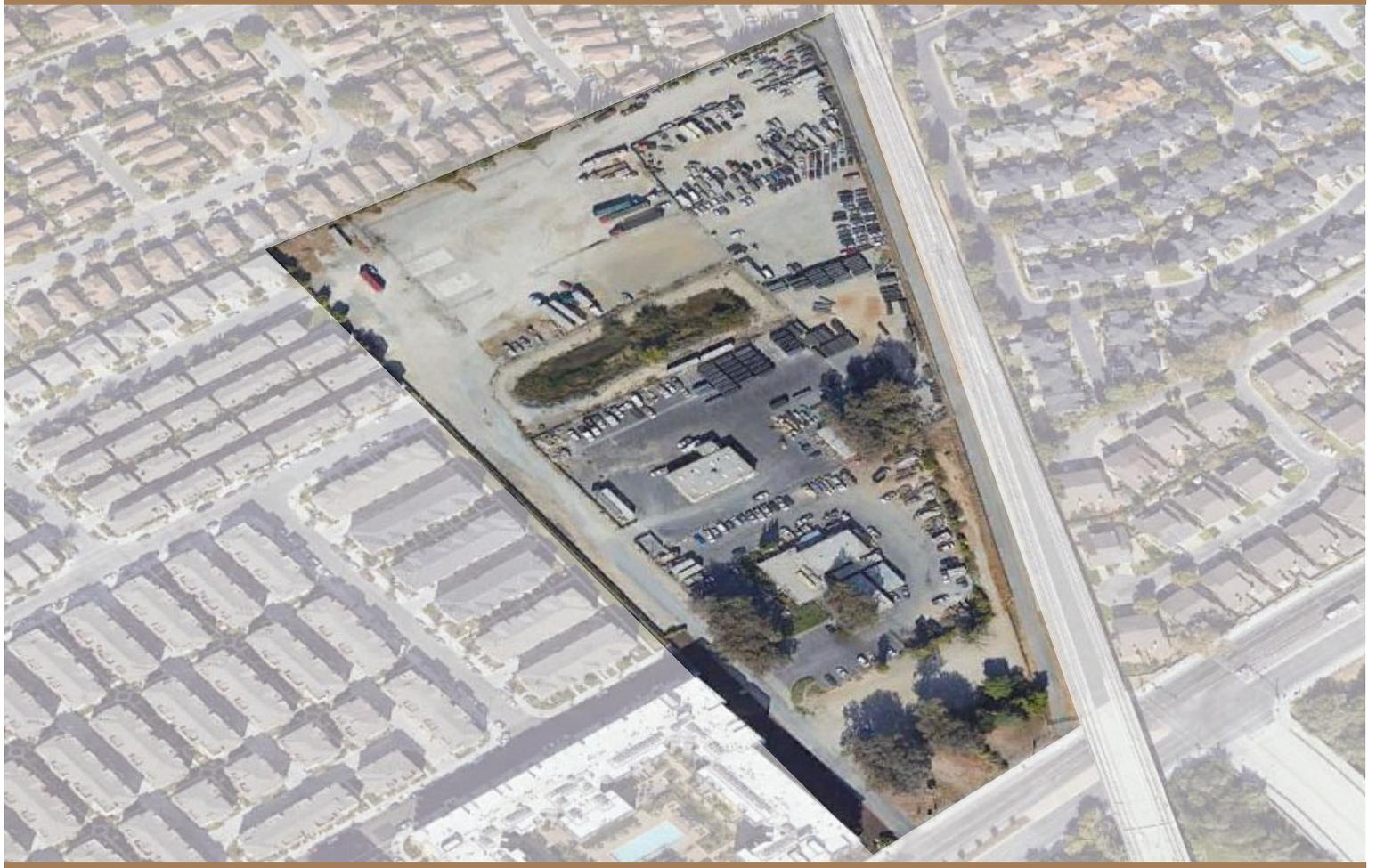


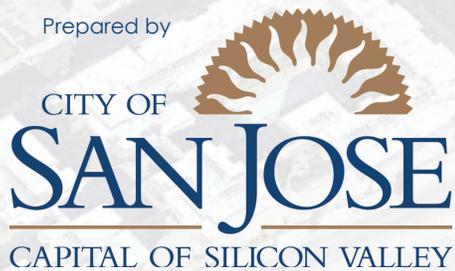
Final Environmental Impact Report  
**Berryessa Road Mixed Use Development**

(File Nos.: PDC18-036, PD21-009, PT21-030)

(SCH No.: 2021070467)



Prepared by



**April 2023**

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## **SECTION 1.0 INTRODUCTION**

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This document, together with the Draft Environmental Impact Report (EIR), constitutes the Final EIR for the Berryessa Mixed Use Development Project (project).

### **1.1 PURPOSE OF THE FINAL EIR**

In conformance with the California Environmental Quality Act (CEQA) and CEQA Guidelines, this Final EIR provides objective information regarding the environmental consequences of the proposed project. The Final EIR also examines mitigation measures and alternatives to the project intended to reduce or eliminate significant environmental impacts. The Final EIR is intended to be used by the City and any Responsible Agencies 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 EIR shall consist of:

- a) The Draft EIR or a revision of the Draft;
- b) Comments and recommendations received on the Draft EIR either verbatim or in summary;
- c) A list of persons, organizations, and public agencies commenting on the Draft EIR;
- 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 EIR is also available for review on the City's website: [Berryessa Road Mixed Use Development](#).

## **SECTION 2.0 DRAFT EIR PUBLIC REVIEW SUMMARY**

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The Draft EIR for the Berryessa Road Mixed Use project, dated August 2022, was circulated to affected public agencies and interested parties for an extended 47-day review period from August 11, 2022, through September 28, 2022. The City undertook the following actions to inform the public of the availability of the Draft EIR:

- A Notice of Availability of Draft EIR was published on the City’s Newsflash and in the San José Mercury News;
- Notification of the availability of the Draft EIR was mailed to project-area residents and other members of the public who had indicated interest in the project;
- The Draft EIR was delivered to the State Clearinghouse on August 11, 2022, as well as sent to various governmental agencies, organizations, businesses, and individuals (see Section 3.0 for a list of agencies, organizations, businesses, and individuals that received the Draft EIR); and
- The Draft EIR was published on the City’s [website](#). Copies of the Draft EIR were made available at Dr. MLK Jr. Main Library, and Educational Park Branch Library..

## **SECTION 3.0 DRAFT EIR RECIPIENTS**

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CEQA Guidelines Section 15086 requires that a local lead agency consult with and request comments on the Draft EIR 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 NOA for the Draft EIR was sent to owners and occupants adjacent to the project site and to adjacent jurisdictions. The following agencies received a copy of the Draft EIR from the City or via the State Clearinghouse:

- California Air Resources Board
- Caltrans District 4
- California Department of Fish and Wildlife
- California Office of Historic Preservation
- California Department of Toxic Substances Control
- California Department of Water Resources
- Native American Heritage Commission
- San Francisco Bay Regional Water Quality Control Board (Region 2)

## **SECTION 4.0 RESPONSES TO DRAFT EIR COMMENTS**

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

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 Appendix A of this document. Comments received on the Draft EIR are listed below.

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## REGIONAL AND LOCAL AGENCIES

### A. Santa Clara Valley Water District (dated September 26, 2022)

**Comment A.1:** Valley Water has reviewed the Draft Environmental Impact Report for the Berryessa Mixed Use Project at 1655 Berryessa Road. Based on our review of the report we have the following comments:

#### **Groundwater:**

1. **Section 3.10, various subsections:** In several subsections, the DEIR refers to the Santa Clara Plain subbasin. Please note this terminology is inconsistent with Valley Water's Groundwater Management Plan. The project is in the Santa Clara Subbasin, which Valley Water subdivides into two groundwater management areas, the Coyote Valley and the Santa Clara Plain. The project is in the Santa Clara Plain groundwater management area of the Santa Clara Subbasin. All references in the DEIR should be updated appropriately. The subbasin and groundwater management areas are described in Valley Water's 2021 Groundwater Management Plan: [https://s3.us-west-2.amazonaws.com/assets.valleywater.org/2021\\_GWMP\\_web\\_version.pdf](https://s3.us-west-2.amazonaws.com/assets.valleywater.org/2021_GWMP_web_version.pdf)

The DEIR also references Valley Water's 2016 Groundwater Management Plan, which was superseded in November 2021. Valley Water recommends all references be updated to the 2021 Groundwater Management Plan.

**Response A.1:** This comment has been noted. The Draft EIR references the 2016 Groundwater Management Plan in Section 8.0 References, Page 273, of the Draft EIR. This reference has been updated with the 2021 Groundwater Management Plan including in Section 8.0 References, Page 273 of the Draft EIR. These Draft EIR Text Revisions are in Section 5.0 of this Final EIR. As stated in Section 3.10.2, Checklist question e), Page 150 the Draft EIR, the project would not interfere with any actions set forth by Valley Water in its Groundwater Management Plan.

**Comment A.2: 2. Section 3.10.2.1, Dewatering:** The project DEIR notes that shallow groundwater is likely present at depths of 5 to 15 feet and that excavation could extend to 30 feet below grade. The DEIR also notes construction will comply with terms of the Construction General Permit and if groundwater dewatering is needed design-level geotechnical investigations will be prepared to evaluate the potential for settlement.

Since the project is located on a regulated contaminant release site, Valley Water recommends that the geotechnical investigations evaluate the potential for dewatering to mobilize the contaminants noted in the site assessment reports submitted to the County Department of Environmental Health. Valley Water also recommends that a more detailed analysis of construction dewatering be conducted, including an evaluation of related impacts based on estimated dewatering volumes and durations. Lastly, Valley Water recommends that the construction dewatering system be designed such that the volume and duration of dewatering are minimized to the greatest extent possible.

**Response A.2:** Geotechnical investigation reports do not typically evaluate the potential for dewatering to mobilize contaminants. The Corrective Action Plan/Risk

Management (e.g., Site Management Plan) will evaluate and include measures to prevent dewatering from mobilizing the contaminants. Mitigation measure MM HAZ-1.1 on Pages 133 and 134 of the Draft EIR has been updated to describe measures for dewatering (refer to Section 5.0 Draft EIR Text Revisions in this Final EIR). The dewatering system would be designed so that the volume and duration of dewatering are minimized to the greatest extent possible. Dewatering impacts are identified on Page 148 and The Draft EIR. This comment does not identify significant new information or new impact and, therefore, the comment does not require recirculation of the Draft EIR.

**Comment A.3:** 3. Section 3.10.2.1, Post Construction and Appendix E: Soil testing performed by Cornerstone Earth Group (detailed in Appendix E of the DEIR) noted that the site consists of primarily clayey soils and infiltration tests showed very low permeability and non-draining conditions. Valley Water recommends further geotechnical analysis to determine whether the proposed bioretention areas would be feasible in this location since stormwater infiltration devices (SWIDs) do not work well in clay soils. This is also aligned with the recommendations in Section 6.4 of the Santa Clara Valley Urban Runoff Pollution Prevention Program C.3 Stormwater Handbook for confirming infiltration rates.

Per Table A-1 of Appendix A of the C.3 Stormwater Handbook (Table A-1), the required groundwater separation for a SWID is 10 feet. Since the depth to first groundwater in the area appears to be within this range, any SWIDs used at this site would likely not meet the groundwater separation requirement. Table A-1 also requires a 1,500-foot setback or regulatory agency approval from any known contamination sites. The DEIR should clarify whether the Site Management Plan required by DEH constitutes “regulatory approval” for SWID design/implementation.

Additionally, Valley Water is concerned about the potential for the proposed SWIDs to mobilize contaminants from shallow soil to deeper soil and/or groundwater that could have negative impacts on groundwater quality. Therefore, Valley Water recommends additional detail about operation of the proposed SWIDs. In addition, there appears to be an active well (06S01E32H001) located within 1,500 feet of the project site, Table A-1 requires a horizontal setback of 1,500 feet or more. Hence, the proposed SWIDs for the project site do not appear to meet several of the guidelines outlined in Table A-1.

**Response A.3:** No bioretention areas or stormwater infiltration devices are proposed as a part of the project. Pages 13 and 148 have been updated to clarify stormwater from the site would be directed to the existing detention basin adjacent to the Coyote Creek; it would then be treated at an existing biotreatment cell, and discharged into Coyote Creek. Therefore, the recommendations regarding stormwater infiltration devices in Table A-1 in the C.3 Stormwater Handbook, discussed in Comment A.3, are not applicable to the proposed project and these infiltration devices do not have the potential to mobilize contaminants at the site. The exclusion of on-site bioretention areas would not result in any new impact and would not increase the severity of the impact to water quality or stormwater drainage systems (less than significant) identified on Pages 148 and 149 of the Draft EIR, as stormwater would be directed to the existing off-site detention basin and treated at the adjacent biotreatment cell. No further response is warranted.

**Comment A.4: 4. Section 3.7.1.2, Existing Conditions, Site Geology:** This section notes that: “Groundwater flows toward the south or southwest.” However, the regional groundwater flow gradient in the Santa Clara Subbasin is toward the San Francisco Bay (north or northwest) as documented in Valley Water’s 2021 Groundwater Management Plan ([https://s3.us-west-2.amazonaws.com/assets.valleywater.org/2021\\_GWMP\\_web\\_version.pdf](https://s3.us-west-2.amazonaws.com/assets.valleywater.org/2021_GWMP_web_version.pdf)). If there are locally available data that supports shallow groundwater flow “toward the south or southwest” Valley Water recommends providing a supporting reference or citation.

Although the project location is within an area of known historical land subsidence (prior to the early 1970s), this DEIR section has no related information. Valley Water recommends adding a brief description about the historical subsidence and Valley Water activities to minimize the risk of resumed subsidence in the Santa Clara Subbasin per Valley Water’s 2021 Groundwater Management Plan.

**Response A.4:** As stated on Page 147 of the Draft EIR, the shallow ground water beneath the site is likely present at depths of approximately 5 to 15 feet. The following links support a south or southwest flow direction toward Upper Penitencia Creek; however, other flow directions also have been reported in the general vicinity:

- State Water Resources Control Board. Accessed February 1, 2023. [https://geotracker.waterboards.ca.gov/view\\_documents?global\\_id=T0608502428&enforcement\\_id=6060101](https://geotracker.waterboards.ca.gov/view_documents?global_id=T0608502428&enforcement_id=6060101)
- State Water Resources Control Board. Accessed February 1, 2023. [https://geotracker.waterboards.ca.gov/view\\_documents?global\\_id=T0608501176&enforcement\\_id=6232757](https://geotracker.waterboards.ca.gov/view_documents?global_id=T0608501176&enforcement_id=6232757).

Page 110 of the Draft EIR discussion has been updated to state that variable ground water flow directions have been reported in the site vicinity, (refer to Section 5.0 Draft EIR Text Revisions in this Final EIR).

No known history of land subsidence has been recorded at the site. From about 1915 to 1966, groundwater pumping in the Santa Clara Plain increased substantially due to growing agricultural use and population growth, resulting in a decline of groundwater levels by as much as 200 feet and long-term overdraft. As referenced by Valley Water, long-term dewatering practices have ceased in the Santa Clara Subbasin since the early 1970s. In addition, only short-term dewatering is anticipated for construction activities. Therefore, the risk of ground subsidence due to on-site or project dewatering is considered low. Section 3.10 Hydrology and Water Quality, Pages 145 and 147 of the Draft EIR has been updated with the above discussion of ground subsidence history in the Santa Clara Subbasin, (refer to Section 5.0 Draft EIR Text Revisions in this Final EIR). This comment does not identify significant new information and, therefore, the comment does not require recirculation of the Draft EIR.

**Comment A.5: 5. Section 3.10.1.1, Regulatory Framework:** This section does not describe the Sustainable Groundwater Management Act (SGMA) of 2014. Valley Water suggests adding a subsection about SGMA and Valley Water’s role as a Groundwater Sustainability Agency (GSA) for the Santa Clara Subbasin because the project overlies this subbasin. Valley Water also recommends adding language about the 2021 Groundwater Management Plan, which is the first five-year periodic update of Valley Water’s state-approved Alternative to a Groundwater Sustainability Plan. A brief history is available on Valley Water’s website here: <https://www.valleywater.org/your-water/where-your-water-comes/groundwater/sustainable> and within the 2021 Groundwater Management Plan, which is available here: [https://s3.us-west-2.amazonaws.com/assets.valleywater.org/2021\\_GWMP\\_web\\_version.pdf](https://s3.us-west-2.amazonaws.com/assets.valleywater.org/2021_GWMP_web_version.pdf).

**Response A.5:** Based on the recommendation in Comment A.5, a discussion of the Sustainable Groundwater Management Act and 2021 Groundwater Management Plan has been added to Section 3.10 Hydrology and Water Quality, Subsection 3.10.1.1 Regulatory Framework, Page 141 of the Draft EIR (see Section 5.0 Draft EIR Text Revisions of this Final EIR).

**Comment A.6: 6.** Valley Water records show 1 active well on APN: 241-03-025. If the well will continue to be used following permitted activity, it must be protected so that it does not become lost or damaged during completion of permitted activity. If the well will not be used following permitted activity, it must be properly destroyed under permit from the District. While the District has records for most wells located in the County, it is always possible that a well exists that is not in the District’s records. If previously unknown wells are found on the subject property during development, they must be properly destroyed under permit from the District or registered with the District and protected from damage. Additionally, it should be clarified that well construction, including borings 45 feet or more in depth, and destruction permits are required under Valley Water’s Well Ordinance 90-1. Under Valley Water’s Water Resources Protection Ordinance, projects within Valley Water property or easements are required to obtain permits.

**Response A.6:** As discussed in the Hazards and Hazardous Materials Section 3.9.2 Impact Discussion (Draft EIR Page 135) and Appendix G, Phase I Environmental Site Assessment (Phase I ESA) of the Draft EIR, at the time the Phase I ESA was prepared, an inactive water supply well was discovered at the site and was not considered a source of contamination assuming the well is properly destroyed in accordance with Valley Water’s Well Ordinance 90-1. The well ordinance is discussed in the Hydrology Subsection 3.10.1.1 Regulatory Framework, Pages 141 and 142 of the Draft EIR. As discussed in the Hazards and Hazardous Materials Section 3.9.2 Impact Discussion (Page 135), well destruction performed by the project would comply with the permitting requirements under Valley Water’s Water Resources Protection Ordinance and Water Ordinance 90-1 and ensure that well destruction would not cause pollution or contamination of groundwater, or otherwise jeopardize the health, safety, or welfare of the people and impacts would be less than significant. No construction of wells are proposed by the project. This comment does not identify any new impacts regarding on-site wells. Therefore, the Draft EIR does not require recirculation.

**Comment A.7:**

**Water Supply:**

7. As noted in the Water Supply Assessment, there is the potential for water shortages in multiple dry years. The Urban Water Management Plans (UWMP) for the San Jose Water Company and for Valley Water assume substantial increases in water conservation which is an important component of the county's future water supply. To meet future needs as projected in the UWMP, additional water demand management and conservation measures will need to be implemented. Consistent with General Plan Policies MS-18.5 and 18.6, the 2030 Greenhouse Gas Reduction Strategy, and to meet water conservation targets assumed in the Water Supply Assessment, Valley Water suggests that all new multifamily development be required to install separate submeters to each unit to encourage efficient water use. Studies have shown that adding submeters can reduce water use 15 to 30 percent.

**Response A.7:** The project proposes to construct up to 802 multi-family residential units, 24 townhouses, and 24 single-family units. The commenter recommended additional water demand management and conservation measures including separate submeters for the multi-family units. However, the capability of the water retailer to serve the additional water demand generated by the project, in normal and dry years, has been documented in the Water Supply Assessment. Page 250 of the Draft EIR has been updated to clarify that each single-family residence will have its own water meter and commercial spaces would have separate submeters to encourage efficient water use (refer to Section 5.0 Draft EIR Text Revisions of this FEIR). Each multi-family residential building would have a single water meter that would regulate water use. The project would include other water conservation and demand management measures such as using water-efficient landscaping and recycled water. This comment does not identify a new impact to water supply and, therefore, the Draft EIR would not require recirculation.

**Comment A.8:**

**Water Use:**

8. Water use efficiency is a key pillar of Valley Water's program to maintain and improve water supply reliability into the future. Valley Water recommends that the developers include water efficient appliances and landscaping. Where feasible, landscaping should get fed with recycled water and the developer could discuss with San Jose the feasibility of a hook up to the South Bay's recycled water system. In addition, Valley Water recommends the developer include recommended actions from our Model New Development Water Efficient Ordinance.

**Response A.8:** A recycled water line, which is a part of the South Bay Water Recycling system, is located on Berryessa Road immediately to the south of the project site. The project would connect to the recycled water line which would be utilized for landscaping.

As shown in Appendix F Greenhouse Gas Emissions Compliance Checklist of the Draft EIR, the project would be consistent with the State's Model New Development

Water Efficient Ordinance which promotes efficient landscapes in new developments. The project would also install high-efficiency fixtures to reduce water use.

**B. San Francisco Bay Regional Water Quality Control Board (August 30, 2022)**

**Comment B.1:** San Francisco Bay Regional Water Quality Control Board (Water Board) staff appreciates the opportunity to review the Draft Environmental Impact Report for the Berryessa Mixed Use Project (DEIR). The DEIR evaluates the potential environmental impacts associated with implementing the Berryessa Mixed Use Project (Project). The 13-acre Project site is located at 1655 Berryessa Road in the City of San José. The Project's applicant seeks to rezone the project site from the LI - Light Industrial Zoning District to a PD - Planned Development Zoning District. In addition, the Project's applicant is seeking approval of a Planned Development Permit to develop up to 850 residential units and up to 480,000 square feet of commercial space, and to create an approximately 0.9-acre open space area. A Vesting Tentative Map to merge three parcels into one; and re-subdivide the merged parcel into 35 lots; and create up to 590 condominium units and new streets is also included in the project. Under the Project, the three existing industrial buildings and ancillary structures and parking lot would be demolished. Trees on the site would be removed and replaced.

**Response B.1:** Comment B.1 describes the proposed project and does not question the adequacy of the Draft EIR's analysis. Therefore, no further response is required.

**Comment B.2:** As is discussed below, the proposed fill of a 0.34-acre pond is a relatively large impact to waters of the State for a single project, and the Project applicant should not assume that the Water Board will issue a permit for the fill of the pond present at the Project site.

In addition, the DEIR does not provide an adequate discussion of potential mitigation measures for Project impacts to waters of the State.

**Response B.2:** This comment summarizes specific concerns provided in more detail that follow, for which more detailed responses are provided. Section 3.4 Biological Resources, Checklist question b), Page 76 of the Draft EIR states that the man-made pond could be considered a state or federally protected wetland, and the San Francisco Bay Regional Water Quality Control Board (RWQCB) or USACE could impose additional requirements as part of Section 404/401 permits that go beyond what the City as the Lead Agency would require as mitigation under CEQA to off-set impacts from filling the pond under the State of California Porter-Cologne Water Quality Control Act. However, the Draft EIR does not state that the project applicant or lead agency assume the RWQCB will issue a permit, as that is a decision to be made by the RWQCB. Pages 76 and 77 of the Draft EIR state that the RWQCB or USACE could impose additional requirements as part of Section 404/401 permits that goes beyond what the City as the Lead Agency would require as mitigation under CEQA (i.e., payment of Habitat Plan fees) to off-set impacts from filling the pond.

As stated on Page 76 of the Draft EIR, as a part of the Standard Permit Condition, the project would be required to comply with all applicable conditions of the Santa Clara Valley Habitat Plan (Habitat Plan), including wetland specialty fee payment for pond impacts. The Draft EIR concludes payment of Habitat Plan fees would adequately

offset impacts to the on-site pond (potential wetland), which the lead agency has determined is adequate to comply with the Habitat Plan that meets CEQA requirements. As a separate process from the City's certification of the EIR and consideration of the land use entitlements, the RWQCB will decide whether to issue a permit and what mitigation would be required, consistent with its jurisdiction under the Porter-Cologne Act. Comment B.2 does not provide further explanation for the claim that the Draft EIR does not provide an adequate discussion of potential mitigation measures for impacts to waters of the State, therefore no further response is necessary.

**Comment B.3: Comment 1. The Project applicant should not assume that the Water Board will approve the fill of the 0.34-acre pond at the Project site.**

Section 3.4, Biological Resources, includes a discussion of existing conditions in Section 3.4.1.2. A 0.34-acre pond with a depth of 10 feet and a wetland fringe is located on the Project site. Arroyo willow and Fremont cottonwood grow around the pond. This pond was constructed between 1968 and 1981. The U.S. Army Corps of Engineers determined that the pond was not a water of the U.S in a jurisdictional determination dated August 23, 2022 (SPN-2022-00077S).<sup>1</sup> However, the jurisdictional determination noted that the pond may still be regulated as a water of the State. This pond is perennial and may intercept the local groundwater table. Regardless of its origin, the pond has been present at the site for half a century and is self-sustaining. Therefore, it is regulated as a water of the State pursuant to the State's Porter-Cologne Water Quality Act. As the DEIR correctly notes, the Water Board considers all areas below the top of bank to be waters of the State. The DEIR should clarify if the complete area below top of bank is greater than 0.34 acres. Since the pond is not subject to federal jurisdiction, fill of the pond will require the issuance of Waste Discharge Requirements (WDRs) from the Water Board. Issuance of WDRs will require public noticing of the proposed WDRs and approval by a vote of the Board at one of our monthly Board meetings.

**Response B.3:** The first part of Comment B.3 provides a description of the pond and when it was constructed. As noted in this comment, the U.S. Army Corps of Engineers (USACE) determined that the on-site pond was not a water of the U.S. in a jurisdictional determination dated August 23, 2022. Pages 76 and 77 of the Draft EIR, have been revised to note that the pond could be considered waters of the state and, therefore, subject to Porter-Cologne Waste Discharge Requirements from the RWQCB (refer to Section 5.0 Draft EIR Text Revisions of this FEIR).

The entire area below the top of bank is approximately 0.60 acre, of which 0.34 acre is the actual pond habitat in the bottom of the basin. For the purposes of CEQA assessment of impacts on habitats/land cover types, the Draft EIR focuses on impacts to the 0.34-acre area that supports aquatic and wetland habitat in the pond, rather than the maintained/disturbed banks of the feature. Pages 14 and 16 in Appendix C (Biological Resources Report) of the Draft EIR has also been revised to describe that

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<sup>1</sup> U.S Army Corps of Engineers, San Francisco District, Regulatory Division. Jurisdictional Determination: File Number SPN-2022-00077S. August 23, 2022.

the total acreage of the pond up to the top of bank is 0.60 acre and that the USACE determined that the pond is not a water of the U.S. Page 76, Checklist question b) of the Draft EIR has also been updated to describe the pond acreage up to the top of bank (refer to Section 5.0 Draft EIR Text Revisions of this Final EIR). RWQCB Waste Discharge Requirements (WDRs) would be met at the time the project applicant seeks a permit to fill the pond (if project is approved by the City of San José).

**Comment B.4:** When the Water Board receives an application for certification and/or WDRs, staff reviews the project to verify that the project proponent has taken all feasible measures to avoid impacts to waters of the State (these impacts usually consist of the placement of fill in waters of the State). Where impacts to waters of the State cannot be avoided, projects are required to minimize impacts to waters of the State to the maximum extent practicable (i.e., the footprint of the project in waters of the state is reduced as much as possible). Compensatory mitigation is then required for those impacts to waters of the state that cannot be avoided or minimized. Avoidance and minimization of impacts is a prerequisite to developing an acceptable project and identifying appropriate compensatory mitigation for an approved project's impacts. Avoidance and minimization cannot be used as compensatory mitigation. After avoidance and minimization of direct impacts to waters of the State have been maximized for the proposed project, the necessary type and quantity of compensatory mitigation for the remaining impacts to waters of the State are assessed on a case-by-case basis.

Under both the Clean Water Act and the San Francisco Bay Basin Water Quality Control Plan (Basin Plan), projects are required to avoid impacts to waters of the U.S. and waters of the State, in conformance with U.S. Environmental Protection Agency's CWA 404(b)(1) Guidelines (Guidelines). The Guidelines provide guidance in evaluating the circumstances under which the fill of jurisdictional waters may be permitted. Projects must first exhaust all opportunities, to the maximum extent practicable, to avoid, and then to minimize impacts to jurisdictional waters. Only after all options for avoidance and minimization of impacts have been exhausted, is it appropriate to develop mitigation for adverse impacts to waters of State. Since mixed use development is not a water dependent project, it is assumed that impacts to waters of the State can be avoided.

The Water Boards only allow compensatory mitigation to be implemented for those impacts to waters of the State that cannot be avoided and/or minimized; "avoidance and minimization" in the context of reviewing applications for WDRs refers to minimizing the proposed project's footprint in waters of the State. The current Project proposes to fill all waters of the State that are present at the Project site. It is unusual for the Water Board to issue permits for projects that include no avoidance or minimization of impacts to waters of the State. The Project applicant is encouraged to revise the DEIR to fully explore an alternative that completely avoids fill of the pond and incorporates it into the Project's landscaping and open space.

**Response B.4:** The first part of Comment B.4 provides explanation regarding the RWQCB's regulatory requirements (e.g., requirements related to WDRs and compensatory mitigation) and does not question the analysis of the Draft EIR. The project applicant will need to address these requirements when pursuing permits for the project, however, these requirements do not need to be addressed in the Draft EIR. These requirements are a part of the RWQCB permit process which would occur after project approval. The RWQCB requirements for the project are unknown at the

time, will be determined by the RWQCB when the project applies for a permit from the RWQCB and, therefore, are not identified in the Draft EIR.

The comment requests exploration of an alternative that completely avoids fill of the pond. An On-site Man-Made Pond Retention Design Alternative, which assumes the on-site pond would be retained, is considered but rejected in Section 7.0 Alternatives of the Draft EIR. As stated on Page 262 of the Draft EIR, retention of the pond would significantly affect site access, alter the circulation pattern, and result in a net loss of approximately 30 percent of the proposed units. Therefore, for purposes of the Draft EIR's analysis, retention of the on-site pond is not considered feasible for the proposed project by the lead agency. For projects that include housing development, such as the proposed project, Section 15041(c) of the CEQA Guidelines state that a lead agency shall not reduce the proposed number of housing units as a mitigation measure or alternative to lessen a particular significant effect on the environment if that agency determines that there is another feasible mitigation or alternative that would provide comparable lessening of the significant effect. The project applicant would pay applicable Habitat Plan fees provide for to off-site mitigation for the impacts to the on-site pond, which would serve to adequately lessen the project effect. For these reasons, the On-site Man-Made Pond Retention Design Alternative was rejected.

**Comment B.5: Comment 2. The DEIR does not describe acceptable mitigation for the proposed fill of 0.34 acres of waters of the State at the Project site.**

Section 3.4.2.1, Project Impacts, states that the 0.34-acre pond on the Project site is proposed to be filled by the Project. The discussion of impacts states that:

The project would comply with all applicable conditions of the Habitat Plan, including measures to protect water quality and payment of land cover and wetland specialty fees for pond impacts. As described in the response to checklist question b), payment of land cover and specialty wetland impact fees for the pond will reduce the project's impact to on-site pond habitat to a less than significant level by contributing to the Habitat Plan's conservation program, which includes creation, maintenance, and management of pond habitats. The San Francisco Bay RWQCB or USACE could impose additional requirements as part of Section 404/401 permits that goes beyond what the City as the Lead Agency would require as mitigation under CEQA (i.e., payment of Habitat Plan fees) to off-set impacts from filling the pond under the State of California Porter-Cologne Water Quality Control Act.  
**(Less than Significant Impact)**

The Habitat Plan does not currently provide mitigation for impacts to waters of the State that satisfies the requirements of the State's no net loss policy. At this time, there are also no mitigation banks with service areas that include the Project site that provide mitigation for the fill of open waters or wetlands. Therefore, if the Water Board determines that it is appropriate to approve the fill of the 0.34-acre pond, the Project's applicant will be required to provide permittee-responsible mitigation. The DEIR's conclusion that fill of the pond will be a less than significant impact is not supported by the information provided in the DEIR.

**Response B.5:** The City of San José is a co-permittee in the Santa Clara Valley Habitat Plan (Habitat Plan). For purposes of making conclusions under CEQA, the City as lead agency has determined the project applicant's payment of Habitat Plan fees would off-set impacts to the on-site pond (potential wetland). The on-site pond is man-made and is surrounded by industrial development and provides low-quality habitat for wildlife.

Impacts to the pond under CEQA are considered less than significant, after implementation of identified condition, for the following reasons:

- The project is considered a covered activity under the Santa Clara Valley Habitat Plan (Habitat Plan), and the project applicant will pay the required Habitat Plan impact fees, including wetland specialty fees for impacts to the pond, as determined applicable in consultation with the Habitat Agency
- The Habitat Plan's conservation strategy includes the creation, restoration, and management of sensitive habitats, including ponds, and the Santa Clara Valley Habitat Agency uses impact fees, such as those to be paid by the Project applicant, to fulfill that conservation strategy.
- The Habitat Plan underwent CEQA review, and the EIR for the Habitat Plan determined that impacts from covered activities to sensitive habitats such as ponds would be less than significant with implementation of all Habitat Plan conditions.
- The City of San José is one of the Habitat Plan co-permittees (i.e., Local Partners), and as such, reviewed and concurred with the determinations of the Habitat Plan's EIR.

Therefore, the project's compliance with the Habitat Plan, including payment of the necessary impact fees, will mitigate, for purposes of CEQA, the project's significant impact on the pond to a less than significant level. This is the approach that has been taken by the City and other Habitat Plan Local Partners (e.g., the County of Santa Clara, the cities of Morgan Hill and Gilroy, the Santa Clara Valley Water District, and the Santa Clara Valley Transportation Authority) since Habitat Plan approval in 2013. The Habitat Plan was established just for situations such as this where land planned for development (in this case transit-oriented residential mixed-use next to a BART station) would be able to mitigate for certain impacts to sensitive biological resources by paying impact fees that would be used to provide off-site mitigation sufficient to offset project impacts. Other resource agencies, such as the U.S. Fish and Wildlife Service, USACE, and California Department of Fish and Wildlife (CDFW), accept this approach to mitigating impacts of Habitat Plan-covered activities through off-site mitigation that is funded collectively by covered activities.

The Draft EIR (Pages 76 and 77) acknowledges that the RWQCB may impose additional requirements/mitigation to offset impacts to the pond as a potential water of the State. Since these requirements would be a part of the RWQCB permit-approval process to fill the pond and remain to be determined by the RWQCB as part of its subsequent permitting process, the Draft EIR could not identify these requirements.

**Comment B.6:** Please note that the required amount of mitigation will depend on the similarity of the impacted water of the state to the provided mitigation water of the State, the uncertainty associated with successful implementation of the mitigation project, and the distance between the site of the impact and the site of the mitigation water. In-kind mitigation for the fill of open waters consists of the creation of new open waters. If the mitigation consists of restoration or enhancement of open waters, the amount of mitigation will be greater than if the mitigation consists of the creation of open waters. If there are uncertainties with respect to the availability of sufficient water to support a mitigation water or sufficiently impermeable soils to sustain ponding, then the amount of mitigation would also have to be greater. Finally, the amount of required mitigation increases as the distance between the impact site and the mitigation site increases.

A mitigation ratio of 1:1 may be acceptable if a mitigation pond is established on the Project site. For mitigation projects that are offsite and/or out-of-kind, the required mitigation ratio will increase with distance from the Project site and any differences between the type of water body that is impacted and the type of water body that is provide at the mitigation site. For an off-site mitigation project, the applicant will need to acquire fee title to a property with the proper hydrology to support an appropriately-sized mitigation feature. In addition, the applicant will need to monitor and maintain the mitigation feature for at least five years, until final performance criteria are attained. The applicant will also need to place a conservation easement or deed restriction over the property and establish an endowment for the long-term maintenance of the mitigation feature.

**Response B.6:** Comment B.6 pertains to details of mitigation that would be required by the RWQCB as a condition of WDRs. The considerations the RWQCB may use in determining appropriate mitigation are noted. As noted in the Draft EIR (Pages 76 and 77), RWQCB may impose additional requirements/mitigation to offset impacts to the pond as a potential water of the State. Since these requirements would be part of the RWQCB permit-approval process to fill the pond and remain to be determined by the RWQCB as part of its subsequent permitting process, the Draft EIR could not identify these requirements.

**Comment B.7:** Without a description of a viable mitigation project, the DEIR does not demonstrate that the Project's impacts to waters of the State can be mitigated to a less than significant level.

**Response B.7:** Please see Response B.5. Payment of Habitat Plan fees is considered adequate mitigation under CEQA by the lead agency to reduce impacts to the on-site pond to a less than significant level. The RWQCB may utilize its jurisdiction to separately identify the mitigation it deems appropriate for the issuance of permits, independent of the CEQA process supporting the City's decision-making regarding the land use entitlements.

**Comment B.8:** In a CEQA document, a project’s potential impacts and proposed mitigation measures should be presented in sufficient detail for readers of the CEQA document to evaluate the likelihood that the proposed remedy will actually reduce impacts to a less than significant level. CEQA requires that mitigation measures for each significant environmental effect be adequate, timely, and resolved by the lead agency. In an adequate CEQA document, mitigation measures must be feasible and fully enforceable through permit conditions, agreements, or other legally binding instruments (CEQA Guidelines Section 15126.4). Mitigation measures to be identified at some future time are not acceptable. It has been determined by court ruling that such mitigation measures would be improperly exempted from the process of public and governmental scrutiny which is required under the California Environmental Quality Act. The current text of the DEIR does not demonstrate that it is feasible to mitigate all potentially significant impacts to waters of the State that may result from project implementation to a less than significant level. Impacts to the jurisdictional waters at the project site, as well as proposed mitigation measures for such impacts, will require review under CEQA before the Water Board can issue permits for those proposed impacts.

**Response B.8:** Impacts to the pond are capable of being reduced to a less than significant level for the reasons described Response B.5. The City of San José disagrees with the contention that payment of Habitat Plan fees is inadequate to mitigate biological resources impacts to less than significant levels; the Habitat Plan has been used for that specific purpose for nearly a decade for the wide variety of impacts to habitat and species that are covered in the Habitat Plan. As stated in Response B.5, implementation of the Habitat Plan’s conditions, including payment of fees, and conservation strategy would provide adequate mitigation of the project’s impact under CEQA to the on-site pond. The Habitat Agency has not reached the Habitat Plan’s permitted cap for wetland mitigation to off-set wetland impacts from covered activities, such as the subject mixed-use, transit-oriented project. Further, Pages 76 and 77 of the Draft EIR acknowledges that the RWQCB may have different requirements to off-set impacts from filling the pond under the State of California Porter-Cologne Water Quality Control Act that the project would comply to as part of the permitting process with RWQCB, which is separate process from the City implementation of CEQA.

**Comment B.9: Conclusion.** The DEIR does not provide sufficient detail with respect to mitigation for Project impacts to waters of the State. The DEIR should be revised to provide specific mitigation measures for all impacts to waters of the State. These mitigation measures should be in-kind and on-site mitigation measures to the maximum extent possible. The amount of proposed mitigation should include mitigation for temporal losses of any impacted waters of the State. If mitigation is out-of-kind and/or off-site, then the amount of the proposed mitigation should be increased. Proposed mitigation measures should include designs with sufficient detail to show that any created waters will have sufficient hydrology to sustain pond hydrology and vegetation without human intervention. A proposed program for monitoring the success of the mitigation features should also be included with the mitigation proposal(s). In addition, before the Water Board issues a permit that authorizes the fill of the 0.34-acre pond, we must be provided with an alternatives analysis that demonstrates that avoidance of some or all of the waters of the State at the Project site is infeasible.

**Response B.9:** Please refer to Responses B.2 through B.8. Payment of Habitat Plan fees to off-set the impacts to the on-site pond is adequate mitigation under CEQA,

and the Habitat Plan was developed in partnership with USFWS and CDFW for this purpose so that infill development, particularly near transit, could mitigate for certain biological impacts by paying fees to fund off-site mitigation to be designed, implemented, and managed over the Habitat Plan permit term by the Habitat Agency. Utilizing its separate jurisdiction, the RWQCB may impose additional requirements during the permit process it administers under the Porter-Cologne Act as noted in the Draft EIR on Pages 76 and 77. The project applicant will comply with the RWQCB requirements. In addition, an alternative to retain the pond on-site was considered in Section 7.0 in the Draft EIR; it was determined that this alternative is not feasible as it would result in significant issues to site access, would result in the loss of residential development, and would result in the loss of park designed for active recreational uses. As allowed by CEQA Guidelines Section 15091(a)(1), a lead agency may approve a project upon making the finding that mitigation has adequately reduced an impact to a less than significant level.

**Comment B.10:** If the DEIR is adopted without providing concrete mitigation proposals for impacts to waters of the State, it is likely that the DEIR will not be adequate to support the issuance of Waste Discharge Requirements for the Project.

**Response B.10:** Comment B.10 describes a decision that the RWQCB may make during the Project's regulatory permitting, as the RWQCB has stated it does not accept the biological mitigation provided in the Draft EIR to offset impacts to the on-site pond. For the reasons previously provided, compliance with the Habitat Plan conditions and payment of fees would adequately mitigate impacts to the on-site pond. Although the City does acknowledge that RWQCB conditions/mitigation may differ, compliance with the RWQCB's Waste Discharge Requirements is not required mitigation for the potential pond/wetland under CEQA. However, the project applicant would comply with the RWQCB's Waste Discharge Requirements as a part of the RWQCB's permit process, following the City's actions on the project.

## ORGANIZATIONS, BUSINESSES, AND INDIVIDUALS

### C. Adams Broadwell Joseph & Cardozo (dated September 28, 2022)

**Comment C.1:** We are writing on behalf of Silicon Valley Residents for Responsible Development (“Silicon Valley Residents”) to provide comments on the Draft Environmental Impact Report (“DEIR”) prepared by the City of José (“City”) for the Berryessa Road Mixed-Use Development Project, PDC18-036/PD21-009 and PT21- 030; SCH# 2021070467, (“Project”), proposed by Terracommercial Real Estate Corporation (“Applicant”).

The Project is located at 1655 Berryessa Road, San Jose 95133. The site’s Assessor’s Parcel Numbers (“APNs”) are 241-03-023, 241-03-024, and 241-03-025. The site currently contains two industrial buildings, a portable office structure, ancillary structures, an associated parking lot, a vegetated stormwater detention pond, and trees.

The Project proposes a Planned Development (“PD”) Zoning for development of up to 850 residential units, 480,000 square feet of commercial space, and a 0.9- acre park at the Project site. The proposed residential units include 614 market rate multi-family, 189 affordable multi-family, 23 townhouse, and 24 single-family units. The proposed residences would be located in the northeastern and central areas and along the northern and western perimeter of the site. The proposed commercial space would be located in the southern area of the site, fronting Berryessa Road, and the open space park would be located on the northwestern corner of the site. Several discretionary approvals will be required to implement the Project, including: PD Rezoning, PD Permit, Subdivision Maps, and Tree Removal Permits.

We reviewed the DEIR and its technical appendices with the assistance of air quality and health risk experts Matt Hagemann, P.G, C.Hg. and Paul E. Rosenfeld, PhD from Soil / Water / Air Protection Enterprise (“SWAPE”),<sup>2</sup> and noise expert Derek Watry. The City must separately respond to these technical comments.

Based upon our review of the DEIR and supporting documentation, we conclude that the DEIR fails to comply with the requirements of CEQA. As explained more fully below, the DEIR fails to accurately analyze, disclose, and mitigate the Project’s potentially significant air quality, public health, greenhouse gas (“GHG”), hazards, noise, growth-inducing, and land use impacts. As a result of its shortcomings, the DEIR lacks substantial evidence to support its conclusions and fails to properly mitigate the Project’s significant environmental impacts. The City cannot approve the Project until the errors and omissions in the DEIR are remedied, and a revised DEIR is recirculated for public review and comment which fully discloses and mitigates the Project’s potentially significant environmental impacts.

**Response C.1:** Comment C.1 summarizes the project description and the commentor’s technical review team. This Final EIR includes responses to technical comments. This comment states that the Draft EIR fails to comply with the requirements of CEQA and that it requires recirculation. Responses C.2 through C.43 address Comment C.1’s claim that the DEIR fails to accurately analyze, disclose, and mitigate the Project’s potentially significant air quality, public health, greenhouse gas (“GHG”), hazards, noise, growth-inducing, and land use impacts. For the reasons

provided in the following responses, C.2 through C.10, the Draft EIR does not require recirculation for public review.

**Comment C.2: I. 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 the International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483 and their members and their families; and other individuals that live and/or work in the City of San José and Santa Clara County.

Individual members of Silicon Valley Residents, including City resident Erica Valentine, 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.

**Response C.2:** Comment C.2 is a Statement of Interest on behalf of the Silicon Valley Residents and lists individuals and organizations affiliated with this group. The comment also notes that environmental degradation can result in reduced employment opportunities. No specific comment on the Draft EIR’s analysis is provided. Therefore, no further response is required.

**Comment C.3: I. Legal Background.** CEQA has two basic purposes, neither of which the DEIR satisfies. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.<sup>4</sup> CEQA requires that an agency analyze potentially significant environmental impacts in an EIR.<sup>5</sup> The EIR should not rely on scientifically outdated information to assess the significance of impacts, and should result from “extensive research and information gathering,” including consultation with state and federal agencies, local officials, and the interested public. To be adequate, the EIR should evidence the lead agency’s good faith effort at full disclosure. 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.” “Thus, the EIR protects not only the environment but also informed self-government.”

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures.<sup>10</sup> The EIR serves to provide public agencies and the

public in general with information about the effect that a proposed project is likely to have on the environment and to “identify ways that environmental damage can be avoided or significantly reduced.” If a project has a significant effect on the environment, the agency may approve the project only upon a finding 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” specified in CEQA section 21081.12

As these comments will demonstrate, the DEIR fails to comply with the requirements of CEQA and may not be used as the basis for approving the Project. It fails in significant aspects to perform its function as an informational document that is meant “to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment” and “to list ways in which the significant effects of such a project might be minimized.” The DEIR also lacks substantial evidence to support the City’s proposed findings that the Project will not result in any significant, unmitigated impacts.

**Response C.3:** Comment C.3 states that the Draft EIR fails to comply with the requirements of CEQA and that it lacks substantial evidence to support the findings that the project would not result in significant and unavoidable impacts. No specific deficiencies are noted in this comment; therefore, no specific response can be provided to refute the statement. As a general matter, the Draft EIR’s analysis is based on substantial evidence throughout, including technical studies completed by experts included as appendices.

**Comment C.4: II. The City Failed to Provide Timely Access to Documents Referenced and Incorporated by Reference in the DEIR.** The City improperly truncated the DEIR public comment period by failing to make all documents referenced and incorporated by reference in the DEIR available for public review during the Project’s public comment period, which ends on September 28, 2022.

Access to all of the documents referenced in the DEIR is necessary to conduct a meaningful review of its analyses, conclusions, and mitigation measures, and to assess the Project’s potential environmental impacts. CEQA requires that “all documents referenced” and “incorporated by reference” in the draft environmental impact report be available for review and “readily accessible” during the entire comment period. The courts have held that the failure to provide even a few pages of a CEQA document for a portion of the review and comment period invalidates the entire CEQA process, and that such a failure must be remedied by permitting additional public comment. It is also well-settled that a CEQA document may not rely on hidden studies or documents that are not provided to the public.

Here, the City failed to provide public access to the Water Supply Assessment (“WSA”) prepared for the Project during the comment period. The DEIR describes a WSA prepared for the Project in January 2022: “[t]his discussion is based in part upon a Water Supply Assessment completed by San José Water Company in January 2022. A copy of this assessment is included in Appendix J of this EIR. But Appendix J does not include the WSA, nor is the WSA elsewhere made available on the City website. The public is precluded from evaluating the adequacy of the EIR’s discussion of water supply impacts without access to the underlying study on which the City’s analysis relies.

The City's approach thus violates CEQA. We reserve our right to submit supplemental comments on the DEIR at a future date.

**Response C.4:** The project's WSA was referenced in Section 3.19 Utilities and Services Systems, Page 241 of the Draft EIR. The water supply analysis in this section is based on the referenced WSA, and the WSA was on file with the City as part of the project materials available for public inspection and accessible to any member of the public that requested it during the public review period, which started on August 11, 2022, and ended September 28, 2022. The Draft EIR Notice of Availability identified that the technical studies supporting the Draft EIR were available on file at the Planning Division's office at City Hall. Therefore, the public was not precluded from evaluating the WSA and the adequacy of the Draft EIR's discussion of water supply impacts given the WSA was available for inspection in the project application file during the entire Draft EIR's public review period. In addition, the WSA was posted on the City's website on October 4, 2022.

**Comment C.5: III. The DEIR Fails to Adequately Analyze, Quantify, and Mitigate the Project's Potentially Significant Impacts.** An EIR must fully disclose all potentially significant impacts of a project, and 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.

The failure to provide information required by CEQA is a failure to proceed in the manner required by law. 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 adequate information, 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.5:** Comment C.5 attempts to generally summarize the law and does not raise any specific issue with the environmental analysis of the EIR. The Draft EIR identifies all significant environmental impacts and includes feasible mitigation to reduce these impacts to a less than significant level. The conclusions of the Draft EIR analyses and conclusions are based on substantial evidence, including technical studies completed by experts, the applicant's plan set and other project information, and existing regulations. Therefore, the Draft EIR is based on adequate information, in compliance with CEQA. This comment provides a general statement and does not

question specific topics in the EIR analysis. Therefore, no further response is required.

**Comment C.6: A. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Potentially Significant Air Quality Impacts.** The DEIR concludes that the Project’s construction and operational criteria air pollutant emissions will be less than significant after mitigation. This conclusion relies on analysis using CalEEMod Version 2020.4.0 modeling software. SWAPE reviewed the DEIR’s CalEEMod analysis and found that several modeling inputs were either unsubstantiated or inconsistent with information disclosed elsewhere in the DEIR. As a result, the Project’s construction and operational emissions are underestimated, and unsupported by substantial evidence. SWAPE corrected the errors in the DEIR’s analysis, finding that the Project would result in a significant air quality impact that was not previously identified or addressed by the DEIR.

**Response C.6:** Comment C.6 claims that air quality modeling inputs were unsubstantiated or inconsistent with information disclosed elsewhere in the Draft EIR, and that the project would result in a significant air quality impact. Section 15384(b) of the CEQA Guidelines state that substantial evidence shall include facts, reasonable assumptions, and expert opinion supported by facts. Based on modeling data completed by technical experts (refer to Appendix B of the Draft EIR and Final EIR), which provides substantial evidence for conclusions of air quality impacts, and determines the project would not result in a significant air quality impact. Per CEQA Guidelines Section 15151, a disagreement among experts regarding the analysis contained in the Draft EIR does not render the EIR inadequate. For specific responses to the claims made by SWAPE regarding the modeling of project construction and operational emissions, refer to Responses C.7 through C.18.

**Comment C.7: A. The DEIR Underestimates the Project’s Air Quality Impacts by Erroneously Assuming Use of Tier 4 Equipment.** The DEIR’s CalEEMod analysis assumes that the Project’s offroad construction equipment will meet Tier 4 Interim standards. This assumption is not supported by substantial evidence. MM AIR-1.1 requires use of Tier 4 equipment “if feasible.” And “[i]f use of Tier 4 equipment is not available,” MM AIR-1.1 permits use of equipment with less stringent emissions standards:

...alternatively use equipment that meets U.S. EPA emission standards for Tier 2 or 3 engines and include particulate matter emissions control equivalent to CARB Level 3 verifiable diesel emission control devices that altogether achieve a 60 percent reduction in particulate matter exhaust in comparison to uncontrolled equipment; alternatively (or in combination).

The DEIR’s assumption that Project’s offroad construction equipment will meet Tier 4 Interim standards is unjustified because the above measure simply does not commit the City to using Tier 4 Interim equipment. Merely requiring use of Tier 4 equipment “if feasible” does not bind the City to this level of mitigation. Further, it is unrealistic to assume the Project will certainly obtain an entire off-road construction equipment fleet that meets Tier 4 Interim emissions, and the DEIR lacks a discussion or supporting evidence describing the feasibility of obtaining Tier 4 Interim equipment during Project construction.

**Response C.7:** Tier 4 equipment is readily available for construction projects and the City routinely requires projects to employ Tier 4 equipment to ensure health risks are appropriately reduced below BAAQMD thresholds. However, the EIR also includes a contingency in the event that Tier 4 equipment is not available for some aspect of construction so that alternative equipment be employed that would also be adequate to reduce project health risk impacts. The inclusion of a contingency measure does not invalidate the EIR’s identification of Tier 4 equipment as a commonly utilized mitigation measure to limit construction emissions, it rather provides further assurance that project impacts would be reduced to acceptable levels. Refer to Responses C.8 through C.11 which further address Comment C.7.

**Comment C.8:** Nevertheless, the DEIR’s construction emissions modeling assumes that Project construction will use exclusively Tier 4 Interim equipment:

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Although off-road Tier 4 equipment is available for purchase, it is new technology that may not yet be readily available at all construction equipment vendors, may require special procurement by the Applicant, and is more costly than lower tier equipment. It is therefore unreasonable to presume, without analysis, that all construction equipment that will be used for the Project will use Tier 4 engines. And absent supporting evidence, such as vendor contracts for the Tier 4 equipment, or a binding condition which requires all off-road construction equipment to be exclusively Tier 4, the assumption that Project contractors will have ongoing access to Tier 4 Interim equipment for all of the Project’s off-road equipment over the Project’s lengthy 44-month construction phase is entirely unreasonable.

The DEIR’s emissions calculations using Tier 4 Interim equipment do not provide the City with substantial evidence demonstrating that the Project construction emissions will be less than significant because Tier 4 Interim equipment achieves greater emissions reductions than required by MM AIR-2. Tier 4 standards require that emissions of PM and NOx be reduced by about 90% over uncontrolled emissions. The DEIR’s emission calculations therefore assume an approximately 90% reduction in construction emissions. By contrast, MM AIR-2 expressly allows lower-tiered equipment which would “achieve a 60 percent reduction in particulate matter exhaust in comparison

to uncontrolled equipment.” In reality, the Project’s construction emissions may therefore be 30% higher than the emissions calculated in the DEIR.

Because Tier 2 and 3 equipment emits substantially more than Tier 4 Interim equipment, the City’s CalEEMod analysis substantially underestimates emissions. SWAPE explains that until the DEIR can provide substantial evidence that Tier 4 Interim equipment is readily available for use at the Project site, the CalEEMod model should not include Tier 4 Interim construction equipment.

**Response C.8:** Tier 4 Interim equipment is widely available for most construction equipment types. Diesel construction equipment meeting Tier 4 emission standards became available in model years 2008 to 2012, depending on the power rating of the equipment. Therefore, construction equipment that meets the mitigation measure requirements has been available for 10 years or greater. In the event that equipment is needed and cannot be feasibly procured with engines that meet Tier 4 standards, mitigation measures MM AIR-1.1 and MM AIR-1.2 (listed in Section 3.3, Pages of 48 and 49 of the Draft) state that engines meeting Tier 2 or 3 standards could be used. This equipment would have to include particulate matter emissions control equivalent to California Air Resources Board (CARB) Level 3 verifiable diesel emission control devices that are diesel particulate filters which according to CalEEMod model reduce DPM 85 percent. Altogether this mitigation measure would achieve a minimum of 60 percent reduction in particulate matter exhaust in comparison to uncontrolled equipment (or unmitigated emissions). According to the CalEEMod model, the use of equipment meeting Tier 4 Interim standards would reduce emissions by over 85 percent. Therefore, the use of Tier 4 Interim equipment, or equipment that meets Tier 2 or 3 standards with CARB Level 3 verifiable diesel emission control devices (in the event that Tier 4 equipment is not available), sufficiently mitigates the project’s construction emissions and health risk impacts to below BAAQMD significance thresholds.

**Comment C.9: 2. The DEIR Underestimates the Project’s Air Quality Impacts by Incorrectly Reducing Area Coating Emission Factors.**

SWAPE’s review of the CalEEMod output files demonstrates that the “1655 Berryessa Mixed Use with VOC Mitigation” model includes two manual reductions to the default area coating emissions. Specifically, the residential and nonresidential exterior area coating emission factors are each reduced from their default values of 150- to 15-grams per liter (“g/L”). The justification provided in the DEIR for these changes is: “At least 90% of paints have to be super-compliant VOC = 15g/L exterior.” But this justification is not supported by substantial evidence, as the DEIR’s VOC mitigation – MM AIR-1.4 – only requires the use of low VOC coatings for 60% of exterior paints. As such, the use of low VOC coatings for 90% of exterior paints in the model may underestimate the Project’s operational ROG/VOC emissions and should not be relied upon to determine Project significance.

**Response C.9:** In response to Comment C.9, the following updates to the air quality modeling have been made: (1) construction and operational area architectural coating that includes volatile organic compound (VOC) limits set forth by South Coast Air

Quality Management District's<sup>2</sup> (AQMD's) Rule 1113 that contain less than 10 grams per liter of VOCs, and (2) the mobile vehicle fleet mix was updated to reflect the EMFAC2021 fleet mix for 2027 Santa Clara County. BAAQMD does not currently have standards for VOC limits in exterior paints. AQMD's VOC limits for exterior paints are commonly used.

The Draft EIR assumed the construction area architectural coating would be 46 and 66 grams per liter, which represents 60 percent of exterior paints, consistent with the text of MM AIR-1.4. The 90 percent of exterior paints that have to be super VOC compliant was in reference to the operational area architectural coating, in which case now includes VOC limits set forth by South Coast AQMD's Rule 1113 that contain less than 10 grams per liter of VOCs. These paints are commonly available and easy for the project applicant to obtain.

Since 90 percent VOC compliant paints are required for operational architectural coating, it assumed that these would be applied during construction; CalEEMod was revised to include 90 percent VOC compliant paints for both construction and operational architectural coating. Mitigation measure MM AIR-1.4 has been updated to account for 90 percent VOC compliant paints (instead of 60 percent). Refer to Section 5.0 Draft EIR Text Revisions. Use of the 90 percent VOC compliant paints during the construction phase in the revised modeling shows an overall construction emissions reduction. Table 3.3-5 Construction Period Emissions on Pages 47 and 48 (Section 3.3 Air Quality) of the Draft EIR has been updated to show the reduced emissions. With the implementation of mitigation measures MM AIR-1.1 through MM AIR-1.4 (including use of 90 percent VOC compliant paints), the construction emissions would be reduced from 36.03 pounds per day to 11.23 pounds per day for ROG (year 2026), and would be the same for NO<sub>x</sub>, PM<sub>10</sub>, and PM<sub>2.5</sub> emissions. Pages 52 and 53, checklist question b) of the Draft EIR, identify less than significant impact with mitigation incorporated related to the project's construction criteria pollutant emissions. The recalculated construction ROG emissions noted above would be lower than identified in the Draft EIR and result in the same determination that the project would result in less than significant impact with mitigation incorporated. No new construction criteria pollutant impact has been identified nor is there an increase in severity of this impact. Therefore, the Draft EIR does not require recirculation.

**Comment C.10: 3. The DEIR Underestimates the Project's Air Quality Impacts by Relying on an Unsubstantiated Reduction to Consumer Product Emission Factor.**

SWAPE's review of the Project's CalEEMod output files demonstrates that the "1655 Berryessa Mixed Use" and "1655 Berryessa Mixed Use with VOC Mitigation" models include a manual reduction to the default consumer product emission factor. The justification the DEIR provides for

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<sup>2</sup> The South Coast AQMD is the regulatory agency responsible for improving air quality for large areas of Los Angeles, Orange, Riverside, and San Bernardino counties in California. South Coast AQMD. About South Coast AQMD. Accessed April 28, 2023. <http://www.aqmd.gov/nav/about>

this change is: “Adjusted ROG for Santa Clara County 2027.” But SWAPE explains that this justification is insufficient, as the DEIR fails to mention or justify the revised consumer product emission factor whatsoever. By including a reduced, unsubstantiated change to the default consumer product emission factors, the Project’s area-source operational emissions may be underestimated and should not be relied upon to determine Project significance.

**Response C.10:** As stated in Response C.9, the consumer product emissions factor was reset to the model default factor, since the California Air Resources Board no longer makes available consumer product emission inventories that CalEEMod was based upon. CalEEMod computes emissions associated with consumer products for all land uses, regardless of their types. However, the emission rate in the model has not been updated since the development of CalEEMod in 2011 that used data published in 2008. At the time the Air Quality Assessment (Appendix B of the Draft EIR) was prepared, the CARB county emissions forecasts for 2010 through 2030 showed ROG emissions from consumer products were forecasted to decrease and, therefore, the adjustment factor was made. However, those CARB forecasts have since been revised and rely on different calculations, so the factor was removed from revised CalEEMod modeling, as requested in the comment.

The CalEEMod modeling included emission factors for EMFAC2021 (i.e., truck trips and vehicle emission factors); however, fleet mix was not reflective of the EMFAC2021. BAAQMD recommends that EMFAC2021 be used, which includes vehicle emission factors and latest vehicle fleet projections. These changes resulted in the area-source operational emissions slightly increasing (due to the adjustment requested in the comment in the paragraph above), while the mobile-source operational emissions decreased as a result of updating the fleet mix as noted. The revised modeling shows an overall operational ROG emissions reduction compared to what was disclosed in the Draft EIR Air Quality discussion. The model results disclosed in the Draft EIR (i.e., without the corrections to the model inputs requested by the commenter), show that the average daily operational emissions with mitigation would be 51.26 pounds per day for ROG (above the BAAQMD threshold of 54lbs/day), 17.31 pounds per day for NO<sub>x</sub>, 30.79 pounds per day for PM<sub>10</sub>, and 8.12 pounds per day for PM<sub>2.5</sub>. Updated model results with the corrected adjustments (including the adjustment requested by the commenter and the noted adjustment to the fleet mix) show that average daily emissions with mitigation would be 48.68 pounds per day for ROG (now below the BAAQMD 54lbs/day threshold), 17.31 pounds per day for NO<sub>x</sub>, 30.75 pounds per day for PM<sub>10</sub>, and 8.12 pounds per day for PM<sub>10</sub>. Therefore, with the corrections to the modeling, all operational criteria pollutant emissions, including ROG, would be below BAAQMD thresholds. The Draft EIR Section 3.3 Air Quality discussion has been revised to reflect the reduction in the project’s ROG emissions, refer to Section 5.0 Draft EIR Text Revisions in this Final EIR. The updated model results can be found in Appendix B of this Final EIR. The updates show that the project’s operational criteria pollutant emissions impact would be consistent with the less than significant impact conclusion identified on Page 52 of the Draft EIR. Therefore, the Draft EIR would not require recirculation.

**Comment C.11: 4. The DEIR Underestimates the Project’s Air Quality Impacts by Underestimating Number of Hauling Trips Required for Grading**

SWAPE’s review of the CalEEMod output files demonstrates that the “1655 Berryessa Mixed Use” and “1655 Berryessa Mixed Use with VOC Mitigation” models fail to include any hauling trips for the grading phase of construction. SWAPE explains that this approach is not supported by substantial evidence because the DEIR elsewhere states that the project requires about 14,585 truckloads of soil export and import combined.” As a result, the total number of one-way hauling trips during grading is underestimated by 29,170 trips. This underestimation in turn results in the underestimation of construction-related emissions associated with on-road vehicles.

**Response C.11:** The hauling trips for the grading phase were included in the EMFAC2021 calculation spreadsheets outside of CalEEMod, included in Attachment 3 of the Appendix B Air Quality Assessment of the Draft EIR. Construction hauling trips (about 10,975 truckloads) were accounted for in the Draft EIR analysis and, therefore, the Draft EIR analysis does not underestimate construction-related emissions associated with on-road vehicles. The CalEEMod default truck haul trip were utilized to calculate the total number of truckloads. The 12 cubic yards per truck load and 14,585 truckloads described in Section 2.2.5 Construction and Demolition, in the Project Description section of the Draft EIR, Page 13, is an error. This text has been updated to state the following: Assuming 16 cubic yards per truck load, the project requires about 10,975 truckloads of soil export and import combined. The clarification to the model assumptions related to the number of truckloads does not change the less than significant impact with mitigation incorporated conclusions for construction criteria pollutant emissions stated on Pages 52 and 53 of the Draft EIR, given the clarification shows the project requires fewer truck trips than were modeled, and, therefore, would generate reduced emissions than disclosed. Therefore, the Draft EIR would not require recirculation. Refer to Section 5.0 Draft EIR Text Revisions in this Final EIR.

**Comment C.12: 5. The DEIR Underestimates the Project's Air Quality Impacts Due to Unsubstantiated Changes to Wastewater System Treatment Percentages**

SWAPE’s review of the CalEEMod output files demonstrates that the “1655 Berryessa Mixed Use” and “1655 Berryessa Mixed Use with VOC Mitigation” models include several changes to the default wastewater treatment system percentage. Specifically, the model assumes that the Project’s wastewater would be treated 100% aerobically. But SWAPE’s review of the San Jose-Santa Clara Regional Wastewater Facilities treatment process reveals the use of anaerobic bacteria in the digesters phase of treatment. Therefore, the assumption that the Project’s wastewater would be treated 100% aerobically is not supported by substantial evidence. SWAPE explains that because each type of wastewater treatment system is associated with different GHG emission factors, the DEIR’s unsubstantiated changes to the default wastewater treatment system percentages may underestimate the Project’s GHG emissions.

**Response C.12:** CalEEMod predicts GHG emissions from wastewater treatment. The treatment of wastewater does not affect air pollutant emissions disclosed for a land use project per BAAQMD methodologies, which CalEEMod was used to predict. The

CalEEMod model provides three options to input for wastewater treatment: (1) through septic systems, (2) anaerobic treatment, and (3) facultative lagoons. Septic systems and facultative lagoons are aerobic treatment techniques that typically occur in rural areas and not in the City of San José. The project applicant plans do not include this treatment type and project generated wastewater would be directed to the San José-Santa Clara Wastewater Facility (treatment plant). It is correct that biosolids removed from the wastewater treatment would be processed using anaerobic digesters, however, the treatment plant captures these emissions. For these reasons, modeling of wastewater treatment emissions does not affect the Draft EIR's findings for GHG emissions contained in Section 3.8, given the Draft EIR, does not utilize a quantitative threshold for evaluation of the project's GHG emissions. Rather, Section 3.8 Greenhouse Gas Emissions of the Draft EIR and the updated Greenhouse Gas Reduction Strategy Checklist included in Appendix B of this Final EIR, evaluate the project's GHG emissions qualitatively, based on the project's consistency with the City's Qualified Climate Action Plan (i.e., 2030 Greenhouse Gas Reduction Strategy).

**Comment C.13: . The DEIR Underestimates the Project's Air Quality Impacts by Underestimating Number of Hauling Trips Required for Grading**

SWAPE's review of the CalEEMod output files demonstrates that the "1655 Berryessa Mixed Use" and "1655 Berryessa Mixed Use with VOC Mitigation" models fail to include any hauling trips for the grading phase of construction. SWAPE explains that this approach is not supported by substantial evidence because the DEIR elsewhere states that the project requires about 14,585 truckloads of soil export and import combined." As a result, the total number of one-way hauling trips during grading is underestimated by 29,170 trips. This underestimation in turn results in the underestimation of construction-related emissions associated with on-road vehicles.

**Response C.13:** Comment C.13 essentially restates the issues raised in Comment C.11. As stated in Response C.11, the construction hauling trips for the grading phase were included in the EMFAC2021 model (which is a more accurate modeling for truck emissions) calculation spreadsheets, separate from the CalEEMod results, which is in Attachment 3 in Appendix B of the Draft EIR. Based on the model results, there were a total of 21,875 trips estimated for hauling during the grading phase and 75 trips estimated for hauling during demolition. As stated in Response C.11, the 12 cubic yards per truck load and 14,585 truckloads described in Section 2.2.5 Construction and Demolition, in the Project Description section of the Draft EIR, Page 13, was included in an error. The text on Page 13 has been updated to state that the project assumes 16 cubic yards per truck load and would require about 10,975 truckloads of soil export and import combined. Given hauling trips were included in the construction air quality modeling and was based on CalEEMod model assumptions, construction emissions were not underestimated in the Draft EIR.

## **Comment C.14: 6. The DEIR Underestimates the Project's Air Quality Impacts Due to Incorrect Application of Operational Energy- Related Mitigation Measure**

SWAPE's review of the CalEEMod output files demonstrates that the "1655 Berryessa Mixed Use" and "1655 Berryessa Mixed Use with VOC Mitigation" models assume that electricity would be 100-percent carbon free. Specifically, the model assumes the implementation of the below mitigation measure:

### **5.1 Mitigation Measures Energy**

#### **Percent of Electricity Use Generated with Renewable Energy**

This measure is inputted as a mitigation measure for on-site renewable energy generation. The City justified this input on the premise that the project would use 100-percent carbon free electricity supplied by San José Clean Energy ("SJCE"). However, SWAPE argues that this justification remains insufficient, as the above-mentioned energy-related mitigation measure can only refer to renewable energy generation on-site according to the CalEEMod User's Guide.<sup>51</sup> As such, SWAPE argues that electricity obtained from the City's grid is not applicable and the inclusion of the energy-related operational mitigation measure in the models is incorrect.

The City's assumption that all electricity will be 100% carbon free is also legally unsupported. The DEIR's Energy section states that "the project would enroll in SJCE's TotalGreen program, which provides 100 percent carbon-free energy." This excerpt is the DEIR's only statement requiring enrolling in the TotalGreen program. This statement must be identified as a binding mitigation measure for the City to rely on it in their model. CEQA provides that any action that is designed to minimize, reduce, or avoid a significant environmental impact qualifies as a mitigation measure. Mitigation measures must be incorporated into the design of the Project or "fully enforceable through permit conditions, agreements, or other legally binding instruments."

Here, enrollment in TotalGreen must be considered a mitigation measure because it is designed to minimize a significant environmental impact. As shown in Table 8 of the DEIR's air emissions study identifies a significant air impact before mitigation. After mitigation, which includes "Energy Mitigation - SJCE goes 100% renewable in 2021," the DEIR concludes that impacts are less than significant. The above is evidence that enrollment in TotalGreen is a mitigation measure designed to minimize a significant environmental impact. Further showing that enrollment in TotalGreen is a mitigation measure is the fact that TotalGreen must be opted into, and "is the highest-priced option" SJCE offers. TotalGreen is priced at either \$0.005 or \$0.01 per kWh above GreenSource, which is the default option.<sup>57</sup> Because TotalGreen must be specifically opted into and costs more, the City cannot argue that enrollment in TotalGreen has an independent purpose from reducing the Project's significant environmental impacts.

**Response C.14:** Projects in the City of San José are required to comply with San José Clean Energy's TotalGreen program which requires new developments to have 100 percent carbon free electricity to comply with the City's Greenhouse Gas Reduction Strategy (GHGRS). In order to account for San José Climate Smart goal of zero net energy by 2030 and GHG Reduction Strategy (GHGRS) Action 1 of 98 percent participation in San José Clean Energy (SJCE) with 100 percent carbon free carbon-

free energy for projects operational by 2030, a modification to the CalEEMod input was applied. Compliance with the TotalGreen Program is required as a part of the project to demonstrate consistency with the GHGRS and, therefore, does not need be included as mitigation. In 2021, the City adopted a new qualified GHG Reduction Strategy for 2030 and an accompanying project compliance checklist. The intent of the GHGRS is to provide a comprehensive path to reduce GHG emissions to achieve the SJCE goal to have all electricity they provide by 100 percent carbon free by 2030. It is not the intent that each project would be required to comply with all of the policies listed in the GHGRS but to implement the policies that are feasible. The project is required to comply with the strategy and checklist to demonstrate less than significant GHG impacts. As such, the project has a less than significant impact with respect to GHG emissions.

**Comment C.15:** Having established that enrollment in SCJE’s TotalGreen program is a mitigation measure, this mitigation measure is not clearly incorporated into the Project’s design – there is only a single statement in the DEIR’s Energy section reflecting intent to enroll. And in the Project Description section, the DEIR merely states that “[e]lectricity at the project site would be provided by San José Clean Energy (SJCE),” without mentioning TotalGreen. Further, the mixed-use buildings proposed by the Project do not themselves require enrollment in the TotalGreen program, showing that enrollment is not a built-in aspect of the Project’s design.

This mitigation measure is currently not identified as such, nor is “fully enforceable through permit conditions, agreements, or other legally binding instruments.” Thus, the DEIR must be revised to include enrollment in TotalGreen as a binding mitigation measure included in the project’s mitigation monitoring and reporting program.

**Response C.15:** Please see response C.14. Compliance with the TotalGreen Program (which requires developments to have 100 percent carbon free electricity) is a requirement for the project to be consistent with the GHGRS and, therefore, does not need to be included as mitigation. The GHGRS Development Compliance Checklist serves to apply the relevant General Plan and 2030 GHGRS policies through a streamlined review process for proposed new development projects that are subject to discretionary review and that trigger environmental review under the California Environmental Quality Act (CEQA). The project’s GHGRS compliance checklist identifies this commitment of the project, and the project is bound to comply with all commitments identified in the compliance checklist.

**Comment C.16: 7. SWAPE’s Updated Analysis Indicates a Significant Air Quality Impact**

To more accurately estimate the Project’s construction-related and operational emissions, SWAPE prepared an updated CalEEMod model.<sup>60</sup> SWAPE’s updated model omits the unsubstantiated changes to the consumer product emission factor, area coating emission factors, and wastewater systems treatment percentages; and excludes the incorrect energy-related mitigation measure. SWAPE’s model still includes the incorrect Tier 4 Interim mitigation.

SWAPE’s updated analysis estimates that the reactive organic gas (“ROG”) emissions associated with Project construction and operation exceed the applicable BAAQMD thresholds of 54-pounds per day (“lbs/day”) and 10-tons per year (“tons/year”).

SWAPE Criteria Air  
Pollutant Emissions

Model	Construction ROG (2026) (lbs/day)	Operational ROG (lbs/day)	Operational ROG (tons/year)
DEIR	36.03	51.26	9.36
SWAPE	134.99	94.82	15.00
% Increase	275%	85%	60%
BAAQMD Threshold	<b>54</b>	<b>54</b>	<b>10</b>
<i>Exceeds?</i>	<b>Yes</b>	<b>Yes</b>	<b>Yes</b>

These significant air quality impacts were not previously identified or addressed by the DEIR. As a result, a revised EIR should be prepared to adequately assess and mitigate the potential air quality impacts that the Project may have on the environment.

**Response C.16:** In an effort to estimate the project’s construction-related and operational emissions, the Commenter prepared an updated CalEEMod model, using the project-specific information provided by the DEIR. The Commenter’s updated model omitted the changes to the consumer product emission factor, area coating emission factors, wastewater systems treatment percentages, and the energy-related mitigation measure. However, by not including the wastewater system treatment and energy-related factors, the commenter’s updated CalEEMod model does not accurately reflect project features. The Project plans do not include septic systems or facultative lagoons, and project generated wastewater would be sent to the San José Wastewater Treatment plant, and the project would be enrolling in SJCE in order to meet the City’s GHG Reduction Strategy goals for 2030. In addition, the commenter’s updated modeling did not include the EMFAC2021 fleet mix or the architectural coating 10 gallons per liter VOC limits put forth by South Coast AQMD’s Rule 1113. By not reflecting the project-specific factors or using correct emissions factors, the commenter’s CalEEMod modeling overpredicts the project’s construction and operational ROG emissions. The project’s emissions have been correctly modeled based on appropriate adjustments, as discussed in prior Responses C.6 through C.13 above.

The SWAPE memorandum also included construction mitigation measures recommended by SCAG (refer to Appendix A of this Final EIR) to reduce construction emissions. However, these measures are either 1) not applicable to the project, 2) already included as standard construction practices or as mitigation measures in the Draft EIR (Section 3.3), or 3) not necessary because the mitigation measures (mitigation measures MM AIR-1.1 through MM AIR-1.4) in the Draft EIR

reduce the project’s impact to less than significant levels. Therefore, project would not require these measures and the less than significant impact with mitigation incorporated conclusion for construction emissions (disclosed in the Draft EIR) would remain the same. As such, recirculation of the Draft EIR is not required.

**Comment C.17: B. The DEIR's Assessment of Health Risk Impacts from Air Emissions is Not Supported by Substantial Evidence.**

The DEIR includes a health risk assessment analyzing the health risk impacts from exposure to diesel particulate matter (“DPM”) generated by the Project’s construction and operations. In the table below, the DEIR acknowledges that the Project’s health risk impacts would exceed BAAQMD thresholds before mitigation.

**Table 11. Construction and Operation Risk Impacts at the Off-Site Project MEIs and Daycare Receptors**

Source		Cancer Risk (per million)	Annual PM <sub>2.5</sub> (µg/m <sup>3</sup> )	Hazard Index
Project Construction (Years 0-4)	Unmitigated MEIs	<b>23.38 (infant)</b>	<b>0.40</b>	0.01
	Mitigated MEI*	4.67 (infant)	0.09	<0.01
Project Traffic on Berryessa Road and Project Site (Years 5-30)	Unmitigated MEIs	0.77 (infant)	0.21	<0.01
	Mitigated MEI	1.01 (infant)	0.21	<0.01
Project Generators (Years 5-30)	Unmitigated MEIs	0.04 (infant)	<0.01	<0.01
	Mitigated MEI	0.24 (infant)	<0.01	<0.01
Total/Maximum Project Impact (Years 0-30)	Unmitigated MEIs	<b>24.19 (infant)</b>	<b>0.40</b>	0.01
	Mitigated MEI*	5.92 (infant)	0.21	<0.01
<b>BAAQMD Single-Source Threshold</b>		<b>10.0</b>	<b>0.3</b>	<b>1.0</b>
<b>Exceed Threshold?</b>	Unmitigated MEIs	<b>Yes</b>	<b>Yes</b>	<b>No</b>
	Mitigated MEI*	<b>No</b>	<b>No</b>	<b>No</b>
<b>Genius Kids Berryessa Daycare Infant Receptor</b>				
Project Construction (Years 0-4)	Unmitigated	<b>17.92 (infant)</b>	0.08	<0.01
	Mitigated*	3.69 (infant)	0.02	<0.01
Project Traffic (Years 5-12)		1.31	0.11	0.02
Project Generator (Years 5-12)		0.06	<0.01	<0.01
Unmitigated Total/Maximum Project (Years 0-4)	Unmitigated	<b>19.29 (infant)</b>	0.11	0.02
	Mitigated*	5.06 (infant)	0.11	0.02
<b>BAAQMD Single-Source Threshold</b>		<b>10.0</b>	<b>0.3</b>	<b>1.0</b>
<b>Exceed Threshold?</b>	Unmitigated	<b>Yes</b>	<b>No</b>	<b>No</b>
	Mitigated*	<b>No</b>	<b>No</b>	<b>No</b>

\* Construction equipment with Tier 4 engines and enhanced BMPs as Mitigation.

As with criteria pollutants, the DEIR explains that its analysis of the Project’s mitigated impacts incorrectly relied on use of Tier 4 construction equipment:

CalEEMod was used to compute mitigated emissions assuming that all equipment larger than 25 horsepower met U.S. EPA Tier 4 standards along with enhanced BAAQMD best management practices for construction were included. With these mitigation measures implemented, the project’s construction cancer risk levels (assuming infant exposure) would be reduced by 80 percent to 4.67 chances per million for the residential MEI and 3.69 chances per million for the daycare MEI. The project’s annual PM<sub>2.5</sub> concentrations from

construction would be reduced by 78 percent to 0.09 µg/m<sup>3</sup> at the residential MEI and 0.02 µg/m<sup>3</sup> at the daycare MEI.

Comment C.17 summarizes the CalEEMod results for construction health risks discussed in Section 3.3 Air Quality, Pages 56 and 57 of the Draft EIR. As stated in Response C.8, the use of Tier 4 Interim equipment, or equipment that meets Tier 2 or 3 standards with CARB Level 3 verifiable diesel emission control devices (in the event that Tier 4 equipment is not available), sufficiently mitigates the project's construction emissions and health risk impacts to below BAAQMD significance thresholds. The comment restates the Draft EIR conclusions and does not comment on the adequacy of the Draft EIR analysis. Therefore, no further response is required.

**Comment C.18:** As discussed above, this assumption is not supported by substantial evidence, and actual emissions are likely to be substantially higher than analyzed. MM AIR- requires use of Tier 4 equipment only "if feasible."<sup>65</sup> And "[i]f use of Tier 4 equipment is not available," MM AIR-1.1 permits use of equipment with less stringent emissions standards. As a result, the City's health risk assessment underestimates the levels of toxic air contaminants that would be emitted by construction equipment if lower-tier equipment is used, and therefore fails to disclose the Project's actual health risk impacts. These impacts might exceed BAAQMD thresholds when the analysis is corrected to reflect the least-stringent emission standards allowed under MM AIR-1.1. A revised EIR must be prepared to adequately evaluate this potentially significant impact.

**Response C.18:** As stated previously in Responses C.7 and C.8, the model assumed the use of Tier 4 interim equipment (or the equivalent). Tier 4 Interim equipment is widely available for most construction equipment types. The model results that assumes use Tier 4 Interim Equipment provide a conservative estimate of construction emissions (when compared to Tier 4 Final Equipment), as this equipment is less stringent than Tier 4 Final Equipment standards (i.e., new construction equipment). Therefore, the Draft EIR analysis, which assumes the use of Tier 4 Interim Equipment, or equipment that meets Tier 2 or 3 standards with CARB Level 3 verifiable diesel emission control devices (in the event that Tier 4 Interim equipment is not available), does not underestimate the levels of toxic air contaminants that would be emitted during construction. The Draft EIR adequately evaluates the project's construction health risk impacts.

**Comment C.19: C. The DEIR's Discussion of the Project's Greenhouse Gas Impacts is Not Supported by Substantial Evidence.** Under the CEQA Guidelines, a lead agency must analyze a project's impacts on GHG emissions. The Guidelines provide that "[i]n determining the significance of impacts, the lead agency may consider a project's consistency with the State's long-term climate goals or strategies, provided that substantial evidence supports the agency's analysis of how those goals or strategies address the project's incremental contribution to climate change and its conclusion that the project's incremental contribution is not cumulatively considerable."

In 2020, the City adopted a Greenhouse Gas Reduction Strategy ("GHGRS") that outlines the actions the City will undertake to achieve its proportional share of State greenhouse gas emission reductions for the interim target year 2030. Appendix H states that "a project's incremental contribution to a

cumulative GHG emissions effect may be determined not to be cumulatively considerable if it complies with the requirements of the GHGRS.” The GHGRS requires (1) all projects to demonstrate consistency with the Envision San José 2040 General Plan’s relevant policies for Land Use & Design, Transportation, Green Building, and Water Conservation, (2) demonstrate consistency with the GHGRS reduction strategies listed in Table B of the GHGRS or document why the strategies are not applicable or are infeasible, and (3) provide an explanation of additional or alternative proposed GHG mitigation measures. Here, the DEIR has not demonstrated that the Project complies with the GHGRS. As a result, the DEIR’s less-than-significant impact conclusion should not be relied upon.

**Response C.19:** As shown in Draft EIR Appendix F, the GHGRS Compliance Checklist, the project is consistent with the mandatory measures in the City’s GHGRS. The compliance checklist demonstrates consistency with the Envision San José 2040 General Plan’s relevant policies for Land Use and Design, Transportation, Green Building, and Water Conservation, (2) consistency with the GHGRS reduction strategies listed in Table B of the GHGRS or documents why the strategies are not applicable or are infeasible, and provides (3) an explanation of additional or alternative proposed GHG mitigation measures. Therefore, the project would result in a less than significant impact. No explanation is provided in the comment for the claim that the Draft EIR has not demonstrated the project complies with the GHGRS, when the Draft EIR specifically includes a compliance checklist for that specific purpose.

**Comment C.20: 1. The DEIR Fails to Demonstrate Consistency with the Envision San José 2040 General Plan.**

**The DEIR does not demonstrate consistency with Envision San José 2040 General Plan Goal MS-2.2,** which states: “Encourage maximized use of on- site generation of renewable energy for all new and existing buildings.” The DEIR’s Compliance Checklist states: “The proposed project would be fully electric. The project could include solar hot water heating systems.”

SWAPE explains that this response is insufficient, as simply stating that the Project would be fully electric fails to demonstrate how the Project would encourage the use of on-site renewable energy for all new and existing buildings. Second, the Compliance Checklist states that the Project “could” include solar hot water heating systems but fails to require their implementation. Environmental documents, including EIRs, must mitigate significant impacts through measures that are “fully enforceable through permit conditions, agreements, or other legally binding instruments.” Because the inclusion of solar hot water heating is not included as a mitigation measure or a binding condition of approval, its inclusion is speculative and unenforceable. Third, the DEIR fails to demonstrate how the Project’s potential renewable energy features represent “maximized use” of on-site generation of renewable energy. The DEIR must be revised to include analysis regarding what specific options are available for this Project to generate renewable energy onsite. Since the Project lacks such analysis, the DEIR fails to demonstrate consistency with MS-2.2.

**Response C.20:** The quoted MS-2.2 goal encourages, but does not mandate, the use of on-site generation of renewable energy, recognizing that it may not be feasible for every project, and that there are other ways for a project to utilize renewable energy,

such as participation in SCJE's TotalGreen program. In this instance, the project would provide on-site generation of renewable energy, in the form of solar hot water heating systems. Page 6 in Draft EIR Appendix F GHGRS Compliance Checklist has been updated to state the project "would" include solar hot water heating systems (refer to Appendix B of this Final EIR). The project would be consistent with Renewable Energy Development Strategy 1 which requires the installation of solar panels, solar hot water, or other clean energy power generation. These updates to the GHGRS compliance checklist are consistent with the Draft EIR's conclusions in Section 3.8 Greenhouse Gas Emissions that project GHG emissions would be less than significant by complying with the measures in the GHGRS. Since the GHGRS checklist measures are required as a part of the project, it is not necessary for the measures to be included as mitigation.

**Comment C.21:** The DEIR does not demonstrate consistency with MS-2.3, which states: "Encourage consideration of solar orientation, including building placement, landscaping, design and construction techniques for new construction to minimize energy consumption." The DEIR's Compliance Checklist responds:

The project would include landscaping, including trees throughout the site, providing shading. The project would be compliance with 2019 Title 24 standards for energy efficiency and the City's Code of Ordinances, Chapter 15.11, Water Efficient Landscape Standards for New and Rehabilitated Landscaping.

This response is insufficient because it does not demonstrate consideration of building placement, landscaping, design and construction techniques to minimize energy consumption. The DEIR's response must be revised to include analysis of how the Project's building placement, landscaping, design and construction techniques can minimize energy consumption. SWAPE also explains that by simply stating that the Project would comply with "2019 Title 24 standards for energy efficiency," the "City's Code of Ordinances," and "Water Efficient Landscape Standards for New and Rehabilitated Landscaping," the Project commits to the bare minimum requirements, rather than attempting to minimize energy consumption. As a result of this inadequate analysis, the DEIR fails to demonstrate consistency with MS- 2.3.

**Response C.21:** The quoted MS-2.3 goal encourages, but does not mandate, consideration of solar orientation, landscaping, and design and construction techniques, recognizing that it may not be feasible for every project, based on site and project circumstances, to implement all methods to minimize energy consumption. In this instance, the project is consistent with MS-2.3 in the GHGRS checklist, as the project utilizes solar orientation including building placement and landscaping in the project design, to reduce energy consumption. The project's landscaping would include trees, which would provide shading, and result in less energy use by the proposed development. The project would include water-efficient landscaping, including drought tolerant trees and shrubs. The project would connect to the recycled water line in Berryessa Road, which would be used for landscaping. In addition, the project applicant would include construction techniques to reduce energy use including limiting idling times for construction equipment, using newer construction equipment (per air quality mitigation measures), obtaining at least 10

percent of construction materials locally, and diverting waste from the landfill and salvaging for reuse. Therefore, the Draft EIR identifies the project's consistency with Measure MS-2.3.

**Comment C.22: The DEIR does not demonstrate consistency with MS-2.11, which states:**

Require new development to incorporate green building practices, including those required by the Green Building Ordinance. Specifically, target reduced energy use through construction techniques (e.g., design of building envelopes and systems to maximize energy performance), through architectural design (e.g., design to maximize cross ventilation and interior daylight) and through site design techniques (e.g., orienting buildings on sites to maximize the effectiveness of passive solar design).

In response, the DEIR's Compliance Checklist states that the "proposed project would be in compliance with the City's Reach Code, the 2019 Title 24 standards for energy efficiency, and achieve a GreenPoint Rated score of 50 points or higher for the residential component and LEED Silver for the commercial component." This response is insufficient because it fails to analyze what green building practices could feasibly be used for the Project. SWAPE explains that the DEIR fails to analyze a Project design that includes building envelopes and systems to maximize energy performance, the maximization of cross ventilation and interior daylight, and the orientation of buildings, per the directives of MS-2.11. Furthermore, SWAPE explains that the DEIR fails to provide any evidence of concrete actions designed to target reduced energy use. Thus, the DEIR fails to demonstrate consistency with MS-2.11.

**Response C.22:** The building design details (e.g., orientation of buildings to maximize the effectiveness of passive solar design) are yet to be developed, and would be confirmed by the City at the time Planned Development Permit applications are filed. This project is a Planned Development Zoning, and these project features will be provided in the project design as part of future Planned Development Permits for the build-out of the site to the satisfaction of the Director of Planning, Building and Code Enforcement, at which time the project's compliance with the goals of Measure MS-2.11 will be confirmed for those aspects of the project design that are normally developed at the permit stage. Projects are required to comply with the GHGRS requirements that are feasible based on the nature and location of a given project, but strict conformance with all of the General Plan Policies is not required. In addition, the project would conform with the City's REACH code and recent requirements which prohibit natural gas appliances (with the exception of some commercial uses such as commercial kitchens), which would reduce energy use and GHG emissions.

**Comment C.23: The DEIR does not demonstrate consistency with CD-2.5, which states:**

"Integrate Green Building Goals and Policies of the Envision San José 2040 General Plan into site design to create healthful environments. Consider factors such as shaded parking areas, pedestrian connections, minimization of impervious surfaces, incorporation of stormwater treatment measures, appropriate building orientations, etc." In response, the DEIR's Compliance Checklist states: "The project would include landscaping to reduce impervious surfaces, enclosed parking, bioretention

areas to treat stormwater.” This response is insufficient because the DEIR fails to demonstrate minimization of impervious surfaces. The response also does not address whether the proposed building orientations achieve the goals of CD-2.5.

**Response C.23:** The quoted CD-2.5 goal encourages consideration, but does not mandate a specific outcome, of a variety of green building practices, recognizing that it may not be feasible for every project to incorporate every practice, so CD-2.5 does not establish a specific performance standard the project must meet. In this instance, the project would include pervious landscaping which would reduce impervious surfaces. As noted in the Draft EIR page 148, the project would replace the impervious surfaces on the project site, including the existing buildings and pavement. Under Provision C.3 of the RWQCB’s MRP and consistent with Post-Construction Urban Runoff Policy 6-29, redevelopment projects that add and/or replace more than 10,000 square feet of impervious surface are required to design and construct stormwater treatment controls to treat post-construction stormwater runoff. The project would be required to comply with Provision C.3 of the MRP to reduce potential postconstruction water quality impacts. The amount of impervious and pervious surfaces will be provided in the project design as part of future Planned Development Permits for the build-out of the site to the satisfaction of the Director of Planning, at which time the project’s compliance with the goals of Measure CD-2.5 will be confirmed for those aspects of the project design that are normally developed at the permit stage.

Planned Development Permits will be reviewed for conformance with the project as evaluated in the EIR, and if the project is modified, additional analysis would be required, pursuant to CEQA Guidelines.

**Comment C.24: The DEIR does not demonstrate consistency with MS-3.2,** which states: “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.” In response, the Compliance Checklist states: “The project will use water-efficient landscaping that conforms to the State’s Model Water Efficient Landscape Ordinance and adhere to the 2019 plumbing code efficiency standards.”

This response is insufficient. SWAPE explains that by simply stating that the Project would comply with the “State’s Model Water Efficient Landscape Ordinance and adhere to the 2019 plumbing code efficiency standards,” the Project commits to the bare minimum requirements. Merely complying with regulatory standards does not address how the Project would “promote the use of captured rainwater, graywater, or recycled water.” The City’s response must be revised to discuss the applicability of concrete actions or measures would help reduce the depletion of the City’s potable water supply, such as the use of captured rainwater, graywater, or recycled water as the preferred source for non-potable water needs. Thus, the Compliance Checklist fails to demonstrate that the Project would satisfy this measure.

**Response C.24:** The quoted MS-3.2 goal promotes technology or techniques that reduce reliance on potable water, but does not mandate a specific approach or amount of reduction, recognizing that it may not be feasible for every project to utilize every approach. In this instance, the landscape design uses drought tolerant plant species and high efficiency irrigation systems to create a landscape that exceeds the City’s water efficient landscape regulations, and in compliance with the State’s Model Water Efficient Landscape Ordinance. Landscaped areas will be irrigated with subsurface irrigation to maximize water efficiency for the planting areas. Each residence will have its own water meter and commercial spaces would have separate submeters. In addition, the project would connect to the recycled water line, which would be used to irrigate the project’s landscaping. As provided in the Santa Clara Valley Urban Runoff Pollution Prevention Program. C.3 Stormwater Handbook, to make gray water or stormwater harvesting for irrigation use feasible for a site in San José that uses water conscious landscaping, the landscape area would need to be 5.1 times the size of the impervious area, which is infeasible for dense, urban infill development near transit. The proposed project, being an urban redevelopment, does not meet this requirement. Therefore, stormwater and gray water would not be used for irrigation, rather recycled water is readily available for that purpose. Although compliance with the 2019 plumbing code efficiency standards is not required by the GHGRS, the project would be consistent with 2019 plumbing code efficiency standards by which requires the use of alternate water sources (such as recycled water) for non-potable uses.

**Comment C.25:** The DEIR does not demonstrate consistency with MS-21.3, which states:

“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.” In response, the Compliance Checklist states: “The project would include a wide range of water- efficient and drought tolerant trees, shrubs, and ground cover that is well adapted to San José’s climate.”

SWAPE’s comments explain that this response is insufficient because it fails to analyze all the issues specified in MS-21.3 (monocultures, pest control, placement of tree species), and does not provide evidence of concrete actions or measures proposed to satisfy this measure. Thus, the Project does not demonstrate consistency with the GHGRS.

**Response C.25:** The quoted MS-21.3 goal does not mandate a specific outcome, but identifies a range of a variety of strategies intended to promote a healthy community forest, recognizing that it may not be feasible for every project to incorporate every practice, so MS-21.3 does not establish a specific performance standard the project must meet. The project landscaping design will be further developed as part of future Planned Development Permits for the build-out of the site to the satisfaction of the Director of Planning, at which time the project’s compliance with the goals of Measure MS-21.3 will be confirmed for those aspects of the project landscape design that are normally developed at the permit stage. The conceptual landscaping plan, which shows the placement of trees at the project site, is on the Landscape Plan provided in Appendix B of this Final EIR. As stated in the Section 3.4, Biological

Resources, Page 79, under Standard Permit Conditions for tree replacement, the species of trees to be planted shall be determined in consultation with the City Arborist and the Department of Planning, Building and Code Enforcement. The City's Arborist will ensure that the trees selected include a diverse range of species that have low water requirements, and are well adapted to its Mediterranean climate. Therefore, as shown in Appendix F of the Draft EIR, the project, at this stage of conceptual design, would comply with MS-21.3, at the Planned Development Permit stage to confirm compliance.

**Comment C.26: The DEIR does not demonstrate consistency with MS-19.4, which states:**

“Require the use of recycled water wherever feasible and cost-effective to serve existing and new development.” The DEIR's Compliance Checklist states: “The project site does not currently have access to recycled water facilities.” The DEIR's response is insufficient because it fails to explain the circumstances surrounding the lack of access to recycled water facilities. The basis for the DEIR's claim is unclear, as it elsewhere states that “a recycled water supply connection is located less than one mile west of the project site in Berryessa Road, approximately 400 feet east of US-101.” The response must be expanded to explain what actions and expenses would need to be taken to obtain access to recycled water. Thus, the Compliance Checklist does not demonstrate the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.

**Response C.26:** The project would connect to the recycled water line located on Berryessa Road, immediately south of the project site. The recycled water would be used for irrigation for the proposed landscaping at the site. At the time the Draft EIR was prepared, no recycled water lines were known to occur in the immediate project area. The GHGRS Compliance Checklist has been updated to state that the project would use recycled water (refer to Appendix B of this Final EIR for the revised GHGRS Checklist). Therefore, the project complies with Measure MS-19.4 in the GHGRS Compliance Checklist. Section 2.2.6 Utilities Page 13 and Section 3.19.2 Impact Discussion, Checklist Question b) of the Draft EIR have been updated to state that the project would connect to the existing recycled water line in Berryessa Road for landscaping/irrigation purposes (refer to Section 5.0 Draft EIR Text Revisions of this Final EIR).

**Comment C.27: 2. The DEIR Fails to Demonstrate Consistency with GHGRS Reduction Strategies**

Table B of the GHGRS identifies GHG reduction strategies and recommended consistency options.<sup>86</sup> Projects need to demonstrate consistency with the GHGRS reduction strategies listed in Table B or document why the strategies are not applicable or are infeasible.<sup>87</sup>

**The Project fails to adequately demonstrate consistency with strategies intended to promote “Zero Net Carbon Residential Development.”** In addition to achieving/exceeding the City's Reach Code, the Project must either (1) exclude natural gas infrastructure, (2) install on-site renewable energy systems or participate in a community solar program to offset 100% of the project's estimated

energy demand, or (3) participate in San José Clean Energy at the Total Green level (i.e., 100% carbon-free electricity). Otherwise, the DEIR is required to explain why such measures are not feasible. In response, the DEIR states, “[t]he project will achieve the City's Reach Code by being fully electric and by excluding natural gas infrastructure in the proposed residences. Strategies 3 and 4 may not be feasible.” But the DEIR fails to support to its claim that Strategies 3 and 4 are not feasible. The DEIR’s response must be expanded in a revised DEIR.

**Response C.27:** The project would include on-site renewable energy systems, such as solar hot water systems. This project feature meets the goals of Strategy 3 under the Zero Net Carbon Residential Development Category. The project would also use 100 percent carbon-free electricity through San Jose Clean Energy’s TotalGreen program, which meets the goals of Strategy 4. Although Appendix F GHGRS Compliance Checklist of the Draft EIR indicates that these strategies may not be feasible, it was determined that they are feasible for the project and the GHGRS Compliance Checklist has been updated to reflect this (refer to Appendix B of this Final EIR). Therefore, the project is consistent with the Zero Net Carbon Residential Construction Goals outlined in the GHGRS Compliance Checklist (the updated checklist is in Appendix B of this FEIR).

**Comment C.28: The Project fails to demonstrate consistency with strategies intended to promote “Renewable Energy Development.”**

These include (1) installing solar panels, solar hot water, or other clean energy power generation sources on development sites, (2) participating in community solar programs to support development of renewable energy in the community, or (3) participating in San José Clean Energy at the Total Green level (i.e., 100% carbon-free electricity) for electricity accounts associated with the project. Here, the Compliance Checklist states: “The project may include solar hot water systems. However, Strategies 2 and 3 may not be feasible.” But as discussed above, the Project fails to identify binding measures requiring installation of solar facilities on the Project site. Further, the DEIR fails to support to its claim that Strategies 2 and 3 are not feasible. The DEIR’s response must be expanded in a revised DEIR.

Overall, the Project has not demonstrated consistency with the GHGRS, and the less-than-significant GHG impact conclusion is not supported by substantial evidence.

**Response C.28:** The project would incorporate on-site generation of renewable energy, specifically the use of solar hot water heating systems. Page 6 in Appendix F GHGRS Compliance Checklist has been updated to state the project “would” include solar hot water heating systems (refer to Appendix B of this Final EIR). The project would be consistent with Renewable Energy Development Strategy 1 which requires the installation of solar panels, solar hot water, or other clean energy power generation. Appendix F has been updated (refer to Appendix B of this Final EIR) to state that the project would comply with Strategy 3 (participation in San José Clean Energy at the Total Green level (100 percent carbon-free electricity). Based on the City’s GHGRS, the project is required to support Strategies 1 and 3. The project is consistent with the GHGRS compliance checklist including Strategies 1 and 3 and, therefore, would result in a less than significant GHG impact.

**Comment C.29: D. The DEIR Fails to Adequately Disclose and Mitigate Potentially Significant Noise Impacts**

**1. The Project’s Construction Noise Impacts Exceed Significance Criteria in the General Plan**

The DEIR claims that the Project has less-than-significant construction noise impacts after mitigation. This conclusion is not supported by substantial evidence, as the Project exceeds significance thresholds established by the Envision San José 2040 General Plan.

General Plan Policy EC-1.7 establishes the threshold for construction noise, which the DEIR adopts as the significance threshold for this impact:<sup>91</sup>

The City considers significant construction noise impacts to occur if a project located within 500 feet of residential uses or 200 feet of commercial or office uses would: Involve substantial noise generating activities (such as building demolition, grading, excavation, pile driving, use of impact equipment, or building framing) continuing for more than 12 months.

This project meets the three basic conditions established for a significant impact to occur:

1. The entire project site is within 500 feet of existing residential use
2. Project construction will require substantial noise-generating activities
3. Project construction will take 44 months

The City acknowledges that the Project meets these conditions, and that “[b]ased on City of San José General Plan Policy EC-1.7, this is a significant impact.” But the City argues that the Project’s construction noise impacts would be mitigated by the implementation of General Plan Policy EC-1.7, which provides:

Require construction operations within San José to use best available noise suppression devices and techniques and limit construction hours near residential uses per the City’s Municipal Code [...] For such large or complex projects, a construction noise logistics plan that specifies hours of construction, noise and vibration minimization measures, posting or notification of construction schedules, and designation of a noise disturbance coordinator who would respond to neighborhood complaints will be required to be in place prior to the start of construction and implemented during construction to reduce noise impacts on neighboring residents and other uses.

Accordingly, the DEIR concludes construction noise impacts would be reduced to a less-than-significant level through implementation of standard noise control measures and implementation of a construction noise logistics plan.<sup>95</sup>

But the DEIR’s reasoning is inconsistent with the clear numeric noise threshold in Policy EC-1.7, and the Policy does not state that projects that implement the measures identified in the Policy are presumed to have a less-than- significant impact.

Further, the DEIR's reliance on noise limits set forth in its municipal code is not legally supported, as courts have held that compliance with noise regulations alone is not substantial evidence of a less-than-significant impact. In *Keep our Mountains Quiet v. County of Santa Clara*, neighbors of a wedding venue sued over the County of Santa Clara's failure to prepare an EIR for a proposed project to allow use permits for wedding and other party events at a residential property abutting an open space preserve. Neighbors and their noise expert contended that previous events at the facility had caused significant noise impacts that reverberated in neighbors' homes and disrupted the use and enjoyment of their property. Similar to the DEIR in this case, the County had prepared a mitigated negative declaration ("MND"), which employed the noise standards set forth in the County's noise ordinance and general plan as the County's thresholds for significant noise exposure from the project, deeming any increase to be insignificant so long as the absolute noise level did not exceed those standards.

**Response C.29:** The comment describes the City of San José's policy (Envision San José 2040 General Plan Policy EC-1.7) for identifying significant construction noise impacts and the mitigation measures necessary to reduce the impact to a less than significant level.

The potential short-term noise impacts associated with construction facilitated by the Envision San José 2040 General Plan Update project were addressed by the adoption and implementation of Policy EC-1.7. Policy EC-1.7 requires that reasonable noise reduction measures be incorporated into the construction plan and implemented during all phases of construction activity to minimize the exposure of neighboring properties to temporary construction noise. The General Plan Final EIR concluded that construction noise impacts from future development that exceeded the thresholds noted in the comment, i.e., substantial noise generating activities within 500 feet of residences (such as building demolition, grading, excavation, pile driving, use of impact equipment, or building framing) continuing for more than 12 months, would be adequately reduced to less than significant levels by implementing Policy EC-1.7.

A construction noise logistics plan, which includes reasonable noise reduction measures and allowable construction hours, was required of the project as mitigation to reduce the impact to a less than significant level consistent with Policy EC-1.7. Therefore, the project is implementing the construction noise mitigation measure the General Plan Final EIR determined would be adequate for situations such as this where construction occurs near residences for over 12 months.

**Comment C.30:** The Court examined a long line of CEQA cases which have uniformly held that conformity with land use regulations is not conclusive of whether or not a project has significant noise impacts. In particular, citing *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.*, the Court explained that "the fact that residential uses are considered compatible with a [County noise ordinance maximum] noise level of 65 decibels for purposes of land use planning is not determinative in setting a threshold of significance under CEQA." The Court further explained that, as required by CEQA Guidelines Appendix G, § XII, subd. (d), the CEQA lead agency is required to "consider both the increase in noise level and the absolute noise level associated with a project" in

evaluating whether a project has significant noise impacts. The Court held that the evidence submitted by local residents and their expert attesting to significant noise impacts felt directly on their residences amounted to substantial evidence demonstrating that the project would have potentially significant noise impacts. The Court also held that the County's reliance on the project's compliance with noise regulations did not constitute substantial evidence supporting the County's finding of no significant impacts.

Here, the City's threshold – compliance with Policy EC-1.7 by meeting municipal code noise levels – does not consider both the increase in noise level and the absolute noise level associated with a project. Thus, as in *Keep Our Mountains Quiet*, the City's reliance on compliance with noise regulations does not provide substantial evidence to support the City's conclusion that the Project will not have significant noise impacts. And whereas the noise threshold in *Keep Our Mountains Quiet* was held insufficient for merely setting a maximum noise level, the City's construction noise threshold does not even set a maximum allowable noise level or increase. Thus, the City lacks substantial evidence that compliance with the General Plan standards alone would ensure less-than-significant construction noise impacts.

**Response C.30:** Comment C.30 pertains to the adequacy of the City's threshold for construction noise impacts. Comment C.30's statement that compliance with General Plan Policy EC-1.7 relies on meeting Municipal Code noise levels is incorrect. The Municipal Code does not establish quantitative noise limits for construction, rather the Municipal Code prohibits construction from occurring within 500 feet of residences outside of the allowed hours of 7:00am to 7:00pm Monday-Friday unless expressly authorized by a planning permit. The Municipal Code noise performance standards are not considered CEQA thresholds, rather they indicate the need for a permit to authorize noise above specific levels. The requirements under the City's General Plan Policy EC-1.7 (described below) are the CEQA threshold for projects in the City.

The City's construction noise threshold is based on whether a project would result in substantial noise generating activities within 500 feet of residences (such as building demolition, grading, excavation, pile driving, use of impact equipment, or building framing) continuing for more than 12 months, and whether a project would exceed ambient noise levels by five DBA  $L_{eq}$  or more and exceed the normally acceptable levels of 60 dBA  $L_{eq}$  at the nearest noise-sensitive land uses for a period exceeding 12 months, which would be the case for the Berryessa Road Mixed-Use Project in the absence of noise controls. Upon disclosing the significant temporary construction noise impact utilizing these appropriate thresholds established in the General Plan FEIR, the Draft EIR concludes, consistent with the prior finding of the General Plan FEIR, that project construction noise would be adequately reduced to less than significant levels by implementing the numerous noise reduction measures identified in Policy EC-1.7, including a construction noise logistics plan, which includes reasonable noise reduction measures and allowable construction hours (refer to Section 3.13 Noise, Pages 169 and 170 of the Draft EIR). The noise reduction measures identified in MM NOI-1.1 are routinely employed in San José, and were found to be feasible and effective by the City Council, as established in the General Plan FEIR. .

**Comment C.31: 2. Substantial Evidence Shows that the Project's Mitigated Construction Noise Impacts Remain Significant**

The CEQA Guidelines call for analysis of a “substantial temporary or permanent increase in ambient noise levels in the vicinity of the project in excess of standards established in the local general plan or noise ordinance, or applicable standards of other agencies” [emphasis added]. The City’s General Plan sets an acceptable exterior noise level objective of 60 dBA DNL or less for residential and most institutional land uses. And though the General Plan does not specifically adopt a threshold for the increase in noise due to construction, Policy EC-1.2, which applies to permanent noise increases, states: “Where future noise levels are at or below the “normally acceptable” noise level standard, noise level increases of 5 dBA DNL or more would be considered significant.”

For this project, the existing ambient noise level for the western property line is 48 dBA  $L_{eq}$  and for the northern property line is 43 dBA  $L_{eq}$ . These residences are located 25 feet north and west of the site. Mr. Watry explains that at that distance, the Project’s mitigated noise levels would be around 78 dBA  $L_{eq}$ , some 30 to 35 dBA above the existing ambient levels.

Mr. Watry also explains that, in addition to the acute noise impacts on the nearest residences, work done at the Project site that is within 200 feet of a residence will cause noise levels at that residence to exceed 60 dBA  $L_{eq}$ . 75% of the Project site is within 200 feet of a residence, meaning that the 60 dBA General Plan threshold would be exceeded during most of the construction process.

These increased noise levels would be above the “Normally Acceptable” levels identified in the General Plan. And the 30-35 dBA increase is greater than the 5 dBA increase identified in the General Plan as significant for permanent noise sources. Further, Mr. Watry’s comments explain that heightened noise levels can result in impacts like noise-induced hearing loss, speech interference, impaired cognitive performance, and physiological effects.

In sum, substantial evidence demonstrates that the Project’s construction noise impacts are significant even after mitigation and applying the noise threshold used in the DEIR.

**Response C.31:** This comment discusses in detail why the Draft EIR found that construction noise would be significant, but the comment does not provide any explanation for the claim that construction noise impacts would remain significant even after mitigation. The Draft EIR included two criteria addressing construction noise impacts. One of the criteria was an increase of 5 dBA  $L_{eq}$  or more over the existing ambient levels and over 60 dBA  $L_{eq}$  for more than 12 months at residences. The Draft EIR concluded that this threshold could be exceeded but would be less than significant with mitigation.

The construction of any project, regardless of its type, size, or duration, and with nearby neighbors, and using all the best available controls, would likely result in “temporary” noise levels exceeding the quantitative noise limits applicable to long-term construction for some period of time.

The terms “temporary” and “substantial” are not defined in the CEQA checklist. Based on the City’s General Plan construction noise policy, the City defines temporary as up to and including 12 months. Construction noise impacts are based on the size of the project (as defined by the duration of the noise generating construction period) and the proximity to, and sensitivity of, nearby land uses. To minimize construction noise levels, standard noise measures are required for all projects requiring environmental review even if the impact is found to be less than significant. Projects that would cause a significant construction noise impact upon persons in the vicinity would be found to be less than significant with the inclusion of the standard noise measures and mitigation measures (including the implementation of a construction logistics plan) showing how construction noise will not exceed the City threshold over any 12-month period, which is consistent with General Plan Policy EC-1.7, as explained in detail in the Draft EIR.

Quantitative instantaneous noise thresholds for temporary construction are not provided in the City’s General Plan or Municipal Code. The City has determined that temporary construction noise is part of expected noises in an urban environment and does not create a significant environmental impact unless substantial noise-generating activities continue for more than 12 months. Based on General Plan Policy EC-1.7, a significant impact would occur if a project located within 500 feet of residential uses or 200 feet of commercial or office uses would involve substantial noise-generating activities (such as building demolition, grading, excavation, pile driving, use of impact equipment, or building framing) continuing for more than 12 months (i.e., long-term construction). As discussed in the Draft EIR and the noise analysis in Appendix H, the nearby residential receptors are located within 500 feet of the project and will experience construction noise for more than 12 months.

As discussed in Section 3.13, Noise, of the Draft EIR, noise levels would vary at an individual receptor based on the construction phase and required equipment, the relative location of the construction activity to the particular receptor, and due to the presence of intervening noise barriers or acoustical shielding. For example, construction of the single-family and townhouse units along the northern and western portions of the site would produce noise levels ranging from 81 to 88 dBA  $L_{eq}$  at a distance of 50 feet from the source with all pertinent equipment present at the site, and from 65 to 83 dBA  $L_{eq}$  at a distance of 50 feet from the source with the minimum required equipment present at the site. However, once these units are constructed, the units would function as a noise barrier for construction occurring on the north, west, and central portions of the site. Construction noise levels emanating from the eight-story multi-family residential buildings, for example, would be reduced by approximately 14 dBA because of increased distance alone and would range from 67 to 74 dBA  $L_{eq}$  with all pertinent equipment present at the site, and from 51 to 67 dBA  $L_{eq}$  with the minimum required equipment present at the site. The shielding provided by intervening noise barriers would reduce these construction noise levels by up to 14 dBA to range from at most 53 to 60 dBA  $L_{eq}$ . Construction noise levels would also be reduced by at least 15 dBA when interior finishing work occurs indoors. The interior finishing phase is anticipated to last over 370 workdays, which is 50 percent of the anticipated building construction duration. Although instantaneous construction noise

levels would not be reduced to 60 dBA or lower at sensitive receptors to the north and west of the site, with the implementation of mitigation measure MM NOI-1.1, noise levels would not exceed 60 dBA  $L_{eq}$  for more than 12 months as described in Appendix B Noise Memo of this Final EIR and Responses C.32 through C.35 that follow. Mitigation measure NOI-1.1 has been updated to identify the required height of noise barriers (14 feet) along the northern and western property lines and the noise reduction these barriers would provide (refer to Section 5.0 Draft EIR Text Revisions of this Final EIR).

The implementation of these measures is consistent with standard City practice to prevent a substantial increase in ambient noise levels, and limits daytime hours during weekdays, and precludes weekend work unless specific findings are made. This finding also recognizes that construction noise levels will vary at an individual receptor based on the construction phase and required equipment, the relative location of the construction activity to the particular receptor. Due to the presence of intervening noise barriers and required mitigation measures, such as acoustical shielding by 14-foot temporary noise barriers along the northern and western property lines of the site, and the best available controls, the project will not exceed the threshold based on five (5) dBA  $L_{eq}$  over the existing ambient and over 60 dBA  $L_{eq}$  for more than 12 months at residences.

**Comment C.32: 3. The DEIR's Claimed Noise Reductions Lack the Support of Substantial Evidence**

The DEIR claims, “[w]ith the implementation of GP Policy EC-1.7, Municipal Code requirements, and the above measures, overall construction noise levels would be reduced by 5 to 10 dBA at nearby noise-sensitive receptors, and the temporary construction noise impact would be reduced to a less-than-significant level.” This claim is unsubstantiated. Because the City relies on this noise reduction to claim impacts would be reduced to a less-than-significant level, the City’s significance determination is not supported by substantial evidence.

**Response C.32:** This comment claims the DEIR lacks substantial evidence to support the finding that construction noise levels would be reduced by 5 to 10 dBA at nearby noise-sensitive receptors, however, this comment ignores the noise study, included as an appendix to the Draft EIR, prepared by a qualified acoustical consultant, which provides the substantial evidence supporting the Draft EIR’s analysis and conclusions. The construction noise logistics plan consists of feasible and reasonable noise reduction measures, including, but not limited to, the following available controls that the project applicant shall implement during all phases of construction activity to reduce the noise exposure to neighboring properties (refer to mitigation measure MM NOI-1.1). The intent of these measures, collectively, is to reduce noise levels as much as possible. With the implementation of these measures, the qualified acoustical consultant concludes (as explained in detail below) overall construction noise levels at noise-sensitive receptors would be reduced by five to 10 dBA, and the temporary construction noise impact would be reduced to a less than significant level, according to the thresholds provided by the General Plan. Additional analysis of temporary noise barriers (refer to Appendix B of this Final EIR) has shown that 14-

foot noise barriers, which would be located along the northern and western property lines, would provide up to 14 dBA of noise reduction. The below discussion demonstrates how the noise reduction measures in mitigation measure MM NOI-1.1 will reduce construction noise by up to 14 dBA at sensitive receptors, resulting in a less than significant construction noise impact. These measures include, but are not limited to the following:

#### Construct Temporary Noise Barriers (where feasible)

- Outside of the consideration that construction noise on the site would move as the development is constructed, and that construction noise levels would be reduced when shielded by intervening structures as they are built, temporary noise barriers are an important tool that can be used to reduce noise levels at off-site receptors. Temporary noise barrier fences would provide at least a five (5) dBA noise reduction if the noise barrier interrupts the line-of-sight between the noise source and receptor and if the barrier is constructed in a manner that eliminates any cracks or gaps. Temporary noise barriers reaching 14-feet in height would be required along the north and west property boundaries to ensure that exterior noise levels from construction do not exceed 60 dBA  $L_{eq}$  for a period exceeding 12 months at the nearest receptors.

#### Limit Construction to 7 a.m. to 7 p.m., Monday through Friday

- This measure is necessary to establish reasonable hours of construction and to inform the community of the time limitations. Work outside of the allowable hours of operation would not be allowed and would be corrected by the disturbance coordinator if violated. Mitigation measure MM NOI-1 on Pages 169 through 171 of the Draft EIR has been updated to describe this (see Section 5.0 Draft EIR Text Revisions of this Final EIR). The mitigation in the noise assessment has also been updated and can be found in Appendix B of this Final EIR.

#### Using “New Technology” and Mufflers in Good Condition

- The measure requires the contractor to use new technology, i.e., the best available technology, to reduce noise levels as low as feasible. This measure would prohibit the contractor from using equipment that is poorly maintained and therefore, noisier than typical equipment. The contractor would be required to select the quietest equipment timely and commercially available to complete the task at hand. There is no quantitative definition for “quiet” equipment. However, manufacturers often have “quieter” equipment models available or noise control packages for generators that can provide a one to three dBA noise reduction as compared to other similar equipment without the additional muffling. This measure would allow the noise disturbance coordinator to identify and replace problematic equipment (e.g., poorly muffled equipment, improper engine enclosures, etc.).

### Avoiding Unnecessary Idling

- This measure would limit the unnecessary idling of equipment and is intended to control noise from idling vehicles at the site (as noted in Section 3.3 Air Quality Standard Permit Conditions, idling of construction equipment is limited to five minutes).

### Locating Staging Areas and Stationary Equipment far from Receptors

- A staging area is regularly used to park mobile construction equipment, receive truck deliveries, and provide a storage area for construction materials that will be moved to others of the site as needed. The staging area is an activity center that produces noise intermittently throughout the workday. In an attempt to reduce construction noise levels as low as feasible at sensitive receptors, the project is required to locate the staging areas as far as possible from any identified sensitive receptors to minimize noise from the operation of mobile equipment and truck deliveries. A 200-foot distance is a feasible distance according to the applicant based on the location of sensitive receptors and the size of the site. The intent of this measure is to avoid locations on the site that are immediately adjacent to sensitive receptors.

### Notifying the Surrounding Neighborhood and Designating a “Noise Disturbance Coordinator”

- The “noise disturbance coordinator” would be available to the community to act as a liaison and respond to any local complaints about construction noise due to activities occurring on the site. Unexpected activities occur regularly on construction sites. For example, the use of poorly muffled equipment would be identified by the coordinator, and noise levels would be reduced by providing proper muffling. The disturbance coordinator would determine the cause of the noise complaints (e.g., beginning work too early, bad muffler, etc.) and institute reasonable measures warranted to correct the problem. Noise mitigation measures that rely on complaints to a noise disturbance coordinator have been upheld by the Court of Appeal. (E.g., *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 208.)

### Use “Quiet” Compressors and Other Equipment

- To reduce construction noise levels as low as feasible, it is recommended that quiet equipment be used to minimize noise. This specific measure addresses the noise sources that can be reduced. This construction equipment is typically portable and can be sited at various locations to increase the distance between the noise source and receptor or utilize intervening shielding.

**Comment C.33: 4. The DEIR does not Disclose a Potentially Significant Off- Site Construction Noise Impact**

The DEIR fails to analyze or disclose the impacts of the Project's off-site construction traffic.

Construction traffic involving spoils removal, materials deliveries, worker access, and other activities generate noise. Noise impacts from construction traffic may be experienced beyond the Project site, which was not disclosed in the DEIR. For this project, Mr. Watry explains that the construction traffic route will necessarily be via Berryessa Road, which has residences facing the street. Further, Genius Kids Berryessa is a daycare facility with children ages two months to 12 years of age located opposite of Berryessa Road, approximately 700 feet east of the project site. Sensitive receptors like these may be impacted by the Project's construction traffic, which would continue for 44 months. Mr. Watry states that the noise analysis should be expanded to include a description of the haul and transit routes, estimates of the number of trips by vehicles type, and noise estimates associated with those trips.

Because the DEIR fails to analyze this potentially significant off-site construction noise impact, the DEIR must be revised.

**Response C.33:** This comment states that the noise analysis should be expanded to include a description of the haul and transit routes, estimates of the number of trips by vehicles type, and noise estimates associated with those trips. Haul trips associated with demolition and construction activities proposed by the project were estimated, as a part of the Draft EIR analysis, using EMFAC2021 (refer to Appendix B, Pages 22 and 23 and Attachment 3 of the Draft EIR). Haul trips would be greatest during the grading phase of the project, with approximately 21,875 haul trips occurring over a period of 75 days. Approximately 292 haul trips would be expected per workday, which equates to approximately 37 trips per hour assuming an eight-hour construction period, although daily construction activity would be allowed over a 12-hour period, 7:00 AM to 7:00 PM Monday through Friday, which would serve to reduce the number of trucks per hour from 37 trips, resulting in less noise than discussed below. Worker and vendor trips utilizing light-duty vehicles were also estimated to be 1,575 trips during the 75-day grading phase.

Based on the haul trip information presented above, hourly average traffic noise levels were calculated with FHWA's Traffic Noise Model (TNM v 2.5). The hourly average noise level resulting from 37 heavy truck trips and three light-duty vehicle trips, at a speed of 40 miles per hour, was calculated to be 60 dBA  $L_{eq}$  at a distance of 75 feet from the centerline of Berryessa Road. The DNL noise level attributable to worst-case trips was calculated to be 55 dBA at a distance of 75 feet from the centerline of Berryessa Road assuming an eight-hour construction period during daytime hours.

Day-night average noise levels at a distance of 75 feet from the centerline of Berryessa Road were measured to be 73 dBA DNL in August 2019 (pre-COVID). The addition of up to 292 haul trips and 21 light-duty vehicle trips per day along Berryessa Road would not measurably increase existing DNL noise levels at sensitive

receptors along Berryessa Road. Therefore, the project's off-site temporary construction traffic noise impacts would be less than significant.

**Comment C.34: 5. The DEIR Fails to Fully Mitigate the Project's Noise Impacts**

As explained above, the Project's construction noise will increase ambient noise levels in the vicinity of the project in excess of standards established in the General Plan. But the City fails to adopt binding mitigation to reduce the impacts to a less-than-significant level. MM NOI-1.1 states:

Prior to the issuance of any demolition or grading permits (whichever occurs first), an acoustic engineer shall prepare and implement a construction noise logistics plan, in accordance with General Plan Policy EC-1.7, prior to issuance of any demolition or grading permits. A typical construction noise logistics plan includes, but is not limited to, the following measures to reduce construction noise levels: [...]

This deferred noise logistics plan does not meet the standards of the CEQA Guidelines, which prohibit deferring formulation of mitigation measures unless the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the types of potential actions that can feasibly achieve that performance standard.”

First, MM NOI-1.1 must be revised to explicitly require the measures listed, rather than identifying them as potential measures in a “typical construction logistics plan.”

Second, MM NOI-1.1 lacks specific performance standards. Since the Project's construction noise impacts increase noise levels above the General Plan's acceptable exterior noise level objective of 60 dBA DNL, the mitigation measure must be revised to ensure the proposed noise logistics plan reduce impacts below General Plan thresholds.

**Response C.34:** This comment does not fully state the relevant threshold used for this project in addition to the Policy EC-1.7, which is to not exceed five (5) dBA  $L_{eq}$  over the existing ambient and over 60 dBA  $L_{eq}$  for more than 12 months at residences. The project applicant will be required to implement the construction noise logistics plan described in mitigation measure MM NOI-1.1 on Pages 169 and 170 of the Draft EIR. Mitigation measure MM NOI-1.1 states that “an acoustic engineer shall prepare and implement a construction noise logistics plan, in accordance with General Plan Policy EC-1.7, prior to issuance of any demolition or grading permits.” Mitigation measure MM NOI-1.1 also states that “a typical construction noise logistics plan will include, but is not limited to, the measures listed in the mitigation.” This statement has been revised to state that “the construction logistics plan (referring to the project's logistics plan) will include, but will not be limited to, the measures listed (refer to Section 5.0 Draft EIR Text Revisions in this Final EIR).” The measures in the construction logistics plan will meet the performance standards outlined in Response C.32. Mitigation measure MM NOI-1.1 is not deferred since the project applicant would be required to implement the listed measures, there are performance standards that the measures will achieve, and there are actions identified which achieve the performance standards. In addition, as discussed in Response C.31, with

the presence of intervening noise barriers and required mitigation measures, such as acoustical shielding, and the best available controls, the project will comply with the five (5) dBA  $L_{eq}$  over the existing ambient and over 60 dBA  $L_{eq}$  for more than 12 months threshold at residences over a continuous period.

**Comment C.35:** Third, MM NOI-1.1 should also be revised to include standards for its proposed temporary noise barriers. The noise attenuation of noise barriers depends largely on their height and form of construction. Mr. Watry's comments show that tall (18-20 feet), heavy noise barriers are available that could provide around 10 to 15 dB of attenuation. Without more specificity MM NOI-1.1, the City is not clearly required to employ this quality of noise barrier.

Fourth, MM NOI-1.1 does not include any text requiring approval of the noise logistics plan by the City. The measure must be revised to require the noise logistics plan to be submitted to the Director of Planning, Building and Code Enforcement or Director's designee prior to the issuance of any grading or demolition permits. And the measure must only allow the City to approve the logistics plan if substantial evidence demonstrates that the plan would reduce noise impacts to a less-than-significant level, and adopt the best available devices and techniques.

In sum, because the City fails to adopt binding mitigation to reduce noise impacts to a less-than-significant level, the DEIR must be revised and recirculated.

**Response C.35:** Barrier effectiveness is determined based on the location of the noise source with respect to the barrier and the location of the receptor with respect to the barrier. For the proposed project, it was determined that 14-foot noise barriers would be required along the north and west property lines to reduce the cumulative duration of construction noise levels exceeding 60 dBA  $L_{eq}$  to less than one year (refer to Appendix B Noise Memo of this Final EIR). With the proposed 14-foot temporary noise barrier along the entirety of the north property boundary, noise levels are calculated to exceed 60 dBA  $L_{eq}$  for approximately six to seven months during the overall construction period (i.e., approximately one month during the construction of horizontal infrastructure within 250 feet, approximately four months during the construction of Parcel A single-family units within 160 feet, and approximately two months during the construction of Parcel D multi-family units within 160 feet). Refer to Figure 2.2-5 of the Draft EIR for the proposed location of the units.

Similarly, with the proposed 14-foot noise barrier along the entirety of the west property line, noise levels would temporarily exceed 60 dBA  $L_{eq}$  for approximately 9 to 10 months during the overall construction period (i.e., approximately one month during the construction of horizontal infrastructure within 250 feet, three months during the construction of Parcel C townhome units within 160 feet, three months during the construction of Parcel F/G multi-family units within 160 feet, and two months during the construction of Parcel I commercial building within 160 feet). Existing eight-foot noise barriers located east of the site, along the BART right-of-way, would be sufficient to achieve the construction noise threshold at residences to the east. Noise levels at these receptors would exceed 60 dBA  $L_{eq}$  for less than 12 months during the overall construction period (i.e., less than two months during the construction of horizontal infrastructure within 400 feet, and less than 10 months

during the construction of Phase D and H units within 250 feet). Note that these calculations are conservative as they do not assume the noise reduction that would occur with interior construction activities, which are estimated to be approximately 50 percent of the building construction phase. Refer to the Noise Memo in Appendix B of this Final EIR, which provides a summary and calculations of the above results.

As discussed in Response C.32 temporary noise barrier fences would be constructed and would provide at least five (5) dBA noise reduction. A temporary construction noise barrier reaching 14 feet in height would be required to achieve the construction noise threshold at receptors to the west and north.

Mitigation measure MM NOI-1.1 has been updated to state that “the noise logistics plan shall be submitted to the Director of Planning, Building and Code Enforcement or Director’s designee prior to the issuance of any grading or demolition permits.” Refer to Section 5.0 Draft EIR Text Revisions of this Final EIR. The project applicant will implement the construction noise logistics plan, including use of the best available equipment and construction techniques, which would reduce the construction impacts to a less than significant level. In addition, the oversight agency (i.e., City of San José) would ensure mitigation measure MM NOI-1.1 (including the construction logistics plan) is implemented. The revisions noted do not address a new significant impact and no recirculation is required.

### **Comment C.36: E. The City Fails to Adequately Analyze and Mitigate Potentially Significant Health Risks from Hazardous Materials**

#### **1. The DEIR Fails to Analyze for Asbestos Prior to Project Approval**

The DEIR acknowledges that “[d]ue to the age of the structures on-site, building materials may contain asbestos and/or lead-based paint, which could expose construction workers to toxins and particulates during demolition.” Accordingly, the DEIR includes Standard Permit Conditions calling for a visual inspection/pre-demolition survey, and possible sampling, prior to the demolition of on-site buildings to determine the presence of asbestos-containing-materials and lead-based paint. However, deferring inspection and sampling for asbestos until after the Project is approved conflicts with the Envision San José 2040 General Plan Policy EC-7.4, which states: “On redevelopment sites, determine the presence of hazardous building materials **during the environmental review process or prior to project approval**” [emphasis added]. Here, the DEIR fails to conduct an inspection and sampling for asbestos during the environmental review process or prior to project approval – the Phase I ESA prepared for the Project does not reference any visual inspections or sampling for asbestos.

Further, this approach conflicts with CEQA, which requires lead agencies to disclose the extent and severity of a project’s impacts in the CEQA document, before the project is approved. By deferring environmental assessment to a future date, the DEIR 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 decision-

making. 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.

Therefore, sampling and an inspection for asbestos must be conducted prior to the Project's approval, and the findings must be included in a revised DEIR circulated for public review.

**Response C.36:** Based on the age of the structures, Pages 131, 135, and 136 of the Draft EIR discloses that lead-based paint and asbestos-containing materials may be present, and, based on the assumption that they are present, identifies a well-established regulatory process, applicable to all projects that involve demolition of structures built prior to established dates, to ensure the materials are appropriately removed by qualified professionals. The Standard Permit Conditions listed in Section 3.9 Hazards and Hazardous Materials, Page 136 of the Draft EIR fully mitigate the impacts of lead-based paint and asbestos-containing materials due to building demolition. The Standard Permit Conditions, required to be implemented prior to demolition, include visual inspection/pre-demolition survey, and possible sampling, requires. The Phase I ESA, in Appendix G of the Draft EIR, states that due to the age of the structures on-site, building materials may contain asbestos and that a survey is required by the National Emissions Standards for Hazardous Pollutants (NESHAP). Page 136 of the Draft EIR states that with the implementation of the standard permit conditions (to reduce exposure to asbestos and lead due to demolition), the project would not result in significant impacts to construction workers, neighboring properties, or the environment due to the release of ACMs or lead-based paint. The project would implement these standard permit conditions and, therefore, the impacts from asbestos and lead-based paint would be fully mitigated, and the public has been made aware of the potential for the materials to be present and the measures to be implemented per an established regulatory program.

**Comment C.37: 2. The DEIR Improperly Defers Analysis of Soil Contamination Near Southern Portion of Project Site**

Soil samples from the Project site were collected and analyzed for organochlorine pesticides, due to the site's former agricultural uses, and soil and groundwater samples were analyzed for TPH, due to former USTs and the truck parking and storage uses on-site. But since the samples were primarily collected in the northern portion of the site, there is a potential for contaminated soils in other portions of the site. To address this potentially significant impact, the DEIR adopts MM HAZ-1.3, which provides in part: "Prior to the issuance of any demolition or grading permits (whichever occurs first), additional shallow soil sampling shall be completed at the southern portion of the site including areas near the existing industrial buildings and former residence and outbuildings." This deferred analysis of potential soil contamination conflicts with General Plan Policy EC-7.2, which calls for identification of "existing soil, soil vapor, groundwater and indoor air contamination and mitigation for identified human health and environmental hazards to future users and **provide as part of the environmental review process** for all development and redevelopment projects" [emphasis added]. Because the DEIR defers sampling on a significant portion of the Project site until after Project approval, the DEIR fails to provide identification of existing contamination "as part of the environmental review process."

Further, this approach conflicts with CEQA, which requires lead agencies to disclose the extent and severity of a project's impacts in the CEQA document, before the project is approved. Here, the City defers sampling of much of the Project site (only the northern part was sampled) until after Project approval. The DEIR does not provide justification for why this analysis is not currently feasible. As a result, the City conflicts with CEQA's limits on deferred analysis. The City must complete the soil contamination sampling before Project approval, and include the findings in a revised DEIR.

**Response C.37:** As stated in the Draft EIR in Section 3.9 Hazards and Hazardous Materials, samples of organochlorine pesticides and TPH have been sampled primarily in the northern portion, but also in the southeastern portion, of the site due to previous UST and truck parking and storage uses at the site. Soil samples were not collected at the portions of the site where the occupied industrial buildings are located (which is in the southern portion of the site). Mitigation measure MM HAZ-1.3 requires shallow soil sampling to be completed at the southern portion of the site including areas near the existing industrial buildings prior to issuance a demolition or grading permit (whichever comes first). This would ensure that any unknown contaminants are addressed and remedied before construction personnel would be on the site. Requiring additional shallow soil sampling prior issuance of a grading/demolition permit is standard practice for the City of San José and complies with applicable state and local requirements. Sampling is often not able to be completed prior to entitlement where active uses (such as the industrial/office buildings on-site) are occupying the site already because of the invasive nature of testing. The mitigation measure as written ensures that construction personnel and future occupants of the project will not be exposed to any significant hazardous concerns and does not constitute deferred mitigation under CEQA.

### **Comment C.38: 3. The DEIR's Soil Contamination Mitigation is Not Sufficiently Protective**

MM HAZ-2.1 calls for evaluation for the presence of TPH, volatile organic compounds ("VOCs"), and metals after Project approval. If elevated concentrations of these contaminants are discovered, the Applicant will prepare a remedial action plan in accordance with SCCDEH requirements. But this mitigation measure is not fully protective. Although the mitigation measure calls for preparation of a remedial action plan after detection of elevated concentrations of contaminants, the measure fails to require that this contamination is mitigated before construction begins. As a result, workers on the Project site are not sufficiently protected from soil contamination. MM HAZ-2.1 must be revised to explicitly require any detected soil contamination to be removed from the Project site before workers proceed with construction.

MM HAZ-2.1 is also flawed because it does not specify the standards to which the soil contamination will be mitigated. The measure must be revised to explicitly state that the soil will be remediated to residential standards.

**Response C.38:** As stated in mitigation measure MM HAZ-2.1 (Page 135 of the Draft EIR), which requires the evaluation of total petroleum hydrocarbons (TPH) in soil once the oil separator is removed, a remedial action plan is required to be implemented prior to the issuance of grading permits. As stated in this measure, if soil contamination is detected, this data shall be provided to the Santa Clara County

Department of Environmental Health (SCCDEH). A remedial action plan would be prepared and submitted to the SCCDEH. Mitigation measure MM HAZ-2.1 has been updated to state that “sampling, preparation of the remedial action plan, and remediation shall be completed by an environmental professional, under the oversight of SCCDEH, prior to the issuance of a grading permit” to ensure remedial action occurs prior to demolition or construction of the project. Refer to Section 5.0 Draft EIR Text Revisions in this Final EIR. The project applicant will be in coordination with the SCCDEH who will determine which regulatory standards or screening levels the project would need to comply with. The project applicant will comply with regulatory screening levels or standards for concentrations of contaminants at proposed residential uses.

**Comment C.39: F. The Project is Inconsistent With Local Land Use Goals, Objectives, and Policies**

The Project site is within the boundaries of the 270-acre Berryessa BART Urban Village (“BBUV”) Plan area. The Project is inconsistent with BBUV policies. Under the CEQA Guidelines, a conflict with any land use plan, policy, or regulation adopted for the purpose of avoiding or mitigating an environmental effect can constitute a significant impact.

The project site is located within the boundaries of the Facchino District in the BBUV Plan Area. The BBUV Plan states: “The planned capacity for the Facchino District is approximately 340,000 square feet of commercial uses and 820 dwelling units.” Implementation of the proposed Project would redevelop the Project site with a mix of uses, including 850 residential units. It is anticipated that the residential units on the project site would result in 2,670 new residents on-site. The Project’s proposed 850 residential units exceeds the 820-unit planned capacity in the BBUV Plan – a plain inconsistency with the BBUV Plan. The DEIR must be revised to resolve this land use inconsistency.

The 30 residential units in excess of the Facchino District’s planned capacity also implicates the CEQA Guidelines’ requirements to analyze the Project’s growth-inducing impacts. The CEQA Guidelines require that an EIR identify the likelihood that a proposed project could “foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment.” In the DEIR’s analysis of growth-inducing impacts, the DEIR does not disclose the exceedance of the 820-unit planned capacity in the BBUV Plan: “the project would not induce substantial growth in the City as it is consistent with residential density and commercial growth envisioned for the site in the General Plan and BBUV Plan.” This discussion must be revised to account for the 820-unit planned capacity in the BBUV Plan. Since the DEIR fails to provide this analysis, it lacks substantial evidence to claim growth-inducing impacts would be less than significant.

**Response C.39:** Comment C.39 indicates that the planned capacity for the Facchino District is 820 dwelling units and 340,000 square feet of commercial space. The BBUV Plan has a total development capacity of 6,156 dwelling units and 16,502 jobs (equivalent to about 4,200,000 square feet of commercial/office space based on 300 square feet per job). This development capacity is reflected in Appendix 5 of the General Plan. The Facchino site is one of four Districts. Based on Chapter 3, Page 31 of the approved BBUV Plan, the Facchino District is designated as a Transit

Employment Center (where the project’s commercial building is proposed), and supports 288,000 to 480,000 square feet of commercial uses. Based on Chapter 3, Pages 32 and 33 of the BBUV Plan, the adopted Urban Residential (multi-family) uses supports a density of 75 to 250 dwelling units per acre. Based on the project applicant’s site plan, the portion of the project site that is designated as Urban Residential is approximately 4.15 acres. As a result, the maximum number of residential units allowed, under this BBUV Plan designation, at the site is approximately 1,038 units. However, the BBUV Plan assigned 820 dwelling units out of the total of 6,156 dwelling units in the BBUV Plan to the Facchino District. The additional 30 units will be transferred from one the other three BBUV districts, but the total planned development capacity of the BBUV will remain 6,156 dwelling units. The project proposes 480,000 square feet of commercial uses and 850 residential units and is consistent with the planned growth forecasted in the BBUV Plan and Appendix 5 of the General Plan, and therefore would not result in new growth-inducing impacts. Further, the proposed commercial uses and residential units are within the planned development capacities included in the Envision San Jose 2040 General Plan, and therefore not growth-inducing, they reflect growth expected within the City’s current General Plan buildout horizon of 2040.

**Comment C.40:** Policy LU-3.2 of the BBUV Plan states: “Require ground-floor active uses in the Urban Residential land use designation in the Facchino District.” But the DEIR does not propose any such uses for the parcels designated Urban Residential. The DEIR only proposes “803 multi-family residential units within the Urban Residential designation.” The DEIR must be revised to include description of how the Project would contain ground-floor actives uses in order to demonstrate consistency with Policy LU-3.2.

Active uses could be retail but it does not mandate it. Active uses refers generally to anything that activates the street and could be a leasing office, a gym, a community room, pet facilities, mail room, etc. Based on Chapter 5, Figure 5-11 (Page 79) and Page 88 of the BBUV Plan (Policy 2A-DS-4 and Figure 5-20), multi-family residential units within the Urban Residential designation of the BBUV Plan are required to have residential stoops, but are not required to have neighborhood serving retail. The project would include residential stoops, in accordance with the Policy 2A-DS-4 and Figure 5-20, which would provide direct access to residential units, as well as the proposed multi-family buildings would also include ground-floor active uses which could include a community room or a gym. Section 2.2 Project Description, Page 6 of the Draft EIR has been updated to describe the proposed ground floor active uses (refer to Section 5.0 Draft EIR Text Revisions of this Final EIR). Nothing about this policy relates to mitigating or avoiding an environmental impact of the project, and is a planning issue for the City to consider in evaluating the project’s conformance with the BBUV Plan, unrelated to disclosure of environmental impacts in the EIR.

**Comment C.41:** Policy LU-8.3 of the BBUV Plan states: “Focus the City’s affordable housing resources into the Berryessa BART Urban Village to further achievement of the Goal that 25% of the housing in the Village is affordable.” But only 22.2% of the housing proposed by the proposed

Project is proposed as affordable housing. The Project must increase the percentage of affordable housing units to 25% in order to be consistent with Policy LU-83.

**Response C.41:** The BBUV Plan Policy LU-8.3 includes a goal of 25 percent affordable housing. The policy, however, does not require each project within the BBUV to have 25 percent affordable housing. The project proposes a total of 850 residential units; 189 of these units are multi-family affordable housing units (as discussed on Page 6 of the Draft EIR). The project would contribute to the City’s BBUV affordable housing goal stated in BBUV Plan Policy LU-8.3 and would not be required to increase the number of affordable housing units under CEQA.

**Comment C.42:** The BBUV Plan contains several policies setting targets for electric vehicle infrastructure. Policy SU-4.1 provide: “All new residential development in each of the four Districts should have at least 80% of the total parking stalls provided as “Electric Vehicle (EV)- capable,” with at least 20% “Electric Vehicle Charging Infrastructure (EVCI)-ready” (above the City’s Energy Reach Code).” And Policy SU-4.2 provides: “All new commercial development in each of the four Districts should have at least 50% of the total parking stalls provided as “Electric Vehicle (EV)- capable,” with at least 20% “Electric Vehicle Charging Infrastructure (EVCI)- ready” (above the City’s Energy Reach Code).” But the Project fails to identify any electric vehicle charging infrastructure in the DEIR. Thus, the Project fails to demonstrate consistency with Policy SU-4.1 and Policy SU-4.2. The DEIR must be revised to identify the number of proposed EV-capable and EVCI-ready parking stalls. This number must be at least as great as required by Policy SU-4.1 and Policy SU-4.2.

**Response C.42:** The project proposes up 905 vehicle parking stalls designated for the proposed residential development and 1,200 parking stalls designated for the proposed commercial development. The proposed project would be required at the Planned Development Permit stage, when specific buildings and uses are permitted, to comply with Policy SU-4.1’s requirements for EV-capable and EVCI-ready parking stalls. Given the project is a Planned Development Zoning, the project applicant could propose Planned Development Permit for less development than what is currently proposed to be allowed under the Planned Development Zoning. Assuming the project would develop 850 residential units and 905 parking stalls, at least 724 parking stalls would be EV-capable, including 145 EVCI-ready stalls. Assuming the project would construct 480,000 square feet of commercial space and 1,200 parking stalls, the project would have 600 EV-capable, including 120 EVCI-ready parking stalls. Section 2.2 Project Description, and Pages 6 and 12 of the Draft EIR have been updated with the maximum number of EV-capable spaces proposed by the project (see Section 5.0 Draft EIR Text Revisions in this Final EIR). Verification of the project’s compliance with this policy would occur at the Planned Development Permit stage, when the precise amounts of each type of allowed use would be established and the requisite amount of EV parking. The text revisions do not identify a new impact and recirculation of the Draft EIR is not warranted.

**Comment C.43:** In sum, the Project has several inconsistencies with the BBUV Plan which have an environmental effect. These inconsistencies must be resolved in a revised DEIR that is recirculated for public review.

#### IV. CONCLUSION

The DEIR is inadequate and must be withdrawn. We urge the City to prepare and circulate a revised DEIR which accurately sets for the existing environmental setting, discloses all of the Project's potentially significant impacts, and requires all feasible mitigation measures to reduce the Project's significant environmental and public health impacts.

**Response C.43:** Each of the claims raised by the commentor in prior specific comments have been addressed, as presented above. The project complies with applicable General Plan and BBUV policies, which include measures to protect the public and the environment. Projects are required to comply with the requirements and policies that are feasible based on the nature and location of a given project, but strict conformance with all of the General Plan and BBUV Policies is not required. At the Planned Development Permit stage, the project's conformance with the BBUV policies would be demonstrated and confirmed. The Draft EIR provides a description of the existing setting and discloses all significant environmental impacts, related to the applicable environmental topics, and feasible mitigation measures from construction and operation of the project. The Draft EIR does not require recirculation for public review.

#### D. Amah Mutsun Tribal Band (dated August 15, 2022)

**Comment D.1:** If you have done a Sacred Lands File (SLF) search and California Historical Resource Information System (CHRIS) and the Native American Heritage Commission (NAHC). If you have received any positives within 1 mile of the project area:

Our recommendations are as follows:

All Crews and Individuals who will be moving any earth be Cultural Sensitivity Trained.

A Qualified California Trained Archaeological Monitor be present during any earth movement.

A Qualified Native American Monitor be present during any earth movement.

If you have not done the searches, please do so and contact us with the results for our recommendations.

Any further questions or information we are happy to assist.

**Response D.1:** As stated in the Draft EIR in Section 3.5 Cultural Resources, Page 86, in October and November 2018, a cultural resources records search was completed at the Northwest Information Center of the California Historical Information (CHRIS), affiliated with Sonoma State University, for the project site and within one quarter mile of the site. A Sacred Land Files (SLF) search was not conducted as a part of the records search, however, tribal consultation (under AB 52) was completed in February 2022 to identify if there were any tribal cultural resources on the site and measures to reduce potential impacts to tribal cultural resources (as discussed in the

paragraph below). Upper Penitencia Creek is located approximately 105 feet south of the project site, and Coyote Creek is located approximately 2,000 feet west of the project site. Both creeks are considered sensitive areas for buried prehistoric/Native American resources; due to the project's proximity to the creeks and previous archaeological studies, there is a moderate to high potential for archaeological resources to be unearthed during construction. Mitigation measures MM CUL-1.1 through MM CUL-1.3 and Standard Permit Conditions are included in the Draft EIR (Pages 91 and 92) to reduce impacts to archaeological and tribal cultural resources to less than significant.

As stated in Section 3.18 Tribal Cultural Resources and Page 238 of the Draft EIR, two tribes known to have traditional lands and cultural places within the City of San José requested notification of projects in the City of San José, the Indian Canyon Mutsun Band of Costanoan, and Tamien Nation. On July 16, 2021, the City submitted a notification letter and the NOP to the tribal representatives, in accordance with AB 52. The Amah Mutson Tribal Band did not request to be notified of the project under AB 52. However, Tamien Nation requested AB 52 consultation with the City on August 19, 2021. On February 1, 2022, Tamien Nation provided input on mitigation for tribal cultural resources which require an Archaeological Monitor and Native American Tribal Representative/Monitor to be present during earth movement. These measures are included in mitigation measures MM CUL-1.1 through MM CUL-1.3. Based on the recommendation in Comment D.1, mitigation measure MM CUL-1.1 has been updated to state that all crews and individuals who will be moving any earth shall be cultural sensitivity trained (refer to Section 5.0 Draft EIR Text Revisions of this Final EIR). This update to the mitigation is not a result of a new significant impact or an increase of severity of the tribal cultural resources impact. Therefore, recirculation of the Draft EIR is not required.

**E. Carpenters Local Union 405 (dated September 28, 2022)**

**Comment E.1:** Carpenters Local 405 appreciates the opportunity to take part in the review process for the proposed Berryessa Road Mixed-Use Project (the Project) and to commenting on the City's Draft Environmental Impact Report (DEIR).

The Project presents tremendous economic opportunities if properly implemented, but also presents significant environmental impacts - including implications for worker safety - that must be mitigated or eliminated to the maximum extent feasible. In this regard, it is the eventual selection of a responsible contractor for the construction phase of the Project that will allow the DEIR's mitigation steps to be best realized. As elaborated further in this letter, the City can and should take steps beyond the CEQA process to encourage this, thereby ensuring to the maximum extent possible that its mitigation steps related to worker welfare are in fact carried out in practice.

Local 405 intends to participate in the Project's CEQA and subsequent processes to ensure that the City of San Jose complies with its CEQA's mandate to minimize the Project's environmental impacts and hazards while maximizing its economic benefits for the community and skilled craft workers.

**Response E.1:** Comment E.1 is not related to the Draft EIR analysis. Therefore, no further response is required.

**Comment E.2:** Local 405 commends the DEIR's identification and intention that mitigating steps should be taken to ensure worker safety during the construction phase of the Project in a number of areas. This includes the DEIR's regard to the following:).

- The identification of mitigation steps to reduce construction workers' exposure to residual concentrations of chemicals including organochlorine pesticides and pesticide-related metals.
- The identification of mitigation steps to reduce construction workers' exposure to potential total petroleum hydrocarbons.
- The identification of mitigation steps to reduce construction workers' exposure to asbestos-containing materials and lead based paint during demolition.

Local 405 also notes the DEIR's assertion that this project is subject to the City's Private Sector Green Building Policy. This policy also takes account of worker welfare by fostering practices in the design, construction, and maintenance of buildings that will minimize the use and waste of energy, water, and other resources.

**Response E.2:** Section 3.9 Hazards and Hazardous Materials, Pages 133 through 136 of the Draft EIR includes mitigation measures to reduce hazardous materials related impacts on construction workers to less than significant. The project would also comply with the City's Private Sector Green Building Policy, as stated in Comment E.2, which would reduce greenhouse gas emissions and energy related impacts. This comment does not question the adequacy of the Draft EIR analysis. Therefore, no further response to this comment is required.

**Comment E.3:** However, other than the mitigating measures and City policy identified within the DEIR, Local 405 notes that - beyond the CEQA process - a crucial mitigating factor in terms of worker welfare will ultimately be the Project Developer's eventual selection of responsible contractors to undertake construction. The City of San Jose currently has no adequate policy in place that would definitively encourage the use of responsible contractors on private developments such as the project in question. City policy that remains permissive to the presence of irresponsible contractors on projects of this size and nature jeopardizes the realization of the various, commendable mitigating steps that the City has outlined in its DEIR with regards to worker safety. After all, the mitigating steps the City has identified in its DEIR will ultimately rely on cooperation between the Project's eventual contractors and the various public agencies implicated by the DEIR's stated mitigation measures.

**Response E.3:** Comment E.3 notes there is no policy in place that would encourage the use of responsible contractors on private developments such as the proposed project. This comment is not related to the adequacy of the Draft EIR analysis. Therefore, no further response to this comment is required.

**Comment E.4:** A lack of jobsite safety presents a clear burden for taxpayers when taking into account costs such as those posed by injuries to the State's workers' compensation system. Instead, recent research cited by the Department of Labor<sup>2</sup> has advocated for the enactment of responsible bidder provisions as an "insurance policy" for taxpayers. This same research demonstrates that construction projects with responsible contractors were 19% less likely to have OSHA violations and had an average of 34% fewer violations per OSHA inspection when compared to projects that failed to ensure the inclusion of responsible contractors.

Local 405 has recently engaged the City of San Jose on the subject of responsible bidder provisions within City policy. On September 20, 2022, Local 405 formally submitted a letter to the City's planning department which proposes additions to the City's Municipal Code for any residential project larger than 10 units. These proposals include apprenticeship, healthcare, and local hire requirements that would encourage the selection of responsible contractors on a project such as this, including the use of a well-trained workforce able to identify and address safety issues; such as those identified as necessary-to-mitigate within the DEIR.

The adoption of such standards is one example of steps the City can take to better guarantee worker welfare and, by extension, effectively realize the DEIR's mitigation steps for worker safety. Local 405 commends the City's intentions regarding worker welfare within this DEIR and looks forward to collaborating with the City beyond the Project's CEQA process to ensure its various mitigation measures are effectively realized and enforced.

**Response E.4:** The mitigation measures in Section 3.9 Hazards and Hazardous Materials (Pages 133 through 136) reduce hazardous materials related impacts on construction workers to less than significant. Comment E.4 includes a discussion of research regarding OSHA and Local 405's proposal to the City to update the City's Municipal Code. This comment does not question the adequacy of the Draft EIR analysis and will be discussed separately with the City. Therefore, no further response is required.

## SECTION 5.0 DRAFT EIR TEXT REVISIONS

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This section contains revisions to the text of the Berryessa Mixed Use Project Draft EIR dated August 2022. Revised or new language is underlined. All deletions are shown with a ~~line through the text~~.

### 5.1.1 Minor Revisions to the Project following the Draft EIR Circulation

The Draft EIR evaluated 850 residential units including 614 market rate multi-family units, 189 affordable housing units, 23 townhouse units, and 24 single-family units (a total of 850 units). Following circulation of the Draft EIR, the project was revised to include one additional townhouse unit and one less market rate multi-family unit, with no net increase in overall units. Therefore, the project would develop 613 market rate multi-family units, 189 affordable housing units, 24 townhouses, and 24 single-family houses, would still total 850 residential units.

The non-residential components of the project, up to 480,000 square feet of commercial space, would stay the same.

This minor revision to the project, i.e., substitution of a market-rate multi-family unit with a townhouse unit, does not change conclusions of the Draft EIR analysis. Multi-family units would range from 545 to 1,520 square feet and townhouse units would range from 1,190 to 1,850 square feet. Given the project would have the same footprint as what was analyzed in the Draft EIR, the minor change to the project would not affect the agricultural and forestry resources, biological resources, cultural resources, geology and soils, hazards and hazardous materials, hydrology and water quality, mineral resources, tribal cultural resources, or wildfire analyses. The revision does not change the conclusions of the aesthetics and land use analyses since the uses would not change and there would be no changes to the visual character of the site. The assumption of the number of residents in the population and housing, public services, recreation analyses, and utilities and service systems analyses is the same for multi-family and townhouse units (based on the City's Housing Element). Therefore, the change in unit type does not change these analyses.

Minor revisions were made in the project description, air quality, energy, noise, and transportation discussions of the Draft EIR. The change in unit type does not affect the results of the transportation analyses since the Traffic Demand Model conservatively evaluates all residential unit types the same as single-family units. The construction assumptions such as the amount of soil that would be excavated, duration, and phasing would not change with the project revision. Therefore, no changes to the construction air quality or noise conclusions are required. Since the air quality model (CalEEMod) requires inputs for individual land uses, the 803 multi-family units and 47 single-family/townhouses were input into the model. The change from a single multi-family unit to a townhouse unit would increase the daily trips by 2.12 (average daily trips for a multi-family unit would be 7.32 and for a townhouse unit would be 9.44). The increase in operational criteria pollutant emissions and operational fuel (energy) use from the increase in approximately two daily trips would be negligible. The two additional daily trips would not increase operational peak hour noise levels. Therefore, the proposed project revision does not change the impact conclusions of the EIR analyses.

## 5.1.2 Draft EIR Text Revisions

**Page 6**      **Section 2.2.1, Residential Development; the text will be REVISED in the fifth and sixth paragraphs as follows:**

The project proposes the development of a maximum of 850 residential units including 61~~34~~ market rate multi-family, 189 affordable multi-family, 24~~3~~ townhouse, and 24 single-family units. The proposed residences would be located on Parcels A, B, C, D, F, G and H (refer to the site plan on Figure 2.2 5). The single-family houses would be located on Parcels A and B, townhouses would be located on Parcel C, market rate multi-family units would be on Parcels D, F, and G, and affordable multi-family units would be on Parcel H. The single-family and townhouse units would be a maximum of three-stories with a height of up to 40 feet above the ground surface. The market rate multi-family buildings on Parcels D, F, and G would be a maximum of 8 eight stories with a height of 90 feet above the ground surface and the affordable multi-family development on Parcel H would be a maximum of 15 stories with a height of 160 feet above the ground surface. The proposed multi-family buildings would also include ground-floor active uses which could include a community room or a gym.

The multi-family buildings would provide up to two levels of underground parking and up to two levels of above grade parking, which would include a maximum of 905 parking stalls. Assuming the project would develop 850 residential units and 905 parking stalls, at least 724 parking stalls would be electric vehicle (EV)-capable, including 145 electric vehicle charging infrastructure (EVCI)-ready stalls.

**Page 12**      **Section 2.2.2, Commercial Development; the text will be REVISED after the second paragraph as follows:**

The proposed commercial building would be a maximum of 10 stories at a height of 160 feet above the ground surface. The commercial building would include up to three levels of underground parking and two levels of above grade parking, with a maximum of a 1,200 parking stalls. The project would have 600 EV-capable, including 120 EVCI-ready parking stalls.

**Page 13**      **Section 2.2.5, Construction and Demolition; the text will be REVISED in the first paragraph as follows:**

### **2.2.5 Construction and Demolition**

The project would export up to 165,000 cubic yards of soil from the project site and would import up to 10,000 cubic yards of soil to the site during construction. Assuming 16 ~~42~~ cubic yards per truck load, the project requires about 10,975 ~~14,585~~ truckloads of soil export and import combined. Development of the project site would require grading for utilities, drainage, roads, and buildings foundations. The project would be constructed in five phases. Demolition and grading of the entire site would occur in the first phase; single-family and townhouse units, and the neighborhood park, would be constructed on Parcels A, B, C, and E in the second phase; multi-family units would be constructed on Parcels D and H in the third phase; multi-family units would be constructed on Parcels F and G in the fourth phase; and the commercial building (to be located on Parcel I) and off-site improvements on Berryessa Road (described in Section 2.2.4) would be constructed in the fifth

phase. Demolition and construction of the proposed mixed-use project would take up to approximately 44 months.

**Page 13      Section 2.2.6, Utilities; the text will be ADDED and REVISED after the second paragraph as follows:**

New domestic water lines and fire service water lines would connect to existing six- to eight-inch water mains on Shore Drive and Mercado Way.

The project would connect to the existing recycled water line in Berryessa Road, immediately south of the site. The recycled water would be used for irrigation for the site's landscaping.

~~The project site drains to Coyote Creek and Upper Penitencia Creek through existing City storm drain systems. Stormwater runoff would flow to the proposed biotreatment areas and would be collected via on-site catch basins. Stormwater would be treated and then directed to the City's stormwater system. Stormwater from the site would be directed to the existing detention basin adjacent to the Coyote Creek; it would then flow into and be treated at the existing biotreatment cell and discharge into Coyote Creek. The project would connect to a 24-inch storm drain on Mercado Way, and a 15-inch storm drain on De Rome Drive.~~

**Pages 47-48      Section 3.3.2.2, Project Impacts; the text will be REVISED in the first paragraph and Table 3.3-5 will be REVISED as follows:**

Construction Period Emissions

The California Emissions Estimator Model (CalEEMod) Version 2020.4.0 was used to estimate emissions from construction and operation of the project assuming full build-out conditions. The project land use types and size including ~~8023~~ apartment units, 24 single-family units, ~~243~~ townhouse units, 480,000 square feet of commercial space, 0.9 acres of park space, and 2,105 enclosed parking spaces.

See Appendix B for the project land use types, size, and other CalEEMod inputs. The CARB Emission FACtors 2021 model (EMFAC2021) model was used to predict emissions from construction truck traffic and trips. Average daily emissions were calculated by dividing the total construction emissions by the total number of construction days. Project construction was estimated to last approximately 44 months or 950 workdays.

Table 3.3-5 below shows daily construction emissions of ROG, NO<sub>x</sub>, PM<sub>10</sub> exhaust, and PM<sub>2.5</sub> exhaust during construction of the project (from 2023 to 2026).

Table 3.3-5: Construction Period Emissions								
Year	ROG		NOx		PM <sub>10</sub> Exhaust		PM <sub>2.5</sub> Exhaust	
<b>Construction Emissions Per Year (Tons)</b>								
Year	Unmitigat.	Mitigat.	Unmitigat.	Mitigat.	Unmitigat.	Mitigat.	Unmitigat.	Mitigat.
2023	0.63	0.44	3.94	2.89	0.21	0.10	0.15	0.05
2024	0.68	0.55	3.50	3.17	0.20	0.14	0.13	0.06
2025	0.66	0.55	3.36	3.15	0.19	0.14	0.12	0.06
2026	8.72	<del>4.17</del> 1.30	2.91	2.81	0.17	0.12	0.10	0.05
<b>Annualized Daily Construction Emissions (pounds/day)</b>								
Year	Unmitigat.	Mitigat.	Unmitigat.	Mitigat.	Unmitigat.	Mitigat.	Unmitigat.	Mitigat.
2023 (195 workdays)	6.42	4.51	40.39	29.64	2.15	1.04	1.50	0.48
2024 (262 workdays)	5.17	4.24	26.72	24.19	1.57	1.04	0.97	0.47
2025 (261 workdays)	5.07	4.23	25.73	24.18	1.48	1.04	0.89	0.47
2026 (232 workdays)	<b>75.25</b>	<del>11.23</del> 36.03	25.10	24.24	1.47	1.03	0.87	0.46
<i>BAAQMD Thresholds (pounds per day)</i>	54 lbs./day		54 lbs./day		82 lbs./day		54 lbs./day	
<b>Exceed Threshold?</b>	<b>Yes (2026)</b>	No	No	No	No	No	No	No
Notes: Unmitigat. = Unmitigated, Mitigat. = Mitigated <b>Bold</b> = Values exceed BAAQMD thresholds; Workdays – construction workdays								

**Page 50**      **Section 3.3.2.2, Project Impacts; the text in mitigation measure MM AIR-1.4 and in the paragraph after this measure will be REVISED as follows:**

**MM AIR-1.4:**      Prior to the issuance of any demolition, grading, and/or building permits (whichever occurs first), the project applicant shall include a stipulation in the Declaration of Covenants, Conditions, and Restrictions requiring the use of low volatile organic compound or VOC (i.e., ROG) coatings, that are below current

BAAQMD requirements (i.e., Regulation 8, Rule 3: Architectural Coatings), for at least ~~60~~ 90 percent of all residential and nonresidential interior paints and ~~90~~ 60 percent of exterior paints. This includes all architectural coatings applied during both construction and reapplications throughout the project's operational lifetime. At least ~~60~~ 90 percent of coatings applied must meet a "super-compliant" VOC standard of less than 10 grams of VOC per liter of paint. For reapplication of coatings during the project's operational lifetime, the Declaration of Covenants, Conditions, and Restrictions shall contain a stipulation for low VOC coatings to be used. Examples of "super-compliant" coatings are contained in the South Coast Air Quality Management District's website.

Prior to the issuance of any demolition, grading, and/or building permits (whichever occurs first), the project applicant shall submit all construction documents and plans, including the Declaration of Covenants, Conditions, and Restrictions, shall be submitted to the Director of Planning, Building and Code Enforcement, or the Director's designee for review and approval.

The CalEEMod model was used to estimate the effectiveness of mitigation measures MM AIR-1.1 through MM AIR-1.3 using Tier 4 interim construction equipment. In addition, the CalEEMod model was used to estimate the effectiveness of MM AIR-1.4 using 90 ~~60~~ percent interior and exterior super-compliant VOC coatings. These measures together were found to reduce on-site construction ROG emissions by 85.47 ~~36~~ percent and below the BAAQMD significant threshold, or average construction emissions of 11.23 ~~36~~ pounds of ROG per day during. With the implementation of MM AIR-1.1 through MM AIR-1.4 during project construction, the project would not result in a significant ROG emissions impact.

**Page 52: Section 3.3.2 Impact Discussion; Checklist Question a); text will be ADDED to the third paragraph and Table 3.3-6 will be REVISED as follows:**

As shown in Table 3.3-6 above, operational daily and annual criteria pollutant emissions would not exceed the BAAQMD significance thresholds.<sup>3</sup> The project, therefore, would result in a less than significant operational criteria pollutant emissions impact.

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<sup>3</sup> The operational air quality modeling assumed the project would develop up to 803 multi-family units and 47 townhouse/single-family units based on information provided by the applicant. The applicant is now proposing to replace one multi-family unit with a townhouse unit. Therefore, the project is now proposing 802 multi-family units and 48 townhouse/single-family units. Multi-family units would range from 545 to 1,520 square feet and townhouse units would range from 1,190 to 1,850 square feet. This change would increase the number of trips by about 2.12 daily trips (as a multi-family unit was assumed to have an average of 7.32 daily trips and a townhouse unit was assumed to generate 9.44 trips). The increase in two daily trips would not result in a measurable increase in operational vehicle emissions. Therefore, the conclusions which state that the project would result in a less than significant operational criteria pollutant emissions impact would be the same.

Personal Communications. Divine, Casey, Illingworth & Rodkin (air quality consultant) Re: 1655 Berryessa Project – Change in Unit Type.

<b>Table 3.3-6: Operational Period Emissions</b>				
<b>Scenario</b>	<b>ROG</b>	<b>NO<sub>x</sub></b>	<b>PM<sub>10</sub></b>	<b>PM<sub>2.5</sub></b>
2027 Annual Operational Emissions ( <i>tons/year</i> )	<del>8.889.36</del>	3.16	5.62	1.48
<i>BAAQMD Thresholds (tons /year)</i>	<i>10 tons</i>	<i>10 tons</i>	<i>15 tons</i>	<i>10 tons</i>
<b><i>Exceed Threshold?</i></b>	<i>No</i>	<i>No</i>	<i>No</i>	<i>No</i>
2027 Daily Operational Emissions – ( <i>pounds/day</i> ) <sup>1</sup>	<del>48.68</del> <del>51.26</del>	17.31	30.78	8.12
<i>BAAQMD Thresholds (pounds/day)</i>	<i>54 lbs.</i>	<i>54 lbs.</i>	<i>82 lbs.</i>	<i>54 lbs.</i>
<b><i>Exceed Threshold?</i></b>	<i>No</i>	<i>No</i>	<i>No</i>	<i>No</i>
Notes: <sup>1</sup> Assumes 365-day operation.				

**Page 76 Section 3.4.2, Impact Discussion; Checklist Question b); the text will be REVISED in the first paragraph as follows:**

The 0.34-acre man-made pond present on the project site is proposed to be filled by the project. The total acreage of the pond up to the top of bank is 0.60-acre. The man-made pond could be considered a state ~~or federally~~ protected wetland, and the San Francisco Bay RWQCB ~~or USACE~~ could impose additional requirements as part of Section ~~404/401~~ permits that goes beyond what the City as the Lead Agency would require as mitigation under CEQA (i.e., payment of Habitat Plan fees, see below) to off-set impacts from filling the pond under the State of California Porter-Cologne Water Quality Control Act (refer to the response to checklist question c). The U.S. Army Corps of Engineers determined that the pond was not a water of the U.S in a jurisdictional determination dated August 23, 2022 (SPN-2022-00077S).

**Pages 77-78 Section 3.4.2, Impact Discussion; Checklist Question c); the text will be REVISED in the fifth paragraph as follows:**

The 0.34-acre man-made pond present on the project site is proposed to be filled by the project. The depth of water in the pond at the end of the dry season suggests that it may intercept natural groundwater sources, and it may be considered waters of the ~~U.S./state~~. Any impacts on verified waters of the ~~U.S./state~~ on the project site would require a ~~Section 404 permit from the USACE~~ and/or Section 401 Water Quality Certification or Porter-Cologne Waste Discharge Requirements from the San Francisco RWQCB.

**Page 90 Section 3.5.2, Impact Discussion; Checklist Question b); the text in mitigation measure MM CUL-1.1 will be REVISED as follows:**

**Impact CUL-1:** Subsurface archaeological resources could be encountered during project construction.

**Mitigation Measures:** The project would implement the following mitigation measures to reduce impacts to buried archaeological resources.

**MM CUL-1.1:** Prior to issuance of any grading permits and prior to construction-related ground disturbance, a qualified archaeologist in coordination with a Native American Tribal Representative shall complete mechanical presence/absence exploration to explore for buried historical and Native American resources. Subsurface exploration shall be completed by an archaeologist trained in current California methods for prehistoric and historic archaeological resources. All crews and individuals who will be moving any earth shall be cultural sensitivity trained. Narrow, deep trenches shall be created to search for Native American use of this site, and shallower, wide trenches employed near the potentially sensitive historic areas.

The results of the presence/absence exploration shall be submitted to the Director of Planning, Building and Code Enforcement or the Director’s designee and the City’s Historic Preservation Officer for review and approval prior to issuance of any grading permit. Based on the findings of the presence/absence exploration, an archaeological resources treatment plan (as described in MM CUL-1.2) shall be prepared by a qualified archaeologist in consultation with the Native American Tribal representative, if necessary.

**Page 110 Section 3.7.1, Environmental Setting; the text will be ADDED in the second paragraph as follows:**

Shallow groundwater on the project site is likely present at depths of approximately 5 to 15 feet, varying seasonally. Groundwater flows toward the south or southwest.<sup>4</sup> Other flow directions have also been reported in the general vicinity.

**Page 133-134 Section 3.9.2, Impact Discussion; Checklist Question b); the mitigation measure MM HAZ-1.1 will be REVISED in the first paragraph as follows:**

**Impact HAZ-1:** Residual concentrations of hazardous chemicals and metals including organochlorine pesticides and pesticide-related metals (in the southern portion of the site) from prior agricultural use, USTs, and truck parking and storage at the site could expose construction workers, neighboring uses, and the environment to hazardous materials.

**Mitigation Measures:** The project applicant will implement the following mitigation measures during project construction to reduce impacts to construction workers, neighboring uses, and the environment related to soil and groundwater quality.

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<sup>4</sup> •State Water Resources Control Board. Accessed February 1, 2023.  
[https://geotracker.waterboards.ca.gov/view\\_documents?global\\_id=T0608502428&enforcement\\_id=6060101](https://geotracker.waterboards.ca.gov/view_documents?global_id=T0608502428&enforcement_id=6060101)  
State Water Resources Control Board. Accessed February 1, 2023.  
[https://geotracker.waterboards.ca.gov/view\\_documents?global\\_id=T0608501176&enforcement\\_id=6232757](https://geotracker.waterboards.ca.gov/view_documents?global_id=T0608501176&enforcement_id=6232757).

**MM HAZ-1.1:** Prior to the issuance of any demolition or grading permits (whichever occurs first), the project applicant shall enter into an agreement with the Santa Clara County Department of Environmental Health's (SCCDEH's) Site Cleanup Program to provide regulatory oversight. The applicant shall meet with the SCCDEH and perform additional soil and groundwater sampling and testing to adequately define the known and suspected contamination. A Corrective Action/Risk Management Plan (e.g., Remedial Action Work Plan and/or Soil Management Plan) shall be prepared and submitted to the agency for their approval to demonstrate that cleanup standards shall be met for the development of the site. The Corrective Action/Risk Management plan shall describe measures necessary to protect the health and safety of construction workers and future site occupants and establish appropriate management practices for handling and monitoring impacted soil, soil vapor and groundwater that potentially may be encountered during construction activities. The Correction Action/Risk Management Plan will also include measures to prevent the discharge of contaminants from dewatering. The dewatering system would be designed so that the volume and duration of dewatering are minimized to the greatest extent possible. All measures identified in the plan(s) shall be implemented during all phases of construction, as applicable. The Corrective Action/Risk Management Plan shall also describe protocols for profiling of soil planned for off-site disposal. The plan shall be prepared by an environmental professional and submitted to the SCCDEH.

**Page 134-135 Section 3.9.2, Impact Discussion; Checklist Question b); the mitigation will be REVISED in the first paragraph as follows:**

**Impact HAZ-2:** Project construction could expose construction workers to potential total petroleum hydrocarbons (TPHs) in the soil beneath the oil-water separator.

**MM HAZ-2.1:** Prior to the issuance of any grading permits, upon removal of the site's oil-water separator soil separator, soil underlying the separator shall be evaluated for the presence of TPH, volatile organic compounds (VOCs), and metals. The confirmation sampling shall be completed by an environmental professional following commonly accepted sampling protocols which shall be coordinated with SCCDEH and the City of San José Environmental Services Department. The sampling data shall be provided to SCCDEH, and approval shall be received prior to issuance of any grading permits. If elevated concentrations of these contaminants are discovered, the project applicant shall notify the Director of Planning, Building, and Code Enforcement or Director's Designee and the SCCDEH, prior to issuance of a grading permit, and prepare a remedial action plan in accordance with SCCDEH requirements. The sampling, preparation of the remedial action plan, and remediation shall be completed by an environmental professional, under the oversight of SCCDEH.

**Page 141      Section 3.10.1.1, Regulatory Framework; the text will be ADDED after the fourth paragraph as follows:**

Sustainable Groundwater Management Act

The historic passage of Sustainable Groundwater Management Act (SGMA) was enacted in 2014 and set forth a statewide framework to help protect groundwater resources over the long-term. SGMA requires local agencies to establish groundwater sustainability agencies (GSAs) for the high and medium priority basins. GSAs develop and implement groundwater sustainability plans (GSPs) to avoid undesirable results and mitigate overdraft within 20 years.

**Page 145      Section 3.10.1.2, Existing Conditions; the text will be ADDED in the fourth paragraph as follows:**

The project site is located in the Santa Clara Plain subbasin, which covers 280 square miles extending from the southern San Francisco Bay to the Coyote Narrows near Metcalf Road. Previous studies completed for the project determined that groundwater was likely to be present at depths of five to fifteen feet below the ground surface (bgs). Groundwater levels at the site may fluctuate with time due to seasonal conditions, rainfall, and irrigation practices.

No known history of land subsidence has been recorded at the site. From about 1915 to 1966, groundwater pumping in the Santa Clara Plain increased substantially due to growing agricultural use and population growth, resulting in a decline of groundwater levels by as much as 200 feet and long-term overdraft. Long-term dewatering practices have ceased in the Santa Clara Subbasin since the early 1970s.

**Page 147      Section 3.10.2.1, Project Impacts; the text will be ADDED to the second paragraph:**

Dewatering

Because shallow groundwater on the project site is likely present at depths of approximately 5 to 15 feet, and excavation could extend to 30 feet below grade, project development could require groundwater pumping and dewatering during construction. As discussed in Section 3.10.1.2, no long-term dewatering practices have occurred in the Santa Clara Subbasin since the early 1970s. In addition, only short-term dewatering is anticipated for construction activities. Therefore, the risk of ground subsidence due to on-site or project dewatering is considered low. Dewatering would be conducted in accordance with City's standard permit condition and impacts from dewatering would be less than significant.

**Page 148      Section 3.10.2.1, Project Impacts; the text will be REVISED in the fourth paragraph:**

Consistent with MRP and NPDES requirements, ~~the project proposes to install bioretention areas throughout the project site that would treat, retain, and release stormwater runoff generated by the proposed project prior to entering the storm drainage system~~ stormwater from the site would be directed to an existing detention basin adjacent to the Coyote Creek; it would then be treated at an

existing biotreatment cell, before being discharged into Coyote Creek. Details of specific site design, pollutant source control, and stormwater treatment control measures demonstrating compliance with the aforementioned policies shall be included in the project design as part of future Planned Development Permits for the build-out of the site to the satisfaction of the Director of Planning, Building and Code Enforcement. **(Less than Significant Impact)**

**Page 156 Section 3.11.2.1, Project Impacts; Checklist Question b); the text will be REVISED in the first paragraph as follows:**

The project proposes up to ~~8023~~ multi-family residential units within the Urban Residential designation, up to 24 single-family units and ~~243~~ townhouse units within the Mixed-Use Neighborhood designation, up to a 480,000 square foot commercial building within the Transit Employment Center designation, and a public park within the Open Space, Parkland, and Habitat designation.

**Page 168 Section 3.13.2.1 Project Impacts; Checklist Question a); the text will be REVISED in the first paragraph and mitigation measure MM NOI-1.1 as follows:**

Project construction is anticipated to begin in 2023 and last approximately 44 months. Pile driving would not be used as a foundation construction technique.<sup>65</sup> Based on the typical construction noise levels shown in Table 3.13-3, project construction is expected to generate noise levels ranging from ~~6572~~ to 88 Leq at a distance of 50 feet during construction of residential buildings and ~~7275~~ to 89 dBA L<sub>eq</sub> during construction of the commercial building. Construction noise levels will vary throughout construction depending on intensity of construction activity and primary location of construction work being performed. Noise levels will be higher when construction activity is located near shared property lines.

Project construction would include substantial noise generating activities occurring for a period of greater than 12 months and would be located within 500 feet of residential uses. Based on the General Plan Policy EC-1.7, this could result in a significant impact to noise-sensitive receptors. This impact would be reduced to less than significant with the implementation of mitigation measure MM NOI-1.1 below.

**Impact NOI-1:** Project construction would result in elevated noise levels of five dBA or more at nearby residences for a period exceeding 12 months.

**Mitigation Measures:** The project would implement the following mitigation measure to reduce impacts related to construction noise.

**MM NOI-1.1:** Prior to the issuance of any demolition or grading permits (whichever occurs first), an acoustic engineer shall prepare and implement a construction noise logistics plan, in accordance with General Plan Policy EC-1.7, prior to issuance of any demolition or grading permits. A typical construction noise logistics plan will include, but is not limited to, the following measures to reduce construction noise levels:

- Construction shall be limited to the hours of 7:00 AM to 7:00 PM Monday through Friday for any on-site or off-site work within 500 feet of any residential unit. Construction outside of these hours may be approved through a development permit based on a site-specific “construction noise mitigation plan” and a finding by the Director of Planning, Building, and Code Enforcement that the construction noise mitigation plan is adequate to prevent noise disturbance of affected residential uses.
- The contractor shall use “new technology” power construction equipment with state-of-the-art noise shielding and muffling devices. All internal combustion engines used on the project site shall be equipped with adequate mufflers and shall be in good mechanical condition to minimize noise created by faulty or poorly maintained engines or other components.
- The unnecessary idling of internal combustion engines shall be prohibited.
- Staging areas and stationary noise-generating equipment shall be located as far as possible from noise-sensitive receptors such as residential uses (a minimum of 200 feet).
- The surrounding neighborhood shall be notified early and frequently of the construction activities.
- A “noise disturbance coordinator” shall be designated to respond to any local complaints about construction noise. The disturbance coordinator would determine the cause of the noise complaints (e.g., beginning work too early, bad muffler, etc.) and institute reasonable measures warranted to correct the problem. A telephone number for the disturbance coordinator would be conspicuously posted at the construction site.
- Implementation of a construction noise logistics plan, which would include the following measures:
  - Utilize “quiet” models of air compressors and other stationary noise sources where technology exists.
  - Equip all internal combustion engine-driven equipment with mufflers, which are in good condition and appropriate for the equipment.
  - Construct temporary noise barriers, where feasible, to screen stationary noise-generating equipment when located within 200 feet of adjoining sensitive land uses. Temporary noise barrier fences would provide at least a 5 dBA noise reduction if the noise barrier interrupts the line-of-sight between the noise source and receptor and if the barrier is constructed in a manner that eliminates any cracks or gaps. A typical temporary construction noise barrier reaching 14 feet in height shall be installed along the northern and

western borders of the site to provide up to 14 dBA of noise reduction.

- If stationary noise-generating equipment must be located near receptors, adequate muffling of the equipment (with enclosures where feasible and appropriate) shall be used. Any enclosure openings or venting shall face away from sensitive receptors.
- Ensure that generators, compressors, and pumps are housed in acoustical enclosures.
- Locate cranes as far from adjoining noise-sensitive receptors as possible.
- During final grading, substitute graders for bulldozers, where feasible. Wheeled heavy equipment are quieter than track equipment and should be used where feasible.
- Substitute nail guns for manual hammering, where feasible.
- Substitute electrically powered tools for noisier pneumatic tools, where feasible.
- The contractor shall prepare a detailed construction plan identifying the schedule for major noise-generating construction activities. The construction plan shall identify a procedure for coordination with adjacent residential land uses so that construction activities can be scheduled to minimize noise disturbance.

With implementation of the mitigation measure MM NOI-1.1, compliance of GP Policy EC-1.7, and Municipal Code requirements, noise levels would be reduced by ~~5 to 10~~ up to 14 dBA, the project would not result in a substantial increase in temporary ambient noise levels at the at adjacent noise sensitive receptor locations in excess of City standards.

**Pages 171-172 Section 3.13.2.1 Project Impacts; Checklist Question a); the text will be ADDED in the last paragraph of page 171 and first paragraph of page 172 as follows:**

#### Traffic Noise

Traffic volumes were reviewed to calculate potential project-generated traffic noise level increases from roadways that would serve the project. Roadway traffic volumes with and without the project under 2030 and 2040 conditions with construction of either the Berryessa or Mabury Interchange Networks were compared to calculate the traffic noise increase attributable to the project during AM and PM peak hour conditions. For the purposes of this analysis, 2040 traffic volumes without project were compared to the 2040 conditions (with construction of either the Berryessa or Maybury Interchanges), which provides a conservative estimate (when compared to 2030 conditions). A three (3) dBA  $L_{eq}$  noise level increase (with the addition of project traffic) was estimated to occur along a segment of Oakland Road approximately 100 feet north of US Route 101 during the AM peak hour. However, the traffic volumes along Oakland Road are substantially lower than those along US Route 101 which serves as the primary noise source in the vicinity. Because of this, the three (3) dBA  $L_{eq}$  AM peak hour increase would not result in a three (3) dBA DNL increase at the nearest noise-sensitive use, an RV park (on Oakland Road) located approximately 900 feet to the north of US 101. The permanent increase in noise at the nearest receptors (residences) to the project site due to the addition of project traffic would be lower than three (3) dBA DNL. Therefore, the permanent

increase in project-generated traffic noise would not result in a significant impact due to a noise increase in excess of City standards.<sup>5</sup>

**Page 219 Section 3.17.2.1, Project Impacts, Checklist Question b); text in the first paragraph will be ADDED as follows:**

The proposed project would implement TDM measures in the BBUV Parking and TDM Plan which would result in an additional 30 percent VMT reduction per resident and per employee (the TDM Plan's measures the project will implement are provided in Section 3.3, Air Quality). Implementation of the BBUV Parking and TDM Plan would help the BBUV district meet its mode split and VMT reduction goals. The project would result in a VMT per resident and a VMT per employee below the established thresholds and would not result in an impact to the transportation system based on the City's VMT impact criteria.<sup>6</sup> **(Less than Significant Impact)**

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<sup>5</sup> The operational noise modeling assumed the project would develop up to 803 multi-family units and 47 townhouse/single-family units based on information provided by the applicant. The applicant is now proposing to replace one multi-family unit with a townhouse unit. Therefore, the project is now proposing 802 multi-family units and 48 townhouse/single-family units. This change would increase the number of trips by about 2.12 daily trips (as a multi-family unit was assumed to have an average of 7.32 daily trips and a townhouse unit was assumed to generate 9.44 trips). The increase in two daily trips would not result in a measurable increase in operational peak hour traffic noise. Therefore, the conclusions which state project-generated traffic noise would not result in a significant impact due to a noise increase in excess of City standards would be the same.

<sup>6</sup> The project's VMT per capita for residents and employees was calculated using the City's Transportation Demand Forecasting (TDF) model. This model assumes the same VMT per resident (8.39 VMT per capita) for all residential unit types. Therefore, the proposed change in unit type of one multi-family residence to a townhouse unit would not change the VMT per capita. The less than significant VMT impact would be the same. Personal Communications. Del Rio, Robert, Hexagon Transportation Consultants. Re: 1655 Berryessa Rd Project - Change in Housing Unit Type. February 3, 2023.

**Page 219 Section 3.173, Non-CEQA Effects, Trip Generation; the text in Table 3.17-3 will be ADDED as follows:**

<b>Table 3.17-1: Project Trip Generation Estimates</b>						
	<b>AM Peak Hour</b>			<b>PM Peak Hour</b>		
	<b>In</b>	<b>Out</b>	<b>Total</b>	<b>In</b>	<b>Out</b>	<b>Total</b>
Proposed Mixed-Use Project	596	422	1,018	626	757	1,383
Note: AM and PM peak hour trips were based on the City of San José travel demand forecasting model runs completed in May 2021 by Hexagon Transportation Consultants. <u>The model assumes peak hour trip generation rates is the same for all residential unit types. Employee trip generation rates were also included in the modeling.</u>						

**Page 250 Section 3.19.2.1, Project Impacts; Checklist Question b); the text will be ADDED in the second paragraph as follows:**

Based on the WSA completed for the project, the SJWC determined that the projected increase in water demand would be consistent with the growth projections and future water demand assumed in the Valley Water’s 2020 UWMP. The project would include water conservation and demand management measures such as water efficient landscaping and would connect to the recycled water line in Berryessa Road for irrigation, which would reduce the project’s potable water demand. In addition, each single-family residence would have its own water meter and commercial spaces would have separate submeters to encourage efficient water use. Each multi-family residential building would have a single water meter that would regulate water use. The 2020 UWMP concluded that sufficient water supplies are available to meet the project’s demand during normal, dry, and multiple dry years. Based on the project’s WSA, SJWC determined the project’s water demand is within normal growth projections and sufficient water available to serve the project. **(Less than Significant Impact)**

**Page 262 Section 7.4.1.2, On-site Man-Made Pond Retention Alternative; the text will be REVISED in the second paragraph as follows:**

The project proposes to fill the on-site man-made pond which is considered sensitive habitat and could be considered waters of the state/U.S. The project requires compliance with the Habitat Plan’s conditions to pay Habitat Plan fees which would contribute to the creation and restoration of wetland, pond, and riparian habitats elsewhere within the Habitat Plan area, but off-site. The On-site Man-Made Pond Retention Alternative would retain the existing pond on-site. To retain the existing man-made pond, the multi-family development on Parcels F and G would either need to be setback 40 feet to the south (which could remove the internal drive aisle connection from De Rome Drive to Lane B) or reduce the number of units at the western portion of Parcel F (refer to Figure 7.4-1). The pond would partially block Lanes A and B. Setting back the multi-family building by 40 feet was not considered in this alternative, given that blocking access on De Rome Drive could have significant

effect on emergency vehicle access. ~~The pond could not be retained as a feature of the proposed park given it would be located approximately 50 feet south of the park (across Mercado Way). If the proposed park was redesigned to be located 50 feet south of its currently proposed location, this would block access via Mercado Way. The 0.34-acre pond would occupy a significant portion of the 0.9-acre park, leaving the park practically unusable as the pond itself does not provide any recreational value, and reduce the usable area of the park. The retention of the pond would eliminate streets, three townhome buildings, and reduce the footprint of two multi-family buildings, resulting in a net loss of approximately 30 percent of the proposed units.~~ Therefore, discussion of an on-site man-made pond retention design alternative ~~for~~ to the proposed project is not required or useful and this alternative is rejected from further consideration.

**Page 264**      **Section 7.4.2.2, No Project – Existing Plans and Policies Alternative; Comparison of Environmental Impacts for the No Project - Existing Plans and Policies Alternative; the text will be REVISED in the fourth paragraph as follows:**

The project would consist of ~~8023~~ multi-family residential units under the Urban Residential designation, which would equate to approximately 200 units per acre (given four acres of the site is designated for Urban Residential uses). The Existing Plans and Policies Alternative would allow up to 250 units per acre resulting in approximately 1,000 multi-family units. This alternative would also allow up to approximately 60 units of townhouses and/or single-family houses (within the Mixed-Use Neighborhood designation), compared to the proposed project, which proposes 24 single family units and ~~243~~ townhouse units.

**Page 265**      **Section 7.4.2.3, Reduced Parking Alternative; the text will be REVISED in the fifth paragraph as follows:**

The project proposes to develop up to 850 residential units (including ~~8023~~ multi-family units, ~~243~~ townhouse units, and 24 single-family units) and 480,000 square feet of commercial space.

**Page 273**      **Section 8.0, References; the text will be REVISED as follows:**

Valley Water. ~~2016~~ 2021 Groundwater Management Plan. Accessed February 3, 2023, September 11, 2021 <https://www.valleywater.org/your-water/where-your-water-comes/groundwater-sustainable-groundwater-management-santa-clara-valley-water>.