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Via E-Mail

April 26, 2021

Debby Fernandez, Associate Planner  
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Planning Division  
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**Re: Comment on the Initial Study/Mitigated Negative Declaration for the Dual-Branded Hotel at Coleman and Brokaw Project (PLN2019-14051 and CEQ2020-01073)**

Dear Ms. Fernandez:

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 Santa Clara ("LIUNA") regarding the Initial Study and Mitigated Negative Declaration ("IS/MND") prepared for the Dual-Branded Hotel at Coleman and Brokaw Project located on three parcels at 1240 Coleman Avenue, 1290 Coleman Avenue, and 312 Brokaw Road in the City of Santa Clara (the "Project"). After reviewing the IS/MND, we conclude that it fails to analyze all environmental impacts and implement all necessary mitigation measures. LIUNA respectfully requests that the City Planning Division prepare an environmental impact report ("EIR") for the Project pursuant to the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000, *et seq.*

These comments have been prepared with the assistance of Certified Industrial Hygienist Francis Offermann, PE, CIH, wildlife biologist Shawn Smallwood, Ph.D., and environmental consulting firm Soil/Water/Air Protection Enterprise ("SWAPE"). Mr. Offermann's comment and curriculum vitae are attached as Exhibit A hereto and are incorporated herein by reference and entirety. Dr. Smallwood's comment and curriculum vitae are attached as Exhibit B hereto and are incorporated herein by reference and entirety. SWAPE's comment and curriculum vitae are attached as Exhibit C hereto and are incorporated herein by reference in their entirety.

## I. PROJECT DESCRIPTION

The Project proposes to demolish three existing on-site structures and on-site improvements and develop a 216,009 square foot six-story, up to 400-room hotel with a 29,757 square foot parking garage composed of triple-stacked mechanical parking lifts and 299 parking stalls. The Project requires a use permit and a variance from the City.

## II. LEGAL STANDARD

As the California Supreme Court has 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 Mgmt. 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.*, 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. Res. 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 (*Bakersfield Citizens*); *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 Univ. of Cal.* (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 CCR § 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.

Where an initial study shows that the project may have a significant effect on the environment, a mitigated negative declaration may be appropriate. However, 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*, 124 Cal.App.4th at 927; *League for Protection of Oakland’s etc. Historic Res. v. City of Oakland* (1997) 52 Cal.App.4th 896, 904–05.

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, 150-51; *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 (emphasis in original).

CEQA requires that an environmental document include a description of the project's environmental setting or "baseline." CEQA Guidelines § 15063(d)(2). The CEQA "baseline" is the set of environmental conditions against which to compare a project's anticipated impacts. *CBE v. SCAQMD*, 48 Cal.4th at 321. CEQA Guidelines section 15125(a) states, in pertinent part, that a lead agency's environmental review under CEQA:

...must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time [environmental analysis] is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant.

See *Save Our Peninsula Committee v. County of Monterey* (2001) 87 Cal.App.4th 99, 124–25 ("*Save Our Peninsula*").) As the court of appeal has explained, "the impacts of the project must be measured against the 'real conditions on the ground,'" and not against hypothetical permitted levels. *Id.* at 121–23.

### III. DISCUSSION

#### A. **There is Substantial Evidence of a Fair Argument that the Project Will Have a Significant Health Risk Impact from its Indoor Air Quality Impacts.**

Certified Industrial Hygienist, Francis "Bud" Offermann, PE, CIH has conducted a review of the Project and the documents provided to the Planning Commission and prepared expert comments on the Project's indoor air emissions and associated health risks. Mr. Offermann concludes it is likely that the Project will expose future employees of the Project 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. Mr. Offermann's expert comments and curriculum vitae are attached as Exhibit A.

Formaldehyde is a known human carcinogen and listed by the State of California as a Toxic Air Contaminant ("TAC"). The Bay Area Air Quality Management District ("BAAQMD") has established a significance threshold of health risks for carcinogenic TACs of 10 in a million. The City fails to acknowledge the significant indoor air emissions that will result from the Project. Specifically, there is no discussion of impacts or health risks, no analysis, and no identification of mitigations for significant emissions of formaldehyde to air from the Project.

Mr. Offermann explains that many composite wood products typically used indoors contain formaldehyde-based glues which off-gas formaldehyde over a very long time period. He explains, "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 building

construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims.” Ex. A, pp. 2-3.

Mr. Offermann calculates that future employees of the Project will be exposed to a cancer risk from formaldehyde of approximately 17.7 per million, even assuming all materials are compliant with the California Air Resources Board’s formaldehyde airborne toxics control measure. *Id.* at 4. This exceeds BAAQMD’s CEQA significance thresholds for airborne cancer risk of 10 per million. *Id.* Mr. Offermann stressed that his calculations account for the fact that wood products for the project would be compliant with the most recent CARB standards. *Id.* at 4-5.

Mr. Offermann concludes that these significant environmental impacts must be analyzed in an EIR and mitigation measures should be imposed to reduce the risk of formaldehyde exposure. *Id.* He prescribes a methodology for estimating the Project’s formaldehyde emissions in order to do a more project-specific health risk assessment. *Id.* at 5-11. Mr. Offermann also suggests several feasible mitigation measures, such as requiring the use of composite wood products manufactured with CARB approved no-added formaldehyde (NAF) resins, which are readily available. *Id.* at 11-13.

When a Project exceeds a duly adopted CEQA significance threshold, as here, this alone establishes substantial evidence that the project will have a significant adverse environmental impact. 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 Air District’s “published CEQA quantitative criteria” and “threshold level of cumulative significance”); see also *Communities for a Better Env’t. v. California Res. Agency* (2002) 103 Cal.App.4th 98, 110-11 (“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 substantial evidence that an “unstudied, potentially significant environmental effect[]” exists. See *Friends of Coll. of San Mateo Gardens v. San Mateo Cty. Cmty. Coll. Dist.* (2016) 1 Cal.5th 937, 958.

The failure to address the Project’s formaldehyde emissions is contrary to the California Supreme Court’s decision in *California Building Industry Ass’n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 386 (“CBIA”). In that case, the Supreme Court 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 800-01. However, to the extent a project may exacerbate existing environmental conditions at or near a project site, those would still have to be considered pursuant to CEQA. *Id.* at 801. 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.

The carcinogenic formaldehyde emissions identified by Mr. Offermann are not an existing environmental condition. Those emissions to the air will be from the Project. People will be using the Project once it is built and begins emitting formaldehyde. Once built, the Project will begin to emit formaldehyde at levels that pose significant direct and cumulative health risks. The Supreme Court in *CBIA* expressly finds that this type of air emission and health impact by the project on the environment and a "project's users and residents" must be addressed in the CEQA process. The existing TAC sources near the Project site would have to be considered in evaluating the cumulative effect on future residents of both the Project's TAC emissions as well as those existing off-site emissions.

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. 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 future employees of the Project are human beings and the health and safety of those employees must be subjected to CEQA's safeguards.

The City has a duty to investigate issues relating to a project's potential environmental impacts. See *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1597–98 ("[U]nder CEQA, the lead agency bears a burden to investigate potential environmental impacts."). The proposed Project will have significant impacts on air quality and health risks by emitting cancer-causing levels of formaldehyde into the air that will expose future residents to cancer risks potentially in excess of BAAQMD's threshold of significance for cancer health risks of 10 in a million.

The City fails to address or mitigate the Project's significant impact from formaldehyde emissions from the Project. Mr. Offermann's comments constitute the only substantial evidence in the record as to the significant impact on air quality from formaldehyde emissions. An EIR must be prepared for the Project prior to approval to address this new significant impact.

**B. The IS/MND Fails to Establish an Accurate Baseline for Sensitive Biological Resources and Fails to Disclose and Properly Mitigate Impacts of the Project on Numerous Sensitive Species.**

Expert biologist Shawn Smallwood, Ph.D. reviewed the IS/MND and supporting documents and visited the Project site on April 22, 2021. Based on his observations of the site and review of the IS/MND, Dr. Smallwood points out numerous shortcomings in the baseline assessment of the presence of species at the site, failure to evaluate impacts that will result from the Project, and numerous instances where the IS/MND's assertions are insufficient or not supported by substantial evidence. See Exhibit B.

1. The IS/MND fails to establish an accurate baseline for sensitive biological resources.

The IS/MND states that the Project site "is entirely devoid of any quality natural habitat," and "[d]ue to the extent of urban development, with the lack of connection to natural environments, and the amount of regular disturbance in the area, the site is not likely to support even species adapted to urban environments, with the exception of rodents." IS/MND, p. 37. The IS/MND then concludes that since the Project site does not contain suitable habitat to support special-status species, the Project would not adversely affect them. *Id.* However, the IS/MND makes this conclusion without any sort of biological survey on the site or any desktop analysis of what species might fly through the area or breed on site. Dr. Smallwood notes that the IS/MND also fails to consider the habitat essential to many species – the aerosphere or aerial habitat. Ex. B, p. 4. See <https://www.allaboutbirds.org/news/the-sky-above-its-not-just-air-its-habitat/>; <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=2178&context=usgsstaffpub>

Habitat is defined by a species' use of the environment. *Id.* Many species of flora and fauna morphologically adapted to living in that part of the part of the atmosphere referred to as the aerosphere. See *id.* Birds' and bats' wings are specifically adapted to particular uses of the atmosphere: short powerful wings for speed, long slender wings for glide, and broad wings for maneuverability, for example. *Id.* Additionally, the atmosphere is such an important element of habitat to wildlife that some birds sleep while in flight, and bats and owls hunt in it, even at night. *Id.* "The aerosphere is an essential element of habitat for a vast number of wildlife species." *Id.* Despite this essential element of habitat, the IS/MND fails to consider the aerosphere when considering whether the Project site provides habitat suitable to support special-status species of wildlife.

Dr. Smallwood observed 17 species of vertebrate wildlife at the Project site, including 3 species with special-status, the double-crested cormorant, California gull, and turkey vulture. *Id.* at 1-2. Dr. Smallwood also used online data bases of species detections to identify the special-status species of wildlife likely to occur at the Project site and in the Project area. See *id.* at 7-8. This research resulted in 43 special-status species of vertebrate wildlife documented very close to the site, nearby, and in the

region. *Id.* The special-status species of birds could collide with automobiles and windows from the Project. However, without performing surveys on the site or any desktop analysis the IS/MND is ill-prepared to address the potential impacts of collision mortality involving the buildings' extensive windows and the Project-generated traffic.

2. The IS/MND fails to address the impacts on wildlife from window collisions.

At least one million birds pass through the South Bay annually and at least 43 special-status species of birds are known to the Project area. *Id.* at 5. Among these 43 special-status species of birds witnessed near the Project area, 23 have been documented as window collision fatalities and are susceptible to new structural glass installations. *Id.* at 6. Despite this information and the large glass windows proposed for the Project, “[n]owhere in the IS/MND is there any concern expressed for bird-window collision impacts nor is there any mitigation proposed to avoid, minimize or compensate for such impacts.” *Id.* Dr. Smallwood indicates that the Project, as proposed, will result in significant impacts on birds colliding with the Project's clear glass windows. *Id.* at 9. Specifically, Dr. Smallwood predicts “165 bird deaths per year” due to the Project. *Id.* Based on the IS/MND's depictions of the Project, Dr. Smallwood estimates that the Project would use at least 2,259 square meters of glass panels. *Id.* As proposed, the Project will cause significant unmitigated impacts to biological resources. *Id.* Despite emerging scientific literature about window collisions as one of the largest sources of avian mortality worldwide, the City and the IS/MND do not assess this potential impact.

Dr. Smallwood notes that the Project could be designed to reduce, though perhaps not eliminate, impacts to birds. To mitigate the Project's potential impacts to birds, Dr. Smallwood recommends adherence to available guidelines on building design intended to minimize collision hazards to birds, such as those by the American Bird Conservancy (“ABC”). *Id.* at 19. ABC recommends: (1) minimizing use of glass; (2) placing glass behind some type of screening (grilles, shutters, exterior shades); (3) using glass with inherent properties to reduce collisions, such as patterns, window films, decals or tape; and (4) turning off lights during migration seasons. *Id.*

Here, there is ample evidence to support a fair argument that the Project will result in many collision fatalities of birds, and that this may result in a significant impact. Yet the IS/MND makes no attempt to analyze this potentially significant impact. An EIR is required to fully analyze and mitigate this impact.

3. The IS/MND fails to address the impacts on wildlife from additional traffic generated by the Project.

According to the IS/MND, the Project will generate an average of 2,394 new daily vehicle trips and predicts an annual 10,596,585 vehicle miles traveled yet the IS/MND provides no analysis of the impacts on wildlife that will be caused by an increase in traffic on the roadways servicing the Project. Based on studies of traffic-caused wildlife mortality, Dr. Smallwood estimates that the Project-generated traffic would cause 5,806 wildlife fatalities per year. Ex. B, p. 17.



Vehicle collisions with special-status species is not a minor issue, but rather results in the deaths of millions of species each year. Dr. Smallwood explains:

Across North America traffic impacts have taken devastating tolls on wildlife (Forman et al. 2003). In Canada, 3,562 birds were estimated killed per 100 km of road per year (Bishop and Brogan 2013), and the US estimate of avian mortality on roads is 2,200 to 8,405 deaths per 100 km per year, or 89 million to 340 million total per year (Loss et al. 2014). Local impacts can be more intense than nationally.

*Id.* at 15. Especially due to the special-status bird species likely to occur at or near the Project site, these collisions represent a significant impact to wildlife that has not been addressed, discussed, or mitigated in the IS/MND. An EIR is needed to analyze and mitigate this potentially significant impact on wildlife.

4. The IS/MND failed to analyze the Project's cumulative impacts on wildlife.

Dr. Smallwood found the IS/MND failed to provide a cumulative impacts analysis related to wildlife. *Id.* at 17. However, a cumulative impacts analysis is required for bird-window collisions and wildlife road mortality. *Id.* The Project's estimated 165 bird deaths per year from window collisions are not limited to the special-status species on the Project site. The City needs to provide an estimate of the extent of windows already constructed and projected future extent of windows in the City to determine the City's cumulative toll on birds colliding with windows and the appropriate mitigation for such impacts. *Id.*

Dr. Smallwood predicted the annual bird collision fatalities at numerous recently proposed projects in the area. *Id.* at 18. These projects, as well as the proposed Project, would cause 8,854 bird deaths per year from window collisions. *Id.* "The unmitigated taking of nearly 10,000 birds per year for these projects alone would qualify as a significant cumulative impact." *Id.* The City should prepare an EIR to analyze all glass windows of facades recently built, under construction, or reasonably foreseeable in the region of the Project to determine the extent of the City's cumulative toll on birds colliding with windows.

**C. The IS/MND Fails to Adequately Analyze and Mitigate the Project's Hazards and Hazardous Materials.**

Matt Hagemann, P.G., C.Hg., and Dr. Paul E. Rosenfeld, Ph.D., of the environmental consulting firm SWAPE reviewed the IS/MND's analysis of the Project's impacts on hazards, hazardous materials, air quality, and greenhouse gases. SWAPE comment letter and CVs are attached as Exhibit C.

According to the IS/MND, the soil vapor and groundwater beneath the Project site is contaminated above Environmental Screening Levels with trichloroethylene

("TCE") and benzene. See IS/MND at 70. The Phase II ESA prepared for the Project concluded that the chlorinated groundwater plume from off-site properties likely extends beneath the Project site and would pose a potentially significant impact. *Id.* To address the soil vapor and groundwater contamination, the IS/MND proposes Mitigation Measure HM-1, which states:

Prior to the issuance of a grading permit, the project sponsor shall retain the services of a qualified environmental professional to prepare a Site Management Plan (SMP) to govern construction work at the project site. The SMP shall establish management practices for handling contaminated groundwater, soil vapor, soil, and other materials during project construction, including proper offsite disposal. A copy of the SMP shall be provided to all construction contractors prior to the initiation of work at the site and construction contracts shall require all contractors to adhere to the provisions of the SMP. Prior to its implementation, the SMP shall be reviewed and approved by the California Department of Toxic Substances Control (DTSC), San Francisco Bay Regional Water Quality Control Board (RWQCB), and/or the Santa Clara Fire Department."

*Id.* Through Mitigation Measure HM-3, the IS/MND also proposes a vapor barrier "to prevent the potential accumulation of VOC vapors within the habitable spaces of the proposed hotel, no subsurface spaces below the hotel structure shall be constructed. A continuous vapor barrier shall be constructed below the building's concrete slab to prevent the migration of VOC vapors into the building." *Id.* at 73. This vapor barrier is to be installed after the preparation of the SMP under HM-1 and a Health and Safety Management Plan ("HSMP") under HM-2. However, as SWAPE states, the IS/MND's plans to address the contamination under the Project site are presumptive and inadequate. Ex. C, p. 4.

The source of TCE has not yet been identified and characterization is underway. *Id.* A Phase II investigation for the Stanford Applied Engineering site, just north of the Project at 282 Brokaw Road, is underway but no results from the Phase II have been posted to the Geotracker website. *Id.* Nor is the Regional Water Quality Control Board ("RWQCB") on record regarding the Project. *Id.* SWAPE states that RWQCB buy-in should be sought prior to presuming that the SMP, HSMP, and the vapor barrier would be sufficient to address health risks from soil vapor and groundwater contamination beneath the Project site. *Id.* Additionally, RWQCB review and oversight is necessary to ensure that the proposed mitigation will be sufficient to protect the health of construction workers and future guests and workers in the hotel. *Id.* SWAPE concludes that an EIR should be prepared to show that the RWQCB has been notified of the Project and is actively engaged in the plans for a hotel development to ensure plans for a hotel will not interfere with the investigation and ultimate cleanup of the Stanford Applied Engineering site. *Id.*

CEQA disallows deferring the formulation of mitigation measures to post-approval studies. CEQA Guidelines § 15126.4(a)(1)(B); *Sundstrom v. County of*

*Mendocino* (1988) 202 Cal.App.3d 296, 308-309. An agency may only defer the formulation of mitigation measures when it possesses “‘meaningful information’ reasonably justifying an expectation of compliance.” *Sundstrom* at 308; see also *Sacramento Old City Association v. City Council of Sacramento* (1991) 229 Cal.App.3d 1011, 1028-29 (mitigation measures may be deferred only “for kinds of impacts for which mitigation is known to be feasible”). A lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation because there was no evidence that replacement water was available). This approach helps “insure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug.” *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

Moreover, by deferring the development of specific mitigation measures, the Applicant has effectively precluded public input into the development of those measures. CEQA prohibits this approach. As explained by the *Sundstrom* court:

An EIR ... [is] subject to review by the public and interested agencies. This requirement of “public and agency review” has been called “the strongest assurance of the adequacy of the EIR.” The final EIR must respond with specificity to the “significant environmental points raised in the review and consultation process.” . . . Here, the hydrological studies envisioned by the use permit would be exempt from this process of public and governmental scrutiny. (*Sundstrom*, 202 Cal.App.3d at 308.)

Given the uncertainties of the contents of the SMP and the improper delay of that evaluation until after the close of the CEQA review period, the MND improperly defers this mitigation.

**D. The IS/MND Relied on Unsubstantiated Input Parameters to Estimate Project Emissions and Thus the Project May Result in Significant Air Quality Impacts.**

SWAPE found that the IS/MND underestimated the Project’s emissions and therefore cannot be relied upon to determine the significance of the Project’s air quality impacts. The IS/MND relies on emissions calculated from the California Emissions Estimator Model Version CalEEMod.2016.3.2 (“CalEEMod”). Ex. C, p. 4. This model, which is used to generate a project’s construction and operational emissions, relies on recommended default values based on site specific information related to a number of factors. *Id.* CEQA requires any changes to the default values to be justified by substantial evidence. *Id.* at 5.

SWAPE reviewed the IS/MND’s CalEEMod output files and found that the values input into the model were inconsistent with information provided in the IS/MND. *Id.* This

results in an underestimation of the Project's emissions. *Id.* As a result, the IS/MND's air quality analysis cannot be relied upon to determine the Project's emissions.

Specifically, SWAPE found that the following values used in the IS/MND's air quality analysis were either inconsistent with information provided in the IS/MND or otherwise unjustified:

- a. Unsubstantiated CO<sub>2</sub> intensity factor. Ex. C, pp. 5-6.
- b. Overestimated existing land use sizes. Ex. C, p. 6.
- c. Underestimated Saturday and Sunday operational vehicle trip rates. Ex. C, pp. 6-7.
- d. Unsubstantiated existing operational vehicle trip rates. Ex. C, pp. 7-8.
- e. Incorrect application of operational mitigation measures. Ex. C, pp. 8-10.

As a result of these errors in the IS/MND, the Project's construction and operational emissions are underestimated and cannot be relied upon to determine the significance of the Project's air quality impacts.

**E. The IS/MND Failed to Adequately Analyze the Project's Greenhouse Gas Impacts and Thus the Project May Result in Significant Greenhouse Gas Emissions.**

The IS/MND estimates that the Project would generate net annual GHG emissions of 1,764 metric tons of CO<sub>2</sub> equivalents per year ("MT CO<sub>2</sub>e/year"). See IS/MND, p. 61, Table GHG-1. Further, based on a service population of 675, the IS/MND estimates that the Project's per capita GHG emissions would be approximately 2.6 metric tons of carbon dioxide equivalents per service population per year ("MT CO<sub>2</sub>e/SP/year"), which would not exceed the threshold of 2.8 MT CO<sub>2</sub>e/SP/year. See *id.* Additionally, the IS/MND relies on the Project's consistency with the City's Climate Action Plan ("CAP"), AB 32, SB 32, MTC/ABAG's Plan Bay Area 2040, and SB 743 to conclude that the Project would have a less-than-significant GHG impact. See *id.* at 62-63. However, SWAPE states that the IS/MND's GHG analysis and subsequent less-than-significant impact conclusion is incorrect for several reasons. Ex. C, p. 10.

First, the IS/MND estimates that the Project would generate net annual GHG emissions of 1,764 MT CO<sub>2</sub>e/year but the IS/MND's quantitative GHG analysis should not be relied upon since it relies on an unsubstantiated air model, as discussed above. *Id.* at 11.

Second, the IS/MND's quantitative GHG analysis relies on an overestimated service population. *Id.* The IS/MND estimates that the Project's per capita GHG emissions would be approximately 2.6 MT CO<sub>2</sub>e/SP/year based on a service population of 675, as discussed above. The IS/MND indicates that the Project's service population includes 600 hotel guests and 75 employees. IS/MND, p. 61. However, according to CAPCOA's CEQA & Climate Change report, service population is defined as "the sum of the number of residents and the number of jobs supported by the project." Ex. C, p. 11. The IS/MND's inclusion of hotel guests in the service population is therefore incorrect and the IS/MND should have instead estimated a service population of 75

people. *Id.* By relying on an overestimated service population, the IS/MND's quantitative GHG analysis and subsequent less than significant conclusion is unsubstantiated. *Id.*

Third, the IS/MND relies on an unsupported threshold. *Id.* The IS/MND estimates that the Project's per capita GHG emission would be approximately 2.6 MT CO<sub>2</sub>e/SP/year, which would not exceed the threshold of 2.8 MT CO<sub>2</sub>e/SP/year, as previously discussed. However, SWAPE notes that the IS/MND fails to explain or provide a source for the threshold of 2.8 MT CO<sub>2</sub>e/SP/year. *Id.* Instead, SWAPE recommends that the IS/MND apply AEP's "2030 Land Use Efficiency Threshold" of 2.6 MT CO<sub>2</sub>e/SP/year. See *id.* at 11-12.

Fourth, the IS/MND fails to identify a potentially significant GHG impact. *Id.* at 12. When utilizing a correct service population of 75 people, SWAPE calculated that the Project would emit approximately 23.5 MT CO<sub>2</sub>e/SP/year based on the IS/MND's incorrect and unsubstantiated air model. *Id.* These emissions exceed both the AEP's 2030 Land Use Efficiency Threshold of 2.6 MT CO<sub>2</sub>e/SP/year and the IS/MND's unsupported threshold of 2.8 MT CO<sub>2</sub>e/SP/year, indicating a potentially significant GHG impact not previously identified or addressed by the IS/MND. *Id.*

Lastly, the IS/MND fails to consider performance-based standards under CARB's 2017 Scoping Plan. *Id.* at 13. The IS/MND relies in part on the Project's consistency with SB 32 to conclude that the Project would result in a less-than significant GHG impact yet it fails to consider performance-based measures proposed by CARB. *Id.* In reaching the State's long-term GHG emission reduction goals, CARB's 2017 Scoping Plan explicitly cites to SB 375 and the VMT reductions anticipated under the implementation of Sustainable Communities Strategies. *Id.* CARB has identified the population and daily VMT from passenger autos and light-duty vehicles at the state and county level for each year between 2010 to 2050 under a baseline scenario that includes "current projections of VMT included in the existing Regional Transportation Plans/Sustainable Communities Strategies (RTP/SCSs) adopted by the State's 18 Metropolitan Planning Organizations (MPOs) pursuant to SB 375 as of 2015." "Supporting Calculations for 2017 Scoping Plan-Identified VMT Reductions," Excel Sheet "Readme." CARB, January 2019, *available at*: [https://ww2.arb.ca.gov/sites/default/files/2019-01/sp\\_mss\\_vmt\\_calculations\\_jan19\\_0.xlsx](https://ww2.arb.ca.gov/sites/default/files/2019-01/sp_mss_vmt_calculations_jan19_0.xlsx). By dividing the projected daily VMT by the population, SWAPE calculated the daily VMT per capita for each year at the state and county level for 2010 (baseline year), 2023 (the Project's operational year), and 2030 (target years). See Ex. C, pp. 13-14. Based on SWAPE's calculations, the IS/MND's modeling shows that the Project exceeds the CARB 2017 Scoping Plan projections for 2010, 2023, and 2030, which results in the Project conflicting with the CARB 2017 Scoping Plan, SB 375, and SB 32. *Id.* at 14. As such, SWAPE concludes an EIR should be prepared for the Project to provide additional information and analysis to evaluate the Project's consistency with the applicable GHG plans and policies. *Id.*

#### **IV. CONCLUSION**

In light of the above comments, the City must prepare an EIR for the Project and the draft EIR should be circulated for public review and comment in accordance with CEQA. Thank you for considering these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Paige F.", with a stylized flourish extending to the right.

Paige Fennie  
LOZEAU DRURY LLP