

**DOCKETED**

<b>Docket Number:</b>	20-SPPE-03
<b>Project Title:</b>	Gilroy Backup Generating Facility
<b>TN #:</b>	240042
<b>Document Title:</b>	ADS Status Report 1 - GBGF
<b>Description:</b>	N/A
<b>Filer:</b>	Scott Galati
<b>Organization:</b>	DayZenLLC
<b>Submitter Role:</b>	Applicant Representative
<b>Submission Date:</b>	10/11/2021 2:38:37 PM
<b>Docketed Date:</b>	10/11/2021

Scott A. Galati  
**DAYZEN LLC**  
1720 Park Place Drive  
Carmichael, CA 95608  
(916) 900-8026

STATE OF CALIFORNIA

Energy Resources  
Conservation and Development Commission

In the Matter of:

Application For Small Power Plant  
Exemption for the **GILROY BACKUP  
GENERATING FACILITY**

**DOCKET NO: 20-SPPE-3**

**ADS STATUS REPORT NUMBER 1**

---

Amazon Data Services (ADS), in accordance with the Committee Scheduling Order (TN 239824), dated, September 23, 2021, hereby files its Status Report Number 1. In the Committee Order the Committee requested the parties provide the following additional information.

Please discuss whether the holdings in *King & Gardiner Farms, LLC v. County of Kern (King & Gardiner Farms)* and *Masonite Corporation v. County of Mendocino (Masonite)* regarding the use of agricultural conservation easements to mitigate a significant farmland conversion impact to less than significant, are applicable to this Project. Please discuss whether the Applicant's proposed mitigation, including its proposal to implement the City's Agricultural Mitigation Policy, is legally sufficient to reduce the Project's potential impacts to less than significant in light of the holdings in *King & Gardiner Farms* and *Masonite*.

According to the Santa Clara County Important Farmland 2016 map, approximately 32 acres of the site are classified as Prime Farmland and 22 acres are classified as Farmland of Statewide Importance. Although the site is currently utilized for agricultural purposes, the site is zoned *M-2 General Industrial*, which allows data processing establishments with an unconditional permit. The project site is designated *General Industrial* under the

City's General Plan. Agricultural uses border the site to the east and southeast on properties designated as *General Industrial* and *Open Space* in the General Plan and zoned as *M-2 General Industrial*.

The City of Gilroy (City) has adopted CEQA significance threshold, specifically for Prime Farmland and Farmland of Statewide Importance. That significance threshold is:

Convert Prime Farmland or Farmland of statewide importance, as shown on the maps prepared pursuant to the Farmland Mapping and Monitoring Program of the California Resources Agency, to an urban use (***projects requiring a legislative act, such as zoning changes, annexation to the City, urban service area amendments, etc.***)?

Further the City, as the land use authority over the project site, has adopted a mitigation policy for agricultural land conversion and has specifically slated the site for conversion to industrial uses, while preserving high value agricultural land in and around the City's boundaries. This land use planning effort should be recognized by the Commission and deference should be given to the City's determination that the project site is not anticipated to stay in long-term agriculture production. The City has made the difficult balancing of land uses within its jurisdiction and through its legislative powers has developed several policies applicable to agricultural conversion. The Commission should not evaluate potential impacts from the GDC in a vacuum without considering the overall land use policies and efforts undertaken legislatively by the City relating to agricultural land preservation.

For example, the 2040 General Plan Policy, LU 5.5 provides:

#### **Agriculture in Industrial Areas**

Encourage agriculture as an interim use in areas designated for industrial development.

LU 5.5 acknowledges that the agricultural use of the project site is *interim* until such time the land can be used for industrial development.

The 2040 General Plan Policy, LU 6.1 provides:

#### **Economic Viability of Agriculture**

Support the long-term economic viability of agriculture and agri-tourism and encourage landowners with land designated as "Rural County" to ***keep their land in cultivation.***

LU 6.1 recognizes that the continued long-term viability of agriculture can be threatened by the cessation of existing agricultural operations.

Finally, the City developed a comprehensive agricultural mitigation program pursuant to Land Use Policy 6.7 which states:

**Agricultural Mitigation**

Maintain and implement an Agricultural Mitigation Program ***to protect productive agricultural lands outside the Urban Growth Boundary from urban encroachment*** and to establish the mitigation requirements for loss of agricultural lands to new development.

LU 6.7 recognizes that removing the development pressure and preserving high quality agricultural lands is essential. The City's preferred method of preservation is through its Agricultural Mitigation Policy, which ADS has agreed to and has proposed as Project Design Measure PD AG-1 in its original Small Power Plant Exemption (SPPE) Application.

It should be noted that compliance with the Agricultural Mitigation Policy requires more than preservation of prime farmland. ADS will be maintaining an agricultural buffer on its site to prevent land use conflicts from surrounding agricultural uses.

In addition, ADS will be constructing a recycled water pipeline to the site, which would allow adjacent agricultural landowners a secondary source of water supply for irrigation during times when their irrigation sources may be unavailable. ADS has also proposed to preserve prime farmland at greater than a 1:1 ratio with a considerable higher agricultural value (established orchards with commercial frontage) than the short-term agricultural production at the project site. All of this proposed mitigation land is prime farmland while the project site includes prime farmland and farmlands of statewide importance.

These additional facts were not before the court in either *King & Gardiner Farms* or *Masonite*. Additionally, the City's adopted CEQA significance thresholds were also not before either court. The question is not whether the City's Agricultural Policy complies with these cases, but rather whether GDC's impact is significant or not under the City's CEQA significance thresholds.

In *King and Gardiner Farms*, the court was evaluating whether a legislative act, proposed ordinance to streamline oil and gas exploration by amending the county's zoning provisions which would have affect in excess of 7,450 acres permanently. Such a legislative act is not before the Commission, and ultimately not before the City of Gilroy, which in any other context would be the lead agency under CEQA but for the Warren Alquist Act CEC lead agency status delegation. A strict reading of *King and Gardiner Farms* would limit its holding to "what is before the court", which was whether conservation

easements alone were sufficient to mitigate to less than significant the conversion of over 7,450 acres undertaken in a comprehensive rezoning effort.

Unlike the action proposed by Kern County in *King and Gardiner Farms*, the GDC is a project and not a program and is:

- providing an agricultural buffer;
- developing on lands identified by the City for industrial development and therefore are short term agricultural uses;
- providing extension of a recycled water pipeline which can provide nearby agricultural operations with secondary source of water during drought and/or curtailment; and
- preserving the long-term viability of higher quality Prime Farmland at City preferred locations at a ratio exceed 1:1.

These facts were not before the court in *King and Gardiner Farms* and there is no legal authority for the Commission to guess how that court would consider the unique facts of the GDC.

The City adopted and amended its Agricultural Mitigation Policy in 2002 and 2016, respectively before the holding in *King and Gardiner Farms*. Nevertheless, the City did identify that the legislative act it took when it rezoned the GDC site to allow industrial development and when it adopted the Agricultural Mitigation Policy when applying its CEQA significance threshold would result in significant and unavoidable impacts to Prime Farmland and Farmland of Statewide Importance and made the appropriate findings of override. The Commission is not evaluating that finding or whether that finding is consistent with current caselaw. Neither is the Commission tiering off of the EIR prepared for those legislative acts. If it were, there would be no reason for an EIR to be prepared for the GDC.

The CEQA evaluation in this case should focus on whether the loss of 33 acres of Prime Farmland and 22 acres of Farmland of Statewide Importance, which has been slated and designated by the City to be developed for industrial uses and which complies with its Agricultural Mitigation Policy is a significant agricultural impact.

Based on the City's adopted CEQA threshold, conversion of Prime Farmland or Farmland of Statewide Importance to an urban use would be considered a significant impact for projects requiring a legislative act, such as zoning changes, annexation to the City, urban service area amendments. The proposed project is consistent with the existing General Plan designation and zoning on the site **and complies with the Agricultural Mitigation Policy**. Because the project would not require a legislative act as defined in the City's

CEQA threshold, and would implement the City's Agricultural Mitigation Policy, the project would result in a less than significant impact to farmland. See attached email from the City agreeing with the determination that the GDC would not result in significant agricultural impacts.

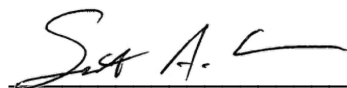
The Commission should use the City's CEQA significance threshold for its analysis in the same way as it relies on the thresholds set by other agencies with expertise in the area (example, various City VMT policies, BAAQMD Air Quality CEQA Significance Thresholds) and find that in this particular case, and because the GDC would comply with the City's Agricultural Policy, the GDC will not result in significant agricultural impacts.

In addition, the Commission should distinguish the GDC from the *King and Gardiner Farms* case, based on the unique facts that the City has planned for the conversion of project site and therefore its continued use is temporary, the GDC is providing more than just agricultural land preservation, and the City's Agricultural Policy has been developed to encourage and promote the long-term viability of agricultural production in the region.

However, in light of Staff's position, ADS is working with the City to provide additional clarification and, if necessary, develop a mitigation package that would demonstrate conformance with the principles outlined in applicable caselaw.

Dated: October 11, 2021

Respectfully Submitted,



Scott A. Galati

Counsel to Amazon Data Services

## Scott Galati

---

**From:** Julie Wyrick <Julie.Wyrick@ci.gilroy.ca.us>  
**Sent:** Monday, June 15, 2020 8:42 PM  
**To:** Arminta Jensen; Karen Garner; Cindy McCormick; johprs@amazon.com; Scott Galati  
**Cc:** Rob Oneto  
**Subject:** RE: Southpoint Ag Policy Approach memo

Arminta,

After reviewing the memo your team provided (dated June 3, 2020) regarding compliance with the City's Agriculture Mitigation policy, it is Planning's opinion that the proposal to "purchase a Farmland Conservation Easement on lands within the 'Preferred Preservation Area' or equivalent lands outside the 'Preferred Preservation Area' and enter into an agreement with the Land Trust of Santa Clara County for their ongoing stewardship and monitoring of the easement" is appropriate and adequate mitigation. With the incorporation of this mitigation into the project, it is our opinion that there would be less than significant impacts to agricultural lands under CEQA.

As we discussed in our phone conversation, this securing the conservation easement must be completed prior to pulling of building permits, and will be included as a condition of approval should the easement not be secured prior to Planning entitlement.

I would like to also point out that the memo included many other details of the project including square footage and siting of facilities and additional project measures such as extension of recycled water line and reuse of cooling water. This email is intended only to support the proposed agriculture mitigation measure. All other project elements will need to be reviewed in the context of an Architecture and Site Permit application.

Please let me know if you have any questions.

-Julie

JULIE WYRICK  
PLANNING DIVISION MANAGER  
Direct 408.846.0209 | [Julie.Wyrick@cityofgilroy.org](mailto:Julie.Wyrick@cityofgilroy.org)  
Main 408.846.0440 | [www.cityofgilroy.org/planning](http://www.cityofgilroy.org/planning)  
7351 Rosanna Street | Gilroy | CA 95020

Help shape the future of Gilroy! Click below.



---

**From:** Arminta Jensen [mailto:AJensen@rja-gps.com]  
**Sent:** Friday, June 12, 2020 7:51 AM  
**To:** Karen Garner; Julie Wyrick; Cindy McCormick; johprs@amazon.com; Scott Galati  
**Cc:** Rob Oneto  
**Subject:** Southpoint Ag Policy Approach memo

Karen, Julie, and Cindy,

Thank you for your quick review of the Ag Policy Approach memo for Southpoint. I have attached the memo for your convenience in documenting the City's response to us.

I have included everybody from yesterday's call on this email, so a "reply all" will include the involved parties.

Thank you,  
Arminta

**Arminta J. Jensen, PE, PLS, LEED® AP**  
Executive Vice President

*We are working remotely. Please use my email or cell phone, below, to contact me. Our office phones are not being answered.*

**RUGGERI-JENSEN-AZAR**  
ENGINEERS - PLANNERS - SURVEYORS

8055 Camino Arroyo  
Gilroy, CA 95020  
T: (408) 848-0300 x304  
C: (408) 234-5936  
F: (408) 848-0302  
[ajensen@rja-gps.com](mailto:ajensen@rja-gps.com)

**Electronic Media Disclaimer**

*These plans and files are provided in an electronic format as a courtesy only. Due to the potential that information exchanged by electronic media can deteriorate, alter by conversion, be damaged, lost or modified unintentionally or otherwise, use of this electronic data by anyone other than Ruggeri-Jensen-Azar (RJA) shall be at the sole risk of such user and without liability or legal exposure to RJA. The recipient is responsible for verifying the accuracy of data against the governing most current hard copy documentation. If there are any differences between signed hard copy documents and the electronic files, the signed hard copy documents shall control. Recipient assumes all risks and expense in the changing or modification of data and revisions or updating of hard copy documents.*