

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201
FAX: (916) 444-6209

etrescott@adamsbroadwell.com

SO. SAN FRANCISCO OFFICE

601 GATEWAY BLVD., SUITE 1000
SO. SAN FRANCISCO, CA 94080

TEL: (650) 589-1660
FAX: (650) 589-5062

DANIEL L. CARDOZO
THOMAS A. ENSLOW
PAMELA N. EPSTEIN
TANYA A. GULESSERIAN
MARC D. JOSEPH
ELIZABETH KLEBANER
RACHAEL E. KOSS
JAMIE L. MAULDIN
ROBYN C. PURCHIA
ELLEN L. TRESMOTT

June 25, 2013

VIA E-MAIL

City of San Jose
Salifu Yakubu, Division Manager and
Hearing Officer on behalf of
Planning Director Joseph Horwedel
E-mail: salifu.yakubu@sanjoseca.gov

**Re: Comments and request for supplemental environmental review
regarding Agenda Item 2e for June 26, 2013 Planning Director's
Hearing: Proposed Vesting Tentative Condominium Map for One
South Market (File T13-025)**

Dear Mr. Yakubu:

Please accept these comments on the proposed Vesting Tentative Map for the One South Market project ("Project") proposed by Essex OSM Reit, LLC ("Essex"). These comments are submitted on behalf of Santa Clara Building and Construction Trades Council, its affiliated local unions, and their members and their families and other individuals who live and/or work in the City of San Jose and Santa Clara County.

A. Noncompliance with Subdivision Map Act and related City Code provisions

There is no published record of findings to show that the requirements of the Subdivision Map Act, Government Code § 66410 *et seq.* (the "Act"), have been met. The applicant Essex initially sought a Site Development Permit from the City for a rental housing project. Essex now wishes to transform the project into a condominium project. Construction of more than five condominiums requires a

June 25, 2013

Page 2

Tentative and Final Subdivision map under the Act.¹ The Act requires the City to make certain findings and approvals before issuing a Tentative Map. The City Code incorporates the requirements of the Act. The proposed four-page set of findings published by the Planning Director is inadequate because it does not contain the findings and approvals required under the City Code and the Act.²

1. No record of an approved soils report

Under the City Code, and in accordance with the Act, the Planning Director “shall not approve any tentative map for a proposed subdivision for which a preliminary [soils] report has been required unless such report has been filed and unless he is satisfied that all geologic hazards have been adequately identified and analyzed, and that adequate corrective measures have been recommended where indicated.”³ For this Project, Condition 13.b.2 of the Site Development Permit requires a soils report. Because the applicant now seeks approval of a Tentative Map, the Planning Director must consult with the City Engineer and must formally approve the soils report and any required mitigation. On its face, the record does not show that the soils report has been submitted and approved.

2. No finding regarding compliance with waste discharge limitations

The City Code and Subdivision Map Act expressly require a finding of compliance with the Regional Water Quality Control Board’s (“RWQCB”) wastewater discharge requirements. The City Code states that the Planning Director “shall not approve any tentative map of any proposed subdivision, unless the director shall determine whether the discharge waste from such proposed subdivision, subject to the conditions imposed thereon by the director, into an existing community sewer system would result in violation of [RWQCB requirements].”⁴ The Planning Director’s proposed Finding No. 7 refers to a separate provision of the City Code, which requires that “when and if” the city

¹ Gov. Code § 66426.

² See *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 513 (land use approvals require adequate agency findings); *Honey Springs Homeowners Assn. v. Bd. of Supervisors* (1984) 157 Cal.App.3d 1122, 1151 (boilerplate or perfunctory findings made without discussion or deliberation are insufficient).

³ San Jose City Code § 19.12.060H; see also Gov. Code § 66490.

⁴ City Code § 19.12.210; Gov. Code § 66474.6.

June 25, 2013

Page 3

manager determines that the City's cumulative sewage treatment demand will violate RWQCB requirements, conditions to reduce sewage output may be imposed.⁵

This condition is not adequate. Before approving a Tentative Map, the Planning Director must make an affirmative finding regarding potential violations of RWQCB waste discharge requirements. No such finding has been made. This issue is further addressed below in our request for supplemental environmental review.

3. No evidence of passive or natural heating or cooling opportunities

The City Code and the Act require that the "design of a subdivision for which a tentative map is required" must provide, "to the extent feasible, for future passive or natural heating or cooling opportunities."⁶ For heating, this includes orienting structures in an east-west alignment for southern exposure, and for cooling it includes orienting structures to take advantage of shade or prevailing breezes, with consideration given to local climate, contour, configuration of the parcel, and other design and improvement requirements. There is no finding to support that all feasible passive or natural heating or cooling opportunities will be implemented in the design of the Project.

C. Noncompliance with other City Code provisions

1. An affordable housing plan is required

The Planning Director's Finding No. 9 states that because the applicant is applying for a Tentative Map, "the City will record Affordability Restrictions to enforce the project's Inclusionary Housing obligations." The City Code, however, states that no application for a Tentative Map shall be deemed complete (let alone approved) until the applicant submits an affordable housing plan.⁷ The Planning Director must review and approve the affordable housing plan "as part of the first approval" of the residential development.⁸ The Planning Director must also attach a condition to that approval, requiring the recordation of an inclusionary housing agreement.⁹

⁵ City Code § 15.12.423.

⁶ City Code § 19.04.080; Gov. Code 66473.1.

⁷ City Code §§ 5.08.610, 5.08.185 ("first approval" includes a tentative map).

⁸ City Code § 5.08.610D.

⁹ *Id.*

There is no public record showing that Essex has submitted an affordable housing plan, or that the Planning Director reviewed and approved that plan as part of the Tentative Map approval. It is important that the public has an opportunity to review this information, including the method by which Essex proposes to comply with the City's affordable housing requirements, and any proposed waivers or other modifications to those requirements. Moreover, the Subdivision Map Act requires the City to consider the effect that granting the Tentative Map will have on the housing needs of the region, and to "balance these needs against the public service needs of its residents and available fiscal and environmental resources."¹⁰ The Planning Director cannot approve the Tentative Map without an approved affordable housing plan that is disclosed to the public.

2. Condominium projects have different parking requirements

The off-street parking requirement for residential downtown projects is 1 parking space per unit, but the downtown ordinance states that such projects are also "subject to any other applicable provision of . . . any other title of the San José Municipal Code."¹¹ The downtown parking ordinance does not specifically address condominium projects. However, another provision of the City Code does provide a specific parking requirement for condominium projects, of 1.5 parking spaces per unit.¹² The Planning Director has not taken this condominium-specific parking requirement into account when considering approval of the Tentative Map.

D. Noncompliance with the Project's Mitigated Negative Declaration

To address potential impacts related to the Project's cumulative contribution to greenhouse gas emissions, page 62 of the Mitigated Negative Declaration ("MND") for the Project states that "the City of San José will require that the developer implement a transportation demand management program as a condition of approval." The Planning Director has not imposed a condition of approval or a CEQA mitigation measure requiring the preparation and implementation of a transportation demand management program ("TDM"). Accordingly, the Planning Director is required to insert a new condition of approval for the Tentative Map, requiring preparation of a TDM.

¹⁰ Gov. Code § 66412.3.

¹¹ City Code § 20.70.100J.

¹² City Code §§ 20.170.150, 20.170.300.

June 25, 2013

Page 5

The City also publicly committed to considering specific transit incentives as components of the TDM, including the provision of transit passes to Project occupants, and unbundled parking requirements. The Santa Clara Valley Transportation Authority's ("VTA") comments on the MND expressed support for requiring a TDM, and requested that the TDM include a "requirement for the project applicant to provide VTA Eco Passes or similar discounted transit passes on a continuing basis."¹³ The VTA provided detailed information about its Eco Pass program, including discounts for housing developments such as this one. In response, the City replied that "if the project is approved, the City of San Jose will consider the inclusion of Eco Passes as part of the final TDM program for the proposed project."¹⁴

VTA also requested that the City should "work with the applicant to unbundle the price of parking from the price of housing in this development, to provide an incentive to reduce auto ownership and increase the use of alternative modes." The City responded that "if the project is approved, the City of San Jose will take VTA's recommendation to charge for parking on-site into consideration."¹⁵

Requiring unbundled parking and the provision of transit passes to project residents and employees are *standard* conditions of approval for downtown mixed-use projects in other Bay Area communities.¹⁶ The City has already committed to requiring a TDM as a condition of Project approval, and it has committed to giving due consideration to VTA's requests. The Planning Director cannot approve the Tentative Map until it complies with these commitments.

Furthermore, unless the City imposes these conditions, it cannot rely on the MND prepared for the Project. The MND found that potential greenhouse gas emissions would be mitigated to below a level of significance, based in part on the

¹³ <http://www.sanjoseca.gov/DocumentCenter/View/11888>, p. 4.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ See City of Berkeley Municipal Code §§ 23E.68.080G and H (<http://codepublishing.com/ca/berkeley/>).

1401-327j

June 25, 2013

Page 6

requirement for a TDM for the Project. Failure to adopt this Project condition would render the impacts of the Project unmitigated, in violation of CEQA, and would require the preparation of an Environmental Impact Report ("EIR") for the Project.¹⁷

E. Request for supplemental environmental review

Under the Subdivision Map Act, the Planning Director must deny a Tentative Map if the design of proposed improvements is "likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat."¹⁸ As discussed above, the Planning Director must also make a finding that the Project will not result in any violation of RWQCB waste discharge requirements for any discharge into an existing community sewer system. Finally, the City cannot rely on an MND unless it adopts all feasible mitigation measures to reduce or avoid potentially significant impacts.¹⁹

Stormwater runoff and dewatered groundwater produced during construction, as well as stormwater runoff from the completed Project, will be discharged into the City's existing community storm sewer system, which flows into the nearby Guadalupe River. Discharges from the storm sewer system are regulated by the RWQCB under Municipal Regional Stormwater "NPDES" Permit No. CAS612008.²⁰ Among the purposes of this Permit is to protect water quality from pollution that adversely affects fish and wildlife. Substantial evidence shows that the Project will not comply with the Permit, and that further environmental review is required.

First, the applicant has declined to apply for coverage under the RWQCB General Permit for Construction Activities, which governs stormwater runoff on construction sites 1 acre in size, because the legal size of the Project parcel is reportedly 42,345 square feet, or 0.97 acres. The City, under its NPDES Permit and

¹⁷ See, e.g., CEQA "Guidelines," 14 Cal. Code Regs §§ 15074(d), 15162, 15183.5 (agency must incorporate greenhouse gas reduction measures, including those from an existing plan for reduction of greenhouse gasses, as mitigation measures applicable to the specific project being approved).

¹⁸ Gov. Code § 66474(e).

¹⁹ CEQA Guidelines § 15074(d).

²⁰ <http://www.sanjoseca.gov/index.aspx?nid=1615>.

1401-327j

June 25, 2013

Page 7

City Policy 8-14, is required to ensure that construction projects disturbing 1 acre adhere to the General Permit requirements. One of the Project plans shows that the Project boundary is actually 1.04 acres, slightly larger than the 0.97-acre parcel boundary.²¹ Moreover, the applicant recently applied to the City for an encroachment permit to allow soil excavation and installation of below-ground tie backs within the public right-of-way adjacent to the Project site.²² It is very likely that this activity will expand the size of the disturbed Project area to at least 1,215 square feet outside the parcel line, triggering the need for coverage under the General Permit. There may be other such improvements on adjacent properties that put the Project over the 1-acre threshold. This and other new significant information about the Project warrant supplemental environmental review to ensure that the Project complies with applicable regulatory requirements and mitigation.

Second, the City has not required full compliance with post-construction stormwater treatment standards under its NPDES permit and the City's Post-Construction Urban Runoff Policy 6-29. The MND, on page 78, acknowledges that stormwater from non-rooftop areas on the Project site will be drained into a media filter, which is typically not an acceptable form of stormwater treatment. The MND concludes, however, that because the Project is a transit-oriented development, it qualifies as a Category C Special Project, and thus it does not need to meet applicable stormwater treatment standards. What the MND does not disclose, however, is that Category C Special Projects must show that on-site or off-site stormwater treatment is "infeasible," before it can qualify for a stormwater exemption.²³ There is no publicly disclosed record showing that adequate stormwater treatment is infeasible.

²¹ See "Notes" and "Legend" on attached plan drawing, stating that the Project area will be 1.04 acres, and distinguishing between the parcel line and the slightly larger Project boundary.

²² City Reference No. 3-06182, Permit No. 2013 106630 RV.

²³ http://www.scvurppp-w2k.com/pdfs/1112/C3_Handbook_Appendices-042012-Web.pdf, App. J, p. 8. 1401-327j

June 25, 2013

Page 8

Before approving the Tentative Map, the Planning Director must specifically find that the applicant will not violate the City's RWQCB permit for its municipal storm sewer system, that the Project will not adversely affect fish and wildlife, and that the Project's environmental impacts have been adequately mitigated. Further review of the issues raised above is required in order for the Planning Director to support his decision with substantial evidence.

Sincerely,



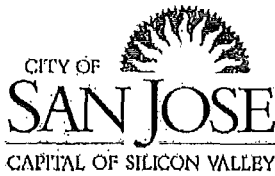
Daniel L. Cardozo
Ellen L. Trescott

cc: Joseph Horwedel, Planning Director (joseph.horwedel@sanjoseca.gov)
Sylvia Do, Project Manager (sylvia.do@sanjoseca.gov)
Neil Struthers, Santa Clara Building & Construction Trades Council
(neil@scbtc.org)

ELT:ljl

June 25, 2013
Page 9

ATTACHMENT



CITY OF SAN JOSE
 Planning, Building and Code Enforcement
 200 East Santa Clara Street
 San José, CA 95113-1905
 tel (408) 535-3555 fax (408) 292-6055
 Website: www.sanjoseca.gov/planning

NOTICE OF ENVIRONMENTAL APPEAL

TO BE COMPLETED BY PLANNING STAFF			
FILE NUMBER	RECEIPT # _____		
TYPE OF ENVIRONMENTAL DETERMINATION (EIR, MND, EX)	AMOUNT _____		
	DATE _____		
	BY _____		
TO BE COMPLETED BY PERSON FILING APPEAL			
PLEASE REFER TO ENVIRONMENTAL APPEAL INSTRUCTIONS BEFORE COMPLETING THIS PAGE.			
THE UNDERSIGNED RESPECTFULLY REQUESTS AN APPEAL FOR THE FOLLOWING ENVIRONMENTAL DETERMINATION:			
REASON(S) FOR APPEAL (For additional comments, please attach a separate sheet.):			
<i>See attached.</i>			
PERSON FILING APPEAL			
NAME <i>Santa Clara + San Benito Building + Construction Trades Council</i>	DAYTIME TELEPHONE <i>(408) 265-7643</i>		
ADDRESS <i>2102 Almaden Rd, Suite 101</i>	CITY <i>San Jose</i>	STATE <i>CA</i>	ZIP CODE <i>95125</i>
SIGNATURE <i>[Handwritten Signature]</i>	DATE		
CONTACT PERSON (IF DIFFERENT FROM PERSON FILING APPEAL)			
NAME <i>Ellen Trescott, Adams Broadwell Joseph + Cardozo</i>			
ADDRESS <i>520 Capitol Mall, Suite 350</i>	CITY <i>Sacramento</i>	STATE <i>CA</i>	ZIP CODE <i>95814</i>
DAYTIME TELEPHONE <i>(916) 444-6201</i>	FAX NUMBER <i>(916) 444-6209</i>	E-MAIL ADDRESS <i>etrescott@adamsbroadwell.com</i>	

PLEASE CALL THE APPOINTMENT DESK AT (408) 535-3555 FOR AN APPLICATION APPOINTMENT.

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-8201
FAX: (916) 444-8209

etrescott@adamsbroadwell.com

SO. SAN FRANCISCO OFFICE

801 GATEWAY BLVD., SUITE 1000
SO. SAN FRANCISCO, CA 94080

TEL: (850) 589-1860
FAX: (650) 689-5062

DANIEL L. CARDOZO
THOMAS A. ENSLOW
PAMELA N. EPSTEIN
TANYA A. GULESSERIAN
MARC D. JOSEPH
ELIZABETH KLEBANER
RACHAEL E. KOSS
JAMIE L. MAULDIN
ROBYN C. PURCHIA
ELLEN L. TRESMOTT

July 9, 2013

City of San Jose
Planning, Building and Code Enforcement
City Hall, Development Services Center
200 East Santa Clara Street
San Jose, CA 95113-1905

**Re: Appeal of Planning Director's July 3, 2013 Environmental
Determination for the One South Market project (File T3-025)**

On behalf of the Santa Clara & San Benito Building & Construction Trades Council, its affiliated local unions, and their members and their families and other individuals who live and/or work in the City of San Jose and Santa Clara County ("SCBCT"), we are writing to appeal the City Planning Director's July 3, 2013 environmental determination for the One South Market project proposed by Essex OSM Reit, LLC ("Project"). On July 3rd, the Planning Director approved a Vesting Tentative Map in reliance on an Initial Study/Mitigated Negative Declaration for the Project ("IS/MND").

Pursuant to City of San Jose procedures and Municipal Code Chapters 21.04 and 21.06, we have attached a Notice of Environmental Appeal Form and a payment of \$100 to cover the fee of the appeal. We have also attached SCBCT's comments submitted to the Planning Director on June 25, 2013. As shown by the June 25th comment letter, the issues raised in this appeal were raised in writing prior to the Planning Director's public hearing on July 3rd. SCBCT's representative, Bill Guthrie, also raised these issues orally at the public hearing.

Comment sections D and E, on pages 4 through 8 of the attached comment letter, highlight the grounds for this appeal, including the Planning Director's failure to: (1) comply with the IS/MND by requiring a transportation demand management program ("TDM") as a condition of approval; (2) consider specific transit incentives as components of the TDM, including the provision of transit

1401-332j

July 9, 2013

Page 2

passes to Project occupants, and unbundled parking requirements; and (3) conduct supplemental environmental review to ensure that the Project fully complies with applicable regulatory requirements and mitigation, including the Regional Water Quality Control Board's General Permit for Construction Activities, and the City's Post-Construction Urban Runoff Policy 6-29.

SCBCT also intends to file a separate appeal of all issues raised in its June 25th comment letter, within the 10-day appeal period for Tentative Map approvals provided under the Municipal Code and the Subdivision Map Act. For the sake of efficiency, and pursuant to Municipal Code section 21.04.140E(9), SCBCT respectfully requests that the City Council be scheduled to hear both Project appeals at the same time.

Thank you for your attention to this important matter.

Sincerely,



Daniel L. Cardozo
Ellen L. Trescott

ELT:ljl