

Dove Hill Medical Care Facility Project

File No. PDC14-051, PD16-019

Initial Study / Mitigated Negative Declaration

RESPONSES TO PUBLIC COMMENTS AND TEXT CHANGES

July 2018

CEQA Lead Agency:



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SECTION 1

SUMMARY OF COMMENTS

The Dove Hill Medical Care Facility Project Initial Study /Mitigation Negative Declaration (IS/MND) was circulated for public review for a 20-day review period, from April 9, 2018 to April 30, 2018. During the circulation period, the City of San José received comment letters and emails from representatives of the Amah Mutsun Tribal Band, local resident Deepesh Chouhan, the Santa Clara Valley Transportation Authority (VTA), and Lozeau Drury LLP.

In summary, the comments received on the draft IS/MND did not raise any new issues about the project's environmental impacts, or provide information indicating the project would result in new environmental impacts or impacts substantially greater in severity than disclosed in the IS/MND. CEQA does not require formal responses to comments on an IS/MND, only that the lead agency consider the comments received [CEQA Guidelines §15074(b)].

Nevertheless, responses to the comments are included in this document to provide a complete environmental record.

The following pages contain a list of the agencies and persons that submitted comments on the IS/MND and the City's responses to comments received on the IS/MND. The specific comments have been excerpted from the letter and are presented as "Comment" with each response directly following ("Response"). Copies of the actual letters and email submitted to the City of San Jose are attached to this document.

Included as part of this document are Attachment A, B, and C as supplemental reports to assist with responses to the questions and concerns below in Section 3. The original public comment letters are available in Attachment D.

SECTION 2**AGENCIES AND PERSONS COMMENTING ON
THE IS/MND**

	Comment Received From	Date of Letter	Response on Page
A.	Amah Mutsun Tribal Band (Attn: Ed Ketchum and Valentin Lopez)	April 9, 2018/ May 2, 2018	5
B.	Deepesh Chouhan	April 29, 2018	5
C.	VTA	April 30, 2018	8
D.	Lozeau Drury LLP	April 30, 2018	9

SECTION 3

RESPONSE TO COMMENTS

This memo responds to comments on the IS/MND as they relate to the potential environmental impacts of the project under CEQA. Numbered responses correspond to comments in each comment letter. Copies of the comment letters are attached.

A. RESPONSE TO AMAH MUTSUN TRIBAL BAND

Comment A1: Per agreement lands once resided by the Tamien speakers will be represented by the Muwekma Tribal Band [sic]. Please consult with the Muwekma Tribal Band. (April 9, 2018)

This project is outside our traditional tribal territory, we have no comment. (May 2, 2018)

Response A1: The Muwekma Tribal Band was notified of the project as part of the City's standard circulation process for the Notice of Intent to Adopt an IS/MND and did not respond to the notification. As discussed in Section 4.5 Cultural Resources of the IS/MND, the project will be required to implement mitigation measures and City's Standard Permit Conditions regarding archaeological resources, human remains and notify the most-likely descendants, and accidental discovery of paleontological resources prior to and during ground disturbance activities.

B. RESPONSE TO DEEPESH CHOUHAN

Comment B1: City of San José Planning Commission, in 2010, recommended that if this project needs to move forward, it needs to address some/all of these concerns at the zoning & permit stages

1. Traffic Hazard

- a. Safety Hazard – Blind Spots, no Shoulders on Dove Road and Hassler Bridge on US-101
- b. Reduced Level of Service (LOS)

Response B1: The collision history at the Dove Hill Road and Hassler Parkway intersection was reviewed as part of the IS/MND and, specifically, a Traffic Operations Analysis prepared for the project in April 2015, updated in March 2018 by Hexagon Transportation Consultants Inc (Hexagon, 2018). Hassler Parkway, as it approaches Dove Hill Road, consists of a straight steep downgrade to a stop sign at the intersection of the two roadways. City of San José collision data indicates five collisions at the intersection of Dove Hill Road and Hassler Parkway over a five-year period. Based on the traffic reports for these accidents, each of the recorded accidents was a solo vehicle accident that involved vehicles traveling westbound along Hassler Parkway and running off the road and/or hitting a fixed object. Project trips would be unlikely to increase this solo vehicle accident rate since the collision history at this location does not appear to be related to congestion, but due to driver error. Therefore, even with the increase in project's traffic as part of this project, the additional volume would not result in an increase in collisions at the intersection (see pages 131-133 of the IS/MND and Appendix I)

As stated above, the proposed project would result in an approximately 20 percent increase in daily traffic volumes along the Dove Hill Road at Hassler Parkway intersection. As shown in Table 4.15-1 of the IS/MND, the proposed project would generate a total of approximately 42 AM peak hour trips and 55 PM peak-hour trips, and a net of 37 AM peak-hour trips and 51 PM peak-hour trips when compared to the existing uses on the site. As indicated in Section 4.15 Transportation/Traffic and Appendix I of the IS/MND, the intersection level of service (LOS) analysis indicates an average vehicle delay of 7.5 seconds during the AM peak hour and 3.0 seconds during the PM peak hour (representing LOS A conditions during each of the peak hours) at the intersection of Dove Hill Road and Hassler Parkway under existing conditions (without the project). The intersection LOS analysis shows that the addition of project traffic would not increase the average delay at the intersection during peak hours and no other intersections would be substantially affected by the proposed project. Therefore, the project conforms to City Council Policy 5-3 and impact is less than significant (see pages 131-132 of the IS/MND)

Comment B2: 2. Noise Health Hazard – Being so close to US-101; Noise level exceed levels permitted by City of San Jose

Response B2: CEQA is primarily concerned with the impacts of a project on the environment and generally does not require the analysis of impacts of existing conditions on a project's future users or residents. However, General Plan polices EC-1.1 through 1.7 require that existing ambient noise levels be analyzed for the proposed type of uses and that noise attenuation be incorporated into the project in order to bring interior and exterior noise levels down to acceptable levels. As stated in Section 4.12.4.2 and Appendix H of the IS/MND, while not a California Environmental Quality Act (CEQA) issue, the project would be required to implement technical attenuation techniques to reduce noise levels, including insulation features to reduce interior noise levels to the City standard of 45 dBA DNL. Prior to issuance of building permits, a noise analysis, including the description of the necessary noise control measures, is required to be submitted to the City with the project building plans to ensure interior noise levels are reduced to 45 dBA DNL or lower. Compliance with California Building Code requirements for interior noise would ensure that occupants of the site are not exposed to excessive interior noise levels. This is a common, standard requirement for projects located near freeways and high-volume roadways and will be part of the Planned Development Permit of this project. (see pages 119 and 120 of the IS/MND)

Comment B3: Fire Safety Hazard – Very limited access to this Hillside location

Response B3: The proposed project would be constructed in accordance with current building and fire codes and would be required to be maintained in accordance with applicable City policies to promote public and property safety including fire protection services. Fire hydrants are proposed along Dove Hill Road and within the project site itself. The project roads and driveways have been designed (in terms of width and turning radii) to accommodate fire vehicles and provide adequate space for staging and access (see pages 133 through 135 of the IS/MND)

As stated in Appendix I of the IS/MND, the traffic operations at the intersection of Dove Road and Hassler Parkway were reviewed to address concerns that have been expressed in regards to evacuation of the Ranch residential area along Hassler Parkway. Residents are concerned that with the additional project traffic, the delay at the intersection will worsen, thus impeding exit in the event of an emergency evacuation (possibly due to a fire). Intersection level of service analysis indicates an average vehicle delay of 7.5 seconds during the AM peak hour and 3.0 seconds during the PM peak hour (representing LOS A conditions during each of the peak hours) at the intersection of Dove Road and Hassler Parkway under existing conditions (without the project). The peak hours represent the periods throughout the day that the greatest amount of traffic proceeds through the intersection.

There are few potential variables that would likely affect the time needed to evacuate the hills including time of the day, controlled traffic, existing nearby residential areas (i.e Ranch residential area), and shuttles that would be used during evacuation for patients on the site. (see pages 9 to 10 of Appendix I of the IS/MND)

Based on the critical gap acceptance and follow-up time analysis, results indicate that the addition of the project traffic at the Dove Road and Hassler Parkway intersection will result in no change to the critical gap and follow-up times currently experienced during the peak hours at the intersection.

Even during a peak-hour emergency evacuation, the project would have little to no effect on vehicle travel through the Dove Hill Road and Hassler Parkway intersection the area would not be heavily congested due to this project.

Comment B4: 4. Air Quality Health Hazards – As per California Air Resource Board – Sensitive use like Medical facility should not be so close to highway. This site is barely 100 feet from US-101; Major air quality impact on future residents of this proposed facility.

Response B4: Although CEQA is primarily concerned with the impacts of a project on the environment and generally does not require the analysis of impacts of existing conditions on a project's future users or residents, the City's General Plan Policy MS-11.1 requires completion of air quality modeling for sensitive land uses such as new residential developments or senior housing that are located near sources of pollution such as freeways. Because analysis in the IS/MND found that future occupants of the site would be exposed to significant health risks from exposure of Toxic Air Contaminants (TACs) and PM2.5 from vehicle exhaust emissions and the wearing of brakes and tires on U.S. 101, the project would be conditioned to implement safeguards (such as air filtration devices) to minimize exposure of site occupants to long-term toxic air contaminant (TAC) and annual particulate matter (PM2.5) emissions. The IS/MND includes conditions of approval that require installation of air filtration devices rated MERV13 or higher (or equivalent control technology) that demonstrates its ability to reduce risks below significance thresholds, and ongoing maintenance for those air filtration devices. (see page 41 of the IS/MND and Appendix A)

Comment B5: 5. Special Status Species Habitat Impact – White Tail Kite, Loggerhead Shrike, Santa Clara Valley Dudleya Plant

Response B5: The project would result in less than significant species impacts to whitetail kite, loggerhead shrike, and Santa Clara Valley dudleya plant with implementation of mitigation measures (MM BIO-1 to MM BIO-3 in the IS/MND) which would include monitoring during construction with consultation from the Santa Clara Valley Habitat Agency. In addition, the project is required to implement Conditions and Avoidance and Minimization Measures for urban development as listed in Section 6 and Tables 6-2 and 6-8 of the Habitat Plan. The project may also be eligible to provide on-site mitigation through participation in the Habitat Plan Reserve System and recording of a conservation easement that includes Santa Clara Valley dudleya plants. For further discussion of the project’s biological impacts, see Attachment A: Biological Resources Response Memorandum.

Comment B6: Land Use and Hillside Development Goals – Proposal conflicts with City of San Jose’s own Hillside Development Goals

Response B6: As described in the IS/MND, the project would be constructed below the 15-percent slope line and is consistent with the General Plan designation of *Public/Quasi-Public*.

Comment B7: Please see attached – Detailed info/slides on each of these topics – Item Number GP08-08-3 of the City of San José Planning Commission meeting on June 9, 2018 (http://sanjose.granicus.com/MediaPlayer.php?view_id=&clip_id=4355&meta_id=304447). For instance when you slide to 1 hour 25 minutes – Developer Mr. Caruso is agreeing that Blind Spot issue for the road needs to be addressed. In the latest proposal, Property Developers have not put forth any new mitigation plans to address these long standing concerns. We appreciate your support and opportunity to provide public comments. Please let us know what the next steps are – If need be, we can come and present our concerns in-person as well.

Response B7: As stated in Response B1, above, the collision history at the Dove Hill Road and Hassler Parkway intersection was reviewed as part of the IS/MND. Based on the traffic reports for these accidents, each of the recorded accidents was a solo vehicle accident that involved vehicles traveling westbound along Hassler Parkway and running off the road and/or hitting a fixed object. Project trips would be unlikely to increase this solo vehicle accident rate since the collision history at this location does not appear to be related to congestion, but due to driver error. = Even though the traffic analysis indicates that the project would result in an increase in daily traffic volumes, the additional volume would not result in an increase in collisions at the intersection (see pages 131-133 of the IS/MND and Appendix I.)

C. RESPONSE TO SANTA CLARA VALLEY TRANSPORTATION AUTHORITY

Comment C1: VTA is not planning to submit comments on the Dove Hill Medical Care Facility Initial Study associated with file numbers PDC14-051 and PD16-019.

Response C1: The commenter confirms they have no comment on the CEQA analysis for the project. No further response is required.

D. RESPONSE TO LOZEAU DRURY, LLP

Comment D1: I am writing on behalf of the Laborers International Union of North America, Local Union 270 and its members living in and around the City of San Jose (“LIUNA”) regarding the Initial Study and Mitigated Negative Declaration (“IS/MND”) prepared for the Dove Hill Medical Care Project (“Project”) (Project Files Nos. PDC14-051 and PD16-019). After reviewing the IS/MND, and with the assistance of expert reviews by wildlife biologist Dr. Shawn Smallwood and environmental consulting firm SWAPE, it is clear that there is a “fair argument” that the Project may have unmitigated adverse environmental impacts. SWAPE’s and Dr. Smallwood’s comments (attached hereto as, respectively, Exhibits A and B), as well as the comments below, identify substantial evidence of a fair argument that the Project may have significant environmental impacts. Accordingly, an environmental impact report (“EIR”) is required to analyze these impacts and to propose all feasible mitigation measures to reduce those impacts. We urge the Department of Planning, Building & Code Enforcement (“DPBCE”) to decline to approve the IS/MND, and to prepare an EIR for the Project prior to any Project approvals.

Response D1: The IS/MND concluded that the project would result in potential impacts to biological resources, cultural resources, geology and soils, hazards and hazardous materials, hydrology, and transportation, and identified mitigation measures for the project, in addition to City standard conditions and conditions of approval, that will reduce those impacts to a less than significant level. Because mitigation measures would reduce the impacts to less than significant levels, there is no basis for having to prepare an Environmental Impact Report. This comment letter includes two technical attachments by the wildlife biologist Dr. Shawn Smallwood (dated April 29, 2018) and by the environmental consulting firm SWAPE (dated April 27, 2018) to address air quality, greenhouse gas, biological, and cumulative environmental concerns. The comment letter itself incorporated excerpts of the main concerns and comments from the two technical attachments referenced above. Therefore, the responses to the commenter’s specific comments, which also address comments that are raised in the technical memorandum and technical reports by the wildlife biologist Dr. Shawn Smallwood and environmental consulting firm SWAPE, are provided below.

Comment D2: I. PROJECT BACKGROUND

Salvatore Caruso Design Corporation proposes to construct a convalescent hospital facility with two buildings containing a total of 155 patient rooms and up to 248 beds. The proposed Project also would include a dining hall, multipurpose room and other ancillary uses, surface parking areas, new landscaping, walkways, and landscaped common outdoor open space. IS/MND, p. 8. Each of the two buildings would contain a back-up diesel generator Id., p. 15. The Project would result in an increase of about 759 vehicle trips per day. The Project would be located on about three-acres of a 21-acre site. The other 18 acres of the site would remain private open space currently zoned for agriculture and consisting of grassland being used as pasture for horses. Id. The Project would be located immediately adjacent to U.S. Highway 101. The Project would include demolishing several existing structures within the 3-acre Project area. The 3-acre Project site is currently designated in the General Plan as Public/Quasi Public. The zoning is Agriculture (A). The Project proposes to rezone the site as A(PD) Planned Development.

Response D2: The comment above is introductory and provides a description of the proposed project. Therefore, no direct response is required to the comment.

Comment D3: II. LEGAL STANDARD

As the California Supreme Court held, “[i]f no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR.” *Communities for a Better Env’t v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320 [“CBE v. SCAQMD”], citing, *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 88; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504–505. “Significant environmental effect” is defined very broadly as “a substantial or potentially substantial adverse change in the environment.” Pub. Res. Code [“PRC”] § 21068; see also 14 CCR § 15382. An effect on the environment need not be “momentous” to meet the CEQA test for significance; it is enough that the impacts are “not trivial.” *No Oil, Inc.*, supra, 13 Cal.3d at 83. “The ‘foremost principle’ in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” *Communities for a Better Env’t v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 109 [“CBE v.CRA”].

The EIR is the very heart of CEQA. *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1214; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927. The EIR is an “environmental ‘alarm bell’ whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return.” *Bakersfield Citizens*, 124 Cal.App.4th at 1220. The EIR also functions as a “document of accountability,” intended to “demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.” *Laurel Heights Improvements Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392. The EIR process “protects not only the environment but also informed self-government.” *Pocket Protectors*, 124 Cal.App.4th at 927.

An EIR is required if “there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment.” PRC § 21080(d); see also *Pocket Protectors*, 124 Cal.App.4th at 927. In very limited circumstances, an agency may avoid preparing an EIR by issuing a negative declaration, a written statement briefly indicating that a project will have no significant impact thus requiring no EIR (14 Cal. Code Regs. § 15371), only if there is not even a “fair argument” that the project will have a significant environmental effect. PRC, §§ 21100, 21064. Since “[t]he adoption of a negative declaration . . . has a terminal effect on the environmental review process,” by allowing the agency “to dispense with the duty [to prepare an EIR],” negative declarations are allowed only in cases where “the proposed project will not affect the environment at all.” *Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440. A mitigated negative declaration is proper only if the project revisions would avoid or mitigate the potentially significant effects identified in the initial study “to a point where clearly no significant effect on the environment would occur, and...there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the

environment.” PRC §§ 21064.5 and 21080(c)(2); *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 331. In that context, “may” means a reasonable possibility of a significant effect on the environment. PRC §§ 21082.2(a), 21100, 21151(a); *Pocket Protectors*, supra, 124 Cal.App.4th at 927; *League for Protection of Oakland’s etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904–905.

Under the “fair argument” standard, an EIR is required if any substantial evidence in the record indicates that a project may have an adverse environmental effect—even if contrary evidence exists to support the agency’s decision. 14 CCR § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 931; *Stanislaus Audubon Society v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-15; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602. The “fair argument” standard creates a “low threshold” favoring environmental review through an EIR rather than through issuance of negative declarations or notices of exemption from CEQA. *Pocket Protectors*, 124 Cal.App.4th at 928.

The “fair argument” standard is virtually the opposite of the typical deferential standard accorded to agencies. As a leading CEQA treatise explains:

This ‘fair argument’ standard is very different from the standard normally followed by public agencies in making administrative determinations. Ordinarily, public agencies weigh the evidence in the record before them and reach a decision based on a preponderance of the evidence. [Citations]. The fair argument standard, by contrast, prevents the lead agency from weighing competing evidence to determine who has a better argument concerning the likelihood or extent of a potential environmental impact. The lead agency’s decision is thus largely legal rather than factual; it does not resolve conflicts in the evidence but determines only whether substantial evidence exists in the record to support the prescribed fair argument.

Kostka & Zishcke, Practice Under CEQA, §6.29, pp. 273-274. The Courts have explained that “it is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency’s determination. Review is de novo, with a preference for resolving doubts in favor of environmental review.” *Pocket Protectors*, 124 Cal.App.4th at 928.

Response D3: The comment cites to various California court cases and does not raise any specific environmental issues under CEQA related to the proposed project. Therefore, no specific response is required.

Comment D4: A. The air quality analysis is not based on substantial evidence because it applies BAAQMD Guidelines which expressly state they do not apply when a project includes emergency generators.

The Project relies solely on screening criteria developed by the Bay Area Air Quality Management District (“BAAQMD”) as the basis for concluding that the Project would not have any significant air quality impacts as a result of its construction and operation. IS/MND, pp. 38-39. The IS/MND points to Table 3-1 of the BAAQMD Guidelines, entitled “Operational-Related Criteria Air Pollutant and

Precursor Screening Level Sizes.” BAAQMD Guidelines, pp. 3-2 – 3-3. The IS/MND relies on screening criteria for a “congregate care facility.” Under the Guidelines, a congregate care facility with less than 657 dwelling units (“du”) is presumed not to have significant operational emissions of reactive organic gases (“ROGs”). Id., p. 3-2. For construction emissions, the Guideline establishes a screening level of 240 du for a congregate care facility below which ROG emission will not be significant.

The City’s use of the BAAQMD screening levels as evidence of no significant air quality impacts is incorrect and not based on substantial evidence for several reasons.

First, Table 3-1 of the BAAQMD Guideline expressly cautions that the screening levels are not sufficient when a project includes back-up generators. The note to Table 3-1 states that “[e]missions from engines (e.g., back-up generators) and industrial sources subject to Air District Rules and Regulations embedded in the land uses are not included in the screening estimates and must be added to the above land uses.” BAAQMD Guidelines, pp. 3-3 (emphasis added). Because the IS/MND fails to include the emissions from testing and operating the back-up generators proposed for the Project, its air quality conclusion is unsupported by substantial evidence and errs as a matter of law. SWAPE Comments, pp. 1-3.

Response D4: Pursuant to CEQA Guidelines Section 15064(b), the determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the lead agency and must be based to the extent possible on scientific and factual data. The City of San José, and other jurisdictions in the San Francisco Bay Area Air Basin, often utilize the thresholds and methodology for assessing air emissions and/or health effects adopted by the BAAQMD based upon the scientific and other factual data prepared by BAAQMD in developing those thresholds.

Thresholds prepared and adopted by BAAQMD in May 2011 were the subject of a lawsuit by the California Building Industry Association and a subsequent appeal by BAAQMD. The Appellate Court decision on August 13, 2013 upheld the threshold adoption process as valid. Subsequently, the Appellate Court’s decision was appealed to the California Supreme Court, which granted limited review and issued a ruling in December 2015. The determination of whether a project may have a significant effect on the environment is subject to the discretion of each lead agency, based upon substantial evidence. The City has carefully considered the thresholds prepared by BAAQMD in May 2017 and regards these thresholds to be based on the best information available for the San Francisco Bay Area Air Basin. Evidence supporting these thresholds has been presented in the following documents:

- BAAQMD. CEQA Air Quality Guidelines. Updated May 2017.
- BAAQMD. Revised Draft Options and Justification Report California Environmental Quality Act Thresholds of Significance. October 2009.
- California Air Pollution Control Officers Association. Health Risk Assessments for Proposed Land Use Projects. July 2009.
- California Environmental Protection Agency, California Air Resources Board. Air Quality and Land Use Handbook: A Community Health Perspective. 2005.

Therefore, the City has determined the thresholds and methodologies from BAAQMD’s May 2017 CEQA Air Quality Guidelines are appropriate for use in this analysis to determine whether there would be any project operational impacts in terms of criteria pollutants, toxic air contaminants and odors. The City has carefully considered the thresholds and has deemed them to be based on the best information available for the San Francisco Bay Area Air Basin and conservative with regard to health impacts.

The project proposes the inclusion of two 100 kilowatt (kW), approximately 134 horsepower generators. These generators would be used for back-up power in emergency conditions. It is assumed that the generators would be diesel-fueled and operated for testing and maintenance purposes, with a maximum of 50 hours per year of non-emergency operation under normal conditions, as allowed by BAAQMD. During testing periods the engine would typically run for less than one hour. The engine would be required to meet California Air Resources Board and U.S. Environmental Protection Agency emission standards and consume commercially available California low-sulfur diesel fuel.

CalEEMod criteria pollutant emissions for the generator are shown in Table 1 below and are included as Attachment C.

Table 1: Generator Criteria Pollutant Emissions (average annual lbs./day)				
Source	ROG	NOx	PM₁₀	PM_{2.5}
Two 100 kW Generators	0.06 lbs./day	0.08 lbs./day	0.008 lbs./day	0.008 lbs./day
<i>BAAQMD Thresholds</i>	54 lbs./day	54 lbs./day	82 lbs./day	54 lbs./day
Exceed Threshold?	No	No	No	No
Source: Illingworth & Rodkin. Gateway Crossings Project Air Quality Assessment. September 19, 2017. Attachment 4: Generator Risk Modeling.				

As shown in Table 1, these generators would represent a very small increase in criteria pollutant emissions, at less than 0.1 percent of the BAAQMD threshold. Given that the project is approximately 25 percent lower than the BAAQMD-specified screening size for the use (as described in response D5), a 0.1 percent increase in criteria pollutants attributable to the back-up generators in combination with other project emissions would not cause the project to exceed BAAQMD thresholds nor would it change the overall impact from less than significant to significant.

Comment D5: Second, the BAAQMD screening criteria do not address emissions associated with demolition activities: “These screening levels are generally representative of new development on greenfield sites without any form of mitigation measures taken into consideration.” BAAQMD Guidelines, pp. 3-2. Because the “analysis” does not address the demolition activities proposed as part of the Project, it is not supported by substantial evidence and errs as a matter of law. SWAPE Comments, pp. 1-3.

Response D5: The IS/MND included analysis of criteria pollutants associated with the proposed demolition activities on the site. There are several small structures on the site, most of which are single-family residences and lean-to accessory structures associated with the agricultural uses that have occurred at the project site. It is assumed that demolition of the existing on-site improvements would occur over approximately one month (with heavy equipment used over one week), as described within the IS/MND. The structures are small and of simple construction and do not have deep foundations such that extensive equipment use is required over extended time periods, but rather one excavator, one rubber tired dozer, and one tractor/loader/backhoe would each be used for seven 8-hour days as part of the demolition activities occurring over a month.

Table 2: Demolition Criteria Pollutant Emissions (Includes on-site and off-site emissions)				
Source	ROG	NOx	PM₁₀	PM_{2.5}
Demolition and Site Preparation	0.04 lbs./day	0.41 lbs./day	0.15 lbs./day	0.008 lbs./day
<i>BAAQMD Thresholds</i>	<i>54 lbs./day</i>	<i>54 lbs./day</i>	<i>82 lbs./day</i>	<i>54 lbs./day</i>
Exceed Threshold?	No	No	No	No

Source: Illingworth & Rodkin, Inc. Dove Hill Assisted Living Facility Community Risk Assessment. April 24, 2015. Revised November 1, 2017. CalEEMod Tables.

As shown in Table 2 (which is based on data included in Attachment B: CalEEMod Output Data), demolition would represent a very small increase in criteria pollutant emissions, at less than 0.7 percent of the BAAQMD thresholds. Given that the project is approximately 25 percent lower than the BAAQMD-specified screening size for the use (as described below in Response D7), a 0.7 percent increase (even when combined with normal project operations emissions and the emergency generators emissions shown in Table 1) would not exceed BAAQMD thresholds for criteria pollutants nor would it change the overall level of impact.

Comment D6: Third, the Project is not a “congregate care facility.” According to an industry source, “[a] congregate care facility is typically for residents 55 years of age or older, where limited or no assistance with daily living activities is needed and a state issued license is not required.” <http://thejchgroup.com/blog/what-is-a-congregate-care-facility/>. This is not equivalent to the proposed convalescent hospital facility. Because the screening criteria relied upon by the IS/MND do not reflect the actual Project, the IS/MND’s air quality discussion and conclusion is not supported by substantial evidence and errs as a matter of law.

Because the screening level table does not provide criteria that address back-up generators and the proposed demolition activities, and the criteria referenced in the IS/MND are not for a facility that is remotely similar to the proposed project, the IS/MND is not supported by substantial evidence and a fair argument exists that the Project may have significant air quality impacts.

Response D6: The proposed project is considered “convalescent hospital” use under the City of San Jose Municipal Code. Section 20.200.250 of the San Jose Municipal Code defined

”convalescent hospital” as “an establishment where for a minimum of forty hours per week, inpatient nursing care including bed care is provided and where other medical care may be provided for persons who are ill, injured, or infirm (physically or mentally), but excluding /persons with communicable disease. No outpatient care shall be provided.” Convalescent hospital is designed for longer-term care and no outpatient services is to be provided at this facility, Based on the project’s description and proposal, the subject project is a medical care facility with significant medical services provided on site, including: skilled nursing services, rehabilitation services, wound care, occupation therapy, physical therapy, speech therapy, and memory care.

BAAQMD screening categories provide a screening size for both a Congregate Care Facility and a Hospital. In the IS/MND, the project is analyzed under BAAQMD screening category of “Congregate Care Facility”, which specifies 657 units for operational impact. This category was selected based on operational information provided by the applicant as part of the original project description, as described above.

Based on the type of use for this project, it could also be argued a “congregate care facility” does not fully cover this use, but that a Hospital category would more closely reflect the proposed project; though, even a Hospital use would be more intense in terms of staffing, numbers of visitors, and type of treatment of patients (i.e., surgical care). In this more conservative case, the BAAQMD screening size for a Hospital use is 334 beds for operational impacts and 337 beds for construction impacts. The project proposes up to 248 beds, which is still approximately 25 percent lower than the BAAQMD-specified screening sizes. Even when combined with emergency back-up generator and demolition emissions (Table 1 and Table 2, above), and regardless of whether the use is considered a Congregate Care Facility or Hospital, the analysis in the IS/MND shows that the project would not exceed BAAQMD thresholds and the impact would still be less than significant.

Comment D7: B. There is substantial evidence of a fair argument that the Project may have significant health risk impacts from its emissions of toxic air contaminants.

The IS/MND claims that construction of the Project will only result in an increased cancer risk of 0.1 in a million. IS/MND, pp. 39-40. Comparing that figure to BAAQMD’s threshold of significant for toxic air contaminants of ten in one million, the IS/MND concludes that the Project will have no significant health risks to nearby sensitive receptors. Id. As noted by SWAPE, “review of the construction HRA demonstrates that the analysis is based on diesel particulate matter (DPM) emission estimates from a CalEEMod file that the Project Applicant fails to provide.” SWAPE Comment, p. 3. Hence, nothing in the documents made available to the public during the comment period provide substantial evidence supporting the City’s health risk assessment for the Project’s construction.

Response D7: The data supporting the diesel particulate matter estimates discussed in Appendix A Air Quality Community Risk Assessment in the IS/MND is included as Attachment B to this memo.

Comment D8: As for the Project’s operational emissions, the IS/MND concludes that there will be no significant health risks but does not rely on any health risk assessment prepared for the Project. IS/MND, p. 41. As SWAPE emphasizes, “the IS/MND fails to evaluate, whatsoever, the health risk impacts posed to nearby residences as a result of exposure to TAC emissions generated by operation of the Project.” SWAPE Comments, pp. 3-4. In order to fully disclose the potential health risks associated with the Project, an accurate health risk assessment encompassing the Project’s operational phase and consistent with guidelines published by the Office of Environmental Health Hazard Assessment must be prepared. Currently, the IS/MND’s conclusion that the Project will not result in any significant health risks is not supported by substantial evidence and a fair argument exists that the Project may have significant health risk impacts.

The arbitrariness of the IS/MND’s health risk discussion is further established by SWAPE’s preparation of a Level 2 health risk screening assessment (“HRSA”). BAAQMD recommends a significance threshold of 10 in one million cancer risk for infants, children and lifetime residency. Applying the U.S. Environmental Protection Agency’s AERSCREEN model, as recommended by OEHHA and CAPCOA, SWAPE calculates that construction and operation of the Project will result in cancer risks to infants, children, adults, and nearby residents over the course of a 30-year residential lifetime of, respectively, 69 in one million, 46 in one million, 7 in one million, and 120 in one million, well in excess of BAAQMD’s threshold. SWAPE Comment, pp. 5-7. Based on this substantial screening evidence, a fair argument is present that the Project may have significant health risk impacts on infants, children and nearby residents. A complete health risk assessment must be prepared for the Project in order to provide a substantial basis for any conclusions regarding the Project’s health risks to current residents.

In addition, the IS/MND fails to meaningfully apply the directives issued by the Supreme Court in its 2015 decision in *California Building Industry Ass’n v. BAAQMD* (2015) 62 Cal.4th 369. As acknowledged by the IS/MND, in *BIA v. BAAQMD* the Supreme Court held that a CEQA document must analyze “a project’s potentially significant exacerbating effects on existing environmental hazards – effects that arise because the project brings ‘development and people into the area affected.’” 62 Cal.4th at 388. “Because this type of inquiry still focuses on the project’s impacts on the environment—how a project might worsen existing conditions—directing an agency to evaluate how such worsened conditions could affect a project’s future users or residents is entirely consistent with this focus and with CEQA as a whole.” *Id.* at 389. Rather than evaluate whether the Project’s additional traffic and vehicle emissions exacerbate the existing TAC emissions spewing onto the Project site from the highway by adding additional vehicles to that serious TAC source, the IS/MND ignores the Project’s additional TAC emissions from additional vehicles associated with the Project using the adjacent highway and contributing to its TAC emissions onto the Project site.

Response D8: As stated in the IS/MND, toxic air contaminants (TACs) are also regulated through state and local risk management programs that eliminate, avoid, or minimize the risk of adverse health effects. TACs tend to be localized and are found in relatively low concentrations in ambient air; however, exposure to low concentrations over long periods can result in increased risk of cancer and/or adverse health effects. Diesel exhaust, in the form of diesel particulate matter (DPM), is the predominant TAC in urban air and accounts for

roughly 60 percent of the total cancer risk associated with TACs in the Bay Area. Other TACs found in urban air include lead, benzene and formaldehyde.

The project does not propose significant operational sources of TACs, such as freeways and high-traffic roads, commercial distribution centers, rail yards, ports, refineries, chrome platers, dry cleaners, or gasoline stations. The project would generate a relatively small amount of passenger vehicle traffic which is not a substantial TAC source. Only diesel delivery trucks would be considered a TAC source, of which the project would generate a very small amount, approximately ten per day, resulting in almost no increase in health risk at the nearest residential receptor 500 feet away. Passenger vehicles are not a significant source of TACs; therefore, a quantitative TAC impact assessment was not completed for the IS/MND. This is consistent with BAAQMD guidance, as passenger vehicles are not a substantial source of TACs.

The SWAPE analysis provided by the commenter ignores the IS/MND analysis and relies on an imprecise screening model (i.e., AERSCREEN) to predict high impact levels. The SWAPE assessment is based on CalEEMod modeling that appears to have used default conditions, and predicted operational mobile emissions assuming all trips were made by diesel vehicles and that all trips came from the site, whereas they would actually be distributed along trip lengths of seven to 12 miles (the assumed average trip distance in CalEEMod) to and from the project site. As such, the majority of trips (and resulting emissions) would travel well away from the site, dispersing project emissions along roadways. Thus, the SWAPE analysis is imprecise and inaccurate.

A screening modeling approach, such as the one used by SWAPE and described in the comment letter using AERSCREEN, is a simplified version of a refined model and is limited to:

- Use of theoretical, or synthetic, meteorological conditions that are designed to encompass the spectrum of potential meteorological conditions that may be present at the location being modeled, but are not actual measured data.
- Calculation of only a one-hour concentration for each of the theoretical meteorological conditions. An average scaling factor is then used to estimate what the annual average concentration may be based on the modeled on-hour concentration.
- No differentiation between daytime and nighttime conditions. As such, the model calculates one hour concentrations under conditions that would occur during the nighttime when operational vehicle emissions and generator testing would not likely be occurring.

Due to its simplicity and reliance on limited actual site-specific physical and meteorological conditions, AERSCREEN is designed to provide conservative (i.e., overstated) pollutant concentrations. Given the lack of TAC emissions sources included in the project, the SWAPE assessment has greatly exaggerated and overestimated project operational risk impacts, and therefore is not substantial evidence of an actual project impact. For these reasons, operational health risk impacts at adjacent sensitive receptors would be less than significant (as described within the IS/MND on page 39).

Comment D9: Likewise, contrary to CEQA, by adding TAC emissions to the immediate area, the Project cannot avoid evaluating the cumulative impacts of the Project including the adjacent highway's existing TAC emissions on nearby sensitive receptors. The estimated increased cancer risks to infants of 92.7 in a million from the Project's TAC emissions is only slightly below the BAAQMDF significance threshold of 100 in a million cancer risk. Those TAC emissions are thus considerable, albeit just below the threshold. There is no evidence of what the operational TAC emissions are from the back-up generators and hundreds of vehicles per day accessing the project site, presumably including diesel trucks. Given that the IS/MND estimates a health risk of 21.2 per million cancer risk from the highway alone already grossly exceeds the BAAQMD significance threshold of 10 in a million, the addition of TACs from the Project's construction or operation is considerable and may significantly contribute to the Project's cumulative adverse health risk impact. Hence, the IS/MND's conclusion that the Project will not have cumulative health risk impacts is not supported by substantial evidence and a fair argument exists that the Project will result in cumulative health risks. Nor is there any assessment of how the proposed TAC mitigations, including air filters, may reduce these cumulative impacts.

Response D9: The construction TAC analysis included a cumulative/combined analysis of the project and vehicles on US 101 (pages 39 and 40 of the IS/MND). As shown in the IS/MND, the project would not exceed BAAQMD cumulative-source thresholds for cancer, PM_{2.5}, or non-cancer risks.

As stated in Section 4.3 Air Quality of the IS/MND, diesel exhaust, in the form of diesel particulate matter (DPM), is the predominant TAC in urban air and accounts for roughly 60 percent of the total cancer risk associated with TACs in the Bay Area. Other TACs found in urban air include lead, benzene and formaldehyde. Common stationary sources of TACs and PM_{2.5} include gasoline stations, dry cleaners, freeways and high volume roadways, truck distribution centers, ports, rail yards, refineries, chrome plating facilities, dry cleaners using perchloroethylene, and gasoline dispensing facilities and diesel backup generators. As stated previously, the project's operational TAC emissions would be low because the source of TACs for this project would be the two small generators (operating only for periodic testing or during an emergency) and approximately five to ten diesel-fueled delivery truck trips per day to and from the site. Table 1, above, shows the diesel generator risk. The low amount of TAC emissions generated from the small number of diesel truck trips would be too minute to measure (approximately 0.00 risk at 500 feet).¹ Passenger vehicles from individual projects are not considered a significant source of TACs, per page 5-15 of the BAAQMD CEQA Guidelines. Therefore, a cumulative operational TAC analysis was not conducted, consistent with BAAQMD guidance, and the cumulative impact is less than significant.

Comment D10: The resulting indoor air levels are not analyzed. Given the extensive landscaping proposed for the Project, the residents will not be in their rooms at all times and will be exposed to significant levels of TACs whenever they venture outside the buildings.

¹ Reyff, James. President, Illingworth & Rodkin, Inc. Email with Ashton, Amie. Project Manager, DJP&A. May 24, 2018.

Response D10: The above comment is purely speculative and provides a conclusion without any data, information, or evidence to support such conclusion. Therefore, no specific response is required.

To clarify, while analysis of an existing condition affecting a project is not required under CEQA, the City's General Plan Policy MS-11.1 requires completion of air quality modeling for sensitive land uses such as new residential developments or senior housing that are located near sources of pollution such as freeways. An assessment of outdoor and indoor air quality levels at the project site was conducted for the project (see pages 40 and 41 of the IS/MND). Conditions of approval requiring the installation of air filtration systems and ongoing maintenance of the facility's HVAC systems were recommended to improve indoor air quality but a quantification of the reduction is not required because it is not a CEQA impact. Page 9 of the Community Risk Assessment (Appendix A to the IS/MND) quantifies the general effectiveness of the recommended air filtration and ventilation units. While a MERV 11 filter would not be completely effective in improving indoor air quality by removing PM, use of a MERV 16 panel filter in the HVAC system would achieve average PM reductions of nearly 90 percent. The project requires a 53 percent reduction in cancer risk and a 72 percent reduction in annual PM_{2.5} exposure. As part of the project approval, the following conditions would be implemented to minimize exposure of site occupants to long-term TAC and annual PM_{2.5} emissions:

- Air filtration devices shall be installed as part of the heating, ventilation, and air conditioning (HVAC) system. Air filtration devices shall be rated MERV13 or higher. Alternately, at the approval of the City of San Jose, equivalent control technology may be used if it is shown by a qualified air quality consultant HVAC engineer that it would reduce risk below significance thresholds.
- An ongoing maintenance plan for the buildings' HVAC air filtration system shall be prepared and submitted to the Director of the Department of Planning, Building and Code Enforcement for review and approval. The maintenance plan shall (1) specify provisions for the cleaning, maintenance, and monitoring of affected buildings for air flow leaks; (2) include assurance that owners/tenants are provided information on the ventilation system; and (3) include provisions that fees associated with occupancy of the building include funds for cleaning, maintenance, monitoring, and replacements of the filters.
- Conditions of approval shall be printed on all approved construction contracts, plans, and similar documents. (see page 41 of the IS/MND)

Comment D11: C. A fair argument exists that the project may have significant GHG emissions because the Project fails to explain how it complies with requirements of the City's GHG Reduction Strategy and does not include solar panels or other strategies supposedly encouraged by the Strategy.

The IS/MND claims that because the Project is not inconsistent with the mandatory requirements of the City's GHG Reduction Strategy ("GHGRS"), it will not have any significant impacts from its

GHG emissions. IS/MND, pp. 82-85. The Project is proposing entirely new uses, new traffic and new operational effects than currently exist at the site. A review of the GHG emission discussion confirms that the Project's actual measures are not identified and not all of the mandatory requirements of the GHG strategy are being implemented. Nor does the discussion show that any of the relevant measures to be encouraged by the City are being implemented at the site. Most of the measures adopted for the Project will have little relevance to GHG reductions, such as for example, "enhanc[ing] the pedestrian environment with new sidewalks." IS/MND, p.82. The Project is isolated from other neighborhoods and amenities and abuts a freeway and will focus on assisting convalescent patients. How improving sidewalks would significantly enhance a pedestrian environment in such a way as to reduce any GHG emissions at such a facility is unknown and without any evidentiary support. No estimate or prediction of any people walking to the facility is suggested in the IS/MND. No connections or amenities that would draw pedestrians from nearby residential areas are proposed. Convalescing patients will not be strolling uphill from the site or onto the adjacent highway.

Going through the relevant GHG reduction strategies included in the City's plan, there is no evidence that the Project will comply with all of the GHG Reduction Strategy's mandatory requirements. Moreover, there is an almost complete failure to implement any strategy being encouraged by the City. In addition, a number of the mandatory strategies, as applied to the Project, would not have any positive reduction effect on GHG emissions and would appear to do the opposite.

For example, without explanation, the IS/MND claims that if the Project is consistent with the General Plan's Public/Quasi-Public land use designation for the site, that fact somehow will control GHG emissions. IS/MND, pp. 82-83 (Table 4.7-1). This may be true for portions of the General Plan that concentrate development near transit and San Jose's downtown area. It cannot be true for an isolated Public/Quasi-Public designation that is interpreted to allow a large convalescent facility to be built in an isolated open space area surrounded by unrelated residential development. No rationale is provided of how this particular land use designation serves to reduce any GHG emissions.

Although LIUNA agrees with the Project's inclusion of bicycle and pedestrian facilities, as noted above, there is no discussion or effort to quantify how these facilities will meaningfully reduce GHG emissions at such an isolated facility with no use relevant to the surrounding neighborhoods. IS/MND, p. 83.

Response D11: A General Plan Amendment (GP08-08-03) was approved in 2008 to change the Land Use/Transportation Diagram land use designation from Non-Urban Hillside to Public/Quasi-Public on the project site in order to facilitate a potential development of a 275-unit adult senior living facility. Since the approval of this General Plan land use change, the City has certified the Envision 2040 General Plan Final EIR, Supplemental EIR, and the City's GHG Reduction Strategy.

The City's GHG Reduction Strategy is based on the cumulative emissions from buildout of the Envision San Jose 2040 General Plan. These emissions were calculated in the Envision San Jose 2040 General Plan FEIR and SEIR based on the distribution of land uses in the General Plan Land Use/Transportation Diagram. These emissions calculations assumed that

the project site would be developed with a use consistent with the Public/Quasi-Public General Plan Land Use Designation, including public facilities such as schools, colleges, and libraries; and private facilities used by the public including private schools, daycare centers, and hospitals.

The calculations and measures within the City's GHGRS accounted for development Citywide in the Envision San Jose 2040 General Plan that would occur through 2020. The City's overall strategy was developed to meet statewide 2020 GHG emissions reduction targets. The primary test for consistency with the City's GHGRS is conformance with the General Plan Land Use/Transportation Diagram and supporting policies because of the anticipated land uses. The proposed project is consistent with the General Plan designation for the site; therefore, site emissions were incorporated into the City's GHGRS analyzed in the General Plan EIR.

The GHGRS did not assume that every project would be able to implement the voluntary measures (such as solar panels) described within the GHGRS, as not all measures would be applicable or practical for all developments. The uses included in the proposed project are consistent with the City's General Plan Land Use Transportation Diagram and are therefore, consistent with the amount of development and related GHG emissions evaluated in City's GHGRS. In the Supplemental EIR prepared for the GHGRS, the Citywide impacts resulting from these uses were found to be less than significant. Further, the project would provide bicycle parking facilities for employees, it is not anticipated that residents would ride bikes given that they will generally be non-ambulatory.

In addition, as part of the previous General Plan Amendment proposal (GP08-08-03), GHG analysis was completed for a similar project and was found to be consistent with the BAAQMD threshold in regards to GHG impacts.

Comment D12: The IS/MND claims that the Project will comply with certain components of the GHG Reduction Strategy, including "Implementation of Green Building Measures related to: • Solar Site Orientation • Site Design • Architectural Design • Construction Techniques • Consistency with City Green Building Ordinance and Policies • Consistency with GHGRS Policies: MS-2.3, MS-2.11, and MS-14.4." IS/MND, p. 83. The referenced GHGRS policies represent a laundry list of possible design and construction measures a project may utilize. The measures however do not say which ones will be used for this Project or how they would be implemented for this Project. Thus, GHGRS Policy MS-2.3 states that the City shall "encourage consideration of solar orientation, including building placement, landscaping, design and construction techniques for new construction to minimize energy consumption." GHGRS, Attachment B, p. 33. Merely encouraging and considering such measures does not indicate that they will be implemented at this Project. Policy MS-2.11 appears somewhat more proactive, stating that the City will "[r]equire new development to incorporate green building practices, including those required by the Green Building Ordinance." Id. Policy MS-2.11 also provides a few examples: "[s]pecifically, target reduced energy use through construction techniques (e.g., design of building envelopes and systems to maximize energy performance), through architectural design (e.g. design to maximize cross ventilation and interior daylight) and through site design techniques (e.g. orienting buildings on sites to maximize the

effectiveness of passive solar design).” Id. Policy MS-14.4 is similar, stating that the City will “[i]mplement the City’s Green Building Policies (see Green Building Section) so that new construction and rehabilitation of existing buildings fully implements industry best practices, including the use of optimized energy systems, selection of materials and resources, water efficiency, sustainable site selection, passive solar building design, and planting of trees and other landscape materials to reduce energy consumption.” Id. None of these general admonitions to employ green building components in designing a project indicates or explains how the Project will employ such techniques or whether the existing design includes any such components. For example, nothing in the IS/MND indicates if or how the Project’s orientation would “maximize the effectiveness of passive solar design.” See SWAPE Comments, p. 10.

Response D12: As part of the project conditions, specific building design features will be reviewed prior to issuance of a building permit. The project is required to comply with the City’s Green Building Ordinance and would be LEED-Silver certified under the United States Green Building Council’s (USGBC) specifications. Text has been provided in Section 5 of this document to address the fact that the project would be required to be LEED Silver certified. Projects customize how they pursue certification. LEED Silver requires 50-59 points for certification and can include the following:

- **Sustainable Sites – 26 Possible Points:** The prerequisite for the Sustainable Sites category aims to curtail pollution and soil erosion that often result from construction. This category also offers points for strategies toward cultivating overall sustainability. For instance, a project wins points for choosing an urban or brownfield site rather than a previously undeveloped area. This category also pertains to the building’s direct environmental impact on the immediate area.
- **Water Efficiency – 10 Possible Points:** The prerequisite here is for the building to use 20 percent less water than the USGBC baseline for buildings of similar size and occupation. A project garners further points for going substantially beyond this 20 percent reduction in water use, as well as implementing further water conservation measures that pertain to landscaping and wastewater technologies.
- **Energy and Atmosphere – 35 Possible Points:** This category focuses mainly on building commissioning and the energy performance of main systems such as HVAC and Lighting. It entails three prerequisites: the building must be fundamentally commissioned (commissioning a building is the testing and balancing of the main systems to assure optimum performance), use at least 10 percent less energy than the USGBC baseline, and contain systems that do not use any chlorofluorocarbon based refrigerants. Extra points go for progressing further than prerequisite dictates in these areas as well as for the use of renewable energy sources for building operation.
- **Materials and Resources – 14 Possible Points:** This category deals with reuse and recycling of materials, both in the construction and the ongoing operation of the building.

- Indoor Environmental Quality – 15 Possible Points: This category deals mainly with indoor air quality issues including ventilation, off-gassing of materials and thermal comfort. It also deals with the need for lighting systems to be energy efficient as well as adequate for all necessary tasks.
- Extra Credit – 10 Possible Points: There are two categories with no prerequisites where you can garner extra-credit points: Innovation in Design and Regional Priority. Innovation in Design deals with successful and innovative solutions for environmental and sustainable concerns. Regional Priority focuses on the addressing of region-specific environmental issues.²

Comment D13: There is no indication as to how water efficiency is promoted by the landscaping proposed for the Project. Indeed, the Project proposes to use 931,258 gallons of water per day. IS/MND, p. 140. Only 28,365 gallons of that would be for the Project’s indoor use. (Id.) Compared to the current estimated water use of the site at approximately 1,213 gallons of water per day, there is certainly nothing in the IS/MND to suggest some effective water conservation strategy, drought resistant landscaping or any other measure that would actually reduce GHGs. See SWAPE Comment, p. 10. The IS/MND ignores GHGRS Policy MS-21.3 which calls on the City to “[e]nsure that San José’s Community Forest is comprised of species that have low water requirements and are well adapted to its Mediterranean climate.” GHGRS, Att. B, p. 34. See SWAPE Comment, p. 10.

Response D13: Lawn areas are not proposed as part of the project, but rather the project will use drought tolerant trees and shrubs (such as olive, salvia, and rosemary). Further, the Landscape Plan proposes different hydrozones, timers, and rain sensors for the irrigation system to minimize excessive watering.

Comment D14: The site selection for the Project has nothing to do with promoting GHG reductions or energy efficiency, amounting to an almost random opportunity to replace a somewhat degraded site with a type of project generally deemed beneficial and in demand. No other details about materials, design or any other aspect of the Project indicate how it will further the referenced green building examples or achieve any particular LEED rating.

The various references to the City’s Private Sector Green Building Policy and Green Building Ordinance boil down to a requirement that certain categories of projects within San Jose achieve certain levels of LEED certification. San Jose Municipal Code, Chapter 17.84. LEED certification is not transparent to a reader of the IS/MND. The various LEED certification levels are based on a point system. The IS/MND does not explain the LEED point system. Nothing in the IS/MND explains what features the Project would claim to justify whatever points may be available to the Project in the LEED system. In other words, it is completely opaque for the IS/MND to invoke the City’s Private Sector Green Building Policy and Green Building Ordinance, which in turn invoke a LEED point system that is inaccessible to the reviewing public, as a logical explanation of how the Project’s specific design elements and facilities will reduce GHG emissions.

² Classroom. Requirements for LEED Silver Certification. Accessed June 26, 2018. <https://classroom.synonym.com/requirements-for-leed-silver-certification-12081683.html>.

In addition, the IS/MND does not accurately describe even the City's Green Building requirements. The IS/MND states that pursuant to the City's Private Sector Green Building Policy, "the proposed project would be required to be LEED Certified." IS/MND, p. 84. However, the Private Sector Green Building Policy actually requires this Project to be certified LEED Silver.

<http://www.sanjoseca.gov/index.aspx?NID=3284> ("Commercial/Industrial Tier 2 - \geq 25,000 square feet = LEED Silver"). Residential projects may rely on a mere LEED certification. This is not a residential or assisted living facility but a private, for-profit, convalescent hospital, a commercial enterprise. San Jose Municipal Code § 17.84.104 ("Commercial / industrial building' means all non-residential construction including construction of retail space, office space, and other commercial uses, regardless of the zoning scheme at the project's location"). See also § 17.84.112 ("Large commercial building' means a non-residential building having a gross floor area of twenty-five thousand (25,000) square feet or more and is not a high-rise building"). Large commercial buildings are deemed Tier two projects under the Code. § 17.84.121 ("Tier two project" means a large commercial industrial building..."). "All tier two commercial industrial projects for which this chapter is applicable must receive the minimum green building certification of LEED Silver." §17.84.220.

Even with that heightened LEED certification level, the City's ordinance does not guarantee that even a large commercial project such as the proposed Project will necessarily achieve LEED Silver because it provides for Project specific exemptions at the discretion of the Director of Planning. § 17.84.210. As a result, no one can be sure what compliance with the City's Green Building Ordinance may look like for this Project.

Response D14: The clarification provided has been included in Section 5 of this document, in that the project would be required to be minimum LEED Silver certified (rather than LEED certified, as described within the IS/MND). A condition of approval requiring LEED Silver certification will be added to the project's building permits. A discussion of LEED Silver criteria is included in Response D-12, above.

Comment D15: In addition to the lack of relevance of many of the table entries, and the lack of any effort to explain how the project's designs would meet the City's policy and achieve a LEED Silver rating, the IS/MND table is most notable for emphasizing the GHG reductions the Project refuses to do, despite the City claiming to have encouraged their implementation. Hence, the Project refuses to install solar panels to make the Facility energy independent. IS/MND, p. 84. Despite its seemingly excessive proposed water use, no water recycling is proposed to meet that excessive demand. Id. Rather than reduce traffic by reducing parking, the Project proposes to increase parking above the City's minimum requirements. Id. In short, the IS/MND's GHG emissions discussion fails to provide any substantive discussion of the Project's GHG emission impacts or what, if any, mitigations would be applied to the Project. This aspect of the IS/MND is entirely without evidentiary support and a fair argument exists that the Project may have significant GHG emission impacts.

Response D15: The parking capacity at the project site is consistent with the San José Municipal Code for the zoning; therefore, no parking reduction measures are required. While LEED certification and project design are ways to reduce GHG emissions, as mentioned

above, the primary test for consistency with the City's GHGRS is conformance with the General Plan Land Use/Transportation Diagram and supporting policies, which is the basis for the Supplemental EIR finding for the GHGRS, that Citywide impacts resulting from these uses were found to be less than significant, as described in Response D-11, above.

Comment D16: D. The IS/MND fails to address all of the Project's potential impacts to biological resources at and near the Project site. Wildlife biologist Dr. Shawn Smallwood, Ph.D., concludes that the Project may have significant impacts on several special status species. An EIR is required to analyze and mitigate these impacts. Dr. Smallwood's expert comments and resume are attached hereto as Exhibit B.

Response D16: As described above in Response B5, above, the IS/MND evaluated impacts to biological resources and found that the project would result in less than significant impacts to whitetail kite, loggerhead shrike, and Santa Clara Valley dudleya plant with implementation of mitigation measures MM BIO-1 to MM BIO-3, which would include on-site monitoring during construction with consultation from the Santa Clara Valley Habitat Agency. For further discussion of the project's biological impacts, see Attachment A: Biological Resources Response Memorandum. Please refer to Responses D17 to D26 for more detailed responses.

Comment D17: a. The wildlife baseline relied upon by the IS/MND is woefully inadequate. Wildlife biologist Dr. Shawn Smallwood, Ph.D., concludes that the Project may have significant impacts on several special status species. An EIR is required to analyze and mitigate these impacts.

The IS/MND's baseline for biological impacts is incomplete, outdated, and understates the biological values at the Project site. According to the IS/MND, a reconnaissance-level wildlife survey was conducted on 12 September 2008 and a reconnaissance level plant survey was done on 21 September 2008. IS/MND, App. B, p. 1; Smallwood Comments, p. 2. A follow-up survey occurred on February 9, 2009. IS/MND, App. B, p. 1. A reconnaissance-level site survey and a focused survey for adult Bay checkerspot butterflies (*Euphydryas editha bayensis*) was conducted on 31 March 2015. IS/MND, App. B, p. 2. "No details were reported about these surveys, such as when they began, how long they lasted, and what methods were used." Smallwood Comments, p. 2. Hence, whether the biotic assessment is substantial evidence is not apparent from the face of the document or the IS/MND.

The surveys conducted for the Project do not provide substantial evidence of the presence or absence of species of concern that are known to be present in the vicinity. For example, the Biotic Assessment states that "No evidence of burrowing owls was observed on the site during reconnaissance-level surveys conducted for the project..." Biotic Assessment, p. 14. Based on this assertion, the Assessment goes on to conclude that "[t]here is a low probability of occurrence of the burrowing owl, a California species of special concern, on the site due to the paucity of California ground squirrel burrows, and if this owl occurs on the site, it would not do so within the developed portion of the site where direct impacts will occur." Id. Dr. Smallwood notes that the lack of evidence of burrowing owls was not necessarily because they weren't there, but because the surveys were not conducted during the breeding season when the owls may be present and did not adhere to

the survey protocols for burrowing owls prepared by the Department of Fish & Wildlife. As Dr. Smallwood writes:

none of these surveys occurred during the burrowing owl breeding season, and none were consistent with the surveys recommended in the available survey guidelines of the time (CDFW 1995) or since (CDFW 2012). Therefore, H.T. Harvey & Associates' (2015:14) statement, "No evidence of burrowing owls was observed on the site during reconnaissance-level surveys conducted for the project..." was misleading because such a survey cannot provide the evidence needed to determine absence. The City of San Jose's (2018:47) determination was even more misleading by claiming that the site lacks burrows of California ground squirrel, a claim that is contrary to the reporting of H.T. Harvey & Associates (2015). Detection surveys are needed for burrowing owls on and near the project site, consistent with the recommendations of CDFW (2012). An EIR should be prepared along with a report of appropriate detection surveys.

Smallwood Comments, p. 2. Given the paucity of owls present in Santa Clara and the importance of that county to the breeding success of the species, the Project's baseline must be informed by protocol level surveys that can determine the presence or absence of burrowing owls at the site. *Id.* Only with an accurate baseline could the IS/MND purport to assess the impacts on that species of concern.

Response D17: As stated in Attachment A of this Response to Comments document, the burrowing owl is a covered species under the Santa Clara Valley Habitat Plan (VHP) and this project is covered under the VHP. For the burrowing owl, habitat surveys (i.e., mapping areas with burrows and all burrows that may be occupied, as indicated by tracks, feathers, egg shell fragments, pellets, prey remains, or excrement) are required only if the study area is located within modeled occupied nesting habitat (see Figure 5-11 of the VHP). Surveys are not required at sites that are mapped as potential burrowing owl nesting or overwintering habitat only. The Project site is not located within modeled occupied nesting habitat for the burrowing owl and therefore, mapping of burrows present on the site is not required under the VHP. In conformance with the VHP, the Project proponent would pay all required impact fees in accordance with the types and acreage of habitat or "land cover" impacted, and would implement conservation measures specified by the VHP. Furthermore, based on decades of experience performing surveys in the Project vicinity, we know that breeding burrowing owls have not been observed in the Project vicinity since the 1990s, and there is no expectation that burrowing owls currently breed on the Project site. Attachment A to this Response to Comments document provides additional information on species habitats.

Comment D18: The same baseline problem afflicts the IS/MND's discussion of bat species on the site. No attempt was made at identifying the baseline for these species. No surveys were performed that could detect bats. According to Dr. Smallwood, "[a]coustic monitoring could have been done, or thermal-imaging surveys." Smallwood Comments, p. 3. Given bats ability to roost in a variety of locations, Dr. Smallwood concludes that "[t]he potential for bat occurrences is likely higher than

reported” in the Assessment. Id. Without having looked for bats, the IS/MND cannot have disclosed their presence or the extent of any impact to that species.

Response D18: The potential presence of bat roosts on the project site is discussed on page 14 of the Biotic Assessment (Appendix B of the IS/MND), and is included in Section 4.4 Biological Resources of the IS/MND. In addition, for the purposes of the analysis of potential impacts of the project on bats, bats are assumed to occupy suitable habitat in the impact area, and mitigation measures to reduce impacts on bats to a less than significant level are provided based on the assumption that impacts could potentially occur. Therefore, because bats are assumed to be potentially present and impacts on bats are assumed to be potentially significant, additional focused surveys are not warranted for the purpose of analysis of significant impacts under CEQA. Implementation of Mitigation Measure MM BIO-3.1 through MM BIO-3.3 will reduce impacts to roosting bats to less than significant. Attachment A to this Response to Comments document provides additional information on species habitats.

Comment D19: The surveys conducted almost a decade ago are similarly flawed for white-tailed kite and dusky woodrats, two species of special concern. From his experience and expertise, DR. Smallwood notes that “White-tailed kites require substantial survey effort to locate nest sites (Erichsen et al. 1995), and these are unlikely to be found in February when the species is still roosting within groups of conspecifics.” Smallwood Comments, p. 3. The same is true for detecting woodrats: “Likewise, I know from experience that woodrats can be difficult to detect without the aid of live-trapping. H.T. Harvey & Associates (2015) reported no use of live-trapping for small mammals.” Id.

In addition to these inadequate surveying methods and unidentified baseline, the IS/MND and its biotic assessment understate the range of animal species that likely are present on the site. Reviewing various on-line databases, Dr. Smallwood identifies no less than 30 special status species one can expect use the site:

A white-tailed kite was seen on the edge of the neighborhood immediately east of the project site. A California tiger salamander was found only 1,200 meters east of the project site only 3 months ago. Thirty special-status species occur in the area (Table 1), two of them were seen on site, and multiple others have added potential to occur on site due to the occurrence of the keystone species, California ground squirrel (*Otospermophilus beecheyi*) (H.T. Harvey & Associates 2015:6).

Response D19: The IS/MND analyzed the impacts on white-tailed kites, loggerhead shrikes, California tiger salamander, California red-legged frog, and other species that occur or may occur on the project site. Implementation of Mitigation Measure MM BIO-2.1 would reduce impacts to white-tailed kites and loggerhead shrikes to less than significant. Salamander breeding and upland habitat is not present on or immediately adjacent to the project site. Attachment A to this Response to Comments document provides additional information on species habitats.

Comment D20: In regard to loggerhead shrikes and white-tailed kites, the biotic assessment acknowledges these species may be present. The Assessment then states that “the loss of one pair of each species [white-tailed kite and loggerhead shrike] would not be considered a significant impact under CEQA given the extremely low proportion of the regional population that would be represented by a single pair.” Biotic Assessment, p.13. Dr. Smallwood notes that “losing individuals of species such as white-tailed kite and loggerhead shrike is not akin to losing individuals of common, r-selected species such as California vole or deer mouse. Species such as white-tailed kite and loggerhead shrike are assigned special status due to the effects of cumulative impacts – due to the past and ongoing losses of breeding colonies and of many single pairs or individuals causing noticeable declines in the species.” Smallwood Comments, p. 3. Dr. Smallwood further notes that this conclusion is without any substantial evidence, the assessment including “no information on local populations of loggerhead shrike or white-tailed kite – no spatial boundaries, no population size estimates, nothing at all about populations or even local demography.” Id., p. 6. In addition, the IS/MND and Assessment do not address the Project’s impacts on foraging habitat for loggerhead shrikes and whitetailed kites, assuming only nesting sites matter to the species. As Dr. Smallwood points out, “[f]oraging habitat is just as critical to species as is nesting habitat, and really there is no distinction between foraging and nesting habitat when it comes to nesting success.” As a result, the conclusion that the Project will not significantly impact shrikes and kites relied upon by the IS/MND is not supported by substantial evidence and a fair argument exists that the Project may have significant impacts on the species of special concern.

Response D20: The proposed project would occur on only 3 acres of the 21-acre site. The approximately 18 acres of open space would not be disturbed and would continue to provide foraging habitat equal to the habitat currently present on the site. In addition, as discussed in Response D19, above, the IS/MND analyzed the impacts on white-tailed kites, loggerhead shrikes, California tiger salamander, California red-legged frog, and other species that occur or may occur on the project site. Implementation of Mitigation Measure MM BIO-2.1 would reduce impacts to white-tailed kites and loggerhead shrikes to a less than significant level and Mitigation Measure MM BIO-1.1 would ensure the construction of this project would not encroach into the adjacent 18 acres to be remain as open space. Attachment A to this Response to Comments document provides additional information on species habitats.

Comment D21: The IS/MND also fails to address the Project’s possible impacts on the nonbreeding habitat of California tiger salamander and California red-legged frog. As Dr. Smallwood explains:

The [IS/MND] draws a false distinction between breeding and non-breeding habitat of California tiger salamander and California red-legged frog, concluding no significant impacts due to lack of breeding habitat on the project site. Having performed extensive surveys for both of these species, I can attest to the importance of ground squirrel burrows as nonbreeding season refugia for these species. For example, in two years of surveys for California red-legged frogs in the Almaden, Los Gatos, and Calero watersheds just west-southwest of the project site, I found the species in only one location, and that happened to be the only location along many miles of surveyed streams where ground squirrels remained abundant in the surrounding uplands (US Fish and Wildlife Service unpublished data). Similarly, at a large study area to the north of the project site, I found California tiger salamander larvae and California redlegged frog adults in ponds surrounded by uplands

occupied by ground squirrels or pocket gophers (Smallwood and Morrison 2007). Orloff (2011) reported California tiger salamanders dispersing to upland refugia up to 2.2 km from breeding ponds, or well beyond the 1,200 m distance between the project site and the recently observed California tiger salamander posted on iNaturalist. The grasslands of the project site could very well be important refuge and crossover habitat used by California tiger salamander and California red-legged frog.

Smallwood Comments, pp. 6-7. Given the close proximity of these species to the Project site, the IS/MND fails as a matter of law to analyze the impacts to these species' non-breeding habitat.

Response D21: As discussed in Response D19, above, the IS/MND analyzed the impacts on white-tailed kites, loggerhead shrikes, California tiger salamander, California red-legged frog, and other species that occur or may occur on the project site. Salamander and frog breeding and upland habitat are not present on or immediately adjacent to the project site. In addition, Mitigation Measure MM BIO-1.1 would further ensure an appropriate monitoring and maintenance plan for prior to and during construction of the project. Therefore, mitigation is not required for California tiger salamander or California red-legged frog. Attachment A to this Response to Comments document provides additional information on species habitats.

Comment D22: b. The IS/MND fails to address the Project's potential significant impacts on wildlife movement. The IS/MND and biotic assessment fail to address impacts on wildlife movement, instead looking for impacts to a "designated migratory wildlife corridor." As Dr.Smallwood states, the CEQA significance threshold is whether a project will "[i]nterfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors..." See Smallwood Comments, p. 7. Impacts to wildlife movement may occur with or without the presence of a migratory wildlife corridor, never mind a designated migratory wildlife corridor, whatever that phrase may signify. Id.

Dr. Smallwood notes that "[w]ildlife movement in the region is often diffuse rather than channeled (Runge et al. 2014, Taylor et al. 2011), and includes stop-over habitat used by birds and bats (Taylor et al. 2011), staging habitat (Warnock 2010), and crossover habitat used by nonvolant wildlife during dispersal, migration or home range patrol." The IS/MND and biotic assessment cite no source for the "designation" of a wildlife corridor. No analysis of any impacts to wildlife movement, including birds' stopover habitat, is included in the IS/MND and its appendix.

Response D22: As discussed in the IS/MND, the 3 acres of the project site footprint is developed with single-family residences and structures, and is already disturbed. As discussed in the Biotic Assessment prepared for the project (Appendix B of the IS/MND) and analyzed in the IS/MND, the project site is not located in an area that is particularly important for wildlife movement. Attachment A to this Response to Comments document provides additional information on species habitats.

Comment D23: c. The Project may have significant effects on wildlife resulting from collisions with vehicles associated with the Project. Dr. Smallwood identifies the serious impacts that increased traffic has on wildlife. Smallwood Comment, pp. 7-8. Indeed, as he points out, the Project is proposed to be located in the midst of a major hotspot of wildlife mortality. Id., p. 8. The additional 759 vehicle trips expected from the Project will result in collisions with wildlife. Id. Wildlife that will be run over by the Project's additional traffic may include special-status species of wildlife such as Alameda whipsnake (*Masticophis lateralis euryxanthus*), California red-legged frog (*Rana draytonii*), California tiger salamander (*Ambystoma californiense*), and American badgers (*Taxidea taxus*). Although these species do not appear on the Project site, they do cross roads over which traffic from the Project will travel. As Dr. Smallwood explains:

Vehicle collisions have accounted for the deaths of many thousands of reptile, amphibian, mammal, bird, and arthropod fauna, and the impacts have often been found to be significant at the population level (Forman et al. 2003). Increased use of existing roads will increase wildlife fatalities (see Figure 7 in Kobylarz 2001). It is possible that project-related traffic impacts will far exceed the impacts of land conversion to residential use. But not one word of traffic-related impacts appears in the IS/MND – a gross shortfall of the CEQA review.

Smallwood Comment, p. 7. The IS/MND fails to recognize at all this potential significant impact of the project. Because a fair argument exists that the Project may have a significant impact on wildlife in the vicinity, an EIR must be prepared to assess this impact and identify appropriate mitigation.

Response D23: As mentioned in Attachment A prepared by a qualified biologist, the vast majority of such species are expected to be common, urban-adapted species, and any increase in traffic associated with the proposed project is not expected to result in a substantial impact on the regional populations of these common wildlife species. Attachment A to this Response to Comments document provides additional information on species habitats.

Comment D24: d. The IS/MND fails to address the Project's potential cumulative impacts on habitat fragmentation. The IS/MND does not assess the likelihood of cumulative impacts to wildlife, especially from habitat fragmentation in the vicinity. Smallwood Comment, p. 8. Because a fair argument exists that developing currently undeveloped and vegetated sites on the southern edge of San Jose will further fragment wildlife habitat in this area, there is a fair argument that the project may contribute to habitat fragmentation.

Response D24: As discussed in the IS/MND, the Project site is located at the very edge of open space along Coyote Ridge, is surrounded on three sides by rural suburban development and is not located within a designated migratory wildlife corridor. The analysis (Section 4.4 in the IS/MND) found that any wildlife movement would not be substantially inhibited by the project because the development footprint is within a three-acre area of the site along Dove Hill Road and is already developed. There are no large areas of habitat to the north, west, or south of the Project site that would be cut off from Coyote Ridge due to development of the project. Thus, the project would not result in any increase in habitat fragmentation and would not contribute to a cumulative impact on habitat

fragmentation. Attachment A to this Response to Comments document provides additional information on species habitats.

Comment D25: e. The pre-construction surveys identified in the IS/MND are not sufficient to address potential impacts to bats and birds that may be present at the site. Dr. Smallwood has reviewed the proposed wildlife impact mitigations identified in the IS/MND. Smallwood Comment, p. 8. Although he agrees with the need for preconstruction surveys for bats and birds at the site, he notes that preconstruction surveys will come too late either to disclose the Project's anticipated impacts or to fully mitigate impacts to birds and bats. Id. Dr. Smallwood states that detection surveys need to be performed to professional standards and that information used to disclose potential impacts and to inform the pre-construction surveys. As Dr. Smallwood explains, "Detection surveys are needed, because detection surveys provide the bases for impacts assessments and formulation of mitigation measures. They also inform preconstruction surveys, which are otherwise performed in a rushed manner just ahead of the tractor blade." Id. By failing to determine the actual baseline of bird's and bat's reliance on the site for roosting, nesting and foraging and instead waiting until the eve of construction to determine what roosts, nests, birds, and bats may suffer impacts from the Project, the IS/MND fails to evaluate and mitigate the Project's potential significant impacts to birds and bats.

Response D25: As discussed in the IS/MND, construction of the project could result in impacts to roosting bats and birds. However, the IS/MND provides mitigation measures that would be implemented to reduce the impacts to roosting bats and birds to less than significant. Mitigation Measure MM BIO-3.1 requires a survey of existing buildings, prior to any removal of trees, demolition, or building activities, by a qualified bat biologist to determine whether the site supports a maternity roost of any bat species. If the survey of existing buildings shows the presence of bat roosts, Mitigation Measure MM BIO-3.2 provides measures for properly removing/relocating the bats or implementing construction activity avoidance in the area. Mitigation Measure MM BIO-2.1 provides similar measures, in accordance with California Fish and Wildlife requirements, to reduce impacts to migratory birds and raptors to a less than significant level. The project is also not located adjacent to a riparian corridor nor is it within an area subject to Council Policy 6-34: Riparian Corridor Protection and Bird-Safe Design. Furthermore, as mentioned throughout Response D16 to D26, the project shall incorporate mitigation measures that require pre-construction surveys, on-site monitoring, and reporting that would reduce potential impacts to biological resources and to species that may not be covered in the HCP, but is required pursuant to the Migratory Bird Treaty Act. Therefore, additional mitigation measures as proposed in the letter from Dr. Smallwood technical attachment are not required and no additional detection surveys are required. Attachment A to this Response to Comments document provides additional information on species habitats.

Comment D26: CONCLUSION For the foregoing reasons, the IS/MND for the Project should be withdrawn, an EIR should be prepared, and the draft EIR should be circulated for public review and comment in accordance with CEQA.

Response D26: Based on all of the above responses, the IS/MND is the adequate CEQA document for analysis of the project. The project was reviewed by the City of San José Director of Planning to determine whether it could have a significant impact on the environment as a result of project completion. CEQA Guidelines §15382 defines a "Significant effect on the environment" as a substantial or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance. Based on the analysis and conclusions in the IS/MND, the Dove Hill Road Medical Care Facility project will not have a significant effect on the environment in that the IS/MND identifies one or more potentially significant effects on the environment for which the project applicant, before public release of this draft Mitigated Negative Declaration, has made or agrees to make project revisions that clearly mitigate the effects to a less than significant level, as defined in CEQA Guidelines §15369.5. Furthermore, as shown in the responses to the comments received on the draft IS/MND, the comments did not raise any new issues about the project's environmental impacts, or provide information indicating the project would result in new environmental impacts or impacts substantially greater in severity than disclosed in the IS/MND [CEQA Guidelines §15074(b)].

SECTION 4

TEXT CHANGES TO THE IS/MND

Page Number	Description of Change
Mitigated Negative Declaration Cover Page	Description: The project proposed to rezone three acres (“development footprint”) of the 21-acre site from Agriculture to A(PD) Planned Development for the demolition of all existing buildings, structures, trees and landscaping, and associated improvements, and to construct with a medical care facility with two buildings containing a total of 155 patient rooms and up to 248 beds, all within <u>only</u> the development footprint of the three acres. The remaining 18 acres would stay zoned Agriculture and would be maintained as undeveloped, permanent private open space.
Mitigated Negative Declaration Cover Page	Location: A three-acre portion of a larger <u>Approximately</u> 21-acre site will be rezoned to a Planned Development (PD) zoning. The three acres include all of Assessor’s Parcel Numbers (APNs) 679-08-003 and 679-09-001, as well as portions of APNs 679-08-002 and 679-09-002. The site is located at 4200 Dove Hill Road in south San José, adjacent to the east side of United States Highway 101 (US 101).
Page 2	2.5 PROJECT LOCATION A three-acre portion of a larger <u>Approximately</u> 21-acre site will be rezoned to a Planned Development (PD) zoning. <u>Only three acres will be developed while the rest of the 21-acre will be designated as open space.</u> The three acres include all of Assessor’s Parcel Numbers (APNs) 679-08-003 and 679-09-001, as well as portions of APNs 679-08-002 and 679-09-002. The site is located at 4200 Dove Hill Road in south San José, adjacent to the east side of United States Highway 101 (US 101), as shown in Figures 2.5-1, 2.5-2, and 2.5-3.

Note: The text changes clarify the project description, in that the entire 21-acre will be rezoned from A Agriculture to A(PD) Planned development, with only three acres to be developed and the remaining 18 acres to be designated as permanent open space. The change does not present new analysis or findings to the IS/MND. The IS/MND has consistently analyzed only three acres of the full 21 site to be developed with the remaining 18 acres to be kept as is in regards to no development would be allowed. The proposed change identified above would only clarify the rezoning boundary and would not result in any new significant environmental effects or substantial increase in the severity of previously identified significant effects, mitigation measures, or conditions. The new information is not significant and recirculation is not required per CEQA Guidelines Section 15073.5. In conformance with Section 15074 of the CEQA Guidelines, the MND, Initial Study, technical appendices and reports, together with this Response to Comments and attachments are intended to serve as documents that will inform the decision-makers and the public of the environmental effects of this project.

Page 2	<p>2.6 GENERAL PLAN DESIGNATION AND ZONING DISTRICT</p> <p>Proposed Zoning District: Planned Development (on approximately three acres of the 21-acre site, the rest will remain Agricultural)</p>
Page 8	<p>3.2 PROJECT DESCRIPTION</p> <p>The project proposed to rezone three acres of the 21-acre site from Agriculture to A(PD) Planned Development in order to develop a convalescent hospital <u>on an approximately three-acre portion of the 21-acre</u>. The remaining 18 acres would stay zoned Agriculture as open space. A conceptual site plan of the project is shown on Figure 3.2-1. Elevations of the proposed buildings are shown in Figures 3.2-2 and 3.2-3.</p>
Page 15	<p>3.4.5 Green Building Measures</p> <p>Consistent with the City’s Private Sector Green Building Policy, the proposed project would be designed to achieve, at minimum, LEED <u>Silver</u> Certified status by incorporating a variety of design features to reduce energy and water use. The features could include community design and planning, site design, landscape design, building envelope performance, and material selections.</p>
Page 53	<p>4.4.3.1 Impacts to Sensitive Habitats and Special-Status Species (Checklist Questions a - c), Special-Status Animals</p> <p>Mitigation Measure: In conformance with the MBTA, the project shall implement the following mitigation measure to reduce impacts related to abandonment of raptor and other protected migratory birds’ nests. <u>Construction disturbance that results in mortality of individual birds or causes nest abandonment or the incidental loss of fertile eggs or nestlings would constitute a violation of state and federal laws.</u></p>
Page 84 and 85	<p>Consistent with the City’s Private Sector Green Building Policy, the proposed project would be required to be LEED <u>Silver</u> Certified. This certification is achieved by incorporating a variety of design features to reduce energy and water use.</p>

SECTION 5 SUPPLEMENTAL REPORTS AND MEMORANDUMS

Please refer to Attachment A, B, and C for supplemental reports and memorandums referred to throughout the responses to comments in Section 3.

SECTION 6 PUBLIC COMMENTS ATTACHMENTS

Please see copy of the original comment in Attachment D.