

June 18, 2009

Mayor Reed  
Mr. Richard Doyle  
San Jose City Hall  
200 East Santa Clara Street  
San Jose, CA 95113

**RE: North of Forest Neighborhood, Traffic Impact Policy Violation, and the Forest Ave (west)/Winchester Blvd. Intersection**

To Mayor Reed and Mr. Richard Doyle,

I realize it is not very green to have all these pages printed out, but I feel the importance of the issues and volumes of work and effort put forth warrant it.

On September 10, 2008 at the San Jose Rules Committee for Open Government, Mr. Richard Doyle told the North of Forest neighbors that Ms. Katy Allen, Director of Public Works, had sole and unchallengeable discretion on the decision to remove a traffic light at Forest Ave. (west) and Winchester Blvd., and the only recourse to a decision made by her was to take her to California's Superior Court and have a judge hear the issue. Her actions not only ignore the concerns of North of Forest residents, it also violates San Jose's Transportation Impact Policy attached to Resolution No. 72765.1. Numerous provisions of this Policy raise significant issues for the proposed removal of the signal. Of particular, but not exclusive, significance is section II. B. 3 on Unacceptable Impacts of Mitigation. It reads: impacts that would be considered "unacceptable" include "encouraging substantial neighborhood cut-through traffic creating unsafe pedestrian and/or automobile operating conditions." This is precisely the condition that would be created on Fernwood Drive, the street directly north of Forest Ave. that would be utilized in place of Forest Ave. when access is removed.

While there are many other issues with her decision, this is a clear violation of San Jose policy and should not be allowed. Additionally, many violations of process and procedure have occurred and are listed below. These include, but are not limited to: Not following the public statements in an EIR, ignoring public comment, inability to substantiate decisions that conflict with public statements and direction, misleading council members and city attorney, misleading the public, inability to justify actions, not answering direct questions, and others. Many of these items are listed below. The actions of Ms. Allen's department have caused great stress and frustration in the North of Forest neighborhood and other bordering neighborhoods. The public feels betrayed. The District 6 Council Member, the public, and the San Jose residents read the letter Mr. Horwedel wrote on April 21, 2006 and believed the City of San Jose was

protecting their interests. Ms. Allen in turn gutted it with no apparent basis or documentation for her action.

This letter is to ask that you intervene based on legal obligation and to stop her actions. The Department of Public Works committed San Jose to certain actions back in April of 2006 and the public expects those actions to be carried out. However, Ms. Allen feels no need to honor those obligations and cannot document how her department arrived at their conclusion to remove the traffic light after her department stated they would not do so before the residents and the District 6 Council Member “concurred” with it (neither of which happened). In addition to betraying the public, she is now violating San Jose policy and needs to be stopped.

### Background

My name is Kirk Vartan and I have been involved in opposing the proposed sale and proposed development of the property located at 90 N Winchester Blvd. in Santa Clara, CA, formerly the BAREC (Bay Area Research and Extension Center) site, known as the Santa Clara Gardens Development. While many residents have been involved for over a decade, I have only been involved for the past six years or so. In my time spent with this site, there have been many issues with legal process, public procedures, and frankly illegal actions. The issues mostly originate with the City of Santa Clara and its Mayor and Council members, but the State of California was also very much a willing participant. The City of San Jose, while not in direct ownership of any land or zoning, stayed on the sidelines most of the time. However, there is one area where the City of San Jose has complete and unquestioned ownership: public right-of-way access on Winchester Blvd. and the intersections at Forest Ave and Winchester Blvd. (there are two: Forest Ave (east) behind Westfield Valley Fair and Forest Ave. (west) entering the North of Forest neighborhood).

### The Public Works Process

The current Director of Public Works, Ms. Allen, has signed and authorized a traffic signal modification that violates the City of San Jose’s Traffic Impact Policy. By allowing the removal of the traffic signal at Forest Ave (west) and Winchester Blvd., Ms. Allen is breaking the City of San Jose's own policy (section II – City Traffic Impact Policy). We have tried multiple times to work with the City of San Jose's Department of Public Works to explain the issues and problems with the current design. Alternatives exist. On advice of San Jose’s City Attorney, the neighborhood invested in an attorney and discovered that the City's own Public Works Department is violating the City's laws. We are now bringing this up to you both Mr. Doyle and Mayor Reed, so you can see the problem that exists in our City and to help fix it. We have had many correspondences with the Department of Public Works (Exhibit A and E), have done multiple Public Records Act requests (Exhibits B-D), met with Ms. Allen directly, and even proposed a solution that the neighborhood would agree to (Exhibit F). The Director of Public Works has not been an advocate to the neighborhood nor has

she helped to facilitate any meaningful solution; her alliances lie elsewhere. The contents of this letter will help to document many of the efforts we have made and the deaf ears they fell on.

Throughout the process, the Environmental Impact Report (EIR) iterations confirmed by all parties that the City of San Jose had jurisdiction over the corridor on Winchester Blvd. and the intersections. Specifically, when the entrance of the proposed development for Santa Clara Gardens was identified at Winchester Blvd. and Forest Ave (east), the City of San Jose clearly stated that they could not support the two design options at that time. Acting Director Joseph Horwedel of the Department of Public Works for San Jose stated in a letter to Santa Clara for inclusion in the Santa Clara Gardens EIR (Exhibit G) “both [options for an entrance to the development] present concerns” and used terms like San Jose may “ultimately reject the proposed improvement.” San Jose was not prepared to approve either design.

Mr. Horwedel stated the first design had safety issues. He stated the second design, while not having safety issues, had quality of life issues for the San Jose residents west of Winchester Blvd. since it removed the traffic light at Forest Ave (west) and Winchester Blvd., affecting access and other quality of life issues. It restricted access to Winchester Blvd. and the neighborhood. Mr. Horwedel stated the Santa Clara project benefited Santa Clara at “the expense of City of San Jose resident’s existing access to Winchester Blvd. at Forest Ave.” Mr. Horwedel fortifies his message further stating: “the reports should analyze other design options, should the affected San Jose neighborhood and City Council District 6 Office not concur with the modification...” He was not prepared to approve the second design without the residents of the neighborhood west of Winchester (the North of Forest neighborhood) and the council representative agreeing to the design. He even suggested the developer should “analyze other design options” such as moving the main entrance outside of the traffic light at Forest Ave (east) and Winchester. This statement has never changed nor has any public outreach occurred.

The neighborhood wrote letters in the Draft EIR and the Revised Draft EIR which were all included in the Final EIR. The letters state opposition to the development and the modification to the traffic light at Forest Ave (west) and Winchester Blvd. At the one public meeting on September 26, 2008 sponsored by the developer where San Jose traffic consultants were present, overwhelming opposition to the removal of this light was expressed (audio of this meeting is available).

The neighborhood and then Councilmember Yeager never showed support for the traffic light modification at Forest Ave (west) and Winchester Blvd.; quite the opposite existed.

### The Change in Status is Revealed

In February 2008, when it was shared that the idea of the modification to the Forest Ave (west) and Winchester Blvd. light was all but approved, residents started making phone calls to the City of San Jose Department of Public Works. Timm Borden was the initial person to provide details, or lack thereof. As you can see from the emails attached (Exhibit A), Mr. Borden does not have a clear understanding of the traffic light issue, nor does he have any idea how the design was approved. In fact, the information that Mr. Borden shared with the residents is incorrect and misleading. He produced a diagram that Westfield drew and was using that as the reason for the approval. He contradicts himself in his emails and does not provide answers to the questions posed. He ultimately stops responding to emails and communication even though complete answers were not given. Mr. Borden's response was "I currently don't have much time to devote to this. I feel that I have answered all of your questions." If you look back at the history of the Westfield development plan and the BAREC development plan, you will find they are not related at all and are independent projects with no dependencies on each other. The traffic light modifications at Forest Ave (west) and Winchester Blvd. are specifically listed as an improvement to be done by the BAREC development.

When the residents realized that there may have been confusion about the traffic light modifications, Timm Borden was contacted (February 2008). As listed above, Mr. Borden could not document how the City of San Jose's Department of Public Works changed its position on the Forest Ave (west)/Winchester Blvd. modifications. Many discussions were made on the phone and via email (Exhibit A) to determine how the position had changed. After a few months of getting less than acceptable information, the neighborhood initiated a Public Records Act request in June 2008. The results (Exhibit B) clearly show that there was no discussion with the public, there were no meetings with the residents, there was no internal documentation, there was no evidence of any kind that would document how the Department of Public Works changed its mind based on the facts at hand. Please note the timing of all of this. The decision to modify the light (removing the light) had been made **\*before\*** the February 2008 special election, not after.

All these questions and Public Records Act requests were occurring after the election in February 2008, but only because facts about the City of San Jose's change in position presented themselves on February 1, 2008 in an article written by the Mercury News Editorial section. The article stated the facts about the driveway and intersection were wrong and I was deliberately trying to deceive them. It is unfortunate that having the truth and integrity on your side is not enough to make a case when it comes to politics and big business. Upon questioning the writer, I discovered that San Jose had changed its position without warning or notice to the public. I then went to discover how and why.

The decision to remove the light was made before the project and zoning changes had been ratified by the voters in Santa Clara. Even so, the Final EIR clearly states that the City of San Jose has jurisdiction over the intersection and as a result, the design may not be feasible (Exhibit G). Here is a brief excerpt of the response from the writers of the EIR to San Jose's comments:

Page 4-11, response 3-2

"The City of San Jose will have final approval authority for the improvement."

Page 4-11, response 3-3

"The DEIR and Recirculated DEIR concluded that this improvement would be under the City of San Jose's control and it is unknown whether this improvement would be implemented."

Research and Meetings

Ultimately, three Public Records Act requests were made, each discovering that nothing existed to justify the decisions the current Director of Public Works, Ms. Allen, made. In an effort to stop this injustice to the neighborhood and residents of San Jose, the neighborhood contacted Christine Shippey, San Jose's assistant City Manager. When the issues were described to her, she offered to liaise and setup a meeting with the neighborhood and Ms. Allen. Two members of the affected neighborhood met with both Ms. Allen and Ms. Shippey on July 24, 2008. Besides many of the exhibits already presented, a copy of the petitions we had signed that shows opposition to the removal of the light were also included (Exhibit H) as well as prior comments to the City of San Jose showing the neighborhood did not want the signal removed (Exhibit I). The information the neighborhood presented to Ms. Allen was as follows:

- Signed petitions from a vast majority of the residents of the affected neighborhood stating they did not support removal of the traffic light at Forest Ave (west) and Winchester Blvd. showing consensus in the neighborhood
- Examples that the draft Letter of Understanding (LOU) with the City of Santa Clara on this issue leaves out an ingress/egress point, making the document incomplete, something that should invalidate it
- Details of the EIR regarding San Jose's statements and response. It stated that San Jose was not prepared to approve the designs without neighborhood and council concurrence with the modifications. By presenting the signatures, it showed the neighborhood was not in concurrence.
- San Jose's lack of documentation to show how a change in decision came about

The meeting lasted approximately 90 minutes and three action items were created for Ms. Allen to follow-up on. Her follow-through on these items was not complete and simply continued the pattern of baseless decisions that were already made. One of the main points she took away was an additional ingress/egress driveway. She did not believe that it existed because it was not shown on the documents she was reviewing and preparing to sign (Exhibit J). There was no additional substantiation or explanation in her messages. This information exchange happened **\*before\*** the LOU was signed. So, Ms. Allen knew the many current issues before she committed her signature to the LOU. The neighborhood pleaded with her not to sign the LOU before the questions at hand were resolved, but she simply said she would forward over a copy of the Final LOU once it was signed by her.

#### Trying to Expose and Challenge Ms. Allen's Actions – Rules Committee

Getting ever more frustrated, we turned to the city government for help. The neighborhood was able to get an item on the Rules Committee agenda so that this issue could be brought before the City Council. The first meeting was on August 20, 2008. Even when first called before the Rules Committee on August 20, 2008, she does not give complete information and further distorts the facts in the matter. Specifically, Ms. Allen in her memo dated August 15, 2008: BAREC DEVELOPMENT (Exhibit K), she stated “the council member at the time did not express opposition to the EIR,” and therefore proceeded to review the design.

The council member at the time was Mr. Ken Yeager. As you can see in an email from Ms. Megan Doyle, his Policy Aide, Mr. Yeager never stated approval of the design suggestions, but saw the existing issues that the City's Staff brought up (i.e., Mr. Horwedel's letter) as a sufficient list of concerns about the project and the intersection (Exhibit L). Ms. Allen also then attempts to say that the Council Member did not want to challenge the EIR. No one is suggesting that challenging the EIR was necessary, yet Ms. Allen feels it is necessary to bring this up all the time and use this as a defense for her actions. The Final EIR incorporates Mr. Horwedel's letter and the response shows that San Jose may reject the proposed modifications. There is nothing to challenge. Had they stated San Jose had to approve the traffic signal modifications, then San Jose would have had a reason to challenge the EIR. Since the EIR was accurate in San Jose's authority and potential action, there was nothing to challenge. This is a recurring theme with Ms. Allen.

Ms. Allen continues to create confusion; however, the statement Mr. Horwedel made in his letter dated April 21, 2006 was very clear. He called for “concurrence” for the modification by the council person and the affected residents. Mirriam-Webster defines concurrence as: “agreement in opinion or design” not the absence of opposition. In this example, she is not responding to the issue. Additionally, Ms. Allen does not address the second point Mr. Horwedel makes with regard to concurrence of the affected residents. Ms. Allen does not even mention it, leaving out a key condition to the approval of the

design from the Department of Public Works. Ms. Allen then justifies the lack of additional designs, as requested by her own department, due to the flawed conclusion she drew from her initial statement.

The question I would want answered is: How can you be sure you have the best alternative design if no other designs were presented? Mr. Horwedel specifically stated he had concerns with the two designs presented, so why would Ms. Allen decide she selected the best alternative and not want to see any others? This is a clear example of Ms. Allen misleading the City Attorney, the City Manager, the Mayor, and the Rules Committee.

### Rules Committee – Round 2

The Mayor deferred the item to the City Manager and the item was heard again on September 10, 2008 (Exhibit M, only relevant pages kept). During this meeting, Ms. Allen made a number of statements that were false and misleading. The biggest frustration was hearing how she convinced the City Attorney that the City needed to make these modifications out of procedure. Further, the City Attorney advised the Rules Committee that the City Council had no influence over this matter and it would be a waste of time to have it go before the City Council. Additionally, the City Attorney stated that this decision rested completely with the Director of Public Works, Ms. Allen. There was no oversight committee or group that could challenge this and the only option for the residents was to take Ms. Allen to the Superior Court so a judge would hear the case.

About 12 neighbors were present and spoke at this meeting, taking time out of their day to share their disapproval of Ms. Allen's actions and of Public Works. While I had a prepared statement (Exhibit N), I did not have an opportunity to read it as I had to address the blatant false statements Ms. Allen made during her five minute statement to the Rules Committee. The packet submitted to the Rules Committee for the meeting by Ms. Allen did not include a complete copy of Mr. Horwedel's letter, omitting key information about the requirements the developer should follow, another example of Ms. Allen's tendency to leave out information to bolster her statements. As you can see on pages 8-9, Ms. Allen does not include page 2 of the letter from Mr. Horwedel (Exhibit O). You can see the entire letter in Exhibit G. The needs of the residents in San Jose were not addressed and Ms. Allen continues to ignore the issues at hand.

### Neighbors Suggest a Solution

As an additional step in trying to create a solution that works for the residents in San Jose, the neighborhood had two meetings and ultimately agreed on a solution that would satisfy the neighbors and work for the developers. This is something the neighborhood did not have to do and something that was asked of the developer by the City of San Jose during the EIR process but was never done.

Two neighbors met with Councilmember Oliverio's office to share this solution on February 12, 2009. The neighborhood presented a solution that the Councilmember liked and was in support of (Exhibit P). The Councilmember said he would take this to the City and ask them to figure out how this could work. After almost two months of not hearing from the City, a letter from Ms. Allen was sent to me on May 5, 2009 (Exhibit Q). The letter basically showed very little attention on the part of Ms. Allen and her team to explore the alternative presented, forwarding over an email from Westfield and a letter from SummerHill Homes. Of course it is easier to simply move forward with removing the traffic light, but that does not help the neighborhood nor does it satisfy the EIR letter.

The suggested solution impacts the Santa Clara development the most; it also affects the Valley Fair expansion. Nevertheless, no development work on either project has begun. Drawings and reviews would have to be done, but no construction would have to be replaced. The biggest opponents are SummerHill Homes, the same people that did not put any effort into resolving the issue when it first surfaced back in 2006. They chose not to make any effort to create another design. The EIR consultant even acknowledged that San Jose had the final say and it could be rejected stating "...it is unknown whether this improvement would be implemented." This is all part of the Final EIR (Exhibit G).

### Conclusion

The developers do not want to make any changes. Specifically, SummerHill Homes does not want any change to the Santa Clara Gardens design, the project most impacted. However, a workable solution does exist. It exists as a solution that meets their needs as a development wanting a signalized light for the entrance to the property and it meets the needs of the San Jose residents to keep the light at Forest Ave (west) and Winchester Blvd. The fact that this solution was not investigated until now is not the fault of the neighborhood, but rather the developer's unwillingness to explore other alternatives when San Jose's Department of Public Works suggested it back on April 21, 2006, over three years ago.

Work has not been started on any of these projects. The LOU between the City of San Jose and the City of Santa Clara has incomplete information, information known to San Jose at the time of signing, and should be considered invalid. San Jose can work with the developers to create a solution that works with the neighborhood since the residents west of Winchester are the ones that are affected. On top of all that, the removal of the traffic light violates San Jose's own Traffic Impact Policy when "an improvement has an unacceptable secondary impact" such as "encouraging substantial neighborhood cut-through traffic" or "creating unsafe pedestrian and/or automobile operating conditions." The first if not both of these conditions would be created on Fernwood Drive and Forest Ave (west) should the traffic light at Forest Ave (west) and Winchester Blvd. be removed. There are also other very relevant items such as livability (as listed by Mr. Horwedel) that would also be affected, but these two items are very concrete

and measurable. And the fact that Acting Direct Horwedel identified these concerns in his letter to Santa Clara on April 21, 2006 shows that he felt the same way.

Please put a stop to Ms. Allen's reckless actions in the Department of Public Works. She has led San Jose down a path that does not respect nor represent the residents of San Jose and its taxpayers. Please take whatever action you can to neutralize her and her actions to remove the traffic light at Forest Ave (west) and Winchester Blvd. The residents don't want it removed. The Councilmembers (both past and present) do not want it removed. Only the developers and Ms. Allen want it removed.

Please stand up for your constituents.

Sincerely,

Kirk Vartan, Acting North of Forest representative  
598 N Henry Ave  
San Jose, CA 95117  
kirk@NorthOfForest.org  
cel: 408.666.6661

cc:

Councilmembers 1-10  
Katy Allen, Director of Public Works, San Jose  
Debra Figone, City Manager, San Jose  
Christine Shippey, Assistant City Manager, San Jose  
Scot Vallee, Westfield  
Katia Kamangar, SummerHill Homes