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March 22, 2022

Kimberly Nash, CPD Director
Office of Community Planning and Development
Region IX Office
One Sansome Street, Suite 1200
San Francisco, CA 94104-4430

RE: Environmental Monitoring Report Community Development Block Grant Program (CDBG) City of Cupertino, CA

Dear Ms. Nash:

I am the City Manager of Cupertino and write in response to the CPD Monitoring letter dated February 22, 2022. That letter noted the long-standing partnership between Cupertino and HUD in carrying out critical community projects supporting housing and community development. As a small City, the financial assistance provided by HUD is invaluable and allows the City to leverage funds to enable us to engage in projects that benefit our lower income, senior and disabled residents. For that assistance, Cupertino is most grateful.

Your letter further transmits an Environmental Monitoring Report ("Report") which provides findings from remote monitoring occurring from March 1 to 21, 2021 for projects spanning program years 2015-2020. As noted in the Report, the purpose of remote monitoring is for HUD to review the City's CDBG funded projects and provide feedback regarding the City's compliance with technical requirements. As the City has historically worked closely with HUD staff to ensure compliance with technical requirements, we welcomed the opportunity to receive technical feedback. As noted in the Report, monitoring allows "an opportunity to provide technical assistance focused on improving the quality of the environmental review, to inform the Responsible Entity (RE) of new guidance regarding the substantive review for the related regulations, laws, and authorities, and/or to recommend strategies that may assist with making the

environmental review process more efficient.” In pursuit of these goals, the City is in full agreement. Not only has the City worked closely with HUD staff during the program years in review, we contracted with a CDBG consultant to ensure compliance.

The Report issued three Findings, including Finding no.1 regarding two City projects: 1) IDIS Activity ID 121, 2016/City Wide Curb Ramp Project (“Curb Ramp Project”) and 2) IDIS Activity ID 137, 2018 Vista Village Rehabilitation Project (“Vista Village”). Due to alleged failures to comply with HUD Environmental Regulations, the Report states that the City is required to repay the entirety of awarded funds. Central to this Finding is the City’s alleged failure to document its environmental review and submit to HUD the Request for Release of Funds and Certification (“RROF-C”).

As explained below, after a diligent search of files from 2016¹, the City located the Environmental Review document (“Curb Ramp ER”) dated May 1, 2016 for the Curb Ramp Project. (Attached as Exhibit A is a copy of the Curb Ramp ER). Since the Curb Ramp ER found that the project was Categorically Excluded pursuant to 24 CFR 58.35(a)(1)(2), a RROF-C was not required. With respect to the Vista Village Project, the Report acknowledged that the City documented its environmental compliance prior to all but one voucher request. Accordingly, the City respectfully requests that HUD reconsider its findings and its harsh remedy of return of all program funds for these projects.

I. ADDITIONAL SUPPORTING EVIDENCE AND REQUEST FOR RECONSIDERATION OF AUDIT FINDINGS AND REMEDIES

A. BACKGROUND AND DISCUSSION

i. Curb Ramp Project

In or about 2015, the City decided to undertake the Curb Ramp Project consisting of constructing and upgrading curb ramps to allow for a continuous path of travel through the public right of way, especially for our disabled and elderly residents. On January 14, 2016, the City applied for CDBG funding through a City Council Allocation Resolution. On April 19, 2016, the City allocated \$224,184 of its CDBG funding to the Curb Ramp Project. On May 1, 2016, the City documented its environmental review for this project. On January 25, 2017, the City executed a contract with J.J.R Construction, Inc. The City executed its first draw of funds on May 8, 2017 and its last draw of funds on July 24, 2017 for a total amount of \$224,184.

¹ The City notes that while this document was not provided during the remote monitoring, access to City Hall was limited at that time due to COVID-19 restrictions, with almost all staff working remotely.

The Curb Ramp ER determined that the project was Categorically Excluded pursuant to 24 CFR §§58.35(a)(1) and (2). Under 24 CFR§58.22(b), “a recipient does not have to submit an RROF and certification, and no further approval from HUD or the State will be needed by the recipient for the drawdown of funds to carry out exempt activities and projects. However, the responsible entity must document in writing its determination that each activity or project is exempt and meets the conditions specified for such exemption under this section.” Here, the City documented its determination that the Curb Ramp Project was Categorically Excluded under §58.35. Accordingly, pursuant to §58.22(b), a RROF-C was not required to be submitted, and thus all of the City’s draws in the total amount of \$224,184 were appropriately drawn and expended.

ii. Vista Village Project

CDBG funds for the Vista Village Project helped repair the Vista Village Below Market Rate residential complex. The complex, built in 2002, is owned by West Valley Community Services (“WVCS”), a non-profit that provides services to the homeless and low-income individuals and families. The complex features 24 one and two bedroom units, 12 of which were in need of substantial repair. This fiscal year, the project saw the continued renovation of 6 units that have been occupied by residents for more than 10 years. Repairs included laminate flooring, painting, new kitchen countertops, cabinets, replacing old carpets, and a new laminate floor for the bathroom.

WVCS applied for CDBG funding on February 16, 2018. In FY 2018-19, the project was allocated \$176,201.65 in CDBG Capital Housing funds by the City. On July 1, 2018, the City executed a contract with WVCS; on September 11, 2018, WVCS executed a contract with Paramount Construction. On January 17, 2019, the City executed its first draw of \$29,480.75. After this draw, the City realized that it inadvertently did not document environmental compliance for this project. As noted in the Report, on February 26, 2019, the “City documented its completion of the CEST and conversion to Exempt.” After documenting its completion of the CEST and conversion to Exempt, the City made three subsequent draws in the total amount of \$146,720.49. As noted in the Report, “under §58.22(b), if a project or activity is Exempt under §58.34, no RROF-C is required, and the recipient may undertake the activity immediately after the RE has documented its determination.” Here, the City documented its determination on February 26, 2019, and thus all draws that occurred after this time were in compliance with HUD environmental regulations. Notwithstanding that \$146,720.49 was appropriately drawn during this time frame, HUD seeks recovery of all funds, including the draws made in compliance with HUD environmental regulations.

In sum, the City properly documented the environmental review of the Curb Ramp Project and documented the environmental review of the Vista Village Project before the vast majority of funds were drawn.

B. RESPONSE TO REQUIRED REPAYMENT CORRECTIVE ACTION

While the City acknowledges that the environmental review documentation of the Vista Village Project was completed late, the above discussion demonstrates that (1) the City complied with all applicable HUD requirements for the Curb Ramp Project, and (2) the City properly determined that the Vista Village Project was exempt from NEPA, and no RROF-C was required. Further, there is no dispute that the City used the funds at issue in compliance with HUD objectives. For these reasons, we request that HUD reconsider a remedy that would require the repayment of over \$400,000 by the City. There is no basis for imposing this remedy for the Curb Ramp Project because the City complied with all applicable HUD regulations. With respect to the Village Project, this extreme remedy would impose a significant financial burden on the City and is grossly disproportionate to the nature of the deficiencies identified by HUD.

24 CFR §570.910 makes clear that HUD has broad discretion to select from a range of remedial actions to remedy identified performance deficiencies. The goal of the selected remedy should be to prevent a continuation of the performance deficiency, mitigate any adverse effects or consequences or prevent a recurrence of the deficiency. As set forth in §570.910(b), the range of potential actions include:

- (1) Issue a letter of warning advising the recipient of the deficiency and putting the recipient on notice that additional action will be taken if the deficiency is not corrected or is repeated;
- (2) Recommend, or request the recipient to submit, proposals for corrective actions, including the correction or removal of the causes of the deficiency, through such actions as:
 - (i) Preparing and following a schedule of actions for carrying out the affected CDBG activities, consisting of schedules, timetables and milestones necessary to implement the affected CDBG activities;
 - (ii) Establishing and following a management plan which assigns responsibilities for carrying out the actions identified in paragraph (b)(2)(i) of this section;
 - (iii) For entitlement and Insular Areas recipients, canceling or revising affected activities that are no longer feasible to implement due to the deficiency and re-programming funds from such affected activities to other eligible activities (pursuant to the citizen participation requirements in 24 CFR part 91); or

(iv) Other actions which will serve to prevent a continuation of the deficiency, mitigate (to the extent possible) the adverse effects or consequences of the deficiency, and prevent a recurrence of the deficiency;

(3) Advise the recipient that a certification will no longer be acceptable and that additional assurances will be required;

(4) Advise the recipient to suspend disbursement of funds for the deficient activity;

(5) Advise the recipient to reimburse its program account or letter of credit in any amounts improperly expended and reprogram the use of the funds in accordance with applicable requirements;

(6) Change the method of payment to the recipient from a letter of credit basis to a reimbursement basis.

The remedy selected by HUD is unnecessarily punitive and is not tailored to serve the purposes set forth in 24 CFR § 570.910. As explained in Section A and documented in Exhibit A, the City complied with its environmental requirements for the Curb Ramp Project and, except for an inadvertent oversight with the first draw from the Vista Village Project, complied with its environmental requirements for that Project as well. Further, the City's documentation clearly shows that both of the Projects were exempt from NEPA.

Moving forward, the City will implement the corrective actions identified in the Report intended to prevent a reoccurrence of its oversight in documenting its environmental requirements. The City's commitments include submission of documentation of practical steps to be taken to prevent any deficiency reoccurrence through the development of a comprehensive environmental review policy and procedures manual, along with all other corrective actions relating to occurrence prevention. Additionally, the City has retained a CDBG consultant, Michael Baker International, to provide a comprehensive range of services to the City, including to explicitly provide Environmental Assessments for CDBG and CDBG-CV programs when needed (although no Environmental Assessment was needed for either of these projects). With the steps outlined above, the City can confidently assure HUD that we will take all reasonable steps to ensure our compliance with environmental review requirements.

II. ADDITIONAL RESPONSES TO AUDIT FINDINGS

The remainder of this letter and associated outline serve as the official draft monitoring compliance plan requested by HUD as it relates to the Report and proposes the following responses and timelines in the draft monitoring and compliance plan below for HUD review and approval:

- *City must electronically submit the complete environmental review record and RROF to OEE for the next two environmental reviews conducted as either environmental assessment per §58.36 or categorically excluded per §58.35(a) subject to laws and authorities listed at §58.5 and not capable of converting to Exempt per §58.34(a)(12).*
 - The City will complete the environmental review record and RROF to OEE for the next two environmental reviews.

- *The City must submit to OEE assurances that this systemic deficiencies will not reoccur and to document the practical steps taken to prevent their reoccurrence. Further, the City must submit to OEE a final approved comprehensive environmental review policy and procedure for all HUD-funded projects. At a minimum, the policy and procedures must identify the city department/staff responsible for conducting reviews; coordination efforts with other city departments to identify projects; coordination and tracking efforts with project sponsors, subrecipients, and other entities that receive HUD program funds to ensure reviews are completed prior to obligating and disbursing funds; documentation requirements; retention and location of documents; on-going staff training; and management review/approval of environmental reviews. The submission must include an organizational chart and an environmental review process flow chart. In addition to policies, procedures, and training considerations, OEE requests the City include in the submission ways it will preserve knowledge of the environmental review process which can be shared with new staff during periods of transitions.*
 - This serves as the assurance required that the systemic deficiencies will not reoccur.
 - The City will document the practical steps taken to prevent their reoccurrence through the development of a comprehensive environmental review policy and procedures manual. The City will submit a final version of the manual to OEE for all HUD-funded projects within 150 days of the date of this letter. Submission will include all HUD requests cited. This effort will require research on existing manuals, outreach to local jurisdictions who have compliant policies and procedures manuals, and staff time to

write, review, and approve the City manual while continuing all current CDBG activities.

- *City must provide a plan describing the steps it will take to secure additional training to develop current staff environmental review capacity. This may include use of HUD's environmental review web resources on the HUD Exchange at <https://www.hudexchange.info/programs/environmental-review/> including, without limitation to, the Web-Based Instructional System for Environmental Review (WISER) at <https://www.hudexchange.info/trainings/wiser/>, the HUD Environmental Review Online System (HEROS) at <https://www.hudexchange.info/programs/environmental-review/heros/>, and HUD Region IX's environmental review virtual training covering Part 58. OEE recommends that staff responsible for completing environmental reviews attend Part 58 training at least every two years, but also take advantage of the recording of the past 3-day training session that occurred September 2020. OEE strongly encourages that all staff conducting environmental reviews use the WISER resource and complete all modules. If the City agrees, the City must send the completion certificates of the staff to the attention of Stanley W. Toal, Environmental Protection Specialist.*
 - The City's staff responsible for environmental reviews will complete the following training and reviews, and submit associated completion certificates within 120 days of the date of this letter:
 - All Web-Based Instructional System for Environmental Review (WISER) modules;
 - Review of HUD Environmental Review Online System (HEROS) informational website;
 - HUD Region IX's environmental review virtual training covering Part 58 and;
 - Watch recording of the Part 58 3-day training session that occurred September 2020.
 - Through the development of a comprehensive environmental review policy and procedure manual, as mentioned previously, the City will provide OEE assurance that internal protocol will be to have all staff responsible for environmental reviews attend and complete Part 58 training at least every two years.
- *City must submit to OEE contract language that complies with §58.22(d) and consistent with HUD Assistant Secretary for Community Planning and Development Mercedes Marquez's HUD memo guidance. The environmental review procedures described above shall specify that this language is incorporated into contracts and other agreement documents, when appropriate.*

- The City will submit contract language that complies with §58.22(d) and consistent with HUD Assistant Secretary for Community Planning and Development Mercedes Marquez's HUD memo guidance to OEE within 90 days of the date of this letter.
- *City must submit to OEE an assurance that it will utilize the HUD Environmental Review Online System (HEROS) to submit and manage all HUD environmental review records.*
 - The City has transitioned to and is currently utilizing HEROS to submit and manage all HUD environmental review records.
- *For IDIS Activity ID 119, the City must complete the procedures for making determinations on Floodplain Management under 24 CFR Part 55, Subpart C, specifically the decision-making process under §55.20, excepting public notification requirements associated with §55.20(b) and (g). The City must send the completed determination to the attention of Stanley W. Toal, Environmental Protection Specialist.*
 - For Activity 119, the City will complete the procedures for making determinations on Floodplain Management under 24 CFR Part 55, Subpart C, specifically the decision-making process under §55.20, excepting public notification requirements associated with §55.20(b) and (g), and submit the completed determination, and associated requirements, to Stanley W. Toal within 120 days of the date of this letter.
- *For IDIS Activity ID 185, the City must reevaluate the Explosive and Flammable Hazards determination in compliance with 24 CFR Part 51, Subpart C. The City must send the completed determination to the attention of Stanley W. Toal, Environmental Protection Specialist.*
 - For IDIS Activity ID 185, the City will reevaluate the Explosive and Flammable Hazards determination in compliance with 24 CFR Part 51, Subpart C, and will send the completed determination to the attention of Stanley W. Toal within 120 days of the date of this letter.

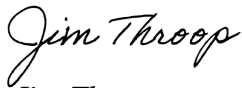
III. CONCLUSION

In summary, while the City accepts the Report's corrective actions intended to prevent future inadvertent failures to comply with environmental requirements, the corrective action of full repayment of all grant funds for both the Curb Ramp and Vista Village Projects is unwarranted, especially since the City documented its environmental

compliance in the Curb Ramp project and the oversight in the Vista Village Project was immediately remedied upon discovery with no adverse effects or consequences occurring due to the deficiency. Accordingly, the City requests HUD to reconsider the harsh corrective action of reimbursement because the other corrective actions more than adequately addresses the deficiencies. Thank you very much for your consideration of this request.

We appreciate your review and look forward to your response. Please feel free to contact me at 408-777-1402 or Kerri Heusler, Housing Manager at (408) 777-3251 if you have any further questions.

Sincerely,

A handwritten signature in cursive script that reads "Jim Throop".

Jim Throop
City Manager

Exhibit A



PROJECT NAME / DESCRIPTION: ADA CURB RETROFIT (2016-17). *CDBG funds in the amount of \$224,184 have been allocated to retrofit approximately 35 intersections City-wide, in conformance with ADA requirements.*

Level of Environmental Review Determination: Categorically Excluded subject to statutes per 58.35(a)(1)(2)

(Exempt per 24 CFR 58.34, Categorically excluded not subject to statutes per § 58.35(b), Categorically excluded subject to statutes per § 58.35(a), Environmental Assessment per § 58.36, or EIS per 40 CFR 1500)

STATUTES and REGULATIONS listed at 24 CFR 58.6

FLOOD DISASTER PROTECTION ACT

1. Does the project involve acquisition, construction or rehabilitation of structures located in a FEMA-identified Special Flood Hazard?

No; Source Document: Project does not involve acquisition, construction or rehabilitation of any structure located in a FEMA-identified Special Flood Hazard. City participates in the National Insurance Program (This factor is completed).

Yes; Source Document: _____ (Proceed).

2. Is the community participating in the National Insurance Program (or has less than one year passed since FEMA notification of Special Flood Hazards)?

Yes (Flood Insurance under the National Flood Insurance Program must be obtained and maintained for the economic life of the project, in the amount of the total project cost. A copy of the flood insurance policy declaration must be kept on file).

No (Federal assistance may not be used in the Special Flood Hazard Area).

COASTAL BARRIERS RESOURCES ACT

1. Is the project located in a coastal barrier resource area?

No; Cupertino is located outside of the Coastal Management Zone (This element is completed).

Yes (Federal assistance may not be used in such an area).

AIRPORT RUNWAY CLEAR ZONES AND CLEAR ZONES DISCLOSURES

1. Does the project involve the sale or acquisition of existing property within a Civil Airport's Runway Clear Zone or a Military Installation's Clear Zone?

No; Project complies with 24 CFR 51.303(a)(3).

Yes; **Disclosure statement must be provided** to buyer and a copy of the signed disclosure must be maintained in the RER.

C.J. Valenzuela May 1, 2016

Preparer Signature / Name /Date

Aarti Shrivastava May 1, 2016

Responsible Entity Official Signature / Name / Date

