



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Rosalynn Hughey

**SUBJECT:** SEE BELOW

**DATE:** December 19, 2018

Approved

Date

12/19/18

**COUNCIL DISTRICT: 1**

**SUBJECT: PUBLIC HEARING ON THE APPEAL OF THE PLANNING DIRECTOR'S  
ADOPTION OF A REVISED MITIGATED NEGATIVE DECLARATION  
FOR THE AC BY MARRIOTT – WEST SAN JOSE PROJECT**

**RECOMMENDATION**

- a) Conduct an Administrative Hearing to consider the Appeal of the Planning Director's adoption of the AC by Marriott – West San José Revised Mitigated Negative Declaration in accordance with the California Environmental Quality Act (CEQA) for a Site Development Permit (File No. H17-023) to allow the demolition of a gas station and convenience store, and the development of a 168-room hotel with a parking reduction of 46% on a 0.42-gross-acre site, in the CG Commercial General Zoning District located at the southeast corner of Stevens Creek Boulevard and Stern Avenue (5696 Stevens Creek Boulevard).
- b) Adopt a resolution upholding the Planning Director's approval of the Revised Mitigated Negative Declaration, and finding that:
  - (1) The City Council has read and considered the AC by Marriott – West San José Revised Mitigated Negative Declaration and related administrative record in connection with Site Development Permit File No. H17-023;
  - (2) The AC by Marriott – West San José Revised Mitigated Negative Declaration was prepared and completed in full compliance with the California Environmental Quality Act of 1970, as amended, together with state and local implementation guidelines; and
  - (3) Approval of the AC by Marriott – West San José Revised Mitigated Negative Declaration reflects the independent judgment and analysis of the City of San José; and
  - (4) Preparation of an environmental impact report is not required because there are (i) no substantial changes in the proposed project, (ii) no substantial changes in the circumstances under which the project is undertaken, and (iii) no new information of substantial importance that would require an environmental impact report in accordance with CEQA Guideline Section 15162.

## **OUTCOME**

Denial of the environmental appeal and adoption of the Revised Mitigated Negative Declaration by the City Council will allow the project applicant to move forward with the implementation of Site Development Permit (File No. H17-023) to allow the demolition of a gas station and convenience store, and the development of a 168-room hotel including, but not limited to obtaining permits associated with the development.

Upholding the environmental appeal would void the approved Site Development Permit and would require the preparation and adoption of a new environmental document prior to any actions to approve the project.

## **EXECUTIVE SUMMARY**

On November 28, 2018, the Planning Director held a public hearing to consider the Initial Study/Mitigated Negative Declaration (IS/MND) for the AC by Marriott Hotel – West San José project and Site Development Permit (File No. H17-023). The Site Development Permit is for the demolition of a gas station and convenience store and the development of a 168-room hotel with a parking reduction of 46% on a 0.42-gross-acre site, in the CG Commercial General Zoning District located at the southeast corner of Stevens Creek Boulevard and Stern Avenue (5696 Stevens Creek Boulevard).

On November 30, 2018, Laborers International Union of North America 270 (LiUNA), represented by Lozeau Drury LLP, submitted a timely appeal of the Planning Director's adoption of the IS/MND for the project (Attachment 1). The appellant claimed there is substantial evidence in the record of a fair argument that the project would have a significant impact due to indoor air quality, toxic air contaminants from project construction and operation, and greenhouse gas emissions, which require the preparation of an environmental impact report (EIR). The appellant based these comments on two previously submitted comment letters dated October 24, 2018 and October 30, 2018.

Staff responded to these comments in the Response to Comments document posted online on November 27, 2018, for public review prior to the November 28, 2018 Director's Hearing. As discussed in staff's response, 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 consistent with CEQA Guidelines §15074(b) and, therefore, the comments have not presented a fair argument that the project will result in significant, adverse, un-mitigatable impacts that would require the preparation of an EIR.

## **BACKGROUND**

The proposed project is a Site Development Permit to allow the demolition of an existing gas station and convenience store, and the development of a seven-story, 168-room hotel with four levels of subterranean parking, a restaurant/bar serving guests, and associated on-site improvements, including paving and landscaping on a 0.42-gross-acre site. The project is located at the southeast corner of Stevens Creek Boulevard and Stern Avenue, at 5696 Stevens Creek Boulevard.

### **Environmental Review**

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

Comments raised concerns about aesthetics related to the scale of the project compared to the surrounding neighborhood, the adequacy of the analysis in the Phase II Environmental Site Assessment, viability of the proposed Transportation Demand Management (TDM) program, traffic circulation on Stern Avenue, construction air quality, and biological resources. During this period, a comment letter from Lozeau Drury, LLP, dated September 5, 2018, stated that the IS/MND is inadequate and requested preparation of an EIR, but did not cite specific inadequacies in the IS/MND to support a fair argument explaining why an EIR is necessary.

In response to public comments on the aesthetics analysis in the IS/MND, the City prepared 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 information, the City re-circulated the IS/MND for an additional 20 days from October 5, 2018 to October 25, 2018. The Recirculated IS/MND also included an additional mitigation measure for pre-construction surveys for nesting migratory birds. Like the first IS/MND, the Recirculated IS/MND determined that the proposed project would not have a significant effect on the environment with the incorporation of the specified mitigation measures.

The City of San José received a total of six comment letters during the public review period and one comment letter after the public review period on the Recirculated IS/MND. Three of the comments were from community members, two in support of the project and one who expressed concerns with traffic generation. Additionally, comments were received from the Muwekma Tribal Band regarding subsurface archeological resources and the Santa Clara Valley Water District regarding potential unknown wells on the project site. Finally, Lozeau Drury LLP submitted an additional comment letter, dated October 24, 2018, claiming that there is a fair argument that the project may have unmitigated adverse air quality and greenhouse gas impacts.

On October 30, 2018, five days after the end of the public comment period, Lozeau Drury LLP, submitted another comment letter on the re-circulated IS/MND via email raising new issues related to the effect of interior finishes on indoor air quality.

The City prepared responses to public comments both in the first IS/MND and the Recirculated IS/MND, and posted these responses to the City's Negative Declarations/Initial Studies website on November 27, 2018. Commenters were notified of the City's response via email.

The IS/MND, supporting technical studies, and response to all comments are available on the Planning Department's Negative Declarations/Initial Studies web site at:  
<http://www.sanjoseca.gov/index.aspx?NID=6145>.

### **Planning Director's Public Hearing**

The Revised IS/MND and Site Development Permit were originally scheduled for the October 31, 2018 Planning Director's Hearing. However, on October 30, 2018, the day before the scheduled hearing, staff received a comment letter from Lozeau Drury LLP regarding the analysis in the Revised IS/MND. To adequately respond to the comment letter, the project was deferred to the November 7, 2018 Planning Director's Hearing. However, due to an error on the agenda, the project could not be heard at the November 7, 2018 Planning Director's Hearing. The item was re-scheduled to the November 28, 2018 Planning Director's Hearing and updated public hearing notices were mailed.

On November 28, 2018, the Planning Director held a public hearing to consider the Revised IS/MND and Site Development Permit. At the public hearing there were four comments from the public, including three from neighboring property owners and one from Lozeau Drury LLP. The community members commented on traffic and parking concerns, traffic impacts during construction, project height and massing, and building architecture. Mr. Michael Lozeau on behalf of Lozeau Drury LLP, representing Laborers International Union of North America 270 (LiUNA), reiterated the October 31, 2018 comment letter focusing on indoor air quality impacts. At this hearing, the Planning Director adopted the Revised IS/MND and the Site Development Permit.

### **Environmental Appeal**

On November 30, 2018, Lozeau Drury LLP, representing Laborers International Union of North America 270 (LiUNA), submitted a timely appeal of the Director's adoption of the IS/MND. The appeal is based on the previously submitted comments in the Lozeau Drury LLP letters of October 24, 2018 and October 30, 2018.

Pursuant to Section 21.06.020 of the San José Municipal Code, any interested person can submit a timely request to appeal to the City Council the decision maker's decision to adopt a mitigated negative declaration. At the appeal hearing, the City Council may uphold the action to adopt the mitigated negative declaration or require the preparation of an EIR in accordance with Title 21 prior to any consideration of whether the project should be approved.

## **ANALYSIS**

The appellant is Laborers International Union of North America 270 (LiUNA), represented by Lozeau Drury LLP. The appeal included copies of letters submitted by Lozeau Drury LLP on October 24, 2018, and October 30, 2018. City staff provided written responses to all the comments provided in both the letters in the Response to Comments document, which were posted to the City's Negative Declarations/Initial Studies website on November 27, 2018. The Response to Comments document is included as Attachment 2. None of the comments raise any new issues about the project's environmental impacts, nor do they provide information indicating the project would result in new environmental impacts or impacts substantially greater in severity than disclosed in the IS/MND. The analysis below summarizes and reiterates the main points provided in the previous responses presented by City staff.

### **Responses to Lozeau Drury LLP Comment Letter dated October 24, 2018**

The Lozeau Drury LLP comment letter dated October 30, 2018, and supporting memorandum from SWAPE makes the claim that there is a fair argument that the Project may have unmitigated adverse environmental impacts or the IS/MND is not supported by substantial evidence. The analysis below responds to the alleged deficiencies with the environmental document asserted by the appellant.

***Comment A:** The MND's air quality analysis is not based on substantial evidence because it fails to address all uses that will attract traffic to the Project.*

#### **Air Quality and Traffic Impacts from Operations of the Hotel Restaurant**

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. As the hotel is the main proposed use, the analysis is adequate.

#### **Underestimation of Operation and Construction Air Quality Impacts**

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.

Additionally, 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 fewer in comparison, at approximately 15 to 20 truck trips (about 2% of the truck trips generated by grading/excavation). 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.

#### Air Pollution and Traffic Impacts from Off-Site Parking Locations

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 Transportation Demand Management Plan (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 B:** There is substantial evidence of a fair argument that the Project may have significant health risk impacts from its emissions of toxic air contaminants.*

#### Health Risk Impacts to Nearby Sensitive Receptors

A Health Risk Assessment was prepared for the proposed project by Illingworth & Rodkin, dated November 5, 2018. This assessment 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. Additionally, the exposure parameters from the OEHHA guidelines and the recent BAAQMD HRA Guidelines were used in this evaluation.

The 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 facility 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.

Pursuant to the Health Risk Assessment project operations will not include activities that would be a significant source of localized TAC or PM<sub>2.5</sub> emissions that could lead to significant operational health or community risks to off-site sensitive receptors. The project is not a significant generator of 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, the project would replace the Stevens Creek Shell gasoline station which is an existing source of TAC emissions. 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.

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. Without mitigation, the project would have a less-than-significant impact with respect to community risk caused by project construction activities.

**Comment C:** *A fair argument exists that the project may have significant GHG emissions because the Project fails to explain how it complies with requirements of the City's GHG Reduction Strategy and does not include solar panels or other strategies supposedly encouraged by the Strategy.*

Compliance with the City's GHG Reduction Strategy

As stated in the Greenhouse Gas Emission (GHG) section of the Recirculated IS/MND, the project is expected to generate 1,528 metric tons (MT) of carbon dioxide equivalent (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; 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.

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. Transportation demand management (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. However, this project complies with 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.

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). 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. 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 GHG 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.

## **Responses to Lozeau Drury LLP Comment Letter dated October 30, 2018**

The Lozeau Drury LLP comment letter dated October 30, 2018, 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 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. 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.

The Health Risk Assessment prepared for the proposed project concluded that the maximum-modeled annual  $PM_{2.5}$  concentration, which is based on combined exhaust and fugitive dust emissions, would be  $0.07\mu g/m^3$ . Therefore, this maximum annual  $PM_{2.5}$  concentration would be below the BAAQMD significance threshold of greater than  $0.3\mu g/m^3$ .

### **Conclusion**

The letters accompanying the environmental appeal did not identify any issues that were not previously addressed in the Revised IS/MND and the responses to comments dated November 27, 2018. 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 consistent with 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.

### **EVALUATION AND FOLLOW-UP**

If the Council adopts the Revised IS/MND and upholds the Planning Director's approval of the Site Development Permit, then the applicant will proceed with the acquisition of the necessary grading and building permits and implement the required mitigation measures to complete the development of the AC by Marriott – West San José project.

## **PUBLIC OUTREACH**

For this item, staff followed Council Policy 6-30: Public Outreach Policy, in that notices for the public hearings for the project were mailed to the owners and tenants of all properties located within 1,000 feet of the project site.

## **COORDINATION**

The preparation of this memorandum was coordinated with the City Attorney's Office.

## **CEQA**

AC by Marriott – West San José Revised Mitigated Negative Declaration. The IS/MND, supporting technical studies, and Response to Comments document on are available on at City's Planning Division located at 200 East Santa Clara Street, Tower 3<sup>rd</sup> Floor during normal business hours or the Planning Department's Negative Declarations/Initial Studies web site at: <http://www.sanjoseca.gov/index.aspx?NID=6145>.

/s/

ROSALYNN HUGHEY, Director  
Planning, Building and Code Enforcement

For questions please contact Krinjal Mathur, Planner II, at (408) 535-7874.

- Attachments: Attach 1 Environmental Appeal from Laborers International Union of North America 270 (LiUNA), dated November 30, 2018.
- Attach 2 Responses to Public Comments on the AC by Marriott – West San José Revised Initial Study/Mitigated Negative Declaration, dated November 2018
- Attach 3 AC by Marriott - West San José Revised Initial Study/Mitigated Negative Declaration:  
<http://www.sanjoseca.gov/index.aspx?NID=6145>
- Attach 4 Planning Director's Hearing Agenda item 3a. including draft Site Development Permit and all associated documents for Planning Director's Hearing dated November 28, 2018, found at:  
<http://www.sanjoseca.gov/DocumentCenter/View/81318>