



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Christopher Burton

SUBJECT: SEE BELOW

DATE: September 14, 2021

Approved

Date

9/14/2021

COUNCIL DISTRICT: 3

SUPPLEMENTAL

SUBJECT: FILE NOS. SP20-005 & T21-015. SPECIAL USE PERMIT AND VESTING TENTATIVE MAP FOR PROPERTY LOCATED ON THE NORTHWEST CORNER OF SOUTH ALMADEN BOULEVARD AND WOZ WAY.

REASON FOR SUPPLEMENTAL

This memorandum responds to a comment letter from Shute, Mihaly & Weinberger LLP, representing the Sierra Club Loma Prieta Chapter, submitted to the City Council on Friday, September 10, 2021. This letter raises new concerns about the Draft Supplemental Environmental Impact Report (DSEIR), First Amendment to the DSEIR, and Planning Commission materials for the project. This letter was submitted outside of the public comment period for the DSEIR and raises new analysis and information not included in the original comment letters submitted by the Sierra Club on September 21, 2020, and the joint comment letter among the Sierra Club and other environmental groups during public circulation and prior to the August 25, 2021 Planning Commission hearing. Although staff is not obligated under the California Environmental Quality Act (CEQA) to respond to the untimely letter, staff prepared additional written responses to the letter as a matter of courtesy. The comment letter with staff's responses are attached to this supplemental memorandum.

BACKGROUND

A comment letter from Patricia Larkin, representative of Shute, Mihaly & Weinberger LLP representing the Sierra Club Loma Prieta Chapter was submitted to staff on Friday, September 10, 2021 at 12:01 PM. The letter contains 30 pages of comments with 178 pages of additional analysis to supplement the content of the letter. The letter includes statements and concerns about the DSEIR, First Amendment to the DSEIR, and content of the staff report and materials to the Planning Commission for the project that took place on August 25, 2021.

The DSEIR was circulated for public review for a period of 52 days from July 31, 2020 through September 21, 2020. This period exceeds the minimum 45-days public circulation period

pursuant to the CEQA guidelines. The City granted an extension of the public comment period from September 14, 2020 to September 21, 2020, in response to a joint request from the Sierra Club Loma Prieta Chapter, the Guadalupe River Park Conservancy, the Santa Clara Valley Audubon Society, the South Bay Clean Creeks Coalition, the California Native Plant Society Santa Clara Valley Chapter, Keep Coyote Creek Beautiful, and the Committee for Green Foothills. The Sierra Club Loma Prieta Chapter submitted a letter to the DSEIR on September 21, 2020. Staff published a First Amendment to the DSEIR, including responses to comments received on the DSEIR on August 13, 2021. The Sierra Club, California Native Plant Society, and the Santa Clara Valley Audubon Society submitted a letter responding to the City's responses in the First Amendment on August 23, 2021, prior to the Planning Commission hearing. Staff verbally responded to these concerns during their presentation at the Planning Commission hearing.

The September 10, 2021 letter contains new analysis on the content of the DSEIR beyond those made in the joint letter submitted by the Sierra Club and other environmental groups on September 21, 2020. Because this new letter was submitted after the public circulation period on the content of the DSEIR, it is untimely. Although staff is not obligated under CEQA to respond to the untimely letter, staff has prepared additional written responses to the letters to supplement the information that was already disclosed and addressed in the DSEIR, First Amendment, staff reports and materials for this project at all public hearings for full disclosure and for the complete administrative record.

The Environmental Impact Report (EIR) for the proposed project has been prepared in full compliance with CEQA and its implementing guidelines. The analysis is detailed, and the conclusions are based on facts and substantial evidence in the records. Based on the analysis disclosed in the DSEIR, First Amendment, associated technical reports, and all other hearing materials for the project, staff maintains that the EIR is adequate, as a full environmental analysis was completed consistent with CEQA statutes, guidelines, and with the City's policies and requirements for CEQA compliance. The Attachment provides additional detailed responses to the new letter as a supplemental to the administrative record pertaining to the environmental analysis of the subject project.

COORDINATION

This memorandum was coordinated with the City Attorney's Office.

/s/
CHRISTOPHER BURTON, Director
Planning, Building and Code Enforcement

For questions please contact Robert Manford, Deputy Director, at (408) 535-7900.

Attachment: Additional Response Letter

The following comment letter was submitted after the public review period ended on September 21, 2020 and after the project was heard by the Planning Commission on August 25, 2021. The City is responding to these comments as a courtesy, though it is not required under the CEQA regulations.

A. Shute Mihaly & Weinberger LLP (September 10, 2021)

Comment A.1: This firm represents the Sierra Club Loma Prieta Chapter in connection with the proposed Almaden Office Project (“Project”). The proposed Project and the City’s Supplemental Environmental Impact Report (“SEIR”) suffer from numerous flaws. Most prominently, the Project conflicts with riparian protections embodied in the City’s General Plan and City Council Policy 6-34: Riparian Corridor Protection and Bird Safe Design. In addition, the SEIR fails to comply with the requirements of the California Environmental Quality Act (“CEQA”), Public Resources Code § 21000 et seq., and the CEQA Guidelines, California Code of Regulations, title 14, § 15000 et seq.

This letter is submitted along with the reports prepared by Ric Reinhardt, consulting geohydrologist/civil engineer with MBK Engineers, attached as Exhibit 1 and Dr. Shani Kleinhaus, ecologist, attached as Exhibit 2. We respectfully refer the City to the aforementioned attached reports, both here and throughout these comments.

I. Background

The Project site is located immediately adjacent to the Guadalupe River, the Guadalupe River Trail, and surrounding riparian area. Initial Study at Figure 2.4-3. The Project is subject to Council Policy 6-34, which implements the 2040 General Plan goals, policies, and actions for the protection of riparian corridors and bird-safe design. As discussed in Section II below, Council Policy 6-34 requires new buildings in existing urban infill areas, such as the Almaden Project, to have a minimum 100-foot setback from riparian habitats. In contravention of City policy, the proposed Project includes an inadequate setback from the adjacent riparian area.

Approval of a project without the required riparian setback would set a harmful precedent for development adjacent to the City’s riparian areas. Several proposed projects in the downtown area along the river and tributaries have already requested exceptions to City Policy 6-34. For example, the Downtown West Mixed-Use Plan (a.k.a. Google project) was granted a reduced setback from the riparian area. Similarly, the 280 Woz Way project is proposing a 35-foot setback from the Guadalupe River (rather than the required 100 feet). If each of these projects is granted a reduced setback, the City will effectively set a pattern of allowing setbacks that are between zero and 35 feet from the riparian area, in stark contrast to the 100-foot requirement.

Response A.1: Responses to specific comments are provided below.

Comment A.2: For the proposed Project, the City is contemplating entirely waiving river setback requirements in contravention of City policy, resulting in the loss of even more riparian area along the river. The Project would crowd the River Trail and riparian area with an imposing 16-story glass building that would cast substantial shade on the adjacent public park and riparian areas. It would also significantly degrade existing riparian habitat, both through physical encroachment and by shading the area, which is anticipated to harm the long-term health and growth of plants. SEIR at 49. The Project’s location immediately abutting this riparian area, without the required setback, could

also degrade water quality in the Guadalupe River, and alter natural stream morphology and functions.

Response A.2: City Council Policy 6-34 provides for exceptions as noted on page 49 of the Draft SEIR. The administrative record provides the analysis and support for the City Council to consider in making the findings to approve the proposed setback consistent with the policy.

While the commentor provides a general overview of the discussion on page 49 of the Draft SEIR, the commentor fails to acknowledge the remainder of the analysis. As discussed on page 50 of the Draft SEIR, since the existing riparian habitat immediately adjacent to the site is of moderate quality (as opposed to high quality) and is not expected to attract a large number of birds, implementation of the project by itself would not affect regional populations of bird species that use the site nor would it result in a substantial degradation of riparian bird communities in the segment of the Guadalupe River adjacent to the site. The project was found to have a less than significant project level impact on Guadalupe River. Furthermore, mitigation is included to offset project impacts on the ecological functions and values of the riparian corridor due to the identified significant cumulative impact (page 56 of the Draft SEIR).

In addition, as mentioned in the Draft SEIR and First Amendment to the Draft SEIR, the project is subject to City Council Policy 6-34 and shall comply with all applicable findings and policies prior to the approval of the project. The commentor should refer to Master Response 1, page 6, of the First Amendment to the Draft SEIR.

Comment A.3: At a time when the City is promoting increased density downtown, the City should be enforcing its policies to protect and restore remaining riparian habitat and open spaces as natural respites for urban wildlife and as an amenity for City residents. Instead, the Project would allow construction of a massive building that is clearly out of scale for the site, and will have serious long-term consequences, not only for area residents, but for workers and visitors from the region. Those consequences include loss of open space; loss of riparian habitat; a significant loss of sunlight; visual impacts; an increased risk of erosion and sedimentation (both at the site and elsewhere on the river); and an increased risk of water pollution. Perhaps most egregious, setting a precedent for reduced or non-existent riparian setbacks for other projects proposed along the river would lead to further degradation of the river and riparian areas.

Response A.3: As mentioned in the First Amendment to the Draft SEIR, the proposed project would not set a precedent for future development along the riparian corridor. Each development site is unique and would be analyzed on a project-by-project basis. The commentor did not provide specific information to support these statements. Refer to Response A.2 and responses below.

Comment A.4: The SEIR suffers from several major problems and is insufficient to support approval of the Project. First, the SEIR describes the Project in a manner that is both incomplete and misleading to the public and decision-makers. As discussed in more detail below, the SEIR ignores or substantially understates the severity and extent of a range of environmental impacts, including,

but not limited to, effects on hydrology, water quality, and biological resources. In addition, in numerous places, the SEIR fails to adequately analyze the Project's cumulative impacts.

To ensure that the public and the City's decision-makers have adequate information to consider the effects of the proposed Project—as well as to comply with the law—the City must require Project revisions to comply with the General Plan and City Policy 6-34, and then circulate a revised SEIR that properly describes the whole of the Project, analyzes all of its impacts (direct, indirect, and cumulative), and considers meaningful, feasible mitigation measures that would ameliorate those impacts. *See* CEQA Guidelines § 15002(a)(1) (one of CEQA's "basic purposes" is to "[i]nform governmental decision makers and the public about the potential, significant environmental effects of proposed activities"). Alternatively, the City should consider approval of a Reduced Development Alternative Project that would include a larger setback consistent with General Plan and City Policy requirements to protect riparian habitat and water quality.

Response A.4: The commenter provides no specific details on the insufficiencies of the SEIR in this comment. Therefore, no further response is required. See responses below.

Comment A.5: II. Approval of the Proposed Project Violates the City's Riparian Setback Requirements.

A. The City's Riparian Corridor Policy Study requires a minimum 30-foot setback, which the Project violates.

The 1999 Riparian Corridor Policy Study establishes that "development adjacent to riparian habitats generally should be set back 100 feet from the outside edge of the riparian habitat (or top of bank, whichever is greater)." Policy Study at 31. While the Policy Study provides limited exceptions to this setback requirement, including exceptions for locations in or near Downtown San Jose and urban infill locations, the Policy Study is clear that these minimum reduced setbacks "should be . . . no less than 30 feet or no less than the average of existing setbacks on adjacent properties, whichever is greater." Policy Study at 33. Simply put, "[m]inimum reduced setbacks for those limited redevelopment sites described under the Setback Exceptions section . . . should never be less than 30 feet." *Id.* (emphasis added).

The Project does not conform with the Policy Study's setback requirement. Even if the Project qualifies for an enumerated exception that would allow a reduction of the standard 100-foot setback, the Policy Study is clear that the Project's setback can never be less than 30 feet. Here, however, the Project setback would be between zero and approximately 26 feet from the riparian corridor along the length of the site and would encroach within approximately 1.8-acres of the 100-foot setback area. SEIR at 49. The Project towers' upper floors would have a setback ranging from 3.92 feet to 32.5 feet to the edge of the riparian corridor and the underground parking garage would have a setback ranging from 1.5 feet to 34.25 feet to the edge of the riparian corridor. PC Staff Report, Item 5.a at 10. Any Project setback less than 30 feet violates the mandates from the Policy Study.

Response A.5: The Policy Study provides guidance for a range of riparian corridor setbacks, based on types of land uses, activities, development and physical attributes of a riparian project's site. As the General Plan was adopted in 2011, this guidance was incorporated and referenced as the latest guidance for analyzing projects within

the City of San José. While the Riparian Corridor Policy Study was incorporated as guidance within the General Plan, the Study itself was never formally adopted as a policy by the City Council as explained in Master Response 1, page 6, of the First Amendment to the Draft SEIR. Further, the Riparian Corridor Policy Study was replaced by Council Policy 6-34 in 2016. This comment does not provide new information that would change the project's impact, provide new information that would require additional analysis or result in new significant impacts or mitigation measures than those analyzed and disclosed in the Draft SEIR, First Amendment, or associated appendices.

Comment A.6: In addition, the Policy Study only allows for reduced setback requirements under certain conditions. It specifies that in certain circumstances “a reduced setback may be considered if:

“There is no evidence of stream bank erosion or previous attempts to stabilize the stream banks which could be *negatively affected by the proposed development.*”

Policy Study at 32. In this case, as discussed in more detail in the MBK Engineers Report, the proposed Project site has visible erosion on the stream bank. *See* MBK Report at 5 and accompanying attachment A. In addition, as the MBK Report explains, the Project as proposed (with only zero to 26 feet from the riparian area) will reduce the area of flood plain, which would limit local agencies' ability to mitigate flood risk, and which would likely result in the need to remove significant portions of the riparian area to accommodate a floodwall or other forms of bank protection. These measures will not only negatively affect the stream bank, but will also further degrade the riparian area.

Response A.6: While the commenter states that the MBK Report notes the proposed project site has visible erosion on the stream bank, the MBK Report actually states that “A review of the site photos (Attachment A) shows areas of minor erosion.” In addition, the MBK Report does not specifically state that the proposed setbacks will reduce the area of flood plain, limiting local agencies' ability to mitigate flood risk, and significant portions of the riparian area to accommodate a floodwall or other forms of bank protection. What the MBK Report actually states is that “Over time, the natural riverine geomorphic processes are expected to result in increased erosion at the project site as the river channels naturally meander and erode their existing banks. With the proposed development being 35 feet from the top of bank, a hard scape solution, such as riprap, will require removal of the riparian vegetation...”

With regard to mitigating flood risk and potential flood improvement options for Guadalupe River, that is outside the scope of proposed project. The City does not have any policy or regulation which requires projects to be designed for a potential future scenario that cannot be accurately forecasted in terms of timing or degree of effect. It would be speculative for the commenter or the City to try to predict what additional flood control measures would be implemented by Valley Water should the need arise in the future because actual flood effects are unknown and new technologies may be available. There are too many external factors to make a reasonable assumption of the effects of a building setback on one parcel located along less than 1,000 linear feet of the Guadalupe River riparian corridor with regard to potential future flooding or flood control measures. If, in the future, it is determined

that additional flood control is required on Guadalupe River beyond what is already in place, the Lead Agency in charge of the project would have to complete environmental review under CEQA based on the specific details of the project and mitigate any impacts to the riparian corridor that may result.

The Guadalupe River has had significant flood improvements to contain floodwaters within its banks. Furthermore, as explained in Response K.6 (page 54) of the First Amendment to the Draft SEIR, consistent with the Downtown Strategy 2040 FEIR the project would be required to implement the identified erosion control measures and prepare a Storm Water Pollution Prevention Plan (SWPPP) as discussed in Sections 4.7 and 4.10 of Appendix A of the SEIR. Streambank erosion occurs when soil, rock, and vegetation are removed from the streambank. Requirements for grading, excavation, and erosion control are included in Chapter 17.04 (Building Code, Part 6 Excavation and Grading). In addition, the project would be required to comply with the Downtown Strategy 2040 FEIR measures listed on page 79 of Appendix A of the Draft SEIR. The project's SWPPP shall include measures for soil stabilization, sediment and erosion control, non-stormwater management, and waste management to be implemented during all demolition, site excavation, grading, and construction activities.

Required compliance with the Municipal Regional Permit (MRP) for post-construction runoff would also reduce the potential for erosion of the streambank from project runoff compared to the existing condition. The project, therefore, would mitigate its effects and is not required to mitigate for effects not caused by the project.

Comment A.7: B. The Planning Commission Staff Report erroneously argues Council Policy 6-34 replaces the Policy Study.

The City attempts to circumvent the Policy Study's mandatory requirements by claiming that "[t]he 2016 adopted Council Policy 6-34 replaces the 1999 Riparian Corridor Policy Study." See PC Staff Report, Item 5.a at 7. This argument is false.

As a threshold matter, the City's existing General Plan *requires* compliance with the Policy Study. Specifically, under General Plan Policy ER-2.1, the City must "ensure that new public and private development adjacent to riparian corridors in San Jose are consistent with the provisions of the City's Riparian Corridor Policy Study." The City has not replaced this General Plan policy, and cannot write its way around the General Plan's express requirement to comply with the Policy Study. Approving the Project in violation of the Policy Study's setback requirements violates the General Plan itself.

Nor does Council Policy 6-34 suggest that it is meant to override the standards in the Policy Study. In fact, Council Policy 6-34 states the opposite: its "general guidelines for setbacks from Riparian Corridors" are "consistent with recommendations from the Policy Study." Council Policy 6-34 at 3.

Response A.7: General Plan Policy ER-2.1 states that new public and private development adjacent to riparian corridors in San José are consistent with the

provisions of the City's Riparian Corridor Policy Study and any adopted Santa Clara Valley Habitat Conservation Plan/Natural Communities Conservation Plan (HCP/NCCP). As discussed in the First Amendment to the Draft SEIR, the Riparian Corridor Policy Study was incorporated as guidance within the General Plan and was never formally adopted as a policy by City Council. The Riparian Corridor Policy Study informed the requirements in the Riparian Corridor Protection and Bird-Safe Design policy (City Council Policy 6-34) adopted in 2016. While the City's General Plan riparian goals reference the City's Riparian Corridor Policy Study and the HCP and state that a 100-foot riparian setback is the standard to be achieved, it recognizes that there will be exceptions.

In addition to Riparian Corridor Policies ER-2.1 through ER-2.5, Chapter 3 page 27 of the General Plan also lists specific actions (ER-2.6 through ER-2.8) required to implement the aforementioned policies. Specifically, Action ER-2.6 states:

Develop a City Council Policy based on the City's Riparian Corridor Policy Study and HCP/NCCP to successfully implement the riparian goals and policies of the Envision General Plan, which recognizes that a 100-foot setback is the standard to be achieved in all but a limited number of instances, where no significant environmental impacts would occur.

Action ER-2.8 states:

Develop and require the use of a criteria checklist from the Riparian Corridor Policy Study to evaluate new developments that propose to use riparian setback exceptions.

In adopting Council Policy 6-34, the City met the intent of the General Plan policies with regard to the protection of riparian corridors. As explained in Master Response 1 of the First Amendment to the Draft SEIR, the City's assessment of the project found it to be consistent with Council Policy 6-34.

Comment A.8: The City Council adopted Council Policy 6-34 on August 23, 2016 to provide guidance consistent with the 2040 General Plan goals, policies and actions for the protection of riparian corridors and bird-safe design, which themselves require compliance with Policy Study. *See* Staff Report for the August 25, 2021 Planning Commission hearing (hereafter "PC Staff Report"). Council Policy 6-34 was developed based on the Policy Study and the Habitat Conservation Plan in order to further implement the General Plan's riparian goals and policies. First Amendment to SEIR at 7-9. Council Policy 6-34 provides guidance on how projects should be designed to protect and preserve the City's riparian corridors, such as incorporating "riparian setback recommendations and exceptions from the 1999 Policy Study." PC Staff Report, Item 5.a at 7.

Like the Policy Study, Council Policy 6-34 requires a minimum 100-foot setback from riparian habitats for new buildings in existing urban infill areas, new residential buildings, as well as commercial/institutional buildings. Neither the PC Staff Report nor the SEIR dispute that the Project is subject to this minimum setback requirement. PC Staff Report, Item 5.a at 10; First Amendment to SEIR at 8. Instead, the City argues that the Project falls under the enumerated exceptions to the 100-foot setback requirement and is thus entitled to a reduced setback. *Id.* However, even if true, a

reduced setback does not mean no setback or an arbitrarily determined setback, as the City appears to advocate. *See* PC Staff Report, Item 5.a at 7, 15; First Amendment to SEIR at 8-9.

Response A.8: See Response A.7.

Consistent with the process stated in Policy 6-34, a project is required a 100-foot setback, but is able to qualify for a reduced setback exception if it meets some of the criteria in Section A.2) of the policy. Exceptions to Council Policy 6-34 include far more conditions than mentioned by the commenter, including for sites located in downtown, sites with existing legal uses within the minimum setback, and sites with unique geometric characteristics and/or disproportionately long riparian frontages in relation to the width of the minimum Riparian Corridor setback. The City, as Lead Agency, is best equipped to evaluate the conformance of a project with the City's adopted policies.

Comment A.9: Rather than provide a specific limitation on reduced setbacks, Council Policy 6-34 relies on the Policy Study to supplement its own guidance. According to Council Policy 6-34, the setback and buffer widths provided in Council Policy 6-34 “are intended to provide *general guidance* for site design. For actual setback and buffer dimensions, the specific setbacks section in Chapter 3 of the Policy Study *should* be consulted.” Council Policy 6-34 at 3, fn. 2 (emphasis added). Thus, Council Policy 6-34 does not supersede the Policy Study, but rather incorporates its specific setback requirements. *Id.*

The Policy Study and Council Policy 6-34 work together to establish requirements for development adjacent to the City's riparian habitats. The documents themselves are clear: the purpose of Council Policy 6-34 is to provide “*general guidelines*” (Council Policy 6-34 at 3) while the Policy Study “*explore[s] in detail*” setback policies for riparian corridors. Policy Study at 1. Read together, the mandate is unambiguous: 100-foot setbacks may be reduced if a project falls under an enumerated exception, but under no circumstances may the reduced setback be less than 30 feet. The Project plainly conflicts with this binding requirement.

Response A.9: Refer to Response A.7 in this document and Master Response 1 of the First Amendment to the SEIR for additional background and application of the Riparian Study versus the City Council Policy 6-34. The commenter suggests that the setbacks identified in the Riparian Corridor Policy Study are prescriptive, which is incorrect. Page 31 of the Riparian Corridor Policy Study states:

“The following setback *guidelines* (emphasis added) are intended to provide basic site design guidance for new development adjacent to a riparian corridor. Setback distances for individual sites may vary if consultation with the City and a qualified biologist, or other appropriate means, is more appropriate for consistency with riparian preservation objectives.”

Response A.9: Consistent with the intent and purpose of adopted General Plan and Council policies, the City of San José evaluated the proposed project and the biological assessment prepared by the City's consultant and concluded that the proposed setbacks did not conflict with Council Policy 6-34. While the commenter may disagree with the City's findings, that does not negate the City's conclusion

which was based on expert analysis. This comment does not provide new information that would change the project's impact, provide new information that would require additional analysis or result in new significant impacts or mitigation measures than those analyzed and disclosed in the Draft SEIR, First Amendment, or associated appendices.

Comment A.10: The City has recently confirmed that the Policy Study is still binding.

Moreover, contrary to staff's assertion, the City has continued to rely on the Policy Study following adoption of Council Policy 6-34. The City's website and recent planning documents repeatedly cite to the Policy Study for riparian development standards, confirming that the Policy Study is still binding and has not been superseded. As of September 7, 2021, the City of San Jose website clearly states that the Policy Study "supplements the riparian . . . policies of the General Plan," and "describes how development adjacent to these corridors should be limited or controlled to avoid environmental damage."¹

The 2019 Master Plan Amendment for the Mineta San Jose International Airport similarly incorporates and utilizes the Policy Study. According to the Master Plan Amendment's Biological Resources Report, the City's "riparian buffer policy is administered through use of a Riparian Corridor Policy Study document that describes suggested buffer widths."² **Error! Hyperlink reference not valid.** Additionally, the 2020 Biological Report for the Villa Del Sol Mixed-Use Project explains that that Policy Study, which was "*codified as policy*" through Council Policy 6-34, dictates circumstances that may warrant consideration of setbacks less than 100 feet.³ The Villa Del Sol report goes on to confirm that the Policy Study, together with Council Policy 6-34, the Habitat Plan, and the City's General Plan "currently *define* the City of San Jose's riparian corridor policy."⁴ The City cannot arbitrarily argue that the Policy Study is irrelevant or superseded by Council Policy 6-34 for the propose Project when the City continues to recognize the Policy Study's requirements for other projects.

Response A.10: See Response A.9. The claim that the 1999 Riparian Corridor Policy Study is still binding and used for recent projects is incorrect. The City evaluated impacts to riparian habitat in the Mineta San Jose International Airport Master Plan Amendment FEIR under Council Policy 6-34, not the Policy Study as disclosed in Section 4.4.2.5 of the Airport EIR. Furthermore, the 2020 Biological Report for the Villa Del Sol Mixed-Use Project stated that the Policy Study, the Habitat Plan, and the City Council Policy 6-34 are all basis for riparian findings and considerations. However, consistent with application, findings to riparian effects and exceptions are made specifically to the City Council Policy 6-34 (Section 4 of the 2020 Biological Report for Villa Del Sol Mixed-Use Project). Therefore, both projects made findings

¹ Policy Studies, City of San Jose Website, available at <https://www.sanjoseca.gov/your-government/departments/planning-building-code-enforcement/planning-division/about-us/policy-studies>.

² Master Plan Amendment for Mineta San Jose International Airport Biological Resources Report at 77, available at <https://www.sanjoseca.gov/home/showpublisheddocument/61652/637304476601070000>.

³ Villa Del Sol Project Riparian Habitat Evaluation at 9, available at <https://www.sanjoseca.gov/home/showpublisheddocument/68681/637469341716670000> (emphasis added).

⁴ Villa Del Sol Project Riparian Habitat Evaluation at 5, available at <https://www.sanjoseca.gov/home/showpublisheddocument/68681/637469341716670000> (emphasis added).

to the City Council Policy 6-34. This comment does not provide new information that would change the project's impact, provide new information that would require additional analysis or result in new significant impacts or mitigation measures than those analyzed and disclosed in the Draft SEIR, First Amendment, or associated appendices.

Comment A.11: III. Approval of the Project Is Inconsistent with the City's General Plan.

The state Planning and Zoning Law (Gov't Code § 65000 et seq.) requires that development approvals be consistent with a jurisdiction's general plan. "Under state law, the propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements." *Resource Defense Fund v. County of Santa Cruz* (1982) 133 Cal.App.3d 800, 806. Accordingly, "[t]he consistency doctrine [is] the linchpin of California's land use and development laws; it is the principle which infuses the concept of planned growth with the force of law." *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1336.

It is an abuse of discretion to approve a project that "frustrate[s] the General Plan's goals and policies." *Napa Citizens for Honest Gov't v. Napa County* (2001) 91 Cal.App.4th 342, 379. A project need not present an "outright conflict" with a general plan provision to be considered inconsistent; the determining question is instead whether the project "is compatible with and will not frustrate the General Plan's goals and policies." *Napa Citizens*, 91 Cal.App.4th at 379.

Here, the proposed Project does more than just frustrate the General Plan's goals. It plainly conflicts with the City of San Jose's General Plan, specifically General Plan policies that protect riparian resources such as ER-2.1 and ER-2.2. General Plan Policy ER-2.1 requires development to be "consistent with the provisions of the City's Riparian Corridor Policy Study and any adopted Santa Clara Valley Habitat Conservation Plan/Natural Communities Conservation Plan (HCP/NCCP)." As described above, the Project's proposed setbacks would violate the Policy Study by allowing development within 30 feet from riparian habitats, and would therefore be inconsistent with General Plan Policy ER-2.1. *See* Section II.A., *supra*.

Response A.11: See Response A.9.

Comment A.12: Additionally, General Plan Policy ER-2.2 specifically requires a 100-foot setback from riparian habitat "in all but a limited number of instances, *only where no significant environmental impacts would occur.*" (Emphasis added.) The SEIR concludes that encroachment of the project within the 100-foot setback would result in significant unavoidable impacts to adjacent riparian communities, including reduction of wildlife, habitat shading, and expected bird collisions. SEIR at 47 ("The proposed project would result in a significant unavoidable cumulative impact to the Guadalupe River riparian corridor beyond what was evaluated in the Downtown Strategy 2040."); 49 (detailing expected impacts to riparian corridor). But the Project is not setback 100-feet from riparian habitats. This plainly violates General Plan Policy ER-2.2.

Response A.12: The SEIR did not identify a project-level impact with regard to the riparian setback. The SEIR did identify a cumulative impact resulting from previous development along the river. The analysis (page 57 of the SEIR) states that "...if encroachment is generally permitted along streams within the City of San José and/or SCVHP permit area because the adjacent riparian habitat is determined to be

moderate or low in quality, the encroaching development would contribute to a significant cumulative impact by further reducing habitat quality throughout a large area.” The project’s contribution to the cumulative effect, which is the result of a new type of development, was identified because the project would have a greater impact on the adjacent corridor compared to existing conditions. Nevertheless, the analysis does not require a 100-foot setback to reduce the impact to less than significant. The fact that General Plan Policy ER-2.2 looks to “ensure that a 100-foot setback from riparian habitat is the standard to be achieved...” does not require 100-foot setbacks to be prescriptive for all development within the City with riparian adjacencies. This comment does not provide new information that would change the project’s impact, provide new information that would require additional analysis or result in new significant impacts or mitigation measures than those analyzed and disclosed in the Draft SEIR, First Amendment, or associated appendices.

Comment A.13: IV. The City Cannot Make the Findings Needed to Approve the Project.

As detailed in the PC Staff Report, the City must make a number of findings to lawfully approve the Project. Substantial evidence in the record fails to support a number of these findings.

For example, in order to issue a Special Use Permit for the Project, the City must find that the special use permit is “consistent with and will further the policies of the general plan.” San Jose Municipal Code § 20100.820 (A)(1). The Special Use permit must also be “consistent with applicable city council policies.” *Id.* § 20100.820 (A)(3); See also Section 20.110.630 (establishing same standard). Moreover, section 20.100.820 requires that any such Findings have to be substantiated or the decision-making body shall deny the application. *Id.* at B.

The record lacks substantial evidence to support these findings. As described above, the Project’s proposed setbacks would violate the Policy Study and General Plan policies ER-2.1 and 2.2 by allowing development within 30 feet from riparian habitats and ignoring the General Plan’s prohibition of setbacks less than 100 feet when significant environmental harm will result. *See* Section III., *supra*. In addition, the SEIR itself demonstrates that the Project would have several impacts that would render it incompatible with not just these policies, but also Council Policy 6-34. *See* Section II., *supra*. The development would also generate substantial environmental impacts, including significant, unmitigated project and cumulative impacts to the adjacent riparian habitat and bird species from noise, pollution, increased traffic, and construction. *See* Section VI., VII., *infra*.

Despite these inconsistencies, the City’s CEQA Findings erroneously conclude that the Project is consistent with each of the Zoning Code’s requirements. *See* PC Staff Report, Item 5.a at 20-23. These Findings however cannot be supported by substantial evidence and do not supply the logical step between the proposed decision and the facts in the record, as required by state law. Indeed, the City’s Findings are directly contradicted by evidence in the Project’s planning documents, as described throughout this letter. As a result, the City cannot lawfully rely on these Findings to support approving the Project.

Response A.13: Refer to Responses A.7 and A.9 in this document and Master Response 1 of the First Amendment to the SEIR for additional background and application of the Policy Study versus the adopted City Council Policy 6-34. Refer to the administrative record including the Draft City Council Permit Resolution for the Special Use Permit for all findings under the Municipal Code, General Plan policies,

and applicable City policies and regulations.

Comment A.14: IV. The City Cannot Make the Findings Needed to Approve the Project.

Under CEQA, the EIR's inclusion of a clear and comprehensive description of the proposed project is critical to meaningful public review. *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193. *County of Inyo* explained:

“A curtailed or distorted project description may stultify the objectives of the reporting process. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the “no project” alternative) and weigh other alternatives in the balance.”

Id. at 192-93. Thus, “[a]n accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.” *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 730. Courts have found that even if an EIR is adequate in all other respects, the use of a “truncated project concept” violates CEQA and mandates the conclusion that the lead agency did not proceed in the manner required by law. *Id.* at 729-30.

Response A.14: This comment does not provide any specific detail, information, or data relating to the commenter's concerns; therefore, no response can be provided.

Comment A.15: The description of the proposed Project is unstable because it has continually shifted since the start of the CEQA process. A table of Minimum Setback from Boundaries, provided in the First Amendment to the Draft SEIR shows that, since January 2019, the proposed Project setbacks from various boundaries have changed at least three times. First Amendment to the Draft SEIR, Master Response 1 at page 6. In addition, the project description has been altered yet again since publication of the First Amendment to the Draft SEIR in August 2021. The PC Staff Report indicates that on “April 15, 2021, BXP Almaden Associates LP filed a Vesting Tentative Map application, File No. T21-015, to merge all existing lots to one lot for up to 15-commercial condominium units.” PC Staff Report, Item 5.a at 2. This change includes not only a change in uses on the site, but an increase of 322,223 square feet (*i.e.*, the Project increased from 1,727,777 square feet to 2,050,000 square feet), a nearly 20 percent increase in the size of the Project. SEIR at iii and First Amendment to the Draft SEIR at 6 and PC Staff Report, Item 5.a at 3, respectively. The PC Staff Report fails to include a graphic showing where on the site the proposed condominiums would be located. It fails to explain whether the building footprint would increase and how the Project would incorporate an additional 322,223 square feet without increasing the square footage or building height. In sum, neither the PC Staff Report nor the Council Staff Report include any additional information or analysis of potential impacts resulting from this last-minute project change.

Response A.15: As discussed on page 6 of the First Amendment to the Draft SEIR, the applicant submitted revised plans in July 2021 which shows increased setbacks from the top of bank. Based on the new plans, the proposed office square footage would decrease from 1,727,777 square feet to 1,416,171 square feet, the amenity/retail space would decrease from 39,137 square feet to 37,603 square feet, and the number of parking spaces would decrease from 1,343 to 1,279. In addition, the commercial condominiums would be within the building footprint.

Response A.15: While the project description in the SEIR and First Amendment to the Draft SEIR focused on actual office, retail, and amenity space, as that is most relevant to much of the analysis provided (including utilities and traffic), total building square footage is always greater as commercial buildings include non-leasable square footage, specifically integrated parking levels. The commenter can see the larger total building square footage noted in the SEIR where applicable, including in the analysis of air quality emissions from construction in Appendix B. The total building size as noted in the Staff Report is correct and is not in conflict with the analysis in the SEIR. This comment does not provide new information that would change the project's impact, provide new information that would require additional analysis or result in new significant impacts or mitigation measures than those analyzed and disclosed in the Draft SEIR, First Amendment, or associated appendices.

Comment A.16: In addition, the SEIR fails to describe aspects of the Project that are essential for the SEIR to provide a meaningful environmental analysis. In some cases, important aspects of the Project are omitted altogether. For example, the SEIR fails to include both the Construction Operations Plan and the Construction Noise Logistics Plan intended to describe hours of construction, noise and vibration minimization measures, and equipment to be used, among other elements. SEIR at iv and xi, respectively. The SEIR must disclose information from these plans as these Project features will result in traffic, noise, and air quality impacts on area residents. Without this information, it is impossible to understand the full scope of these impacts.

Response A.16: As clearly discussed in the Draft SEIR pages iv, xi, 29, and 68 the Construction Operations Plan and Construction Noise Logistics Plan are mandated to be completed as part of the detailed mitigation requirements for the project.

Response A.16: The project applicant shall submit the construction operations plan and the construction noise logistics plan to the Director of Planning, Building and Code Enforcement or the Director's designee prior to the issuance of any demolition, grading and/or building permits (whichever occurs earliest). The construction operations plan and noise logistics plan shall meet the standards identified under Mitigation Measure AIR-1.1 and Mitigation Measure NOI-1.1, respectively. The impacts are analyzed and disclosed in the Draft SEIR and associated appendices. This mitigation is consistent with other approved projects within San José and the downtown, including the adjacent Woz Way Project, also located along Guadalupe River, for which the commenter raised no objections or questions regarding the details provided in the SEIR or the mitigation outlining the Construction Operations Plan and the Construction Noise Logistics Plan. This comment does not provide new information that would change the project's impact, provide new information that would require additional analysis or result in new significant impacts or mitigation measures than those analyzed and disclosed in the Draft SEIR, First Amendment, or associated appendices.

Comment A.17: The Initial Study also indicates that the Project site contains contaminated soil and groundwater. Initial Study at 66. A Site Cleanup Program is therefore required by the Santa Clara County Department of Environmental Health to evaluate the past uses of the property, and the

agency may require a Phase II Environmental Site Assessment, a Groundwater Management Plan, and other studies to ensure the Project is safe for construction workers and future site occupants. SEIR at x and First Amendment to the Draft SEIR, Comment and Response L.10 at 79 and 80. The SEIR should have included the Site Cleanup Program and a Groundwater Management Plan so that related impacts could be evaluated now, rather than deferred to future regulatory processes. *See Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 936 (CEQA requires agencies to “integrate” their environmental review with other environmental regulations “to the maximum feasible extent” so that environmental permitting processes run concurrently, not consecutively). Here, providing this information is necessary to allow the public and decision-makers to review and evaluate the elements of these proposed plans to understand whether they adequately address concerns related to contaminated soils and groundwater. (To the extent the City would treat these plans as mitigation rather than part of the Project, their omission from the SEIR would be an impermissible deferral of mitigation.)

Response A.17: As discussed in the Initial Study, no violations were identified for the on-site facility located at 435 Vine Street and the open Leaking Underground Storage Tank (LUST) case at 291 Auzerais Avenue has been closed as of December 1997. A soil management plan and groundwater management strategy for dewatering during future construction was recommended after groundwater sampling results were found above groundwater Tier 1 Environmental Screening Levels (ESLs). Per the Downtown Strategy 2040, specific requirements for future development projects within the downtown area shall be determined during the supplemental project-level review phase in accordance with current regulations. Consistent with the Downtown Strategy 2040, the project includes mitigation to evaluate the past uses of the property and the project would be required to enter into the Site Cleanup Program with the Santa Clara County Department of Environmental Health prior to the issuance of any site demolition, grading, or excavation permits. This mitigation is consistent with other approved projects within San José and the downtown and has been vetted by the regulatory agency.

The mitigation identified is not deferral as it clearly defines the requirement elements of the plans, measurable standards (where applicable), responsible parties, and timing.

Comment A.18: CEQA does not allow an EIR to fold what is effectively an assumed mitigation measure into a significance determination—the project’s significant impacts must be determined first, and then the EIR must identify enforceable mitigation that will “offset” the impacts. *See Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 656, 658 (rejecting EIR that relied on project modifications to find no significant impact, instead of identifying significant impacts and considering mitigation measures). *Lotus* held that an EIR was legally inadequate where it assumed certain mitigation techniques would be incorporated into the project, and thus the EIR did not disclose the impacts of the project without those special techniques. *See id.* Further, the court in *Lotus* held that the EIR there was inadequate because it “fail[ed] to discuss the significance of the environmental impacts apart from the proposed ‘avoidance, minimization, and/or mitigation measures’ and thus fail[ed] to consider whether other possible mitigation measures would be more effective.” *Id.* at 657. Such is the case here: the SEIR relies on a variety of deferred plans as a key factor in its determination that a list of Project-related impacts would be less than significant. *See, e.g.,* SEIR at x. In so doing, the SEIR fails to reveal the true nature of the impacts and consider other

feasible mitigation measures and their effectiveness, in violation of CEQA.

Response A.18: Technical reports were prepared for the project which analyzed project impacts and identified mitigation to reduce/minimize project impacts to a less than significant level. Where appropriate, measurable targets for the mitigation measures have been identified.

Even with mitigation, the Draft SEIR identified significant unavoidable impacts associated with air quality biology [refer to Impacts AIR-1, AIR-2, AIR(C)-1, BIO-2, and BIO(C)-1]. In addition, the Draft SEIR does not assume certain mitigation techniques would be incorporated into the project. If the project is approved, the project would be required to comply with all mitigation measures that have been identified to lessen or avoid significant impacts provided in the Mitigation Monitoring and Reporting Program (MMRP), consistent with CEQA requirements. See Response A.17.

Comment A.19: Even where the SEIR describes Project features, the description is incomplete. For instance, the SEIR fails to provide any information regarding the construction of the proposed commercial condominiums, which were only added after the SEIR was finalized. The SEIR also fails to include any information on design provisions to address energy conservation. The SEIR merely asserts that the Project will comply with Council Policy 6-32 and the City's Green Building Ordinance, but fails to explain how the Project will do so. SEIR at 11, 23, and 82.

The SEIR also fails to include information on the following Project components:

- information on planned construction activities and construction schedule (SEIR at 11);
- location of the Project construction staging areas and machinery storage (SEIR at 11);
- amount of proposed soil removal, where it will be stored, and how it will be disposed of; and
- dewatering volumes and durations.

This information is critical to disclose, especially for a construction project lasting five years or longer that will result in visual, noise, and air quality impacts to area residents and will also impact water quality and biological resources. Yet, the SEIR omits details of the locations of these activities and project elements. In addition, the SEIR omits disclosure and description of the Project approvals necessary from agencies other than the City (*e.g.*, Santa Clara County Department of Environmental Health, and Santa Clara Valley Water District).

Response A.19: First, the proposed commercial condominium units would be located within the building footprint already described in the project description of the SEIR. It is unclear what additional information would be required as the commercial condominiums would operate as commercial space along with the rest of the building. The commercial square footage is accounted for in the analysis, which is not dependent on ownership structure.

Response A.19: Second, the project is required to be built in accordance with the California Building Code and the City's Green Building Ordinance. All projects in California are subject to the California Building Codes. In addition, new development

projects (including the proposed project) would be required to demonstrate compliance with City Council Policy 6-32 by submitting verification documents from the U.S. Green Building Council (USGBC) or Build It Green to the Director of Planning, Building and Code Enforcement during the building permit stage. When design specific features are not identified prior to building permit review, no credit for efficiency features is given in the analysis.

Third, the project's construction schedule and estimated export volume is identified in Appendix B of the Draft SEIR on page 23 and Attachment 2: CalEEMod Modeling Output. As discussed in the First Amendment to the Draft SEIR, the staging area for daytime construction activities are unknown at this stage of the planning process as has been the case with previous downtown projects. If the project is approved, the logistics of construction including staging, worker parking, temporary road closures, truck routes, etc. will be reviewed and approved with the issuance of the Public Work's encroachment permit for the public street improvements required by the project. The Public Work's encroachment permit must be obtained by the project prior to issuance of the Building Permit. This is the typical approval process with all construction projects, both inside and outside of downtown.

Fourth, per Mitigation Measure HAZ-1.1, prior to the issuance of any site demolition, grading, or excavation permits, the project applicant or its contractor shall enter the Site Cleanup Program (SCP) with the Santa Clara County Department of Environmental Health (SCCDEH) to evaluate the past uses of the property. The SCCDEH may require a Soil Management Plan to ensure that all soils to be removed from the site that are contaminated are properly disposed of. The Soil Management Plan would identify how soils would be stored on-site, if required. The project would also comply with the City's Construction and Demolition Diversion Program during construction which ensures that at least 75 percent of construction waste generated by the project is recovered and diverted from landfills. Soils removed would be hauled to a certified Waste Diversion Facility in compliance with the City's Construction and Demolition Diversion Program.

Lastly, as discussed in the First Amendment to the Draft SEIR, the estimated amount of dewatering that would be required is unknown at this time and would fluctuate over time due to variations in groundwater levels caused by average rainfall years, heavy rainfall years, and drought years. The proposed project would be constructed in conformance with the recommendations of the site-specific geotechnical analysis (refer to Appendix F of the Draft SEIR) regarding dewatering and the most current California Building Code as a condition of the permit. The Draft SEIR discloses and evaluates potential impacts from the proposed project and identifies mitigation to reduce or avoid those identified significant environmental impacts. Specific information regarding construction staging or dewatering are unknown at this time; therefore, it was not included in the Draft SEIR. This comment does not provide new information that would change the project's impact, provide new information that would require additional analysis or result in new significant impacts or mitigation measures than those analyzed and disclosed in the Draft SEIR, First Amendment, or associated appendices.

Comment A.20: In sum, the SEIR presents an incomplete and unstable project description, which also lacks additional Project details that may be contained in a Development Agreement. This approach is not permissible under CEQA. The failure to describe the whole of the Project is a serious and pervasive deficiency, as it renders faulty the SEIR’s environmental impact analyses as well as the discussion of potential mitigation measures and alternatives to minimize those impacts. The SEIR must provide a sufficient description of off-site improvements associated with the Project, information regarding required plans to minimize Project-related construction and operational impacts, details of anticipated construction activities, and any other Project details. This information is necessary to allow decision makers, the public and responsible agencies to evaluate potential environmental impacts.

Response A.20: Refer to Responses A.14 to A.20 above.

Comment A.21: VI. The SEIR’s Analysis of and Mitigation for the Impacts of the Proposed Project Are Inadequate.

An EIR is “the heart of CEQA,” and should be of the highest quality, giving both decision-makers and the public a full opportunity to understand and analyze environmental repercussions of the Project. *Laurel Heights Improvement Ass’n v. Regents of University of California* (1988) 47 Cal.3d 376 at 392. “The EIR is also intended ‘to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.’ Because the EIR must be certified or rejected by public officials, it is a document of accountability.” *Id.* at 392 (citations omitted). The SEIR fails to live up to this mandate.

An EIR must provide enough analysis and detail about environmental impacts to enable decision-makers to make intelligent judgments in light of the environmental consequences of their decisions. The City, as lead agency, must make a good faith effort to disclose the Project’s direct and cumulative impacts. Unfortunately, the SEIR fails to meet even the most basic objectives of CEQA and deprives the public and decision-makers of any opportunity to understand the environmental repercussions of the Project. Where, as here, the environmental review document fails to fully and accurately inform decision-makers and the public of a project’s environmental consequences, it violates CEQA. See Pub. Resources Code § 21061.

As explained below, the SEIR fails to analyze the Project’s numerous environmental impacts, including those affecting hydrology, water quality, and biological resources. These inadequacies require that the EIR be revised and recirculated so that the public and decision-makers are provided with a proper analysis of the Project’s environmental impacts and feasible mitigation for those impacts. *See* CEQA Guidelines § 15002(a)(1) (one of CEQA’s “basic purposes” is to “[i]nform governmental decision makers and the public about the potential, significant environmental effects of proposed activities”).

Response A.21: Responses to specific comments on the Draft SEIR are provided below.

Comment A.22: A. Land Use

As explained in section II above, the proposed Project fails to comply with the City's policies and ordinance for riparian setbacks. Under CEQA, an inconsistency or conflict between a plan or ordinance and the Project is a significant impact that must be disclosed and analyzed. The SEIR misses the mark in its evaluation of these issues.

The SEIR acknowledges that numerous policies of the Envision San Jose 2040 General Plan apply to the Project. SEIR at 41-43. However, as discussed above in section III, the SEIR fails to adequately consider the Project's inconsistency with the General Plan. These plain inconsistencies represent significant impacts that the SEIR fails to acknowledge.

The PC Staff Report attempts to rectify the SEIR's lack of General Plan consistency analysis, but ultimately falls short. The PC Staff Report's General Plan consistency analysis regarding riparian corridor policies focuses exclusively on conformance with ER-2.1. PC Staff Report, Item 5.a at 6-7. In its analysis of the policy, the PC Staff Report wrongly concludes that the Project is consistent with General Plan Policy ER-2.1. *Id.* However, as discussed above, General Plan Policy ER-2.1 requires compliance with the Riparian Corridor Policy Study, which the PC Staff Report cannot and does not show. *See* Section II., *supra*. Moreover, the PC Staff Report does not claim that the Project is consistent with any of the other riparian corridor policies in the General Plan, including General Plan Policy ER-2.2. *See* PC Staff Report, Item 5.a. at 7. Nor can it, as the Project plainly conflicts with ER-2.2. *See* Section III., *supra*.

Response A.22: While the Riparian Corridor Policy Study was incorporated as guidance within the General Plan, the Study itself was never formally adopted by City Council. City Council adopted Council Policy 6-34: Riparian Corridor Protection and Bird Safe Design on August 23, 2016 which was developed based on the Riparian Corridor Policy Study and the HCP. As noted in the Staff Report, the City Council Policy 6-34 replaces the Riparian Corridor Policy Study.

Based on the Downtown Strategy 2040 FEIR (as amended), a setback will be established in accordance with the Council-adopted Santa Clara Valley HCP/NCCP (Chapter 18.40 of Title 18 of the San José Municipal Code), the Zoning Code (Title 20 of the San José Municipal Code), the development guidelines in the San José City Council Policy 6-34 "Riparian Corridor Protection and Bird-safe Design" and General Plan Policy ER-2.2. City Council Policy 6-34 provides a list of exceptions that could be granted for applicants requesting a reduction to the 100-foot minimum riparian setback (refer to pages 31-32 of the City Council Policy 6-34 for the list of circumstances). As discussed in the Draft SEIR, the proposed project would not result in a project-level impact. The proposed project would, however, have a cumulatively considerable contribution to the Guadalupe River as a whole due to encroachment. As noted on page nine of Appendix D of the Draft SEIR, while the biologist believes that encroachment within 35 feet would be acceptable with compensatory mitigation, an exception for the encroachment within 100 feet of the riparian corridor would need to be granted by the City. Refer to pages 9-16 of the Staff Report for a discussion of the project's consistency (for a reduced setback) with Section A.2 of City Council Policy 6-34.

Comment A.23: Additionally, as discussed in section II above, the SEIR asserts that the Project is consistent with City Council Policy 6-34, based on the assumption that the Project qualifies for an

exception from mandatory riparian setbacks. However, the SEIR fails to acknowledge that the Project does not comply with the City’s riparian setback requirements, whether 100 feet or 30 feet.

The SEIR’s failure to properly acknowledge and analyze these land use impacts renders the document legally adequate, and the record lacks substantial evidence to support any conclusion that these impacts will be less than significant.

Response A.23: See responses above.

As discussed in the Draft SEIR, the project would not result in a project-level impact as the existing riparian habitat immediately adjacent to the site is of moderate quality. Although the identified impacts would reduce the quality of the riparian habitat, the Biological Resources Report concluded that implementation of the project, by itself, would not result in a substantial degradation of riparian bird communities in this portion of the Guadalupe River. To offset the project impacts on the ecological functions and values of the riparian corridor, the project would be required to implement Mitigation Measure BIO(C)-1.1. The Draft SEIR acknowledges that encroachment of the project (1.8 acres) within the standard 100-foot riparian setback would result in a considerable contribution to significant cumulative impacts without mitigation. Since the project site is developed and surrounded by existing development, encroachment within the 100-foot setback can occur to some extent and be mitigable; therefore, the Biological Resources Report determined that encroachment within 35 feet was acceptable with Mitigation Measure BIO(C)-1.1.

Comment A.24: B. Riparian Habitats

The Project does not comply with the Downtown Strategy 2040 FEIR’s proposed mitigation for riparian habitats. Nor does the Project comply with mitigation measures adopted in the City’s General Plan EIR to protect riparian habitats.

The Downtown Strategy 2040 FEIR assumes compliance with the General Plan policies for riparian corridors, including policies ER-2.1 and ER-2.2. The Downtown Strategy 2040 FEIR even admits that the “intensification of urban development in the vicinity of the Guadalupe River and Los Gatos Creek would result in a substantial adverse effect” to the environment. Downtown Strategy 2040 FEIR at 80. However, unlike this SEIR, the Downtown Strategy 2040 FEIR requires compliance with General Plan Policy ER-2.2 and Council Policy 6-34 to mitigate any impacts to riparian habitats: “For specific projects adjacent to the riparian corridor a setback will be established in accordance with . . . development guidelines in City Council Policy 6-34 . . . and General Plan Policy ER-2.2.”⁵

Response A.24: Based on the Downtown Strategy 2040 FEIR (as amended), a setback will be established in accordance with the Council-adopted Santa Clara Valley HCP/NCCP (Chapter 18.40 of Title 18 of the San José Municipal Code), the Zoning Code (Title 20 of the San José Municipal Code), the development guidelines in the San José City Council Policy 6-34 “Riparian Corridor Protection and Bird-safe

⁵ Downtown Strategy 2040 Integrated Final EIR at 80, available at <https://www.sanjoseca.gov/home/showpublisheddocument/44054/637082061948370000>.

Design” and General Plan Policy ER-2.2. As mentioned on page 80 of the Downtown Strategy 2040 FEIR (as amended), at the time individual development projects proposed near creeks in Downtown are evaluated for project-level environmental impacts, detailed evaluation will be required to determine impacts to riparian habitat and identify any necessary mitigation. As stated in the First Amendment to the Draft SEIR, City Council Policy 6-34 and the CEQA analysis are separate, independent regulations that require separate assessments for compliance documentation. In accordance with CEQA, a Draft SEIR was prepared to assess the project’s potential environmental impacts and a Biological Resources Report was prepared which analyzed impacts on the site and the riparian corridor. The Draft SEIR and Biological Resources Report focus on impacts to ecological elements and findings for City Council Policy 6-34 are made as part of the project recommendation.

Comment A.25: Similarly, compliance with the Policy Study is included in Envision San Jose 2040 General Plan as part of policies and actions that provide “program-level mitigation for impacts to fish and wildlife movement” as well as “sensitive communities and habitats within the City.”⁶

Here however, the Project does not conform with General Plan policies ER-2.1-2.2, nor does the Project comply with the Policy Study, as discussed above. *See* Sections II., III, *supra*. Accordingly, the Project violates the mitigation underlying both the Downtown Strategy 2040 FEIR and the City’s General Plan EIR.

Response A.25: Refer to the previous responses and the Staff Report.

Comment A.26: CEQA forbids deleting or modifying previously-adopted mitigation measures like compliance with the General Plan policies and the Council Policy 6-34 “without a showing that it is infeasible.” *Napa Citizens for Honest Government*, 91 Cal.App.4th at 359; *see also Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1167 (“mitigation measures cannot be defeated by ignoring them”); *Katzeff v. California Dept. of Forestry and Fire Protection* (2010) 181 Cal.App.4th 601, 611 (mitigation measures are not “nullified by the passage of time”). Additionally, if an agency pursues modification of mitigation, it must conduct additional environmental review to evaluate the environmental impacts of changing its mitigation. *Lincoln Place Tenants Assn. v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1509; 1 Kostka & Zischke, *Practice Under the Cal. Environmental Quality Act* (2d ed. 2015) § 14.35, pp. 14-44 to 14-45 (“reasons for deleting the mitigation measure . . . must be addressed in a supplemental EIR or other CEQA document such as an addendum”).

Here, the Project fails to comply with mandatory mitigation requirements in both the Downtown Strategy 2040 FEIR and the City’s General Plan EIR in violation of CEQA. Because the Project fails to comply with the Downtown Strategy 2040 FEIR, the City cannot rely on that document to justify

⁶ Envision San Jose 2040 General Plan, Draft Program EIR at 464, 476, available at <https://www.sanjoseca.gov/home/showpublisheddocument/22039/636688304347700000>

its conclusion that development of the Project will not result in significant impacts to riparian corridors.⁷

Response A.26: The comment failed to articulate with specificity what mitigations measures were deleted or modified. Therefore, the City has insufficient details and information to respond. However, it should be noted that the Downtown Strategy 2040 FEIR does not provide project-level CEQA clearance for biological resources impacts (see Section 2.6 of the Downtown Strategy 2040 FEIR). Development projects seeking coverage under the Downtown Strategy 2040 FEIR must prepare their own project-level analysis of biological resources, which the SEIR does. This analysis evaluated consistency with all measures identified in the Downtown Strategy 2040 FEIR and includes appropriate project-level mitigation measures to address them. This is not deleting or modifying these measures, but providing project-level mitigation to satisfy these measures.

C. Hydrology and Water Quality Impacts

The Initial Study fails to address Project-related impacts related to hydrology and water quality as a result of a series of errors, including: (1) the failure to consider applicable guidance regarding development in floodplains, which would increase the likelihood of bank hardening in the future; (2) the failure to disclose the extent and severity of impacts related to erosion and sedimentation; and (3) the failure to identify feasible mitigation measures. The SEIR's treatment of hydrology impacts does not meet CEQA's well established legal standard for impacts analysis. Given that analysis and mitigation of such impacts are at the heart of CEQA, the SEIR will not comply with the Act until these serious deficiencies are remedied.

The report prepared by MBK Engineers, which is incorporated by reference, provides detailed comments on the SEIR's inadequate hydrology analysis. *See* MBK Engineers Report attached as Exhibit 1. The discussion below highlights the most egregious deficiencies.

Response A.26: Responses to specific comments on the Draft SEIR are provided below.

Comment A.27: 1. The SEIR Fails to Disclose the Extent and Severity of Foreseeable Impacts Related to Erosion and Sedimentation.

The existing riverbank is in its natural state and has no added bank protection. See MBK Report, Attachment A (photos of the riverbank at the Project site.). According to the MBK Report, over time, the natural riverine geomorphic processes are expected to increase erosion in the Project area. MBK Report at 5. As explained above, given that the proposed Project would not have an adequate setback from the riparian area, it is foreseeable that local agencies would have to seek a hardscape solution to protect the proposed building from flood risks. MBK Report at 3 and 5. Construction of a hardscape solution, such as riprap, would require removal of the riparian vegetation for construction.

⁷ The Project's inconsistencies with the Downtown Strategy 2040 program and the General Plan also prevent the City from tiering the Project's CEQA analysis from the Downtown Strategy 2040 FEIR. See CEQA Guidelines § 15152. The SEIR should have conducted an independent CEQA analysis.

Installation of riprap, or similar bank protection methods will establish a hard point in this reach of the river and would lead to increased erosion upstream and downstream of the site. MBK at 5. Managing flood risk in this way would further exacerbate sedimentation in the Guadalupe River, harming water quality and aquatic habitat downstream.⁸ The SEIR fails to evaluate these impacts, and consequently, fails to evaluate mitigation necessary to avoid them.

As the MBK Report explains, an adequate setback from the riparian area would allow for more flexibility in permitting the natural riverine processes to occur, and would provide more flexibility in addressing erosion in ways that preserve the existing riparian vegetation. MBK Report at 5.

Response A.27: See Response A.6.

Comment A.28: 2. The SEIR’s Failure to Consider Guidance on Floodplain Development Ignores Foreseeable Floods at the Project Site, Which Increase the Likelihood of Bank Hardening.

The Initial Study concludes that the Project site is not subject to any restrictions on development because it is not located in the Federal Emergency Management Agency (FEMA) 100-year floodplain. MBK Report at 1. But even if the site does not face flood-related restrictions, it does not mean that a building so close to the Guadalupe River would be free from potential flood threats. As explained in the MBK Report, the site’s designation as a Shaded Zone X site indicates that it is in an area at risk of flooding for events greater than a historical 100-year risk, but less the 500-year risk. MBK at 1.

The Initial Study’s deficient analysis ignores State and Federal guidance related to development in the floodplain. The MBK Report explains the importance of considering such guidance, such as the Federal Flood Risk Management Standard (FFRMS), the California Water Resiliency Portfolio, and the California Flood Future Report regarding flood risk given that climate change is increasing the frequency and intensity of extreme flood events. *Id.* These standards and guidance documents provide more current information and recommendations that account for changing conditions due to climate change. The SEIR’s failure to consult such guidance understates the flood risk at the Project site.

Response A.28: See Response A.6.

Comment A.29: Significantly, approving a Project within 35 feet of the top of the riverbank would result in insufficient right-of-way (area between the riverbank and the proposed structure) to respond to flooding concerns in the future. For example, when the 100-year flow increases as forecasted with climate change, or the City or Valley Water decide to provide higher levels of protection, a floodwall would likely be needed. Construction of a floodwall would require removal of a significant portion of the riparian corridor because the development is not setback far enough from the top of the streambank. MBK Report at 2 and 3. In fact, urban areas have long recognized the need for higher

⁸ See, <https://www.epa.gov/caddis-vol2/caddis-volume-2-sources-stressors-responses-urbanization-riparian-channel-alteration> and Santa Clara Valley Water District Bank Protection/Erosion Repair Design Guide available at https://www.valleywater.org/sites/default/files/GS%20Ch%204%20Bank%20Protection%20Erosion_0.pdf and attached as Exhibit 3.

levels of flood protection than FEMA's minimum standard of limiting development to outside the 100-year flood risk designation. For instance, several cities including Lathrop, Stockton, Manteca, Sacramento, West Sacramento, Woodland and Marysville, have a 200-year flood risk minimum standard. *Id.* at 3. Sacramento and Yuba counties are currently seeking to pass the 500-year flood risk minimum standard in their urban areas. *Id.*

State guidance regarding right-of-way criteria for floodwalls in urban areas recommends expanding right-of-way areas for higher levels of flood protection, anticipated and unanticipated changes in design criteria, and updated hydrology/hydraulics and other data needed to maintain urban level flood protection. State of California's Urban Levee Design Criteria (ULDC), Section 7.11 and MBK Report at 3. This guidance recommends flood rights-of-way for future needs that are at least 50 feet. *Id.* and ULDC, Section 7.11.2. The recommendation is that the right-of-way would not contain structures, though open space, trails, outdoor recreation and other compatible uses could be allowed within the right-of-way.

Response A.29: See Response A.6.

Comment A.30: By contrast, allowing development of a large office Project within 20 feet of the top of bank without an adequate setback will restrict how local agencies can respond to mitigating flood risk in the future and will increase the costs of providing flood protection. *Id.*; SEIR at 46. If flood risk in the Project area increases as predicted, flood protection measures would likely require the removal of significant portions of the riparian corridor adjacent to the Guadalupe River to construct a floodwall and install bank protection. These measures would, in turn, result in significant changes to the river that will exacerbate erosion and flooding downstream. MBK Report at 5. The SEIR fails to consider these flood risks and the indirect impacts that will result from them.

By ignoring necessary flood protections, the SEIR takes a piecemeal approach to environmental review and foregoes analysis of impacts resulting from implementation of flood protection elements. CEQA, however, prohibits such segmentation of a project. See *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1229 (“when one activity is an integral part of another activity, the combined activities are within the scope of the same CEQA project” and must be analyzed together); CEQA Guidelines § 15378(a) (“‘Project’ means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.”). Breaking the project into smaller sub-projects or failing to consider the reasonably foreseeable consequences of a project will lead to inadequate environmental review. See *Bozung v. Local Agency Formation Comm’n* (1975) 13 Cal.3d 263, 283-84 (CEQA mandates that “environmental considerations do not become submerged by chopping a large project into many little ones”); see also *Laurel Heights Improvement Ass’n v. Regents of the University of California* (1988) 47 Cal.3d 376, 396 (“*Laurel Heights I*”) (“[A]n EIR must include an analysis of . . . reasonably foreseeable consequence[s] of the initial project” that “change the scope or nature of the initial project or its environmental effects”).

Response A.30: See Response A.6.

Comment A.31: In sum, the SEIR fails to consider the site's increased exposure to flooding due to climate change, and the foreseeable environmental impacts from protecting the Project from flooding. Allowing development without an adequate setback from the riparian area would restrict local agency response to flood risk mitigation, thereby increasing the likelihood of the need for bank

hardening. This flaw will, in turn, lead to increased erosion and sedimentation in the Guadalupe River. A revised SEIR that adequately describes the Project and comprehensively evaluates and mitigates the proposed Project's flood-related impacts must be prepared and recirculated.

Response A.31: See previous response. In addition, the project would be required to implement the erosion control measures identified in the Draft SEIR (refer to page 78) as well as prepare a Storm Water Pollution Prevention Plan (SWPPP) under the National Pollution Discharge Elimination System (NPDES) General Construction Permit and the City's Municipal Code to prevent erosion and sedimentation into the Guadalupe River.

Comment A.32: 3. The Project's Initial Study and SEIR Impermissibly Rely on Compliance with Existing Regulations to Mitigate Significant Impacts Related to Hydrology and Water Quality.

The Project's Initial Study and SEIR impermissibly relies on compliance with existing laws and regulations to mitigate Project-related hydrology impacts and to conclude that related impacts would be less than significant. For example, the Initial Study implies that state regulations requiring review and oversight of the erosion control system by the Regional Water Board will ensure that potential impacts will be avoided or mitigated. Initial Study at 49. Similarly, in response to California Department of Transportation comments stating that surface runoff from the Project site must be evaluated and mitigated to pre-construction levels (First Amendment to the SEIR, Comment B.4 at 14), the SEIR states that the Project would comply with City's Post-Construction Urban Runoff Policy 6-29 and the Mitigation Monitoring and Reporting Program to reduce stormwater runoff from the proposed project.

Aside from stating the Project proposes media filters and flow through planters to treat stormwater, the SEIR fails to describe how the Project would comply with the applicable regulations. In addition, dewatering discharge can also add pollutants and sediment, impacting water quality. The SEIR fails to quantify the amount of expected wastewater from the dewatering process, or how it would be treated, and fails to provide information on the rate and volume of expected wastewater discharge after treatment. SEIR Appendix F at 25-29 and MBK Report at 5.

Response A.32: The comment failed to articulate with specificity how reliance on established performance standards and laws from regulatory agencies who have jurisdictions over the impacts is impermissible under CEQA. Therefore, the City has insufficient details and information to respond. Laws and regulations adopted for the purpose of avoiding environmental effects can and are appropriately relied upon by Lead Agencies in review of development projects to determine a less than significant impact.

Response A.32: As mentioned previously, the estimated amount of dewatering that would be required is unknown at this time and would fluctuate over time. The project would be required to implement the identified construction measures, comply with the NPDES General Construction Permit, and comply with the recommendations from the site-specific geotechnical analysis to reduce impacts on water quality. In addition, the rate and volume of wastewater discharge after treatment is also unknown at this time. This comment does not provide new information that would

change the project's impact, provide new information that would require additional analysis or result in new significant impacts or mitigation measures than those analyzed and disclosed in the Draft SEIR, First Amendment, or associated appendices.

Comment A.33: Under well-established case law, an agency may not use compliance with regulations to avoid describing Project activities or from analyzing resulting impacts. *Oro Fino Gold Mining Corporation v. County of El Dorado* (1990) 225 Cal.App.3d 872, 885. The City fails to provide any explanation or evidence to support the conclusion that the Project's impacts on water quality are less than significant. *See* Initial Study at 49.

In sum, the SEIR must clearly and consistently describe each of the Project's elements and perform the necessary analysis prior to Project approval. Without this information, it is simply not possible to verify the accuracy of the SEIR's analysis of the Project's impacts related to on-site hydrology and water quality. As to downstream impacts from increased erosion and sedimentation, the SEIR has entirely skipped over the required analysis and is wholly inadequate. A legally adequate analysis must consider the aforementioned significant impacts and identify feasible, effective mitigation or alternatives to avoid or minimize the impacts.

Response A.33: As discussed in Section 4.10 Hydrology and Water Quality, the project would be required to obtain an NPDES General Construction permit and prepare a SWPPP. In addition, the project would be required to comply with the identified Standard Permit Conditions to reduce impacts to water quality (during construction). The project would also be subject to the Municipal Regional Stormwater NPDES Permit (MRP) and the City's Post-Construction Urban Runoff Policy 6-29. To treat stormwater runoff, the project currently proposes media filters and flow-through planters. With inclusion of the stormwater treatment and compliance with the City's regulatory policies, operation of the proposed project would have a less than significant water quality impact. The required permits described above have established criteria and performance standards to meet applicable environmental screening levels under state and federal laws.

Comment A.34: D. **The SEIR Fails to Disclose the Extent of the Project's Significant Biological Resources Impacts or to Adopt All Feasible Mitigation Measures.**

1. The SEIR Mischaracterizes the Existing Setting of the Project Site and Adjacent Riparian Habitat.

Accurate and complete information pertaining to the setting of the Project and surrounding areas is critical to an evaluation of a Project's impact on the environment. *San Joaquin Raptor/Wildlife Center v. Stanislaus County* (1994) 27 Cal.App.4th 713, 728; *see also Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 875 (incomplete description of the Project's environmental setting fails to set the stage for a discussion of significant effects). An EIR also "must include a description of the environment in the vicinity of the project, as it exists before the commencement of the project, from both a local and a regional perspective." CEQA Guidelines § 15125; *see also Environmental Planning and Info. Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354. Here, the SEIR's deficiencies in describing the Project's setting undermine its adequacy as an informational document.

As discussed in more detail in the attached Kleinhaus Report, which is incorporated by reference, the SEIR fails to present important contextual information related to biological resources on the Project site and in adjacent areas along the Guadalupe River. This is important information from which to establish baseline conditions. Without a proper description of baseline conditions, the SEIR is unable to provide an adequate analysis of Project-related and cumulative impacts on biological resources compared to existing conditions.

Response A.34: Responses to specific comments on the Draft SEIR are provided below.

Comment A.35: As the Kleinhaus Report explains, despite the fact that the riparian and riverine habitat adjacent to the Project site is not pristine, it has relatively high value as a natural habitat area in an urban river environment where some upstream and downstream reaches has been compromised by development. Kleinhaus Report at 3. Even small natural habitat areas play an important role in conservation efforts. *Id.* Here, the SEIR underestimates the value of the riparian habitat on the Project site for hosting an abundant diversity of birds. *Id.* at 4. The site is recorded to host 95 bird species, many of which are migratory species. *Id.* The riparian forest is a healthy and robust forest, comprised of approximately 70 percent native species, along a relatively wide riparian stretch along the river. *Id.* at 5. The diversity of vegetation on site makes for a welcome refuge for migratory birds. The biological value of the site for birds is substantiated by the fact that the Guadalupe River Park Trail is one of the most popular, accessible sites for bird watching. *Id.* Therefore, the riparian area adjacent to the Project site provides valuable habitat in an urbanized area with few natural riparian habitat areas.

Response A.35: Because there is a difference of opinion between the conclusions in the Biological Resources Report prepared by H.T. Harvey & Associates and those expressed by Dr. Shani Kleinhaus in the Kleinhaus Report, it is appropriate to provide the qualifications of the City's consultant to convey their experience with riparian bird communities along the Guadalupe River. The Biological Resources Report that was used as the basis for the biological resources assessment in the SEIR was prepared by wildlife ecologists Steve Rottenborn, Ph.D. and Robin Carle, M.S.

Dr. Steve Rottenborn performed his doctoral research at Stanford University on the impacts of urbanization on riparian bird communities in the South Bay. That research, which led to a publication on how urbanization affects riparian bird communities⁹, included a number of bird surveys and characterization of habitat and land use conditions along the Guadalupe River, Los Gatos Creek, and Coyote Creek. Among numerous survey plots along these three streams, one survey plot was within the riparian corridor immediately adjacent to the Almaden Office project site. In addition to conducting that dissertation research, Dr. Rottenborn has spent well over 1,000 hours birding along South Bay riparian corridors since 1992, and has

⁹ Rottenborn, S. C. 1999. Predicting the impacts of urbanization on riparian bird communities. *Biological Conservation* 88:289-299.

performed work involving CEQA, the National Environmental Policy Act, and Federal and State Endangered Species Acts for hundreds of projects in Santa Clara County over more than 20 years as a professional ecological consultant. Many of those projects have involved assessment of impacts to streams, riparian habitats, and birds. He was heavily involved in field work for and preparation of the Santa Clara County Breeding Bird Atlas¹⁰; he served on the Board of Directors of the Coyote Creek Riparian Station and the Technical Advisory Committee of San Francisco Bay Bird Observatory; he has served two three-year terms as a member of the Board of Directors of Western Field Ornithologists; he has served three three-year terms (including one as Chair) on the California Bird Records Committee, which maintains the official records of California's avifauna; and he has served as one of the regional editors for Northern California for the publication *North American Birds* for more than 15 years. Thus, Dr. Rottenborn is very familiar with the riparian bird communities of the San José area, including the birds at the Almaden Office project site, as well as how those communities fit into the larger context of the birds of Santa Clara County, the state of California, and western North America as a whole. Robin Carle's Master's research focused on how local habitat features and larger landscape-level human effects combine to influence the nesting productivity of passerine birds, including riparian-nesting birds, in the Greater Yellowstone region. Robin is an avid birder, and is skilled at birding by ear. She also banded, sexed, and aged resident and migrant passerines, near-passerines, and raptors along Coyote Creek in San José for the San Francisco Bay Bird Observatory for 10 years, during which time she processed more than 1,500 birds of approximately 60 species. She has spent hundreds of hours in the field conducting nesting bird surveys and active nest monitoring for H. T. Harvey & Associates projects over the past 14 years, including numerous projects within riparian habitats, and has found hundreds of passerine nests as well as many nests of raptors. Robin has provided bird-safe design support for more than 40 projects in the San Francisco Bay Area over the past six years, including numerous projects located adjacent to riparian corridors. Her work on these projects has consisted of preparing avian collision risk assessments, sections of CEQA documents, assessments of project compliance with City requirements, design recommendations, avian collision monitoring plans, and calculations of qualification for LEED Pilot Credit 55. Thus, she is very familiar with riparian bird communities in the South Bay as well as bird-safe design issues, mitigations, and requirements.

As discussed in the Biological Resources Report, the riparian habitat along the reach of the Guadalupe River adjacent to the project site is considered to be of "moderate" quality for birds – not of particularly high or low quality. That determination was made relative to the quality and value of other riparian habitats in the San José area.

The commenter and the Kleinhaus Report suggest that Dr. Kleinhaus "roughly estimated the proportion of native trees and canopy onsite to be over 70% of the riparian canopy". The nonnative vegetation (presumably representing approximately

¹⁰ Bousman, W. G. 2007. Breeding Bird Atlas of Santa Clara County, California. Santa Clara Valley Audubon Society.

30% of the vegetation in the canopy) reduces habitat quality, relative to sites that are dominated more heavily by natives, and we observed that the understory is dominated largely by nonnative plants. Nonnative vegetation supports fewer of the resources required by native birds than native vegetation.^{1,11} Trampling and disturbance of the riparian vegetation by unhoused individuals has further reduced habitat quality by removing and reducing ground cover and understory vegetation in some areas. Furthermore, it was concluded that the fragmentation of riparian habitat along the downtown reach of the Guadalupe River by numerous bridges and channelization has reduced connectivity and introduced disturbance that further reduces habitat quality.

The commenter and Kleinhaus Report refer to the number of bird species (95) that birders have observed in the area delineated by San Carlos Street, Almaden Boulevard, and Woz Way, including the Guadalupe River Trail and Discovery Meadow Park, and refers to a recent visit to this section of the riparian corridor by birder Matthew Dodder. While the City's biological consultant does not disagree that a number of bird species may use this segment of riparian habitat and creek, and concur that observation of birds compiled by birders over time can be useful in assessing a site's value to birds. However, scientific study of bird-habitat relationships is more useful in determining a site's value, and Dr. Rottenborn's dissertation research, which included this reach of the Guadalupe River, found bird-habitat relationships that would support H.T. Harvey and Associates' conclusion that this reach does not provide high-quality riparian habitat.¹ That research found that many native breeding bird species, including most riparian-dependent (as opposed to generalist) species, neotropical migrants, and scarce breeding birds were associated with riparian habitat that was broad, dominated by native species, and far from bridges and buildings, whereas fewer species (most of them generalist species) were present in riparian habitat that was narrower, closer to artificial surfaces, and containing more nonnative vegetation.

The commenter and Kleinhaus Report state that small natural habitat areas play an important role in conservation efforts. The City's consultant agrees that even narrow riparian corridors in urban settings have value to riparian birds, but that does not then suggest that any small habitat area is of high quality to birds. The aforementioned research conducted along the Guadalupe River, Los Gatos Creek, and Coyote Creek demonstrated that broader riparian corridors with greater buffers from adjacent development support more species and higher densities of birds than narrow riparian corridors closer to adjacent development and fragmented by bridges.¹² Based on scientific research H.T. Harvey & Associates has conducted in the Santa Clara Valley on relationships between riparian bird communities and urbanization, and decades of impact assessment and birding experience in the Santa Clara Valley, it is their best professional judgment that the riparian corridor adjacent to the Almaden Office

¹¹ Mills, G. S., J. B. Dunning, Jr., and J. M. Bates. 1989. Effects of urbanization on breeding bird community structure in southwestern desert habitats. *Condor* 91:416-429.

¹² Rottenborn, S. C. 1997. The impacts of urbanization on riparian bird communities in central California. Ph.D. dissertation, Stanford University.

project site does not provide “high-quality” riparian habitat compared to areas providing broader riparian corridors in intensively developed settings in the region.

Based on the above, the DEIR has fulfilled its obligation as an informational document in describing the expert opinions and providing the public and decision-maker with full disclosure and information. Further, there is substantial evidence in the administrative record to support the analysis in the City’s biological report.

Comment A.36: Because the SEIR characterizes the riparian area adjacent to the Project site as degraded and having only moderate value, the SEIR’s evaluation of the Project’s impacts on biological resources erroneously concludes that these impacts would be less-than-significant. Had the SEIR properly characterized the riparian habitat on-site, the SEIR would have concluded that Project impacts on this habitat related to shade and proximity of the massive structure, it would have concluded that impacts would be significant.

Response A.36: As discussed in the Draft SEIR and the Biological Resources Report, the existing riparian habitat immediately adjacent to the site is of moderate quality (as opposed to high quality) and is not expected to attract a large number of birds. The impacts would not affect regional populations of bird species that use the site, nor would it result in a substantial degradation of riparian bird communities in the segment of the Guadalupe River adjacent to the site. In addition, as mentioned in Section 3.2.1.2 Existing Conditions, the site is currently developed with a public parking lot with no sensitive habitats or wetlands present on-site. None of the riparian trees are proposed for removal. See Response A.35.

Comment A.37: 2. The SEIR Fails to Disclose the Extent and Severity of Impacts to Biological Resources Resulting from the Project’s Shading Impacts.

The SEIR discloses that, based on the Downtown Strategy 2040 FEIR, development proposals within 100 feet of the riparian corridor of the Guadalupe River must assess the effects of the proposed development on riparian vegetation and creek temperatures. SEIR at 50. The SEIR explains that Projects that result in 20 percent or more increase in shade are required to alter their design to reduce shading. *Id.* The SEIR does not include a shade and shadow study to address this issue, but we presume the City is relying on the shadow study presented in the proposed Project’s Initial Study analysis of impacts to natural sunlight on public open spaces. Initial Study Figure 4.11-1 at 88. The Initial Study concludes that Project impacts from shading of open space would be less-than-significant (*i.e.*, shade would not increase by 10 percent or more), but the Initial Study fails to quantify existing and proposed amounts of shade. *Id.* at 86 and 87. Without evidentiary support for this assertion, the City cannot conclude that shading increases will not exceed the City’s adopted thresholds for shading on either public open spaces or on the river corridor, to trigger redesign of the Project.

Response A.37: The land area of the Guadalupe River Park & Trail as defined by the Downtown Strategy 2040 is shown on Figure 3.14-1 (page 258) of the Downtown Strategy 2040 FEIR. Guadalupe River Park is an approximately three-mile linear park that runs along the river from I-880 in the north to I-280 in the south, which is approximately 250 acres in size. The park includes neighborhood-serving spaces such as Arena Green, Discovery Meadow, and McEnery Park, as well as 33 plazas and

educational exhibits. As mentioned in the First Amendment to the Draft SEIR, the increase in shade and shadow would be limited to the morning hours primarily in the winter months. The Shade and Shadow Analysis included in Appendix A of the Draft SEIR show the project's shading for 9:00 AM, noon, and 3:00 PM for March 21, June 21, and December 21. Based on the Shade and Shadow analysis, the proposed project would not increase shade on Guadalupe River Park by 10 percent or more. For reference, 10 percent of the 250 acre park would be 25 acres.

The SEIR does state that shading of riparian habitat by the proposed towers could potentially affect the health and growth of plants and degrade the riparian habitat in the long term. However, it is the opinion of H.T. Harvey & Associates that sufficient light will reach these plants both indirectly (reflected light) and directly (in afternoons when the riparian corridor would not be shaded by the proposed building) that the project would not have a significant impact on riparian vegetation. Canopy trees are expected to be able to continue to obtain sufficient light for growth, and most native understory plants are shade tolerant, as they have adapted to growing beneath the shade of riparian canopies. Although some degradation may occur, the riparian vegetation would not be significantly impacted by shading.

Comment A.38: Despite this lack of analysis, the shadow study depicts the Project's shade and shadow throughout the year under current conditions and with the proposed Project and shows that the Project would shade the riparian habitat on site "throughout all or most of the morning year-round." SEIR at 49. The SEIR discloses that this level of shading would potentially affect the health and growth of adjacent riparian plants. SEIR at 49 and 57 and SEIR Appendix D, Biological Resources Technical Report by H.T. Harvey at 8 and 9. However, the SEIR concludes, without analysis, that impacts associated with the Project's shading of riparian habitat will be less-than-significant. *Id.*

This conclusion is entirely unsupported. Neither the Initial Study nor the SEIR support the conclusion that increased shading will not harm adjacent riparian plants. Indeed, the evidence provided by the record supports the opposite conclusion—that the Project will harm the long-term viability of adjacent riparian vegetation. The SEIR should have evaluated this foreseeable environmental impact.

Response A.38: See Response A.37.

Comment A.39: 3. The SEIR Fails to Adequately Evaluate the Project's Adverse Indirect Impacts on Downstream Habitat Areas.

The SEIR fails to analyze the Project's potential to impact aquatic habitat downstream. The SEIR discloses that native fish, such as the Central California Coast steelhead and Central Valley Fall-run Chinook salmon are known to spawn, and special status fish such as Pacific Lamprey, green sturgeon, and longfin smelt may occur, in the Guadalupe River watershed. SEIR at 46. Despite these disclosures, the SEIR inexplicably omits analysis of the Project's potential impacts on downstream habitats except for one sentence stating that conditions in the Guadalupe River are less than optimal for fish habitat. *Id.* The SEIR fails to provide information on the locations where native fish are known to spawn or any details on where special-status fish might occur upstream or downstream.

This approach is contrary to CEQA requirements. Under CEQA, if an environmental impact is reasonably foreseeable, a lead agency has an obligation to disclose and analyze the impact as part of the CEQA process. CEQA Guidelines § 15064(d); *see* also CEQA Guidelines §§ 15065(a)(4) and 15358(a). CEQA defines a project-specific effect as *all the direct and indirect environmental effects* of a project. Public Resources Code § 21065.3; emphasis added.

The City has an obligation to disclose and analyze any and all Project-related impacts to habitat downstream (*i.e.*, resulting from degradation of water quality, increased erosion/siltation, etc.) and to native and special-status fish populations. This analysis must be completed now as part of this CEQA evaluation process rather than being deferred to an unspecified future date after the Project has been approved.

Response A.39: While the Central California Coast steelhead (federally threatened) and Central Valley Fall-run Chinook salmon (a California species of special concern) are known to spawn in Guadalupe River and Los Gatos Creek, the reach of Guadalupe River through downtown provides less than optimal conditions for steelhead and Chinook salmon due to water temperatures, velocity and depth of flow, sandy gravel substrate, pollution, and barriers to migration (refer to page 73 of the Downtown Strategy 2040 FEIR).

H.T. Harvey & Associates concluded that the project would not have an adverse effect on fish or other aquatic life in the Guadalupe River. Rather, the project would likely improve the quality and quantity/timing of runoff from this site that enters the river. The project would be required to be designed so that runoff flows into treatment and detention facilities before being discharged into the river via an existing outfall. As a result of treatment using media filters and biofiltration facilities, the quality of runoff from the site would be higher than the current untreated runoff from the existing parking lot. In addition, the project would be able to regulate the rate of runoff, whereas runoff under existing conditions is unregulated. As a result, the project would not have an adverse effect on fish or on aquatic habitat or species upstream or downstream from the project site.

Comment A.40: 4. **The Project’s Approach to Mitigation of Impacts on Riparian Habitat is Inadequate.**

Because the SEIR fails to adequately analyze significant impacts on biological resources impacted by project-related encroachment into the riparian area of the river, it also fails to provide adequate mitigation to address all of the ways that biological resources will be impacted. An EIR is inadequate if it fails to identify feasible mitigation measures, or if its suggested mitigation measures are so undefined that it is impossible to evaluate their effectiveness. *Lotus*, 223 Cal.App.4th 645; *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 79. The City may not use the inadequacy of its impacts review to avoid mitigation: “The agency should not be allowed to hide behind its own failure to collect data.” *Sundstrom*, 202 Cal.App.3d at 306. The formulation of mitigation measures may not properly be deferred until after Project approval; rather, “[m]itigation measures must be fully enforceable through permit conditions, agreements, or legally binding instruments.” CEQA Guidelines § 15126.4(a). Here, the SEIR’s identification and analysis of mitigation measures, like its analysis of biological impacts, are legally inadequate.

The SEIR's approach to mitigating impacts to the riparian habitat is unacceptable for multiple reasons. First, the SEIR states that a Riparian Habitat Mitigation and Monitoring Plan is required to describe the mitigation planned for the site. SEIR at viii and 58-59. Yet, these important details are not included. It is critical that the mitigation plan be prepared now, prior to the City's approval, to ensure that all of the elements of the Project including the proposed mitigation, and reasonably foreseeable impacts, are evaluated for effectiveness and feasibility.

Second, as explained in comments submitted by both the San Francisco Bay Regional Water Quality Control Board ("Regional Board") and the Santa Clara Valley Water District, the proposed mitigation for impacts to the riparian habitat (i.e., Mitigation Measure BIO (C)-1) on site has not been shown to be feasible and no other mitigation has been proposed. First Amendment to the Draft SEIR Comment and Response C.2 and C.3 at 15-16 and Comment and Response E.5 at 20-21. The two commenting agencies stated that restoration of the riparian habitat on-site would require approval from the Water District, which does not typically allow private parties to implement such mitigation. Both agencies also requested verification that there are feasible opportunities for implementing the proposed 3.6 acres of riparian restoration and/or enhancement on the Santa Clara Valley floor in the City of San Jose. *Id.*

SEIR responses C.2, C.3 and E.5 reiterate the Project's proposed reduced setbacks and proposed mitigation measure, but never actually respond to the agencies' comments regarding the infeasibility of implementing the proposed mitigation measure. Under CEQA, "an agency must solicit and respond to comments from the public and other agencies concerned with the project." *See* CEQA Guidelines §§ 15073, 15086-88 (emphasis added); *see also King and Gardiner Farms v. County of Kern* (2020) 45 Cal.App.5th 814, 882 (lead agency failed to provide reasoned response to EIR comment that proposed new mitigation measure). Here, the SEIR fails to adequately respond to these agencies' comments indicating that the proposed mitigation is infeasible.

Response A.40: Mitigation Measure BIO(C)-1.1 requires riparian habitat to be enhanced or restored to native habitat along the immediate adjacent riparian corridor, and/or off-site on the Santa Clara Valley floor and in areas that drain to the San Francisco Bay at a minimum ration of 2:1 (compensation : impact), on an acreage basis, for a total of 3.6 acres of enhanced or restored habitat to compensate for 1.8 acres of project encroachment within the 100-foot setback. The CEQA Guidelines state the general rule that "[f]ormulation of mitigation measures shall not be deferred until some future time." Cal. Code Regs. tit. 14 ("Guidelines") §15126.4. The Guidelines, however, go on to state that the specific details of a mitigation measure may be developed after project approval "when it is impractical or infeasible to include these details during the project's environmental review" provided that the agency: (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identified the types(s) of potential actions(s) that can feasibly achieve that performance standard and that will be considered, analyzed, and potentially incorporated in the mitigation measure. Compliance with a regulatory permit or other similar process may be identified as mitigation if compliance would result in implementation of measure that would be reasonably expected, based on substantial evidence in the record, to reduce significant impact to the specified performance standards. Guidelines, §15126.4(a)(1)(B). Furthermore, previous cases such as the North Coast Rivers Alliance v. Marin Municipal Water District Board of Directors, 46 Cal.App.5th 665

(2020) concluded that details of exactly how mitigation will be achieved under the identified measures can properly be deferred pending completion of future study. *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Ca.App.4th 88 also had commitment to mitigation in the form of design standards was not deferred mitigation even though future site-specific investigations and reports were required to determine the final project mitigation details.

Here, the Project's mitigation measures meet the level of specificity identified in the Guidelines and case law above. The DSEIR adopts a specific performance measure that mitigation will achieve (i.e. to provide a 3.6 acres of "enhanced or restored habitat) and the MMRP must include a "final and performance criteria" and measurement of "success criteria." Again, the SEIR Mitigation Measure BIO(C)-1.1 requires some combination of on-site and/or off-site mitigation for encroachment into the riparian setback, and Mitigation Measure BIO(C)-1.2 requires preparation of a Riparian Habitat Mitigation and Monitoring Plan detailing how this mitigation would be provided. These mitigation measure describes the contents of the Mitigation and Monitoring Plan and include one of the success criteria that will be required (related to canopy closure at the mitigation site). Therefore, the SEIR does not inappropriately defer identification of impacts or the appropriate mitigation.

The applicant and City are working together to identify mitigation sites that meet the requirements of these mitigation measures and have determined that suitable mitigation sites exist on City lands, in locations where Santa Clara Valley Water District approval would not be necessary.

Comment A.41: The requirement of mitigation measures is at the core of CEQA. See Pub. Resources Code 21080(c)(2); *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564. Mitigation measures ensure that an environmental document not only informs the public but charts a course to minimize a project's environmental impacts. Under CEQA, "public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects." Pub. Resources Code § 21002.

Here, because the SEIR defers identification of impacts and defers preparation of enforceable mitigation plans, the EIR does not comply with CEQA. There cannot be meaningful scrutiny of an environmental document when the mitigation measures are not set forth at the time of project approval. See *Sundstrom*, 202 Cal.App.3d at 311 (1988) at 306-08. As such, the City must prepare a revised EIR for the Project to correct this egregious flaw.

Response A.41: See responses above.

Comment A.42: 5. The SEIR's Analysis and Mitigation of Impacts Related to Bird Collisions is Inadequate.

The SEIR discloses that the Project could create a potentially significant impact from birds colliding with the Project's high-rise glass structure. SEIR at 51. However, the SEIR identifies only three of the building facades as potentially impacting birds. *Id.* As the Kleinhaus Report explains, bird collisions in structures adjacent to riparian habitat are common on all facades of a building,

regardless of their orientation relative to riparian areas. Kleinhaus Report at 8. By failing to account for the Project's full potential to cause bird collisions, the SEIR understates the Project's potential biological impacts.

Response A.42: While it is agreed that bird collisions are expected to occur with all facades of the proposed building, regardless of a façade's orientation. However, the purpose of Mitigation Measure BIO-1.1 is to ensure that the numbers of collisions that occur over time is reduced to less than significant levels under CEQA. It is the opinion of the City's biological consultant that the number of bird collisions with the building's west façade is expected to be highest compared to all other facades because this façade faces riparian habitat along the Guadalupe River, where the majority of birds are expected to occur. Collisions with the building's north and south facades may also be relatively high as birds using riparian habitat along the Guadalupe River disperse outward from the river looking for other foraging, nesting, or roosting sites. Of all of the building's facades, the fewest numbers of birds are expected to travel to the area opposite the east facades, which faces South Almaden Boulevard with limited landscape vegetation, and with urban development across the street.

Some bird collisions with the east façade are expected to occur, as some birds will use the street trees present along South Almaden Boulevard east of the site. However, the number and diversity of birds that are expected to occur east of the project site is low enough that there is no reasonable expectation that such high numbers of birds will collide with this façade that these collisions would contribute to a significant impact under CEQA (i.e., a significant reduction in the populations of those bird species). Thus, Mitigation Measure BIO-1.1 does not prescribe bird-safe design measures on the east façade.

Comment A.43: In addition, the mitigation measures related to this impact are inadequate for several reasons. First, mitigation measure MM BIO-1.1 limits application of certain elements of the measure only to portions of the building at certain heights. SEIR at 51. As explained in the Kleinhaus Report, bird collisions can occur at any building height, including on the podium portion of the building. Kleinhaus Report at 8. Thus, mitigation would be necessary for the full height of the building.

Second, the proposed mitigation measures do not comply with the City's Downtown Design Guidelines and Standards ("DTDG"), which include bird safety guidelines and standards. *Id.* and DTDG at 49. The DTDG specifies that bird safety measures apply to all facades of buildings located within 300 feet of a riparian corridor, regardless of building orientation and whether or not a façade is visible from the riparian corridor. Kleinhaus Report at 8.

In addition, the proposed mitigation measures ignore bird safety requirements found in Council Policy 6-34 section 4, which states that:

"[N]ew development should use materials and lighting that are designed and constructed to reduce light and glare impacts to Riparian Corridors. For example, the use of bright colors, and glossy, reflective, see through or glare producing Building and material finishes is discouraged on Buildings and Structures."

To ensure compliance with this policy, the mitigation measures should be revised to incorporate these requirements.

Response A.43: The project is subject to the 2004 Downtown Design Guidelines and is not subject to the 2019 Downtown Design Guidelines and Standards because the project application was filed in January 2019, prior to the April 23, 2019 effective date of the current Downtown Design Guidelines and Standards. Nevertheless, the commenter and the Klienhaus Report are incorrect in their interpretation of the language for bird safe design in the Downtown Design Guidelines and Standards. Page 49, Guideline a, states:

“For projects within 300 feet of a riparian corridor, treat all glass that is visible from a riparian corridor with bird safe treatment.”

Mitigation Measure BIO-1.1 is correctly applied to the north, west, and south-facing building facades. Furthermore, the mitigation identified is based on LEED Pilot Credit 55: Bird Collision Deterrence, which is the industry standard used for bird safe design. Based on the information provided on the American Bird Conservancy (ABC) website (<https://abcbirds.org/glass-collisions/leed-credit/>) The LEED program, in concert with ABC (the nation’s foremost experts in bird-safe design) developed the program to address the impacts of structures on birds after construction is complete based on ABC’s Glass Collision Program and represents the most intensive, effective bird-safe design measures encountered by the City’s biological consultant.

LEED Pilot Credit 55 calculates a Bird Collision Threat Rating (BCTR) for a building (or in the case of the Almaden Office project, the three combined facades) as a whole. The BCTR is an index that accounts for the fact that bird collisions can occur with any portion of a building, regardless of height. However, because collision risk is higher with the lower portions of a building where vegetation is present, the lower 36 feet of the building are weighted more heavily when calculating a building’s index compared to the portions of the building located above 36 feet. Nevertheless, because the facades of the Almaden Office building are composed primarily of glass, it will be necessary for the majority of the glass on the three facades to be treated with a bird-safe treatment that is highly effective at reducing collisions, as determined by a product-specific rating assigned by the AABC, in order to comply with the requirement and achieve a BCTR of 15. Thus, Mitigation Measures BIO-1.1 requires bird-safe design for the full height of the building.

Mitigation Measures BIO-1.1 (and LEED Pilot Credit 55) requires more intensive bird-safe design measures for certain locations, due to heightened collision risk. These include the aforementioned lower 36 feet of the building, as well as areas within 0–12 feet above any green roof. However, this does not correspond to a lessened or weakened requirement for the facades; rather, it ensures that sufficiently intensive measures are implemented at locations with higher collision risk in order to effectively reduce collision risk at those locations.

Comment A.44: E. The SEIR's Analysis of the Project's Cumulative Impacts Is Incomplete and Flawed.

CEQA requires lead agencies to disclose and analyze a project's "cumulative impacts," defined as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." CEQA Guidelines § 15355. A legally adequate cumulative impacts analysis views a particular project over time and in conjunction with other related past, present, and reasonably foreseeable future projects whose impacts might compound or interrelate with those of the project. Cumulative impacts may result from a number of separate projects, and occur when "results from the incremental impact of the project [are] added to other closely related past, present, and reasonably foreseeable probable future projects," even if each project contributes only "individually minor" environmental effects. CEQA Guidelines §§ 15355(a)-(b). Cumulative impacts analysis is necessary because "environmental damage often occurs incrementally from a variety of small sources [that] appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact." *Communities for a Better Env't v. Cal. Res. Agency* (2002) 103 Cal.App.4th 98, 114. *See also Kings County Farm Bureau*, 221 Cal.App.3d at 728-729 (EIR's treatment of cumulative impacts on water resources was inadequate where the document contained "no list of the projects considered, no information regarding their expected impacts on groundwater resources and no analysis of the cumulative impacts").

The SEIR concludes that the Project's encroachment into riparian habitat would result in a considerable contribution to significant cumulative impacts. SEIR Impact BIO(C)-1 at 57. Specifically, the SEIR's biological resources technical report states:

"If encroachment is generally permitted along streams within the City of San José and/or VHP Habitat Plan Permit Area because the adjacent riparian habitat is determined to be moderate or low in quality, the encroaching developments will contribute to a significant cumulative impact by further reducing habitat quality throughout a large area" and "the contribution to cumulative impacts due to encroachment into the riparian buffer would be considerable for construction of the new building within this area, as it *represents a new type of development that will have a greater impact on the adjacent riparian corridor* (due to hemming in the riparian habitat and potentially reducing wildlife use of the adjacent portion of the river, shading riparian habitat and potentially affecting the health and growth of adjacent riparian plants, and bird collisions with new buildings, as discussed above) *compared to existing conditions.*"

SEIR at 57 and SEIR Appendix D, Biological Resources Technical Report by H.T. Harvey at 8 and 9; emphasis added. While the SEIR comes to the correct conclusion, it fails to provide information on the extent and severity of the cumulative riparian area that will be affected and the efficacy of the proposed mitigation, so that the public and decision makers may reach their own conclusions. *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 130.

Response A.44: The SEIR need only address the project's contribution to the cumulative impact, which it does. The SEIR specifies that the area of impact is the reach adjacent to the site. Regarding the effectiveness of the mitigation, that cannot be quantified at this time. The mitigation is the restoration/enhancement of habitat and can succeed or fail for a multitude of natural or manmade reason. It would be

speculative to make assumptions of the success of the mitigation proposed. Because of this, the mitigation specifies success criteria (page 59 of the SEIR) and a 10-year monitoring plan to ensure that the success criteria have been met. If the success criteria has not been met at year 10, then additional measures are required.

Even with the mitigation identified, the impact was determined to be significant and unavoidable for encroachment within 35 feet of the riparian corridor.

Comment A.45: Moreover, the SEIR fails to evaluate the cumulative impacts of shading of riparian habitat areas by the proposed Project in combination with the two 20-story, 297-foot office towers with a total building area of approximately 1.8 million square feet planned to the south of the Project site across Woz Way. The EIR for 280 Woz Way includes a shade and shadow study indicating that the Woz Way project will cast shade on the west bank of the river, opposite the Almaden Office Project, in the morning, year-round. Presumably, this shading would impact riparian plants similarly to the anticipated impacts disclosed for the proposed Project, doubly impacting riparian habitats. See, Shade and Shadow Study for 280 Woz Way, attached as Exhibit 4.

Nor can the SEIR cure its failure to analyze these impacts by rotely acknowledging the impacts' significance. As the Court of Appeal explained, "this acknowledgement is inadequate. 'An EIR should be prepared with a sufficient degree of analysis to provide decision makers with information which enables them to make a decision which intelligently takes account of environmental consequences.'" *Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.* (1997) 60 Cal.App.4th 1109, 1123 (quoting CEQA Guidelines § 15151).

Here, although the SEIR concludes that cumulative impacts to riparian habitat would be significant, the SEIR fails to evaluate myriad indirect impacts to plant and wildlife along the length of the river, or quantify the magnitude of that impact when combined with the Woz Way project. SEIR at 3.6-9 and 3.6-10. A revised SEIR must evaluate impacts to all biological resources impacted and the analysis must account for both direct and indirect impacts.

Response A.45: The Notice of Preparation (NOP) for the proposed project was circulated in May 2019 and the SEIR circulated starting July 31, 2020. The NOP for the Woz Way Project was circulated in June 2020 and the SEIR circulated starting March 1, 2021. Because there was no project information available from the Woz Way Project at the time the SEIR for the proposed project was completed and circulated, the analysis could not have accounted for shade from the adjacent parcel, nor was it required to.

The onus of any cumulative discussion of shading would be on the Woz Way Project SEIR as the data for the proposed project was publicly available prior to completion and circulation of the Woz Way Project SEIR. The Woz Way Project SEIR did evaluate cumulative impacts of that project with the Almaden Office project in Section 4.0 of that SEIR. The commenter did not provide written comments during the Woz Way Project SEIR public circulation period with regard to this issue. Nevertheless, two buildings casting the same shade would not result in a cumulative effect. Overlapping building shadows would not double the effect of the shade.

Comment A.46: VII. The SEIR Impermissibly Rejects the Identified Environmentally Superior Alternative.

A proper analysis of alternatives is essential to comply with CEQA's mandate that, where feasible, significant environmental damage be avoided. Pub. Resources Code § 21002 (projects should not be approved if there are feasible alternatives that would substantially lessen environmental impacts); CEQA Guidelines §§ 15002(a)(3), 15021(a)(2), 15126(f). Every EIR must describe a range of alternatives to the proposed project that would feasibly attain the project's basic objectives while avoiding or substantially lessening the project's significant impacts. Pub. Resources Code § 21100(b)(4); CEQA Guidelines § 15126(d). Therefore, the discussion of alternatives must focus on project alternatives that are capable of avoiding or substantially lessening the significant effects of the project, *even if such alternatives would impede to some degree the attainment of the project objectives* or would be more costly. CEQA Guidelines § 15126.6(b), emphasis added; *see also Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1089 (“[T]he key to the selection of the range of alternatives is to identify alternatives that meet most of the project's objectives but have a reduced level of environmental impacts”); emphasis added.

As a preliminary matter, the SEIR's failure to disclose the extent and severity of the Project's broad-ranging impacts necessarily distorts the analysis of Project alternatives. As a result, the alternatives are evaluated against an inaccurate representation of the Project's impacts. Proper identification and analysis of alternatives is impossible until Project impacts are fully disclosed. Moreover, as discussed above, the document's analysis is incomplete and/or inaccurate so that it is simply not possible to conduct a comparative evaluation of the Project's and the alternatives' impacts.

Response A.46: The City fully and accurately assessed the environmental effects of the proposed project. Based on the identified impacts, a range of alternatives was assessed in the SEIR. More detailed responses are below.

Comment A.47: The SEIR's Reduced Development Alternative 1 (Option 1) – Reduced Square Footage With 35-Foot Setback Alternative (which incorporates a 35-foot setback from the riparian habitat), was found to be the environmentally superior alternative “because it would reduce the significant construction air quality impact to a less than significant level and it would reduce the project's cumulatively considerable contribution to the Guadalupe River riparian corridor with implementation of Mitigation Measures BIO-1.1. This alternative would meet nine of the 10 project objectives.” SEIR at 91.

The Planning Commission rejected the Reduced Development Alternative (Option 1), following staff's recommendation to deny it because “this alternative would not meet *one* of the project objectives, which is to maximize the use of an underutilized infill site compared to the Project.” PC Staff Report, Item 5.a at 24; emphasis added. As discussed below, the proposed finding rejecting the Reduced Development Alternative (Option 1) does not comport with CEQA. PC Staff Report, Item 5.a at 12; PC Staff Report Appendix H Draft Special Use Permit Resolution at 15; and PC Staff Report Appendix I Draft Vesting Tentative Map Resolution at 6.

This approach is flawed for two reasons. First, the SEIR presents an overly narrow Project objective that effectively circumscribes and mandates selection of the Project or an alternative that is substantively similar. “[M]aximizing” the use of infill sites requires taking into account regulatory

constraints. Therefore, the environmentally superior alternative *does* maximize the infill site, because it allows development to the maximum legal limit.¹³

Response A.47: Project Objective No. 6 specifically states:

“Maximize use of an underutilized infill site by providing office, amenity/retail, and public space in an area served by various modes of public transportation such as the Caltrain, VTA light rail and buses, and planned BART extension to downtown; thereby creating opportunities to reduce vehicle miles traveled.”

It is unclear from the comment how this is overly narrow.

Comment A.48: CEQA requires agencies to explain their rejection of potentially feasible alternatives in a manner “sufficient to enable meaningful public participation and criticism.” *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1458. Courts have repeatedly found that agencies fail to meet this standard when they reject alternatives based on unsupported conclusions. *Save Round Valley Alliance*, 157 Cal.App.4th at 1465. To reject environmentally favorable alternatives, the agency must find that they either do not meet the project’s objectives or that they are infeasible—that is, they are not “capable of being accomplished in a successful manner . . . taking into account economic, environmental, social, and technological factors.” Pub. Resources Code § 21061.1. This finding must be supported by substantial evidence in the record.

CEQA mandates selection of the environmentally superior alternative if it can feasibly attain most of the project’s objectives, “even if it would impede to some degree the attainment of the project objectives, or would be more costly.” CEQA Guidelines § 15126.6(b). Moreover, any failure to meet project objectives is not grounds to reject an alternative where those objectives are too narrowly drawn. *See North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 669-70 (where the lead agency’s overly narrow project purpose caused it to “dismiss[] out of hand” a relevant alternative, this error “infected the entire EIR”). As discussed, the environmentally superior alternative clearly satisfies the majority of the project objectives without impacting the riparian corridor to the same degree as the proposed Project. The proposed findings fail to include legitimate justification for rejecting the Reduced Development Alternative (Option 1).

Response A.48: See Response A.47.

Comment A.49: Troublingly, the First Amendment to the SEIR shifts the reduced-scale alternatives to be setback from the property lines, not the edge of the riparian corridor. First Amendment to the SEIR (text revisions at 103) and Council Staff Report at 4. This is a substantial change from the reduced scale alternatives presented and analyzed in the SEIR, which would be consistent with City requirements for riparian setbacks. SEIR at 88. Riparian setback requirements, as set forth in the City’s Riparian Corridor Policy Study, and as confirmed by City staff, make clear that the relevant

¹³ To the extent that “maximizing” use of the site beyond regulatory constraints may result in more profit for the applicant, the applicant’s profit motivation plays no role in decision making under CEQA. *See Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1460 (“[T]he willingness or unwillingness of a project proponent to accept an otherwise feasible alternative is not a relevant consideration.”).

development setback measurement is not from edge of the property line, but from the edge of the riparian drip line. Policy Study at 31; Council Staff Report at 6.

The Riparian Setback Diagram, attached to the Council Staff Report, shows measurements from various points of the proposed Project (Building or L1F&B/Amenity; L2 Tower Above; and Basement Underground) where the property line encroaches into the riparian habitat for most of the length of the proposed Project site.¹⁴ The proposed change in measurement is irrational given that staff evaluated the proposed Project setback as measured from the edge of the riparian corridor.” Council Staff Report at 4. The SEIR likewise indicates that for the Reduced Development Alternative 1 (Option 1) – Reduced Square Footage With 35 Foot Setback “[T]he proposed building would be set back from the Guadalupe River riparian corridor by 35 feet.” SEIR at 88. The Council Staff report also states that “staff evaluated the setback as measured from the edge of the riparian corridor.” Council Staff Report at 4. The Council Staff Report further clarifies that “[F]or this project site, the edge of the vegetation is the edge of the riparian corridor.” *Id.* Therefore, it is abundantly clear that when the EIR contemplates riparian setbacks, the measurement is assumed to be made to the edge of the riparian corridor defined by the edge of vegetation.

This late change to the Project alternatives means that the SEIR failed to fully analyze impacts on the riparian habitat. That is, an analysis of impacts with the measurement from the edge of the riparian corridor would necessarily find that impacts would be less than an analysis of impacts with the measurement from the property line. This is because the latter scenario allows for significant encroachment into riparian area compared to an alternative that measures the setback from the edge of riparian corridor.

Significantly, the alternatives revision in the First Amendment to the SEIR means that the SEIR fails to consider any alternative that is consistent with the City’s setback requirements as set forth in the Riparian Corridor Policy Study, Council Policy 6-34, and the City’s General Plan. This approach violates CEQA. *Banning Ranch*, 2 Cal.5th at 936-37 (an EIR’s consideration of alternatives must account for constraints placed on a project by “other plans or regulatory limits”). Further, the SEIR fails to evaluate the alternatives’ impacts related to their inconsistency with the City’s riparian setback policies.

Response A.49: The DSEIR identified biological resources and a conflict with the Santa Clara Valley Habitat Conservation Plan. Section 7.4.1.3 and 7.4.1.4 of the DSEIR include two figures showing a 35’ and a 100’ setback from the property line. However, the description of these alternatives incorrectly referred to this as a “set back from the Guadalupe River riparian corridor” but did not define how the edge of the riparian corridor was determined. For the purpose of the setback alternatives in the DSEIR, the property line was selected as a more conservative analysis than top-

¹⁴ For purposes of considering whether the proposed Project would be consistent with required setbacks and for evaluating foreseeable impacts, the most relevant measurement is from the riparian edge to the basement line. This is because: 1) relevant City policies measure the required riparian setback from the riparian edge to the edge of development, and 2) impacts to the riparian habitat occur above and below ground. Excavation and construction of the basement/underground parking garage would damage tree and plant roots, impacting their ability to thrive. According to the Riparian Setback Diagram, in the case of the proposed Project, the development would take place within 1 foot 6 inches (1’6”) of the riparian edge.

of-bank, as the intention of the setback alternatives was to reduce significant unavoidable impacts due to the conflict with the Habitat Plan and the cumulative impact to biological resources. However, the First Amendment provides the text changes and clarifications to the alternatives. Since the DSEIR circulation, the Santa Clara Valley Habitat Agency provided clarification that the project would not be subject to conditions in the Habitat Plan for the preservation of riparian habitat (see memorandum in Attachment G of the First Amendment), resulted in removal of the Significant and Unavoidable impact and the project has less than significant impact as it would not conflict with the Habitat Conservation Plan (refer to Master Response 1 in First Amendment of the DSEIR).

Comment A.50: Lastly, with this change, aside from the required No Project Alternative, the SEIR also only considers one alternative that complies with City policies - Reduced Development Alternative 2 – Square Footage Reduction and Increase in Height, which would allow a building up to a maximum height of 30 stories. But here too, the EIR is flawed because it never evaluates shade and shadow impacts of constructing a building to such height. SEIR 90-91. In short, the SEIR’s alternatives analysis is riddled with flaws that both improperly constrain to the City’s consideration of project alternatives, and prevents the City Council from fully grasping the advantages and disadvantages of the listed alternatives.

Response A.50: The alternatives analyzed in the Draft SEIR were developed with the goal of being at least potentially feasible, given project objectives and site constraints, while avoiding or reducing the project’s identified environmental effects. The SEIR identified six alternatives, two of which were considered and rejected. Of the remaining alternatives, there was the no-project alternative and three reduced density alternatives.

As explained in the First Amendment to the Draft SEIR, CEQA requires a reasonable range of alternatives be studied that would reduce or avoid project impacts (CEQA Guidelines Section 15126.6). The alternatives addressed in the SEIR included setbacks consistent with applicable policies and consistent with the recommendation of the biological consultant (35 feet and 100 feet). An setback alternative between 35 and 100 feet would result in similar impacts to those identified under *Reduced Development Alternative 1 (Option 1) – Reduced Square Footage With 35 Foot Setback* and *Reduced Development Alternative 1 (Option 2) – Reduced Square Footage With 100 Foot Setback*.

Comment A.51: VIII. Conclusion

This Project cannot be approved in its present form. It contains substantial conflicts with the City’s General Plan and other mandatory policies. At the same time, the SEIR is legally inadequate and cannot serve as the basis for Project approval. For these reasons, the Sierra Club requests that the Council deny the Project. Alternatively, if the Council opts to proceed with the Project, we request that you modify the project so that it is consistent with all applicable requirements, including an adequate riparian setback, and would not result in significant impacts on the adjacent riparian habitat.

Response A.51: Refer to previous responses.

Exhibit 1 – MBK Engineers Report, September 9, 2021

Comment A.52: 1. Comments on hydrology and flood management:

- A. The IS concludes that because the project is not in the Federal Emergency Management Agency (FEMA) 100-year floodplain, there are no restrictions on development. In reviewing the FEMA effective Flood Insurance Rate Map for the project area, the project site is mapped into a shaded Zone X and the surrounding area is mapped in a Zone D. Shaded Zone X is defined as an area at risk of flooding for events greater than 100-year, but less than 500-year. Zone D is defined as an area of undetermined flood risk.
- B. Using FEMA’s flood insurance requirement for the 100-year floodplain is inconsistent with State and Federal recommendations regarding the management of flood risk, especially when considering the risk that climate change will result in an increased frequency and intensity of extreme flood events.
- i. Federal guidance on development of the floodplain is contained in Executive Order (EO) 13690, which established a Federal Flood Risk Management Standard (FFRMS). EO 13690 amended the existing EO 11988. EO 11988 governs Federal actions in floodplains. It encourages wise use of the floodplain, and is used in guiding decisions on Federal investment in order to minimize the risk of flood damages in the future. The FFRMS is a more conservative standard than the FEMA flood insurance standard of the 100-year flood, and FFRMS relies on several methods to consider flood risk, including increases in flooding due to climate change and use of the 500-year floodplain, along with other options, to inform investment decisions to reduce the risk of flood damages and loss of life. EO 13690 also encouraged consideration of natural systems, ecosystem processes, and nature-based approaches.

Response A.52: As discussed on page 76 of the SEIR Appendix A, Flood Zone X is designated as areas of 0.2 percent annual chance flood, areas of one percent annual chance flood with average depths of less than one foot or with drainage areas of less than one square mile, and areas protected by levees from one percent annual chance floods. There are no City floodplain requirements for Flood Zone X. Pursuant to General Plan Policy EC-5.1, the City requires protection from a one percent annual change flood (100-year flood). New development is not required to provide flood protection for less frequent flood events unless required by the state. Requirements for building in various flood zones is detailed in the Municipal Code Section 17.08.

Executive Order (EO) 13690, as noted by the commenter, had no regulatory authority over privately funded development. Only projects which receive federal funds would be required to comply with the flood risk management standard in EO 13690. The Lead Agency has discretion over the use of non-mandated regulations and policies. The City does not require conformance with EO 13690 for private development projects.

Comment A.53: ii. State guidance on development in the floodplains is documented in the California Water Resiliency Portfolio and the California Flood Future Report.

a. The Water Resiliency Portfolio was prepared by the California Resources Agency with support from other State agencies and stakeholders. It is a framework for actions the State and local agencies should take to prepare for a warming climate. With respect to floodplain management, the following statements are relevant: Page 14 – Flood Risk, “Avoiding floodplain development and allowing rivers to regain access to floodplains can help manage floods while benefiting water supplies and fish and wildlife habitat.” Page 81 of appendix 3 section 2 – “Winter storms [are] more intense – a once-in-20-year storm will become a one-in-seven year or more frequent storm.” And “Dry and wet extremes will increase.”

b. The California Flood Futures Report was prepared by the California Department of Water Resources (DWR) and the U.S. Army Corps of Engineers (USACE) in 2013. “California’s Flood Future is provided to help inform local, State, and Federal decisions about policies and financial investments to improve public safety, foster environmental stewardship, and support economic stability.” Section 2.3.2 of this report states: “Land Use Planning employs policies and practices to limit development in flood-prone areas and encourages land uses that are compatible with floodplain functions. This can include policies and practices that restrict or prohibit development within floodplains, restrict size and placement of structures, prevent new development from causing adverse flood impacts to existing structures, encourage reduction of impervious areas, require floodproofing of buildings, and encourage long-term restoration of streams and floodplains.” Page 4-5 of the report states, “Some short-term actions, such as the following, do not require substantial additional financial resources: Land use planning and decision making must consider flood management. This includes limiting development in floodplains.”

Response A.53: See Response A.52.

As discussed on page 183 of the Downtown Strategy 2040 Integrated Final EIR, the City and future project applicants would be subject to the following programs, 2040 General Plan policies, and floodplain management regulations intended to minimize risks associated with flooding:

- FEMA National Flood Insurance Program (NFIP)
- City of San José Municipal Code, Chapter 17.08 (Special Flood Hazard Area Regulations)
- Post-Construction Hydromodification Management Policy 8-14
- City of San José Local Hazard Mitigation Plan

The EIR also states that most regulated flood plain areas in the downtown are confined within the channel banks of Los Gatos Creek and Guadalupe River with exceptions along Stockton Avenue. As required by the City, the project complies with all floodplain requirements and no state mandated regulations are applicable.

Comment A.54: C. While it is accurate to state that there are no restrictions on development in a FEMA shaded Zone X, by approving a project within 35 feet of the top of the streambank, there is insufficient right of way to respond to flood management concerns in the future. For example, if the 100-year flow increases as forecasted with climate change, or if the City or Valley Water decide to provide higher levels of protection, a floodwall would likely be needed. Construction of a floodwall would require removal of a significant portion of the riparian corridor because the development is not setback far enough from the top of the streambank. Urban areas across the State and the nation have

long recognized the need for higher levels of protection than what is provided in FEMA’s minimum 100-year. For example, cities in the California Central Valley have a 200-year standard, including Lathrop, Stockton, Manteca, Sacramento, West Sacramento, Woodland, Yuba City, and Marysville. Meanwhile, communities in Sacramento and Yuba counties are attempting to pass the 500-year flood in their urban areas. Allowing development within 35 feet of the top of bank will increase the costs of providing flood protection and would likely require the removal of significant portions of the riparian corridor in order to construct a floodwall and install bank protection to protect the project site from flooding.

Response A.54: The statements made by the commenter in reference to possible future climate change scenarios and potential flood improvement options for the project site are outside the scope of proposed project. The City does not have any policy or regulation which requires projects to be designed for a potential future scenario that cannot be accurately forecasted in terms of timing or degree of effect. It would be speculative for the commenter or the City to try to predict what additional flood control measures would be implemented by Valley Water should the need arise in the future because actual effects are unknown and new technologies may be available. If, in the future, it is determined that additional flood control is required on Guadalupe River beyond what is already in place, the Lead Agency in charge of the project would have to complete environmental review under CEQA based on the specific details of the project and mitigate any impacts to the riparian corridor that may result.

Comment A.55: State guidance regarding the development of setbacks is contained in the State of California’s Urban Levee Design Criteria (ULDC). Section 7.11 of this document states:

“Right-of-Way¹⁵ criteria for levees and floodwalls in urban and urbanizing areas need to meet the following objectives: Allow adequate room for maintenance, inspection, patrolling during high water, and flood-fighting. To the extent practical, adequate right-of-way should be available to provide additional room to expand facilities in the future. Reasons to expand the facilities might include:

- Desire by the community to provide higher levels of flood protection.
- Changes in design criteria, poor performance during high water, updated hydrology and/or hydraulics, or other data that would indicate that additional modifications are necessary to maintain the urban level of flood protection.”

Right-of-Way for Long-Term Flood Protection in Section 7.11.2 states:

“In order to meet the second objective, the city, county, or levee maintaining agency should consider acquiring right-of-way for a future needs area that has a width equal to at least four times the levee height or 50 feet, whichever is greater, on the land side of the 20-foot clear zone. If acquired:

- Structures should not be constructed in this future needs area.

¹⁵ Right way in this application is defined as the footprint needed for the flood control structure and adequate operation and maintenance corridors on the water and landside of the structure.

- It must also be understood that some seepage is normal and acceptable during high water, so uses incompatible with this seepage should not be allowed in this area. The future needs area may be used for open space, agriculture, bike and pedestrian trails, outdoor recreation, parking lots, or other similar uses not likely to have an adverse impact on the structural integrity of the levee or floodwall, but with the understanding that these facilities may be displaced by future levee construction.”

Response A.55: As there are no planned or approved flood control projects along the reach of the Guadalupe River adjacent to the project site which would result in levees or floodwalls being installed, the State of California Urban Levee Design Criteria are not relevant or applicable to the proposed project.

Comment A.56: *Conclusion: Allowing development within 35 feet of the river without an adequate setback/buffer is shortsighted land use planning and will restrict how local agencies respond in the future to mitigate changes in flood risk. Placing the proposed project so close to the Guadalupe River increases the likelihood that undeveloped portions of the riparian corridor will need to be replaced with flood protection measures in the future.*

Response A.56: See Responses A.52 through A.55.

Comment A.57: D. The IS and SEIR do not evaluate the impacts of climate change on hydrological conditions surrounding the project site. The specific concern regards how climate change may increase the intensity and/or frequency of extreme flood events. The most likely effect being increased areas along the river being mapped into the FEMA 100-year floodplain. EO 13690, the Water Resiliency Portfolio, and the Flood Futures Report all highlight the need to plan for increased extreme flood events in the future due to climate change. Valley Water’s Climate Change Action Plan states, “Precipitation could increase in overall volume. Extreme heat and precipitation events are likely to increase in frequency.” Section 2.2.2 of the report states that, “Floods may become more likely as a result of increasing precipitation intensity, extreme storm events, and [sea level rise] (Ackerly et al., 2018).”

Section 2.2.2.1 states:

“River flooding, also called fluvial or riverine flooding, occurs when rainfall intensity or frequency causes a river to exceed its capacity. Climate change will affect the level of river flood risk since existing flood protection projects have been designed considering statistical analysis of past events and are built to provide protection to a certain level—often the one percent flood (1-in-100 chance or 1% probability) of being equaled or exceeded in any given year. Climate change impacts on the frequency and severity of fluvial flooding are difficult to predict with certainty. Most models project more intense storms, and possibly increased return frequencies. Using IPCC data, (Ackerly et al.,2018) projected that a 20-year return frequency one-day storm event for the Bay Area would increase in frequency by a factor of three or more by end of century, becoming a once-in-seven year storm rather than a once-in-20-year storm. The level of protection provided by previously built flood protection infrastructure may be insufficient if hydrologic conditions vary from design assumptions, as a result of climate change.”

Section 3.2.2.1 states:

“As it is likely that the frequency of extreme precipitation events will increase by mid-century, Santa Clara County is at a higher risk of storm-related flooding. This has the potential to damage public and private infrastructure, coastal and riverine habitat, and public safety. Existing flood protection facilities are vulnerable to climate-related events such as extreme storms and wildfires. For example, creek channels in the county, which are maintained to provide adequate flow capacity, can become clogged with sediment and debris following a wildfire, decreasing capacity to pass flood flows.”

Conclusion: The proposed project is placing lives and damageable property at risk without planning for a way to address the increased flows that Valley Water, DWR, and USACE are predicting will result from climate change. This should be addressed in Section 5 of the SEIR as a Significant and Irreversible Environmental Change. The SEIR should also describe the foreseeable flood-protection measures that the proposed project would require to prevent flooding of the project site.

Response A.57: See Responses A.54 and A.55.

The suggestion that the SEIR should address potential future changes in Guadalupe River water flows from climate change and redesign or mitigate for those effects is unreasonable and outside what is required by CEQA. CEQA Guidelines Section 15144 states that drafting an EIR or preparing a Negative Declaration, necessarily involves some degree of forecasting. While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can. While there are studies that predict possible climate change outcomes, there are too many external factors to make a reasonable assumption of the effects of a building setback on one parcel located along less than 1,000 linear feet of the Guadalupe River riparian corridor. No further analysis is required.

Comment A.58: E. The existing streambank does not have bank protection. A review of the site photos (Attachment A) shows areas of minor erosion. Overtime, the natural riverine geomorphic processes are expected to result in increased erosion at the project site as river channels naturally meander and erode their existing banks. With the proposed development being 35 feet from the top of bank, a hard scape solution will likely be required to protect the building. Construction of a hardscape solution, such as riprap, will require removal of the riparian vegetation for construction to create a stable slope to place the riprap. Installation of riprap or similar bank protection methods will establish a hard point at the project site, and risks increasing erosion up and downstream of the site by increasing and/or redirecting velocities.

Attachment B includes images from Google Earth showing the project site and the reaches of the Guadalupe River upstream and downstream of the project site. The images show that in 1993 there was very little bank protection or hardscaping of the riverbanks, and the riparian corridor was largely intact. However, in comparing the 1993 images to current images, as the area developed, the riverbanks have been hardened with concrete terraces, riprap, and other hardscape features.

Conclusion: If the setback was increased, it would allow for more flexibility in permitting the natural riverine processes to occur, and would provide more flexibility in addressing erosion in ways that preserve the existing riparian vegetation without having to construct hardscaping to address erosion at the project site. This should be addressed in Section 5 of the SEIR as a Significant and Irreversible Environmental Change.

Response A.58: See previous responses.

Comment A.59: 2. Comments on groundwater analysis:

A. Appendix F of the SEIR is the Geotechnical Engineer's Report. This report identifies a sand layer that is at a similar depth to that of the Guadalupe River's riverbed. The report identifies alternatives for addressing groundwater during construction, but does not specify which alternative will be used during construction. The SEIR does not state whether there will be permanent groundwater pumping or other features installed to permanently alter groundwater flow at the site. Section 6.2 of Appendix F states that, "Drainage should be collected by perforated pipes and discharged by gravity or directed to a sump(s)." However, it is not clear whether this is a temporary construction action or a long-term feature of the project. If permanent groundwater pumping occurs, it could reduce flows into the Guadalupe River, and negatively affect the river system or it could cause subsidence around the project site.

B. Valley Water's comment E.8 states:

"Valley Water recommends that the construction dewatering system be designed such that the volume and duration of dewatering are minimized to the greatest extent possible. Valley Water also recommends that a more detailed analysis of construction dewatering be conducted, including estimating dewatering volumes/durations and evaluating related impacts."

However, the response to this comment simply refers the commentor to Appendix F, which does not identify the specific dewatering system and construction shoring method that will be used to address this concern.

Conclusion: The SEIR does not identify the method of excavating the foundation of the building or the associated dewatering plan that will be used, only options that could be considered. As a result, the SEIR does not demonstrate that the method of construction will not adversely impact the river or the surrounding aquifer.

Response A.59: The second part of the Valley Water's comment E.8 in the First Amendment is, "It is important that the project comply with the recommendations from the geotechnical exploration report (SEIR Appendix F), which will be reviewed and approved by the Department of Public Works, and the City's Standard Permit Conditions for dewatering. Valley Water supports the geotechnical exploration report recommendation that the project be constructed with a structural mat foundation and waterproofing to avoid the need for permanent dewatering." The response to this comment in the First Amendment acknowledge that there is a project specific geotechnical report and consistent with the commenter's support, the project is required to comply with the project specific geotechnical investigation and recommendation.

Comment A.60: 3. Comment on Water Quality Section of the IS:

The IS identifies the regulatory requirements and the process for meeting water quality requirements. However, the IS does not specify how certain portions of the project will comply with these regulations. For example, there is not a description of the methods that will be used to treat the

groundwater removed by the dewatering system, or a description of exactly where the point of discharge of the treated groundwater will be. The long-term treatment plan and point of discharge for the drains that are proposed are also not specified.

Conclusion: The IS and SEIR do not identify the specific methods that will be utilized to meet water quality requirements during construction. As a result, the IS and SEIR do not disclose how the chosen methods will meet the regulatory requirements; they simply assert requirements will be met, and can be accomplished through a range of alternatives.

Response A.60: Appendix F of the DSEIR is the site specific geotechnical investigation with recommendation on dewatering potential and methodology. Consistent with City's protocol, these reports shall be further reviewed prior to the issuance of any Public Work permits to ensure consistent with regulatory requirements. The report identified that dewatering would be recommended and foreseeable and the SEIR have disclosed as such. Details of the treatment plans are still subject to future review prior to issuance of Public Works Clearances such as grading permits.

Exhibit 2 – Shani Kleinhaus Report, September 9, 2021

Comment A.61: On behalf of the Santa Clara Valley Audubon Society and the Sierra Club Loma Prieta Chapter, I have reviewed the City's Supplemental Environmental Impact Report ("SEIR") for the Almaden Office project. The Project proposes to construct a 16-story building immediately adjacent to the Guadalupe River without an adequate setback to buffer the riparian area from construction and operation impacts and increased human activity.

I am a biologist with over 30 years of expertise in avian research and protection in urban habitats and beyond. I earned my Ph.D. degree in Ecology from the University of California at Davis. I subsequently conducted post-doctoral research at the Ben Gurion University of the Negev in Beersheba, Israel focusing on the hazards of man-made structures to migratory birds. I also conducted post-doctoral research focusing on watershed master planning efforts and on restoration of creek corridors in rural and urban landscapes at Tel Aviv University in Tel Aviv, Israel.

Upon completion of my post-graduate work, I worked as the lead biological consultant to the Israeli River Restoration Authority and to the Israeli National Park Authority. For over ten years, I have been the Environmental Advocate for Santa Clara Valley Audubon Society, and have provided professional consulting services related to bird collisions with glass buildings, native plantings and habitat creation. Through my employment with Audubon, as well as through independent consulting work, I have worked with Intuit, Facebook, Google, CBRE (CB Richard Ellis), Cushman and Wakefield, and other companies to help monitor, evaluate and incorporate adequate bird safety measures, lighting, and glazing treatments in new construction and retrofitted buildings and native habitat protection and enhancement. In addition, I have engaged in the development of regulations for bird safety in several Santa Clara Valley cities, including: a 2021 ordinance in the City of Cupertino, the San Jose Downtown Design Standards and Guidelines (2019), and the Citywide Design Standards and Guidelines (2021).

I am also a member of the National Audubon Society Bird-Friendly Communities effort and the American Bird Conservancy Collision Network.

Response A.61: This comment summarizes the commenters professional experience, and is not related to the adequacy of the EIR. No response is required.

Comment A.62: Method

In preparation for this review, I reviewed the following documents, available on the City's Almaden Office Project website:

- First Amendment to the SEIR and First Amendment attachments,
- Almaden Office 1st Draft SEIR Public Comments,
- Supplemental EIR,
- Appendix A: Initial Study,
- Appendix C: Arborist Report,
- Appendix D: Biological Resources Report,
- Supplemental EIR 1st draft Public Comment letters regarding riparian corridors:
 - Comment Letter A (California Native Plant Society),
 - Comment Letter E (Guadalupe-Coyote Resource Conservation District),
 - Comment Letter F (Guadalupe River Park Conservancy),
 - Comment Letter G (Jean Dresden),
 - Comment Letter J (San Francisco Bay Regional Water Quality Control Board),
 - Comment Letter K (Sierra Club),
 - Comment Letter L (Valley Water),
 - Please note that I wrote Comment Letter H (Santa Clara Valley Audubon Society), see in the Supplemental EIR 1st draft Public Comment letters.

I also reviewed the City of San José Downtown Design Standards and Guidelines (2019), and Citywide Design Standards and Guidelines (2021), available on the City's website.

I reviewed the San José Riparian Corridor Policy Study (1999). This document provides a strong foundation for requiring 100-ft setback from the riparian edge of San José streams.

I reviewed eBird, a bird observation database managed by the Cornell Lab of Ornithology. It is the primary online, citizen science, scientifically vetted online database for birds. eBird data documents bird distribution, abundance, habitat use, and trends through data collected by birders who submit checklists showing when, where, and how they went birding, and then fill out a checklist of all the birds seen and heard during the outing. I also reviewed iNaturalist data. iNaturalist is one of the world's most popular citizen science tools. It is a joint initiative of the California Academy of Sciences and National Geographic.

I used Calscape, a California Native Plant Society database, for some of the information regarding native trees.

I have also conducted several site visits (March 18, 2019; September 9, 2019; June 26, 2021; and August 29, 2021) to the project site and within the 100-ft setback of the riparian corridor (as defined by the city, the riparian corridor is measured from top of the bank or the dripline of the riparian trees, whichever is greater) to evaluate the quality of the riparian habitat adjacent to the site, and consulted

with Mr. Matthew Dodder, Executive Director for Santa Clara Valley Audubon Society and a professional birder¹⁶ (Mr. Dodder visited the site on August 30, 2021). I reviewed the habitat value of native trees (SK Attachment 1) with Dr. Linda Ruthruff, Conservation Chair for the California Native Plant Society Santa Clara Valley Chapter (Personal communication, August 30 and September 1, 2021) and used references including resources (published and unpublished) from local native plant and pollinator habitat expert Mr. Jeffrey Caldwell¹⁷.

Response A.62: This comment summarizes the data review by the commenter, and is not related to the adequacy of the EIR. No response is required.

Comment A.63: Analysis and Comments

In my opinion, the SEIR's analysis underestimates the high biological value of the riparian area along the Guadalupe river in the area between Woz Way and San Carlos street, especially for birds. In addition, the SEIR does not provide adequate, feasible mitigation for bird collision - mitigations that are required for other developments in the downtown area.

Rivers and their riparian corridors are the most natural and geographical features in urban landscapes. Riparian corridors provide critically important habitat for aquatic invertebrates, fish, amphibians, birds, and mammals, especially in landscapes modified by humans, where the rivers, creeks and their riparian ecosystems are often the last remaining habitats that provide resources and sustain wildlife. Numerous species are dependent on riparian corridors (and water within) for survival at least for some part of their life cycle: foraging, breeding, migration, and dispersal. Many breeding birds in Santa Clara Valley are associated with the riparian corridors, as evident from breeding maps of bird species provided in the Breeding Bird Atlas of Santa Clara County, California. Many of these species nest in riparian corridors that are not pristine.

The Biological Report recognizes that daytime shading of the riparian corridor by tall buildings may over time affect the health and growth of adjacent riparian plants. The SEIR also acknowledges that construction and operations of the project will reduce the use of the riparian corridor by birds and other wildlife species. Despite the predicted degradation of the riparian trees and the reduced usability of the riparian corridor, the report considers the adjacent stretch of the river and its riparian corridor to be of Moderate Value and concludes that the proposed project would not result in a project-level impact since the existing riparian habitat immediately adjacent to the site is of moderate quality (as opposed to high quality). I disagree with this assessment, and with the conclusion. Instead, I find that while not pristine, the riparian habitat in this location and at this setting is of high value for birds and other biota, and significant, project specific impacts are inevitable.

¹⁶ Matthew Dodder has been an avid birder since 1977, and has observed 2000 species worldwide and over 500 bird species detected in California. In Santa Clara County, Mr. Dodder has identified 342 species (~95% of the total number of species recorded in the county). Mr. Dodder has been a Birding instructor at Palo Alto Adult School since 1999-2020 (21 years). He has taught hundreds of students who moved from beginner to advanced and finally master birders in that time. He has led hundreds of field trips to all areas of California. Mr. Dodder continues to offer popular birding classes online and has produced dozens of videos for Audubon dealing with bird identification. Mr. Dodder is currently the Executive Director of Santa Clara Valley Audubon Society.

¹⁷ Jeffrey Caldwell is a biologist and horticulturist in Santa Clara County. He is a former chief horticulturist for Theodore Payne Foundation for Wild Flowers and Native Plants.

Response A.63: The City recognizes that the commenter has a differing opinion than the City's biological expert. However, the commenter has provided no supportable evidence in this comment to offer a different conclusion than that of the City. While the commenter may have a different opinion than the City, the professional opinion of the City's qualified expert who evaluated the proposed project is considered substantial evidence under CEQA (CEQA Guidelines Section 15384). Furthermore, even if the commenter had provided evidence to support their opinion, CEQA allows for a disagreement among experts. If this were to occur, the City would weigh the evidence from both experts and make a determination. More importantly, disagreement among experts does not make an EIR inadequate (CEQA Guidelines Section 15151). Based on available evidence, the City has concluded that the proposed project would have a less than significant project-level impact on Guadalupe River and a less than significant bird strike impact (with mitigation). Even with mitigation, the City determined the cumulative impact to Guadalupe River to be significant and unavoidable.

Comment A.64: 1) The report fails to recognize the critical importance of the site as a high value natural habitat patch in an urban river continuum where upstream and downstream reaches have been compromised.

The conservation value of even small, isolated remnants of habitat have been shown to be much more important for biodiversity conservation than often recognized¹⁸. This is particularly true in heavily modified, human-dominated landscapes such as cities.

In their global analysis encompassing 28 countries, Wintle et al.¹⁹ show that many species would be lost if small, isolated patches of remnant habitat were ignored and conservation efforts were focused solely on large, intact, and highly connected areas. The work of Wintle et al. adds to the array of case studies that likewise highlight the importance of small (and often relatively isolated) patches for conservation (for example, Leroux et. al. 2007).²⁰

The Guadalupe River Corridor in downtown San Jose comprises a series of habitat patches in a linear continuum of concrete channels, underpasses and tunnels, modified creek channels and some unmodified stretches. Some of the modified creek channels retain moderate habitat quality where riparian trees and vegetation are present, but the highest habitat value in an urban setting such as downtown San José is its riparian corridors and in these corridors, unmodified stretches with diverse community of riparian trees have the highest value, especially in areas where adjacent parks provide

¹⁸ <https://www.pnas.org/content/116/3/717>

¹⁹ Wintle BA, et al. (2019) Global synthesis of conservation studies reveals the importance of small habitat patches for biodiversity. Proc Natl Acad Sci USA 116:909–914. Abstract/FREE Full Text Google Scholar (SK Attachment 2)
Bennet, et al. (2014) Riparian vegetation has disproportionate benefits for landscape-scale conservation of woodland birds in highly modified environments. Journal of Applied Ecology (SK Attachment 4).

Tulloch, et al. (2016) Understanding the importance of small patches of habitat for conservation. Journal of Applied Ecology (SK Attachment 6).

Lindenmayer. (2019) Small patches make critical contributions to conservation efforts. Proc Natl Acad Sci USA (SK Attachment 5).

²⁰ Leroux SJ, et al. (2007) Minimum dynamic reserves: A framework for determining reserve size in ecosystems structured by large disturbances. Biological Conservation.

buffers and healthy riparian forest shades the river and provide habitat for fish, birds, and other wildlife.

Response A.64: The City and H.T. Harvey & Associates agree that riparian corridors provide the highest habitat value in urban, downtown San José, but that does not suggest that any riparian habitat in downtown San José is of “high quality”, relative to reaches of streams with broader riparian corridors, longer segments of riparian habitat without bridges, less human activity within the riparian habitat, and lower predominance of nonnative vegetation.

t The City disagrees that the SEIR has underestimated the biological value of the riparian habitat adjacent to the project area. The SEIR actually identifies cumulative impacts as significant and unavoidable. Although small habitat patches can provide important habitat, it is our conclusion, based on thorough analysis, and for reasons stated in the Biological Resources Report for this project and Response A.35, that the riparian habitat on the project site is not of high quality, relative to other areas in the Santa Clara Valley where substantially higher-quality habitat is present.

Comment A.65: 2) The report underestimates the habitat value of the riparian forest, and the diversity and abundance of bird species in the riparian corridor and its vicinity. As a result, it mistakenly finds that existing riparian habitat adjacent to the project site is of only moderate quality.

eBird identifies the area delineated by San Carlos Street, Almaden Blvd., and Woz Way, including the Guadalupe River Trail and Discovery Meadows park, as a birding hotspot. The attached eBird “profile” of this area (SK Attachment 3 and <https://ebird.org/hotspot/L1316518>). 98 checklists have been submitted for this location since May, 2004. A total of 95 species have been recorded there. Of the 95 avian species known to utilize this area, several are migratory species associated with riparian habitats (especially in urban areas)²¹. These riparian species are: Pacific-slope Flycatcher, Tree Swallow, Hooded Oriole, Bullock’s Oriole, Orange-crowned Warbler, Yellow Warbler, Yellow-rumped Warbler, Townsend’s Warbler, Wilson’s Warbler and Western Tanager.

In addition, it is important to note the variety of avian families represented at this hotspot. 5 species of Woodpeckers, 4 species of Hawks, 2 species of Falcons, 4 species of Flycatchers, 2 species of Vireos, 3 species of Thrushes, 5 species of Swallows, 5 species of Finches and 8 species of Sparrows. These families include species that feed in trees, grasslands, and the air. It includes species that feed on seeds, fruit, insects and other animals. This is testament of the value of this location.

Response A.65: See Response A.64.

While all of the species listed here may use riparian habitats, it is inaccurate to call them all riparian-associated species, even when considering the urban areas of San Jose. Of the species listed here, Hooded Oriole nests primarily in fan palms, regardless of proximity to creeks; Townsend’s Warbler is an uncommon migrant and winter visitor that, on the Santa Clara Valley floor, is associated more with conifers

²¹ Mr. Matthew Dodder, Personal communications.

(which are not prevalent along valley floor streams), than riparian vegetation; and Western Tanager occurs as a migrant in a variety of habitats, including parks and residential areas.

Comment A.66: Mr. Dodder visited this section of the riparian corridor on Monday, August 30, 2021. He reported 11 species including Western tanager (a migratory species) found in the riparian cottonwoods, 5 individuals of Western bluebird in the park (3 young being fed by 2 adults), and several individuals of Chestnut-backed chickadees along the creek and near trees.

Mr. Dodder observed:

“I was impressed with the variety of riparian vegetation in the area. Sycamore and willows are especially productive for birds as they set up nests or pause in the area to feed. There were also a variety of oaks and a number of ornamental trees. The banks of the creek were festooned with low growth that could host smaller, secretive breeding species. The water way was blocked in places, but small pools could serve as resting and refueling stops for migrant species.

I fully expect that both Bullock’s Oriole and Hooded Oriole will be found here in spring as the willow and sycamore habitat is perfect, as are the nearby fan palm trees. Both have been found by other birders.

The habitat is also perfect for Song Sparrow, but loud nearby construction prevented me from detecting the species. It has been detected by other visitors and was recorded on their checklists.”

Mr. Dodder’s visual bird observations from August 30, 2021 can also be found at this eBird checklist: <https://ebird.org/checklist/S93957075>.

Response A.66: This comment, which expresses the opinion of the commenting party is noted, and will be provided to the decision-makers for consideration.

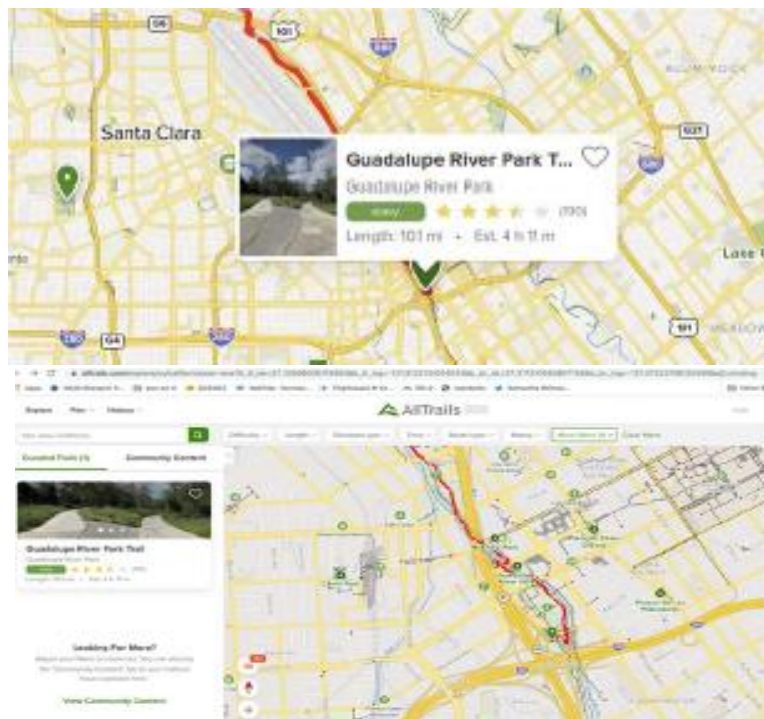
Comment A.67: The diversity of avian families and species is likely supported primarily by the diverse riparian forest in the creek. The SEIR and associated documents, and site visits I conducted onsite demonstrate a healthy and robust riparian forest in a relatively wide riparian stretch along the river. The riparian forest comprises a diverse and mature community of California native trees, non-native trees and dense understory vegetation. As reported by the Biological resources report (and supported by my observations), the riparian canopy includes native coast live oaks (*Quercus agrifolia*), red willows (*Salix laevigata*), and Fremont cottonwoods (*Populus fremontii*), with lesser numbers of native valley oaks (*Quercus lobata*), box elders (*Acer negundo*), California bays (*Umbellularia californica*), western sycamores (*Platanus racemosa*), and California buckeyes (*Aesculus californica*), as well as non-native trees. While non-native trees and vegetation provide limited food sources for birds, when mixed with native trees of high habitat value such as the native trees onsite, the riparian forest can have a high habitat value, especially in an urban setting. The importance of a water source - the Guadalupe river - is also critical to resident and migratory birds, especially as cities and water agencies mandate water savings and surface water is becoming scarce in the urban landscape.

The native trees onsite have the potential to support dozens of species of invertebrates (SK Attachment 1, compiled with the help of Dr. Linda Ruthruff) and provide food for insectivorous birds, fish, and other wildlife species. A search of the iNaturalist database for the riparian corridor shows, among other observations, 2 amphibians species, 2 reptiles, 14 moth/butterfly species as well as other insects, arachnids and more.

These observations include the arboreal salamander (amphibian), California slender salamander (amphibian), Western fence lizard (reptile), turtle (reptile), and the following moths/butterflies: painted lady, gray hair streak, common checkered-skipper, Western tiger swallowtail, polyphemus moth, Western monarch butterfly, red admiral, gulf fritillary, fiery skipper, anise swallowtail, mourning cloak, Western tussock moth, garden tortrix, and cabbage looper moth²². This abundance of prey species helps explain the diversity of birds in the riparian corridor, and supports my conclusion that this riparian patch is of high habitat quality. Please note that the Western monarch is now a candidate under the Endangered Species Act²³.

Response A.67: See Response A.35.

Comment A.68: The value of the site for birds is further substantiated by the fact that a Google search for “Best bird watching trails in San Jose, California”²⁴ shows the Guadalupe River Park Trail across the river from the project site as one of the most popular, accessible sites for watching birds.



The impacts to birds at the site will degrade an important birding recreation site for San Jose residents and visitors.

²² iNaturalist

²³ <https://www.fws.gov/savethemonarch/SSA.html>

²⁴ AllTrails maps and bird watching trails, <https://www.alltrails.com/us/california/san-jose/birding>

The comment attempts to assess habitat value based on a Google search for bird watching trails in San José, which does not constitute substantial evidence from a qualified expert. The City's biological consultant, reviewed this comment in light of the whole record and concluded that this approach does not provide evidence of the quality of the habitat along the project reach of the Guadalupe River for birds.

Comment A.69: 3) The Biological Resources Report and SEIR wrongly argue that the riparian habitat adjacent to the project site is of moderate habitat value and concludes that the proposed project would not result in a project-level impact since the existing riparian habitat immediately adjacent to the site is of moderate quality (as opposed to high quality).

The Biological Studies Report provides (page 7), "Shading of the riparian habitat by the buildings will reduce the amount of light received by riparian trees and plants, potentially affecting the health and growth of these plants". In response to comment from Jean Dresden (p. 37) the First amendment provides "...the proposed towers would shade the adjacent habitat throughout some of the morning hours year-round". The Biological Resources Report establishes an expectation that "some degradation of the riparian habitat over time as a result", but finds no significant impacts "since the existing riparian habitat immediately adjacent to the site is of moderate quality"

During a site visit (August 29, 2021), I roughly estimated the proportion of native trees and canopy onsite to be over 70% of the riparian canopy. The foreseeable degradation of the tree canopy due to shading by the proposed building, cannot be taken lightly. The reduction of available sunlight can modify the tree composition and reduce the proportion of native trees with preference to full-sun conditions, such as valley oak, Fremont cottonwood, and Western sycamore²⁵. The degradation of the riparian forest due to shading and potential change in tree composition can reduce the availability of food resources such as acorns or insects in the tree canopy and in tree trunks. This will compound the significant, unavoidable reduction of the riparian habitat value of the river adjacent to the project site.

3.1) The riparian corridor includes a large number of non-native trees and understory, and disturbance from homeless activity (SEIR Appendix D Biological Resources Report at page 5)

As I have shown, the site is a birding hotspot that provides habitat to migratory birds and a wide spectrum of avian taxa. The data establish that the riparian corridor and its environment are of high quality for birds (SK Attachment 3).

Response A.69: The SEIR does state that shading of riparian habitat by the towers could potentially affect the health and growth of plants and degrade the riparian habitat in the long term. However, based on the analysis in the SEIR, it is expected that sufficient light will reach these plants, both indirectly (reflected light) and directly (in afternoons when the riparian corridor is not shaded by the new building) that impacts will not be so great as to result in a significant impact on riparian vegetation. Canopy trees are expected to be able to continue to obtain sufficient light for growth, and most native understory plants are shade tolerant, as they have adapted

²⁵ 11 <https://calscape.org/>

to growing beneath the shade of riparian canopies. Although some degradation may occur, the riparian vegetation is not expected to be significantly impacted by shading.

Raw data on birds reported to eBird, in the absence of any context such as comparison to other riparian sites, does not establish the value or quality of this riparian corridor to birds.

Comment A.70: 3.2) “The habitat is not likely to be heavily used by migrating birds.” The biologist conducted a one-hour site visit September 7, 2018 and observed 45 individuals of 13 bird species. The biologist states, “all species were relatively common native birds that are widespread in the region and only one was dependent on riparian systems (mallard). None of these were migrants, even though timing of visit just prior to peak migration of Neotropical migrants in the area.” (SEIR Appendix D Biological Resources Report at page 5).

The data from eBird and observations by Mr. Dodder and others show that a diverse community of birds, including migratory birds, use the habitat

Response A.70: This comment was made in response to the statement in the Biological Resources Report that the riparian habitat is not likely to be used heavily by migrating birds. Mr. Dodder’s eBird checklist, cited by the Kleinhaus Report, included only one species (western tanager) that was an obvious migrant rather than a resident breeding bird. Based on Dr. Rottenborn’s doctoral dissertation research on riparian birds in the Santa Clara Valley and intensive birding experience along much of the riparian habitat present in the Santa Clara Valley, it is his best professional judgment that the segment of riparian habitat adjacent to the project site is not as heavily used by migrating birds as the habitat in a number of higher-quality creek segments in the valley.

Comment A.71: 3.3) Habitat fragmentation due to surrounding high-density urban development and presences of bridges, road crossings, and channelization along nearby portions of river, and therefore the “site lacks connectivity to higher-quality riparian habitats in the region” (SEIR Appendix D Biological Resources Report page 5).

Based on scientific evidence of the importance of small habitat value, Mr. Dodder’s observations and my own experience, I believe that this “patch” of habitat is critically important to birds and wildlife connectivity along the Guadalupe River exactly because it is located in a developed urban landscape, and allows birds and other species to find refuge, forage, rest, roost and breed along the river. As stated above, the riparian corridor supports a mature and diverse native tree canopy that provides high quality habitat. In this area, this high quality habitat serves as an important stepping stone along the fragmented riparian corridor of the river (SK Attachments 2, 4, 5, 6).

Response A.71: See Response A.35.

Comment A.72: Conclusion

On page 7, the Biologist Resources Report states, “In our opinion, based on the moderate quality of the riparian habitat present and the native bird community present at this location, coupled with the ecological value of the Guadalupe River on the scale of the Santa Clara Valley, a 100-ft standard

setback is appropriate between new building construction and the Guadalupe River on the project site to maintain suitable riparian functions and values. For the purposes of this project, the standard 100-ft setback extends landward from the outer edge of the riparian habitat along the Guadalupe River...”. I concur.

I believe that due to the foreseeable degradation of the riparian canopy due to shading, and the intrusion into the riparian corridor, this project has the potential to result in substantial degradation of riparian bird communities in the segment of the Guadalupe River adjacent to the project site and beyond. The encroachment impact on riparian birds and habitat, in my opinion, is a significant impact under CEQA on a project-specific basis as well as a cumulative basis.

Response A.72: The statement above from the Biological Resources Report (Appendix D of the SEIR), is in reference only to the cumulative impact of the project and is not representative of the project-level conclusion of the City’s biological expert. The commenter’s opinion is noted, and will be provided to the decision-makers for consideration

Comment A.73: 4) The SEIR’s analysis of bird collision impacts is incomplete and inaccurate.

4.1)_Impact Bio-1 erroneously does not identify the building’s eastern façade as hazardous to birds. Mitigation Measure Bio-1 should apply to all 4 facades of the building.

For over 4 years, I have been a participant in online discussion forums and monthly calls organized by the National Audubon Society and by the American Bird Conservancy (ABC). Both forums provide presentations and discussions focusing on bird collision monitoring efforts, location-related hazards, building architecture (including overall architecture, specific features, height, elements that increase collisions, lighting, the effectiveness of mitigation measures and more). Several of the participants in these forums are from the west coast, and a few from California. The discussions show surprisingly consistent location and architectural hazards across the continent. In locations adjacent to riparian and other sensitive habitats, bird collisions are common at all facades and all heights. Of special concern here, buildings that are curvilinear or include indentations, these features trap birds in situations where veering from a flight path is difficult to perform in mid-flight. Raptors such as hawks and falcons are known to collide with buildings when they chase birds in flight. With 6 species of hawks and falcons in the riparian corridor, this is of great concern.

In monitoring bird collisions in Mountain View and Sunnyvale (on behalf of Cushman and Wakefield), I observed glazed facades that were prone to bird collisions even when they were oriented away from creeks or open space, but within 300-ft of such habitats. These observations hold true even where there is little vegetation near the facades. Observations by over a dozen contributors to the Audubon and the ABC networks support the need for implementation of bird safety measures, at a minimum, within 300-ft of creeks and other habitat areas.

San Jose implements requirements for bird safety near the Bay (with some added protection in creek corridors citywide; Riparian Corridor Protection and Bird Safe Design Council Policy 6-34, 2016), within 300 feet of a creek or a river Citywide (Section 3.3.6 Bird Safety in the Citywide Design Standards and Guidelines, 2021) and downtown (section 4.4.2.b Bird Safety Downtown Design Guidelines (“DTDG”) and Standards, 2019). Recent projects in the downtown area have been required to abide by the DTDG (Woz Way) and some projects voluntarily exceed these requirements (Downtown West).

The importance of the riparian corridors to birds are also the reason why San Jose's DTDG requires bird safety application to all facades of buildings that are located within 300 feet of a riparian corridor, regardless of the exact location of the building, and whether or not a facade is visible from the riparian corridor. This is a feasible mitigation that should apply to the project as it does to all other developments.

Response A.73: The project is subject to the 2004 Downtown Design Guidelines and is not subject to the 2019 Downtown Design Guidelines and Standards because the project application was filed in January 2019, prior to the April 23, 2019 effective date of the current Downtown Design Guidelines and Standards. Nevertheless, the commenter is incorrect in their interpretation of the Bird Safety Downtown Design Guidelines and Standards. Page 49, Guideline a, states:

“For projects within 300 feet of a riparian corridor, treat all glass that is visible from a riparian corridor with bird safe treatment.”

Pursuant to the Bird Safety Downtown Design Guidelines and Standards, the project is not required to implement bird safe treatment on the east side of the building.

The implementation of bird-safe design measures within 300 feet of sensitive habitats, including streams such as the Guadalupe River, are an effective strategy to reduce bird collisions. However, the purpose of Mitigation Measure BIO-1.1 is to reduce bird collisions to a less than significant level under CEQA, rather than to recommend good practices for bird-safe design in a more general sense. Thus, while we agree that the implementation of bird-safe design measures on the building's east façade would reduce bird collisions, the City's biological consultant determined that these measures are not necessary to reduce population-level impacts on birds to less than significant levels under CEQA.

As stated in Response A.42, although collisions with the building's east façade will occur, there is no reasonable expectation that such high numbers of birds will collide with the east façade such that these collisions would contribute to a significant impact under CEQA (i.e., a significant reduction in the populations of those bird species).

Hawks and falcons are among the many common, widespread species of birds that occur along the riparian corridor, and it is possible that small numbers of these birds will collide with the Almaden Office building over the long term even with the implementation of Mitigation Measure BIO-1.1. However, the intensive bird-safe design measures required by Mitigation Measure BIO-1.1 will substantially reduce the potential for raptors to collide with the north, west, and south facades of the Almaden Office building. Due to the low numbers of prey species (e.g., rodents and smaller birds) expected to be present along Almaden Boulevard on the east side of the building, there is no reasonable expectation that such high numbers of hawks and falcons will collide with the east façade to contribute to a significant impact under CEQA (i.e., a significant reduction in the populations of hawk and falcon species in the region). Thus, this impact is less than significant under CEQA with the implementation of Mitigation Measure BIO-1.1.

Comment A.74: Mitigation Measure BIO-1.1 recognizes the potential for the proposed towers on the project site to result in a high number of bird collisions. SEIR Mitigation Measure MM BIO-1.1 at pages 51 and 52. However, the mitigation measure would only apply to the building’s north, west, and south-facing façades. Id. The SEIR does not provide any justification for excluding other portions of the building from mitigation. All glass facades of the project, including the podium, are within 300 feet of the riparian corridor, and therefore, have the potential to result in a high number of bird collisions, and the mitigation should also apply to the podium and the east facade. San Jose DTDG at page 49.

In addition, Council Policy 6-34 section 4 provides:

“4) Materials and Lighting a. New development should use materials and lighting that are designed and constructed to reduce light and glare impacts to Riparian Corridors. For example, the use of bright colors, and glossy, reflective, see through or glare producing Building and material finishes is discouraged on Buildings and Structures”.

Response A.74: As stated in Responses A.42 and A.43, although collisions with the building’s east façade will occur, there is no reasonable expectation that such high numbers of birds will travel around the corners of the building to collide with the east façade such that these collisions would contribute to a significant impact under CEQA (i.e., a significant reduction in the populations of those bird species).

Further, Mitigation Measure BIO-1.1 provides more effective bird-safe design requirements compared to the bird-safe design standards in the City’s Downtown Design Guidelines. For example, the City’s standards state “Use a bird safety treatment on facades within 300 feet of a riparian corridor that have 50% or more glazed surface.” However, the standards do not specify the required extent or effectiveness of the bird-safe treatment. It is possible that a building may use a bird-safe treatment with low effectiveness (e.g., a few window stickers) on only a portion of the glass facades of a building and be considered in compliance with this standard. In contrast, Mitigation Measure BIO-1 requires the building as a whole to have a BCTR of 15; for glassy buildings, it is necessary for the majority of the glass to be treated with a product that is highly effective at reducing collisions (e.g., a frit with good visibility and narrow spacing) in order to achieve a BCTR of 15. Thus, in our opinion, the highly stringent and effective bird-safe design requirements specified by Mitigation Measures BIO-1.1 will effectively reduce bird collisions with the building’s facades.

Comment A.75: The proposed building is composed entirely of glazed facades. The renderings show a see-through design, which is (in my experience) greatly hazardous to avian species even when bird safety treatments are applied to the glazing. Furthermore, it can be expected that in the afternoons, sun will hit the building, and light will be reflected, introducing glare into the riparian corridor and reducing habitat value for birds.

1. The Project’s Impact of Bird Collisions is Significant Even With Proposed Mitigation

Based on my experience and resources, I believe that the riparian habitat nestled between the project and the Discovery meadow area is of high quality, and that the proximity of the building to the

Guadalupe River, the height of the building and its long curvature along the river pose an unmitigable impact to birds, especially migratory birds that fly at night.

As migratory birds travel along riparian corridors, tall buildings in proximity to quality habitat areas can cause substantial increase in bird collisions as migratory birds ascend from or descend to forage, roost, or breed. The importance of the 300-ft buffer is recognized by many cities in their planning efforts, including the City of San Jose in its Design Guidelines and standards.

Response A.75: See responses above.

Comment A.76: To protect birds migrating to and along the riparian corridor, the City of Santa Clara's Tasman East Specific Plan²⁶ restricted building height within 300-ft of the top of bank of the Guadalupe River and nearby natural habitat to 55-ft. The City of Mountain View's North Bayshore Precise Plan²⁷ restricts any new development near creeks mandating a 150-ft buffer (Habitat Overlay Zone) even for creeks in an urban setting that have no riparian forest, such as the channelized Permanente Creek. The plan further reduces building height near sensitive areas by restricting building heights to 55-ft within 100 feet from the boundary of the Habitat Overlay Zone, (for creeks - 250-ft altogether) to provide an additional buffer between sensitive resources and taller buildings. The Downtown West (Google) project in downtown San Jose reduces the volume and massing of buildings within 150-ft of the riparian corridor of Los Gatos Creek

In addition to the restriction of building heights near riparian corridors, the City of Santa Clara requires bird safety treatment applications for the buildings that are within 300-ft of the river. In Mountain View, all new buildings in North Bayshore, and most new buildings in the City are required to implement bird safety measures (some exemptions may be considered, but not at the scale of the proposed project or near waterways).

The City of Santa Clara, even with a wider setback from the Guadalupe River than the narrow setback this project proposes, and height restriction and the requirement of bird safety glazing, has found the impact of bird collision to be significant and unavoidable.

Response A.76: The policies of other municipal jurisdictions are not applicable to San José with regard to bird strikes and riparian setbacks. San José has adopted policies which address these issues which the commenter acknowledges being party to. As specifically noted by the commenter in Comment A.79, "I have engaged in the development of regulations for bird safety in several Santa Clara Valley cities, including: a 2021 ordinance in the City of Cupertino, the San Jose Downtown Design Standards and Guidelines (2019), and the Citywide Design Standards and Guidelines (2021). I am also a member of the National Audubon Society Bird-Friendly Communities effort and the American Bird Conservancy Collision Network."

Having been involved with the development of the San Jose Downtown Design Standards and Guidelines (2019) as well as affiliated with the ABC, the commenter

²⁶ <https://www.santaclaraca.gov/Home/Components/BusinessDirectory/BusinessDirectory/152/3649>

²⁷ <https://www.mountainview.gov/civicax/filebank/blobdload.aspx?BlobID=29702>

should be fully aware that the mitigation measures identified for the proposed project area consistent with the City's requirements and are derived from the guidance of the ABC. For these reasons, it is unclear why the commenter is asserting that the bird safe design mitigation is inadequate. The mitigation measure is adequate, feasible and in full compliance with the requirements of CEQA.

Comment A.77: The City of Cupertino considers areas within 300 feet of the Wildland Urban Interface; within 300 feet of watercourses to be "Bird-Sensitive Areas". In these areas, for all new development, no more than 10% of the surface area of the façade can be untreated glass between the ground and 60 feet above ground. No more than 5% of the surface area of the façade may be untreated glass between 60 feet above ground and up.

The enormity in height and length of the Project, its curvature and its siting within 300 feet of the riparian corridor are in my opinion, a significant unavoidable project-specific impact to birds. Furthermore, other glass tower developments are planned along the Guadalupe River in the San Jose downtown area (Woz Way, Adobe tower, Downtown West and more). All these developments would construct massive glass buildings within 300 feet of the river. Even with mitigation measures, the cumulative impacts of bird collision would be significant.

Response A.77: This comment makes reference to the requirements in the City of Cupertino, which is outside the jurisdiction of the City of San Jose, where the subject project is located. See previous responses.