent for a BUOW Conservation Easement

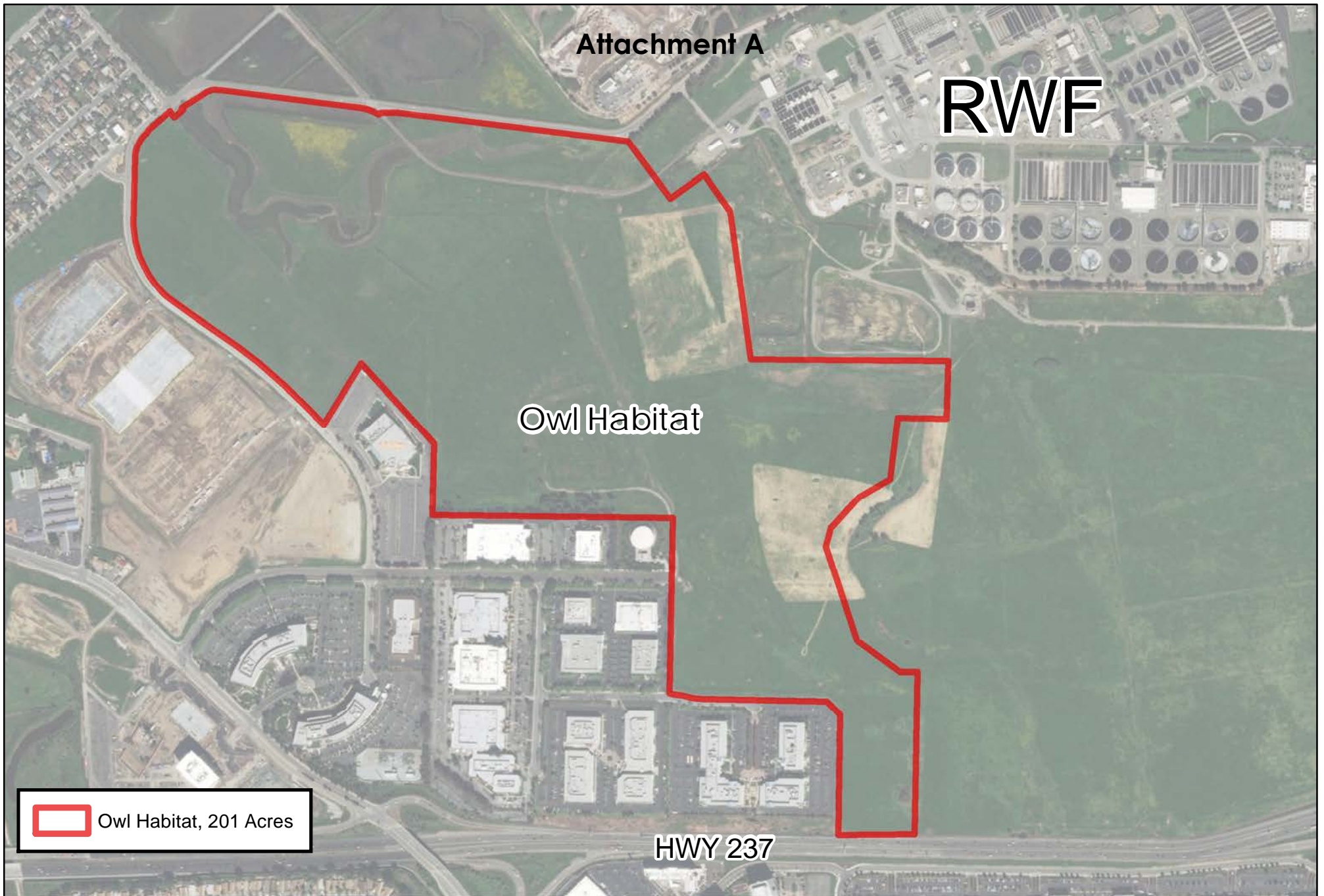
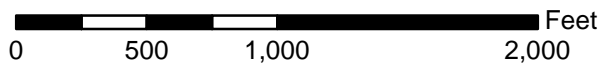
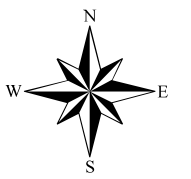


Figure 1 - Site Features



San José-Santa Clara
Regional Wastewater Facility





Attachment B

Environmental Services Department

April 13, 2016

Edmund Sullivan, Executive Officer
Santa Clara Valley Habitat Agency
535 Alkire Avenue
Morgan Hill, CA 95037

Dear Mr. Sullivan,

The purpose of this letter is to confirm the City of San José's (City) intent regarding a proposed land-in-lieu of fee arrangement and land management agreement. The City, as the administering agency for the San José -Santa Clara Regional Wastewater Facility (RWF), intends to enter into a land-in-lieu of fees arrangement with the Santa Clara Valley Habitat Agency (HA) to enroll 72 acres belonging to the RWF into the HA Owl Habitat Reserve System. The agreement(s) that would bind the Cities of San José and Santa Clara would require approval from the respective City Councils. It is anticipated that the agreements will be considered on or before June 2016. The following Capital Improvement Projects at the RWF are estimated to impact 20 acres and would be subject to HA fees without this land-in-lieu deal:

| Project | Start Date | Estimated Fee Cost* |
|------------------------------------|-------------------|----------------------------|
| Fiber Optic Connection | June 2016 | \$3,600 |
| Iron Salt Feed Station | June 2016 | \$211,600 |
| Construction-Enabling Improvements | July 2016 | \$705,300 |
| Digested Sludge Dewatering | September 2019 | \$493,700 |
| Grand total | | \$1,414,200 |

*Fee estimates based on HA Land Cover Type (\$17,781/acre) & Burrowing Owl (\$52,752/acre) fee schedules

The enrolled land will be a subset of the larger Burrowing Owl Habitat established in the San José-Santa Clara Regional Wastewater Facility Plant Master Plan (PMP). A formal appraisal of the area as habitat was conducted in September 2015, and the appraisal valued the land at \$40,000/acre. The City also owns the Cisco mitigation area (21.4 acres).

The HA burrowing owl fee schedule would otherwise require an estimated payment in the amount of \$1,414,200 for the above projects. As consideration for not paying the HA fees, the City will enroll 72

acres of habitat in the HA Reserve System in lieu of fees, comprised of the Cisco mitigation area, and another 50.6 acres from the larger RWF habitat area. The remaining balance of the endowment funds tied to the Cisco mitigation area, approximately \$161,000, will also transfer to the HA for purposes of continued maintenance of the habitat at that site. The HA shall not use this money for any purpose outside of this habitat.

The HA has determined a 72 acre enrollment is required to cover the estimated 20 acres of CIP Project Impacts. The appraised value of \$40,000/acre requires a multiplier of 1.8 in order to cover the otherwise applicable fee schedule. The formula becomes 20 acres x 1.8 = 36 acres. That is then doubled to 72 to accommodate a "buffer and recovery" area. The HA has agreed to accepting the 21 acres of the Cisco area as "buffer and recovery" along with 49 acres from the original 180 acres Burrowing Owl Habitat for a total of 72 acres. See attached Vicinity Map.

The City also intends that the HA will, under a 5-year short-term management agreement, assume responsibility for managing the land for burrowing owl habitat beginning July 1, 2016. The land contemplated to be covered by the agreement would include the Burrowing Owl Habitat (180 acres) and the Cisco mitigation area (21.4 acres). Under the management agreement, HA would be responsible for the following maintenance activities:

| Activity | Frequency |
|---|-----------|
| Repair and maintain burrows and perches in the Area of Activity | Weekly |
| Conduct a minimum of two burrowing owl breeding season surveys in the area within the Habitat Conservation Plan (HCP) boundary and twelve burrowing owl surveys within the Area of Activity | Monthly |
| Conduct one Congdon's Tarplant survey in the Area of Activity | Annually |
| Provide review and input on Burrowing Owl Habitat Management Plan | As needed |
| Photography of burrowing owls | Ongoing |
| Install and Maintain Motion-sensing Cameras | Weekly |
| Project Management | As needed |
| Habitat Management and Enhancement Activities in Area of Activity | As needed |

The City would continue to mow the entire 201 acre habitat upon request by the HA and would bill HA approximately \$3,000/mow, with an estimated frequency of three to four times annually.



Kerrie Romanow

Director, City of San Jose, Environmental Services Department



December 20, 2021

Edmund Sullivan, Executive Officer
 Santa Clara Valley Habitat Agency
 535 Alkire Avenue
 Morgan Hill, CA 95037

Subject: Letter of Intent for Land-in-Lieu of Fee and Conservation Easement Agreement for the San José-Santa Clara Regional Wastewater Treatment Facility

Dear Mr. Sullivan,

The purpose of this letter is to confirm and update the City of San José's (City's) intent regarding the land-in-lieu of fee arrangement and conservation easement agreement initiated in 2016. The City, as the administering agency for the San José -Santa Clara Regional Wastewater Facility (RWF), intends to finalize the agreement with the Santa Clara Valley Habitat Agency (HA) to enroll land belonging to the RWF into the HA Reserve System. In 2016, 72 acres were identified for enrollment based on the Capital Improvement Program (CIP) projects known at that time. Since then, the program and projects have evolved from what was originally conceptualized. The City now intends to enroll the entire 201 acres dedicated for Western burrowing owl habitat. This agreement would bind the Cities of San José and Santa Clara as co-owners of the RWF and would require approval from the respective City Councils.

The following CIP projects known to date are estimated to impact 49.48 acres and would be subject to \$3,455,390 in HA fees without this land-in-lieu deal:

| Project | Start Date | Estimated Fee Cost* |
|------------------------------------|-------------------|----------------------------|
| Fiber Optic Connection | June 2016 | \$3,600 |
| Iron Salt Feed Station | June 2016 | \$211,600 |
| Construction-Enabling Improvements | July 2016 | \$705,300 |
| Digested Sludge Dewatering | August 2021 | \$218,187 |
| New Headworks & Improvements | June 2020 | \$2,316,703 |
| Grand total | | \$3,455,390 |

As consideration for not paying the HA fees, the City will enroll 201 acres of habitat in the HA Reserve System in lieu of fees, part of which will cover the new project impacts for the Digested Sludge Dewatering Project and the New Headworks and Headworks Improvements Project. Any remaining acreage will be set aside or "banked" for use against future projects at the RWF.

The HA has determined that a 178-acre enrollment is required to cover the estimated 49.48 acres of CIP project impacts. The appraised value of \$40,000/acre requires a multiplier of 1.8 to cover the fee

schedule. The formula becomes 49.48 acres x 1.8 = 89.06 acres. That acreage figure is then doubled to 178 to accommodate a “buffer and recovery” area.

A portion of the 201 acres is the Cisco mitigation area comprised of 21.4 acres. The HA has agreed to accept the 21.4 acres of the Cisco area as “buffer and recovery”. The remaining balance of the endowment funds tied to the Cisco mitigation area, approximately \$128,953, will also transfer to the HA for purposes of continued maintenance of the habitat. These Cisco endowment funds are separate from the RWF’s mitigation fees owed. The HA shall not use this money for any reason outside of this habitat.

It should also be noted that this easement has been specifically valued below market based on other potential uses because of the limitations on use set forth in Exhibit C and Exhibit D of the Conservation Easement & Land in Lieu Agreement being finalized. As such, any future value determination should be limited to the same considerations used in the original agreed upon appraised value.

In June 2021, the City amended the short-term management agreement with the HA through June 2026. This allows the HA to maintain responsibility for managing and protecting the 201-acre land for Western burrowing owl habitat. Under Exhibit B of the management agreement, the HA would be responsible for continuing to implement the Burrowing Owl Habitat Management Plan with their partners Santa Clara Valley Audubon Society and Talon Ecological Research Group.

The City intends to work with the HA to update the necessary portions of the land-in-lieu and conservation agreement to reflect the City’s new commitment to enroll the entire 201 acres into the reserve system.

Any questions or comments regarding this letter can be discussed with Jennifer Voccola-Brown, Sustainability & Compliance Manager, at (408) 975-2594 or jennifer.brown@sanjoseca.gov.

Sincerely,

Napp Fukuda /s/

Kerrie Romanow, Director
City of San José, Environmental Services Department