



**City of  
Santa Clara**  
The Center of What's Possible

City Manager's Office

July 2, 2019

City of San Jose, City Manager's Office  
Attn: Kim Walesh, Director of Economic  
Development/Deputy City Manager  
200 East Santa Clara Street  
San Jose, CA 95113

Re: North San Jose Area Development Policy Update

Dear Ms. Walesh:

Thank you for your June 13, 2019 letter regarding the City of San Jose's (San Jose) proposed changes to the North San Jose Area Development Policy and Project (North San Jose). Your letter was in response to the City of Santa Clara's (Santa Clara) March 22, 2019 letter regarding questions and concerns that the Santa Clara has regarding the project. Santa Clara appreciates the direct outreach and coordination with San Jose regarding this project, however, serious concerns remain regarding the proposed changes to the North San Jose project and how these changes affect San Jose's compliance with the 2006 North San Jose Settlement Agreement.

- 1. CEQA Analysis:** With the June 13, 2019 letter, San Jose has indicated that an addendum will be prepared to address the proposed changes to North San Jose. Santa Clara seeks to understand how an addendum is the appropriate environmental clearance mechanism for these changes. For example, included with the June 13, 2019 letter is a 2019 North San Jose Transportation Improvement Phasing Study and within the executive summary on page i is the following statement, "New traffic data, along with new funding opportunities that have occurred since the adoption of the NSJADP, such as the VTA Measure B Program (2017), provide a change of environmental setting that justifies a re-phasing of the transportation improvements." Within the Phasing Study are the proposed shifting of intersection improvements and two major transportation projects. The Phasing Study appears to indicate that environmental (i.e. traffic) conditions have changed in such a manner as to warrant the shifting of major transportation improvements within the phases of the North San Jose project. Santa Clara seeks to understand how the shifting of major transportation improvements can be supported by an addendum and why a Supplemental Environmental Impact Report isn't the more prudent way to analyze and disclose these changes to the public.



- 2. NSJ Phase Reductions:** While the letter characterizes the North San Jose changes as “narrow in scope”, “limited”, and “minor timing changes”, it is important to note the San Jose’s proposed reduction of project phases (from 4 phases to 2 phases) essentially defers the timing of transportation improvements as there is no built-in guarantee that any of the improvements will be completed sooner. Additionally, Santa Clara does not consider deferring transportation improvements as minor and note that one of the key provisions within the North San Jose policy is the requirement that 85% of the necessary traffic mitigation funding be secured prior to building permits being issued for a subsequent phase. By reducing the North San Jose phasing from 4 phases to 2 phases, this essentially eliminates this requirement twice, yet it is unclear why this critical transportation protection feature within the original North San Jose project is no longer important or necessary.
- 3. 2006 North San Jose Settlement Agreement:** While Santa Clara and San Jose staff have met three times (October 15, 2018, May 10, 2019, and May 28, 2019), it was not until the May 2019 meetings and the June 13, 2019 letter that Santa Clara was formally made aware that San Jose was intending to move the North San Jose project changes to formal approval by the San Jose City Council prior to addressing Santa Clara’s concerns regarding compliance with the 2006 North San Jose Settlement Agreement (2006 NSJ Settlement Agreement). To that end, Santa Clara formally requests that San Jose defer City Council hearings on the North San Jose proposed changes until discussions regarding compliance with the 2006 NSJ Settlement Agreement have concluded. In anticipation that San Jose may elect to seek San Jose City Council’s approval prior to addressing Santa Clara’s compliance concerns regarding the 2006 NSJ Settlement Agreement, please see the attached June 28, 2019 correspondence from Santa Clara’s outside legal counsel, Thomas Law Group, regarding a “Demand for Mediation of Anticipatory Breach of Settlement Agreement related to the North San Jose Development Policies.” Due to the impending nature of San Jose’s proposed changes to the North San Jose project, Santa Clara believes is necessary and warranted that mediation take place prior to San Jose’s adoption of changes to the North San Jose project. It is assumed that San Jose’s proposal to reduce the number of North San Jose phases was conceived in early 2018, which would have provided ample time to discuss these changes with Santa Clara. For all these reasons, Santa Clara reasonably requests that San Jose defer City Council hearings on the North San Jose project until these issues can be resolved.

Please note that consistent with the 2018 Settlement Agreement between Santa Clara, Related Santa Clara, LLC and San Jose, Santa Clara looks to support San Jose’s goal of producing additional needed housing to address critical housing issues within the Santa Clara Valley provided that any modifications to North San Jose “include revision of the timing, nature, and scope of related traffic improvements where necessary to serve the acceleration of housing...” To that end, Santa Clara remains unclear regarding how San Jose’s proposed changes support this provision within the 2018 Settlement Agreement.

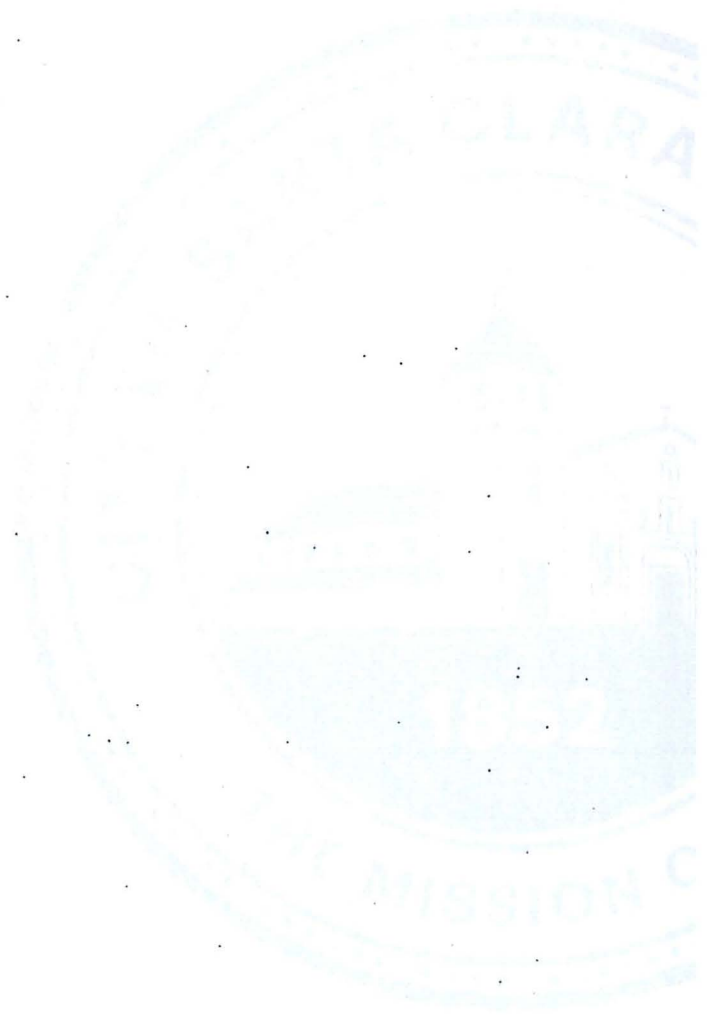
Kim Welsh, Director of Economic Development/Deputy City Manager  
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Santa Clara looks forward to further discussion of these issues and are ready to support San Jose's important goal of increased housing production provided that our concerns regarding traffic improvements are addressed.

Best regards,



Manuel Pineda  
Assistant City Manager  
City of Santa Clara





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NICHOLAS S. AVDIS  
Of Counsel

*Sent via Electronic Mail*

June 28, 2019

Richard Doyle, City Attorney  
City of San Jose  
Office of the City Attorney  
200 E. Santa Clara St., 16th Floor  
San Jose, CA 95113

Re: *Demand for Mediation of Anticipatory Breach of Settlement Agreement  
related to the North San Jose Development Policies*

Dear Mr. Doyle:

By this letter, the City of Santa Clara demands mediation for anticipatory breach of the Settlement Agreement and General Release entered into on November 16, 2006 by the City of Santa Clara, the County of Santa Clara, and the City of San Jose to settle litigation relating to San Jose's 2005 approval of the North San Jose Development Policies (2006 Settlement Agreement). San Jose proposes changes to the 2005 North San Jose Development Policies that are inconsistent with the terms of the 2006 Settlement Agreement. By adopting those changes without first attempting to negotiate an amendment of the agreement, San Jose will be in breach of the 2006 Settlement Agreement when it adopts the update this summer.

The 2006 Settlement Agreement addresses the March 28, 2006 Judgment and Peremptory Writ of Mandate issued by the Santa Clara County Superior Court, which overturned San Jose's certification of the environmental impact report (EIR) prepared for the North San Jose Development Policies. The Judgment concluded, in part, that San Jose's determination there were no feasible mitigation measures to address significant traffic impacts related to implementation of the North San Jose Development Policies was not supported by substantial evidence. In order to settle the litigation and address the deficiencies identified by the Superior Court, the 2006 Settlement Agreement requires that San Jose fund and implement certain specified transportation improvements to

coincide with four phases of development under the Policies, with each improvement timed to ensure that it would be in place prior to commencement of the next phase of development. (See 2006 Settlement Agreement, Paragraphs 1.2 – 1.6.)

San Jose now proposes to revise the North San Jose Development Policies to change the structure of the development phases. The proposed changes center around two major components: 1) collapsing the four phases of development in North San Jose project into two phases and 2) shifting the timing of North San Jose traffic mitigation projects. Staff from the two cities have met over the past several months and Santa Clara sent letters on March 22, 2019 and May 13, 2019 seeking to understand how San Jose intends to comply with the terms of the 2006 Settlement Agreement in light of these proposed changes to the Development Policies.

On June 13, 2019, San Jose responded with a letter that characterizes the changes in phasing and funding of transportation improvements as narrow and limited. Santa Clara disagrees with this characterization. The amendments proposed to the 2006 Settlement Agreement will not ensure that required transportation improvements are in place when needed to serve accelerated development. Under the terms of a 2018 Settlement Agreement related to litigation brought by San Jose to challenge Santa Clara's approval of the City Place project, the cities agreed that, consistent with the policies of both Santa Clara and San Jose to encourage the development of housing in each respective jurisdiction, in the event that San Jose elected to alter the phasing structure of the North San Jose Development Policies to allow more housing units to be constructed earlier than envisioned in 2005, Santa Clara would make good faith efforts to support any modifications that accelerate the construction of housing. However, Santa Clara's obligation to support the modification only applies so long as such modifications include revision of the timing, nature and scope of related traffic improvements where necessary to serve the acceleration of housing under the North San Jose Development Policies. (2018 City Place Agreement, Paragraph 3.a.) Based on Santa Clara's current understanding, the proposed timing and changes in funding structure under the proposed policy update will not ensure that traffic improvements are in place when required to serve the acceleration of housing production.

Because it appears that San Jose will be in breach of the 2006 Settlement Agreement when it approves the proposed update to the North San Jose Development Policies, and the transportation improvements required under that agreement to serve housing will no longer be guaranteed to be in place, Santa Clara intends to seek enforcement of the terms of the 2006 Settlement Agreement. Paragraph 11 of the 2006 Settlement Agreement requires that any action to enforce its terms or to seek damages for breach of the agreement must be brought before a mediator at a mutually convenient location, and if such mediation is unsuccessful, then before a mutually agreeable impartial arbitrator. As

stated above, by this letter, hereby Santa Clara demands mediation under the terms of the 2006 Settlement Agreement. Santa Clara proposes Hon. Leslie C. Nichols for the mediation of this matter; however, San Jose may propose its own mediators as well.

We look forward to your response.

Sincerely,



Tina A. Thomas

cc: Brian Doyle, Santa Clara City Attorney  
Deanna Santana, Santa Clara City Manager



*Office of the City Attorney*  
RICHARD DOYLE, CITY ATTORNEY

VERA M. I. TODOROV  
Sr. Deputy City Attorney  
Direct Line: (408) 535-1956

July 22, 2019

Manuel Pineda  
Assistant City Manager  
CITY OF SANTA CLARA  
15000 Warburton Avenue  
Santa Clara, CA 95050

*Transmitted by email attachment  
to MPineda@SantaClaraCA.gov*

Tina A. Thomas  
Attorney at Law  
THOMAS LAW GROUP  
455 Capitol Mall, Ste. 801  
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*Transmitted by email attachment  
to tthomas@thomaslaw.com*

Re: Potential North San José Area Development Policy Amendments

Dear Mr. Pineda and Ms. Thomas:

This is written in response to your July 2, 2019 letters and is addressed to you both because Ms. Thomas's letter was attached to and delivered electronically with Mr. Pineda's communication. The primary purpose of your communication is to allege an "anticipatory breach" by the City of San José (San José) of the 2006 Settlement Agreement among the City of San José, the City of Santa Clara (Santa Clara), and the County of Santa Clara relating to the North San José Area Development Policy (NSJADP) and to demand mediation of the alleged anticipatory breach. Mediation is not necessary for the following reasons.

Contrary to your belief that a breach of the 2006 settlement agreement is somehow imminent, San José has proposed specific changes to the settlement agreement that are clearly articulated in the June 13, 2019 letter from Kim Walesh to Mr. Pineda (pp. 3-4) in its effort to negotiate with Santa Clara. San José has no intent to breach the 2006 agreement, which is precisely why San José staff is discussing potential amendments with Santa Clara staff and is keeping options for amendments to the 2006 settlement agreement and the NSJADP open and subject to reasonable change.

San José representatives who attended the May 28, 2019 meeting informed me that they discussed options with Santa Clara staff, among which was an option to agree to make the proposed NSJADP amendments first in time upon Santa Clara's agreement to revise the settlement agreement. There was no response to this option by Santa Clara staff during the meeting and no response was provided until your July 2 missives. This option was not

mentioned in San José's June 13 letter. Rather than sending a substantive response to the specific changes to the settlement agreement proposed by San José on June 13, however, Santa Clara incorrectly alleges an anticipatory breach based upon an abandoned timing proposal for changes to the NSJADP and related settlement agreement.

This approach to relations between our cities is, in our view, not productive. All Santa Clara and its counsel needed to do was to ask San José to explain its intent. San José would have confirmed, as it is doing now, that it will discuss any necessary or desired changes to the 2006 settlement agreement with Santa Clara when such changes are required by proposed changes to the NSJADP. San José's actions have always been directed toward this purpose. Indeed, San José staff have been meeting with Santa Clara staff by telephone and in person to attempt to determine the issues of most concern to Santa Clara so that they can be reasonably addressed. San José has responded in great detail to questions raised by Santa Clara. Among other discussions, the 10-page June 13, 2019 letter, with its 134 pages of attachments (including AB1600 impact fee report, lengthy current transportation impact analyses, funding plan, and transportation project status) provides a plethora of information responding to Santa Clara's questions. San José has approached Santa Clara in good faith to attempt to negotiate changes to the settlement agreement and respectfully requests the same courtesy in return.

With its June 13 letter, San José in good faith provided Santa Clara with the draft 2019 "North San Jose Transportation Improvement Study" (Attachment B) regardless that draft documents are usually not shared by public agencies. Despite providing such detailed information in response to Santa Clara's requests, Mr. Pineda's July 2 response to San José focuses singularly on general, colloquial language from one sentence in the draft Executive Summary in the draft 2019 "North San José Transportation Improvement Phasing Study." Mr. Pineda's July 2 letter does not provide any comments relating to the detailed transportation information provided to Santa Clara by San José in the draft study and the letter.

The 2019 updated current transportation impact analysis indicates that there is no new significant impact upon transportation using the same significance criteria and method of analysis that was used in the 2005 EIR for the NSJADP. While previously employed by San José, both Mr. Pineda and Santa Clara's Director of Community Development, Andrew Crabtree, were instrumental in the preparation of that EIR, including but not limited to providing direction to and reviewing the work product of environmental consultants. Both were apparently satisfied with the methodology and evaluation of transportation impacts in the EIR were appropriate and met their rigorous professional standards. Moreover, the major NSJADP transportation improvements were allocated to phases of development by predicting when and where development would likely occur during the lengthy Policy term. Since the adoption of the NSJADP, development happened in locations that were not predicted to occur first. So, in addition to the goal of advancing 8,000 needed housing units, San José proposes to retain all the same improvements, but change the timing of specified improvements to reflect where development has occurred as explained in the June 13 letter and attachments.

Our agencies both have an obligation to advance housing, which is the principal intent of the proposed amendment to the NSJADP. Santa Clara is obligated by Section 3.a of the January 12, 2018 settlement agreement among Santa Clara, Related Santa Clara LLC, and San Jose to make good faith efforts to support any modifications to the NSJADP that accelerate the construction of housing units even when earlier than envisioned in the four phases of the



NSJADP. Section 3.a also states that such modification to the timing of housing will include revision of the timing, nature and scope of related traffic improvements where necessary to serve the acceleration of housing under the NSJADP. It is for that very reason that San Jose in good faith is attempting to work towards potential revisions the NSJADP and the 2006 settlement agreement with Santa Clara.

We acknowledge Santa Clara's concerns with timing of transportation improvements but believe its concerns have been addressed by the transportation information previously provided to Santa Clara. Moreover, the June 13 letter to Mr. Pineda shows that non-residential development has not kept pace with residential development in North San José, so the conditions by which Phase 1 would conclude are not likely to occur in the near term making current phasing in North San Jose less desirable and less effective. For that reason, the end of Phase 1 obligation in the 2006 settlement agreement will also not likely occur soon, though current status and funding of Phase 1 improvements is explained in San José's June 13 letter to Santa Clara.

San José desires to continue discussion with Santa Clara about changes to the 2006 settlement agreement relevant to the currently proposed changes to the NSJADP, and to consider responses and counter-proposals for change from Santa Clara. Of course, the current proposal is only one potential option for regulating and enabling future development in North San José. We propose that staff from each agency timely commence regular meetings to attempt to resolve this matter. I am happy to discuss arranging a meeting to move towards a resolution of these issues.

Very truly yours,

RICHARD DOYLE  
City Attorney



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VERA M. I. TODOROV  
Senior Deputy City Attorney

cc: Dave Sykes  
Kim Welsh  
Chris Burton  
Rosalynn Hughey  
John Ristow  
Jacky Morales-Ferrand



August 6, 2019

Vera M. I. Todorov  
Senior Deputy City Attorney  
City of San Jose  
200 E. Santa Clara St, 16th Floor  
San Jose, CA 95113

RE: Potential North San Jose Area Development Policy Amendments

Dear Ms. Todorov:

Thank you for your letter responding to our comments. We appreciate the meetings and discussion we have completed as part of North San Jose's proposed changes. The City's concerns have been clearly delineated in my previous letter (and other communication) and have already been provided to San Jose. We will not repeat our concerns regarding the appropriate levels of CEQA analysis, the NSJ Phase Reduction, and the 2006 North San Jose Settlement Agreement, as they have not been responded to appropriately.

As you were not present at the May 28<sup>th</sup> meeting I would like to highlight some of the key points discussed at the meeting that are not reflected in your letter:

- Santa Clara staff once again noted that an Addendum is probably not the right approach for such a significant change to the policy and circumvents appropriate public review. As you stated in your letter, Andrew Crabtree and I were both instrumental in the development of the original NSJADP and are intimately familiar with the level of analysis, outreach, and public review associated with the Policy. Based on that experience, both Andrew Crabtree and I reiterated the concerns with the Addendum approach at the May 28 meeting.
- Santa Clara communicated that we will provide specific comments on the traffic analysis at the appropriate time.
- The policy change is significant and collapses four phases into two phases. As stated to San Jose staff on May 28<sup>th</sup> this is a significant change as the main purpose of having four phases with phased housing and office development was to ensure that transportation improvements and traffic internalization occurred in parallel with the new development.
- Santa Clara staff commented, and San Jose staff acknowledged that San Jose has not built the required transportation improvements per the current level of development that has already occurred in North San Jose.
- The proposed change to reduce the phasing from 4 to 2 phases, effectively defers half of the transportation phasing funding requirements for development. Santa Clara staff commented that under the proposed change approximately 16 million square feet of office and 16,000 housing units could



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be built without any transportation improvements. San Jose staff acknowledged this was possible and that there are no assurances that this level of development could not happen without transportation improvements.

- Santa Clara staff requested consideration of other policy options that align development with the construction of transportation improvements. San Jose staff stated they were not considering these types of options and they would be moving forward to Council with the current proposal in late August 2019. This timeline is not sufficient to begin and conclude any negotiations regarding the 2006 North San Jose Settlement Agreement.

As stated in Santa Clara's July 2, 2019 letter, any 2006 North San Jose Settlement Agreement issues must be resolved in full prior to San Jose's approval of the changes to North San Jose. Consequently, Santa Clara believes that a breach of the 2006 North San Jose Settlement Agreement is imminent. However, in your letter, you refer to "abandoned timing proposal for changes to the NSJADP". Please explain this reference and provide the current timing for proposed changes as that information has not been communicated to Santa Clara.

If any of the above is a misunderstanding, we would like San Jose to take the opportunity to clarify this in writing. As stated in your letter both Cities have an obligation to advance housing and to make good faith efforts to support revisions to the NSJADP. The City of Santa Clara has and will continue to make good faith efforts. Your letter states that "the current proposal is only one potential option for regulating and enabling future development in North San Jose". Let me reiterate that this was not what was communicated to Santa Clara on May 28<sup>th</sup>. San Jose staff made it clear that any changes to the proposal that assured the construction of transportation improvements would not be considered. San Jose staff also communicated that the intent was to move forward to Council with the proposal as-is.

Santa Clara will continue to make good faith efforts to help facilitate housing in the region. As responsible partners we also want to make sure these efforts allow for the appropriate level of analysis and public review and assures the construction of required transportation improvements. We are hopeful that per your letter that the current proposal is only one option, and we look forward to hearing what good faith modifications and additional options you will propose to address our concerns.

Best regards,



Manuel Pineda  
Assistant City Manager

cc: Deanna Santana, City Manager  
Brian Doyle, city Attorney  
Andrew Crabtree, Director of Community Development  
Craig Mobeck, Director of Public Works