



City Council Hearing

Item #6 RTC 22-769

Freedom Circle Focus Area / Greystar General Plan Amendment

June 7, 2022

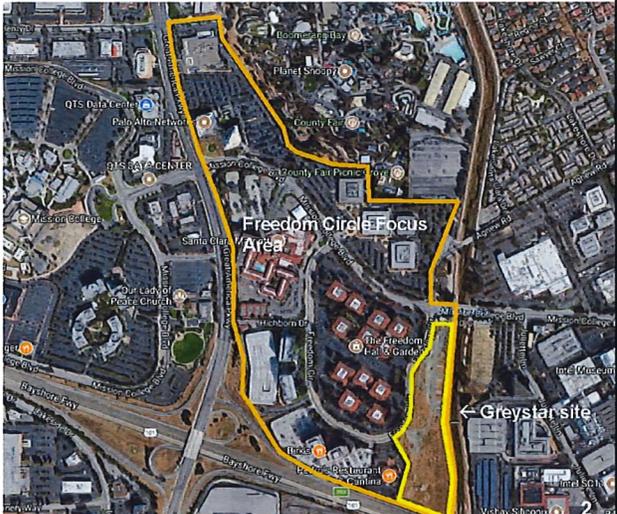
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Freedom Circle / Greystar

Proposed Actions

- Certify Final EIR
- Add Very High-Intensity Office/R&D Designation to General Plan
- Create the Freedom Circle Future Focus Area within the General Plan
- Greystar General Plan Amendment from High Intensity Office/R&D to Very High Density Residential
- Greystar Planned Development Rezoning / Vesting Tentative Map



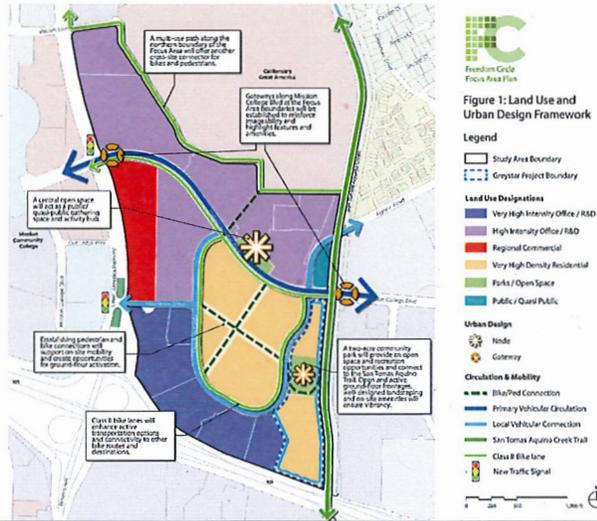
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Freedom Circle / Greystar

Future Focus Area

- General Plan policy
- Designates area for future residential & commercial growth
- Establishes goals & policies
- Provides additional development capacity:
 - 3,600 housing units
 - 2 million sq. ft. office



Freedom Circle / Greystar

Future Focus Area – General Plan Text Amendments

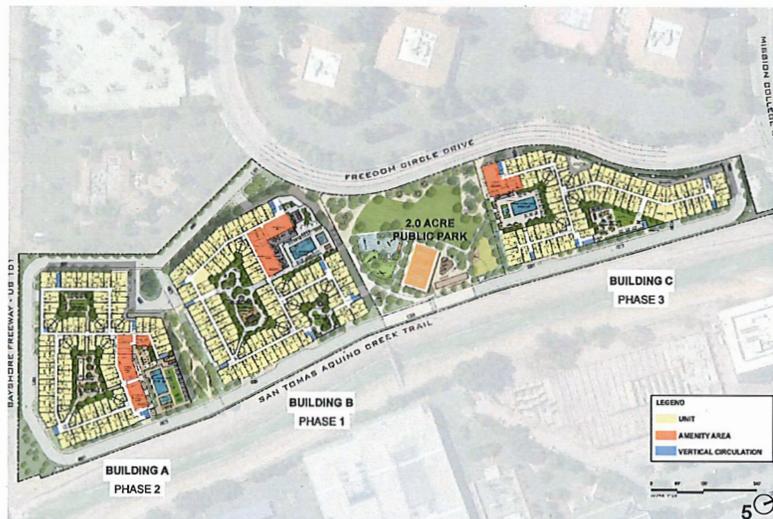
- 5.4.7 Future Focus Areas Goals and Policies
 - Ability to add Future Focus Areas in addition to those established in 2010
 - Ability to process General Plan Amendments and Rezonings concurrently with establishment of a new Future Focus Area
- New land use designation for Very High Intensity Office (3.0 FAR)



Freedom Circle / Greystar

Greystar Project

- 13.3 Acre Site
- GP Amendment and Planned Development
- High Intensity Office (Max FAR 2.0) to Very High Density Residential (51-100 DU/AC)
- 1,075 Housing Units
- Three 7-story buildings
- 2 Acre Public Park



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Freedom Circle / Greystar

Planning Commission Hearing

- Public testimony by labor union representatives
- Recommendation for approval as proposed by staff with one modification:
 - Change the proposed bike lanes in the Future Focus Area from Class II on-street bike lanes to Class IV separated bikeways

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Freedom Circle / Greystar

Recommendation

1. Approving and certify the Final EIR including CEQA Findings and a statement of overriding consideration;
2. Approve General Plan amendments regarding the creation of additional Future Focus Areas, re-designation of land outside of Focus Areas, creation of the new Very High-Intensity Office/R&D designation, and to create the Freedom Circle Future Focus Area, including modifications of the plan area diagram to change all Class II bike lanes to Class IV separated bikeways;
3. Approve the Greystar General Plan Amendment from High Intensity Office/R&D (max FAR of 2.0) to Very High Density Residential (51-100 du/ac);
4. Approve the Planned Development Rezoning and Vesting Tentative Parcel Map for up to 1,100 units on the 13.3 gross acre Greystar site

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Mr. John Davidson
Principal Planner
City of Santa Clara
1500 Warburton Avenue
Santa Clara, CA 95050
j davidson@santaclaraca.gov

Re: Freedom Circle/Greystar Project Response to Comments from Adams Broadwell Joseph & Cardozo Letter dated May 24, 2022

Dear Mr. Davidson:

This letter provides responses to three comments submitted May 24 by Aidan Marshall, Esq. of Adams Broadwell Joseph & Cardozo regarding biological resources on the Greystar project site. The comments are included verbatim, below, and each is followed by our response.

II. The EIR Fails To Adequately Analyze and Mitigate All Potentially Significant Impacts to Biological Resources

Comment 1: In our previous comments, we explained that the EIR's description of the Greystar site's biological baseline is not supported by substantial evidence. These flaws have not been corrected in the City's Updated Biological Setting. As a result, the EIR's conclusions regarding significant impacts are unsupported. First, we commented that the EIR fails to substantiate any details of its original site visit, so it is unknown who performed the survey, methods used, the time of day when the survey began, how long the survey lasted, which portion of the Project site was covered, and weather conditions during the survey. As a result, the EIR lacks substantial evidence that the baseline is as described. As explained by Dr. Smallwood, the City's Updated Biological Setting "repeats the deficiencies in the DEIR by not detailing who performed the site visit, which date the survey was performed, what were the weather conditions, what time of day the survey began, how long the survey lasted, and which methods were used."¹¹ Without any of these details about the survey, the Updated Biological Setting's characterization of the environmental setting is unsupported by substantial evidence.

¹¹ Smallwood Comments (May 24, 2022), pg. 2.

Response 1: The survey completed on December 12, 2020 was completed by Senior Biologist Melinda Mohammed, M.S., who spent 2.5 morning hours surveying the Greystar site, and 2.5 morning-midday hours surveying the Focus Area Plan area. The Greystar site had been mowed, and vegetation was predominantly dried grasses in winter. Ms. Mohammed did not observe burrows during the survey; these would have been evident under the mowed conditions due to mounded dirt or ground squirrel activity during the day. The weather was cloudy, dry, and about 60 degrees. Ms. Mohammed summarized her observations on that day

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in Chapter 6 of the DEIR, including that the site vegetation was either lacking or had died back and that she did not observe any animal burrows.

Since it had been more than a year, and the initial survey was conducted in winter, an additional survey was conducted in April 2022, and reported in an update memo. That survey was conducted by Senior Biologists David Gallagher, M.S. and Taylor Peterson over 3 hours on the morning of April 25, under clear skies, slight breeze (3-5 mph) and mid-70 degree temperatures. It included wandering transects throughout the site to identify vegetation present, search for ground squirrel colonies, and interview the property caretaker. The adjacent channel was also walked along the entire length of the project site. The survey report provided more information about the historic uses of the site, and reported current site conditions related to biological resources. No new information about biological resources was found that would change the conclusions in the EIR. Ms. Peterson conducted an additional 2 hour site visit on May 10, 2022, to specifically observe ground squirrel activity on the Greystar site after the site had been mowed, and to again walk the adjacent levee to check for ground squirrel burrows. The weather was clear and warm.

In addition, Dr. Smallwood reported the results of research and a survey he conducted around the perimeter of the site in December 2021. More surveys would probably expand the list of common wildlife species that use the site, but would not change the conclusions made in response to the CEQA checklist questions. The three surveys of the site, in three subsequent years, provide the public with substantial information about the biological resources present.

Comment 2: Second, the EIR, in its significance findings, concludes that “[g]roundtruthing of the biological resources on the Greystar property site on the December 12, 2020 site visit provided no evidence that further biological surveys would be required to be in compliance with this EIR’s mitigation measures, as the site contained no vegetation, no aquatic resources, is regularly disked, and did not contain any small mammal burrows.”¹² But Dr. Smallwood conducted a site visit on December 18, 2021, and found at least several burrow systems of California ground squirrels on the project site.¹³ This finding is important because it demonstrates that the site contains potential habitat for burrowing owls, and foraging grounds for carnivores.¹⁴ Dr. Smallwood’s findings were confirmed by the City’s own April 2022 site visit.¹⁵ But the City fails to revise its conclusion that no further biological surveys are required.¹⁶ The EIR must be revised to include protocol surveys for special-status species with potential to occur on the Project site.

¹² *Id.* at 2-17. Emphasis added.

¹³ Smallwood Comments (December 20, 2021), pg. 14.

¹⁴ Smallwood Comments (December 20, 2021), pg. 36.

¹⁵ Updated Biological Setting, pg. 5.

¹⁶ MIG, Freedom Circle Focus Area Plan and Greystar General Plan Amendment: Post-Planning Commission EIR Memo for Air Quality Comments, pg. 18.

Response 2: This was stated for the Greystar project in one section of the EIR, however, it is misleading when taken out of context. The EIR also requires future survey of all sites,

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including the Greystar site, for nesting birds (including Western burrowing owl) in compliance with mitigation measure 6-4, and ordinance trees in compliance with measure 6-5. This is included in the DEIR under cumulative impacts with the following statement on pages 20-3 to 20-4:

(b) Greystar Project. As discussed in EIR Chapter 6 (Biological Resources), there is a low potential for birds on the project site due to low-quality foraging habitat and/or lack of suitable roosting and/or nesting habitat. However, because many common bird and bat species may utilize gravel substrates and landscaped vegetation for nesting, foraging, and roosting, the Greystar project would implement EIR Mitigation 6-4 by conducting a nesting bird and roosting bat survey prior to construction activities. The project would also comply with EIR Mitigation 6-5 related to potential removal of trees, plants, and shrubs along streets or public places (i.e., during utility trenching, sidewalk roadways). These mitigations would reduce project impacts on biological resources to a less-than-significant level, and the project would not make a cumulatively considerable contribution to any significant cumulative biological resource impact.

Western burrowing owls prefer open grassland with mounds or berms where they can easily stand and watch for predators. In April the site conditions were not attractive to Western burrowing owls due to few apparent burrows, tall weedy vegetation, and a predominantly flat site, although a berm next to US 101 and the levee adjacent to San Tomas Aquino Creek provide raised areas that could provide suitable burrow and sentinel habitat. Feral cats are fed on the site adjacent to Freedom Circle, despite efforts by the landowner to stop this use (M. Avila, pers. comm.), and these are a Western burrowing owl predator. For safety reasons it is likely that ground squirrel burrows are discouraged in the creek levee; in April a few ground squirrel burrows were observed in the levee at US 101, but the rest of the levee along the parcel had been mowed and no evidence of burrows was detected. During a subsequent visit in May, after the site had been mowed, it was easier to detect ground squirrel burrows. There is an active squirrel burrow system consisting of 5 or 6 openings on the creek levee at US 101. There are squirrel burrows on the berm at the south end of the project site, but they did not have the dirt spray that typically indicates they are in use.

Although burrows were not detected during the December 2020 survey, the DEIR acknowledges that site conditions can change over time, and species can appear into what was thought to be unoccupied habitat. The DEIR includes a mitigation measure to survey for nesting birds prior to site disturbance (measure 6-4 applies to the Focus Plan Area and the Greystar site). The survey will include observations of all ground squirrel burrows on or adjacent to the site for sign of Western burrowing owl use (whitewash, feathers, prey items), followed by dawn and dusk surveys completed by a qualified biologist according to CDFW protocol. No sign of Western burrowing owl use was observed at ground squirrel burrows in site surveys in April and May 2022, and potential use by Western burrowing owl is expected to be low.

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If Western burrowing owls are detected on the site, clearing and construction shall be postponed as set forth in measure 6-4 until the biologist has determined that the burrow is inactive. The biologist must also document the findings and conclusions in a report provided to the City for review and approval prior to commencement of construction. Use of preconstruction surveys to avoid potential impacts to a species with a low-potential for occur on a site in the future is fully consistent with CEQA. (See, e.g., *Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503, 524-526 [upholding mitigation requiring preconstruction surveys and construction postponement and/or buffers in the event the species of concern were identified].)

The impact and mitigation statements from the DEIR are included here:

Impact 6-4: Potential Impacts on Nesting Birds or Roosting Bats. *The Federal Migratory Bird Treaty Act and California Fish and Game Code sections 3503, 3503.5, 3513, 3800, and 4150 protect migratory and nesting birds, as well as roosting bats. Although the project does not specify which trees or buildings might be removed under individual projects facilitated by the Plan, trees (potential nesting and roosting habitat) or buildings could be disturbed or removed by Plan implementation. The possibility of removing trees and/or buildings that contain nests or roosting bats is identified here as a potentially significant impact. Any direct removal of trees or indirect disturbance by construction or operational activities during the nesting season that causes nest abandonment and/or loss of reproductive effort (killing or abandonment of eggs or young) is considered a "take."*

*There is a low potential for burrowing owl (*Athene cunicularia*; California species of special concern), white-tailed kite (*Elanus leucurus*; California Fully-Protected Species), pallid bat (*Antrozous pallidus*), and Townsend's big-eared bat (*Corynorhinus townsendii*; California species of special concern) to utilize the landscaped habitat within the project area for roosting and/or nesting, especially if the area is left undisturbed for a long period of time. In addition, many common bird species without a special status, though protected by the MBTA, MBPA, and California Fish and Game Code (CFGF), may utilize buildings, gravel substrates, and the landscaped vegetation within the project area for nesting, foraging, and roosting. Common bat species protected by the CFGF may also rarely utilize vegetation or roof tiles within the project area for individual roosting. Without a proactive mitigation procedure in place, Plan implementation could inadvertently result in the removal of existing trees containing nests or eggs of migratory birds, raptors, or bird species during the nesting season, or roosting bats, which would be considered unlawful take under the MBTA and the CFGF (see Regulatory Setting above). This is considered a **potentially significant impact** (see criterion [d] in subsection 6.3.1, "Significance Criteria," above).*

The mitigation measure below would reduce this potentially significant impact to migratory and nesting birds to a less-than-significant level.

Mitigation 6-4. *The demolition of any buildings, disturbance of gravel substrate, and/or removal of trees, shrubs, or weedy vegetation shall be avoided during the February 1 through*

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August 31 bird nesting period to the extent possible. If no demolition, gravel disturbance, vegetation, or tree removal is proposed during the nesting period, no further action is required. If it is not feasible to avoid the nesting period, the project applicant shall retain a qualified wildlife biologist to conduct a survey for nesting birds at most 14 days prior to the start of removal of trees, shrubs, grassland vegetation, or buildings, including prior to grading or other construction activity. If demolition of buildings, disturbance of gravel substrate, or vegetation removal efforts do not begin within the 14 days following the nesting bird survey, another survey shall be required. The area surveyed shall include all construction sites, access roads, and staging areas, as well as reasonably accessible areas within 150 feet outside the boundaries of the areas to be cleared or as otherwise determined by the biologist and dependent on species' life history requirements.

If an active nest is discovered in the areas to be directly physically disturbed, or in other habitats within the vicinity of construction boundaries and may be disturbed by construction activities (as determined by the qualified biologist), clearing and construction shall be postponed within a species-specific no-work buffer (to be determined by the qualified biologist and based on the species life history and regulatory requirements) until the biologist has determined that the young have fledged (left the nest), the nest fails, or the nest is otherwise determined to be inactive by the biologist (i.e., predation).

To avoid impacts to roosting bats that may rarely utilize the project area vegetation, roof tiles, and/or vacant buildings for day roosting, the project applicant shall retain a qualified wildlife biologist to conduct a survey for roosting bats no sooner than 14 days prior to the start of demolition of any vacant buildings left with entry and egress points accessible to bats or removal of suitable bat roosting vegetation. If demolition of buildings or vegetation removal efforts do not begin within the 14 days following the roosting bat survey, another survey shall be required. If roosting bats are detected, the biologist shall enact a minimum of a 150-foot no-work buffer and confer with CDFW to determine potential roost protection or roost eviction practices. After conferring with CDFW, the protective buffer may be adjusted based on specific roost needs. Once bats have been suitably protected by a buffer and/or safely evicted from roosting sites (as approved by CDFW, avoiding take as defined by CESA and the CFGC), construction may resume outside the buffered area.

A nesting bird and roosting bat survey report of the methods and results of the pre-project survey will be submitted to the City for review and approval prior to commencement of construction activities for individual projects. Any additional construction monitoring, as determined through any necessary coordination/discretionary approvals with the resource agencies, will be documented per requirements set forth in an approved mitigation monitoring and reporting program for the entirety of the project.

*Implementation of this measure would reduce the impact to a **less-than-significant level**.*

Comment 3: Third, the EIR assumes that because the Greystar site is disturbed, it has low habitat value. Dr. Smallwood's initial comments explained that this reasoning lacks substantial

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evidence by providing analysis and photographic evidence showing that wildlife forages, nests, and moves through the site. The Updated Biological Setting nonetheless points to past disturbances of the project site – as long ago as 25 years – to support the EIR's conclusion that wildlife use of the site is limited.¹⁷ As explained in Dr. Smallwood's comments, the City must evaluate the biological setting of the Project site based on its actual use by wildlife, not by broad characterizations of the quality of the open space. Here, site visits by the City and Dr. Smallwood detected 35 vertebrate species of wildlife at the project site. These site visits also detected prey mammals and burrows, which indicate potential presence of special-status wildlife species including burrowing owls.¹⁸ As a result, the City lacks substantial evidence to conclude that protocol surveys for special-status species are not required for the Greystar site. The EIR and Mitigation Monitoring and Reporting Program must be revised to include protocol surveys for special status species with potential to occur on the Project site.¹⁹

¹⁷ Updated Biological Setting, pg. 2.

¹⁸ Smallwood Comments (May 24, 2022), pg. 2.

¹⁹ A full list of species of occurrence likelihoods of special-status species is presented in Dr. Smallwood's comments (December 20, 2021), Table 2.

Response 3: The three surveys (including Dr. Smallwood's) conducted for the site provide a description of the current biological conditions. The value of understanding past use is how it influences current values, and that is why the site history is provided. It is not pristine wildlife habitat, and although the site provides forage and nesting habitat for wildlife, it is dominated by non-native, weedy vegetation and has very little structural variety (such as trees, shrubs, rock outcrops, dirt mounds) that are typical of higher quality forage and nesting habitat. The analyses in the DEIR and FEIR explain the site conditions and that the site provides habitat for common, urban-adapted wildlife species. Lists of observed species are provided. Common and urban-adapted wildlife species are expected to use the site for forage and nesting after it is developed. The CEQA checklist questions focus on impacts to habitats and species that are identified as special-status. The DEIR and MMRP include measures to protect special-status species that may occur onsite, including nesting birds (including Western burrowing owl and white-tailed kite), roosting bats, rare plants, and includes a measure to protect ordinance trees.

The EIR and subsequent biological surveys document that the site does not provide habitat to sustain the Western burrowing owl, but recognizes that Western burrowing owl could use the limited resources onsite, and therefore requires a pre-construction survey to avoid direct loss of Western burrowing owl during construction, as noted in the response to Comment 2. The City's consultant reviewed Western burrowing owl use in the area and the existing conditions on the parcels, and determined that protocol level surveys for Western burrowing owl were not required to assess potential impacts; therefore, they were not recommended during preparation of the EIR. This determination is based on an evaluation of the ground squirrel burrows on the site and on the adjacent levees on San Tomas Aquino Creek because ground squirrel burrow systems provide nesting habitat for Western burrowing owl. As noted earlier, we detected ground squirrel burrow openings present on the berm at the southern end of the site, and these showed no signs of current activity. There are 5 or 6 openings on the levee

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adjacent to the site where the levee ends at US 101 that are currently active. Ground squirrel burrows are managed for levee safety, and are therefore not common along San Tomas Aquino Creek. The City's biological consultant's observations are that the likelihood of Western burrowing owl use is very low, but measures are included to survey for this species prior to construction to make sure that it has not established use of the site. The mitigation measures are described in Response 2.

Please do not hesitate to contact me if there are any questions (650-400-5767; tpeterson@migcom.com)

Sincerely,

A handwritten signature in black ink that reads "Taylor Peterson". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Taylor Peterson
Director of Biological Analysis

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

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June 7, 2022

Via Email

Mayor Gillmore and Santa Clara City Council Members
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Santa Clara, CA 95050
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John Davidson
Principal Planner
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Andrew Crabtree
Director, Planning & Inspection Dept.
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Re: Agenda Item 6 (22-769): Comments on the Freedom Circle Focus Area and Greystar General Plan Amendment Project

Honorable Mayor and City Council Members:

We write on behalf of Silicon Valley Residents for Responsible Development ("Silicon Valley Residents") to provide comments on the Freedom Circle Focus Area and Greystar General Plan Amendment Project ("Project"), which appears as Item 6 (22-769) on the Agenda for the June 7, 2022 Santa Clara Council and Authorities Concurrent Meeting. The City Council will consider whether to adopt resolutions (1) approving an Environmental Impact Report ("EIR") and an associated Mitigation Monitoring and Reporting Program ("MMRP"); (2) adopting General Plan amendments; and (3) rezoning the Greystar site (collectively, "Approvals").

On December 20, 2021, Silicon Valley Residents submitted comments on the Draft EIR ("DEIR") prepared for the Project. On March 30, 2022, the City released the Final EIR ("FEIR"), which revises the DEIR and includes responses to our comments. Silicon Valley Residents submitted responsive comments in advance of the April 13, 2022 Planning Commission meeting explaining that the Project had unresolved environmental impacts and land use inconsistencies.

After the Planning Commission meeting, and after the release of the FEIR, the City released new technical documents revising elements of the Project in

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response to our comments.¹ These documents included (1) a health risk assessment,² (2) responses to our comments,³ (3) revisions to the Project's General Plan Amendments,⁴ and (4) an updated biological setting.⁵ Silicon Valley Residents submitted comments on May 24, 2022 explaining that the new studies failed to resolve some of the issues raised in our comments, and that there remain potentially significant impacts to biological resources and inconsistencies with the General Plan.

Just a few hours ago, at 2:45 PM on June 7, 2022, the City emailed Silicon Valley Residents a new technical document from its consultant containing additional responses to our comments. As the Project's hearing is scheduled the same day at 7:00 PM, Silicon Valley Residents was not provided sufficient time to adequately respond to the City's letter. However, biological resources expert Shawn Smallwood, PhD prepared the attached preliminary responses briefly demonstrating that neither the new study still fails to resolve the FEIR's shortcomings on biological resource analysis and mitigation.⁶ His comments show that the EIR's environmental setting, impacts analysis, and mitigation remain unsupported by substantial evidence.

The City's latest responses, as well as the technical documents released after the Planning Commission hearing, warrant recirculation of the EIR. Section 15088.5(a) of the CEQA Guidelines require a lead agency "to recirculate an EIR when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review under Section 15087 but before certification." The Guidelines state that "Significant new information' requiring recirculation include, for example, a disclosure showing that: (1) A new significant environmental impact would result from the project or from a new mitigation

¹ City of Santa Clara, Post-Planning Commission Technical Information, https://www.santaclaraca.gov/Home/Components/BusinessDirectory/BusinessDirectory/370/3649?np_age=2.

² MIG, Freedom Circle Focus Area Plan and Greystar General Plan Amendment: Post-Planning Commission EIR Memo for Air Quality Comments, May 12, 2022, <https://www.santaclaraca.gov/home/showpublisheddocument/77391/637880536900270000>.

³ *Id.*

⁴ *Id.*

⁵ MIG, Updated Biological Setting for the Greystar Parcels in the Freedom Circle Focus Area Plan, May 11, 2022, <https://www.santaclaraca.gov/home/showpublisheddocument/77389/637880536006030000>.

⁶ Dr. Smallwood's reply comments and curricula vitae are attached hereto as **Exhibit A**.
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measure proposed to be implemented...”⁷ The documents released by the City after the close of the comment period contain significant new information.

For example, whereas the DEIR concluded that “no evidence that further biological surveys would be required to be in compliance with this EIR’s mitigation measures, as the site ... did not contain any small mammal burrows,”⁸ the City’s subsequent survey detected several burrow systems of California ground squirrels on the project site. The presence of burrows shows that special-status species such as burrowing owls may be impacted by the Project. Since the Project’s mitigation does not call for protocol-level surveys for such species, potentially significant impacts on these species remains unmitigated.

The City’s responses and technical documents released after the close of the comment period contain significant new information. The new study is also an improper attempt by the City to rely on new evidence that was not disclosed to the public or to responsible agencies in either the DEIR or the FEIR. The EIR must be recirculated for public review.

Silicon Valley Residents urges the City Council not to adopt the Project’s Approvals at the City Council meeting set for June 7, 2022. Silicon Valley Residents urges the City Council to remand the Project back to Staff to allow for preparation of a legally adequate, recirculated EIR pursuant to CEQA and to enable proper planning for the proposed Freedom Circle Focus Area as set forth in the existing 2010-2035 General Plan.

Sincerely,

Aidan P. Marshall

APM:

⁷ CEQA Guidelines, 15088.5(a)(1).

⁸ *Id.* at 2-17. Emphasis added.

Exhibit A

Shawn Smallwood, PhD
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Davis, CA 95616

Aidan Marshall
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
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7 June 2022

RE: Freedom Circle Focus Area and Greystar General Plan Amendment Project

Dear Mr. Marshall,

I write to reply to responses to previous replies I prepared regarding potential project impacts to biological resources.

Response 1: The response continues to imply that ground squirrels were absent during the 12 December 2020 biological survey of the site. This could not have been the case. I have monitored ground squirrel burrow systems over multiple years at several research sites, so I know that long-term use of a burrow system accumulates soil. I refer to these long-occupied burrow systems as “raised burrow systems.” These are the types of burrow systems I saw on the Greystar site. A raised burrow system requires many years of occupation, not just one year. Ground squirrels were either missed during the 12 December 2020 survey, or they were observed and not reported. I assume they were missed.

The response provides more information about the 12 December 2020 survey, such as how long the biologist was on site. However, the purpose of the survey remains unreported, as were the methods used, the level of coverage of the site, and a list of species detected. Most of the most fundamental information needed by the reader remains unreported.

The response provides more information about the 25 April 2022 biological survey, which is helpful. The added information reveals that I found 4.24 times more wildlife species per hour during my survey of 18 December 2021 than did the consulting biologists on 25 April 2022. This very large difference in survey outcomes suggests that M.I.G’s consultants might be under-qualified for these types of surveys.

The response concludes, “More surveys would probably expand the list of common wildlife species that use the site, but would not change the conclusions made in response to the CEQA checklist questions. The three surveys of the site, in three subsequent years, provide the public with substantial information about the biological resources present.” In fact, more surveys would expand the list of wildlife species that use the site, including both “common” species, whatever that means, and special-status species. (Species that lack special status are not necessarily common.) To qualify as substantial information regarding the wildlife community as part of the environmental setting, the list of species needs to be either complete in its representation of the wildlife community, or else carefully interpreted as a sampling of the species that use the site. It is inappropriate to assert, without substantial evidence (see my

comments regarding the purpose of protocol-level detection surveys), that special-status species would not be found in additional surveys.

Response 2: The City's assertion that "[i]n April the site conditions were not attractive to Western burrowing owls due to few apparent burrows, tall weedy vegetation, and a predominantly flat site, although a berm next to US 101 and the levee adjacent to San Tomas Aquino Creek provide raised areas that could provide suitable burrow and sentinel habitat" is unsupported. Burrowing owls are not constrained by some number of ground squirrel burrows less than some unstated threshold. Burrowing owls will nest in vegetation of various heights, including in vegetation taller than my standing height. Burrowing owls nest in cavities on a variety of terrains, including cliff faces, rolling hills, berms, and on flat ground. There is nothing about the Greystar site that would prevent the occurrence of burrowing owls. Protocol-level detection surveys (CDFW 2012) are warranted.

The response says, "There are squirrel burrows on the berm at the south end of the project site, but they did not have the dirt spray that typically indicates they are in use." The term "dirt spray" indicates that the MIG biologists are insufficiently familiar with ground squirrels to provide credible recommendations regarding ground squirrel use of the site or their implications for burrowing owls. Ground squirrels scatter their excavated soil into surrounding vegetation, so it is rare to find extruded soil at the burrow entrance. The means for assessing whether ground squirrel burrows are active are to look for feces, clearing of vegetation at the immediate vicinity of the burrows, trails left through vegetation around the burrows, whether the burrows are intact, i.e., not collapsed, and the squirrels themselves. Lack of "dirt spray" would indicate presence, not absence.

According to the response, "No sign of Western burrowing owl use was observed at ground squirrel burrows in site surveys in April and May 2022, and potential use by Western burrowing owl is expected to be low." Not seeing burrowing owls during two reconnaissance-level surveys means nothing. I recently twice missed a burrowing owl nest site only to discover it on my third visit, and I have a lot more experience surveying for burrowing owls than do the MIG consultants. Burrowing owls can be very difficult to detect, and often fool skilled biologists about the locations of their nest sites. This is why the CDFW (2012) guidelines recommend multiple surveys separated by at least 3 weeks each, and based on multiple methods. Nothing like the CDFW (2012) guidelines have been implemented at the project site.

The response concludes by repeating the mitigation measures in the DEIR relevant to nesting birds, roosting bats and burrowing owls. The mitigation measures remain deficient by characterizing the likelihoods of occurrence of these animals as low, because the survey effort needed to characterize these aspects of the environmental setting was inadequate. That is, the impact assessments (low) were based on incomplete and misleading characterization of the environmental setting.

Response 3: "The three surveys (including Dr. Smallwood's) conducted for the site provide a description of the current biological conditions." The same could be said of the first survey alone, or the second, but neither description would be complete or anywhere close to satisfactorily informative.

“It [the site] is not pristine wildlife habitat, and although the site provides forage and nesting habitat for wildlife, it is dominated by non-native, weedy vegetation and has very little structural variety (such as trees, shrubs, rock outcrops, dirt mounds) that are typical of higher quality forage and nesting habitat.” The same can be said of nearly every place that burrowing owls and other birds struggle to survive in a very disturbed world. It might help for the response to point out places that are “pristine,” but this is not done because no such place exists anymore. This and the rest of the response is contrived and insubstantial.

The response asserts, “The EIR and subsequent biological surveys document that the site does not provide habitat to sustain the Western burrowing owl...” But the EIR does no such thing. The CDFW (2012) guidelines were formulated to support negative findings where the species is truly absent. The guidelines have not been implemented, so there is no foundation for concluding the site does not provide habitat to burrowing owls. With ground squirrels on site, and all that open space, detection surveys for burrowing owls are warranted.

According to the response, “The City’s consultant reviewed Western burrowing owl use in the area and the existing conditions on the parcels, and determined that protocol level surveys for Western burrowing owl were not required to assess potential impacts; therefore, they were not recommended during preparation of the EIR. This determination is based on an evaluation of the ground squirrel burrows on the site and on the adjacent levees on San Tomas Aquino Creek because ground squirrel burrow systems provide nesting habitat for Western burrowing owl.” As I commented earlier, the MIG consultants misinterpreted the lack of “dirt spray” as evidence of absence of ground squirrels; lack of freshly extruded soil is evidence of active use of the burrow system. The City has been misinformed.

Thank you for your attention,



Shawn Smallwood, Ph.D.