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**Re: Comments on Draft Environmental Impact Report for the 0 Seely Ave Mixed-Use Project (PDC21-035, PD22-002, ER21-284, SCH# 2022020565)**

We are writing on behalf of **Silicon Valley Residents for Responsible Development** (“Silicon Valley Residents”) to comment on the Draft Environmental Impact Report (“DEIR”)<sup>1</sup> prepared by the City of San Jose (“City”) for the 0 Seely Ave Mixed-Use Project (PDC21-035, PD22-002, ER21-284, SCH# 2022020565) (“Project”) proposed by The Hanover Company (“Applicant”). We reserve the right to supplement these comments at later hearings and proceedings on the Project.<sup>2</sup>

The Project proposes demolition of existing residential and agricultural buildings and removal of 584 trees (261 ordinance-size trees and 323 non-ordinance-size trees) for development of 1,472 residential units consisting of a mix of three-story townhomes and six- to seven-story apartment buildings, 18,965 square feet of general neighborhood retail space, and a 2.5-acre public park. The Project also

<sup>1</sup> Silicon Valley Residents submitted comments on the Project DEIR originally released on January 18, 2024. This comment letter addresses the revised DEIR that was released for public review and comment on March 19, 2024.

<sup>2</sup> Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield (“Bakersfield”)* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

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Cont. includes the dedication of an approximately 0.11-acre site to the San Jose Municipal Water System for the development of a domestic water well.

Based on our review of the DEIR and available supporting documentation, we conclude that the DEIR fails to comply with the requirements of the California Environmental Quality Act (“CEQA”).<sup>3</sup> The DEIR lacks an adequate Project baseline, fails to adequately disclose and analyze the Project’s significant impacts, and fails to include substantial evidence supporting conclusions that mitigation measures will reduce the Project’s impacts to less than significant levels, as required by CEQA. The City may not approve the Project until it revises the DEIR to adequately analyze and mitigate the Project’s significant impacts and incorporate all feasible mitigation measures to avoid or minimize these impacts to the greatest extent feasible.

C-7.3 We reviewed the DEIR, its technical appendices, and available reference documents with the assistance of biological resources expert Scott Cashen,<sup>4</sup> transportation expert Norman Marshall,<sup>5</sup> and noise and vibration expert Neil Shaw.<sup>6</sup> The City must respond to the expert comments separately and fully.<sup>7</sup>

## I. STATEMENT OF INTEREST

C-7.4 Silicon Valley Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential environmental impacts associated with Project development. Silicon Valley Residents includes San Jose resident Jeremy Malave, the International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, and their members and their families, and other individuals that live and/or work in the City of San Jose.

Individual members of Silicon Valley Residents and its member organizations live, work, recreate, and raise their families in the City and surrounding

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<sup>3</sup> Pub. Resources Code §§ 21000 et seq.; 14 Cal. Code Regs (“CEQA Guidelines”) §§ 15000 et seq. (“CEQA Guidelines”).

<sup>4</sup> See April 27, 2024 letter from Scott Cashen to Ariana Abedifard re “Comments on the Draft Environmental Impact Report for the Seely Avenue Mixed-Use Project” (“Cashen Comments”) and Scott Cashen’s curriculum vitae, attached hereto as Exhibit A.

<sup>5</sup> See February 29, 2024 letter from Norman Marshall to Ariana Abedifard re “Seely Ave Mixed Use Project” (“Marshall Comments”) and Norman Marshall’s resume, attached hereto as Exhibit B.

<sup>6</sup> See February 29, 2024 letter from Neil Shaw to Ariana Abedifard re “Seely Avenue Mixed-Use Project DEIR SCH No. 2022020565– Acoustic Review” (“Shaw Comments”) and Neil Shaw’s resume, attached hereto as Exhibit C.

<sup>7</sup> 14 Cal. Code Regs. (“CCR”) §§ 15088(a), (c).

communities. Accordingly, they would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist onsite.

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In addition, Silicon Valley Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making the area less desirable for new businesses and new residents. Continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

## II. LEGAL BACKGROUND

CEQA requires public agencies to analyze the potential environmental impacts of their proposed actions in an EIR.<sup>8</sup> “The foremost principle under CEQA is that the Legislature intended the act to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.”<sup>9</sup>

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CEQA has two primary purposes. First, CEQA is designed to inform decisionmakers and the public about the potential significant environmental effects of a project.<sup>10</sup> “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR ‘protects not only the environment but also informed self-government.’”<sup>11</sup> The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”<sup>12</sup> As the CEQA Guidelines explain, “[t]he

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<sup>8</sup> PRC § 21100.

<sup>9</sup> *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal* (“*Laurel Heights I*”) (1988) 47 Cal.3d 376, 390 (internal quotations omitted).

<sup>10</sup> Pub. Resources Code § 21061; CEQA Guidelines §§ 15002(a)(1); 15003(b)-(e); *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 517 (“*Sierra Club*”) (“[T]he basic purpose of an EIR is to provide public agencies and the public in general with detailed information about the effect [that] a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.”).

<sup>11</sup> *Citizens of Goleta Valley*, 52 Cal.3d at p. 564 (quoting *Laurel Heights I*, 47 Cal.3d at 392).

<sup>12</sup> *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810; see also *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal.App.4th 1344, 1354 (“*Berkeley Jets*”) (purpose of EIR is to inform the public and officials of environmental consequences of their decisions *before* they are made).

EIR serves not only to protect the environment but also to demonstrate to the public that it is being protected.”<sup>13</sup>

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring consideration of environmentally superior alternatives and adoption of all feasible mitigation measures.<sup>14</sup> The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.”<sup>15</sup> If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment” to the greatest extent feasible and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.”<sup>16</sup>

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While courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.’”<sup>17</sup> As the courts have explained, a prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process.”<sup>18</sup> “The ultimate inquiry, as case law and the CEQA guidelines make clear, is whether the EIR includes enough detail ‘to enable who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.’”<sup>19</sup>

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<sup>13</sup> CEQA Guidelines § 15003(b).

<sup>14</sup> CEQA Guidelines § 15002(a)(2), (3); *see also Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at p. 564.

<sup>15</sup> CEQA Guidelines § 15002(a)(2).

<sup>16</sup> PRC § 21081(a)(3), (b); CEQA Guidelines §§ 15090(a), 15091(a), 15092(b)(2)(A), (B); *Covington v. Great Basin Unified Air Pollution Control Dist.* (2019) 43 Cal.App.5th 867, 883.

<sup>17</sup> *Berkeley Jets*, 91 Cal.App.4th at p. 1355 (emphasis added) (quoting *Laurel Heights I*, 47 Cal.3d at 391, 409, fn. 12).

<sup>18</sup> *Berkeley Jets*, 91 Cal.App.4th at p. 1355; *see also San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722 (error is prejudicial if the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process); *Galante Vineyards*, 60 Cal.App.4th at p. 1117 (decision to approve a project is a nullity if based upon an EIR that does not provide decision-makers and the public with information about the project as required by CEQA); *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946 (prejudicial abuse of discretion results where agency fails to comply with information disclosure provisions of CEQA).

<sup>19</sup> *Sierra Club*, 6 Cal.5th at p. 516 (quoting *Laurel Heights I*, 47 Cal.3d at 405).

### III. THE DEIR FAILS TO ADEQUATELY DESCRIBE THE EXISTING BASELINE

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The existing environmental setting is the starting point from which the lead agency must measure whether a proposed project may cause a significant environmental impact.<sup>20</sup> CEQA defines the environmental setting as the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, from both a local and regional perspective.<sup>21</sup> Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate, meaningful evaluation of environmental impacts. The courts have clearly stated that “[b]efore the impacts of a project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined.”<sup>22</sup>

Here, the DEIR fails to accurately describe the baseline conditions against which it must measure the Project’s environmental impacts. Specifically, it fails to identify the extent of wildlife on the Project site and the baseline ambient noise at the Project site, therefore resulting in an incomplete and inaccurate assessment of the Project’s biological resources and noise impacts.

#### A. The DEIR Fails to Fully Disclose The Extent Of Wildlife Species At The Project Site

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The DEIR fails to accurately disclose the baseline environmental conditions related to the Project’s biological impacts; namely, the state of wildlife resources at the Project site. As a result, the DEIR lacks the necessary baseline information against which to measure the Project’s environmental impacts on biological resources.

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First, as Mr. Cashen explains, “Although the DEIR provides a list of plant species observed during reconnaissance level surveys of the Project site, it does not list (or otherwise identify) the wildlife species that were observed during the surveys. This precludes understanding of the wildlife resources that could be directly impacted by the Project.”<sup>23</sup> Similarly, the DEIR also does not provide any

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<sup>20</sup> See, e.g., *Communities for a Better Env’t v. S. Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 316.

<sup>21</sup> CEQA Guidelines § 15125(a); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453.

<sup>22</sup> *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.

<sup>23</sup> Cashen Comments, pg. 7.

C-7.8 information on the wildlife species that occur or could occur in the adjacent Coyote Creek riparian corridor, thus precluding any understanding of potential indirect Project impacts on wildlife.<sup>24</sup>

C-7.9 Second, the DEIR's Biological Resources Analysis<sup>25</sup> ("BRA") did not conduct the surveys needed to determine presence of burrowing owls. Instead, it erroneously dismisses the potential presence of burrowing owls due to the absence of ground squirrel burrows.<sup>26</sup> However, this overlooks alternative nesting and roosting habitats such as debris piles within the Project site, which could support burrowing owl populations.<sup>27</sup>

C-7.10 Third, the DEIR dismisses the presence of golden eagle because it states that the Project doesn't provide the necessary habitat for golden eagles. However, as Mr. Cashen states, that conclusion is inconsistent with the Arborist Report<sup>28</sup> prepared for the DEIR, which identifies the presence of several large trees at the Project site.<sup>29</sup> The California Department of Fish & Wildlife ("CDFW") also commented on the potential for golden eagle nesting and foraging habitat within the Project area.<sup>30</sup> Thus, the DEIR overlooks the habitat suitability and viability for golden eagles, thereby potentially missing potential impacts to the species.

C-7.11 Fourth, the DEIR's assertion that the Crotch Bumble Bee is unlikely to occur at the Project site contradicts available evidence. As highlighted by Mr. Cashen, despite the BRA's claim that the species' range excludes the Project area, recent occurrence records and CDFW survey guidelines suggest otherwise.<sup>31</sup>

C-7.12 Finally, the DEIR's characterization that oak trees on the site are not part of a sensitive natural community is flawed. Mr. Cashen points out data from the Arborist Report that indicates clustering of oak trees that meet the criteria for woodland classification.<sup>32</sup> Therefore, the DEIR's conclusion that the Project will not have a significant impact on sensitive natural communities is unsupported.

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<sup>24</sup> *Id.*

<sup>25</sup> DEIR, Appendix D.

<sup>26</sup> *See id.*; *see also* Appendix D: Biological Resources Analysis, Table 3.

<sup>27</sup> Cashen Comments, pg. 7.

<sup>28</sup> DEIR, Appendix C.

<sup>29</sup> Cashen Comments, pg. 8; *see also* Appendix C: Arborist Report and Tree Mitigation Memorandum.

<sup>30</sup> *Id.*

<sup>31</sup> Cashen Comments, pg. 9.

<sup>32</sup> Cashen Comments, pp. 9-10.

C-7.13 In summary, the DEIR's inadequate and inaccurate disclosure of the presence of wildlife species and sensitive natural communities results in an unreliable baseline against which to evaluate environmental impacts.

#### **B. The DEIR Fails to Properly Document Baseline Ambient Noise Measurements**

C-7.14 The DEIR fails to accurately disclose the baseline environmental conditions regarding noise. Mr. Shaw identified significant shortcomings in the methodology used to calculate existing noise levels, including the lack of details regarding sound level meter settings, microphone height, equipment specifications, calibration records, and the use of field calibrators.<sup>33</sup> This information is critical and must be disclosed according to standard practices outlined in guides such as ASTM's Standard Guide for Applying Environmental Noise Measurement Methods and Criteria.<sup>34</sup> Without such information, the data regarding existing ambient noise levels are unverifiable.<sup>35</sup> Thus, the City's noise analysis fails to support the measured data for existing noise levels. As a result, the DEIR lacks the necessary baseline information against which to measure the Project's environmental impacts with regard to noise impacts.

#### **IV. THE DEIR FAILS TO DISCLOSE, ANALYZE AND MITIGATE POTENTIALLY SIGNIFICANT IMPACTS**

C-7.15 An EIR must fully disclose all potentially significant impacts of a project and implement all feasible mitigation to reduce those impacts to less than significant levels. The lead agency's significance determination with regard to each impact must be supported by accurate scientific and factual data.<sup>36</sup> An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.<sup>37</sup>

Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.<sup>38</sup> Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than

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<sup>33</sup> Shaw Comments, pg. 4.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> 14 CCR § 15064(b).

<sup>37</sup> *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

<sup>38</sup> *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

challenges to an agency's factual conclusions.<sup>39</sup> In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will 'determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements.'<sup>40</sup>

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Even when the substantial evidence standard is applicable to agency decisions to certify an EIR and approve a project, reviewing courts will not 'uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.'<sup>41</sup>

Here, the DEIR fails to properly analyze, disclose, and mitigate the Project's impacts on biological resources, transportation, and noise.

#### **A. The DEIR Fails To Adequately Disclose, Analyze And Mitigate The Project's Biological Resources Impacts**

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As explained by biological resources expert Scott Cashen, the DEIR falls short in adequately assessing the Project's impacts on biological resources, including wildlife resources and riparian habitat. Moreover, the proposed mitigation measures are insufficient to address the Project's potential adverse effects.

##### **1. The DEIR Fails to Identify Potentially Significant Impacts To Special-Status Bats and Crotch Bumble Bee**

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In answering whether the Project would have a substantial adverse effect on any species identified as a candidate, sensitive, or special status species, the DEIR identifies a potentially significant impact on roosting bat habitat.<sup>42</sup> However, as described below, the Project could have a significant impact on special-status bats beyond what is discussed in the DEIR. Furthermore, the Project could have an impact on the candidate species Crotch Bumble Bee, but the DEIR did not identify or address this potentially significant impact.

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First, with respect to the DEIR's analysis on special-status bats, Mr. Cashen underscores the importance of considering the full extent of direct and indirect impacts on special-status bats, beyond the DEIR's limited focus on habitat during

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<sup>39</sup> *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

<sup>40</sup> *Id.*, *Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

<sup>41</sup> *Berkeley Jets*, 91 Cal.App.4th at 1355.

<sup>42</sup> DEIR, pp. 107-108.



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Cont. maternity roosting seasons.<sup>43</sup> As Mr. Cashen states, “Significant impacts also could occur if roost sites are removed when bats are hibernating because the metabolic cost of waking bats from hibernation can be very high and enough to reduce their energy supply to the point where survival is not possible.”<sup>44</sup> Because bats spend over half their lives at roosts, and when bats are evicted from a roost (as proposed in the DEIR), recovery or recolonization is slow if it occurs at all.<sup>45</sup> Indeed, as Mr. Cashen points out, the greatest threat to bats in the south coast ecoregion is urban/suburban expansion and its associated impacts to roosts and foraging habitat.<sup>46</sup>

Ultimately, the DEIR provides no analysis of, or mitigation for, the Project’s direct and indirect impacts on habitat for special-status bats. As a result, the Project’s potentially significant impacts on habitat for special-status bats remain unmitigated.

C-7.19 Similarly, the DEIR fails to address and mitigate potentially significant impacts to Crotch Bumble Bee, which is a candidate for listing under the California Endangered Species Act (“CESA”).<sup>47</sup> As Mr. Cashen explains, at least some of the ecological features that Crotch Bumble Bee inhabit occur at the Project site.<sup>48</sup> Consequently, ground disturbance activities associated with construction of the Project could destroy bumble bee nests, and they would remove floral resources needed for persistence of the bumble bee colony.<sup>49</sup> Despite these concerns, the DEIR fails to address or mitigate these potentially significant impacts.

C-7.20 In summary, Mr. Cashen’s analysis sheds light on the DEIR’s failure to support with substantial evidence its conclusions concerning special-status bats and the Crotch Bumble Bee, emphasizing the need for a more comprehensive assessment of these impacts.

## C-7.21 **2. The DEIR Fails to Identify A Potentially Significant Impact to Wildlife Nursery Sites**

In answering whether the Project would impede the use of native wildlife nursery sites, the DEIR concludes that “[t]he project site includes partially

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<sup>43</sup> Cashen Comments, pg. 10.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Cashen Comments, pg. 9.

<sup>48</sup> Cashen Comments, pg. 11.

<sup>49</sup> *Id.*

developed land and does not support native resident or wildlife species.”<sup>50</sup> However, as Mr. Cashen points out,

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Cont. [T]his statement is inconsistent with the DEIR’s determination that the Project could support nesting birds protected under the Migratory Bird Treaty Act, and that it could contain maternity (nursery) roosts of four special-status bat species. Bird nests and bat roosts qualify as wildlife nursery sites. The permanent loss of these nursery (nest or roost) sites due to Project construction is a potentially significant impact that is not mitigated by the mitigation measures incorporated in the DEIR. In addition, the severity of the impact has not been disclosed to the public because no surveys were conducted to identify the bird and bat species that are using the Project area as a nursery site. As a result, the Project’s permanent impacts to wildlife nursery sites are not mitigated and remain potentially significant.<sup>51</sup>

C-7.22 Because the DEIR fails to adequately identify and address the presence of wildlife nursery sites, the DEIR’s conclusion that impacts to wildlife nursery sites are less than significant are unsupported.

### 3. The DEIR’s Conclusions Regarding Impacts On Coyote Creek and Its Associated Riparian Habitat are Unsupported

C-7.23 The Project proposes a domestic well that would pump groundwater supply directly for the Project.<sup>52</sup> Coyote Creek, a river adjacent to the Project, has been designated as critical habitat for the steelhead Central California Coast Evolutionary Significant Unit (ESU).<sup>53</sup> Additionally, Coyote Creek’s riparian corridor is a sensitive natural community<sup>54</sup> and includes wetlands.<sup>55</sup> In their comments on the Notice of Preparation (NOP) of the DEIR, the California Department of Fish & Wildlife (“CDFW”) commented that the Project’s well operation could result in diversion of water from Coyote Creek, thereby potentially adversely affecting surface or subsurface flow or riparian resources in Coyote

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<sup>50</sup> DEIR, p. 111.

<sup>51</sup> Cashen Comments, pg. 11.

<sup>52</sup> DEIR, pg. 19.

<sup>53</sup> Appendix D: Biological Resource Analysis, pg. 14.

<sup>54</sup> Appendix D: Biological Resource Analysis, pg. 16 (“riparian habitat is generally identified as a sensitive natural community by [the California Department of Fish & Wildlife]”).

<sup>55</sup> See National Wetlands Inventory Wetlands Mapper, classifying 10.5 acres of land along Coyote Creek as wetlands, with the code “R3UBH”, available at:

<https://fwsprimary.wim.usgs.gov/wetlands/apps/wetlands-mapper/>.

Creek.<sup>56</sup> CDFW highlighted the need for the DEIR to include a hydrological analysis to evaluate impacts of the well on Coyote Creek and its surrounding habitat, with a written report of results.<sup>57</sup> However, the City failed to do so. The DEIR concludes that the well will have a less than significant impact on riparian habitat<sup>58</sup> and no impact on the surface/subsurface flow of Coyote Creek.<sup>59</sup> No study was done to confirm these conclusions and, as demonstrated below, the DEIR fails to provide any substantial evidence supporting these conclusions. Accordingly, the DEIR's conclusions that the impacts on Coyote Creek will be less than significant are unsupported.

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**a. Impacts on Coyote Creek Surface and Subsurface Flow**

The DEIR concludes there would be a less than significant impact on state or federally protected wetlands in part because the well will not draw water nor have any impact on surface or subsurface flow in and from Coyote Creek.<sup>60</sup> This conclusion is unsupported because no hydrology analysis was completed for the Project. In support for this statement, the DEIR merely states a general directive to “see Section 3.10.” However, nothing in Section 3.10 addresses the impact of the well or Project generally on the surface or subsurface flow of Coyote Creek. The only time Coyote Creek is mentioned in Section 3.10 is when the DEIR addresses the flood runoff potential to Coyote Creek.<sup>61</sup>

Further, the BRA states, “Luhdorff and Scalmanini Consulting Engineers prepared a Water Supply Assessment for the Project and concluded that the installation and use of the proposed well would not draw water from or have any impact on surface or subsurface flow in/from Coyote Creek.”<sup>62</sup> However, nowhere in the Water Supply Assessment is this issue discussed. The Water Supply Assessment simply demonstrates the projected Project demand and supply from the proposed well.<sup>63</sup> Indeed, the purpose of the Water Supply Assessment as a whole is

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<sup>56</sup> Shannon Hill, California Department of Fish and Wildlife (“CDFW”), “Re: 0 Seely Avenue Mixed-Use Project, Notice of Preparation of a Draft Environmental Impact Report, SCH No. 2022020565, City of San José, Santa Clara County” (April 4, 2022) pg. 8, available in Appendix A: NOP Comments [“CDFW NOP Comments”].

<sup>57</sup> CDFW NOP Comments, pg. 8.

<sup>58</sup> DEIR, pg. 110-11.

<sup>59</sup> DEIR, pg. 111.

<sup>60</sup> DEIR, pg. 111.

<sup>61</sup> See DEIR, pg. 180 (“The project site is adjacent to Coyote Creek. Although the creek is bordered by an engineered levee, runoff could flow into the Creek, degrading water quality.”) & pg. 182 (discussing whether the Project would impede or redirect flood flows).

<sup>62</sup> Appendix D: Biological Resource Analysis, pg. 16.

<sup>63</sup> See Appendix Q: Water Supply Assessment, pg. 14.

to “assess whether the total projected water supplies available for a project . . . will meet the projected water demand associated with the proposed project.”<sup>64</sup> The Assessment does not have any analysis regarding the impacts of the well on the nearby Coyote Creek and therefore no support for the conclusion that the proposed well would not have a significant impact. The DEIR lacks any support for its conclusions regarding the Project’s groundwater well’s surface and subsurface flow impacts. This lack of analysis and disclosure directly contravenes CEQA’s fundamental purpose of disclosure and transparency.

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The DEIR should be revised to adequately analyze and disclose how the well will impact Coyote Creek and related riparian habitat.

**b. Impacts on Coyote Creek Riparian Habitat**

The DEIR concludes the Project would have a less than significant impact on riparian habitat.<sup>65</sup> The conclusion is unsupported for several reasons. First, as with the conclusions regarding Coyote Creek’s surface and subsurface flow, no hydrology study was done to determine the scope of impacts on Coyote Creek’s riparian habitat.

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Second, the DEIR concludes that compliance with the City’s Riparian Corridor Protection and Bird-Safe Design Policy would ensure a less than significant impact.<sup>66</sup> However, as demonstrated by Mr. Cashen’s comments, these measures will not be sufficient because the Project does not actually comply with these policies.<sup>67</sup> Most notably, the Project fails to comply with the policies’ 100-foot riparian setback requirement.<sup>68</sup> As Mr. Cashen demonstrates, considerably more of the Project would lie within the 100-foot setback if the setback is properly measured in accordance with the terms of the Riparian Corridor Protection and Bird-Safe Design Policy.<sup>69</sup> Mr. Cashen explains, “This is important because a setback (buffer) of *at least* 100 feet is needed to protect water quality, riparian biotic communities, and habitat values of riparian corridors—larger buffers are needed in areas with steep slopes or high intensity land uses.”<sup>70</sup>

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<sup>64</sup> *Id.* at pg. 1.

<sup>65</sup> DEIR, pp.110-11.

<sup>66</sup> DEIR, pg. 111.

<sup>67</sup> *See* Cashen Comments, pp. 13-16.

<sup>68</sup> Cashen Comments, pp. 2-6.

<sup>69</sup> *Id.*

<sup>70</sup> Cashen Comments, pg. 3.

C-7.25  
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Third, the DEIR claims that “project plans would include measures to reduce impacts to the riparian corridor from on-site structures and site occupation, including avoidance of bright colors and glossy and/or glare producing building finishes on structures facing the riparian corridor and directing low-intensity exterior lighting downward and away from the riparian corridor to the greatest extent feasible.”<sup>71</sup> However, these measures are ineffective in reducing impacts to the corridor, as demonstrated by Mr. Cashen’s analysis.<sup>72</sup> Namely, these measures do not eliminate significant impacts associated with ecological light pollution and do not address indoor lighting pollution and vehicle-generated light pollution.<sup>73</sup> Further, the DEIR “does [not] analyze how lighting would affect wildlife movement in areas where it is not feasible to direct lighting away from the riparian corridor.”<sup>74</sup>

Because no hydrology study was done and because the measures delineated do not mitigate the potential impact discussed above, the City has failed to adequately support its conclusions. A revised and recirculated DEIR is necessary to fully disclose, analyze and mitigate impacts of the Project’s potentially significant impacts to Coyote Creek and associated riparian habitat.

#### **4. The DEIR’s Proposed Mitigation Measures are Insufficient to Reduce Biological Resource Impacts**

Mr. Cashen’s analysis reveals that the DEIR’s proposed mitigation measures, Mitigation Measure (“MM”) BIO-1 and MM BIO-2, fail to adequately address the Project’s potential impacts on nesting birds and bats.

C-7.26

First, MM BIO-1, which calls for avoiding construction during nesting season, is incapable of implementation because construction would begin in June 2024 (i.e., during the avian nesting season) and would occur continuously through October 2028 (i.e., during four additional nesting seasons).<sup>75</sup> Further, MM BIO-1 fails to establish standards for nest searching techniques, minimum survey effort, and qualifications of surveyors, rendering it incapable of ensuring the identification and protection of all nests.<sup>76</sup> Additionally, MM BIO-1’s proposed buffer sizes for active nests are smaller than those specified by the City’s consultants in the BRA and for other development projects in San Jose, as well as CDFW guidance.<sup>77</sup> Accordingly, the DEIR lacks evidence to support that MM BIO-1 will reduce impacts to a less

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<sup>71</sup> DEIR, pg. 111.

<sup>72</sup> Cashen Comments, pp. 11-13.

<sup>73</sup> *Id.*

<sup>74</sup> Cashen Comments, pg. 17.

<sup>75</sup> DEIR, Table 2-4.

<sup>76</sup> Cashen Comments, pp. 17-18.

<sup>77</sup> Cashen Comments, pp. 18-19.

C-7.26  
Cont. than significant level.

C-7.27 Second, MM BIO-2, which addresses bats, does not require implementation of the techniques necessary to locate bats that roost in concealed locations.<sup>78</sup> It also fails to identify when the site surveys would be conducted in relation to construction activities or how the surveys should be conducted. As a result, the mitigation measure is too vague to ensure impacts to bat roosts are avoided.<sup>79</sup> Further, MM BIO-2 doesn't implement the proper technique to minimize impacts to tree-roosting bats. As Mr. Cashen explains, "minimizing impacts to tree-roosting bats requires 'soft-felling,' whereby all potential bat roost features in trees are felled in one piece and carefully lowered to the ground by rope, then left in-situ on the ground for at least 24 hours before being removed."<sup>80</sup> Because MM BIO-2 fails to do so, the mitigation measure is inadequate and the Project's impacts on special-status bats remain potentially significant.

C-7.28 The DEIR concludes that both mitigation measures would reduce the impacts on the species' habitats. However, neither mitigation measure addresses the Project's permanent impacts on habitat (i.e., habitat loss). As Mr. Cashen points out, habitat loss is the primary threat to most bird and bat populations.<sup>81</sup> "Indeed, because habitat loss has a permanent (negative) effect on population recruitment, the Project's permanent impacts to habitat are much more significant than its impacts to bird nests or bat roosts during an individual reproductive cycle."<sup>82</sup> Therefore, it is imperative that the mitigation measures properly address the Project's permanent destruction of bird and bat habitat, an impact that the DEIR is required to evaluate and mitigate.<sup>83</sup> For this reason, Project impacts to habitat for special-status bat species and migratory birds remain potentially significant.

C-7.29 **B. The DEIR Fails to Adequately Disclose, Analyze And Mitigate The Project's Transportation Impacts**

The DEIR's transportation impacts analysis fails to accurately describe and address the Project's impacts, most notably with respect to the Project's vehicle miles traveled ("VMT") impacts.

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<sup>78</sup> Cashen Comments, pg. 19.

<sup>79</sup> *Id.*

<sup>80</sup> Cashen Comments, pg. 20.

<sup>81</sup> Cashen Comments, pg. 21.

<sup>82</sup> *Id.*

<sup>83</sup> See DEIR, pg. 107 (answering whether the Project would have a "substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species ...")

## 1. The DEIR's Transportation Analysis Fails to Analyze or Disclose the Project's True Significant and Unmitigated VMT Levels

As explained in detail in transportation expert Norman Marshall's comments, the DEIR's VMT analysis contains a crucial flaw that led to an underestimation of the Project's significant impacts.

The DEIR acknowledges that the Project would lead to a significant VMT impact, with projected VMT per capita exceeding the city's established threshold.<sup>84</sup> To mitigate this impact, the DEIR proposes MM TR-1.1, which would implement a series of mitigation measures, with the most significant reduction attributed to the "Voluntary Travel Behavior Change Program."<sup>85</sup>

However, Mr. Marshall highlights why the DEIR overestimates the efficacy of this mitigation strategy. In short, the assumption of 100% participation in the Voluntary Travel Behavior Change Program is flawed. First, Mr. Marshall highlights that the Voluntary Travel Behavior Change Program's travel diary requirement<sup>86</sup> will decrease participation due to the burdensome nature of travel diaries.<sup>87</sup> Mr. Marshall emphasizes how uncommon such a requirement is, stating that he has been unable to find any recent voluntary travel reduction programs with travel diaries documented anywhere in the United States.<sup>88</sup> Second, Mr. Marshall points out that simply providing information to residents or employers will not yield the projected 4% reduction in VMT as assumed in the DEIR.<sup>89</sup> Instead, "A more realistic participation rate is 10%, with the VMT reduction reduced proportionally to 0.4% as shown in Figure 12. **The resulting VMT per capita with all six measures would be 10.71, i.e., 5.8% higher than the City's threshold of 10.12.**"<sup>90</sup>

In light of these findings, the DEIR lacks substantial evidence supporting the conclusion that the proposed mitigation measures will mitigate the Project's VMT impacts to less than significant levels. The analysis provided by Mr. Marshall calls into question the accuracy of the projected reductions and highlights the need for a more realistic and comprehensive analysis that addresses the significant VMT

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<sup>84</sup> DEIR, pg. 241.

<sup>85</sup> DEIR, pp. 241-242.

<sup>86</sup> See DEIR, pg. 242 ("Voluntary Travel Behavior Change programs include mass communication campaigns and travel feedback programs, *such as travel diaries* or feedback on calories burned from alternative modes of travel." (emphasis added)).

<sup>87</sup> Marshall Comments, pg. 3.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

C-7.29  
Cont impact associated with the Project. Indeed, if the analysis was done accurately, the DEIR would have identified a significant VMT impact. Therefore, the DEIR should be revised to accurately disclose the Project's VMT, and to include all feasible mitigation.

**2. The DEIR Fails to Adequately Analyze and Address the Project's Traffic Hazards**

C-7.30 The DEIR concludes that the Project would not substantially increase hazards due to a geometric design feature (such as dangerous intersections).<sup>91</sup> However, as demonstrated by Mr. Marshall, the Project will indeed result in hazards due to a dangerous intersection.<sup>92</sup> As Mr. Marshall explains, "With the proposed project and DEIR intersection design, the DEIR estimates that queues would extend into the upstream intersection during the AM peak hour . . . The Project therefore will result in traffic blockages."<sup>93</sup> Therefore, it is imperative that the DEIR analyze, disclose and mitigate the risks made evident in the DEIR's own traffic analysis.

**C. The DEIR Fails To Adequately Disclose, Analyze And Mitigate The Project's Noise Impacts**

C-7.31 Noise and vibration expert Neil Shaw's analysis shows that the DEIR inadequately addresses the Project's noise impacts by failing to consider new sensitive receptors introduced by the Project, proposing insufficient mitigation measures, underestimating construction noise levels, and failing to provide a quantitative significance threshold. Accordingly, the DEIR must be revised and recirculated to fully analyze and mitigate the Project's noise impacts.

**1. The DEIR Fails to Account for Noise Impacts on New Sensitive Receptors as a Result of the Project**

According to the DEIR's Project Phasing timeline, residents will move into some of the completed buildings while the other buildings are still being constructed.<sup>94</sup> For example, occupancy for the Townhomes begins in January 2026, but all other buildings will still be under construction until October 2026, 2027, and

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<sup>91</sup> DEIR, pg. 243.

<sup>92</sup> Marshall Comments, pp. 5-8.

<sup>93</sup> Marshall Comments, pg.8.

<sup>94</sup> See Table 2-4, Project Phasing, DEIR, pg. 35.



C-7.31  
Cont. 2028.<sup>95</sup> Therefore, the Project will be introducing new sensitive receptors—the new residents living in direct proximity to all other Project construction. However, the DEIR did not account for these new sensitive receptors; instead, the DEIR’s noise analysis only identified sensitive receptors *near* the Project site, not within it.<sup>96</sup> But as Mr. Shaw explains, “the Project can have a significant impact on these new residents as construction will be ongoing and . . . the construction noise levels will be significant and insufficiently mitigated.”<sup>97</sup> Therefore, the DEIR must analyze how ongoing construction noise levels will impact the sensitive receptors introduced as part of the Project. The failure to do so is a violation of CEQA and requires that the DEIR be revised and recirculated.

## 2. The Proposed Mitigation Measure is Insufficient to Mitigate Significant Noise Impacts

C-7.32 The DEIR concludes that because construction could last longer than 12 months and would require work on Saturdays, the Project would result in a potentially significant temporary construction noise impact.<sup>98</sup> To reduce the potentially significant construction impact to less than significant, the DEIR includes MM NSE-1.<sup>99</sup> However, as detailed by Mr. Shaw, MM NSE-1 is not sufficient to adequately mitigate this significant noise impact. Further, the calculated construction noise impact is understated; without an accurate understanding of the construction noise, the effectiveness of MM NSE-1 is further diminished.

### a. Mitigation Measure NSE-1 Is Insufficient

The proposed mitigation measure outlined in the DEIR is insufficient to address the Project’s anticipated significant construction noise impacts. MM NSE-1 proposes a Construction Noise Logistics Plan, which would include construction of solid 8-foot plywood fences or similar barriers along the northwest boundary of the site adjacent to existing adjacent residences to shield them from ground-level construction equipment and activities.<sup>100</sup> The DEIR claims the 8-foot noise barrier

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<sup>95</sup> *Id.*; see also Shaw Comments, Attachment A, pg. 9 (visual demonstration of the construction periods)

<sup>96</sup> See Appendix O: Noise and Vibration Study, pg. 26 (“The nearest sensitive receptors to the project site are the residents of the existing apartment building about 60 feet northwest of the project site, as well as workers and customers at the existing commercial/office buildings located about 150 feet to the west of the site.”); see also Shaw Comments, pg. 2.

<sup>97</sup> Shaw Comments, pg. 2.

<sup>98</sup> DEIR, pg. 203.

<sup>99</sup> DEIR, pg. 203.

<sup>100</sup> DEIR, pg. 204.

would result in a 5 dBA noise reduction.<sup>101</sup> However, as demonstrated by Mr. Shaw, this measure is not adequate to reduce the noise levels to less than significant levels.

Specifically, the purported 5 dBA noise reduction may only be achieved when the barrier effectively blocks the line of sight between the noise source and the receiver.<sup>102</sup> However, certain sources have their acoustic source higher than the barrier height, and the barrier will be ineffective for sensitive receivers located above the barrier height, such as the upper floors of existing sensitive receivers or the upper floors of the Townhomes, Building A, and Building B, for which no fence is proposed.<sup>103</sup> Additionally, barrier effectiveness is contingent upon noise frequency, with barriers being more effective for higher frequency noises and less effective for low-frequency noises such as engine and exhaust noise.<sup>104</sup> Therefore, the reduction anticipated from the noise barriers included in the Construction Noise Logistics Plan is inaccurate and inadequate.

C-7.32  
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Further, despite the Construction Noise Logistics Plan calling for other noise-reducing components beyond the 8-foot barriers, these measures fail to compensate for the lack of effectiveness of the barriers.<sup>105</sup> Consequently, the proposed mitigation measures are inadequate to adequately mitigate the significant construction noise impacts associated with the Project.

#### **b. The DEIR Underestimates Construction Noise Levels, Further Undermining the Proposed Mitigation Measures**

As highlighted by Mr. Shaw, the construction noise levels identified in the DEIR are underestimated due to a crucial oversight in the calculations. Mr. Shaw points out that the Noise Analysis only considers the noise generated by the two loudest pieces of construction equipment, disregarding the higher quantity of equipment actually anticipated to be used during Project construction.<sup>106</sup> As Mr. Shaw explains:

*A project of this scope will have more than just two noisy pieces of equipment in use at one time; the Tables themselves show this. For example, as shown in Table 10, the Site Preparation phase will use a total of 13 pieces of*

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<sup>101</sup> *Id.*

<sup>102</sup> Shaw Comments, pg. 4.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Shaw Comments, pg. 3.

equipment, and in Table 11, the Paving phase will use 5 pieces of equipment. The noise levels presented are therefore underestimated.<sup>107</sup>

C-7.32  
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In summary, as elucidated by Mr. Shaw, the construction noise levels presented in the DEIR are underestimated due to the omission of multiple pieces of equipment from the noise calculation, resulting in a failure to accurately assess the true noise impacts. This oversight undermines the effectiveness of the proposed mitigation measure and underscores the need for a more comprehensive evaluation and response to mitigate the adverse effects of the Project's construction noise.

### 3. The DEIR Fails to Identify Construction Noise Level Significance Thresholds

In evaluating the Project's construction noise levels, the DEIR fails to identify any noise thresholds against which it purports to measure the Project's impacts. In answering whether the Project would "result in generation of a substantial temporary or permanent increase in ambient noise levels in the vicinity of the project in excess of standards established in the local general plan or noise ordinance, or applicable standards of other agencies"<sup>108</sup> the DEIR notes that "[t]he City does not currently have an established quantitative noise standard for construction noise."<sup>109</sup> However, the threshold question allows standards from other agencies. Indeed, the City's Noise and Vibration Study (Appendix O) relied on noise limits established by the Federal Transit Administration (FTA).<sup>110</sup> But the DEIR failed to do the same. As explained by Mr. Shaw:

C-7.33

Notably, while the Appendix proposes this as a threshold, the DEIR does not mention these numeric FTA thresholds. However, Table 10 and 11 of the Appendix show that the construction will exceed these thresholds. As summarized by the Appendix, "Construction noise levels would exceed the exterior threshold of 80 dBA Leq at residential land uses to the west when activities occur within about 90 feet." (page 41). Because these thresholds were not included in the DEIR, the DEIR fails to identify this significant impact.<sup>111</sup>

The DEIR's failure to include any quantitative threshold is a blatant violation of CEQA. CEQA requires agencies to conduct noise analyses for projects

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<sup>107</sup> *Id.* (emphasis added).

<sup>108</sup> DEIR, pg. 199 (emphasis added).

<sup>109</sup> DEIR, pg. 203.

<sup>110</sup> Appendix O: Noise and Vibration Study, pg. 36.

<sup>111</sup> Shaw Comments, pp. 2-3.

that consider both the absolute noise levels expected, and the degree to which noise levels are expected to increase. Here, the DEIR does neither.

In *King & Gardiner Farms, LLC v. County of Kern*, the Court of Appeal held that an agency cannot simply rely on compliance with local noise regulations to conclude there will be no significant noise impacts without considering the impacts of increases in noise.<sup>112</sup> The County approved an EIR for proposed zoning amendments to streamline oil and gas permitting.<sup>113</sup> The EIR included an analysis of noise impacts that determined significance based solely on whether the 65 decibel day-night average (“dBA DNL”) threshold in the County General Plan would be exceeded.<sup>114</sup> The Court of Appeal reasoned that the County General Plan did not conclude that all increases in the magnitude of noise are insignificant until the 65 dBA DNL threshold is exceeded, so the General Plan “does not constitute substantial evidence that the magnitude of an increase in ambient noise is irrelevant.”<sup>115</sup> Rather, an EIR’s noise analysis should consider both the increase in noise level and the absolute noise level associated with a project in determining the significance of the project’s noise impacts.<sup>116</sup> The Court of Appeal concluded that an agency cannot exclusively rely on “a single cumulative DNL metric for determining the significance of the project’s noise impacts” while deciding “the magnitude of the increase in ambient noise is irrelevant.”<sup>117</sup>

In *Berkeley Jets*, the Court of Appeal invalidated the Port of Oakland’s EIR for expansion of the Oakland Airport because of its reliance on an improper noise standard.<sup>118</sup> The EIR evaluated the significance of noise impacts based on whether the estimated level of sound would exceed 65 dB Community Noise Equivalent Level (“CNEL”).<sup>119</sup> However, as the Court of Appeal explained, the CNEL metric—which averages noise over the course of a day—could not be the sole indicator of significant effects from noise because it does not provide a meaningful analysis of the “degree single overflights will create noise levels over and above the existing ambient noise level at a given location, and the community reaction to aircraft

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<sup>112</sup> *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 894.

<sup>113</sup> *Id.* at 829.

<sup>114</sup> *Id.* at 830, 889.

<sup>115</sup> *Id.* at 894.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Berkeley Jets*, 91 Cal.App.4th at 1381–1382.

<sup>119</sup> *Id.* at 1373.

noise, including sleep disturbance.”<sup>120</sup> Therefore, the Court concluded, a revised EIR with additional study of noise impacts from flights was necessary.<sup>121</sup>

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Here, the DEIR lacks any quantitative noise thresholds—either absolute or ambient-based—against which the Project’s construction noise impacts can be evaluated. The City ignores the suggestion by its own noise consultants that it utilize the noise limits established by the FTA. This omission is especially glaring since the DEIR’s analysis shows that construction noise levels would exceed those thresholds. The City must revise the DEIR to address compliance with absolute noise limits, such as those set by the FTA, and include an evaluation of the impact of increased noise levels attributable to Project construction and operations.

#### **D. The DEIR Fails To Adequately Disclose, Analyze And Mitigate The Project’s Public Services Impacts**

Under the DEIR’s analysis of public services impacts, in answering whether the Project would result in substantial adverse physical impacts associated with the need for new or physically altered governmental facilities in order to maintain acceptable service ratios, response times or other performance objectives for Parks, the DEIR states:

C-7.34

*The project will add more residents, which may increase demand on local parks. However, the project includes a new 2.5-acre City-owned public park on the project site. The City’s [Parkland Dedication Ordinance] and [Park Impact Ordinance] require residential developers to dedicate public park land or pay in-lieu fees (or both) to compensate for the increase in demand for neighborhood parks. The amount of proposed development represents a small fraction of the total growth identified in the 2040 General Plan. However, because the project would add more residents that would utilize park services, the applicant is required to comply with the PDO/PIO. The project, by itself, would not require the construction of new or expanded parks, resulting in less than significant impact. Less Than Significant Impact.*<sup>122</sup>

The DEIR incorrectly asserts that the Project’s proposed 2.5-acre park is sufficient so as to not require any more construction of parkland or trigger any other parkland obligations. To the contrary, since the Project will be proposing

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<sup>120</sup> *Id.* at 1381–1382.

<sup>121</sup> *Id.* at 1382.

<sup>122</sup> DEIR, pp. 222-223 (emphasis added).

parkland less than what the City itself has deemed necessary to meet demand, it is likely to cause a significant impact.

The City's Parkland Dedication Ordinance ("PDO")<sup>123</sup> and Park Impact Ordinance ("PIO")<sup>124</sup> require new residential housing construction projects to address the impact residents will have on existing park facilities and provide new facilities to future residents.<sup>125</sup> This is referred to as a "parkland obligation." The parkland obligation is calculated by using the estimated occupancy per housing unit (based on U.S. Census housing types/data), the number of new units, and the obligation to dedicate three acres of land for every 1,000 new residents.<sup>126</sup> Accordingly, the amount of land to be dedicated shall be determined pursuant to the following formula: Minimum acreage dedication = .003 acres × Number of dwelling units × Average number of persons per dwelling unit.<sup>127</sup> Residential projects can comply with this obligation through land dedication, paying an in-lieu fee, developing parkland, improving existing recreational facilities, or a combination of these methods.<sup>128</sup>

As the DEIR states that the Project will have an average of 2.91 persons per household, the parkland obligation would be calculated as: .003 x 1472 x 2.91 = **12.85 acres. But the Project is only proposing to construct 2.5 acres of parkland, less than 20% of what is required under the PIO/PDO.**<sup>129</sup> Thus, the Project is inconsistent with the required parkland obligation set by the City.

There is also no discussion as to whether the Applicant plans to take advantage of credits that may reduce the parkland obligation. Projects with deed restricted residential units that meet the City's affordable housing guidelines qualify for a 50% credit towards park impact fees.<sup>130</sup> Additionally, projects can

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<sup>123</sup> San Jose Municipal Code ("SJMC"), chapter 19.38.

<sup>124</sup> SJMC, chapter 14.25

<sup>125</sup> City of San Jose, Developers Page, Parkland Obligation, available at:

<https://www.sanjoseca.gov/your-government/departments-offices/parks-recreation-neighborhood-services/in-the-works/developers-page#obl> ["San Jose Developers Page"].

<sup>126</sup> *Id.*; see also SJMC § 14.25.300.

<sup>127</sup> SJMC § 19.38.310.

<sup>128</sup> See <https://www.sanjoseca.gov/your-government/departments-offices/parks-recreation-neighborhood-services/in-the-works/fees-that-support-parkland-development> & <https://www.sanjoseca.gov/your-government/departments-offices/parks-recreation-neighborhood-services/general-information/policies-reports/developers>.

<sup>129</sup> DEIR, pg. xii.

<sup>130</sup> San Jose City Council Resolution No. 75540, available at:

<https://records.sanjoseca.gov/Resolutions/RES75540.PDF>; San Jose City Council Resolution No. 79369, available at: <https://records.sanjoseca.gov/Resolutions/RES79369.pdf>; San Jose City Council Resolution No. 79913, available at: <https://records.sanjoseca.gov/Resolutions/RES79913.pdf>

obtain Private Recreation Credits to receive up to 50% credit towards the required parkland obligation by providing a variety of public and private residential on-site amenities as part of the project.<sup>131</sup> This includes children play lots, picnic areas, hard game courts, turf playing fields, publicly accessible plazas and gardens, pet yards, swimming pools, community and recreational rooms—all with specific design guidelines.<sup>132</sup>

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The DEIR provides no discussion as to whether its recreational facilities will meet these guidelines such that it can qualify for a Private Recreation Credit. Additionally, as described below in Section VI, the Project does not comply with the City's affordable housing guidelines and therefore cannot qualify for the 50% credit from providing affordable housing. Consequently, the DEIR's conclusion that the Project, by itself, would not require the construction of new or expanded parks, resulting in less than significant impact, is unsupported by any analysis or evidence.

Based on the information set forth in the DEIR, the Project clearly does not meet the City's parkland requirements and the conclusion of no significant impact is completely without support. The DEIR should be revised to adequately disclose, analyze and mitigate the impact on local parks.

## V. THE PROJECT FAILS TO COMPLY WITH THE CITY'S AFFORDABLE HOUSING ORDINANCE

The City has a city-wide inclusionary housing ordinance ("IHO") that sets a series of requirements for affordable housing in San Jose.<sup>133</sup> As the Project proposes more than 10 dwelling units, it is subject to the IHO.<sup>134</sup> Indeed, one of the Project's stated objectives is to "[d]eliver affordable housing consistent with the goals set forth in the City's recently amended Inclusionary Housing Ordinance."<sup>135</sup> However, as demonstrated below, the Project fails to demonstrate compliance with the IHO's requirements.

CEQA Guidelines section 15125(d) requires that an environmental impact report "discuss any inconsistencies between the proposed project and applicable

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<sup>131</sup> San Jose Developers page, *supra* n. 131.

<sup>132</sup> San Jose City Council Resolution No. 73587, available at: <https://records.sanjoseca.gov/Resolutions/RES73587.PDF> ; See Design Guidelines here: <https://www.sanjoseca.gov/home/showpublisheddocument/88757/637965184122970000>

<sup>133</sup> SJMC, chapter 5.08.

<sup>134</sup> *Id.*

<sup>135</sup> DEIR, pg. 39.

general plans, specific plans and regional plans,” which includes regional housing plans.<sup>136</sup> Therefore, the Project’s inconsistency with affordable housing goals, objectives, and policies is a violation of CEQA.

**A. The Project Does Not Propose A Sufficient Number Of Affordable Housing Units**

According to the DEIR, the Project aims to build 178 affordable units out of a total of 1,472 residential units, representing 12 percent of the housing designated as affordable.<sup>137</sup> This percentage is too low to comply with the IHO, which requires a minimum of **15 percent** of residential units built on-site to be affordable, or pay an in lieu fee.<sup>138</sup> The Project’s 12 percent allocation is insufficient, and the DEIR does not describe any plans to take advantage of an in-lieu fee so as to make up for the 3% difference. The Project is therefore inconsistent with the IHO and its own stated objective.

**B. The Proposed Inclusionary Units Are Not Comparable To The Market Rate Units**

The IHO requires all inclusionary housing units to have a comparable square footage and the same bedroom count and bedroom count ratio as the Market Rate Units.<sup>139</sup> The affordable housing building are proposed to consist of Studio, 1-bedroom, and 2-bedroom units, while all the Market Rate buildings contain Studio, 1-bedroom, 2-bedroom, and 3-bedroom units.<sup>140</sup> Consequently, the bedroom count and ratio between the two types of units are inherently mismatched. Furthermore, the DEIR lacks detailed information on the individual square footage of the units and whether they would be comparable to the market rate units.

**C. The DEIR Does Not Describe How The Project Will Comply The IHO’s Partnership For Clustered Units Requirements**

The IHO, through its “Partnership for Clustered Units” requirement, allows construction of clustered rental affordable housing on the site of the Residential Development in lieu of constructing the affordable units *within* the Residential

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<sup>136</sup> See also *Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal. App. 5th 467, 543.

<sup>137</sup> Table 2-1, DEIR, pg. 16.

<sup>138</sup> SJMC § 5.08.400.

<sup>139</sup> SJMC § 5.08.470(F).

<sup>140</sup> Table 2-3, DEIR, pg. 17-18.

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Development, so long as the project meets certain conditions.<sup>141</sup> Because the Project is not proposing affordable housing within the residential buildings but rather is constructing a distinct affordable housing building, the Project must comply with the Partnership for Clustered Units requirements. The IHO delineates specific criteria concerning location/proximity, financing, percentage of inclusionary Units and affordability, among others, for this type of inclusionary housing plan.<sup>142</sup> The DEIR fails to lay out these policies in its Regulatory Background and analyze whether the Project will comply with these key requirements. The DEIR must be revised to discuss and analyze its compliance with the IHO.

## VI. THE CITY CANNOT MAKE THE REQUISITE FINDINGS TO APPROVE THE PROJECT

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The Project requires that the City issue discretionary approvals, including a Vesting Tentative Subdivision Map and a Planned Development Permit.<sup>143</sup> Under SJMC section 19.13.010, the Vesting Tentative Map must be consistent with the General Plan.<sup>144</sup> Similarly, the Planned Development Permit requires that the City make certain findings, including that the permit as issued complies with all applicable General Plan policies.<sup>145</sup> The City must also find that “[t]he environmental impacts of the project, including, but not limited to noise, vibration, dust, drainage, erosion, storm water runoff, and odor which, *even if insignificant for purposes of the California Environmental Quality Act (CEQA)*, will not have an unacceptable negative effect on adjacent property or properties.”<sup>146</sup>

As an initial matter, the City may not make the required finding for the Planned Development Permit that the Project will not result in unacceptable negative environmental impacts. As demonstrated above, the DEIR fails to disclose, analyze or effectively mitigate the Project’s potentially significant impacts on transportation, noise, and biological resources. Accordingly, the Project will have an unacceptable negative effect on adjacent property, since even “insignificant” impacts under CEQA can be deemed so.

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<sup>141</sup> SJMC § 5.08.590. The clustered Inclusionary Units must comply with the standards established by SJMC § 5.08.470, with the same percentages and levels of affordability as required by the IHO for on-site rental units.

<sup>142</sup> SJMC § 5.08.590

<sup>143</sup> DEIR, pg. 39.

<sup>144</sup> SJMC § 19.13.010.

<sup>145</sup> SJMC § 20.100.940 (A)(1).

<sup>146</sup> SJMC § 20.100.940 (A)(5) (emphasis added).

These impacts also create inconsistencies with the General Plan policies which the DEIR fails to disclose and mitigate. The Project’s inadequate affordable housing also results in inconsistency with the General Plan. Specifically, our analysis of the DEIR reflected in these comments show that the Project fails to comply with several key goals and policies in the Envision San José 2040 General Plan,<sup>147</sup> including the following.

Transportation

C-7.39

TR-1.1	Accommodate and encourage use of non-automobile transportation modes to achieve San José’s mobility goals and reduce vehicle trip generation and vehicle miles traveled (VMT)
TR-1.2	Consider impacts on overall mobility and all travel modes when evaluating transportation impacts of new developments or infrastructure projects
TR-1.4	Through the entitlement process for new development, projects shall be required to fund or construct needed transportation improvements for all transportation modes giving first consideration to improvement of bicycling, walking and transit facilities and services that encourage reduced vehicle travel demand. . . Development proposals shall be reviewed for their impacts on all transportation modes through the study of Vehicle Miles Traveled (VMT), Envision San José 2040 General Plan policies, and other measures enumerated in the City Council Transportation Analysis Policy and its Local Transportation Analysis. Projects shall fund or construct proportional fair share mitigations and improvements to address their impacts on the transportation systems
TR-5.3	Development projects’ effects on the transportation network will be evaluated during the entitlement process and will be required to fund or construct improvements in proportion to their impacts on the transportation system. Improvements will prioritize multimodal improvements that reduce VMT over automobile network improvements
TR-9.1	Enhance, expand and maintain facilities for walking and bicycling to provide neighborhoods with safe and direct access to transit and key destinations, a particularly to provide neighborhoods with safe and direct access to transit and key destinations, a complete alternative transportation network that facilitates non-automobile trips, and enjoyable outdoor open space.

<sup>147</sup> Available at:  
<https://www.sanjoseca.gov/home/showpublisheddocument/22359/637928744399330000>

TR-9.2	Serve as a model city for VMT reduction by implementing programs and policies that reduce VMT for City of San José employees
TR-9.3	Enhance the overall travel experience of transit riders, pedestrians, bicyclists, and shared micromobility users to encourage mode shift.

C-7.39  
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The DEIR's inadequate disclosure and analysis of the Project's transportation impacts directly conflict with the General Plan policies. For example, policies such as TR-1.1, TR-1.4, TR-5.3, and TR-9.2 underscore the City's commitment to reducing VMT, a goal undermined by the DEIR's flawed VMT analysis and proposed insufficient mitigation measures highlighted by Mr. Marshall's analysis. By failing to accurately assess and address the significant VMT impact and traffic hazards associated with the Project, the DEIR falls short of meeting these critical General Plan policies, undermining the city's efforts to reduce VMT and promote sustainable transportation and mobility.

Biological Resources

C-7.40

Goal ER-2	Preserve, protect, and restore the City's riparian resources in an environmentally responsible manner to protect them for habitat value and recreational purposes.
ER-2.1	Ensure that new public and private development adjacent to riparian corridors in San José are consistent with the provisions of the City's Riparian Corridor Policy Study and any adopted Santa Clara Valley Habitat Conservation Plan/ Natural Communities Conservation Plan (HCP/NCCP).
ER-2.2	Ensure that a 100-foot setback from riparian habitat is the standard to be achieved in all but a limited number of instances, only where no significant environmental impacts would occur
ER-2.3	Design new development to protect adjacent riparian corridors from encroachment of lighting, exotic landscaping, noise and toxic substances into the riparian zone.
ER-2.4	When disturbances to riparian corridors cannot be avoided, implement appropriate measures to restore, and/or mitigate damage and allow for fish passage during construction.
ER-2.5	Restore riparian habitat through native plant restoration and removal of nonnative/invasive plants along riparian corridors and adjacent areas.
ER-4.1	Preserve and restore, to the greatest extent feasible, habitat areas that support special-status species. Avoid development in such habitats unless no feasible alternatives exist and mitigation is provided of equivalent value.

ER-4.4	Require that development projects incorporate mitigation measures to avoid and minimize impacts to individuals of special-status species
ER-5.2	Require that development projects incorporate measures to avoid impacts to nesting migratory birds.

The DEIR's deficient analysis and mitigation strategies concerning the Project's biological resources impacts directly contradict several critical General Plan policies aimed at preserving and protecting San Jose's natural habitats and wildlife. For example, the General Plan includes a general goal aimed at the preservation of riparian resources (Goal ER-2) that includes several policies that underscore the importance of maintaining and restoring ecological balance in riparian corridors (such as ER-2.1, ER-2.2, ER-2.3, and ER-2.4). However, the DEIR's minimal analysis and mitigation of the impacts of the Project on the nearby riparian corridor fail to comply with these policies. Notably, as Mr. Cashen pointed out, the Project fails to comply with the 100-foot riparian setback, thereby directly contravening Policy ER-2.2.

Moreover, the DEIR's shortcomings in identifying and mitigating impacts on special-status species and habitats directly conflict with policies aimed at protecting wildlife species and their habitats, such as ER-4.1, which mandates the preservation, to the greatest extent feasible, habitat areas that support special-status species. Furthermore, because the proposed mitigation measures (MM BIO-1 and MM BIO-2) are insufficient, the Project is inconsistent with policies requiring the incorporation of effective measures to mitigate impacts on special-status species and nesting birds (ER-4.4, ER-5.2).

Overall, the DEIR's failure to adequately disclose, analyze, and mitigate the Project's biological resources impacts undermines and violates several key General Plan policies aimed at preserving the City's biodiversity.

Noise

EC-1.1	<p>Locate new development in areas where noise levels are appropriate for the proposed uses. Consider federal, state and City noise standards and guidelines as a part of new development review. Applicable standards and guidelines for land uses in San José include:</p> <p><u>Interior Noise Levels</u></p> <p>The City's standard for interior noise levels in residences, hotels, motels, residential care facilities, and hospitals is 45 dBA DNL. Include appropriate site and building design, building construction and noise attenuation techniques in new development to meet this standard. For</p>
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C-7.41

	<p>sites with exterior noise levels of 60 dBA DNL or more, an acoustical analysis following protocols in the City-adopted California Building Code is required to demonstrate that development projects can meet this standard. The acoustical analysis shall base required noise attenuation techniques on expected Envision General Plan traffic volumes to ensure land use compatibility and General Plan consistency over the life of this plan.</p> <p><u>Exterior Noise Levels</u></p> <p>The City’s acceptable exterior noise level objective is 60 dBA DNL or less for residential and most institutional land uses (refer to Table EC-1 in the General Plan. Residential uses are considered “normally acceptable” with exterior noise exposures of up to 60 dBA DNL and “conditionally compatible” where the exterior noise exposure is between 60 and 75 dBA DNL such that the specified land use may be permitted only after detailed analysis of the noise reduction requirements and needed noise insulation features are included in the design.</p>
C-7.41 Cont.	<p>EC-1.2 Minimize the noise impacts of new development on land uses sensitive to increased noise levels (Land Use Categories 1, 2, 3 and 6 in Table EC-1 in the General Plan by limiting noise generation and by requiring use of noise attenuation measures such as acoustical enclosures and sound barriers, where feasible. The City considers significant noise impacts to occur if a project would: Cause the DNL at noise sensitive receptors to increase by five dBA DNL or more where the noise levels would remain “Normally Acceptable”; or Cause the DNL at noise sensitive receptors to increase by three dBA DNL or more where noise levels would equal or exceed the “Normally Acceptable” level.</p>
EC-1.6	<p>Regulate the effects of operational noise from existing and new industrial and commercial development on adjacent uses through noise standards in the City’s Municipal Code.</p>
EC-1.7	<p>Require construction operations within San José to use best available noise suppression devices and techniques and limit construction hours near residential uses per the City’s Municipal Code. The City considers significant construction noise impacts to occur if a project located within 500 feet of residential uses or 200 feet of commercial or office uses would: Involve substantial noise generating activities (such as building demolition, grading, excavation, pile driving, use of impact equipment, or building framing) continuing for more than 12 months. For such large or complex projects, a construction noise logistics plan that specifies hours of construction, noise and vibration minimization measures, posting or notification of construction schedules, and designation of a noise</p>

	disturbance coordinator who would respond to neighborhood complaints will be required to be in place prior to the start of construction and implemented during construction to reduce noise impacts on neighboring residents and other uses.
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C-7.41  
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The DEIR's failure to adequately address noise impacts from the Project directly contradicts several key General Plan policies aimed at safeguarding against adverse noise effects. Specifically, EC-1.1 mandates the location of new development in areas with appropriate noise levels and requires adherence to noise standards, such as for interior and exterior noise levels. However, as Mr. Shaw's comments explain, the Project will exceed the 45 dBA interior noise limit, and the DEIR fails to include measures that will adequately reduce these levels.<sup>148</sup> Further, as Mr. Shaw highlights, the calculated future exterior noise levels are unsupported, and therefore the DEIR fails to demonstrate that the Project meets the policy's exterior noise limit.<sup>149</sup>

Moreover, the proposed mitigation measure, Mitigation Measure NSE-1, fails to adequately reduce noise impacts as required by EC-1.2, which aims to minimize noise impacts on sensitive land uses. In summary, the DEIR's inadequate analysis and mitigation of noise impacts demonstrate a clear inconsistency with the General Plan's policies aimed at protecting against adverse noise impacts.

Affordable Housing

H-2.1	Facilitate the production of extremely low-, very low-, low-, and moderate-income housing by maximizing use of appropriate policies and financial resources at the federal, state, and local levels; and various other programs.
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C-7.42

The Project's failure to comply with the City's affordable housing ordinance (the IHO) directly contradicts this General Plan policy, which aims to facilitate the production of affordable housing by maximizing the use of appropriate policies, such as the IHO. As demonstrated above, the Project falls short of meeting the IHO requirements in several ways, thereby undermining the goals of affordable housing outlined in the General Plan.

As a result of the Project's inconsistencies with these policies, the City is precluded from making required findings pursuant to SJMC sections 19.13.010 (for

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<sup>148</sup> Shaw Comments, pp. 5-6.

<sup>149</sup> Shaw Comments, pg. 5.

C-7.42  
Cont. issuance of a Vesting Tentative Map) and 20.100.940(A)(1) (for issuance of a Planned Development Permit) because it cannot find that the Project complies with and is consistent with applicable General Plan policies.

## VII. CONCLUSION

C-7.43 For the reasons discussed above, the DEIR for the Project is wholly inadequate under CEQA. It must be revised to provide legally adequate analysis of, and mitigation for, all of the Project's potentially significant impacts. These revisions will necessarily require that the DEIR be recirculated for additional public review and comment. Until the DEIR has been revised and recirculated, the City may not lawfully approve the Project.

Thank you for your consideration of these comments. Please include them in the record of proceedings for the Project.

Sincerely,



Ariana Abedifard

Attachments  
AA:acp