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March 5, 2024

Via Email and Overnight Delivery

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**Re: Request to Restart the Public Review and Comment Period for
the Draft Environmental Impact Report – Seely Avenue Mixed-
Use Project (PDC21-035, PD22-002, ER21-284, SCH# 2022020565)**

Dear Ms. Taber, Mr. Burton, and Ms. Telahun:

On behalf of Silicon Valley Residents for Responsible Development (“Silicon Valley Residents”), we respectfully request that City of San Jose (“City”) restart the public review and comment period for the Draft Environmental Impact Report (“DEIR”) prepared for the Seely Avenue Mixed-Use Project, PDC21-035, PD22-002, ER21-284, SCH# 2022020565, (“Project”) proposed by The Hanover Company (“Applicant”). **The current public comment period ends on March 11, 2024.** We are continuing to review the DEIR and appendices that have been made available to date by the City. However, we cannot prepare meaningful comments on the adequacy of the DEIR until the City provides complete and accurate versions of the operative DEIR and supporting appendices.

C-2.1 As demonstrated in this letter, a restart of the 45-day comment period is necessary under the California Environmental Quality Act (“CEQA”)¹ because the City failed to make available all DEIR documents, as required by CEQA.² **We request that the City restart the 45-day public review and comment period on the DEIR to ensure the public is properly informed about the Project.**

We expressly reserve the right to file comments on the DEIR at a later date, and to supplement these comments at any later hearings and proceedings related to this Project following our receipt and review of the documents referenced in the DEIR.³

I. The DEIR Was Not Properly Uploaded to the State Clearinghouse Website

C-2.2 The Project’s DEIR and its appendices can be viewed both on the State Clearinghouse website⁴ and through the City’s website.⁵ Because members of the public can access either website, it’s crucial that both platforms accurately and uniformly present this information. Any discrepancies would result in an unequal distribution of information, leaving some members of the public insufficiently informed, which, as demonstrated herein and further below, is precisely what occurred here.

On February 29, 2024, just days before the comment deadline, the City asked the State Clearinghouse to “add the Draft Environmental Impact Report to the documents” uploaded on the State Clearinghouse site because “[t]he document was not uploaded correctly by the submitter.”⁶ There is no further explanation of this issue, making it unclear whether the DEIR was not uploaded to the State Clearinghouse site at all, an incorrect version of the DEIR was uploaded, or otherwise. This means that members of the public relying on the State Clearinghouse website may not have had proper access to the DEIR. The State Clearinghouse’s re-upload of the DEIR should have prompted a restart of the

¹ Public Resources Code (“PRC”) §21000 et seq.; California Code of Regulations (“CCR”), Title 14, Division 6, Chapter 3, Sections 15000 et seq.

² PRC § 21092(b)(1); 14 CCR § 15087(c)(5).

³ See *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1118-21.

⁴ Available at: <https://ceqanet.opr.ca.gov/2022020565/2>

⁵ Available at: <https://www.sanjoseca.gov/your-government/departments-offices/planning-building-code-enforcement/planning-division/environmental-planning/environmental-review/active-eirs/0-seely-ave-mixed-use-project>

⁶ Letter from Christopher Burton, City to State Clearinghouse, re: “Update Documents for Published Draft EIR (SCH Number 2022020565): Seely Avenue Mixed-Use Project” (February 29, 2024), available at: <https://files.ceqanet.opr.ca.gov/276489-2/attachment/so4O7OYL5ZlmuJ2mHbQeSHnzsUmrBZ-PGgOFMG5d11vmlGEqbZbJtZcgI-8KcVvDAdN5lHt0gTXkLB-0>

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comment period because members of the public were unable to view the proper DEIR on the State Clearinghouse website for almost the entirety of the review and comment period. The City should restart the comment period now to ensure all members of the public have proper access to the DEIR.

II. The State Clearinghouse and City's Websites Provide Conflicting Appendices

CEQA requires that "all documents referenced" – and the CEQA Guidelines require that "all documents incorporated by reference" – in a draft environmental impact report shall be "readily accessible to the public during the lead agency's normal working hours" during the entire public comment period.⁷ Further, an EIR may not rely on hidden studies or documents that are not provided to the public.⁸ The City is in violation of these requirements because the City has failed to provide Silicon Valley Residents and the public with access to the DEIR's correct appendices.

C-2.3

For example, two different versions of Appendix D, the Biological Resources Evaluation, appear on the City's webpage and the State Clearinghouse website. On the City's website, it is a 106-page document titled "Biological Resource Analysis, 0 Seely Avenue Mixed-Use Project" by Johnson Marigot Consulting, LLC.⁹ However, on the State Clearinghouse site, it is a 26-page document titled "Revised Brief Biological Constraints Analysis, 681 E Trimble Road Property" by the same consultant.¹⁰ It is unclear which document is the correct biological resource evaluation that the DEIR relied on. This also means that some members of the public relied on one Appendix D while others relied on an entirely different one. It is imperative that the City clarify which document is the correct Appendix D and the public needs adequate time to review the appropriate document.

Additionally, several appendices are incompletely uploaded, depending on which website is viewed. Specifically, Appendix B, the Air Quality Assessment, and Appendix P, the Transportation Analysis, are both missing their own appendices/attachments on the State Clearinghouse website. On the State

⁷ Pub. Resources Code § 21092(b)(1); 14 C.C.R. § 15072(g)(4); see *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689, 699.

⁸ *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3rd 818, 831 ("Whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.").

⁹ See Appendix D uploaded on the City's website at:

<https://www.sanjoseca.gov/home/showpublisheddocument/109310/638441364765770000> (last accessed March 5, 2024).

¹⁰ See Appendix D uploaded on the State Clearinghouse website at:

<https://ceqanet.opr.ca.gov/2022020565/2/Attachment/LPAEnB> (last accessed March 5, 2024).

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Clearinghouse page, Appendix B (Air Quality Assessment) only includes Attachment 1, but the Assessment also refers to Attachments 2, 3, 4 and 5, which are not provided.¹¹ Similarly, Appendix P (Transportation Analysis) is missing all of its appendices on the State Clearinghouse site.¹² The Table of Contents specifies that there are several appendices for the Transportation Analysis, Appendices A through G,¹³ but the document contains only cover pages for each appendix and does not provide the content.¹⁴ After identifying these issues for the City,¹⁵ Appendix B and P were reuploaded *on the City's website*, but remain incomplete on the State Clearinghouse webpage. Further, the City never notified the general public of the re-uploaded documents. Thus, not only do many members of the public remain unaware of the document changes, but the deficiencies persist on the State Clearinghouse webpage.

Furthermore, since our last notification to the City about the incomplete appendices, we have identified additional inconsistencies. First, like Appendices B and P, Appendix E (Historical Resources Evaluation) does not include any of its appendices on the State Clearinghouse website.¹⁶ Second, Appendix K (Phase I, Parcel 1 ESA) is not the same document between the State Clearinghouse website and City's website. On the State Clearinghouse website, it is 3,443 pages, dated July 12, 2021, and, per the Executive Summary, is based on parcel number 097-15-034.¹⁷ However, on the City's website, the document is 3,070 pages, dated March 8,

¹¹ See Appendix B uploaded on the State Clearinghouse website at: https://files.ceqanet.opr.ca.gov/276489-2/attachment/Jjf-I2OPDn4Y912-0LqpxJgF7NzuV0gS7y7JA6TaMoonvUcxanJKirG8uSXQbajtRg0MtoNh8_u7DM10 (last accessed March 5, 2024).

¹² See Appendix P uploaded on the State Clearinghouse website at: https://files.ceqanet.opr.ca.gov/276489-2/attachment/xyNIhGGSkS85iA8iqVQsmas6epdpfkpF9PrwrNBd5QGNPMTz4S9_WX3bRO5lfysk5FO7i13MCEqHm5E0 (last accessed March 5, 2024).

¹³ Appendix P, as uploaded on the State Clearinghouse website, pg. ii.

¹⁴ Appendix P, as uploaded on the State Clearinghouse website PDF pp. 98-105.

¹⁵ **Exhibit A:** Email from Janet Laurain, Adams, Broadwell, Joseph & Cardozo ("ABJC") to City re: "0 Seely Avenue Project - Appendix B and missing attachments" (February 1, 2024, 1:43 PM); **Exhibit B:** Email from Janet Laurain, ABJC to City re: "0 Seely Avenue Project by Hanover Company (5905)" (February 21, 2024, 8:09 AM)

¹⁶ The Appendix E on the City's webpage is 186 pages long and includes its own Appendices A and B after page 83. See Appendix E on the City's website here: <https://www.sanjoseca.gov/home/showpublisheddocument/109312/638441364788870000> (last accessed March 5, 2024). However, Appendix E on the State Clearinghouse website is only 90 pages and only has cover pages for its Appendices A and B. See Appendix E on the State Clearinghouse's webpage here: <https://ceqanet.opr.ca.gov/2022020565/2/Attachment/KKZoqq> (last accessed March 5, 2024).

¹⁷ See Appendix K uploaded on the State Clearinghouse website at: https://ceqanet.opr.ca.gov/2022020565/2/Attachment/eAdF_J (last accessed March 5, 2024). See Executive Summary, pg. 1.

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2021, and is regarding a different parcel number (097-15-033).¹⁸ Third, on February 29, 2024, the City requested that Appendixes G and H be made confidential on the State Clearinghouse website.¹⁹ This means that the public had access to those appendices if viewing the DEIR on the State Clearinghouse website, but not if viewing via the City’s webpage for the Project. The City ultimately needs to address these discrepancies and ensure the completeness and consistency of all documents across both platforms.

Without access to these critical DEIR reference documents, the public is unable to fully evaluate the DEIR’s analysis, conclusions, and mitigation measures which rely on these studies and documents. Silicon Valley Residents and other members of the public are precluded from having the meaningful opportunity to review and comment on the DEIR, as required by CEQA. Indeed, because of the inconsistencies described above, different members of the public and state agencies may not even be reviewing and commenting on the same Project documents.

The courts have held that the failure to provide even a few pages of a CEQA documents for a portion of the CEQA review period invalidates the entire CEQA process, and that such a failure must be remedied by permitting additional public comment.²⁰ It is also well settled that an EIR may not rely on hidden studies or documents that are not provided to the public.²¹ By failing to make all documents referenced in the DEIR “readily available” during the current comment period, the City is violating the clear procedural mandates of CEQA, to the detriment of East Bay Residents and other members of the public who wish to meaningfully review and comment on the DEIR.

Accordingly, we request that the City provide immediate access to the correct DEIR reference documents, as required by CEQA, and restart the public review and comment period on the DEIR for at least 45 days from the date on which the City releases all correct reference documents for public review.

¹⁸ See Appendix K uploaded on the City’s website at: <https://www.sanjoseca.gov/home/showpublisheddocument/109314/638441364852470000> (last accessed March 5, 2024). See Executive Summary, pg. 1.

¹⁹ Letter from Christopher Burton, City to State Clearinghouse, re: “Update Documents for Published Draft EIR (SCH Number 2022020565): Seely Avenue Mixed-Use Project” (February 29, 2024), available at: <https://files.ceqanet.opr.ca.gov/276489-2/attachment/so4O7OYL5ZlmuJ2mHbQeSHnzsUmrBZ-PGgOFMG5d11vmlGEqbZbJtZcgI-8KcVvDAdN5lHt0gTXkLB-0>

²⁰ *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689, 699.

²¹ *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3rd 818, 831 (“Whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.”).

III. The City's One-Week Extension is Not Sufficient

On February 26, 2024, the City requested that the State Clearinghouse extend the public review period by one week, from March 4, 2024 to March 11, 2024 (referred to on the State Clearinghouse website as "Notice to Extend Review Period").²² The State Clearinghouse then released a Memorandum stating that the lead agency added "additional information," noting that one can refer to the City's Notice to Extend Review Period for more details.²³ However, the City's letter provides no information on why the review period was extended and what specific additional information was provided.²⁴

C-2.4

Nevertheless, for the reasons mentioned above, the one-week extension is not adequate to provide the public with time to meaningfully review the DEIR and its appendices. As it stands, some members of the public have completed a different review than others due to the inconsistent breadth of information provided between the State Clearinghouse and the City's website. As demonstrated above, the missing documents are substantial; some members of the public have missed out on hundreds of pages of analysis that were incorporated in the DEIR. The City must restart the review period to ensure that the public has an equal opportunity to review and comment.

IV. Conclusion

Silicon Valley Residents respectfully requests that the City restart the public review and comment period on the DEIR for at least 45 days from the date on which the City releases all complete DEIR reference documents for public review.

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²² Letter from Christopher Burton, City to State Clearinghouse, re: "Extend Circulation Period, Draft EIR (SCH Number 2022020565): Seely Avenue Mixed-Use Project" (February 26, 2024), available at: https://files.ceqanet.opr.ca.gov/276489-2/attachment/sNoLG_7EtOIBTlbV_PmKv8IeALAbDqeQt3S711-uIXoeACJcabyVZzGbC8fFwdoKQXMMJK9xrKIzemSJ0

[2/attachment/sNoLG_7EtOIBTlbV_PmKv8IeALAbDqeQt3S711-uIXoeACJcabyVZzGbC8fFwdoKQXMMJK9xrKIzemSJ0](https://files.ceqanet.opr.ca.gov/276489-2/attachment/sNoLG_7EtOIBTlbV_PmKv8IeALAbDqeQt3S711-uIXoeACJcabyVZzGbC8fFwdoKQXMMJK9xrKIzemSJ0)

²³ Memorandum from Samuel Assefa, Director, California Governor's Office of Planning and Research, State Clearinghouse and Planning Unit to All Reviewing Agencies, RE: SCH # 2022020565 Seely Avenue Mixed-Use Project (February 27, 2024), available at:

https://files.ceqanet.opr.ca.gov/276489-2/attachment/t0rvhrccAtP11Km3Ron8mx220V_c8WeegrkNCxwBzl68wzkegTnDTbYAZ3hKhmDTtFHSwRWmE8XiUQP-0

²⁴ See footnote 21. The entire body of the letter merely reads: "The City of San José is requesting that the State Clearinghouse extend the public review period to end on March 11, 2024."

C-2.5
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Given the limited time left in the DEIR public comment period, we respectfully request a response to this letter by close of business on Wednesday, March 6, 2024.

Sincerely,



Ariana Abedifard

Attachments
AA:acp