**U.S. Department of Housing and Urban Development**
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Harry Freitas, Director
Planning, Building, and Code Enforcement
City of San Jose
200 E. Santa Clara Street, T-3
San Jose, CA 95113

MAY 22 2015

Dear Mr. Freitas:

SUBJECT: Results of HUD Environmental Review Monitoring

On Thursday, March 27th , Friday, March 28th, and Monday, March 30th, Environmental Officer Zach Carter conducted environmental monitoring of the City's HUD-funded programs. He was very cooperatively assisted in this endeavor by the City's Housing and Planning staff. HUD determined that the City is generally complying with its environmental review, decision-making and action responsibilities under the National Environmental Policy Act (NEPA) and HUD Environmental regulations at 24 CFR Part 58. Additionally, the monitoring demonstrated that the City's HUD-funded activities are generally implemented in harmony with the natural and urban environments and provide for the health and safety of residents and other occupants.

However, HUD identified one Finding requiring corrective action and four Concerns regarding which HUD is providing recommendations to strengthen the environmental review process. The Finding refers to failure to document compliance with Section 106 of the National Historic Preservation Act and implementing regulations at 36 CFR 800 in the Japantown Lofts multifamily development activity. The Concerns address the City's process for recording environmental determinations and documenting implementation of project descriptions and mitigation measures. A more detailed report of the monitoring follows this summary.

The Department would like to thank James Stagi, Eric Calleja, John Davidson and Rebekah Ross for their cooperation and expertise during the monitoring. A response to the Finding in this monitoring report is required within 45 days of receipt of the report, unless otherwise specified. Response to Concerns may be provided at the City's option. Please send your response directly to Mr. Carter at HUD Region IX, One Sansome, Suite 1200, San Francisco, CA, 94104-4430. Should you have questions or issues resulting from this review, you are welcome to contact Mr. Carter directly at (415) 489-6621.

Sincerely,

Maria Cremer
Director
Office of Community Planning
& Development

enclosure

**HUD Environmental Review Monitoring Report – City of San Jose**

**Dates on Site: March 26, 27, and 30, 2015**

**Programs Reviewed: Community Development Block Grant (CDBG), HOME Investments Partnership Program (HOME), and NSP**

## Background and Introduction

Section 104 (e) of the Housing and Community Development Act of 1974 requires HUD to undertake the reviews needed to determine whether a community carries out its HUD-assisted activities in accordance with appropriate statutes, regulations and the community's certifications. Therefore, HUD Environmental Officer Zach Carter conducted environmental monitoring of the City's HUD-funded programs from March 26-30, 2015.

The scope of the monitoring included Environmental Review Records (ERRs) and supporting documentation, interviews with key staff, and visits to project sites. The purpose of this letter is to report the results of HUD's monitoring review. Specific activities that were the focus of monitoring are noted in the attached Activities List. ERRs were monitored to assess procedural and technical compliance with the requirements of National Environmental Policy Act (NEPA), HUD Environmental regulations at 24 CFR Part 58 and other related federal environmental laws and executive orders.

HUD was assisted in the monitoring by Eric Calleja, Development Officer; James Stagi, Housing Policy & Programs Administrator; Rebekah Ross, Planner II; and John Davidson, Planner IV. The monitoring was enhanced by the City's professionalism, cooperation and courtesy, which was very much appreciated by HUD staff.

The entry conference on March 28 addressed the experience and training that contributes to the City's capacity to fulfill its duties as Responsible Entity, whereby it steps into the shoes of the federal agency for purposes of documenting compliance with the National Environmental Policy Act, 42 U.S.C. 4321 et seq.; related laws at authorities listed at 24 CFR 58.5-6; and other environmental regulations described in 24 CFR Part 58 generally.

Mr. Calleja has attended HUD environmental review training during the last several years, and is experienced with completing HUD environmental review records (ERRs) for a variety of development projects. Mr. Calleja is the primary person responsible for maintaining the City's ERR files, and coordinating with other staff, consultants, and development partners to ensure that HUD environmental review requirements are implemented in the City's activities.

Mr. Stagi plays a managerial role in the environmental review process. Ms. Ross and Mr. Davidson act as internal consultants, bringing planning expertise to the preparation of environmental reviews for the City's Housing Division's HUD-assisted activities. The Certifying Officer is currently the Director of Planning. This has the benefit of ensuring that Planning Division expertise is fully leveraged

in the environmental review process, and, if appropriately implemented, makes it possible to ensure coordinated implementation of planning requirements with HUD environmental review mitigation measures.

During the conference Mr. Stagi described some of the venues in which the City communicates environmental review requirements to its development partners. For larger projects, these requirements may be initially noted in the Notice of Funding Availability or Request for Proposals utilized by the program. For other activities the requirements may be communicated on a one-off or project by project basis. Due to the fact that the City continues to work with a well-established pool of developers who are generally familiar with HUD regulatory requirements, the City has not recently identified a need for an annual grantee or subrecipient training to communicate these requirements. Where a new development partner is used, the City can usually bring them up to speed on the environmental review process through direct technical assistance.

Mr. Calleja described the first step in the process of developing the environmental review as working with the project manager to define the project description. HUD encourages this approach because a clear, thorough and accurate project description is essential in order to complete a sustainable and defensible environmental review. For example, for HOME funded activities, Mr. Calleja and Mr. Stagi would coordinate with Dan Beaton, HOME project manager, and the developer to define the project purpose. For CDBG, Mr. Calleja would coordinate with the program financial analyst who manages the CDBG beneficiary contract in order to determine scope of environmental review.

After the environmental review is started and the project description is defined, completion of the review varies by program and activity. For example, in more complex projects such as HOME-assisted multifamily development, the City would coordinate with a general contractor/development consultant, who would supervise the various components of both development and regulatory compliance on behalf of the developer. Such a consultant would be responsible for completing or contracting for completion of the environmental assessment, which would then be reviewed by both Housing and Planning staff, and signed by the Certifying Officer. Mr. Calleja would then coordinate for publication of the FONSI/NOIRROF and submittal of the RROF to HUD.

For the NSP single family acquisition and rehabilitation program, the City utilized a tiered format. The City considered using such a format for HOME assistance to Habitat for Humanity, but ultimately determined that this was not practicable given the limited number of projects (8 last year) vs. the level effort required for implementing a tiered review.

The City has a programmatic agreement with SHPO (1996) that it uses to address Section 106 requirements in several of its activities, which saves time.

Other staff with HUD environmental review experience include Rahil Butt, Carlos Azcona and previously Don Gross. They are Rehabilitation Specialists with environmental compliance experience, who sometimes complete the Appendix A and site inspection for HUD-assisted single family rehabilitation.

In summary, the team with which HUD interacted during monitoring has ample capacity to address HUD environmental review requirements, given continued training and communication with HUD environmental specialists. HUD recommends that the City maintain staff capacity by requiring that HUD ERR preparers attend environmental review training at least every two to three years.

## Monitoring Results

The preliminary results of HUD's review were summarized during an exit conference on April 1st, attended by Mr. Calleja, Mr. Stagi, Ms. Ross, and Mr. Davidson.

The monitoring resulted in one Finding and four Concerns, described below. A Finding is defined as a deficiency in program performance based on statutory, regulatory or other HUD policy requirements for which sanctions or other corrective actions are authorized at HUD's discretion. A concern is a deficiency in program performance not based on a statutory, regulatory or other program requirement, for which sanctions and corrective actions are not authorized. The type of sanctions applicable to Findings and available to the Department varies in spectrum from mere administrative corrections to a request for repayment of Federal funds

In addition, this report provides comments regarding environmental best practices noted in City HUD-funded activities.

### Finding 1: Failure to Document Consultation with the State Historic Preservation Officer and to Develop a Memorandum of Agreement for Japantown Lofts

**Condition:** Japantown Lofts Senior Apartments is a 75-unit, six-story development located at 675 N. 6th St. in the Japantown Historic District. The City completed an ERR for the activity on April 3, 2012, and the development was under construction at the time of monitoring. The ERR recorded consultation with the City's historic preservation staff and a thorough consideration of the project's potential impact on historic properties via the California Environmental Quality Act (CEQA), which was then incorporated into the HUD ERR. This analysis determined that the project could have a significant effect on the historic district, and required mitigation to avoid an adverse effect on the district and on the adjacent National Register-eligible historic 665 N. Sixth Street building. In general, the activity's historic preservation analysis and mitigation design appears to be excellent. The City is a Certified Local Government (CLG), registered with the National Park Service.

However, the City's HUD ERR did not include a record of consultation with the State Historic Preservation Officer (SHPO). Upon request, the City was able to locate a draft consultation letter in its archives. However, the letter was not finalized with attachments, was not dated or signed, and there was no record of mailing or of SHPO acknowledgement or response.

**Criteria:** Section 106 of the National Historic Preservation Act requires that federal agencies provide the Advisory Council on Historic Preservation with the opportunity to comment on federal undertakings that could impact historic properties. Any HUD-assisted activity is a federal undertaking subject to Section 106, and the Responsible Entity (RE) bears HUD's agency responsibility for consultation under the Act, as noted in 24 CFR Part 58. In order to expedite the consultation requirement, ACHP promulgated regulations at 36 CFR 800 which allow for consultation with the State Historic Preservation Officer to satisfy the ACHP consultation requirement for most projects, with ACHP involvement only under certain circumstances. The regulations also require an opportunity for public input into the historic preservation process.

Further, 36 CFR 800 requires that when a project may adversely affect a historic property without mitigation, the mitigation resolving such adverse effects must be developed through a Memorandum of Agreement (MOA) signed by the Responsible Entity and SHPO, as well as other consulting parties. ACHP must have an opportunity to comment on the MOA as well. The HUD ERR cannot be signed, and no Request for Release of Funds can be submitted to HUD, until the MOA is signed by required parties and filed with ACHP.

**Cause and Effect:** The cause of this violation was a failure to document compliance with 36 CFR 800, to consult with SHPO, and to develop a Memorandum of Agreement to resolve acknowledged adverse effects. Due to the requirements of CEQA, and the City's expertise in historic preservation as a CLG, the failure to comply with 36 CFR 800 does not appear to have resulted in adverse effects to the historic district or adjacent historic property. Fortunately, therefore, the result appears to be a technical violation without adverse and incurable impacts. *Had such impacts occurred, however, HUD would be required to request repayment of funds*. Additionally, if ACHP objects to HUD based on "foreclosure of opportunity to comment" under Section 106, *HUD could be required to request repayment of funds on that basis as well*. Unless prevented from reoccurring, therefore, this omission represents a significant compliance risk to future activities.

**Corrective Action:** Prior to approving future environmental reviews for new multifamily construction activities, the City is required to provide HUD with the record of Section 106 and 36 CFR 800 compliance in order to ensure that this error does not reoccur. HUD will notify the City when this requirement no longer applies.

**Concern 1: Documenting compliance with Section 106 of the National Historic Preservation Act in Rehabilitation Activities**

**Condition:** Although HUD found that the City generally does an excellent job of taking historic preservation into account in its HUD-assisted activities, HUD has a concern about the City's ERR documentation of compliance with NHPA implementing regulations at 36 CFR 800.

For single family rehabilitation activities the City utilizes a Programmatic Agreement (PA) with the California State Historic Preservation Officer, allowing these activities to be exempt from the SHPO

consultation required by 36 CFR 800, if certain requirements are followed in project implementation. If the home is more than 50 years old and potentially eligible for listing on the National Register of Historic Places, for example, the rehabilitation must comply with the Secretary of the Interior's Standards for Rehabilitation of Historic Properties (use of in-kind materials, limited disturbance, etc.).

For at least two activities, single family acquisitions at 46 N. King Road and 2685 Rosalinda Court, property ages were not recorded in the ERR (Appendix A). Review of the project file confirmed that the homes were more than 50 years of age, and therefore the rehabilitation required coordination with the terms of the PA, which was not recorded in the ERR. However, review of the scope of work and before and after photographs of the properties supported a monitoring conclusion that had no adverse impact (and possibly a beneficial impact) on the architectural integrity of the homes.

**Cause and Effect:** The cause of this Concern was caused by a deficiency in maintaining the record of the City's compliance with 36 CFR 800. Due to the fact that the City complied with the terms of the PA even though this was not recorded in the ERR, there was no regulatory violation.

**Concern 2: Documenting compliance with 24 CFR 58.5(i)(2), Toxic and Hazardous Substances**

**Condition:**

For less environmentally complex activities, such as single family rehabilitation, where compliance with 58.5(i)(2) is documented with a site visit and database search, the City routinely searches multiple EPA databases (RCRA, CERCLIS, TRI) using the Envirofacts or NEPAssist web tools. This is appropriate, but not sufficient as these databases do not cover all sites controlled by state agencies including California Department of Toxic Substances Control and the Water Resources Control Board. During recent trainings, HUD has instructed REs to search federal EPA databases *as well as* DTSC's Envirostor *and* WRCB's Geotracker.

For more complex development activities where an environmental professional is utilized to prepare and ASTM Phase I Environmental Site Assessment to demonstrate compliance with 24 CFR 58.5(i)(2), it is important that the results of this investigation (and the fact that such an investigation was undertaken) are appropriately documented in the environmental review record. This was a concern in HUD's review of the Taylor Oaks multifamily acquisition and rehabilitation activity.

For Taylor Oaks, the statutory worksheet 58.5(i)(2) compliance section referred only to an EPA Envirofacts database. However, for acquisition of multifamily property HUD recommends more in-depth analysis by an environmental professional, especially for a central urban location in a mixed-use are. Taylor Oaks is in proximity to several gas stations, and an auto repair facility, and the neighborhood is a mix of residential, commercial and commercial/industrial. However, although it was not noted in the Statutory Worksheet, the file included a Phase I for the site, completed by the Orrin Group on September 3, 2010. It analyzed a number of detailed investigation results, including the past use of the property as an orchard, and the presence of 12 leaking underground storage tanks within the

recommended search distance around the property. The Phase I concluded after a thorough analysis that no further action was recommended based on environmental findings associated with the property.

**Cause and Effect:** This professional analysis of the threat or lack of threat posed by the surrounding uses including the Leaking Underground Storage Tanks was an essential part of the documentation that the multifamily acquisition project complied with 58.5(i)(2), but it was not referenced in the Statutory Worksheet. The ERR contained the necessary information to show that the site is safe, but a compliance risk exists when this conclusion is not clearly recorded in the City's environmental review determinations on the HUD-recommended format.

**Concern 3: Monitoring implementation of the project description and mitigation measures determined in the ERR**

**Condition:** In order to verify that activities were implemented in accordance with ERR project descriptions and required mitigation measures, particularly for more complex development activities, the City was required to search for additional records outside the ERR.

According to the President's Council on Environmental Quality (CEQ), monitoring implementation of project descriptions and mitigation measures is a key step in the environmental review process and evidence of implementation should be incorporated into the ERR. Since ERR approval is completed by the City's Planning Department, it should be possible to incorporate verification of mitigation measure implementation into the building inspection process.

**Cause and Effect:** The cause of this concern was the lack of a clear record tying determinations in the ERR to verification of their implementation in the finished project. Based on HUD's visits to project sites, and supplemental records provide by the City (e.g., the record of drainage improvements at Taylor Oaks), mitigation measures were actually implemented. However, a compliance risk exists where there is not a clear process for recording this verification process, and recipients should understand that if HUD-assisted activities are later discovered to have been completed out of accordance with the ERR project description, or fail to incorporate required mitigation measures in the final product, they risk required repayment of HUD assistance.

**Concern 4: Coordination of CEQA/NEPA Combined Review Processes**

**Condition:** In the Ford & Monterey Apartments development, the City utilized a combined CEQA/NEPA review process. Based on review of the ERR, it appears that documentation of compliance with CEQA was assembled first, and this record was then referenced as documentation supporting determinations of compliance with HUD environmental review requirements and NEPA.

This combined approach is acceptable. However, it is necessary to fill in gaps where the CEQA analysis does not map precisely onto HUD's recommended NEPA analysis. For example, the City's NEPA

analysis for Ford & Monterey "Air Quality" references a CEQA discussion of the project's construction impact on ambient air quality in the surrounding area, particularly from construction dust, and recommends controls on this basis. The focus of the Japantown Lofts air quality analysis was similar.

However, in HUD NEPA analysis of air quality, the RE is required to analyze both the impact of the project on ambient air quality *as well as the impact of ambient air quality on residents of the HUD-assisted development*.

**Cause and Effect:** This contrast is characteristic of the difference between the CEQA and HUD NEPA analysis; HUD NEPA is specifically focused on the impact of the environment on residents of HUD-assisted development, as well as the project's impact on the surrounding environment, whereas CEQA under current case law is almost solely focused on the project's impact on the surrounding environment. This distinction must be considered and addressed when preparing a joint CEQA/NEPA review.

## Comments

### Reviews Included Documentation Adequately Addressing Acceptable Separation Distance (ASD) from Above-Ground Storage Tanks as Required by 24 CFR 51C

While all reviews made some determination regarding compliance with HUD's ASD requirements, HUD was pleased to note that in at least one instance the City went beyond reconnaissance to perform a separation calculation. In the Appendix A for 46 North King Road, Rehabilitation Specialist Carlos Azcona correctly identified an above ground tank within the search distance, and calculated the ASD using the HUD-recommended method. The tank location was demonstrated to exceed the required separation distance.

This example shows that the City is diligently performing reconnaissance for explosive and flammable hazards and making the HUD-recommended calculations when encountered. The City is to be commended for its attention to resident safety, which is the highest priority in HUD environmental review.

### Sustainability is Considered in the City's Consolidated Planning Process and Reflected in the City's HUD Assisted Activities

The City's Consolidated Plan specifically notes that sustainability is a goal of the City's HUD-funded programs. Examples of sustainable activities include LED streetlight retrofits in the Five Wounds/Mayfair neighborhood; incorporation of sustainable drainage and landscaping at Ford & Monterey Apartments; and permeable paving and recycling facilities, and impressive interior architectural features at Kings Crossing Apartments. Some of these features are recorded in photographs in the Appendix.

**Conclusion**

In summary, HUD verified that City is generally complying with its environmental responsibilities under HUD regulations at 24 CFR 58, with the exception of one finding. HUD noted several exemplary review practices, as discussed above. HUD-funded activities were implemented in an environmentally sensitive manner, incorporating appropriate conservation measures whenever possible.

As noted in the cover letter to this report signed by Director of Community Planning and Development Maria Cremer, the response to this monitoring report, including description of corrective action performed in response to the Finding, should be sent directly to Environmental Officer Zach Carter, HUD Region IX, One Sansome, Suite 1200, San Francisco, CA, 94104, or by email at zach.r.carter@hud.gov. Please note that the response to monitoring is requested within 45 days after receipt of this report. If this time frame does not work, please contact Mr. Carter to request an extension of the deadline. Additionally, HUD understands that some corrective action may require more than 45 days for implementation; planned actions not completed at time of monitoring response may be described, and updated as requested by HUD.

**Site Visit Photographs**

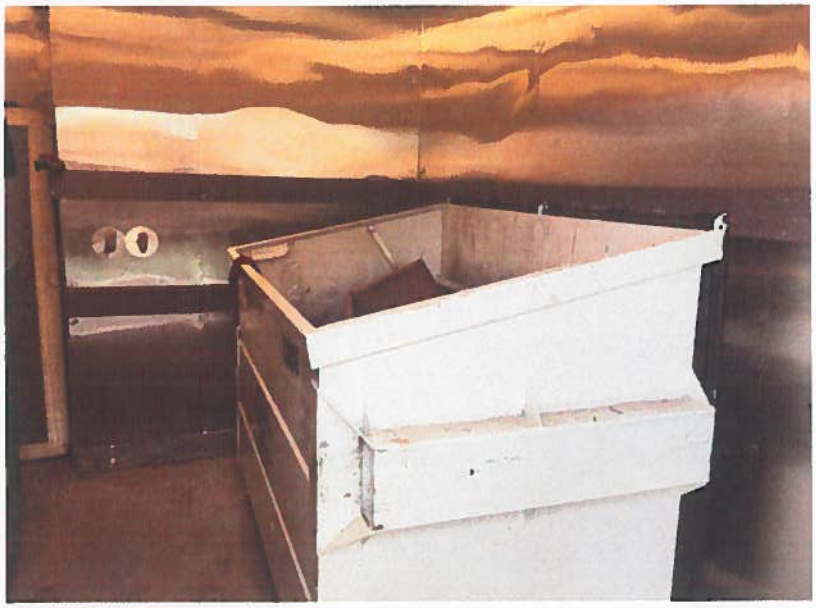
Ford & Monterey – View from Entry on Ford Road

Ford & Monterey – Native Plantings

Ford & Monterey - perforated curb directing parking lot runoff into vegetative (native turf) bioswale

Ford & Monterey – bike rack

Ford & Monterey - roof drainpipe directing rainwater into elevated planter/window buffer



Ford & Monterey - stainless steel room

**Ford & Monterey – LED sidewalk lighting**

**Kings Crossing – high ceilings in passageway w/natural light**

**Kings Crossing – lobby sculpture**

**Kings Crossing – lobby sculpture**

**Kings Crossing – permeable pavers**

**Japantown Lofts – new affordable housing development in background; historic property in foreground**