



U.S. Department of Housing and Urban Development
San Francisco Regional Office – Region IX
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July 5, 2022

Ms. Kerri Heusler, Housing Manager
City of Cupertino
Cupertino City Hall
10300 Torre Avenue
Cupertino, CA 95014-3202

SENT VIA EMAIL to KerriH@cupertino.org

SUBJECT: Results of Remote Environmental Monitoring, City of Cupertino

Dear Ms. Heusler:

The US Department of Housing and Urban Development conducted an in-depth environmental monitoring of the City of Cupertino's Community Development Block Grant (CDBG) Program from March 1 to 11, 2021. By letter of February 22, 2022, HUD transmitted a report documenting the results of the monitoring which included three findings. The City of Cupertino (City) responded by letter of March 22, 2022, with proposals for corrective action and supplemental documentation. This letter represents HUD's response to the City's proposed corrective actions.

*Finding No. 1: a) City obligated and expended CDBG funds on a project prior to HUD's approval of the Request for Release of Funds and Certification (RROF-C) in violation of Section 104 of the Housing and Community Development Act of 1974 [42 U.S.C. §5304(g)(2)].
b) City and/or subrecipient obligated and expended CDBG and/or non-HUD funds on a project prior to City having documented its environmental compliance and/or determination of exemption in violation of the provisions in §58.22 or §58.34(b).*

Finding No. 1 is associated with eight corrective actions. The following summarizes the status of the required corrective actions for this finding:

- *Section 104(g)(2) of the Housing and Community Development Act of 1974 (42 U.S.C. 5304(g)(2)) provides that the Secretary of HUD may not release funds for a project unless the recipient has submitted a RROF-C prior to any commitment of funds to the project. HUD's Office of General Counsel has interpreted the word "funds" in the Act to mean HUD funds. Due to the fact that the City obligated and expended CDBG program funds prior to submission of a RROF-C, a statutory violation has occurred of Section 104(g)(2) of the Housing and Community Development Act of 1974 (42 U.S.C. 5304(g)(2)), and neither the City nor any participant in the activity can use any HUD funding subject to the environmental review requirements of the statute that was violated for the same project. Therefore, IDIS Activity IDs 121 and 137 are prohibited from using HUD program funds associated with the Housing and Community Development Act of 1974.*
- *Repayment to the line of credit: City must repay the funds disbursed from non-Federal funds to the CDBG program account for IDIS Activity IDs 121 and 137. The City must provide OEE an assurance that it will not provide additional CDBG program funds to any of these activities, and any*

commitments must be de-obligated and the unexpended CDBG fund balances, if any, for the projects must be reprogrammed.

- *It is possible for the City or any participant in the development process to use HUD funding that is subject to a different statute's environmental review requirements, but only if the recipient first obtains a waiver of §58.22(a) for the regulatory violation. If the City determines that IDIS Activity IDs 121 and 137 might be eligible for HUD funding under a different statute, the City will notify HUD so that it may share guidance for requesting a waiver of the regulatory violation. HUD will only grant such a waiver where there is good cause, the violation was inadvertent, and no unmitigated adverse environmental impact resulted or will result. Note that approving HUD assistance to a project that incurred a §58.22(a) violation is an extraordinary action; there is no guarantee that HUD will approve the request to provide assistance to the project.*
 - *The City's response to Finding No. 1 corrective actions bullets 1, 2, and 3 is provided on pages 2 through 5 of its March 22, 2022, letter, specifically paragraphs 1 and 2 of page 2 and sections I.A.i and I.A.ii of pages 2 through 5.*
 - *HUD's response to Finding No. 1 corrective actions bullets 1, 2, and 3 is as follows:*
 - *Regarding Finding No. 1 as it pertains to IDIS Activity ID 121-2016/2/City-Wide Curb Ramp Installation: The City failed to conduct the environmental review, disseminate and/or publish the Notice of Intent to Request Release of Funds (NOI/RROF), and submit to HUD the RROF-C. Consequently, the City failed to comply with NEPA, and the related authorities listed in HUD's implementing regulations at Part 58, as well as failed to comply with Part 58 Subpart H – Release of Funds for Particular Projects, prior to obligating and expending CDBG funds.*

Exhibit A of the City's March 22, 2022, letter is the City's checklist for compliance with §58.6 *Other requirements*, which was signed by Aarti Shrivastava on May 1, 2016. The preparer cited under the Level of Environmental Review Determination: *Categorically Excluded subject to statues per 58.35(a)(1)(2)*. To date, the City has not been able to provide to HUD its compliance or conformance determinations for each §58.5 NEPA-related federal law and authority or its determination that this categorically excluded activity was permissible to convert to Exempt per §58.34(a)(12). As such, HUD cannot concur with the following City's opinions: • *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.* • *the City properly documented the environmental review of the Curb Ramp Project and* • *the City's documentation clearly shows that both of the Projects were exempt from NEPA.*

- By providing HUD the City's checklist for compliance with §58.6 *Other requirements*, the condition is more consistent with noncompliance of §58.38 *Environmental review record (a) ERR Documents*. §58.38(a) states: *The ERR shall contain all the environmental review documents, public notices and written determinations or environmental findings required by this part as evidence of review, decision-making and actions pertaining to a particular project of a recipient.* The revised finding for IDIS Activity ID 121, therefore, is the following: complete Environmental Review Records for a project were not maintained by the City. Please see Criteria 24 CFR Part 58, §58.38 *Environmental review record* and the first two paragraphs of Effect under Finding No. 2 for a full explanation. No additional corrective actions are required. The corrective actions stated under the first three bullets of Finding No. 1 are no longer applicable to IDIS Activity ID 121.
- *Regarding Finding No. 1 as it pertains to IDIS Activity ID 137-2018/5/Vista Village Rehabilitation: The Agreement Between West Valley Community Services and Paramount Construction for Construction Services for Vista Village Rehabilitation Project [see Paragraph 7 Labor Laws and Appendix C therein], executed 09/11/18, and voucher #6226913, submitted 01/17/19, for the reimbursement of the cost of these services both occurred before completion of the Categorically Excluded under §58.35(a), subject to the*

laws and authorities at §58.5 (CEST), and determination of the conversion to Exempt per §58.34(a)(12).

HUD has determined that the Corrective Actions as stated in the Monitoring Report released on February 22, 2022, were appropriate for the commission of a Statutory Violation of Section 104 of the Housing and Community Development Act of 1974 [42 U.S.C. §5304(g)(2)], and a Regulatory Violation of the provisions in §58.22. The corrective actions described under the first three bullets of Finding No. 1 specific to IDIS Activity ID 137 are still applicable.

- *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's response is that it will complete the environmental review record and RROF to OEE for the next two environmental reviews.*
 - *HUD will clear this corrective action upon receipt of the two requested environmental review records.*
- *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 City of Cupertino, California 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.*
 - *The City's response is as follows:*
 - *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.*
 - *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.*

- HUD acknowledges the City's commitments. HUD will clear this corrective action upon receipt of an acceptable policy and procedure manual.
- *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 response is as follows:
 - *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.*
 - HUD will clear the corrective action upon receipt of training certificates and the aforementioned policy and procedure manual.
- *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's response is that it 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.
 - HUD will clear the corrective action upon receipt of the acceptable contract language documentation.
- *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's response is that it has transitioned to and is currently utilizing HEROS to submit and manage all HUD environmental review records.
 - HUD's response is as follows:
 - *The City has recently experienced resignation of its staff member who was being trained to conduct environmental reviews for HUD-assisted projects and in the use of HEROS. HUD requests that the City maintains its commitment to deliver HEROS training for new staff members that will be conducting environmental reviews for HUD-assisted projects. HUD considers this corrective action cleared and appreciates the City's action in using HEROS.*

Finding No. 2: City failed to sufficiently characterize impacts and determine whether any circumstances exist that would require formal compliance or mitigation. A corollary to Finding No. 1.

Finding No. 2 is associated with four corrective actions. The following summarizes the status of the required corrective actions for this finding:

- *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. The City must include in its determination, without limitation to, the following assessments: - Would occupants of this structure be sufficiently mobile and have available transport capability to avoid loss of life and injury given the flood warning lead times available? - Would emergency services functions be delayed or unavailable as a result of the location of the action? - Are there routes to and from the structure that would be inaccessible during a flood and hinder evacuation? - Would the location of the structure result in unacceptable hazards to human safety, health, and welfare of the occupants? - Is the Emergency Action Plan (Version Date 01.2014) which was submitted to the City by the project sponsor acceptable to the City? - Does this action involve a significant financial investment that would be either extremely expensive or extremely time consuming to replace were it to be damaged by flood waters?*
 - The City's response is as follows:
 - *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.*
 - HUD will clear the corrective action upon receipt of the acceptable decision-making process documentation in compliance with 24 CFR Part 55 for IDIS Activity 119.
- *HUD retains the authority to require additional corrective action to remediate adverse effects or otherwise remedy the City's noncompliance based on the results of the City completing the decision-making process for IDIS Activity ID 119.*
- *As stated under Required Corrective Action Finding No. 1, the City must submit to OEE a final approved comprehensive environmental review policy and procedures for all HUD funded projects. The City must formally adopt management oversight measures to be taken to avoid recurrence of these deficiencies. The measures must describe the internal procedures and controls that will be implemented to ensure that the responsibilities described at §58.22 and §58.34 through §58.36 are upheld. The City must submit to OEE its procedures and management oversight controls for our review and comment.*
 - The City's response was provided in Finding No. 1 corrective action bullet 5 (above).
 - HUD's response was provided in Finding No. 1 corrective action bullet 5 (above).
- *All City staff that performs environmental reviews must take the WISER learning module Water Elements at: <https://www.hudexchange.info/trainings/wiser/>. The City must send the completion certificates to the attention of Stanley Toal, Environmental Protection Specialist.*
 - The City's response was provided in Finding No. 1 corrective action bullet 6 (above).
 - HUD's response was provided in Finding No. 1 corrective action bullet 6 (above).

Finding No. 3: *ERRs for several projects undertaken by the City were incomplete. City failed to adequately document its compliance with Federal environmental laws and authorities under 24 CFR §58.5 and §58.6. Further, several ERRs state an incorrect standard used in the compliance determination.*

- *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. City of Cupertino, California

- The City's response is as follows:
 - *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.*
- HUD will clear the corrective action upon receipt of the acceptable reevaluation of 24 CFR Part 51, Subpart C, for IDIS Activity ID 185.
- *HUD retains the authority to require additional corrective action to remediate adverse effects or otherwise remedy the City's noncompliance based on the results of the City completing the Explosive and Flammable Hazards determination for IDIS Activity ID 185.*
- *As stated under Required Corrective Action Finding No. 1, the City must submit to OEE a final approved comprehensive environmental review policy and procedures for all HUD funded projects. The City must formally adopt management oversight measures to be taken to avoid recurrence of these deficiencies. The measures must describe the internal procedures and controls that will be implemented to ensure that the responsibilities described at §58.34 through §58.36 are upheld. The City must submit to OEE its procedures and management oversight controls for our review and comment.*
 - The City's response was provided in Finding No. 1 corrective action bullet 5 (above).
 - HUD's response was provided in Finding No. 1 corrective action bullet 5 (above).
- *City must provide a plan describing the steps it will take to secure additional training to develop 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 response was provided in Finding No. 1 corrective action bullet 6 (above).
 - HUD's response was provided in Finding No. 1 corrective action bullet 6 (above).

HUD thanks you for your detailed responses to its requests for documentation and for ensuring that the City's projects are sustainable and free from adverse effects that could affect the health and safety of people and the environment. When the aforementioned documents are available, please email them to Stan Toal, HUD Environmental Specialist, at Stanley.W.Toal@HUD.gov. If you have any questions or want to discuss the information in this letter in further detail, please contact Mr. Toal at the email address above or (415) 489-6668.

Sincerely,

G. Morgan Griffin
Regional Environmental Officer