

# CONFORMED COPY

**RECORDING REQUESTED BY**

First American Title Insurance Company  
National Commercial Services

**AND WHEN RECORDED MAIL TO:**

Department of Toxic Substance Control  
Standardized Permits and Corrective  
Action Branch

700 Heinz Avenue, Suite 200  
Berkeley, CA 94710

Attention: Mohinder S. Sandhu, P.E., Chief

Doc#: 19451014

5/31/2007

8:00 AM

Space Above This Line for Recorder's Use Only

A.P.N.: 230-46-055

## COVENANT TO RESTRICT USE OF PROPERTY Environmental Restriction

Recording Requested By:  
City of San Jose  
200 East Santa Clara Street  
San Jose, California 95113

When Recorded, Mail To:

Department of Toxic Substances Control  
Standardized Permits and Corrective  
Action Branch  
700 Heinz Avenue, Suite 200  
Berkeley, CA 94710  
Attention: Mohinder S. Sandhu, P.E., Chief

**COVENANT**  
**TO RESTRICT USE OF PROPERTY**  
**Environmental Restriction**

Former FMC Corporation - San Jose Facility – Central Plant Area

1125 Coleman Avenue

San Jose, California

This Covenant and Agreement (“Covenant”) is made on the 8th of May, 2007 by and between the City of San Jose, California (“Covenantor”), who is the owner of record of certain property situated in San Jose, County of Santa Clara, State of California, described in Exhibit A (Legal Description of Property) attached hereto and incorporated herein by this reference (“Property”), and the Department of Toxic Substances Control (“Department”).

Pursuant to Civil Code Section 1471, the Department has determined that this Covenant is reasonably necessary to protect present or future human health or safety or the environment as a result of the presence on the land of hazardous materials as defined in Health and Safety Code

section 25260. The Covenantor and the Department (collectively referred to as the “Parties”) therefore intend that the use of the Property be restricted as set forth in this Covenant in order to protect human health and safety and the environment.

## **ARTICLE I**

### **STATEMENT OF FACTS**

1.01 The Property, totaling some 23.23 acres, is more particularly described and depicted in Exhibit B (Map of Property). The Property is located at 1125 Coleman Avenue, San Jose, Santa Clara County, and is bounded by Coleman Avenue on the north, Newhall Drive on the east, the Union Pacific Railroad and railroad tracks and right of way on the south, and industrial property owned by the City of San Jose on the west. Land adjacent to the Property has been used for industrial purposes. The closest residential area is located along Newhall Street, approximately 2,000 feet to the east-southeast. Pursuant to Planned Development Zoning Ordinance No. 26958 adopted by the City of San Jose on September 2, 2003, the Property has been zoned to permit future commercial uses, including use for office/research and development, hotel, and retail purposes.

1.02 The Property has been the site of a manufacturing facility primarily for the production and testing of military tracked vehicles. Principal operations at the Property have included machining, degreasing, metal finishing, welding, painting, and parts assembly for the manufacture and rehabilitation of such equipment. The hazardous materials managed and/or used at the Property included various petroleum hydrocarbon oils, coolants, lubricants, solvents, paints, acids, alkalis and metals. Hazardous waste constituents of concern associated with the above-mentioned hazardous materials have been detected in subsurface soil and groundwater on the Property as a result of routine handling and use of these materials and the management of

hazardous wastes. The constituents of concern at the Property include volatile organics, metals and petroleum hydrocarbons.

1.03 The Property is being remediated pursuant to a Corrective Action Consent Agreement under Section 25187 of the California Health and Safety Code. Because hazardous waste and/or hazardous constituents will remain on the Property, the Corrective Measures Study provides that a deed restriction on use of groundwater be included as part of the final site corrective measures. In addition to the investigation of soil and groundwater on the Property, soil gas was sampled throughout the Property. A total of approximately 5.3 acres within the Property were found to have soil gas present at sufficient levels to warrant further evaluation (a vapor intrusion assessment) of the potential for volatile organic vapors to migrate through building foundations. The investigation and vapor intrusion assessment were performed in accordance with the Department's requirements and guidelines. The assessment was approved by the Department on July 29, 2005. In addition to the restrictions and permitted uses contained in this Covenant for the entire Property, specific restrictions are enumerated in Section 4.07 which apply to the construction of buildings within the 5.3 acres identified in Exhibits C (Legal Description of Restricted Area) and D (Map of Restricted Area) so as to ensure protection of future commercial or office workers who may occupy such buildings.

1.04 Based on the Risk Assessment, summarized in the approved Corrective Measures Study, the maximum concentrations of the constituents of concern in soil and groundwater, following implementation of corrective measures for soil and groundwater, are below the Department's approved site-specific health risk-based concentration levels acceptable for industrial or commercial uses of the Property. The Department has determined that the Property,

as remediated, does not present an unacceptable risk to the environment or public health provided that the restrictions of this Covenant are fully complied with.

## ARTICLE II

### DEFINITIONS

2.01 Department. “Department” shall mean the California Department of Toxic Substances Control and shall include its successor agencies, if any.

2.02 Improvements. “Improvements” shall mean all buildings, roads, driveways, regrading, and paved parking areas, constructed or placed upon any portion of the Property.

2.03 Occupant(s). “Occupant(s)” shall mean those persons entitled by ownership, leasehold, or other legal relationship to the right to occupy any portion of the Property.

2.04 Owner(s). “Owner(s)” shall mean the Covenantor and each person or entity who thereafter acquires title to all or any portion of the Property; provided, however, that once Covenantor or an Owner no longer holds title to any portion of the Property, Covenantor and such Owner, respectively, shall have no further obligations pursuant to this Covenant, except as to violations of the Covenant occurring during the period of Covenantor’s or such Owner’s ownership, possession or control of a portion of the Property.

## ARTICLE III

### GENERAL PROVISIONS

3.01 Restrictions to Run with the Land. This Covenant sets forth protective provisions, covenants, restrictions, and conditions (collectively referred to as “Restrictions”), upon and subject to which the Property or the portions thereof to which the Restrictions are applicable

shall be improved, held, used, occupied, leased, sold, hypothecated, encumbered, and/or conveyed. Each and every one of the Restrictions: (a) shall run with the land pursuant to Health and Safety Code sections 25202.5 and 25202.6 and Civil Code section 1471; (b) shall inure to the benefit of and pass with each and every portion of the Property; (c) shall apply to and bind the respective successors in interest to the Property; (d) are for the benefit of, and shall be enforceable by the Department; and (e) are imposed upon the entire Property unless expressly stated as applicable only to a specific portion.

3.02 Binding upon Owners/Occupants. Pursuant to Health and Safety Code section 25202.5(b), this Covenant shall be binding upon the Covenantor and all of the Owners of the Property, their heirs, successors, and assignees, and the agents, employees, and lessees of the Owners, heirs, successors, and assignees. Pursuant to Civil Code section 1471, but subject to Sections 2.04 and 3.03 hereof, all successive Owners of the Property are expressly bound by this Covenant for the benefit of the Department.

3.03 Concurrence of Owners/Occupants Presumed. All Owners or Occupants of any portion of the Property shall be deemed by their purchase, leasing, or possession of such Property, to be in accord with the foregoing and to agree for and among themselves, their heirs, successors, agents, sublessees, and the agents and lessees of such Owners, heirs, successors, and assignees, that the Restrictions herein established must be adhered to for the benefit of future Owners and Occupants and that their interest in the Property shall be subject to the Restrictions contained herein. Once an Owner or the Covenantor no longer holds title to any portion of the Property, the former Owner or Covenantor shall have no further obligations pursuant to this Covenant, except as to violations of the Covenant occurring during the period of the former Owner's or Covenantor's ownership, possession or control of a portion of the Property.

3.04 Written Notice of Hazardous Substance Release. The Owner shall, prior to the sale, lease, or rental of the Property, give written notice pursuant to Health and Safety Code section 25359.7.

3.05 Incorporation into Deeds and Leases. This Covenant shall be incorporated by reference into each and all deeds and leases of any portion of the Property.

3.06 Conveyance of Property. Covenantor agrees that the Owner shall provide notice to the Department not later than thirty (30) days after the conveyance of any ownership interest in the Property (except for building space leases, mortgages, liens, and other non-possessory encumbrances). The Department shall not, by reason of this Covenant, have authority to approve, disapprove, or otherwise affect such proposed conveyance, except as otherwise provided by law, administrative order, or specific provision of this Covenant.

3.07 Private Right of Action. This Covenant shall not create any private right of action against Covenantor or any other Owner or Occupant of the Property or any portion thereof.

#### ARTICLE IV

#### RESTRICTIONS

4.01 Prohibited Uses. The Property shall not be used for any of the following purposes:

- a. A residence, including any mobile home or factory- built housing, constructed or installed for use as residential human habitation.
- b. A hospital for humans.
- c. A public or private school for persons under 21 years of age.
- d. A day care center for children.

4.02 Prohibited Activities. The following activities shall not be conducted at the Property:

- a. Raising of food (e.g., cattle, food crops).
- b. Drilling for water, oil, or gas without the prior written approval of the Department.
- c. Extraction of groundwater for purposes other than site remediation, groundwater monitoring, or construction dewatering.
- d. Any activities that may interfere with the selected remedy or the operation and maintenance activities required for the Property.

4.03 Permitted Uses and Improvements. The use of the Property shall be restricted to commercial, industrial, research and development, hotel, retail and office purposes, any other use permitted by Planned Development Zoning Ordinance No. 26958, adopted by the City of San Jose on September 2, 2003, and any other use permitted by any amendment to the aforementioned Planned Development Zoning Ordinance, provided that the use is consistent with the restrictions and requirements of this Covenant.

4.04 Non-interference with Groundwater Extraction and Treatment System, Groundwater Monitoring Wells, and Conveyance Piping on the Property.

- a. Activities that may disturb the groundwater remediation system, groundwater monitoring wells, and conveyance piping (e.g., excavation, grading or removal of soil; trenching; filling; earth movement; or mining) shall not be permitted on the Property without prior review and written approval by the Department.

b. All uses and development of the Property shall preserve the integrity and physical accessibility of the groundwater remediation system, groundwater monitoring wells, and conveyance piping.

c. The groundwater remediation system, groundwater monitoring wells, and conveyance piping shall not be altered without prior review and written approval by the Department.

4.05. Property Cover. The Property shall be variously occupied by buildings, paved with either concrete or asphalt, covered with landscaping or other vegetative cover, contain clean soil imported from an off-site location, or shall be covered with other suitable cover to mitigate direct exposure. The other suitable cover shall consist of loose coverings of clean materials (e.g., soil, gravel) maintained at a thickness of at least six inches. In the event that there is future use of the Property that does not involve one or more forms of the foregoing cover over the Property, approval for such use must be obtained from the Department.

4.06 Controls during Construction Activities. Engineering controls, such as wind erosion control and dust suppression by watering, shall be implemented during construction activities to minimize or mitigate potential exposure of off-site residents and on-site workers to contaminated soil via pathways such as inhalation of impacted dust and direct contact after deposition of impacted dust.

4.07 Restrictions on Development and Use (Specific to New Building Construction and for Protection of Future Indoor Office Workers). Covenantor hereby agrees that any new buildings constructed within that portion of the Property (“Restricted Area”) more particularly shown on Exhibits C (Legal Description of Restricted Area) and D (Map of Restricted Area) after the date hereof may be required by the Department to incorporate risk management measures to mitigate possible vapor intrusion into such buildings for the protection of future

indoor office workers. Such risk management measures shall be consistent with then-current Department guidelines for mitigation of vapor intrusion into buildings and protection of indoor office worker health. The type of risk management measures shall be dependent upon the location of the building within the Restricted Area, the design and use of the building, and the concentrations of volatile organic compounds (VOCs) in the soil gas concentrations below the building footprint. The restrictions in this Section 4.07 shall apply only to buildings constructed in the Restricted Area and shall not apply to any other portion of the Property. Construction of parking lots or other improvements that do not entail occupancy by humans are not subject to the specific restrictions of this Section 4.07.

4.08 Soil Management. Any contaminated soils brought to the surface by grading, excavation, trenching, backfilling, or other activity shall be managed in accordance with all applicable provisions of state and federal laws and regulations and the Soil Management Plan approved by the Department.

4.09 Access for Department. The Department shall have reasonable right of entry and access to the Property for inspection, monitoring, and other activities consistent with the purposes of implementing and enforcing this Covenant as deemed necessary by the Department in order to protect the public health or safety, or the environment.

4.10 Access for Implementing Operation and Maintenance Activities. The entity or person responsible for implementing the operation and maintenance activities with respect to the groundwater remediation and monitoring system shall have reasonable right of entry and access to the Property for the purpose of implementing such activities until the Department determines that no further such activities are required.

**ARTICLE V**  
**ENFORCEMENT**

5.01 Enforcement. Failure of the Covenantor, Owner, or Occupant to comply with any of the Restrictions or obligations of this Covenant specifically applicable to it shall be grounds for the Department to require that the Covenantor, Owner, or Occupant, as applicable, discontinue unpermitted use(s) or modify or remove any unpermitted improvements constructed or placed upon any portion of the Property in violation of the Restrictions if the Department finds that such improvement(s) present an unacceptable risk to human health or the environment. Violation of this Covenant shall be grounds for the Department to file civil or criminal actions as provided by law.

**ARTICLE VI**  
**VARIANCE AND TERMINATION**

6.01 Variance. Any Owner(s) or, with the Owner(s)' written consent, any Occupant of the Property or any portion thereof may apply to the Department for a written variance from the provisions of this Covenant. Such application shall be made in accordance with California Health and Safety Code section 25202.6.

6.02 Termination. Any Owner(s) or, with the Owner(s)' written consent, any Occupant of the Property or a portion thereof may apply to the Department for a termination of the Restrictions as they apply to all or any portion of the Property. Such application shall be made in accordance with California Health and Safety Code section 25202.6.

6.03 Term. Unless modified or terminated in accordance with Sections 6.01 or 6.02 above, by law or otherwise, this Covenant shall continue in effect in perpetuity.

## ARTICLE VII

### MISCELLANEOUS

7.01 No Dedication Intended. Nothing set forth herein shall be construed to be a gift or dedication, or offer of a gift or dedication, of the Property or any portion thereof to the general public or any other person or for any purposes whatsoever.

7.02 Notices. Whenever any person gives or serves any notice, demand, or other communication with respect to this Covenant, each such notice, demand, or other communication shall be in writing and shall be deemed effective 1) when delivered, if personally delivered to the person being served or to an officer of a corporate party being served or official of the government agency being served, or 2) seven business days after deposit in the mail if mailed by United States mail, postage paid certified, return receipt requested:

To: City of San Jose  
200 East Santa Clara Street  
San Jose, California 95113  
Attention: City Manager

Or to: Owner(s) as identified to the Department under section 3.06 of this  
Covenant.

Copy to: FMC Corporation  
1735 Market Street  
Philadelphia, PA 19103  
Attention: Director, Environment

To: Department of Toxic Substances Control  
Standardized Permitting and Corrective Action Branch  
700 Heinz Avenue, Suite 200  
Berkeley, California 94710  
Attention: Chief

Copy to: California Regional Water Quality Control Board  
San Francisco Bay Region  
1515 Clay Street  
Oakland, CA 94612  
Attention: Executive Officer

7.03 Partial Invalidity. If any portion of the Restrictions or other term set forth in this Covenant is determined by a court of competent jurisdiction to be invalid for any reason, the remaining portions of this Covenant shall remain in full force and effect as if such portion found invalid had not been included herein.

7.04 Article Headings. Headings at the beginning of each numbered article of this Covenant are solely for the convenience of the parties and are not a part of the Covenant.

7.05 Recordation. The Covenantor shall record this Covenant, with all referenced Exhibits, in the Official Records of the County of Santa Clara within ten (10) days of the Covenantor's receipt of a fully executed original.

7.06 Statutory References. All statutory references include successor provisions.

7.07 Department References. All references to the Department include successor agencies or other successor entity.

7.08 Mortgagee Protection. No violation of, or failure to comply with, the Restrictions contained in this Covenant by any Owner or Occupant shall impair, defeat or render invalid the lien of any mortgage or deed of trust given in good faith and for value and encumbering all or a portion of the Property, but the Restrictions contained in this Covenant shall be binding upon and enforceable against any Owner whose title is acquired by judicial or non-judicial foreclosure, deed-in-lieu of foreclosure or otherwise.

**SIGNATURE PAGE FOLLOWS**

IN WITNESS WHEREOF, the parties execute this Covenant as of the date set forth above.

OWNER:

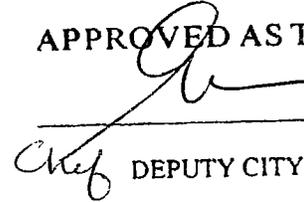
CITY OF SAN JOSE,  
A California municipal corporation

//original signed by//

By: \_\_\_\_\_  
Deanna Santana  
Deputy City Manager

Date: 5/8/07

APPROVED AS TO FORM

  
\_\_\_\_\_  
Chief DEPUTY CITY ATTORNEY

DEPARTMENT OF TOXIC SUBSTANCES CONTROL

//original signed by//

By: \_\_\_\_\_  
Mohinder S. Sandhu, P.E. Chief  
Standardized Permitting and Corrective Action Branch

Date: May 21, 2007

STATE OF CALIFORNIA

COUNTY OF Santa Clara

On 5/8/07 before me, <sup>Sandra Onita Cranford</sup> a Notary Public in and for State of California, personally appeared Deanna Santana, personally known to me ~~or~~ ~~proved to me on the basis of satisfactory evidence~~ to be the person whose name is subscribed to the within instrument and acknowledged to me that ~~he~~ ~~or~~ she executed the same in ~~his~~ ~~or~~ her authorized capacity, and that by ~~his~~ ~~or~~ her signature on the instrument, the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Sandra Onita Cranford  
Notary's Signature



**ACKNOWLEDGMENT**

State of California

County of Sacramento

On May 21, 2007 before me, Kathleen C. Duncan, <sup>Notary Public</sup> personally  
appeared Mohinder S Sandhu <sub>Notary Public</sub>

- Personally known to me
- Proved to me on the basis of satisfactory evidence

To be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

//original signed by//

Signature \_\_\_\_\_

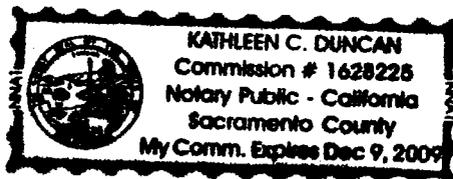


EXHIBIT "A"

DESCRIPTION OF PROPERTY

All that certain real property situate in the City of San Jose, County of Santa Clara, State of California described as follows:

Being "Adjusted Parcel B" described in that Lot Line Adjustment Permit filed for record in the office of the Recorder of the County of Santa Clara on June 22, 1999 under Recorder's Series No. 14867793, Santa Clara County Official records and being more particularly described as follows:

Commencing at a point on the Northwestern line of Newhall Street at the Easternmost corner of that certain 7.528 Acre tract of land described in the Deed from Food Machinery Corporation, a corporation, to Southern Pacific Railroad Company, a corporation, dated January 23, 1947, recorded February 25, 1947 in Book 1433 Official Records, page 231 Santa Clara County Records; Thence North 57 deg. 34' 50" West along the northeasterly line of said 7.528 acre tract 841.00 feet to the True Point of Beginning;

Thence North 32 deg. 25' 10" East 35.14 feet;

Thence North 57 deg. 34' 50" West 39.00 feet;

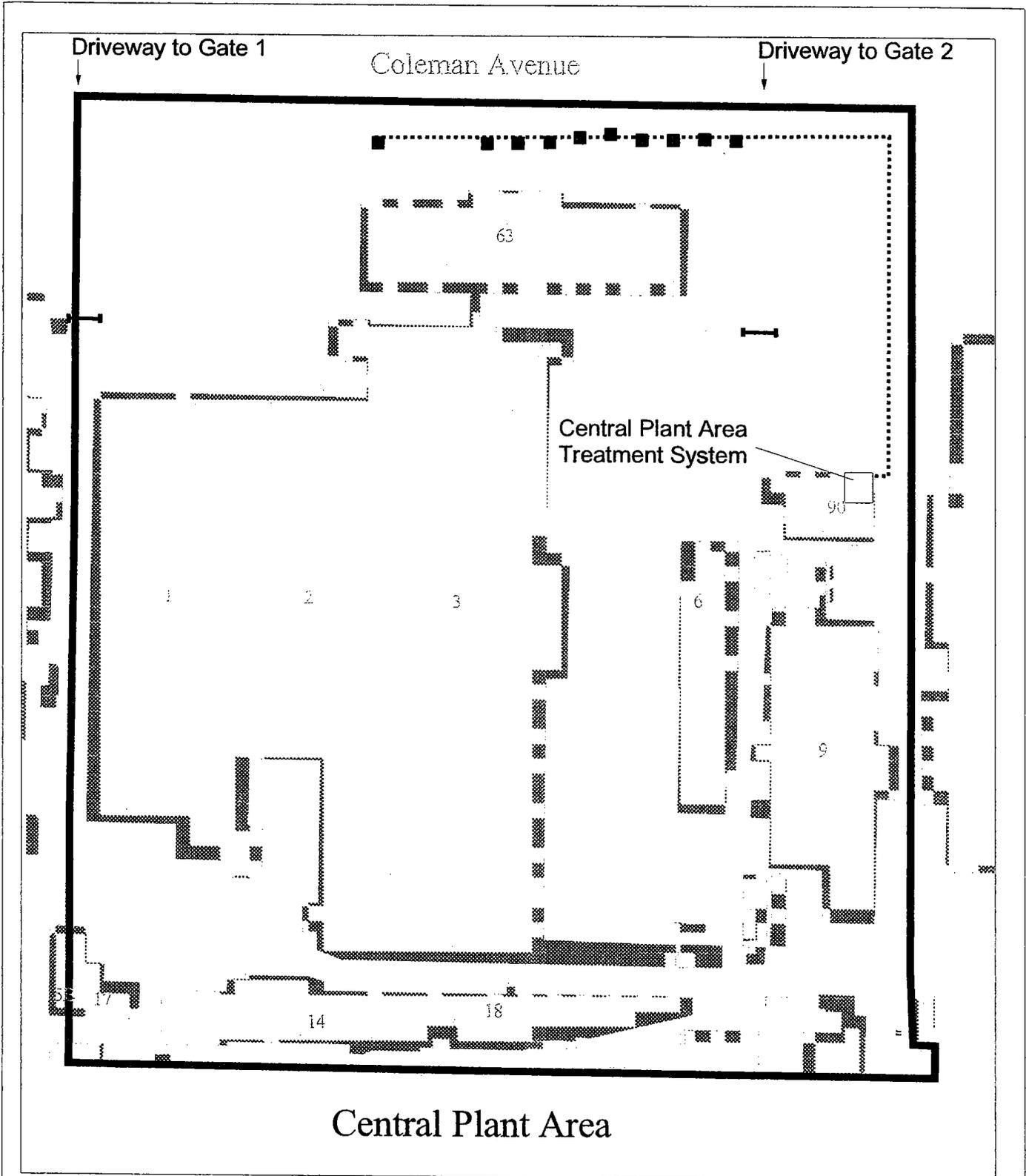
Thence North 32 deg. 25' 10" East 1047.94 feet to the Southwesterly line of Coleman Avenue (100.00 feet in width);

Thence North 57 deg. 34' 50" West 933.02 feet along said Southwesterly line;

Thence South 32 deg. 25' 10" West 1083.08 feet to said Northeasterly line of said 7.528 acre tract; Thence South 57 deg. 34' 50" East along said Northeasterly line 972.02 feet to the True point of Beginning.

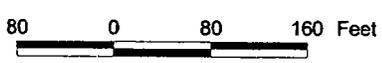
APN: 230-46-055

ARB: 230-46-032.05



**Legend**

- Central Plant Area Boundary
- Building
- Extraction Well
- Conveyance Piping
- Treatment System
- Entrance Gate



**MALCOLM  
PIRNIE**

**FMC**

1125 Coleman Avenue  
San Jose, California

Site Plan  
Central Plant Area

January 2007

Exhibit B

P:\3917\003\gis\ceqa\_report\2005.apr Unit Locations

February 6, 2007

## EXHIBIT C

### Restricted Property Description

All that real property, situated in the City of San Jose, County of Santa Clara, State of California, described as follows:

Being a portion of that certain parcel of land described in the deed from FMC Corporation to the City of San Jose, recorded May 24, 2006 as Document Number 18948286, Santa Clara County Official Records, being more particularly described as follows:

#### Restricted Property Area A

Beginning at the Northwesterly corner of said lands of the City of San Jose, said corner lying on the Southwesterly line of Coleman Avenue; thence along the Southwesterly line of Coleman Avenue North  $56^{\circ}47'24''$  West 492.01 feet; thence leaving said Southwesterly line of Coleman Avenue South  $33^{\circ}12'36''$  West 259.84 feet to the true point of beginning.

Thence South  $56^{\circ}47'24''$  East 312.00 feet; thence South  $33^{\circ}12'36''$  West 401.00 feet; thence North  $56^{\circ}47'24''$  West 212.00 feet; thence North  $33^{\circ}12'36''$  East 203.00 feet; thence North  $56^{\circ}47'24''$  West 100.00 feet; thence North  $33^{\circ}12'36''$  East 198.00 feet to the true point of beginning.

#### Restricted Property Area B

Beginning at the Northwesterly corner of said lands of the City of San Jose, said corner lying on the Southwesterly line of Coleman Avenue; thence South  $33^{\circ}12'36''$  West 1083.08 along the Northwesterly line of said parcel to the Southwesterly corner of the said lands of the City of San Jose, also being the Northerly line of the lands of the S.C.V.T.A. as recorded in document number 18146543, Santa Clara County Official Records; thence South  $56^{\circ}47'24''$  East 180.02 feet along the Southwesterly line of the said lands of City of San Jose also being the Northerly line of the said lands of the S.C.V.T.A. to the true point of beginning.

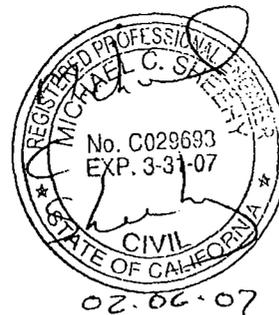
Thence North  $33^{\circ}12'36''$  East 195.00 feet; thence South  $56^{\circ}47'24''$  East 102.00 feet; thence North  $33^{\circ}12'36''$  East 207.00 feet; thence South  $56^{\circ}47'24''$  East 210.00 feet; thence South  $33^{\circ}12'36''$  West 402.00 feet to the Southern boundary of the lands of the City of San Jose also

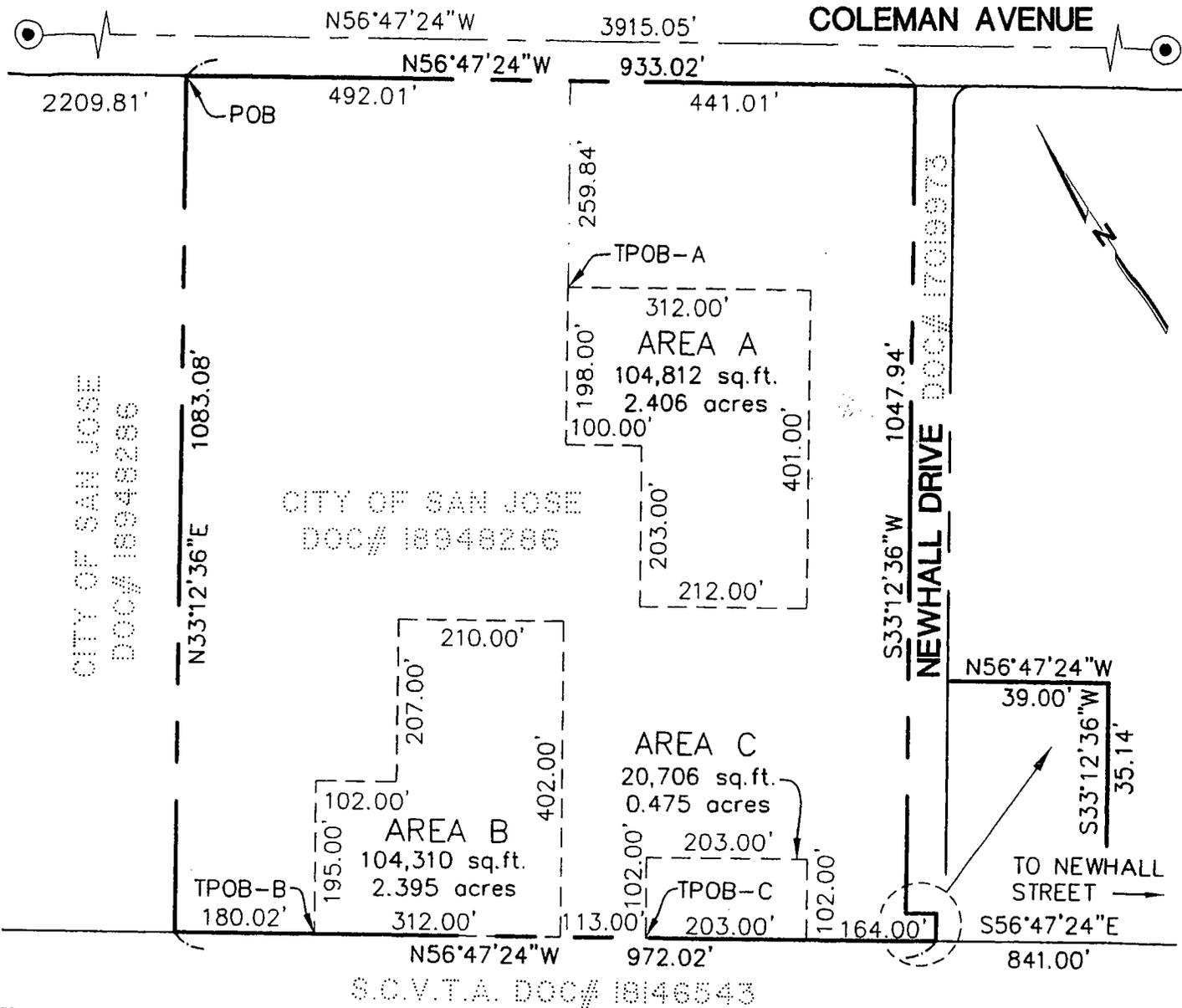
being the Northerly line of the said lands of the S.C.V.T.A.; thence North 56°47'24" West 312.00 feet along above described boundary to the true point of beginning.

Restricted Property  
Area C

Beginning at the Northwesterly corner of said lands of the City of San Jose, said corner lying on the Southwesterly line of Coleman Avenue; thence South 33°12'36" West 1083.08 along the Northwesterly line of said parcel to the Southwesterly corner of the said lands of the City of San Jose, also being the Northerly line of the lands of the S.C.V.T.A. as recorded in document number 18146543, Santa Clara County Official Records; thence South 56°47'24" East 605.02 feet along the Southwesterly line of the said lands of City of San Jose also being the Northerly line of the said lands of the S.C.V.T.A. to the true point of beginning.

Thence North 33°12'36" East 102.00 feet; thence South 56°47'24" East 203.00 feet; thence South 33°12'36" west 102.00 feet to the Southwesterly line of the said lands of City of San Jose also being the Northerly line of the said lands of the S.C.V.T.A.; thence North 56°47'24" West 203.00 feet along the said Southwestern and Northern lines to the true point of beginning.





**LEGEND**

- CENTERLINE
- STREET RIGHT OF WAY
- ADJACENT LOT
- PROPERTY LOT
- EASEMENT

CITY OF SAN JOSE STD MONUMENT

POB POINT OF BEGINNING  
 TPOB TRUE POINT OF BEGINNING

**NOTE**

ALL EASEMENT LINES ARE PARALLEL OR PERPENDICULAR TO THE SOUTHERLY LINE OF COLEMAN AVENUE



**EXHIBIT D**

02.05.07

Q:\Civil\95083D\dwg\PLAT-DEED-RESTRICTION.dwg

**R+G** RUTH AND GOING, INC.  
 Civil Engineering Land Surveying  
 2216 THE ALAMEDA SANTA CLARA, CA. 95050  
 (408) 236-2400

*PLAT TO ACCOMPANY  
 RESTRICTED PROPERTY DESCRIPTION*

*FMC CENTRAL PLANT AREA  
 City of San Jose California*

02-06-07	95083D	Drwn.: DAW
Dept.: Survey	Scale: 1"= 200"	Chkd.: