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VIA E-MAIL AND FEDERAL EXPRESS

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Re: *City Place Santa Clara Project*
Environmental Impact Report SCH No. 2014072078
Planning/CEQA File No. PLN2014-10554/CEQ2013-01180

Dear Ms. Fernandez:

We have been retained by the City of San José in the above-referenced matter. San José appreciates the opportunity to comment on the Final Environmental Impact Report (“Final EIR”) for the proposed City Place Santa Clara Project (“Project”). San José has reviewed the Project from the outset, and has submitted comments on the Draft Environmental Impact Report released in 2015 (“Draft EIR”), as well as on the previous environmental documents prepared for the Project.¹

¹ See Comment Letters A17a and A17b from Harry Freitas, Director, Department of Planning, Building & Code Enforcement, dated November 23, 2015, and incorporated in

City of Santa Clara
April 29, 2016
Page 2

San José is gravely concerned about the Project's numerous and far-reaching significant, unavoidable environmental effects on a site currently planned for recreational use through 2035. The growth that would result from the Project is not envisioned in the City's recently adopted General Plan, or in *Plan Bay Area*, the Bay Area's Sustainable Communities Strategy ("SCS") under SB 375, adopted in 2013. Instead of a golf course, the City now proposes to approve a massive commercial center that will flood the area with traffic, clogging roadways and intersections surrounding the Project site, including North San José.

There is nothing remotely sustainable or green about the Project as proposed, which would add more than 140,000 daily vehicle trips to a transportation network that is already bursting at the seams, and would dump thousands of additional vehicles into the City of San José without proposing feasible mitigation measures. By adding almost 20 times more jobs than housing units, the Project would conflict with numerous General Plan policies designed to reduce the City's existing jobs/housing imbalance. By focusing on commercial and retail uses over housing, the Project would also conflict with the balanced growth objectives of *Plan Bay Area*, and its mandate to reduce greenhouse gas emissions from vehicle use. The environmental consequences of this unplanned growth are severe. The Final EIR identifies 28 significant unavoidable impacts, ten of which are cumulative, including impacts to traffic, air quality, greenhouse gas emissions, and noise. The Final EIR also recognizes that, due to the unplanned nature of the development, the Project's induced housing demand would have to be borne by other jurisdictions in the region, including the City of San José. In short, while the Project would bring more than \$80 million in annual revenue to the City of Santa Clara, its impacts would be borne by the residents of neighboring San José. The City's consideration of a Project that in one fell swoop would bring tens of thousands of people and cars to a site planned for recreational use turns responsible planning on its head.

To address the Project's General Plan inconsistency, the City proposes to amend the General Plan to add a new land use designation designed to accommodate the Project. This amendment does nothing to cure the Project's inconsistency with General Plan policies balancing jobs and housing or the resulting severe secondary environmental effects. Equally problematic, the limited scope of the amendment creates internal inconsistencies, resulting in a legally inadequate General Plan.

The City of San José opposes any action on the Project until these issues are resolved, and requests that the City delay further consideration of this Project until it cures the Project's General Plan inconsistencies, and a legally adequate EIR is prepared

full by this reference. See also Comment Letter A1 from the Norman Y. Mineta San José International Airport, dated October 27, 2015.

City of Santa Clara
April 29, 2016
Page 3

in compliance with CEQA. As currently designed and drafted, the Project and the EIR suffer from the following legal flaws:

- The Project is fundamentally inconsistent with General Plan policies designed to promote a jobs/housing balance.
- The General Plan Amendment proposed for the Project renders the General Plan internally inconsistent.
- The Final EIR fails to identify feasible mitigation measures to reduce significant land use impacts, and associated significant secondary impacts.
- The Final EIR's evaluation of Project area intersections is under-inclusive and fails to evaluate significant traffic impacts in the City of San José.
- The fee-based transportation mitigation measures in the Final EIR are not based on an actual plan of mitigation that will be implemented, nor do they accurately estimate total costs or Project fair share costs for mitigation measures within San José.
- The Project air quality analysis fails to explain how air pollutants emitted by the Project, which greatly exceed Bay Area Air Quality Management District ("BAAQMD") thresholds, would impact public health.
- The Final EIR fails to incorporate feasible mitigation measures to reduce the Project's significant air quality impacts, and improperly rejects a measure requiring the Project sponsor to purchase emissions offsets.
- The analysis of greenhouse gas emissions fails to analyze the impacts of sea level rise on the Project's future users and residents.
- The Final EIR's consideration of the Santa Clara Valley Habitat Conservation Plan/Natural Community Conservation Plan is legally inadequate and fails to acknowledge the Project's location in the Plan's extended study area.
- The biological resources analysis understates impacts to burrowing owl and fails to adequately analyze the effects of Project nitrogen deposition on grassland habitat.

City of Santa Clara
April 29, 2016
Page 4

- The Final EIR fails to consider a reasonable range of alternatives, omitting alternatives that would reduce the Project's significant effects while meeting its basic objectives.
- The Final EIR's project description fails to include the whole of the action, resulting in an understatement of Project impacts.

I. THE PROJECT IS INCONSISTENT WITH THE CITY OF SANTA CLARA'S GENERAL PLAN

The majority of the Project site is designated in the 2010-2035 General Plan as Parks/Open Space and assumed to operate as a golf course through 2035. (Draft EIR at 3.1-2.) The 9.16 million square feet of new development proposed by the Project, equal to almost 160 football fields of development, and the 25,270 new employees that would result, is not part of any planned development identified in the City's General Plan. As acknowledged in the Final EIR, the Project would be inconsistent with goals and policies in the City's General Plan that promote a jobs/housing balance and "would exacerbate the city's job/housing imbalance significantly" by proposing development that would create 24,760 net new jobs but at most 1,360 residential units (Scheme A proposes to house 3,270 residents). (See Draft EIR at 3.1-20; Table 3.12-6.) This exacerbated imbalance would lead to other General Plan inconsistencies, including inconsistency with Housing Element policies, policies on reducing VMT and traffic congestion, as well as policies promoting local and regional air quality and reduced GHG emissions.

The Project proposes a new General Plan land use designation – "Urban Center/Entertainment District" – intended for local and regional scale destinations that feature a mixture of uses, including commercial retail and services, urban residential, hotel, and employment generating uses. (Draft EIR at 2-3.4.) The City also proposes to amend the Climate Action Plan element of the General Plan to reflect the new land use designation. (Draft EIR at 2-34.) Unfortunately, the City stops far short of its legal mandate to maintain an internally consistent General Plan.

A. General Plan Consistency Requirements

The California Supreme Court has held that the General Plan is the "constitution for all future development." (*Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540; see also *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570-71; *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 815 [General Plan provides "a charter for future development" and sets forth "a city or county's fundamental policy decisions about such development."].) Development projects can only be approved when they are consistent with the General

City of Santa Clara
April 29, 2016
Page 5

Plan (“vertical consistency”). (See *Friends of Lagoon Valley*, 154 Cal.App.4th at 815; *Citizens of Goleta Valley*, 52 Cal.3d at 570.)

The General Plan also must be internally consistent. (Gov. Code § 65300.5.) If not, the General Plan is legally inadequate and the required finding of consistency for land use approvals cannot be made. (*Garat v. City of Riverside* (1991) 2 Cal.App.4th 259, 286 [overruled on other grounds in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743 n.11].)

B. The Project is Inconsistent with the General Plan

As proposed, the Project is inconsistent with numerous General Plan policies designed to improve the jobs/housing balance. Santa Clara’s charter city status does not exempt it from the Government Code’s vertical consistency requirements. (See, e.g., Gov. Code §§ 66473.5; 66474(a); 65867.5.)

1. The Project Would Negatively Impact the City’s Existing Jobs/Housing Imbalance Resulting in Fundamental General Plan Policy Inconsistencies

The City of Santa Clara has an existing and substantial jobs/housing imbalance. As of 2008 (existing conditions at the time the City’s General Plan was prepared), Santa Clara had 106,680 jobs and only 44,166 housing units, a jobs/housing ratio of 2.42. (General Plan Table 5.2-1, Ch. 5, p. 6). With construction of the Project, the jobs/housing ratio would increase to 2.73 by 2035, significantly worse than the predicted ratio without the Project. (Draft EIR, Table 3.1-3, at 3.1-11.) Per Association of Bay Area Government’s (“ABAG”) forecasts, the ratio with the Project would be even worse – 3.15 in 2030 and 3.04 in 2040.²

According to the City’s General Plan Housing Element, “[a]t a regional scale, a jobs-housing imbalance results in longer commutes and increases traffic congestion and transportation-related environmental impacts.” (General Plan, p. 8.12-25.) This is particularly true in the Bay Area, a region that has experienced robust job growth without

² Draft EIR Table 3.1-6 at 3.1-13 (Source: ABAG, Projections 2013, <http://www.abag.ca.gov/planning/housing/projections13.html>). ABAG’s 2000-2025 growth projections for Santa Clara County show the City of Santa Clara with a 2025 jobs/housing ratio of 3.35. San José’s ratio is projected to be 1.61. (See http://www.abag.ca.gov/planning/interregional/pdf/projections/IRP_Projections-Santa_Clara_County.pdf, attached as Exhibit A).

City of Santa Clara
April 29, 2016
Page 6

commensurate growth in housing units.³ The City's Housing Element acknowledges that "[l]ocal jurisdictions can help address this issue by attempting to strike a local balance between local jobs and housing." Consistent with this statement, the General Plan includes critical policies, set forth below, designed to improve the City's jobs/housing imbalance.

Jobs in Santa Clara are projected to increase by 29 percent between 2010 and 2040. (General Plan Housing Element, Table 8.12-3-8, p. 8.12-26.) "These employment projections suggest a need for housing to serve a growing and diverse workforce." (General Plan Housing Element, p. 8.12-26.) Contrary to the comprehensive planning process undertaken by the City to prepare the 2010-2035 General Plan, however, the unplanned Project proposes development that would create almost 25,000 jobs, but a maximum of only 1,360 housing units. This would negatively impact the City's jobs/housing balance, and would obstruct the attainment of General Plan goals and policies intended to improve it, in violation of the Government Code's General Plan consistency requirements. (See Gov. Code §§ 66473.5; 66474(a); 65867.5.)

The Project as proposed would conflict with the following fundamental General Plan goals and policies (emphases added):

- **Goal 5.3.1-G3:** Development that *minimizes vehicle miles traveled*, capitalizes on public investment in transit and infrastructure, and is compatible with surrounding uses.
- **Policy 5.3.1-P18:** Meter net new industrial and commercial development excluding "Approved/Not Constructed and Pending Project" identified on Figure 2.1-1 *so as not to exceed 2.75 million square feet in Phase I, 5.5 million square feet in Phase II and 5.5 million square feet in Phase III in order to maintain the City's jobs/housing balance* and ensure adequate infrastructure and public services.
- **Policy 5.3.1-P29:** Encourage design of new development to be compatible with, and sensitive to, nearby existing and planning development, consistent with other applicable General Plan policies.

INCONSISTENT: The Project would increase VMT by creating jobs without providing local housing for workers, an approach that leads to longer commutes, traffic

³ See, e.g., "Job growth, housing affordability, and commuting in the Bay Area," A report prepared for the Bay Area Regional Prosperity Plan Housing Working Group (May 29, 2015) available at: http://planbayarea.org/pdf/prosperity/research/Jobs-Housing_Report.pdf, attached as Exhibit B.

City of Santa Clara
April 29, 2016
Page 7

congestion and increases in air quality pollution and GHG emissions. The Project would result in over nine million square feet of unplanned development, almost twice the development allowed in either General Plan Phase II or Phase III, which conflicts with the policy's fundamental purpose of imposing commercial caps to maintain the jobs/housing balance. The new and unplanned development contemplated by the Project would create traffic congestion and attendant air quality and GHG impacts on surrounding communities, incompatible with existing development and in conflict with applicable General Plan policies.

- **Goal 5.3.2-G4:** Respect for the *existing character and quality of adjacent neighborhoods from new residential development* and redevelopment.
- **Policy 5.3.3-G4:** New commercial uses that *respect surrounding neighborhoods and are sited to reduce potential land use conflicts*.

INCONSISTENT: The vehicle trips and congestion that would result from the unplanned Project development, in addition to criteria air pollutant emissions, TACs and GHG emissions, would negatively impact the existing character and quality of adjacent neighborhoods.

- **Goal 5.3.5-G3:** Higher-intensity employment centers located near major transit services and major transportation corridors *to reduce vehicle miles traveled*.
- **Goal 5.8.1-G3:** Transportation networks that promote a *reduction in the use of personal vehicles and vehicle miles traveled*.
- **Policy 5.8.1-P4:** Expand transportation options and improve alternate modes that *reduce greenhouse gas emissions*.
- **Policy 5.8.1-P5:** Work with local, regional, State and private agencies, as well as employers and residents, to encourage programs and services that *reduce vehicle miles traveled*.

INCONSISTENT: Because Project jobs far exceed Project housing, commute lengths to new Project jobs would increase use of personal vehicles and resulting VMT, resulting in traffic, air quality and GHG impacts. The Project would result in more than 140,000 daily vehicle trips, and only 8,320 daily transit riders. (Draft EIR at 3.3-62.)

- **Goal 5.8.3-G2:** A transit network that supports a *reduction in automobile dependence* for residents, employees and visitors.
- **Policy 5.8.3-P9:** Require new development to incorporate *reduced on-site parking* and provide enhanced amenities, such as pedestrian links, benches and lighting, in order to encourage transit use and increase access to transit services.

City of Santa Clara
April 29, 2016
Page 8

INCONSISTENT: As discussed above, the Project would result in VMT increases. The Project proposes parking to meet the needs of all Project employees, residents and visitors, as well as providing opportunities for supplemental parking for stadium events, thereby promoting the use of single-occupancy vehicles.

- **Goal 5.8.5-G1**: Transportation demand management programs for all new development in order to *decrease vehicle miles traveled* and single occupant vehicle use.
- **Policy 5.8.5-P5**: Encourage transportation demand management programs that provide incentives for the use of alternative travel modes *to reduce the use of single-occupant vehicles*.

INCONSISTENT: Although the Project proposes to include a TDM program, many of the measures are not enforceable, and the program would not mitigate the Project's traffic impacts, including increases in VMT, resulting from the jobs/housing imbalance. The Project would increase the use of single-occupant vehicles.

- **Policy 5.10.1-P4**: *Protect all healthy cedars, redwoods, oaks, olives, bay laurel and pepper trees of any size, and all other trees over 36 inches in circumference measured from 48 inches above-grade on private and public property as well as in the public right-of-way.*

INCONSISTENT: The Project proposes to remove almost 2,000 trees, many of which are protected, in direct conflict with this policy. Measures requiring the developer to plant other trees do not rectify the inconsistency.

- **Goal 5.10.2-G1**: *Improved air quality* in Santa Clara and the region.
- **Goal 5.10.2-G2**: *Reduced greenhouse gas emissions* that meet the State and regional goals and requirements to combat climate change.
- **Policy 5.10.2-P2**: Encourage development patterns that *reduce vehicle miles traveled and air pollution*.

INCONSISTENT: The Project would significantly increase VMT due to the need to commute to new Project jobs and would result in significant unavoidable air quality and GHG impacts.

- **Policy 5.10.2-P5**: *Promote regional air pollution prevention plans* for local industry and businesses.

INCONSISTENT: The Project as proposed would significantly worsen local and regional air quality.

City of Santa Clara
April 29, 2016
Page 9

2. The Project is Fundamentally Inconsistent with the City's Housing Element and Violates the Regional Welfare Doctrine

The Final EIR acknowledges the Project's inconsistency with Housing Element Policy B-5, which mandates that the City mitigate the jobs/housing ratio impacts created by new development. The Project falls woefully short of this policy mandate by proposing to create almost *20 times more jobs* than housing units. Notably, only 13.5 percent of the total housing demand generated by the Project could occur within the City under its current General Plan. (Draft EIR at 3.12-11.) The impacts of the Project's induced housing demand on San José would be untenable, particularly given San José's projected jobs/employed resident ratio of 0.8-0.9.⁴ Moreover, the City's approval of a project that shifts the burden of providing new housing onto other cities runs afoul of the regional welfare doctrine, which requires municipalities to evaluate more than their local self-interest in enacting land use regulations. (See, e.g., *Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 607 ["if, as alleged here, the ordinance may strongly influence the supply and distribution of housing for an entire metropolitan region, judicial inquiry must consider the welfare of that region."]; *Arnel Development Co. v. City of Costa Mesa* (1981) 126 Cal. App. 330, 338-340.) As proposed, the Project provides great financial benefits to Santa Clara, to the environmental detriment of neighboring jurisdictions.

The growth is also not anticipated in the City's Regional Housing Needs Allocation ("RHNA") for the current eight-year period ending in 2022.⁵ Based on information provided by the City of Santa Clara, ABAG identified 4,093 units as the City's fair share of the regional housing need for the 2014 to 2022 period. (Draft EIR at 3.12-2; General Plan Housing Element, Table 8.12-6-2.) However, this allocation did not take into account the job growth associated with the Project, its negative impact on the jobs/housing balance, or the fact that Project job growth will take place in non-PDA locations.⁶

⁴ Envision San José 2040 General Plan, Chapter 1, at 61-62.

⁵ The RHNA was prepared by ABAG as part of Plan Bay Area, available at: http://files.mtc.ca.gov/pdf/Plan_Bay_Area_FINAL/Plan_Bay_Area.pdf.

⁶ The EIR claims that Project Parcel 5 and the southern edge of Parcel 4 are within a PDA (Draft EIR at 3.1-5), but that information conflicts with documentation from both ABAG and VTA, which list El Camino Real Focus Area and Santa Clara Station Focus Area as the only City of Santa Clara PDAs, neither of which includes a portion of the Project Site. See Priority Development Areas, available at: <http://abag.ca.gov/priority/index.html#pda> (via GIS) or <http://www.abag.ca.gov/abag/events/agendas/e091715a-Item%2008,%20Attachment%201%20List%20PDAs%202015.pdf>, attached as Exhibit

City of Santa Clara
April 29, 2016
Page 10

C. The General Plan Amendment Proposed for the Project Does not Cure the Project's General Plan Inconsistencies and Results in Major Internal Inconsistencies

Santa Clara's proposal to approve an unplanned 9.16 million gross square foot project flies in the face of responsible local and regional planning. At minimum, the City must consider a comprehensive amendment to the General Plan that proposes additional residential development to offset the Project's job growth. The City's proposal to add a new mixed-use land use designation to accommodate the Project in an area currently planned for open space does not accomplish this goal, and falls far short of the City's legal mandate to ensure internal consistency. (Gov. Code § 65300.5; see also *Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 Cal.App.3d 90 [land use element containing proposals expected to result in increased population was inconsistent with circulation element that failed to provide remedies for predicted traffic congestion].)

D. The Project's General Plan Inconsistencies Would Lead to Significant Local and Regional Impacts

As discussed in detail in the remainder of this letter, the Project's General Plan inconsistencies, including the increase in the City's jobs/housing imbalance, would lead to many significant local and regional impacts, including huge increases in VMT and traffic congestion and associated increases in emissions of criteria pollutants and TACs, as well as GHG. The EIR identifies 28 significant unavoidable impacts, ten of which are cumulative. (Draft EIR at 5-2 - 5-4.) Additional feasible mitigation measures or alternatives must be implemented to reduce or avoid these significant effects.

E. The Final EIR Fails to Identify Feasible Mitigation Measures to Reduce the Project's Significant Land Use Impacts

In response to the numerous General Plan inconsistencies created by the Project (which lead to numerous significant secondary environmental effects), the Final EIR proposes Mitigation Measure LU-1.1. This measure requires the City to *explore* permitting higher residential densities in the City, as well as allowing residential land uses in non-residential areas, during the next General Plan Update cycle. (Draft EIR at

C; Priority Development Areas in Santa Clara County, available at: <http://www.vta.org/sfc/servlet.shepherd/version/download/068A0000001FbMu>, attached as Exhibit D. Similarly, San Jose's County PDA map includes only two Santa Clara PDAs. (Priority Development Areas in Santa Clara County, available at: <http://www.sanjoseca.gov/DocumentCenter/View/735>, attached as Exhibit E.)

City of Santa Clara
April 29, 2016
Page 11

3.1-15, emphasis added.) It further requires the City to explore permitting up to 11,000 units. (Final EIR at 3-4.) This measure is impermissibly deferred. (CEQA Guidelines § 15126.4(a)(1)(B).) The Final EIR concedes as much, concluding that the impact would remain significant and unavoidable because “it cannot be stated with certainty whether and when the mitigation measure can be implemented.” (Draft EIR at 3.1-15.)

A fundamental purpose of an EIR is to identify ways in which a proposed project’s significant environmental impacts can be mitigated or avoided. (Pub. Resources Code §§ 21002.1(a), 21061.) To implement this statutory purpose, an EIR must describe feasible mitigation measures that can minimize the project’s significant environmental effects. (CEQA Guidelines §§ 15121(a), 15126.4(a).) Rather than impermissibly deferring consideration of the Project’s severe secondary impacts to the next General Plan update cycle in 2035, which is years away, the City should consider approving a General Plan amendment as part of the Project. This amendment should incorporate the recommendations set forth in MM LU-1.1 regarding increased residential uses in the City, and require consideration of such uses concurrently with the Project.

As a starting point for such a General Plan amendment, the Final EIR identifies several locations in the city that *could be* developed for residential uses in the future, and that *could* accommodate approximately 9,576 additional residential units that were not programmed in the General Plan or considered in the General Plan EIR.⁷ (Final EIR at 3-3, 5-21.) As noted above, only 13.5 percent of the total housing demand generated by the Project could occur within the City under its current General Plan, and these additional units would help to offset the Project’s induced demand of 15,408 units which would otherwise have to be distributed throughout the region.⁸ (Draft EIR at 3.12-11.) Inclusion of a General Plan amendment identifying additional residential uses Citywide would not only reduce the Project’s significant land use impacts, it would also reduce other significant unavoidable impacts resulting from the increased jobs/housing imbalance, including cumulative traffic, air quality, GHG, noise and population and housing impacts, as well as the Project’s effect on induced growth in the region and beyond. (Draft EIR at 4-6.) The City should amend its General Plan now to facilitate development of these (and other) residential units and mitigate the Project’s significant effects.

⁷ The Draft EIR identified 6,640 units that could be developed in the future to offset the Project’s housing impact. The Final EIR identifies 9,576 units, but many of the projects it relies upon for this figure are speculative, at best. (Master Response 1, Final EIR at 3-3.)

⁸ The Final EIR’s discussion of growth inducing impacts states that the Project would create a demand for roughly 17,873 units outside the City. (Draft EIR at 4-6.) The reason for this discrepancy is not readily apparent in the document.

City of Santa Clara
April 29, 2016
Page 12

F. The Final EIR Does Not Remedy the Deficiencies of the Draft EIR's Land Use Analysis or Adequately Respond to Land Use-Related Comments

Mitigation Measure LU-1.1 does not meet CEQA's requirements for mitigation measures and the Final EIR does not remedy that deficiency, despite comment letters from San José and other Draft EIR commenters which informed the City that the mitigation measure, as drafted, was inadequate. (See, e.g., Comment Letter A17a, p. 2.) In response to these comments, the Final EIR restates the Draft EIR's conclusion that implementation of the measure is uncertain, and adds a requirement that the City "explore permitting up to 11,000 units." (Final EIR Master Response 1 at 3-4.) Contrary to the Final EIR's claims, this revision does nothing to remedy the legal inadequacy of Mitigation Measure LU-1.1. San José continues to urge the City to incorporate the requirements of LU-1.1 into a General Plan amendment to be considered as part of the Project.

II. THE FINAL EIR'S ANALYSIS OF TRAFFIC IMPACTS IS LEGALLY INADEQUATE

The Project would add more than 140,000 daily vehicle trips to already congested area roadways and intersections. The Final EIR inadequately addresses the Project's transportation impacts on the City of San José, which shares a border with the Project site, and fails to propose measures to avoid or minimize the Project's significant effects. To the extent that the Final EIR's air quality, noise and climate change impact analyses rely on the inadequate traffic analysis, they too, are inadequate.

A. The Final EIR's Evaluation of Project Area Intersections is Under-Inclusive and Results in the Failure to Evaluate Significant Traffic Impacts

Based on the Valley Transportation Authority ("VTA") Transportation Impact Analysis Guidelines (10 peak hour vehicles per lane) and the data included in the Final EIR appendices, the Final EIR should have evaluated impacts on 12 additional intersections. These intersections include:

- North First Street and Old Bayshore Highway
- East Brokaw Road and I-880 Southbound Ramps
- North First Street and Component Drive
- West Trimble Road and Orchard Parkway

City of Santa Clara
April 29, 2016
Page 13

- North First Street and Plumeria Drive
- Zanker Road and Plumeria Drive
- North First Street and River Oaks Parkway
- Zanker Road and River Oaks Parkway
- North First Street and Rio Robles
- East Trimble Road and Junction Avenue
- Old Bayshore Highway and I-880 Southbound Ramps
- Airport Parkway and Old Bayshore Parkway

City of San José analyses indicate that impacts at the intersection of North First Street and Old Bayshore Parkway would be significant under existing conditions with the Project, and therefore require additional fair share mitigation.⁹ This is a new significant impact that was not analyzed in the Draft EIR and would require that the document be recirculated unless the impact is mitigated.

B. The Transportation Mitigation Measures Lack Sufficient Information to Demonstrate That They Would be Financially Feasible and Effective

Fee-based mitigation measures must be based on “an actual plan of mitigation” that will be implemented. (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App. 4th 1173, 1187.) The Final EIR does not present an actual plan of mitigation showing the accurate cost of each transportation mitigation measure and the proposed “fair share” dollar amounts to be paid by the Project applicant for each mitigation measure. The roadway project cost information included in Final EIR Table D-1 is incomplete, and sources of the estimates are not provided. (Draft EIR Appendix 3.3D.)

By calculating the Project’s fair share as the Project’s percent contribution to *total* traffic at a given facility for many mitigation measures (see, e.g., Draft EIR Table 3.3-20), the Final EIR incorrectly assumes that both existing and future roadway users are financially responsible for Project mitigation measures. Only new roadway users contribute to the cost of mitigation measures. The Final EIR’s fair-share discussion and calculations should be based on the Project’s percent contribution to *added* traffic.

⁹ The impact is significant based on the Final EIR significance criteria for San José intersections. Unacceptable operations (LOS F) at this intersection would be exacerbated because critical delay would increase by more than 4 seconds and the V/C ratio would increase by more than 0.01.

City of Santa Clara
April 29, 2016
Page 14

The Final EIR refers to the Valley Transportation Plan (“VTP”) 2040, published in October 2014, for cost estimates for large-scale mitigation measures that were also included on the VTP project lists. On October 1, 2015, the VTA Board of Directors approved the Envision Silicon Valley Preliminary Project Lists and updated the cost estimates to 2017.¹⁰ The Final EIR’s cost estimates for improvements included in these Project Lists should be updated to reflect 2017 estimates.

C. The Final EIR Does Not Present Accurate Estimates of Total Costs and Project Fair Share Costs for City of San José Transportation Mitigation Measures

The Final EIR fails to clearly present Project applicant responsibilities for City of San José transportation mitigation measures. In particular, it does not present accurate estimates of total costs and Project fair share costs for transportation mitigation measures within San José’s boundaries.

For mitigation measures included in the North San José area, an accurate fair share for the Project would be the ratio of Project trips to all new trips, which would include both the Project and other future developments. Although the Final EIR acknowledges that the fair share for North San José area mitigation measures would be based on the Project’s percent contribution to added traffic, this intent is not clearly demonstrated in the Final EIR’s mitigation measure tables or text. (Draft EIR at 3.3-92.) The Final EIR’s reliance on North San José traffic impact fees as mitigation for the Project’s North San José impacts is misplaced. The North José Traffic Impact Fee Plan did not include Project traffic because the Project was not included in the Santa Clara General Plan. It is not intended to provide mitigation measures for the Project.

The Final EIR should present accurate estimates of the Project’s financial obligations for mitigation measures within San José boundaries, along with commitments that these obligations will be met. Based on the updated 2017 cost estimates for VTP projects as well as the more accurate fair-share calculations discussed above, San José estimates that the Project would be responsible for \$45.3 million to either fully construct or pay its fair share for improvements on local streets and County expressways at approximately 14 locations.¹¹ This figure includes additional fair share mitigation for the

¹⁰ http://vtaorgcontent.s3-us-west-1.amazonaws.com/Site_Content/bod_100115_agendapacket.pdf, Agenda Item 6.10, attached as Exhibit F.

¹¹ The \$45.3 million is a preliminary figure that does not account for administrative costs or construction index changes. It also does not account for fair-share contribution toward the Project’s cumulatively considerable contributions to cumulative impacts, since the

City of Santa Clara
April 29, 2016
Page 15

significant impact at North First Street and Old Bayshore Parkway that was omitted from the Final EIR.

The City of Santa Clara has conditioned past projects with San José transportation impacts so that fair share contributions could be used only for construction costs for San José roadway improvements within five years of project approval. To more effectively mitigate impacts, the Final EIR should specify that Project fair share contributions for San José improvements can also cover the costs of preliminary engineering and design, as well as construction extending beyond five years after Project approval.

D. The Phasing and Funding of Transportation Mitigation Measures Should be Described in Detail

The Final EIR includes separate traffic impact and mitigation analyses for the Project as a whole and for Phases 1, 2, and 3, but does not discuss how implementation of transportation mitigation measures would be integrated with Project phasing, i.e., which traffic mitigation measures would be required to be implemented at certain points during construction of the Project.

More broadly, the Final EIR's discussion of Project phasing lacks sufficient detail to determine what specific improvements would be required for each phase of Project construction. (See Draft EIR Table 2-11, at 2-31, acknowledging that the identified phasing is hypothetical.) Without accurate information about phasing, particularly given the magnitude of the Project, it is impossible to determine whether the impacts of the Project have been adequately analyzed and would be adequately mitigated. San Jose requests that the project description be revised to include a detailed phasing schedule, and that the EIR, including the traffic analysis, be revised to identify which improvements will occur coterminous with each phase of Project development.

E. The Transportation Impact Analysis Methodology is Flawed

The background conditions in the Final EIR assume a North San José roadway network that includes future improvements that are not included as North San José Phase I improvements. The background conditions, therefore, are not based on substantial

Final EIR does not provide sufficient information to make that determination. San José estimates that the Project's fair share contribution could increase total Project responsibility for traffic improvements by approximately \$10 million. San José can provide a detailed spreadsheet supporting this cost estimate upon request. (See Exhibit H to this comment letter for additional details on Project fair share.)

City of Santa Clara
April 29, 2016
Page 16

evidence and likely underestimate intersection impacts, for example, at the Montague/Trimble Flyover and Montague/McCarthy-O'Toole Square Loop Interchange.

Cumulative transportation impacts and required mitigation measures are also underestimated because the Final EIR used ABAG growth projections rather than San José General Plan growth projections. For example, the ABAG projections for San José assume a jobs/housing mix which would result in lower traffic volumes than the jobs/housing mix planned for in the San José General Plan.¹² The Final EIR omits analysis of the following CEQA Guidelines significance criterion: “Would the project conflict with adopted policies, plans or programs regarding public transit, bicycle, or pedestrian facilities, or otherwise decrease the performance of such facilities?” The regulatory setting discusses applicable VTA and City of Santa Clara plans, policies and programs. Applicable San José plans, policies, and programs (e.g., from the Envision San José 2040 General Plan) should be added to this discussion, and the impact analysis should determine whether conflicts with any of these plans, policies, or programs would cause significant impacts to public transit, bicycle, or pedestrian facilities.

F. The Final EIR Does Not Adequately Analyze the Project’s Transit-Related Impacts

The Final EIR lacks sufficient information with which to analyze the Project’s connections to transit, and fails to provide actual details or design plans to support its conclusions that the Project will support greater transit ridership.¹³ As currently configured, for example, the Great America/Santa Clara station, served by Capitol Corridor and Altamont Commuter Express (“ACE”) trains, is not designed in a manner to support the passenger rail transit service as described in the Final EIR. (Draft EIR starting at 3.3-168.) The Final EIR also fails to demonstrate whether and how active

¹² See Envision San José 2040 General Plan, which supports both job and housing growth capacity, available at: <http://www.sanjoseca.gov/DocumentCenter/Home/View/474>. Total plan growth capacity (growth above existing) is 470,000 jobs and 120,000 dwelling units. (San José General Plan, Appendix 5, p. 3.) See also Memorandum from Mayor Sam Liccardo to City Council re North San José Area Development Policy, discussing development of a framework for 1,500 additional units of housing in North San José, available at: http://sanjose.granicus.com/Viewer.php?view_id=&event_id=2131&meta_id=567696; City of San José City Council Agenda Synopsis, April 12, 2016, Item 4.1, attached as Exhibit G.)

¹³ See Comment Letter A13 from Jim R. Allison, Manager of Planning, Capitol Corridor Joint Powers Authority, dated November 23, 2015, and incorporated in full by this reference.

City of Santa Clara
April 29, 2016
Page 17

transportation connections (bicycling and walking) to and from the Project site to the Great America station would be developed, and there are currently no such connections due to functional incompatibility with existing land uses. Given that the use of transit is highly affected by design and connectivity, the Final EIR, as drafted, does not sufficiently describe how the Project meets the EIR's objective to promote transit-oriented infill development.

The Final EIR also fails to demonstrate how the existing employer shuttle system will be affected by Project construction and modifications to street design. For example, the detail provided in the roadway modification figures is not sufficient to determine whether the Capitol Corridor and ACE shuttles, which are a key party of ridership viability, would be affected. (See, e.g., Figure 3.3-15.) Employer shuttles would also be negatively affected by degraded LOS caused by the Project. As mitigation for this impact, employer shuttles should be permitted to use a connector road from Stars and Stripes Drive to Marie P Bartolo Way. Signal preemption devices should also be investigated and documented to mitigate impacts on shuttle travel time.

Impact TRA-9 concludes that the Project would generate public transit ridership that could use available transit capacity and that no mitigation would be required. (Draft EIR at 3.3-168.) However, the Final EIR uses incorrect weekday peak hour load factors for ACE. Current peak-hour ACE load factors between Fremont and Pleasanton are typically upwards of 80 percent and will clearly be impacted by the Project.¹⁴ The Final EIR does not provide a good-faith reasoned response to this comment. (See Response to Comment A9.8, Final EIR at 4-45.)

G. The Final EIR Does Not Remedy the Deficiencies of the Draft EIR's Traffic Analysis or Adequately Respond to San José's Traffic-Related Comments

San José's comments on the Draft EIR recommended that the traffic analysis utilize updated transportation standards and land use assumptions. The comments also recommended that the Project pay a fair-share contribution toward roadway and intersection improvements in North San José, and detailed a number of specific improvements that would be needed to address Project traffic. The Final EIR's responses to these comments do not represent a good faith reasoned response as required by CEQA. (See Response to Comment A17b.) San José's additional technical comments are attached to this letter as Exhibit H.

¹⁴ Comment Letter A9 from Stacey Mortensen, Executive Director, San Joaquin Regional Rail Commission, dated November 20, 2015, and incorporated in full by this reference.

City of Santa Clara
April 29, 2016
Page 18

III. THE FINAL EIR'S ANALYSIS OF AIR QUALITY IMPACTS FAILS TO MEET THE REQUIREMENTS OF CEQA

The Project would result in numerous significant air quality impacts, several of which the Final EIR determined to be unavoidable. These significant unavoidable impacts include impacts from reactive organic gases (ROG), oxides of nitrogen (NO_x) and particulate matter (PM_{2.5}) (Impacts AQ-1, AQ-3 and AQ-4.) The Final EIR also disclosed significant unavoidable cumulative air quality impacts related to criteria pollutants and health risk (Impacts C-AQ-1 and C-AQ-2.) The Final EIR concedes that long-term operational emissions generated by the Project would “far exceed” BAAQMD’s thresholds of significance, even with mitigation.

Project ROG and NO_x emissions, which are precursors to ozone, are estimated to be seven to nine times higher than BAAQMD significance thresholds, which “will make it more difficult for the region to attain and maintain National Ambient Air Quality Standards (“NAAQS”).”¹⁵ (EIR, Table 3.4-9.) PM emissions would also significantly exceed BAAQMD thresholds, PM₁₀ by a multiple of almost eight, and PM_{2.5} by double. The BAAQMD notes that as the NAAQS become more stringent over time, it will be even more important for large developments like the Project to implement all feasible mitigation measures to reduce the severity of air quality impacts.

A. The Air Quality Analysis Fails to Adequately Explain how the Air Pollutants Emitted by the Project would Impact Public Health

The Final EIR discloses, in its analysis of Impacts AQ-3 and AQ-4, that Project operational criteria pollutant emissions and regional criteria pollutant emissions during construction and operation would greatly exceed BAAQMD thresholds, but fails to correlate these adverse air quality impacts to resulting adverse health impacts. This omission precludes informed public participation and decision-making, making the Draft EIR inadequate as a matter of law. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1220-1221.)

The Final EIR concedes that all criteria pollutants are associated with some form of health risk. (Draft EIR at 3.4-14.) It goes on to describe, in a general manner, the health effects associated with increased emissions of ozone precursors (ROG and NO_x). The Final EIR provides other, very general, information about health impacts associated with criteria pollutants in its discussion of the Project’s environmental setting. (See Draft EIR at 3.4-6 and -7.) Despite the inclusion of general information about the adverse

¹⁵ See Comment Letter A15 from Jean Roggenkamp, Deputy Executive Officer, BAAQMD, dated November 23, 2015, and incorporated in full by this reference.

City of Santa Clara
April 29, 2016
Page 19

health impacts that could result from the Project's air quality impacts, the Final EIR does not correlate the Project's massive criteria pollutant emissions with the adverse human health impacts that would be expected to result from those emissions. A reader could certainly infer from the information provided that the Project will make air quality, and therefore human health, worse, but would need more information to truly understand the nature of the impact.

For example, the information provided in the Final EIR does not enable a reader to determine whether the daily emissions resulting from the Project might require individuals with respiratory difficulties to be concerned about health effects when they go outside in the Project area. The Final EIR also provides no information about whether the Project might affect the number of days on which the NAAQS or CAAQS might be exceeded, similar to the data provided in Table 3.4.2. Regardless of how the City chooses to provide information correlating the Project's emissions with human health impacts, it must provide additional analysis in order to meet CEQA's requirements for meaningful assessment of environmental effects.

B. The Final EIR's Air Quality Mitigation Measures are Legally Inadequate

1. The Final EIR Improperly Dismisses Mitigation Measure AQ-2.4

Mitigation Measure AQ-2.4 requires the Project developer to offset NO_x emissions generated during construction that are above BAAQMD NO_x average daily emissions thresholds. (Draft EIR at 3.4-28.) Pursuant to this measure, the Project developer is required to track construction activity, estimate emissions, and enter into a construction mitigation contract with BAAQMD to offset emissions that exceed the 54 pounds per day NO_x threshold. The City impermissibly limits MM AQ-2.4 to Project *construction* impacts only, even though the Final EIR concludes that operational ROG and NO_x emissions (as well as emissions from construction combined with operation) would greatly exceed applicable thresholds. The Final EIR states that requiring operational offsets such as those in Mitigation Measure AQ-2.4 is not considered feasible, because it would cost an estimated \$76 million in fees. In short, “[p]urchasing offsets in this magnitude and duration would place an undue financial burden on the Project that is not considered economically feasible.” (Draft EIR at 3.4-32.) The Final EIR provides no evidence in support of this conclusion.

A mitigation measure may not be excluded from an EIR simply because the project proponent believes that it would not be economically viable or because it would be an undue financial burden. Rather, a determination of economic infeasibility must be

City of Santa Clara
April 29, 2016
Page 20

supported by evidence showing that the additional costs or lost profits would make the project impractical. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 737.) Other decisions on economic feasibility findings have applied a “prudent person” standard, holding that a determination of economic infeasibility must be supported by information demonstrating that the cost is so great that a reasonably prudent person would not proceed if the measure were imposed. (See, e.g., *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 600.)

The Final EIR provides no analysis or evidence demonstrating that the Project applicant cannot purchase emissions offsets to fully mitigate the enormous and harmful air quality impacts of the Project it wishes to construct. At minimum, Santa Clara should require the developer to purchase offsets to mitigate some portion of the Project’s air quality impacts.

2. The Draft EIR Fails to Include Feasible Mitigation Measures to Reduce the Project’s Significant Air Quality Impacts

a) Measures to Reduce Criteria Pollutant Emissions

An EIR must propose and describe mitigation measures to minimize the significant environmental effects identified in the EIR. (Pub. Resources Code §§ 21002.1(a), 21100(b)(3); CEQA Guidelines § 15126.4.) The requirement that EIRs identify mitigation measures implements CEQA’s policy that agencies adopt feasible mitigation measures when approving a project to reduce or avoid its significant environmental effects. (Pub. Resources Code §§ 21002, 21081(a).)

The Final EIR fails to include feasible mitigation measures to reduce the Project’s significant air quality impacts, particularly measures designed to reduce the Project’s severe exceedances of BAAQMD criteria pollutant thresholds. The following mitigation measures were identified by the BAAQMD and recommended for inclusion in the EIR:¹⁶

- Increase the transportation demand management (TDM) plan requirement to reduce peak-hour and daily vehicle trips from 10% to at least 25%;
- Prepare a comprehensive parking plan for the entire project area that establishes parking pricing strategies, unbundling of parking costs, and shared parking for visitors and employees;

¹⁶ The mitigation measures identified by the BAAQMD apply to Impacts AQ-1, AQ-3, AQ-4, as well as GHG-1. San José’s comments regarding the Draft EIR’s GHG analysis will be addressed later in this letter.

City of Santa Clara
April 29, 2016
Page 21

- Require electrical hook-ups for diesel trucks at loading docks;
- Prohibit all diesel powered trucks from idling for more than 2 minutes;
- Require truck fleets based within the Project site to meet CARB's highest engine tier standard in place at the time that building permits are issued;
- Require only electrical landscaping equipment;
- Require solar hot water heating systems;
- Require electric heat pumps for space heating;
- Require recycling and composting programs for offices and residences;
- Require energy efficiency reductions at least 25% beyond Title 24 on all new development at the time building permits are issued;
- Require on-site photovoltaic (PV) solar to meet at least 50% of the electricity demand, and;
- For electricity not generated on-site (e.g., via PV), require that buildings receive the maximum amount achievable from renewable energy.

While portions of some of these measures were incorporated into Mitigation Measure GHG-1.2, many were rejected. (Response to Comment A15.1.) San José continues to believe that inclusion of these mitigation measures in the Final EIR would reduce the Project's air quality and GHG impacts.

b) Measures to Reduce Diesel Particulate Matter Emissions from Project-Related Heavy Truck Traffic

The Project must include feasible mitigation measures to reduce DPM emissions from heavy trucks. Diesel engines emit large amounts of NO_x and PM, both of which contribute to serious health problems. The Final EIR proposes to implement Mitigation Measure AQ-2.2, which would require use of modern fleet (EPA 2007) for on-road material delivery and haul trucks with a gross vehicle weight rating of 19,500 pounds or greater during construction. However, more stringent standards should be imposed to further reduce Project-related emissions.

The United States Environmental Protection Agency ("U.S. EPA") has promulgated stringent diesel emission standards intended to dramatically decrease discharges of PM and NO_x, and virtually eliminate these emissions from on-road diesel

City of Santa Clara
April 29, 2016
Page 22

engines.¹⁷ Consistent with these standards, many jurisdictions have imposed feasible mitigation measures designed to reduce DPM impacts associated with on-road heavy-duty trucks. San José requests that the City include a mitigation measure in the EIR requiring on-road, heavy-duty trucks with a gross vehicle weight rating (“GVWR”) of greater than 14,000 pounds and transporting materials to and from (and within) the Project site to meet EPA 2010 on-road, heavy-duty diesel engine emission standards.¹⁸ In addition, the City should require the Project applicant to verify that the companies supplying the on-road heavy-duty trucks are in compliance with the CARB Truck and Bus Regulation.¹⁹ The City should also include a requirement for truck operators to submit documentation showing the following:

- Truck company name; make, model of truck, and vehicle identification number;
- EPA/CARB truck engine certification indicating truck meets or exceeds 2010 EPA on-road heavy-duty diesel engine emission standards;
- Any emission control devices installed, including, but not limited to diesel oxidation catalysts and/or diesel particulate filters/traps;
- Proof of compliance that the truck fleet of the companies, including subcontractors, from which on-road trucks are hired or dispatched for the Project are in compliance with the CARB Truck and Bus Regulation by providing one of the following documents:
 - Truck and Bus Regulation Reporting Certificate printed from CARB website (see <http://www.arb.ca.gov/msprog/truckstop/pdfs/printcert.pdf>).
 - Written statement from the truck fleet owner that verifies that they are aware of the CARB Truck and Bus regulation (Title 3, California Code of Regulations, § 2025) and their fleet is in compliance with the engine model year schedule specified in the Truck and Bus Regulation.

Inclusion of such a mitigation measure in the Final EIR would reduce the Project’s DPM emissions and attendant air quality and health impacts.

¹⁷ See U.S. EPA Regulatory Announcement, Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements, available at <http://www.epa.gov/otaq/highway-diesel/regs/f00057.pdf>, attached as Exhibit I.

¹⁸ U.S. EPA, Control of Air Pollution from New Motor Vehicles: Heavy-Duty <https://www.gpo.gov/fdsys/pkg/FR-2001-01-18/pdf/01-2.pdf>, attached as Exhibit J.

¹⁹ California Air Resources Board, Truck and Bus Regulation, available at: <http://www.arb.ca.gov/msprog/onrdiesel/onrdiesel.htm>, attached as Exhibit K.

City of Santa Clara
April 29, 2016
Page 23

3. Mitigation Measure AQ-2.3 is Impermissible as Drafted

Mitigation Measure AQ-2.3 sets forth a series of BAAQMD measures to reduce construction-related dust and exhaust emissions, and the Final EIR concludes that with implementation of mitigation, impacts would be less than significant. The measure allows the Project developer or contractor to identify alternate measures, “provided that they are as effective as the measures below” and states that [a]lternative measures shall be submitted to the City of Santa Clara for approval. (Draft EIR at 3.4-27.)

Mitigation measures adopted when a project is approved may be modified or deleted if the agency gives a legitimate reason for making the change and supports those reasons with substantial evidence. (*Napa Citizens for Honest Gov’t v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 359; *Katzeff v. Department of Forestry & Fire Protection* (2010) 181 Cal.App.4th 601, 614.) However, when considering whether to modify a mitigation measure, the agency also must consider whether further CEQA review is required. If modification of the measure would change the prior approval in a way that would allow a new significant impact to occur or increase the severity of a previously identified significant impact, then supplemental environmental review would be required. (See Pub. Resources Code § 21166; CEQA Guidelines § 15162; see also *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1174.) This decision must be made by the agency decision-makers subject to CEQA compliance, not approved by staff.

C. The Final EIR Does Not Remedy the Deficiencies of the Draft EIR’s Air Quality Analysis or Adequately Respond to Air Quality-Related Comments

As noted above, the Final EIR fails to include feasible mitigation measures to reduce or avoid the Project’s severe significant impacts to air quality, despite recommendations from BAAQMD that it do so. (See Comment A15-1.) The Final EIR also fails to provide evidence supporting its conclusion that requiring emissions offsets for operational air quality impacts is infeasible, therefore failing to adequately respond to comments asserting that such offsets should be required to reduce the Project’s significant unavoidable air quality impacts. (See, e.g., Comment O3.5.)

Response to Comment A17a.6 does not represent a good faith, reasoned response to San José’s request that Mitigation Measures AQ-6.1 and AQ-7.1 be applied to construction along the eastern portion of the Project site due to the location of sensitive receptors along the Guadalupe River. According to the Final EIR, the only DPM-related risks due to exposure to construction-related emissions occur on-site after on-site residential or daycare facilities are occupied. (Response to Comment A17a.6, Final EIR

City of Santa Clara
April 29, 2016
Page 24

at 4-153.) The Final EIR goes on to state that the first phase of construction (at the southwest corner of the Project site) is over 2,300 feet from the nearest San José receptor. However, as stated in the comment, construction activities on the *eastern* portion of the site will be less than 600 feet from the San José residences.

IV. THE FINAL EIR'S ANALYSIS OF GREENHOUSE GAS IMPACTS IS LEGALLY INADEQUATE

A. The Analysis of Impact GHG-1 Fails to Accurately Disclose Project Construction GHG Emissions

Impact GHG-1 amortizes construction GHG emissions over 30 years. (Draft EIR at 3.5-15.) No rationale is provided for this approach, which hides actual construction GHG emissions. The Project construction period is assumed to last only 17 years (not 30), and Table 3.5-4 shows that construction GHG emissions are clearly highest over the first four years of construction. Given the need to rapidly reduce GHG emissions in the near-term to avoid dangerous climate change, construction GHG emissions in the early years of the Project should be given more weight, not less. The calculations in Table 3.5-5 should be redone to properly account for construction GHG emissions and mitigation implemented as necessary. (Draft EIR at 3.5-17.)

B. The Final EIR's Analysis of Impact GHG-3 is Legally Inadequate

The Final EIR does not accurately describe or apply case law requiring analysis of the impact of existing conditions on the Project's future users and residents. (Impact GHG-3, see also Draft EIR at 3.5-12 and -13.) After the Draft EIR was published, the Supreme Court decided *California Building Industry Association v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369, which held that an EIR must consider the effects of the environment on a proposed project to the extent the proposed project would risk *exacerbating* these effects. In those specific instances, the Court held, it is the project's impact on the environment – and not the environment's impact on the project – that compels an evaluation of how future residents or uses could be affected by the exacerbated conditions. (*Id.* at 392.) While the Final EIR acknowledges the Supreme Court's decision (see Final EIR at 5-65 et seq.), its application of the legal standard is incorrect. This holding extends to future climate change impacts on the Project, including sea level rise. Impact GHG-3's discussion of sea level rise impacts should be reanalyzed consistent with the holding of this case to determine whether the Project would exacerbate sea level rise impacts. If Impact GHG-3 is determined to be significant, recirculation of the EIR would be required unless the impact is mitigated.

City of Santa Clara
April 29, 2016
Page 25

C. The Final EIR's Evaluation of the Cap-and-Trade Program as Mitigation for GHG Emissions is Inadequate

The Final EIR's discussion of GHG offsets as mitigation is misleading and inadequate. (Draft EIR at 3.5-20.) The Final EIR limits its discussion of offsets to the context of the AB 32 Cap-and-Trade program. However, land use projects are not a capped sector participating in the program, so this discussion is largely irrelevant. Furthermore, it is possible for the proposed Project to directly purchase emissions offset credits outside the context of the Cap-and-Trade program. The Final EIR should have evaluated the feasibility and effectiveness of offsets outside the context of the Cap-and-Trade program as a GHG mitigation measure.

The Final EIR further states that imposing GHG offsets as additional mitigation to meet the need for additional GHG reduction in the post-2020 period "risks duplication of the economy-wide cap and trade GHG reductions and also risks going beyond the project's "fair-share" mitigation." (Draft EIR at 3.5-22.) This statement is speculative and is not supported by evidence. There is no "economy wide cap" in the AB 32 Cap-and-Trade program; rather, the cap applies only to specific capped sectors, which do not include land use projects. The Final EIR also fails to provide any evidence in support of its assertion that GHG offsets risk going beyond fair-share mitigation.

V. THE FINAL EIR'S ANALYSIS OF BIOLOGICAL RESOURCES IMPACTS IS LEGALLY INADEQUATE

A. The Final EIR Fails to Adequately Consider the Project's Inconsistency with the Regional Conservation Plan

The Final EIR's consideration of Project inconsistency with the Santa Clara Valley Habitat Conservation Plan/Natural Community Conservation Plan ("HCP/NCCP" or "Plan"), and the environmental consequences of such inconsistency, is legally inadequate, regardless of whether the HCP/NCCP is an applicable regional plan under CEQA.

The Final EIR asserts that the HCP/NCCP is not an applicable plan because the City of Santa Clara is not a Plan participant, and the proposed Project site is located outside of the Plan area. (See, e.g., Draft EIR at 3.8-4.) However, the proposed Project is located within the HCP/NCCP's expanded study area for burrowing owl, and would require approval for a Project component from a Plan participant (the Santa Clara Valley

City of Santa Clara
April 29, 2016
Page 26

Water District [“SCVWD”]²⁰). Even if the proposed Project is not within the Plan area, or does not include a covered activity, the HCP/NCCP is an applicable regional plan under CEQA for the purpose of evaluating the Project’s effects on the physical environment. (CEQA Guidelines § 15125(d).)

The Project’s conflicts with the HCP/NCCP’s plans to conserve burrowing owl and burrowing owl habitat clearly would result in significant impacts. Master Response 4 implicitly acknowledges this conflict, but asserts that impeding the species’ recovery is not an impact under CEQA. This is false. Moreover, the Final EIR mischaracterizes the Project’s impacts on burrowing owl, which include loss of nesting, forage and dispersal habitat, as compared to baseline conditions, discussed in detail below. These effects should have been considered as factors in extirpation of the local populations and restricting the range of the species.

The Project’s conflicts with the HCP/NCCP conservation goals and plans would also result in significant impacts to other species such as bay checkerspot butterfly.

B. The Final EIR Fails to Adequately Analyze the Effects of Nitrogen Deposition on Serpentine Grassland Habitat

The Final EIR acknowledges that nitrogen deposition in serpentine grassland habitat – attributable to the Project – would have adverse effects on special status species. (EIR at 3.8-23.) However, these impacts are discussed only in general terms in a cumulative impact discussion. Nitrogen deposition on serpentine grassland habitat alters conditions in a way that favors non-native plant species over native special status plant species. Effects on the individual plant species (which appear to be significant) should be examined in more detail, and mitigation to reduce significant effects should be identified, including impacts on bay checkerspot butterfly. Measures to be considered could include compensatory mitigation requiring preservation of replacement habitat in serpentine habitat that is less subject to nitrogen deposition including, as necessary, propagation of impacted species at the mitigation site.

The Final EIR does not remedy the deficiencies of the Draft EIR or adequately respond to comments regarding analysis of the effects of nitrogen deposition. (See Response to Comment A17a.9.) Vehicle trips associated with the Project, located immediately adjacent to San Jose, would have the same nitrogen deposition impacts as vehicle trips from projects located within San Jose. The fact that Santa Clara is not a participant in the HCP/NCCP does not reduce the Project’s obligation to mitigate its

²⁰ Comment Letter A11 from SCVWD to City of Santa Clara, dated November 23, 2015, and incorporated in full by this reference.

City of Santa Clara
April 29, 2016
Page 27

significant impacts. Nitrogen deposition impacts throughout Santa Clara County are caused primarily by vehicular traffic, and Santa Clara sources within the study area are estimated to provide 63 percent of the current deposition. (See HCP/NCCP, Appendix E.) At minimum, Santa Clara must pay the Habitat Agency an amount commensurate with that paid by Plan Area applicants, with added costs of administration, and reach an agreement regarding mitigation of nitrogen deposition with the Agency or provide adequate mitigation in another manner.

The Project's reliance on a fair-share nitrogen deposition fee contribution to the SCVHA's nitrogen deposition fee program in Mitigation Measure BIO-C.1 is misplaced. Because the Project was not included in the Santa Clara General Plan, the growth it contemplates was not included in the JPA's development of the fee program. Payment of fees will therefore not adequately mitigate the Project's impacts. (See BIO-C.1, Draft EIR at 3.8-25.) In addition, there is no requirement that a voluntary contribution be used to address the Project's adverse nitrogen deposition effects, and therefore it may not be relied upon as mitigation.²¹ The measure's effectiveness is further diluted by its comparison of the Project's actual impacts to a hypothetical average for development in the HCP/NCCP plan area, which artificially dilutes the Project's nitrogen deposition impacts.

C. The Final EIR Understates Impacts to Burrowing Owl

The Final EIR fails to adequately present relevant baseline conditions for burrowing owl, and understates the Project's significant impacts to burrowing owl as well as its contribution to a significant cumulative impact to this species.²² The Final EIR fails to acknowledge that the proposed Project site should be considered "occupied" by burrowing owl. San Jose concurs with the California Department of Fish and Wildlife's ("CDFW's") conclusion that the Project site is active burrowing owl habitat, and must be treated as such in the EIR. As stated in CDFW's comment letter on the Project Notice of Preparation ("NOP"), burrowing owls were observed foraging and nesting on and near

²¹ In Master Response 4, the City of Santa Clara takes the position that its previous "voluntary" commitment to provide mitigation for burrowing owls was not actually a commitment.

²² The Final EIR does not include Project- or site-specific reports or surveys to support its conclusion that the Project site is not considered to be occupied burrowing owl habitat. The surveys discussed in the Draft EIR (starting at p. 3.8-11) are not included in an appendix, which would be particularly useful given that the EIR's conclusions are contradicted by CDFW's NOP comments.

City of Santa Clara
April 29, 2016
Page 28

the Project site by burrowing owl biologists within a two-year period prior to the NOP.²³ These reported observations are sufficient to establish that the site should be considered “occupied” habitat as the baseline for existing conditions.

Even without those observations, other evidence supports the same conclusion. CDFW guidance on determining whether a site is “occupied” provides that occupancy may be indicated by conditions described in the Final EIR (i.e., pellets near a perch site) and that such signs of occupancy within the prior three years should be considered as indicators that the site is “occupied”. The Final EIR does not explain why it departs from this guidance.²⁴ Master Response 4’s discussion of burrowing owl habitat also conflicts with revisions made to the Draft EIR in response to other comments, e.g., deletion of a statement asserting that occupied burrowing owl habitat is not present at the site. (Draft EIR at 3.8-13; revised text shown in Final EIR at 5-44.) Nesting burrowing owls have been detected approximately 0.4, and 1.0 miles from the proposed Project site and the Project site is located within occupied nesting habitat as defined in the HCP/NCCP.²⁵ These occurrences are well within known adult and natal dispersal distances (generally 53 km and 150 km, respectively).²⁶ The longest recorded dispersal distance in the South Bay area is 12 km.²⁷

The Final EIR also fails to acknowledge or examine the significant effects that loss of burrowing owl habitat on the Project site would have on remaining offsite burrowing owl habitat. Habitat isolation and fragmentation are factors for effects on other small, localized offsite burrowing owl populations. Given the Project site’s proximity to the remaining burrowing owl populations along the Highway 237 corridor (as noted in CDFW’s NOP comment letter), this failure to fully characterize existing

²³ Letter from CDFW in response to EIR NOP, dated August 28, 2014, and incorporated in full by this reference.

²⁴ Master Response 4 asserts that the owl pellets located on the Project site were too old to be considered as evidence of occupation, but provides no evidentiary support for this assertion, and no reason for its determination that the pellets exceed 3 years in age. (Final EIR at 3-19.) The response also does not explain why this “determination” would outweigh reported occurrences in other surveys, as noted in CDFW’s letter.

²⁵ See Comment Letter A5 from Santa Clara Valley Habitat Agency, dated November 19, 2015.

²⁶ 2012 Staff Report on Burrowing Owl Mitigation at p. 20, available at:

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjokJXJy6_MAhUIwGMKHRMhDvgQFggfMAA&url=https%3A%2F%2Fnm.dfg.ca.gov%2FFileHandler.ashx%3FDocumentID%3D83843&usg=AFQjCNGxKDV-Co8e68nibt4aen7MI0qaxg&sig2=Ocr4oxlg9DFUds6zOf6RAg, attached as Exhibit L.

²⁷ Santa Clara Valley HCP/NCCP Appendix M, p. M-2.

City of Santa Clara
April 29, 2016
Page 29

conditions for burrowing owl requires additional investigation. The HCP/NCCP recommends preservation of burrowing owl habitat to support owl populations that are primarily outside of the study area.²⁸ Given that Santa Clara is closer to existing burrowing owl habitat and populations than most members of the HCP/NCCP, it should participate in this effort, particularly because the Project would be destroying some of the last remaining potential burrowing owl habitat in the area.

Although the Final EIR acknowledges that the Project site provides forage habitat for burrowing owls, the impact analysis does not seriously address the loss of forage habitat, and fails to identify adequate mitigation. This is a serious omission given the documented declines in the local and regional populations of this species.²⁹ Mitigation Measure BIO-2.2 fails to guarantee that burrowing owl habitat will be replaced, because implementation is tied to identification of an active nest; this limitation on implementation is inconsistent with CDFW's guidance on determining whether a site is "occupied". Mitigation Measure BIO-2.1 further undermines this mitigation strategy by ensuring that development activities take priority over burrowing owl surveys. San José recommends that BIO-2.1 be revised as follows:

BIO-2.1: Detection and Protection of Burrowing Owls. The Project Developer shall submit a plan for surveying and monitoring for burrowing owls to the City and CDFW at least 60 days prior to the scheduled start of construction or other ground disturbing activities. The survey plan shall require qualified biologists approved by the City to conduct the surveys and monitoring. Survey timing and methods shall be consistent with CDFW guidance in the 2012 Staff Report on Burrowing Owl Mitigation, as updated. The plan shall include regular and timely reporting to the City and CDFW. City approval is required before project activities begin. ~~allow access to the Project site or offsite areas for~~ ~~Biologists who participate in the annual burrowing owl nest survey coordinated by the Santa Clara Valley HCP/NCCP shall be allowed access to the project site and offsite areas. Burrowing owl surveys are conducted between March and August of each year.~~ ~~Access to the site~~ Appropriately timed surveys for burrowing owl

²⁸ Santa Clara Valley HCP/NCCP Appendix N, p. 4-5.

²⁹ See Comment Letter A5 from Santa Clara Valley Habitat Agency, dated November 19, 2015 and Comment Letter O4 from Santa Clara Valley Audubon Society, dated November 23, 2015; see also CDFW NOP Comment Letter, dated August 28, 2014, all incorporated in full by this reference.

City of Santa Clara
April 29, 2016
Page 30

~~surveys shall be granted~~continue until the Project site and/or off-site area is completely built out. ~~The Project Developer shall not, however, be required to postpone planned development activities to provide such access, except to the extent such postponement is necessary to meet regulatory requirements.~~ Currently occupied burrows shall not be disturbed. If nesting burrowing owls are detected project activities, including construction shall be scheduled to occur outside of nesting season, to the extent possible. Disturbance buffers consistent with the guidance in the 2012 Staff Report on Burrowing Owl Mitigation, as updated, shall be established to avoid disturbing individual burrowing owls.

The Final EIR also asserts that no portion of the Project site has been set aside for burrowing owl mitigation. (Draft EIR at 3.8-6.) Commenters disagree with this assertion, and have provided details and records of the City's previous commitment to managing a portion of the site as mitigation for burrowing owl.³⁰ The Final EIR relies on a very different account of the City's approval and mitigation for the previous project. This discrepancy has generated considerable confusion for the public and decision makers as to the level of mitigation required for impacts to burrowing owl habitat, and Master Response 4 does not resolve the issue, asserting only that the City's commitment to providing mitigation habitat on the Project site was voluntary. If the City of Santa Clara previously committed some 24 acres of the Project site to be managed as mitigation for loss of burrowing owl habitat for a previous project, the loss of the mitigation site and any impacts to the mitigation site must be also be mitigated.

BIO-2.2: Mitigation for Loss of Burrowing Owl Habitat during Construction. ~~Should burrowing owls begin nesting on developable portions of the Project site or off-site areas that remain undeveloped as phases of the Project are constructed, or suitable habitat within 600 meters of an active nest is removed from the Project site, then lost burrowing owl habitat~~ Permanent impacts to suitable nesting, forage, and/or dispersal habitat for burrowing owl shall be replaced at a ratio of at least 1:1 prior to ground-disturbing activities in the area of the

³⁰ See Comment Letter 15 from Jan Hintermeister, dated November 20, 2015, including attachments relating to the Bayshore North project's burrowing owl mitigation and comment letter from Santa Clara Valley Audubon Society, dated November 23, 2015, both incorporated in full by this reference.

City of Santa Clara
April 29, 2016
Page 31

Project site or off-site area ~~with an active nest~~. In addition to the area previously identified as either voluntary or required mitigation land on the project site, Aaffected habitat shall be ~~defined~~ determined as suitable habitat (based on the habitat mapping completed for this EIR, and pre-construction surveys) ~~within a 600 meter radius of an active burrowing owl nest~~ consistent with the methods and definitions in the 2012 Burrowing Owl Staff Report, as updated, and Mitigation measure BIO-2.1.

Greater than 1:1 mitigation shall be required if high quality mitigation land is not acquired and protected prior to the start of project construction; and/or if mitigation land is outside the maximum known dispersal range of local burrowing owl individuals. Mitigation lands outside this range should be identified by qualified biologists, and located on or near other conserved lands. Suitable land cover types include annual grassland, ruderal, or barren areas. Mitigation sites shall have documented nesting occurrences from at least 1 year within the previous 3 years.

Mitigation land shall be permanently protected through a conservation easement, or deed to a non-profit conservation organization of a public agency with a conservation mission, for the purpose of conserving burrowing owl habitat and prohibiting activities incompatible with burrowing owl use.

If burrowing owls move onto undeveloped portions of the Project Site or off-site areas, including the Retention Basin, once the site is fully constructed, appropriate fencing and habitat management practices (including pest management) shall be required to protect burrowing owl individuals, remaining habitat areas, and prey species; there shall be no requirement to provide replacement habitat, unless that undeveloped habitat is developed in the future.

City of Santa Clara
April 29, 2016
Page 32

D. The Final EIR's Analysis of Impacts to Wetland Habitat is Inadequate

The Final EIR limits compensatory mitigation for impacts to wetlands (Mitigation Measure BIO-5.2) to jurisdictional (State or federal) wetlands. However, compensatory mitigation should also be provided for loss of non-jurisdictional wetlands or other aquatic features. Non-jurisdictional wetlands include areas that meet one of the USFWS criteria³¹ and/or the definition of wetlands in the California Coastal Act.³² The USFWS definition of wetlands is also considered biologically appropriate by the California Fish and Game Commission.³³ The definition in the California Coastal Act is statutory. (Pub. Res. Code §30121.)

E. The Final EIR's Analysis of Impacts to Anadromous Fish is Inadequate

The Final EIR's analysis of impacts to central California coast steelhead (*Oncorhynchus mykiss*) and Central Valley fall-run Chinook salmon (*Oncorhynchus tshawytscha*) is inadequate. The discussion in the Final EIR focuses on construction impacts, but does not explain whether or why habitat for these species would not be impacted (or impaired) under post build-out conditions. (Draft EIR at 3.8-17, 18; 3.8-26.) Freshwater migration corridors free of obstruction and excessive predation, with water quality and quality conditions and natural cover in and near the water or side channels and other features supporting juvenile and adult mobility and survival constitute a "primary constituent element" of critical habitat for these species, regardless of whether this particular reach of the Guadalupe River is excluded from critical habitat designation. Existing conditions for fish through the Project area should be described, including features that may be considered primary constituent elements, and the Project's significant effects post-buildout should be evaluated.

³¹ USFWS Wetlands Classification System, available at <http://www.fws.gov/policy/660fw2.html>, attached as Exhibit M .

³² Public Resource Code § 30121; Cal. Code of Regulations § 13577(b); discussed at Definition and Delineation of Wetlands in the Coastal Zone, available at: <http://documents.coastal.ca.gov/reports/2011/10/W4-10-2011.pdf>, attached as Exhibit N.

³³ California Department of Fish and Game Recommended Wetland Definition, available at <http://www.fgc.ca.gov/policy/p4misc.aspx>, attached as Exhibit O

City of Santa Clara
April 29, 2016
Page 33

VI. THE FINAL EIR'S ANALYSIS OF HAZARDS AND HAZARDOUS MATERIALS IMPACTS IS INADEQUATE

A. Impact HAZ-4 Must Include Enforceable Mitigation for Long-Term Landfill Monitoring Requirements

San José shares the concerns expressed by the Regional Water Quality Control Board (“RWQCB”) and the County of Santa Clara Department of Environmental Health regarding the Project’s long-term monitoring and maintenance needs.³⁴ The mitigation measures in the Final EIR to address Impact HAZ-4 (MMs HAZ 4.1-4.6; Draft EIR at 3.11-31 - 3.11-33) identify plans, systems, maintenance requirements and restrictions intended to ensure the safety of future Project residents and users, but the document is short on detail regarding the manner in which these long-term requirements would be met.

The mitigation measures adopted for a project must be enforceable through conditions of approval, contracts or other means that are legally binding. (Pub. Resources Code § 21081.6(b); CEQA Guidelines § 15126.4(a)(2). This requirement is designed to ensure that mitigation measures will actually be implemented, not merely adopted and then ignored. As stated by the County Environmental Health Department, it is imperative that there is a viable party responsible for upkeep of the landfill control measures and post closure maintenance, as well as to deal with any imminent health or safety issues that may arise. To the extent that mechanisms to ensure that there is an entity with legal and financial responsibility to address future health and safety needs for the landfill would be in a Project development agreement, such an agreement must be made available for public review and comment. As discussed in greater detail below, if a development agreement is part of the Project, as is indicated in the project description, it should be included in the Final EIR for public review.

B. The Final EIR’s Analysis of Impact HAZ-8 is Inadequate

The Final EIR concludes that the Project would not impair implementation of adopted emergency access or evacuation plans. (Draft EIR at 3.11-36.) In reaching this conclusion, the Final EIR fails to acknowledge the large numbers of people that would be present on the Project site during an emergency, as well as the severity of the potential

³⁴ Comment Letter A13 from San Francisco Bay Regional Water Quality Control Board, dated November 23, 2015; Comment Letter A7 from County of Santa Clara Department of Environmental Health, dated November 19, 2015, both incorporated in full by this reference.

City of Santa Clara
April 29, 2016
Page 34

hazards that could result from a disaster based on the Project's location on a former Landfill.

As proposed, the Project would create almost 25,000 new jobs and house more than 3,270 residents (under Scheme A). (Draft EIR Table 3.12-6). Proposed retail and entertainment uses would draw additional people to the site. As acknowledged in the Final EIR's traffic analysis, existing traffic conditions in the Project area are already severe, and made worse by events held at the recently constructed Levi's Stadium. (See, e.g., analysis of Impact TRA-19, Draft EIR at 3.3-220.)

Given the risks inherent in constructing development on a landfill, including the potential for releases of hazardous materials and subsurface fires, the Final EIR must provide additional analysis of the Project's potential to impact existing evacuation routes. Prior to considering approval of the Project, decision makers as well as members of the public must have a full understanding of how development of the Project could affect the safety of its future residents and users. The Final EIR also must propose mitigation measures to reduce significant effects and to ensure the safety of future Project users. For example, the Final EIR should include a requirement to develop a detailed evacuation plan, including measures to ensure the safety of children, the elderly, and the mobility impaired.

C. The Final EIR Does Not Remedy the Deficiencies of the Draft EIR's Analysis of Hazards or Adequately Respond to Hazards-Related Comments

In response to comments from the RWQCB (Comment A13) and the County Environmental Health Department (Comment A7) regarding long-term maintenance and monitoring for the Landfill to ensure public health and safety, the Final EIR references the Disposition and Development Agreement ("DDA") to be entered into by the City and the Project developer. (Response to Comment A7.1, Final EIR at 4-34.) The Final EIR states that the City Council would consider the DDA for approval in conjunction with its consideration of certification of the Final EIR. If the City intends to rely on the provisions of a DDA to implement Project requirements designed to protect public health and safety, the DDA (along with the DA, as discussed in greater detail below) must be made available for public review and comment.

City of Santa Clara
April 29, 2016
Page 35

VII. THE FINAL EIR DOES NOT ADEQUATELY ANALYZE THE IMPACTS OF SUPPLYING WATER TO THE PROJECT

A. The Final EIR's Analysis of Project Water Supply is Legally Inadequate

The Final EIR's discussion of Impact UT-1 concludes that the Project would have sufficient water supplies, but does not provide evidentiary support for this conclusion. (Draft EIR at 3.14-19.) Table 3.14-9 shows inadequate City water supply in 2035 under every scenario save a "normal" year, and only then with the assumption that Hetch-Hetchy water is available from the SFPUC.³⁵ Despite this identified deficit, the Final EIR concludes that the Project would have a less than significant impact on water supplies in SCVWD's service area, and expansion of existing entitlements would not be necessary to accommodate the Project. (Draft EIR at 3.14-25.) The Final EIR bases this conclusion on the assertion that the calculated shortfall "would not likely occur" due the conservative assumptions used in the water supply analysis, the potential to expand use of recycled water, and the use of groundwater from the Santa Clara Valley Groundwater Basin.

B. The Final EIR Does Not Remedy the Deficiencies of the Draft EIR's Water Supply Analysis or Adequately Respond to Water Supply-Related Comments

The SCVWD calls the Draft EIR's assertions regarding conservative water use assumptions into question, stating that "[w]ater demand declined significantly during the economic decline late last decade, and is not by itself proof that previous demand were overestimated."³⁶ It further notes that water use has rebounded with improved economic conditions. It therefore cautions reliance on the 2010 UWMP as validation for these assumptions. The SCVWD also challenges the Draft EIR's statements regarding safe yield of the groundwater basin, noting that is not appropriate to make a conclusion regarding the safe and sustainable groundwater production volumes by the City based on these values. The SCVWD states that sustainable yields are subject to hydrology in a given year and the geographic distribution of pumping in a localized area. It also notes that some of the stated values are being reconsidered in the upcoming Sustainable Groundwater Management Plan. San José echoes these concerns. The Final EIR notes its disagreement with SCVWD's comments, but does not provide a good-faith reasoned

³⁵ The City's contract with SFPUC is up for renegotiation in 2018, so the Hetch-Hetchy water supply is not assured. (Draft EIR at 3.14-25.)

³⁶ Comment Letter A11 from SCVWD to City of Santa Clara, dated November 23, 2015, incorporated in full by this reference.

City of Santa Clara
April 29, 2016
Page 36

response. (See Responses to Comments A11.11, A11.12, A11.13 and A11.15, Final EIR at 4-66, -67.)

When a full analysis of future water supplies for a project leaves some uncertainty regarding the availability of future supplies, the Final EIR must discuss possible replacement or alternative supply sources and the environmental effects of resorting to those alternative supply sources. (*Vineyard Area Citizens or Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 431.) Given that the Final EIR's assumptions about water use may not be as conservative as claimed, it is more likely that the Project would result in the need to rely on groundwater. The Final EIR must provide analysis of the potential impacts of relying on groundwater.

VIII. THE FINAL EIR'S ANALYSIS OF HYDROLOGY AND WATER QUALITY IMPACTS IS INADEQUATE

A. The Analysis of Impact WQ-2 is Inadequate

The Final EIR concludes that the Project's groundwater impacts would be less than significant based on the assertion that (1) projected water supply is adequate to provide water until 2035 and (2) existing groundwater supplies are sufficient to absorb any future Project groundwater use. (Draft EIR at 3.10-31 and -32.) However, as discussed above, the Project water supply analysis shows that water supply would be inadequate in 2035 under most scenarios, and the SCVWD disagrees with the Draft EIR's discussion of groundwater availability in the Santa Clara Valley Basin. The analysis should be redrafted in light of this additional information. The same holds true for the analysis of cumulative groundwater recharge and supply, which reaches a similar conclusion. (Draft EIR at 3.14-26.)

B. The Analysis of Flood Impacts is Inadequate

FEMA Region 9 is in the process of remapping the coastal flood plain.³⁷ This information should be included in the Final EIR's discussion of baseline (on pp. 3.10-17 and -18), particularly because the 100-year floodplain would expand in the Project area if the new maps are adopted. Based on this new information, the analysis of Impacts WQ-6, WQ-7, WQ-8 and C-WQ-1 (pertaining to cumulative flood impacts) should be revised.

³⁷ See FEMA Region 9 National Flood Insurance Program, available at: <http://www.r9map.org/Pages/default.aspx>, attached as Exhibit P.

City of Santa Clara
April 29, 2016
Page 37

C. The Final EIR Does Not Remedy the Deficiencies of the Draft EIR's Hydrology Analysis or Adequately Respond to Hydrology-Related Comments

In response to comments from the SCVWD regarding new baseline flood information, the Final EIR incorporates a footnote stating that FEMA is in the process of conducting a Flood Insurance Study in the Project area. (Response to Comment A11.7, Final EIR at 4-61.) However, the Final EIR does not acknowledge the impact that an expanded 100-year floodplain would have on the analysis and therefore does not represent a good faith reasoned response. Instead, the Final EIR claims that there is no requirement to analyze flooding impacts under the *CBIA v. BAAQMD* case. The Final EIR fails to acknowledge that under *CBIA* an EIR still must consider the effects of the environment on a proposed project to the extent the proposed project would risk exacerbating these effects. Impacts WQ-6, WQ-7, WQ-8 and C-WQ-1 should be reanalyzed consistent with the holding of this case to determine whether the Project would exacerbate flooding impacts. If these impacts are determined to be significant, recirculation of the EIR would be required unless the impacts are mitigated.

IX. THE FINAL EIR'S ANALYSIS OF IMPACTS TO PUBLIC SERVICES AND RECREATION IS INADEQUATE

The Final EIR acknowledges that the Project site has served as open space and a recreation facility for more than 25 years and is the largest contiguous park/open space in the City. (Draft EIR at 3.13-20.) The Project would eliminate this existing recreational use and replace it with 9.16 million square feet of primarily commercial use, with a small component of residential. Nevertheless, the Final EIR concludes that the Project's impact to park and recreational facilities would be less than significant, because the elimination of the current use would not result in the need to construct any new recreational facilities. (Draft EIR at 3.13-21.) In a seemingly contradictory argument, the Final EIR concludes that in lieu fees paid by the developer would reduce impacts, because they would be used by the City to acquire or develop new parkland or facilities. (Id.)

The parkland dedication requirements and in lieu fees referenced in the Final EIR are based on numbers of residents. (Draft EIR at 3.13-3.) Because the Project proposes a very small amount of residential use, the requirement to dedicate parkland (8.27 acres) is also small. (Draft EIR at 3.13-21.) To the extent that the Project developer is not able to fully satisfy the park requirement with land dedication, the Final EIR states that it would pay park in-lieu fees to satisfy requirements, and concludes that this payment would represent full and complete mitigation for parkland impacts due to new development. (Id.) A commitment to pay fees is not adequate mitigation, however, if there is no evidence that mitigation will actually result. (See, e.g., *California Clean Energy Comm.*

City of Santa Clara
April 29, 2016
Page 38

v. City of Woodland (2014) 225 Cal.App.4th 173. 197.) The Final EIR provides no information about the types of facilities that might be constructed with the Project's in lieu fees, or their location. However, according to the City's General Plan, opportunities for additional open space are limited, due to the current build out condition of the City. (Draft EIR at 3.13-13.) Based on the information provided in the Final EIR, there is no evidence to suggest that park impacts will be adequately mitigated through additional facilities.³⁸

The Final EIR also provides no evidence in support of the assertion that a requirement to dedicate 8.27 acres of parkland would mitigate the loss of more than 162 acres of existing recreational uses on the Project site.³⁹ The Project site currently houses a public golf course, seven lighted tennis courts, and a BMX track. The Final EIR claims that existing parks and other similar amenities would be sufficient to absorb the loss of these facilities, but provides no actual evidence of use to support its conclusions.⁴⁰ (See *City of Hayward v Board of Trustees of Cal. State Univ.* (2015) 242 Cal.App.4th 833 [overturning EIR's discussion of recreation impacts based on lack of evidence regarding use of parks].) The Final EIR's discussion of existing conditions states that several school district facilities serve the community, but the district has commented that the open space and fields at the schools and parks within Santa Clara are already used to capacity.⁴¹

X. THE FINAL EIR'S ANALYSIS OF IMPACT AES-1 IS INADEQUATE

The Project would remove all 1,405 trees which currently exist at the Project site, 951 of which are protected trees.⁴² (Draft EIR at 3.2-19.) It would also remove up to 338

³⁸ The City's own policies have led to a shortfall in open space and parkland, as acknowledged in the City's General Plan. See, e.g., Policy 5.9.1-P20, which promotes the continuation of a parks per population ratio of 2.4 per 1,000 residents, well under Quimby Act standards (3-5 acres per 1,000 residents) and those set forth in the City's Municipal Code. (Gov. Code § 66477; City Code Section 17.35.010(f); see also Draft EIR at 3.13-10.)

³⁹ The golf course is located on 155 acres of the Project site, and the BMX track occupies 7 acres. (Final EIR at 3.13-6, -7.) In addition to the golf course itself, the Santa Clara Golf and Tennis Club has other recreational facilities, including tennis courts.

⁴⁰ The City's supply of parkland falls well short of its parkland dedication standard of 3 acres per 1,000 residents. (See City Code, Section 17.35.010(f).)

⁴¹ Comment Letter A4 from Santa Clara Unified School District, dated November 18, 2015, incorporated in full by this reference.

⁴² The General Plan defines protected trees as "healthy cedars, redwoods, oaks, olives, bay laurel and pepper trees of any size, and all other trees over 36 inches in

City of Santa Clara
April 29, 2016
Page 39

off-site trees, 232 of which are protected. (Id.) Despite the removal of almost 2,000 trees that would result from the Project, the Final EIR asserts that Impact AES-1 would be less than significant, because removal of these trees would not degrade existing visual character or quality. However, in the same analysis, the Final EIR states that the Project developer would replace these trees at a ratio of 2 to 1 of 24-inch box specimen trees pursuant to General Plan Policy 5.3.1-P10. (Draft EIR at 3.2-19.)

An EIR should indicate whether the project's environmental impacts would be potentially significant if mitigation measures were not adopted and separately determine whether the mitigation measures described in the EIR would substantially reduce or avoid the identified significant impacts. (*Lotus v. Department of Transp.* (2014) 223 Cal.App.4th 645, 656.) The Final EIR should have identified Policy 5.3.1-P10 as a mitigation measure, and made clear whether the impact is significant or less than significant both before and after the imposition of mitigation. (*Id.* at 656.) The biological resources analysis suffers from the same flaw. (See Impact BIO-6, Draft EIR at 3.8-20.) The Final EIR does not remedy the deficiencies of the Draft EIR's analysis of impacts to trees or adequately respond to tree-related comments. (See, e.g., Response to Comment O4.7 [restating Draft EIR's rationale for failing to adequately mitigate impacts to tree and thereby failing to provide a good faith reasoned response].)

XI. THE EIR FAILS TO CONSIDER A REASONABLE RANGE OF ALTERNATIVES

An EIR must present a reasonable range of alternatives that could feasibly attain most of the project's objectives while avoiding or substantially lessening the proposed project's significant effects. (CEQA Guidelines § 15126.6(a).) The Final EIR fails to meet this requirement.

A. Increased Housing Alternatives

The Project proposes job-generating uses that greatly exceed its proposed residential uses. This results in a greater jobs/housing imbalance that currently exists in the City, along with resulting increases in VMT, air pollution and GHG emissions. The Final EIR rejects four increased housing alternatives as infeasible, primarily because they would fail to meet Project objectives or because they would cost more to construct than would the proposed Project. (Draft EIR at 5-13 - 5-14.) The increased housing alternative that the Final EIR does include, proposes only 320 additional residential units, resulting in a net increase of 23,610 employees (instead of the 24,760 employees

circumference measured from 48 inches above-grade on private and public property as well as in the right-of-way." (Project Tree Assessment at 4, Draft EIR Appendix 3.8.)

City of Santa Clara
April 29, 2016
Page 40

proposed by the Project). (Draft EIR at 5-8.) This increase is insufficient to truly reduce the Project's significant effects, as required by CEQA.

The creation of additional housing would reduce many of the Project's significant effects resulting from the jobs/housing imbalance without affecting basic Project objectives regarding mixed-use development, landfill protection systems and facilitation of jobs. As discussed previously in this letter, an alternative may not be rejected on the ground that it is economically infeasible just because it would be more expensive to construct and operate. Rather, a determination of economic infeasibility must be supported by evidence showing that the additional costs or lost profits would make the project impractical, or that a reasonably prudent person would not construct such a project due to the added expense. The City cannot make the requisite infeasibility finding without this additional evidence.

1. Include More Housing as Part of the Project

At minimum, the Final EIR must include an alternative that includes enough housing to truly minimize the Project's significant effects. San Jose requests the addition of an alternative with a sufficient number of housing units (and a commensurate reduction in jobs) to reduce the Project's jobs/housing balance to 1.0.

2. Amend the General Plan to Increase Residential Density

The Final EIR must include an alternative with a General Plan amendment to increase residential density Citywide, consistent with the approach set forth in Mitigation Measure LU-1.1. Rather than deferring the City's mandate to explore increased residential density years into the future as proposed by MM LU-1.1 and after construction of the Project, amending the General Plan to shift development capacity now would offset the job-rich development proposed by the Project and correspondingly reduce the Project's significant effects on VMT, traffic congestion, air quality and GHG emissions.

B. Clean Closure Alternatives

When considering the ability of the alternatives to avoid or substantially lessen the Project's significant impacts, the Final EIR improperly ignores alternatives that could reduce significant impacts that it claims are capable of mitigation, in particular, hazardous materials impacts. However, an EIR must discuss alternatives that avoid or substantially lessen a significant impact even if that impact can be avoided or reduced by mitigation measures. (See *Laurel Heights Improvement Ass'n v. Regents of University of California* (1988) 47 Cal.3d 376, 403.) The Final EIR made a fundamental error by failing to present such alternatives.

City of Santa Clara
April 29, 2016
Page 41

The Final EIR identifies significant hazards and hazardous materials impacts resulting from the Project's location on a landfill, but fails to propose Project alternatives to reduce these significant effects.

1. Clean Closure of Entire Site

The Final EIR considered and rejected an alternative involving removal of all waste in the former landfill prior to development of the site: the "clean closure" alternative. The clean closure alternative was rejected based on construction impacts and the assertion that costs of waste removal would be very high. The Final EIR's discussion of cost includes only the cost of waste removal, not the cost of closure and long-term monitoring. This approach does not provide evidence of economic infeasibility under CEQA because it provides no comparative data demonstrating the magnitude of the difference between the two approaches. (See, e.g., *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 598-602 [City's rejection of four rehabilitation/relocation alternatives based on economic infeasibility was not based on substantial evidence; the fact that rehabilitation of the home may cost between \$4.9 and \$10 million was insufficient to support a finding of infeasibility without any comparable information about the cost of constructing a new residence on the property].)

2. Clean Closure of Parcel 4 Only

The Final EIR failed to consider other alternatives that would reduce Project safety impacts without extensive construction impacts, namely the clean closure of only a portion of the Project site. The great majority of the residential units in Scheme A (1,160) would be located on Parcel 4, so this alternative would address many of the significant safety-related impacts resulting from siting residential uses on the landfill. As an added plus, some of the waste underlying Parcel 4 has already been removed, which would further reduce construction impacts associated with this alternative. When the Santa Clara Golf and Tennis Club, clubhouse and restaurant were constructed in 1985, waste beneath the portion of Parcel 4 currently used for tennis courts was removed and replaced with clean fill. (Draft EIR at 3.11-9.) This alternative is feasible, and should be included in the EIR.

C. Additional Reduced Project Size Alternatives

The Final EIR considers a Reduced Intensity Alternative that would reduce total floor area by 30 percent compared to the Project, but fails to consider any other alternative that would decrease the Project footprint. Given the severity of the significant and unavoidable impacts associated with the Project, an alternative that reduces FAR by 50 percent or more must be considered. The Final EIR concludes that such an alternative

City of Santa Clara
April 29, 2016
Page 42

“is highly unlikely to be financially feasible” but provides insufficient evidentiary support for this assertion.

The Final EIR should also consider an alternative that would reduce the retail, restaurant, entertainment and hotel uses proposed by the Project by at least 50 percent. These uses would result in 71,190 daily vehicles trips, which would cause increased congestion and significant traffic to area roadways and intersections. (Draft EIR Table 3.3-19 at 3.3-87.)

D. Transit Oriented Alternative

Given the numerous significant impacts created by the more than 140,000 daily vehicle trips associated with the Project, including impacts to traffic, air quality and GHG emissions, the Final EIR should include a transit oriented alternative. Such an alternative would improve connections to surrounding light and heavy rail stations, and include more aggressive TDM measures, such as reduced parking ratios. Specifically, a transit-oriented alternative should include significant improvements to the Great America station to effectively integrate the Project with adjacent transit, including improved bus and shuttle access, additional bus/shuttle bays, and improved pedestrian/bicycle access.⁴³

E. The Final EIR Does Not Remedy the Deficiencies of the Draft EIR’s Alternatives Analysis or Adequately Respond to Comments on Project Alternatives

Several commenters requested that the Draft EIR include additional alternatives to avoid or reduce the Project’s significant effects. The Final EIR failed to provide a good-faith reasoned response when it rejected such requests, particularly given the Project’s numerous significant effects. (See, e.g. Comment Letters A13, O2, O3, O4, O6.)

XII. OTHER DEFICIENCIES

A. The Project Description Does Not Describe the Whole of the Action

When examining an activity to determine whether it could affect the physical environment, an agency must consider the entire activity that is the subject of its approval. (*Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283.) The project description includes the relocation of existing Santa Clara Fire Station 10, but does not include relocation of the Bicycle-Motocross (“BMX”) Track, even though the relocation process

⁴³ Comment Letter A12a from Nuria Fernandez, General Manager/CEO, Santa Clara Valley Transportation Authority, dated November 23, 2015 and incorporated in full by this reference.

City of Santa Clara
April 29, 2016
Page 43

for the facility is being managed by the City of Santa Clara in cooperation with the Project developer.⁴⁴ The physical environmental impacts of relocating the BMX track are reasonably foreseeable, and must be addressed in the Final EIR. (Pub. Resources Code § 21065; CEQA Guidelines § 15378(a).) If there are plans to relocate the Santa Clara Golf and Tennis Club, or any other facilities or structures that would be demolished to make way for the Project, those activities must also be included in the EIR's project description, and any reasonably foreseeable impacts must be evaluated.

B. The Development Agreement and the Disposition and Development Agreement are Part of the Project and Must be Available for Public Review

The project description indicates that a Development Agreement (“DA”) would be required prior to development at the Project site and would be informed by the EIR. As discussed above, the Final EIR states that long term monitoring and maintenance responsibilities for the Landfill would be set forth in a Disposition and Development Agreement (“DDA”) which would be considered by the Council concurrently with Final EIR certification. However, neither document has been made available for public review. Without access to key documents that will dictate how the Project is constructed and implemented, it is impossible to determine whether the Final EIR's analysis is legally adequate. San José respectfully requests copies of the proposed DA and DDA so that we may evaluate the Final EIR's adequacy against these aspects of the Project.

C. The Exclusive Negotiating Rights Agreement

CEQA applies when a public agency proposes to “approve” a project. (Pub. Resources Code § 21080(a); CEQA Guidelines § 15004; see also *Save Tara v. City of W. Hollywood* (2008) 45 Cal.4th 116.) The term “approval” refers to a public agency decision that “commits the agency to a definite course of action in regard to a project.” (CEQA Guidelines § 15352(a).) Under this standard, an agency cannot formally approve a project, or commit itself to approve it, without complying with CEQA before doing so.

In April 2013, the City entered into an Exclusive Negotiating Rights (“ENR”) Agreement with the Project developer, Related Santa Clara, LLC. The ENR Agreement contains various provisions indicating that it is a preliminary step in the process, and is not intended to represent a commitment by either party to proceed with the Project. (See, e.g., Recital E, Paragraphs 14 and 19.) Paragraph 14 states that the City would prepare

⁴⁴ See Related Santa Clara Frequently Asked Questions, available at: <http://www.relatedsantaclara.com/frequently-asked-questions/> (What will happen to the BMX track?), attached as Exhibit Q.

City of Santa Clara
April 29, 2016
Page 44

any environmental documentation required by CEQA but that nothing in the agreement “shall be construed to compel the City to approve or make any particular findings with respect to such environmental documentation.” However, this language does not comport with existing case law on predetermination, which emphasizes that in not committing to a project as a legal or practical matter, the city should be left with complete discretion to modify the transaction or the project, to select other alternatives, and to determine not to proceed with the project at all. (See e.g., *Save Tara, supra*; *Cedar Fair LP v. City of Santa Clara* (2011) 194 Cal.App.4th 1150.)

XIII. CONCLUSION

San José urges the City of Santa Clara to rectify the severe deficiencies in the Project and the Final EIR, to consider the mitigation measures and alternative proposed in this letter, and to recirculate the Final EIR for further review and comment. San José will continue to actively participate in the environmental review process for this Project, and looks forward to working with the City to ensure each of its concerns are sufficiently addressed in a revised document.

Very truly yours,



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Enclosure: Thumdrive with Exhibits