

CONSENT AGREEMENT FOR PROPOSED MITIGATION MEASURES  
WITH MITIGATED NEGATIVE DECLARATION

**PROJECT FILE NUMBER:** PDC05-060, PD05-075, PT05-099 & McKee130

**PROJECT DESCRIPTION AND LOCATION:** PDC05-060, PD05-075, PT05-099 & McKee130: Planned Development Rezoning from Unincorporated County to A(PD) Planned Development Zoning District to allow up to 199 single-family attached residential units and two existing single-family detached residences on a 10.5 gross acre site and annexation of 10.5 acres from the County into the City of San Jose, located on the southwest corner of Capitol Avenue and Mabury Road (781 N CAPITOL AV)

In order to avoid or significantly reduce significant environmental impacts of the project to a less than significant level so that a Mitigated Negative Declaration may be adopted, the applicant must agree to revise the project to include the mitigation measures contained herein before a proposed Mitigated Negative Declaration and initial study are released for public review in accordance with the California Environmental Quality Act Guidelines 15070 (b)(1).

I, John Moniz, the applicant, on the behalf of Richard V. Messina, hereby agree to fully implement the Mitigation Measures described below which have been developed in conjunction with the preparation of an initial study and Mitigated Negative Declaration for my proposed project. I understand that these Mitigation Measures or substantially similar measures will be adopted as conditions of approval with my development permit request to avoid or significantly reduce potential environmental impacts to a less than significant level.

The Environmental issues and Mitigation Measures are as follows:

**MITIGATION MEASURES INCLUDED IN THE PROJECT TO REDUCE  
POTENTIALLY SIGNIFICANT EFFECTS TO A LESS THAN SIGNIFICANT LEVEL**

I.

**I. AESTHETICS – The project will not have a significant impact on this resource, therefore no mitigation is required.**

**II. AGRICULTURE RESOURCES – The project will not have a significant impact on this resource, therefore no mitigation is required.**

**III. AIR QUALITY –**

- a. **Mitigation Measure 3-1:** The following controls shall be implemented during all construction phases of the project:
- i. Water all active construction sites at least twice daily, and more often during windy periods;
  - ii. Cover all trucks hauling soil, sand and other loose materials or require all trucks to maintain at least two feet of freeboard;
  - iii. Pave, apply water three times daily, or apply (non-toxic) soil stabilizers on all unpaved access roads, parking areas and staging areas at construction sites;
  - iv. Sweep daily (with water sweepers) all paved access roads, parking areas and staging areas at construction sites;
  - v. Sweep streets daily (with water sweepers) if visible soil material is carried onto adjacent public streets;
  - vi. Hydroseed or apply (non-toxic) soil stabilizers to inactive construction areas (previously graded areas inactive for 10 days or more);
  - vii. Enclose, cover, water twice daily or apply non-toxic soil binders to exposed stockpiles (dirt, sand, etc.) sufficient to prevent visible airborne dust;
  - viii. Limit traffic speeds on unpaved roads to 15 mph;
  - ix. Install sandbags or other erosion control measures to prevent silt runoff to public roadways; and
  - x. Replant vegetation in disturbed areas as quickly as possible.

#### IV. **BIOLOGICAL RESOURCES –**

- a. **Mitigation Measure 4-1.** If possible, construction should be scheduled to begin between October and December (inclusive) to avoid the raptor nesting season. If this is not possible, pre-construction surveys for nesting raptors shall be conducted by a qualified ornithologist to identify active raptor nests that may be disturbed during project implementation. Between January and April (inclusive) pre-construction surveys shall be conducted no more than 14 days prior to the initiation of construction activities or tree relocation or removal. Between May and September (inclusive), pre-construction surveys no more than thirty (30) days prior to the initiation of these activities. The surveying ornithologist shall inspect all trees in and immediately adjacent to the construction area for raptor nests. If an active raptor nest is found in or close enough to the construction area to be disturbed by these activities, the ornithologist, shall, in consultation with the State of California, Department of Fish & Game (CDFG), designate a construction-free buffer zone (typically 250 feet) around the nest. The applicant shall submit a report to the City's Environmental Principal Planner indicating the results of the survey and any designated buffer zones to the satisfaction of the Director of Planning prior to the issuance of any grading or building permit.
- b. **Mitigation Measure 4-2:** The project will be required to conform to the City's tree preservation ordinance, and will provide replacement trees in conformance with City policy. Replacement trees will be over and above the regular landscaping to be provided on the site. All non-orchard trees that are to be removed shall be replaced at the following ratios:

- i. Each tree less than 12" in diameter to be removed = one 15 gallon tree
- ii. Each tree 12" to 17" diameter to be removed = two 24" box trees
- iii. Trees 18" or more in diameter shall not be removed unless a Tree Removal Permit has been approved for the removal of such trees. Each tree greater than 18" diameter to be removed = four 24" box trees

The species and exact number of trees to be planted on the site will be determined in consultation with the City Arborist and the Department of Planning, Building and Code Enforcement during the Planned Development Permit stage. In the event the developed portion of the site does not have sufficient area to accommodate the required tree mitigation, one or more of the following measures will be implemented at the permit stage:

- iv. An alternative site(s) will be identified for additional tree planting. Alternative sites may include local parks or schools or installation of trees on adjacent properties for screening purposes to the satisfaction of the Director of Planning.
  - v. A donation of \$300 per mitigation tree to San Jose Beautiful or Our City Forest for in-lieu off-street planting in the community. These funds will be used for tree planting and maintenance of planted trees for approximately three years. A donation receipt for off-site tree planting will be provided to the Environmental Principal Planner prior to issuance of a development permit. Residential construction on the subject site under the proposed or alternative General Plan designation could potentially result in the removal of ordinance-sized trees, which would be considered a significant impact. Conformance with the City's Tree Removal Permit process (as described in Mitigation Measure 4-2) would reduce potential impacts to less than significant levels.
- c. **Mitigation Measure 4-3:** Standard mitigation for tree protection: The following tree protection measures will also be included in the project in order to protect trees to be retained during and after construction.
- i. Pre-construction treatments
    - I. The applicant shall retain a consulting arborist. The construction superintendent shall meet with the consulting arborist before beginning work to discuss work procedures and tree protection..
    - II. Fence all trees to be retained to completely enclose the TREE PROTECTION ZONE prior to demolition, grubbing or grading. Fences shall be 6 ft. chain link or equivalent as approved by consulting arborist. Fences are to remain until all grading and construction is completed.
    - III. Prune trees to be preserved to clean the crown and to provide clearance. All pruning shall be completed or supervised by a Certified Arborist and adhere to the Best Management Practices for Pruning of the International Society of Arboriculture.
  - ii. During construction

- I. No grading, construction, demolition or other work shall occur within the TREE PROTECTION ZONE. Any modifications must be approved and monitored by the consulting arborist.
- II. Any root pruning required for construction purposes shall receive the prior approval of, and be supervised by, the consulting arborist.
- III. Supplemental irrigation shall be applied as determined by the consulting arborist.
- IV. If injury should occur to any tree during construction, it shall be evaluated as soon as possible by the consulting arborist so that appropriate treatments can be applied.
- V. No excess soil, chemicals, debris, equipment or other materials shall be dumped or stored within the TREE PROTECTION ZONE.
- VI. Any additional tree pruning needed for clearance during construction must be performed or supervised by an Arborist and not by construction personnel.
- VII. As trees withdraw water from the soil, expansive soils may shrink within the root area. Therefore, foundations, footings and pavements on expansive soils near trees shall be designed to withstand differential displacement.

- d. **Mitigation Measure 4-4:** Before the issuance of the Planned development Permit, an arborist's report shall be prepared to estimate the probable construction impact on the trees on the "*Remainder Messina Property*" (as defined in the Initial Study) or that portion of the site that would remain unchanged. Any mitigation measure recommended by the arborist shall be incorporated in the Planned Development Permit conditions. Standard mitigation measures for protection of trees within the "*Remainder Messina Property*" (as defined in the Initial Study) during and prior to construction (as described in Mitigation Measure 4-3) shall also be followed.

V. **CULTURAL RESOURCES –**

- a. **Mitigation Measure 5-1:** Prior to the approval of any grading permits, removal of any trees on the site or recordation of Final Map, the project applicant shall provide, to the satisfaction of the Director of Planning, additional historic documentation of the Messina property, prepared by a qualified historic consultant, supplementing the earlier documentation of the barn and fruit dehydration shed. The historic documentation shall include large format photography based on the guidelines of the Historic American Building Survey, National Park Service. The documentation shall focus on a detailed description of orchard trees and of the spatial organization and patterns of the buildings in relation to the adjacent orchard and other landscape features. Supporting materials to the photographs shall include historic maps, site plans and aerials.
- b. **Mitigation Measure 5-2:** Construction workers will be alerted of the potential that site clearing and trenching may uncover buried archaeological materials. If evidence of any archaeological, cultural, and/or historical deposits is found, the following measures shall be taken:

- i. A qualified professional archaeologist will be notified and all further excavation activity shall be monitored. There shall be no excavation or disturbance of the site or any nearby area reasonably suspected to overlie adjacent remains, until archaeological monitoring by the qualified archeologist begins.
- ii. Under monitoring by the qualified archeologist, hand excavation and/or mechanical excavation will proceed to evaluate the deposits for determination of significance as defined by CEQA guidelines. The archaeologist shall submit reports, to the satisfaction of the Director of Planning, Building and Code Enforcement, describing the testing program and subsequent results. These reports shall also identify any program mitigation that the Developer shall complete in order to mitigate archaeological impacts (including resource recovery and/or avoidance testing and analysis, removal, reburial, and curation of archaeological resources.)
- iii. In the event that human remains and/or cultural materials are found, all project-related construction shall cease within a 50-foot radius in order to proceed with the testing and mitigation measures required. Pursuant to Section 7050.5 of the Health and Safety Code and Section 5097.94 of the Public Resources Code of the State of California:
  - I. In the event of the discovery of human remains during construction, there shall be no further excavation or disturbance of the site or any nearby area reasonably suspected to overlie adjacent remains. The Santa Clara County Coroner shall be notified and shall make a determination as to whether the remains are Native American. If the Coroner determines that the remains are not subject to his authority, he shall notify the Native American Heritage Commission who shall attempt to identify descendants of the deceased Native American. If no satisfactory agreement can be reached as to the disposition of the remains pursuant to this State law, then the land owner shall re-inter the human remains and items associated with Native American burials on the property in a location not subject to further subsurface disturbance.
  - II. A final report shall be submitted to the Director of Planning, Building and Code Enforcement prior to release of a Certificate of Occupancy. This report shall contain a description of the mitigation programs and its results including a description of the monitoring and testing program, a list of the resources found, a summary of the resources analysis methodology and conclusions, and a description of the disposition/curation of the resources. The report shall verify completion of the mitigation program to the satisfaction of the Director of Planning, Building and Code Enforcement.

**VI. GEOLOGY AND SOILS** The project will not have a significant impact on this resource, therefore no mitigation is required.

**VII. HAZARDS AND HAZARDOUS MATERIALS –**

- a. **Mitigation Measure 7-1:** A site specific work plan, providing mitigation measures to address the elevated organo-chlorine pesticide level report shall be prepared, to the satisfaction of the Director of Planning, Building and Code Enforcement and before approval of the Planned Development Permit. Contaminated soils at the project site will be either capped, removed and disposed of as required, or mixed with clean soils so that the level of contamination is reduced to a level that is below the regulatory limits for organochlorine as required by this construction specific work plan. Any proposed mitigation shall include the elimination of pesticide contaminated soil at hazardous waste levels and residential ESLs from the site; including handling, transportation and disposal practices that meet all federal, state and local requirements.

### VIII. HYDROLOGY AND WATER QUALITY –

- a. **Mitigation Measure 8-1:** The project shall incorporate Best Management Practices (BMPs) into the project to control the discharge of stormwater pollutants including sediments associated with construction activities. Examples of BMPs are contained in the publication Blueprint for a Clean Bay. Prior to the issuance of a grading permit, the applicant may be required to submit an Erosion Control Plan to the City Project Engineer, Department of Public Works, Third Floor, 200 E. Santa Clara Street, San Jose, California 95113. The Erosion Control Plan may include BMPs as specified in ABAG's Manual of Standards Erosion & Sediment Control Measures for reducing impacts on the City's storm drainage system from construction activities. For additional information about the Erosion Control Plan, the NPDES Permit requirements or the documents mentioned above, please call the Department of Public Works at (408) 535-3555. Consistent with the City's Post Construction Urban Runoff Management Policy, the project incorporates bubble-up emitters to convey roof drainage to landscaped areas and common open areas, where appropriate, to reduce pollutants from post-construction storm water runoff. In addition to the swales, structural filtration-based treatment devices integrated in the storm drain system are proposed for treatment of runoff from roof and paved driveway surfaces.
- b. **Mitigation Measure 8-2:** Prior to the commencement of any clearing, grading or excavation, the project shall comply with the State Water Resources Control Board's National Pollutant Discharge Elimination System (NPDES) General Construction Activities Permit as follows:
  - i. The applicant shall develop, implement and maintain a Storm Water Pollution Prevention Plan (SWPPP) to control the discharge of stormwater pollutants including sediments associated with construction activities;
  - ii. The applicant shall file a Notice of Intent (NOI) with the State Water Resources Control Board (SWRCB).
- c. **Mitigation Measure 8-3:** The project applicant shall comply with the City of San Jose Grading Ordinance, including erosion and dust control during site preparation and with the City of San Jose Zoning Ordinance requirements for keeping adjacent

streets free of dirt and mud during construction. The following specific BMPs will be implemented to prevent storm water pollution and minimize potential sedimentation during construction:

- i. Restriction of grading to the dry season (April 15 through October 15);
- ii. Utilize on-site sediment control BMPs to retain sediment on the project site;
- iii. Utilize stabilized construction entrances and/or wash racks;
- iv. Implement damp street sweeping;
- v. Provide temporary cover of disturbed surfaces to help control erosion during construction;
- vi. Provide permanent cover to stabilize the disturbed surfaces after construction has been completed.

**IX. LAND USE AND PLANNING – The project will not have a significant impact on this resource, therefore no mitigation is required.**

**X. MINERAL RESOURCES – The project will not have a significant impact on this resource, therefore no mitigation is required.**

**XI. NOISE**

**a. Mitigation Measure 11-1:**

- i. The project shall be constructed in conformance with the sound barrier requirements and STC rating recommendations for windows and doors, as contained in the report entitled Messina Project – San Jose, California, Environmental Site Assessment prepared by Charles M. Salter Associates, Inc., dated June 8, 2005.
- ii. All units shall have forced air ventilation systems to allow the windows to remain closed so that an interior noise level of 45 dBA can be achieved. Outdoor patio areas shall be walled as described in the Site Assessment. Prior to issuance of occupancy permits, building plans for all units will be checked by a qualified acoustical consultant to ensure that noise levels are attenuated sufficiently.

**b. Mitigation Measure 11-2: The following measures shall be implemented by the project developer and/or construction site supervisor to reduce potential construction noise impacts to surrounding neighbors:**

- i. Notify neighbors within a 500 feet radius of the subject site of the schedule and type of equipment used for each phase of construction;
- ii. Limit hours of construction to between 7:00 a.m. and 7:00 p.m. on weekdays, when construction occurs within 500 feet of existing residences, in conformance with City standards;
- iii. Locate noisy stationary equipment (i.e., generators or compressors) away from neighboring residences;
- iv. Require that all construction equipment be in good working order and that mufflers be inspected for proper functioning;
- v. Require that vehicles and compressors turn off engines when not in use;

- vi. Utilize available noise suppression devices and techniques as appropriate, in conformance with General Plan policy; and
- vii. Designate a construction noise coordinator who would be available to respond to complaints from neighbors and take appropriate measures to reduce noise.

**XII. POPULATION AND HOUSING – The project will not have a significant impact on this resource, therefore no mitigation is required.**

**XIII. PUBLIC SERVICES – The project will not have a significant impact on this resource, therefore no mitigation is required.**

**XIV. RECREATION – The project will not have a significant impact on this resource, therefore no mitigation is required.**

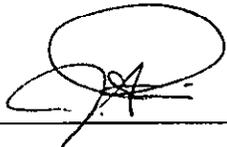
**XV. TRANSPORTATION / TRAFFIC –**

- a. **Mitigation Measure 15-1:** Widen Mabury Road along the project frontage to provide extra vehicle storage necessary for eastbound traffic. The existing bicycle lane along the frontage shall be re-stripped to be a broken, rather than a solid line.
- b. **Mitigation Measure 15-2:** The project sponsor shall pay a traffic signal fee based on a fair share contribution towards the installation of a traffic signal at the intersection of Cedarville Lane and Mabury Road.

**XVI. UTILITIES AND SERVICE SYSTEMS – The project will not have a significant impact on this resource, therefore no mitigation is required.**

**XVII. MANDATORY FINDINGS OF SIGNIFICANCE –** The project will not substantially reduce the habitat of a fish or wildlife species, be cumulatively considerable, or have a substantial adverse effect on human beings, therefore no additional mitigation is required. However, the project will have previously identified significant impact on cultural resources. Additional mitigation measures, as described in *Mitigation Measure 5-1*, will reduce the significant impact, but not to a less than significant level.

Applicant's Signature \_\_\_\_\_



Date \_\_\_\_\_

1.4.06