

Letters from the Public

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

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

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

kfederman@adamsbroadwell.com

SACRAMENTO OFFICE

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

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

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

Of Counsel

MARC D. JOSEPH
DANIEL L. CARDOZO

December 13, 2022

Via Email and Overnight Mail

Honorable Mayor Sam Liccardo

Honorable Vice Mayor Charles Jones, Honorable Councilmembers: Sergio Jimenez; Raul Peralez; David Cohen; Magdalena Carrasco, Devora Davis, Maya Esparza, Sylvia Arenas, Pam Foley, Matt Mahan

Emails: mayoremail@sanjoseca.gov; District1@sanjoseca.gov;

District2@sanjoseca.gov; District3@sanjoseca.gov; District4@sanjoseca.gov;

District5@sanjoseca.gov; district6@sanjoseca.gov; District7@sanjoseca.gov;

district8@sanjoseca.gov; District9@sanjoseca.gov; District10@sanjoseca.gov

Via Email Only

Kara Hawkins, Environmental Project Manager

Email: kara.hawkins@sanjoseca.gov

Angela Wang, Project Manager

Email: Angela.Wang@sanjoseca.gov

Robert Manford, Deputy Director

Email: Robert.Manford@sanjoseca.gov

Christopher Burton, Director

Email: Christopher.Burton@sanjoseca.gov

Re: Agenda Item 10.2 H20-037 & ER20-242 - Site Development Permit for Fountain Alley Mixed Use Project and Supplemental Environmental Impact Report SCH No. 2003042127

Dear Honorable Mayor Liccardo, Vice Mayor Jones, and Councilmembers Jimenez, Peralez, Cohen, Carrasco, Davis, Esparza, Arenas, Foley and Mahan, Ms. Hawkins, Ms. Wang, Mr. Manford, and Mr. Burton:

On behalf of Silicon Valley Residents for Responsible Development ("Silicon Valley Residents" or "Commenters"), we submit these comments to oppose approval of Agenda Item 10.2, the Resolutions to certify the Fountain Alley Mixed Use Project Supplemental Environmental Impact Report to the Downtown Strategy 2040 Environmental Impact Report (SCH No. 2003042127) and approving the Site Development Permit for the San José Fountain Alley Mixed-Use Project ("Project") proposed by Westbank Corp, dba Project Fountain Alley, LLC ("Applicant").

5066-

We reviewed the Memorandum prepared for the December 13, 2022, City Council hearing, which includes the City's responses to Silicon Valley Residents' comments. The FSEIR still provides inadequate mitigation of air quality impacts, and fails to adequately analyze and mitigate impacts from hazardous contamination. As such, we respectfully request the City Council direct staff to revise and recirculate the FSEIR before approving the Project and the necessary Site Development Permit.

I. PROJECT AND COMMENTERS' BACKGROUND

The Project proposes to develop a 21-story curvilinear mixed-use building containing 194 residential units, 31,259 square feet of ground floor retail and 405,924 square feet of office space. The building would have a maximum height of 267 feet to the roof and 289 feet to the top of the mechanical penthouse. The Project would contain 22,500 square feet of public open space area. The Project proposes to develop four below-grade level parking with up to 292 parking spaces. The Project site is 1.25-acres located at 35 South 2nd Street, San José, California, 95113, west of Second Street, between East Santa Clara Street and West San Fernando Street, in the Fountain Alley area of downtown San José, Assessor Parcel Number ("APN") 467-22-121.¹

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

Individual members of Silicon Valley Residents live, work, recreate, and raise their families in the City and in the surrounding communities. Accordingly, they would be directly affected by the Project's environmental and health and safety

¹ City of San Jose, Planning Building & Code Enforcement, Fountain Alley Mixed Use Project Draft SEIR (June 17, 2022). Available at: <https://www.sanjoseca.gov/your-government/departments-offices/planning-building-code-enforcement/planning-division/environmental-planning/environmental-review/active-eirs/fountain-alley-mixed-use-project>.
5066-008j

impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist on site.

In addition, Silicon Valley Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for businesses and industries to expand in the region, and by making the area less desirable for new businesses and new residents. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

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

The FSEIR and the City's Responses to Comments fails to incorporate all feasible mitigation measures to avoid or substantially lessen air emissions impacts, especially with respect to cumulative annual PM_{2.5} emissions. "CEQA establishes a duty for public agencies to avoid or minimize environmental damage where feasible."² A public agency cannot approve a project if there are feasible alternatives or mitigation measures available that would substantially lessen any significant effects that the project would have on the environment.³ CEQA defines "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors."⁴ CEQA requires an agency to set forth, identify, and describe proposed feasible mitigation measures.⁵ Further, agencies are required to focus on mitigation measures that are feasible, practical, and effective.⁶

Silicon Valley Residents presented substantial mitigation measures which are both feasible, practical, and would effectively reduce the Project's air quality and greenhouse gas emissions impacts. The Responses to Comments fails to provide substantial evidence supporting the City's determination to exclude these measures as infeasible. The measures presented below would feasibly mitigate and

² 14 CCR § 15021(a).

³ 14 CCR § 15021(a)(2).

⁴ 14 CCR § 15364.

⁵ 14 CCR § 15126.4(a)(1).

⁶ *Napa Citizens for Honest Gov't v. Napa County Bd. of Supervisors* (2001) 91 CA4th 342, 365. 5066-008j

reduce the Project's air pollution and greenhouse gas emissions. The City must circulate an adequate EIR which incorporates all feasible measures recommended by Commenters to mitigate construction-related air emissions, including:

- Ensure the cleanest possible construction practices and equipment are used. This includes eliminating the idling of diesel-powered equipment and providing the necessary infrastructure (e.g., electrical hookups) to support zero and near-zero equipment and tools.
- Implement, and plan accordingly for, the necessary infrastructure to support the zero and near-zero emission technology vehicles and equipment that will be operating on site. Necessary infrastructure may include the physical (e.g., needed footprint), energy, and fueling infrastructure for construction equipment, on-site vehicles and equipment, and medium-heavy and heavy-heavy duty trucks.
- In construction contracts, include language that requires all off-road equipment with a power rating below 19 kilowatts (e.g., plate compactors, pressure washers) used during project construction be battery powered.
- In construction contracts, include language that requires all heavy-duty trucks entering the construction site during the grading and building construction phases be model year 2014 or later. All heavy-duty haul trucks should also meet CARB's lowest optional low-oxides of nitrogen (NOx) standard.
- Include contractual language in tenant lease agreements that requires tenants to use the cleanest technologies available, and to provide the necessary infrastructure to support zero-emission vehicles and equipment that will be operating on site.
- Include contractual language in tenant lease agreements that requires all loading/unloading docks and trailer spaces be equipped with electrical hookups for trucks with transport refrigeration units (TRU) or auxiliary power units. This requirement will substantially decrease the amount of time that a TRU powered by a fossil-fueled internal combustion engine can operate at the project site. Use of zero-emission all-electric plug-in TRUs, hydrogen fuel cell transport refrigeration, and cryogenic transport refrigeration are encouraged and should also be included in lease agreements.
- Include contractual language in tenant lease agreements that requires all TRUs entering the project-site be plug-in capable.

- Include contractual language in tenant lease agreements that requires future tenants to exclusively use zero-emission light and medium-duty delivery trucks and vans.
- Include contractual language in tenant lease agreements that requires all service equipment (e.g., yard hostlers, yard equipment, forklifts, and pallet jacks) used within the project site to be zero-emission. This equipment is widely available and can be purchased using incentive funding from CARB's Clean Off-Road Equipment Voucher Incentive Project (CORE).
- Include contractual language in tenant lease agreements that requires all heavy-duty trucks entering or on the project site to be model year 2014 or later, expedite a transition to zero-emission vehicles, and be fully zero-emission beginning in 2023. A list of commercially available zero-emission trucks can be obtained from the Hybrid and Zero-emission Truck and Bus Voucher Incentive Project (HVIP).
- Include contractual language in tenant lease agreements that requires the tenant to be in, and monitor compliance with, all current air quality regulations for on-road trucks including CARB's Heavy-Duty (Tractor-Trailer) Greenhouse Gas Regulation, Advanced Clean Trucks Regulation, Periodic Smoke Inspection Program (PSIP), and the Statewide Truck and Bus Regulation.
- Include contractual language in tenant lease agreements restricting trucks and support equipment from idling longer than two minutes while on site.
- Include rooftop solar panels for each proposed building to the extent feasible, with a capacity that matches the maximum allowed for distributed solar connections to the grid.
- Include contractual language in tenant lease agreements, requiring the installing of vegetative walls or other effective barriers that separate loading docks and people living or working nearby to help mitigate noise impacts, air quality, health risk, and greenhouse gas emissions.
- Include contractual language in tenant lease agreements, requiring all emergency generators to be powered by a non-diesel fuel.
- The project should be constructed to meet CalGreen Tier 2 green building standards, including all provisions related to designated parking for clean air vehicles, electric vehicle charging, and bicycle parking.

The above mitigation measures should be discussed and adopted in a revised and recirculated EIR.

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

The FSEIR provides that a Phase II Soil, Soil Gas and/or Groundwater Investigation will be conducted after Project approval. CEQA prohibits the deferral of study and disclosure a project's environmental impacts.⁷ Furthermore, deferring formulation of mitigation measures to post-approval studies is generally impermissible.⁸ Mitigation measures adopted after Project approval deny the public the opportunity to comment on the Project as modified to mitigate impacts.⁹ If identification of specific mitigation measures is impractical until a later stage in the Project, specific performance criteria must be articulated and further approvals must be made contingent upon meeting these performance criteria.¹⁰ Courts have held that simply requiring a project applicant to obtain a future report and then comply with the report's recommendations is insufficient to meet the standard for properly deferred mitigation.¹¹

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

The Project site was occupied by a coffee roaster business from 1930 to 1955.¹² Per the Phase I Environmental Site Assessment ("ESA"), tetrachloroethene (PCE/PERC) was historically used to decaffeinate coffee beans until the 1970s, when it was banned for food preparation and pharmaceutical operations.¹³

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

⁸ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; Pub. Resources Code § 21061.

⁹ *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393; *Quail Botanical*, *supra*, 29 Cal.App.4th at p. 1604, fn. 5.

¹⁰ *Gentry*, 36 Cal.App.4th at 1393.

¹¹ *Id.*

¹² FSEIR, p. 77.

¹³ *Id.*

PCE/PERC can accumulate in soil and soil gas and migrate to groundwater and was identified by the Phase I ESA as a recognized environmental condition (REC).¹⁴ The site may contain significant levels of PCE/PERC.¹⁵

The FSEIR does not adequately disclose existing contamination, or the additional impacts associated with mitigation to remediate the contamination, nor can it do so absent a Phase II ESA.¹⁶ If PCE is found at the Project site through sampling, excavation and offsite transport of contaminated soil may be necessary.¹⁷ Installation of a soil vapor extraction system may also be necessary. These activities, through use of excavation equipment and trucks, would emit air pollutants and air toxins unaccounted for in the FSEIR.¹⁸ If a mitigation measure would cause a significant impact in addition to those caused by the project itself, the effects of such mitigation must be discussed in the EIR.¹⁹ The City's failure to allow for public review of a Phase II ESA in the FSEIR constitutes impermissibly deferred analysis in violation of CEQA and the FSEIR fails to rectify this deficiency.

By deferring environmental assessment to a future date, the FSEIR runs counter to CEQA's requirement of environmental review at the earliest feasible stage in the planning process.²⁰ In *Bozung v. Local Agency Formation Commission* the Supreme Court of California approved "the principle that the environmental impact should be assessed as early as possible in government planning."²¹ A study conducted after approval of a project will inevitably have a diminished influence on decision-making.²² Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA.²³ The FSEIR recognized that "[c]onstruction associated with the proposed project could expose construction workers and nearby land uses to soil and/or groundwater contamination (e.g.,

¹⁴ FSEIR, p. 11.

¹⁵ FSEIR, Appendix E, Phase I Environmental Site Assessment, pdf p. 1939-1940.

¹⁶ SWAPE Comments, p. 2.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 14 CCR § 15126.4(a)(1)(D).

²⁰ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307; PRC § 21003.1; *No Oil, Inc. v. City of Los Angeles*, supra, 13 Cal.3d 68, 84.

²¹ (1975) 13 Cal.3d 263, 282.

²² *Sundstrom v. County of Mendocino*, supra, 202 Cal.App.3d 296, 307.

²³ *Id.*; *No Oil, Inc. v. City of Los Angeles*, supra, 13 Cal.3d 68, 81; *Environmental Defense Fund, Inc. v. Coastside County Water Dist.* (1972) 27 Cal.App.3d 695, 706.

tetrachloroethene) from the former coffee roaster business.”²⁴ But, the FSEIR failed to adequately analyze the full extent of the contamination in a Phase II ESA for public review and scrutiny, in violation of CEQA Guidelines Section 15126.2 subdivision (a).

The City responded to Silicon Valley Residents’ DSEIR comments by referring to proposed mitigation measures that identify the necessary testing that will be required. This doesn’t change the fact that such testing is being deferred until after the FSEIR would be certified, far too late to inform the public of the extent and potentially significant impacts of the contamination as required by CEQA. The City further responds that the DSEIR includes measures in MM HAZ-1.2 which the City argues include “performance standards which must be met before the project would be issued any grading permits needed to commence construction.”²⁵ But the City still fails to address potentially significant impacts of soil vapor remediation or other mitigation efforts. Accordingly, the FSEIR remains inadequate to inform the public about the Project’s potentially significant impacts, and the City must circulate an adequate EIR to adequately address impacts associated with hazardous contamination and impacts associated with such cleanup.

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

The FSEIR relies on Mitigation Measures HAZ-1.1 and HAZ-1.2 to purportedly reduce hazardous materials impacts to less than significant, but these measures constitute impermissibly deferred mitigation under CEQA.²⁶ “By deferring environmental assessment to a future date, the conditions run counter to that policy of CEQA which requires environmental review at the earliest feasible stage in the planning process.”²⁷ CEQA Guidelines § 15126.4(a)(1)(B) provides that formulation of mitigation measures shall not be deferred until some future time.²⁸

The specific details of a mitigation measure, however, may be developed after project approval when it is impractical or infeasible to include those details during the project’s environmental review provided that the agency (1) commits itself to the

²⁴ FSEIR, p. 79.

²⁵ DSEIR, p. ix.

²⁶ DSEIR, p. 79.

²⁷ *Sundstrom v. County of Mendocino*, supra, 202 Cal.App.3d at 305.

²⁸ 14 CCR 15126.4(a)(1)(B).

mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will be considered, analyzed, and potentially incorporated in the mitigation measure.²⁹ Compliance with a regulatory permit or other similar process may be identified as mitigation if compliance would result in implementation of measures that would be reasonably expected, based on substantial evidence in the record, to reduce the significant impact to the specified performance standards”.³⁰ “An EIR is inadequate if ‘[t]he success or failure of mitigation efforts ... may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR.’”³¹

Here, the Site Management Plan, Removal Action Workplan, and Health and Safety Plans called for by MM HAZ-1.2 would require additional analysis and establish mitigation measures that should have been included for public review in the FSEIR. The FSEIR fails to identify the types of measures that may be included to mitigate the Project’s potentially significant hazardous material impacts including measures that may be included in the Removal Action Plan and the Health and Safety Plan.³² Without first assessing the extent of the potential PCE/PERC contamination and then providing details about the mitigation measures, the efficacy of mitigation measures HAZ-1.1 and HAZ-1.2 cannot be determined to be effective. The FSEIR fails as an informational document for impermissibly deferred analysis and mitigation.

The FSEIR’s Responses to Comments does not state why specifying specific performance standards was impractical or infeasible at the time the FSEIR was drafted. In *Preserve Wild Santee v. City of Santee*, the city impermissibly deferred mitigation where the EIR did not state why specifying performance standards for mitigation measures “was impractical or infeasible at the time the EIR was certified.”³³ The court determined that although the City must ultimately approve the mitigation standards, this does not cure these informational defects in the

²⁹ *Id.*

³⁰ 14 CCR 15126.4(a)(1)(B).

³¹ *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, quoting *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92, quoting *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645 670.

³² FSEIR, p. 79-80.

³³ *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281.

EIR.³⁴ Further, the court in *Endangered Habitats League, Inc. v. County of Orange*, held that mitigation that does no more than require a report to be prepared and followed, or allow approval by a county department without setting any standards is inadequate.³⁵

Here, the fact that the Phase II Soil, Soil Gas and/or Groundwater Investigation and potential Site Cleanup Program will be approved later by the Santa Clara County Department of Environment Health or State Department of Toxic Substances Control does not cure the informational defects in this FSEIR, and the FSEIR fails to cure these defects.³⁶ The City must circulate an adequate revised EIR which provides complete analysis and mitigation of the Project's hazardous materials impacts before the Project can be approved.

IV. CONCLUSION

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

Thank you for your consideration of these comments.

Sincerely,



Kelilah D. Federman

KDF:ljl

³⁴ *Id.*

³⁵ *Endangered Habitats League, Inc. v. County of Orange*, (2005) 131 Cal.App.4th 777, 794.

³⁶ *See Cal. Clean Energy Comm. v. City of Woodland* (2014) 225 Cal.App.4th 173, 194.
5066-008j

FW: Support Letter Energy Hub (Item 10.2)

City Clerk <city.clerk@sanjoseca.gov>

Tue 12/13/2022 3:41 PM

To: Agendadesk Agendadesk@sanjoseca.gov

From: The Office of Mayor Sam Liccardo TheOfficeofMayorSamLiccardo@sanjoseca.gov

Sent: Tuesday, December 13, 2022 3:23 PM

To: Sahid, Robyn Robyn.Sahid@sanjoseca.gov ; Lomio, Michael Michael.Lomio@sanjoseca.gov

Cc: City Clerk <city.clerk@sanjoseca.gov>

Subject: Fw: Support Letter Energy Hub (Item 10.2)

FYI

From: Derrick Seaver derricks@sjchamber.com

Sent: Tuesday, December 13, 2022 3:21 PM

To: Derrick Seaver derricks@sjchamber.com

Subject: Support Letter - Energy Hub (Item 10.2)

[External Email]

Mayor Liccardo and Members of the San Jose City Council:

Attached, please find a letter of support from the San Jose Chamber of Commerce for Item 10.2 on today's Council agenda. We greatly appreciate your consideration of our position and look forward to an affirmative vote on the item when it comes before you this evening.

Derrick Seaver

President & CEO

San Jose Chamber of Commerce

101 W Santa Clara Street

San Jose, CA 95113

derricks@sjchamber.com

This message is from outside the City email system. Do not open links or attachments from untrusted sources.



**San Jose
Chamber of
Commerce**

101 W Santa Clara St,
San Jose, CA 95113

408.291.5260
sjchamber.com

December 13, 2022

San Jose City Council
Mayor Sam Liccardo
200 E. Santa Clara Street
San Jose, CA 95113

Mayor Liccardo & San Jose City Council Members:

On behalf of the San Jose Chamber of Commerce I am writing to you today to ask for your support of the Energy Hub project, item 10.2 on the December 13, 2022, Council agenda. We respectfully request your support of staff recommendations on Items 1 & 2 and full approval of the proposed project.


Members of the Chamber of Commerce, as well as most residents of our city, believe that the shortage of housing in our region is a significant impediment to economic growth and competitiveness, and that correcting the shortage is an imperative. The project as proposed would bring 194 residential units to San Jose at a location that will soon be served by the BART expansion into downtown.

This project will also serve as a catalyst to reinvigorate an area that was once one of the most vibrant spots in the city. With residential units comes new downtown residents, and with them comes purchasing power and vibrancy that will benefit all the small businesses that make up the heart of Downtown San Jose.

Finally, the project as proposed includes more than 30,000 square feet of commercial and retail space on the ground levels. In addition to the positive economic impact of such development, this also serves to bring a more vibrant retail strategy to downtown at a time when it is most desperately needed.

For these reasons, we would respectfully request an affirmative vote on the Energy Hub project – item 10.2 - when it comes before you on December 13. We thank you for your consideration, and for all you do to make San Jose a world class place to start and grow your business.

Sincerely,


Derrick Seaver