



T 510.836.4200  
F 510.836.4205

1939 Harrison Street, Ste. 150  
Oakland, CA 94612

www.lozeaudrury.com  
brian@lozeaudrury.com

**VIA EMAIL ONLY**

May 20, 2021

Reema Mahamood, Planner III  
Department of Planning, Building and Code  
Enforcement  
200 East Santa Clara Street, 3rd Floor Tower  
San José, CA 95113  
Email: Reema.Mahamood@sanjoseca.gov

**Re: Draft SEIR Comment  
Marriot Townplace Suites - San Jose (C19-051 & H19-053)**

Dear Ms. Mahamood:

I am writing on behalf of Laborers International Union of North America, Local Union 270 and its members living or working in and around the City of San Jose (“LIUNA”) regarding the draft supplemental environmental impact report (“draft SEIR”) prepared for the Marriott Townplace Suites Project (C19-051 & H19-053) (“Project”) in San Jose. After reviewing the draft SEIR, it is clear that the document fails to comply with the California Environmental Quality Act (“CEQA”), and fails to adequately analyze and mitigate the Project’s significant environmental impacts.

Certified Industrial Hygienist, Francis “Bud” Offermann, PE, CIH, has conducted a review of the Project, the draft SEIR, and relevant appendices regarding the Project’s indoor air emissions. Mr. Offerman concludes that it is likely that the Project will expose future employees of the hotel to significant impacts related to indoor air quality, and in particular, emissions of the cancer-causing chemical formaldehyde. This impact has not been addressed in the DEIR. Mr. Offermann is one of the world’s leading experts on indoor air quality and has published extensively on the topic. Mr. Offerman’s expert comments and CV are attached hereto as Exhibit A.

A revised EIR should be prepared prior to Project approval to analyze all impacts and require implementation of all feasible mitigation measures, as described more fully below.

**PROJECT DESCRIPTION**

The 0.6-acre Project site is located at 491, 493, 495, 497, and 499 West San Carlos Street

and 270 and 280 Josefa Street (APN 259-47-013, -014, -015, and -016) on the northeast corner of West San Carlos Street and Josefa Street in the City of San José. The Project proposes to redevelop the project site with eight-story Marriott hotel building with up to 175 rooms. Some or all of the rooms could be extended stay. The maximum height of the building would be approximately 84.5 feet to the rooftop and 95 feet to top of the parapet. The first through third floors would consist of parking for hotel guests. The fourth through eighth floor of the building would have the hotel rooms. The building would be set back approximately six feet from the property lines along the street frontages to allow for a 15-foot wide public sidewalk on San Carlos Street and a 10-foot wide sidewalk on Josefa Street.

The Project site is currently developed with two commercial buildings, a tank house, a duplex, a mixed-use building, and one single-family residence, totaling approximately 26,233 square feet. The northernmost lot on Josefa Street (APN 259-47-016) is an asphalt-paved parking lot with no built structures. The project proposes to demolish the existing buildings and redevelop the site with the Project.

### **LEGAL STANDARD**

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report (“EIR”), except in certain limited circumstances. (e.g., Pub. Res. Code § 21100.) The EIR is the very heart of CEQA. (*Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.) “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. Calif. Resources Agency* (2002) 103 Cal.App.4th 98, 109.)

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. (14 CCR 15002(a)(1).) “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR ‘protects not only the environment but also informed self-government.’” (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.) The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.” *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal.App.4th 1344, 1354 (*Berkeley Jets*); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.)

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation measures. (14 CCR § 15002(a)(2), (3); see also, *Berkeley Jets, supra*, 91 Cal.App.4th 1344, 1354; *Citizens of Goleta Valley, supra*, 52 Cal.3d at 564.) The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.” (14 CCR 15002(a)(2).) If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant

effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.” (PRC § 21081; 14 CCR 15092(b)(2)(A), (B).) The lead agency may deem a particular impact to be insignificant only if it produces rigorous analysis and concrete substantial evidence justifying the finding. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 732.)

The EIR is the very heart of CEQA “and the integrity of the process is dependent on the adequacy of the EIR.” (*Berkeley Jets, supra*, 91 Cal.App.4th at 1355.) CEQA requires that a lead agency analyze all potentially significant environmental impacts of its proposed actions in an EIR. (PRC § 21100(b)(1); 14 CCR 15126(a); *Berkeley Jets, supra*, 91 Cal.App.4th at 1354.) The EIR must not only identify the impacts, but must also provide “information about how adverse the impacts will be.” (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831.) The lead agency may deem a particular impact to be insignificant only if it produces rigorous analysis and concrete substantial evidence justifying the finding. (*Kings County Farm Bureau, supra*, 221 Cal.App.3d at 732.) “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., supra*, 103 Cal.App.4th at 109.)

While the courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. A ‘clearly inadequate or unsupported study is entitled to no judicial deference.’” (*Berkeley Jets, supra*, 91 Cal.App.4th at 1355 [quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391, 409 n. 12].) A prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.” (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.* (1997) 60 Cal.App.4th 1109, 1117; *County of Amador v. El Dorado Cnty. Water Agency* (1999) 76 Cal. App. 4th 931, 946.)

## **DISCUSSION**

### **A. The Draft SEIR Fails to Discuss Indoor Air Quality Impacts Related to the Project.**

The draft SEIR fails to discuss, disclose, analyze, and mitigate the significant health risks posed by the Project from formaldehyde, a toxic air contaminant (“TAC”). Certified Industrial Hygienist, Francis Offermann, PE, CIH, has conducted a review of the Project, the DEIR, and relevant documents regarding the Project’s indoor air emissions. Mr. Offermann is one of the world’s leading experts on indoor air quality, in particular emissions of formaldehyde, and has published extensively on the topic. As discussed below and set forth in Mr. Offermann’s comments, the Project’s emissions of formaldehyde to air will result in very significant cancer risks to future residents at the Project’s apartments. Mr. Offermann’s expert opinion demonstrates the Project’s significant health risk impacts, which the City has a duty to

investigate, disclose, and mitigate in an EIR. Mr. Offermann's comment and curriculum vitae are attached as Exhibit A.

Formaldehyde is a known human carcinogen and listed by the State as a TAC. BAAQMD has established a significance threshold of health risks for carcinogenic TACs of 10 in a million and a cumulative health risk threshold of 100 in a million. The draft SEIR 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 in home and apartment building 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, office, and retail building construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims." (Ex. A, pp. 2-3.)

Mr. Offermann found that future employees of the hotel will be exposed to a cancer risk from formaldehyde of approximately 17.7 per million, *even assuming that* all materials are compliant with the California Air Resources Board's formaldehyde airborne toxics control measure. (Ex. A, pp. 4-5.) This impacts exceeds BAAQMD's CEQA significance threshold of 10 per million. (*Id.*)

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. (Ex. A, pp. 5-6, 12-13.) He prescribes a methodology for estimating the Project's formaldehyde emissions in order to do a more project-specific health risk assessment. (*Id.*, pp. 5-10.) Mr. Offermann also suggests several feasible mitigation measures, such as requiring the use of no-added-formaldehyde composite wood products, which are readily available. (*Id.*, pp. 12-13.) Mr. Offermann also suggests requiring air ventilation systems which would reduce formaldehyde levels. (*Id.*) Since the EIR does not analyze this impact at all, none of these or other mitigation measures have been considered.

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 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 SCAQMD’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 [emphasis added].) As a result, the City must prepare an EIR for the Project to address this impact and identify enforceable mitigation measures.

The failure of the draft SEIR 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 [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. People will be residing in and working in the Project’s buildings once built and 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., PRC §§ 21000, 21001].) It goes without saying that the future residents and employees at the Project are human beings and their health and safety must be subject 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 buildings 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 and employees to cancer risks potentially in excess of BAAQMD’s threshold of significance for cancer health risks of 10 in a million. Likewise, when combined with the risks posed by the nearby TAC sources, the health risks inside the project may exceed BAAQMD’s cumulative health risk threshold of 100 cancers in a million. Currently, outside of Mr. Offermann’s comments, the City does not have any idea what risks will be posed by formaldehyde emissions from the Project or the residences. As a result, the City must include an analysis and discussion in an updated draft SEIR which discloses and analyzes the health risks that the Project’s formaldehyde emissions may have on future residents and employees and identifies appropriate mitigation measures.

### CONCLUSION

For the foregoing reasons, the draft SEIR for the Project should be revised and circulated for public review and comment in accordance with CEQA. Thank you for considering these comments.

Sincerely,



Brian B. Flynn  
Lozeau Drury LLP