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>> Commissioner Cahan: Good evening. My name is Hope Cahan, and I am the chair of the Planning Commission. On behalf of the entire Planning Commission, I would like to welcome you to the Planning Commission public hearing of Wednesday, November 2, 2011. Please remember to turn off your cell phones. Parking ticket validation machine for the garage under City Hall is located at the rear of the chambers. If you want to address the commission, fill out a speaker card. Those are located on the table by the door on the parking validation table at the back, and at the bottom of the stairs near the audiovisual technician. Deposit the completed card in the basket near the planning technician. Please include the agenda item number, not the file number, for reference. For example, 4A, not PD 06-023. The procedure for this hearing is as follows: After the staff report, applicants and appellants may make a five-minute presentation. The chair will call out names on the submitted speaker cards in the order received. As your name is called, line up in front of the microphone at the front of the chambers. And each speaker will have two minutes. After the public testimony, the applicant and appellant may make closing remarks for an additional five minutes. Planning Commissioners may ask questions of the speakers. Response to the commissioners' questions will not reduce time from the speakers' time allowance. The public hearing will then be closed, and the Planning Commission will take action on the item. The planning Commission may request staff to respond to the public testimony, ask staff questions, and discuss the item. If you challenge these land use decisions in court, you may be limited to raising only those issues you or someone else has raised at this public hearing or in written correspondence delivered to the city, at, or prior to, the public hearing. The Planning Commission's actions on rezoning, prezonings, general plan amendments and code amendments is advisory only to the City Council. The City Council will hold public hearings on these items. Roll call. Let the record show that all commissioners are present except for Commissioner Kamkar, Commissioner Abelite and Commissioner Platten. Deferrals. Any item scheduled for hearing this evening for which deferral is being requested will be taken out of order to be heard first on the matter of deferral. A list of staff-recommended deferrals is available on the press table. Staff will provide an update on the items for which deferral is being requested. If you want to change any of the deferral dates recommended, or speak to the question of deferring these or any other items, you should say so at this time. Staff.

>> Staff has one recommended deferral. And it's for a planned development rezoning file number PDC 10-028. It's to allow for the conversion of a storage room into two studio apartments and our recommendation is it be

deferred to the next Planning Commission meeting of November 16th, 2011. That includes staff-recommended deferrals.

>> Commissioner Cahan: Okay do I have a motion? Commissioner Kline.

>> Commissioner Kline: Move to defer 1A to November 16th.

>> Commissioner Cahan: Do I have a second? All in favor, opposed, that passes. Consent calendar. Consent calendar items are considered to be routine and will be adopted by one motion. There will be no separate discussion of these items unless a request is made by a member of the Planning Commission, staff, or the public to have an item removed from the consent calendar and considered separately. Staff will provide an update on the consent calendar. If you wish to speak on one of these ideas individually please come to the podium at this time. 2A, staff.

>> No additions to the item.

>> Commissioner Cahan: Commissioner Kline.

>> Commissioner Kline: I move to approve the consent calendar item 2A.

>> Commissioner Cahan: Okay I have a motion and second to approve 2A. All in favor? Any opposed, abstaining? Item passes with all commissioners present voting in favor. Okay, public hearing. Generally, the public hearing items are considered by the Planning Commission in the order which they appear on the agenda. However, please be advised that the commission may take items out of order to facilitate the agenda, such as to accommodate significant public testimony or may defer discussion of items to later agendas for public hearing time management purposes. 3A. Staff.

>> Thank you. I'm just going to talk about the EIR first. The first agenda item that you have before you tonight. So you've received the First Amendment, as part of the Planning Commission packet. Where we responded to a letter from James Dombrowsky. There were no new significant impacts identified, no new text changes required to the original draft EIR. We're recommending certification of the final EIR which is the combination of the draft and the First Amendment. Staff received an additional letter from Mr. Dombrowsky yesterday. And we will just quickly move through the items he presents. You've received that, and you've also received a copy of that and you've also received a copy of the original judgment which overturned the negative declaration that was a part of the original approval CP 091 five. In the November 1st letter Mr. Dombrowsky brings up issues relating to the court's decision not eliminating the EIR to traffic impacts, hazardous materials, traffic impact analysis, and that EIR should be rejected because Mr. Shirazi violated the city's stop work order. We'll talk about each of those points. At least as far as the draft EIR or the final EIR it includes the full analysis of all the checklist categories including traffic but also including hazardous materials. Hazardous materials were found to be less than significant, and specifically, in the First Amendment I just wanted to read, well test data indicated that from data collected onsite the well tests show that the highest concentrations of petroleum impacted groundwater are found on the site at this monitoring well 2 near the Northwest boarder of the site and the plume attenuates nondetectable levels as it goes offsite near the Ann darling school and undetectable levels near Andy's BP. Substantial evidence in the record that the hazardous materials impacts were less than significant. With that I'll have Renee talk about the court order. Thank you.

>> Renee Gurza: Thank you. In the litigation concerning the negative declaration, the court discussed how the court felt that the traffic analysis that there could have been a fair argument of an impact and so the court sent it back to address that issue. In one of the letters of Mr. Dombrowsky he is saying that the court's writ of mandate did not limit the EIR to just doing a traffic analysis. And I just wanted to note for the commission that CEQA requires that if a court does find that an action was taken without compliance with CEQA that the court led the public entity know the alleged grounds of noncompliance. So it's in CEQA that if a court is going to find that there was a problem with an environmental analysis that the court let you know in what ways there was noncompliance. The court's order I think you have it discusses only deficiencies in the traffic analysis. So that's why we are saying that that was the issue that needed to be addressed. Nevertheless, Mr. Davidson already

summarized that even if you for some reason feel there should have been analysis of hazardous materials that analysis was performed and found there was no significant impact. So it is included in the initial study for this EIR. Thank you.

>> And Karen Mack will briefly respond to traffic questions from Mr. Dombrowsky.

>> Good afternoon, Planning Commissioners. The traffic report that was originally prepared was an in-house traffic analysis. It was based on the city standard and was consistent with the plus or minus 200 gas stations that are in existence in San José. The dispute that was originally stated was Mr. Dombrowsky disputed the trip generation rate in order to determine how much traffic the project generated with this addition and also the pass by trip generation both of those are standard traffic measures when you're looking at traffic signals. While the Department of Transportation, Department of Public Works still dispute our assumptions were in fact accurate and Mr. Dombrowsky's allegations were -- we still don't agree with, we nevertheless did run the traffic with his numbers, and it resulted in no level of service impact at the intersection that's affected. Therefore this project was found to be in conformance with the city's transportation policy, council policy 5-3, our measure, CEQA, the applicant then went back, though, you know, by request of the courts and did do an EIR, and they did more -- they counted the adjacent gas station in order to come up with what they thought to be relevant traffic numbers for comparison sake. They did a traffic analysis and they concluded again that there were no traffic impacts.

>> And then the director will address the issue that the EIR should be rejected that Mr. Shirazi ignored the City's stop work order.

>> Joe Horwedel: Thank you John. In the letter Mr. Dombrowsky did provide photos that shows allegedly that the driveway was modified for the proposed gas station in violation of the permit adjustment that the city approved. Where we explicitly pointed out that the driveway could not be relocated until such time as conditional use permit was approved. I will ask code enforcement to go out to the site tomorrow and verify that circumstance and if in fact it has been relocated then we will go through and proceed through our enforcement actions including up to issuing citations for the use of that driveway network. But as Mr. Davidson pointed out, violations of zoning

rules are not inherently a CEQA issue. It is not a predisposition that it is a significant impact under CEQA it is a legislative enforcement act and that is something that the city deals with separately and will proceed with.

>> And staff's available for questions, thank you.

>> Joe Horwedel: Just for clarification, we will go through and hear the two items separately. We will deal with the EIR first, and then the smaller crowd gives an opportunity to then deal with the conditional use permit so we can deal with that individually.

>> Commissioner Cahan: Thank you. Is the applicant here? Okay. You have five minutes to speak, then we'll hear from the other side, and any other speaker cards. And then you'll have another five minutes to respond. Okay, great. Okay, Mr. Dombrowsky.

>> Good evening. My name is Jim Dombrowsky. I represent Andy Sabari as an individual, Andy's BP, Inc., and also Sabeck, Inc. all of whom have an interest in the station located across the street from Moe's which is the subject of this permit. I've just heard the reaction to my letter that I sent yesterday. And I just want to make a brief response. And also, I want to speak also with reference to the conditional use permit which is also before the Planning Commission.

>> Commissioner Cahan: We will give you another two minutes for that.

>> Okay, perfect. The issue that was addressed in my letter yesterday, is first of all, the writ of mandate clearly did not limit the EIR to traffic impact, notwithstanding the interpretation of the order, which was not reduced to anything in terms of the judgment or the peremptory writ of mandate. The peremptory writ of mandate which requires a preliminary EIR, did not specify a traffic analysis. And in fact our verified petition for the writ of mandate included a request for review by EIR of the hazardous material issue. We've briefed that in the letter I'm not going to repeat myself. But that clearly was before the court. And to read into the order that was rendered by judge Murphy before he issued the judgment and the peremptory writ I think misplaces the issue and does not create

any problem with respect to the position we're taking which is the EIR, required both a traffic impact analysis, and an environmental impact with respect to the hazardous waste. And I think that's clear, was before the court, and we prevailed on the issue, got a judgment against the city, there was no appeal taken of the writ or the judgment. So therefore that judgment stands. And notwithstanding the interpretation that you just heard I submit that the EIR is required to be done for the environmental impact.

>> Commissioner Cahan: Thank you. So we will come back later to do the conditional use permit, and you'll have two minutes to speak on that issue.

>> Okay.

>> Commissioner Cahan: And right now your two minutes is up for the EIR.

>> Okay, thank you.

>> Commissioner Cahan: Mr. Wesley.

>> Gary Wesley for the applicant. Mr. Dombrowsky gave you one page from a 13-page hearing before judge Uber where judge Uber noted on that 13th page that just looking at the judgment and writ which were prepared by Mr. Dombrowsky are very vague, just looking at that. The judge couldn't tell what the prior judge had based his opinion on. And what judge Uber had to do was to go back and look at that decision, that eight-page decision, written by judge Murphy, to determine on what basis an EIR would be required. And what he found was that it concerned just traffic, and the judge had not accepted, and thereby had rejected, this business of there being some pollution from decades ago underneath the gas station. So that's how judge Uber discharged his OSC, denied any request for injunctive relief in regards to any activities at the gas station, and if Mr. Dombrowsky didn't like the fact that judge Murphy didn't buy his argument regarding pollution, because no explanation had been made as to how that would be affected by some project, then he could have appealed, but he did not appeal. Thank you very much.

>> Commissioner Cahan: Thank you. Staff.

>> So I guess to summarize the testimony that you just heard from both sides, Mr. Dombrowsky is saying look, you really should have analyzed hazardous materials. Although we disagree with that because we feel we should only analyze areas where there's a potential for a significant impact. And so we prepared an initial study to try and identify, what are those areas, where are those areas of potential impact? There weren't any with regard to hazardous materials, to be honest there weren't any with regard to traffic, but the court told us to do traffic, so we did traffic. So that's why we have an EIR that has no significant impact which is a little bit unusual. But even though we may have a disagreement with Mr. Dombrowsky, it is really form over substance. We did a study anyway. We analyzed the hazardous materials anyway, and we found there were trace amounts and were not migrating off the site. We did analysis hazardous materials, you can see that summarized, within the original study as Mr. Davidson alluded to initially. Whether there is disagreement whether there should have been a full blown analysis in the EIR, we did analyze it as a part of the initial study and found that there was potential for significant impact, and so it wasn't further explored. So I hope that addresses that issue. And then, with regard to the traffic analysis, again, we did a full -- a more fuller analysis pursuant to the court order, and as Ms. Mack alluded to earlier with regard to the methodology, didn't find any significant impacts. Went ahead and ran Mr. Dombrowsky's consultant's numbers anyway, still didn't find a significant impact. But again tried to do an exhaustive analysis giving a benefit of the doubt to the information that was submitted but still didn't find any significant impact. So those are my notes in terms of the two issues that were raised. I don't know if there are any others that you want me to address but I'm here to answer questions. Thank you.

>> Commissioner Cahan: Okay, commissioners, I will entertain a motion to close public hearing on this item. Okay, we have a motion and second. All in favor? Okay motion passes. Discussion on the matter? Commissioner Kline.

>> Commissioner Kline: I'll just get started. Move to certify the environmental impact report, 3A 1.

>> Commissioner Cahan: Okay, I have a motion and second. Discussion on the motion? Okay, we will vote by light. Okay, that motion passes with all commissioners voting -- that are present voting in favor except for Commissioner Platten because he came in later on, on this item. Okay. Moving on to 3A 2. Staff.

>> Thank you. This is the request for the conditional use permit. Which would allow for the demolition of an existing single family detached residence and expansion of the existing gas station at southwest -- southeast corner, I apologize, of McKee road and North 33rd street. The expansion involves the addition of three gasoline pumps and a canopy over that pumping facility, as well as some additional customer parking and probably typical of gas station upgrades. We are closing one of the driveways on north 33rd and relocating the remaining one further south which will improve the traffic at the intersection. The previous C.U.P. was approved in April of 2010. So with this, staff is recommending that the Planning Commission rescind the original approval of C.U.P., 09-115, and approve this conditional use permit request as we put forth in the staff report that it conforms with the general plan land use transportation diagram, designation, of general commercial. It's designed such that it's compatible with the surrounding land uses and would not be detrimental to the Public Health, safety or welfare, as the site is adequate in size, shape and reconfigured such that it would be adequately served by transportation and other infrastructure, as well as the proposed project, with your recent certification conforms to the requirements of CEQA, that concludes staff presentation.

>> Commissioner Cahan: Thank you. Mr. Wesley would you like to speak? Okay. All right, and Mr. Dombrowsky. Again, you'll have another two minutes. We won't start the clock till you're ready.

>> I won't repeat myself, I'll incorporate everything I said previously with respect to the opposition to this permit but I want to make clear that the letters we submitted, I submitted two letters one October 17th and one November 1st, I'm submitting those in opposition to this permit and all the reasons that are stated in those letters, especially the one with respect to the permit, having to do with compliance with all laws as a condition for the issuance of the permit, and we have clear evidence that he's violated the court order, he's violated the stop work order, and he's also -- and we have additional evidence that I want to present today in the form of videos that have been taken over the last week that show that the violations have occurred. And I'm presenting this to the

staff now. There's videos, there's five separate videos. That clearly establish violations of stop-work order and the court order with respect to prohibiting driveway relocation. It shows the use of the driveway, that was Verboten by Mr. Horwedel, hope I'm pronouncing your name correctly, sorry if I mispronounced. We submitted the letters and declaration and also the maps that clearly show that the driveway relocation has not to be used, it has been used and we have videos proving that so I'm presenting that now. As I say I want to incorporate by reference the two other letters that were submitted in opposition to the EIR. I wanted to point out also that as stated in the letter those responses in terms of the issues that we raised in the October 17th letter, that are from well test Inc, the person, the entity that did the tests used by the city to perform the analysis were not made under penalty of perjury as required. There's no accountability. It is clear I respectfully submit that the Planning Commission be irresponsible to accept those reports, without the required statement of penalty of perjury. Thank you.

>> Commissioner Cahan: Thank you. Staff, do we even have the ability to see a video?

>> Renee Gurza: So we did check with the technician and should you want to consider the evidence apparently he can play videos.

>> Commissioner Cahan: And would you advise us if -- it's my understanding their violation doesn't have to do with the conditional use permit per se, that that's a --

>> Joe Horwedel: I would say that the allegations are that the applicant has constructed some improvements without benefit of planning approvals and that is -- it does happen from time to time. The commission does have projects come before you where they are already operating, and are then coming through a code enforcement or other action, to legalize that use. So it does happen on a very regular basis. So this would not be a first time that we would ever be faced of that situation. So normally we go through and deal with the enforcement pieces of that, and as alluded to, that we will go out to the site tomorrow, ascertain, the issue for the commission is reviewing the C.U.P. and do you think it has the appropriate conditions in it and site design pursuant to code, and then I think as Mr. Dombrowsky said, then there is the secondary piece of do you have confidence in the applicant to comply

with the conditions of the permit or that you might issue. And I think that is something you should ask the applicant's representative about, or conversely, the applicant himself to explain what's going on.

>> Commissioner Cahan: Okay, would I like to take a quick vote from the commissioners whether you would like to look at some of the video. So anyone in favor of looking at the video? Okay. We have one in favor. So majority rules. We won't look at that right now. Okay. Mr. Wesley.

>> Thank you, so I wouldn't mind seeing the video but my client is indicating that there is a sign that says that -- that that path is closed, and there is no public that's coming and going, but occasionally people may jump across there and it isn't any part of any project that he undertook. So the city can look at the video but we're in compliance as far as I know with every court order. There's no court order that says we can't do anything that's been done. If there had been the judge would have told us that last time we were in court. Mr. Dombrowsky hasn't quite had the gall to go back to court and try to trick people again. Maybe he'll try it after this hearing. But with regard to what the city requires, my client's worked very closely with the city. He knows that this has been pending. He is not out to violate anything. That isn't his intention. I don't think it's been done. I'd like to see the video. But if it isn't a condition to your issuing a conditional use permit, that somebody not have violated anything at all, then you don't have to figure it out right now. And it's fortunate that you don't because anybody could come in here and dump a bunch of evidence on you that you can't easily look at and say it's 15 hours long and you'd never get through anything. So it's fortunate that you don't have that rule. But my client is not trying to violate any rules at all because he knows that he's on camera 24 hours a day from across the street. And that they're out to do him in. And -- but in terms of what's in the best interest of the city and this project, of course this is a great project help the city. Thank you very much.

>> Commissioner Cahan: Thank you. Do I have a motion to close public hearing? A motion, second all in favor, aye, any opposed or abstaining? Okay. Public hearing is closed on the item. Staff.

>> Staff doesn't have any additional comments, but we are available for questions.

>> Renee Gurza: But I did run a note for the benefit of Mr. Dombrowsky, that I heard the director say that he will assume that the evidence on this DVD is as stated by Mr. Dombrowsky, and that there is use of a driveway, and so the director has indicated that he is going to send someone out to investigate. So even if everything on this DVD is true, the city would still independently verify it, and wouldn't initiate a code enforcement action just based on a DVD. So again, just assuming that everything that Mr. Dombrowsky said is on the DVD, code enforcement can independently go out and witness, actually witness what's going on to ascertain whether or not there is any sort of municipal code violation going on at the site.

>> Commissioner Cahan: Thank you.

>> Joe Horwedel: And the action about I do have one clarification. We also need to do the rescission for the previous permit.

>> Correct.

>> Joe Horwedel: Right.

>> Commissioner Cahan: It is my understanding that can be one motion.

>> Commissioner Kline so moved.

>> Commissioner Cahan: Commissioner Kline, your mic is off.

>> Commissioner Kline: I move to approve the conditional use permit which is 3-2, CP11-049 which includes the revocation of 09-015, as recommended by staff.

>> Commissioner Cahan: We have a motion and a second, but I believe we have to rescind.

>> Rene Gurza: Included in the motion was a revocation of the prior permit.

>> Commissioner Cahan: Did you include that and I missed it? I'm sorry. Thank you. I was listening for it at the beginning. All right. So we have a motion and second. Seeing no discussion on the item, we will vote by light. Okay motion passes with all commissioners present voting in favor. Moving on to petitions and communication. Public comments to the planning commission on nonagendized items. Please fill out a speaker's card and give it to the technician. Each member of the public may address the commission for up to three minutes. The commission cannot take any formal action without the item being properly noticed or placed on the agenda. In response to public comment, the Planning Commission is limited to the following options: Responding to statements made or questions posed by members of the public or requesting staff to report back on a matter at a subsequent meeting, or directing staff to place the item on a future agenda. Seeing none, move on to referrals from city council, boards, commissions or other agencies. Seeing none, good and welfare. Report from city council.

>> Joe Horwedel: Madam Chair, the city council last night on a unanimous vote proved the envision 2040 general plan. We had a study session with the council in the afternoon with about an hour and a half discussion about the plan, and I think really importantly, the implementation of the plan, that there was widespread support by the council, and how they talked about the goals of the plan and what it was achieving and that really, pushing the envelope forward for the city and land use. But also, recognizing that there is a lot of hard work in front of us and so we are as staff kind of starting today on the implementation piece. The plan will be effective December 1st, once the 30 days run on the clock for that. We are already starting up discussions with Public Works and transportation staff on the capital improvement program process, and are working to schedule a time with the commission to start up that budgetary process with you so you are well involved well before the normal May big document showing up. We're also working through with the council on a work plan for ordinances, changing to the zoning code to implement the envision 2040, starting with some -- the normal linking terminology back and forth. We talked quite a bit with the council yesterdays about the importance of this plan focused on jobs and that we need to be prepared to look at our regulatory structure, our policy structure on achieving those job objectives and including are there some things that we being much clearer about in our zoning code to really move towards

essentially a building permit type process for job employment activity for city. So we are really trying to explore how best for us to compete in the region for jobs both from a cost standpoint, from a process standpoint, and desirability standpoint. It was widespread support from the community about our goals for transit villages so we are looking at what are the code changes we need to be making for multifamily zoning districts to bring mixed use into those to eliminate some of the requirements to go through a planned development process. We did answer a number of questions that had come up in the last week or so leading up to the adoption of the plan kind of dealing with rumors that the general plan will do X or Y. So there was a supplemental staff report that we put out last week dealing with each one of those, eliminate planned development zonings which it does not, but our goal is to bring a lot of certainty to the development process, that the development community and our neighborhoods deserve to have certainty about how to build what the plan really wants to achieve. That is our stated objectives now. So we are, as staff, going to spend a lot of time trying to work through that and partly go battle for resources to get the staff behind that. We also did talk about our village planning efforts and what success we've had in attracting state and federal grants to do a number of that work. We celebrated a work of you Communitercity at San José State that's been working in the five wounds neighborhood that has been putting together the first four of our village plan and really powerful work coming out from the community and so we are working very aggressively on getting village plans funded and underway including getting some already into the second horizon year. And so I think it was a great day for the city to have the general plan adopted on a unanimous recommendation, widespread community support both in the afternoon and in the evening here in the chambers. I think we had three speakers that were opposed to what was going on and it was really of how it affected their individual property their ability to do what we've been concerned with in the past of putting an individual property owner's interest of highest and best use above what the city's obligations and what happens after that happens. So it was I think a good reflection of four years of hard work by the community to pull that together. And so I think we have a lot to be proud of and now we get to go make it happen.

>> Commissioner Cahan: Were there any changes to the riparian corridor requirements?

>> Joe Horwedel: The council did have discussions and some of the speakers in the community talked both about the riparian corridor and the need -- the appreciation that it is more woven into the general plan now than it

was in the past. But acknowledgment that the council does need to go and spend some time on the riparian corridor study and reassess really what we want to achieve with that, and then move it into a true policy form instead of where it is today, with just the study document. So that's one that I think as we go through in the work plan of things to implement with the new general plan we'll go through and put in, but it won't be like next week, next year but it will be further down the list. There was recognition about that. They did have discussion about also the open space allowances and regulations outside of the urban service area. That is, you may remember, staff put forward some ideas around appropriate levels of development outside of the urban service area because we've never really quantified that. The council ended up going with the staff recommendation on that. There was a recommendation by Councilmember Kalra to go with a more stringent standard that several speakers had asked about to tighten down those percentages of development, but that failed for a lack of a second. I will -- Vera did remind me the council did approve one of the incidental changes. There were three on the Mabury property that was originally public-quasi-public, remnant piece, staff recommended 8 to the acre and the council approved it up to 25 to 30, 30 I think is the new number at the request of the property owner. That was the -- I think the one thing that was different out of the items that were recommended by commission and staff.

>> Commissioner Cahan: Thank you. Commissioners report from committees, Norman Y. Mineta, San José international airport advisory committee, I have no report. Review and synopsis from 10-26 Donna-11.

>> Commissioner Platten: Move adoption.

>> Commissioner Cahan: So what I had in my packet was October 12th. Would the commissioners double-check the date on theirs? Okay, we have two 12th.

>> Joe Horwedel: Staff apparently got the 26th and commission got the 12th.

>> Commissioner Cahan: Commissioner Yob and I both got the 12th.

>> Joe Horwedel: We'll put that on the next agenda for the 26th. Yeah, we'll bring them for the next agenda, we'll put them all in there.

>> Commissioner Cahan: Okay so we'll defer that to the next agenda. Subcommittee formation reports and outstanding business. Seeing none, commission calendar and study sessions. Okay, seeing none I'll take a motion to adjourn.

>> Commissioner Platten: So move.

>> Second.

>> Commissioner Cahan: Motion and second, all in favor, we are adjourned, thank you.