

**RESPONSES TO PUBLIC COMMENTS  
TO THE**

**AC BY MARRIOTT – WEST SAN JOSE  
REVISED INITIAL STUDY/  
MITIGATED NEGATIVE DECLARATION**

**File No.: H17-023**

**November 2018**



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## **ATTACHMENTS**

- ATTACHMENT A: COMMENT LETTERS RECEIVED IN RESPONSE TO THE RE-  
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- ATTACHMENT B: REVISED CALEEMOD OUTPUT FOR THE 5096 STEVENS CREEK  
BOULEVARD HOTEL, DATED OCTOBER 25, 2018 AND NOVEMBER 5,  
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- ATTACHMENT C: HEALTH RISK ASSESSMENT BY ILLINGWORTH & RODKIN, INC.,  
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- ATTACHMENT D: COMMENT LETTER FROM LOZEAU DRURY, LLP, DATED OCTOBER 30,  
2018**

## **SECTION 1            RESPONSE TO COMMENTS ON THE RECIRCULATED INITIAL STUDY / MITIGATION NEGATIVE DECLARATION**

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Pursuant to the California Environmental Quality Act (CEQA), the City prepared an Initial Study/Mitigated Negative Declaration (IS/MND) for the AC by Marriot Hotel – West San Jose Project, located at 5696 Stevens Creek Boulevard (proposed project). The Draft Initial Study/Mitigated Negative Declaration was first circulated for public comments for 20 days, from August 17, 2018 to September 6, 2018. The City received six comments during the public circulation period, including three from local community members; one from Lozeau Drury, LLP, representing Laborers International Union of North America 270 (LiUNA); and one from the City of Cupertino.

In response to public comments on the aesthetics analysis in the IS/MND, the City provided new visual simulations and additional analysis on aesthetics and conformance of the project with policies in the Stevens Creek Boulevard Urban Village Plan. To provide the public with sufficient opportunity to review this new information, the City re-circulated the IS/MND for an additional 20 days from October 5, 2018 to October 25, 2018. The City of San Jose received a total of seven (7) comment letters on the Recirculated IS/MND six (6) during the public review period and one (1) comments after the end of the review period.

On October 30, 2018, five days after the end of the public comment period, Lozeau Drury LLP, who commented on the during the Recirculated IS/MND circulation period, submitted another comment letter on the re-circulated IS/MND via email. Although these comments were not received during the public circulation period, the City is responding to these comments as a courtesy to clarify the analysis in the IS/MND, address community concerns, and for purposes of providing information and the administrative record.

In summary, the comments received on the Recirculated IS/MND did not raise any new issues about the project’s environmental impacts, or provide information indicating the project would result in new environmental impacts or impacts substantially greater in severity than disclosed in the IS/MND. CEQA does not require formal responses to comments on an IS/MND, only that the lead agency consider the comments received [CEQA Guidelines §15074(b)]. Nevertheless, responses to the comments are included in this document to provide a complete environmental record.

The re-circulated IS/MND, supporting technical studies, and response to comments on the original circulated IS/MND are available on the Planning Department’s Negative Declarations/Initial Studies web site at: [www.sanjoseca.gov/negativedeclarations](http://www.sanjoseca.gov/negativedeclarations).

The following pages contain a list of the agencies and persons that submitted comments on the Recirculated IS/MND and the City’s responses to comments received on the Recirculated IS/MND. The specific comments have been excerpted from the letter and are presented as “Comment” with each response directly following (“Response”). Copies of the actual letters and email submitted to the City of San Jose are attached to this document.

**SECTION 2 LIST OF AGENCIES AND PERSONS COMMENTING  
ON THE IS/MND**

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<b><u>Comment Received From</u></b>	<b><u>Date of Letter</u></b>	<b><u>Response on Page</u></b>
1. Ed Ketchum	October 7, 2018	4
2. Kirk Vartan	October 23, 2018	6
3. Sean McFeely	October 23, 2018	7
4. Lozeau Drury, LLP	October 24, 2018	8
5. Santa Clara Valley Water District	October 25, 2018	25
6. Catherine Thaler	October 25, 2018	26
7. Lozeau Drury, LLP	October 30, 2018	29

**SECTION 3      RESPONSES TO COMMENTS RECEIVED ON THE  
RE-CIRCULATED IS/MND**

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**1.      RESPONSES TO COMMENTS FROM ED KETCHUM ON OCTOBER 7, 2018**

**Comment 1.1:**

This project is within the lands once held by the Tamien speakers. By agreement these are represented by Muwekma Tribal Band. I suggest you speak to their representative Alan Leventhal.

**Response 1.1:**

As part of the public circulation process, Mr. Alan Leventhal was notified of this project via email. In addition, as discussed on Page 144 of the Recirculated IS/MND, “at the time of the preparation of this Initial Study, no tribes have sent written requests for notification of projects to the City of San José, except for projects located in Coyote Valley.” Follow up letters were also submitted to the Native American Heritage Commission and no responses were received by the City.

**Comment 1.2:**

As the project has four levels of subterranean parking It will require monitors as there is a significant possibility as a cultural resources thousand of years old could be buried by many feet of alluvium.

**Response 1.2:**

The Recirculated IS/MND states that as part of the development permit approval the project would be required to perform the following standard permit conditions to avoid impacts associated with disturbance to buried archaeological resources during construction:

- In the event that prehistoric or historic resources are encountered during excavation and/or grading of the site, all activity within a 50-foot radius of the find shall be stopped, the Director of Planning, Building, and Code Enforcement shall be notified, and the archaeologist will examine the find and make appropriate recommendations prior to issuance of building permits. Recommendations could include collection, recordation, and analysis of any significant cultural materials. A report of findings documenting any data recovery during monitoring would be submitted to the Director of Planning, Building, and Code Enforcement.
  
- Pursuant to Section 7050.5 of the Health and Safety Code, and Section 5097.94 of the Public Resources Code of the State of California, in the event that human remains are discovered during excavation and/or grading of the site, all activity within a 50-foot radius of the find shall be stopped. The Santa Clara County Coroner shall be notified and make a determination as to whether the remains are of Native American origin and whether an investigation into the cause of death is required. If the remains are determined to be Native American, the

Coroner will notify the Native American Heritage Commission (NAHC) immediately. Once the NAHC identifies the most likely descendants, the descendants will make recommendations regarding proper burial, which will be implemented in accordance with Section 15064.5(e) of the CEQA Guidelines.

**2. RESPONSES TO COMMENTS FROM KIRK VARTAN, DATED OCTOBER 23, 2018.**

**Comment 2.1:**

I am writing a letter of support for the project called: AC by Marriott – West San José, file #: H17-023, Assessor’s Parcel Number: 375-12-017.

This is a good project and one that is controversial only because it is on a City border. The fact is, no one in any neighborhood wants to see \*any\* change in their neighborhood. This is a good project for the area that just happens to be in San Jose. If it were in Cupertino, I am sure the Cupertino City Council would enthusiastically support it. Why? Because it just makes sense. It is directly across from the 9-story Apple “sardine can” that will have a twin 9-story building in a few years. Apple and other corporate identities will continue to dominate this area. This will support need hotel demand with a quality option. San Jose benefits because of the tax revenue, but Cupertino and Santa Clara also benefit because less traffic will be seen when corporate travelers will either walk to the Apple building if that is where they are going, or they will simply jump on 280 North or South to get to where they need to go. It is a win-win for all Cities involved. This will help the region with emissions and pollution.

Stevens Creek is already VTA’s second highest grossing transit line, second only to El Camino. It is only growing and expanding.

On top of all that, Stevens Creek is being looked at as a future intense transportation corridor, with technologies such as Hyper-Loop or tunneling being discussed. And as part of Councilmember Jones’ Innovation Corridor, I think there is incredible need for high intensity uses along Stevens Creek to really make it shine. Hotels like this one will be a great addition to the Innovation Corridor.

I was a co-chair of the Stevens Creek Advisory Group and we looked at this project when looking at the land uses for the corridor. This use fit cleanly and clearly into the design.

I hope you will support this project quickly and let it get built.

**Response 2.1:** Comment noted. The author of this comment is expressing support for the Proposed Project, and does not identify any CEQA issues in the Recirculated IS/MND, and therefore, no specific response is required.

### **3. RESPONSES TO COMMENT FROM SEAN MCFEELY, DATED OCTOBER 23, 2018**

#### **Comment 3.1:**

I am writing a letter of support for the project called: AC by Marriott – West San José, file #: H17-023, Assessor's Parcel Number: 375-12-017.

This project is consistent with the city's goals for urban transit oriented developments along major transportation corridors, and is consistent with the approved Stevens Creek Urban Village. This is an important corridor that will continue to receive transit improvements from VTA, San Jose and neighboring cities. Cupertino has recently discussed a high frequency transit solution such as hyperloop. The project is adjacent to existing 4 story residential and 4-6 story commercial/hotel building.

The valley has a significant hotel shortage with room prices reaching up to \$1,000/night in places. The project would help the city capture significant economic impact from the nearby existing and proposed commercial developments. With that said, the architectural design is horribly dull and lacking (compared to AC Hotel in Sunnyvale, link). The project can still be a success with proper attention to the streetscape and base of the building, particularly the pedestrian hostile west elevation. It would be critical that the hotel bar is open to the public to help promote street vibrancy. Ideally, the project would have a more iconic design to due to the site being the western gateway into the Stevens Creek Corridor. San Jose can capture more economic development if it pushes for equal or better design to proposals in the neighboring towns.

Many hotels in other cities provide rentable bike for patrons. I would be best if the hotel partners with motivate or another provider to locate rentable bikes on site. Bike stalls are no good... if there are no bikes.

The general plan and specific plan call for urban transit and pedestrian focused developments along the Stevens Creek Corridor. I hope you will follow thru on that goal and support this project.

**Response 3.1:** Comment noted. The author of this comment is expressing support for the Proposed Project, and does not address the analysis contained in the Recirculated IS/MND. Therefore, no specific response is required.



#### **4. RESPONSES TO COMMENTS FROM LOZEAU DRURY, LP, DATED OCTOBER 24, 2018.**

##### **Comment 4.1:**

I am writing on behalf of the Laborers International Union of North America, Local Union 270 and its members living in and around the City of San Jose (“LIUNA”) regarding the Initial Study and Mitigated Negative Declaration (“IS/MND”) prepared for the AC by Marriott - West San Jose Project (“Project”) (Project File No. HI7-023). After reviewing the IS/MND, and with the assistance of expert review by environmental consulting firm SWAPE, the evidence indicates that there is a “fair argument” that the Project may have unmitigated adverse environmental impacts or, alternatively, the IS/MND is not supported by substantial evidence. SWAPE’s comments (attached hereto as Exhibit A) as well as the comments below identify substantial evidence of a fair argument that the Project may have significant environmental impacts. Accordingly, an environmental impact report (“EIR”) is required to analyze these impacts and to propose all feasible mitigation measures to reduce those impacts. We urge the Planning Director to decline to approve the IS/MND, and to instruct staff to prepare an EIR for the Project prior to any Project approvals.

##### **Response 4.1:**

Responses to specific comments related to the adequacy of the IS/MND are provided below. Pursuant to the responses below and the analysis in the Recirculated IS/MND, the City made the findings that an IS/MND is the adequate CEQA document for this project. The Director of Planning, Building and Code Enforcement determined that the project would not have a significant effect on the environment if certain mitigation measures are incorporated into the project. The Recirculated IS/MND concluded that the project would result in potential impacts to biological resources and hazards and hazardous material. Consistent with the conclusion in the Recirculated IS/MND, the project would incorporate project-specific mitigation measures, City standard conditions and conditions of approval that will reduce those impacts to a less than significant level. The project applicant has made or agrees to make project revisions that will clearly mitigate the potentially significant effects to a less than significant level. Therefore, the project would reduce the impacts to less than significant levels, resulting in no further mitigation measures or an environmental impact report to be required.

##### **Comment 4.2:**

The proposed Project includes the demolition of an existing gas station and the construction of an approximately 78,850 square feet hotel including 168 guest rooms, a restaurant and four floors of underground parking for 100 vehicles. Little information is provided regarding the restaurant but it would presumably be open to the public as well as guests and could generate significant use by non-guests. The Project’s hotel use would generate about 1,400 vehicle trips per day. The MND hints at the possible use of parking at another nearby location should the proposed parking prove insufficient to handle the demand generated by the Project.

**Response 4.2:** The comment incorrectly assumes the restaurant would be a larger, stand-alone type operation that would be marketed to both guests and non-guests. Similar to other hotels in the region, the restaurant is intended for use of hotel guests as a breakfast buffet and bar with snacks and light meals. Although these facilities are open to the public, it is not intended to be a full-scale restaurant operation that would attract significant use by non-guests. The restaurant/bar area is small and is located within the open lobby, and is not intended to be marketed as a separate restaurant to non-guests.

**Comment 4.3:**

As the California Supreme Court held, “[i]f no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR.” *Communities for a Better Env’t v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320 [“CBE v. SCAQMD”], citing, *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 88; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504–505. “Significant environmental effect” is defined very broadly as “a substantial or potentially substantial adverse change in the environment.” Pub. Res. Code [“PRC”] § 21068; see also 14 CCR § 15382. An effect on the environment need not be “momentous” to meet the CEQA test for significance; it is enough that the impacts are “not trivial.” *No Oil, Inc., supra*, 13 Cal.3d at 83. “The ‘foremost principle’ in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” *Communities for a Better Env’t v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 109 [“CBE v. CRA”].

The EIR is the very heart of CEQA. *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1214; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927. The EIR is an “environmental ‘alarm bell’ whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return.” *Bakersfield Citizens*, 124 Cal.App.4th at 1220. The EIR also functions as a “document of accountability,” intended to “demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.” *Laurel Heights Improvements Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392. The EIR process “protects not only the environment but also informed self-government.” *Pocket Protectors*, 124 Cal.App.4th at 927.

An EIR is required if “there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment.” PRC § 21080(d); see also *Pocket Protectors*, 124 Cal.App.4th at 927. In very limited circumstances, an agency may avoid preparing an EIR by issuing a negative declaration, a written statement briefly indicating that a project will have no significant impact thus requiring no EIR (14 Cal. Code Regs. § 15371), only if there is not even a “fair argument” that the project will have a significant environmental effect. PRC, §§ 21100, 21064. Since “[t]he adoption of a negative declaration . . . has a terminal effect on the environmental review process,” by allowing the agency “to dispense with the duty [to prepare an EIR],” negative declarations are allowed

only in cases where “the proposed project will not affect the environment at all.” *Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440. A mitigated negative declaration is proper only if the project revisions would avoid or mitigate the potentially significant effects identified in the initial study “to a point where clearly no significant effect on the environment would occur, and...there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.” PRC §§ 21064.5 and 21080(c)(2); *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 331. In that context, “may” means a reasonable possibility of a significant effect on the environment. PRC §§ 21082.2(a), 21100, 21151(a); *Pocket Protectors, supra*, 124 Cal.App.4th at 927; *League for Protection of Oakland's etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904–905.

Under the “fair argument” standard, an EIR is required if any substantial evidence in the record indicates that a project may have an adverse environmental effect—even if contrary evidence exists to support the agency’s decision. 14 CCR § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 931; *Stanislaus Audubon Society v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-15; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602. The “fair argument” standard creates a “low threshold” favoring environmental review through an EIR rather than through issuance of negative declarations or notices of exemption from CEQA. *Pocket Protectors*, 124 Cal.App.4th at 928.

The “fair argument” standard is virtually the opposite of the typical deferential standard accorded to agencies. As a leading CEQA treatise explains:

This ‘fair argument’ standard is very different from the standard normally followed by public agencies in making administrative determinations. Ordinarily, public agencies weigh the evidence in the record before them and reach a decision based on a preponderance of the evidence. [Citations]. The fair argument standard, by contrast, prevents the lead agency from weighing competing evidence to determine who has a better argument concerning the likelihood or extent of a potential environmental impact. The lead agency’s decision is thus largely legal rather than factual; it does not resolve conflicts in the evidence but determines only whether substantial evidence exists in the record to support the prescribed fair argument.

Kostka & Zishcke, *Practice Under CEQA*, §6.29, pp. 273-274. The Courts have explained that “it is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency’s determination. Review is de novo, with a preference for resolving doubts in favor of environmental review.” *Pocket Protectors*, 124 Cal.App.4th at 928.

In addition, a negative declaration must accurately describe the proposed project and its environmental setting. *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180; CEQA Guidelines §15071(a). The initial study must “provide documentation of the factual basis for the finding in a Negative Declaration that a project will not have a significant effect on the environment.” CEQA Guidelines § 15063(c)(5).

**Response 4.3:** This comment provides information regarding the definition of the substantial evidence and fair argument standards, and does not address the analysis contained

in the Recirculated IS/MND. As discussed in Response 4.1 above, explained that the City has determined that an IS/MND is the appropriate environmental review for the project.

**Comment 4.4:**

Based on the floor plans included in the materials, it appears that the proposed restaurant is slated for about one-fourth to one-third of the first floor of the building. Based on the 9,850 square feet of floor space identified for the first floor, the restaurant would correlate to about a 3,000 square feet restaurant. Like other restaurants located in hotels, the proposed restaurant would presumably be open to the public. Those additional visitors to the Project are not factored into either the traffic counts or the air modeling for the Project. As SWAPE's review identifies, "only the proposed hotel land use was inputted into the model, while the restaurant land use was omitted entirely from the model." SWAPE Comments, pp. 2, 4. As a result, the air emissions from the Project are underestimated and not based on substantial evidence. *Id.*

**Response 4.4:**

As discussed in Response 4.2, above, the restaurant/bar is intended for use of hotel guests as a breakfast buffet and bar with snacks and light meals. Although these facilities are open to the public, it is not intended to be a full-scale restaurant operation that would attract significant use by non-guests. As the hotel is the main proposed use, the analysis is adequate.

**Comment 4.5:**

The air emissions are further underestimated by the use of a smaller building square footage in the CalEEMod inputs than is proposed. Rather than the 78,850 square feet building described in the IS/MND, the CalEEMod files use a 77,900 square feet building. This error also underestimates the air pollution emissions of the Project. SWAPE Comments, p. 2.

**Response 4.5:**

The IS/MND air quality analysis and supporting CalEEMod air quality modeling are based on a 168 room hotel with 100 parking spaces. The size of the hotel is significantly below the screening level sizes for hotels in the Bay Area Air Quality Management District's (BAAQMD) 2017 CEQA Guidelines, which call for operational air quality analysis for Criteria Air Pollutants for projects with more than 489 hotel rooms and more than 554 rooms for an analysis of construction-related air quality. Despite the size of the hotel, the City performed an air quality analysis using CalEEMod, which resulted in maximum daily operational and construction emissions significantly below the established BAAQMD thresholds for Reactive Organic Gases (ROG), Nitrogen Oxide (NO<sub>x</sub>), and Particulate Matter (PM<sub>10</sub> and PM<sub>2.5</sub>), with operational emissions being approximately 2% to 15% of the operational emissions thresholds and construction emissions approximately 2% to 36% of construction emission thresholds. The approximately 1,000-square foot difference in building size noted by the commenter is not sufficient to trigger an increase in either operational or construction air pollutants, as demonstrated by the revised

CalEEMod output dated October 25, 2018. Therefore, the analyses as disclosed in the Recirculated IS/MND are adequate.

**Comment 4.6:**

Highly significant emissions from the many truck trips necessary to haul away materials from the demolition of the existing gas station also are not calculated by the project's CalEEMod modeling. Although the IS/MND states that "estimated emissions associated with the demolition of the existing gas station and service station are included in the demolition phase of the project[,]" a review of the CalEEMod inputs shows that zero haul trips were input for that demolition activity. IS/MND, p. 43; *Id.*, App. B, p. 7. The inputs indicate that haul trips are estimated to be 20 miles in distance, but the number of trips would be zero. *Id.*, App. B, p. 7. Significant air pollution emissions are overlooked by this omission.

**Response 4.6:**

As discussed in the in the Air Quality Summary in Appendix B to the IS/MND, "construction of the proposed project would generate temporary criteria pollutant emissions primarily due to the operation of construction equipment and truck trips. Estimated emissions associated with the demolition of the existing gas station and service station are included in the demolition phase of the project. Site preparation and grading typically generate the greatest amount of emissions due to the use of grading equipment and soil hauling. Additionally, the grading phase of the project includes the excavation of an estimated 17,000 cubic yards of soil to account for the construction of the subterranean parking structure." Most demolition and haul trips are accounted for in the analysis of the grading stage, as this is the stage when the most haul trips will be generated (estimated at approximately 850 truck trips). Haul trips associated only with demolition of the existing gas station and canopies will be less in comparison, at approximately 15 to 20 truck trips (about 2% of the truck trips generated by grading/excavation). As discussed in Response 4.5, above, construction emissions are significantly below BAAQMD thresholds for Criteria Air Pollutants, and the haul trips associated with demolition are not sufficient to trigger a significant construction air quality impact. Therefore, the analyses as disclosed in the Recirculated IS/MND are adequate

**Comment 4.7:**

Lastly, the Transportation Demand Management Plan ("TDM Plan") and IS/MND both identify a parking contingency requiring the use of nearby off-street parking should the 100 spaces included in the subterranean garage prove to be inadequate. No specific off-street parking location is identified. Under the City's code, without a TDM plan and nearby bus routes, the Project would require 186 parking spaces. It thus seems reasonable to evaluate a worst case scenario contingency of providing up to 86 off-site spaces. Neither the air pollution nor traffic impacts of vehicles using the possible off-site parking locations is evaluated in the CalEEMod air modeling or the traffic impact analysis. As a result, the air emissions as well as the Project's traffic impacts are once again underestimated.

**Response 4.7:**

The air quality analysis is based on 1,373 average daily weekday trips, which

includes trips that do not park on site such as guests arriving or departing through rideshare services. Furthermore, the TDM program and the proposed reduction in parking requirements are supported by the traffic analysis conducted by TJW Engineering Inc., dated August 3, 2018, and included as Appendix F in the Recirculated IS/MND, which concluded that the proposed project would reduce vehicle parking demand to 46% below the City's parking requirement. If parking surveys find that parking is insufficient on the site, additional measures, such as tandem parking or valet parking, could be provided. Such measures would not result in any change in the assumptions in the air quality analysis.

**Comment 4.8:**

Because of these omissions and inaccuracies, the air pollution modeling result is not supported by substantial evidence. The applicant should rerun the modeling in order to ascertain the actual anticipated emissions from the Project's construction and operation.

**Response 4.8:** See Response 4.5, above.

**Comment 4.9:**

People sensitive to toxic air contaminants virtually surround the proposed site. "The sensitive receptors nearest to the project include existing residences to the east and south/south west and the Sunflower Learning Center (pre-school and afterschool) to the west." IS/MND, p. 38. "The closest sensitive receptors to the project site are existing residences approximately 60 feet east of the project site." *Id.*, p. 104. Despite the numerous nearby receptors, the IS/MND cavalierly attempts to interpolate that the Project's emissions will not have any health impacts on nearby sensitive receptors from its claim that the Project will not exceed any BAAQMD significance thresholds. IS/MND, p. 38. The IS/MND's conclusion is not supported by a quantitative health risk assessment ("HRA"). *Id.*; SWAPE Comments, p. 4. Nor is there any quantitative assessment of toxic air contaminant emissions, including diesel particulate matter from the project. *Id.* As SWAPE points out:

the Project Applicant cannot claim that the Project would result in a less than significant health risk impact without properly assessing the diesel particulate matter (DPM) emissions that will be emitted during Project activities. As a result, until the Project's construction and operational health risk impacts are adequately quantified and compared to applicable thresholds, the IS/MND cannot make any conclusions with regard to the Project's health risk impacts.

**Response 4.9:** A Health Risk Assessment was prepared for the proposed project by Illingworth & Rodkin, dated November 5, 2018 (Appendix C). This health risk assessment evaluated potential health effects of sensitive receptors at these nearby residences from construction emissions of diesel particulate matter (DPM) and particulate matter (PM<sub>2.5</sub>). Dispersion modeling was conducted to predict the off-site concentrations resulting from project construction, so that lifetime cancer risks and non-cancer health effects could be evaluated. DPM and PM<sub>2.5</sub> concentrations were

calculated at nearby sensitive receptors. The closest sensitive receptors to the project site are multi-family residences adjacent to the eastern site boundary, a daycare to the west, and single-family residences further away to the south and west.

The health risk assessment concluded that the maximum-modeled annual PM<sub>2.5</sub> concentration, which is based on combined exhaust and fugitive dust emissions, would be 0.07µg/m<sup>3</sup>. Therefore, this maximum annual PM<sub>2.5</sub> concentration would be below the BAAQMD significance threshold of greater than 0.3µg/m<sup>3</sup>. The maximum modeled annual residential DPM concentration (i.e., from construction exhaust) would be 0.06µg/m<sup>3</sup>. The maximum computed Hazard Index (HI) based on this DPM concentration would be 0.01, which does not exceed the BAAQMD significance criterion of a HI greater than 1.0. Therefore, the project would not result in a significant impact for air quality and would not require new mitigation measures.

**Comment 4.10:**

SWAPE Comments, p. 5. In order to fully disclose the potential health risks associated with the Project, an accurate health risk assessment for the entire Project consistent with guidelines published by the Office of Environmental Health Hazard Assessment must be prepared. Currently, the IS/MND's conclusion that the Project will not result in any significant health risks is not supported by substantial evidence and a fair argument exists that the Project may have significant health risk impacts.

**Response 4.10:**

The Health Risk Assessment prepared for the proposed project utilized BAAQMD's recommendation of cancer risk methodology that follows the State of California Office of Environmental Health Hazard Assessment (OEHHA) and California Air Resources Board (CARB) recommended methods for conducting health risk assessments. Exposure parameters from the OEHHA guidelines and the recent BAAQMD HRA Guidelines were used in this evaluation. The analysis conclude maximum-modeled annual PM<sub>2.5</sub> concentration would be 0.07µg/m<sup>3</sup>, maximum modeled annual residential DPM concentration (i.e., from construction exhaust) would be 0.06µg/m<sup>3</sup>, and maximum computed Hazard Index (HI) based on this DPM concentration would be 0.01. All of which would be below the BAAQMD significant thresholds. Refer to Response 4.9 and Appendix C of this Responses to Comment for further details.

**Comment 4.11:**

Based on the limited information provided by the IS/MND, a fair argument exists that the Project may have a significant health risk impact to nearby sensitive receptors. SWAPE has prepared a Level 2 health risk screening assessment ("HRSA") for the project. BAAQMD recommends a significance threshold of an increased cancer risk of 10 in one million and an increased cumulative cancer risk of 100 in a million from all local sources. Applying the U.S. Environmental Protection Agency's AERSCREEN model, as

recommended by OEHHA and the California Air Pollution Control Officers Association, SWAPE calculates that construction and operation of the Project will result in cancer risks to infants, children, adults, during the third trimester of pregnancy, and nearby residents over the course of a 30-year residential lifetime of, respectively, 310 in one million, 170 in one million, 26 in one million, 16 in one million, and 510 in one million, well in excess of BAAQMD's threshold. SWAPE Comment, pp. 4-8. Based on this substantial screening evidence, a fair argument is present that the Project may have significant health risk impacts on nearby residents.

**Response 4.11:** The project is not a significant generator of toxic air contaminants (TAC) from operation as it is a hotel with no manufacturing, generators, or significant numbers of truck trips (such as a warehouse distribution facility). In fact, as stated in the Health Risk Assessment prepared for the proposed project, the project would replace the Stevens Creek Shell gasoline station which is an existing source of TAC emissions.

As stated in Response 4.9, above, the health risk assessment concluded that the maximum increased residential cancer risk was computed as 9.7 in one million for an infant exposure and 0.2 in one million for an adult exposure. At the daycare facility, the maximum child risk was computed at 0.2 per million. The maximum excess cancer risk, assuming infant exposure, would be below the significance threshold of 10.0 in one million.

**Comment 4.12:**

Likewise, contrary to CEQA, by adding TAC emissions to the immediate area, the Project cannot avoid evaluating the cumulative impacts of the Project including the adjacent Stevens Creek Boulevard's existing TAC emissions on the Project's nearby sensitive receptors. Given the health risks identified above and the fact that the Project itself may increase cancer risks by more than 100 in a million, the addition of TACs from the Project's construction and operation is considerable and may significantly contribute to the Project's cumulative adverse health risk impact including the existing impacts from traffic on Steven's Creek Boulevard and perhaps other adjacent TAC sources. Hence, the IS/MND's conclusion that the Project will not have cumulative health risk impact is not supported by substantial evidence and a fair argument exists that the Project will result in cumulative health risks.

**Response 4.12:** Pursuant to the Health Risk Assessment prepared by Illingworth & Rodkin, dated November 5, 2018, "(p)roject operations will not include activities that would be a significant source of localized TAC or particulate matter (PM<sub>2.5</sub>) emissions that could lead to significant operational health or community risks to off-site sensitive receptors. Furthermore, the project would not generate substantial diesel truck trips or include stationary equipment that emits TACs or PM<sub>2.5</sub>. The project would replace the Stevens Creek Shell gasoline station, an existing source of TAC emissions. As provided in the background information regarding existing TAC sources in Health Risk Assessment, the Stevens Creek Shell gasoline station is



reported by BAAQMD as Plant 112344 to have a source risk of 5.05 chances per million. Additionally, the facility includes Plant 21376 that has a cancer risk of 0.50 chances per million. These facilities are about 115 feet from the nearest receptors where the maximum construction cancer risk was modeled. Using the BAAQMD Gas Station Distance Multiplier, the adjusted cancer risk from the Stevens Creek Shell gasoline station is 2.5 chances per million.”

Cumulative community risk impacts were addressed through an evaluation of TAC sources located within 1,000 feet of the construction maximally exposed individual (MEI). These sources include highways (i.e., Interstate 280), busy surface streets (i.e., Stevens Creek Boulevard), and stationary sources identified by BAAQMD. Community risk impacts from these sources upon the construction MEI are below the required thresholds and are reported in the table below.

Source	Maximum Cancer Risk (per million)	PM2.5 concentration (µg/m3)	Hazard Index
Project Construction	9.7 (infant)	<b>0.07</b>	0.01
Removal of Shell Gas Station	2.5 (lifetime)	<b>0.00</b>	0.01
Project Increased Cancer Risk →	7.1 (infant)	<b>0.07</b>	0.00
<b>BAAQMD Single-Source Threshold</b>	<b>&gt;10.0</b>	<b>&gt;0.3</b>	<b>&gt;1.0</b>
<b>Significant?</b>	<i>No</i>	<i>No</i>	<i>No</i>
Interstate 280 (Link 289, 6ft) at 600 feet south	11.8	0.09	0.01
Stevens Creek Boulevard at 190 ft south ADT 28355	4.6	0.17	<0.03
Plant #2181 (Generator) at 640 feet	0.2	<0.01	<0.01
Plant #108709 (Gas Station) at 680 feet	0.7	-	<0.01
Plant #22425 (Generator) at 670 feet	0.9	<0.01	<0.01
Plant #22426 (Generator) at 850 feet	1.5	<0.01	<0.01
<i>Combined Sources Total</i>	26.8 (infant)	0.33	<0.09
<b>BAAQMD Cumulative Source Threshold</b>	<b>&gt;100</b>	<b>&gt;0.8</b>	<b>&gt;10.0</b>
<b>Significant?</b>	<i>No</i>	<i>No</i>	<i>No</i>

The table above reports both the project and cumulative community risk impacts. Without mitigation, the project would have a less-than-significant impact with respect to community risk caused by project construction activities, since the maximum cancer risk, PM2.5 concentration, and HI do not exceed the single-source thresholds of 10.0 per million for cancer risk, 0.3 µg/m3 for PM2.5, and HI of 1.0, respectively. Therefore, the combined annual cancer risk and Hazard risk values, which includes unmitigated and mitigated, would not exceed the cumulative threshold.

**Comment 4.13:**

By failing to assess the health risks to adjacent sensitive receptors, the Project also is inconsistent with the City’s General plan. The General Plan addresses toxic air contaminants by establishing Goal MS-11

requiring the City to “[m]inimize exposure of people to air pollution and toxic air contaminants such as ozone, carbon monoxide, and particulate matter.” To achieve this goal, the General Plan’s Policy MS-11.1 states that the City must “[r]equire completion of air quality modeling for sensitive land uses such as new residential developments that are located near sources of pollution such as freeways and industrial uses” and require effective mitigation measures. The lack of any TAC modeling for the Project fails to protect the sensitive receptors adjacent to the project and is inconsistent with this goal and policy.

**Response 4.13:** The City’s General Plan Policy MS-11.1 does not apply to the project because it is not considered a sensitive land use, such as new residences or a school, which would have significant concentrations of sensitive receptors over a long period of time (i.e., more than a few nights typically associated with hotel guests). . Moreover, as part of the Response to Comment, TAC analysis was completed to disclose the potential impact of the project operations and constructions to the nearby residents and had concluded to meet the BAAQMD threshold (Refer to Response 4.9 to Response 4.11).

**Comment 4.14:**

The IS/MND, despite acknowledging that the Project is projected to emit approximately 1,528 metric tons per year – well above the BAAQMD threshold of 1,100 metric tons of CO<sub>2</sub>e per year – claims that because the Project is consistent with the mandatory requirements of the City’s GHG Reduction Strategy (“GHGRS”), it will not have any significant impacts from its GHG emissions. IS/MND, pp. 64-69. However, “[i]f there is substantial evidence that the effects of a particular project may be cumulatively considerable notwithstanding the project’s compliance with the specified requirements in the plan for the reduction of greenhouse gas emissions, an EIR must be prepared for the project.” 14 Cal. Admin Code § 15183.5(b)(2). The evidence that the Project is projected to exceed BAAQMD’s numeric GHG threshold is substantial evidence that the Project may be cumulatively considerable despite its alleged compliance with the City’s GHGRS. The Guidelines thus require the preparation of an EIR.

**Response 4.14:** As stated in the Greenhouse Gas Emission Section of the Recirculated IS/MND, the project is expected to generate 1,528 MT CO<sub>2</sub>e per year. Although this is over the 1,100 MT CO<sub>2</sub>e BAAQMD “bright line” threshold for new projects, it does not account for annual CO<sub>2</sub>e emissions generated by the existing gas station. The existing gas station generates approximately 1,195 CO<sub>2</sub>e emissions per year, as demonstrated by the CalEEMod output dated November 5, 2018 (Appendix B); using the existing gas station emissions as a baseline, the project would result in a net increase of only approximately 333 CO<sub>2</sub>e emissions per year. The net increase in CO<sub>2</sub>e will be significantly less than the 1,100 MT CO<sub>2</sub>e “bright line” threshold.

GHG emissions are a cumulative impact which was evaluated in the 2011 Envision San Jose 2040 General Plan Final Environmental Impact Report (General Plan 2040 FEIR) and the 2015 Envision San Jose 2040 General Plan Supplemental Environmental Impact Report (General Plan 2040 SEIR). These EIRs evaluated

the cumulative GHG emissions of buildout of the General Plan pursuant to the overarching major strategies outlined in the General Plan, including focusing future growth into Urban Villages along transit lines or locations near downtown or major employment centers. The proposed hotel project is within the anticipated growth capacity evaluated in these EIRs for development of the Stevens Creek Boulevard Urban Village, and is therefore consistent with the City's Greenhouse Gas Reduction Strategy. The project would not result in a new significant impact that was not disclosed in the Recirculated IS/MND, and therefore, an EIR is not required.

**Comment 4.15:**

Moreover, “[a] plan for the reduction of greenhouse gas emissions should: ... (B) Establish a level, based on substantial evidence, below which the contribution to greenhouse gas emissions from activities covered by the plan would not be cumulatively considerable.... 14 Cal. Admin Code § 15183.5(b)(1)(B). San Jose’s GHGRS does not establish any such level.

**Response 4.15**

This statement is false. The City’s GHG Reduction Strategy is supported by analysis and substantial evidence in the General Plan 2040 SEIR, which was certified by City Council in December 2015.

**Comment 4.16:**

In addition, “[a]n environmental document that relies on a greenhouse gas reduction plan for a cumulative impacts analysis must identify those requirements specified in the plan that apply to the project, and, if those requirements are not otherwise binding and enforceable, incorporate those requirements as mitigation measures applicable to the project.” 14 Cal. Admin Code § 15183.5(b)(2). Going through the relevant GHG reduction strategies included in the City’s plan and referenced in the IS/MND, there is no evidence that any of the referenced strategies are either requirements that apply to the Project or would result in any significant reduction in GHG emissions from the Project.

For example, the GHGRS calls for the City to “[p]lan for housing sufficient to house 100% of the Bay Area’s future workers and residents from all income levels, without displacing current low-income residents.” This strategy is not a requirement that applies to or is even relevant to this hotel project and does nothing to mitigate the Project’s GHG emissions.

**Response 4.16:**

The project does not propose to remove existing housing units nor does it propose to construct housing units. Development of the proposed project is anticipated to begin the first quarter of 2019, in one single phase and anticipated to take approximately eighteen months. As stated in the Greenhouse Gas Emission Section of the Recirculated IS/MND, the proposed use is consistent with the General Plan Land Use Designation/Transportation Diagram which anticipate these type of uses in the land use capacity and is consistent with all applicable mandatory measures. Furthermore, as stated in Response 4.14 the project’s emission calculation result

conclude that the project would continue to be below the “bright line” threshold.

**Comment 4.17:**

The IS/MND points to the GHGRS’s requirement that the City “[r]educe vehicle miles traveled (VMT) per capita by 10%.” The proposed hotel Project will increase the existing VMTs resulting from the gas station at the site. No reduction of VMTs from the existing conditions will result from the Project. The IS/MND relies on the notion that the hotel project is infill development. IS/MND, p. 66. The IS/MND then points to the presence of four Santa Clara Valley Authority (“SCVA”) bus stops within a quarter mile of the site. No evidence that hotel guests actually use public transit buses is provided in support of the IS/MND analysis. The notion that hotel guests for a Marriott hotel laden with luggage are likely to use buses rather than ride-share services or rental cars is not supported by any evidence and is counterintuitive. Certainly, SCVA must have data on its ridership, including what, if any, percent of riders are hotel guests. AC Marriott also has other existing hotels in the Bay area from which it also could have extracted information about the likelihood that guests would utilize bus transit at the proposed location. The assertion that bus options will in fact encourage any significant number of the hotel’s guests to drive less is not substantiated with any evidence. Even if the hotel were to provide shuttles to nearby attractions, there is no evidence that the additional VMT required to get people to and from the hotel will be reduced at all.

**Response 4.17:**

The primary component of the City’s GHG Reduction Strategy is to focus growth into infill locations in Urban Villages, designated employment areas, or downtown. Most of these locations, like the Stevens Creek Boulevard Urban Village where the project is located, are on high-frequency transit lines. TDM plans are typically implemented for several reasons including to reduce the amount of traffic generated by a land use, to promote more efficient utilization of existing transportation facilities and ensure that developments are designed to maximize the potential for alternative transportation usage, or to reduce the parking demand generated by new development and allow for a reduction in parking supply. The project will implement a TDM Plan, which could include transit passes for employees, a shuttle service to major points of interest, and unbundled parking (guests must pay for parking), all of which will contribute to a reduction in vehicle miles traveled as it provides alternative modes of transportation. Therefore, hotel employees can utilize the transit passes and take advantage of the nearby transit stations for their daily commute. Additionally, for hotel guests the TDM plans provides hotel shuttles for transport to and from the airport as well as to major destinations, and promotes the use of rideshare services. Refer to project’s consistency with other City’s policy to reduce greenhouse gas emission (i.e. Greenhouse Gas Reduction Strategy) in Responses 4.14 to Responses 4.16 above.

**Comment 4.18:**

A similar paucity of evidence undermines the IS/MND’s reference to the TDM’s strategy of “[i]ncreas[ing] location efficiency.” IS/MND, p. 69. Again, the IS/MND relies on the unsubstantiated assumption that hotel guests will opt to use transit buses within a quarter of a mile of the Project in some significant

numbers. *Id.* There is no evidence that any substantial number of guests would utilize that service. The IS/MND also notes the presence of a bike lane on Stevens Creek Boulevard. Again, few if any people arriving and departing the hotel or heading to business meetings are likely to ride a bike from the hotel, so there is no evidence that the presence of the bike lane would encourage in any meaningful way any transportation efficiencies associated with the project's location.

**Response 4.18:** The analysis in the IS/MND does not assume a substantial number of guests would use public transit, as evidenced by trip generation rates in the CalEEMod outputs and the Transportation Impact Analysis supporting the IS/MND. The IS/MND does assume the project will have locational efficiencies due to the location of the proposed hotel within a mile of major destinations such as Main Street Cupertino, future development on the Valco site, and major employment centers (such as Apple Park). Guests will be able to walk to eating and entertainment destinations in Main Street Cupertino and will be a short drive or bike ride to major employment centers. This implements a major component of the City's GHG Reduction Strategy by placing new development in locations near major destinations to give future users options to using a single-occupancy vehicle and reducing driving distance when a single-occupancy vehicle is used.

**Comment 4.19:**

The GHGRS calls for the "Installation of solar panels or other clean energy power generation sources on development sites, especially over parking areas." *See* IS/MND, p. 68. Rather than installing solar panels, the Project merely proposes to "install solar ready zone areas on the roof which is an allocated space suitable for solar panels to be installed at a future date." *Id.* How is this half-step consistent with the installation of solar panels? In order to be consistent with the GHGRS and Section 15183.5(b)(2), there must be a binding commitment for the hotel to install solar panels. In order to mitigate the Project's GHG impacts, the panels should be operative by the conclusion of the Project's construction.

**Response 4.19:** Installation of solar panels is not a mandatory measure of the City's GHG Reduction Strategy. It is an optional criteria that the applicant could choose to implement in order to reduce energy use and/or to comply with the City's Green Building Ordinance. The project is subject to compliance with the City's Green Building Policy as a condition of approval and is implemented prior to the issuance of a building permit. Refer to project's consistency with other City's policy to reduce greenhouse gas emission (i.e. Greenhouse Gas Reduction Strategy) in Responses 4.14 to Responses 4.18 above.

**Comment 4.20:**

The GHGRS calls for the use of recycled water wherever feasible and cost-effective. *See* IS/MND, p. 68. Rather than explain whether or not recycled water is feasible and cost-effective, the Project and IS/MND simply state that recycled water is not proposed. *Id.* More is needed to erase this mandatory requirement of the City's GHGRS.

**Response 4.20:** The use of recycled water is not a mandatory requirement of the City’s GHG Reduction Strategy. Furthermore, the project site is not served by the South Bay Water Recycling Distribution System, and therefore use is not feasible.

**Comment 4.21:**

The GHGRS highlights the importance of car share programs. IS/MND, Appendix F (AC Hotel Transportation Demand Management Plan [“TDM”]), p. 12; IS/MND, p. 68. However, the Project’s IS/MND leaves its possible car share program entirely undeveloped. The IS/MND indicates that the hotel “will implement a carpool/vanpool or car-share program, carpool ride-matching for employees, assistance with vanpool formation, provision of vanpool or car-share vehicles, and assign carpool, vanpool and car-share parking at the most desirable on-site locations at the ratio set forth in the proposed project’s conditions of approval.” It is impossible to tell what kind of program is envisioned or whether it would prove effective in a hotel context. The TDM actually identifies only five measures. These include providing bus passes to employees. TDM, p. 14. Certainly useful but not a large source of VMTs from the Project given that 18 employees are anticipated on site at any given time. *See* IS/MND, Appendix G, p. 35. The TDM also identifies a hotel shuttle for guests to points of interest and a bicycle program. TDM, p. 14. As noted above, how effective these measures may be is not supported by any evidence or analysis. Even the suggested hotel shuttle to and from major points of interest may or may not meaningfully reduce VMTs if use by guests is limited. The TDM also relies on having guests pay for parking. *Id.*, pp. 14-15. Lastly, the TDM includes a TDM coordinator at the hotel and identifies various third party trip planning services. *Id.*, p. 15. Although each of these measures is beneficial and could reduce the Project’s expected VMTs by some unknown amount, there is no evidence to suggest it is likely that these measures will reduce the Project’s increased VMTs in any meaningful way.

**Response 4.21:** A TDM Plan is not required for compliance with the City’s GHG Reduction Strategy. The project’s TDM Plan is required to reduce parking demand, not as mitigation to reduce project GHG emissions. Although implementation of the TDM Plan will have the additional benefit of contributing to a reduction in project GHG emissions, the project is not required to calculate the precise reduction in VMT and GHG emissions because no significant GHG impact was identified. Furthermore, as stated in the IS/MND, the project complies with the City’s GHG Reduction Strategy by virtue of being a high-density development in an area with increased location efficiency.

**Comment 4.22:**

The GHGRS calls for plans to “[l]imit parking above code requirements.” IS/MND, p. 68. The Project does limit parking to well below the spaces otherwise required by the Code – 100 versus 186 spaces. However, the TDM and IS/MND indicate that the hotel may arrange for parking at nearby lots. IS/MND, pp. 128-129. That contingency would effectively eliminate any benefit of requiring reduced parking on-site. Moreover, the TDM relies mostly on the presence of bus lines nearby. It is unrealistic for a hotel project to depend on guests visiting for a few days to meaningfully rely upon bus routes to travel to and

from the hotel, especially when first arriving and departing with luggage.

**Response 4.22:** As stated in Responses 4.17, 4.18, and 4.21, above, the TDM Plan is required to reduce parking demand to support the reduction in on-site parking spaces. The TDM Plan is not required to reduce GHG emissions. The analysis in the IS/MND also does not assume that guests will use bus service for their transportation needs, but other TDM options include guest-friendly measures such as hotel shuttle service and rideshare availability. Refer to project's consistency with other City's policy to reduce greenhouse gas emission (i.e. Greenhouse Gas Reduction Strategy) in Responses 4.14 to Responses 4.16 above.

**Comment 4.23:**

The IS/MND relies on the requirement for the Project to comply with the City's Green Building ordinance. IS/MND, p. 66. The IS/MND lists several green building features to be applied by the project. *Id.*, p. 67. These include designated parking for clean air vehicles, underground parking reducing heat island effects, low water use fixtures, rainwater (grey water) use in landscaped areas, rainwater bio swales developed on-site, cooling roofing material shall be utilized reducing heat island effects, adhesives, sealants and caulks shall be low or no VOC and the dedicated solar ready zone will be provided on the roof. Although these measures may have incremental benefits (although actual solar panels are not guaranteed), there is no indication whether or how these measures will comply with the green building ordinance.

**Response 4.23:** Compliance with the City's Green Building Ordinance will be evaluated at time of building permit application review. As a commercial project, the project will be required to submit certification that the project meets criteria to be either U.S. Green Building Council LEED certified or GreenPoint Rated certified pursuant to Chapter 17.84 of the Municipal Code. This is a condition of approval in the permit and the project is required to illustrate compliance to this requirement prior to the issuance of a building permit. Therefore, the project is consistent with City's applicable policies.

**Comment 4.24:**

The City's Green Building Ordinance boils down to a requirement that certain categories of projects within San Jose achieve certain levels of LEED certification. San Jose Municipal Code, Chapter 17.84. LEED certification is not transparent to a reader of the IS/MND. The various LEED certification levels are based on a point system. The IS/MND does not explain the LEED point system. Nothing in the IS/MND explains what features the Project would claim to justify whatever points may be available to the Project in the LEED system. In other words, it is completely opaque for the IS/MND to invoke the City's Private Sector Green Building Policy and Green Building Ordinance, which in turn invoke a LEED point system that is inaccessible to the reviewing public, as a logical explanation of how the Project's specific design elements and facilities will reduce GHG emissions.

**Response 4.24:** Compliance with the City's Green Building Ordinance is not intended as mitigation under CEQA, but is a requirement for all projects unless exempted due to unique

circumstances. Therefore, the IS/MND is not required to justify compliance with checklist requirements for CEQA clearance. Therefore, this comment not raise any new significant impact or result in the need for any new mitigation measures.

**Comment 4.25:**

The Private Sector Green Building Policy actually requires this Project to be certified LEED Silver. <http://www.sanjoseca.gov/index.aspx?NID=3284> (“Commercial/Industrial Tier 2 -  $\geq$  25,000 square feet = LEED Silver”). Residential projects may rely on a mere LEED certification. San Jose Municipal Code § 17.84.104 (“‘Commercial / industrial building’ means all non-residential construction including construction of retail space, office space, and other commercial uses, regardless of the zoning scheme at the project’s location”). *See also* § 17.84.112 (“‘Large commercial building’ means a non-residential building having a gross floor area of twenty-five thousand (25,000) square feet or more and is not a high-rise building”). Large commercial buildings are deemed Tier two projects under the Code. § 17.84.121 (“Tier two project” means a large commercial industrial building...”). “All tier two commercial industrial projects for which this chapter is applicable must receive the minimum green building certification of LEED Silver.” § 17.84.220.

**Response 4.25:** This comment re-iterates the City’s Green Building Policy, and does not speak to the analysis in the IS/MND. Therefore, no further response is required.

**Comment 4.26:**

Even with that heightened LEED certification level, the City’s ordinance does not guarantee that even a large commercial project such as the proposed Project will necessarily achieve LEED Silver because it provides for Project specific exemptions at the discretion of the Director of Planning. § 17.84.210. As a result, no one can be sure what compliance with the City’s Green Building Ordinance may look like for this Project.

Accordingly, the IS/MND is entirely without evidentiary support and a fair argument exists that the Project may have significant GHG emission impacts.

**Response 4.26:** As stated in Response 4.24, compliance with the City’s Green Building Ordinance is not required as CEQA mitigation for an identified impact. As stated in the IS/MND, the project will not have a GHG impact because it complies with the City’s GHG Reduction Strategy.

In addition, the Recirculated IS/MND analysis finds that GHG emissions will be below the project-specific BAAQMD thresholds. As stated in the IS/MND, the project is expected to generate 1,528 MT CO<sub>2</sub>e per year. The existing gas station generates approximately 1,195 CO<sub>2</sub>e emissions per year, resulting in a net increase of only 333 CO<sub>2</sub>e emissions per year. See Response 4.14.



**Comment 4.27:**

For the foregoing reasons, the IS/MND for the Project should be withdrawn, an EIR should be prepared, and the draft EIR should be circulated for public review and comment in accordance with CEQA. Thank you for considering these comments.

**Response 4.27:**

Based on the analysis disclosed in the Recirculated IS/MND and response to comments, the proposed project will not have a significant effect on the environment in that the IS/MND identifies one or more potentially significant effects on the environment for which the project applicant, before public release of the Mitigated Negative Declaration, has made or agreed to make project revisions that clearly mitigate the effects to a less than significant level, as defined in CEQA Guidelines §15369.5.

Furthermore, the comments raised did not provide information indicating the project would result in new environmental impacts or impacts substantially greater in severity than disclosed in the IS/MND [CEQA Guidelines §15074(b)] and therefore, and have not presented a fair argument that the project will result in significant, adverse, unmitigatable impacts. Therefore, the project does not require the preparation of an Environmental Impact Report.

## **5. RESPONSES TO COMMENTS FROM SANTA CLARA VALLEY WATER DISTRICT ON OCTOBER 25, 2018**

### **Comment 5.1:**

The District has reviewed the Revised MND for City File H17-023, AC by Marriott- West San Jose Project, dated October 2018 and received by the District on October 5, 2018. The District does not have any facilities or right of way on or adjacent to the project. However, District records there is one active well at the site. If the well will continue to be used following redevelopment of the site, it must be protected so that it does not become lost or damaged during redevelopment of the site. If the well will not be used following redevelopment of the site, it must be properly destroyed under permit from the District. For more information regarding how to obtain a well destruction permit, please call the District's Well Ordinance Program Hotline at 408-630-2660.

Santa Clara Valley Water District (District) records indicate that 11 properly destroyed wells are located on the subject property. Because the wells are considered properly destroyed, no action is necessary to protect them or to bring them into compliance with the District Well Ordinance. While the District has records for most wells located in the County, it is always possible that a well exists that is not in the District's records. If previously unknown wells are found on the subject property during development, they must be properly destroyed under permit from the District or registered with the District and protected from damage.

**Response 5.1:** Comment noted, the project would be required to comply with the requirements of other regulatory agencies. The author of this comment does not address the analysis contained in the Recirculated IS/MND. Therefore, no further response is required.

## 6. RESPONSES TO COMMENTS FROM CATHERINE THALER DISTRICT ON OCTOBER 25, 2018

### Comment 6.1:

Thank you for the opportunity to respond.

First: I don't feel the response to my letter about the effect on Stern was complete. I don't believe that the simple fact that all trips will impact the first 130 feet of Stern was studied or a concern. It really is immaterial how many gas station trips there are because most of them are on Stevens Creek. ALL of the proposed 1400 trips will be on Stern, with an immediate left turn required for half of them. This is going to be a problem.

**Response 6.1:** The intersection of Stevens Creek/Stern was projected to operate at LOS C in the AM and LOS D in the PM with the additional project traffic. When measuring intersection Level of service, Traffix, the approved software, is used to calculate intersection operations.

The LOS calculations measure what the increase in delay would be during the highest peak hour. In this case, the existing AM delay at the intersection is 34.6 seconds and with the addition of project traffic will increase to 34.7 seconds. The existing PM delay is 36.4 and with the additional project traffic will increase to 36.5 seconds. Thus for both the am and pm peak hour, the overall intersection delay increases slightly.

Focusing on the north leg only at the intersection of Stevens Creek and Stern along the project frontage, the intersection analysis indicates that the existing vehicle delay in the AM is approximately 27.1 seconds with the average queue of one vehicle per lane and in the PM the existing vehicle delay is 32 seconds with the average PM queue of seven vehicles per lane.

Again focusing on the north leg only, with the addition of the project traffic, the projected AM vehicle delay is approximately 27.3 seconds with the average queue of one vehicle per lane and the projected PM vehicle delay is 32.1 seconds with the projected PM queue of 7 vehicles per lane. Thus, for both the AM and PM peak hour, the traffic remains consistent for both the existing condition and the existing condition with the addition of the project traffic. Therefore the Level of service at this intersection currently operates at LOS D and will continue to operate at LOS D with the project traffic.

Based on the intersection LOS which does not measurably change, and typical vehicle operations of a hotel, and the relatively low number of peak hour trips generated by the proposed hotel, the report did not identify any significant vehicle queuing along Stern Ave. However, once the project is operational, if there are

issues created by the project, the City always reserves the right to coordinate with Hotel at any time, to address any transportation issues that may arise.

**Comment 6.2:**

Second; I have several major concerns about the construction impact.

1. We already have a parking issue on Stern Avenue because of the overflow from the adjacent Apartment Complex on San Jose land. All construction workers parking needs to be offsite- maybe on the empty land across the street.
2. Stern is a major egress from this neighborhood and should not be closed or partially closed during construction.
3. There is a bus stop on Stevens Creek at this location, it needs to remain available also.
4. Children and teenagers walk and ride bikes along this section of Stevens Creek to get to Hyde Junior High and Cupertino High School. It needs to be safe for them at all times.

**Response 6.2:**

1.Construction Worker Parking

The City will consider a condition in the planning permit requiring the developer to coordinate parking for the workers that would minimize the effects to the existing neighborhood parking prior to issuance of Public Works Clearances.

2.Partial or full closure of Stern

Construction staging typically occurs on low volume streets such as Stern Ave. Typically, the City will issue a permit that will allow use of the sidewalk as a staging area and may include a parking lane. The appropriate signage directing pedestrians to the other side of the street will be required. It is not anticipated that two-way traffic will be prohibited along Stern Ave. There are many other conditions such as hours of operations, designating truck routes, etc. that will be included in the permit or required during construction that are intended to minimize neighborhood impacts.

3.Existing Bus Stop

If construction affects the existing bus stop, the bus stop may be temporarily relocated to avoid conflicts. The City anticipates that the bus stop will remain in operation and accessible during construction.

4.School Walking Route

City staff concurs with providing safe walking, bicycling routes to school, especially along major streets like Stevens Creek Boulevard and will work with the contractor to ensure good pedestrian access.

**Comment 6.3**

Third: This project does not conform to the adjacent style and size of buildings. It is so evident in the pictures. This is a tree lined street, where the mature trees hide 3 and 4 story buildings. You are plunking

down a 7 story "lego like" tower at the entrance to a neighborhood of 5000 residents.

**Response 6.3:**

As discussed in the Aesthetics section of the Recirculated IS/MND on page 25, Stevens Creek Boulevard and Stern Avenue are not designated as scenic corridors in the City's General Plan, and the project site is not located as a designated City Gateway in the City's General Plan. As a result, the project would not degrade visual character of the area, and would not obscure any scenic vistas, damage scenic resources, or degrade the visual quality of the area. The project is located within the Stevens Creek Boulevard Urban Village Plan and as such, the include Urban Design Guidelines and Standards. The building's location and elevations respect the character of the approved urban village and respect the interface of the adjacent buildings. The building is designed to include large setbacks and façade articulation to reduce the massing of the building, consistent with the Urban Village Plan. Therefore, the project is not a significant impact with regards to aesthetics and meets the requirements of the Stevens Creek Boulevard Urban Village Plan and the Urban Village Design Guidelines.

## **7. RESPONSES TO COMMENTS FROM LOZEAU DRURY, LP, DATED OCTOBER 30, 2018.**

*This comment letter was submitted after the end of the public comment period, see Attachment D. Although these comments were not received during the public circulation period, the City is responding as a courtesy to clarify the analysis in the IS/MND, address community concerns, and for purposes of providing information and the administrative record.*

### **Comment 7.1:**

Please accept the following supplemental comments submitted on behalf of Laborers International Union of North America, Local Union 270 and its members (“LIUNA”) regarding the Initial Study and Mitigated Negative Declaration (“IS/MND”) prepared for the AC by Marriott - West San Jose Project (“Project”) (Project File No. HI7-023). Certified Industrial Hygienist, Francis “Bud” Offermann, PE, CIH, has conducted a review of the Project, the IS/MND and relevant appendices regarding the Project’s indoor air emissions. Indoor Environmental Engineering Comments (Oct. 29, 2018) (attached). Mr. Offerman concludes that it is likely that the Project will expose future workers employed at the hotel to significant impacts related to indoor air quality, and in particular, emissions of the cancer-causing chemical formaldehyde. Mr. Offermann is one of the world’s leading experts on indoor air quality and has published extensively on the topic.

### **Response 7.1:**

Responses to specific comments related to the adequacy of the IS/MND are provided below. Pursuant to the responses below and the analysis in the Recirculated IS/MND, the City made the findings that an IS/MND is the adequate CEQA document for this project and would not expose future workers to adverse, significant air quality impacts. The Director of Planning, Building and Code Enforcement determined that the project would not have a significant effect on the environment if certain mitigation measures are incorporated into the project. The Recirculated IS/MND concluded that the project would result in potential impacts to biological resources and hazards and hazardous material. Consistent with the conclusion in the Recirculated IS/MND, the project would incorporate project-specific mitigation measures, City standard conditions and conditions of approval that will reduce those impacts to a less than significant level. The project applicant has made or agrees to make project revisions that will clearly mitigate the potentially significant effects to a less than significant level. Therefore, the project would reduce the impacts to less than significant levels, resulting in no further mitigation measures or an environmental impact report to be required.

### **Comment 7.2:**

Mr. Offermann explains that many composite wood products typically used in hotel construction contain formaldehyde-based glues which off-gas formaldehyde over a very long time period. He states, “The primary source of formaldehyde indoors is composite wood products manufactured with urea-formaldehyde resins, such as plywood, medium density fiberboard, and particle board. These materials are commonly used in residential and hotel building construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims.”

Formaldehyde is a known human carcinogen. Mr. Offermann states that there is a fair argument that full-time workers at the AC by Marriott project will be exposed to a cancer risk from formaldehyde of approximately 18.4 per million. This is almost double the Bay Area Air Quality Management District (BAAQMD) CEQA significance threshold for airborne cancer risk of 10 per million. Mr. Offermann states:

With respect to this project, AC by Marriott - West San Jose, since this is a hotel, guests are expected to have short term exposures (e.g. less than a week), but employees are expected to experience longer term exposures (e.g. 40 hours per week, 50 weeks per year). The longer term exposures for employees is anticipated to result in significant cancer risks resulting from exposures to formaldehyde released by the building materials and furnishing commonly found in residences and hotels.

Offermann Comments, p. 4. Mr. Offermann concludes that this significant environmental impact should be analyzed in an EIR and mitigation measures should be imposed to reduce the risk of formaldehyde exposure. *Id.*, pp. 6-7. Mr. Offermann suggests several feasible mitigation measures, such as requiring the use of no-added-formaldehyde composite wood products, which are readily available. Offermann Comments, pp. 6-7. Mr. Offermann also suggests requiring air ventilation systems which would reduce formaldehyde levels. *Id.* Since the MND does not analyze this impact at all, none of these or other mitigation measures are considered.

When a Project exceeds a duly adopted CEQA significance threshold, as here, this alone establishes a fair argument that the project will have a significant adverse environmental impact and an EIR is required. Indeed, in many instances, such air quality thresholds are the only criteria reviewed and treated as dispositive in evaluating the significance of a project's air quality impacts. See, e.g. *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960 (County applies BAAQMD's "published CEQA quantitative criteria" and "threshold level of cumulative significance"). See also *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 110-111 ("A 'threshold of significance' for a given environmental effect is simply that level at which the lead agency finds the effects of the project to be significant"). The California Supreme Court made clear the substantial importance that an air district significance threshold plays in providing substantial evidence of a significant adverse impact. *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 327 ("As the [South Coast Air Quality Management] District's established significance threshold for NOx is 55 pounds per day, these estimates [of NOx emissions of 201 to 456 pounds per day] constitute substantial evidence supporting a fair argument for a significant adverse impact"). Since expert evidence demonstrates that the Project will exceed the BAAQMD's CEQA significance threshold, there is a fair argument that the Project will have significant adverse impacts and an EIR is required.

**Response 7.2:** The comment letter and supporting memorandum from Mr. Offerman on indoor air quality claims that the project will expose future workers employed at the hotel to

significant impacts related to indoor air quality, and in particular, emissions of the cancer-causing chemical formaldehyde. This assertion of a fair argument is incorrect as the project will need to comply with the 2016 CalGreen Code, which specifies that composite wood products (such as hardwood plywood and particleboard) meet the requirements for formaldehyde as specified in the California Air Resources Board's Air Toxic Control Measures. The 2016 CalGreen building code does not allow added formaldehyde-based resins or ultra-low emitting formaldehyde resins, and requires documentation of compliance with the California Air Resources Board's Air Toxic Control Measures. Furthermore, the commenter is speculating in the assertion that composite wood materials would be used in the interior of the building. Indoor building materials will not be known until the building permit stage, and as stated above, these materials will be required to comply with the California Air Resources Board, 2016 CalGreen building code, and LEED certification requirements.

**Comment 7.3:**

Mr. Offermann also notes that the high cancer risk that may be posed by the Project's indoor air emissions likely will be exacerbated by the additional cancer risk that exists from vehicle emissions from the adjacent Stevens Creek Boulevard and other nearby roadways. As the previous comments submitted by SWAPE point out, however, the applicant and City have not estimated the cumulative health risk impacts of the Project either on nearby sensitive receptors or future workers at the Project. *See* SWAPE Comment (Oct. 24, 2018). Consistent with SWAPE's observations, Mr. Offermann notes:

The [IS/MND] does not assess the impact of existing or future traffic related emissions of PM2.5 upon the outdoor or indoor air concentrations. The air quality analyses in this MND focuses only on the emissions (pounds/day) of air contaminants from construction and operation and compares these emissions to the requirements established by the Bay Area Air Quality Management District (BAAQMD). The MND contains no air dispersion calculations of the cumulative impact these project related emissions and existing emissions have upon the concentrations of air contaminants in the outdoor and indoor air that people inhale each day.

**Response 7.3:** See Responses 4.9 through 4.12.

**Comment 7.4:**

Offermann Comments, p. 6. Mr. Offermann identifies a rule adopted in San Francisco that identifies a level of PM2.5 that triggers the installation of air filter systems in new development. "The San Francisco Department of Public Health, 2014. Article 38, Enhanced Ventilation Required for Urban Infill Sensitive Use Developments, requires that air filtration, with a minimum efficiency of MERV 13 be installed to remove PM2.5 from mechanically supplied outdoor air in all PM2.5 impacted areas." Offermann Comments, p. 6. A PM2.5 impacted area includes "[a]ll areas within 500 feet of any freeway or high-traffic road way (defined as urban roads with 100,000 vehicles/day or rural roads with 50,000 vehicles/day), unless air dispersion modeling shows total (traffic and ambient) outdoor concentrations of



less than an annual average of 10 µg/m<sup>3</sup> PM<sub>2.5</sub>, are defined as PM<sub>2.5</sub> impacted areas.” *Id.* Mr. Offermann concludes that:

It is my experience that based on the high future traffic noise level of 79 dBA Ldn. (City of San Jose, 2018, Revised Public Review Draft Initial Study – Mitigated Negative Declaration, Table 14 - Predicted Future Traffic Noise Exposure) that the annual average concentration of PM<sub>2.5</sub> will be substantially higher than 10 µg/m<sup>3</sup>, and warrant installation of MERV 13 air filters in all mechanically supplied outdoor air ventilation systems.

*Id.*

**Response 7.4:** The Health Risk Assessment prepared for the proposed project (Appendix C) concluded that the maximum-modeled annual PM<sub>2.5</sub> concentration, which is based on combined exhaust and fugitive dust emissions, would be 0.07µg/m<sup>3</sup>. Therefore, this maximum annual PM<sub>2.5</sub> concentration would be below the BAAQMD significance threshold of greater than 0.3µg/m<sup>3</sup>. Refer to Response 4.9 to 4.13 and Appendix C of this Response to Comment for detailed information on the results of the Health Risk Assessment and conformance to BAAQMD thresholds.

**Comment 7.5:**

LIUNA has previously brought Mr. Offermann’s indoor air pollution concerns to the attention of the City. During a Planning Commission hearing held on September 26, 2018 regarding a project proposed at 715 West Julian Street, Planning Department staff responded to the indoor air pollution concerns raised by LIUNA. During that hearing, staff claimed that a California Supreme Court decision – *California Building Industry Ass’n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 386 (“*CBIA*”) – ruled that this type of air quality impact need not be addressed under CEQA because future residents of a mixed use project are part of the project and CEQA does not require evaluation of health or other impacts of a project on itself. To the extent staff again takes the position that future workers are not worthy of considering health protections under CEQA because they are part of the AC by Marriott project, staff’s responses would be incorrect as a matter of law. Indeed, rather than support staff’s response, the California Supreme Court in *CBIA* expressly holds that potential adverse impacts to future users and residents from pollution generated by a proposed project ***must be addressed*** under CEQA.

At issue in *CBIA* was whether the Air District could enact CEQA guidelines that advised lead agencies that they must analyze the impacts of adjacent environmental conditions on a project. The Supreme Court held that CEQA does not generally require lead agencies to consider the environment’s effects on a project. (*CBIA*, 62 Cal.4th at 800-801.) However, to the extent a project may exacerbate existing adverse environmental conditions at or near a project site, those would still have to be considered pursuant to CEQA. (*Id.* at 801) (“CEQA calls upon an agency to evaluate existing conditions in order to assess whether a project could exacerbate hazards that are already present”). In so holding, the Court expressly held that CEQA’s statutory language required lead agencies to disclose and analyze “impacts on ***a project’s users or residents*** that arise ***from the project’s effects*** on the environment.” (*Id.* at 800 (emphasis added).)

The carcinogenic formaldehyde emissions identified by Mr. Offermann are not an existing environmental condition. Those emissions to the air will be from the Project. Employees will be users of the hotel. Currently, there is presumably little if any formaldehyde emissions at the site. Once the Project, emissions will begin at levels that pose significant health risks. Rather than excusing the City from addressing the impacts of carcinogens emitted into the indoor air from the Project, the Supreme Court in *CBIA* expressly finds that this type of effect by the project on the environment and a “project’s users and residents” must be addressed in the CEQA process.

The Supreme Court’s reasoning is well-grounded in CEQA’s statutory language. CEQA expressly includes a project’s effects on human beings as an effect on the environment that must be addressed in an environmental review. “Section 21083(b)(3)’s express language, for example, requires a finding of a ‘significant effect on the environment’ (§ 21083(b)) whenever the ‘environmental effects of a project will cause substantial adverse effects *on human beings*, either directly or indirectly.’” (*CBIA*, 62 Cal.4th at 800 (emphasis in original.) Likewise, “the Legislature has made clear—in declarations accompanying CEQA’s enactment—that public health and safety are of great importance in the statutory scheme.” (*Id.*, citing e.g., §§ 21000, subs. (b), (c), (d), (g), 21001, subs. (b), (d).) It goes without saying that the hundreds of future employees at the Project are human beings and the health and safety of those workers is as important to CEQA’s safeguards as nearby residents currently living adjacent to the Project site.

**Response 7.5:** See Response 7.2. Additionally, the indoor air quality comments submitted by the commenter for the 715 West Julian Street project were responded to in a Supplemental Memorandum dated October 17, 2018. Consistent with this project and the responses provided above, the Supplemental Memorandum explained that the project will comply with the 2016 CalGreen Code, requirements for formaldehyde as specified in the California Air Resources Board’s Air Toxic Control Measures, and comply with the City’s Green Building Ordinance.

**Comment 7.6:**

For the above additional reasons, the IS/MND for the Project should be withdrawn, an EIR should be prepared, and the draft EIR should be circulated for public review and comment in accordance with CEQA. Thank you for considering these comments.

**Response 7.6:** Based on the analysis disclosed in the Recirculated IS/MND and the responses to similar comments herein, the proposed project will not have a significant effect on the environment in that the IS/MND identifies one or more potentially significant effects on the environment for which the project applicant, before public release of this Recirculated Mitigated Negative Declaration, has made or agreed to make project revisions that clearly mitigate the effects to a less than significant level, as defined in CEQA Guidelines §15369.5.

Furthermore, the comments raised did not provide information indicating the project would result in new environmental impacts or impacts substantially greater

in severity than disclosed in the IS/MND [CEQA Guidelines §15074(b)] and therefore, and have not presented a fair argument that the project will result in significant, adverse, un-mitigatable impacts which would require the preparation of an Environmental Impact Report.