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VIA E-MAIL

City Clerk
cityclerk@sanjoseca.gov
City of San Jose
200 East Santa Clara Street # 200
San José, CA 95113

Re: **Petition for Reconsideration Pursuant to Municipal Code Section 21.07.080: 237 Industrial Center, Council File No. 17-094, Rezoning (File No. C15-054), Special Use Permit (File No. SP16-053) and Development Exception (File No. V17-004) Applications, and Environmental Impact Report SCH # 201605203**

To the City Clerk of the City of San José:

Morgan, Lewis & Bockius LLP represents Los Esteros Critical Energy Facility, LLC ("Los Esteros") in connection with its facility located at 800 Thomas Foon Chew Way, San José. The 237 Industrial Center (the "Project") is the subject of City Council File Number 17-094 and Planning Files Number C15-054, SP16-053 and V17-004. On October 24, 2017, the City Council took action on the Project, including certifying the Environmental Impact Report for the Project (SCH # 201605203, the "EIR") and adopting statements of overriding consideration in connection with certain significant, unmitigated impacts of the Project. Los Esteros timely petitioned for reconsideration of the Council's determination that certification of the EIR would satisfy the City's obligation to comply with the California Environmental Quality Act ("CEQA," Public Resources Code Section 21000 *et seq.*).

Los Esteros is hopeful that its current discussions with the Project's proponent, Microsoft Corporation, will be successful in allaying Los Esteros' concerns. However, as those discussions are ongoing, Los Esteros hereby reiterates its objections to the determination as set forth in its October 11, 2017 and October 24, 2017 letters to, respectively, the Planning Commission and the Council, which we incorporate herein by reference.¹

¹ Those letters were submitted the City with Los Esteros' October 26, 2017 Petition for Reconsideration, are in the record for this proceedings, and we have therefore not enclosed them again, herein.

Morgan, Lewis & Bockius LLP

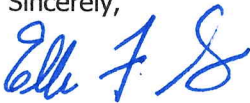
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In addition, we note the following:

- The updated air quality analysis dated November 6, 2017, prepared to address the EIR's failure analyze emissions associated with the import of 124,00 cubic yards of fill material, analyzes additional emissions from an estimated 15,500 off-site truck trips not considered in the EIR and concludes there would not be a significant impact. But it is not clear from the additional analysis whether additional on-site emissions associated with distribution and grading of the 124,000 cubic yards of fill were analyzed. The record continues to lack substantial evidence to support the CEQA findings required to certify a legally adequate EIR.
- The City failed to address the patently inadequate findings of conformance required under Zoning Code Section 20.100.720, which requires substantial evidence supporting a finding that "[t]he environmental impacts of the project, including but not limited to noise, vibration, dust, drainage, erosion, storm water runoff, and odor which, ***even if insignificant for purposes of [CEQA]***, will not have unacceptable affect [*sic*] on adjacent property or properties." October 11, 2017 Staff Report to Planning Commission, page 15 (emphasis added). Resolution No. 78394, Section 10.g, relies solely on the City's CEQA analysis to find conformance with Section 20.100.720. Indeed, there is no evidence in the record providing any support for the finding beyond the CEQA analysis, despite the language of the City's Code explicitly foreclosing reliance solely on that analysis for conformance. Los Esteros asserted this defect in its October 11, 2017 letter (pages 1-2), incorporated it into its October 24, 2017 letter to the Council, and for the avoidance of doubt hereby preserves and reasserts this ground for challenging the City's approval of the Project.

Sincerely,



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