



September 18, 2017

Hon. Sam Liccardo, Mayor
City of San Jose
200 E. Santa Clara Street, 18th Floor
San Jose, CA 95124

RE: VTA BART Phase II Priorities and Preferred Alternatives; 9.19.17 Council Agenda Item No. 6.1

Dear Mayor Liccardo and Councilmembers,

I am writing on behalf of Sharks Sports & Entertainment, LLC ("SSE"), the parent company of San Jose Arena Management, LLC, which serves as the manager of the SAP Center.

SSE remains supportive of the BART extension to downtown San Jose. However, the SAP Center is sited across the street from the proposed Diridon station location, so the community arena will uniquely suffer the impacts and long term consequences of any mistakes made with the BART project.

We previously shared SSE's comments on the BART Phase II Draft EIR/EIS with the City, a copy of which is attached. The issues identified in the letter -- particularly those regarding the project scope, parking, access and construction impacts -- are serious ones that will affect the health and success of downtown for generations, including the SAP Center. SSE is deeply concerned that after more than six months VTA has still not provided any public information about any of the issues raised in its comment letter, nor responded to the many hundreds of other comments apparently received, in order to better inform the VTA Board's decision-making process or the City's recommendations.

To make matters more difficult, it appears that the Diridon Station project description, including location of the BART construction area and station footprint itself, has changed significantly. Coupled with the now reasonably foreseeable Google Village project, it is hard for us to understand how VTA can proceed, or the City can recommend, a final project alternative without more study to account for these changes.

Many of the serious concerns raised by SSE were included in the City's comment letter on the Draft EIR/EIS as well. We are disappointed the City administration has neglected to address any of these mutual concerns in the proposed recommendations to the City Council in any meaningful way, especially those related to parking, access and construction impacts. These issues and concerns are shared by many other stakeholders in the downtown and deserve attention in the City's recommendations. SSE simply asks that the City Council formally address them in any final recommendations to the VTA Board.

Sincerely,

A solid black rectangular box redacting the signature of the sender.

March 6, 2016

Via Hand Delivery & Electronic Mail: BARTphase2EIS-EIR@vta.org

Mr. Tom Fitzwater
Santa Clara Valley Transportation Authority
3331 North First Street, Building B
San Jose, CA 95134-1927

Via U.S. Mail

Ms. Dominique M. Paukowits
U.S. Dept. of Transportation
Federal Transit Administration, Region IX
90 Seventh Street, Suite 15-300
San Francisco, CA 94103-6701

RE: Sharks Sports & Entertainment LLC Comments Regarding VTA's BART Silicon Valley Phase II Extension Project – Draft Supplemental Environmental Impact Statement/Subsequent Environmental Impact Report and Draft Section 4(f) Evaluation, December 2016.

Dear Mr. Fitzwater Ms. Paukowits:

I am submitting comments to the Draft Supplemental Environmental Impact Statement/Subsequent Environmental Impact Report and Draft Section 4(f) Evaluation, dated December 2016 (Draft SEIS/SEIR) for the BART Silicon Valley Phase II Extension Project (the Phase II Project) on behalf of Sharks Sports & Entertainment LLC (SSE). SSE supports BART to San Jose and the downtown development. Nevertheless, our review indicates that as currently presented the Draft SEIS/SEIR does not contain the necessary evaluation of certain significant impacts and does not offer adequate mitigation measures. It is our sincere hope that by drawing attention to these issues now the Draft SEIS/SEIR can be revised and the Phase II Project will be constructed without unnecessary damage to the downtown.

Background:

SSE is the parent company of San Jose Arena Management, LLC, which manages the SAP

Center (the Arena), an 18,000-seat regional multipurpose event center located adjacent to the planned BART Diridon Station.

With over 170 events per year, the Arena is one of San Jose's most consistent and impactful economic catalysts, and is a critical asset to the City's economic success. The SAP Center operations support over 5,000 FTE jobs, generate more than \$250 million in annual economic impact, and provide millions of dollars in direct general fund revenue for the City of San Jose (City).

As a regional event center, the Arena attracts more than 1.5 million people to San Jose's downtown area every year, drawing a diverse crowd from throughout Santa Clara, San Mateo, Santa Cruz and Alameda counties and beyond. The region from which the Arena draws is primarily suburban, and mass transit is not a viable option for the majority of the Arena's patrons. Accordingly, the Arena is reliant on a large supply of convenient parking nearby, as well as highly functional and efficient vehicle ingress and egress. One of the reasons the Arena was located where it was is because of the excellent access to this location by major highways and large surface streets.

Automobile transport is the primary means of transportation in the South Bay. In fact, the 2040 San Jose General Plan predicts that more than 20 years from now 60% of all trips will still be by automobile. After approximately 20 years of light rail operation, the use of light rail to attend Arena events is trivial – currently averaging less than 2% of patrons for regular games and far less for special events. Similarly, travel by Caltrain for Arena events is minimal – estimated to be less than 5% of patrons for regular games and far less for special events. Past predictions of mass transit use for Arena events have been grossly overestimated. There is no evidence in the record that BART would do any better, and certainly there is no study in the Draft SEIS/SEIR supporting any speculation that BART riders will reduce parking demand for Arena events by any measurable level. For the foreseeable future the users of the Diridon Station area and Arena will remain automobile dependent, and the Draft SEIS/SEIR must recognize that reality. Providing adequate parking, therefore, is required for any reasonable planning horizon.

SSE has been one of downtown's biggest investors for more than two decades, and will continue to support efforts to advance the city center's smart growth, so long as the success of the SAP Center is not impeded. SSE was proud to be a major contributor to Measure B which is funding the BART Phase II extension to downtown San Jose. SSE did so with the clear understanding for the better part of a decade that the BART Diridon station would include a parking garage and would not dramatically disrupt traffic operations and pedestrian flow on Santa Clara Street. SSE is incredibly disappointed that the VTA staff has abandoned any plans to provide parking for the

BART station and intends to close up to two lanes of Santa Clara Street in front of the Arena, potentially for years, apparently without any direction from the VTA Board. SSE cannot stand by on a project that as currently planned and under analyzed will severely wound the Arena's ability to remain downtown's primary economic engine.

Prior Planning Review:

SSE has participated in nearly every environmental or planning process affecting the Diridon Station area over the last twenty-five years. SSE participated in the scoping process for the Phase II Project's environmental evaluation, and on February 27, 2015, submitted a letter to the Federal Transit Administration (FTA) and Santa Clara Valley Transportation Authority (VTA) identifying significant environmental issues that should be addressed in the Draft SEIS/SEIR (SSE Scoping Letter).

The SSE Scoping Letter was not SSE's first attempt to have these significant issues addressed. SSE submitted a letter dated March 28, 2002, from Ken Swezey to Lisa Ives with comments on the scoping process for the original environmental analyses. SSE subsequently submitted a letter dated May 14, 2004, from Jim Goddard to Tom Fitzwater with comments on the Draft Environmental Impact Report for the Silicon Valley Rapid Transit Corridor Project. SSE also submitted a letter dated May 8, 2009, from Jim Goddard to Tom Fitzwater with comments on the Draft Environmental Impact Statement for the Silicon Valley Rapid Transit Corridor Project. All of these letters identified significant environmental impacts that would need to be studied and mitigated in connection with the Phase II Project.

Notwithstanding those prior efforts by SSE to call attention to important environmental concerns, the Draft SEIS/SEIR wholly fails to identify, evaluate, propose mitigation for, or otherwise address the issues raised in SSE's Scoping Letter. Inexplicably, the Draft SEIS/SEIR has even ignored the prior transportation and parking analysis and mitigations that were presented by VTA in its March 2010 Final EIS for this same project.

Other environmental planning documents in the Diridon Station area have taken the transportation and parking issues into consideration, including the 2004 Final Environmental Impact Report (EIR) for the San Jose Water Land Company Planned Development Rezoning; the 2005 Downtown Strategy 2000 Final Program EIR; the 2011 Envision San Jose 2040 General Plan Final Program EIR; the 2015 Envision San Jose 2040 General Plan Supplemental EIR; the 2014 Diridon Station Area Plan EIR; the 2015 Final EIR for Caltrain's Peninsula Corridor Electrification Project; and a host of others.

A transportation and parking evaluation is something the City of San Jose would require in an EIR for any other large project in the Diridon Station area. The City has, on multiple occasions, recognized the need to consider and mitigate adverse impacts on the Arena caused by any major project in the Diridon Station area, particularly impacts related to parking and transportation. This expressly includes transit projects. In a memo dated June 6, 2014 (excerpts of which are attached as **EXHIBIT A**), City staff recommended the following approach, which was accepted by the City Council upon approval of the Diridon Station Area Plan:

“For the BART and High Speed Rail transit projects, the City will request that the lead agency conduct a project parking analysis – The analysis should include a projection of parking demand, demand management strategies, recommended supply solutions, and potential impacts on the existing parking supply within the Diridon area, including suggested ways to mitigate the impact if it is deemed significant. The results of any parking analysis will be provided to Arena Management for review and comment. The City will consider Arena Management’s timely feedback in formulating comments that the City forwards to the lead agency as part of the project development and approval process.”

The AMA and Baseline Conditions:

The City and SSE are parties to an Arena Management Agreement (AMA), which includes a Transportation and Parking Management Plan (TPMP) of over 100 pages. The AMA requires the City to maintain certain levels of available parking within close proximity to the Arena, and to manage traffic operations in order to ensure convenient and efficient ingress and egress to and from the Arena. Typically, environmental documents relating to projects in the vicinity of the Arena have considered these obligations as part of their analyses. In other words, the agencies have treated the City’s obligations under the AMA as tantamount to a land use plan, and have considered whether the projects in question would be consistent with such plan.

The City’s obligations related to parking and traffic are expressly incorporated into the June 2014 final plan report for the Diridon Station Area Plan. The primary project objectives listed on page 1-5 of the Plan include the objective to “ensure the continued vitality of the San Jose Arena, recognizing that the San Jose Arena is a major anchor for both Downtown San Jose and the Diridon Station area, and that sufficient parking and efficient access for San Jose Arena Customers, consistent with the provisions of the Arena Management Agreement, are critical for the San Jose Arena’s on-going success.” The Plan includes numerous provisions in support of this objective, including the following:

“Since its opening some two decades ago as the home of the San Jose Sharks, the San Jose Arena has consistently ranked among the 10 busiest indoor facilities for non-sporting entertainment events. Preserving the extraordinary success of Downtown’s “anchor tenant” appears paramount and is reflected in the Land Use Plan. Although densities will increase, and parking ratios will drop over time, it is imperative that Diridon’s development occurs in a coordinated fashion with its transportation infrastructure to ensure adequate parking supply for the San Jose Arena and avoid traffic problems in each phase of development.” (Page 2-3)

“The San Jose Arena Management Agreement commits the City to pursue best efforts to achieve and maintain at least 6,350 parking spaces at Off-Site Parking Facilities available for Arena patrons within one-half mile of the West Santa Clara Street entrance to the Arena, of which approximately half of such spaces will be within one-third mile of the West Santa Clara Street entrance. In addition, the City will manage and facilitate convenient vehicular access to and from parking facilities located in the Diridon Station area. Future TPMPs need to be in compliance with this agreement in order to meet the City’s obligations and ensure the continued success of the Arena as an anchor of the Diridon area and as a regional draw.” (Page 2-133)

Unfortunately, the Draft SEIS/SEIR for the Phase II Project completely ignores these important provisions of this land use plan. The permanent need for adequate parking, and for continued excellent access to and from the Arena, is a baseline condition of the Diridon Station area that was identified in the SSE Scoping Letter, yet the Draft SEIS/SEIR fails to identify or evaluate the adverse impacts the Phase II Project will have on transportation and parking within the Diridon Station area.

Economic Consequences:

The consequences of this failure in planning is that not only will there be significant adverse environmental impacts as will be detailed below, but there will also be significant long term socioeconomic impacts that will burden the Arena, the Diridon Station area (including the surrounding neighborhoods) and the City as a whole. Travel to Arena events is unlike commuter transportation analysis. Like other sports and entertainment venues, travel to the Arena is discretionary. Thus, worsening transportation or parking conditions, which may not deter a commuter from making a required trip to work or home, will often completely deter a patron from going to an Arena event. Consequently, good transportation access is required in order for the Arena’s on-going success. A Phase II Project that damages the transportation and parking experience can have ruinous economic impacts on the continued vitality of the Arena.

VTA has a long history of failing to consider the disruption and resulting economic damage caused by its construction projects. One only needs to remember the damage to San Jose's downtown businesses caused by the construction of the downtown transit mall, and the damage to businesses on Alum Rock Avenue due to construction of VTA's Bus Rapid Transit (BRT), to know that myopic planning causes significant harm. Several articles documenting these impacts are attached as **EXHIBIT B**. The City can ill afford to allow one of its major anchors for both downtown San Jose and the Diridon Station area to be harmed the same way businesses adjacent to those other projects were harmed.

NEPA Legal Background:

SSE believes the current environmental review does not comply with the National Environmental Policy Act, 42 U.S.C.A. §§ 4321 et. seq. (NEPA) or, as will be discussed later, the California Environmental Quality Act, Pub. Res. C. §§ 21000-21189.3 (CEQA).

An EIS must identify and provide a full and fair discussion of all significant environmental impacts caused by the proposed action. 42 U.S.C.A §4332; 40 CFR §1502.1. EISs shall not serve as a means of justifying decisions already made. 40 CFR §1502.2(g). The EIS shall describe the environment of the area. 40 CFR §1502.15. The EIS shall also describe all direct and indirect effects and their significance. 40 CFR §1502.16. Such analysis must include the urban environment. 40 CFR §1502.16(g). An EIS shall identify the means to mitigate adverse environmental impacts. 40 CFR §1502.16(h). Agencies must insure professional and scientific integrity in the discussions and analysis in an EIS. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix. 40 CFR §1502.24.

The agency must take a "hard look" at identifying and evaluating potential adverse environmental impacts. *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1376 (1998). An action will be set aside as arbitrary or capricious if the agency identified no "rational connection between the facts found and the choice made," if the "explanation for its decision [ran] counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The impact of traffic and parking is a NEPA impact. NEPA covers the human environment including quality of urban life. 40 CFR §1502.16(g). "[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action forcing' function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals

can properly evaluate the severity of the adverse effects.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352, 371 (1989). Here, providing adequate parking is a mitigation measure. A number of cases have held an EIS inadequate because it did not adequately discuss mitigation measures, or because it did not contain mitigation measures that should have been discussed. *NEPA Law and Litig.* § 10:44 (2016).

Mitigation measures must meet the NEPA scientific integrity standard of 40 CFR §1502.24, and be presented in sufficient detail to ensure that environmental consequences have been fairly evaluated. See *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep’t of the Interior*, 588 F.3d 718, 727 (9th Cir. 2009) A perfunctory description of mitigating measures is inconsistent with the “hard look” an EIS is required to render under NEPA. “Mitigation must ‘be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.’ ” *Carmel-By-the-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1154 (9th Cir.1997). There should be an estimate of how effective the mitigation measures would be if adopted, or a reasoned explanation as to why such an estimate is not possible. Mitigation cannot be so general that it would be impossible to determine where, how, and when they would be used and how effective they would be. *Neighbors of Cuddy Mountain*, 137 F.3d at 1381 There needs to be clear commitments and performance expectations that are measurable. CEQ Memo dated January 4, 2011 “*Appropriate Use of Mitigation Monitoring and Clarifying the Appropriate use of Mitigated Findings of No Significant Impact*” p. 8.

The Failure to Apply NEPA Analysis to the Transit-Oriented Joint Development

The Draft SEIS/SEIR artificially limits its NEPA analysis to only direct BART construction and operation adverse impacts and disclaims any responsibility for a NEPA analysis of the Transit-Oriented Joint Development (TOJD). With this artificial constraint the Draft SEIS/SEIR only evaluates the TOJD under CEQA. Draft SEIS/SEIR 6.1-1 et. seq. The VTA and FTA take too narrow a view of the scope of NEPA. NEPA is to be interpreted broadly and used by federal agencies to the fullest extent possible. 40 CFR §1500.2. The statutory requirement that an environmental impact statement be prepared for all “major Federal actions” must be assessed with a view to the overall, cumulative impact of the action proposed, related federal action and projects in the area, and further actions contemplated. 42 U.S.C.A. § 4332.

The determination of whether federal and non-federal projects are sufficiently intertwined to constitute a federal action for NEPA purposes will generally require a careful analysis of all facts and circumstances surrounding the relationship. 42 U.S.C.A. § 4332(2)(C). Here the TOJD is tightly intertwined with the federal action and could not take place but for the federal action, and therefore the TOJD must be analyzed under NEPA. Moreover, to survive a challenge over the legal sufficiency of the Draft SEIS/SEIR there must be, in the document, a careful analysis of all the facts and circumstances between the TOJD and the Phase II Project justifying the conclusion that the TOJD is not a connected project requiring a NEPA analysis. There is no such analysis in the Draft SEIS/SEIR.

Traffic Engineer Report

SSE's traffic engineer, Jim Benshoof of Wenck Associates, reviewed the Draft SEIS/SEIR to determine whether the transportation and parking impacts have been accurately and professionally identified and evaluated. He also assessed any proposed mitigation measure to determine whether it was likely to be effective. His professional judgment is that the Draft SEIS/SEIR has not adequately identified or evaluated easily foreseeable adverse transportation and parking impacts. Moreover, the vague assurances of future mitigation in the Draft SEIS/SEIR lack detail or measurable objectives and thus do not meet the NEPA standard requiring sufficient detail to ensure that environmental consequences have been fairly evaluated.

Mr. Benshoof's memorandum regarding *VTA's BART Silicon Valley Phase II Extension Project, Draft Supplemental Environmental Impact Statement/Subsequent Environmental Impact Report and Draft Section 4(f) Evaluation, December 2016 -- Failure to Adequately Identify or Mitigate Direct and Indirect Transportation Impacts in the Diridon Station Area* and attachments dated March 2, 2017 (Wenck Memo) is submitted as **EXHIBIT C** and incorporated by reference.

Highlights of Mr. Benshoof's analysis include the following:

1. The Draft SEIS/SEIR fails to adequately describe and address construction-related impacts and mitigation measures for Diridon Station options. See the Wenck Memo at sections B.1 & C. Appendix C in the Draft SEIS/SEIR presents three options for the Diridon Station. Although the Draft SEIS/SEIR indicates that major impacts would occur during construction of all three options, the magnitude of such impacts is unexplained, and the differences in impacts among the alternatives are not presented in sufficient detail to allow them to be fairly evaluated. The construction impacts related to the North Option Single Bore Tunnel, North Option Twin Bore Tunnel, and South Option Single and Twin Bore Tunnel must be separately identified and evaluated. Otherwise it is impossible to determine which option should be preferred.
2. The Draft SEIS/SEIR fails to address the alternative presented in 2010 FEIS for Diridon Station requiring an 8-level parking garage to handle the expected BART parking demand. See Wenck Memo at sections B.2 & D. NEPA requires that all reasonable alternatives be rigorously explored and evaluated, and for alternatives which were eliminated from detailed study, the reasons for their having been eliminated must be discussed. In the 2010 FEIS for this project, the preferred alternative for the Diridon Station included a 1,300 space parking garage to accommodate parking by BART users. Neither the Draft SEIS/SEIR, nor the Environmental Scoping Report dated May 2015 provides any discussion of this alternative or reasons why it has been eliminated. This violates 40 CFR §1502.14(a); see also "The existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008).

3. Despite statements in the Draft SEIS/SEIR that some BART riders using the Diridon Station would drive to the station and need to find a parking space, the Draft SEIS/SEIR states that no parking spaces would be provided at the Diridon Station for BART users. Beyond causing difficulties for BART users and impacts on nearby parking facilities and neighborhoods, this intention to provide no BART parking at the Diridon Station is illogical and unsupported in the Draft SEIS/SEIR for the several reasons that are laid out in the Wenck Memo at sections B.3 & E.
4. As explained in the Wenck Memo at sections B.4 & F, the Draft SEIS/SEIR fails to identify or mitigate parking impacts that would occur upon completion of the Phase II Project. NEPA requires analysis of potential parking impacts and development of mitigation measures where necessary to overcome negative impacts. Inexplicably, the Draft SEIS/SEIR presents **no analysis** of the increased parking demand caused by BART riders using the Diridon Station, where those motorists would park, and whether there are sufficient spaces available to accommodate those BART parkers. **No analysis** is presented regarding indirect impacts in the Diridon and downtown areas caused by BART parkers, including vehicle emissions, congestion, and safety. Both NEPA and CEQA require analysis of these indirect impacts. Further, depending on the Diridon Station option chosen, the Phase II Project would cause an approximate permanent loss of between 210 and 310 parking spaces. The Draft SEIS/SEIR presents **no analysis** regarding impacts caused by the permanent loss of these parking spaces, and no mitigation measures are presented to alleviate these impacts.
5. The Draft SEIS/SEIR fails to adequately identify or mitigate parking impacts that would occur during construction of Diridon Station. See Wenck Memo sections B.5 & G. The Draft SEIS/SEIR states that up to 715 parking spaces in the Diridon area would be removed during construction of the station. **No analysis** is presented regarding the impacts caused by this loss of parking.
 - a. The Draft SEIS/SEIR incorrectly states that an interim parking study being completed by the City (not VTA) for completely different purposes will mitigate parking impacts during construction of the Phase II Project. The City's report on that study, however, clearly shows that the purpose of the parking study was not to analyze the BART construction impacts or to mitigate those impacts. Furthermore, the agencies participating in that study have not committed to any budgets, allocation of costs, funding, construction schedules, or any other actions that would be needed in order to implement any recommendations from such study or to achieve any parking solution. Any mitigation resulting from such

parking study is completely speculative. Accordingly, the City parking study may not be relied on as a mitigation in the Draft SEIS/SEIR.

6. Mitigation proposed in the Draft SEIS/SEIR in response to identified construction related transportation impacts does not meet NEPA standards. See Wenck Memo sections B.6 & H. The impacts include full and partial closures of Autumn, Montgomery, and Cahill Streets, one at a time, for several months each. In addition, page 5-75 states that “truck haul routes may impact traffic on West Julian Street, Almaden Boulevard, Santa Clara Street, Montgomery Street, Autumn Street, Notre Dame Street, and Bird Avenue.” The proposed haul routes and projected volumes of material are described in Section 5.2.4.2. The Draft SEIS/SEIR presents two mitigation measures that will be developed and applied to minimize adverse traffic impacts during construction. The two mitigation measures have several deficiencies. In particular, mitigations identified as TRA-CNST-A and TRA-CNST-B, fail to provide sufficient specificity to meet Federal requirements. The measures provide just a general description of steps that will be taken, which fall far short of requirements specified in the Federal Transit Administration document dated August 2016 that “the environmental document clearly identifies the impact(s) to be mitigated and carefully specifies any relied-upon mitigation ‘in terms of measurable performance standards or expected results, so as to establish clear performance expectations.’” Furthermore, this is but one of several examples of where the Draft SEIS/SEIR has impermissibly deferred “myriad studies, surveys and mitigation plans” in violation of NEPA, NEPA requires discussion of “mitigation of likely impacts at the outset.” *S.Fork Band*, 588 F.3d at 727.

Additional Comments

SSE believes that the Draft SEIS/SEIR is deficient in numerous other respects as well. The following is a summary of SSE’s additional concerns, focused on transportation and parking – the two categories of impacts that SSE has consistently raised with the VTA.

7. The Draft SEIS/SEIR improperly manipulated the traffic demand model by treating the Diridon station as an urban station in complete disregard of the actual physical setting of the Diridon station being surrounded by parking lots, and its over 80-year history of being a terminus for a commuter train (currently known as “Caltrain”). NEPA and CEQA require an accurate description of the project area.
8. The 2010 FEIS for the BART Extension covered parking impacts and required mitigation (8-level parking garage). Nothing regarding transportation and parking has changed for the better in the Diridon Station area since 2010. Parking is tighter now than it was in 2010. The VTA decision not to study parking demand impacts and to unashamedly assert

that BART riders will not drive and park at the BART Diridon station is incomprehensible. It is particularly incomprehensible in light of the SSE Scoping Letter, SSE's previous letters, the discussion of the issue in every other environmental document relating to the Diridon Station area, the recent litigation over parking shortfalls, etc. It is apparent that if the Draft SEIS/SEIR had studied parking demand with "scientific integrity," that study would show extremely significant adverse parking and transportation impacts that require mitigation. Yet the Draft SEIS/SEIR does not identify, evaluate or suggest ways to mitigate these parking impacts that were previously studied and known to VTA.

9. The physical plan of the Diridon BART station has not changed-except the parking garage is gone! See 2010 FEIS D-30. The station is the same size, same general layout, and same number of trains. However, the predicted number of passengers has decreased. The travel demand model used for the 2010 FEIS, which assumed unconstrained parking demand, predicted that the daily boardings and alightings at the Diridon Station in 2030 would be approximately 21,020. The travel demand model used for the 2016 DEIS assumed that there would be no dedicated BART parking spaces at the Diridon Station, but that BART riders could park in other nearby parking facilities. With that model and assumptions, the 2016 Draft SEIS/EIR predicts that the daily boardings and alightings at the Diridon Station in 2035 would be only 13,771. There is **no study provided** supporting that prediction. Additionally, the Draft SEIS/SEIR is assuming BART riders will drive to the Diridon station and park in other nearby parking facilities. The direct and indirect impacts of these BART riders parking in other facilities is not analyzed.
10. The Draft SEIS/SEIR completely fails to identify, analyze or suggest ways to mitigate the increased parking demand the new BART Diridon station riders will place on existing parking for the Arena, other Diridon Station area businesses and nearby neighborhoods. The amount of additional parking caused by BART riders will cause direct adverse impacts to the planned parking supply in the area.
 - a. A similar concern was addressed in the 2002 EIR for the Dublin Transit Center (DTC), as described in the 2016 Addendum to that EIR (excerpts of the Addendum are attached as **EXHIBIT D**). The DTC project included a multi-level BART parking structure to replace surface parking throughout the DTC area. The DTC EIR recognized that even this was not sufficient to solve for the parking demand created by the project, and identified a significant impact (Impact 4.11-4) resulting from the fact that BART patrons could utilize on-street and nearby private parking, resulting in insufficient parking for such facilities. The DTC EIR required that such impact be mitigated.

11. The additional parking pressure at the BART Diridon station, coupled with no additional parking supply, and indeed a reduction in existing parking, will cause adverse indirect impacts on the surrounding area: congestion, negative land use and economic impacts on business, traffic safety, interference with other downtown/Diridon area future development plans, etc. Failure to identify, evaluate and suggest ways to mitigate these indirect effects violates both NEPA and CEQA.

12. The Draft SEIS/SEIR assumption that there will be very few BART riders driving to the BART Diridon station appears to be motivated by the desire to avoid the cost of the 8-level parking garage described in the 2010 FEIR, which is necessary to mitigate the impacts caused by the BART riders. EISs must serve as the means of assessing the environmental impact of proposed agency actions rather than justifying decisions already made. Ignoring clearly foreseeable adverse impacts, particularly when done to avoid mitigation costs, violates NEPA. *Environmental Defense v Corps of Engineers*, (2007) 515 F. Supp 2d 69, 77-81. VTA cannot avoid doing its fair share to mitigate the parking shortage by attempting to foist the burden, and cost, on others.
 - a. This is not the only example of BART deciding not to build a parking garage to save money even though the parking is needed and called for in its own environmental planning documents. In the case of the DTC described above, the parking structure was to be constructed in two phases: Phase I was a seven-level structure containing 1,512 parking spaces that was completed in 2007. Phase II, which was originally described in the 2002 DTC EIR and is the subject of the 2016 Addendum, called for a six-level parking structure expansion to help mitigate a dire parking situation that has become even worse than what was originally anticipated. According to the information on page 7 of the Addendum, all 2,886 parking spaces in the existing parking structure and nearby surface lots at the Dublin/Pleasanton Station are 100 percent occupied by approximately 7:30 a.m. each typical weekday morning. This results in BART patrons having to drive around looking for other spaces or forego transit and continue their commute by automobile. Despite this, the BART Board last month voted to look at options other than constructing the parking structure expansion that they had previously said they would construct, due to the high cost of such construction. Articles regarding the parking problem and the Board's vote to look at other options are attached as **EXHIBIT E**.

13. By arbitrarily assuming that only a few people will park and ride at the BART Diridon station the Draft SEIS/SEIR is making an impermissible agency predetermination. By not identifying and evaluating with scientific integrity the increased parking demand on the surrounding environment VTA is irreversibly and irretrievably committing itself to a plan

of action that is dependent upon the NEPA environmental analysis producing a certain assumed outcome. This is contrary to the law, which requires that the agency only commit to a project alternative after it has completed its environmental analysis – which of course is supposed to involve an objective, good faith inquiry into the environmental consequences of the agency’s proposed action. *Forest Guardians v U. S. Fish & Wildlife*, 611 F.3rd 692, 714 (2010)

14. The BART riders’ occupancy of spaces in the Diridon area will be a hardship to SAP’s employees and customers. For some events, SSE may have well over 400 employees who need to park within walking distance, many of whom arrive early in the day to start work and many others who arrive mid-day but leave late at night. In addition, some events occur during weekday daytime hours. Finally, the Draft SEIS/SEIR implies that there are a relatively small number of events occurring during the weekday evenings, but that is not true. BART riders who leave their cars parked into the early evening will deprive SSE customers of needed parking for evening events. All of these factors should be studied in the Draft SEIS/SEIR.
15. BART policy has been to provide parking associated with expansion projects. For example, in the 2006 BART Warm Springs Expansion FEIS, the response to comment 37-13 states in part as follows:

“37-13: BART policy is to provide parking associated with expansion projects that meets the demand expected to be generated by the projects. **Failure to do so would be considered a direct adverse environmental impact to transportation** and, by reducing access, would reduce the ridership and indirectly reduce the associated environmental benefits of the projects.” (Emphasis added)

There is no explanation for why the Draft SEIS/SEIR deviates from BART policy.

16. The BART Diridon station is the equivalent of an end of line station because it is at the southwest crook of the BART Line. It has large automobile infrastructure feeding it, namely freeway access via 87 and 280 plus large urban roads such as Santa Clara Street, Montgomery Street and Bird Avenue. Significantly, the City of San Jose will open Autumn Street through to Coleman within a few weeks which will provide easy access through Coleman Avenue to the 880 freeway. The large, spread-out South Bay communities use the roads, not mass transit. The miniscule VTA light rail ridership numbers demonstrate that the South Bay commuters will use their cars to get to Diridon BART station. Most South Bay commuters do not take light rail, as the stations are too spread out and light rail is too slow. Generally, South Bay residents will need to get in their cars to start their commute. Once in their cars they will not go to a light rail station

to get to a BART station; rather, they will drive to the Diridon BART station. Moreover, Diridon is a traditional main terminus for Caltrain, and community habit is to drive to the Diridon station to get on Caltrain.

- a. As an end of line station, BART and other heavy rail operators know they need parking. BART admitted as much the following response to a comment letter in the 2006 BART Warm Springs Expansion FEIS (with emphasis added):

“37-12: Parking facilities with large numbers of parking spaces are commonly found at the end-of-the-line stations in most heavy rail systems in this country, including FTA New Starts heavy rail projects. The Largo Metrorail Extension for the WMATA system in Washington, D.C. includes the Largo Station at the end of the line with 2,200 parking spaces. The North Springs Station of the North Line Extension in Atlanta, which is operated by MARTA, has 2,325 parking spaces. The BART San Francisco Airport Extension includes the Millbrae Station at the end of the line with 3,000 parking spaces. These three stations were all recently funded in part with federal New Starts funding. The Red Line in Boston was extended to the Alewife Station with 2,595 parking spaces. (These examples are illustrative and not intended to be comprehensive.)”

17. The Draft SEIS/SEIR does not meet CEQA requirements for a project level environmental review. The Draft SEIS/SEIR indicates in the Introduction section that it tiers off of several prior studies, and provides clearance for Phase II of the BART project. This Draft SEIS/SEIR does not provide “project-specific” analysis under NEPA or CEQA, given that there are several decisions still to be made later about major project components, which could dramatically change the long-term and short-term environmental impacts to nearby land uses. Some of the main examples of this are:

- a. Construction Staging Areas:

- i. The Draft SEIS/SEIR states (on pages 5-28 through 5-31) that the contractor may use any of the Construction Staging Areas (CSAs) for tunnel construction, launch or excavation shafts, storage of equipment, and muck removal. According to the Draft SEIS/SEIR, no decisions have been made at this time regarding what types of construction activities will occur at each of the CSA sites.
- ii. The Draft SEIS/SEIR does not provide “project-specific” analysis under NEPA or CEQA, given that it has not been determined which construction activities will occur at the different construction staging areas. Our

understanding of such tunnel boring projects is that there are often very different activities (and resulting noises, waste streams, truck trip lengths, etc.) that occur at the launch shaft vs. the receiving shaft, for example. The Draft SEIS/SEIR does not analyze the specifics of the environmental impacts (such as noise levels, air quality and greenhouse gas emissions), of such equipment or activity at each staging site. The Draft SEIS/SEIR also does not identify specific noise mitigation measures for the various equipment which would be used at the launch shaft(s) vs. at the receiving shaft(s) or the reduction and attenuation expected to be received from such measures. Therefore, the residents and businesses nearby cannot accurately understand the potential impacts to them resulting from project construction.

- b. Construction Transportation Management Plan (p. 5-60):
 - i. The Draft SEIS/SEIR states that temporary traffic disruptions will be mitigated by the development and implementation of a Transportation Management Plan (TMP), however, the Draft SEIS/SEIR does not identify any specific details about this future TMP or metrics of its effectiveness. While these TMPs are often general at this stage during the environmental review process, this project will have extensive and atypical construction impacts throughout downtown San Jose, for many years. As the Draft SEIS/SEIR acknowledges, construction is estimated to take a total of 8 years. Given the long duration and the heavy amount of construction work along major arterials and adjacent to existing businesses and residences in downtown San Jose, this appears, at best, to be a program-level analysis of these impacts. If the intention of this analysis is to be project-specific, then this is improper “deferred mitigation” under CEQA. The basic TMP details and measures of effectiveness need to be identified in this Draft SEIS/SEIR to show that this mitigation is in fact feasible and will reduce the transportation impacts, particularly if this is identified as “mitigation” that is relied upon in the Draft SEIS/SEIR to reduce this significant unavoidable impact to a less than significant level under CEQA. As stated in CEQA Guidelines Section 15126.4(a)(B): “Formulation of mitigation measures should not be deferred until some future time. However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specific way.” There are no specifics or performance standards regarding this proposed TMP mitigation measure in the Draft SEIS/SEIR.

c. Material Disposal:

- i. The Draft SEIS/SEIR states that excavated material from the tunnel construction will be transported to a disposal site permitted to receive such material. (Some of this excavated material will likely be classified as hazardous waste.) The Draft SEIS/SEIR does not state where this material will be disposed.
- ii. Were the truck trips for this waste disposal included in the construction traffic and the construction AQ/GHG analyses? If so, what landfill and what trip length was assumed?

18. The Draft SEIS/SEIR violates CEQA due to its unstable project description. Given all the variables for the Phase II Project which are discussed in the Draft SEIS/SEIR (including the east/west Downtown Station options, the north/south Diridon Station options, and the Single-Bore vs. Twin Bore tunnel options), it appears that the Project Description is not well defined and is not stable as required by CEQA. *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185. (An accurate, stable, finite project description is an essential element of an informative and legally sufficient EIR.)

- a. The Draft SEIS/SEIR only cursorily mentions the differences in impacts that would result from these variations; however, the reader is not presented with a clear comparison of the differences in impacts from each option.

19. The Draft SEIS/SEIR also fails to identify several potential construction impacts of the Phase II Project under CEQA:

- a. The Draft SEIS/SEIR acknowledges on page 6.2-6 that “construction activities for the BART Extension Alternative may result in lane or road closures in the vicinity of SAP Center and Avaya Stadium.” However, the document states that “because potential interference with activities at event centers is not included in Appendix G of the State CEQA Guidelines...this discussion is provided for informational purposes.” This is an incorrect interpretation of CEQA. The Draft SEIS/SEIR then states that “similar to other businesses and property owners affected by construction, VTA will coordinate with the owners/operators of these event centers to provide information regarding lane closures and detours and provide wayfinding signs during construction.”

- b. Coordination alone is not adequate mitigation. This applies to NEPA and CEQA. While Appendix G of the CEQA Guidelines does not specifically mention event centers, question X. Land Use and Planning (a) asks: “Would the project physically divide an established community?” Up to eight years of lane closures, lost parking, and disruptive construction activity immediately adjacent to long-established businesses (including the SAP Center) and residents, could significantly impact the viability of these businesses and would constitute physically dividing an established community. This impact is erroneously not identified, analyzed or mitigated in the Draft SEIS/SEIR.
 - c. The Draft SEIS/SEIR is deficient because it is impossible to determine if the sidewalk on the south (eastbound) side of Santa Clara Street between Stockton and Delmas Avenues will remain fully available for pedestrians during construction, under either the north or south alignment, and whether the single- or twin-bore option is chosen. Page 5-74 of the Draft SEIS/SEIR states that there will be lane closure (and impliedly sidewalk closures) on Santa Clara Street. This is inconsistent with Figures 5-7/8 which indicate the construction staging area will not intrude onto Santa Clara Street. This creates two problems: (1) The document does not accurately identify the potential adverse impacts; and (2) The Arena will suffer significant adverse impacts if any portion of that sidewalk is inaccessible to pedestrians or if the vehicular capacity of Santa Clara Street is diminished. As to the first issue, the Draft SEIS/SEIR is deficient on its face due to the inconsistency. As to the second issue, SSE is strongly opposed to any intrusion onto Santa Clara street by the BART construction.
20. The Alternatives analysis is wholly inadequate under CEQA. The SEIS/SEIR includes only three CEQA alternatives (the No Project, the BART Alt. and the TOJD BART Alt), which do not constitute an adequate “reasonable range” of CEQA alternatives in accordance with CEQA Guidelines Section 15126.6(a), which states:
- “An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project, but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.”
21. The three alternatives included in the SEIS/SEIR do not address the potential to reduce or avoid significant impacts of the Phase II Project. In fact, there are only two real alternatives analyzed aside from the required No Project Alternative, and these are essentially two variations of the proposed project. There is no real discussion of other potential Alternatives that could reduce the significant impacts identified (particularly the

transportation disruption and noise impacts). The courts have held that a major function of an EIR is “to ensure that all reasonable alternatives are thoroughly assessed by the responsible official (or board).” (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 197)

- a. As outlined in CEQA Guidelines Section 15126.6(b) & (c):

“Purpose. Because an EIR must identify ways to mitigate or avoid the significant effects that a project may have on the environment (Public Resources Code Section 21002.1) the discussion of alternatives shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly.”

“Selection of a range of reasonable alternatives. The range of potential alternatives to the proposed project shall include those that could feasibly accomplish most of the basic objectives of the project and could avoid or substantially lessen one or more of the significant effects. The EIR should briefly describe the rationale for selecting the alternatives to be discussed. The EIR should also identify any alternatives that were considered by the lead agency but were rejected as infeasible during the scoping process and briefly explain the reasons underlying the lead agency’s determination....”

22. The two alternatives analyzed in the Draft SEIS/SEIR are variations of the proposed Phase II Project, and do not appear to be created specifically to reduce potential environmental impacts of the project. Although the Draft SEIS/SEIR is a subsequent analysis that tiers off of prior environmental documents, and incorporates those prior analyses by reference, the prior environmental documents completed were of a program nature and are now obsolete. There is no discussion of the original selection process for this segment of the BART alignment and no evaluation of why it was the selected. While there was a discussion of this in the original EIR in 2004 or the SEIR in 2007, in either case, those documents are very old now, and the existing setting and conditions in downtown San Jose have changed drastically since 2001, 2004, and 2007.
23. The locally preferred alignment alternative was originally selected in 2001. This decision is very old now, and may need to be revisited since downtown has changed much in the last 16 years. The discussion on page 1-22 even admits that much has changed since prior documents in 2004 and 2007, thus warranting this Draft SEIS/SEIR.
24. Much new information has arisen regarding potential environmental impacts, thresholds, and mitigation requirements since these prior environmental documents were finalized.

For these reasons, the Draft SEIS/SEIR should include a summary of how the alignment and station locations were originally selected, and should examine why those alignments and station locations are still the best alternatives to be considered for the Phase II Project. There is no such analysis in the Draft SEIS/SEIR.

25. There is no discussion of the other Alternatives Considered but Rejected. There is also no discussion of alternative locations for the stations or track alignment (other than the two east/west and north/south options), and no explanation of how this has been explored previously.

As support for SSE's observation that BART has repeatedly failed to adequately plan for parking needs at its stations, SSE is attaching a collection of articles obtained from the internet (**EXHIBIT E**), documenting the negative impacts lack of parking has on BART ridership, on the neighborhoods where BART stations are located, and on local businesses. Particularly instructive is the article about Stoneridge Mall having to chain up its parking lots because BART riders were taking it over. This is just one example of what happens when BART fails to provide adequate parking to meet the demand caused by its projects – the burden is shifted to innocent parties. These articles also document the burdens on businesses when VTA fails to adequately disclose and mitigate its construction impacts.

Conclusion:

SSE supports BART to San Jose. However, the Draft SEIS/SEIR must include suitable analysis based on fact, not assumption, as well as definitive, enforceable mitigation of the significant adverse environmental impacts identified by SSE. It is SSE's belief, grounded in long experience, that such mitigation will result in a Phase II Project that is better for BART, for VTA, for SSE and for the entire City.

Respectfully Submitted,

SILICON VALLEY LAW GROUP



Jeffrey S. Lawson

- Exhibits A: Excerpts from City of San Jose staff memo dated June 6, 2014
B: Articles re economic impacts from prior transit projects
C: Wenck Associates Memorandum dated March 2, 2017, with attachments
D: Excerpts from 2016 Addendum to Dublin Transit Center EIR
E: Articles re BART parking problems at other stations

Cc: Jim Goddard, w/attachments via email
John Tortora, w/attachments via email
Nanci Klein, w/attachments via email
Sean Morley, w/attachments via email
Jim Benshoof w/attachments via email
Ken Caveney, w/attachments via email
Lucy Lofrumento, w/attachments via email