

# Morgan Lewis

**Deborah E. Quick**

Of Counsel

+1.415.442.1393

deborah.quick@morganlewis.com

October 11, 2017

City of San José Planning Commission

Chair Pham

Commissioners Allen, Abelite, Bit-Badal, Ballard, Vora and Yesney

City of San Jose

200 East Santa Clara Street

San José, CA 95113

**Re: 237 Industrial Center Rezoning (File No C15-054), Special Use Permit (File No. SP16-053) and Development Exception (File No. V17-004) Applications, and Environmental Impact Report**

Dear Chair Pham and Honorable Commissioners:

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, which provides critically needed reliability functions to serve the electrical grid. The 237 Industrial Center (the "Project") is proposed for the approximately 64.59 acre Cilker agricultural property (the "Cilker Site") adjacent to Los Esteros' site. Los Esteros offers these comments on the Project and the Final Environmental Impact Report ("FEIR") as a supplement to its comments on the Draft Environmental Impact Report ("DEIR") for the Project.

Los Esteros supports development consistent with the *Alviso Master Plan* and *Envision San José 2040* (the "General Plan"), particularly as that development supports the continued economic vitality of, and job growth in, San José and the South Bay region. As a neighbor, Los Esteros, is very concerned about the environmental impacts that may occur as a result of construction of the Project and is vitally interested in ensuring that development decisions are made only after impacts have been identified and assessed adequately as required by the California Environmental Quality Act (Public Res. Code § 21000 *et seq.*, "CEQA"). As is detailed below, we believe that there are currently significant deficiencies in the Project's FEIR which need to be addressed prior to certification of the EIR and consideration of the Project's entitlements. We believe that there is a pathway forward for considering and addressing these issues and we are willing to work with the City and the Project applicant to address these issues.

**1. The Required Finding That The Project Will Not Have An Unacceptable Negative Effect On Adjacent Property Cannot Be Made Unless Dust Impacts To Critical Energy Infrastructure Are Adequately Addressed.**

The Project requires approval of a Special Use Permit under San José Municipal Code Section

**Morgan, Lewis & Bockius LLP**

One Market

Spear Street Tower

San Francisco, CA 94105-1596

United States

**T** +1.415.442.1000

**F** +1.415.442.1001

20.100.720. That approval cannot be issued unless substantial evidence supports the 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 an unacceptable negative affect [*sic*] on adjacent property or properties." Staff Report, p. 15 (emphasis added). As Los Esteros stated in its July 17, 2017 letter commenting on the DEIR and the Project (the "Comment Letter"), the Los Esteros facility has a unique sensitivity to dust and particulate matter, which "can degrade and potentially clog the air inlet filters of the LECEF Facility's combustion turbines." Comment Letter, p. 2. The First Amendment to the DEIR asserts that, in the context of the City's CEQA analysis, impacts to the Los Esteros critical energy infrastructure are insignificant and do not require mitigation. Los Esteros believes that analysis is incorrect.<sup>1</sup> More importantly, neither the staff report nor the proposed finding makes any attempt to supply substantial evidence that the Project "will not have an unacceptable negative affect [*sic*] on" the adjacent Los Esteros property, "even if" the dust and particulate matter impacts of the Project on the Los Esteros critical energy facility are "insignificant for purposes of" the City's CEQA analysis. Staff Report, p. 15 and Attachment E, p. 20 (Draft Resolution for File Nos. SP16-053 and V17-004, § 10.g. The analysis and proposed findings rely solely on the FEIR's CEQA analysis. Harmful dust emissions are recognized under California law as a nuisance. *Baker v. Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 Cal.3d 862, 866; *Wade v. Campbell* (1962) 200 Cal.App.2d 54, 59. That the harm suffered by third parties is unequal does not prevent dust emissions from constituting an abatable nuisance. *People v. Mason* (1981) 124 Cal.App.3d 348, 352. The record before the Planning Commission does not support the proposed finding that the environmental impacts of the Project, including dust, will not result in unacceptable negative effects to Los Esteros. Los Esteros is willing to cooperate with the City and the Project's proponents to develop an effective and practical dust mitigation program in order to prevent negative impacts to critical energy infrastructure and avoid time-consuming and costly post-approval conflicts.

## **2. Recirculation Is Required Because The First Amendment To The DEIR Identifies New Significant Impacts.**

Public Resources Code Section 21092.1 requires recirculation of an EIR for public comment "[w]hen significant new information is added" after notice has been given of the availability of the EIR for public review and prior to certification. CEQA's regulations (14 Cal. Code Regs. §§ 15000-15387, the "Guidelines") provide that recirculation is required when:

- (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.
- (2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance.

---

<sup>1</sup> See the discussion of clear inadequacies in the EIR's disclosure and analysis of construction related emissions in Section 5(b) of this letter.



(3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the environmental impacts of the project, but the project's proponents decline to adopt it.

(4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.

Guidelines § 15088.5(a); *see also Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 1130 and *Mountain Lion Coalition v. Fish & Game Comm'r* (1989) 214 Cal.App.3d 1043. The First Amendment to the DEIR identifies the following new, significant impacts:

- Impact TRAN(C)-1 has been revised to include a newly identify a cumulatively considerable impact at the Mission College Boulevard/Montague Expressway intersection. First Amend. to DEIR, pp. 84, 95-96 and 99.
- DEIR Section 3.14.2.1's thresholds of significance for Utilities includes that the Project will have a significant impact if there is insufficient water to meet the Project's needs from existing entitlements or resources, or if it requires new or expanded water supplies or entitlements. DEIR, p. 226. Section 3.14.2.3, Water Supply Impacts, has been revised to identify that "the potable backup flow [for cooling purposes to serve the data center use] at the required daily rate would adversely impact system-wide operations" and requires the Project to mitigate this significant impact through the dedication of a new well site to the City. First Amend. to the DEIR, p. 97.

The identification of these new significant impacts mandates recirculation. Public Res. Code § 21092.1, Guidelines § 15088.5(a)(1).

### **3. Recirculation Is Required To Provide Public Disclosure Of The Impacts Associated With Construction And Operation Of The Oakmead Pump Station Utilization.**

The DEIR presented two alternatives for disposal of the Project's storm water, as well as storm water runoff from City-owned properties east of Zanker Road: constructing a new outfall in Coyote Creek, or conveying runoff to the existing Oakmead Pump Station, located on the Guadalupe River approximately two miles southeast of the Cilker Site. As noted in Los Esteros' Comment Letter, the DEIR discussion of these options was deficient. First, the DEIR did not include any concrete criteria for determining whether the Oakmead Pump Station is feasible nor did it describe the factors that will impact the choice of disposal option. In addition, the DEIR failed to adequately disclose the impacts from either option, the mitigation measures that could reduce those impacts, or provide an adequate basis for assessing the differential in impacts as between the two options. FEIR, pp. 42-43. With respect to the analysis of the Oakmead Pump Station option, the FEIR states that "[u]tilization of the pump station by the project was analyzed in the attached memo (Appendix A)." However, no such memorandum is attached to the FEIR. Appendix A to the FEIR consists solely of "Transportation Impact Analysis (TIA) Revisions."

The memorandum analyzing utilization of the Oakmead Pump Station, per the FEIR, disclosed that "the existing pump station has the capacity to discharge storm water runoff generated at the site and new roadways; however, there is not enough capacity to accommodate runoff from City held properties east of Zanker Road." FEIR, p. 43. The memorandum not included in the FEIR identified a material difference between the two storm water disposal options; its exclusion renders the FEIR inadequate as an informational document, triggering an obligation to recirculate. Guidelines § 15088.5(a)(4). Further, the accompanying text revisions at FEIR pages 86-87 still do not clarify what criteria will be used to select between the two options. Further text revision is required to clarify the criteria for selection between the two storm water disposal options, followed by recirculation with the inclusion of the omitted memorandum, in order to allow for public comment on the revised text, newly-disclosed memorandum and the potential impacts associated with this option.

#### **4. The FEIR Fails To Adequately Consider Potential Mitigation For Impacts To Agricultural Resources.**

The Cilker Site has been in agricultural use for more than a century and is identified as Prime Farmland on the *Santa Clara County Important Farmlands 2012 Map*. DEIR, pp. 115 and 171. The Cilker Site is among the limited number of remaining properties designated as Prime Farmland within the Urban Growth Boundary, as discussed in the EIR analyzing the General Plan. General Plan DEIR, p. 142, Table 3.1-1. The General Plan EIR recognized that the permanent conversion of Prime Farmland would impose a significant, unavoidable impact on each identified property, as well as cumulatively. General Plan DEIR, pp. 179 and 845. The General Plan DEIR recognized that "[f]or properties without existing entitlements that include some Prime Farmland, agricultural easements could be considered at the time of future development" to address the property-specific impact, and that "conservation easements .... for agriculture could be used to limit future loss of Prime Farmland in other parts of the County." General Plan DEIR, pp. 193-194 and 845. In response to comments questioning the City's failure to adopt feasible mitigation for loss of Prime Farmland by requiring agricultural conservation easements at the time of entitlement for permanent conversion of Prime Farmland, the General Plan First Amendment to the DEIR stated:

The EIR does identify conservation easements as a possible means of offsetting some of the impacts of converting agricultural land to non-agricultural uses. The decision of whether or not to require such easements of new development on land not yet entitled in San José must be made by the decision-making body for the City of San José, the City Council. Those properties that are designated as Prime Farmland, do not have entitlements for the uses discussed, and whose development is considered likely during the timeframe of this General Plan ... include: Cilker ... .

First Amend to General Plan DEIR, p. 45. Neither the Project EIR nor the staff report address this commitment to consider at the entitlement stage whether it would be appropriate to off-set the individual and cumulative impacts of the Project's permanent conversion of Prime Farmland by requiring an agricultural conservation easement within the County.

This omission must be addressed in a recirculated document. Guidelines § 15088.5(a)(3). The revised analysis should include consideration of the "Agricultural Mitigation Policies" of the Santa



Clara County Local Agency Formation Commission, attached hereto as Exhibit A, including that project proponents proposing the permanent conversion of Prime Farmland put in place agricultural conservation easements providing for permanent conservation of agricultural land at a 1:1 ratio, or payment of in-lieu fees to an agricultural conservation entity sufficient to fund that entity's acquisition and management of an agricultural conservation easements at a 1:1 ratio. Santa Clara LAFCO Ag Mit. Policies, Ex. A, pp. 2-3. The analysis should address the ongoing conversion of small-parcel agricultural land in the Morgan Hill/San Martin area to "rural ranchette development," as found by the Santa Clara Valley Climate & Agriculture Preservation Program.<sup>2</sup> Putting in place one or more conservation easement(s) to protect regional small-parcel Prime Farmlands from permanent conversion is eminently feasible, as the Santa Clara County Open Space Authority currently administers several regional agricultural conservation easements.<sup>3</sup> While such a mitigation measure may not reduce the impact to Prime Farmland to a less than significant level, it does have the potential to reduce the magnitude of a significant, unavoidable impact, and therefore the City has an obligation to consider it.

##### **5. The FEIR Fails To Adequately Identify And Analyze The Potential Impacts Associated With The Whole Of The Project.**

California courts have consistently held that "an accurate, stable and finite project description is the *sin quo non* of an informative and legally sufficient [CEQA document]." *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193. CEQA also requires that a lead agency evaluate the potential impacts of the whole of the action including "later phases of the project, and any secondary, support or off-site features necessary for its implementation." *Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283-84. Here, although the FEIR includes a description of two potential projects, it does not evaluate all potential impacts (including off-site impacts) associated with both options and therefore fails to meet the legal requirements of CEQA.

The EIR defines the Project as including two options: (i) a "Light Industrial Development Option," "Option 1," including up to seven two-story light industrial buildings covering the majority of the Cilker Site (DEIR, pp. 38 and 40, Fig. 2.0-7); and (ii) a "Data Center/Light Industrial Option," "Option 2," including four main buildings for data center uses, and ancillary structures including an electrical substation, on "26.5 acres of the 64.5 acre site," with "the remainder of the site (a total of approximately 38 acres) ... developed with up to 728,000 square feet of light industrial uses similar to what is proposed in" Option 1. DEIR, pp. 42-43, Fig. 2.0-9. Los Esteros' Comment Letter noted that instability in the descriptions of Options 1 and 2 of the Project led to the Project not being consistently analyzed in the DEIR. Those problems persist.

(a) There Is No Geotechnical Analysis Of Option 1 Or The Light Industrial Portion Of Option 2.

The DEIR's geological analysis analyzes only the data center portion of Project Option 2. DEIR, p. 131 and Appendix H, *Geotechnical Investigation Report*, Kleinfelder, June 10, 2016, p. 2 ("[S]ite

---

<sup>2</sup> See

[https://www.sccgov.org/sites/dpd/DocsForms/Documents/CAPP\\_TechPanel\\_InitialFindings\\_201702.pdf](https://www.sccgov.org/sites/dpd/DocsForms/Documents/CAPP_TechPanel_InitialFindings_201702.pdf) .

<sup>3</sup> See <https://www.openspaceauthority.org/conservation/land-protection.html> .

development may include up to four 90-foot tall, 4-story structures,<sup>[4]</sup> each with an approximately 250,000 square-foot footprint, as well as smaller ancillary structures including a new electrical substation, storm water outfall, and parking.”). There is no analysis geotechnical analysis whatsoever in the EIR—either the DEIR or the First Amendment to the DEIR—regarding Option 1 **or** the light industrial portion of Option 2. The EIR cannot be certified until this analysis is completed and the DEIR is recirculated for public review and comment. Guidelines § 15088(a)(4).

(b) Construction-Related Vehicle And Fugitive Dust Emissions Associated With The Import Of 124,000 Net New Cubic Yards Of Fill For The Data Center Portion Of Option 2 Are Neither Disclosed Nor Analyzed.

The discussion of air quality impacts during construction (DEIR Section 3.2.2.4, pp. 79-80) analyzes only the projected impacts from Option 1, the Light Industrial Development Option, based solely on a projected shorter time period for construction of Option 1.<sup>5</sup> This analytical approach fails to take account of the dramatic difference in the amount of imported fill required by the two development options: “Option 1 is anticipated to require the import of approximately **1,000 cubic yards of fill**. Option 2 would require importing approximately **124,000 net new cubic yards of fill** to be spread on the data center portion of the site.” DEIR, p. 42 (emphasis added). The EIR fails to calculate the differential in truck trips required for import of fill materials as between Options 1 and 2, and also fails to disclose or analyze the fugitive dust impacts from Option 2, which is anticipated to require **124 times the amount of fill** required by Option 1. Without this information, it is impossible to evaluate whether substantial evidence supports—or, more likely, does not support—the decision to base the analysis of air quality impacts during the construction phase solely on Option 1. This inadequate disclosure and analysis is of particular concern for Los Esteros in light of the dangers posed to Los Esteros’ critical energy infrastructure by fugitive dust.<sup>6</sup> This information must be provided and the revised analysis recirculated for comment. Guidelines § 15088(a)(4); *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722 (Omission of information in an EIR is prejudicial “if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.”).

---

<sup>4</sup> Note that this is inconsistent even with the Project description for Option 2, as the DEIR states only one of the data center buildings will be four-stories. DEIR, pp. 42 and 44, Fig. 2.0-10.

<sup>5</sup> “Based on construction phasing, construction emissions for the data center/light industrial development option (approximately 10 years between the completion of the data center and the construction of light industrial uses on the southern portion of the site) would be less than for the light industrial development option (approximately 20-months of construction), as that project would be built over an extended number of years which reduce the full impacts of construction on the entire site. Therefore, the following analysis is based on the light industrial option which represents the worst-case for construction emissions.” DEIR, p. 79. Construction of the data center portion of Option 2 is anticipated to last 30 months. DEIR, p. 49. The ten-month differential in projected construction times for the data center portion of Option 2 is clearly insufficient to attenuate the increased vehicle and fugitive dust emissions associated with 124 times the amount of fill and consequent dramatic increase in the number of truck trips.

<sup>6</sup> See the discussion at Section 1 of this letter.



(c) The EIR Fails To Consider All Impacts Associated With Construction Of Off-Site Infrastructure.

The FEIR fails to adequately consider all impacts from construction of off-site infrastructure. For example, while the DEIR states that archeological surveys were conducted on "the project site and off-site utility corridors," (DEIR, p. 113) there is no indication that the area of disturbance necessary to construct the proposed site of the storm water outfall in Coyote Creek was surveyed. Given the EIR's admission that "[i]n this area of North San José, Native American sites have been recorded on the wide valley terraces within one-half mile of major waterways and creeks," and the confirmed archaeological site located "generally southeast of the" Cilker Site, Coyote Creek must be surveyed and, to the extent that expanded survey discloses new impacts, the EIR recirculated. Guidelines § 15088.5(a)(1).

**6. The FEIR Improperly Relies On Mitigation Measures To Reduce Impacts To Less Than Significant That Are Not Imposed As Binding And Enforceable Permit Conditions.**

Mitigation measures relied on by an agency to conclude that a project's impacts will be reduced to less than significant must be imposed as binding and enforceable permit conditions. Public Res. Code § 21002.1(b); Guidelines § 15126.4(a)(2) ("Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments."). In a number of areas, the FEIR inexplicably relies on various "permit conditions" to reduce otherwise significant impacts to less-than-significant but does not impose those measures as required mitigation and avoidance measures nor describe how they will be enforced. This does not satisfy the requirements of CEQA. For example, the DEIR recognizes that construction activities can result in significant air quality impacts but finds that such impacts can be reduced to a less than significant level through the use of identified Best Management Practices. DEIR p. 80. However, the DEIR does not impose implementation of the identified Best Management Practices as a necessary Mitigation and Avoidance Measure for Air Quality Impacts. DEIR p. 81; *see also* the similar treatment of impacts to subsurface cultural resources (DEIR, pp. 12-121), and soil contamination impacts (pp. 158-159). The analysis of impacts to historic structures likewise relies on specific documentation, relocation and salvage mitigation measures to arrive at a conclusion of less than significant impact, yet these are described as being incorporated into the project rather than being imposed as binding and enforceable permit conditions. DEIR, pp. 118-119. All mitigation measures relied on to conclude impacts will be less than significant must be incorporated into the permit approvals as binding, enforceable conditions of approval.

**7. The Differences In Kind And Degree Of Significant, And Significant And Unavoidable, Impacts Among The Alternatives Analyzed Must Be Disclosed.**

CEQA is designed to inform decisions makers and the public of the relative consequences of taking various actions. To satisfy this disclosure requirement, it is critical that an EIR provide a mechanism for meaningfully comparing the impacts of various ways of meeting a project's objectives. The DEIR frames its alternatives analysis as considering "the significant impacts from the proposed project that could be reduced or avoided by an alternative," and states that "[a]lternatives may also be considered if they would further reduce impacts that are already less than significant because the project is proposing mitigation." DEIR, p. 244-245. The analysis that follows, however, does not fulfill this function. The "Comparison of Environmental Impacts" for the "No Project-Existing Zoning," "Reduced Scale – Data Center Only," "Reduced Scale – Light

Industrial Only Alternative" and "Reduced Development – Data Center and Reduced Light Industrial Development Alternatives" fail to quantify the differential in impacts from the alternatives, instead finding alternatives equivalent if they, like the Project, result in significant and unavoidable impacts to the same resources. It is therefore impossible to compare the magnitude of impacts between the various alternatives. The complete lack of any quantification of, for example, greenhouse gas or other air emissions, or vehicle trips and differences in trip distribution, means there is not substantial evidence supporting the EIR's alternatives analysis or its conclusions. An EIR is required to "include sufficient information about each alternative to allow meaningful evaluation, analysis and comparison with the proposed project." Guidelines § 15126.6(d). The unsupported conclusion that there is no significant difference between the alternatives because they share a similar number of unavoidable impacts does not meet this requirement. The EIR must be revised to include a comparative analysis of the level of impacts associated with each alternative and the revised EIR must be recirculated for public review and comment. Guidelines § 15088.5(a).

Sincerely,



Deborah E. Quick

c: Kieulan Pham (via e-mail at [Kieulan.Pham@sanjoseca.gov](mailto:Kieulan.Pham@sanjoseca.gov))  
Tracy Tam (via e-mail at [Tracy.Tam@sanjoseca.gov](mailto:Tracy.Tam@sanjoseca.gov))



EXHIBIT A

EXHIBIT A

# **AGRICULTURAL MITIGATION POLICIES**

## **Background**

LAFCO's mission is to encourage orderly growth and development, discourage urban sprawl, preserve open space and prime agricultural lands, promote the efficient provision of government services and encourage the orderly formation of local agencies. LAFCO will consider impacts to agricultural lands along with other factors in its evaluation of proposals. LAFCO's Urban Service Area (USA) Amendment Policies discourage premature conversion of agricultural lands, guide development away from existing agricultural lands and require the development of existing vacant lands within city boundaries prior to conversion of additional agricultural lands. In those cases where LAFCO proposals involve conversion of agricultural lands, LAFCO's USA Amendment Policies require an explanation of why the inclusion of agricultural lands is necessary and how such loss will be mitigated.

## **Purpose of Policies**

The purpose of these policies is to provide guidance to property owners, potential applicants and cities on how to address agricultural mitigation for LAFCO proposals and to provide a framework for LAFCO to evaluate and process in a consistent manner, LAFCO proposals that involve or impact agricultural lands.

## **General Policies**

1. LAFCO recommends provision of agricultural mitigation as specified herein for all LAFCO applications that impact or result in a loss of prime agricultural lands as defined in Policy #6. Variation from these policies should be accompanied by information explaining the adequacy of the proposed mitigation.
2. LAFCO encourages cities with potential LAFCO applications involving or impacting agricultural lands to adopt citywide agricultural mitigation policies and programs that are consistent with these policies.
3. When a LAFCO proposal impacts or involves a loss of prime agricultural lands, LAFCO encourages property owners, cities and agricultural conservation agencies to work together as early in the process as possible to initiate and execute agricultural mitigation plans, in a manner that is consistent with these policies.
4. LAFCO will work with agricultural entities, the County, cities and other stakeholders to develop a program and public education materials to improve the community's understanding of the importance of agriculture in creating sustainable communities within Santa Clara County.



5. LAFCO will review and revise these policies as necessary.

#### **Definition of Prime Agricultural Lands**

6. "Prime agricultural land" as defined in the Cortese Knox Hertzberg Act means an area of land, whether a single parcel or contiguous parcels, that has not been developed for a use other than an agricultural use and that meets any of the following qualifications:
  - a. Land that qualifies, if irrigated, for rating as class I or class II in the USDA Natural Resources Conservation Service land use capability classification, whether or not land is actually irrigated, provided that irrigation is feasible.
  - b. Land that qualifies for rating 80 through 100 Storie Index Rating.
  - c. Land that supports livestock used for the production of food and fiber and that has an annual carrying capacity equivalent to at least one animal unit per acre as defined by the United States Department of Agriculture in the National Handbook on Range and Related Grazing Lands, July, 1967, developed pursuant to Public Law 46, December 1935.
  - d. Land planted with fruit or nut-bearing trees, vines, bushes, or crops that have a nonbearing period of less than five years and that will return during the commercial bearing period on an annual basis from the production of unprocessed agricultural plant production not less than four hundred dollars (\$400) per acre.
  - e. Land that has returned from the production of unprocessed agricultural plant products an annual gross value of not less than four hundred dollars (\$400) per acre for three of the previous five calendar years.

#### **Mitigation Recommendations**

7. Proposals involving the conversion of prime agricultural lands should provide one of the following mitigations at a not less than 1:1 ratio (1 acre preserved for every acre converted) along with the payment of funds as determined by the city / agricultural conservation entity (whichever applies) to cover the costs of program administration, land management, monitoring, enforcement and maintenance of agriculture on the mitigation lands:
  - a. The acquisition and transfer of ownership of agricultural land to an agricultural conservation entity for permanent protection of the agricultural land.
  - b. The acquisition and transfer of agricultural conservation easements to an agricultural conservation entity for permanent protection of the agricultural land.

- c. The payment of in-lieu fees to an agricultural conservation entity that are sufficient to fully fund\*:
  - 1. The cost of acquisition of agricultural lands or agricultural conservation easements for permanent protection, and
  - 2. The cost of administering, managing, monitoring and enforcing the agricultural lands or agricultural conservation easements, as well as the costs of maintaining agriculture on the mitigation lands.

\* with provisions for adjustment of in-lieu fees to reflect potential changes in land values at the time of actual payment
- 8. Agricultural lands or conservation easements acquired and transferred to an agricultural conservation entity should be located in Santa Clara County and be lands deemed acceptable to the city and entity.
- 9. The agricultural mitigation should result in preservation of land that would be:
  - a. Prime agricultural land of substantially similar quality and character as measured by the Average Storie Index rating and the Land Capability Classification rating, and
  - b. Located within cities' spheres of influence in an area planned/envisioned for agriculture, and
  - c. That would preferably promote the definition and creation of a permanent urban/agricultural edge.
- 10. Because urban/non-agricultural uses affect adjacent agricultural practices and introduce development pressures on adjacent agricultural lands, LAFCO encourages cities with LAFCO proposals impacting agricultural lands to adopt measures to protect adjoining agricultural lands, to prevent their premature conversion to other uses, and to minimize potential conflicts between the proposed urban development and adjacent agricultural uses. Examples of such measures include, but are not limited to:
  - a. Establishment of an agricultural buffer on the land proposed for development. The buffer's size, location and allowed uses must be sufficient to minimize conflicts between the adjacent urban and agricultural uses.
  - b. Adoption of protections such as a Right to Farm Ordinance, to ensure that the new urban residents shall recognize the rights of adjacent property owners conducting agricultural operations and practices in compliance with established standards.
  - c. Development of programs to promote the continued viability of surrounding agricultural land.



### **Agricultural Conservation Entity Qualifications**

11. The agricultural conservation entity should be a city or a public or non-profit agency. LAFCO encourages consideration of agricultural conservation entities that:
  - a. Are committed to preserving local agriculture and have a clear mission along with strategic goals or programs for promoting agriculture in the areas that would be preserved through mitigation,
  - b. Have the legal and technical ability to hold and administer agricultural lands and agricultural conservation easements and in-lieu fees for the purposes of conserving and maintaining lands in agricultural production and preferably have an established record for doing so, and
  - c. Have adopted written standards, policies and practices (such as the Land Trust Alliance's "Standards and Practices") for holding and administering agricultural lands, agricultural conservation easements and in-lieu fees and are operating in compliance with those standards.

### **Timing and Fulfillment of Mitigation**

12. LAFCO prefers that agricultural mitigation be in place at the time of LAFCO approval or as soon as possible after LAFCO approval. The mitigation (as detailed in the Plan for Mitigation) should be fulfilled no later than at the time of city's approval of the final map, or issuance of a grading permit or building permit, whichever occurs first.
13. Cities should provide LAFCO with information on how the city will ensure that the agricultural mitigation is provided at the appropriate time.
14. Cities should provide LAFCO with a report on the status of agricultural mitigation fulfillment every year following LAFCO approval of the proposal until the agricultural mitigation commitments are fulfilled.
15. The agricultural conservation entity should report annually to LAFCO on the use of the in-lieu fees until the fees have been fully expended.

### **Plan for Mitigation**

16. A plan for agricultural mitigation that is consistent with these policies should be submitted at the time that a proposal impacting agricultural lands is filed with LAFCO. The plan for mitigation should include all of the following:
  - a. An agreement between the property owner, city and agricultural conservation entity (if such an entity is involved) that commits the property owner(s) to provide the mitigation for the loss of prime agricultural lands and establishes the specifics of the mitigation. Upon LAFCO approval of the proposal, the agreement should be recorded with

the County Recorder's office against the property to be developed. The agreement should specify:

1. The type of mitigation that will be provided in order to mitigate for conversion of agricultural lands. (purchase of fee title or easement or payment of in-lieu fees)
  2. The agricultural conservation entity that will be involved in holding the lands, easements, or in-lieu fees.
  3. The acreage that would be preserved through mitigation and /or the amount of in-lieu fees that would be paid (with provisions to adjust fees to reflect land values at time of payment) along with the methodology adopted by the entity for calculating the in-lieu fees.
  4. The location of the mitigation lands, when possible.
  5. Information on the specific measures adopted by the city as encouraged in Policy #10 (mitigation for impacts to adjacent agricultural lands)
  6. The time-frame within which the mitigation will be fulfilled, which should be no later than at the time of city's approval of the final map, or issuance of the grading permit or building permit, whichever occurs first.
  7. The mitigation agreement is to be contingent on LAFCO approval of the proposal.
- b. Applicant should provide all other supporting documents and information to demonstrate compliance with these policies.



## **237 Industrial Center C15-054 and SP16-053**

**David Keyon I would appreciate having my letter put into the official record.**

Hi my name is Esther Alday  
I take my Mom and Dad for her walks  
sometimes in morning and or in the  
afternoon in her wheelchair.

**I've had two incidents with traffic where**  
we almost got hit the. One was on Frist st.  
and liberty st. walking to the post office,  
the second incident was on Grand Blvd  
and Spreckles ave. walking to the wildlife  
refuge.

My sister, brother and neighbors have  
complained about how the drivers are  
inconsiderate and aggressive these  
drivers are not Alviso residence.

If we are having these issues now that are  
pending and have not been  
addressed. We have great concern over  
these issues please help us to alleviate  
these issues and keep our family and  
neighborhood or community safe so we  
can walk to the wildlife refuge, so we can

walk to the post office we can walk to the grocery. without fear or concern that we may get injured in the process.

Please help us keep our community safe for children or elderly our neighbors

Thank you  
Esther Alday



To Whom it May Concern:

I am a resident of Alviso, I have lived here for the past 15 years. I am opposed to this project, I have sat in meeting after meeting for multiple projects and have heard pretty much the same thing every time from the planning dept. "this project will have little to no impact on the community of Alviso". Every single project the community has opposed that has been approved by the City has impacted Alivso residents negatively. We have increased traffic from commuters trying to bypass an already congested freeway (237), Truckers who are not supposed to drive thru Alviso to avoid the same traffic and potholes filling our roads. This is not even to mention the unsafe conditions you are putting the Youth of Alviso in. I love this neighborhood my kids use to be able play outside with their friends, ride their bikes to the Youth Center or Library in relative safety but the cities lack of regard for this community has lead to projects being approved at the behest of the community much like this one which puts our safety at risk. With the proposed development of North San Jose and the "Santana Row" like development in the plans for Santa Clara adding something like this to this area without addressing the Traffic issues would be ridiculous!

In addition to the safety risks and increased traffic I am also concerned about the potential pollution from this project, with a "light manufacturing" facility (Trammell Crow) already in the Heart of Alviso how would this project impact our health when looking at the combined effects of Diesel emissions among other pollutants. How would it affect our sensitive receptors in the area? I hope careful consideration of the Community of Alviso is had before making a decision on this project.

Concerned Citizen and Tax Payer  
Richard Ruiz

To whom it may concern:

I am writing you this email in opposition about 237 Industrial Center Project File No. C15-054 and SP16-053. I live in Alviso and I am concerned with the traffic congestion we already endure. 237 as well as I-880, Calaveras Boulevard, Zanker road, Gold street, as well as other surrounding streets and exits are extremely hard to get in and out of. I take my son to practice in Milpitas, and what would and should take us 15 minutes takes us about 45 min to an hour, which I find ridiculous. The city of San Jose should be putting more thought into who it affects and our already congested freeways and streets before considering more building or buildings, because that equals more congestion and traffic hazards. I mention traffic hazards because we are going to have a new school in the near future that will suffer from the congestion and dust that comes from more vehicles and buildings. The school and our homes already suffer from heavy dust. One cannot open a window without seeing all the filth on our blinds. Depending on what is built, also creates more big rigs coming in and out of the Zanker road as well as on 237. This is a concern because we have people going through Alviso trying to by pass the traffic on 237. They drive in through Zanker, Gold and First street and go into neighborhood streets as though they were on the freeway zipping by, not stoping at the stop signs, speeding through the neighborhood where kids play and walk to and from school as well as walking to and from the post office we have. I was driving and someone thought I was driving too slow, so they drove around me cutting me off on a neighborhood street and this was the time children were getting off busses and walking home. I hope you seriously take my letter into consideration before approving this project. Thank you.

Concerned citizen and taxpayer,  
Sarah Ruiz



Re: Iris Chang Park

Planning Commission 3

Wed 10/11/2017 11:50 AM

To:

Tam, Tracy

Cc:

Hughey, Rosalynn

Hi again Tracy,

In conducting some cursory research on my own, I've found that the planned Iris Chang Park is nowhere near the project site in this proposal. Furthermore, there is no mention the DEIR or First Amendment thereof that mentions a new well at that location. (There is a reference to a new well in the Appendix on water usage, but no specific site is listed.)

Now my curiosity surrounds how the community came to understand that said park was threatened by this project. I fully appreciate that our residents are at times not well-informed — and at times misled by community leaders who should know better — so I just want to assess if there's anything in City outreach regarding this item that would have led these individuals astray.

Thanks,  
Peter

—

**Peter Allen**

*Planning Commissioner*

City of San José

200 E. Santa Clara Street

San José, CA 95113

Ph: (408) 673-8371

[Learn about the Planning Commission](#)

[Visit the Planning Division](#)

---

**From:** Planning Commission 3

**Sent:** Tuesday, October 10, 2017 2:43:11 PM

**To:** Tam, Tracy

**Cc:** Hughey, Rosalynn

**Subject:** Re: Iris Chang Park

Hi Tracy,

I'm wondering if you can shed some light on correspondence Planning Commissioners have received related to Item 5a on the PC agenda for tomorrow night and the parkland referenced in the email below.

Perhaps I missed something in the staff report, but I do not recall any reference to a potential City park on the proposed data center site, nor the remainder of the parcel, which is projected to be developed at a later time.

Thanks in advance for your assistance.

Cheers,  
Peter

—

**Peter Allen**  
*Vice Chair, Planning Commission*  
City of San José  
200 E. Santa Clara Street  
San José, CA 95113  
Ph: (408) 673-8371

[Learn about the Planning Commission](#)  
[Visit the Planning Division](#)

---

**From:** Ying-Ying Chang <yyc29616@yahoo.com>  
**Sent:** Tuesday, October 10, 2017 12:47:47 AM  
**To:** Planning Commission 2; Planning Commission 3; Planning Commission 1; Planning Commission 4; Planning Commission 5; Planning Commission 7; Planning Commission 6  
**Subject:** Iris Chang Park

Dear Planning Commissioners:

I'm Iris Chang's mother, Ying-Ying Chang. My husband, Shau-Jin Chang and I just heard that the land designated for Iris Chang Park will be considered to be a new project for Microsoft. As you know the land for Iris Chang Park has been planned and art work has been designed since 2015 after several public meetings and public hearings. The land use and design have been overwhelmingly approved by the San Jose City and the residents surrounding the park area. We do not want this piece of land get changed or altered for some other purpose. We as well as neighbors have been waiting for this park for two years. It's originally to be opened this year, but unfortunately with delay due to soil problems. We need the park to finish its work as soon as possible. All the neighbors are waiting for such a lovely park.

We sincerely wish you to understand that we hope the Iris Chang Park will continue as planned without change. It will be a big betrayal to us and for all the people living around the Park if there is any change of Iris Chang's original plan.

Please let us know if there is any news about the plan of Iris Chang Park. Please also let us know how we can help to prevent the change of the plan. Thank you so much for your time and attention.

Best wishes,  
Ying-Ying Chang  
425 Camille Circle, Unit 11  
San Jose, CA 95134  
Tel: 408-944-0601



Re: 237 Industrial Center EIR

Planning Commission 7

Tue 10/10/2017 6:13 PM

To:

Nusbaum, Jenny;

Pham, Kieulan

Cc:

Thomas, Ned;

Tam, Tracy;

Keyon, David

thank you - I looked all over for that!

Michelle Yesney  
Planning Commissioner

---

**From:** Nusbaum, Jenny  
**Sent:** Tuesday, October 10, 2017 6:00:52 PM  
**To:** Planning Commission 7; Pham, Kieulan  
**Cc:** Thomas, Ned; Tam, Tracy; Keyon, David  
**Subject:** Re: 237 Industrial Center EIR

Hi Commissioner Yesney,

I am including David in this correspondence because Kieulan is on vacation, and David is her supervisor. The adopted City Council Policy on Riparian Corridor Protection and Bird-safe Design provides guidelines for land uses and development near riparian corridors, and this Council Policy references Chapter 3 of the Riparian Corridor Study for more detailed guidance. The General Plan also references the policies in the Riparian Corridor Study.

<http://www.sanjoseca.gov/DocumentCenter/View/60393>

[City of San José, California](http://www.sanjoseca.gov)

[www.sanjoseca.gov](http://www.sanjoseca.gov)

RD:MD 8/23/16 City of San José, California COUNCIL POLICY TITLE RIPARIAN  
CORRIDOR PROTECTION AND BIRD-SAFE DESIGN PAGE Page 1 of 8 POLICY  
NUMBER 6-34

We are reviewing the proposed plant palette and fence design in the plans dated 09/15/17 to respond to your comments.

Thank you,

Jenny Nusbaum  
City of San José, Dept. of PBCE

Planning Division  
200 East Santa Clara Street, 3rd Floor Tower  
San José, CA 95113  
jenny.nusbaum@sanjoseca.gov  
408-535-7872

---

**From:** Planning Commission 7  
**Sent:** Tuesday, October 10, 2017 4:26 PM  
**To:** Pham, Kieulan; Nusbaum, Jenny  
**Cc:** Thomas, Ned; Tam, Tracy  
**Subject:** 237 Industrial Center EIR

I'm including all of you on this email because either you are involved with the City's CEQA process, or your name is on this EIR.

This project site is next to some of the most valuable riparian habitat in San Jose, its proposed design is not fully consistent with the requirements of the Riparian Corridor Policy Study (which is disclosed in the staff report, but NOT in the EIR), and the only evaluation of compatibility with the riparian corridor is a statement that it is consistent with the Riparian Corridor Policy Study because it is located outside the 100' setback (page 98 of the DEIR).

There follows some blanket statements about the compatibility of the design, apparently NOT based on the actual design, since it says loading docks will be oriented away from the creek "to the extent possible" (which turned out to be not at all).

The Riparian Corridor Policy Study is over 50 pages long and the minimum 100' setback is only part of it.

There are vague statements in both the EIR and the staff report that landscaping will be used to reduce impacts to the riparian corridor, but no explanation of how that will be done. There is no restriction on the types of species that would be planted on site, except for the actual incursion into the riparian habitat for the new outfall. It appears from the plan set that there will be a lot of "native wildflower" seeding, but I don't believe that mitigates or protects anything. As a minimum there should be prohibitions on the introduction of invasive non-native species this close to Coyote Creek, and emphasis on the desirable species, based on Appendix B of the Riparian Corridor Policy Study.

Michelle Yesney  
Planning Commissioner  
Re: Microsoft Loading Docks  
Planning Commission 7  
Reply all  
Tue 10/10/2017 3:28 PM  
To:  
Tam, Tracy  
Cc:  
Thomas, Ned;  
Do, Sylvia;  
Nusbaum, Jenny

Tracy - I'm sorry, but that doesn't answer my questions. I didn't ask about the security fence, which appears to be transparent and therefore of no value for screening purposes. I was wondering if those

weird orange things adjacent to the loading docks are screening walls (page A201.4, elevation 1) and if so, how high are they? If they're not screening walls, what are they?

Also, if they are very tall screening walls, is all of the loading dock lighting behind them and therefore fully shielded from the riparian habitat? Because then it might be reasonable to argue that the loading docks are unlikely to impact the riparian corridor.

As you know, the 100' setback from riparian corridors is not a maximum and it is not a guarantee that there will be no impact. It is a minimum and in some cases, it is not enough, especially when other provisions of the Riparian Policy are not met.

I cannot find anything that demonstrates a 25' landscaped buffer next to the loading docks. Sheet L100.5 doesn't show an area near the loading docks, or even adjacent to Building B. Sheet L100.6 does show the landscaping in the relevant area, but I do not scale the landscaping at 25' wide. (Actually, I'm not sure what IS landscaping, since all the little dot patterns look pretty much alike - decorative rock "mulch", sand volleyball, seed mixes and erosion control.) There is a reference in the staff report to a 20'-40' landscaped separator. If there is a 25' landscaped buffer that is provided somewhere between the loading docks and the riparian setback, what plant materials will it contain and how will its design help protect the riparian habitat from the impacts created by noise, lighting, traffic, and litter that result from the project's failure to conform to the Riparian guidelines? (Since the loading docks will be used for garbage and recycling removal, it should be assumed that there is some increased risk of litter at this location.)

Thanks for your help with my questions.

Michelle Yesney  
Planning Commissioner

---

**From:** Planning Commission 7  
**Sent:** Tuesday, October 10, 2017 12:09:53 PM  
**To:** Tam, Tracy  
**Cc:** Thomas, Ned; Do, Sylvia  
**Subject:** Microsoft Loading Docks

Tracy- I'm trying to decipher the plans for the data centers. It appears that the loading docks adjacent to the riparian corridor have very tall screening walls. Is that true? How tall are they? Are all of the lights behind the wall?

Thanks,

Michelle Yesney  
Planning Commissioner



RE: Microsoft Loading Docks

TT

Tam, Tracy

Reply all

Wed 10/11/2017 4:17 PM

To:

Planning Commission 7

Cc:

Thomas, Ned;

Do, Sylvia;

Nusbaum, Jenny;

Mendrin, Shaunn;

Hughey, Rosalynn

[20171011100844353.pdf](#)

[812 KB](#)

Show all 1 attachments (812 KB) Download

Save to OneDrive - City of San Jose

Hi Commissioner Yesney,

Apologies for the delay in response and for not being clear in my last email. The orange material is for screening walls for the outdoor generators. Per the plans, they are 30-feet tall. This screening mechanism does not screen the loading docks and only screens the generators. To address the concern of riparian disturbance, staff is recommending the following Condition of Approval be added to the project:

“Permit Adjustment. The permittee shall be required to obtain a Permit Adjustment to the satisfaction of the Director of Planning, Building, and Code Enforcement for the following:

1. A solid screening wall for the loading dock area (generally located between the paving and pedestrian path, parallel to the riparian corridor). This screening wall shall fully shield the loading dock area from the riparian corridor. Additionally, the landscape planting shall be adjusted to include only native species plant material between the creek and project paving on the east site of project site. The biologist shall be retained to evaluate the height and planting material in this immediate area and provide a letter indicating that the wall and planting materials meet the intent of condition.

I have attached a diagram that will hopefully bring additional clarity. As the riparian area curves, the landscaping buffer (located between the 100-foot riparian setback line and the drive aisle) ranges from approximately 25 feet to 40 feet. While the plans do not explicitly measure this out, these figures are drawn from utilizing the full sized drawings and an architectural scale (this may be the reason why your measurements are different as you received the reduced plan set).

In regards to the landscaping material in this area, per the plans, the following species are proposed:

- Floss Silk Tree
- Strawberry Tree
- California Mountain Lilac

With the incorporation of the above Condition of Approval, Condition of Approval number 13 (Anti-Litter) and Condition of Approval number 8 (Loading Activity Hours), the project should be designed to protect the riparian habitat.

I hope this answers your questions.

Best,

**TRACY TAM** | Planner

City of San Jose | Planning Division | PBCE

[tracy.tam@sanjoseca.gov](mailto:tracy.tam@sanjoseca.gov) | (408) 535-3839

200 E. Santa Clara Street, San Jose, CA 95113

**From:** Planning Commission 7

**Sent:** Tuesday, October 10, 2017 3:28 PM

**To:** Tam, Tracy <[tracy.tam@sanjoseca.gov](mailto:tracy.tam@sanjoseca.gov)>

**Cc:** Thomas, Ned <[ned.thomas@sanjoseca.gov](mailto:ned.thomas@sanjoseca.gov)>; Do, Sylvia <[sylvia.do@sanjoseca.gov](mailto:sylvia.do@sanjoseca.gov)>; Nusbaum, Jenny <[Jenny.Nusbaum@sanjoseca.gov](mailto:Jenny.Nusbaum@sanjoseca.gov)>

**Subject:** Re: Microsoft Loading Docks

Tracy - I'm sorry, but that doesn't answer my questions. I didn't ask about the security fence, which appears to be transparent and therefore of no value for screening purposes. I was wondering if those weird orange things adjacent to the loading docks are screening walls (page A201.4, elevation 1) and if so, how high are they? If they're not screening walls, what are they?

Also, if they are very tall screening walls, is all of the loading dock lighting behind them and therefore fully shielded from the riparian habitat? Because then it might be reasonable to argue that the loading docks are unlikely to impact the riparian corridor.

As you know, the 100' setback from riparian corridors is not a maximum and it is not a guarantee that there will be no impact. It is a minimum and in some cases, it is not enough, especially when other provisions of the Riparian Policy are not met.

I cannot find anything that demonstrates a 25' landscaped buffer next to the loading docks. Sheet L100.5 doesn't show an area near the loading docks, or even adjacent to Building B. Sheet L100.6 does show the

landscaping in the relevant area, but I do not scale the landscaping at 25' wide. (Actually, I'm not sure what IS landscaping, since all the little dot patterns look pretty much alike - decorative rock "mulch", sand volleyball, seed mixes and erosion control.) There is a reference in the staff report to a 20'-40' landscaped separator. If there is a 25' landscaped buffer that is provided somewhere between the loading docks and the riparian setback, what plant materials will it contain and how will its design help protect the riparian habitat from the impacts created by noise, lighting, traffic, and litter that result from the project's failure to conform to the Riparian guidelines? (Since the loading docks will be used for garbage and recycling removal, it should be assumed that there is some increased risk of litter at this location.)

Thanks for your help with my questions.

Michelle Yesney

Planning Commissioner

---

**From:** Planning Commission 7

**Sent:** Tuesday, October 10, 2017 12:09:53 PM

**To:** Tam, Tracy

**Cc:** Thomas, Ned; Do, Sylvia

**Subject:** Microsoft Loading Docks

Tracy- I'm trying to decipher the plans for the data centers. It appears that the loading docks adjacent to the riparian corridor have very tall screening walls. Is that true? How tall are they? Are all of the lights behind the wall?

Thanks,

Michelle Yesney

Planning Commissioner



RE: Microsoft Loading Docks

TT

Tam, Tracy

Reply all

Tue 10/10/2017 1:23 PM

To:

Planning Commission 7

Cc:

Thomas, Ned;

Do, Sylvia;

Mendrin, Shaunn;

Keyon, David

Hi Commissioner Yesney,

There is a security fence proposed at the 100-foot riparian setback line (please see Sheet A401 detail 4). It is proposed at 8-feet tall. There is also a landscape buffer adjacent to the loading dock area (please see sheet L001.5) of approximately 25-feet. There isn't any lighting proposed in the 100-foot riparian setback area (please see Sheet E200) and therefore, all lighting fixtures are placed inside the security fence. Lastly, there will not be any lighting footcandles in the riparian area (please see sheets E100-3 and E100-4).

Please let me know if there are any additional questions.

Best,

**TRACY TAM** | Planner

City of San Jose | Planning Division | PBCE

[tracy.tam@sanjoseca.gov](mailto:tracy.tam@sanjoseca.gov) | (408) 535-3839

200 E. Santa Clara Street, San Jose, CA 95113

**From:** Planning Commission 7

**Sent:** Tuesday, October 10, 2017 12:10 PM

**To:** Tam, Tracy <[tracy.tam@sanjoseca.gov](mailto:tracy.tam@sanjoseca.gov)>

**Cc:** Thomas, Ned <[ned.thomas@sanjoseca.gov](mailto:ned.thomas@sanjoseca.gov)>; Do, Sylvia <[sylvia.do@sanjoseca.gov](mailto:sylvia.do@sanjoseca.gov)>

**Subject:** Microsoft Loading Docks

Tracy- I'm trying to decipher the plans for the data centers. It appears that the loading docks adjacent to the riparian corridor have very tall screening walls. Is that true? How tall are they? Are all of the lights behind the wall?

Thanks,

Michelle Yesney  
Planning Commissioner