



Legislation Details (With Text)

<b>File #:</b>	13-138	<b>Version:</b>	1	<b>Name:</b>	Appeal of Halus Variance Approval
<b>Type:</b>	Staff Report	<b>Status:</b>		<b>In control:</b>	City Council
<b>On agenda:</b>	4/1/2013	<b>Final action:</b>		<b>Enactment #:</b>	
<b>Enactment date:</b>					

**Title:** Staff Report for Matter of PLN2013-00009, an Appeal by the Heron Bay Homeowners Association c/o A. Alan Berger of the Board of Zoning Adjustments' Approval on February 7, 2013 of PLN2012-00006, a Variance to Construct an 80-Foot Tall Single Wind Turbine Where the Blades Will Extend an Additional 20 Feet from the Structure for a Maximum Height of 100 Feet and the Adoption of the Related Mitigated Negative Declaration and Mitigation Monitoring Program per the California Environmental Quality Act (CEQA). Structures up to Sixty (60) Feet in Height Are Permitted in the IG Zoning District and a Variance to Height Is Required for Exceeding 60 Feet. The Proposed Turbine Would Be an Accessory Use to the Primary Manufacturing/Research and Development Use of the Site; 2539 Grant Avenue; Alameda County Assessor's Parcel Numbers 80G-910-15; L. Rigaud, Halus Power Systems (Applicant and Property Owner)

**Indexes:**

**Code sections:**

**Attachments:** 1. Halus Appeal by Heron Bay HOA 2-21-2013.pdf, 2. J Palma letter 2-6-2013.pdf, 3. BZA Resolution No 02-13.pdf, 4. Excerpts of the 2-7-13 BZA Meeting Minutes.pdf, 5. Vicinity Map.pdf, 6. Applicants Supporting Statement.pdf, 7. EBRPD recirc MND cmmts 01-31-13.pdf, 8. P Tong 1-28-2013.pdf, 9. H Beckman 2-7-2013.pdf, 10. Mission Bay Residents Petition 3-12-2013.pdf, 11. J Zhao 3-23-2013.pdf, 12. Exhibit A Site Plan.pdf, 13. Exhibit B Existing Site Conditions.pdf, 14. Exhibit C Elevations.pdf

Date	Ver.	Action By	Action	Result
4/1/2013	1	City Council	Received and Filed	

Staff Report for Matter of PLN2013-00009, an Appeal by the Heron Bay Homeowners Association c/o A. Alan Berger of the Board of Zoning Adjustments' Approval on February 7, 2013 of PLN2012-00006, a Variance to Construct an 80-Foot Tall Single Wind Turbine Where the Blades Will Extend an Additional 20 Feet from the Structure for a Maximum Height of 100 Feet and the Adoption of the Related Mitigated Negative Declaration and Mitigation Monitoring Program per the California Environmental Quality Act (CEQA). Structures up to Sixty (60) Feet in Height Are Permitted in the IG Zoning District and a Variance to Height Is Required for Exceeding 60 Feet. The Proposed Turbine Would Be an Accessory Use to the Primary Manufacturing/Research and Development Use of the Site; 2539 Grant Avenue; Alameda County Assessor's Parcel Numbers 80G-910-15; L. Rigaud, Halus Power Systems (Applicant and Property Owner)

**SUMMARY AND RECOMMENDATIONS**

The Board of Zoning Adjustments (BZA) at its February 7 meeting approved this project, PLN2012-00006, by acting on two resolutions: one adopted the Mitigated Negative Declaration and the Mitigation Monitoring Program; and the other approved the Variance to exceed the 60 foot maximum allowable height, to a maximum of 100 feet, subject to the recommended findings and recommended conditions of approval. Actions by the BZA are final unless appealed to the City Council within 15 days of the action (Zoning Code Section 5-2804 A.).

On February 21 the Heron Bay Homeowners Association filed an appeal to the BZA's approval (see Attachment 1). The appeal was given case number PLN2013-00009. The matter was scheduled for April 1, 2013 (39 days) as an appeal, which will be a public hearing before the City Council acting as the appellate body. An appeal must be heard within 45 days of the City's receipt of the appeal (Zoning Code Section 5-2808 A.).

**Recommendation:**

The Board of Zoning Adjustments and staff recommend that the City Council adopt and approve the attached Resolution to deny the appeal and affirm the BZA's actions:

1. To adopt the Mitigated Negative Declaration and the Mitigation Monitoring Program;
2. To approve the Variance to exceed the 60 foot maximum allowable height, to a maximum of 100 feet, subject to the recommended findings and recommended conditions of approval; and
3. To determine there was no prejudice to the Board of Zoning Adjustments' actions on the application.

**BACKGROUND**

The applicant proposed to construct an 80-foot tall, single wind turbine where the blades will extend an additional 20 feet from the structure for a maximum height of 100 feet.

An avian study was performed and due to various existing and operational conditions, and types of species of birds and bats, the proposed single wind turbine poses a low potential risk to them.

Noise levels for the proposed wind turbine are anticipated to not exceed 55 decibels Adjusted (dBA); the residences to the north are greater than 500 feet from the turbine and at this distance the turbine operation would have no audible tones or impulses.

An evaluation to analyze potential shadows on the homes and residents to the north and northwest of the site was performed. The study determined that the project would cast no shadows on the residences throughout the year.

The proposed wind turbine will be located on a monopole in the interior of the site and in an area that is already developed with industrial buildings and uses. Although the proposed project requires a variance to height, the 100 foot tall turbine with large setbacks from residences and public open spaces would not have any impact on immediate adjacent properties, persons and avian species.

The Heron Bay Homeowners Association c/o A. Alan Berger, attorney, are the appellants. They have listed three reasons for the appeal: 1) The appellant argues that the BZA improperly and illegally granted a variance to Halus for the 100 foot tall wind turbine based on a Mitigated Negative Declaration; 2) That the approval of the height variance by the BZA was not and is not supported by Required Findings; and 3) That there was possible prejudice to the BZA as a result of the statements of one BZA member prior to the public hearing, to wit: Ms. Janet Palma. (See Attachment2).

BZA Resolution No. 01-13 that adopted the Mitigated Negative Declaration (MND) and the Mitigation Monitoring Program (MMP) for the Halus wind turbine cites the chronology of the various facts and the review process for the MND (see Attachment 3). Staff carefully reviewed and addressed the extensive comments about the project. In the end, the BZA found that the Project, as mitigated, would avoid or reduce the potentially significant biological, geological and airport hazard impacts to a point where clearly no significant effects would occur, and there is no substantial evidence that the

Project as mitigated may have a significant effect on the environment.

The BZA Findings (see Attachment 3) included that a lower height is not a viable option in operating the turbine and that the intention of the variance to gain height is to resolve a practical difficulty to effectively operate the turbine. These statements are based on the fact that wind speeds increase with height, thus the turbine needs to be mounted on a pole. In general, the higher the pole, the more efficient the turbine can operate and the more power the wind system can produce. Further analysis of existing site conditions in the vicinity and site visits to the project area showed that there are existing obstructions in the southwesterly direction from the turbine on property owned by PG&E. Approximately 280 to 400 feet from the turbine are various groupings of tall trees (i.e., acacias and eucalyptuses). These are broadleaf evergreen trees that are approximately 40 to 65 feet tall with large canopies. Their canopies will continue to grow in height and width. The existing trees create a special circumstance in that their physical location and size would obstruct the southwesterly on-shore winds without the height variance for the turbine.

The City disagrees with the claim that Board member Janet Palma biased the Board of Zoning Adjustments' actions regarding this matter. As provided in Ms. Palma's letter dated February 6, 2013 (see Attachment 2) which was in reply to Mr. Berger's letter of February 5, 2013, she disputed all accusations that were stated in his letter. Ms. Palma did not attend the BZA meeting either as a member of the BZA or as a member of the public in the audience; thus it is the City's opinion that she had no influence over the BZA members that attended the meeting, and who deliberated and acted on the matter.

The proposed facility is not anticipated to produce low-frequency sound effects. At the Board of Zoning Adjustments hearing on February 7, 2013, the City received a letter from Howard Beckman commenting on the Project Variance application. Although the letter did not mention the revised MND and was submitted more than two months after the close of the public review period, it included comments on noise issues. Since noise was an important feature of the revised MND, the City reviewed the comments carefully. Review of the research cited in the letter showed that the research paper Mr. Beckman submitted with the letter limits its discussion to wind turbines taller than 50 meters (164 feet tall) or from 0.75MW (megawatt) to 2MW. The Halus facility is 100 feet tall and projected to generate 0.05MW, which are below these specifications. Thus it is not anticipated that the project will pose low-frequency sound effects. Also, the letter does not show how the referenced Denmark regulations are relevant to the project circumstances. And although asserting that low-frequency noise is a regulatory concern, the comments cite to no applicable regulations. By contrast, the revised MND and Project information show compliance with all applicable General Plan noise element requirements. In addition, there were no comments of concern received about low-frequency air pressure or sound effects from the Federal Aviation Administration (FAA) or any other State or local agency. Based on its review, the City has determined that the letter does not meet any of the triggers for recirculating the revised MND per CEQA Guidelines section 15073.5. Further, the comments in the letter are not based on facts as related to the Project and are not substantial evidence of the potential for a significant noise impact. The letter provides no grounds for changing the revised MND conclusion that the Project will have a less than significant noise impact.

### **Current Agency Policies**

Zoning Code Section 5-2808 Procedures for Appeals provides that at an appeal hearing, the appellate body shall consider only the same application, plans, and related project materials that were the subject of the original decision and only the issue(s) raised by the appeal or the call for review. However, applicants may modify plans to respond to issues raised, and such modification

shall be considered at the hearing.

At the hearing, the appellate body shall review the record of the decision and hear testimony of the appellant, the applicant, and any other interested party.

After the hearing, the appellate body shall affirm, modify, or reverse the original decision. When a decision is modified or reversed, the appellate body shall state the specific reasons for modification or reversal. Decisions on appeals shall be rendered within 21 days of the close of the hearing.

### **Applicable General Plan Policies**

The proposed use conforms to the General Plan, which designates the property for General Industrial uses which are characterized by distribution facilities, research and development, and manufacturing operations which produce minimal off-site impacts. The following General Plan policies are applicable to the proposed project:

**7.01 Industrial Assets** - Build on the strengths of the City's existing industrial base, transportation infrastructure, and proximity to Oakland International Airport in the City's business development efforts.

**7.02 Economic Diversity** - Promote economic diversity and the growth of new and emerging industries. Target businesses that will provide higher-paying jobs for San Leandro residents.

**7.03 Sustainable Manufacturing** - Promote environmentally sustainable manufacturing practices by San Leandro businesses and focus business attraction efforts on clean, environmentally-friendly businesses.

**7.06 Adaptive Reuse** - Encourage private reinvestment in vacant or underutilized industrial and commercial real estate to adapt such property to changing economic needs, including the creation of flex/office space.

**10.02 Off-Site Impacts** - Consider the setting and context of each site when evaluating proposals for development in industrial areas. The potential for impacts on adjacent uses, including the potential for land use conflicts and increased parking demand and truck traffic, should be a key consideration.

In addition to conforming to the General Plan, the proposal also satisfies a goal under the San Leandro Climate Action Plan.

**Section 3.3 Goal:** Increase residential, commercial and industrial renewable energy use. "On-site renewable energy systems offer another important lever for reducing emissions...To encourage on-site renewable energy, one common strategy employed by other local governments is to offer expedited permitting procedures for renewable generation and green buildings."

There are a number of significant public benefits that would result from the proposed project. They include local green/high tech jobs, research and development investment that has the potential to increase sales of new products, which would translate into increased City sales tax revenues, and compliance with state and local mandated policies which promote green/wind energy projects to reduce greenhouse gas emissions, reduce dependence on foreign energy sources and reduce the

overall consumption of fossil fuels.

### **Variance Granted**

Structures covering not more than 10 percent of the ground area covered by the structure may exceed the maximum permitted height in the district where the site is located by no more than 10 feet (Zoning Code Section 4-1658). In the IG District, the maximum permitted height is 50 feet (Zoning Code Section 2-734 C.); thus the maximum permitted height is 60 feet tall. The proposed structure exceeds the 60 foot maximum height limit that the Zoning Code permits in the IG Industrial District. The maximum height for the proposed turbine is 100 feet; the variance that was granted by the BZA exceeds the maximum height limit by 40 feet.

### **Environmental Review**

The City prepared an Initial Study consistent with CEQA Guidelines section 15063 and determined that a Mitigated Negative Declaration was required for the Project. Based on the Initial Study, the City prepared a Mitigated Negative Declaration (MND) dated May 22, 2012, which was circulated for public review for the required 30-day period. Following a meeting between the applicant and the Heron Bay Homeowners Association on June 20, 2012, the City, with the applicant's approval, extended the public review period for an additional 40 days, to July 31, 2012.

Based on the feedback from the June 20, 2012 meeting and written public comments that were submitted on the MND, the City determined that additional information was needed for the Project. The City prepared a revised MND, dated October 11, 2012, that provided further analysis on the potential for environmental impacts from implementation of the Project including avian and shadow analysis by ESA, an environmental consulting firm. The revised MND superseded the first MND and was circulated for public review for the required 30-day period, ending November 13, 2012.

The City received extensive comments on the revised MND from the Heron Bay Homeowners Association through its attorney, including a report from Paul Taylor, as well as comments from the President of the Association. Mr. Taylor was identified by the attorney as an environmental expert. Comments were also received from individuals, including residents of Heron Bay. No comments were received from any public agency during the comment period.

Although not required by CEQA, the City prepared written responses to all of the comments on the revised MND in the Responses to Comments document (included in Attachment 3) posted on the City's website on January 29, 2013. These responses reflect the City's good faith analysis of the issues raised by the comments. The Responses to Comments do not address any of the comments on the first MND as that MND was superseded and is no longer under consideration. The Responses to Comments includes all of the comment letters received during the public review period and the City's responses to them.

The City carefully reviewed the comments, provided written responses and determined that the comments did not constitute or require substantial revisions to the revised Mitigated Negative Declaration. On these bases, the City determined that no recirculation of the revised MND was required pursuant to CEQA Guidelines.

The Board of Zoning Adjustments reviewed the draft revised MND, including the comments and responses, at a noticed public hearing on February 7, 2013 at which time all interested parties had the opportunity to be heard. Following the public hearing, the Board of Zoning Adjustments adopted Resolution No. 01-13, adopting the revised MND and Mitigation Monitoring Program, and Resolution

No.02-13, approving the height variance subject to conditions.

The Heron Bay Homeowners Association (HOA) filed a timely appeal of the Board of Zoning Adjustments' approvals on February 21, 2013. The appeal repeats the HOA's position that an Environmental Impact Report (EIR) should be prepared for the Project and references the HOA's prior comments on the draft revised MND. At the April 1, 2013 meeting, the appeal will be heard by the City Council.

### **Board Review and Actions**

The Board of Zoning Adjustments reviewed this application at its meeting on February 7, 2013. At the conclusion of the public hearing, the Board approved the variance, and MND and MMP. The Findings of Fact for approval is attached to this report and included in Resolution No. 02-13 as Exhibit B. The BZA motion to approve the MND and the MMP included a revision to Mitigation Monitoring Measure # 1a for a qualified Wildlife Biologist to conduct a pre-construction survey of raptors and nesting birds one week before initiation of construction and it added Mitigation Monitoring Measure # 1i where the turbine may not operate in heavy or dense fog. The MND, MMP and conditions of approval have been amended accordingly.

In addition, this report mentioned earlier that further review of existing site conditions in the surrounding vicinity showed that there are existing large trees on property owned by PG&E adjacent to the Project site that pose as an obstruction to wind coming from the southwesterly direction toward the turbine. The variance is also necessary so that the turbine is constructed taller than the existing trees in order to have access to greater wind speeds so that the turbine can operate properly and efficiently.

### **Summary of Public Outreach Efforts**

On June 20, 2012 the applicant, City staff and City Councilperson Joyce Starosciak, attended a Heron Bay HOA meeting. A majority of the comments from that meeting were in opposition to the project and requested more information about the project. As a result of that meeting, CEQA documents for the applicant's Project were posted and maintained on the City's website.

Prior to the Board of Zoning Adjustments public hearing, the Notice of Availability and Intent to Adopt a Mitigated Negative Declaration received a 30-day noticing period due to the Initial Study and Mitigated Negative Declaration that was prepared. The methods used for providing notice of the BZA public hearing for approval of the Variance and the Mitigated Negative Declaration were the same methods used for the City Council public hearing regarding the Appeal including a legal advertisement in the Daily Review Newspaper, the posting of placards near the subject property on nearby utility poles, a mailed notification to property owners and business owners within a 300-foot radius of the subject property, a mailed notification to all of the property owners in the Heron Bay subdivision, and the property owners within a 300-foot radius of the subject property in the unincorporated area.

On March 12, 2013, subsequent to the Board of Zoning Adjustments' approval of the MND, MMP and Variance to height for the Project, the applicant and City staff attended a Golden State Mobilehome Owners League meeting at Mission Bay Mobilehome Park (15333 Wicks Boulevard). At the meeting, the Owners Association submitted a petition to the City that an EIR should be completed for the Project. The petition was in support of the Heron Bay HOA's comments, which were comprehensively addressed by the City in the Responses to Comments (see attached).

## **Legal Analysis**

The City Attorney's Office has reviewed and approved the staff report, resolution, and attachments.

## **ATTACHMENTS**

1. Application for Appeal and Attached Statement Listing Reasons for the Appeal
2. Board Member J. Palma letter to Mr. Berger, dated February 6, 2013, and Mr. Berger letter to the City dated February 5, 2013.
3. BZA Resolution 02-13 Approving Variance to Height Subject to Findings and Conditions of Approval, including BZA Resolution 01-13 Adopting Mitigated Negative Declaration and Mitigation Monitoring Program, Responses to Comments, BZA Staff Report, Findings and Conditions of Approval
4. Excerpts of the Board of Zoning Adjustments Meeting of February 7, 2013
5. Vicinity Map
6. Applicant's Supporting Statement
7. Additional Correspondence Received: EBRPD, January 31, 2013; P. Tong, January 28, 2013; H. Beckman, February 7, 2013; Mission Bay Residents Petition, March 12, 2013; J. Zhao, March 23, 2013.
8. Exhibit A - Site Plan
9. Exhibit B - Aerial Photograph of Existing Site Conditions
10. Exhibit C - Elevations

**PREPARED BY:** Elmer Penaranda, Senior Planner, Community Development Department