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APPLICATION FOR APPEAL TO CITY COUNCIL

GENERAL INFORMATION

This appeal application must be submitted within fifteen (15) calendar days of the decision, and within ten (10) calendar days of a Tentative Map approval. If the appeal period ends on a weekend or holiday, the time limit shall be extended to the next business day.

Please note that decisions of the Zoning Enforcement Official (ZEO) or the Community Development Director are appealed to the Board of Zoning Adjustments or the Planning Commission, depending on the specific project or issue. An Appeal Application to the Planning Commission/Board of Zoning Adjustments must be used for these appeals and is available at the Community Development Department.

APPELLANT INFORMATION (Please print)

Name: Heron Bay Homeowners Association

Relationship to Project:
 Applicant Concerned Resident Other _____

Daytime Telephone Number: (408) 536-0500

Email Address: aabtwo@aol.com

Mailing Address: c/o A. Alan Berger, 95 S. Market Street, #545, San Jose, CA 95113

An appeal is hereby submitted on the decision of:
 Board of Zoning Adjustments Planning Commission Site Development Sub-Commission Other _____

For the Approval or Denial of:

Planning (PLN) Permit Number: PLN 2012-00006

Date of Action: February 7, 2013

Project Address: 2539 Grant Avenue, San Leandro, CA

Reasons for Appeal (List all grounds relied upon in making this appeal. Attach additional sheets if more space is needed):
The Appeal is presented on three grounds. See attached Exhibit "A"

Signature: *Alan Berger*

Date: February 20, 2013

Please return the completed form with a fee for \$500 (payable to the City of San Leandro) to the City Clerk's Office at the address shown above. If the appellant is the applicant, direct costs for processing the appeal, which may include but are not limited to preparation of staff reports and meeting attendance, are charged in addition to the appeal fee.

Office Use Only

APPEAL APPLICATION

Filed timely Yes No
 Received by Marianttanda
 Appeal fee \$ 500.00 (attach copy of receipt)

CITY COUNCIL HEARING

Scheduled for _____
 Checklist due on _____ to City Clerk's Office
 cc: Planner

**LAW OFFICES OF
A. ALAN BERGER
95 South Market Street
Suite 545
San Jose, CA 95113
Telephone: 408-536-0500
Facsimile: 408-536-0504**

EXHIBIT A TO THE APPLICATION FOR APPEAL TO THE CITY COUNCIL

Reasons for Appeal:

The appeal of Heron Bay Homeowners Association to the decision of the Board of Zoning Adjustments (hereinafter referred to as BZA) rendered February 7, 2013 in the matter of the Halus Power Systems Application for a Variance is presented on three distinct grounds. Those grounds and the supporting argument are as follows:

1. That the BZA improperly and illegally granted a variance to Halus Power Systems for a one hundred foot (100') tall wind turbine based on a Mitigated Negative Declaration.

Appellant argues that both statutory and case law in the State of California demand that an Environmental Impact Report be prepared and considered before any variance may be granted based on the clear and fair argument presented by appellant that the granting of said variance will have significant environmental impact on the surrounding area and in particular, but not limited to, the residents of Heron Bay Homeowners Association and the protected bay area marshlands. This argument is presented in the document entitled "Amended Public Comments of Heron Bay Homeowners Association and Individual Owners/Members of Heron Bay Homeowners Association In Opposition of the City of San Leandro's Intent to Adopt a Mitigated Negative Declaration for Halus Power Systems Wind Turbine Located at 2539 Grant Avenue, Within the City of San Leandro." This document and attachments were presented to the BZA in a timely fashion. A true copy of that filing is marked as Exhibit 1 to this Appeal and made a part hereof by reference.

2. That the Approval of the Height Variance by the BZA was not and is not supported by Required Findings.

Appellant argues that the BZA's approval of the height variance was not based on findings mandated by the City's own zoning ordinance. This argument, in summary, is as follows:

The Board of Zoning Adjustment's approval of a height variance for Halus Power Systems is not based on findings mandated by the City's zoning ordinance (sec. 5-2202(A) and 5-2212(B)).

A variance is intended to provide equitable relief from the application of zoning standards in the form of a minor variation of a standard. Under the well-established law of variances in California, as throughout the United States, a variance is proper when strict application of a standard would create an inequitable burden on a parcel because of unique features of the parcel. The City does not have the power under the guise of a variance to effectively waive a zoning standard.

The applicant is asking the city to give it a major exception to the height standard, allowing it to erect a structure of 100 feet (80 foot tower plus 20 foot rotating propeller), which would exceed the zoning standard by 67 percent. The magnitude of the variation is contrary to the well- established purpose of variances.

More important, the variance approved by the BZA is not predicated on any features of the applicant's parcel that would deprive him of parity with owners of other parcels subject to the height standard. Absent this, the BZA could not lawfully make the first finding required by the city zoning ordinance (sec. 5-2212(A)):

"1. That because of special circumstances or conditions applicable to the subject property, including narrowness and shallowness or shape, exceptional topography, or the extraordinary or exceptional situations or conditions, strict application of the requirements of this article would result in peculiar and exceptional difficulties to, or exceptional and/or unique hardships upon, the owner of the property."

In granting a variance, the City is required to make all of several findings stated in the ordinance. Failure to make any one finding is fatal to approval of the variance. ("Failure to make all the required findings under subsections A, B, or C shall require denial of the application for a use permit." Sec. 5-2212(D).)

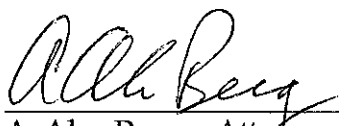
None of the "special circumstances" cited by City planning staff in its recommended findings of fact for the variance, and adopted by the BZA, are circumstances or conditions of the applicant's parcel that put him at a disadvantage compared to owners of all other parcels subject to the height limit. The staff report does not even discuss the application of Halus in terms of hardship, special circumstances of the property or extraordinary or exceptional situations or conditions. Instead, staff cites five reasons why the applicant's parcel is an ideal location for installation of a wind turbine generator. Such reasons are completely irrelevant to the rationale for a variance mandated by the city zoning ordinance and by well-established California law.

The City Council must reverse the BZA's approval of the variance because the approval was a capricious action, contrary to the law, and if left standing will leave San Leandro citizens with the perception that the City does not treat all property owners equally.

3. That there was possible prejudice to the BZA board as the results of the actions of one BZA board member prior to the public hearing, to wit: Ms. Janet Palma.

Attached as Exhibit 2 to this appeal, and incorporated herein by reference, is a copy of a letter and attachment sent to the Chairperson of the BZA and the City Attorney for the City of San Leandro immediately prior to the hearing of February 7, 2013. Appellant notes that while it never received a response from the BZA to this letter, Ms. Janet Palma did not appear at the hearing on February 7, 2013. However as her prejudicial comments regarding appellant and her pre-determined decision to grant the variance were published on or about November 7, 2012, some three months before the actual hearing, it is certainly arguable and possible, that Ms. Palma infected and influenced the remaining Board members and city staff well before the public hearing. Having been presented with clear and convincing evidence of the prejudicial conduct of one of the appointed Board members of the BZA who had three months thereafter before the public hearing of the application to influence staff or the remaining Board members, the City Council must disapprove the decisions of the BZA relative to this application.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "A. Alan Berger".

A. Alan Berger, Attorney for Heron
Bay Homeowners Association

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A. Alan Berger, State Bar #47459
LAW OFFICES OF A. ALAN BERGER
95 S. Market Street, Suite 545
San Jose, California 95113
Telephone: (408) 536-0500
Fax: (408) 536-0504

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Received yesterday
November 13, 2012
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Attorneys for
HERON BAY HOMEOWNERS ASSOCIATION

CITY OF SAN LEANDRO
COMMUNITY DEVELOPMENT DEPARTMENT
PLANNING DIVISION

IN RE:

THE CITY OF SAN LEANDRO'S
PROPOSED INTENT TO ADOPT A
MITIGATED NEGATIVE DECLARATION
FOR HALUS POWER SYSTEMS WIND
TURBINE AT 2539 GRANT AVENUE, SAN
LEANDRO, CALIFORNIA 94579

**AMENDED PUBLIC COMMENTS OF
HERON BAY HOMEOWNERS
ASSOCIATION AND INDIVIDUAL
OWNERS/MEMBERS OF HERON BAY
HOMEOWNERS ASSOCIATION IN
OPPOSITION OF THE CITY OF SAN
LEANDRO'S INTENT TO ADOPT A
MITIGATED NEGATIVE
DECLARATION FOR HALUS POWER
SYSTEMS WIND TURBINE LOCATED
AT 2539 GRANT AVENUE, WITHIN
THE CITY OF SAN LEANDRO.**

BZA Hearing Date: Dec. 6, 2012

The following comments and legal argument is being submitted on behalf of the Heron Bay Homeowners Association and individual owners/members of the Association in opposition to the City of San Leandro's published Intent to Approve a Mitigated Negative Declaration for a Halus Power Systems Proposed Wind Turbine to be located at 2539 Grant Avenue, San Leandro,

EXHIBIT 1

1 A. Alan Berger, State Bar #47459
2 LAW OFFICES OF A. ALAN BERGER
3 95 S. Market Street, Suite 545
4 San Jose, California 95113
5 Telephone: (408) 536-0500
6 Fax: (408) 536-0504

7 Attorneys for
8 HERON BAY HOMEOWNERS ASSOCIATION

9 CITY OF SAN LEANDRO
10 COMMUNITY DEVELOPMENT DEPARTMENT
11 PLANNING DIVISION

12
13 IN RE:

14 THE CITY OF SAN LEANDRO'S
15 PROPOSED INTENT TO ADOPT A
16 MITIGATED NEGATIVE DECLARATION
17 FOR HALUS POWER SYSTEMS WIND
18 TURBINE AT 2539 GRANT AVENUE, SAN
19 LEANDRO, CALIFORNIA 94579

**AMENDED PUBLIC COMMENTS OF
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BZA Hearing Date: Dec. 6, 2012

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24
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26 Homeowners Association and individual owners/members of the Association in opposition to the
27 City of San Leandro's published Intent to Approve a Mitigated Negative Declaration for a Halus
28 Power Systems Proposed Wind Turbine to be located at 2539 Grant Avenue, San Leandro,

1 California. For all future reference in this document, the Heron Bay Homeowners Association
2 and individual owners/members of the Association will be referred to as "the Association," the
3 City of San Leandro will be referred to as "the City" and Halus Power Systems will be referred
4 to as "Halus" unless otherwise stated. The Heron Bay Homeowners Association previously filed
5 on July 31, 2012, a document entitled "Public Comments of Heron Bay Homeowners
6 Association and Individual Owners/Members of Heron Bay Homeowners Association in
7 Opposition of the City of San Leandro's Intent to Adopt a Mitigated Negative Declaration for
8 Halus Power Systems Wind Turbine Located at 2539 Grant Avenue within the City of San
9 Leandro." Attached to that submittal and made a part thereof by reference was an expert report
10 and opinion by Mr. Paul Taylor of Paul Taylor Consulting. Mr. Taylor is a renowned
11 environmental scientist and CEQA specialist. That document was previously referred to as "the
12 Taylor report."
13

14 Subsequent to the filing of the earlier public comments of the Association, the City
15 continued the then scheduled public BZA hearing several times without stating a reason for the
16 continuances. Said continuances were apparently for the purpose of allowing Halus to file an
17 amended or supplemental filing supporting their argument for approval of the MND proposed by
18 the City. Halus has since filed amended documents and the public hearing by the Board is now
19 scheduled for December 6, 2012. Unfortunately, Halus and the City did not see fit to use the
20 several months granted them by virtue of the unexplained continuances to prepare and file an
21 Environmental Impact Report (EIR) as demanded by California statutes and the Heron Bay
22 Association, but rather used their time to attempt to address the shortcomings in the original City
23 findings and Halus submittals as pointed out by the Taylor report. The amended filings and the
24 City's stated intention to approve the MND are still woefully deficient and fail to satisfy the legal
25 standards demanded by the California Environmental Quality Act and cited case law. The
26 simple fact of the matter is that nothing short of a full EIR will suffice and the residents of Heron
27 Bay and the people of the City of San Leandro deserve no less that full compliance.

28 The Association has again asked Mr. Paul Taylor of Paul Taylor Consulting to review and

1 comment on all of the filings by Halus and the City's response to same. A copy of his report is
2 dated November 9, 2012 and is entitled "Updated Halus Wind Turbine Negative Declaration
3 Analysis Review." A true copy of that report is marked as Exhibit A to these comments and
4 made a part hereof by reference as if fully set forth herein. Heron Bay Homeowners Association
5 submits their Amended Comments and the Amended Paul Taylor report, their original
6 Comments filed on July 31, 2012 and the original Paul Taylor report attached thereto and such
7 oral comments as may be presented at the hearing on December 6, 2012 in support of their
8 opposition to the City's intention to accept a MND. To make it perfectly clear, the Association
9 absolutely objects to any approval of the MND and demands that the BZA and the City of San
10 Leandro order Halus to prepare and submit a full EIR in compliance with California statute and
11 case law.
12

13 **I. Preliminary statement.**

14 The Association is comprised of 629 homes (451 single family homes and 178 shared court
15 homes) located entirely in the City of San Leandro. The Association's homes are the northern
16 neighbors to the industrial complex and storage yard maintained by the Petitioner Halus Power
17 Systems. The proposed wind turbine is proposed to be located at the northern boundary of the
18 Halus Power Systems property and the southern boundary of Association homes. Prior to this
19 period of public comment, the City of San Leandro notified 4-6 homes located closest to the
20 proposed project of the City's intent to allow a mitigated negative declaration. This notice met
21 the minimum requirements of State law but certainly did not meet nor satisfy the needs and
22 interests of the Association and its many members and owners. A public hearing of interested
23 Association members called by the Board of Directors of Heron Bay was held in June 2012. The
24 Board of Directors of the Association attended that open forum meeting along with
25 representatives of the City of San Leandro Department of Development Services, a
26 representative of the City Council and the owner of Halus Power Systems. Subsequent to this
27 meeting, the City notified the Association that the time to file public comments in objection to
28 the intent to adopt a Mitigated Negative Declaration had been extended to July 31, 2012. The

1 Association, and several interested homeowners, filed their opposition comments to the proposed
2 City action in a timely fashion, notwithstanding their objection to the City's denial of their
3 request for a 120-day continuance. Subsequent to July 31st, the City continued the Board
4 hearing several times without stating any reason for that action. Apparently said continuances
5 were at the bequest of Halus in order to allow them to file amended documents responsive to the
6 criticism contained in the Heron Bay HOA opposition. Subsequent to the amended filings by
7 Halus, the City has continued with their intent to allow the MND and has reset the public hearing
8 before the BZA for December 6, 2012. The Association, having once again been denied a
9 request for an additional 30-days to file their opposition comments, notwithstanding that Halus
10 was given more than four months to file additional documentation, files these comments in
11 opposition to the proposed MND. To be perfectly clear, the Association and its owner/members
12 continue to strongly object to the proposed adopted of a mitigated negative declaration and will
13 take this matter to the City Council and the appropriate Courts should this MND be approved.
14 The Association demands that an EIR be required for this project.

15 **II. Procedural Standards of Review.**

16 In its earlier comments, the Association stated the procedural standards for review.
17 However, since Halus has failed to file an EIR and the City has failed to demand an EIR, we
18 restate the very clear legal requirement for the EIR at length herein for the convenience of the
19 Board and the City. The purpose of the Association's comments is to insure that the City does
20 not allow this ill-conceived project to proceed forward on the basis of a Mitigated Negative
21 Declaration. A brief history of the CEQA requirements as it relates to this project are identified
22 in the amended Taylor report at page 1-3 and those statements are incorporated herein. Section
23 21064.5 of the California Public Resources Code (the California Environmental Quality Act) sets
24 the standards for the use of a Mitigated Negative Declaration. That section states: " 'Mitigated
25 negative declaration' means a negative declaration prepared for a project when the initial study
26 has identified potentially significant effects of the environment, but (1) revisions in the project
27 plans or proposals made by, or agreed to by, the applicant before the proposed negative
28

1 declaration and initial study are released for public review would avoid the effects or mitigate the
2 effects to a point where clearly no significant effect on the environment would occur, and (2)
3 there is no substantial evidence in light of the whole record before the public agency that the
4 project, as revised, may have a significant effect on the environment.”

5 The significant language in this section is the following language “... would avoid the
6 effects or mitigate the effects to a point where **clearly no significant effect** on the environment
7 would occur...” (emphasis added), and “there is **no substantial evidence** in light of the whole
8 record before the public agency...” (emphasis added). Based on the language of this operative
9 statute and the uncontroverted case law interpreting it, the comments of the Association and the
10 scientific evidence presented by the Taylor report, it is clear that the Mitigated Negative
11 Declaration should not be adopted by the City of San Leandro.

12 The landmark case of Ocean View Estates Homeowners Association, Inc. v. Montecito
13 Water District (2004) 116 Cal.App.4th 396, 10 Cal.Rptr.3d 451 directly dictates the path that the
14 City should follow in the Halus application. In Ocean View a homeowners association filed a
15 petition for a writ of mandate to compel a water district to prepare an environmental impact
16 report for a project to cover a reservoir with an aluminum roof. The district found that there was
17 a potential significance to the environment from flooding but the district found no significant
18 aesthetic impact. The district did not order an EIR based on their “checklist” and findings but
19 rather allowed the project to go forward with a Mitigated Negative Declaration (hereinafter
20 referred to as “a MND” unless otherwise stated). After the district and the trial court denied the
21 HOA petition, the Court of Appeal reversed and ordered the district to order a full EIR.

22 The court stated that an EIR provides detailed information about the likely effect a
23 proposed project may have on the environment, lists ways in which significant effects might be
24 minimized and indicates alternatives to the project (Public Resources Code, section 21061). An
25 EIR is required whenever there is a “fair argument” that significant impacts may occur.” So the
26 standard to be imposed by the City, as defined by the courts, is whether or not a **fair argument**
27 has been presented that would indicate that significant impacts might occur. It is not necessary
28

1 that interested parties demanding an EIR prove conclusively, beyond a reasonable doubt or even
2 by a preponderance of the evidence that significant impacts may occur. It is only necessary that
3 the interested party make a fair argument that there could be significant impacts. It is then the
4 function of the EIR to determine if whether or not there are significant environmental impacts.
5 (See also Quail Botanical Gardens Foundation, Inc. v. City of Encinitas (1994) 29 Cal.App.4th
6 1597, 1602, 35 Cal.Rptr.2d 470). The comments and facts as stated by the Association and in
7 the original and in the amended Taylor report clearly constitute a fair argument and the City must
8 order the EIR in order to determine the full impact of the environmental impact. The Ocean
9 View case is particularly significant because it argues the danger of granting a MND in cases
10 where a fair argument has been presented. The court stated: **“Because a negative declaration
11 ends environmental review, the fair argument test provides a low threshold for requiring
12 an EIR.”** The City may not conclude that the low threshold has not been attained in the present
13 case. Ocean View also stood for the proposition that evidence may be presented that would
14 suggest that a project might have a **significant negative aesthetic impact**. One of the questions
15 then would be would the project have a substantial adverse affect on a scenic vista. A review of
16 Figure 1 attached to the updated Taylor report, Exhibit A, clearly indicates that the presence of
17 the wind turbine would seriously compromise, if not destroy, the pristine scenic views of the
18 protected east marsh and the San Lorenzo creek. One can stand on the corner of the Southwest
19 corner of Heron Bay, in the closest location to the proposed turbine, and easily view the bay
20 waters and it takes no great imagination to see that the turbine will constitute an eyesore. One
21 that damages the near perfect scenic view of the marsh, the creek and the bay. These
22 considerations alone would dictate the preparation of an EIR. It may be argued by the applicant
23 that opinions of homeowners do not constitute scientific evidence. The Ocean View case
24 eliminated this argument by stating, “ Opinions that the cover will not be aesthetically pleasing is
25 not the special purview of experts. Personal observations on these nontechnical issues can
26 constitute substantial evidence.”
27
28

The case of Bakersfield Citizens for Local Control v. City of Bakersfield (Panama 99

1 Properties) (2004) 124 Cal.App.4th 1184 also confirmed the substantial evidence standard. It
2 stated that “substantial evidence is defined as enough relevant information and reasonable
3 inferences from this information that a fair argument can be made to support a conclusion, even
4 though other conclusions might also be reached.” In other words using the fair argument
5 standard, an EIR should be ordered even if the ultimate conclusion is that there are not
6 significant environmental impacts if substantial evidence is presented that would dictate that an
7 EIR be required. The Bakersfield case also discussed and approved the concept of urban decay
8 in considering whether or not to require an EIR and it also allowed individuals to present
9 evidence obtained from their own personal knowledge.

10 The case of The Pocket Protectors v. City of Sacramento (Regis Homes of Northern Cal.,
11 Inc.) (2004) 124 Cal.App.4th 903 involved a project submitted on a MND. In this case the court
12 discussed the principles and purpose of CEQA. The court stated: “The foremost principle under
13 CEQA is that the Legislature intended the act to be interpreted in such manner as to afford the
14 fullest possible protection to the environment within the reasonable scope of the statutory
15 language... We have repeatedly recognized that the EIR is the heart of CEQA.” The court also
16 affirmed that public participation is an essential part of the CEQA process. The court reaffirmed
17 “With certain limited exceptions, a public agency must prepare an EIR whenever substantial
18 evidence supports a fair argument that a proposed project may have a significant effect on the
19 environment... Significant effect on the environment means a substantial, or potentially
20 substantial, adverse change in the environment.” The Pocket Protector case also affirmed that a
21 “The fair argument standard is a ‘low threshold’ test for requiring the preparation of an EIR.” In
22 the Halus matter, clearly the original and amended Taylor report and the comments and
23 observations of the Association meet any low threshold requirement for requiring an EIR. This
24 court also confirmed “relevant personal observations of area residents on nontechnical subjects
25 may qualify as substantial evidence for a fair argument. So might expert opinion if supported by
26 facts, even if not based on specific observations as to the site under review... Where such expert
27 opinions clash, an EIR should be done.” Under the authority of this case, even if the applicant
28

1 produces evidence of no environmental impact, which Halus has not successfully done, the
2 report of Paul Taylor alone should demand an EIR, even if the expert opinions clash. In this
3 regard the court said: "It is the function of the EIR, not a negative declaration, to resolve
4 conflicting claims, based on substantial evidence, as to the environmental effects of a project."
5 This is another case that confirmed the rule that non-technical, area resident's opinions should be
6 considered on aesthetic issues. The court stated: "As on other CEQA topics, the opinions of area
7 residents, if based on direct observation, may be relevant as to aesthetic impact and may
8 constitute substantial evidence in support of a fair argument; no special expertise is required on
9 this topic." Therefore on the topic of aesthetics, the opinions of the Association and local
10 residents must be considered in addition to the opinions expressed in the original and updated
11 Taylor reports.
12

13 The case of Architectural Heritage Assn. v. County of Monterey (2004) 122 Cal.App.4th
14 1095 was a challenge to the adoption of a MND by the County who wanted to tear down the old
15 Monterey courthouse. The court stood for the proposition that CEQA embodies the state's
16 policy that the long-term protection of the environment shall be the guiding criterion in all public
17 decisions. **The court cited the California Supreme Court in recognizing that the Court has**
18 **repeatedly recognized that the EIR is the heart of the CEQA.** Accomplishment of the high
19 objectives of that act requires the preparation of an EIR whenever it can be fairly argued on the
20 basis of substantial evidence that the project may have significant environmental impact. The
21 Supreme Court stressed the importance of preparing an EIR in cases in which the determination
22 of a project's environmental effect turns upon the resolution of controversial issues of fact and
23 forms the subject of intense public concern. It is hard to imagine more intense public concern
24 than the City's expressed intention to approve a MND has caused.

25 Finally, the case of Sierra Club v. California Dept. of Forestry & Fire Protection (2007)
26 150 Cal.App.4th 370, 59 Cal.Rptr.3d 9 establishes the fact that great weight is to be given to
27 expert testimony in evaluating the fair argument standard to be used. Under the guidelines of
28 this case, therefore, great weight must be given to the opinions of Paul Taylor, one of the

1 recognized experts in the field of environmental protection. In support of Paul Taylor's
2 expertise, the Association marks as Exhibit B to these comments the curriculum vitae of Mr.
3 Taylor, and makes it a part hereof by reference as if set forth at length herein. A review of Mr.
4 Taylor's CV highlights his educational and professional experience and his preeminence in the
5 field of environmental protection.

6 **III. Specific Issues of Environmental Concern.**

7 The Association specifically adopts all of the comments and recommendations contained in
8 the updated Taylor report, Exhibit A to this document. The following represent specific
9 highlights of that report on which the Association would comment.
10

11 A. Aesthetics. As the Taylor report discusses on page 3, the City finds less than
12 significant impact on scenic vistas because of the existing adjacent industrial uses and zoning.

13 Also because the turbine is similar or less height than existing PG&E high tension wires.

14 Apparently the City is influenced by the additional filings of Halus including 11 photo-shopped
15 views into the project site. Unfortunately, the subject photos simulations are all taken from
16 public trail and bay views. None of them are taken from the home sites of the approximately 25
17 homes that would be directly affected by the proposed wind turbine. As stated in the updated
18 Taylor report, the size, scale, format and perspective of the photo simulations are inadequate to
19 afford any fair or independent analysis of the project impacts to scenic vistas or existing visual
20 character or quality. This analysis completely ignores the obvious scenic visual impact of the
21 turbine on the homes of Heron Bay that are directly across from the turbine, the impact on the
22 protected area of the east marsh and the San Lorenzo creek and its relationship to San Francisco
23 bay. In analyzing the impact on vistas, one cannot picture themselves in the actual projected site,
24 admittedly industrial, and ignore the areas on the immediate and adjacent vicinity. As stated as
25 many as 25 homes in the Association would have a direct and unimpeded view of the turbine
26 from their back yards and rear windows. The approximately 300 acres of marsh and creek have
27 been protected and cherished for a long time. To place the turbine in the proposed location
28 would have it be the centerpiece and the eyesore of the entire area surrounding the east marsh. It

1 would be the first thing anyone's eye would travel to as there are no other turbines in the area or,
2 for that matter, surrounding any city or county touching the San Francisco bay. The impact of
3 this 100-foot turbine in the middle of the beautiful, protected areas of the bay and marsh cannot
4 be underemphasized. To ignore that consideration demonstrates the flawed concept of granting
5 the MND. It is unfair to compare the turbine to the existing PG&E power lines as the power
6 lines predated the development of the Association and the protected marsh areas. High power
7 wires are common throughout the bay area and offer no shock or surprise to any resident. One
8 would question, however, if power lines were planned to be installed at this time if they would
9 be approved. It is highly doubtful. But Halus should not be allowed to rely on what is already
10 on site; rather the merits of their proposal must be evaluated on its own environmental impact.

11
12 As the updated Taylor report points out there are no similarities in visual aesthetic
13 impact in the PG&E tower profiles, aerial mechanization, moving member distractions or scenic
14 vista intrusion. The proposed turbine has a 2000 square foot sweep area. As Taylor states, this
15 would have the same effect as a Cessna Citation 500 spinning like a pinwheel at the top of a 100
16 foot tower less than 500 feet from homes in the Association and directly adjacent to the protected
17 marsh areas. The public trails and parks form an integral part of the unique Bay Trail, East Bay
18 recreation system which has provided hiking, jogging, bicycling, skating opportunities and the
19 observation of more than 100 species of migrating birds since 1989. To conclude that the
20 presence of a 100 square foot turbine essentially in the middle of such protected areas would be
21 tragic at best. It is interesting to note that no 100-foot horizontal axis, tubular towers or wind
22 turbines have been previously allowed within any scenic vistas of the Bay Trail. To allow this
23 100-foot aerial advertising tower would be to start a precedent that will not be easily reversed.

24 The City must consider Taylor's conclusion that the turbine may create a potentially
25 significant impact to occupied, off-site structures due to daytime shadow casting effects. It is
26 well established that towers of this height and size may create "shadow flickering" that may
27 substantially affect the use and enjoyment of the owners of the adjacent homes. Certainly under
28 the cases cited, the City must at least order an EIR that would investigate the potential of

1 environmental impact of this variety. The City must conduct a wind project shadow impact
2 assessment as part of an EIR. The City must demand an independent Visual Impact Analysis
3 using computer simulations on current color photos showing the proposed turbine in its location
4 at scale from various points of view among the adjoining Heron Bay homes and the Bay Trails.

5 It is important to note that other jurisdictions have adopted ordinances recognizing the
6 effects of shadowing on the environment. The City of San Francisco has adopted an ordinance
7 prohibiting new structures over 40 feet in height from casting shadows over public open space.
8 Certainly the City of San Leandro should not adopt a de-facto policy that would be less
9 restrictive than that of San Francisco, a city famous for protecting its scenic vistas. The
10 Association urges the City to adopt a "wind turbine siting criteria" rather than approve this
11 particular turbine without sufficient study, thereby setting a dangerous and permanent precedent.
12

13 The Association is aware that Benny Lee, the president of the Heron Bay Homeowners
14 Association, has independently sent written comments listing six separate concerns that he has
15 with the proposed project. The Association hereby incorporates and adopts each and every point
16 raised by Mr. Lee in his comments. On this particular subject, the Association specifically
17 adopts Mr. Lee's points number 3 and 4. As Mr. Lee points out, allowing this installation will
18 single out the community as allowing the first turbine on the bay shoreline. It can only lead to a
19 slippery slope of ugliness and uncontrolled and unwarranted development on some of the most
20 cherished areas of the bay lands. The project will clearly add environmental insult and injury to
21 Heron Bay homeowners, their property values and family enjoyment. The City should and must
22 require an EIR to fully consider all of these potentially damaging areas.

23 B. Biological Resources. The Association adopts the findings of Paul Taylor, Exhibit
24 A, pages 5-6 in reference to biological resources. A project may impact biological resources
25 through the loss or destruction of individual bird species or through the degradation of sensitive
26 habitats. Anyone who has ever walked the public trails or visited the protected area in question
27 has to be aware of the extent and variety of migrating birds and other native birds in the areas of
28 the marshes, in the direct proximity of the proposed project. The City finds that an

1 Environmental Sciences Associates (ESA) memorandum concludes that the risk of bird fatalities
2 from a single wind turbine is not statistically significant. The Association would note that the
3 loss of a single bird habitat due to an unnecessary project that serves no useful purpose other
4 than advertising for the applicant is too many. Taylor notes that the aerial twisting, spinning and
5 noise from a wind turbine will disturb and alter avian flight patterns and nesting habits in
6 proximity to the project. The ESA report makes no mention of the nearly one million birds that
7 rest and nest in the 300 acres of marsh land that would be affected by the presence of the turbine.
8 The ESA report does not mention the in-flight mating patterns of the California Least Tern, a
9 federal and state endangered species. It does not mention the Northern Harrier's in flight
10 exchange of prey with their mates, also a protected species. It does not address impact on the
11 Western Burrowing Owl that flies in circular patterns and engages in in-flight courtship. The
12 ESA report admits that it does not have enough evidence or research on migration or mating
13 patterns to objectively address this issue. There is no explanation how they arrived at the
14 artificially low figure of 1 bird killed every 6 ½ years but such an estimate would strain
15 credibility. The City cannot compare any other area in California to the largest bird wildlife
16 habitat in the East Bay. The bird mortality estimates do not apply to the presence of a wind
17 turbine next to a bird sanctuary. Pictures of all of the above species, which may be dramatically
18 affected by the proposed turbine, are again attached as group Exhibit C to these comments, made
19 a part hereof by reference and incorporated herein. The photos constitute a small percentage of
20 the bird species that may be affected by the proposed turbine.
21

22 The City Mitigation Measures are not fully consistent with the June 29, 2012 California
23 Department of Fish and Game's letter mitigations. It is inconceivable that the City would allow
24 this project without a strict compliance with the clear directives of the Department of Fish and
25 Game. It is further inconceivable that the City would allow this project to move forward without
26 an EIR investigation of the effect of the project at least on these specific species. Remember the
27 legal standard is a fair argument. The Association does not have to prove that these species will
28 be involved, just that there is evidence that they could be affected. This fact alone should

1 generate an order for an EIR.

2 C. Geology/Soils. The Association adopts the comments contained in the updated
3 Taylor report, Exhibit A, pages 6-7, in this section as their own and offers no additional
4 comments.

5 D. Hazards & Hazardous Materials. The Association adopts the comments contained
6 in the updated Taylor report, Exhibit A, pages 7-8, in this section. As contained in the Taylor
7 report, research has demonstrated that wind turbine blades have an extremely large radar
8 signature that can disrupt aircraft navigational radar. As the Heron Bay project lies in close
9 proximity to Oakland International Airport, this finding presents a clear and present danger to the
10 residents and should be investigated and included as part of an EIR. As stated by Mr. Taylor,
11 "the City must acknowledge and address potential added aircraft navigational radar impacts of
12 the proposed Halus Wind Turbine Project where no public benefits are provided." There is little
13 doubt that should an air catastrophe occur, and should disaster be traced back to interference
14 from the proposed wind turbine, that the City would be liable for all resultant damages as the
15 result of their refusal to demand a full EIR pursuant to state law. Can anyone from the City or
16 from Halus name any other wind turbine currently in use or under construction in similar
17 proximity to an active, international airport? We sincerely doubt that they could so demonstrate.
18 There is also no argument to the point that this turbine will provide any public benefit. This
19 project benefits exactly no one in the City of San Leandro other than Halus.

20 E. Noise. The Association adopts the comments contained in the updated Taylor
21 report, Exhibit A, pages 9-10, in this section. The comments in the Taylor report relative to
22 noise intrusion are technical and clearly qualify as fair argument under the standards of the cases
23 cited in this brief. In summary Taylor states that horizontal axis wind turbines generate
24 significant noise and vibration. There is no City acoustical analysis that would show noise or
25 vibration impact levels inside the homes closest in proximity to the turbine. Furthermore there
26 are no City studies that would evaluate the resultant noise impact on the trails or marsh areas.
27 The Halus provided manufacturer's noise specifications dated November 1996, more than 16
28

1 years old, are neither current nor relevant to the Halus-modified wind turbine. The Association
2 demands that as part of an EIR that a computer analysis be performed per Community Noise
3 Equivalent Levels (CNEL) or County noise ordinance compliance standards. The study should
4 provide project noise levels at adjacent residential and recreational receptors from a computer
5 modeling of sound in decibels. Noise contours at 5 dBA levels should be plotted over a scaled
6 site plan or aerial photo capturing the locations of the turbine noise source and proximate
7 residential and recreational receptors. As stated by Mr. Taylor, a common limit, adopted by
8 other jurisdictions, for significant wind turbine noise impacts to adjacent residential land use is
9 an increase of 10 dBA above existing ambient residential noise levels. For the City to proceed
10 with the MND in spite of the criteria and specifications set by other relevant jurisdictions
11 pertaining to noise intrusion, without a scintilla of supporting scientific evidence, flies in the face
12 of the California code.

13
14 F. Property Values and Economic Hardship. All studies of wind turbines as they
15 relate to property values indicate that property values will decline for both permanent and
16 temporary periods. Any individual looking to purchase a home in the Heron Bay area would be
17 immediately impacted by the presence of a ten-story wind turbine in their back yards. Such a
18 presence could only cause further stress and hardship on the residents of San Leandro, both in
19 potential sales and in the refinancing of their homes. The City has the duty and obligation to
20 protect the resident's property values as best they can. It would be unconscionable for the City
21 to ignore potential property value impact on its residents in order to satisfy the advertising needs
22 of one two year old business owner. An EIR must be ordered to include a property value
23 evaluation. Declining property values can lead to the abandonment of homes, decline in upkeep,
24 the presence of squatters and accompanying crime. This type of urban decay has a domino effect
25 on all surrounding properties. The lowering of property values, and the concurrent abandonment
26 of homes, as the result of an unsightly wind turbine, can certainly lead to urban blight and this
27 phenomenon should be studied. The residents of Heron Bay, particularly those 25 homes facing
28 the proposed Halus project, have already accepted that their property values may be affected by

1 the presence of the referred to electrical power lines and the adjacent industrial area. They have
2 accepted those facts and have built that realization into their economic decisions to purchase
3 their homes where located. However, it is abundantly clear that the presence of the 100-foot
4 turbine will significantly, adversely affect those home values. A potential buyer could not help
5 but notice the presence of a singular, large turbine within a few hundred feet of the subject
6 homes. One might look across the channel and not notice the power lines, which are a common
7 occurrence in the bay area, but no potential buyer could fail to notice and comment on the
8 presence of the 100-foot turbine. No one could rationally state that the presence of such a
9 mechanical eyesore would serve to increase the property values. The negative impact is clear to
10 all.

11
12 G. Risk of Failure and Abandonment. As stated succinctly by Mr. Lee in his
13 comments, the City has no specific policy and no experience in evaluating the seismic and wind
14 load risks of a free standing ten story wind turbine in an area of bay fill. Failures could well
15 include fires, explosions and rotating blades breaking loose from the podium structure and falling
16 more than ten stories. Certainly, at the very minimum, an EIR should establish failsafe
17 procedures that would be in effect for all of the above potential disasters. There also appears to
18 be no plan in effect in the event that Halus would abandon the project and the site or file
19 bankruptcy. This risk has certainly become more obvious is recent times as evidenced by the
20 Solyndra disaster. In this event of bankruptcy or abandonment, the site would be burdened with
21 a decaying and unmaintained wind turbine which would pose a direct danger to the residents and
22 the surrounding areas. As a bankrupt corporation would have no incentive to remove or even
23 maintain the turbine, the City should require a deposit or fund from Halus that could be used to
24 remove the turbine in the event of abandonment.

25 IV. Conclusion.

26 The Association urges the City of San Leandro to abandon their intention to grant approval
27 of this project and a code variance based on a Mitigated Negative Declaration. The entire
28 premise of the project, i.e., that it is green, is misplaced. While it is admirable that the City

1 strives to be more "green" and encourages green projects, the proposed wind turbine hardly
2 satisfies that purpose. The amount of power allegedly generated by this one, used, old
3 technology turbine serves only Halus. They would save less than \$1,000 in power usage and yet
4 may cause untold amount of damage to the environment and surrounding areas. The sad fact of
5 the matter is that this project has very little to do with being green. The real purpose of the
6 project is to provide advertising of the Halus product to any interested customers. We are quite
7 sure that it would be advantageous to Halus to be able to take a customer into their back yard and
8 show them a working wind turbine made from used, recycled parts rather than drive them to
9 Suisun City or wherever else they have a similar product in operation. The proposed project is
10 nothing more than aerial advertising. No power generated by this turbine will ever be sold to the
11 electrical grid because the output would be insignificant. The only "green" consideration of this
12 proposed turbine is that Halus is a company marketing a green product. This, in itself, does not
13 make the proposed turbine green. Would the City then allow any other industrial business in the
14 area to erect their own ten-story turbine? Doubtful. Would the City allow a ten-story moving
15 parts billboard for advertisement of a green business? Doubtful. Any yet that is exactly what is
16 being proposed. However, the residents of Heron Bay and the surrounding areas and the
17 residents of greater San Leandro who use and respect the protected marsh and habitat areas
18 should not suffer for the corporate benefit of one business. Any type of risk analysis would
19 clearly demonstrate the folly of such a venture.

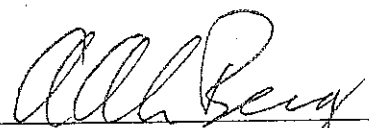
21 Heron Bay has clearly demonstrated a fair argument for an EIR in the above and in the
22 comments of its owner/members. The City already allowed Halus an additional four months,
23 after the opposition filed by Heron Bay and its residents, to file additional documents in support
24 of their application. During that time they could have produced an EIR or at least agreed to
25 prepare an EIR. Instead they manipulated the information previously presented with no new
26 scientific evidence or sustainable support for the variance. For the City to ignore the fair
27 arguments raised, not order an EIR and proceed with a MND will result in an almost sure
28 reversal by the courts and will involve the City in prolonged and expensive litigation. The body

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of California law almost universally calls for action on the side of caution, that is, the insistence on an EIR in all questionable cases. Heron Bay has met the standard set by numerous cases and the City should and must reverse their intent to proceed on a Mitigated Negative Declaration. An EIR must be ordered before the Halus project may continue.

Dated: Nov. 13, 2012

LAW OFFICES OF A. ALAN BERGER



A. ALAN BERGER, Attorney for Heron Bay Homeowners Association

EXHIBIT A

PAUL TAYLOR CONSULTING

E N V I R O N M E N T A L

11960 Iowa Avenue, Suite 11

Los Angeles, California 90025

Phone (310)709-8711 Fax (310)826-5476

E-Mail ptaylor@verizon.net Website www.taylorenvironmental.net

November 9, 2012 Update

Updated

Halus Wind Turbine Mitigated Negative Declaration Analysis Report

Introduction

Paul Taylor Consulting (PTC) environmental science and regulatory consulting has been engaged by the Heron Bay Homeowners Association (HOA) in San Leandro, California to analyze a revised October 11, 2012 *Mitigated Negative Declaration* (MND) prepared by the City of San Leandro Planning Department (City) as Project PLN2012-00006 pursuant to the California Environmental Quality Act (*Public Resources Code Section 21000 et seq.* and CEQA Guidelines *California Code of Regulations Section 15000 et seq.*). As CEQA Lead Agency, the City supports the revised MND findings with a CEQA *Initial Study Checklist* dated October 11, 2012, Halus and their FSA Consultant's May 10, 2012 *Technical Memorandum* concerning wind turbine impacts to birds, ESA's Sept. 20, 2012 *Technical Memorandum* evaluating wind turbine shadows, Halus' Nov. 28, 1996 Vestas Model V29 wind turbine noise specifications, March 12, 2012 Project site plans and Oct. 10, 2012 photo simulations, a June 21, 2012 Federal Aviation Administration "determination" letter, as well as various Federal, State, County and City environmental regulatory requirements, and City staff determinations.

PTC relies upon current, reputable scientific references and published environmental science research, recent and direct Project site reconnaissance and City CEQA Lead Agency policies, practices and work products. PTC's task is to analyze the technical accuracy, adequacy and specific scientific bases for findings and conclusions in the City's MND and related records for the Project. PTC will report CEQA/MND errors, omissions, inaccuracies, speculation and inconsistencies. PTC will recommend additional scientific investigations, issues resolutions and precedent wind turbine siting criteria. PTC will also amplify HOA and public recreational stakeholder concerns, and rebut City findings where appropriate.

Project Description

Halus Power Systems, a San Leandro supplier of re-manufactured wind turbines, has applied to the City of San Leandro for a Zoning Variance to exceed the 60 foot height limit on their industrial property allowing an 80-foot tall (100 feet to the full blade sweep height), single, 50 kilowatt horizontal axis wind turbine electric power generator to be located on their property at 2539 Grant Avenue in the I-G Zoning District.

Applicant Halus Power Systems states the purpose and justifications for the proposed Project wind turbine to be: 1) research and development purposes as part of the company's ongoing efforts to increase operational and energy efficiencies of the turbines it re-manufactures; and 2) energy generated by the turbine will offset the company's demand for non-renewable energy for their operations. (ESA *Technical Memo*, May 10, 2012) As proposed, the Project requires a discretionary action by the City, which requires environmental review and public disclosures under the California

Environmental Quality Act and Guidelines (CEQA).

The Project wind turbine operating specifications are indicated in Table 1 below. The turbine would be erected atop a tubular tower, with a maximum blade sweep height of approximately 100 feet and a ground clearance under the blade of 51.5 feet. The turbine will achieve full power at wind speeds of 37.6 mph with a turbine rotational speed of approximately 44 rpm. The turbine's operational cut-in wind speed is 7.4 mph, with a cut-off wind speed of 62 mph. An electronic wind vane mechanism allows the turbine to rotate on its horizontal axis to face maximum windward force directions.

Table 1
Halus Project Wind Turbine Specifications

Wind Turbine Model: Vestas V17 90 kilowatt-rated, horizontal turbine axis on tubular tower
Electric Power Output: 50 kilowatt-rated with Halus modifications
Total Wind Turbine Weight: Approx. 4 tons
Total Operating Height: 100 ft.
Tubular Tower Height: 73.82 ft.
Tubular Tower Diameters: Base approx. 12 ft., top approx. 6 ft.
Reinforced Concrete Tower Foundation: Approx. 20 ft. x 20 ft. slab
Turbine Rotor Blades: 3
Turbine Rotor Hub Height: 76 ft.
Rotor Blade Sweep Diameter: 44 ft.
Blade Tip Ground Clearance: 51.5 ft.
Blade Swept Area: 2,000 square ft.

Sources: Halus Power Systems 2012, PIC July 2012, and ESA *Technical Memo*, May 10, 2012.

The final page of this report is Figure 1 depicting the Halus Proposed Wind Turbine Location, and Project vicinity residential, industrial and public recreational land uses in aerial color photo perspective. The ESA-derived Figure 1 annotation data for the Halus wind turbine vary slightly from entries in Table 1 above.

Mitigated Negative Declaration Analysis

The CEQA statute provides that Mitigated Negative Declarations (MNDs) are used "when the Initial Study has identified potentially significant effects on the environment, but 1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and 2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment." (CEQA Section 21064.5)

An Initial Study formalizes the City Lead Agency preliminary analysis to determine whether an Environmental Impact Report or Negative Declaration must be prepared. Most commonly, the Initial Study is based upon a "Checklist" which illuminates the various environmental impacts which may result from the development project. The Checklist, however, is only part of the Initial Study. The Initial Study also must explain the reasons for supporting the Checklist findings and note or reference the source or content of the data relied upon in its preparation and determinations.

Mitigated Negative Declarations are a project applicant's expediting short cut to avoid the time and

six-figure (\$) expense of preparing and processing a full CEQA Environmental Impact Report (EIR) – including Draft EIR and Final EIR with Response to Comments disclosures. The abbreviated MND processing route also avoids the controversies and delays that can result from the requisite EIR analysis of “alternatives to the proposed project” and “cumulative environmental impacts.”

The following is an analysis of the technical accuracy, adequacy and specific scientific bases for findings and conclusions in the revised City’s Initial Study Checklist and resultant MND where five “potentially significant impact” factors are addressed. These Project impact factors are: Aesthetics, Biological Resources, Geology/Soils, Hazards & Hazardous Materials and Noise. Analysis of the five impact factors that follow is presented in the same order and name in which they appear in the City’s Initial Study Checklist dated Oct. 11, 2012. Where appropriate, PTC will provide a point-by-point rebuttal of City findings.

Aesthetics

Aesthetics, views, shading and nighttime illumination issues are related elements in the visual or scenic environment. Aesthetics generally refer to the identification of visual resources and the quality of what can be seen, or overall visual perception of the environment. Views refer to visual access and obstruction, or whether it is possible to see a focal point or panoramic view from an area. Shading issues are concerned with effects of shadows cast by existing or proposed structures on adjacent land uses. Nighttime illumination addresses the effects of a proposed project's exterior lighting upon adjoining uses.

Potentially significant impacts addressed in City’s Initial Study Checklist followed by PTC Rebuttal:

- a. Would the Project have a substantial adverse effect on a scenic vista – **City finds** *Less than Significant Impact* due to existing adjacent industrial uses and zoning, Project wind turbine similar or less than height of existing PG&E high-tension utility towers. Halus provides a “Photo Simulation” depicting 11 views into the Project site before and after wind turbine construction as evidence of no significant Project impacts to existing scenic vistas.

Rebuttal – The Checklist should find the Project a *potentially significant impact* to both private and public Aesthetics -- degrading scenic vistas and the existing visual character where there is no mitigation. Figure 1 herein depicts the Project location adjacent to a large, fully-occupied residential subdivision known as Heron Bay. As many as 25 Heron Bay homes would have direct rear views into the Halus Project property and the proposed 100-ft. high wind turbine. Halus’ selective photo simulations of 11 locations all are taken from public Bay Trail views, without consideration for the direct rear views from Heron Bay residents into the Project site. Moreover, the size, scale, format and perspectives of the photo simulations are inadequate to afford any fair or independent analysis of Project impacts to scenic vistas or existing visual character or quality.

Heron Bay homeowners accept that existing adjacent electric power utility and drainage facilities are necessary for the greater community good. These homeowners also accepted that there are existing, southeasterly-adjacent, low-rise general industrial-zoned land uses. However, all of these facilities and uses negatively affect their home investment values and impair their marketability, neighborhood visual character and lifestyle enjoyment. The new, intrusive, unanticipated adjacent 10-story high Halus wind turbine will add further environmental insult and injury to the Heron Bay private property owners.

Existing PG&E high-tension power line towers are approximately 16 feet higher than the operating height of the proposed Halus Project wind turbine. However, there are no similarities in visual aesthetic impact in their structural tower profiles, aerial mechanization, moving member distractions or scenic vista intrusion. The PG&E towers have static, maximum one-foot profiled, lattice structural steel construction as opposed to the single, modular wind turbine tower with visual profiles varying from a base of approximately 12 foot width, to top 6 foot width, to a ten-story high whirling and twisting turbine blade with a sweep diameter of 44 feet – covering a 2,000 square foot area. This 2,000 square foot area is the visual impact equivalent of seeing a Cessna Citation 500 corporate jet spinning like a pinwheel at the top of 100 foot tower less than 500 feet from homes in the Heron Bay neighborhood and less than 350 feet from the Bay Trail and San Lorenzo Creek waterfowl habitat.

In addition, the Project wind turbine will have *potentially significant impact* to public scenic vista aesthetics for which there is no mitigation. Co-extensive with the Heron Bay homes southeastern and southwestern boundaries are public trails and parks that are an integral part of the unique Bay Trail, East Bay recreation system. Begun in 1989, the Bay Trail provides easy accessible recreational opportunities for outdoor enthusiasts, including hikers, joggers, bicyclists and skaters. It also offers a setting for wildlife viewing and environmental education, and it increases public respect and appreciation for the entire San Francisco Bay ecosystem. The Bay Trail provides important transportation benefits such as commuting alternatives for cyclists and connections to numerous public transportation facilities. The Bay Trail offers access to commercial, industrial and residential neighborhoods; points of historic, natural and cultural interest; recreational areas like beaches, marinas, fishing piers, boat launches, and over 130 parks and wildlife preserves totaling 57,000 acres of open space. The Bay Trail's policies specifically seek to protect sensitive natural habitats such as the estuarine marsh supporting waterfowl in San Lorenzo Creek that separates Heron Bay homes from the Halus Project site with parallel trails on each creek bank. (*Association of Bay Area Governments, Website July 2012*)

The proposed Halus wind turbine Project would be unprecedented in the public Bay Trail system as no 100-ft. horizontal axis, tubular tower, wind turbines have been permitted or constructed in or within scenic vistas of the Bay Trail. The City would be setting perilous land use precedent in approving the Halus Project zoning variance.

Additional Investigation

In order to fully analyze and disclose evidence for City decision makers, the public and Heron Bay homeowners the following additional studies are necessary to satisfy CEQA requirements and limit City liabilities:

Conduct an independent Visual Impact Analysis using computer simulations on current color photos showing the proposed Halus wind turbine in its location at scale from various points of view among the proximate Heron Bay homes and Bay Trails adjacent to the Project site. Presentation exhibits should be no smaller than 11 inches x 17 inches in landscape format.

- b. Would the Project substantially damage scenic resources, including, but not limited to, trees, rock outcroppings, and historic buildings within a state scenic highway – **City finds No**

Impact due to existing adjacent industrial uses and zoning, the Project wind turbine is similar or less than the height of existing PG&E high-tension utility towers. There would not be a substantial adverse effect on scenic resources. **Finding noted.**

- c. Would the Project substantially degrade the existing visual character or quality of the site and its surroundings – **City finds *Less than Significant Impact*** due to wind turbine located in an area that is already subject to industrial uses. The existing visual character is of industrial uses. Open space to the northwest is already compromised with the PG&E high-tension utility towers. The proposed wind turbine would have a similar impact. Halus provides a “Photo Simulation” depicting 11 views into the Project site before and after wind turbine construction as evidence of no significant Project impacts to existing scenic vistas.

Rebuttal – Refer to Section a. above.

- d. Create a new source of substantial light or glare which would adversely affect day or nighttime views in the area – **City finds *No Impact*** due to wind turbine would not create a new source of light or glare. Halus provides ESA’s Sept. 20, 2012 *Technical Memorandum* evaluating wind turbine shadows.

Rebuttal – While the Proposed Halus Project does not alter illumination or glare in views of the area, the Checklist should find the Project a *potentially significant impact* to public “open space” in the form of Bay Trails northwest from the Project site according to the ESA Sept. 20, 2012 *Technical Memorandum* evaluating wind turbine shadows. ESA’s shadow analysis Figure 2 therein indicates that the existing Bay Trail open space segment between the Project site and Heron Bay homes would receive Halus wind turbine shadowing before, during and after 8:30 a.m. on December 21. The City and community could benefit from “wind turbine siting criteria” precedent of its neighboring jurisdictions. Accordingly, a City of San Francisco ordinance prohibiting new structures over 40 ft. in height from casting shadows over public open space should be applied to the Halus Project in a *potentially significant impact* finding.

Additional Investigation

In order to fully analyze and disclose evidence for City decision makers, the public and Heron Bay homeowners the following additional studies are necessary to satisfy CEQA requirements and limit City liabilities:

City should consider adopting “wind turbine siting criteria” precedent of its neighboring jurisdictions.

Biological Resources

A project may impact biological resources through the loss or destruction of individuals of a sensitive species or through degradation of sensitive habitat. Habitat degradation may occur through grading or excavation, increases in water or air pollutants, increased noise, light or vibration, interruption of fresh or salt water supplies, reduction in food supplies or foraging areas or interference with established wildlife movement patterns on or between habitat areas. Projects that create long-term or episodic impacts to natural areas, such as by generating toxic fumes or fugitive dust, could also result in degradation or destruction of a natural habitat. New development, construction, roadways and agricultural use all have the potential to lower or remove

natural resource values of natural open space systems.

Potentially significant impacts addressed in City's Initial Study Checklist followed by PTC Rebuttal:

- a. Would the Project have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate sensitive or by special status species in local or regional plans, policies or regulations or by California Dept. of Fish and Game or U.S. Fish and Wildlife Service – **City finds *Potentially Significant Impact Unless Mitigation Incorporated*** due to determinations in an Environmental Science Associates (ESA) Technical Memorandum dated May 10, 2012 that the calculated risk of bird fatalities from a single wind turbine operation were not statistically significant. The City has also required Halus to comply with eight mitigation measures specified in a June 29, 2012 California Department of Fish and Game letter commenting on the Halus Project.

Rebuttal – It should be noted that the aerial twisting, spinning and noise from the Halus wind turbine will disturb and alter avian flight patterns and nesting habits in proximity to the Project. The City "Mitigation Measures" for potential impacts to biological resources are not fully consistent with the June 29, 2012 California Department of Fish and Game letter mitigations.

-
- b. **City finding *Less than Significant Impact*.**

Rebuttal -- Refer Section a. above.

- c. **City finding *No Impact*.**

Rebuttal -- Refer Section a. above.

- d. Would the project interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native nursery sites – **City finds *Less than Significant Impact*** due to wind turbine site has no resident or migratory fish among industrial land uses.

Rebuttal -- Refer Section a. above.

Geology/Soils

Geologic processes that result in geologic and soil hazards include: surface rupture, ground shaking, ground failure, tsunamis, seiches, landslides, mudflows, and subsidence of the land. Because the region is generally considered to be geologically active, most projects will be exposed to some risk from geologic hazards, such as earthquakes. Thus, significant geologic impacts exceed the typical risk of hazard for the region.

Potentially significant impacts addressed in City's Initial Study Checklist followed by PTC Rebuttal:

- a. **City finding *Potentially Significant Impact Unless Mitigation Incorporated*. Finding noted.**

- b. **City finding** *No Impact*. **Finding noted.**
- c. **City finding** *No Impact*. **Finding noted.**
- d. **City finding** *No Impact*. **Finding noted.**
- e. **City finding** *No Impact* adopting Mitigation Measure #1: The City of San Leandro has incorporated the 2009 International Building Code into its municipal building code (Title 7, Chapter 7-5). The Project Applicant would be required to comply with all applicable State and City regulations to address potential geologic hazards associated with the proposed project, including ground shaking and liquefaction. Geotechnical and seismic design criteria must conform to engineering recommendations in accordance with the seismic requirements of the 2009 California Building Code (Title 24) and any amendments adopted in the San Leandro Municipal Code. Additionally, because the project site is in a liquefaction Seismic Hazard Zone, the Project Applicant will be required to comply with the guidelines. **Finding noted.**

Hazards & Hazardous Materials

Hazardous materials generally are chemicals, which have the capability of causing harm during an accidental release or mishap, and are characterized as being toxic, corrosive, flammable, reactive, an irritant or strong sensitizer. The term "hazardous substances" encompasses every chemical regulated by both the U.S. Dept. of Transportation's (DOT) "hazardous materials" regulations and the U.S. Environmental Protection Agency's (EPA) "hazardous waste" regulations, including emergency response. Hazardous wastes require special handling and disposal because of their potential to damage public health and the environment. Activities and operations that use or manage hazardous or potentially hazardous or explosive substances could create a hazardous situation if an accidental explosion or release of these substances occurred. Individual circumstances, including the type of substance; quantity used or managed, and the nature of the activities and operations, affect the probable frequency and severity of consequences from a hazardous situation. Federal, state, and local laws regulate the use and management of hazardous or potentially hazardous or explosive substances.

Potentially significant impacts addressed in City's Initial Study Checklist followed by PTC Rebuttal:

- a. **City finding** *Less than Significant Impact* as to creating a significant hazard to the public.

Rebuttal – The City should find *Potentially Significant Unless Mitigation Incorporated* due to the known probability of wind turbine structural blade failures and fragmentation – so-called "rotor failure." The risk of wind turbine blade break-ups and projectile fragment hazards is known to be as high as one in one hundred per year. Thus, planning jurisdictions have established land use setbacks to separate people and property from the hazards of rotor failure. (*California Energy Commission*, Nov. 2006)

The Heron Bay homes are less than 500 ft. from the proposed Halus wind turbine, and thus are exposed to the rotor failure risk from the Halus wind turbine. A 500-ft. setback, or separation, of the Halus wind turbine from the adjacent Heron Bay homes must be a minimum mitigating revision in the Project to comply with Mitigated Negative Declarations provisions, i.e. "... 1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for

public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and 2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment." (CEQA Section 21064.5)

Additional Investigation

City should consider adopting "wind turbine siting criteria" precedent of its neighboring jurisdictions. Alameda County has a wind turbine setback requirement of three times the proposed structure height, or 500 ft., whichever is greater from the structure's property line.

- b. **City finding** *Less than Significant Impact*. **Finding noted.**
- c. **City finding** *Less than Significant Impact*. **Finding noted.**
- d. **City finding** *No Impact*. **Finding noted.**
- e. **City finding** *Less than Significant Impact* adopting Mitigation Measure #2: Halus Power Systems shall secure approval of Alameda County Airport Land Use Commission and the Federal Aviation Administration (FAA) prior to building permit approval of the wind turbine. The FAA issued a June 21, 2012 "Determination of No Hazard to Air Navigation" letter concerning the Halus Project with conditions.

Rebuttal – FAA determined "The proposed wind turbine would be in the line of sight for Oakland ASR-9 (radar terminal system) used by the Northern California Terminal Radar Approach Control (NCT), Oakland (OAK) and Hayward (HWD) Air Traffic Control Towers. The wind turbine would cause unwanted primary returns (clutter) and primary target drops in the area of the turbine. ..."

- f. **City finding** *No Impact*. **Finding noted.**
- g. **City finding** *Less than Significant Impact*. **Finding noted.**
- h. **City finding** *No Impact*. **Finding noted.**

Additional Investigation

Concerning the above-referenced FAA and Alameda County Airport Commission permits to approve the Halus wind turbine construction and operation, research has shown that wind turbine blades have an extremely large radar signature which can disrupt aircraft navigational radar. The City must acknowledge and address potential added aircraft navigational radar impacts of the proposed Halus Wind Turbine Project where no public benefits are provided.

Noise

Environmental noise is measured in decibels (dB). To better approximate the range of sensitivity of the human ear to sounds of different frequencies, the A-weighted decibel scale (dBA) was devised. Because the human ear is less sensitive to low frequency sounds, the A-scale deemphasizes these frequencies by incorporating frequency weighting of the sound signal. When the

A-scale is used, the decibel levels are represented by dBA. On this scale, the range of human hearing extends from about 3 dBA to about 140 dBA. A 10-dBA increase is judged by most people as a doubling of the sound level. To account for the fluctuation in noise levels over time, noise impacts are commonly evaluated using time-averaged noise levels. The Community Noise Equivalent Level (CNEL) represents an energy average of the A-weighted noise levels over a 24-hour period with 5 dBA and 10 dBA increases added for nighttime noise between the hours of 7:00 p.m. and 10:00 p.m. and 10:00 p.m. to 7:00 a.m., respectively. The increases were selected to account for reduced ambient noise levels during these time periods and increased human sensitivity to noise during the quieter periods of the day.

Potentially significant impacts addressed in City's Initial Study Checklist followed by PIC Rebuttal:

- a. Would the Project expose people to or generate noise levels in excess of standards established in the local general plan or noise ordinances or applicable standards of other agencies – **City finds *Less than Significant Impacts*** referencing “manufacturer’s noise specifications” consistency with General Plan’s “normally acceptable” residential noise level of 55 dBA.

Rebuttal – The Halus-provided “manufacturer’s noise specifications” dated November 28, 1996 for a Vestas Model V29, 225 kilowatt wind turbine is neither current nor relevant to the proposed Halus-modified Vestas Model V17, 90 kilowatt wind turbine. Horizontal axis wind turbines such as Halus proposes generate significant noise and vibration. The City provides no acoustical analysis to show noise or vibration impact levels at or inside the Heron Bay private homes adjacent to the Halus Project site. No comparative noise standards are provided to disaggregate inside from outdoor residential noise impact levels, nuisance noise compliances at the public use Bay Trails and related park areas, or existing local ambient residential noise levels. PIC understands that Heron Bay homes were built with added acoustical attenuation windows and wall insulation in recognition of their proximity to Oakland International Airport three miles north and the Hayward Executive Airport two miles south from Heron Bay homes. The City MND and Initial Study reference wind turbine noise levels, but do not show substantial evidence of the actual levels off site. Numerical noise standards compliance at residential and recreational noise receptors must be demonstrated.

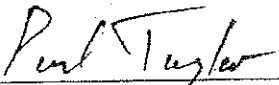
Additional Investigation

In order to fully analyze and disclose evidence for City decision makers, the public and Heron Bay homeowner the following additional studies are necessary to satisfy CEQA requirements and limit City liabilities:

Conduct computer analysis per Community Noise Equivalent Level (CNEL) or County noise ordinance compliance standards. Provide Halus Project noise levels at adjacent residential and recreational receptors from computer modeling of sound in decibels (dBA). Noise contours at 5 dBA intervals should be plotted over a scaled site plan or aerial photo capturing the locations of the Halus wind turbine noise source and proximate residential and recreational noise receptors.

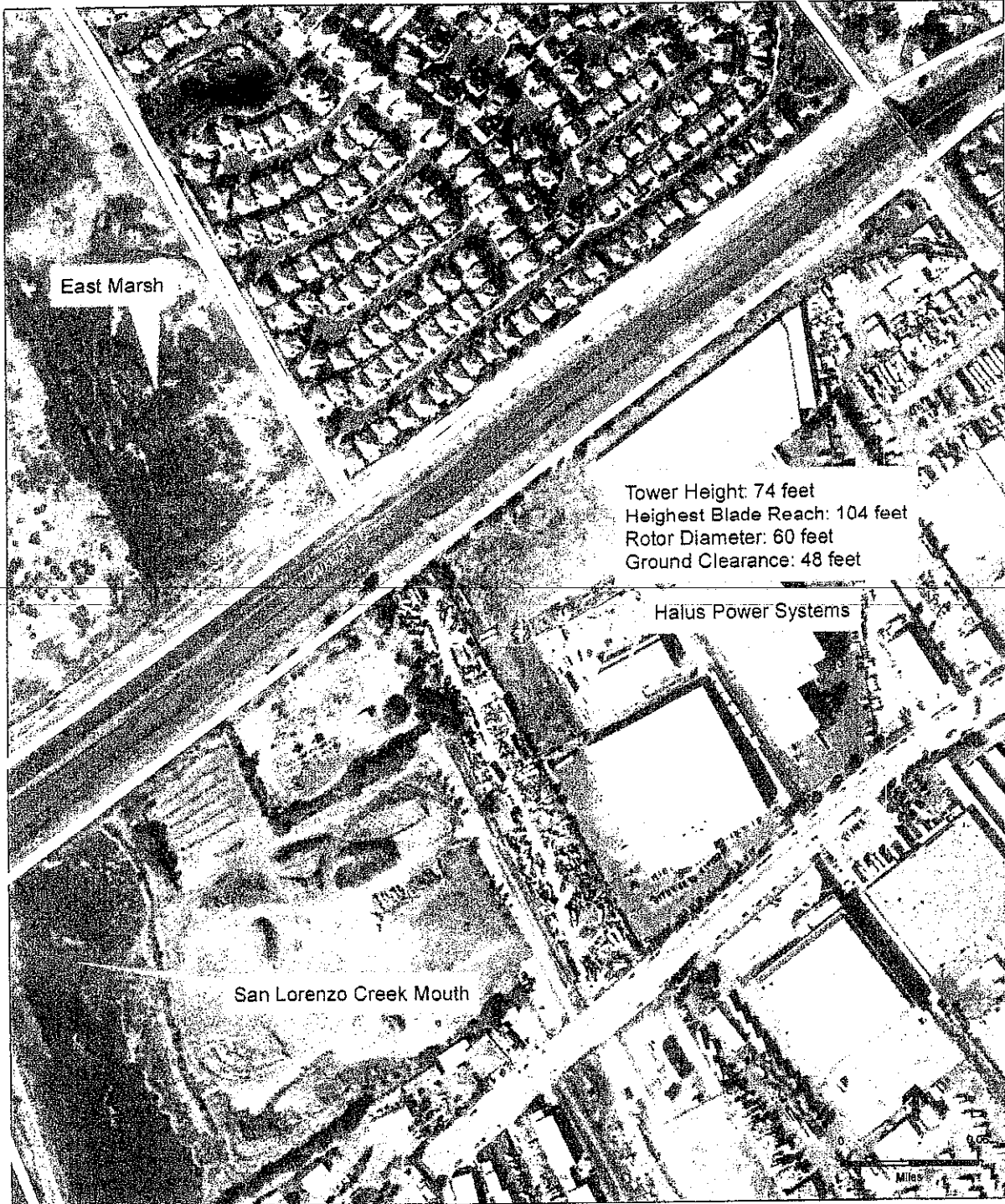
The City and community could benefit from adopting “wind turbine siting criteria” precedent of other jurisdictions. A common limit for significant wind turbine noise impacts to adjacent residential land uses is an increase of 10 dBA above existing ambient residential noise levels.

PTC 07-12 File


Paul Taylor, B.S., M.S.
Principal Environmental Scientist

The following and final page of this Report is Figure 1 depicting the Halus Proposed Wind Turbine Location, and Project vicinity residential, industrial and public recreational land uses in scaled aerial color photo perspective.

↓ Heron Bay Homeowners ↓



SOURCE: Microsoft Virtual Earth

Halus Power Systems

Figure 1
Proposed Turbine Location

Public Trails and Parks

Forensi s Group

Technical, Engineering, Construction, Medical & Scientific Experts

3452 East Foothill Blvd., Suite 1160, Pasadena, CA 91107-3160

626/795-5000 tel. 626/785-1950 fax

800/555-5422 (Toll Free)

e-mail: experts@Forensi sGroup.com

http://www.Forensi sGroup.com

Paul Taylor, B.S., M.S., R.E.A., Principal RESUME

SUMMARY

Corporate environmental science and regulatory consultant to real estate, commercial, industrial and public clients, and law firms. Expertise and proven success in the following areas:

- Executive Leadership and Diligence in Professional Business Planning and Practice;
- Principal Company Management in Communications, Technology and Production;
- Public Policy, Government and Corporate Regulatory Affairs Compliance and Issues Resolution;
- Strategic Research, Analysis and Planning, and Liability and Litigation Avoidance;
- Multidisciplinary Team Director and Public Policy Editorial.

~~A reputation for technical competence, professional integrity, aggressive advocacy and skillful, effective communications in all media.~~

EXPERIENCE

Present Principal, PAUL TAYLOR CONSULTING, environmental science and regulatory consultants to real estate, commercial, industrial and public clientele, with specialty in EIRs, EISs, wetland and wildlife permitting and mitigation plans, siting analyses, litigation support and expert testimony. Practice experience throughout Southern and Central California.

2004-2005 Principal Planner, PCR Services Corp., Santa Monica and Irvine.
Mr. Taylor was planning and CEQA manager for urban infill and large raw land developments in the fast-paced and complex Southern California market, with particular emphasis on environmental impact reports, mitigation strategies and entitlements processing. Projects located in Los Angeles, Riverside, San Bernardino and Kern Counties. Project Team leadership, consultants management and communications, and regulatory permitting are his strong points.

1991-2004 Founder and Managing Principal, TAYLOR & COMPANY, Los Angeles.
Mr. Taylor's executive experience, academic training, business and professional practice have emphasized a multidisciplinary approach in management and issues resolution. He has over 20 years experience, and provides principal project management with primary responsibilities in regulatory compliance strategy development, project permit programs and expediting, environmental impact report (CEQA EIR) and statement (NEPA EIS)

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<http://www.Forensi s' Group.com>

preparation and processing, environmental assessments and audits, land use analyses, water and wildlife resource mitigation plans and agreements, wetland and mining permits, recycling/solid waste management, litigation support, and expert testimony. As Principal-in-charge, Mr. Taylor personally represented each client in administrative and judicial

proceedings.

1988-1991 Director of Regulatory Affairs, Meredith/Boli & Associates, Inc.; Los Angeles, Santa Cruz, and Chicago.

Responsible for managing and directing feasibility studies, environmental research, and engineering investigations for industrial, commercial, residential, and waste management projects. Provided regulatory analysis, management and technical support on a variety of projects including site assessments, EISs, EIRs, endangered species habitat conservation plans (Section 10), wetlands permits (Section 404), waste recycling methodologies, regulatory compliance advisement, overall project permitting, forensic ecology, hearing presentations, and litigation support.

1985-1988 Manager of Environmental Services, Engineering Service Corp., Los Angeles, Santa Clarita and Palm Desert.

Responsible for managing and directing multi-disciplinary studies in preparation of EIRs for industrial, residential, and commercial developments. Provided regulatory compliance strategies and expedited agency approval for multi-use, raw land developments in Southern California.

1977-1984 Senior Project Manager, Nelson & Co., Inc. Engineers and Architects, New Orleans.

Responsible for environmental engineering studies for foreign and domestic, industrial and public projects. Responsible for industrial site selection studies in coastal and river systems. Manager of permit acquisition programs, and environmental issues resolution for major industrial facilities in sensitive environments in the US, Africa, South America, and the Pacific Rim.

1975-1977 Environmental Scientist, Burk and Associates, Inc., New Orleans.

Responsible for environmental impact assessments of industrial, commercial and recreational projects involving water pollution, sewerage facilities, noise pollution and aesthetic impacts.

1973-1975 Research Assistant, Tulane University Medical School, New Orleans.

Responsible for designing and conducting medical research laboratory experiments in endocrinology and microbiology. Researchers at this laboratory received the *Nobel Prize in Medicine* in 1977.



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626/795-5000 tel 626/795-1950 fax
800/555-5422 (tel Fax)

e-mail: experts@ForensisGroup.com
http://www.ForensisGroup.com

EDUCATION/TRAINING

M.S. Environmental Sciences, Tulane University, New Orleans, Louisiana;
B.S. Biology/Chemistry, Livingston University, Alabama;
Marine and Coastal Sciences Curricula, University of Alabama, Gulf Coast Research Laboratory;
Environmental Law Curriculum, Tulane University Law School;
Communications and Journalism Studies, Loyola University;
Hazardous Waste Management Workshop, University of Maryland;
California Environmental Quality Act Workshop, University of California at Irvine;
Environmental Policy Negotiations and Resolutions, Massachusetts Institute of Technology;
Los Angeles County Bar Assn. Member in Environmental Law Continuing Legal Education
(inactive);
PC Windows, MS Word/Works, and Excel Proficient

PROFESSIONAL CREDENTIALS

California Community College Lifetime Instructor's Credential in Ecology and Water Quality (1985)

PROFESSIONAL REGISTRATIONS

Registered Environmental Assessor in the State of California, R.E.A. No. 00850 (inactive)

ORGANIZATIONS/AFFILIATIONS

Founder and Director of *Land Trust Imprimatur* environmental accreditation program
Past President of West Los Angeles Homeowners Association
Associate Member, Los Angeles County Bar Association (inactive)
Institutional Affiliate of The Ecotourism Society (inactive)
Member of the Screen Actors Guild (inactive)

PUBLICATIONS

Mr. Taylor has authored and contributed to hundreds of scientific and regulatory reports on a variety of environmental matters. Mr. Taylor has supported, and actively participated in, numerous administrative and judicial proceedings, including expert court testimony.

Mr. Taylor has authored dozens of public policy news and analysis articles, and has been published in *The Wall Street Journal*, *Los Angeles Times*, *The Los Angeles Daily News*, *The Los Angeles Business Journal*, *San Francisco Chronicle*, *Investors Business Daily* and *The Washington Times*.

Mr. Taylor has also been published at noted public policy news websites such as "Media Matters" and "Common Conservative."

Mr. Taylor has been an on-air Guest Commentator and an environmental issues advisor with nationally



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626/795-5000 Tel. 626/795-1950 Fax
800/555-5422 (Toll Free)
e-mail: experts@forensisgroup.com
<http://www.ForensisGroup.com>

syndicated radio talk shows.

PRESENTATIONS

Mr. Taylor has been a Guest Lecturer for the University of California at Los Angeles Environmental Management curriculum.

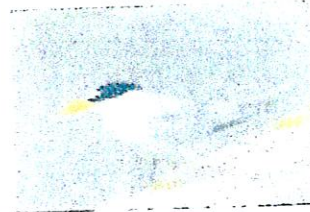
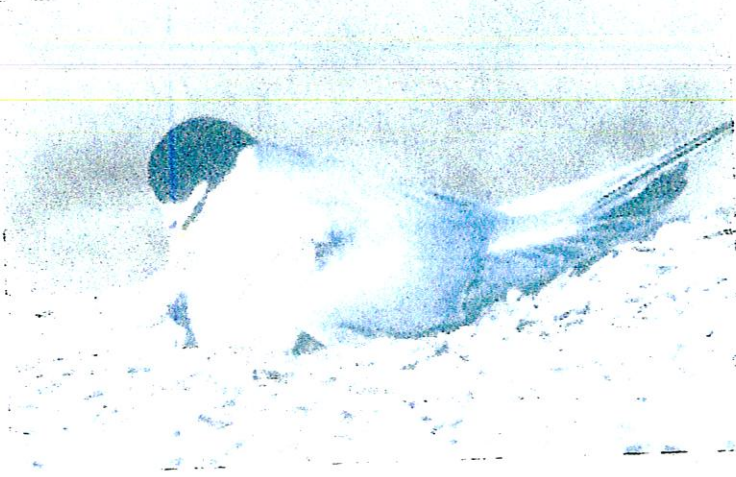
Mr. Taylor conducts a *Speaker Program* on environmental policy for trade groups, business associations, law firms and corporate gatherings.

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EXHIBIT C

California Least Tern

A Federally & State Endangered Species
Living on our San Leandro Shoreline



California Least Terns have been listed as endangered since 1970.

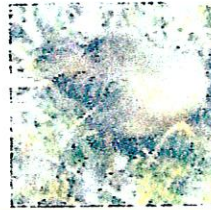
California Least Terns nest on beaches, mudflats, and sand dunes. Adults have short, forked tails and short yellowish legs. They have a distinctive triangular black cap across the eyes to the beak, and a white forehead and underparts. Their backs and tops of their wings are pale gray. The outer edges of their wings are black. Their bills are golden with a black tip.

Primary foraging sites for these opportunistic feeders are shallow estuaries, bays, and lagoons. They hover until they spot prey and then plunge into the water to grab a fish without fully submerging.

Courtship is an elaborate ritual that takes place near an exposed tidal flat or beach. In a ritual called the "fish-flight display," a male flies around with a small fish in his beak, often pursued by a female looking for a fishing mate. The chases are spirited and vocal as the birds weave high in the sky and make paired aerial glides, descending swiftly in close unison.

California Clapper Rail

A Federally Endangered Species
Living on our San Leandro Shoreline



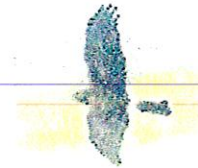
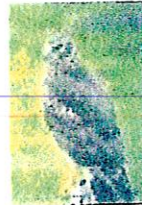
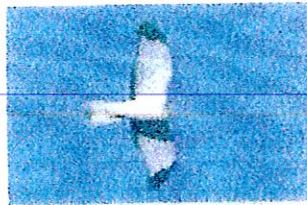
The California Clapper Rail is close to the brink of extinction.

The California Clapper Rail is a squat, short-necked, and long-legged bird with a modest streak. Appearing mostly brownish in color from afar, when seen up-close it becomes apparent that the bird has an intricate beauty: a rust-colored breast, brown streaks along its olive wings, and black-and-white bars on its flanks not only make it a wonderful sight, but also help the species hide in the pickleweed and cordgrass that typify its preferred habitats.

Once common in coastal salt marshes in northern and central California, the California Clapper Rail has declined precipitously in both range and number. Only 15% of the San Francisco Bay's original marshland remains today, and much of it is highly fragmented and altered. Since 1970, the California Clapper Rail has seen population increases but also in some years heartbreaking, somewhat unexplained declines.

Northern Harrier

A Federally Endangered Species
Living on our San Leandro Shoreline



Northern Harrier populations diminished with wetland destruction.

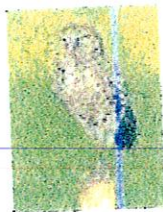
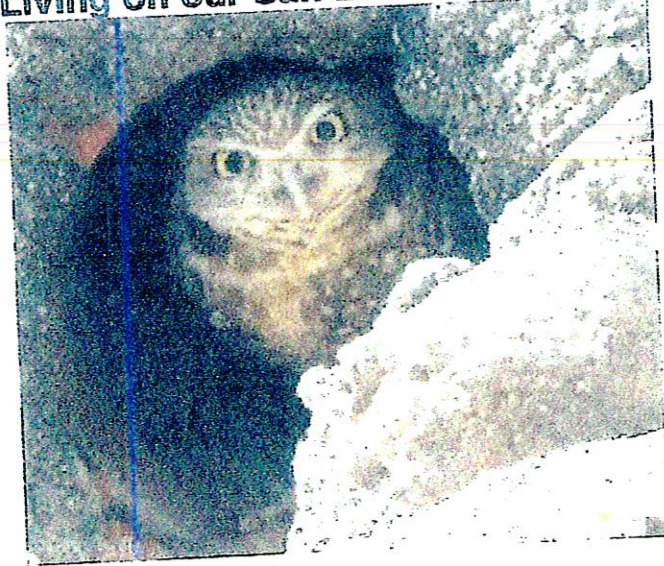
The slender-bodied Northern Harrier has a long tail and wings, yellow legs, owl-like facial discs, a conspicuous white rump patch, and yellow eyes. Adult males have blue-gray and white underparts. The females are more brown and tan. The Northern Harrier is medium-sized, with females typically larger than males.

Northern Harriers hunt for small mammals while flying over open habitats. The species is often called the "marsh hawk" because it inhabits open marshlands. It got the name "harrier" due to its habit of raiding or harrying its prey. A female, after receiving prey in flight from the male, will not return directly to the nest but will make several false landings to confuse predators.

Western Burrowing Owl

A Species of Special Concern

Living on our San Leandro Shoreline



In 2003, due to large declines of Western Burrowing Owls, California conservationists petitioned to list them as Endangered Species. Though unsuccessful, conservationists continue work on behalf of these owls.

The Western Burrowing Owl is small, long-legged, and yellow eyed, without ear tufts. It is white around the eyes and under the cheeks. Its body is mostly brown with white spots. These owls build their nests underground and are active both day and night (diurnal).

Their flight pattern involves rapid ascents (~30 m), hovering for 5-10 seconds, then rapid descents (~15 m). Males also fly in circular patterns. These owls' elaborate courtship involves cooing, bowing, and short flights.

People harm Western Burrowing Owls, destroying the ecosystem around them via wind turbine collisions, burning, and heavy equipment crushing.

EXHIBIT 2

**LAW OFFICES OF
A. ALAN BERGER
95 South Market Street
Suite 545
San Jose, CA 95113
Telephone: 408-536-0500
Facsimile: 408-536-0504**

February 5, 2013

Chairman of the Board of Zoning Adjustments
The Honorable Catherine Vierra Houston
c/o Sally Barros, Secretary to the BZA
835 E. 14th Street
San Leandro, CA 94577

City Attorney of the City of San Leandro
Attn: Jennifer Faught
555 12th Street #1500
Oakland, CA 94607

Re: The Intent of the City of San Leandro to Adopt a Mitigated Negative Declaration
Relative to the Application of Halus Power Systems to Install a Wind Turbine.
PLN2012-00006.

Via Overnight Mail, Facsimile and Email

Gentlepersons,

This is to advise you that I am the attorney for the Heron Bay Homeowners Association. As you are no doubt aware, I have previously filed on behalf of Heron Bay Homeowners Association Opposition and Amended Opposition to the application of Halus Power Systems (hereinafter referred to as "Halus") to install a 100-foot wind turbine on their property located in the City of San Leandro, adjacent to the homes of Heron Bay. I am advised that after several continuances, the above entitled matter is now set for public hearing and comment before the Board of Zoning Adjustments (hereinafter referred to as the "BZA") on Thursday, February 7, 2013.

I am directing this correspondence to your attention because it has recently been brought to my attention that one of the sitting members of the BZA, who apparently intends to rule on the Halus application on Thursday night, is guilty of egregious, unethical and illegal conduct. Board Member Janet Palma has published prejudicial and unethical comments that clearly indicate that she is not fit to hear or decide any issues relative to the Halus application or, frankly, any issues at all relative to Heron Bay Homeowners Association. On behalf of the Association, we hereby demand that Janet Palma recuse herself, or in the event that she refuses recusal, be removed from any hearing, argument

or vote regarding the Halus project. Only the City Council may decide whether or not she is even fit to serve the City and this Board in the future.

I have attached a ten page excerpt from the San Leandro Patch dated November 7, 2012 et.al. for your review. It is obvious that Ms. Palma was very disappointed that Benny Lee, a former President of the Heron Bay Homeowners Association and now an elected City Councilperson, won recent election over Mr. Chris Crow. On page 4, 9:47 pm, Nov.7, Ms. Palma states: "Damn Chris, I really thought you would make it. We need some real change in this city not someone who is going to back one "gated" community that should never and would never now have been built. Next time." Her obvious and stated prejudice against Benny Lee and the Heron Bay Association should be enough to have her removed from any vote involving Heron Bay, but she unfortunately goes much further in her later absurd rants. (I might note that her ignorance is also alarming, to wit: Heron Bay is not a "gated" community).

At page 4, 10:55 am, Nov. 8, in response to a comment by Carlos J. that its time to have the wind mill (sic) approved, she states: "That's right Carlos! Thank you."

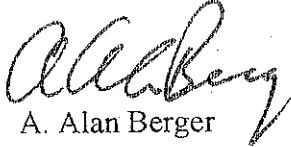
At page 5, 12:01 pm, Nov. 8, Palma states: "... not true that Halus has no local support, in fact just the opposite. And you never know what can happen about those supposed "private streets." Heron Bay are not good neighbors and do not believe in supporting the great San Leandro citizenry." Could there be a more clear statement demonstrating Ms. Palma's inherent prejudice to Heron Bay? Can one regard her comments as anything but a threat to Heron Bay relative to their private streets? She also clearly indicates her support of the Halus project notwithstanding that these comments were made before the final public comments and before the public hearing to be held this Thursday. To allow her to remain on the Board for this hearing is a mockery of fair play and public interest.

I direct your attention to the comments of Mr. Steve Leroux, who I do not know but whom I anticipate is a member of the Heron Bay community, made on page 5-6, 12:28 pm, Nov. 8. Mr. Leroux expresses his opinion as to the conduct of Ms. Palma with justifiable outrage and in a manner that should represent every owner of a home in Heron Bay and frankly every member of the City of San Leandro. Every citizen, at some time, may be a victim of Ms. Palma's predetermined decisions and prejudice. It is hard to imagine how she could have more clearly violated her oath as an appointed representative of the City Council and the People of San Leandro.

In the remainder of the chain of comments, Ms. Palma obviously realizes that she has committed her preformed notions, her prejudices and her unethical conduct to written form. She weakly attempts to soften her position but in this case the damage is done. She is clearly not fit to participate in any manner in the Halus application. Every citizen has the right to rely on the fact that each and every Board member approaches the entire hearing process in an unbiased manner and with no preformed judgments. Should she be allowed to participate, this egregious behavior will definitely be the subject of Court action. Frankly, it remains to be seen if she has already conveyed her poisonous attitude to other members of the BZA or to staff members of the City who have voiced an opinion

on the reasonableness of the Halus application. At a minimum the City must see that she does not participate on Thursday.

Very truly yours,

A handwritten signature in cursive script, appearing to read "A. Alan Berger".

A. Alan Berger

Enclosure
AAB/ceb

Editor [Zoneil Maharaj](#) zoneil.maharaj@patch.com

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Elections

Benny Lee Wins District 4; Reed & Mack-Rose In Nail Biter; Slim Hope For Measure L?

How many ballots remain uncounted, such as vote-by-mail folks who missed the postal deadline? They could swing 2 races. But Lee joins Jim Proia as a clear council winner.

By [Tom Abate](#) [Email the author](#) November 7, 2012

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1 of 1

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San Leandro: Benny Lee, president of the Heron Bay Homeowner's Association, wins his race for city council district four. Credit [Tom Abate](#)

Benny Lee led his closest challenger, Chris Crow, by a 60-40 margin in a four-way race Wednesday morning after ranked choice votes were counted, earning him a seat on the San Leandro City Council.

Lee will become the representative of council district four which covers Washington Manor. He joins incumbent Jim Prola, who handily beat challenger Hermy Almonte in a head to head race in council district six and the Mulford Gardens area.

But two races remain up for grabs in contests that prove how much each vote counts, especially in local election.

As of 10 am Wednesday, incumbent Councilwoman Ursula Reed led school board president Morgan Mack-Rose by 97 votes in a three-way race for district 2 which covers southeast San Leandro.

And Measure L, the \$39-per-house school parcel tax, was a little over a percent shy of the two-thirds margin it needed to pass.

Local blogger and election strategist Mike Katz said that based on past voter turnouts in San Leandro there are likely more than 5,000 uncounted ballots, such as vote-by-mail packets that were filled out too late to send by postal service and had to be dropped off in person Tuesday.

The Alameda County Registrar of Voters estimates there could be 140,000 late or provisional ballots still uncounted. The county has 28 days to certify elections though final tallies will likely be done much earlier.

In the Reed-versus-Mack-Rose race, the critical dynamic is what happens to the second-place votes of the third candidate, Bal Theater owner Dan Dillman. Reed has lead all along in first place votes. But Mack-Rose has gained on the incumbent by grabbing a larger share of Dillman's second choice votes.

So at this point the outcome hinges on two unknowns: the number of uncounted ballots, and how Dillman's second-choices are split between Reed and Mack-Rose.

A similar dynamic is at play with the Measure L parcel tax, which needed a daunting two-thirds margin to pass.

Measure L had started the night with a yes vote in the low 60s and had slowly climbed as the count progressed to end Tuesday with 65.38 percent of the 14,475 votes tabulated thus far.

But Katz said more than 22,000 ballots were cast in the 2010 San Leandro mayor's race.

Again, the variables are: how many ballots remain uncounted and whether the parcel tax will continue creeping up in the vote count to jump that two-thirds hurdle.

Stick with Patch for continuing election coverage and analysis.

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40 Comments



Leah Hall

10:59 am on Wednesday, November 7, 2012

Fingers and toes crossed!

Flag as inappropriate

Reply



Tom Abate

11:26 am on Wednesday, November 7, 2012

For?

Flag as inappropriate

Reply



Leah Hall

11:39 am on Wednesday, November 7, 2012

Flag as inappropriate

My candidates and ballot measures. :)

It was an energetic election season and this time I had several friends and neighbors ask me how I was voting on local candidates and measures. Perhaps this will be a small but meaningful factor in one of the closer races.

Win or lose, this feels pretty good going forward. :)



Leah Hall

12:02 pm on Wednesday, November 7, 2012

Woot-woot! Here's one of mine....

Flag as inappropriate

"Measure J passed with an amazing 84% of the vote. Great job, Oakland! This means \$475 million to ensure Oakland schools are safe and healthy, and that students and teachers have the technology and resources they need."

-- www.qopublicschools.org



Leah Hall

12:18 pm on Wednesday, November 7, 2012

84% voted "Yes"

Flag as inappropriate

Tip of the Hat, Oakland!



Leah Hall

3:05 pm on Wednesday, November 7, 2012

Forgive me, David. I'll take a pass and we aren't going anywhere soon.

Flag as inappropriate

We have many blessings right here in San Leandro, including all my lovely neighbors.



Chris Crow

4:17 pm on Wednesday, November 7, 2012

My Congratulations to Mr. Lee and his campaign on a strong victory. I wish him much luck and hope he can be the leader this community wants him to be.

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Outside of the sting of defeat I do not feel much different today than I did yesterday. As a competitor you understand defeat is always a possibility, and indeed I am more motivated today to be involved in the community.

The intense and invaluable experience in understanding my own flaws and my real strengths / friends is still a personal victory. Hopefully I can build on the lessons learned and relationships made to propel myself onward and upward.

Thank you to all of the people who voted for me first, second, or third and thank you to all of my supporters who helped me campaign and get my message out. There are still many, endless even, things for a non-city council member to work on to improve the quality of life in San Leandro and I look forward to continuing that work.

[Reply](#)

Whit Magor

6:25 pm on Wednesday, November 7, 2012

Good luck, Chris. Thank you for the effort.

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Justin H.

8:33 pm on Wednesday, November 7, 2012

Congratulations to Benny! It has been a great pleasure becoming friends over the last couple of months!! Your a Great Man and I am proud to have you as the councilman representing my family.

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[Reply](#)

[Janet Palma](#)

Flag as inappropriate

9:47 pm on Wednesday, November 7, 2012

Damn Chris, I really thought you would make it. We need some real change in this city not someone who is going to back one "gated" community that should never and would never now have been built. Next time!

[Reply](#)

[Carlos J](#)

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10:30 am on Thursday, November 8, 2012

Now it's time to get have the wind mill approved and the change the parking at the end of wicks!

[Reply](#)

[Janet Palma](#)

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10:55 am on Thursday, November 8, 2012

That's right Carlos! Thank you.

[anthony](#)

Flag as inappropriate

11:22 am on Thursday, November 8, 2012

Halus backed the losing candidate and has no local support, also the parking is on private property... what's your point?



[Marga Lacabe](#)

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11:55 am on Thursday, November 8, 2012

I am sad that Chris lost. I regret not having able to do more or be better at what we did.

Unlike Chris, however, I'm not going to be gracious.

Political attacks are part of every campaign. I have not shied away from pointing out Benny's duplicity in changing his positions to suit his audience or the ridiculous excuses he's given to try to drive Halus out of town.

But there should not be room for personal attacks.

Benny's campaign team - with his full knowledge - have spent the campaign making extremely offensive and misogynistic comments about me and other opponents, on Tavares' blog. I have a pretty thick skin and I've often been the subject of personal attacks, but never so vile and degrading. Before this campaign, I didn't quite understand the power of hate speech. In that sense it's been a learning experience.

I might still have said nothing, if it wasn't because these vile attacks extended to my 10-year old daughter. I have dealt with many evil people in this world, I've shaken hands with men who've committed genocide, but it takes someone truly sick to degrade a child.

At no point did Benny apologize or disavow those comments. Nor have any of his supporters.

There are no words to express my contempt for Benny. I am definitely unhappy that he won, but I'm even sadder to live in a city with people like him and his acolytes.

[Reply](#)

[Janet Palma](#)

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12:03 pm on Thursday, November 8, 2012

I am very sorry to hear about what happened to you and your daughter. Unconscionable, but not surprising. There are still some rude people in this relatively small city. Whether they won an election or not, doesn't make them good people in my opinion if they do things like that.

Steve Leroux

12:22 pm on Thursday, November 8, 2012

Marga, This "patch" apparently is another word for 'place where people who have lost touch with reality gather'. You didn't really believe Crow would win, did you? He was thrown off the Planning Commission for being a flake (and-worse), he is apparently so spaced out from his pot use that he forgot to pay his pot fine, if one reads his Planning Commission remarks they are boring and uninformed, etc. That you thought he had any chance to win is bizarre. It is great news that he lost as it shows the citizens of San Leandro can see the truth.

Flag as inappropriate

**Marga Lacabe**

12:31 pm on Thursday, November 8, 2012

"Steve",

The race is over, you won. The fact that you feel that you need to continue the personal attacks against Chris - I'm sure the ones against me/my daughter will follow - further confirms the lack of integrity of the Benny team.

Flag as inappropriate

**Chris Crow**

12:49 pm on Thursday, November 8, 2012

Steve, if may help you find a more correct reality.

I was not kicked off the Planning Commission because I was a flake. Yes, someone had been removed in the past because she failed to attend the meetings, but that was not me. The timeline and actions support the conclusion that I was kicked off because I put forth the real reason the city was trying to ban entertainment - as a response to cover themselves in the Faith Fellowship case. The week after I was removed the city called a "special" planning commission meeting to try and re-pass the ban that I lead an effort against. The Planning Commission was unanimous in rejecting the entertainment Ban and the City Council had one heck of a time trying to pass it themselves, until the City Attorney admitted on the record it was needed in response to Faith Fellowship litigation. Although I was removed with a 7 - 0 vote, all commissioners are appointed and removed 7-0. I went on to receive the endorsement in my race of 2 of those 7, so that should be obvious to reality checkers like yourself.

I took my Planning Commission experience seriously, but I'm not sure any comments you read in the minutes will be exciting without the context of the actual meeting.

As for my pot ticket, it was my mistake I did not take care of it when I was suppose to. As soon as I was made aware of it, I pleaded not guilty, the case was dismissed, and I paid no fine.

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**Marga Lacabe**

11:31 pm on Thursday, November 8, 2012

Fred, you don't change anything by running away. You do it by confronting it.

Flag as inappropriate

Janet Palma

12:01 pm on Thursday, November 8, 2012

@anthony - not true that Halus has no local support, in fact just the opposite. And you never know what can happen about those supposed "private streets". Heron Bay are not good neighbors and do not believe in supporting the greater San Leandro citizenry.

Flag as inappropriate

[Reply](#)**Steve Leroux**

12:28 pm on Thursday, November 8, 2012

Janet, as a San Leandro BZA member it is inappropriate to post the things you post. It is also a violation of your AICP code of ethics and proper city ethics. Someone needs to bring your behaviour to the attention of the city attorney and the APA. Can't you 'class' up and do the right thing for the city? So, what is someone who lives in Heron Bay and fwho is seeking a BZA action supposed to think of your statement?

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Are your prejudice prior to the hearing? And to call a whole group of citizens in Heron Bay who you have now labeled "not good neighbors" is unethical and tacky. Grow up or resign your position.



Chris Crow

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12:35 pm on Thursday, November 8, 2012

Steve, Janet has not said anything other than she knows there is community support to move forward with the Halus project.

anthony

Flag as inappropriate

7:28 pm on Thursday, November 8, 2012

Halus "project"... they want to erect a 100+ ft windmill structure for demonstration purposes and cover their PG&E bill, how is that a project ? Zero Net Energy Center/San Leandro is a project, this windmill is an act of convenience that could set harmful precedent.



Chris Crow

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8:24 pm on Thursday, November 8, 2012

Not for just demonstration, or energy production Anthony, indeed the most important function of the turbine is a "testing" platform so that they may expand their product base and grow their business. All of the bad data that Mr. Lee fed to the residents of Heron Bay has to do with large 400 ft Wind Turbine farms. I'm not sure how one 100ft testing platform = 400 ft wind farms. This is only hysteria that Mr. Lee has spread to justify harming a green business in his district.

anthony

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9:33 pm on Thursday, November 8, 2012

Testing platform for what, did that get mentioned? What can't they do now without the tower? Last I heard they were working on controller system research, can't that happen on a "bench" or simulation? I've assumed that prior to shipping units for installation they've done run ups on the ground, can't that be applied for testing as well? Even a green business can act in a non-green way, which I believe is the case here considering the location, so... thanks but no thanks. (BTW) I do my own research, and much more often than not, can recognize hysteria.



Marga Lacabe

Flag as inappropriate

11:30 pm on Thursday, November 8, 2012

Mike wrote a great article about the Halus project, including links to the documents filed with the city and what the research says about the claims the Heron Bay crowd are making. Also, make sure to take a look at the google map for the area.

The article is at: <http://www.sanleandrobytes.com/archives/016511.html>

Mike

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12:39 pm on Thursday, November 8, 2012

Wow, I have never heard of Janet Palma but googled her after reading the comment that she is on the BZA. Once again, wow a member of a San Leandro Board comes on a public website and throws out a threat to a San Leandro community?

Hey Janet, this is America, we have elections, obviously I am assuming the people you supported lost. Who ever supported you for the BZA should ask for your immediate dismissal. But since you are at large I am assuming the current mayor appointed you and doubt he has the moral fortitude to ask for your resignation.

[Reply](#)

Chris Crow



12:57 pm on Thursday, November 8, 2012

Hi Mike, Welcome to America! Free Speech and all. Always a pleasure to see you exercise your rights. I don't see a threat in Janet's remarks.

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Janet Palma

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12:58 pm on Thursday, November 8, 2012

I have not threatened anyone. I have not done anything unethical per AICP, which you clearly know nothing about. I am sad to see that people are using SL Patch to vent their ridiculous ideas and opinions about things and people they know little about. I will not participate again in this forum. Again, as Chris stated, I said nothing except that I do believe that there is support for the Halus wind turbine and that all information needs to be heard before it is considered a dead deal. I am still a citizen of this city and entitled to my opinion whether I serve on the BZA or not. And I do not appreciate the slur against our current Mayor who has tried diligently to represent all people of San Leandro and make this a more equitable place to live for everyone.

[Reply](#)

Mike

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1:02 pm on Thursday, November 8, 2012

." And you never know what can happen about those supposed "private streets". "

Sure sounds like an implied threat to me



Chris Crow

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1:04 pm on Thursday, November 8, 2012

That's right Mike, you never know. Heck, supposedly Benny Lee is trying to open the streets up for public parking, so at worst Janet is threatening Benny might follow through and stand by one of his positions. "you never know"

Janet Palma

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1:28 pm on Thursday, November 8, 2012

As my last comment here - and Chris please let's be done for responses on my issue - the implication related to the supposed "private streets" is that there is a question still in some people's mind whether those streets really are or should be private. No threat at all.

[Reply](#)

Kate

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1:54 pm on Thursday, November 8, 2012

Tom, is there any way to limit the number of posts from one author to ten a day, regardless of the story they are commenting on? These posts become tit-for-tat and the negativity sucks the life right out of me.

Go ahead you negative posters, attack my throat for writing the truth. I won't be checking back.

[Reply](#)

Justin H.

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9:01 pm on Thursday, November 8, 2012

Janet, Marga, Carlos how do them sour grapes taste?? I am curious....

[Reply](#)



Marga Lacabe

Flag as inappropriate

11:25 pm on Thursday, November 8, 2012

Justin,

In politics, like in life, you win some and you lose some. You take your losses as learning opportunities, and next time you do better. Being bitter about a defeat is a solid waste of time.

But neither in politics nor in life it's ever OK to degrade a child. You, as a father, should know that. The fact that you tacitly condone the behavior speaks volumes.



Leah Hall

10:29 pm on Thursday, November 8, 2012

Stephen Colbert Exposes Wind Power's Health Hazards

<http://www.colbertnation.com/the-colbert-report-videos/420904/november-07-2012/wind-power-s-health-hazards>

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[Reply](#)



Rob Rich

9:57 am on Friday, November 9, 2012

if you want to control what happens on your neighbor's property, then buy it. That's how you get to decide what legitimate uses go on there.

Halus is a good local business. They play by the rules. They've jumped through every hoop. Yet some want to keep moving the goal posts, dragging this out and driving costs up so that Halus will leave.

I hope Halus sticks it out. And I hope to see their generator spinning in the wind, soon.

Until then we bare witness to the spectacle of a modern day Don Quixote & his trusty sidekick Sancho Panza preparing to slay the lone windmill.

[Reply](#)

Carlos J

7:32 am on Friday, November 9, 2012

Who is playing Don Quixote, who is Quixote riding? Sad that one person generates hundred of lies and continuously changes his position, someone at Heron Bay has the chameleon syndrome. The windmill would allow him to see which way the wind is blowing... Halus has the support of the community and we'll continue to support Halus

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xigua

1:04 am on Tuesday, November 13, 2012

When Shaun Rein drives to <http://www.coachoutletonline.com> Coach Factory Outlet Shanghai's Pudong International Airport, about 10 minutes outside the airfield, he begins to notice a line of <http://www.louisvuittonoutlet.com> Louis Vuitton Purses cars including Rolls Royces and Bentleys parked along the side of the highway. Why? It's because <http://www.coachoutletstore.com> Coach Factory Outlet these people, who can spend a million dollars on a car, don't want to spend \$2 on parking at the garage, said <http://www.guccibeltsoutlets.com> Gucci Belts Rein, managing director at China Market Research Group. For Chinese leaders, the nation's newfound wealth represents <http://www.coachfactoryonline.com> Coach Factory Outlet a bumpy road as they try to steer the economy on a new path. The ruling Communist Party continues meetings this <http://www.coachfactoryonline.com> Coach Factory Outlet week for the 18th Party Congress, where it is expected to select and Li Keqiang to become the president <http://www.coachoutlet1.com> Coach Factory Online and premier, respectively,

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xiachui123

12:36 am on Wednesday, November 14, 2012

789with which a consensus emerged within hours t <http://www.coachfactoryoutletonline.com> air force, Western governments have shown little appetite for <http://www.coachoutlet.com> new military ventures in such a complex Arab state. nd Russia and China, which have blocked <http://www.coachfactoryoutlet.com> previous moves against Assad in the United Nations <http://www.coachoutlet.com> swiftly to alter positions which call for dialogue with Assad and view opposition groups <http://www.coachfactorystore.com> as being in thrall to the West. regional power Iran, in whose Shi'ite brand of <http://www.coachfactoryoutlet.com> Islam Assad's Alawite minority has its religious roots, remains firmly behind the president <http://www.coachoutletstore.com> in a conflict which pits him against majority Sunni Muslims supported by Iran's <http://www.coachoutletstore.com> Sunni Arab adversaries. After long arguments over whether and how to form the new <http://www.coachoutletonline.com> opposition assembly, the speed with which <http://www.coachoutletonline.com> that Khatib stood unopposed for the post of president was notable and may encourage its <http://www.coachoutletonline.com> supporters. His deputies will be Riad Seif, a veteran dissident who had proposed the U.S.-backed initiative <http://www.coachoutlet.com> to set up an umbrella group uniting

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groups inside and outside Syria, and Suhair al-Atassi, one <http://www.coachfactoryonlinebp.com> of the

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