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October 15, 2018

**Via Email and Overnight Mail**

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City of San Jose  
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San Jose, CA 95113  
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**Re: Comments on the Draft Environmental Impact Report for the  
4300 Stevens Creek Boulevard Mixed-Use Project by Fortbay,  
LLC (PDC#16-036 PD17-014, PT17-23)**

Dear Mr. Keyon:

On behalf of **San Jose Residents for Responsible Development**, we submit these comments on the Draft Environmental Impact Report ("DEIR") prepared by the City of San Jose ("City") for the 4300 Stevens Creek Boulevard Mixed-Use Project ("Project").

The 10-acre Project site is located on the south side of Stevens Creek Boulevard between Palace Drive and Kiely Boulevard, and is bisected by Lopina Way.<sup>1</sup> The site is currently developed with a group of three two-story and one one-story office buildings, a one-story commercial building, and surface parking lots. The Project site is accessed by a driveway on Stevens Creek Boulevard, two driveways on Albany Drive, three driveways on the west side of Lopina Way, and three driveways on the east side of Lopina Way.

The proposed Project includes a Planning Development Permit that would allow demolition of the existing buildings and construction of a six-story office/commercial building, a six level parking garage, and two eight-story

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<sup>1</sup> Draft Environmental Impact Report, File No. PDC16-036, PD17-014, PT17-23, 4300 Stevens Creek Boulevard Mixed-Use Project, August, 2018 (hereinafter, "DEIR"), p. 3.  
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residential buildings, one with up to 15,000 square feet of ground floor retail.<sup>2</sup> The residential buildings would have a combined total of 582 residential units and would be located on the west side of the project site. In addition, the Project proposes to vacate the existing Lopina Way and relocate it to the eastern property line. The existing Lopina Way would be replaced with a landscaped promenade.<sup>3</sup>

As these comments demonstrate, the DEIR fails to comply with the requirements of CEQA and may not be used as the basis for approving the Project. It overwhelmingly fails to perform its function as an informational document that is meant “to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment” and “to list ways in which the significant effects of such a project might be minimized.”<sup>4</sup>

Substantial evidence shows that the Project is likely to cause significant adverse impacts that are not adequately analyzed and mitigated in the DEIR. Specifically, the DEIR is legally defective due to its failure to adequately identify, evaluate and mitigate the following impacts:

- Failure to adequately disclose, analyze, and mitigate significant air quality and health risk impacts;
- Failure to adequately mitigate significant greenhouse gas emissions;
- Failure to adequately disclose, analyze, and mitigate significant impacts related to hazardous site conditions;
- Failure to adequately disclose, analyze, and mitigate significant traffic impacts;
- Failure to adequately disclose, analyze, and mitigate significant vibration impacts;

The DEIR must be withdrawn and revised to address these errors and deficiencies. Because of the substantial omissions in the information disclosed in the DEIR, revisions that are necessary to comply with CEQA will be, by definition, significant. Therefore, a revised DEIR will need to be circulated for public comment.

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391. 4343-008acp

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We prepared our comments with the assistance of hazards expert James J.J. Clark of Clark & Associates<sup>5</sup> and air quality experts Mr. Matthew Hagemann and Ms. Hadley Nolan of SWAPE.<sup>6</sup> Their comments are attached to this letter along with each expert's curriculum vitae. The City must respond to these expert comments separately and individually.

## I. INTEREST OF THE COMMENTERS

San Jose Residents for Responsible Development ("San Jose Residents") is an unincorporated association of individuals and labor unions that may be adversely affected by the potential public and worker health and safety hazards, and environmental and public service impacts of the Project. The association includes local residents as well as International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104 and Sprinkler Fitters Local 483, their members, their families and other individuals that live and/or work in the City of San Jose and Santa Clara County.

Individual members of San Jose Residents and the affiliated unions live, work, recreate and raise their families in the City of San Jose and Santa Clara County. They would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist onsite. San Jose Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there. Finally, San Jose Residents' members are concerned about projects that present environmental and land use impacts without providing countervailing economic and community benefits.

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<sup>5</sup> See Letter from James J.J. Clark, Clark & Associates, to Laura del Castillo re: Comment Letter on 4300 Stevens Creek Boulevard Mixed-Use Project Draft Environmental Impact Report, October 12, 2018 (hereinafter, "Clark Comments"), **Attachment A**.

<sup>6</sup> See Letter from SWAPE to Laura del Castillo re Comments on the 4300 Stevens Creek Boulevard Mixed-Use Project, October 12, 2018 (hereinafter, "SWAPE Comments"), **Attachment B**.

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## II. THE CITY LACKS SUBSTANTIAL EVIDENCE TO SUPPORT ITS CONCLUSIONS IN THE DEIR REGARDING THE PROJECT'S SIGNIFICANT IMPACTS AND FAILS TO INCORPORATE ADEQUATE MITIGATION

CEQA has two basic purposes. First, CEQA is designed to inform decisionmakers and the public about the potential, significant environmental effects of a project.<sup>7</sup> Except in certain limited circumstances, CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an EIR.<sup>8</sup> An EIR's purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, an EIR "protects not only the environment but also informed self-government."<sup>9</sup>

To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and "reflect a good faith effort at full disclosure."<sup>10</sup> CEQA requires an EIR to disclose all potential direct and indirect, significant environmental impacts of a project.<sup>11</sup> In addition, an adequate EIR must contain the facts and analysis necessary to support its conclusions.<sup>12</sup>

The second purpose of CEQA is to require public agencies to avoid or reduce environmental damage when possible by requiring appropriate mitigation measures and through the consideration of environmentally superior alternatives.<sup>13</sup> If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.<sup>14</sup> CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.<sup>15</sup> Without an adequate analysis and

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<sup>7</sup> CEQA Guidelines, 14 Cal. Code Regs. § 15002(a)(1).

<sup>8</sup> See, e.g., Pub. Resources Code § 21100.

<sup>9</sup> *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

<sup>10</sup> CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

<sup>11</sup> Pub. Resources Code § 21100(b)(1); CEQA Guidelines § 15126.2(a).

<sup>12</sup> See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.

<sup>13</sup> CEQA Guidelines § 15002(a)(2)-(3); see also, *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391, 400.

<sup>14</sup> Pub. Resources Code §§ 21002.1(a), 21100(b)(3).

<sup>15</sup> Pub. Resources Code §§ 21002-21002.1.

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description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

Furthermore, under CEQA, it is improper to defer the formulation of mitigation measures.<sup>16</sup> Courts have imposed several parameters for the adequacy of mitigation measures. First, the lead agency may not defer the formulation of mitigation measures until a future time unless the EIR also specifies the specific performance standards capable of mitigating the project's impacts to a less than significant level.<sup>17</sup> Deferral is impermissible where an agency "simply requires a project applicant to obtain a ... report and then comply with any recommendations that may be made in the report."<sup>18</sup> Second, a public agency may not rely on mitigation measures of uncertain efficacy or feasibility.<sup>19</sup> Third, "[m]itigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments."<sup>20</sup> Fourth, mitigation measures that are vague or so undefined that it is impossible to evaluate their effectiveness are legally inadequate.<sup>21</sup>

As discussed in detail below, the DEIR fails to meet either of these two key goals of CEQA. The DEIR fails to disclose and evaluate all potentially significant environmental impacts of the Project. In addition, it proposes mitigation measures that are inadequate, unenforceable, deferred, or so undefined that it is impossible to evaluate their effectiveness. Therefore, the City must revise and circulate a new DEIR to adequately address these deficiencies.

#### A. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Significant Air Quality and Health Risks

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<sup>16</sup> CEQA Guidelines § 15126.4(a)(1)(B);

<sup>17</sup> *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 793-94; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.

<sup>18</sup> *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.

<sup>19</sup> *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation measure because no record evidence existed that replacement water was available).

<sup>20</sup> CEQA Guidelines § 15126.4(a)(2).

<sup>21</sup> *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal.App.3d 61, 79.

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The DEIR includes a Health Risk Assessment (“HRA”) to evaluate the Project’s health risk impact from diesel particulate matter (“DPM”) emissions generated during the Project’s construction as well as impacts from nearby freeway exhaust to new on-site sensitive receptors.<sup>22</sup> The DEIR then concludes that those impacts would be less than significant with mitigation.<sup>23</sup> However, SWAPE explains that the DEIR fails to fully analyze and mitigate the health risks posed by the Project because it fails to conduct an *operational* HRA to evaluate the health risk posed to existing sensitive receptors near the Project site from additional emissions generated during operation.<sup>24</sup> As a result, SWAPE finds that “the DEIR fails to provide a comprehensive review of all of the Project’s potential health-related impacts.”<sup>25</sup>

According to SWAPE, the City’s failure to prepare an operational HRA is inconsistent with recommendations set forth by the Office of Environmental Health Hazard Assessment (“OEHHA”), the organization responsible for providing recommendations for health risk assessments in California.<sup>26</sup> In February of 2015, OEHHA released its most recent *Risk Assessment Guidelines: Guidance Manual for Preparation of Health Risk Assessments*, which was formally adopted in March of 2015.<sup>27</sup> This guidance document describes the types of projects that warrant the preparation of an HRA, which would include this Project.

SWAPE notes that once construction of this Project is complete, the Project will generate 7,030 daily operational vehicle trips, which will generate additional exhaust emissions, “thus continuing to expose nearby sensitive receptors to emissions.”<sup>28</sup> OEHHA recommends that exposure from projects lasting more than 6 months should be evaluated for the duration of the project, and recommends that an exposure duration of 30 years be used to estimate individual cancer risk.<sup>29</sup> Assuming a conservative Project duration of at least 30 years (a Project duration was not provided in the DEIR), SWAPE concludes that “an assessment of health

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<sup>22</sup> DEIR, Appendix A, pp. 17

<sup>23</sup> DEIR, p. 38.

<sup>24</sup> SWAPE Comments, p. 2.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments*, OEHHA, February 2015, [http://oehha.ca.gov/air/hot\\_spots/hotspots2015.html](http://oehha.ca.gov/air/hot_spots/hotspots2015.html).

<sup>28</sup> SWAPE Comments, p. 2.

<sup>29</sup> *Risk Assessment Guidelines*, OEHHA, p. 8-6, 8-15.

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risks to nearby sensitive receptors from operation should be included in a revised [CEQA] evaluation for the Project.”<sup>30</sup>

To demonstrate the potential risk posed by the Project to nearby sensitive receptors, SWAPE prepared a simple screening-level HRA. The results of SWAPE’s assessment demonstrate that “operational DPM emissions may result in a potentially significant health risk impact that was not previously identified or evaluated within the DEIR.”<sup>31</sup> SWAPE based its analysis on the DEIR’s own CalEEMod PM10 exhaust estimates, as well as guidance and methodologies from OEHHA, Bay Area Air Quality Management District (“BAAQMD”), and the Environmental Protection Agency (“EPA”).<sup>32</sup> After determining the closest sensitive receptors, SWAPE used AERSCREEN to prepare a preliminary HRA of the Project’s health-related impact on those sensitive receptors.<sup>33</sup> Further detail on SWAPE’s calculations and AERSCREEN output files can be found in Attachment B to these comments.

SWAPE’s conservative analysis demonstrates that “the excess cancer risk to adults, children, infants, and 3<sup>rd</sup> trimester gestations at a sensitive receptor located approximately 25 meters away, over the course of Project operation, are approximately **8.1, 87, 79, and 3.3 in one million**, respectively.”<sup>34</sup> Furthermore, SWAPE explains that “the excess cancer risk posed by operation over the course of a residential lifetime is approximately **177 in one million**.”<sup>35</sup> In sum, SWAPE finds that the “infantile, child, and lifetime cancer risks all greatly exceed the BAAQMD’s threshold of 10 in one million,” resulting in a significant impact not identified, analyzed, or mitigated in the DEIR.<sup>36</sup>

Therefore, SWAPE concludes that “an updated DEIR should be prepared to adequately evaluate the Project’s health risk impact and should include additional mitigation measures to reduce these impacts to a less-than-significant level.”<sup>37</sup>

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<sup>30</sup> SWAPE Comments, p. 2.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*, at 2-4.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*, at 4.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*, at 5.

<sup>37</sup> *Id.*

B. The DEIR Fails to Adequately Mitigate Significant Greenhouse Gas Emissions

The DEIR evaluates the Project's per service population GHG emissions and concludes that the Project will exceed applicable GHG thresholds and thus result in a significant impact.<sup>38</sup> The DEIR then provides a list of mitigation measures to reduce emissions, but determines that impacts would be significant and unavoidable "if the project is not completed until after January 1, 2021" or that the Project would "have a less than significant operational GHG impact if the project is fully constructed and operational by January 1, 2021."<sup>39</sup> The DEIR states that because the Project is consistent with the City's General Plan and GHG Reduction Strategy land use designations, "projects that are fully constructed and operational by January 1, 2021 and consistent with the GHG Reduction Strategy would not interfere with the implementation of AB 32 and would have a less than significant impact related to GHG emissions."<sup>40</sup> The DEIR notes that based on information provided by the Applicant, the Project is expected to be fully operational by January 1, 2021 and therefore, the "current 2020 GHG thresholds would apply."<sup>41</sup> SWAPE finds the DEIR's reasoning to be "entirely incorrect."<sup>42</sup>

BAAQMD has developed thresholds of significance for proposed land use developments. For developments such as the proposed Project, SWAPE notes that the threshold is compliance with a qualified GHG Reduction Strategy; or annual emissions less than 1,100 MT CO<sub>2</sub>e/yr; or 4.6 MT CO<sub>2</sub>e/sp/yr.<sup>43</sup> SWAPE finds that the DEIR fails to demonstrate how the Project is compliant with the GHG Reduction Strategy.<sup>44</sup> Furthermore, according to SWAPE, the Project would generate GHG emissions that exceed both the bright-line threshold of 1,100 MT CO<sub>2</sub>e/yr and the 4.6 MT CO<sub>2</sub>e/sp/yr threshold, regardless of the year that the Project is actually completed.<sup>45</sup> As such, SWAPE explains that "the Project's GHG impact

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<sup>38</sup> DEIR, p. 77-86.

<sup>39</sup> DEIR, p. 179.

<sup>40</sup> *Id.*, at p. 86.

<sup>41</sup> *Id.*

<sup>42</sup> SWAPE Comments, p. 6.

<sup>43</sup> BAAQMD, *California Environmental Quality Act Air Quality Guidelines*, May 2017, p. 2-4, [http://www.baaqmd.gov/~media/files/planning-and-research/ceqa/ceqa\\_guidelines\\_may2017-pdf.pdf?la=en](http://www.baaqmd.gov/~media/files/planning-and-research/ceqa/ceqa_guidelines_may2017-pdf.pdf?la=en).

<sup>44</sup> SWAPE Comments, p. 6.

<sup>45</sup> *Id.*



would be significant.”<sup>46</sup> However, the measures provided in the DEIR to mitigate this impact are flawed for various reasons. Furthermore, the conclusion that the impacts is significant *and unavoidable* is also flawed, as explained below.

The DEIR lists a transportation demand management plan (“TDM”) as a mitigation measure, stating that “[t]he TDM Plan will be finalized and approved by the City prior to issuance of occupancy permits and would include a combination of at least three or more” of the measures listed in the DEIR.<sup>47</sup> The DEIR then clearly states that “the TDM Plan has not yet been fully developed and quantified”<sup>48</sup> and that as part of the deferred mitigation, the Applicant must provide “an on-site TDM coordinator who will be responsible for implementing and managing the TDM Plan.” This is counter to CEQA’s prohibition against deferred mitigation unless the EIR also specifies the specific performance standards capable of mitigating the project’s impacts to a less than significant level.<sup>49</sup> The TDM is clearly deferred with no standards by which the success of the measures listed can be determined. The implementation and management plan would be developed later by a person unknown. This mitigation plan is unacceptable under CEQA. Furthermore, not only is this measure unlawfully deferred, but SWAPE finds the potential measures listed in the DEIR to be utterly lacking.

To conclude that an impact is significant and unavoidable, an EIR must include all feasible mitigation, as required under CEQA.<sup>50</sup> SWAPE reviewed the Project’s proposed mitigation measures and finds that “not all feasible mitigation is being implemented”<sup>51</sup> and that “[u]ntil all feasible mitigation is reviewed and incorporated into the Project’s design, impacts from GHG emissions cannot be considered as significant and unavoidable.”<sup>52</sup> SWAPE identifies a list of viable mitigation measures in Attachment B that are applicable to the Project.<sup>53</sup> Feasible

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<sup>46</sup> *Id.*

<sup>47</sup> DEIR, p. 85.

<sup>48</sup> *Id.*, at 86.

<sup>49</sup> *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 793-94; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.

<sup>50</sup> San Joaquin Valley Air Pollution Control District, *Guidance for Assessing and Mitigating Air Quality Impacts*, March 19, 2019, p. 115 of 125, [http://www.valleyair.org/transportation/GAMAQI\\_3-19-15.pdf](http://www.valleyair.org/transportation/GAMAQI_3-19-15.pdf).

<sup>51</sup> SWAPE Comments, p. 7.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*, at 7-9.

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mitigation measures can also be found in CAPCOA's *Quantifying Greenhouse Gas Mitigation Measures*, which can reduce GHG levels.<sup>54</sup>

SWAPE explains that the combined measures “offer a cost-effective, feasible way to incorporate lower-emitting design features into the proposed Project, which subsequently, reduces emissions released during Project operation.”<sup>55</sup> Therefore, SWAPE concludes that an “updated DEIR must be prepared to include mitigation measures to ensure that the necessary [measures] are implemented to reduce operational GHG emissions to below thresholds.”<sup>56</sup> Furthermore, the Applicant must demonstrate commitment to the implementation of these measures prior to Project approval, “to ensure that the Project’s operational significant emissions are reduced to the maximum extent possible.”<sup>57</sup>

C. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate  
Significant Impacts Related to Hazardous Site Conditions

1. *Failure to Consider the Potentially Significant Impacts  
from Residual Pesticides, Asbestos, and Lead*

The DEIR acknowledges that the Project site had been in agricultural use for over 40 years, and that “possible historic pesticide use on-site could have resulted in the accumulation of residual pesticides (e.g., DDT compounds, arsenic, and lead) in the shallow soil on-site.”<sup>58</sup> In addition, the DEIR states that there is likely asbestos containing materials and lead-based paint in the building materials of the buildings to be demolished.<sup>59</sup> Furthermore, the DEIR states that Project construction could “disturb on-site soils with residual agricultural pesticide contamination, and expose construction workers and/or nearby residential receptors to elevated concentrations of pesticide chemicals.”<sup>60</sup> However, the DEIR proposes mitigation measures and concludes that the Project “would have a less than significant impact to construction

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<sup>54</sup> CAPCOA, *Quantifying Greenhouse Gas Mitigation Measures*, August 2010, <http://www.capcoa.org/wp-content/uploads/2010/11/CAPCOA-Quantification-Report-9-14-Final.pdf>.

<sup>55</sup> SWAPE Comments, p. 9.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> DEIR p. 88.

<sup>59</sup> *Id.*, at 89.

<sup>60</sup> *Id.*, at 91.

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workers and nearby residential receptors.”<sup>61</sup> The mitigation measures proposed in the DEIR include:

MM HAZ-1.1: After demolition but prior to the issuance of grading permits, a qualified environmental specialist shall collect shallow soil samples, from the native soil layers within the surface lots and have the samples analyzed to determine if contaminated soil from previous agricultural operations is located on-site with concentrations above established construction/trench worker and residential thresholds. The soil shall be tested for organochlorine pesticides and pesticide based metals, arsenic and lead. Once the soil sampling analysis is complete, a report of the findings will be provided to the Supervising Environmental Planner of the City of San José Department of Planning, Building, and Code Enforcement and the Municipal Compliance Officer of the City of San José Environmental Services Department for review.

MM HAZ-1.2: If contaminated soils are found in concentrations above established regulatory environmental screening levels, the applicant shall enter into the Santa Clara County Department of Environmental Health’s (SCCDEH) Voluntary Cleanup Program (VCP) to formalize regulatory oversight for remediation of contaminated soil to ensure the site is safe for construction workers and the public after development. The project applicant must remove contaminated soil in order to achieve detection levels acceptable to the SCCDEH. With approval of the SCCDEH, some of the contaminated soil may be allowed to be left in-place buried under hardscape and/or several feet of clean soil. The project applicant shall prepare and implement a Removal Action Plan, Soil Mitigation Plan or other similar report describing the remediation process and to document the removal and/or capping of contaminated soil. All work and reports produced shall be performed under the regulatory oversight and approval of the SCCDEH.

Regarding MM Haz-1.1, Mr. Clark notes that the measure’s analytical testing of the soils and building waste “will be performed *only after* the demolition of the building and disturbance of the shallow soils, which can generate large amounts of

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<sup>61</sup> *Id.*, at 92.  
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dust containing hazardous materials which will migrate off-site.”<sup>62</sup> Mr. Clark states that “[t]his contaminated dust directly impacts the health of construction workers and the surrounding community.”<sup>63</sup> Therefore, deferring the tests until after the waste materials have been generated and the soil has been disturbed “is counter to CEQA and only ensures that any substantive mitigation measure that would prevent the exposure of workers or the surrounding community members will not be effective or even implemented.”<sup>64</sup>

Regarding MM HAZ-1.2, Mr. Clark finds again that the measure is “improperly deferred” and fails to identify what environmental screening levels will be utilized, “leaving uncertainty as to whether the clean-up levels will be sufficiently health protective for the development of the site as a residential facility.”<sup>65</sup>

Mr. Clark notes that according to the California Department of Toxic Substances Control August 2008 Interim Guidance for Sampling Agricultural Properties, the most commonly detected pesticides at former agricultural sites have been DDT and its derivatives DDD and DDE, toxaphene, dieldrin, and aldrin.<sup>66</sup> These substances have been labeled carcinogens or known to cause developmental health effects by the State of California.<sup>67</sup> Furthermore, Mr. Clark states that “the historical use of arsenical herbicides in many agricultural properties is known to be the source of elevated arsenic levels and lead levels in the properties evaluated.”<sup>68</sup> Arsenic and lead are also listed by the State of California as carcinogens and causes for developmental health effects,<sup>69</sup> and “[e]xposure to lead is a serious concern for decreases in intelligence scores for young children and for increased blood pressure in adults.”<sup>70</sup> Mr. Clark further explains that “[e]xposure through impacted soils via incidental ingestion or dermal absorption and through the inhalation of fine dust

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<sup>62</sup> Clark Comments, p. 6.

<sup>63</sup> *Id.*, at 7.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*, at 5; see Attachment A (exhibits), Interim Guidance for Sampling Agricultural Properties (Third Revision) California Department of Toxic Substances Control California Environmental Protection Agency August 7, 2008.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*, at 6.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

(particulate matter) impacted with the chemicals is the primary route of exposure for community members and sensitive receptors near the project site.”<sup>71</sup>

CEQA requires that DEIR demonstrate a good faith effort at full disclosure.<sup>72</sup> Under CEQA, an EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.<sup>73</sup> Given the volume of soils to be graded on site and the volume of soils to be excavated in the construction of the underground parking lots, Mr. Clark states that “it is imperative that the public be given an opportunity to understand and assess the extent of any soil contamination prior to beginning the project, as required under CEQA.”<sup>74</sup> Here, not only does the DEIR fail to provide basic information regarding the state of soil contamination, but it unlawfully defers any further analysis and mitigation that could remedy contamination that harms workers and community members.

Therefore, Mr. Clark concludes that the “lack of a cogent sampling and analysis plan, screening level determination [prior to Project approval], and the planned disturbance of materials on site prior to sampling are serious deficiencies in the DEIR” and that a revised DEIR is necessary.<sup>75</sup>

## 2. *Failure to Identify Sensitive Receptors*

The DEIR not only fails to analyze and mitigate hazardous soil conditions, but it fails to identify all sensitive receptors that could be impacted by the disturbance of contaminated soil during construction. The DEIR clearly states that an impact from the project is significant if the Project will “[e]mit hazardous emissions or handle hazardous or acutely hazardous materials, substances, or waste within one-quarter mile of an existing or proposed school.”<sup>76</sup> The DEIR then lists the nearest school as Sierra Elementary School located at 220 Blake Avenue in Santa Clara (approximately 0.3 miles north of the site).<sup>77</sup>

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<sup>71</sup> *Id.*

<sup>72</sup> *Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1390.

<sup>73</sup> *Association of Irrigated Residents*, 107 Cal.App.4th at 1390.

<sup>74</sup> Clark Comments, p. 6.

<sup>75</sup> *Id.*, at 7.

<sup>76</sup> *Id.*

<sup>77</sup> DEIR, p. 91.

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However, the DEIR fails to accurately identify the closest school. Mr. Clark states that the closest school to the site is the Starbright School located at 4645 Albany Drive, approximately 0.23 miles from the edge of the Project site boundary.<sup>78</sup> According to Mr. Clark, the generation of dusts containing toxic materials from the Project site (e.g., pesticides from historical land uses, lead in paints used on site, or asbestos bearing materials) “can easily migrate to the nearby residences and to the previously unidentified sensitive receptors at the Starbright School...[and] [e]xposure of young children to toxic metals is a significant concern.”<sup>79</sup>

Therefore, Mr. Clark concludes that “it is clear that the project will have a potential significant impact on the community that has not been adequately analyzed or mitigated in the DEIR.”<sup>80</sup>

3. *Failure to Identify All Relevant Hazardous Waste Sites Within One Mile of the Project Site*

Given that EIRs must describe existing environmental setting in enough detail to enable a proper impact analysis,<sup>81</sup> Mr. Clark notes that “[i]t is vital to the CEQA process that accurate information be compiled to describe the current conditions of the community in which the proposed project is to be sited.”<sup>82</sup> The DEIR lists two sources of off-site contamination.<sup>83</sup> However, according to Mr. Clark’s review of the Geotracker website, maintained by the State Water Quality Control Board, there are 56 different cases of hazardous waste sites within a mile of the project site.<sup>84</sup> Furthermore, Mr. Clark notes that “[a]t least 5 of the sites are still open and may have active remediation or verification monitoring being performed.”<sup>85</sup> According to Mr. Clark, the chemicals of concern at the active sites include chlorinated solvents (perchloroethylene, trichloroethylene, 1,2-dichloroethylene, etc...), petroleum hydrocarbons from USTs releases (gasoline,

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<sup>78</sup> Clark Comments, p. 8.

<sup>79</sup> *Id.*, at 9.

<sup>80</sup> *Id.*, at 8.

<sup>81</sup> *Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal.App.4th 1109, 1121-22.

<sup>82</sup> Clark Comments, p. 9.

<sup>83</sup> DEIR, p. 89-90.

<sup>84</sup> Clark Comments, p. 9.

<sup>85</sup> *Id.*

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diesel, waste oils), or polychlorinated biphenyls (PCBs),” with the closest active site being less than 900 feet away from the Project.<sup>86</sup> Mr. Clark provides detailed evidence of these sites in his comments.

The DEIR fails to satisfy CEQA’s requirements that EIRs include a full description of the physical environmental conditions in the vicinity of the Project and adequately evaluate the Project’s impacts based on those conditions.<sup>87</sup> Mr. Clark finds that the DEIR fails to “accurately describe the conditions surrounding the site” and thus should “update the hazard assessment in a revised DEIR.”

Given the above facts, Mr. Clark concludes that “the Project could result in significant unmitigated impacts that were not identified in the DEIR” and that to protect public health, “the City must prepare a revised DEIR for the Project to address the deficiencies identified above.”<sup>88</sup>

#### D. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Significant Traffic Impacts

The DEIR identifies significant impacts related to an increase in traffic caused by the Project. Traffic in the area is already a major issue of public concern and controversy, as acknowledged in the DEIR.<sup>89</sup> Specifically, the DEIR identifies the following significant impact:

Impact TRAN-1: Implementation of the proposed project would have a significant impact on the San Tomas Expressway and Saratoga Avenue intersection during the AM Peak Hour under background plus project conditions.<sup>90</sup>

To mitigate this impact to less than significant levels, the DEIR provides the following mitigation measure:

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<sup>86</sup> *Id.*

<sup>87</sup> CEQA Guidelines § 15125(a), (d); see also *Communities For A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 321.

<sup>88</sup> Clark Comments, p. 15.

<sup>89</sup> DEIR, p. xi.

<sup>90</sup> *Id.*, at 158.

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MM TRAN-1.1: Prior to issuance of any building permits, the project applicant shall pay fair share fees to the County of Santa Clara based on the August 2015 update of the County Expressway Plan 2040, which identifies the widening of San Tomas Expressway to eight lanes (by adding a fourth through lane in each direction) between Homestead Road and Stevens Creek Boulevard as a Tier 1 project. Payment of the fee would reduce the impact to a less than significant level.<sup>91</sup>

There are several flaws with the City's approach to mitigating this significant traffic impact.

First, the DEIR's conclusion that the impact will be less than significant after this mitigation is in direct conflict with the conclusions found in the Traffic Impact Analysis ("TIA") prepared by the City's consultants. The TIA recommends the same fee payment mitigation measure, but clearly states "payment of a fair-share toward improvement costs alone would not guarantee the timely construction of the identified improvement to mitigate the project impact." Therefore, the TIA concludes that "in the event that the developer makes a fair-share contribution rather than constructing the improvement, this impact would be considered significant and unavoidable."<sup>92</sup> There is no indication that the Applicant plans to construct the improvement itself, and the DEIR provides no explanation as to why it presents a conflicting conclusion regarding the Project's impact to this intersection.

Second, the TIA offered another potential mitigation measure for this impact, which is not mentioned at all in the DEIR. This "Alternative Mitigation Measure" states:

Alternatively, the project could implement a transportation demand management (TDM) program for the office and residential developments to reduce the vehicle trips generated by the project during the peak hours. To eliminate the significant impact at the

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<sup>91</sup> *Id.*, at 159.

<sup>92</sup> 4300 Stevens Creek Boulevard Mixed-Use Development, Traffic Impact Analysis, Hexagon Transportation Consultants, Inc., August 17, 2018 (hereinafter, "TIA"), p. 36.  
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intersection, the project would need to implement a TDM program to reduce the vehicle trips by 20 percent.<sup>93</sup>

The DEIR does incorporate a TDM into the traffic mitigation plan; it only mentions it with regard to the Project's impacts from GHG emissions. The DEIR fails to mention whatsoever the consultants' suggestion to implement the TDM program to reduce vehicle trips by 20 percent and therefore properly reduce the Project's significant traffic impact. The DEIR provides no explanation for failing to incorporate or even mention this potential mitigation measure in the DEIR's traffic analysis. Furthermore, the TDM mitigation measure for GHG impacts is flawed in itself, and therefore cannot be adequately relied upon, as discussed above in our comments on GHG impacts.

Third, regardless of the DEIR's inconsistency with the conclusions in the TIA, the City cannot lawfully rely upon the payment of fair share fees to the County of Santa Clara to adequately mitigate the Project's impacts. As the DEIR clearly acknowledges in the discussion of another traffic impact, Impact TRAN-2, payment of fees is not adequate mitigation under certain circumstances.<sup>94</sup> Impact TRAN-2 states that "[i]mplementation of the proposed project would have a significant impact on six HOV freeway segments on I-280." According to the DEIR, mitigation cannot be proposed for this impact:

Mitigation of significant project impacts on freeway segments would require roadway widening to construct additional through lanes. Because it would not be feasible for the project to bear the responsibility for implementing such improvements, it is recommended the project make a fair share contribution towards the VTA Voluntary Mitigation Program for the impacted freeway segments. Because no freeway widening project has been developed by Caltrans or VTA, the impacts on the HOV freeway segments identified would be significant and unavoidable.<sup>95</sup>

The DEIR's conclusion that payment of fees for Impact TRAN-2 is not acceptable mitigation is consistent with case law, which has found that fee-based mitigation

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<sup>93</sup> *Id.*, at 38.

<sup>94</sup> DEIR, p. 159.

<sup>95</sup> *Id.*

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programs must meet certain conditions under CEQA to be viable. However, the DEIR's analysis regarding Impact TRAN-1 fails to follow this same logic and is therefore inconsistent with CEQA. Specifically, the DEIR provides no evidence that the County of Santa Clara's plan to widen the San Tomas Expressway, as discussed in MM TRAN-1.1, has been sufficiently analyzed and funded, or is even certain to occur.

The CEQA Guidelines generally allow the payment of fees to mitigate impacts such as cumulative impacts.<sup>96</sup> However, California courts have consistently found that "...a commitment to pay fees without any evidence that mitigation will actually occur is inadequate."<sup>97</sup> Furthermore, courts have held that in order for a project to rely on a fee program for mitigation of impacts, the fee program itself also had to be analyzed in an EIR.<sup>98</sup>

In *Napa Citizens for Honest Government v. Board of Supervisors*, a California court of appeal found that a pre-existing fee program failed to provide the "mitigation cover" to avoid a significance determination for a project's traffic impacts.<sup>99</sup> The County had previously adopted a traffic fee program and had collected over \$2 million pursuant to this fee. However, the improvements necessary to fulfill the program totaled over \$70 million and although the current project was obligated to pay its fair share of fees, the evidence showed that the necessary improvements would not be funded. As a result, there was no evidence that impacts would be mitigated simply by paying the adopted fee.

Here, as in *Napa Citizens*, there is no evidence that the plan to widen the San Tomas Expressway to eight lanes between Homestead Road and Stevens Creek Boulevard will be funded. Although Santa Clara County recently approved another section of that highway north of the Project for widening (between El Camino Real and Homestead),<sup>100</sup> regarding widening between Homestead and Stevens Creek the

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<sup>96</sup> Guidelines § 15130(a)(3)

<sup>97</sup> *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 140 (quoting *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692).

<sup>98</sup> *California Native Plant Society v. County of El Dorado* (2009) 170 Cal.App.4th 1026).

<sup>99</sup> *Napa Citizens for Honest Government v. Board of Supervisors* (2001) 91 Cal.App.4th 342.

<sup>100</sup> Jacob Bourne, The Silicon Valley Voice, *County To Help Fund San Tomas Expressway Widening* (June 27, 2018), <https://www.svvoice.com/county-to-help-fund-san-tomas-expressway-widening>; <https://www.sccgov.org/sites/rda/PnS/CP/stexpy/Pages/improvements.aspx>; County of Santa Clara, County News, *Yearlong Project to Widen San Tomas Expressway from El Camino Real through* 4343-008acp

Santa Clara County's website merely states that it may happen "[w]hen additional money becomes available."<sup>101</sup> This indicates that funding is not currently available for this project, and there is no information provided about when funding would be available in the future.

Furthermore, the Santa Clara County website contains CEQA analysis only for widening the section between El Camino Real and Homestead.<sup>102</sup> The DEIR has provided no evidence that the rest of the plan to widen from Homestead to Stevens Creek has undergone CEQA analysis,<sup>103</sup> nor has the DEIR identified any final CEQA analysis on a programmatic level for a fee-based traffic mitigation program that would cover this highway section, as required by CEQA.<sup>104</sup>

The DEIR fails to adequately demonstrate that the mitigation program relied upon will occur and, specifically, whether it has been analyzed under CEQA and is sufficiently funded. Therefore, the City failed to require feasible mitigation to reduce the Project's significant impacts from increased traffic to less than significant levels. The DEIR must be revised and recirculated to reflect accurate analysis and conclusions.

#### E. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Significant Vibration Impacts

The DEIR identifies significant impacts related to vibrations caused during Project construction. Specifically, the DEIR identifies the following significant impact:

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*Homestead Road in Santa Clara Begins Week of June 13,*  
<https://www.sccgov.org/sites/opa/nr/Pages/SanTomasProject.aspx>.

<sup>101</sup> County of Santa Clara Roads and Airports Department, *San Tomas Expressway Improvement Projects*, <https://www.sccgov.org/sites/rda/PnS/CP/stexpy/Pages/improvements.aspx> (accessed 10/13/18), **Attachment C**.

<sup>102</sup> Initial Study/ Mitigated Negative Declaration, San Tomas Expressway Widening Project, April 2014,  
<https://www.sccgov.org/sites/rda/PnS/CP/stexpy/Documents/Public%20Draft%20Initial%20Study%20San%20Tomas%20Widening%204-30-14.pdf>.

<sup>103</sup> *California Native Plant Society v. County of El Dorado* (2009) 170 Cal.App.4th 1026.

<sup>104</sup> *Id.*

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Impact NOI-1: Construction of the proposed project could expose the adjacent automotive dealership to vibration levels in excess of City standards in General Plan Policy EC- 2.3.<sup>105</sup>

To mitigate this impact to less than significant levels, the DEIR provides the following mitigation measures:

MM NOI-1.1: A Construction Vibration Monitoring Plan shall be implemented to document conditions prior to, during, and after vibration generating construction activities. The plan shall be submitted to the Supervising Environmental Planner of City of San José Department of Planning, Building, and Code Enforcement for review and approval. The Plan shall address vibration impacts to adjacent structures. The plan shall include, but is not limited to:

- A list of all heavy construction equipment to be used for this project and the anticipated time duration of using equipment that has been known to produce high vibration levels (tracked vehicles, vibratory compaction, jackhammers, hoe rams, etc.)
- Avoidance methodology to avoid and/or reduce impact to the adjacent property.

MM NOI-1.2: The project applicant shall include the following measures as part of the approved construction plans prior to the issuance of any demolition or grading permits:

- Construction crews shall avoid dropping heavy objects or equipment within 30 feet of any adjacent structure.
- The project applicant shall ensure that all contractors follow the prescribed vibration mitigation measures.
- The project applicant shall designate a specific person responsible for registering and investigating claims of excessive vibration. The contact information shall be clearly posted on the construction site so as to be seen from all street frontages.
- If cosmetic or structure damage to the adjacent buildings is caused directly or indirectly by project construction, the project applicant shall make the necessary repairs and provide adequate documentation of the repairs to the Director of

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<sup>105</sup> DEIR, p. 127.  
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Planning, Building and Code Enforcement prior to issuance of any occupancy permits.

A closer inspection of these mitigation measures reveals that mitigation for significant vibration impacts are in fact unlawfully deferred. As stated above, deferral is impermissible where an agency “simply requires a project applicant to obtain a ... report and then comply with any recommendations that may be made in the report.”<sup>106</sup>

Here, the DEIR clearly defers the development of “[a]voidance methodology to avoid and/or reduce impact” in a future Construction Vibration Monitoring Plan. Indeed, the only real measure described is found in MM NOI-1.2, which requires that “construction crews shall avoid dropping heavy objects or equipment within 30 feet of any adjacent structure.” Confusingly, this measure is required to be included in seemingly separate (also apparently deferred) “approved construction plans.”<sup>107</sup> It is unclear whether this measure is also required to be included in the Construction Vibration Monitoring Plan. The DEIR appears to anticipate the development of further measures because MM NOI-1.2 also requires that the Applicant “ensure that all contractors follow the prescribed vibration mitigation measures.”<sup>108</sup> However, no other measures are included in the mitigation and no specific performance standards are identified as requirements in the Construction Vibration Monitoring Plan, as required under CEQA.<sup>109</sup>

The Noise and Vibration Assessment prepared by the City’s consultants provides analysis of the vibration impacts and recommended a more specific measure than what is included in the DEIR. Specifically, the noise consultant recommends that the City “[p]rohibit the use of heavy vibration-generating construction equipment, such as vibratory rollers or excavation using clam shell or chisel drops, within 30 feet of any adjacent building.”<sup>110</sup> The DEIR provides no explanation as to why it did not include these specific limitations in MM NOI-1.1 or 1.2. Specific measures to reduce impacts, or at the very least performance standards to include in a mitigation plan, are required under CEQA. After-the-fact damage

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<sup>106</sup> *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.

<sup>107</sup> DEIR, p. 128.

<sup>108</sup> *Id.*

<sup>109</sup> *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 793-94; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.

<sup>110</sup> Noise and Vibration Assessment, p. 27.

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control, as described in MM NOI-1.2, is insufficient to reduce the Project's impacts to less than significant levels.

The DEIR fails to demonstrate that the Project's significant vibration impacts during construction have been mitigated to less than significant levels. Therefore, the DEIR must be revised and recirculated to include adequate mitigation.

### III. CONCLUSION

It is essential that the City's DEIR adequately identify and analyze the Project's foreseeable direct, indirect and cumulative impacts. It is also imperative that any and all feasible mitigation measures be presented and discussed. Indeed, CEQA requires nothing less. As discussed above, the Project will result in significant impacts in a number of areas, including public health, air quality, traffic, and impacts from vibration. The DEIR continues to mischaracterize, underestimate, or fail to identify many of these impacts. Furthermore, many of the mitigation measures relied upon by the DEIR are improperly deferred or will not mitigate impacts to the extent claimed.

The DEIR must be recirculated if: (1) it reveals new substantial environmental impacts not disclosed in the DEIR; (2) it reveals a substantial increase in the severity of impacts (unless mitigated); (3) comments have been received that identify new feasible mitigation measures, but the feasible mitigation measures are not adopted; or (4) it is so fundamentally and basically inadequate and conclusory in nature that public comment on the DEIR was essentially meaningless.<sup>111</sup>

The courts have held that the failure to recirculate an EIR turns the process of environmental evaluation into a "useless ritual" which could jeopardize "responsible decision-making."<sup>112</sup> Both the opportunity to comment and the preparation of written responses to those comments are crucial parts of the EIR process.

These comments have identified substantial environmental impacts that were again not discussed at all in the DEIR or were not meaningfully considered.

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<sup>111</sup> CEQA Guidelines § 15088.5(a).

<sup>112</sup> *Sutter Sensible Planning v. Sutter County Board*, (1981) 122 Cal.App.3d 813, 822. 4343-008acp

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These comments have also identified feasible mitigation measures for significant, unmitigated impacts that have not been evaluated or proposed for adoption by the DEIR. Under CEQA Guidelines, a DEIR must be revised and recirculated to allow for public comment on these unadopted, feasible mitigation measures.<sup>113</sup> These deficiencies result in a DEIR “so fundamentally inadequate and conclusory in nature that public comment on the draft was in effect meaningless.”<sup>114</sup> Therefore, the DEIR must be withdrawn, revised and recirculated to properly evaluate these impacts.<sup>115</sup>

Sincerely,



Laura E. del Castillo

Attachments

LEDC:acp

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<sup>113</sup> *Id.*

<sup>114</sup> *Laurel Heights Improvement Association v. Regents of the University of California* (1993) 6 Cal.4<sup>th</sup> 1112, 1130.

<sup>115</sup> CEQA Guidelines § 15088.5(a).  
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