



Memorandum

TO: HONORABLE MAYOR AND
COUNCIL

FROM: Rosalynn Hughey

SUBJECT: SEE BELOW

DATE: February 16, 2018

Approved

D. D. S. L.

Date

3/1/18

COUNCIL DISTRICT: 4

**SUBJECT: RECONSIDERATION HEARING ON THE CITY COUNCIL'S
CERTIFICATION OF THE AMERICA CENTER PHASE III PROJECT FINAL
SUBSEQUENT ENVIRONMENTAL IMPACT REPORT PURSUANT TO
SECTION 21.07.080 OF THE SAN JOSE MUNICIPAL CODE**

RECOMMENDATION

- a) Conduct a hearing to reconsider the City Council's certification of the America Center Phase III Project Subsequent Environmental Impact Report adopted on January 23, 2018 (Resolution No. 78493) for a Planned Development Rezoning (File No. PDC15-058) from the A(PD) Planned Development Zoning District to the A(PD) Planned Development Zoning District to allow an additional 190,000 square feet of commercial and office/research and development uses; and a Planned Development Permit (File No. PD15-053) to allow the construction of an approximately 192,350-square foot, six-story office building, associated amenity space, expansion of the existing parking garage on the eastern portion of the site, and removal of 101 ordinance and non-ordinance sized trees on an approximately 63-gross acre site located on the north side of California State Route (SR) 237 at the terminus of Great America Parkway.
- b) Adopt a resolution affirming City Council Resolution No. 78493 certifying the America Center Phase III Project Subsequent Environmental Impact Report adopted on January 23, 2018, and City Council Resolution No. 78494 approving Planned Development Permit File No. PD15-053, and finding that:
 - (1) The City Council has read and considered the America Center Phase III Project Subsequent Environmental Impact Report and related administrative record in connection with Planned Development Rezoning File No. PDC15-058 and Planned Development Permit File No. PD15-053;

- (2) The America Center Phase III Project Subsequent Environmental Impact Report was prepared and completed in compliance with the California Environmental Quality Act of 1970, as amended, together with state and local implementation guidelines; and
 - (3) Certification of the America Center Phase III Project Subsequent Environmental Impact Report for Planned Development Rezoning File No. PDC15-058 and Planned Development Permit File No. PD15-053 reflects the independent judgment and analysis of the City of San José.
- c) Final adoption of Ordinance No. 30067. An ordinance of the City of San José rezoning certain real property of approximately 63 gross acres situated at the terminus of America Center Drive (APNs: 015-45-013, 024, 032, 048, 049, 050, 051, 051, 052, & 053) from the A(PD) Planned Development Zoning District to the A(PD) Planned Development Zoning District.

OUTCOME

Affirming the certification of the America Center Phase III Project Final Subsequent Environmental Impact Report, along with final adoption of the rezoning ordinance and affirming the proposed Planned Development Permit, will allow the project applicant to move forward with the building permit process and implementation of the Planned Development Rezoning from A(PD) Planned Development Zoning District to the A(PD) Planned Development Zoning District (File No. PDC15-058); removal of 101 ordinance and non-ordinance sized trees, expansion of the existing parking garage on the eastern portion of the site, and the construction of an approximately 192,350-square foot, six-story office building with associated amenity space (File No. PD15-053).

Reversing the certification of the America Center Phase III Project Final Subsequent Environmental Impact Report would mean there is no environmental clearance for the proposed project and therefore, City Council Resolution No. 78494 approving Planned Development Permit File No. PD15-053 would not be effective. Moreover, the City could not move forward with final adoption of the rezoning ordinance, and the project applicant would not have the needed entitlements for the proposed project.

EXECUTIVE SUMMARY

The project site is located on an approximately 63-acre site situated north of California State Route (SR) 237 at the terminus of Great America Parkway, in the Alviso community of the City of San José. The project site is currently designated *Combined Industrial/Commercial* in the Envision San José General Plan and is located within a Planned Development (PD) Zoning District (File No. PDC03-024), for which 900,000 square feet of Commercial Office/R&D development is allowed. Of that total, 867,762 square feet of new development has been constructed or is currently under construction in the form of four, six-story office buildings. Approximately 32,238 square feet of capacity remains under the existing entitlements. The proposed project includes a Planned Development Rezoning and a Planned Development Permit to construct a fifth office building on the

site totaling about 192,350 square feet and a new five-story expansion of an existing stand-alone parking garage to provide an additional 1,870 parking spaces (resulting in a total of 3,610 on-site spaces), landscaping, and associated site improvements on the site.

In compliance with the California Environmental Quality Act (CEQA), a Subsequent Environmental Impact Report (SEIR) was prepared for the proposed project. The Notice of Preparation for the SEIR was circulated on September 29, 2016, for a 30-day public review period. On October 11, 2016, a Community/EIR Scoping meeting was held to gather comments on the scope and contents of the environmental document. The Draft Subsequent Environmental Impact Report (Draft SEIR) was circulated for public review and comment for 45 days, from June 12, 2017 to July 27, 2017, during which the City received a total of five written comment letters. None of the comments received in response to the circulation of the Draft SEIR raised substantive issues that required re-circulation. A First Amendment to the Draft SEIR was prepared that provided responses to the written comments submitted during the public circulation period and revisions to the text of the Draft SEIR, which was posted to the City's website on November 17, 2017. The First Amendment together with the Draft SEIR constitute the Final Subsequent Environmental Impact Report (Final SEIR) for the proposed project.

On January 18, 2018, the Planning Commission considered the project and recommended the City Council certify the Final SEIR and approve the proposed project. On January 23, 2018, the City Council held a public hearing and (i) adopted Resolution No. 78493 certifying the America Center Phase III Project Final SEIR; (ii) passed for publication Ordinance No. 30067 for the Planned Development rezoning; and (iii) adopted Resolution No. 78494 approving the Planned Development Permit to allow the construction of a six-story, 192,350-square foot office building, parking structure addition, landscaping, and associated site improvements. The Planned Development Permit would only be effective if the rezoning ordinance becomes effective.

Subsequent to the City Council's actions, the City received a Notice of Request for Reconsideration of the Final SEIR from Mr. Mark Espinoza on behalf of Organizacion Comunidad de Alviso (OCA) pursuant to Section of 21.07.080 of the San José Municipal Code. The notice was received on January 25, 2018. The Municipal Code states the City Clerk shall schedule a reconsideration hearing before the City Council no later than sixty days after the timely filing of the reconsideration petition. At this hearing, the City Council may affirm, reverse, or modify its original decision, and may adopt additional findings of fact based upon the evidence submitted in any and all hearings conducted by the City Council concerning the EIR.

OCA's request for reconsideration is based on arguments made in a letter submitted prior to the City Council meeting by M.R. Wolfe & Associates on behalf of OCA dated January 22, 2018. This letter argues that the SEIR is inadequate because of: (1) insufficient project-level and cumulative analysis of toxic air contaminants; (2) failure to evaluate feasible air quality and traffic mitigation measures; and (3) post-2020 greenhouse gas impacts. The request for reconsideration and submitted letter are included as Attachment 1 to this memorandum.

Pursuant to the Municipal Code, the grounds for reconsideration are limited to (1) an offer of relevant evidence which was improperly excluded at the prior City Council certification hearing, (2)

proof of facts which demonstrate that the City Council proceeded without, or in excess, of its jurisdiction, (3) proof of facts which demonstrate that the City Council failed to provide a fair hearing, and (4) proof of facts which demonstrate that the City Council abused its discretion by not proceeding in a manner required by law, rendering a decision which was not supported by findings of fact, or rendering a decision in which the findings of fact were not supported by the evidence.

As discussed in the Analysis section below, none of these findings can be made because the City prepared a Subsequent EIR in compliance with CEQA, and the reconsideration request did not raise any new issues that were not previously addressed in the administrative record, including the Final SEIR, or reiterated in staff's oral responses at the Planning Commission on January 18, 2018 and the City Council public hearing on January 23, 2018.

BACKGROUND

In February 2000, the City of San José certified the *Final Environmental Impact Report for the Legacy Terrace Development Planned Development Rezoning and Prezoning* (Legacy Terrace FEIR) for development of approximately 45.2 acres of a 70.5-acre site. The rezoning was approved to allow development of 900,000 square feet of commercial office/R&D uses, a 175-room hotel, and 25,000 square feet of River Commercial uses. The remaining 25.3 acres of the site were to remain as open space within a designated open space preserve. The development evaluated in the Legacy Terrace FEIR was renamed America Center prior to completion of the first buildings within the development. Two of the five office buildings and the 175-room hotel planned on the America Center site have been constructed and are in operation and two other commercial office/R&D buildings are permitted and under construction.

The proposed PD Rezoning would amend the site's current Planned Development Zoning (File PDC03-024) to include: (1) the removal of the approximately 6.7 acre River Commercial area adjacent to the Guadalupe River/Alviso Slough which was covered under a separate PD Zoning (PDC15-016), approved in March 2016; (2) an adjustment in the boundaries for the remaining land use areas to reflect minor lot line adjustments; and (3) a 190,000 square foot increase in the allowed commercial office/R&D development capacity on the site. The proposed Planned Development Permit would allow the construction of a fifth office building of approximately 192,350 square feet and the expansion of a previously approved five-story parking structure resulting in a total of 1,870 structured parking spaces.

Environmental Review

To evaluate the environmental impacts of the project, the City prepared a Subsequent Environmental Impact Report (SEIR) to the original Legacy Terrace FEIR. The Legacy Terrace FEIR was adopted by City Council Resolution No. 69392 on February 15, 2000. The current project is within the boundaries of the original Legacy Terrace project site. The Final SEIR included an updated evaluation of the existing environmental setting and identified new significant environmental effects not previously identified in the Legacy Terrace FEIR.

The Final SEIR evaluated project impacts, identified mitigation where feasible, and discussed and analyzed project alternatives.

Identified Significant and Unavoidable Impacts

The previous Legacy Terrace FEIR identified the following significant, unavoidable impacts that would be the same under the proposed project as analyzed in the Final SEIR:

- Aesthetics: views of the site from SR 237 and recreational trails in the vicinity
- Air Quality: vehicle-related operational emissions of NOx
- Noise: short-term, construction noise at sensitive residential receptors
- Transportation/Traffic: mixed-flow lane freeway segment traffic at SR 237 between Great America Parkway and North First Street (PM peak hour)

Furthermore, implementation of the proposed project would also result in the following new or substantially more severe significant impacts, which were found to be significant and unavoidable:

- Transportation: impacts at the following locations:

Mixed-flow lane freeway segment impacts:

- Eastbound SR 237 between Great America Parkway and North First Street (PM Peak Hour)
- Eastbound SR 237 between North First Street and Zanker Road (PM peak hour)
- Westbound SR 237 between I-880 and McCarthy Boulevard (AM peak hour)
- Westbound SR 237 between McCarthy Boulevard and Zanker Road (AM and PM peak hours)

High Occupancy Vehicle lane freeway segment impacts:

- Westbound SR 237 between I-880 and McCarthy Boulevard (AM peak hour)

Less than Significant Impacts with Mitigation

The Final SEIR found that the following impacts would be reduced to a less than significant level with mitigation:

- Air Quality: construction-related dust
- Biological Resources: impacts to nesting birds and burrowing owls
- Geology and Soils: differential settlement and seismicity
- Hazards and Hazardous Materials: soil contamination and landfill gas
- Hydrology and Water Quality: contaminated stormwater runoff
- Transportation/Traffic: intersection impacts at Lafayette Street and the Gold Street Connector

The Mitigation Monitoring and Reporting Program (MMRP) and Final SEIR further explained in detail how these mitigation measures reduce each identified above to a less than significant level.

Project Alternatives

As required under the CEQA, the Draft SEIR evaluated two no-project alternatives and one design alternative. These alternatives are as follows:

1. No Project – No Development Alternative: Under the No Project – No Development Alternative, the buildings and parking lots existing and under construction at the site would remain. Building 5 would not be constructed. The site would remain as zoned and approved for Buildings 1 through 4 and the parking garage.
2. No Project – Develop Under Current PD Zoning Alternative: The project site is currently designated Combined/Industrial Commercial in the City's General Plan and is located within a PD Zoning district. Under the current PD Zoning (File No. PDC99-044), 900,000 square feet of development is allowed for the Commercial Office/R&D portion of the project site. Of that total, 867,762 square feet have been constructed or is currently under construction and 32,238 square feet of entitlement remains.

Under the current PD zoning, a 32,238-square-foot office building could be constructed. A potential project under the No Project – Develop Under Current PD Zoning Alternative would likely be one story and would occupy the footprint of the proposed Building 5. The building would likely not be visible from SR 237 and nearby recreational trails as it would be shielded on all sides by existing, much taller structures. Pile driving would still be required for a smaller Building 5 and parking garage extension.

3. Reduced Intensity Alternative: A Reduced Intensity Alternative would potentially allow 55,000 additional feet of development resulting in an approximately 87,000-square foot, three-story Building 5 (assuming the same footprint as the proposed project and use of the remaining 32,238 square feet of yet unbuilt but entitled square footage at the site). The building would likely not be visible as it would be shielded on all sides by existing, taller structures. The extent of pile driving that might be necessary for a three-story structure is unknown.

These alternatives were evaluated and rejected as discussed in detail in the Final SEIR and City Council Resolution No. 78493.

Circulation and Public Comments

The Draft SEIR was circulated for public review and comment for 45 days, from June 12, 2017 to July 27, 2017. The City received a total of five written comment letters during the public circulation period. Comments received were from the California Department of Transportation; Santa Clara Valley Transportation Authority; Santa Clara Valley Audubon Society; M.R. Wolfe & Associates on behalf of OCA; and Steve Dunn, of SteelWave LLC. Issues raised in these comment letters include the following:

- Transportation analysis and impacts for project-generated traffic
- Transportation improvements (Great America Parkway/State Route 237 and Lafayette Street/Gold Street Connector intersections)
- Traffic mitigation measures (MM TRA-1.1 and MM TRA(C)-1.2)
- Transportation Demand Management (TDM) program
- Queuing analysis and queuing reductions
- Traffic congestion impacts
- Surrounding traffic improvements
- Improvements to pedestrian and bicycle access
- Bicycle parking and connectivity
- Transit access and ridership
- Impacts to potential sensitive archaeological sites and Native American consultation
- Nitrogen deposition impacts
- Air pollutant monitoring and toxic air contaminants
- Greenhouse gas emissions assessment

None of the comments received in response to the circulation of the Draft SEIR raised substantive issues that required re-circulation of the Draft SEIR. A First Amendment to the Draft EIR was prepared that provided responses to the comments submitted during the public circulation period and revisions to the text of the Draft SEIR, which was posted to the City's website on November 17, 2017. The First Amendment together with the Draft SEIR constitute the Final SEIR for the proposed project. The Final SEIR is included as Attachment 5 of this memorandum and available on the City's website at: <http://www.sanjoseca.gov/index.aspx?NID=5230>.

Planning Commission Public Hearing

On January 10, 2018, the Planning Commission held a public hearing to consider the Final SEIR, PD Rezoning, and PD Permit. On the day of the hearing, January 10, 2018, staff received an email from Mr. Espinoza claiming the Final SEIR inadequately analyzed cumulative toxic air contaminants, greenhouse gases, and air quality and congestion impacts generated by the project. Staff provided an oral response to the email at the hearing, noting responses to these comments were addressed on pages 22-29 and Appendix F of the First Amendment. Additionally, at the hearing, Mr. Espinoza spoke in opposition to the proposed project, citing concerns regarding traffic, air quality, and negative impacts to the community of Alviso.

The Planning Commission voted 5-0-1-1 (Bit-Badal absent, Vora abstained) to recommend that the City Council adopt a resolution certifying the Final SEIR, adopt the PD Rezoning ordinance, and approve the PD Permit.

City Council Public Hearing

On January 23, 2018, the City Council conducted a public hearing on the certification of the Final SEIR, consideration of an ordinance for a PD Rezoning File No. PDC15-058, and approval of PD File No. PD15-053. The day before the hearing, January 22, 2018, M.R. Wolfe & Associates, on

behalf of OCA, submitted a comment letter to the Mayor and City Council regarding the adequacy of thresholds for project-level and cumulative impacts from toxic air contaminants, mitigation for air quality and traffic impact, and greenhouse gas impacts analyzed in the Final SEIR. In accordance with Title 21 Environmental Clearance, Section 21091 of Public Resources Code, and Section 15088 of the CEQA Guidelines from the California Code of Regulations, the City is not required under CEQA to provide responses to public comments on environmental impact reports outside of the public circulation period, which ended on July 27, 2017. As a courtesy and for informational purposes, staff responded to these comments as part of the oral response at the City Council hearing.

Additionally, at the hearing Mr. Espinoza spoke in opposition to the adoption of the Final SEIR, stating the environmental document had inadequate analysis for noise, greenhouse gas emissions, and traffic congestion. Mr. Espinoza also stated the project would have negative quality of life impacts for the Alviso community; he opposed the modification of the boundary to remove the northeast portion of the site, and identified a plan created by the Lincoln Property Company describing amenities in the Alviso area that were not constructed.

The City Council voted 10-0-1 (Liccardo absent) to certify the Final SEIR (Resolution No. 78493), pass the PD Rezoning ordinance for publication (Ordinance No. 30067), and approve the PD Permit (Resolution No. 78494).

Reconsideration of City Council's Certification of Final SEIR

On January 25, 2018, Mr. Espinoza, on behalf of OCA, submitted a Notice of Request for Environmental Reconsideration claiming that the City Council failed to proceed in the manner required by CEQA by certifying a Final SEIR that fails to adequately disclose, evaluate, and/or mitigate all potentially significant environmental impacts caused by the project; and the City Council adopted findings in support of certification of the Final SEIR that are not supported by substantial evidence in the record. Attached to the request for reconsideration were copies of: (1) the comment letter submitted to the City Council on January 22, 2018, including comments by a third-party reviewer of the air quality health risk analysis, (2) Addendum to Legacy Terrace FEIR for the Residence Inn and Fairfield Inn & Suites America Center Court Project (File No. PDC15-016); (3) Development Activity Highlights and Five-Year Forecast (2007-2012); (4) an article titled "Watchin' the Tidelands Roll Away" in *Metroactive San Jose*; (5) Addendum to the Legacy Terrace FEIR for PD07-060; (6) Resolution No. 69392 for the adoption for the Legacy Terrace FEIR; and (7) Alviso Project Cargill/Collishaw Properties Plan by Lincoln Property Company.

Pursuant to Section 21.07.080 of the San José Municipal Code, an interested person can submit a timely request for reconsideration of a certified EIR by the City Council. Upon receipt of a request, the City Clerk is required to set a hearing before the City Council within 60 days of the request. At the reconsideration hearing, the City Council may affirm, reverse, or modify its original decision, and may adopt additional findings of fact based upon the evidence submitted in any and all hearings conducted by the city council concerning the matter.

If the City Council affirms the City Council's certification of the Final SEIR, then the proposed project can proceed with applications for grading, building, and other permits. Reversing the

certification of the Final SEIR would result in no environmental clearance for the proposed project and City Council's approval of the PD Permit would not be effective and the City Council cannot move forward with the final adoption of the rezoning ordinance. (Ordinance No. 30067). The project applicant would not be able to implement the proposed project.

ANALYSIS

The petitioner is OCA, an organization which Mr. Espinoza is President and who filed the reconsideration request with the City. Additionally, the firm of M.R. Wolfe & Associates has submitted comment letters on behalf of OCA and Mr. Espinoza. This section addresses a timeline of when the petitioner raised concerns during the environmental review process and summarizes staff's response to comments raised by the petitioner.

On July 26, 2017, M.R. Wolfe & Associates, on behalf of OCA, submitted a comment letter during the Draft SEIR public comment period. Responses to those comments were provided in the First Amendment to the Draft SEIR posted on the City's Active EIRs website and made available to the public on November 17, 2017. On January 10, 2018, the day of the Planning Commission hearing, staff received an email from Mr. Espinoza with claims that the EIR analysis was inadequate because it did not properly evaluate cumulative toxic air contaminants, greenhouse gas emissions, air quality, and transportation impacts generated by the project. Staff provided an oral response to the email at the Planning Commission hearing, noting responses to these comments were addressed on pages 22-29 and Appendix F of the First Amendment. On January 22, 2018, M.R. Wolfe & Associates, on behalf of OCA, submitted a comment letter to the Mayor and City Council regarding the adequacy of thresholds for project-level and cumulative impacts from toxic air contaminants, mitigation for air quality and traffic impact, and greenhouse gas emissions impacts analyzed in the Final SEIR. Staff provided an oral response to these comments at the January 23, 2018, City Council hearing.

Responses to Reconsideration of City Council's Certification of Final SEIR

The Notice of Request for Environmental Reconsideration application states that the grounds for the petition for environmental reconsideration are based on correspondence submitted to the City Council prior to its action on January 23, 2018, comments on the Draft SEIR during the public circulation period and responses thereto, and other relevant communications and correspondence contained in the administrative record maintained by the City.

As discussed above, in accordance with Title 21 of the San José Municipal Code, Section 21091 of the Public Resources Code, and Section 15088 of the CEQA Guidelines from the California Code of Regulations, the City is not required under CEQA to provide responses to public comments on the Draft SEIR outside of the public circulation period which ended on July 27, 2017. As a courtesy and for informational and disclosure purposes, staff provided oral responses at the City Council hearing to the comments submitted on January 22, 2018 to City Council. Furthermore, this comment letter to City Council was also attached to the reconsideration request. A summary of the comments and responses to the environmental issues raised in the January 22, 2018 comment letter were already provided as part of the administrative record but are further clarified and expanded below.

Comment A: Adequacy of thresholds for project-level and cumulative impacts from toxic air contaminants

This comment is a general statement outlining a potential process for determining whether there is a project-level or cumulative impact. It calls out that, “An arbitrary limit to the geographic scope of analysis is in error.” The combined threshold of 1,000 feet used in the toxic air contaminant (TAC) impact analysis is based on the Bay Area Air Quality Management District (BAAQMD) adopted thresholds of significance, which are based on substantial evidence and are described in detail below.

- 1. The health risk assessment fails to consider all toxic air contaminant sources that affect the project site in a step-one determination whether there is a significant cumulative impact.*

In June 2010, BAAQMD adopted thresholds of significance to assist in the review of projects under the CEQA. These thresholds were designed to establish the level at which BAAQMD believed air pollution emissions would cause significant environmental impacts under CEQA and were posted on BAAQMD’s website and included in BAAQMD’s updated CEQA Air Quality Guidelines (May 2017). The significance thresholds identified by BAAQMD were utilized in the America Center Phase III Project Final SEIR.

As discussed in CEQA Guidelines Section 15064(b), the determination of whether a project may have a significant impact on the environment calls for careful judgment on the part of the Lead Agency and must be based to the extent possible on scientific and factual data. The City of San José has reviewed the air quality impact thresholds updated by BAAQMD in May 2017 and regards these thresholds to be based on the best information available for the San Francisco Bay Area Air Basin and conservative in terms of the assessment of health effects associated with toxic air contaminants (TACs) and PM_{2.5}. The thresholds are based on substantial evidence as cited by BAAQMD in establishing the threshold.

- 2. The health risk assessment fails to consider whether the Project’s own incremental TAC risk is a “considerable contribution” to the significant cumulative impact.*

Within the CEQA Air Quality Guidelines, BAAQMD determined a single source (project-level) and combined source (cumulative) impact threshold for TACs and a methodology for computing risk levels based on substantial evidence as cited by BAAQMD. These thresholds and impact assessment methodology were utilized in the America Center Phase III Project analysis and form the basis for the less than significant impact determination for both the project-level and cumulative analysis with regard to TACs. While the proposed project does not include significant new sources of TACs (such as industrial equipment) other area sources were included in the analysis, such as mobile sources (Highway 237), stationary sources (generators on Lafayette Street), and Union Pacific Railroad operations at the tracks located to the east of the project site.

The reconsideration letter and attachments reference BAAQMD’s Community Air Risk Evaluation (CARE) program. CARE was initiated in 2004 to address community risk from TACs and PM_{2.5} and identify locations with high levels of risk from these pollutants. It encourages local jurisdictions to

develop and adopt Community Risk Reduction Plans to reduce the overall exposure to TAC and PM_{2.5} emissions and concentrations from new and existing sources. The City does not have an adopted Community Risk Reduction Plan. However, General Plan Policies MS-11.1 through MS-11.5 address community air risk as they require projects to evaluate TAC exposure to sensitive receptors and incorporate mitigation to avoid significant risks to health and safety. Further, as mentioned previously, the proposed project does not propose a new stationary source of TACs and PM_{2.5}. The project site is also not located within a BAAQMD-designated 2013 Cumulative Impact Area where TACs, PM_{2.5}, and ozone are estimated to have the greatest impacts on health.

Comment B: The Final SEIR fails to evaluate or require feasible mitigation proposals for air quality and traffic impacts that remain significant despite other mitigation.

Air Quality: The Final Amendment to the Draft SEIR updated and strengthened mitigation measure MM AIR-1.1 (to address exceedance of the BAAQMD emissions threshold for nitrous oxides [NOx] originally called out in the original 2000 Legacy Terrace FEIR) in response to comments received. The mitigation measure was revised to clarify that review and approval of a site transportation demand management (TDM) plan by City of San José Departments of Public Works and Planning Building & Code Enforcement staff and annual monitoring to measure the effectiveness of the TDM plan is required. The TDM Plan would be required to contain components or equivalent measures to result in a 10 percent reduction in projected weekday mobile emissions. Ten percent was chosen as a feasible target for reduction, given the project's location. As discussed in the First Amendment to the Draft SEIR, however, an additional 30 percent reduction would be required to reduce NOx impacts to a less than significant level. This reduction is not likely to be feasible given the location of the project and lack of existing transit infrastructure; therefore, the impact remains significant and unavoidable.

The proposed project would also be required to be built to the State of California's CalGreen code, which includes insulation and design provisions to minimize wasteful energy consumption. The proposed office building would also be built to achieve LEED Silver certification consistent with Council Policy 6-32. The project proponent anticipates that LEED certification would be achieved in part by implementing the following green building measures and design features:

- Solar-ready roof;
- Salvage or recycle at least 50 percent of construction waste;
- Use of recycled and/or local building materials; and
- Water efficient landscaping and irrigation design.

Traffic/Transportation: All traffic impacts would be reduced to a less than significant level with incorporation of proposed mitigation, except for Impact TRA-2, which identifies impacts on the identified 12 directional freeway segments and one high-occupancy vehicle (HOV) lane. Reduction of this impact to a less than significant level would require roadway widening to construct additional through lanes, thereby increasing freeway capacity, or would require reducing the project to be less than 50,000 square feet in size (as described in the Final SEIR Alternatives Analysis). It is not feasible for an individual project to bear the responsibility for implementing such extensive

transportation system improvements due to constraints in acquisition and cost of right-of-way. Furthermore, no comprehensive project/fee program to increase freeway capacity on the adjacent or nearby freeways (SR-237 and I-880) has been developed by Caltrans, so there are no identified improvement projects in which to pay fair share fees.

Because an improvement/fee program has not been developed by Caltrans for the impacted freeway segments, contributing towards unknown improvements would not constitute feasible mitigation. A voluntary contribution to regional transportation improvements is also not considered feasible mitigation under CEQA, in that there is no reasonable assurance the improvements will be constructed to reduce project impacts. CEQA requires that mitigation measures be fully enforceable through permit conditions, agreements, or other legally binding instruments (CEQA Guidelines Section 15126.4(2)). A voluntary contribution would not be legally binding and therefore, cannot be considered mitigation under CEQA. While the project would be required to prepare and implement a TDM program, which would reduce air quality emissions as well as the number of vehicle trips to and from the site, the impact under CEQA remains significant and unavoidable.

Comment C: The SEIR fails to acknowledge that the Project makes a considerable contribution to post-2020 greenhouse gas impacts and thus fails to propose feasible mitigation.

For development anticipated to be constructed prior to the end of 2020, the City of San José has not required individual projects to quantify project greenhouse gas (GHG) emissions if the project complies with the City's GHG Reduction Strategy and is consistent with the General Plan land use designation for the project site. Use of an adopted GHG Reduction Strategy to reduce GHG emission effects is consistent with the BAAQMD CEQA Air Quality Guidelines and CEQA Guidelines Section 15183.5. As described in Section 3.7.2.3 of the Draft SEIR, projects that are consistent with the GHG Reduction Strategy would have a less than significant impact related to GHG emissions through 2020 and would not conflict with targets in the currently adopted State of California Climate Change Scoping Plan through 2020. The primary test for consistency with the City's GHG Reduction Strategy is conformance with the General Plan Land Use/Transportation Diagram and supporting policies. The uses included in the proposed project are consistent with the San José General Plan's Land Use Transportation Diagram and are therefore, consistent with the City's GHG Strategy and impacts are less than significant. The project is also consistent with the mandatory measures from the City's GHG Reduction Strategy.

Additional Attachment Submitted by Petitioner

In addition to the comment letter which was submitted to the City Council on January 22, 2018, a number of other documents were attached to the Notice of Request for Environmental Reconsideration application. These documents, which included a third-party review of the air quality health risk analysis and various planning documents as described herein, did not offer relevant evidence on the grounds for reconsideration. The Addendum to Legacy Terrace FEIR for the Residence Inn and Fairfield Inn & Suites America Center Court Project (File No. PDC15-016) and Addendum to the Legacy Terrace FEIR for PD07-060 are environmental clearances for projects that are approved and built or currently under construction. City Council Resolution No. 69392, was for the certification of the Legacy Terrace FEIR which was adopted on February 15, 2000. The

Development Activity Highlights and Five-Year Forecast (2007-2012) is a document prepared by the City's Planning Department for the purpose of providing information and data on major development projects. The document entitled "Alviso Project Cargill/Collishaw Properties" prepared by Lincoln Property Company was a developer created and presented plan with no City approval or actions. Finally, the feature article entitled "Watchin' the Tidelands Roll Away," about development in general in Alviso, is from the August 20-26, 1998 issue of Metro San José weekly publication, and provides no specific commentary on the project. All of these supporting documents have no bearing or relevance to the reconsideration of the SEIR.

Conclusion

Pursuant to the Municipal Code, the grounds for reconsideration are limited to (i) an offer of relevant evidence which was improperly excluded at the prior City Council certification hearing, (ii) proof of facts which demonstrate that the City Council proceeded without, or in excess, of its jurisdiction, (iii) proof of facts which demonstrate that the City Council failed to provide a fair hearing, and (iv) proof of facts which demonstrate that the City Council abused its discretion by not proceeding in a manner required by law, rendering a decision which was not supported by findings of fact, or rendering a decision in which the findings of fact were not supported by the evidence.

None of the grounds for reconsideration apply because the City prepared a Final SEIR in compliance with CEQA and the letter accompanying the reconsideration request did not raise any new issues that were not previously addressed in the administrative record including the Final SEIR, or reiterated in staff's oral responses at the January 18, 2018 Planning Commission and January 23, 2018 City Council public hearings. Furthermore, the City provided a fair hearing with public notices mailed in accordance with the City's Public Outreach Policy (Policy 6-30), and the City Council's certification of the Final SEIR was supported by findings of fact supported by evidence in the record.

EVALUATION AND FOLLOW UP

As stated above, if the City Council affirms the prior certification of the Final SEIR, then the applicant may proceed with the acquisition of the necessary demolition, grading, and building permits and complete the proposed project identified under Planned Development Permit File No. PD15-053 approved by City Council on January 23, 2018 (Resolution No. 78494). The Planned Development Rezoning ordinance (Ordinance No. 30067) will also proceed with the final adoption.

Reversing the certification of the Final SEIR would result in no environmental clearance for the proposed project and therefore, City Council Resolution No. 78494 approving Planned Development Permit File No. PD15-053 would not be effective and the City cannot move forward with the final adoption of the Planned Development Rezoning ordinance (Ordinance No. 30067). Therefore, the applicant could not implement the proposed project.

POLICY ALTERNATIVES

As discussed in the Analysis section, the Council may:

- a. Affirm their decision on January 23, 2018 for certification of the Final Subsequent Environmental Impact Report; or
- b. Modify its decision on January 23, 2018; or
- c. Reverse its decision on January 23, 2018.

PUBLIC OUTREACH

For this item, staff followed Council Policy 6-30: Public Outreach Policy in that notices for the public hearings for the project were mailed on December 12, 2017, to the owners and tenants of all properties located within 1,000 feet of the project site. Furthermore, staff mailed a copy of this City Council Memorandum to adjacent property owners pursuant to Section 21.04.140 of the San José Municipal Code.

COORDINATION

The preparation of this memorandum was coordinated with the City Attorney's Office.

FISCAL/POLICY ALIGNMENT

This project is consistent with applicable Zoning and General Plan goals and policies as discussed in the Final SEIR, Planning Commission Staff Report, and Memorandum to the City Council from the Planning Commission.

CEQA

The America Center Phase III Project Subsequent Environmental Impact Report adopted by City Council Resolution No. 78493. The Subsequent Environmental Impact Report (Draft SEIR plus the First Amendment) and supporting documents can be found on the City's Active EIRs website at <http://www.sanjoseca.gov/index.aspx?NID=5230>.

/s/

ROSALYNN HUGHEY, ACTING DIRECTOR
Planning, Building and Code Enforcement

For questions about the environmental reconsideration, please contact Krinjal Mathur at (408) 535-7874.

- Attachments: Attach 1 – Environmental Reconsideration from Mark Espinoza of Organizacion Comunidad de Aviso, dated January 25, 2018.
- Attach 2 – Planning Commission Agenda item 5a. including Planning Commission Staff Report and all associated documents for Planning Commission Hearing dated January 10, 2018, found at:
<http://www.sanjoseca.gov/DocumentCenter/View/74020>
- Attach 3 – City Council Agenda item 18-057 including Memorandum to the City Council from the Planning Commission and all associated documents for City Council Hearing dated January 23, 2018, found at:
<https://sanjose.legistar.com/LegislationDetail.aspx?ID=3310476&GUID=4682DDD6-4E1B-44C4-95BB-D9B3DB6AF9B6&Options=&Search>
- Attach 4 – Email from Mr. Mark Espinoza prior to the January 10, 2018 Planning Commission Meeting, dated January 10, 2018
- Attach 5 – Final Subsequent Environmental Impact Report for the America Center Phase III Project adopted by the City Council on January 23, 2018 (Resolution No. 78493), found at:
<http://www.sanjoseca.gov/index.aspx?NID=5230>
- Attach 6 – City Council Resolution No. 78493; City Council Resolution No. 78494; Ordinance No. 30067.

**Note: All attachments are available via a link on the City Council Agenda for the March 13th, 2018 Hearing. The City Council Agendas can be found at:
<http://www.sanjoseca.gov/index.aspx?NID=5897>.**