



Memorandum

TO: PLANNING COMMISSION

FROM: Stephen M. Haase

SUBJECT: SEE BELOW

DATE: May 25, 2005

COUNCIL DISTRICT: 3 & 4
SNI AREAS: None

SUBJECT: FINAL ENVIRONMENTAL IMPACT REPORT (FEIR) FOR THE NORTH SAN JOSE AREA DEVELOPMENT POLICIES UPDATE for General Plan Text Amendment, General Plan Land Use / Transportation Diagram Amendment, revision of the North San Jose Area Development Policy and revision to the North San Jose Deficiency Plan. The project includes approximately 26.7 million square feet of new industrial/office/R&D building space in the Rincon de los Esteros Redevelopment Area beyond existing entitlements. In addition, up to 32,000 new dwelling units would be allowed in the Rincon area at minimum densities of 20, 55 or 90 dwelling units per acre (DU/AC) depending on their location. The project area consists of approximately 4,987 acres located south of State Route 237, east of the Guadalupe River and generally north and west of Interstate 880, but also including land along both sides of Murphy Avenue as far east as Lundy Avenue. (SCH # 2004102067).

BACKGROUND

I. Draft EIR

The Draft EIR has been prepared to evaluate the environmental impacts of the proposed project description listed above. The California Environmental Quality Act (CEQA) requires the preparation of an EIR when “there is substantial evidence, in light of the whole record before a lead agency, that a project may have a significant effect on the environment” (CEQA Guidelines Section 15064).

A. CEQA Requirements for Certification of an EIR

The California Environmental Quality Act (CEQA) Guidelines 15090 require, prior to approving a project, the lead agency to certify that (1) the Final EIR has been completed in compliance with CEQA, (2) the final EIR was presented to the decision-making body of the lead agency and the decision-making body reviewed and considered the information contained in the Final EIR before approving the project, and (3) the Final EIR reflects the independent judgement and analysis of the lead agency. When an EIR is certified by a non-elected decision-making body with the local lead agency, that certification may be appealed to the local lead agency’s elected decision-making body.

B. San Jose Municipal Code Chapter 21.07 Requirements for Certification of an EIR

The City of San Jose is the lead agency for the North San Jose Development Policies Update Final EIR as defined by CEQA. San Jose Municipal Code Chapter 21.07 designates the Planning Commission as the decision-making body for certification of EIRs. The Planning Commission must hold a noticed public hearing to certify the Final EIR. Upon conclusion of its certification hearing, the Planning Commission may find that the Final EIR is completed in compliance with CEQA.

If the Planning Commission certifies the Final EIR, it may then immediately act or make recommendations on the project associated with the EIR. No action or recommendation by the Planning Commission may be deemed final until after the appeal period has expired. A decision by the Planning Commission not to certify a Final EIR is not subject to an appeal. If the Planning Commission does not certify the EIR, it may not take action or make any recommendation with regard to the project. A Final EIR which is revised at the direction of the Planning Commission shall require another noticed public hearing.

Any person may file a written appeal of the Planning Commission's certification of the Final EIR with the Director of Planning, Building and Code Enforcement no later than 5:00 p.m. on the **third business day** following the certification of the Final EIR. The appeal must state the specific reasons that the Final EIR should not be found to be completed in compliance with CEQA. No appeal will be considered unless it is based on issues that were raised at the public hearing either orally or in writing prior to the public hearing. Upon receipt of a timely appeal, filed on the appropriate form and accompanied by filing fees, the Director shall schedule a noticed public hearing on the appeal of the Commission's certification of the Final EIR before the City Council. In this specific case, if the Planning Commission certifies the EIR on June 2, the EIR appeal period would expire June 7 at 5:00 p.m., and the appeal is scheduled to be heard by City Council June 21 at 1:30 p.m.

ANALYSIS

II. Preparation and Review of an EIR and Agency Decision Making

A. Notice of Preparation

On October 18, 2004, the Director of Planning, Building and Code Enforcement sent a Notice of Preparation (NOP) to the State Clearinghouse, interested parties, and Responsible and Trustee Agencies as required by CEQA Guidelines Section 15082. The NOP contains a project description, project location, and probable environmental effects of the project. It is intended to solicit participation in determining the scope of the EIR. The NOP and responses to the NOP are contained in Appendix L of the Draft EIR. The Draft EIR may be circulated after the recipients have had 30 days to review the NOP.

B. Contents of the Draft EIR

The Draft EIR contains the contents required by Pub. Res. Code sec. 21002.1 and CEQA Guidelines 15143. The required contents include (1) a table of contents, (2) executive summary, (3) project description, (4) environmental setting, significant environmental impacts of the project, and mitigation measures, (5) cumulative impacts, (6) alternatives to the proposed project including the No Project Alternative and identification of an environmentally superior alternative, (7) growth inducing impacts, and (8) Significant unavoidable adverse impacts.

Page vii of the Draft EIR contains a summary of the potentially significant environmental impacts. It identifies as “Less Than Significant with Mitigation” environmental impacts regarding Land Use Compatibility, Transit Impacts, Construction Air Quality Impacts, Residential Interior Noise, Construction Noise, Riparian Impacts, Impacts to Trees, Cultural Resources, Geology and Soils, Hydrology and Water Quality, Hazardous Materials, and Visual and Aesthetics. “Less Than Significant with Mitigation” means the impacts of the proposed project will not exceed the significance thresholds contained in the EIR with changes included in the project.

The Draft EIR also identifies as “Significant Unavoidable Impact” impacts related to Traffic and Circulation including impacts to local roadways in San Jose and adjacent jurisdictions and regional freeway segments, Regional Air Quality, Traffic Noise, Vegetation and Wildlife impacts to raptors, Burrowing owls, and bats, and Energy. Significant cumulative impacts are disclosed to Land Use, Traffic Congestion, Air Quality, Noise, cumulative loss of Trees as well as Burrowing Owl Habitat, and Energy. “Unavoidable Significant Impact” means that impacts of the project would be exceed the significance thresholds even with changes or mitigation included in the project.

C. Lead Agency Responsibilities

The City of San Jose as the Lead Agency prepared the Draft EIR with the assistance of consultants and subconsultants. City staff with expertise in various topic areas reviewed the Administrative Draft EIR to exercise their independent judgment and analysis concerning the scope, content, and general adequacy of the EIR. CEQA requires that, no matter who prepares the Draft EIR, the EIR must reflect the Lead Agency’s independent judgement and analysis regarding the scope, content, and adequacy. The Lead Agency is responsible for the objectivity of the Draft EIR. At the time of EIR certification, the Planning Commission, or City Council on appeal, must make a specific written finding that the EIR reflects the independent judgement and analysis of the City of San Jose.

D. Public Notice and Review of a Draft EIR

On March 10, 2005, the Director of Planning, Building and Code Enforcement caused a Notice of Availability (NOA) to be published in the San Jose Mercury News and posted for review with the County Clerk. As required by Pub. Res. Code secs. 21092(b), 21092.6; CEQA Guidelines secs. 15087, 15105, the NOA contains (1) a project description and location, (2) identification of

significant environmental impacts, (3) specification of the review period, (4) identification of the public hearing date, time, and place, (5) information about where the Draft EIR is available, (6) and whether the project site is a listed toxic site.

The Director filed a Notice of Completion (NOC) with the State Clearinghouse to coordinate the systematic review of the Draft EIR with State Agencies such as the Department of Transportation. CEQA requires State Clearinghouse review of an EIR when a project, such as the North San Jose Development Policies Update, is of “statewide, regional, or area significance”.

The Draft EIR was circulated for public review for 45 days, beginning on March 10, 2005 and ending on April 25, 2005, as required by Pub. Res. Code sec. 21091 and CEQA Guidelines 15087 and 15105. The Draft EIR was available for review in the Department of Planning, Building and Code Enforcement, at the Martin Luther King Junior Main Library and four local branch libraries within or adjacent to the project area, and online on the Department’s website. In addition, the Draft EIR was mailed to Federal and State Agencies, Regional and Local Agencies, and private organizations and individuals listed in Section I of the First Amendment to the Draft EIR.

E. Preparation of a Final EIR

CEQA requires the Lead Agency to prepare a Final EIR responding to all environmental comments received on the Draft EIR during the public review period and to certify the Final EIR before approving the project. The responses to comments on a Draft EIR must include good faith, well-reasoned responses to all comments received on the Draft EIR. In responding to comments, CEQA does not require a Lead Agency to conduct every test or perform all research, study, or experimentation recommended or demanded by commentors. CEQA only requires a Lead Agency to respond to significant environmental issues and does not need to provide all information requested by reviewers as long as a good faith effort at full disclosure is made in the EIR.

The City’s responses to comments on the Draft EIR are contained in the First Amendment to the Draft Environmental Impact Report. The First Amendment and the Draft EIR constitute the Final EIR. As required by CEQA, the First Amendment contains (1) a list of persons, agencies, and organizations commenting on the Draft EIR, (2) copies of comments received during the public review period of the Draft EIR, (3) the City’s responses to those comments. The City provided a copy of its responses to each public agency and organization that submitted comments by April 25, 2005, at least ten days prior to certifying the Final EIR in conformance with CEQA Guidelines Section 15089(b).

Twenty-two comment letters were received on the Draft EIR. The First Amendment contains responses to comments from agencies such as Federal Aviation Administration, California Department of Transportation (Caltrans), Santa Clara Valley Water District, County of Santa Clara, and the Santa Clara Valley Transportation Authority, as well as neighboring jurisdictions such as City of Milpitas, City of Santa Clara, and organizations such as Committee for Green

Foothills and Preservation Action Council San Jose. The First Amendment also contains text amendments to reflect changes to the project description since circulation of the Draft EIR and changes to the text made in response to comments received on the Draft EIR.

Comments received from the various reviewing agencies, organizations, and individuals primarily focused on discussion of the project's impacts and mitigation in the areas of traffic, hydrology, water quality and water supply, and cultural resources. Detailed discussion can be found in the First Amendment. A summary discussion of the primary comments received regarding traffic is provided below:

Traffic. By far, the topic of most interest in the comment letters received was the analysis of the project's traffic impacts and the identified mitigation measures. Commensurate with a project of this magnitude, as part of the EIR, one of the most comprehensive traffic studies in recent City history was completed. The study included analysis of 220 signalized intersections, including 35 intersections in City of Santa Clara, five in Campbell, two in Cupertino, four in Sunnyvale, nine in Mountain View, and nine in Milpitas. In addition, 124 directional freeway segments and 75 freeway ramps were studied on State Route 237, I-880, US 101, I-280, and I-680.

Vehicular traffic impacts were evaluated using the methodology adopted by the City and the Congestion Management Agency, which methodology is also used by neighboring cities. In those instances where significant vehicular traffic impacts attributable to the proposed project were identified based on the levels of vehicular traffic congestion considered acceptable by each of the relevant jurisdictions, mitigation measures were also evaluated. Beginning on page 169, the Draft EIR lists the mitigation measures that were identified for roadway (non-freeway) facilities that are located in cities other than the City of San José, under the heading "Mitigation Measures Not Included in the Project".

The Draft EIR disclosed the project would result in significant unmitigated traffic impacts to 38 signalized intersections, of which 21 are in San Jose, including 12 in the North San Jose project area, nine in City of Santa Clara, one in City of Sunnyvale, six in City of Milpitas, and one in City of Campbell, as well as 72 directional freeway segments. The nine intersections in San Jose that are outside the North San Jose project area boundary, [(21 total) minus (12 in North San Jose) equals (9 elsewhere in San Jose)], are proposed to be included on the proposed Transportation Impact Policy 'List of Protected Intersections.' (See related staff report entitled 'Revised Transportation Impact Policy,' dated May 25, 2005, regarding Item 7.b on June 2 Planning Commission agenda). Three of the nine intersections outside of the North San Jose project area impacted by the project (Capitol/McKee, Capitol/Hostetter, and Almaden/Grant) are proposed for addition to the 'List of Protected Intersections' as a result of the North San Jose project.

While several comments were received regarding the study methodology and assumptions, most comments were directed at the identified impacts and mitigation measures and whether roadway improvements to intersections in adjacent jurisdictions would be provided. To address these similar comments and questions regarding intersection impacts outside San Jose, a Master Response was provided in the First Amendment. As discussed in the Draft EIR and First

Amendment Master Response, the project does not propose mitigation for intersection impacts outside of San Jose. The identified mitigation measures for these intersections are not proposed to be implemented as a part of the project because the City of San José has no authority to construct improvements outside of its own jurisdictional boundaries and cannot guarantee the implementation of the mitigation measures in a timely and appropriate manner.

Cities all over Santa Clara County have continued to approve development projects that have impacts on roadways and intersections in other cities, but do not require developments to mitigate impacts on streets or intersections outside their own jurisdictions.

The difficulties that arise in trying to require development within one city to mitigate impacts on roadways in other cities include:

1. The lead agency city cannot make sure that the mitigation improvements are built outside their own jurisdiction as required. On some facilities, there may even be multiple jurisdictions involved, as with County expressways.
2. In most cases, the project being considered is only part of the traffic problem. It contributes to congestion, but it is only one source among many.
3. It is rarely possible to mitigate the traffic impacts from a single project precisely. In most cases, a “fair share” contribution to a larger improvement project would be an appropriate mitigation, but no mechanism exists for providing or accepting the contribution and turning it into actual mitigation, consistent with CEQA and case law.

In the past, cities have sometimes improvised mitigation agreements for individual projects.

This has generally occurred where the appropriate context for the mitigation is known and agreed upon, usually is already planned, and the improvements are due to be built within a reasonable time frame that would be timely for mitigating impacts from the project under consideration.

Because there is no established mechanism for implementing and overseeing this kind of mitigation arrangement, its physical implementation cannot always be assured. As mentioned above, the City of San José has reached agreements with other jurisdictions for contributions by development within one jurisdiction to be paid to another city for intersection improvements. Should the City Council choose to do so, the potential exists in the context of the North San José project for cooperative agreements to be reached between San José and other affected jurisdictions for fair share contributions to intersection improvements in the other jurisdictions.

Table 38 in Section IV of the First Amendment to the Draft EIR identifies the impacted intersections in each affected jurisdiction, the identified intersection improvement, and the project development phase under which the impact would occur. Should the Council choose to pursue agreements with other jurisdictions, the North San José project’s proportional trip contribution to the impact at a given intersection can be identified to gauge a fair share contribution toward the improvement cost. The funding for fair share contributions could then be factored into the traffic development impact fee assessed on future development. A fair share contribution to intersection improvements in another jurisdiction is not mitigation as defined under CEQA, however, in that there is no guarantee as to the timing and ultimate completion of the improvements in relation to the implementation of the development that creates the impact.

Therefore, the traffic impact discussion in the EIR provides adequate environmental clearance for the project.

F. Recirculation of a Draft EIR

As a general rule, EIRs are circulated once for public review and comment. If “significant new information” is added to the EIR after the close of the public review period on the Draft EIR but before certification of the Final EIR, the Lead Agency must provide a second public review period and recirculate the Draft EIR for comments. Under CEQA Guidelines 15088(b), recirculation is required when new significant information identifies:

- (1) a new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented;
- (2) a substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance;
- (3) a feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the environmental impacts of the project, but the project’s proponents decline to adopt it; or
- (4) the Draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.

Recirculation of a Draft EIR is not required where the new information merely clarifies, amplifies, or makes minor modification to an adequate Draft EIR. Staff believes that none of the recirculation criteria have been met for the Final EIR. All new information that has been added to the Final EIR merely clarifies, amplifies, or makes minor modifications to the discussion and analysis in the Draft EIR.

G. Consideration of a Final EIR

A decision-making body is required to read and consider the information in an EIR before making a decision on the project. The City’s administrative record on the proposed project must show that the Lead Agency reviewed and considered the Final EIR before acting on the project.

H. Certification of a Final EIR

Before approving the project, the Planning Commission must certify that the Final EIR was prepared in compliance with CEQA and was presented to the Lead Agency’s decision-making body, which reviewed and considered the Final EIR before approving the project. In addition, the Planning Commission must certify that the EIR reflects the independent judgement and analysis of the City of San Jose.

PLANNING COMMISSION

June 2, 2005

Subject: North San Jose Development Policies Update EIR

Page 8 of 8

CONCLUSION

The North San Jose Development Policies Update Final EIR meets the requirements of CEQA by disclosing the significant environmental effects of the project, identifying feasible ways to mitigate the significant effects, and describing reasonable alternatives to the project. The Final EIR complies with the substantive and procedural requirements of the CEQA guidelines for projects of regional significance. The Final EIR has been completed in compliance with the requirements of CEQA. It also represents the independent judgement and analysis of the City of San Jose.

RECOMMENDATION

The Director of Planning, Building and Code Enforcement recommends the Planning Commission adopt a resolution to certify that:

1. The Planning Commission has read and considered the Final EIR;
2. The Final EIR has been completed in compliance with CEQA;
3. The Final EIR reflects the independent judgement and analysis of the City of San Jose; and
4. The Director of Planning, Building and Code Enforcement shall transmit copies of the Final EIR to the Applicant and to the decision-making body of the City of San Jose for the project.

STEPHEN M. HAASE, AICP, DIRECTOR
Planning, Building and Code Enforcement