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July 12, 2013

VIA OVERNIGHT MAIL

Attention: Sylvia Do
City of San Jose Development Services
200 East Santa Clara Street, Third Floor Tower
San Jose, CA 95113

Re: Appeal of Planning Director's July 5, 2013 Approval of a Vesting Tentative Map 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 5, 2013 approval of a Vesting Tentative Map for the One South Market project proposed by Essex OSM Reit, LLC ("Project").

Pursuant to City of San Jose procedures and Municipal Code Section 19.12.230, we have attached a Notice of Permit Appeal Form and a payment of \$100 to cover the fee of the appeal. We have also attached a copy of SCBCT's comments submitted to the Planning Director on June 25, 2013, and a copy of SCBCT's Notice of Environmental Appeal filed on July 9, 2013. The Notice of Environmental Appeal is specifically focused on the environmental issues raised in SCBCT's June 25th comment letter. 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.

SCBCT raised seven issues in its June 25th comment letter, which was submitted to the Planning Department eight days before the Planning Director's July 3rd hearing on the Project. The staff report submitted to the Planning Director, however, did not address any of the issues raised by SCBCT. Instead,

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staff verbally communicated Project-related findings and recommendations at the July 3rd hearing. Pursuant to the Subdivision Map Act, however, any "report or recommendation on a tentative map by the staff of the local agency to the advisory agency or legislative body *shall be in writing*."¹ The City Council should remand the Project to the Planning Director and should require that staff's reports and recommendations on the issues raised in SCBCT's comment letter be made in writing.

The first and third issues raised in SCBCT's comment letter have apparently been addressed, as a soils report was reportedly approved by the City on April 23, 2013, and the Project has been found to incorporate passive and natural heating and cooling opportunities. The remaining issues have not been adequately addressed, and they form the basis for this appeal

1. Wastewater discharges will not meet Regional Water Quality Control Board permit requirements

The second and seventh issues raised in SCBCT's comment letter were not adequately addressed by staff. These issues are closely related and will therefore be addressed together in this appeal.

The City Code and the Subdivision Map Act expressly requires compliance with the Regional Water Quality Control Board's ("RWQCB") wastewater discharge requirements, and prohibits the issuance of a Tentative Map unless such compliance is shown *in advance of Project approval*.² The Subdivision Map Act also requires the City to 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."³ Finally, the California Environmental Quality Act ("CEQA") requires the City to adopt all feasible mitigation measures to reduce or avoid potentially significant impacts.⁴

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

¹ Gov. Code § 66452.3.

² City Code § 19.12.210; Gov. Code § 66474.6.

³ Gov. Code § 66474(e).

⁴ CEQA Guidelines § 15074(d).

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the nearby Guadalupe River and then to San Francisco Bay. Discharges from the storm sewer system are regulated by the RWQCB under Municipal Regional Stormwater "NPDES" Permit No. CAS612008.⁵ Among the purposes of that 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 City Policy 8-14, is required to ensure that construction projects disturbing 1 acre or more 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.⁶ 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.⁷ 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 Construction Stormwater 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. City staff responded at the July 3rd hearing that the NPDES stormwater permitting requirements fall under the RWQCB's jurisdiction, and not the City's, and therefore the City is not responsible for ensuring compliance. This is incorrect, first because the City's NPDES stormwater permit *requires* the City to ensure individual project compliance with stormwater permitting requirements, but also because the City has an independent duty to do so under the City Code, Subdivision Map Act, and CEQA. Staff's response on this issue was inadequate.

⁵ <http://www.sanjoseca.gov/index.aspx?nid=1615>.

⁶ See "Notes" and "Legend" on plan drawing attached to SCBCT's June 25th comment letter, stating that the Project area will be 1.04 acres, and distinguishing between the parcel line and the slightly larger Project boundary.

⁷ City Reference No. 3-06182, Permit No. 2013 106630 RV.
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The City has also not required full compliance with post-construction stormwater treatment standards ("LED 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 not an acceptable LED standard for stormwater treatment. Staff at the July 3rd hearing acknowledged that 55% of the Project's stormwater will be treated using non-LED methods. Staff concluded, 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. A category C Special Project must show that on-site or off-site stormwater treatment is "infeasible" before it can qualify for a stormwater exemption.⁸ There is absolutely no record showing that adequate stormwater treatment is infeasible. In fact, the applicant has offered to treat at least 45% of its stormwater through LED-acceptable methods. The Project applicant should be required to incorporate LED methods to treat all of its stormwater discharge, or else provide substantial evidence that using such methods would be infeasible.

2. The in-lieu inclusionary housing fee was miscalculated, and the affordable housing plan for the project was approved in error and without public review

The fourth issue raised in SCBCT's comment letter was also not adequately addressed by staff. SCBCT objected that the City had not yet approved an Affordable Housing Plan for the Project, as required by City ordinance, and had not allowed for any public review of the proposed Affordable Housing Plan. At the July 3rd hearing, staff reported that an Affordable Housing Plan for the Project had been approved just the day before, on July 2, 2013. SCBCT obtained a copy of that plan (attached), and SCBCT objects that the required payment of in-lieu fees under the plan is miscalculated and has not been adequately explained. "Attachment 2," which is the second page of the Affordable Housing Plan, indicates that the 20% affordable housing obligation was reduced by half, so that the Project will only be required to pay the City's in-lieu fees for 10% of the proposed condominium units. Thus, under the City's \$65,000 per-unit cap on for-sale units in the Downtown High-Rise Incentive area, the in-lieu fee was calculated as \$2,028,000, which equals \$65,000 for only 10% of the proposed units.

⁸ http://www.sevurppp-w2k.com/pdfs/1112/C3_Handbook_Appendices-042012-Web.pdf, App. J, p. 8. 2914-001j

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Nothing in the City's Inclusionary Housing Policy or In-Lieu Fee Chart indicates why the Project should be eligible for a 50% reduction in fees. Under the City's in-lieu fee system, downtown high rise projects must pay \$8.50 per square foot, with a cap of \$65,000 per unit, for 20% of proposed units, not 10%.⁹ As described in a memo to the City Council dated April 23, 2013, the normal fee is \$17.00 per square foot, and therefore the \$8.50 fee for downtown high rises already includes a 50% reduction:

[T]here is an Inclusionary in-lieu fee discount of 50% (\$8.50 per net square foot of market-rate residential with a maximum of \$65,000 per unit) for high rise for-sale projects of at least 10 stories within an expanded downtown core area. . . . The City has *already set the incentive fee for Downtown high rises at 50% of the normal rate.*¹⁰

The Affordable Housing Plan for the Project miscalculated the required fee, because it included another 50% reduction on top of the built-in reduction in the fee rate. This was in error. The Affordable Housing Plan must be revised to require payment of \$4,056,000 in in-lieu fees, which equals \$65,000 for 20% of the proposed units.

3. Condominium parking requirements apply to all condominiums

The fifth issue raised in SCBCT's comments is that Municipal Code section 20.170.300 establishes a standard of 1.5 parking spaces per unit for condominiums, not 1 space per unit. Staff responded at the July 3rd hearing that this section only applies to condominium conversions of existing housing, not to newly constructed condominium projects. However, under the Municipal Code a "conversion" is defined as "a change in the type of ownership of a parcel or parcels of land, together with the existing attached structures, to that defined for a condominium project or community apartment project regardless of the present or prior use of such land and structures, and whether substantial improvements have been made or are to be made to such structures."¹¹ The Project at issue here involves "a change in the type of ownership of a parcel" and "the existing attached structures" to a condominium project. The 1.5 parking standard should apply.

⁹ <http://www.sanjoseca.gov/index.aspx?NID=1306>

¹⁰ http://www3.sanjoseca.gov/clerk/Agenda/20120515/20120515_0402.pdf (emphasis added).

¹¹ San Jose Municipal Code § 20.170.100.

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4. Failure to require a Transportation Demand Management ("TDM") program and give meaningful consideration to TDM measures requested by the Santa Clara Valley Transportation Authority renders the CEQA document for the Project inadequate

The Initial Study/Mitigated Negative Declaration ("IS/MND") for the Project states explicitly that "the City of San José will require that the developer implement a transportation demand management program as a condition of approval."¹² In response to this unequivocal statement, the Santa Clara Valley Transportation Authority ("SCVTA") submitted comments expressing support for the TDM program, and requesting that two specific components be included in the TDM program: a requirement that the developer provide transit passes to residents and employees (SCVTA would provide these passes at a discount for the Project), and a requirement that the price of parking be "unbundled" from the price of housing units. The City's response in no way indicated that the City in fact *did not intend* to require a TDM program for the Project. Instead, the City responded that it would consider SCVTA's request to incorporate the two identified components.

The City did not require a TDM program for the Project, or give any meaningful consideration to SCVTA's and SCBCT's request to include transit passes and unbundled parking. Staff's response at the July 3rd hearing was simply that: (1) transit passes and unbundled parking are not required by the Municipal Code; (2) the Project is "consistent" with the City's Greenhouse Gas Reduction Strategy and therefore will not cause a significant environmental impact; and (3) several "TDM features" are already incorporated, such as the provision of bicycle parking, the simple fact that the Project is located downtown, and the design of the Project.

First, the City has significantly deviated from the Project as described in the IS/MND by refusing to require a TDM program that the City expressly represented would be a required condition of Project approval. California courts have repeatedly held that "an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient [CEQA document]."¹³ CEQA requires that a project be described with enough particularity that its impacts can be assessed. It is impossible for the public to make informed comments on a project that is not accurately described. "Only through an accurate view of the project may affected

¹² IS/MND p. 62 (emphasis added).

¹³ *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.
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outsiders and public decision-makers balance the proposal's benefit against its environmental costs."¹⁴ As articulated by the court in *County of Inyo v. City of Los Angeles*, "a curtailed, enigmatic or unstable project description draws a red herring across the path of public input."¹⁵ Without a complete project description, the environmental analysis under CEQA is impermissibly limited, thus minimizing the project's impacts and undermining meaningful public review.

Public commenters, including agencies like the SCVTA, were led to believe that the City would require a TDM program for the Project. SCVTA was also led to believe that the City could give meaningful considerations to its suggestions for transit-related mitigation, when instead the City dismissed these suggestions because they are not required by the Municipal Code. Had the IS/MND reflected the actual Project, then the nature and scope of comments would very likely have been different. The IS/MND should be recirculated to reflect that the City does not intend to require a TDM program for the Project, and does not intend to consider the components requested by SCVTA. If it is shown that this may result in significant unmitigated impacts, an Environmental Impact Report should be prepared.

Second, the City's failure to require a TDM program that includes transit passes and unbundled parking constitutes "significant new information" that requires the City to recirculate the IS/MND for additional public review and comment.¹⁶ The term "information" includes "changes in the project or environmental setting as well as additional data or other information."¹⁷ New information is "significant" when its addition "deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the Project or a feasible way to mitigate or avoid such an effect."¹⁸ The purpose of recirculation is to give the public and other agencies an opportunity to evaluate the new data and the validity of conclusions drawn from it.¹⁹ Recirculation is required when the new information shows: (1) a new significant environmental impact; (2) a substantial increase in the severity of an environmental impact unless mitigation measures are adopted that reduce the impact to a level of insignificance; (3) a project alternative or mitigation measure, considerably different from those

¹⁴ *Id.* at 192-193.

¹⁵ *Id.* at 197-198.

¹⁶ Pub. Resources Code § 21092.1; CEQA Guidelines, 14 Cal. Code Regs. § 15088.5.

¹⁷ CEQA Guidelines § 15088.5.

¹⁸ CEQA Guidelines § 15088.5.

¹⁹ *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (1981) 122 Cal.App.3d 813, 822. 2914-001j

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considered in the IS/MND, that would lessen the environmental impacts, but the project proponents refuse to adopt it; or (4) the IS/MND was so inadequate and conclusory that public comment was meaningless.²⁰

At least one of these standards for recirculation, if not all of them, are met here. Staff's response that the Project would not cause significant environmental impacts related to greenhouse gas ("GHG") emissions, and that the existing Project features are sufficient, are inadequate. The IS/MND relies on the City's 2040 General Plan Environmental Impact Report ("EIR"). The IS/MND represents that the EIR found that City GHG emissions impacts were less than significant. In fact, the EIR found that the long-term Citywide cumulative emissions from transportation, residential energy use, and other emissions sources, unless they were significantly reduced, would be significant and unavoidable.²¹ This requires the City to implement all feasible mitigation measures for projects proposed within the City that will contribute to this cumulatively significant impact.

That City's 2040 General Plan EIR acknowledged that CEQA requires public agencies to identify mitigation for GHG emissions, "including but not limited to the effects associated with transportation or energy consumption."²² The EIR found that transportation is responsible for 46% of the City's GHG emissions, and that electricity use or generation from residences is responsible for 19%.²³ For this Project, despite the fact that transportation accounts for more than twice as many GHG emissions as residential electricity use, the IS/MND only lists specific energy-saving features associated with the Project, and does not list specific transportation-reduction features.²⁴ The only discussion related to transportation emissions is as follows:

As discussed in the Regulatory Background section above, the City of San José has an adopted GHG Reduction Strategy which includes both mandatory measures for all projects and other measures which are considered voluntary. Voluntary measures could be incorporated in the project as mitigation measures for proposed projects, at the discretion of the City.

²⁰ CEQA Guidelines § 15088.5(a).

²¹ City's 2040 General Plan EIR p. 825.

²² *Ibid.* p. 786.

²³ *Ibid.* p. 783.

²⁴ Project IS/MND pp. 61-62.

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Compliance with the mandatory measures and any voluntary measures required by the City would ensure an individual project's consistency with the GHG Reduction Strategy. The proposed project is consistent with the Land Use/Transportation Diagram designation of Downtown. The proposed development will be required to incorporate the mandatory green building measures and bicycle and pedestrian site design measures, as applicable. Furthermore, the City of San José will require that the developer implement a transportation demand management program as a condition of approval.²⁵

The point made in the IS/MND is that the Project will be consistent with the City's GHG Reduction Strategy and will therefore have a less-than-significant environmental impact *if* the City incorporates transportation-related measures to reduce GHG emissions. City staff's reasoning, that the City is not required to incorporate transportation-related measures because the Project is consistent with the GHG Reduction Strategy, is entirely circular.

The 2040 General Plan EIR lists City policies that encourage unbundled parking, TDM programs, and transit subsidies.²⁶ The EIR then commits to implementing the City's Greenhouse Gas Reduction Strategy by adopting an Implementation Policy.²⁷ The City has not yet done so. The Implementation Policy is still being developed, and it is proposed to require measures such as TMD programs and unbundled parking.²⁸ Absent an approved Implementation Policy, and especially in a situation such as this where the City refuses to incorporate suggested, feasible, and reasonable mitigation measures such as those suggested by SCVTA and SCBCT, the City cannot rely on the bald statement that the Project complies with the City's GHG Reduction Strategy and therefore will have less-than-significant environmental impacts. The IS/MND must be revised and recirculated.

²⁵ *Ibid.* p. 62.

²⁶ City's 2040 General Plan EIR pp. 809-820.

²⁷ *Ibid.* p. 800.

²⁸ <http://www.sanjoseca.gov/index.aspx?nid=3687>

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Thank you for your attention to this important matter.

Sincerely,

A handwritten signature in cursive script that reads "Ellen Trescott".

Daniel L. Cardozo
Ellen L. Trescott

ELT:ljl

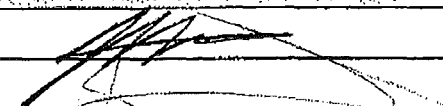
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ATTACHMENTS



INCLUSIONARY HOUSING COMPLIANCE PLAN

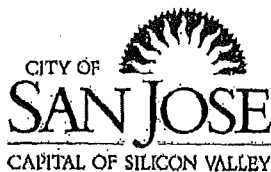
Prior to the City Issuing any Foundation or Building Permit, developer will be required to submit a completed Compliance Plan (please see below) to the City's Housing Department that identifies the way in which a project's affordable housing obligation will be met. After Housing Department approval of the Compliance Plan, the Developer is required to execute and record against the entire property an Affordability Restriction that codifies the developer's obligation. It is prudent for developers to contact the Inclusionary Housing Team early in the project's planning stage to discuss Inclusionary requirements and the ways in which any obligations may be met.

DEVELOPER INFORMATION	
Name: ESSEX PROPERTY TRUST	E-Mail: Judy@essexpropertytrust.com
Contact: JOHN EUDY	Phone #: 650-849-1600
Contact Address (street, city, state): 925 E. MEADOW DR. PALO ALTO, CA 94301 94303	
PROJECT INFORMATION	
Project Name: ONE SOUTH MARKET	Project Address: 1 SOUTH MARKET ST.
Project APN(s): 259-40-093	
RDA Project Area Name:	
Approved Site or PD Permit #:	Building Permit #:
Total # and types of Housing Units: 312 APARTMENTS	
Tenure of Housing (Rental/For-sale): RENTAL	Condo map planned? YES
SELECT YOUR PROPOSED METHOD OF COMPLYING WITH THE CITY'S INCLUSIONARY POLICY	
<input type="checkbox"/> Will provide the required affordable units within the project	
<input checked="" type="checkbox"/> Will pay the required in-lieu fee if/when the project becomes a for-sale project	
<input type="checkbox"/> Will use an alternative or a combination of approved methods (subject to Housing Department approval)	
For all proposals, please attach a letter to the Compliance Plan that explains how the Inclusionary requirements will be met and a map indicating where units will be located, if applicable. Please refer to the City's <i>Inclusionary Housing Policy Guidelines</i> (http://www.sanjoseca.gov/index.aspx?nid=1306) for detailed information on all compliance options.	
SIGNATURES	
Developer's Signature: 	Date:
City's Approval of Plan:	Date: 7/2/13

The City's current Inclusionary Housing Policy Guidelines including the current rates for In-lieu fees can be found online at <http://www.sanjoseca.gov/index.aspx?nid=1306>. For additional help, call the Inclusionary Housing team at (408) 975-2647 or (408) 535-8236 or by email at: Patrick.helsinger@sanjoseca.gov.

Version: May 2013

***Inclusionary requirements only apply if/when the project becomes a for-sale project. In addition, because the project is within the Downtown Incentive Area, the inclusionary obligations are reduced by 50%.



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
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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.):			
See attached.			
PERSON FILING APPEAL			
NAME	DAYTIME TELEPHONE		
Santa Clara + San Benito Building + Construction Trades Council	(408) 265-7643		
ADDRESS	CITY	STATE	ZIP CODE
2102 Almaden Rd, Suite 101	San Jose	CA	95125
SIGNATURE	DATE		
CONTACT PERSON (IF DIFFERENT FROM PERSON FILING APPEAL)			
NAME	Ellen Trescott, Adams Broadwell Joseph + Cardozo		
ADDRESS	CITY	STATE	ZIP CODE
520 Capitol Mall, Suite 350	Sacramento	CA	95814
DAYTIME TELEPHONE	FAX NUMBER	E-MAIL ADDRESS	
(916) 444-6201	(916) 444-6209	etrescott@adamsbroadwell.com	

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