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Protecting the Children of Orchard School  
6

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
8 COUNTY OF SANTA CLARA  
9

10 PROTECTING THE CHILDREN OF  
11 ORCHARD SCHOOL,  
12 Petitioner,  
13 v.  
14 CITY OF SAN JOSE; DOES 1 through 100,  
15 inclusive,  
16 Respondents.  
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Case No.  
**VERIFIED PETITION FOR WRIT OF  
MANDATE (California Environmental  
Quality Act, Pub. Resources Code §§ 21100  
et seq.)**

1 Petitioner PROTECTING THE CHILDREN OF ORCHARD SCHOOL (“Petitioner”)  
2 brings this action for writ of mandate under the California Environmental Quality Act (“CEQA”)  
3 (“Petition”) on behalf of Petitioner’s interested members and residents, and in the public interest.

4 **INTRODUCTION**

5 1. On June 9, 2020, the City of San Jose (“City” or “Respondent”) passed resolution  
6 No. 79559 (“Resolution”) certifying the Final Environmental Impact Report (“FEIR”) for its  
7 Charcot Avenue Extension Project (“Project”), making certain findings regarding significant  
8 impacts, and adopting a statement of overriding considerations, and adoption a mitigation and  
9 monitoring and reporting program.

10 2. The Project seeks to extend Charcot Avenue from its eastern boundary at Paragon  
11 Drive over Interstate 880 (“I-880”) to Oakland Road in the North San Jose area. This would  
12 include an approximately .6 mile-long two-lane extension and an overcrossing, sidewalks,  
13 bikeways, and intersection modifications.

14 3. This Project has been on the City’s plans for over 25-years, yet the environmental  
15 review itself shows that the Project serves no particular current need, yet the Project would lead to  
16 thousands of additional cars passing a few feet away from Orchard School’s classrooms, baseball  
17 field and elementary school playground, causing significant environmental effects.

18 4. Beholden to this antiquated plan, the City failed to properly consider alternatives to  
19 the Project, and relied on an unduly narrow set of project purposes and objectives.

20 5. The FEIR, and the statement of overriding considerations in the Resolution, are  
21 deficient and legally inadequate under CEQA as an informational document in numerous respects  
22 as alleged herein. California courts repeatedly have held that CEQA must be scrupulously  
23 followed in order to afford the “fullest protection to the environment.” Moreover, “[a]n EIR must  
24 include detail sufficient to enable those who did not participate in its preparation to understand and  
25 to consider meaningfully the issues raised by the proposed project.”

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1 6. The Court should therefore issue a peremptory writ of mandate, vacating  
2 Respondents' approvals of the FEIR and Project, unless and until the Project can be brought into  
3 compliance with law.

4 **THE PARTIES**

5 7. Petitioner PROTECTING THE CHILDREN OF ORCHARD SCHOOL is an  
6 unincorporated association dedicated to the protection of the students of Orchard School.  
7 Members of Petitioner group commented in opposition to the Project for its numerous CEQA  
8 deficiencies and deleterious significant effects to public health and welfare.

9 8. Respondent CITY OF SAN JOSE is a city of California and is the "lead agency"  
10 that prepared and certified the FEIR, and approved the Project.

11 9. The true names and capacities of the Respondents named here as DOES 1 through  
12 100, inclusive, are presently unknown to Petitioner. As such, Petitioner has sued these  
13 Respondents by fictitious names, and Petitioner will seek to amend this Petition to show their true  
14 names and capacities when ascertained.

15 **JURISDICTION AND VENUE**

16 10. This Court has jurisdiction to issue a writ of mandate to set aside Respondents'  
17 actions and decisions relating to the FEIR and Project, and to compel Respondents to comply with  
18 CEQA under California Code of Civil Procedure section 1085 and California Public Resources  
19 Code section 21168.5.

20 11. This Court has jurisdiction to issue an order for injunctive relief pursuant to  
21 California Code of Civil Procedure section 525 *et seq.*

22 12. Venue is proper in the County of Santa Clara under California Code of Civil  
23 Procedure section 393 and 401 and California Government Code section 955.3.

24 **NOTICE REQUIREMENTS AND TIMING**

25 13. The City filed a Notice of Determination regarding its certification of the FEIR on  
26 June 11, 2020.

1           14. Pursuant to Judicial Council of California’s emergency rule 9, amended effective  
2 May 29, 2020, “Notwithstanding any other law, the statutes of limitations and repose for civil  
3 causes of action that are 180 days or less are tolled from April 6, 2020, until August 3, 2020.  
4 Advisory Committee Comment to emergency rule 9 states that “Emergency rule 9 is intended to  
5 apply broadly to toll any statute of limitations on the filing of a pleading in court asserting a civil  
6 cause of action” which includes “all the types of petitions for writ made for California  
7 Environmental Quality (CEQA) and land use challenges.” Thus, here, the statute of limitations did  
8 not begin to run until August 3, 2020.

9           15. Petitioner filed this action within the applicable statute of limitation as required by  
10 California Public Resources Code section 21167(c).

11           16. On August 26, 2020, prior to commencing this action, Petitioner served  
12 Respondents with written notice of Petitioner’s intent to commence this action under CEQA, and  
13 thus Petitioner has complied with the requirements of California Public Resources Code section  
14 21167.5. Copies of that written notice and proof of service are attached as Exhibit A.

15           17. On September 1, 2020, Petitioner provided to the Attorney General of the State of  
16 California notice of the filing of this Petition and a copy thereof, and thus Petitioner has complied  
17 with the requirements of California Public Resources Code section 21167.7 and California Code  
18 of Civil Procedure section 388. A copy of that notice is attached as Exhibit B.

19           18. Petitioner is filing and serving, concurrently with the filing of this Petition,  
20 Petitioner’s election to prepare the administrative record

21           19. Petitioner is filing and serving, concurrently with the filing of this Petition, a  
22 Request for Hearing concurrently with the filing of this Petition, and thus complied with Public  
23 Resources Code section 21167.4.

24   **ADDITIONAL STANDING ALLEGATIONS**

25           20. Petitioner and its respective members and residents live in the areas included in,  
26 and that will otherwise be affected by the Project, and use the areas affected by the Project for  
27 recreational and educational purposes.

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1           21.     Petitioner and its respective members and residents are directly and beneficially  
2 interested in Respondents' mandatory duty to fully comply with CEQA, and Petitioner and its  
3 respective members and residents are directly and beneficially interested in, and aggrieved by, the  
4 acts, decisions, and omissions of Respondents as alleged in this Petition.

5           22.     Petitioner and its respective members and residents have articulated their concerns  
6 about and objections to the Project and FEIR to Respondents. Petitioner has exhausted any and all  
7 available administrative remedies to the extent required by law. Respondents' determinations are  
8 final and no further administrative appeal procedures are provided by state or local law. Petitioner  
9 and their respective members and residents and many other organizations, and public entities  
10 presented detailed and specific objections to the Project and FEIR orally at public meetings and  
11 hearings and during the public comment period. These objections include each of the legal  
12 deficiencies asserted in this Petition.

13           23.     Petitioner does not have a plain, speedy and adequate remedy in the ordinary course  
14 of law. Without the requested mandatory and injunctive relief, Petitioner and its respective  
15 members and residents will be irreparably harmed by implementation of the Project and by  
16 Respondents' violations of CEQA. Such harm cannot be adequately compensated by money or  
17 other legal remedies.

18   **PRIVATE ATTORNEY GENERAL DOCTRINE**

19           24.     Petitioner brings this action as a private attorney general pursuant to California  
20 Code of Civil Procedure section 1021.5, and any other applicable legal theory, to enforce  
21 important rights affecting the public interest.

22           25.     Issuance of the relief requested in this Petition will confer significant benefits on  
23 the general public by, among other benefits: 1) requiring Respondents to properly disclose,  
24 analyze and mitigate the direct, indirect, and cumulative impacts of the Project that were not  
25 properly disclosed, analyzed or mitigated, 2) ensuring that Respondents properly consider  
26 alternatives and/or mitigation measures to reduce or avoid the Project's potentially significant,  
27 adverse environmental effects, 3) requiring Respondents to implement all feasible alternatives and  
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1 mitigation measures to avoid such adverse effects or reduce them to less-than-significant levels,  
2 and 4) ensuring that Respondents afford the public and affected agencies with the opportunity to  
3 review and comment on potentially significant project impacts, and receiving a meaningful and  
4 complete response to any such comments on such issues, prior to the approval of such Project.

5 26. Issuance of the relief requested in this Petition will result in the enforcement of  
6 important rights affecting the public interest. By compelling Respondents to complete a legally  
7 adequate analysis of the Project, to protect public health and natural resources, Respondents will  
8 be required to properly and publicly disclose and analyze all of the Project’s potentially  
9 significant, adverse environmental effects, and to ensure that all feasible mitigation measures or  
10 alternatives that would reduce or avoid the Project’s potentially significant, adverse environmental  
11 impacts are implemented.

12 27. The necessity and financial burden of enforcement are such as to make an award of  
13 attorneys’ fees appropriate in this proceeding. Absent enforcement by Petitioner, the Project might  
14 otherwise be deemed valid despite its legally and factually inadequate disclosures, analysis,  
15 conclusions, mitigation measures, and alternatives, among other things, and, as a result, potentially  
16 significant, adverse environmental effects might otherwise have evaded legally adequate  
17 environmental review and mitigation in accordance with the California Legislature’s policy, in  
18 adopting CEQA, of affording the greatest protections to the environment within the scope of the  
19 statute.

20 28. Petitioner has served a copy of this Petition on the Attorney General’s office to  
21 give notice of Petitioner’s intent to bring this proceeding as private attorneys general under Code  
22 of Civil Procedure section 1021.5, attached as Exhibit B.

23 **LEGAL FRAMEWORK**

24 29. CEQA has two purposes: environmental protection and informed self-government.  
25 *Woodward Park Homeowners Assn., Inc. v. City of Fresno*, 150 Cal.App.4th 683, 690-691 (2007).  
26 CEQA is “to be interpreted to afford the fullest possible protection to the environment within the  
27 reasonable scope of the statutory language.” *Mountain Lion Foundation v. Fish & Game Com.*, 16  
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1 Cal.4th 105, 134 (1997). CEQA requires agencies to “take all action necessary to protect,  
2 rehabilitate, and enhance the environmental quality of the state.” Pub. Resources Code, §  
3 21001(a).

4 30. Pursuant to CEQA, a “project” is an activity which may cause either direct physical  
5 change in the environment, or reasonably foreseeable indirect physical change in the environment  
6 (Pub. Resources Code § 21065(a)); and a “discretionary” project is one that is subject to  
7 judgmental controls, where the agency can use its judgment to decide whether and how to carry  
8 out a project. Cal. Code Regs., tit. 14, ch. 3 (“CEQA Guidelines”), § 15002(i). Prior to approving  
9 any discretionary project, an agency must fully disclose and analyze all of the project’s potentially  
10 significant direct, indirect, and cumulative environmental effects. *See, e.g.*, CEQA Guidelines §  
11 15002(f)), and that public agencies avoid or minimize such environmental damage where feasible.  
12 CEQA Guidelines § 15021(a). Pursuant to this duty, no public agency may approve or carry out a  
13 project where one or more significant effects on the environment may occur if the project is  
14 approved, unless certain narrow findings are made. CEQA Guidelines §§ 15091, 15093.

### 15 **FACTUAL BACKGROUND**

16 31. On April 30, 2018 the Notice of Preparation (“NOP”) of the EIR was issued for  
17 public review.

18 32. In August of 2019, the City released the Draft Environmental Impact Report  
19 (“DEIR”) for a 69-day review period from August 27, 2019 to November 4, 2019.

20 33. On or about May 27, 2020, the City released a “First Amendment to the Draft EIR”  
21 As stated therein, “This document, together with the Draft Environmental Impact Report”  
22 “constitutes the Final Environmental Report.”

23 34. The Project seeks to extend Charcot Avenue from its eastern boundary at Paragon  
24 Drive over Interstate 880 (“I-880”) to Oakland Road in the North San Jose area. This would  
25 include an approximately .6 mile-long two-lane extension and an overcrossing, sidewalks and  
26 bikeways, and intersection modifications.

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1           35.     The FEIR characterizes the project as a “major roadway improvement”, yet in  
2 response to comments characterizes the Project as not being a “major roadway improvement” and  
3 as “local serving.”

4           36.     The Project would, in part, implement an existing City of San Jose settlement  
5 agreement with Santa Clara County, City of Santa Clara, and City of Milpitas; without disclosing  
6 these agreements as part of the whole of the Project, or assessing the effects of implementing these  
7 agreements.

8           37.     The EIR identifies the North San Jose Area Development Policy, and the North San  
9 Jose Deficiency Plan (“NSJADP”), as key to the Project’s goals and objectives, but the EIR fails  
10 to describe the underlying purposes identified in the NSJADP, or to assess whether the Project  
11 would satisfy those purposes, which it would not.

12          38.     The EIR’s project objectives are unclear, too narrow, and/or inconsistently applied.  
13 The EIR states:

14           The purpose of extending Charcot Avenue across I-880 is to provide a safe multi-modal  
15 facility, improve connectivity for vehicular, bicycle, and pedestrian travel routes, provide  
16 the opportunity to utilize alternative travel modes, and reduce travel time for the east-west  
17 travelers in the North San José Area.

18           The objectives for the proposed project are as follows:

- 19           ▶ Improve connectivity between the east side of I-880 and the west side of I-880;
- 20           ▶ Increase the capacity for east/west travel across the I-880 corridor;
- 21           ▶ Provide a safe bicycle/pedestrian facility over I-880, in compliance with San José’s  
22 Complete Streets Policy;
- 23           ▶ Implement a programmed roadway network improvement project identified in the  
24 Envision San José 2040 General Plan; and
- 25           ▶ Implement a planned major roadway improvement project, as set forth in the North San  
26 José Area Development Policy and the North San José Deficiency Plan.

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1           39.     Elsewhere, however, the EIR reveals that the City believes only an automobile  
2 serving alternative would meet most of the Project’s objectives, which is untrue, and reveals that  
3 two of the Project objectives are unduly narrow for purposes of CEQA review, or to meet the  
4 Project’s stated goals. Even worse, however, the EIR fails to demonstrate that the selected Project  
5 alternative would even serve the Project’s goals or objectives, stating that “[t]he proposed  
6 extension will provide little to no measurable travel time savings” for drivers, although the EIR  
7 provides several contradictory remarks on this point.

8           40.     The DEIR did not exclude Alternative E, “New Overcrossing for Bicycles and  
9 Pedestrians Only,” as infeasible, and suggested that it may have the fewest adverse environmental  
10 effects. However, the FEIR rejected Alternative E as the environmentally superior alternative,  
11 despite comments that Alternative E could meet more than one project objective, contrary to the  
12 City’s position.

13           41.     The FEIR itself has numerous problems with how it is organized and presented. For  
14 example, the air quality and greenhouse gas analysis contained 140 pages of non-indexed tables,  
15 as well as missing citations to data and thus there was no reasonable way to further evaluate the  
16 results.

17           42.     The description of baseline conditions did not take existing conditions and hazards  
18 to pedestrians in and around the Project area, and specifically on Fox Lane into account, because  
19 the City did not consider them to be required under CEQA. The City neglected to assess effects  
20 related to shifting student drop-off and pick up locations.

21           43.     The FEIR failed to evaluate effects related to induced demand as a result of  
22 increasing roadway capacity. The City’s Transportation Analysis Handbook explains that,  
23 “[s]hortly after the project becomes operational, induced VMT may occur where road users  
24 respond to an initial appreciable reduction in travel time. With lower travel times, the modified  
25 facility becomes more attractive to travelers.” Here, the EIR found a sixty percent decrease in  
26 travel time for some users, which would lead to induced demand, though the reduction in travel  
27 time is also inconsistent with other findings in the EIR. The fundamental rule of traffic is, building  
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1 more roads makes people drive more.

2 44. The FEIR also failed to assess the full scope of traffic effects, arbitrarily limiting  
3 the sphere of traffic effects considered to a 1.5 mile radius from the Project, whereas the FEIR’s  
4 air quality assessment considers effects at a 2.5 mile radius.

5 45. The FEIR purports to evaluate vehicle miles traveled (“VMT”) “for informational  
6 purposes only,” claiming VMT analysis is exempted by the City’s Transportation Analysis Policy,  
7 but the EIR fails to accurately apply the City’s transportation policy to the Project, and fails to  
8 accurately or fully assess VMT.

9 46. The FEIR states, without substantial evidence, that the Project would result in a  
10 decrease in traffic congestions, resulting in a decrease in greenhouse gas emissions, neither of  
11 which conclusions are supported by substantial evidence in the record, and which are contradicted  
12 by evidence in the record.

13 47. The FEIR did not properly evaluate or mitigate significant air quality impacts from  
14 the Project.

15 48. According to the EIR itself, the Project would *more than double* existing PM2.5 air  
16 pollution.

17 49. The EIR’s own modeling, which was criticized by the Bay Area Air Quality  
18 Management District (“BAAQMD”), and which was clearly flawed, estimates that the Project will  
19 be extremely close to the BAAQMD threshold of significance for a single project’s PM2.5  
20 exposure, and proper modeling and analysis would likely have put the project above the  
21 BAAQMD threshold.

22 50. Traffic studies undertaken by City prior to the publication of the EIR, showed one  
23 and half times the number of expected automobile trips on the Project, which would result in a  
24 significantly worse air quality impact.

25 51. The EIR fails to disclose all air quality modeling assumptions, rendering public  
26 review and informed decision-making impossible.

27 52. The EIR proposes sound walls, and acknowledges that such barriers can alter the  
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1 flow and concentration of air pollution, but fails to explain such effects at the Project site, while  
2 determining without substantial evidence that such effects would be less than significant.

3 53. The FEIR did not properly evaluate or mitigate significant noise impacts from the  
4 Project.

5 54. The FEIR defers design of noise barriers until after Project approval, but fails to  
6 address questions regarding site configuration calling into question the feasibility of such  
7 mitigation.

8 55. Further, the FEIR fails to consider noise effects upon the second floor of  
9 residences, which would be located well above the sound wall.

10 **CAUSE OF ACTION**

11 **(Violations of CEQA)**

12 56. Petitioner incorporates by reference the allegations of set forth above, as if fully set  
13 forth in this paragraph.

14 57. The City prejudicially abused its discretion in certifying the FEIR. The City did not  
15 proceed in the manner required by law and its decisions in approving the Project and certifying the  
16 FEIR are not supported by substantial evidence. Pub. Resources Code § 21168.5; *Vineyard Area*  
17 *Citizens for Responsible Growth v. City of Rancho Cordova*, 40 Cal.4th 412, 426 (Cal. 2007).

18 These legal deficiencies include, without limitation, the following:

19 **The Project Description is Vague, Incomplete, and Unstable**

20 58. CEQA requires that an EIR include an accurate project description, and that the  
21 nature and objective of a project be fully disclosed and fairly evaluated in an EIR. *San Joaquin*  
22 *Raptor Rescue Center v. County of Merced*, 149 Cal.App.4th 646, 655 (2007) (*SJ Raptor*). An EIR  
23 should contain a “sufficient degree of analysis to provide decision-makers with information which  
24 enables them to make a decision which intelligently takes account of environmental  
25 consequences.” CEQA Guidelines § 15151. “An accurate, stable and finite project description is  
26 the sine qua non of an informative and legally sufficient EIR.” *County of Inyo v. City of Los*  
27 *Angeles*, 71 Cal. App. 3d 185, 193 (1977). “Only through an accurate view of the project may  
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1 affected outsiders and public decision makers balance the proposal’s benefit against its  
2 environmental cost, consider mitigation measures, assess the advantage of terminating the  
3 proposal . . . and weigh other alternatives in the balance.” *Id.* at 192-93. A project description may  
4 not provide conflicting signals to decision makers and the public about the nature and scope of the  
5 project as such a description is fundamentally inadequate and misleading. *SJ Raptor, supra*, 149  
6 Cal. App. 4th at 655-656.

7         59. The FEIR characterizes the scale of the Project in a contradictory manner,  
8 including characterizing the Project as a “major roadway improvement”, yet in response to  
9 comments characterizes the Project as not being a “major roadway improvement” and as “local  
10 serving.”

11         60. The FEIR fails to explain the extent to which the Project implements an existing  
12 City of San Jose settlement agreement with Santa Clara County, City of Santa Clara, and Milpitas;  
13 and fails to analyze consistency with the North San Jose Area Development Policy , which are all  
14 part of the whole of the Project, requiring environmental review.

15                                 The Project Uses Impermissible Project Objectives

16         61. CEQA requires that an EIR set forth a project’s basic objectives. (CEQA  
17 Guidelines, § 15124, sub. (b)[“A clearly written statement of objectives will help the lead agency  
18 develop a reasonable range of alternatives to evaluate in the EIR and will aid the decision makers  
19 in preparing findings or a statement of overriding considerations, if necessary.”]); *Habitat &*  
20 *Watershed Caretakers v. City of Santa Cruz*, (2013) 213 Cal. App. 4th 1277, 1299. Project  
21 objectives should not be so narrowly defined that they preclude consideration of reasonable  
22 alternatives for achieving the project's underlying purpose. (*North Coast Rivers Alliance v*  
23 *Kawamura* (2015) 243 Cal.App.4th 647, 668.)

24         62. The FEIR’s project objectives are unclear, too narrow, and/or inconsistently  
25 applied.

26         63. The project objectives to “Implement a programmed roadway network  
27 improvement project identified in the Envision San José 2040 General Plan,” and to “Implement a  
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1 planned major roadway improvement project, as set forth in the North San José Area Development  
2 Policy and the North San José Deficiency Plan,” were unduly narrow, as they could only be met  
3 by developing an automobile roadway, when other projects could have adequately met the project  
4 goals and underlying purposes of the inclusion of the Project in the Envision San José 2040  
5 General Plan and North San José Area Development Policy.

6 The FEIR is Inadequate as an Informational Document

7 64. The information in an EIR must not only be sufficient in quantity, but it must be  
8 presented a clear manner so as to adequately inform the public and decision makers. “A reader of  
9 the FEIR could not reasonably be expected to ferret out an unreferenced discussion . . . , interpret  
10 that discussion's unexplained figures without assistance, and spontaneously incorporate them into  
11 the FEIR's own discussion of total projected supply and demand.” *Vineyard Area Citizens for*  
12 *Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4th 412, 442 (2007). Information  
13 scattered throughout an EIR and its appendices and supporting reports are not substitutes for good  
14 faith reasoned analysis. *Ibid.* An EIR should be written in a way that readers are not forced “to sift  
15 through” to find important components of the analysis. *San Joaquin Raptor Rescue Ctr. v. County*  
16 *of Merced* (2007) 149 Cal.App.4th 645, 659.

17 65. Here, the EIR is disorganized, relevant information is inaccessible, and the analysis  
18 is incomplete. Relevant data and assumptions regarding air, noise, and traffic effects are difficult if  
19 not impossible to locate; descriptions of the Project itself vary significantly throughout the  
20 documents; and understanding and application of the Project’s goals and objectives are  
21 inconsistent and ambiguous.

22 The FEIR Fails to Adequately Define the Project’s Baseline

23 66. In order to determine whether a project’s impacts will be significant, CEQA  
24 requires lead agencies to compare the impact of a proposed project to the “physical environmental  
25 conditions in the vicinity of the project, as they exist at the time the notice of preparation is  
26 published.” These conditions serve as the project’s “baseline.” CEQA Guidelines § 15125. The  
27 description of the project’s baseline ensures that the public has “an understanding of the  
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1 significant effects of the proposed project and its alternatives.” CEQA Guidelines § 15125(a).  
2 Accurately determining the baseline environmental conditions is crucial to accurately evaluating a  
3 project’s impact. *E.g., San Joaquin Raptor/Wildlife Rescue Ctr. v. County of Stanislaus*, 27  
4 Cal.App.4th 713 (1994).

5 67. The FEIR’s description of baseline conditions is alternatively incomplete and  
6 inaccurate, infecting and invalidating the entirety of the EIR’s environmental analysis. The flaws  
7 include, but are not limited to:

- 8 A. Failure to sufficiently address baseline existing hazards to pedestrians;
- 9 B. Incomplete and inadequate discussion and misrepresentation of current  
10 roadway traffic conditions and current causes of congestion, making it  
11 impossible to independently assess the plausibility of the results of the  
12 theoretical traffic modelling and if the project meets its underlying purpose.

13 The FEIR Fails to Adequately Analyze Significant Environmental Impacts

14 68. CEQA requires that an EIR describe the proposed project’s significant  
15 environmental effects. Each must be revealed and fully analyzed in the EIR. Pub. Resources Code  
16 § 21100(b), CEQA Guidelines § 15126.2(a).

17 69. The FEIR fails to provide decision makers with sufficient analysis in numerous  
18 respects, as discussed, above: induced vehicle demand, VMT, air pollution, greenhouse gasses,  
19 noise impacts, and impacts to pedestrian safety, and traffic effects to Fox Lane.

20 The FEIR’s Project Alternatives Analysis Is Inadequate

21 70. The FEIR must “consider a reasonable range of potentially feasible alternatives that  
22 will foster informed decision making and public participation.” CEQA Guidelines § 15126.6.

23 71. The FEIR improperly rejected Alternative E as the environmentally superior  
24 alternative, through misapplication of both facts and law.

25 72. The Statement of Overriding Consideration, in turn, failed to include a defensible  
26 legal rationale supported by any evidence in its decision to reject Alternative E as the  
27 environmentally superior alternative.

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1 The FEIR’s Mitigation Measures are Legally Inadequate

2 73. “An EIR shall describe feasible measures which could minimize significant adverse  
3 impacts.” CEQA Guidelines § 15126.4(a)(1). An EIR may not defer the formulation of mitigation  
4 measures to a future time, but mitigation measures may specify performance standards that would  
5 mitigate significant effects and may be accomplished in in more than one specified way.

6 “Impermissible deferral of mitigation measures occurs when an EIR puts off analysis or orders a  
7 report without either setting standards or demonstrating how the impact can be mitigated in the  
8 manner described in the EIR.” *Preserve Wild Santee v. City of Santee*, 210 Cal.App.4th 260, 280-  
9 281 (2012).

10 74. The efficacy of a mitigation measure in remedying the identified environmental  
11 problem must be apparent in the EIR. *Sierra Club v. County of San Diego*, (2014) 231 Cal.App.4th  
12 1152, 1168; *Communities for a Better Env't v. City of Richmond*, (2010) 184 Cal.App.4th 70,  
13 95; *Gray v. County of Madera*, (2008) 167 Cal.App.4th 1099, 1116; *Cleveland Nat'l Forest*  
14 *Found. v. San Diego Ass'n of Gov'ts*, (2017) 17 Cal.App.5th 413, 433.

15 75. The FEIR improperly defers analysis and formulation of mitigation measures, and  
16 what mitigation measures that are included in the FEIR’s are unenforceable or insufficient,  
17 including its adopted mitigation measures for noise and pedestrian safety.

18 The FEIR Failed to Respond to All Comments

19 76. “The lead agency shall evaluate comments on environmental issues received from  
20 persons who reviewed the draft EIR and shall prepare a written response.” CEQA Guidelines §  
21 15088.

22 77. The FEIR failed to include and address at least three comment letters that were  
23 submitted during the public comment period on the Draft EIR, including: comments from Andrew  
24 Tubbs, regarding Project objectives, sent September 3, 2019; comments from Robin Roemer,  
25 regarding air pollution and project objectives, sent September 17, 2019; and comments from  
26 Clemence Tiradon, regarding air quality, sent November 3, 2019.

1           78.     For each of these reasons, the City prejudicially abused its discretion and failed to  
2 proceed in the manner required by law in certifying the FEIR and approving the Project. The  
3 FEIR’s errors and omissions precluded informed decision making and informed public  
4 participation, thereby thwarting the statutory goals of the EIR process.

5                   **WHEREFORE**, Petitioner prays for relief as follows:

- 6           1.     That this Court issue a peremptory writ of mandate:
  - 7                   a.    Commanding Respondents to set aside their certifications of the FEIR and to  
8                            prepare a revised EIR and otherwise comply with CEQA prior to any  
9                            subsequent action taken to approve the Project:
  - 10                   b.   Commanding Respondents to immediately suspend all activities in furtherance  
11                            of the Project; and,
  - 12                   c.   Commanding Respondents to set aside their approvals of the Project.
- 13           2.     For an award of Petitioner’s costs incurred in bringing this action, and reasonable  
14 attorneys’ fees pursuant to Code of Civil Procedure Section 1021.5, or as otherwise authorized by  
15 law; and
- 16           3.     For such other relief as the Court deems just and proper.

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18 Dated: September 1, 2020

19   AQUA TERRA AERIS LAW GROUP

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21   By \_\_\_\_\_  
22    JASON R. FLANDERS

23    Attorneys for  
24    Protecting the Children of Orchard School



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**VERIFICATION**

I, Robin Roemer, am an authorized representative and member of Petitioner, Protecting the Children of Orchard School. I have read the foregoing Petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 1<sup>st</sup> day of September 2020, in San Jose, California.

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Robin Roemer  
Protecting Children of Orchard School