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COUNTY OF SANTA CLARA**

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May 13, 2022

**SENT VIA EMAIL**

Nora Frimann  
City Attorney  
City of San José  
200 East Santa Clara Street, 16th Floor  
San José, CA 95113-1905

Re: May 17, 2022 San José City Council Meeting Item No. 10.2; Draft Amendment to Settlement Agreement and General Release with the City of Santa Clara (“2022 Draft Amendment”) and GPT 21-003, PP21-008 and C21-018 Amendments to the San José General Plan and North San José Development Policy, Addition of Chapter 20.65 to the Zoning Ordinance Regarding Overlay Districts, Amendments to Municipal Code Chapter 14.29 Regarding the North San José Traffic Impact Fee, and Addendum to the Envision San Jose 2040 General Plan Environmental Impact Report (Collectively the “NSJ Amendments”)

Dear Ms. Frimann:

The City Council intends to consider the proposed NSJ Amendments and a draft 2022 Draft Amendment at its May 17, 2022 meeting. The County is extremely concerned that approval of such actions would constitute breach of contract, bad faith, and a breach of the covenant of good faith and fair dealing as a result of the City’s blatant disregard of the binding settlement agreements that currently exist between the City and the County. The County is surprised and disappointed by the City’s course of action in putting the 2022 Draft Amendment and NSJ Amendments in front of the City Council for consideration without further meaningful discussions with the County. In order to allow these discussions to occur, I write to respectfully reiterate our prior requests that the item be deferred for a sufficient period of time (at least two months) to allow the County of Santa Clara (“County”) and City of San José (“City”) to engage in substantive settlement discussions relating to the existing binding settlement agreements between the City, the City of Santa Clara, and the County relating to North San José.

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Our hope is that meaningful discussions may result in a mutually agreeable resolution that will further the City's goal of substantial housing production in North San José while at the same time honoring the City's commitments to ensure traffic mitigation in the settlement agreements that resolved the prior litigation over the North San José Development Policy. In this way, additional adversarial proceedings can be avoided and public resources can be put to productive use.

You notified this Office for the first time in early March 2022 that the City intended to take the NSJ Amendments to the City's Planning Commission on March 23, 2022 (which hearing did occur) and to the City Council on May 2, 2022. On April 28, 2022, our Office requested to your Office that the NSJ Amendments item be continued to at least June 14, 2022 to allow for additional negotiations and consideration of any proposed settlement agreement amendments by our Board of Supervisors. This request was rejected and the item was instead deferred to the May 17, 2022 City Council meeting.

Since March 2022, when your initial letters were received, the County and City have worked cooperatively, including holding a meeting between our offices on April 8, 2022, as well as a larger meeting between County and City staff on April 19, 2022. On April 22, 2022, your Office sent an initial settlement proposal to our Office for review. As previously mentioned to your Office, the County has engaged with an expert traffic engineering firm to evaluate the potential implications of the City's initial proposal, including the City's proposed deletion of the Trimble Flyover project even though the settlement agreements require that it be built prior to the start of Phase 2 of the North San José project. The County has also asked the consultant to evaluate additional options for discussion with the City. In short, the County is working in good faith with its consultants to diligently complete its analysis so that it can negotiate in an informed manner with the City.

In light of the above, the County cannot agree to the City's initial proposed settlement terms. It is simply not reasonable for the City to expect the County to agree to revised settlement terms without sufficient time to evaluate them, and reasonable minds would agree that a couple of weeks is not sufficient time.<sup>1</sup> This is why we believe a more productive course of action would be sufficient deferral to allow the City and County to conduct more substantial, informed discussions that would benefit both parties.

The 2022 Draft Amendment attached to the May 17, 2022 City Council Agenda packet purports to amend the November 16, 2006 Settlement Agreement and General Release relating to North San José that included the City of Santa Clara, the Redevelopment Agency of the City of Santa Clara, the County of Santa Clara, the City of San José, and the Redevelopment Agency of

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<sup>1</sup> Your March 11, 2022 letter notes that the City has been in mediation with the City of Santa Clara on these same topics for several *years*. It is unclear to us why the City has engaged the City of Santa Clara without including the County in those same conversations when all three entities are parties to one of the critical settlement agreements.

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San José (“Original Agreement”). However, the 2022 Draft Amendment only mentions and includes as signatories the City of San José and the City of Santa Clara, and not the other parties to the Original Agreement, including the County. This is in direct contradiction to basic contract law and Section 15 of the Original Agreement which states that:

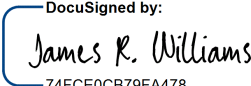
Any Amendment or modification of this Settlement Agreement must be in writing, and signed by all of the Parties. **Any amendment or modification not made in this manner shall have no force and effect.** (Emphasis added)

The City’s proposed intentional breach of the Original Agreement by entering into the 2022 Draft Amendment and approval of the NSJ Amendments (that ignore the City’s obligation under the Original Agreement and the related settlement agreement) constitute extreme bad faith and a breach of the covenant of good faith and fair dealing.

On a final note, in the spirit of cooperation, the County has not yet publicly asserted its legal rights in a comprehensive manner. However, in the event that the City Council moves forward with consideration of the NSJ Amendments and the 2022 Draft Amendment, the County has no choice but to pursue all of its available legal remedies to protect its rights, including enforcement of the existing settlement agreements, causes of action for, including but not limited to, bad faith and breach of the covenant of good faith and fair dealing, as well as legal challenges to the flawed process that the City has utilized to consider the NSJ Amendments and 2022 Draft Amendment. This is, of course, not the County’s preferred course of action.

Thank you for your consideration.

Very truly yours,

DocuSigned by:  
  
74FCE0CB79FA478...  
JAMES R. WILLIAMS  
County Counsel

- c: Honorable Board of Supervisors (via email)
- Jeffrey V. Smith, JD, MD, County Executive (via email)
- Miguel Márquez, JD, MPP, Chief Operating Officer (via email)
- Hon. Mayor Liccardo and Councilmembers (via email to City Clerk)
- Jennifer Maguire, City Manager (via email)

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May 17, 2022

**SENT VIA EMAIL TO CITY CLERK FOR DISTRIBUTION TO HON. MAYOR AND  
CITY COUNCIL**

Hon. Mayor Sam Liccardo and Councilmembers  
City of San José  
200 East Santa Clara Street  
San José, California 95113

**Re: May 17, 2022 City Council Meeting Item No. 10.2:** Comments on Draft Settlement Agreement Amendment with the City of Santa Clara and Proposed Amendments to the San José General Plan and North San José Development Policy, Addition of Chapter 20.65 to the Zoning Ordinance Regarding Overlay Districts, Amendments to Municipal Code Chapter 14.29 Regarding the North San José Traffic Impact Fee, and Addendum to the Envision San Jose 2040 General Plan Environmental Impact Report

Dear Mayor Liccardo and Council Members:

The County of Santa Clara (“County”) submits this letter to protect its rights pursuant to existing settlement agreements with the City of San José (“City”) and its former Redevelopment Agency (“RDA”) and to express its concerns regarding the Draft Settlement Agreement Amendment (“2022 Draft Amendment”) and the City’s rushed and legally flawed process for the above-referenced amendments to the San José General Plan, the North San José Development Policy, Zoning Ordinance, and Municipal Code (collectively, the “NSJ Amendments”). The County also submits the following comments on the corresponding Addendum to the Envision San Jose 2040 General Plan Environmental Impact Report and Supplemental Program Environmental Impact Report (SCH#2009072096) and Addenda Thereto (collectively, “Addendum”).

The County is extremely concerned that approval of such actions are, among other things, legally unenforceable and would constitute breach of contract, bad faith, and breach of the covenant of good faith and fair dealing as a result of the City’s blatant disregard of the binding settlement agreements that currently exist between the City and the County, and between the City, the County, and the City of Santa Clara. The County is truly disappointed by the City’s

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course of action in putting the 2022 Draft Amendment and NSJ Amendments in front of the City Council for consideration.

**The County respectfully requests that the City Council continue this item to a date uncertain so that the relevant parties can continue their productive discussions and hopefully reach a mutually agreeable resolution.** While the County supports the City's efforts to encourage additional housing production in North San José, the City must recognize its previous binding commitments to improve the County's transportation infrastructure that serves these areas to ensure that the planned housing development does not exacerbate traffic congestion that harms our mutual residents and hampers the regional economy. The currently effective settlement agreements were intended to mitigate negative impacts to the county's residents. While the County is certainly willing to consider appropriately amending these binding agreements in a legal manner, any change to them must provide adequate substitute mitigation, consistent with law and sound public policy.

#### **I. Background**

The City's North San José Development Policy ("Policy") was originally enacted in 2005 with the goal of making North San José an important employment center and innovation district. In summary, the existing Policy authorizes up to 32,000 housing units, 26.7 million square feet of research and development and office space, 2.7 million square feet of retail uses, and 1,000 hotel rooms.

The existing Policy currently in effect is phased. Given the overarching goal of creating an employment center, each phase includes *both* housing *and* industrial development. The Policy's concurrent development of jobs-creating land uses together with housing partially mitigates traffic impacts associated with the Policy by allowing people to live near their jobs and decreasing the number of long-distance trips. Specifically, each of the first three phases includes 8,000 dwelling units and 7 million square feet of industrial development. The fourth and final phase allows 8,000 dwelling units and 5.7 million square feet of industrial development. Each phase includes transportation improvement projects to help mitigate traffic impacts, and the Policy does not allow for the next Phase to occur—in whole or in part—until, among other things, the required transportation improvements from the preceding phase are reasonably assured to be completed.

In 2005, the County, along with the cities of Milpitas and Santa Clara, challenged the approval of the Policy and alleged that the Environmental Impact Report (EIR) certified by the City violated the California Environmental Quality Act (CEQA) because it failed to properly consider or impose mitigation for the Policy's impacts to transportation facilities under the jurisdiction or control of the non-City entities. In March 2006, in a consolidated action, the Santa Clara County Superior Court rendered judgment in favor of the County, Milpitas, and the City of Santa Clara. The Court held that there was not substantial evidence to support the City's conclusion that mitigation measures were infeasible for non-City transportation facilities.

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On November 16, 2006, the County, the City, the RDA, and related parties executed two settlement agreements to resolve the CEQA litigation (collectively the “Settlement Agreement”).<sup>1</sup> Generally, the Settlement Agreement requires that the City undertake and/or fund specified transportation improvements prior to initiation of Phase 2 to mitigate the Policy’s impacts on the County’s Montague Expressway, which is an extremely important East-West thoroughfare that, among other things, links I-680 with Highway 101. The Court-approved stipulation dismissing the cases recognized that the County was foregoing its legal rights in exchange for the City’s binding commitment to provide major traffic mitigation projects. Importantly, the Settlement Agreement establishes that discovery of new facts (e.g., the City’s incorrect assumptions about market interest in certain development types) or new law (e.g., the State Legislature revises methodologies for calculating traffic impacts) would not affect the binding nature of the Settlement Agreement.<sup>2</sup>

Although virtually the full allocation of Phase 1 housing has been completed, other Phase 1 development has not been completed, and many of the Phase 1 traffic improvements are outstanding. The outstanding improvements are vital to relieving congestion on the Montague Expressway, a critical infrastructure backbone that affects county residents beyond those living in North San José.<sup>3</sup> The list below summarizes the status of the traffic mitigation improvements that the City agreed in the binding Settlement Agreement to fund and/or construct before the initiation of Phase 2 of the Policy:

1. Fund and construct improvements to Montague Expressway, including eight lanes between Lick Mill and Trade Zone:
  - Widening between I-880 and First St. (Status: Complete)

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<sup>1</sup> One settlement agreement included the City, the City of Santa Clara, and related parties (“City, City of Santa Clara and County Agreement”). The other settlement agreement only include the City and County and related parties (“County Agreement”). The two settlement agreements had identical terms with respect to the Policy. One of the agreements also settled separate disputes with the City involving a proposal for a theatre at the Santa Clara County Fairgrounds, annexation of County pockets, and pass-through payments from the City’s redevelopment agency to the County.

<sup>2</sup> Section 7 of the settlement agreement between the County, City, and RDA states: “Each of the Parties expressly and knowingly acknowledges that it or its attorneys may, after execution of this Settlement Agreement, discover claims, damages, facts, or law different from or in addition to those which each now knows or believes to exist or be applicable with respect to this Settlement Agreement. Nonetheless, it is the Parties’ intention fully, finally and forever to settle and release each and every matter released in this Settlement Agreement, known and unknown, suspected or unsuspected, which now exist, may exist, or heretofore have existed, which is released in this Settlement Agreement. In furtherance of this intention, the releases given by Santa Clara, San Jose and County shall be and remain in effect as full and complete releases of matters notwithstanding the discovery or existence of any such additional or different claims, damages, facts, or law.”

<sup>3</sup> The attachments indicate what Settlement Agreement projects have been completed and not completed as of April 2022.

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- Widening between Lick Mill Blvd. and First St. (Status: Outstanding)
  - Widening between I-880 and Trade Zone Blvd. (Status: Outstanding)
  - Interchange modifications at I-880 (Status: Outstanding)
  - The Trimble flyover (Status: Outstanding)
  - The McCarthy-O'Toole Interchange (Prior to Phase 3)(Status: Outstanding)
2. Fund up to an amount not to exceed \$11 million to the County for the construction of the Montague Expressway widening project from East Capitol Avenue easterly to Park Victoria Drive, including the I-680 interchange modification. (Status: Complete)
  3. Fund \$1.5 million to the County for the Montague/Mission/US-101 Interchange study. (Status: Outstanding)

**II. Current Status of Settlement Agreement and Request for Continuance to Date Uncertain**

On March 23, 2022, the City's Planning Commission approved a recommendation to the City Council for approval of the NSJ Amendments consistent with the City's plans to move forward with residential development originally planned for Phase 2 and later phases without completing the previously required infrastructure in advance of each phase. The NSJ Amendments eliminate the phasing plan and would allow development beyond Phase 1 to move forward without the required infrastructure improvements described in the Policy and required by the Settlement Agreement. The NSJ Amendments now under consideration by the City Council would violate the City's commitments in the Settlement Agreement.

The County recently discovered that the City has been negotiating for some time with the City of Santa Clara and engaged in an extended mediation process to discuss alternate terms under the settlement agreement that includes the City of Santa Clara and the County. Alarming, the City has not included the County in these conversations despite its obligations under the Settlement Agreement, the County's shared interest in traffic mitigation, and the integrated responsibilities of the three jurisdictions for many of the improvements. The County has engaged in recent discussions with City and City of Santa Clara representatives on potential amendments to the existing Settlement Agreement. Notwithstanding these discussions, the City has put the 2022 Draft Amendment in front of the City Council for discussion even though the 2022 Draft Amendment violates the existing Settlement Agreement on its face.

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### **III. Enforcement of the Settlement Agreement**

Notwithstanding that City staff has appeared to recognize in writing on numerous occasions that amendments to the Settlement Agreement are a necessary prerequisite for the NSJ Amendments to move forward (even the 2022 Draft Amendment contemplates the need to negotiate with the County), the City Council is considering the NSJ Amendments and 2022 Draft Amendment on an expedited basis with no County concurrence in place.

Significantly, paragraph 7 of the Stipulation approving the Settlement Agreement provides:

Collectively the [Settlement] Agreements represent Respondents' [City's] commitment to invest millions of dollars for traffic improvements on Santa Clara County facilities in Milpitas and Santa Clara and to support regional funding for major traffic projects within Santa Clara.

The Settlement Agreement requires that the projects be completed “[i]n and as a part of the implementation of Phase I of the NSJ Plan.”<sup>4</sup> Thus, the fundamental consideration for the Settlement Agreement was the City’s commitment to mitigate impacts to the County’s Expressway caused by development under the Policy concurrent with or prior to the development occurring, as required by the phasing plan.

If the City Council approves the NSJ Amendments, the County will consider this action to be a breach and/or anticipatory breach of contract, extreme bad faith, and a breach of the covenant of good faith and fair dealing. The NSJ Amendments would allow for the development of far more than the 8,000 housing units allowed in Phase 1, even though the Phase 1 traffic mitigation improvements will not be completed. In other words, the NSJ Amendments purport to allow the City to move forward with the housing portion of Phase 2 without fulfilling its prerequisite traffic mitigation commitments under the Settlement Agreement. The City cannot rewrite history and ignore the agreements that resolved the County’s successful CEQA challenge and allowed the City to execute the Policy since 2006. The County and its residents must receive the benefit of its bargain with the City, and the County is prepared to utilize all its available remedies to ensure that this occurs.

In addition, the 2022 Draft Amendment attached to the May 17, 2022 City Council Agenda packet purports to amend the November 16, 2006 Settlement Agreement and General Release (referred to herein as the City, City of Santa Clara and County Agreement) relating to North San José that included the City of Santa Clara, the Redevelopment Agency of the City of Santa Clara, the County of Santa Clara, the City of San José and the Redevelopment Agency of San José. However, the 2022 Draft Amendment only mentions and includes as signatories the City of San José, and the City of Santa Clara, and not the other parties to the City, City of Santa

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<sup>4</sup> City, City of Santa Clara and County Agreement ¶ 1.2; County Agreement ¶ 2(a).



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Clara and County Agreement, including the County. This is in direct contradiction to basic contract law and Section 15 of the City, City of Santa Clara and County Agreement which states that:

Any Amendment or modification of this Settlement Agreement must be in writing, and signed by all of the Parties. **Any amendment or modification not made in this manner shall have no force and effect.** (Emphasis added)

The City's proposed intentional breach of the City, City of Santa Clara and County Agreement by entering into the 2022 Draft Amendment and approval of the NSJ Amendments (that ignore the City's obligation under Settlement Agreement) constitute extreme bad faith and a breach of the covenant of good faith and fair dealing, in addition to breach of contract and/or anticipatory breach. If the 2022 Draft Amendment moves forward, the County will have no choice but to assert its rights under the Settlement Agreement against the City and the City of Santa Clara.

#### **IV. CEQA Compliance and Comments on the Addendum**

The Addendum before the City Council fails to satisfy CEQA's procedural and substantive standards in several respects. A new or subsequent Environmental Impact Report (EIR) must be prepared for the NSJ Amendments because substantial changes have been made to the project and the circumstances surrounding the project.

##### **A. The Addendum Violates CEQA's Fundamental Purpose to Promote Informed Decision-Making**

Informed decision-making and public participation are fundamental purposes of the CEQA process.<sup>5</sup> The prior Planning Commission staff report and Addendum violate basic principles of transparency and CEQA because there is only one passing reference to the Settlement Agreement in the Addendum in Section 2.1.2 (Areas of Known Controversy) and no discussion of the Settlement Agreement's mitigation requirements. There is also no mention of the 2022 Draft Amendment in the Addendum. These omissions result in an inaccurate and misleading project description in violation of CEQA.

As explained above, the mitigation measures required by the Settlement Agreement address the legal inadequacies of the EIR for the North San José Development Policy identified in the Court's judgment. Given this context, it is unconscionable and a clear abuse of discretion for the City to move forward with the NSJ Amendments and the 2022 Draft Amendment without

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<sup>5</sup> See *Union of Med. Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1184-1185. The EIR thus works to "inform the public and its responsible officials of the environmental consequences of their decisions before they are made," thereby protecting "not only the environment but also informed self-government." *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 (quoting *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 392).

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any analysis of the Settlement Agreement in the Addendum. This omission makes informed public participation and decision-making impossible and violates the most fundamental CEQA tenets.<sup>6</sup>

The City's failure to implement the mitigation projects according to the phasing plan will also result in new and different physical impacts to the environment. These impacts are not analyzed in the Addendum. Omission of key information that CEQA mandates be included in an environmental analysis constitutes a failure to proceed in the manner required by law, and the City has failed to set forth sufficient information to foster informed public participation.<sup>7</sup> Moreover, eliminating the phasing plan and abandoning the City's obligations under the Settlement Agreement constitutes a significant change that makes use of an addendum inappropriate. Finally, the City's deferral of analysis to future individual projects constitutes inappropriate "piecemealing."

The Addendum concludes that the environmental impacts of the NSJ Amendments were addressed by the Final EIR for the Envision 2040 General Plan<sup>8</sup> but there is no discussion of *how* these are addressed. Moreover, it is not clear from the face of the Final EIR for the Envision 2040 General Plan that these impacts are addressed in that document. Also, there is no discussion of the relationship between the original EIR for the Policy and the 2040 Envision General Plan EIR. In other words, the City fails to offer a coherent explanation for why it is legally acceptable to address the environmental impacts of the NSJ Amendments in an addendum to the 2040 Envision General Plan EIR, instead of preparing a subsequent EIR to the Policy EIR. This creates a confusing record and makes it impossible for the public to understand and participate in the City's decision-making process. For example, as discussed below, the traffic study attached to the 2040 Envision General Plan EIR Addendum discusses the EIR for the original Policy, even though the Addendum modifies the 2040 Envision General Plan EIR.

#### **B. The Addendum's Conclusions Are Not Supported by Substantial Evidence**

As a general rule, if an EIR has been prepared for a project, the lead agency must prepare a subsequent or supplemental EIR under Public Resources Code section 21666 and section 15162 of the CEQA Guidelines if substantial changes are made to the project or circumstances surrounding the project. The agency's determination must be supported by substantial evidence.<sup>9</sup> Importantly, substantial evidence includes fact, reasonable assumptions based on

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<sup>6</sup> See *Ventura Foothill Neighbors v. County of Ventura* (2014) 232 Cal.App.4th 429 (invalidating addendum and requiring supplemental environmental review under abuse of discretion standard where county omitted key fact from addendum, i.e. that building had increased by fifteen feet in height from what was analyzed in prior EIR).

<sup>7</sup> *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 516.

<sup>8</sup> Addendum, Cover Memo, p. 2.

<sup>9</sup> CEQA Guidelines § 15162(a).

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fact, and expert opinion supported by facts.<sup>10</sup> Substantial evidence does not include argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence that is not credible.<sup>11</sup>

Here, the City's Addendum (to the wrong EIR) concludes that no subsequent or supplemental environmental review is required and therefore the Addendum to the 2040 Envision General Plan EIR is the appropriate CEQA document.<sup>12</sup> But the City's key conclusions are not supported by substantial evidence.

The Addendum repeats on numerous occasions that abandoning the Policy's phasing plan and the Transportation Impact Fee (TIF) will not increase the maximum residential development beyond 32,000 residential units (as analyzed in the 2040 General Plan EIR) and, therefore, the NSJ Amendments will have no new or increased impacts. This conclusion is not supported by evidence or analysis, and therefore does not satisfy CEQA's standards. Given the substantial intervening development in North San José and the surrounding area since the original Policy EIR was prepared, it strains credulity to assume that accelerating residential development, abandoning nearby job-center development, delaying traffic improvements, and eliminating a key funding source will not lead to new or increased impacts.

To justify its conclusion of no new or increased impacts, the Addendum mentions Senate Bill 743 and states that the Vehicle Miles Travel (VMT) standard will be used to evaluate traffic impacts of individual projects moving forward.<sup>13</sup> However, the City fails to apply this standard to the NSJ Amendments or to explain why—under the new standard—the elimination of the phasing plan and the TIF will not lead to new or increased environmental impacts.

The Addendum references and attaches as an exhibit the North San José Traffic Impact Fee Plan Update, dated February 18, 2022 ("Hexagon Study"). The Addendum's reliance on this study suffers from several defects. First, and most importantly, the Hexagon Study *does not analyze* the NSJ Amendments and therefore does not provide substantial evidence to support the conclusion that the NSJ Amendments will result in no new or increased impacts. Moreover, reliance on the VMT standard does not relieve the City from analyzing the potential impacts of the NSJ Amendments on potentially significant transportation impacts related to air quality, noise, safety, or any other impact associated with transportation.<sup>14</sup>

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<sup>10</sup> Pub. Res. Code § 20080(e)

<sup>11</sup> *Id.*

<sup>12</sup> Addendum, p. 2.

<sup>13</sup> *Id.*, p. 66.

<sup>14</sup> Pub. Res. Code § 21099(b)(3).

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Among other things, an adequate CEQA traffic study would need to compare existing traffic patterns to projected patterns after implementation of the proposed project. The Hexagon Study does not include such an analysis. In other words, it does not compare the transportation impacts of the NSJ Amendments to transportation impacts under the existing 2040 General Plan and Policy. Nor does it consider changed circumstances since the original Policy was adopted in 2006. Instead, the Hexagon Study “reviews 16 years of built development and traffic growth to update the required improvements to serve Phase 1 of the NSJADP that were previously identified.”<sup>15</sup> Crucially, it ignores the possible impact of abandoning the phasing plan, expediting the development of thousands of housing units, and eliminating the TIF. Indeed, as discussed below, the Hexagon Study’s analysis of mitigation measures appears to rest on the false assumption that the Policy—and the phasing plan—will remain in place.

The Addendum and the Hexagon Study also include misstatements and inaccuracies. Importantly, they both describe the Montague Expressway Widening project as “complete.”<sup>16</sup> This is false—the widening between Lick Mill Boulevard and First Street and between I-880 and Trade Zone Boulevard are both outstanding. The Hexagon Study also states that the Trimble Road and Montague Expressway Flyover are “no longer necessary” without considering the City’s obligations under the Settlement Agreement.<sup>17</sup> The County attaches a traffic analysis prepared by WSP, Inc. to support these comments.

The Addendum assumes that the 2040 General Plan Transportation Network will remain in place after the NSJ Amendments, even though the TIF will be eliminated for new projects.<sup>18</sup> This assumption is unfounded. The TIF provided the vast majority of funds for the completed traffic improvements.<sup>19</sup> The City relies on the unsupported and speculative assertion that it will be able to obtain funding from other sources.<sup>20</sup> No specific alternative funding sources or mechanisms are identified, and the Addendum does not consider any challenges to securing new financing or its likelihood of success. In other words, the Addendum does not account for the fact that it is replacing a stable and secure source of funding for traffic improvements with an unspecified and purely conjectural source of funding.

Eliminating the TIF is a major change that requires new environmental analysis and is not appropriate for consideration in an addendum. There is no substantial evidence to support the

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<sup>15</sup> Addendum, p. 66.

<sup>16</sup> *Id.*, p. 9, 65.

<sup>17</sup> Hexagon Study, p. 18.

<sup>18</sup> Addendum, p. 68.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

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City's conclusion that alternative fundings sources will be available other than the TIF to ensure completion of the vast majority of the General Plan Transportation Network.

With respect to specific impacts to the County's infrastructure, the Addendum contains two findings as follows:

Impacts to Adjacent Jurisdictions – Same as 2040 General Plan EIR.

The 2040 General Plan EIR and SEIR found that implementation of the 2040 General Plan would result in significant increases in traffic congestion on already congested roadways in neighboring cities and on County and Caltrans facilities. Amendment of the NSJADP would not contribute to new or substantially more severe traffic congestion in adjacent jurisdictions because no additional development capacity would be added to NSJ. As indicated previously, the City would continue to implement planned traffic improvement projects in the NSJ area using alternate funding mechanisms.<sup>21</sup>

**Impact TRANS-5:** Implementation of the 2040 General Plan, including development in NSJ, would result in significant increases in traffic congestion on congested roadways in neighboring cities and on County and Caltrans facilities. (Significant Unavoidable Impact).<sup>22</sup>

These findings are not supported by substantial evidence and are legally defective. They fly in the face of the Court's ruling that there was no substantial evidence to support the City's conclusion that mitigation measures for impacts to County facilities were infeasible. They also fail to address the City's obligations under the Settlement Agreement to construct traffic improvements to mitigate impacts to the County's Expressway prior to the initiation of further development. Moreover, there is no analysis to substantiate the bald conclusion in the first finding that no net increase in total development necessarily means that there will not be an increase in traffic impacts. As stated above, the 2005 Policy relied in large part on synergies between housing and job-center development to address traffic impacts. Those synergies will be gone under the proposed actions. Rather than rely on back-of-the-envelope generalities, CEQA demands that the City analyze the impacts of removing job-center development from the Policy while proceeding with the housing development.

**C. The Addendum Violates CEQA's Requirements for Mitigation Measures**

The most current and operative version of the Policy—adopted in 2015 and amended in 2017—also includes the improvements required by the Settlement Agreement and the mandatory

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<sup>21</sup> *Id.*, p. 69.

<sup>22</sup> *Id.*, p. 82.

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phasing plan.<sup>23</sup> It explains that “[e]ach improvement must be built, under construction, or funded and within one year from beginning of construction before the next phase of development can begin.”<sup>24</sup>

Under CEQA, if an EIR identifies feasible mitigation measures that avoid or substantially lessen significant environmental impacts, these mitigation measures must be “required in” or “incorporated into” the project—unless they are within the responsibility and jurisdiction of another agency and have been (or can and should be) adopted by another agency.<sup>25</sup> Such mitigation measures must be enforced and can only be modified under certain conditions.

The improvements mandated by the Settlement Agreement *are* legally required mitigation measures. The original Policy EIR identifies the improvements and explained that they would reduce and/or avoid significant project impacts at certain intersections.<sup>26</sup> The only justification for excluding them from the project was “because the intersections are not within the jurisdiction of the City of San José.”<sup>27</sup> This justification was squarely rejected by the Court, and the Court-approved stipulation describes the Settlement Agreement as fulfilling the purpose of the Court’s judgment by requiring “the mitigation of extra-jurisdictional traffic impacts arising from the Project.”<sup>28</sup> Finally, the Settlement Agreement requires that the projects be completed “[i]n and as a part of the implementation of Phase I of the NSJ Plan,”<sup>29</sup> which is consistent with CEQA’s requirement that mitigation measures be made enforceable by, among other things, “incorporating” them into a plan or policy.<sup>30</sup>

CEQA requires public agencies to ensure that mitigation measures are “fully enforceable” and to adopt monitoring programs to ensure implementation.<sup>31</sup> “The purpose of these requirements is to ensure that feasible mitigation measures will actually be implemented as

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<sup>23</sup> [Development Policy](#) (rev. 2015).

<sup>24</sup> *Id.*, p. 29.

<sup>25</sup> *See* Pub. Res. Code § 21081(a)(1).

<sup>26</sup> [Development Policy Draft Program EIR](#) (March 2005), p. 169.

<sup>27</sup> *Id.*

<sup>28</sup> Stipulation ¶ 3; *see also id.* ¶ 8 (similar language); County Agreement ¶ 2(b) (same). The California Supreme Court subsequently validated the Superior Court’s analysis in *City of Marina v. Board of Trustees of the Cal. State Univ.* (2006) 39 Cal.4th 341.

<sup>29</sup> County Agreement ¶ 2(a).

<sup>30</sup> Pub. Res. Code § 21081.6(b).

<sup>31</sup> *Id.* § 21081.6.

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a condition of development, and not merely adopted and then neglected or disregarded.”<sup>32</sup> Crucially, mitigation measures may not be avoided by treating phases of the project as separate projects as this constitutes unlawful piecemealing.<sup>33</sup>

Here, the City is attempting to do just that. As stated in the Addendum, “the distribution and density of land uses . . . will remain unchanged.”<sup>34</sup> The Addendum goes on to explain—without justification—that the improvement projects will now be implemented on a new timeline based on project-specific CEQA analyses.<sup>35</sup> In other words, the City is swapping a whole-project analysis with corresponding mitigation measures for a piecemeal approach that would provide the City an (unlawful) opportunity to avoid its mitigation obligations based on a project-by-project analysis.

The City cannot abandon its mitigation obligations without proper evidence, analysis, and consideration. “[W]here a public agency has adopted a mitigation measure for a project, it may not authorize destruction or cancellation of the mitigation . . . without reviewing the continuing need for the mitigation, stating a reason for its actions, and supporting it with substantial evidence.”<sup>36</sup> Similarly, “[i]f a mitigation measure later becomes ‘impracticable or unworkable,’ the governing body must state a legitimate reason for deleting an earlier adopted mitigation measure, and must support that statement of reason with substantial evidence.”<sup>37</sup> As explained above, the Addendum does not satisfy these standards.

As discussed above, the Addendum also fails to squarely address the scope and conclusions of the Hexagon Study. The stated purpose of the study is “to update the required improvements to serve Phase 1 of the [Policy].”<sup>38</sup> It concludes that based on recent development patterns, only “three of the four major roadway improvements continue to be required to support Phase 1 development levels.”<sup>39</sup> However, the proposed amendments would abandon the Policy’s requirements to complete the outstanding improvements during Phase 1. Instead, it proposes a

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<sup>32</sup> *Fed’n of Hillside and Canyon Ass’ns v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261 (citing Pub. Res. Code § 21002.1).

<sup>33</sup> See *Lincoln Place Tenants Ass’n v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1508.

<sup>34</sup> Addendum, p. 68.

<sup>35</sup> *Id.*, p. 71.

<sup>36</sup> *Katzeff v. Dept. of Forestry & Fire Protec.* (2010) 181 Cal.App.4th 601, 614.

<sup>37</sup> *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1165-1166 (cleaned up); see also *Mani Brothers Real Est. Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1403.

<sup>38</sup> Hexagon Study, p. 40.

<sup>39</sup> *Id.*

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project-by-project traffic mitigation plan.<sup>40</sup> The Addendum does not properly address the impact of this fundamental change to legally binding mitigation measures.

Finally, the Addendum violates CEQA's rule against deferred formulation of mitigation measures. The CEQA Guidelines provide that the "[f]ormulation of mitigation measures shall not be deferred until some future time."<sup>41</sup> An agency may only delay the details of a mitigation measure "when it is impractical or infeasible to include those details during the project's environmental review," and only if 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 be considered, analyzed, and potentially incorporated in the mitigation measure.*

The Addendum does not satisfy any of these requirements. The NSJ Amendments would abandon the phasing plan without a clear substitute. The Addendum itself does not adopt performance standards, but instead references "the City's Transportation Analysis Policy (Council Policy 5-1)."<sup>42</sup> Although this policy provides a general framework for analyzing traffic impacts, it does not include specific performance standards for mitigating the impact of the NSJ Amendments.

Courts routinely approve CEQA settlement agreements that require public agencies to implement additional mitigation measures.<sup>43</sup> The NSJ Amendments and 2022 Draft Amendment threaten the effectiveness of the Settlement Agreement here, and undermine the legal viability of the proposed development. If a public agency settles a CEQA action by committing to mitigation measures for a regional development plan, it cannot abandon its obligations by pivoting to a project-by-project CEQA approach—especially if the underlying land-use regulations remain unchanged.

Again, we respectfully request that the City Council take no action at this time and continue the matter to a date uncertain so that the parties can continue to discuss a mutually agreeable resolution. Absent an amended Settlement Agreement agreed to by all parties, the

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<sup>40</sup> Addendum, p. 71 ("Individual development projects and transportation improvement projects in the NSJ policy area will be required to undergo project-level transportation analysis using VMT based on the City's Transportation Analysis Policy.").

<sup>41</sup> CEQA Guidelines § 15126.4.

<sup>42</sup> Addendum, p. 71.

<sup>43</sup> See 2 Stephen L. Kosta & Michael H. Zischke, *Practice Under the California Environmental Quality Act* § 23.115 (rev. ed. 2022).



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proposed actions are unlawful and the County will be compelled to act accordingly to ensure Montague Expressway is not negatively impacted.

In the event that the City Council moves forward with approval of the NSJ Amendments and the 2022 Draft Amendment, the County has no choice but to pursue all of its available legal remedies to protect its rights, including enforcement of the existing settlement agreements, causes of action for, among other things, bad faith and breach of the covenant of good faith and fair dealing, as well as legal challenges to the flawed process that the City has utilized to consider the NSJ Amendments and 2022 Draft Amendment.

Thank you for your consideration.

Very truly yours,

JAMES R. WILLIAMS  
County Counsel

DocuSigned by:  
  
B179ECE83EEF431...  
CHRISTOPHER CHELEDEN  
Lead Deputy County Counsel

cc: Honorable Board of Supervisors (via email with attachments)  
Jeffrey V. Smith, JD, MD, County Executive (via email with attachments)  
Miguel Márquez, JD, MPP, Chief Operating Officer (via email with attachments)  
James R. Williams, County Counsel (via email with attachments)  
Jennifer Maguire, City Manager (via email with attachments)  
Nora Frimann, City Attorney (via email with attachments)

Attachments

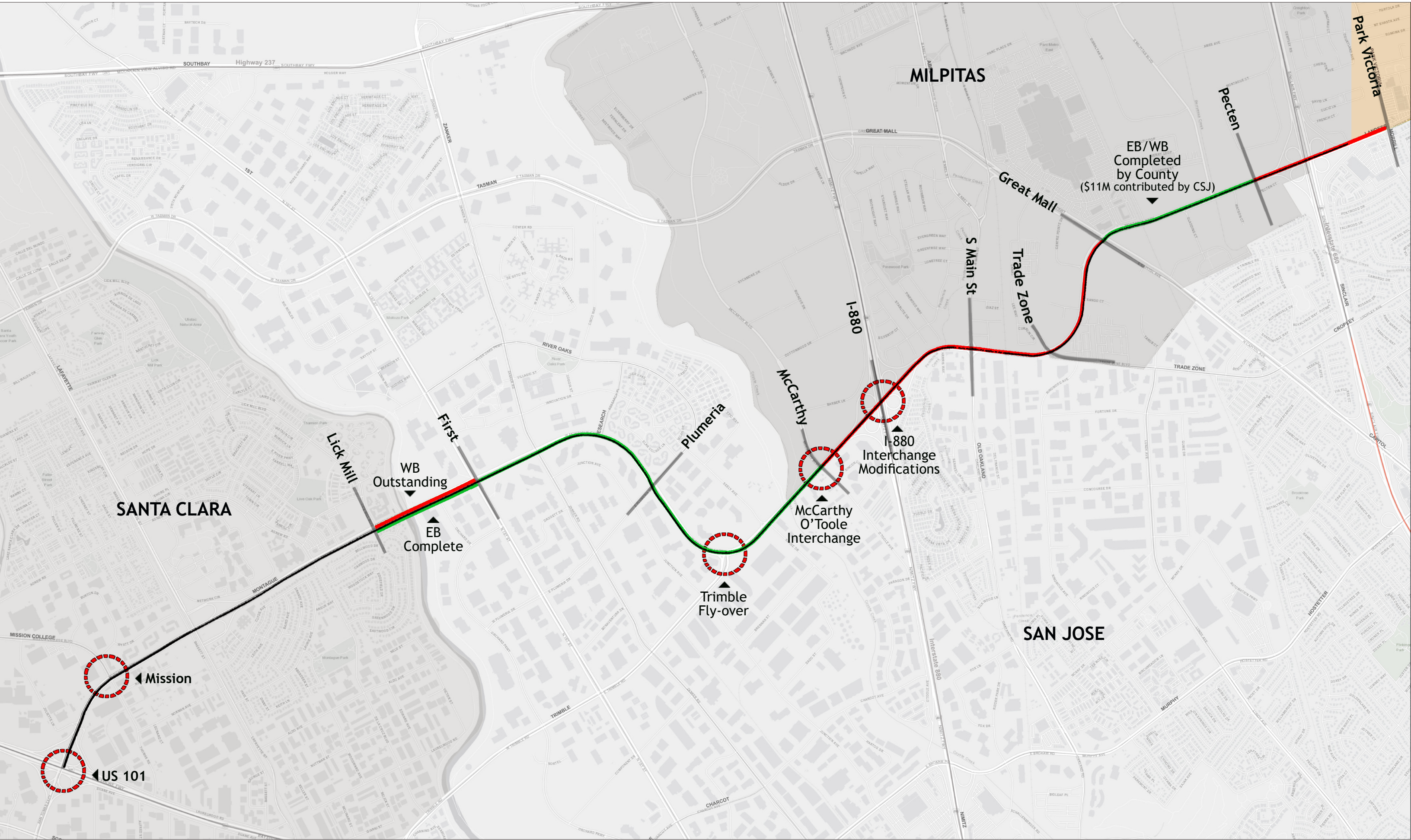
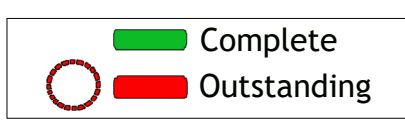
1. Completed and Outstanding Traffic Improvement Projects Required by Settlement Agreement (Table and Map)
2. WSP USA Memorandum, dated May 16, 2022

Attachment 1

*Settlement Agreements Projects – as described by the 2006 Settlement Agreement between County of Santa Clara, Santa Clara County Financing Authority, Silicon Valley Theatre Financing Corporation, City of San José, and Redevelopment Agency of City of San José and the 2006 Settlement Agreement between the County, City of San José and City of Santa Clara (Agreements contained same terms with regard to NSJ/County)*

<b>Required Improvement</b>	<b>Status</b>	<b>Comment</b>
<b>Section 2.B.i – City Constructed Projects</b>		
In and as part of the implementation of Phase I of the NSJ Plan, City shall complete and fund mitigations as follows:		
Widen to 8 lanes between Lick Mill to Trade Zone	Incomplete	Widening is outstanding between Lick Mill Ave to First St, and widening is outstanding from McCarthy to Trade Zone
Widen to 8 lanes all portions of the Expressway regardless of City Boundary	Incomplete	Incomplete from Trade Zone to Great Mall Complete from Great Mall to Pecten Ct. Incomplete from Pecten Ct. to Park Victoria
Including the I-880 Interchange	Incomplete	Outstanding
Trimble Flyover	Incomplete	Outstanding
Montague Expressway/McCarthy-O’Toole Interchange (as Part of NSJ Phase 3)	Incomplete	Outstanding
<b>2.B.ii – City Funded Projects</b> City shall fund up to an amount not to exceed \$11 million dollars to widen Montague east of Capitol Ave/Great Mall	Complete	City contributed \$11 million
<b>2.B.iii - Montague and 101 and Mission and 101 Interchanges</b>	Incomplete	City has not contributed \$1.5 million

# Settlement Agreement Projects





## MEMO

TO: Harry Freitas, Director of Santa Clara County Roads and Airports

FROM: [WSP USA](#)

SUBJECT: Transportation Improvement Documents

DATE: [May 16, 2022](#)

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WSP was tasked by the County of Santa Clara with providing an overview of several transportation improvement reports regarding details related to the Trimble Flyover at Montague Expressway. This Memorandum presents that overview.

## SUMMARY OF NORTH SAN JOSE TRANSPORTATION REPORTS

North San Jose Deficiency Plan by Hexagon (Jan 2006) – This original Hexagon Report (“2006 Report”) is 15 years old and does not use state of the practice traffic operations methodology, which is HCM 2000 in Traffix software, and doesn’t account for upstream/downstream effects of congestion. The “future condition” in the Hexagon Study is the base year (2000) + assumed build-out of the North San Jose Development Plan, so it doesn’t account for other growth, and no future analysis year is stated.

- The 2006 Report calls for inclusion of a Trimble Flyover as part of Phase 1 improvements and estimates a cost of \$30M

North San José Transportation Improvement Phasing Study by City of San Jose (Draft) (October 2018) (“2018 Report”) analyzes a future condition that is existing plus future development not including any growth not part of the NSJ development plan. Phase 4 improvements are likened to 2040 conditions. This 2018 Report assumes the flyover for 2040 conditions and says it should be included as part of Phase “B” improvements (Phase B = Phases 3+4 from the original 4 phases). The 2018 Report also states that, while the flyover would provide improvement at the intersection, it wouldn’t enhance for through capacity on the corridor, and recommends a new I-880 overcrossing at Charcot Ave as more cost-effective.

- The 2018 Report’s analysis methodology appears to be partial toward what it designates as “major roadway improvements”.
- The 2018 Report’s intersection analysis is isolated, for example it doesn’t account for congestion from upstream/downstream intersections.
- The 2018 Report’s roadways are studied with link-based (and screenline-based) volume-to-capacity ratio analysis which rely on link capacity—ignoring that intersections are the primary source of congestion on arterials.



As a result, the 2018 Report draws a conclusion that the Trimble flyover serves the intersection but doesn't provide benefit for the corridor as a whole, even though intersection delays control corridor travel times and the Montague/Trimble intersection was one of the most congested in the corridor. Corridor benefits should be evaluated from the cumulative effect of intersection and roadway improvements—not roadway improvements in isolation.

The NSJ Phase 1 Transportation Improvements Update by Hexagon (April 2021) ("2021 Report") looks at conditions in 2018 and compares them to what was forecast in the North San Jose Deficiency Plan by Hexagon (Jan 2006) Report for Phase 1 conditions. It points out the differences including that in 2018 a Trimble flyover wasn't necessary (in 2018). The 2021 Report concludes that Phase 1 improvements for Trimble/Montague are complete (with the additional 4<sup>th</sup> through lane on Montague).

The analysis provided in the 2018 Report relies on determining level-of-service based on screenline volume to capacity (V/C) ratios using outputs generated from the City of San Jose 2015 model. Based on Figure 3 of the 2021 Report, which shows the screenlines used in the analysis, it is difficult to determine the rationale for the screenlines. For example, if the analysis is focused on development in North San Jose, a more reasonable location for the East and North screenlines would be to locate the screenlines closer to the San Jose city limits at Milpitas (East Screenline) and Santa Clara (North Screenline), to better isolate impacts caused by North San Jose Phase 1 and subsequent phase developments. In particular, the North Screenline seems problematic towards isolating North San Jose development impacts, as it is too long, as well as located on the wrong side of US 101 to capture travel on and off from US 101 to North San Jose.

For the screenline analysis, the 2015 City of San Jose (CSJ) model is used in the 2021 Report to determine the segment volume to capacity ratio for segment level of service for peak hour and 4-hour peak period traffic levels. Results from the model reported in Tables 4 and 5 (East Screenline) show counterintuitive volumes for Brokaw Road and significant underestimation of volumes on East Tasman Drive in the PM peak conditions. Prior to use in the study, validation of the City of San Jose model is needed, to validate to actual screenline counts to demonstrate that the model volumes are reasonable; the 2021 Report does not indicate whether this validation was performed by Hexagon. In particular, it is not standard practice for models to be validated to 4-hour counts (which Hexagon appears to have done in its 2021 Report), which introduces uncertainty regarding the use of 4-hour volumes for estimating screenline level-of-service analysis.

The findings in the 2021 Report on the East Screenline improvements for Phase 1 should be revised, as there is a deficiency indicated for the AM eastbound direction in the screenline analysis reported in Table 4. This deficiency is based on the statement in the report: "If the volume-to-capacity ratio of a screenline for a four-hour commute or peak-hour periods under Year 2015 Conditions is higher than 0.9 (i.e. LOS E or F), the major roadway improvements would be needed to increase the overall capacity of the screenline." Based on the results shown on Table 4 of the 2021 Report, AM peak hour westbound screenline V/C is greater than 0.9 (0.92 on Table 4), therefore the capacity is inadequate for Phase 1 development levels according to the impact thresholds. The concluding statements in the 2021 Report for the improvements required for Phase 1 for the East Screenline should be updated to address the deficiency. Finally, this and future analysis for North San Jose development policies should reflect the latest decision by the City of San Jose to not proceed with the Charcot Road overcrossing, and how the project phasing conclusions for projects originally defined in the North San Jose Deficiency Plan (January 2006) are impacted without the overcrossing.



The NSJ Traffic Impact Fee Plan Update by Hexagon (February 2022) (“2022 Report”) provides an update to The NSJ Phase 1 Transportation Improvements Update (2021 Report) to consist of Year 2021 Updates within Section 4. Discussion related to COVID’s affect on transportation were also included within the 2022 Report. Several discussion points related to the I-880/Charcot interchange were also removed from various sections of the report.

The overall assessment of this document is the same as those noted within the section above.

## KEY TAKAWAYS

The analysis methods included within the above reports do not provide sufficient detail and results to determine the effectiveness of a proposed flyover at the Trimble Road/Montague Expressway intersection. The Reports did not include a future analysis (20-Year Horizon) to determine future needs at the intersection. The Reports note that future improvements within the corridor should include the proposed flyover but do not provide quantitative analysis. Trimble Flyover would provide benefits at the Trimble Road/Montague Expressway intersection. Furthermore, it would also improve flow along Montague Expressway in combination with other intersection improvements along the corridor.