


6/13/23: Late Submittal: Item 10.2

Mitre, Betty <Betty.Mitre@sanjoseca.gov>

Tue 6/6/2023 10:11 AM

To:Agendadesk <Agendadesk@sanjoseca.gov>

Cc:Blattman, Rachelle <Rachelle.Blattman@sanjoseca.gov>;CMOAgendaServices <cmoagendaservices@sanjoseca.gov>;Meiners, Laura <Laura.Meiners@sanjoseca.gov>

 1 attachments (558 KB)

Public Correspondence Redacted.pdf;

Hi,

Please post the public correspondence for Item 10.2. The item is scheduled for the 6/13 City Council meeting.

Thank you,

**Betty Mitre, Staff Specialist**

Planning Division, Planning, Building and Code Enforcement Department

City of San José | 200 E. Santa Clara Street – 3<sup>rd</sup> FL | San José, CA 95113



**From:** [Alex Shoor](#)  
**To:** [Gomez, Charla](#)  
**Cc:** [Kelly A Snider](#); [Meiners, Laura](#); [Erika Pinto](#); [Burton, Chris](#); [Cohen, David](#); [Nguyen, Lam](#); [Manford, Robert](#); [Fred Buzo](#); [Erik Schoennauer](#); [Brown, Darius](#); [Brilliot, Michael](#)  
**Subject:** Re: Why was Planning Commission told single-family homes are required on Facchino Property?  
**Date:** Wednesday, May 17, 2023 11:48:27 PM  
**Attachments:** [image001.png](#)  
[image002.png](#)  
[image003.png](#)  
[image004.png](#)  
[image005.png](#)

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[External Email]

Charla,

Thanks for chiming in with your perspective, as it certainly adds to this discussion and my understanding. Allow me to return the volley.

1. Can't the dwelling unit count be higher on some townhome designs versus some single-family homes? Your message seemed to indicate that they are one and the same in this case when it comes to density.
2. In other cities in America, it's my understanding that they don't approve single-family homes next to the most important transit centers in their region. Why should we?
3. In your message below, you touch on "the big picture," If we truly want to look at the big picture in San Jose, it's that's we're not building enough housing. The [City's 2021-2022 General Plan Performance Review](#) indicates as much, and doesn't even tell the whole picture. If the NYTimes is correct, 94% of our city is zoned for single-family homes. And many of those single-family homes are now well over a million dollars to buy. So building them doesn't do our city a lot of good, and it doesn't meet its greatest need, which is affordable housing. Moreover, city reports indicate building about 40-50 units per acre actually is revenue generating for the City of SJ, as opposed to single-family homes, which are a drain on city resources.

So we really aren't doing our city any favors by approving plans with single-family homes.

If planners know San Jose needs more housing, and recognize that the city isn't approving enough medium to high-density housing, then why the heck are planners still recommending projects with at least portions that contain hyper-low densities?

4. The "Plan" we create should always drive the outcomes we need. The Plans themselves are not the outcomes.

You challenged us Charla to see the forest through the trees. Fair point. Now, I'm asking City staff to see the larger ecosystem through the forest — Alex

--

Alex Shoor  
Executive Director | Catalyze SV

[REDACTED] | [REDACTED]  
[REDACTED]

On May 16, 2023, at 10:40 AM, Gomez, Charla <[Charla.Gomez@sanjoseca.gov](mailto:Charla.Gomez@sanjoseca.gov)> wrote:

+ Michael

Hi Kelly –

I would like to shed some light about this issue in the context of the BBUV Plan preparation.

### Neighborhood Compatibility

Whether townhomes or single-family, the purpose and intent of those few units in the Facchino District is better neighborhood compatibility and appropriate urban form transition, from very low scale development to high-density development. They simply stitch better the urban fabric. The dwelling unit count at the end is the same (single-family or townhomes), only the form changes slightly.

### Proportionality (single-family vs high density multi-family)

The Facchino District is envisioned for 820 units approx. The project proposes 850 and fully meets the goals and vision of the BBUV Plan (including 1-acre park). Focusing on the text of the Plan to find where it says single-family vs townhomes is not fruitful to anyone, and it is missing the big picture and virtues of the project. Total proposed single-family units are 24, as part of the total 850 units. So single-family units represent 2.8% of the total units. Which means the 97% of the project is essentially a high-density project that meet multiple criteria of TOD development principles, consistent with the BART investment.

I encourage you to see the proposed project in the Facchino District as an opportunity for everyone to see a great project in proximity to transit, focused on the big picture of benefits and goals, and less on whether or not the project has a few single-family units or not. Note also that the Plan is able to accommodate 850 units using a site plan approach that largely mitigate the impact of high-density development in a mostly single-family neighborhood. And it does it gracefully, providing a 1-acre park where none existed before, which combined to a few single-family units, they in aggregate serve as an appropriate buffer to the adjacent homes. Imagine if you would have 850 units or more spread-out in the entire site, likely in the form of 5+story buildings next to single-family units, with people scratching their head how to address privacy concerns.

Respectfully,

Charla

Charla Gomez, AICP LEED-ND Eco-Districts AP  
Planner IV – Supervising Planner, Station Area Planning Team  
City of San Jose | Planning, Building, and Code Enforcement  
200 E Santa Clara Street, 3<sup>rd</sup> Floor Tower | San Jose, CA 95113  
Office 408-793-5543  
[Charla.gomez@sanjoseca.gov](mailto:Charla.gomez@sanjoseca.gov)

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**From:** Kelly Snider [REDACTED]  
**Sent:** Monday, May 15, 2023 7:44 PM  
**To:** Meiners, Laura <[Laura.Meiners@sanjoseca.gov](mailto:Laura.Meiners@sanjoseca.gov)>  
**Cc:** Erika Pinto [REDACTED]; Alex Shoor [REDACTED]; Burton, Chris <[Christopher.Burton@sanjoseca.gov](mailto:Christopher.Burton@sanjoseca.gov)>; Cohen, David <[David.Cohen@sanjoseca.gov](mailto:David.Cohen@sanjoseca.gov)>; Nguyen, Lam <[Lam.Nguyen@sanjoseca.gov](mailto:Lam.Nguyen@sanjoseca.gov)>; Gomez, Charla <[Charla.Gomez@sanjoseca.gov](mailto:Charla.Gomez@sanjoseca.gov)>; Manford, Robert <[Robert.Manford@sanjoseca.gov](mailto:Robert.Manford@sanjoseca.gov)>; Fred Buzo [REDACTED]; Erik Schoennauer [REDACTED]; Brown, Darius <[Darius.Brown@sanjoseca.gov](mailto:Darius.Brown@sanjoseca.gov)>  
**Subject:** Re: Why was Planning Commission told single-family homes are required on Facchino Property?

[External Email]

Thanks, Laura.

I agree that the BBUVP includes the definition of Mixed-Use Neighborhood as it is applied citywide in the General Plan. But as adopted, the BBUVP "translates the goals of the General Plan to on-the-ground policies for the Berryessa/BART Urban Village" (p. 11). Throughout the entire BBUVP, the only time single-family homes are mentioned is to describe EXISTING single-family homes. The BBUVP expressly and clearly states that "Townhomes or similar" are the **only allowed type of residential development in the north end of the Facchino district**. Given the preponderance of times that Townhomes are named in the Facchino district, and that single-family homes are not named as an allowed or anticipated

use in the Facchino district, it seems clear that no single-family homes are allowed in the Facchino District.

**Page 24**

**FACCHINO DISTRICT**

The Facchino District is located in the northern portion of the Urban Village, bounded by an existing single-family residential neighborhood to the north and west, BART tracks to the east, Berryessa Road to the south, and medium-density residential to the west along Berryessa Road. Development in this District is envisioned with a mix of commercial and residential uses. **Townhomes will serve as a transition buffer with the existing single-family residential areas to the north and west.**

**Page 77**

**Facchino District**

Residential Setbacks: Up to 6 feet (**townhomes or similar housing** product along the District buffers)

**Page 82**

**Facchino District**

Parking provided for **townhouses of the Facchino District** shall face a public street.

**Page 84**

**A row of townhouses or similar housing** product not exceeding 40 feet in height shall be provided along adjacent single-family neighborhoods to provide adequate height transition.

Fig 5-14 on this page shows the proposed new homes with the label: "**ROW OF TOWNHOMES AS A BUFFER**"



Thank you,  
Kelly

~~~~~

Kelly Snider  
Director CRED Program, URBP

On Mon, May 15, 2023 at 8:50 AM Meiners, Laura <[Laura.Meiners@sanjoseca.gov](mailto:Laura.Meiners@sanjoseca.gov)> wrote:

Erika, Alex, and Kelly,

Thank you for your comments on the project, File Nos. PDC18-036, PD21-009, and PT21-030. I will address the two comments below I hear being said on this email thread, which are 1) The applicant should be required to

place townhomes, not single-family homes, on this site, and 2) The phasing of the project should require the multifamily housing to be constructed before the low-density housing.

With regard to Comment 1, the single-family homes currently proposed are within the Mixed-Use Neighborhood designation on the Berryessa BART Urban Village Plan. The following is an excerpt from the Urban Village Plan regarding this designation:

**Mixed-Use Neighborhood**  
Facchino District and other areas outside of the Districts

| Land Use    | Density         |
|-------------|-----------------|
| Residential | up to 30 DU/AC  |
| Commercial  | FAR 0.25 to 2.0 |

The Mixed-Use Neighborhood designation in the General Plan is intended for development primarily with either townhouse or small lot single-family and also to existing neighborhoods that were historically developed with a wide variety of housing types and residential densities. For existing residential areas (outside the Districts), the Mixed-Use Neighborhood designation is applied north of Berryessa Road and along King Road. These areas are envisioned to be preserved for the horizon of the Plan. If redevelopment occurs in the future, the governing density and FARs established in the General Plan for this designation will apply to those areas.

Therefore, the placement of single-family residences at this location is allowed. The function of the Planning Department when reviewing projects is to verify consistency with the General Plan/Urban Village designation, and this project clearly does that. It does not say that single-family is only allowed outside of the Urban Village Plan area. Further, based on the screenshot below, it says “The planned capacity for the Facchino District is approximately 340,000 square feet of commercial uses and 820 dwelling units.” However, the applicant has requested that this project be approved at 455,000 square feet of commercial and 850 dwelling units, which is more than the target stated in the Urban Village Plan.

In regards to Comment 2, it was made clear that the applicant’s goal is to build all the buildings as fast as possible. The reason why the applicant needs to construct the for-sale single-family homes and townhomes first is because it will pay for the infrastructure that will create the neighborhood to build the rest of the homes, including the construction of the public and private streets and the utilities. That’s why the sequence must be in that order. Further, in regards to the Inclusionary Housing Ordinance (IHO) requirements, all required affordable units will be proposed on-site on Parcels H, F & G of the site. The applicant’s base commitment is to provide the required 128 affordable units on-site per the IHO requirements. The bigger goal is to make all of Parcels H, F & G all affordable at 80% AMI or lower with varying bedroom counts, totaling approximately 697 affordable units. The applicant has agreed to the Housing Department requirement of a bond for the in-lieu fees because of the project phasing.

However, in order for this to happen, the for-sale homes will fund the construction of the roadway infrastructure to create the blocks where the affordable housing will be built, which means there will be a slight lag time between when the for-sale market rate units will be built, and when the affordable units will be built. The current IHO says that you have to build them at the same time, which would not be feasible for this project. The Housing Department is saying that if there is a lag time, then the developer has to provide a bond to ensure that the affordable homes get built, and if they aren’t built, then the City has the right to take the in-lieu payment instead.

Thanks! If anyone on this email would like to provide more information in response to the comments, please feel free.

Laura Meiners

Planner IV / Supervising Planner

City of San Jose

Planning, Building, and Code Enforcement (PBCE) Department

200 East Santa Clara Street, Tower 3<sup>rd</sup> floor

San Jose, CA 95113

(408) 535-7869 / [laura.meiners@sanjoseca.gov](mailto:laura.meiners@sanjoseca.gov)

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**From:** Erika Pinto [REDACTED]  
**Sent:** Friday, May 12, 2023 6:20 PM  
**To:** Alex Shoor [REDACTED]  
**Cc:** Burton, Chris <[Christopher.Burton@sanjoseca.gov](mailto:Christopher.Burton@sanjoseca.gov)>; Cohen, David <[David.Cohen@sanjoseca.gov](mailto:David.Cohen@sanjoseca.gov)>; Nguyen, Lam <[Lam.Nguyen@sanjoseca.gov](mailto:Lam.Nguyen@sanjoseca.gov)>; Meiners, Laura <[Laura.Meiners@sanjoseca.gov](mailto:Laura.Meiners@sanjoseca.gov)>; Gomez, Charla <[Charla.Gomez@sanjoseca.gov](mailto:Charla.Gomez@sanjoseca.gov)>; Kelly A Snider [REDACTED] Manford, Robert <[Robert.Manford@sanjoseca.gov](mailto:Robert.Manford@sanjoseca.gov)>; Fred Buzo [REDACTED]  
**Subject:** Re: Why was Planning Commission told single-family homes are required on Facchino Property?

You don't often get email from [REDACTED]. [Learn why this is important](#)

[External Email]

Hello all,

While SPUR does not rate projects we are nonetheless invested in seeing San Jose realize the full potential of its Urban Villages.

This [land-use strategy is a key opportunity](#) to address the city's housing shortage, and it has tremendous potential to accommodate housing and job growth in environmentally sustainable locations near fixed-guideway transit.

With the [city having a 2022 median single-family home price of \\$1.56 million](#) and a **median condo/townhouse home price of \$827,500**, a family making a median income salary can no longer afford to compete for a home in San Jose. People want to remain here or move here, and San Jose simply does not have enough housing available.

Detached single-family homes do not fulfill the potential set forth in Berryessa's Urban Village Plan, and would be incorrect to say that it is required for MUN parcels and this project. We should be building more homes per acre in the urban village, including in the provided buffer.

Thank you Kelly and Alex for sharing your research and input, and for including us in this thread! Councilmember Cohen, Chris, Charla, and all, SPUR appreciates you considering our perspective.

Best,  
Erika

On Fri, May 12, 2023 at 3:43 PM Alex Shoor [REDACTED] wrote:

Chris, Robert & CM Cohen,

While Catalyze SV members didn't score this project, I know they care deeply about building as many homes as possible. One of the reasons we didn't get involved in scoring this project was because of the low-density in parts of the project.

I can confidently say that our members would rate poorly, and push back on, the developer choosing single-family homes as part of this project, especially when, if Kelly is correct, they actually *should* be building more homes per acre based on the City's plan.

Thus, I'd like to echo Kelly Snider and urge the City to both correct any factual errors about the plan, and more importantly, have the applicant convert all single-family homes to at least townhomes to increase the number of homes in this project.

Moreover, I'd like city staff to probe the applicant on the sequencing of the project. Aren't there tons of example of mixed-use projects in CA like this one that find financing for their projects without having to build the low-density first?



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3. On page 33 of the BBUVP, it clarifies that all MUN categories allow Townhomes AND it expressly states that single-family homes are appropriate ONLY outside the BBUVP area.



4. I respectfully ask that City Council require that only Townhomes to be built in the Mixed-Use Neighborhood parcels of the Facchino District, as directed by the BBUVP, and correct the applicant's mis-statements that single-family homes are required. Single-family homes are not required and the City Council can easily ask the applicant to make this change in order to comply with the BBUVP.

Thank you,  
Kelly Snider

Kelly Snider, MCP  
Director, Real Estate Development Certificate Program  
Professor of Practice, Urban & Regional Planning  
San Jose State University

--  
**Erika Pinto (she • her)**  
San José Planning Policy Manager | [SPUR](#)

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## FW: JUNE 13th AGENDA: Item 10.2 - Facchino District Urban Village Neighborhood

City Clerk <city.clerk@sanjoseca.gov>

Thu 6/8/2023 1:52 PM

To:Agendadesk <Agendadesk@sanjoseca.gov>

---

**From:** Erik Schoennauer <[REDACTED]>

**Sent:** Thursday, June 8, 2023 1:51 PM

**To:** Mahan, Matt <Matt.Mahan@sanjoseca.gov>; Kamei, Rosemary <Rosemary.Kamei@sanjoseca.gov>; Jimenez, Sergio <sergio.jimenez@sanjoseca.gov>; Torres, Omar <Omar.Torres@sanjoseca.gov>; Cohen, David <David.Cohen@sanjoseca.gov>; Davis, Dev <dev.davis@sanjoseca.gov>; Doan, Bien <Bien.Doan@sanjoseca.gov>; Candelas, Domingo <Domingo.Candelas@sanjoseca.gov>; Foley, Pam <Pam.Foley@sanjoseca.gov>; Batra, Arjun <arjun.batra@sanjoseca.gov>; Ortiz, Peter <Peter.Ortiz@sanjoseca.gov>

**Cc:** Manford, Robert <Robert.Manford@sanjoseca.gov>; Meiners, Laura <Laura.Meiners@sanjoseca.gov>

**Subject:** JUNE 13th AGENDA: Item 10.2 - Facchino District Urban Village Neighborhood

[External Email]

Dear Mayor and City Councilmembers:

We are excited to present to you the Facchino District Urban Village Neighborhood. This zoning, development permit, tentative map, and EIR conform entirely with the adopted Berryessa BART Urban Village Plan, thus **the Planning Staff AND the unanimous Planning Commission recommend approval of the project.**

Below are the key features of the project that we hope you will consider:

1) **These Entitlements Implement the Adopted Berryessa BART Urban Village Plan:** Once the City Council adopts an Urban Village Plan, then individual properties must be zoned and development permits issued, so that actual development can occur. As you can see by the images below, our proposed Facchino neighborhood matches the urban design concept plan of the Berryessa BART Urban Village Plan. To be sensitive to the existing single family neighbors, the Plan explicitly allows for "small lot single family" homes on the northern and western property lines to act as a step down transition buffer to the existing single family neighbors. This is described in the land use description for the "Mixed-Use Neighborhood" area pasted below. Overall, this is the next step to get the Urban Village ready for construction.

2) **Mix of Housing Types Walking Distance From The BART Station:** The proposed project maximizes housing production to support transit ridership with a planned capacity of up to 850 housing units. The range of housing types will allow both for-sale and rental housing. The project's goal is to provide substantial amounts of dedicated affordable housing on the high density blocks.

3) **New Commercial Space Fronting on Berryessa Road:** The project provides the opportunity for up to 455,000 square feet of commercial space that will activate Berryessa Road and create jobs walking distance from the BART Station.

4) **Creates a New Neighborhood Park:** The project will dedicate a new City-own neighborhood park, consistent with the Berryessa BART Urban Village Plan.

For all of the reasons above, we hope that you find the project worthy of your support.

Thank you for your consideration. Please email or call if you have questions.

Best Regards,

ERIK

**Adopted Berryessa BART Urban Village Plan - Urban Design Concept Plan:**

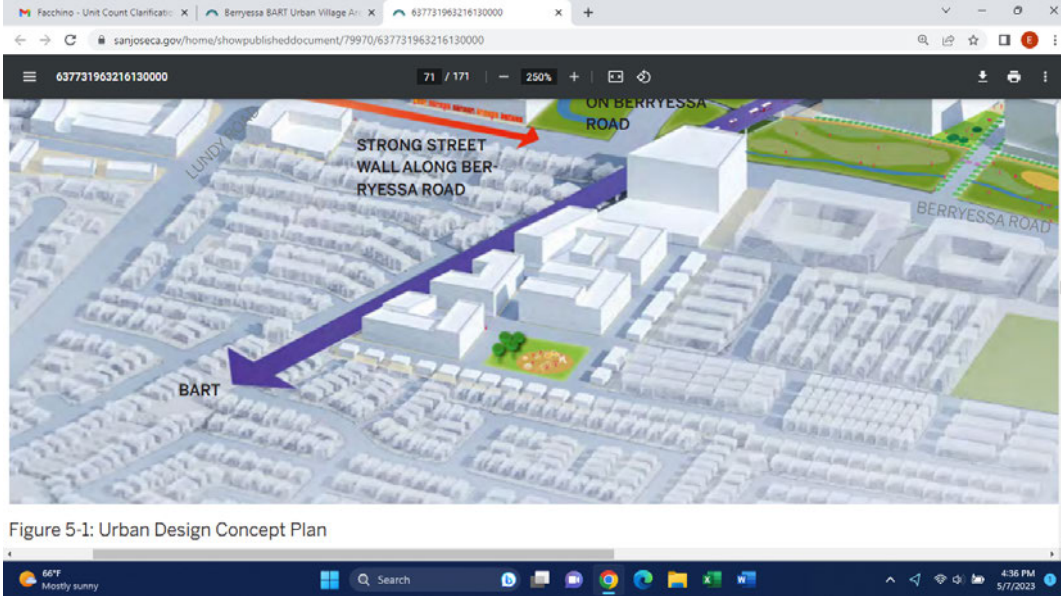
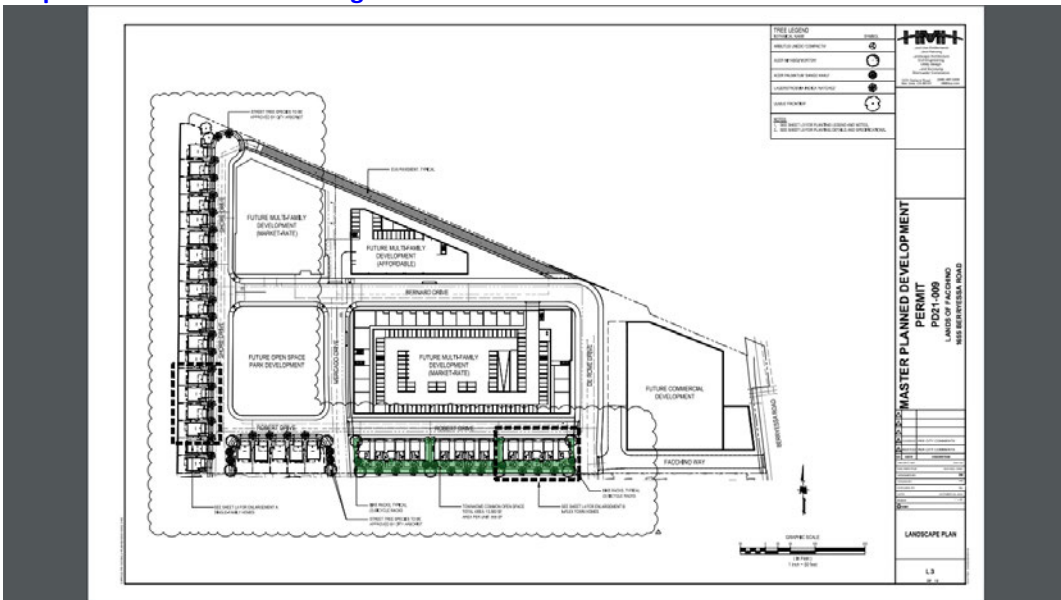


Figure 5-1: Urban Design Concept Plan

## Proposed Facchino District Neighborhood Entitlements:



## Urban Village Plan Land Use Description for the Mixed-Use Neighborhood areas:

the area designated as Urban Residential in the land use plan. For condos and for-sale residential the Plan allows a density range of 95-100 DUs considering the larger size of those units (See General Plan Policy LU-6.5).

**Mixed-Use Neighborhood**  
Facchino District and other areas outside of the Districts

| Land Use    | Density         |
|-------------|-----------------|
| Residential | up to 30 DU/AC  |
| Commercial  | FAR 0.25 to 2.0 |

The Mixed-Use Neighborhood designation in the General Plan is intended for development primarily with either townhouse or **small lot single-family** and also to existing neighborhoods that were historically developed with a wide variety of housing types and residential densities. For existing residential areas (outside the Districts), the Mixed-Use Neighborhood designation is applied north of Berryessa Road and along King Road. These areas are envisioned to be preserved for the horizon of the Plan. If redevelopment occurs in the future, the governing density and FARs established in the General Plan for this designation will apply to those areas.

For new development, the Mixed-Use Neighborhood designation is applied to specific areas in the Facchino district only. The goal of the Plan is to concentrate planned growth in District areas, which results in mid- and high-density residential development in most Districts. In the Facchino District, a limited amount of residential uses under the Mixed-Use Neighborhood designation will serve as a transitional buffer between the mid-density residential in the District

will minimize the height impacts of tall residential buildings on adjacent homes. The Mixed Use Neighborhood designation has an allowable residential density of up to 30 DU/AC.


**Residential Neighborhood**  
Areas outside of the Districts

| Land Use    | Density       |
|-------------|---------------|
| Residential | 8 DU/AC       |
| Commercial  | FAR up to 0.7 |

The Residential Neighborhood land use designation is applied to areas outside of the four Districts, but within the Urban Village boundaries. This land use designation is particularly suitable for the existing residential areas that are already developed with a mix of single-family residences, duplexes, and apartments as indicated on the Land Use Plan (Figure 3-2).

The Residential Neighborhood land use designation is applied to areas within the Urban Village that are outside of the Districts and are already developed with uses consistent with this land use designation. The Residential Neighborhood land use designation intends to preserve the character of the existing neighborhoods only. Some infill projects may be permitted under the Residential Neighborhood designation if such projects strictly conform to the prevailing neighborhood character and fit the existing urban fabric, as defined by density, lot size and shape, building massing, and other considerations. Infill projects in this Plan refer to individual projects on existing parcels, and not to new large-scale developments such as those planned in the four Districts of the Urban Village. For reference, the Residential Neighborhood land use designation in the General Plan calls for a

Erik E. Schoennauer

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## FW: Correspondence from Californians for Homeownership

City Clerk <city.clerk@sanjoseca.gov>

Tue 6/13/2023 7:45 AM

To:Agendadesk <Agendadesk@sanjoseca.gov>

 1 attachments (152 KB)

2023-6-12 - Letter to San Jose City Council.pdf;

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**From:** Matt Gelfand <[REDACTED]> **On Behalf Of** Matt Gelfand

**Sent:** Monday, June 12, 2023 11:07 PM

**To:** City Clerk <city.clerk@sanjoseca.gov>

**Subject:** Correspondence from Californians for Homeownership

[External Email]

To the City Council:

Please see the attached correspondence regarding [Agenda Item 10.2 \(File No. 23-879\)](#) being considered at your upcoming meeting.

Sincerely,

Matthew Gelfand

--

Matthew Gelfand

Counsel, Californians for Homeownership

Californians for Homeownership is a 501(c)(3) non-profit organization that works to address California's housing crisis through impact litigation and other legal tools.

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June 12, 2023

San Jose City Council  
City of San Jose  
Email: [city.clerk@sanjoseca.gov](mailto:city.clerk@sanjoseca.gov)

RE:                   Agenda Item 10.2, File No. 23-879  
                      *Mixed-Use Development at 1655 Berryessa Road*

To the City Council:

Californians for Homeownership is a 501(c)(3) organization devoted to using legal tools to address California's housing crisis. We are writing to support the environmental approvals for the multi-use development at 1655 Berryessa Road.

California has experienced a significant housing access and affordability crisis for several decades. In recent years, this crisis has reached historic proportions. As a result of the crisis, younger Californians do not have access to homeownership and housing security opportunities afforded to previous generations. Many middle- and lower-income families devote more than half of their take-home pay to rent, leaving little money to pay for transportation, food, healthcare, and other necessities. Unable to set aside money for savings, these families are denied the opportunity to become homeowners and are at grave risk of losing their housing in case of a medical issue, car trouble, or other personal emergencies. Indeed, housing insecurity in California has led to a mounting homelessness crisis. Furthermore, the crisis has disproportionately affected historically disadvantaged communities, including individuals with physical and developmental disabilities and communities of color. The COVID-19 crisis has only reinforced the need for high-quality, stable housing available to California families at all income levels.

At the core of California's housing crisis is its failure to build enough new housing to meet the needs of its growing population. The Legislative Analyst's Office estimates that from 1980 to 2010, the state should have been building approximately 210,000 units yearly in major metropolitan areas to meet housing demand. Instead, it built approximately 120,000 units per year. Today, California ranks 49th out of the 50 states in existing housing units per capita. The legislature has recognized that the housing crisis is an emergency that requires proactive solutions: "The consequences of failing to effectively and aggressively confront this crisis are hurting millions of Californians, robbing future generations of the chance to call California home, stifling economic opportunities for workers and businesses, worsening poverty and homelessness, and undermining the state's environmental and climate objectives." Gov. Code § 65589.5(a)(2)(A).

Our organization's sole purpose is to participate in litigation to support the critical public interest in developing new housing. This project would provide 850 vitally needed housing units in the City, including affordable units for low-income families. Approval of the project is well-



June 12, 2023

Page 2

supported by the record, and the project's environmental review has met CEQA requirements. If the City faces a lawsuit challenging the project's approval, we may seek to intervene in the litigation to support the City's critical efforts to address the region's housing crisis. Further, we may seek reimbursement for our attorneys' fees from the plaintiff in such a lawsuit.

The project's Final Environmental Impact Report complies with CEQA requirements and thoroughly examines the project's potential impacts and mitigation measures. The applicant has gone above and beyond in addressing the project's environmental impacts concerning air quality, bird and biological resources, hazardous materials, and noise and vibrations.

Sincerely,

A solid black rectangular box used to redact the signature of Matthew Gelfand.

Matthew Gelfand




**FW: Agenda Item No. 10.2: Berryessa Road Mixed-Use Development Project (PDC18-036, PD21-009, PT21-030 and ER21-113)**

City Clerk <city.clerk@sanjoseca.gov>

Tue 6/13/2023 11:20 AM

To:Agendadesk <Agendadesk@sanjoseca.gov>

 1 attachments (426 KB)

Comments on Agenda Item 10.2 - Berressa Rd 6.13.23.pdf;

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**From:** Aidan P. Marshall [REDACTED] >

**Sent:** Tuesday, June 13, 2023 10:41 AM

**To:** City Clerk <city.clerk@sanjoseca.gov>

**Subject:** FW: Agenda Item No. 10.2: Berryessa Road Mixed-Use Development Project (PDC18-036, PD21-009, PT21-030 and ER21-113)

[External Email]

---

**From:** Aidan P. Marshall

**Sent:** Tuesday, June 13, 2023 10:39 AM

**To:** [Tina.garg@sanjoseca.gov](mailto:Tina.garg@sanjoseca.gov); [city.clerk@sanjoseca.gov](mailto:city.clerk@sanjoseca.gov)

**Subject:** Agenda Item No. 10.2: Berryessa Road Mixed-Use Development Project (PDC18-036, PD21-009, PT21-030 and ER21-113)

Good morning,

Please find attached comments on Agenda Item No. 10.2 for today's City Council meeting. Please let me know if you have any questions.

Best,

Aidan P. Marshall

Adams Broadwell Joseph & Cardozo

601 Gateway Boulevard, Suite 1000

South San Francisco, CA 94080



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## ATTORNEYS AT LAW

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## SACRAMENTO OFFICE

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June 13, 2023

### **VIA EMAIL**

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### **Re: Agenda Item No. 10.2: Berryessa Road Mixed-Use Development Project (PDC18-036, PD21-009, PT21-030 and ER21-113)**

Dear Mayor Mahan, Honorable Council Members, and Ms. Garg:

We are writing on behalf of Silicon Valley Residents for Responsible Development ("Silicon Valley Residents" or "Residents") to provide comments on Agenda Item Number 10.2, the Berryessa Road Mixed-Use Development Project (PDC18-036, PD21-009, PT21-030; SCH# 2021070467) ("Project"), proposed by Terracommercial Real Estate Corporation ("Applicant"). The Project will be considered by the San José City Council as Agenda Item No. 10.2 at the June 13, 2023 City Council meeting.

The City Council will consider whether to take the following actions: (1) adopt a resolution certifying the Environmental Impact Report ("EIR"), (2) approve an ordinance rezoning the Project Site to Planned Development Zoning Districts, (3) adopt a resolution approving a Vesting Tentative Map, and (4) adopt a resolution approving a Planned Development Permit (collectively, "Approvals").

5435-008

As is discussed herein, the City lacks the necessary substantial evidence to support the Approvals for two reasons. First, the City's Housing Conditions of Approval ("Housing COAs") fail to require the Project to construct on-site affordable housing, instead allowing the Applicant to potentially forfeit a bond as an in-lieu fee. This failure renders the Project inconsistent with local policies calling for on-site affordable housing.

The Project also fails to comply with the California Environmental Quality Act ("CEQA").<sup>1</sup> As is discussed in detail in Residents' comments on the Draft EIR ("DEIR") and Final EIR ("FEIR"), the FEIR fails to meet CEQA's requirements to disclose and mitigate the Project's environmental and public health impacts.<sup>2</sup> The City continues to rely on an EIR that fails to accurately analyze, disclose, and mitigate the Project's potentially significant air quality, public health, greenhouse gas ("GHG"), hazards, noise, growth-inducing, and land use impacts. These inadequacies must be remedied in a revised EIR before the Project can be approved.

As a result of the Project's ongoing environmental impacts and land use inconsistencies, the City cannot make the requisite findings to certify the EIR and approve the Project's entitlements. Silicon Valley Residents respectfully requests the City Council remand the Project back to staff to prepare a legally adequate EIR and bring the Project into compliance with all State and local land use policies before the Project can be considered for approval.

## **I. STATEMENT OF INTEREST**

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 the International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483 and their members and their families; and other individuals that live and/or work in the City of San José and Santa Clara County.

Individual members of Silicon Valley Residents, including City resident Erica Valentine, 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

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<sup>1</sup> California Public Resources Code § 21000 et seq.

<sup>2</sup> California Public Resources Code § 21000 et seq.

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.

## **II. THE PROJECT FAILS TO COMPLY WITH AFFORDABLE HOUSING POLICIES**

To approve the Project's entitlements, the City must provide substantial evidence demonstrating that the Project is consistent with local land use policies and ordinances. But the City's draft Housing COAs fail to ensure that the Project will include adequate on-site affordable housing to comply with applicable affordable housing policies. As a result, the City lacks substantial evidence to find the Project consistent with the BBUV Plan's affordable housing policies and the General Plan Housing Element . The City Council should revise the Housing COAs to ensure compliance with the BBUV Plan and General Plan.

### **A. Background on the Project's Housing Conditions of Approvals**

The Project's Draft Resolutions PD21-009 and PT21-030 include Housing Conditions of Approvals reflecting Inclusionary Housing Ordinance ("IHO")<sup>3</sup> requirements for mixed use developments. In summary, the Housing COAs would require the Applicant to construct 697 affordable units on the Project site, or forfeit a bond as an in-lieu fee.

The IHO generally requires for-sale and rental developments having 10 or more units to provide at least 15% of the units as affordable to income-eligible buyers or renters.<sup>4</sup> The IHO requires these affordable units to be built prior to or concurrently with the market-rate units.<sup>5</sup> If a project does not build this required

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<sup>3</sup> Chapter 5.08.610 of the San José Municipal Code.

<sup>4</sup> SJMC 5.08.590(F); 5.08.400, 5.08.450, 5.08.500.A, 5.08.520, 5.08.525, 5.08.620.

<sup>5</sup> SJMC Sections 5.08.460, 5.08.610.

15%, the IHO would require the Applicant to pay an in-lieu fee<sup>6</sup> or build a greater number of off-site units.<sup>7</sup> The in-lieu fee is calculated by multiplying the project size (measured in net residential square feet) by the current in-lieu fee rate.<sup>8</sup> Here, 15% of the 850 total units proposed by the Project results in a minimum of 128 on-site affordable units to achieve the IHO requirements.<sup>9</sup>

The Applicant's proposed Affordable Housing Compliance Plan seeks to waive several IHO requirements in exchange for building a greater number of on-site affordable units than the 128 required by the IHO. One of the proposed waivers is the requirement to build the affordable units concurrently with the market-rate units – here, the Applicant seeks to build the affordable units after the market-rate units.<sup>10</sup> In return for the waiver, the Applicant proposes to construct 697 out of the total 850 as affordable rental units, which is greater than the 128 required by the IHO.<sup>11</sup> To provide assurance for the City that the 697 units are constructed, the Housing COAs require the Applicant to provide a surety bond to cover the in-lieu fees, which would be returned within five years if the applicant provides affordable units to meet the Inclusionary Housing Ordinance (IHO) requirements.<sup>12</sup> This plan would allow three potential outcomes: (1) the 697 affordable units do not get built and the bond is surrendered to the City to cover the in-lieu fees, (2) 697 affordable units get built, in which case the Applicant would get the bond back, or (3) fewer than 697 affordable units would be built, in which case a portion of the bond may be returned.<sup>13</sup>

## **B. The Waiver of IHO Requirements would Not Provide Sufficient Benefit to the Public**

Under the proposed Housing COAs and Affordable Housing Compliance Plan, the requirement to build 697 on-site affordable units is illusory. The only apparent requirement in the COAs that these units are constructed is the Applicant's incentive not to surrender the bond to the City.<sup>14</sup> But the monetary value of the bond would be equal to the value of the in-lieu fees already required by the IHO

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<sup>6</sup> SJMC Section 5.08.520.

<sup>7</sup> SJMC Sections 5.08.410, 5.08.500.B, 5.08.510.

<sup>8</sup> SJMC Section 5.08.520.

<sup>9</sup> May 22, 2023, City of San José Planning Commission Memorandum, pg. 7.

<sup>10</sup> Planning Commission Memorandum, pg. 7-8.

<sup>11</sup> Planning Commission Memorandum, pg. 7.

<sup>12</sup> Draft Resolution PD21-009, pg. 24; Planning Commission Memorandum, pg. 7.

<sup>13</sup> Planning Commission Memorandum, pg. 8.

<sup>14</sup> Draft Resolution PD21-009, pg. 24; Draft Resolution PT21-030, pg. 17.

(e.g. the same in lieu fee for the 128 on-site affordable units required under the IHO), not the monetary value of 697 units.<sup>15</sup>

Therefore, the developer could decide not to build any affordable units and simply pay the in-lieu fee via the bond. Since the fee for not building the proposed 697 units would be the same as not building the required 128 units, the Housing COAs and Affordable Housing Compliance Plan would enable the Applicant to obtain a waiver from several IHO requirements without providing any additional public benefit. This is contrary to the intent of the IHO. The City should not approve the waivers unless the Applicant commits to constructing the 697 affordable units described in the Housing COAs and Affordable Housing Compliance Plan, or provides additional public benefit or in lieu fees above and beyond the minimum required by the IHO.

**C. The Project Can Avoid Building On-Site Affordable Units by Paying an In-Lieu Fee, in Conflict with BBUV Plan Policies.**

The Project site is within the boundaries of the 270-acre BBUV Plan area.<sup>16</sup> Policy LU-8.3 of the BBUV Plan states: “Focus the City’s affordable housing resources into the Berryessa BART Urban Village to further achievement of the Goal that **25%** of the housing in the Village is affordable.” But this Project, under the draft Housing COAs, could avoid constructing any affordable units on the Project site by paying an in-lieu fee (via a bond), potentially resulting in **0%** of the Project’s 850 units being affordable.<sup>17</sup> The Applicant’s Affordable Housing Plan and the City’s draft Housing COA’s do not require that the bond pay for off-site

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<sup>15</sup> Draft Resolution PD21-009, pg. 24 (“The entire market rate obligation for in-lieu security is due for the entire market rate project prior to the first Certificate of Occupancy for the first unit. The amount of the fee security should be based on the current fiscal year fee when the security is provided. Alternatively, the market rate phase 1 obligations for in-lieu security could be due for the entire market rate project prior to the first C of O for the first phase 1 unit and with the same conditions applying to phase 2. The amount of the fee security should be based on the current fiscal year fee when the security is provided.”) Affordable Housing Compliance Plan, Attachment A; Planning Commission Memorandum, pg. 7-8; City of San José, IHO Implementation Guidelines, Attachment 7 – Partnership for Clustered Units, pg. 6 (“should the Affordable Housing Developer and the Applicant wish to allow for a different construction financing and commencement timeline in the Agreement, or if the Applicant and Affordable Housing Developer otherwise fail to meet the timeline and requests extension that would allow the Applicant to obtain the certificates of occupancy for the remaining portions of the Residential Development, the Applicant must provide the City with a letter of credit or escrow account for amount of the of the In Lieu Fee that would be otherwise required for the Residential Development.”).

<sup>16</sup> DEIR, pg. v.

<sup>17</sup> Draft Resolution PD21-009, pg. 24; Draft Resolution PT21-030, pg. 17.



affordable units within the BBUV Plan area. Therefore, the City lacks substantial evidence to find that the Project would comply with the BBUV Plan's 25% affordability goal.

The Project's inconsistency with the BBUV Plan is also greater than analyzed in the EIR. Silicon Valley Residents' comments on the Draft EIR explained that the 189 affordable units proposed in the EIR would only assign 22% of the Project as affordable, which would not fully meet the 25% overall goal for the BBUV Plan area.<sup>18</sup> The City's response in the FEIR was that Policy LU-83 does not require each project within the BBUV to have 25 percent affordable housing, and that 189 units would adequately contribute to the 25% goal. But under the new Housing COAs, the Project can avoid constructing any on-site units by paying an in-lieu fee. And the City has not produced any evidence that BBUV Plan area is on track to meet the 25% goal. Therefore, the City lacks substantial evidence to find that the Project is consistent with this policy.

The City Council should revise the proposed Housing COAs to ensure that the baseline percentage of on-site affordable housing units would be 25% in order to be consistent with Policy LU-83.

#### **D. The Project is Inconsistent with the Housing Element Update of the General Plan**

The Regional Housing Needs Assessment ("RHNA") is the California State-required process that seeks to ensure cities and counties plan for enough housing in their Housing Element cycle to accommodate all economic segments of the community.<sup>19</sup> Accordingly, the Housing Element of the City's General Plan identifies the City's housing conditions and needs, evaluates the City's ability to meet its RHNA numbers, and establishes the goals, objectives, and policies of the City's housing strategy. The Housing Element Annual Progress Report ("APR"), as required by Government Code Section 65400, requires jurisdictions to report on the annual progress towards meeting the RHNA during the calendar year, as well as on the status of implementation programs identified in the Housing Element.

The City's 2021 Housing Element APR shows that "San José is ahead of schedule in delivering market-rate housing and is behind schedule in delivering all

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<sup>18</sup> FEIR, pg. 57.

<sup>19</sup> Cal. Gov. Code Section 65580 – 65589.9; *see* City of San José, 2014-2023 San José Housing Element (January 27, 2015), pg. 1-2.

other income levels of affordable housing.”<sup>20</sup> Affordable units are those offering rents affordable to extremely low-, very low-, low- and moderate-income households.<sup>21</sup> The APR states that “[t]he City’s annual production of “extremely low-, very low-, low- and moderate-income housing remained well below the annual goals for each income level.”<sup>22</sup>

| Income Level   |                     | RHNA Allocation by Income Level | Total Units to Date (all years) | Total Remaining RHNA by Income Level |
|----------------|---------------------|---------------------------------|---------------------------------|--------------------------------------|
| Very Low       | Deed Restricted     | 9,233                           | 1,796                           | 7,437                                |
|                | Non-Deed Restricted |                                 |                                 |                                      |
| Low            | Deed Restricted     | 5,428                           | 162                             | 5,266                                |
|                | Non-Deed Restricted |                                 |                                 |                                      |
| Moderate       | Deed Restricted     | 6,188                           | 2,591                           | 3,597                                |
|                | Non-Deed Restricted |                                 |                                 |                                      |
| Above Moderate |                     | 14,231                          | 11,106                          | 3,125                                |
| Total RHNA     |                     | 35,080                          |                                 |                                      |
| Total Units    |                     |                                 | 15,655                          | 19,425                               |

As shown in the table<sup>23</sup> above, excerpted from the 2021 APR, the City still has not produced enough affordable housing at any level (extremely low-, very low-, low- and moderate-income). San José was obligated to identify capacity for 35,080 new units of housing in the 2015-2023 RHNA cycle. And, while the City produced more than 15,655 new affordable units, the City has a deficit of 19,425 affordable units. The 2021 APR concludes that “[a]s the City remains far short of meeting its RHNA housing goals, despite diligent staff work and the dedication of considerable resources, San José will need to be aggressive in pursuing all production strategies appropriate and feasible to grow and diversify its housing stock – both with new types of housing and with more housing affordable to lower- and moderate-income residents.”<sup>24</sup> Because the City has not produced and is not expected to produce enough affordable housing to meet its RHNA, projects that do not contribute to the City’s RHNA are inconsistent with the City’s Housing Element, a primary goal of which is to meet the RHNA.

<sup>20</sup> City of San José, 2021 Housing Element and FY 2020-21 Housing Successor Annual Report to State of California (“2021 APR”), pg. 12, available at <https://www.sanJoseca.gov/home/showpublisheddocument/87578/637926224037070000>.

<sup>21</sup> *Id.* at 10.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, Table B.

<sup>24</sup> *Id.* at 16.

Here, the Housing COAs do not ensure that the Project would construct affordable units by allowing the Applicant to pay an in-lieu fee. This in-lieu fee would be paid if the Project's does not build affordable on-site units within five years of the 1st Certificate of Occupancy for the first phase market-rate unit.<sup>25</sup> The fee would be deposited into an IHO account used to fund other affordable projects within the City of San José, which would be built years later.<sup>26</sup> This approach would substantially defer development of affordable units necessary for the City to meet its RHNA, so is therefore inconsistent with the Housing Element's near-term affordable housing goals.

The Project should not be approved until the Applicant demonstrates compliance with the Housing Element Update by providing on-site affordable units.

### **III. THE CITY CANNOT MAKE THE REQUISITE FINDINGS TO MAKE THE PROJECT'S APPROVALS**

#### **A. The City Cannot Make the Requisite Findings to Certify the EIR**

The City Council will consider whether to adopt a resolution certifying the Project's EIR in accordance with CEQA. As explained in Residents' comments on the DEIR and FEIR, the EIR failed to accurately analyze, disclose, and mitigate the Project's potentially significant air quality, public health, GHG, hazards, noise, growth-inducing, and land use impacts. As a result of its shortcomings, the EIR lacks substantial evidence to support its conclusions and fails to properly mitigate the Project's significant environmental impacts. The record before the City does not contain substantial evidence to support the findings necessary to certify the EIR or approve the Project.

#### **B. The City Cannot Make the Requisite Findings to Approve the Planned Development Permit**

The Project seeks a Planned Development Permit to establish a Master Plan for a general site layout, public and private street layout, grading and drainage patterns, and utility layout to allow the future construction of up to 455,000-square feet of commercial space, an approximately 0.92-gross-acre park, and up to 850 residential units, including the demolition of an existing light industrial facility

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<sup>25</sup> Draft Resolution PD21-009, pg. 24; Draft Resolution PT21-030, pg. 17.

<sup>26</sup> Planning Commission Memorandum, pg. 7.

(9,740 square feet) and surface parking lot, and the removal of 47 ordinance-size trees and 56 non-ordinance trees on the Project Site.

SJMC Section 20.100.940(A) provides that the City may issue a planned development permit only if all of the following findings are made:

1. The planned development permit, as issued, is consistent with and furthers the policies of the general plan; and
2. The planned development permit, as issued, conforms in all respects to the planned development zoning of the property; and
3. The planned development permit, as approved, is consistent with applicable city council policies, or counterbalancing considerations justify the inconsistency; and
4. The interrelationship between the orientation, location, mass and scale of building volumes, and elevations of proposed buildings, structures and other uses on-site are appropriate, compatible and aesthetically harmonious; and
5. The environmental impacts of the project, including, but not limited to noise, vibration, dust, drainage, erosion, storm water runoff, and odor which, even if insignificant for purposes of the California Environmental Quality Act (CEQA), will not have an unacceptable negative effect on adjacent property or properties.

SJMC Section 20.100.940(B) provides that the City Council “shall deny the application where the information submitted by the applicant and/or presented at the public hearing fails to satisfactorily substantiate such findings.”

Here, the City lacks substantial evidence to conclude that the environmental impacts of the project will not have an unacceptable negative effect on adjacent properties. As explained in Residents’ comments on the EIR, the EIR failed to accurately analyze, disclose, and mitigate the Project’s potentially significant air quality, public health, greenhouse gas GHG, hazards, noise, growth-inducing, and land use impacts. Many of these impacts will acutely impact adjacent properties. For example, although the Project’s construction would generate Toxic Air Contaminants such as Diesel Particulate Matter, which would increase health risks in the surrounding community to a significant level, the Project fails to adopt binding mitigation measures necessary to reduce health risks to the levels assumed

in the EIR. And noise from the Project's construction would negatively affect adjacent properties by exceeding noise thresholds.

The City also lacks substantial evidence to conclude that the planned development permit, as issued, is consistent with and furthers the policies of the general plan. The Project fails to commit to construct on-site affordable housing, which is inconsistent with the BBUV Plan and the Housing Element of the General Plan. A planned development permit that would enable the Project to avoid constructing on-site affordable housing would not further the policies of the General Plan. And, as discussed in Residents' comments on the EIR, the Project's planned development permit fails to identify any electric vehicle charging infrastructure, which is required by BBUV Plan Policies SU-4.1 and SU-4.2 of the BBUV Plan.<sup>27</sup>

The FEIR stated that "[v]erification of the project's compliance with this policy would occur at the Planned Development Permit stage, when the precise amounts of each type of allowed use would be established and the requisite amount of EV parking." But the draft planned development permit does not contain evidence that the Project would be consistent with these policies. Per SJMC Section 20.100.940(B), the City cannot approve the planned development permit until this information is included in the permit.

### **C. The City Cannot Make the Requisite Findings to Approve the Vesting Tentative Map**

The Project seeks approval of Vesting Tentative Map to merge three parcels into one and subdivide up to thirty-two lots and up to 590 condominium units on the Project Site. But the City cannot make the requisite findings under the Subdivision Map Act.<sup>28</sup> The Subdivision Map Act provides that the City shall deny approval of a tentative map, if it makes any of the following findings:

1. That the proposed map is not consistent with applicable general and specific plans as specified in Section 65451.

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<sup>27</sup> FEIR, pg. 57 (Policy SU-4.1 provides: "All new residential development in each of the four Districts should have at least 80% of the total parking stalls provided as "Electric Vehicle (EV)- capable," with at least 20% "Electric Vehicle Charging Infrastructure (EVCI)-ready" (above the City's Energy Reach Code)." And Policy SU-4.2 provides: "All new commercial development in each of the four Districts should have at least 50% of the total parking stalls provided as "Electric Vehicle (EV)- capable," with at least 20% "Electric Vehicle Charging Infrastructure (EVCI)- ready" (above the City's Energy Reach Code).")

<sup>28</sup> Government Code section 66474.

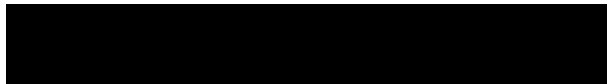
2. That the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans.
3. That the design of the subdivision or type of improvements is likely to cause serious public health problems.<sup>29</sup>

Here, the Project conflicts with applicable specific and general plans, as discussed herein and in Silicon Valley Residents' comments on the EIR. Further, substantial evidence shows the Project has potential public health impacts. These involve the disturbance of contaminated soil – which will not be analyzed until the project is already approved, and emissions of DPM. Thus, the proposed subdivision cannot be approved under the Subdivision Map Act criteria until these impacts are adequately analyzed and mitigated.

#### IV. CONCLUSION

For these reasons, the City lacks substantial evidence to make the requisite findings to make the Project's Approvals. Silicon Valley Residents urges the City Council to direct the City to prepare a legally adequate EIR before any further action is taken on the Project, and to require the Applicant to bring the Project into compliance with all State and local land use policies before the Project can be considered for approval. We thank you for the opportunity to provide these comments.

Sincerely,

A solid black rectangular box used to redact the signature of the sender.

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<sup>29</sup> *Id.*