



January 4, 2019

Via E-mail

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Re: AC by Marriott - West San Jose Project (January 8, 2019, City Council  
Hearing of Appeal, Agenda Item 10.3; Project File No. HI7-023)

Dear Mayor Liccardo, City Council Members, Director Hughey, Deputy Director Do, Mr.  
Rivera, and Ms. Mathur:

Please accept the following additional 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) and in  
support of LIUNA's appeal of the Project now pending before the City Council. This  
additional comment focuses the Council's attention on the expert evidence submitted by  
LIUNA that establishes fair arguments that (1) the Project's construction and operation  
may have significant health risks on nearby sensitive receptors living feet from the  
proposed site and (2) the Project's operation may have significant health risks from  
exposing future employees of the hotel to formaldehyde emissions from the Project.

Under the "fair argument" standard, the City must prepare an EIR 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 v. City of Sacramento* (2004) 124 Cal.App.4th 903, 931. 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. As a matter of law, “substantial evidence includes . . . expert opinion.” Pub. Resources Code, § 21080(e)(1); 14 CCR § 15064(f)(5).) CEQA Guidelines demand that where experts have presented conflicting evidence on the extent of the environmental effects of a project, the agency must consider the environmental effects to be significant and prepare an EIR. 14 CCR § 15064(f)(5); Pub. Res. Code § 21080(e)(1). Where, as here, there is no conflicting expert evidence disputing the Project’s health risks and only a flawed health risk assessment for the construction phase of the Project, substantial evidence of a fair argument exists that the Project may have significant health risk impacts requiring the preparation of an EIR.

**A. Substantial Expert Evidence Establishes a Fair Argument That the Project’s Emissions of Diesel Particulate Matter May Have Significant Impacts on Adjacent Residents.**

Our expert consultants at SWAPE, including Paul E. Rosenfeld, Ph.D., a recognized expert on Chemical Fate and Transport & Air Dispersion Modeling and a Risk Assessment & Remediation Specialist, have had an opportunity to review staff’s responses to comments and a health risk assessment (“HRA”) of the Project’s construction phase prepared by the applicant’s consultant Illingworth & Rodkin, Inc. and distributed by staff just prior to the Planning Director hearing on October 30, 2018. As is presented in the attached comments prepared by SWAPE (attached as Exhibit 1), Dr. Rosenfeld’s and SWAPE’s review of the HRA reveals that the construction health risk modeling assumed a construction period of only 13 months rather than the 18-month period identified by the applicant and staff. SWAPE Jan. 3, 2019 Comment, p. 3. As a result, emissions of toxic air contaminants, in particular diesel particulate matter emitted by construction equipment and trucks for five months of the Project’s construction are omitted from the consultant’s health risk assessment. *Id.* By reducing the emission period by almost 30 percent, it is likely that the projected cancer risk to infants of 7.1 cancers in a million has been significantly underestimated.

In addition, SWAPE’s review reveals that the applicant’s construction HRA also does not address a requisite class of sensitive receptors – the third trimester receptor. SWAPE Jan. 3, 2019 Comment, p. 3. BAAQMD’s Health Risk Assessment Guidelines expressly provide that “[f]or residential exposures, the cancer risk calculations should include the most sensitive age groups: from third trimester of pregnancy to 3 years of age for a 30 year exposure duration.” BAAQMD Air Toxics NSR Program Health Risk Assessment (HRA) Guidelines, p. 4 (January 2016) (attached as Exhibit 2). As SWAPE observes:

failing to assess the health risk posed to the 3rd trimester receptor presents a significant issue as the BAAQMD requires this receptor be evaluated. By only evaluating the health risk posed to the infantile sensitive receptor, the Project Applicant leaves a large gap in their analysis. Prior to Project Approval, the health risk posed to the nearest sensitive receptor starting at the third trimester stage of life should be quantified and compared to BAAQMD thresholds.

SWAPE Jan. 3, 2019 Comment, p. 3. As a result, by omitting 5 months of construction from the analysis as well as any consideration of the 3rd trimester receptors, the applicant's construction HRA does not amount to substantial evidence supporting the MND's assertion of no significant health impacts and a fair argument exists that health risks from the Project's construction may be significant.

The likelihood of a significant health risk impact from the Project to sensitive receptors living adjacent to the site is made more obvious by the continuing refusal of the applicant and staff to perform a health risk assessment that includes the Project's operation. This is despite SWAPE's earlier comments applying the U.S. Environmental Protection Agency's AERSCREEN model, as recommended by OEHHA and the California Air Pollution Control Officers Association, to calculate that construction and operation of the Project will result in cancer risks to infants, children, adults, third trimester receptors, 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. See SWAPE Oct. 24, 2018 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.

Despite SWAPE's earlier comments, staff's response assumes the operational health risks of the Project are insignificant, even when combined with the construction emission health risks. As staff's response states:

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 sources of TAC emissions.

Staff Responses, p. 15. This conclusory assertion is not supported by any quantitative analysis. Hence, the MND has failed to calculate the Project's overall health risk to the immediately adjacent neighbors, there being no modeled cancer risk that can be added to the construction health risk which, even though flawed, still calculates a cancer risk to infants of 7.1 cancers in a million. Correcting the construction HRA's incorrect inputs

and adding in the Project's operational TAC emissions may exceed BAAQMD's significance threshold of 10 in a million cancers.

In the absence of any quantitative analysis by the applicant or staff, SWAPE has prepared a health risk assessment that includes the Project's construction and operational TAC emissions, consistent with guidance provided by OEHHA. SWAPE Jan. 3, 2019 Comment, pp. 4-7. Applying the CalEEMod inputs used by the applicant, SWAPE prepared an updated health risk screening assessment using the AERSCREEN model, a screening level air quality dispersion model included in the OEHHA and the California Air Pollution Control Officers Associated (CAPCOA) guidance as the appropriate air dispersion model for Level 2 health risk screening assessments ("HRSAs"). *Id.*, p. 5. SWAPE's analysis does not correct the significant flaw in the applicant's construction emission inputs that construction will be five months shorter than stated in the IS/MND. Nevertheless, even with that flawed input, cancer risks for most of the receptor groups are well in excess of BAAQMD's significance threshold. As SWAPE summarizes:

The excess cancer risk posed to adults, children, infants, and during the third trimester of pregnancy at the MEIR located approximately 1 meter away, over the course of Project construction and operation are approximately 16, 100, 24, and .69 in one million, respectively. Furthermore, the net excess cancer risk over the course of a residential lifetime (30 years) at the MEIR is approximately 142 in one million. Consistent with OEHHA guidance, exposure was assumed to begin in the third trimester of pregnancy to provide the most conservative estimates of air quality hazards. The adult, child, infant, and net lifetime cancer risks exceed the BAAQMD threshold of 10 in one million.

SWAPE Jan. 3, 2019 Comment, pp. 4-7. Although SWAPE's analysis is a screening-level HRA, it signals the need for the applicant to perform a more refined HRA for not only the construction phase of the Project but its operational phase as well. Absent an HRA addressing the operational phase and, for the construction phase, using correct input parameters, SWAPE's updated screening-level HRA is substantial evidence of a fair argument that the Project may have significant health risk impacts on immediately adjacent neighbors.

Likewise, as noted in our October 24, 2018 comment, by adding TAC emissions to the immediate area, the Project must evaluate 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 potential 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.

**B. Substantial Expert Evidence Establishes a Fair Argument That the Project's Emissions of Formaldehyde May Have Significant Impacts on Future Employees.**

In addition to the potentially significant health risks the Project will pose to adjacent neighbors, the Project also may pose significant health risks to workers at the hotel. LIUNA previously submitted expert comments prepared by Certified Industrial Hygienist, Francis "Bud" Offermann, PE, CIH evaluating the Project's likely emissions of formaldehyde to indoor air. Indoor Env't'l Engineering Comments (Oct. 29, 2018). Mr. Offermann's expert resume is attached as Exhibit 3. Based on his calculations, 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 cancers per million. *Id.*, p. 4. As LIUNA noted earlier to the Planning Director and staff, this is almost double the Bay Area Air Quality Management District (BAAQMD) CEQA significance threshold for airborne cancer risk of 10 per million. *Id.* Dr. Offermann's calculation assumes that the Project will only use interior finishing products that comply with California Air Resources Board's Air Toxic Control Measures limiting the amount of formaldehyde in products sold within California. *Id.*

Despite this expert evidence of a significant potential impact, staff, with no expertise of its own, attempt to refute Mr. Offermann's concerns rather than evaluate the likely impact and address it. Thus, staff asserts that Mr. Offermann's calculations are wrong because "the project will need to comply with the 2016 CalGreen Building 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." Staff Responses, p. 9. This, of course, does not respond at all because Mr. Offermann assumes such compliance in his calculations. Indoor Env't'l Engineering Comments, p. 4. Indeed, Mr. Offermann is one of the preeminent indoor air pollution experts whose investigatory work in the early 2000s was one of the primary bases of CARB's ATSM standards. Offermann CV, p. 1. His extensive experience measuring and studying formaldehyde and other contaminants in every variety of indoor environment makes him more than qualified to provide his expert opinion on the likely formaldehyde emissions in a new building. Offermann CV.

In their zeal to refute Mr. Offermann's expert comments rather than learn from them and disclose potential impacts, staff asserts incorrectly that "[t]he 2016 CalGreen Building Code does not allow [no] 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." Staff Responses, p. 9. Why would the building code not allow products that do not emit carcinogenic formaldehyde? The code says no such thing. Indeed, CARB expressly promotes the use of no-added formaldehyde (NAF) resins or ultra-low emitting formaldehyde (ULEF)

resins in its regulatory program, allowing exemptions from testing for manufacturers using such resins. See [https://www.arb.ca.gov/toxics/compwood/naf\\_ulef/naf\\_ulef.htm](https://www.arb.ca.gov/toxics/compwood/naf_ulef/naf_ulef.htm). A developer is free to utilize these safer materials that do not rely on formaldehyde resins or go well beyond the ATCM limits. Likewise, the City is free to formulate a mitigation requirement that conditions a project on utilizing interior finishing materials that are made from these NAF and ULEF resins.

Merely stating a project will comply with another agency's regulations is not sufficient to satisfy CEQA's disclosure and analysis requirements. See *Kings Co v. Hanford* (1990)221 CA3d 692, 712-718 (agency erred by "wrongly assuming that, simply because the smokestack emissions would comply with applicable regulations from other agencies regulating air quality, the overall project would not cause significant effects to air quality."); *Citizens for Non-Toxic Pest Control v. Dept. Food & Agr.* (1986) 187 CA3d 1575, 1587-88 (state agency may not rely on registration status of pesticide to avoid CEQA review); *Sundstrom v. Cty. of Mendocino* (1988) 202 Cal.App.3d 296, 309 ("Having no 'relevant data' pointing to a solution of the sludge disposal problem, the County evaded its duty to engage in a comprehensive environmental review by approving the use permit subject to a condition requiring future regulatory compliance"); See *Citizens for Quality Growth v. City of Mount Shasta* (1988) 198 Cal.App.3d 433, 442 n. 8 (lead agency cannot refrain from considering means of exercising its own regulatory power simply because another agency has general authority over the impacted natural resource). Especially where as here an expert comment indicates that significant health risks may be posed even if a Project's materials comply with the CARB regulations, the City is obligated to address these potential impacts in an EIR.

After stating that the hotel would use materials that merely comply with the CARB ATSM levels, and rejecting the NAF and ULEF based materials as not allowed, staff then reverses course and argues that Mr. Offermann "is speculating in the assertion that composite wood materials would be used in the interior of the building." Staff Responses, p. 9. First, staff asserts that NAF and ULEF options are not allowed, guaranteeing that materials merely complying with the CARB ASTM requirements will be used in the Project. Those are the very materials that Mr. Offermann reasonably expects will be present and upon which he based his health risk calculations.

Second, any inability of the public to understand the elements of a project, including the types of formaldehyde-emitting materials that will be used on the interior of the project, is equally applicable to staff. If staff does not know what formaldehyde emitting materials will be used, it certainly cannot claim to have based its responses to Mr. Offermann's comments on any substantial evidence. Just like traffic, NOx emissions, noise and other impacts, staff must obtain from the applicant the information necessary to evaluate those impacts. "[U]nder CEQA, the lead agency bears a burden to investigate potential environmental impacts. 'If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.'" *County*

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*Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal. App. 4th 1544, 1597, quoting *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 311. Staff has not met its burden to investigate this significant worker health issue.

Mr. Offermann's analysis is the only substantial evidence in the record discussing the Project's formaldehyde emissions and resulting health risks. That expert evidence is substantial evidence that the Project may have a significant health impact on workers at the facility.

For the above reasons as well as those presented in earlier comments, 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.

Sincerely,

Michael R. Lozeau  
Lozeau | Drury LLP

Attachments