

SUBJECT: FILE NO. H20-037 – RESPONSES TO CEQA COMMENTS RECEIVED PRIOR TO PLANNING COMMISSION.

NOTIFICATION OF COMMUNICATION RECEIVED

Please see the attached document prepared by Planning staff to respond to public comment received from Adams Broadwell Joseph & Cardozo on the day of Planning Commission, Wednesday, November 16, 2022. The supplemental letter reiterates the commenter's concerns raised during the SEIR's public comment period. The attached responses to comments document identifies where the commenter's concerns are addressed in the First Amendment and provides additional information for why the SEIR is adequate and does not require recirculation.

Attachments: Responses to Comments Memorandum
San Jose Planning Commission Correspondence – Adams Broadwell Letter

A. Adams Broadwell Joseph & Cardozo (November 14, 2022)

Comment A.1: On behalf of Silicon Valley Residents for Responsible Development (“Silicon Valley Residents” or “Commenters”), we submit these comments in response to the Staff Report¹ and First Amendment to the Draft Supplemental EIR (DSEIR”), which, together with the DSEIR constitutes the Final SEIR (“FSEIR”)² prepared for the November 16, 2022 San José Planning Commission (“Commission”) hearing on the San José Fountain Alley Mixed-Use Project (“Project”) proposed by Westbank Corp, dba Project Fountain Alley, LLC (“Applicant”).

We reviewed the Staff Report, and the FSEIR, which includes the City’s responses to public comments. The FSEIR still provides inadequate analysis and mitigation for potential hazardous contamination on the Project site. The FSEIR improperly defers analysis and mitigation of potential hazardous contamination, in violation of CEQA. Additionally, the FSEIR fails to implement all feasible mitigation measures to reduce the Project’s air pollution emissions. We respectfully request that the Commission direct that staff address these outstanding issues in a revised and recirculated EIR before the Project can be recommended for approval by the City Council.

Response A.1: Refer to Responses A.2 to A.8 below.

Comment A.2: I. PROJECT AND COMMENTERS’ BACKGROUND

The Project proposes to develop a 21-story curvilinear mixed-use building containing 194 residential units, 31,259 square feet of ground floor retail and 405,924 square feet of office space. The building would have a maximum height of 267 feet to the roof and 289 feet to the top of the mechanical penthouse. The Project would contain 22,500 square feet of public open space area. The Project proposes to develop four below-grade level parking with up to 292 parking spaces. The Project site is 1.25-acres located at 35 South 2nd Street, San José, California, 95113, west of Second Street, between East Santa Clara Street and West San Fernando Street, in the Fountain Alley area of downtown San José, Assessor Parcel Number (“APN”) 467-22-121.³

Silicon Valley Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards, and the environmental and public service impacts of the Project. Residents includes San José residents Edmundo Escarcega, Ryan Jones, Johnny Bahr, the International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, along with their members, their families, and other individuals who live and work in the City of San José.

¹ City of San Jose, Memorandum from Christopher Burton to Planning Commission re File No. H20-037 (November 16, 2022), <https://www.sanjoseca.gov/home/showdocument?id=91905&t=638035887662826833>.

² City of San Jose, First Amendment to the Draft SEIR, San José Fountain Alley Mixed-Use (File Nos. H20-037 & ER20-242) (November 2022), <https://www.sanjoseca.gov/home/showpublisheddocument/91675/638030726278870000>.

³ City of San Jose, Planning Building & Code Enforcement, Fountain Alley Mixed Use Project Draft SEIR (June 17, 2022). Available at: <https://www.sanjoseca.gov/your-government/departments-offices/planning-building-code-enforcement/planning-division/environmental-planning/environmental-review/active-eirs/fountain-alley-mixed-use-project>.

Individual members of Silicon Valley Residents live, work, recreate, and raise their families in the City and in the surrounding 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 on site.

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 businesses and industries to expand in the region, and by making the area less desirable for new businesses and new residents. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

Response A.2: The commenter has correctly summarized the proposed project. This comment does not raise any specific issues about the adequacy of the Draft SEIR. No further response is required.

Comment A.3: II. THE FSEIR DOES NOT RESOLVE ALL ISSUES RAISED IN SILICON VALLEY RESIDENTS' COMMENTS

The FSEIR provides that a Phase II Soil, Soil Gas and/or Groundwater Investigation will be conducted after Project approval. CEQA prohibits the deferral of study and disclosure a project's environmental impacts.⁴ Furthermore, deferring formulation of mitigation measures to post-approval studies is generally impermissible.⁵ Mitigation measures adopted after Project approval deny the public the opportunity to comment on the Project as modified to mitigate impacts.⁶ If identification of specific mitigation measures is impractical until a later stage in the Project, specific performance criteria must be articulated and further approvals must be made contingent upon meeting these performance criteria.⁷ Courts have held that simply requiring a project applicant to obtain a future report and then comply with the report's recommendations is insufficient to meet the standard for properly deferred mitigation.⁸

Response A.3: See Response A.4 below.

Comment A.4: A. The FSEIR Fails to Adequately Analyze the Project's Hazardous Materials Impacts

The Project site was occupied by a coffee roaster business from 1930 to 1955.⁹ Per the Phase I Environmental Site Assessment ("ESA"), tetrachloroethene (PCE/PERC) was historically used to decaffeinate coffee beans until the 1970s, when it was banned for food preparation and

⁴ 14 CCR §§ 15126.2(a), 15143, 15151, 15162.2(a); *Madera Oversight Coalition*, 199 Cal.App.4th at 1370-71.

⁵ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; Pub. Resources Code § 21061.

⁶ *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393; *Quail Botanical, supra*, 29 Cal.App.4th at p. 1604, fn. 5.

⁷ *Gentry*, 36 Cal.App.4th at 1393.

⁸ *Id.*

⁹ DSEIR, p. 77.

pharmaceutical operations.¹⁰ PCE/PERC can accumulate in soil and soil gas and migrate to groundwater and was identified by the Phase I ESA as a recognized environmental condition (REC).¹¹ The site may contain significant levels of PCE/PERC.¹²

The DSEIR does not adequately disclose existing contamination or the additional impacts associated with mitigation to remediate the contamination, nor can it do so absent a Phase II ESA.¹³ If PCE is found at the Project site through sampling, excavation and offsite transport of contaminated soil may be necessary.¹⁴ Installation of a soil vapor extraction system may also be necessary. These activities, through use of excavation equipment and trucks, would emit air pollutants and air toxins unaccounted for in the DSEIR.¹⁵ If a mitigation measure would cause a significant impact in addition to those caused by the project itself, the effects of such mitigation must be discussed in the EIR.¹⁶ The City's failure to allow for public review of a Phase II ESA in the DSEIR constitutes impermissibly deferred analysis in violation of CEQA and the FEIR fails to rectify this deficiency.

By deferring environmental assessment to a future date, the DSEIR runs counter to CEQA's requirement of environmental review at the earliest feasible stage in the planning process.¹⁷ In *Bozung v. Local Agency Formation Commission* the Supreme Court of California approved "the principle that the environmental impact should be assessed as early as possible in government planning."¹⁸ A study conducted after approval of a project will inevitably have a diminished influence on decision-making.¹⁹ Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA.²⁰ The DSEIR recognized that "[c]onstruction associated with the proposed project could expose construction workers and nearby land uses to soil and/or groundwater contamination (e.g., tetrachloroethene) from the former coffee roaster business."²¹ But, the DSEIR failed to adequately analyze the full extent of the contamination in a Phase II ESA for public review and scrutiny, in violation of CEQA Guidelines Section 15126.2 subdivision (a).

The City responded to Silicon Valley Residents' DSEIR comments by referring to proposed mitigation measures that identify the necessary testing that will be required. This doesn't change the fact that such testing is being deferred until after the FSEIR would be certified, far too late to inform the public of the extent and potentially significant impacts of the contamination as required by CEQA. The City further responds that the DSEIR includes measures in MM HAZ-1.2 which the City argues include "performance standards which must be met before the project would be issued any grading permits needed to commence construction."²² But the City still fails to address

¹⁰ *Id.*

¹¹ FSEIR, p. 11.

¹² DSEIR, Appendix E, Phase I Environmental Site Assessment, pdf p. 1939-1940.

¹³ SWAPE Comments, p. 2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 14 CCR § 15126.4(a)(1)(D).

¹⁷ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307; PRC § 21003.1; *No Oil, Inc. v. City of Los Angeles*, supra, 13 Cal.3d 68, 84.

¹⁸ (1975) 13 Cal.3d 263, 282.

¹⁹ *Sundstrom v. County of Mendocino*, supra, 202 Cal.App.3d 296, 307.

²⁰ *Id.*; *No Oil, Inc. v. City of Los Angeles*, supra, 13 Cal.3d 68, 81; *Environmental Defense Fund, Inc. v. Coastside County Water Dist.* (1972) 27 Cal.App.3d 695, 706.

²¹ DSEIR, p. 79.

²² DSEIR, p. ix.

potentially significant impacts of soil vapor remediation or other mitigation efforts. Accordingly, the FSEIR remains inadequate to inform the public about the Project's potentially significant impacts, and the City must circulate an adequate EIR to adequately address impacts associated with hazardous contamination and impacts associated with such cleanup.

Response A.4: As mentioned in the First Amendment, on page 77 of the Draft SEIR, and correctly stated by the commenter, tetrachloroethene (PCE/PERC) was historically used to decaffeinate coffee beans until the 1970s. PCE/PERC can accumulate in soil and soil gas and migrate to groundwater and was identified by the Phase I ESA as an REC.

The proposed mitigation on pages 79-80 of the Draft SEIR properly identifies the necessary testing required (specifically to establish if contaminants are found in concentrations above established construction/trench worker and residential or commercial Regional Water Quality Control Board Environmental Screening Levels) and, if remediation is deemed necessary, the actions and regulatory oversight required which includes regulation of excavation and transport of contaminated soil, exposure of contaminated groundwater, soil vapor remediation, and worker safety protocols. In addition, the mitigation identifies performance standards which must be met before the project would be issued any demolition or grading permits needed to commence construction. The information regarding the existing REC and the level of mitigation required to allow the project to proceed in accordance with adopted thresholds for residential occupation is sufficient for the lead agency to make an informed decision.

Additionally, it is not uncommon for a Phase II Environmental Site Assessment (ESA) to be completed post-approval, particularly when a site is in active use or inaccessible. As stated in the project description (page 8 of the Draft SEIR), the site will be excavated to allow for four levels of below-grade loading and parking. The total depth of excavation would be 56 feet below the ground surface as stated on page 70 and page 80 of the Draft SEIR. Therefore, the results from the Phase II ESA are not relevant to the project's design since the effects of soil removal from the site due to the proposed below-grade parking garage (including the use of heavy equipment for excavation and haul trucks to remove the soil) are already disclosed in the Draft SEIR (e.g., preparation of a site-specific geotechnical investigation and implementation of the project's Storm Water Pollution Protection Plan). The results from the Phase II ESA would be used to confirm whether any precautions are needed for worker exposure and whether any restrictions shall be placed on where the soil can be disposed. This is handled by the oversight agency as a routine matter, and not an issue the City has to resolve and disclose in the Draft SEIR. The Phase II, whenever completed, does not provide absolute certainty about conditions throughout the site since only a small percentage of the site area would be sampled. The Site Management Plan (SMP) is included to deal with unforeseen conditions encountered during construction. Therefore, preparing the Phase II ESA now would not provide a fully defined baseline picture of site conditions and preparation of the Phase II at the Draft SEIR stage does not make the Draft SEIR inadequate. For these reasons, recirculation of the Draft SEIR is not required.

Comment A.5: B. The DSEIR Fails to Adequately Mitigate the Project’s Hazardous Materials Impacts

The DSEIR relies on Mitigation Measures HAZ-1.1 and HAZ-1.2 to purportedly reduce hazardous materials impacts to less than significant, but these measures constitute impermissibly deferred mitigation under CEQA.²³ “By deferring environmental assessment to a future date, the conditions run counter to that policy of CEQA which requires environmental review at the earliest feasible stage in the planning process.”²⁴ CEQA Guidelines § 15126.4(a)(1)(B) provides that formulation of mitigation measures shall not be deferred until some future time.²⁵ The specific details of a mitigation measure, however, may be developed after project approval when it is impractical or infeasible to include those details during the project’s environmental review provided that the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will be considered, analyzed, and potentially incorporated in the mitigation measure.²⁶ Compliance with a regulatory permit or other similar process may be identified as mitigation if compliance would result in implementation of measures that would be reasonably expected, based on substantial evidence in the record, to reduce the significant impact to the specified performance standards.”²⁷ “An EIR is inadequate if ‘[t]he success or failure of mitigation efforts ... may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR.’ ”²⁸

Here, the Site Management Plan, Removal Action Workplan, and Health and Safety Plans called for by MM HAZ-1.2 would require additional analysis and establish mitigation measures that should have been included for public review in the DSEIR. The DSEIR fails to identify the types of measures that may be included to mitigate the Project’s potentially significant hazardous material impacts including measures that may be included in the Removal Action Plan and the Health and Safety Plan.²⁹ Without first assessing the extent of the potential PCE/PERC contamination and then providing details about the mitigation measures, the efficacy of mitigation measures HAZ-1.1 and HAZ-1.2 cannot be determined to be effective. The DSEIR fails as an informational document for impermissibly deferred analysis and mitigation.

Response A.5: Refer to Response A.4 above.

Comment A.6: The FSEIR does not state why specifying specific performance standards was impractical or infeasible at the time the DSEIR was drafted. In *Preserve Wild Santee v. City of Santee*, the city impermissibly deferred mitigation where the EIR did not state why specifying performance standards for mitigation measures “was impractical or infeasible at the time the EIR was certified.”³⁰ The court determined that although the City must ultimately approve the mitigation

²³ DSEIR, p. 79.

²⁴ *Sundstrom v. County of Mendocino*, supra, 202 Cal.App.3d at 305.

²⁵ 14 CCR 15126.4(a)(1)(B).

²⁶ *Id.*

²⁷ 14 CCR 15126.4(a)(1)(B).

²⁸ *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, quoting *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92, quoting *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645 670.

²⁹ DSEIR, p. 79-80.

³⁰ *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281.

standards, this does not cure these informational defects in the EIR.³¹ Further, the court in *Endangered Habitats League, Inc. v. County of Orange*, held that mitigation that does no more than require a report to be prepared and followed, or allow approval by a county department without setting any standards is inadequate.³²

Here, the fact that the Phase II Soil, Soil Gas and/or Groundwater Investigation and potential Site Cleanup Program will be approved later by the Santa Clara County Department of Environment Health or State Department of Toxic Substances Control does not cure the informational defects in this DSEIR, and the FSEIR fails to cure these defects.³³ The City must circulate an adequate EIR which provides complete analysis and mitigation of the Project's hazardous materials impacts before the Project can be approved.

Response A.6: As noted in Response C.5 of the First Amendment, the mitigation has defined thresholds for cleanup (if necessary based on testing) and requires more than the preparation and approval of a report. Specifically, Mitigation Measure HAZ-1.2 (pages 79-80 of the Draft SEIR) states that the Site Management Plan (SMP) shall be reviewed and approved prior to issuance of grading permits and commencement of cleanup activities. This is consistent with procedural requirements for the City of San Jose's Environmental Services Department (ESD), the Santa Clara County Department of Environmental Health (SCCDEH), and the Department of Toxic Substances and Control (DTSC), who would be the primary oversight agencies. In addition, the Mitigation Measures HAZ-1.1 and HAZ-1.2 states that the approved SMP shall do the following:

1. detail procedures and protocols for management of soil containing environmental contaminants during site development activities,
2. any further investigation and remedial actions must be performed under regulatory oversight to mitigate the contamination and make the site suitable for the proposed residential development, and
3. the SCCDEH or DTSC shall provide documentation of completed cleanup activities to the City prior to the issuance of permits.

Therefore, the Draft SEIR adequately analyzed the hazards and hazardous materials impacts and no recirculation is required. Also, refer to Response A.4 above for more information.

Comment A.7: III. THE FSEIR FAILS TO ADEQUATELY MITIGATE THE PROJECT'S AIR QUALITY IMPACTS

The DSEIR fails to incorporate all feasible mitigation measures to avoid or substantially lessen air emissions impacts, especially with respect to cumulative annual PM2.5 emissions. "CEQA establishes a duty for public agencies to avoid or minimize environmental damage where feasible."³⁴

³¹ *Id.*

³² *Endangered Habitats League, Inc. v. County of Orange*, (2005) 131 Cal.App.4th 777, 794.

³³ *See Cal. Clean Energy Comm. v. City of Woodland* (2014) 225 Cal.App.4th 173, 194.

³⁴ 14 CCR § 15021(a).

A public agency cannot approve a project if there are feasible alternatives or mitigation measures available that would substantially lessen any significant effects that the project would have on the environment.³⁵ CEQA defines “feasible” as “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.”³⁶

The core of an EIR is the mitigation and alternatives sections.³⁷ The CEQA Guidelines define mitigation as a measure which (1) avoids the impact altogether by not taking a certain action or parts of an action, (2) minimizes the impact by limiting the degree or magnitude of the action and its implementation, (3) rectifies the impact by repairing, rehabilitating, or restoring the impacted environment, (4) reduces or eliminates the impact overtime by preservation and maintenance operations during the life of the action, and (5) compensates for the impact by replacing or providing substitute resources or environments.³⁸ “In deciding whether changes in a project are feasible, an agency may consider specific economic, environmental, legal, social, and technological factors.”³⁹

Findings as to mitigation measures must be supported by substantial evidence.⁴⁰ Substantial evidence means “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.”⁴¹ Substantial evidence “shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts,”⁴² but it should not include “[a]rgument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment.”⁴³

The City must circulate an adequate EIR which incorporates all feasible measures recommended by Commenters to mitigate construction-related air emissions, including:

- Ensure the cleanest possible construction practices and equipment are used. This includes eliminating the idling of diesel-powered equipment and providing the necessary infrastructure (e.g., electrical hookups) to support zero and near-zero equipment and tools.
- Implement, and plan accordingly for, the necessary infrastructure to support the zero and near-zero emission technology vehicles and equipment that will be operating on site. Necessary infrastructure may include the physical (e.g., needed footprint), energy, and fueling infrastructure for construction equipment, on-site vehicles and equipment, and medium-heavy and heavy-heavy duty trucks.
- In construction contracts, include language that requires all off-road equipment with a power rating below 19 kilowatts (e.g., plate compactors, pressure washers) used during project construction be battery powered.

³⁵ 14 CCR § 15021(a)(2).

³⁶ 14 CCR § 15364.

³⁷ *Citizens of Goleta Valley v. Bd. of Supervisors (“Goleta II”)* (1990) 52 Cal.3d 553, 564.

³⁸ 14 CCR § 15370.

³⁹ 14 CCR § 15021(b).

⁴⁰ 14 CCR § 15091(b); *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 449.

⁴¹ 14 CCR § 15384(a).

⁴² *Id.* at § 15384(b).

⁴³ *Id.* at § 15384(a).

- In construction contracts, include language that requires all heavy-duty trucks entering the construction site during the grading and building construction phases be model year 2014 or later. All heavy-duty haul trucks should also meet CARB's lowest optional low-oxides of nitrogen (NOx) standard.
- Include contractual language in tenant lease agreements that requires tenants to use the cleanest technologies available, and to provide the necessary infrastructure to support zero-emission vehicles and equipment that will be operating on site.
- Include contractual language in tenant lease agreements that requires all loading/unloading docks and trailer spaces be equipped with electrical hookups for trucks with transport refrigeration units (TRU) or auxiliary power units. This requirement will substantially decrease the amount of time that a TRU powered by a fossil-fueled internal combustion engine can operate at the project site. Use of zero-emission all-electric plug-in TRUs, hydrogen fuel cell transport refrigeration, and cryogenic transport refrigeration are encouraged and should also be included in lease agreements.
- Include contractual language in tenant lease agreements that requires all TRUs entering the project-site be plug-in capable.
- Include contractual language in tenant lease agreements that requires future tenants to exclusively use zero-emission light and medium-duty delivery trucks and vans.
- Include contractual language in tenant lease agreements that requires all service equipment (e.g., yard hostlers, yard equipment, forklifts, and pallet jacks) used within the project site to be zero-emission. This equipment is widely available and can be purchased using incentive funding from CARB's Clean Off-Road Equipment Voucher Incentive Project (CORE).
- Include contractual language in tenant lease agreements that requires all heavy-duty trucks entering or on the project site to be model year 2014 or later, expedite a transition to zero-emission vehicles, and be fully zero-emission beginning in 2023. A list of commercially available zero-emission trucks can be obtained from the Hybrid and Zero-emission Truck and Bus Voucher Incentive Project (HVIP).
- Include contractual language in tenant lease agreements that requires the tenant to be in, and monitor compliance with, all current air quality regulations for on-road trucks including CARB's Heavy-Duty (Tractor-Trailer) Greenhouse Gas Regulation, Advanced Clean Trucks Regulation, Periodic Smoke Inspection Program (PSIP), and the Statewide Truck and Bus Regulation.
- Include contractual language in tenant lease agreements restricting trucks and support equipment from idling longer than two minutes while on site.
- Include rooftop solar panels for each proposed building to the extent feasible, with a capacity that matches the maximum allowed for distributed solar connections to the grid.
- Include contractual language in tenant lease agreements, requiring the installing of vegetative walls or other effective barriers that separate loading docks and people living or working nearby to help mitigate noise impacts, air quality, health risk, and greenhouse gas emissions.
- Include contractual language in tenant lease agreements, requiring all emergency generators to be powered by a non-diesel fuel.
- The project should be constructed to meet CalGreen Tier 2 green building standards, including all provisions related to designated parking for clean air vehicles, electric vehicle charging, and bicycle parking.

The above mitigation measures should be discussed and adopted in a revised and recirculated EIR. The City responded to Silicon Valley Residents' prior comments on this issue stating that "AIR-1.1 represents the best available measures to reduce project construction period emissions."⁴⁴ This wholly conclusory statement is not supported by substantial evidence. Additional feasible mitigation measures proposed by Silicon Valley Residents and our expert consultants show that the Project has not implemented the best available measures to reduce project construction emissions. The additional measures listed above must be analyzed and adopted in a revised and recirculated EIR prior to Project approval.

Response A.7: The commenter does not now, nor did they in their August 2, 2022 comment letter provide documentation regarding the source of these measures or any evidence of the need or effectiveness of these measures. It should also be noted that in addition to Mitigation Measure AIR-1.1, the project includes Standard Permit Conditions (pages 29-30 of the SEIR) to address PM_{2.5} during construction including limiting idling times.

As discussed in Response C.9 of the First Amendment and Appendix B of the Draft SEIR (Air Quality Assessment), with implementation of Mitigation Measure AIR-1.1, the project's construction cancer risk levels (assuming infant exposure) and annual PM_{2.5} concentrations would be reduced by 84 and 78 percent to 5.11 per million and 0.10 µg/m³, respectively, and would no longer exceed the BAAQMD single-source significance thresholds. This would reduce the cumulative cancer risk to less than 94.62 per million, below the 100 per million threshold. The PM_{2.5} concentration risk would be reduced to less than 2.04 µg/m³, which still exceeds the PM_{2.5} concentration cumulative threshold.

According to BAAQMD, health risks would be less than significant at the MEIs if the risks from the project are reduced below the single-source thresholds.⁴⁵ The PM_{2.5} concentration from existing sources and nearby developments⁴⁶ alone exceeds the cumulative threshold at 1.94 µg/m³. Cumulative risks exceed the PM_{2.5} concentration threshold because of the overwhelming influence of the potentially simultaneous nearby developments at the maximum exposed individuals (MEIs). Project traffic would generate 0.04 µg/m³ of PM_{2.5} annually and backup generators would emit <0.01 µg/m³ of PM_{2.5} annually. Both individually and combined, these operational emissions would be well below the >0.3 µg/m³ PM_{2.5} single-source threshold. When project construction emissions (0.10 µg/m³ of PM_{2.5} annually) are added to the project, the project's total PM_{2.5} emissions would still be below the >0.3 µg/m³ PM_{2.5} single-source threshold. The project's mitigated PM_{2.5} concentration only represents five percent of the total mitigated cumulative concentration. Therefore, the project (by itself) would not substantially contribute to the total cumulative PM_{2.5} concentration. The project would not be cumulatively considerable, and no additional mitigation (including the tenant lease measures) would be required on the part of the project to mitigate the exceedance of the cumulative source threshold for annual

⁴⁴ FSEIR, p. 17.

⁴⁵ Correspondence with Areana Flores, MSc, Environmental Planner, BAAQMD, February 23, 2021.

⁴⁶ Assumes construction of nearby developments would occur simultaneously.

PM_{2.5} concentration. As discussed in Response C.9 of the First amendment and Appendix B of the Draft SEIR, the project would apply best practices in reducing construction emissions, including those of PM_{2.5}. Therefore, Mitigation Measure AIR-1.1 represents the best available measures to reduce project construction period emissions and no recirculation of the Draft SEIR is required.

Comment A.8: IV. CONCLUSION

We respectfully request the Planning Commission by direct staff to address the issues raised herein in a revised and recirculated EIR before the Project can be approved. It is critical that the Planning Commission exercise their decision-making authority to ensure that the City complies with CEQA, protects the health and safety of its constituents, and that all potentially significant Project impacts are analyzed, disclosed, and substantially mitigated prior to approval.

Response A.8: See Responses A.2 to A.7 above.

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

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

kfederman@adamsbroadwell.com

SACRAMENTO OFFICE

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

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

KEVIN T. CARMICHAEL
CHRISTINA M. CARO
THOMAS A. ENSLOW
KELILAH D. FEDERMAN
RICHARD M. FRANCO
ANDREW J. GRAF
TANYA A. GULESSERIAN
RACHAEL E. KOSS
AIDAN P. MARSHALL
TARA C. RENGIFO

Of Counsel

MARC D. JOSEPH
DANIEL L. CARDOZO

November 14, 2022

Via Email and Overnight Mail

San Jose Planning Commission Chair Pierluigi Oliverio and Commissioners
c/o City Clerk Toni Taber
200 East Santa Clara Street
San José CA 95113-1905

Email: city.clerk@sanjoseca.gov

Email: planningsupportstaff@sanjoseca.gov

Via Email Only

Kara Hawkins, Environmental Project Manager

Email: kara.hawkins@sanjoseca.gov

Angela Wang, Project Manager

Email: Angela.Wang@sanjoseca.gov

Re: Agenda Item 5.a. Fountain Alley Mixed Use Project

Dear Chair Oliverio and Commissioners, Ms. Hawkins, and Ms. Wang:

Comment A.1

On behalf of Silicon Valley Residents for Responsible Development (“Silicon Valley Residents” or “Commenters”), we submit these comments in response to the Staff Report¹ and First Amendment to the Draft Supplemental EIR (DSEIR”), which, together with the DSEIR constitutes the Final SEIR (“FSEIR”)² prepared for the November 16, 2022 San José Planning Commission (“Commission”) hearing on the San José Fountain Alley Mixed-Use Project (“Project”) proposed by Westbank Corp, dba Project Fountain Alley, LLC (“Applicant”).

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¹ City of San Jose, Memorandum from Christopher Burton to Planning Commission re File No. H20-037 (November 16, 2022),

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² City of San Jose, First Amendment to the Draft SEIR, San José Fountain Alley Mixed-Use (File Nos. H20-037 & ER20-242) (November 2022),

<https://www.sanjoseca.gov/home/showpublisheddocument/91675/638030726278870000>.

November 16, 2022

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Comment A.2

I. PROJECT AND COMMENTERS' BACKGROUND

The Project proposes to develop a 21-story curvilinear mixed-use building containing 194 residential units, 31,259 square feet of ground floor retail and 405,924 square feet of office space. The building would have a maximum height of 267 feet to the roof and 289 feet to the top of the mechanical penthouse. The Project would contain 22,500 square feet of public open space area. The Project proposes to develop four below-grade level parking with up to 292 parking spaces. The Project site is 1.25-acres located at 35 South 2nd Street, San José, California, 95113, west of Second Street, between East Santa Clara Street and West San Fernando Street, in the Fountain Alley area of downtown San José, Assessor Parcel Number ("APN") 467-22-121.³

Silicon Valley Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards, and the environmental and public service impacts of the Project. Residents includes San José residents Edmundo Escarcega, Ryan Jones, Johnny Bahr, the International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, along with their members, their families, and other individuals who live and work in the City of San José.

Individual members of Silicon Valley Residents live, work, recreate, and raise their families in the City and in the surrounding 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 on site.

³ City of San Jose, Planning Building & Code Enforcement, Fountain Alley Mixed Use Project Draft SEIR (June 17, 2022). Available at: <https://www.sanjoseca.gov/your-government/departments-offices/planning-building-code-enforcement/planning-division/environmental-planning/environmental-review/active-eirs/fountain-alley-mixed-use-project>.

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 businesses and industries to expand in the region, and by making the area less desirable for new businesses and new residents. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

Comment A.3

II. THE FSEIR DOES NOT RESOLVE ALL ISSUES RAISED IN SILICON VALLEY RESIDENTS' COMMENTS

The FSEIR provides that a Phase II Soil, Soil Gas and/or Groundwater Investigation will be conducted after Project approval. CEQA prohibits the deferral of study and disclosure a project's environmental impacts.⁴ Furthermore, deferring formulation of mitigation measures to post-approval studies is generally impermissible.⁵ Mitigation measures adopted after Project approval deny the public the opportunity to comment on the Project as modified to mitigate impacts.⁶ If identification of specific mitigation measures is impractical until a later stage in the Project, specific performance criteria must be articulated and further approvals must be made contingent upon meeting these performance criteria.⁷ Courts have held that simply requiring a project applicant to obtain a future report and then comply with the report's recommendations is insufficient to meet the standard for properly deferred mitigation.⁸

Comment A.4

A. The FSEIR Fails to Adequately Analyze the Project's Hazardous Materials Impacts

The Project site was occupied by a coffee roaster business from 1930 to 1955.⁹ Per the Phase I Environmental Site Assessment ("ESA"), tetrachloroethene (PCE/PERC) was historically used to decaffeinate coffee beans until the 1970s,

⁴ 14 CCR §§ 15126.2(a), 15143, 15151, 15162.2(a); *Madera Oversight Coalition*, 199 Cal.App.4th at 1370-71.

⁵ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; Pub. Resources Code § 21061.

⁶ *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393; *Quail Botanical*, *supra*, 29 Cal.App.4th at p. 1604, fn. 5.

⁷ *Gentry*, 36 Cal.App.4th at 1393.

⁸ *Id.*

⁹ DSEIR, p. 77.

when it was banned for food preparation and pharmaceutical operations.¹⁰ PCE/PERC can accumulate in soil and soil gas and migrate to groundwater and was identified by the Phase I ESA as a recognized environmental condition (REC).¹¹ The site may contain significant levels of PCE/PERC.¹²

The DSEIR does not adequately disclose existing contamination or the additional impacts associated with mitigation to remediate the contamination, nor can it do so absent a Phase II ESA.¹³ If PCE is found at the Project site through sampling, excavation and offsite transport of contaminated soil may be necessary.¹⁴ Installation of a soil vapor extraction system may also be necessary. These activities, through use of excavation equipment and trucks, would emit air pollutants and air toxins unaccounted for in the DSEIR.¹⁵ If a mitigation measure would cause a significant impact in addition to those caused by the project itself, the effects of such mitigation must be discussed in the EIR.¹⁶ The City's failure to allow for public review of a Phase II ESA in the DSEIR constitutes impermissibly deferred analysis in violation of CEQA and the FEIR fails to rectify this deficiency.

By deferring environmental assessment to a future date, the DSEIR runs counter to CEQA's requirement of environmental review at the earliest feasible stage in the planning process.¹⁷ In *Bozung v. Local Agency Formation Commission* the Supreme Court of California approved "the principle that the environmental impact should be assessed as early as possible in government planning."¹⁸ A study conducted after approval of a project will inevitably have a diminished influence on decision-making.¹⁹ Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA.²⁰ The DSEIR recognized that "[c]onstruction associated with the proposed project could expose construction workers and nearby land uses to soil and/or groundwater contamination (e.g.,

¹⁰ *Id.*

¹¹ FSEIR, p. 11.

¹² DSEIR, Appendix E, Phase I Environmental Site Assessment, pdf p. 1939-1940.

¹³ SWAPE Comments, p. 2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 14 CCR § 15126.4(a)(1)(D).

¹⁷ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307; PRC § 21003.1; *No Oil, Inc. v. City of Los Angeles*, supra, 13 Cal.3d 68, 84.

¹⁸ (1975) 13 Cal.3d 263, 282.

¹⁹ *Sundstrom v. County of Mendocino*, supra, 202 Cal.App.3d 296, 307.

²⁰ *Id.*; *No Oil, Inc. v. City of Los Angeles*, supra, 13 Cal.3d 68, 81; *Environmental Defense Fund, Inc. v. Coastside County Water Dist.* (1972) 27 Cal.App.3d 695, 706.

tetrachloroethene) from the former coffee roaster business.”²¹ But, the DSEIR failed to adequately analyze the full extent of the contamination in a Phase II ESA for public review and scrutiny, in violation of CEQA Guidelines Section 15126.2 subdivision (a).

The City responded to Silicon Valley Residents’ DSEIR comments by referring to proposed mitigation measures that identify the necessary testing that will be required. This doesn’t change the fact that such testing is being deferred until after the FSEIR would be certified, far too late to inform the public of the extent and potentially significant impacts of the contamination as required by CEQA. The City further responds that the DSEIR includes measures in MM HAZ-1.2 which the City argues include “performance standards which must be met before the project would be issued any grading permits needed to commence construction.”²² But the City still fails to address potentially significant impacts of soil vapor remediation or other mitigation efforts. Accordingly, the FSEIR remains inadequate to inform the public about the Project’s potentially significant impacts, and the City must circulate an adequate EIR to adequately address impacts associated with hazardous contamination and impacts associated with such cleanup.

Comment A.5

B. The FSEIR Fails to Adequately Mitigate the Project’s Hazardous Materials Impacts

The DSEIR relies on Mitigation Measures HAZ-1.1 and HAZ-1.2 to purportedly reduce hazardous materials impacts to less than significant, but these measures constitute impermissibly deferred mitigation under CEQA.²³ “By deferring environmental assessment to a future date, the conditions run counter to that policy of CEQA which requires environmental review at the earliest feasible stage in the planning process.”²⁴ CEQA Guidelines § 15126.4(a)(1)(B) provides that formulation of mitigation measures shall not be deferred until some future time.²⁵ The specific details of a mitigation measure, however, may be developed after project approval when it is impractical or infeasible to include those details during the project’s environmental review provided that the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve,

²¹ DSEIR, p. 79.

²² DSEIR, p. ix.

²³ DSEIR, p. 79.

²⁴ *Sundstrom v. County of Mendocino*, supra, 202 Cal.App.3d at 305.

²⁵ 14 CCR 15126.4(a)(1)(B).

and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will be considered, analyzed, and potentially incorporated in the mitigation measure.²⁶ Compliance with a regulatory permit or other similar process may be identified as mitigation if compliance would result in implementation of measures that would be reasonably expected, based on substantial evidence in the record, to reduce the significant impact to the specified performance standards”.²⁷ “An EIR is inadequate if ‘[t]he success or failure of mitigation efforts ... may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR.’”²⁸

Here, the Site Management Plan, Removal Action Workplan, and Health and Safety Plans called for by MM HAZ-1.2 would require additional analysis and establish mitigation measures that should have been included for public review in the DSEIR. The DSEIR fails to identify the types of measures that may be included to mitigate the Project’s potentially significant hazardous material impacts including measures that may be included in the Removal Action Plan and the Health and Safety Plan.²⁹ Without first assessing the extent of the potential PCE/PERC contamination and then providing details about the mitigation measures, the efficacy of mitigation measures HAZ-1.1 and HAZ-1.2 cannot be determined to be effective. The DSEIR fails as an informational document for impermissibly deferred analysis and mitigation.

The FSEIR does not state why specifying specific performance standards was impractical or infeasible at the time the DSEIR was drafted. In *Preserve Wild Santee v. City of Santee*, the city impermissibly deferred mitigation where the EIR did not state why specifying performance standards for mitigation measures “was impractical or infeasible at the time the EIR was certified.”³⁰ The court determined that although the City must ultimately approve the mitigation standards, this does not cure these informational defects in the EIR.³¹ Further, the court in *Endangered Habitats League, Inc. v. County of Orange*, held that mitigation that does no more

²⁶ *Id.*

²⁷ 14 CCR 15126.4(a)(1)(B).

²⁸ *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, quoting *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92, quoting *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645 670.

²⁹ DSEIR, p. 79-80.

³⁰ *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281.

³¹ *Id.*

than require a report to be prepared and followed, or allow approval by a county department without setting any standards is inadequate.³²

Here, the fact that the Phase II Soil, Soil Gas and/or Groundwater Investigation and potential Site Cleanup Program will be approved later by the Santa Clara County Department of Environment Health or State Department of Toxic Substances Control does not cure the informational defects in this DSEIR, and the FSEIR fails to cure these defects.³³ The City must circulate an adequate EIR which provides complete analysis and mitigation of the Project's hazardous materials impacts before the Project can be approved.

Comment A.7

III. THE FSEIR FAILS TO ADEQUATELY MITIGATE THE PROJECT'S AIR QUALITY IMPACTS

The DSEIR fails to incorporate all feasible mitigation measures to avoid or substantially lessen air emissions impacts, especially with respect to cumulative annual PM_{2.5} emissions. "CEQA establishes a duty for public agencies to avoid or minimize environmental damage where feasible."³⁴ A public agency cannot approve a project if there are feasible alternatives or mitigation measures available that would substantially lessen any significant effects that the project would have on the environment.³⁵ CEQA defines "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors."³⁶

The core of an EIR is the mitigation and alternatives sections.³⁷ The CEQA Guidelines define mitigation as a measure which (1) avoids the impact altogether by not taking a certain action or parts of an action, (2) minimizes the impact by limiting the degree or magnitude of the action and its implementation, (3) rectifies the impact by repairing, rehabilitating, or restoring the impacted environment, (4) reduces or eliminates the impact overtime by preservation and maintenance operations during the life of the action, and (5) compensates for the

³² *Endangered Habitats League, Inc. v. County of Orange*, (2005) 131 Cal.App.4th 777, 794.

³³ *See Cal. Clean Energy Comm. v. City of Woodland* (2014) 225 Cal.App.4th 173, 194.

³⁴ 14 CCR § 15021(a).

³⁵ 14 CCR § 15021(a)(2).

³⁶ 14 CCR § 15364.

³⁷ *Citizens of Goleta Valley v. Bd. of Supervisors ("Goleta II")* (1990) 52 Cal.3d 553, 564.

impact by replacing or providing substitute resources or environments.³⁸ “In deciding whether changes in a project are feasible, an agency may consider specific economic, environmental, legal, social, and technological factors.”³⁹

Findings as to mitigation measures must be supported by substantial evidence.⁴⁰ Substantial evidence means “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.”⁴¹ Substantial evidence “shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts,”⁴² but it should not include “[a]rgument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment.”⁴³

The City must circulate an adequate EIR which incorporates all feasible measures recommended by Commenters to mitigate construction-related air emissions, including:

- Ensure the cleanest possible construction practices and equipment are used. This includes eliminating the idling of diesel-powered equipment and providing the necessary infrastructure (e.g., electrical hookups) to support zero and near-zero equipment and tools.
- Implement, and plan accordingly for, the necessary infrastructure to support the zero and near-zero emission technology vehicles and equipment that will be operating on site. Necessary infrastructure may include the physical (e.g., needed footprint), energy, and fueling infrastructure for construction equipment, on-site vehicles and equipment, and medium-heavy and heavy-heavy duty trucks.
- In construction contracts, include language that requires all off-road equipment with a power rating below 19 kilowatts (e.g., plate compactors, pressure washers) used during project construction be battery powered.

³⁸ 14 CCR § 15370.

³⁹ 14 CCR § 15021(b).

⁴⁰ 14 CCR § 15091(b); *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 449.

⁴¹ 14 CCR § 15384(a).

⁴² *Id.* at § 15384(b).

⁴³ *Id.* at § 15384(a).

- In construction contracts, include language that requires all heavy-duty trucks entering the construction site during the grading and building construction phases be model year 2014 or later. All heavy-duty haul trucks should also meet CARB's lowest optional low-oxides of nitrogen (NO_x) standard.
- Include contractual language in tenant lease agreements that requires tenants to use the cleanest technologies available, and to provide the necessary infrastructure to support zero-emission vehicles and equipment that will be operating on site.
- Include contractual language in tenant lease agreements that requires all loading/unloading docks and trailer spaces be equipped with electrical hookups for trucks with transport refrigeration units (TRU) or auxiliary power units. This requirement will substantially decrease the amount of time that a TRU powered by a fossil-fueled internal combustion engine can operate at the project site. Use of zero-emission all-electric plug-in TRUs, hydrogen fuel cell transport refrigeration, and cryogenic transport refrigeration are encouraged and should also be included in lease agreements.
- Include contractual language in tenant lease agreements that requires all TRUs entering the project-site be plug-in capable.
- Include contractual language in tenant lease agreements that requires future tenants to exclusively use zero-emission light and medium-duty delivery trucks and vans.
- Include contractual language in tenant lease agreements that requires all service equipment (e.g., yard hostlers, yard equipment, forklifts, and pallet jacks) used within the project site to be zero-emission. This equipment is widely available and can be purchased using incentive funding from CARB's Clean Off-Road Equipment Voucher Incentive Project (CORE).
- Include contractual language in tenant lease agreements that requires all heavy-duty trucks entering or on the project site to be model year 2014 or later, expedite a transition to zero-emission vehicles, and be fully zero-emission beginning in 2023. A list of commercially available zero-emission trucks can be obtained from the Hybrid and Zero-emission Truck and Bus Voucher Incentive Project (HVIP).
- Include contractual language in tenant lease agreements that requires the tenant to be in, and monitor compliance with, all current air quality regulations for on-road trucks including CARB's Heavy-Duty (Tractor-Trailer) Greenhouse Gas Regulation, Advanced Clean Trucks

Regulation, Periodic Smoke Inspection Program (PSIP), and the Statewide Truck and Bus Regulation.

- Include contractual language in tenant lease agreements restricting trucks and support equipment from idling longer than two minutes while on site.
- Include rooftop solar panels for each proposed building to the extent feasible, with a capacity that matches the maximum allowed for distributed solar connections to the grid.
- Include contractual language in tenant lease agreements, requiring the installing of vegetative walls or other effective barriers that separate loading docks and people living or working nearby to help mitigate noise impacts, air quality, health risk, and greenhouse gas emissions.
- Include contractual language in tenant lease agreements, requiring all emergency generators to be powered by a non-diesel fuel.
- The project should be constructed to meet CalGreen Tier 2 green building standards, including all provisions related to designated parking for clean air vehicles, electric vehicle charging, and bicycle parking.

The above mitigation measures should be discussed and adopted in a revised and recirculated EIR. The City responded to Silicon Valley Residents' prior comments on this issue stating that "AIR-1.1 represents the best available measures to reduce project construction period emissions."⁴⁴ This wholly conclusory statement is not supported by substantial evidence. Additional feasible mitigation measures proposed by Silicon Valley Residents and our expert consultants show that the Project has not implemented the best available measures to reduce project construction emissions. The additional measures listed above must be analyzed and adopted in a revised and recirculated EIR prior to Project approval.

Comment A.8 IV. CONCLUSION

We respectfully request the Planning Commission by direct staff to address the issues raised herein in a revised and recirculated EIR before the Project can be approved. It is critical that the Planning Commission exercise their decision-making authority to ensure that the City complies with CEQA, protects the health and safety of its constituents, and that all potentially significant Project impacts are analyzed, disclosed, and substantially mitigated prior to approval.

⁴⁴ FSEIR, p. 17.

November 16, 2022
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Thank you for your consideration of these comments.

Sincerely,



Kelilah D. Federman

KDF:acp