

ITEM 9.A.

**MOORPARK CITY COUNCIL
AGENDA REPORT**

TO: Honorable City Council

FROM: Steven Kueny, City Manager 

DATE: December 30, 2013 (CC Meeting of 1/15/2014)

SUBJECT: Consider Resolution to Reject Initiation of any Proceedings to Amend the Covenant between the City of Moorpark and A-B Properties as Adopted by Ordinance No. 416 that Could Lead to the Allowance of a Natural Gas-Fired Power Plant on the Property Subject to the Covenant

BACKGROUND

On February 13, 2013, the California Public Utilities Commission authorized Southern California Edison (SCE) to procure between 215 and 290 Megawatts of electrical capacity in the Moorpark sub-area of the Big Creek/Ventura local reliability area to be available by 2021. This sub-area includes SCE's Goleta, Mandalay, Moorpark, Ormond Beach, and Santa Clara High Voltage Substations. On September 12, 2013, SCE issued a Request for Offers for gas-fired generation to meet the Local Capacity Requirements identified by the California Public Utilities Commission. Offers were due on December 16, 2013. Shortlist notification would take place on January 30, 2014, with agreements to be completed and signed by June 26, 2014. Approved bidders would then need to obtain permits from the California Energy Commission.

In October of 2013, the City was contacted by Diamond Generating Corporation, a subsidiary of Mitsubishi Corporation, to express its interest in responding to SCE's Request for Offers by proposing a 290-Megawatt natural gas-fired power plant in the City of Moorpark adjacent to the SCE substation. The power plant site would occupy all of Tract No. 5147 and Tentative Tract No. 5906 (a re-subdivision of Tract No. 5147), owned by A-B Properties. Development on this site is subject to a recorded Development Agreement and Covenant between the City of Moorpark and A-B Properties, which limits use of the property. A gas-fired power plant would not be a use permitted by either the Zoning Ordinance or the recorded Development Agreement and Covenant. On November 6, 2013, the City Attorney notified Paul Burns, General Partner of A-B Properties, that the development of a power plant on this site would be in violation of the Zoning Ordinance and recorded Development Agreement and Covenant. The Covenant is attached.

On November 20, 2013, the City Council held a public workshop to inform and solicit input from Moorpark residents on Diamond Generating Corporation's proposal. Diamond Generating Corporation staff made a brief presentation of their proposal at the workshop and members of the public commented on the proposal. At the conclusion of the workshop, the City Council took a position to oppose the project and directed staff to send letters informing Diamond Generating Corporation and SCE of the City's opposition to this project. The December 4, 2013 letters from the City Attorney are attached. On December 23, 2013, Competitive Power Ventures informed the City that it had obtained the controlling interest in the project, and had submitted a bid to SCE for the construction of a 300-Megawatt natural gas-fired power plant on this site.

DISCUSSION

Because a proposed natural gas-fired power plant is not permitted on the site by both the Zoning Ordinance and recorded Development Agreement and Covenant, consideration of such a use would require (1) an amendment to the Zoning Ordinance to list the power plant as a use permitted in the M-2 Zone; (2) an amendment to the recorded Development Agreement between the City and A-B Properties; (3) an amendment to the accompanying recorded Covenant in favor of the City; and (4) likely a merger of the subdivided parcels on the Property.

Section 65800 et seq. of the Government Code and Title 17 of the Moorpark Municipal Code outline the procedures for amending a Zoning Ordinance. A Zoning Ordinance Amendment is a legislative act that requires either initiation by City Council resolution or submission of an application. Section 65864 et seq. of the Government Code and Chapter 15.40 of the Moorpark Municipal Code outline the procedures for the amendment of Development Agreements. An amendment to an existing Development Agreement, like an amendment to a Zoning Ordinance, is also a legislative act of the City. Since amending the City's Zoning Ordinance or the Development Agreement are legislative acts, the City is under no obligation under the Government Code or Municipal Code to review such a request within any timeframe under the Permit Streamlining Act. In addition, both a Zoning Ordinance Amendment and an amendment to a Development Agreement must be considered at public hearings of the Planning Commission and City Council, after preparation of environmental review under the California Environmental Quality Act. Given that an amendment to either the Zoning Ordinance or Development Agreement to allow a natural gas-fired power plant on this site would likely have significant environmental effects, it is expected that such an amendment would require the preparation of an Environmental Impact Report. The potential effects include air pollution, visual impacts, and land use incompatibility, as outlined at the public workshop.

The Covenant is an agreement between the City and A-B Properties that runs with the land to restrict certain uses and activities on the Property. Unlike an amendment to the Zoning Ordinance or the Development Agreement, the City has no formal procedure for

considering an amendment to a Covenant it is a party to. Amending the Covenant would require the mutual consent of both the City and A-B Properties, and it is within the City's discretion whether it will consider any amendment to the Covenant to authorize development of a natural gas-fired power plant.

The M-2 zone generally provides for development of limited industrial activities that include light manufacturing, processing, and fabrication, and is intended to safeguard adjoining neighborhoods from intensive industrial uses. The City, through its letters to interested parties, has expressed concern that permitting this power plant within the M-2 Zone would be inconsistent with the zone's purpose and could lead to deleterious effects on the surrounding community. Given the Council's stated opposition to the project, it is recommended that the City Council take a position that it will not initiate a process to consider any amendment to the recorded Covenant between the City of Moorpark and A-B Properties. It is important for such a position to be considered at this time, so that Council action can be conveyed to SCE and Competitive Power Ventures before the shortlist determination is made by SCE on January 30, 2014.

FISCAL IMPACT

None.

STAFF RECOMMENDATION

Adopt Resolution No. 2014-_____.

Attachments:

1. Recorded Covenant
2. December 4, 2013 City Attorney Letters
3. Draft Resolution

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

CITY OF MOORPARK
799 Moorpark Avenue
Moorpark, California 93021
Attn: City Clerk

NO FEE REQUIRED PURSUANT TO:
Government Code Sections 6103 and 27383



20131122-00190595-0 1/8

Ventura County Clerk and Recorder
MARK A. LUNN

11/22/2013 09:28:37 AM

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COVENANT RUNNING WITH THE LAND
BY AND BETWEEN
THE CITY OF MOORPARK
AND
A-B PROPERTIES

ATTACHMENT 1

COVENANT RUNNING WITH THE LAND

THIS COVENANT is made this 4th day of September, by and between A-B Properties ("Covenantor") and the City of Moorpark ("Covenantee").

WHEREAS, Covenantor is the owner of certain real property consisting of approximately 34.53 acres, approximately 1,300 feet west of Gabbert Road and North of the Union Pacific Railroad Right-of-Way in the City of Moorpark, County of Ventura, more particularly described in Exhibit "A" attached hereto and made a part hereof ("the Covenantor Property"); and

WHEREAS, Covenantee is the owner of certain real property at 799 Moorpark Avenue, in the City of Moorpark, County of Ventura, more particularly described in Exhibit "B" attached hereto and made a part hereof ("the Covenantor Property"); and

WHEREAS, Covenantee rezoned the Covenantor Property from Agricultural Exclusive (AE) to Limited Industrial (M-2) through Ordinance No. 249 on December 16, 1998, but for the concern that some of the uses that are presently, or may subsequently be, allowed by right or permit in the M-2 zone are, or may be, inappropriate uses for the Covenantor Property because of its particular location;

WHEREAS, Covenantor acknowledges that some of the uses that are presently, or may subsequently be, allowed by right or permit in the M-2 zone are, or may be, inappropriate uses for the Covenantor Property because of its particular location; and

NOW, THEREFORE, in consideration of the mutual promises of the parties to this Covenant, each to the other as Covenantor and Covenantee, and expressly for the benefit of, and to bind, their successors in interest, the parties agree as follows:

1. Covenantee adopted Ordinance No. 249 rezoning the Covenantor Property from Agricultural Exclusive (AE) to Limited Industrial (M-2);
2. Covenantor agrees that, commencing on the effective date of the ordinance rezoning the Covenantor Property from Agricultural Exclusive (AE) to Limited Industrial (M-2), that Covenantor Property will be subject to the following restrictions; in addition to, and superseding the M-2 regulations. In the event there is a conflict between the restrictions in Paragraphs 2.A. and 2.B. of this Covenant and the M-2 regulations, the restrictions in Paragraphs 2.A. and 2.B. shall control.

- A. Primary uses, except agricultural crops, shall be conducted within completely enclosed buildings and metal faced buildings shall not be allowed as principal buildings. Outside storage and operations shall not be allowed as primary uses, only accessory outside storage shall be allowed, subject to the permitting requirements (Administrative Permit) and limitations in the M-2 zone (in conjunction with an approved use and screened by an eight (8) foot high masonry wall matched to the structure.
- B. The following uses shall not be allowed as a primary use:
- Manufacturing - Batteries
 - Manufacturing - Metal industries, primary; Rolling, drawing, and extruding
 - Manufacturing - Rubber and plastics products including tire retreading and recapping
 - Manufacturing - Cement, concrete and plaster, and product fabrication
 - Self-storage or mini-storage
 - Recreational vehicle storage
 - Distribution and transportation facilities
3. Covenantor and Covenantee agree that, commencing on the effective date of the Development Agreement, all uses specified in Paragraph 2.B. hereof that are presently allowed or that at any time in the future may be allowed in the M-2 (Limited Industrial) zone, whether by right or by permit, shall be deemed transferred from the Covenantor's Property to the Covenantee Property for the benefit of the Covenantee Property.
4. Covenantors and Covenantee agree that from time to time Covenantee may substitute any other property owned by Covenantee on the date of the substitution for the Covenantee Property ("the Substitute Covenantee Property") without the consent of Covenantor by the recordation of an amendment to this Covenant. The amendment shall describe the Substitute Covenantee Property and shall provide that, commencing on the date of recordation of the amendment, all uses not specified in Paragraph 2 hereof that are presently allowed, or that at any time in the future may be allowed, in the M-2 (Limited Industrial) zone, whether by right or by permit, shall be deemed transferred from that Covenantor Property to the Substitute Covenantee Property for the benefit of the Substitute Covenantee Property.
5. All of the covenants, restrictions, and limitations set forth herein shall run with the Covenantee Property and the Covenantor Property and shall benefit and bind all persons, whether natural or legal, having or acquiring any right, title, or interest in any portion of the Covenantee Property or the Covenantor Property. Each grantee of a conveyance or purchaser under a contract of sale or similar instrument that covers any right, title, or interest in or to any portion of the

Covenantee Property or the Covenantor Property, by accepting a deed or a contract of sale or similar instrument, accepts the conveyance or sale subject to, and agrees to be bound and benefited by, all of the covenants, restrictions and limitations set forth herein.

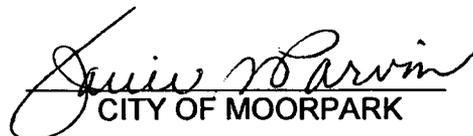
6. Nothing in this Covenant shall be construed so as to limit the right of Covenantee to rezone, or the right of Covenantor to petition Covenantee to rezone, the Covenantor Property in the future.
7. This Covenant shall remain in full force and effect until such time as an ordinance rezoning the Covenantor Property from Limited Industrial (M-2) to another zone designation becomes effective.
8. This Covenant may be enforced by proceedings at law or in equity against any person who violates or attempts to violate a covenant, restriction or limitation hereof. The prevailing party shall be entitled to recover such attorneys' fees and court costs as it reasonably incurs in such a proceeding.
9. In the event any provision of this Covenant is found to be invalid or unenforceable in any proceeding at law or in equity, such finding shall not affect the other provisions of this Covenant, which shall remain in full force and effect.
10. Either party may record in the office of the Recorder of Ventura County this Covenant or any amendment hereto specified in Paragraph 4 hereof without the consent of the other party.

IN WITNESS WHEREOF, Covenantor and Covenantee have executed this Covenant on the date first above written

COVENANTOR

COVENANTEE


A-B PROPERTIES


CITY OF MOORPARK

ACKNOWLEDGMENT

State of California
County of Ventura)

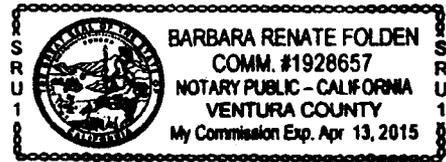
On July 17, 2013 before me, Barbara Renate Folden
(insert name and title of the officer)

personally appeared Paul D. Burns ,
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are
subscribed to the within instrument and acknowledged to me that he/she/they executed the same in
his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the
person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing
paragraph is true and correct.

WITNESS my hand and official seal.

Signature Barbara Renate Folden (Seal)





CITY OF MOORPARK

799 Moorpark Avenue, Moorpark, California 93021 | Phone (805) 517-6200 | Fax (805) 532-2205

PUBLIC AGENCY FORM OF ACKNOWLEDGMENT

STATE OF CALIFORNIA)
COUNTY OF VENTURA) ss.
CITY OF MOORPARK)

On this 4th day of September in the year 2013, before me, Maureen Benson, City Clerk of the City of Moorpark, personally appeared Janice S. Parvin, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and who is personally known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her authorized capacity as the Mayor of the City of Moorpark, and that by her signature on the instrument, acknowledged to me that the City executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

Witness my hand and Official Seal


Maureen Benson
City Clerk



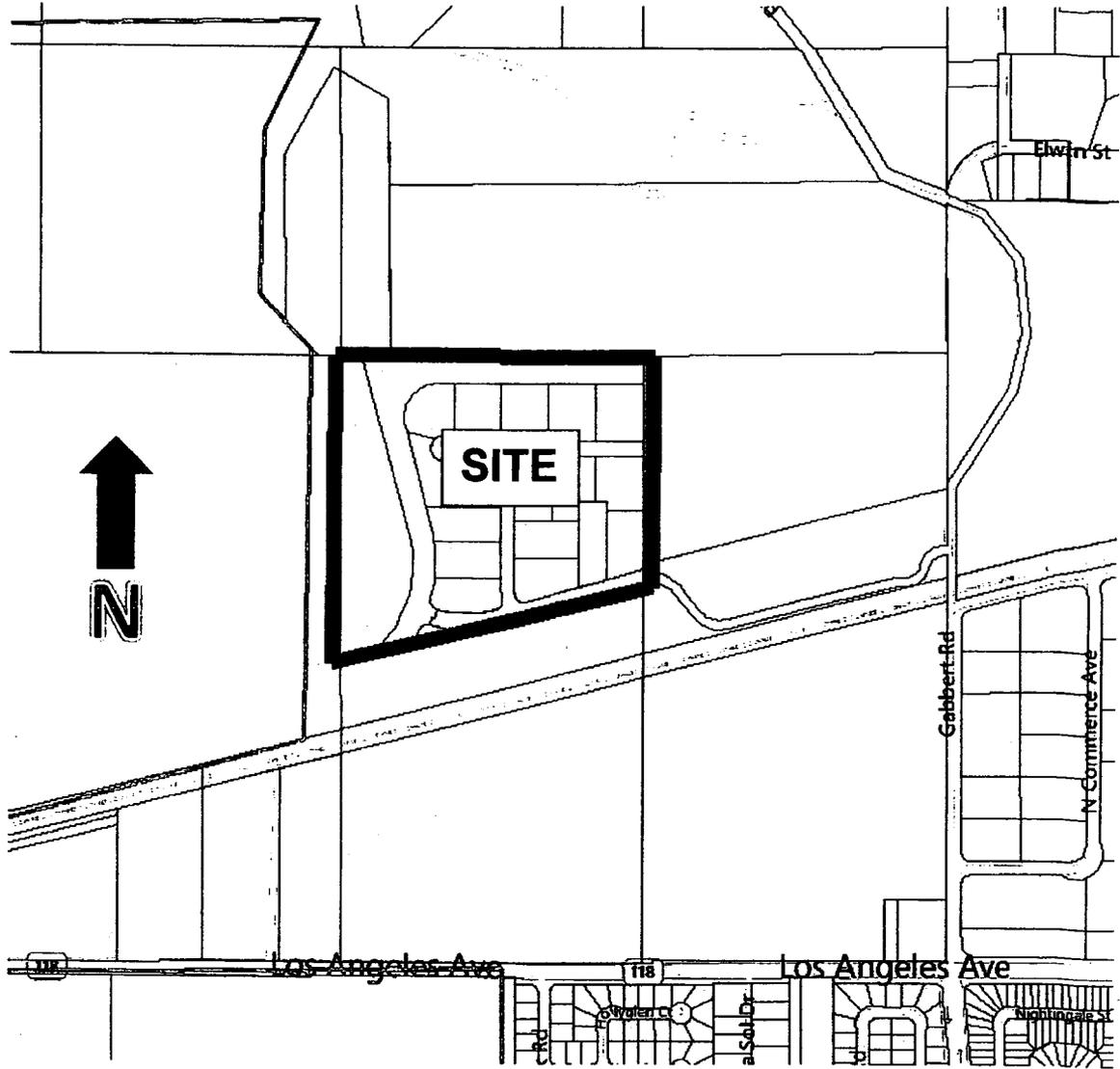


EXHIBIT A

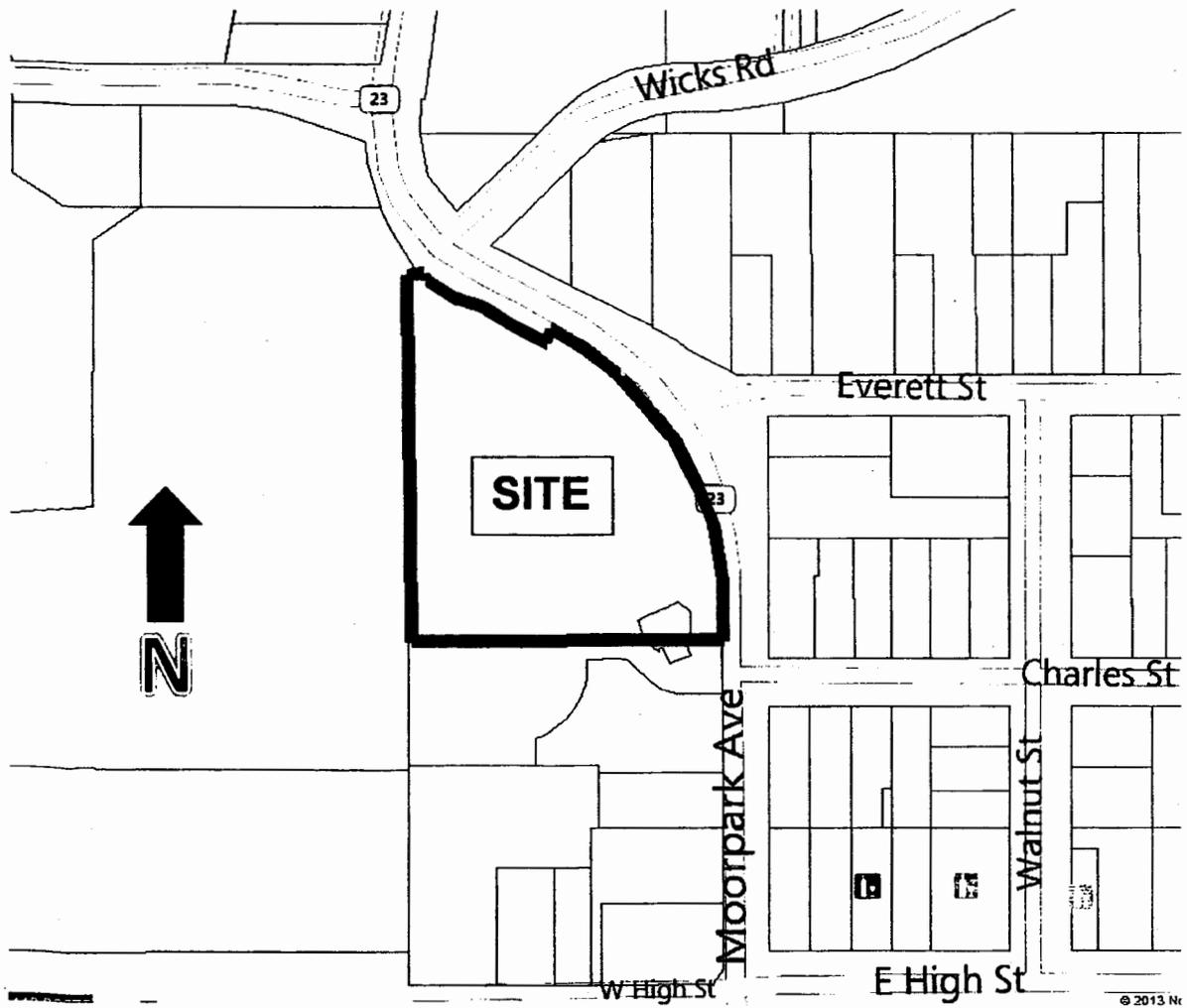


EXHIBIT B



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TELEPHONE 951.695.2373

December 4, 2013

VIA ELECTRONIC MAIL & U. S. MAIL

Mr. Russell C. Swartz
Senior Vice President and General Counsel
Southern California Edison
2244 Walnut Grove Avenue
Rosemead, California 91770

Re: Proposed Development of the Amaranto Energy Center in the City of Moorpark

Dear Mr. Swartz:

Our firm serves as the City Attorney for the City of Moorpark (the “City”), and I am the appointed City Attorney. Diamond Generating Corporation (“DGC”) has presented preliminary plans to the City to seek approval of a natural gas-fired power plant, referred to as the Amaranto Energy Center, on land owned by A-B Properties (the “Property”). I understand that DGC’s proposal is made in response to a solicitation for bids from Southern California Edison (“SCE”) for new energy production in the region.

At the November 20, 2013, Moorpark City Council meeting, the City Council conducted a workshop regarding DGC’s proposed power plant. At the conclusion of the workshop the City Council voted, based upon the information presented to the city to date, to take a position opposing the proposal at this time. The reasons for the City Council’s current opposition are expressed in this letter.

By way of background, the Property encompasses approximately 34.53 acres north of the Union Pacific Railroad right-of-way and west of Gabbert Road. It is immediately north of an 8.79 acre parcel owned by SCE. Development on the Property is governed by the City’s zoning regulations, the February 15, 2013, Development Agreement between the City and A-B Properties (the “Agreement”), its accompanying recorded Covenant in favor of the City (the “Covenant”), and a recorded tract map subdividing the Property into 17 individual lots. The Agreement is binding upon all successors in interest to the Property.

I have now had an opportunity to further review the land use entitlements applicable to the Property, including the Agreement and Covenant, and I want to make clear that DGC’s proposal would constitute a breach of the Agreement and Covenant and would violate the zoning restrictions on the Property.

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Paragraph B.1.1 of SCE's 2013 Request for Offers for Local Capacity Requirements clearly states that it will evaluate offers for "gas fired resources, including new resources . . . that meet all local, state, and federal rules, regulations, standards, permitting, and interconnection requirements and certifications as applicable." We read this term to preclude SCE from considering proposals for natural-gas fired power plants sited in the City that do not comply with the City's Zoning Code, an enforceable development agreement, or other land use regulations. As I have already mentioned, the proposed DGC facility would constitute a breach of the Agreement and Covenant and would directly conflict with the zoning restrictions on the Property. For the following reasons, SCE must reject any proposal from DGC for energy produced by a natural gas-fired power plant on the Property so as to avoid a breach of the Agreement and Covenant and avoid a violation of the City's Zoning Code.

First, Paragraph 4.1 of the Agreement provides that the permitted and conditionally permitted uses of the Property are limited to those allowed by the Project Approvals and the Agreement. Paragraph 1.4 provides that the Project Approvals include General Plan Amendment No. 97-2 and Zone Change No. 97-6. The latter, adopted by the City Council in 1998 as Ordinance No. 249, amended the zoning of the Property from Agricultural Exclusive (AE) to Limited Industrial (M-2). Paragraph 2 of the Covenant expressly states that the developable portion of the Property is subject to the permitted uses in the M-2 zone.

Moorpark Municipal Code Section 17.20.060 lists the permitted uses in the M-2 zone. It specifically permits "energy production from renewable resources," subject to a conditional use permit. The Code defines "energy production from renewable resources" as "any facility or installation such as a windmill, hydroelectric unit or solar collecting or concentrating array, which is designed and intended to produce energy from natural forces such as wind, water, sunlight or geothermal heat, or from biomass, for off-site use." Energy produced from natural gas does not fall within this definition.

Energy production from non-renewable sources and other types of energy generation facilities are not permitted uses under the Zoning Code. Therefore, DGC's proposed natural gas-fired power plant is not a permitted use on the Property. *See Building Industrial Legal Defense Fund v. Superior Court*, 72 Cal.App.4th 1410, 1416 (1999) (uses not identified in a zoning code are non-permitted uses within the zone).

DGC's legal counsel for this project, Mr. Michael J. Carroll, has already conceded that natural gas-fired power generation is not a permitted use within the M-2 zone. In a letter to me dated November 19, 2013, he noted that DGC would be required to seek

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approval for a non-listed use under the procedure provided by Moorpark Municipal Code Section 17.20.030. That section grants the City's Community Development Director discretion to approve certain non-permitted uses that are "similar in nature, character, and intensity" to one or more listed uses. Mr. Carroll argues that natural-gas fired power generation is similar in nature and character to renewable energy production and less intensive than other permitted uses within the M-2 zone.

This argument is simply untenable. Energy produced from burning fossil fuels, including most types of natural gas, involves significantly more health and environmental risks than energy produced from natural forces. In recognition that certain renewable sources may also pose certain risks, the City still requires a conditional use permit for energy production from renewable sources in the M-2 zone. The City's decision to exclude non-renewable energy production in the M-2 zone, while allowing non-renewables with a conditional use permit, was based on the fact that the two categories of uses are dissimilar.

Second, even if a natural gas-fired power plant were a permitted use on the Property, the proposed Amaranto Energy Center would not be consistent with the development requirements within the M-2 zone. Moorpark Municipal Code Section 17.24.035 provides that the maximum height of all buildings and structures located within the M-2 zone is thirty feet. Although this height may be increased to sixty feet with approval of a conditional use permit, the proposed Amaranto Energy Center would exceed even this higher limit. DGC's proposal to the City estimates that the power plant would be approximately seventy feet high, with smokestacks reaching up to eighty feet in height. Such a structure would require an amendment to the City's Zoning Code to raise the current height limit.

Although the Zoning Code authorizes the City to grant a variance to deviate from the height limit, the proposed power plant would not meet the standard for doing so. For the City to grant a variance, Moorpark Municipal Code Section 17.44.040(E) requires that the City's Planning Commission find "special circumstances applicable to the subject property with regard to size, shape, topography, location or surroundings, such that the strict application of the zoning regulations denies the property owner privileges enjoyed by other property owners in the vicinity and under identical zoning districts." The Planning Commission must also find that the variance "will not confer a special privilege inconsistent with the limitations upon other properties in the same vicinity and zone." In this case, the City's denial of a height limit variance would not preclude A-B Properties from developing the Property in a manner consistent with the permitted uses allowed on all other properties in the M-2 zone and consistent with the Agreement and Covenant. The City has not granted a variance above sixty feet to any

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property within the zone, and doing so in this instance would confer a special privilege to A-B Properties and DGC not available to other properties.

Third, the proposed Amaranto Energy Center would not be consistent with the development standards required within the M-2 zone. The purpose of the M-2 zone is to provide suitable areas for the development of industrial activities that include light manufacturing, processing, and fabrication. It is intended to safeguard adjoining industrial sites, nearby non-industrial properties, and the surrounding community from intensive industrial uses or development.

To effectuate this purpose, Moorpark Municipal Code Section 17.36.050(A)(3)(a) provides that “[t]he following shall be maintained at levels which are appropriate for the zone and geographic area and are not objectionable at the point of measurement when the use is in normal operation:

- i. Smoke, odors, vapors, gases, acids, fumes, dust, dirt, fly ash or other forms of air pollution;
- ii. Noise, vibration, pulsations or similar phenomena;
- iii. Glare or heat;
- iv. Radioactivity or electrical disturbance. The point of measurement for these factors shall be at the lot or ownership line surrounding the use.”

Given the probable size and magnitude of the Amaranto Energy Center, which is described as a 290 megawatt power plant, we have significant questions and concerns as to whether it would violate these standards.

Fourth, Paragraph 2 of the Covenant provides that “[p]rimary uses, except agricultural crops, shall be conducted within completely enclosed buildings and metal faced buildings shall not be allowed as principal buildings.” The examples of modern natural-gas fired power plants provided to the City by DGC, including pictures of DGC’s own facilities, are constructed almost entirely out of metallic materials. While we understand that DGC may be willing to enclose the proposed power plant within a non-metallic building, we have yet to receive such a proposal in writing. Assuming the proposed facility on the Property would be constructed in a manner similar to other natural gas-fired power plants, the facility would violate the terms of the Covenant.

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Finally, the Agreement was intended to permit development of 17 individual buildings on the Property, not a single, large industrial project. This intent was made clear in the Mitigated Negative Declaration (MND) applicable to the Agreement. The MND reviewed the environmental impact of subdividing the Property into 17 industrial lots “for the future development of 17 *industrial buildings*” (italics added). The MND estimated that the 17 buildings would have footprints ranging from 17,424 square feet to 21,257 square feet. The Property is already governed by an approved and recorded final tract map (Tract No. 5147), which subdivides the Property into 17 individual lots, and the City Council approved a new tentative tract map to re-subdivide the Property into 17 individual lots only six months ago.

This plan of development contemplated in the Agreement and Tentative Tract Map was made in recognition that the site is located near a rural residential neighborhood and other non-industrial properties. In fact, the adjacent SCE property was rezoned from Limited Industrial to Agricultural Exclusive in 2011. Given the surrounding land uses, the City believed that appropriate development on the Property would be limited to relatively small scale, light industrial uses. One large natural gas-fired power plant encompassing all or nearly all of the Property contradicts the clear intent of the Agreement.

As to state law, we are aware that the California Energy Commission (CEC) has siting authority with respect to certain power plants of 50 megawatts or greater. Public Resources Code Section 25500. However, Public Resources Code Section 25525 states that the CEC may not certify a facility that does not conform with applicable local “standards, ordinances, or laws.” Only where the CEC determines there are no more “prudent and feasible means of achieving public convenience and necessity” may the CEC site a facility in conflict with local law. *Id.* The proposed Amaranto Energy Center is clearly incompatible with the Agreement, Covenant, and the City’s zoning development standards and requirements, and consequently the CEC would need to take the extraordinary, and in our opinion, unlawful action to override all of these restrictions and agreements to potentially approve the proposal.

The CEC has described its override authority as “an extraordinary measure which . . . must be done in as limited a manner as possible.” California Energy Commission Decision, Metcalf Energy Center, CEC Pub. No. P800-01-023, Docket No. 99-AFC-3 (Sept. 2001), p. 469. In fact, we have found no instance where the CEC has used its authority to override a development agreement applicable to a proposed site, and we do not believe that its authority extends to override these types of restrictions. Under Public Resources Code Section 25500, the CEC’s exclusive authority to certify power plant sites supersedes only “applicable statute[s], ordinance[s], or regulation[s],” not

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agreements and covenants. Therefore, approval of DGC's proposal by SCE would be futile.

Development of the proposed Amaranto Energy Center on the Property is not permitted because it is inconsistent with the City's zoning regulations, the Agreement, and its accompanying Covenant.

Furthermore, given the clear intent of the entitlements on the Property and the Covenant, there is no basis for modifying the Agreement or amending the Zoning Code to accommodate the proposed power plant.

Violations of the Agreement may be remedied by injunctive relief and specific performance. In certain situations the City may also withhold the issuance of building permits for the Property until a violation is cured.

The City therefore urges SCE to reject DGC's proposal for natural gas-fired energy production on the Property.

Thank you for your consideration.

Very truly yours,



Kevin G. Ennis
City Attorney
City of Moorpark

Attachments: 2013 Development Agreement and Covenant

cc: Honorable Mayor Parvin and Members of the Moorpark City Council (w/o attachments)
Steven Kueny, City Manager (w/o attachments)
David Bobardt, Community Development Director (w/o attachments)
Rudolph Gonzales, Local Public Affairs Region Manager, Southern California Edison
Gene Lee, Trading Specialist, Southern California Edison
Jesse Bryson, Principal Manager, Southern California Edison

RICHARD RICHARDS
(1916-1988)

GLENN R. WATSON
(1917-2010)

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December 4, 2013

VIA ELECTRONIC MAIL & U. S. MAIL

Mr. Michael J. Carroll
Latham & Watkins LLP
650 Town Center Drive, 20th Floor
Costa Mesa, California 92626-1925

Re: Proposed Development of the Amaranto Energy Center in the City of Moorpark

Dear Mr. Carroll:

As you may know, our firm serves as the City Attorney for the City of Moorpark (the "City"), and I am the appointed City Attorney. Your client, Diamond Generating Corporation ("DGC") has presented preliminary plans to seek approval from the City for a natural gas-fired power plant, referred to as the Amaranto Energy Center, on land owned by A-B Properties (the "Property"). I understand that DGC's proposal is made in response to a solicitation for bids from Southern California Edison ("SCE") for new energy production in the region.

At the November 20, 2013, Moorpark City Council meeting, the City Council conducted a workshop regarding DGC's proposed power plant. You attended that workshop and provided information to the City Council regarding DGC's proposal. As you know, at the conclusion of the workshop, the City Council voted, based upon the information presented to the City to date, to take a position opposing the proposal at this time. The reasons for the City Council's current opposition are expressed in this letter.

By way of background, development on the Property, which encompasses approximately 34.53 acres north of the Union Pacific Railroad right-of-way and west of Gabbert Road, is governed by the City's zoning regulations, the February 15, 2013, Development Agreement between the City and A-B Properties (the "Agreement"), its accompanying recorded Covenant in favor of the City (the "Covenant"), and a recorded tract map subdividing the Property into 17 individual lots. The Agreement is binding upon all successors in interest to the Property.

I have now had an opportunity to further review the land use entitlements applicable to the Property, including the Agreement and Covenant, and I want to make clear that DGC's proposal would constitute a breach of the Agreement and Covenant and would violate the zoning restrictions on the Property.

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Paragraph B.1.1 of SCE's 2013 Request for Offers for Local Capacity Requirements clearly states that it will evaluate offers for "gas fired resources, including new resources . . . that meet all local, state, and federal rules, regulations, standards, permitting, and interconnection requirements and certifications as applicable." We read this term to preclude SCE from considering proposals for natural-gas fired power plants sited in the City that do not comply with the City's Zoning Code, an enforceable development agreement, or other land use regulations. As I have already mentioned, the proposed DGC facility would constitute a breach of the Agreement and Covenant and would directly conflict with the zoning restrictions on the Property. For the following reasons, we believe SCE should reject DGC's proposal so as to avoid a breach of the Agreement and Covenant and avoid a violation of the City's Zoning Code.

First, Paragraph 4.1 of the Agreement provides that the permitted and conditionally permitted uses of the Property are limited to those allowed by the Project Approvals and the Agreement. Paragraph 1.4 provides that the Project Approvals include General Plan Amendment No. 97-2 and Zone Change No. 97-6. The latter, adopted by the City Council in 1998 as Ordinance No. 249, amended the zoning of the Property from Agricultural Exclusive (AE) to Limited Industrial (M-2). Paragraph 2 of the Covenant expressly states that the developable portion of the Property is subject to the permitted uses in the M-2 zone.

Moorpark Municipal Code Section 17.20.060 lists the permitted uses in the M-2 zone. It specifically permits "energy production from renewable resources," subject to a conditional use permit. The Code defines "energy production from renewable resources" as "any facility or installation such as a windmill, hydroelectric unit or solar collecting or concentrating array, which is designed and intended to produce energy from natural forces such as wind, water, sunlight or geothermal heat, or from biomass, for off-site use." Energy produced from natural gas does not fall within this definition.

Energy production from non-renewable sources and other types of energy generation facilities are not permitted uses under the Zoning Code. Therefore, DGC's proposed natural gas-fired power plant is not a permitted use on the Property. *See Building Industrial Legal Defense Fund v. Superior Court*, 72 Cal.App.4th 1410, 1416 (1999) (uses not identified in a zoning code are non-permitted uses within the zone).

In your letter to me dated November 19, 2013, I understand you to have already conceded that natural gas-fired power generation is not a permitted use within the M-2 zone. In your letter, you noted that DGC would be required to seek approval for

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a non-listed use under the procedure provided by Moorpark Municipal Code Section 17.20.030. That section grants the City's Community Development Director discretion to approve certain non-permitted uses that are "similar in nature, character, and intensity" to one or more listed uses. You allege that natural-gas fired power generation is similar in nature and character to renewable energy production and less intensive than other permitted uses within the M-2 zone.

This argument is simply untenable. Energy produced from burning fossil fuels, including most types of natural gas, involves significantly more health and environmental risks than energy produced from natural forces. In recognition that certain renewable sources may also pose certain risks, the City still requires a conditional use permit for energy production from renewable sources in the M-2 zone. The City's decision to exclude non-renewable energy production in the M-2 zone, while allowing non-renewables with a conditional use permit, was based on the fact that the two categories of uses are dissimilar.

Second, even if a natural gas-fired power plant were a permitted use on the Property, the proposed Amaranto Energy Center would not be consistent with the development requirements within the M-2 zone. Moorpark Municipal Code Section 17.24.035 provides that the maximum height of all buildings and structures located within the M-2 zone is thirty feet. Although this height may be increased to sixty feet with approval of a conditional use permit, the proposed Amaranto Energy Center would exceed even this higher limit. DGC's proposal to the City estimates that the power plant would be approximately seventy feet high, with smokestacks reaching up to eighty feet in height. Such a structure would require an amendment to the City's Zoning Code to raise the current height limit.

Although the Zoning Code authorizes the City to grant a variance to deviate from the height limit, the proposed power plant would not meet the standard for doing so. For the City to grant a variance, Moorpark Municipal Code Section 17.44.040(E) requires that the City's Planning Commission find "special circumstances applicable to the subject property with regard to size, shape, topography, location or surroundings, such that the strict application of the zoning regulations denies the property owner privileges enjoyed by other property owners in the vicinity and under identical zoning districts." The Planning Commission must also find that the variance "will not confer a special privilege inconsistent with the limitations upon other properties in the same vicinity and zone." In this case, the City's denial of a height limit variance would not preclude A-B Properties from developing the Property in a manner consistent with the permitted uses allowed on all other properties in the M-2 zone and consistent with the

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Agreement and Covenant. The City has not granted a variance above sixty feet to any property within the zone, and doing so in this instance would confer a special privilege to A-B Properties and DGC not available to other properties.

Third, the proposed Amaranto Energy Center would not be consistent with the development standards required within the M-2 zone. The purpose of the M-2 zone is to provide suitable areas for the development of industrial activities that include light manufacturing, processing, and fabrication. It is intended to safeguard adjoining industrial sites, nearby non-industrial properties, and the surrounding community from intensive industrial uses or development.

To effectuate this purpose, Moorpark Municipal Code Section 17.36.050(A)(3)(a) provides that “[t]he following shall be maintained at levels which are appropriate for the zone and geographic area and are not objectionable at the point of measurement when the use is in normal operation:

- i. Smoke, odors, vapors, gases, acids, fumes, dust, dirt, fly ash or other forms of air pollution;
- ii. Noise, vibration, pulsations or similar phenomena;
- iii. Glare or heat;
- iv. Radioactivity or electrical disturbance. The point of measurement for these factors shall be at the lot or ownership line surrounding the use.”

Given the probable size and magnitude of the Amaranto Energy Center, which is described as a 290 megawatt power plant, we have significant questions and concerns as to whether it would violate these standards.

Fourth, Paragraph 2 of the Covenant provides that “[p]rimary uses, except agricultural crops, shall be conducted within completely enclosed buildings and metal faced buildings shall not be allowed as principal buildings.” The examples of modern natural-gas fired power plants provided to the City by DGC, including pictures of DGC’s own facilities, are constructed almost entirely out of metallic materials. While we understand that DGC may be willing to enclose the proposed power plant within a non-metallic building, we have yet to receive such a proposal in writing. Assuming the proposed facility on the Property would be constructed in a manner similar to other natural gas-fired power plants, the facility would violate the terms of the Covenant.

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Finally, the Agreement was intended to permit development of 17 individual buildings on the Property, not a single, large industrial project. This intent was made clear in the Mitigated Negative Declaration (MND) applicable to the Agreement. The MND reviewed the environmental impact of subdividing the Property into 17 industrial lots “for the future development of 17 *industrial buildings*” (italics added). The MND estimated that the 17 buildings would have footprints ranging from 17,424 square feet to 21,257 square feet. The Property is already governed by an approved and recorded final tract map (Tract No. 5147), which subdivides the Property into 17 individual lots, and the City Council approved a new tentative tract map to re-subdivide the Property into 17 individual lots only six months ago.

This plan of development contemplated in the Agreement and Tentative Tract Map was made in recognition that the site is located near a rural residential neighborhood and other non-industrial properties. Given the surrounding land uses, the City believed that appropriate development on the Property would be limited to relatively small scale, light industrial uses. One large natural gas-fired power plant encompassing all or nearly all of the Property contradicts the clear intent of the Agreement.

As to state law, we are aware that the California Energy Commission (CEC) has siting authority with respect to certain power plants of 50 megawatts or greater. Public Resources Code Section 25500. However, Public Resources Code Section 25525 states that the CEC may not certify a facility that does not conform with applicable local “standards, ordinances, or laws.” Only where the CEC determines there are no more “prudent and feasible means of achieving public convenience and necessity” may the CEC site a facility in conflict with local law. *Id.* The proposed Amaranto Energy Center is clearly incompatible with the Agreement, Covenant, and the City’s zoning development standards and requirements, and consequently the CEC would need to take the extraordinary, and in our opinion, unlawful action to override all of the restrictions and agreements to potentially approve the proposal.

The CEC has described its override authority as “an extraordinary measure which . . . must be done in as limited a manner as possible.” California Energy Commission Decision, Metcalf Energy Center, CEC Pub. No. P800-01-023, Docket No. 99-AFC-3 (Sept. 2001), p. 469. In fact, we have found no instance where the CEC has used its authority to override a development agreement applicable to a proposed site, and we do not believe that its authority extends to override these types of restrictions. Under Public Resources Code Section 25500, the CEC’s exclusive authority to certify power plant sites supersedes only “applicable statute[s], ordinance[s], or regulation[s],” not

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agreements and covenants. Therefore, approval of DGC's proposal by SCE would be futile.

Development of the proposed Amaranto Energy Center on the Property is not permitted because it is inconsistent with the City's zoning regulations, the Agreement, and its accompanying Covenant.

Furthermore, given the clear intent of the entitlements on the Property and the Covenant, there is no basis for modifying the Agreement or amending the Zoning Code to accommodate the proposed power plant.

Violations of the Agreement may be remedied by injunctive relief and specific performance. In certain situations the City may also withhold the issuance of building permits for the Property until a violation is cured.

The City therefore urges DGC to discontinue its efforts to develop the proposed Amaranto Energy Center on the Property.

If you have any questions regarding this matter, please contact me.

Very truly yours,



Kevin G. Ennis
City Attorney
City of Moorpark

Attachments: 2013 Development Agreement and Covenant

cc: Honorable Mayor Parvin and Members of the Moorpark City Council (w/o attachments)
Steven Kueny, City Manager (w/o attachments)
David Bobardt, Community Development Director (w/o attachments)
David N. Hicks, Director, Development, Diamond Generating Corporation

RESOLUTION NO. 2014-_____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MOORPARK, CALIFORNIA, TO REJECT INITIATION OF ANY PROCEEDINGS TO AMEND THE COVENANT BETWEEN THE CITY OF MOORPARK AND A-B PROPERTIES AS ADOPTED BY ORDINANCE NO. 416 THAT COULD LEAD TO THE ALLOWANCE OF A NATURAL GAS-FIRED POWER PLANT ON THE PROPERTY SUBJECT TO THE COVENANT

WHEREAS, on January 16, 2013, the Moorpark City Council adopted Ordinance No. 416 (effective February 15, 2013), approving a Development Agreement between the City of Moorpark and A-B Properties regarding approximately 34.53 acres approximately 1,300 feet west of Gabbert Road and north of the Union Pacific Railroad right-of-way (Property); and

WHEREAS, Section 6.18 of the Development Agreement required the execution and recordation of a Covenant (Appendix B of the Development Agreement) to limit the use of the Property; and

WHEREAS, the developable portion of the Property is located within the Limited Industrial (M-2) Zone, with an area set aside as a conservation easement located in the Agricultural Exclusive (A-E) Zone; and

WHEREAS, the Covenant recorded on November 22, 2013 by Instrument No. 20131122-00190595-0 limits the use of the Property to those uses permitted in the M-2 Zone, with certain specific listed uses prohibited on the Property; and

WHEREAS, a natural gas-fired power plant is not a permitted use in the M-2 Zone and therefore is not permitted on the Property; and

WHEREAS, the City has been approached by Diamond Generating Corporation and later by Competitive Power Ventures on a proposal to construct a natural gas-fired power plant on the Property; and

WHEREAS, allowance of a natural gas-fired power plant on the Property would require an amendment to the Covenant; and

WHEREAS, after holding a November 20, 2013 public workshop on the proposed natural gas-fired power plant on the Property, the City Council took a position in opposition to the proposal based on its concerns about the negative effects of siting a natural gas-fire power plant on the Property;

WHEREAS, a large natural-gas fired power plant would be inconsistent with the uses presently permitted within the M-2 Zone and the purposes of the M-2 Zone; and

WHEREAS, natural-gas fired energy production could threaten neighboring communities with certain harmful effects associated with the burning of fossil fuels.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF MOORPARK DOES HEREBY RESOLVE AS FOLLOWS:

SECTION 1. REJECTION OF INITIATION OF PROCEEDINGS: Based upon the information in the recitals of this Resolution and information presented to the City Council, the City Council hereby rejects initiation of any proceedings to amend the Covenant between the City of Moorpark and A-B Properties as adopted by Ordinance No. 416 that could lead to the allowance of a natural gas-fired power plant on the property subject to the Covenant.

SECTION 2. The City Clerk shall certify to the adoption of this resolution and shall cause a certified resolution to be filed in the book of original resolutions.

PASSED AND ADOPTED this 15th day of January, 2014.

Janice S. Parvin, Mayor

ATTEST:

Maureen Benson, City Clerk