

The following transcript is provided for your convenience, but does not represent the official record of this meeting. The transcript is provided by the firm that provides closed captioning services to the City. Because this service is created in real-time as the meeting progresses, it may contain errors and gaps, but is nevertheless very helpful in determining the gist of what occurred during this meeting.

>> 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, May 9, 2012. 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 located on the table by the door on the parking ticket 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. If you challenge these land use decisions in court, you may be limited to raising only those issues you or someone else 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 only advisory to City Council. The City Council will hold public hearings on these items. Let the record show that all commissioners present except Commissioner Yob, Commissioner Bit-Badal and Commissioner Abelite. Deferrals, staff.

>> Madam chair there are no deferrals today.

>> Commissioner Cahan: Thank you. Consent calendar items?

>> No items on consent calendar.

>> Commissioner Cahan: All right. Public hearing, we have one item there. Staff.

>> Thank you, madam chairman. Open March 11, 2011, the applicant requested a planned development permit to allow late night use of an existing restaurant of to 2:00 a.m. up to seven days a week and also to maintain the existing use of the 30-person capacity outdoor patio area until 12 midnight. The restaurant unit is a 2044 square foot tenant space in a large 8.3 acre shopping center. It is centrally located within the site with front doors oriented towards the parking lot and Silver Creek Valley Road to the east. And the outdoor patio towards the Silver Creek riparian corridor and residential uses, beyond an open hillside area to the West. The closest residential use is

located about 450 feet from the patio. Two community meetings were held for the subject proposal. With the majority of attendees at the first meeting opposed to the promote while the second was more balanced. Key concerns raised included e-mails and phone calls after the community meetings, included noise, potential disruptive behavior from after midnight patrons, disruption of sleep, additional nighttime traffic and associated accidents and disturbance of riparian habitat. Similar concerns were also raised at the director's public hearing. The existing planned development zoning covering the sites required a plan development permit for the operation of commercial uses from midnight to 6 a.m. It allows the sale of alcohol as incidental if patrons are served a meal. The director of planning approved the subject permit on February 17, 2012, with limitations more stringent than proposed by the applicants. These limitations included late night operations from midnight to 1:30 a.m., the use of the outdoor patio to seats after 10:00 p.m. daily and nonservice of alcohol to nondining customers. On February 27th, the applicant appealed the permit on the basis that the limitation for late night use and patio uses were overly restrictive. Accompanying the appeal was a noise report which analyzes the potential impacts of the project. The report also assesses existing noise conditions at the restaurant through midnight, and late night operations for similar restaurant uses at other location in order to model late night noise from the subject tenant site and outdoor patio during the hours of operation requested by the applicant. The noise report concludes that the applicant's proposal would not exceed the noise standards of the subject planned development zoning district which 60 decibels DNL measured over 24 hour period. However after 10:00 p.m. the ambient noise is lower and peak noise levels are more intrusive, thus warranting the limitation on outdoor patio use to 10:00 p.m. seven days a week and indoor operations to midnight during the week, and 1:30 a.m. on Fridays and Saturdays. The appeal identified five specific objections. The first objection relates to permit number 5, which addresses the allowable days for extended hours of operation. The applicant's request, the applicant's request that the condition be changed from Fridays and Saturdays to any two days of the week, and floating days during the three weeks of Valentine's Day, New Year's Eve and Cinco de Mayo. The applicant's request would make future monitoring and enforcement practically impossible. The floating days would result in less certainty for residents. Friday and Saturday nights have generally been better suited for after-midnight uses in the vicinity of residences as next day is non-working. The limitation of late night hours is a reasonable compromise. In fact, similar conditions have been included in other permits in the city to minimize the potential for noise nuisances. The second objection related to permit condition number 6, which addresses the hours of operation for

the outdoor patio. The applicant requests that the patio closing hours be changed from 10:00 p.m. to 11:15 p.m. There are existing single family houses on East Bon court to the west of the property that does back up to an open hillside area and the riparian corridor. As recommended, the limited late-night use of the patio should not have detrimental effect on the neighborhood residential areas. 10:00 p.m. is a more reasonable time for residents and school-going children to retire for the night than 11:15 p.m. The indoor operation of the restaurant to midnight every day is not as problematic because of the ability to contain indoor noise sources within the building. Hour, outdoor noise can be more noticeable and disruptive after 10:00 p.m. The third objection related to condition number 28 B under the heading security management plan. The applicant has identified the requirement to add additional professional or management personnel during special events and peak periods, the depth is an extraordinary measure. The additional should be removed according to the appeal. City council policy 6-2007 for the evaluation of 24 hour uses recommends the permit conditions address concerns raised by the police. The San José police department is opposed to a planned development permit for late night hours from midnight to 1:30 a.m. for the existing restaurant stating the late night operations would put increased demand on already reduced police staffing. The planning staff recommendation addresses the police department's concern by limiting the duration and days from midnight operations and prohibits a drinking establishment at the subject tenant site. Requiring additional professional or management personnel during special events and peak periods is a standard measure that has been included in other permits in the City of San José as well. The fourth objection relates to condition number 28.C, also under heading security management plan, the applicant is concerned about having active security cameras including closed circuit television to monitor the parking lot until midnight and has asked that this condition be eliminated. Staff feels this condition has been used successfully in similar permits. Most recently the planned development permit for late night uses for Willow Glen included such a condition. The fifth and final objection related to condition number 28C also under the heading of security management plan. The applicant has contested a permit condition that requests assignment of appropriately trained professional management security staff to monitor the site during late night hours. Because the police do not have resources to provide surveillance and timely responses to service calls, staff has concluded that the adequate facility for the late-night use is the responsibility of the applicant in this case. Appropriately trained professional management personnel assigned to monitor and manage the operation and security of the restaurant and this parking area in front. And who are trained by the applicant or their designee how to control crowds and

manage patrons to avoid potential programs with excessive noise nuisance loitering and vandalism. This with the Planning Commission is de novo, therefore the Planning Commission can approve the application with conditions or deny the application outright. However, the planning staff recommends that the Planning Commission uphold the director of planning's decision to approve the proposed permit as noted in the staff report. This concludes staff report.

>> Commissioner Cahan: Thank you. During staff report, Commissioner Bit-Badal did arrive and counsel.

>> Renee Gurza: Thank you. Commissioner Bit-Badal did arrive, but she is recusing herself from this matter, as the applicant has made a contribution to her campaign. So she has left the building and will return after this public hearing.

>> Commissioner Cahan: Thank you. So with this we'll have applicant, will have the opportunity to speak for five minutes. We have a number of speaker cards. Each speaker with a speaker card will have two minutes. And you may or may not receive questions from us that will not be taken away from your time allowance and then after all of the speaker cards the applicant will have another five minutes to speak and then we will close the public hearing. And is the applicant here? If you will state your name before you begin.

>> My name is Andres Valencia. I'm one of the owners of Mexico Lindo Restaurant in Silver Creek. I want to thank everybody for being here. I know that this matter was kind of delayed as of the last couple of weeks or whatnot and I know everyone lives busy lives, so I appreciate that. On behalf of Mexico Lindo, I would like to share with the committee the desire to extend our current hours of operation. I'd like to address the advantages of extending our hours of operation and the value-added benefits that this would provide to our customers and to our business plan. Our current use permit obviously allows us to stay open until 12 midnight, seven days a week, 365 days a year, inside and outside. Like any business we have an option to close earlier, given the demands and the needs of our customers. We so do on a daily basis. We are applying for the use permit to extend our hours of operation to 1:30 p.m. inside in the operation not outside on the patio. Adding an additional hour and a half options to provide and plan for events. Due to our current hours of operation we have been unable to grant

numerous requests from our customers to reserve our birthdays graduations various et cetera. Additional operating hours allow us to in some cases the ability to provide services to more than one event and enhance restaurant availability to our local community and provide financial benefits to our customers. on the family. The purpose of the application is of extending hours is not to turn the restaurant into a bar or a night club as has been suggested and it is to have the option to stay open when it is required. For example, I had somebody who came in DJ indoors at 11:30 I had to shut it down, when they would have stayed an extra hour and a half and generated more money for the restaurant and for the city. On the weekends, the restaurant does tend to get loud. the acoustics of the restaurant and the volume of people that we deal with it does get loud inside. But the noise is contained within the restaurant. Do we have patio noise? Absolutely. You also have noise from the street that carries up the hill. It is not unreasonable that the neighbors are going to hear some noise, just like the neighbors that live right around the country club itself, silence and he serenity. It is not reasonable to expect that in any living situation, obviously the noise report that Jeffrey pack provided states a lot of the things that I'm stating, and that actually a very busy weekend in March where we had a party of 25 on the patio and we had a party of 50 on the patio simultaneously up until 10:00. And the faculty or the argument that we weren't busy that weekend was probably to the contrary, actually last weekend of the Cinco de Mayo festivities and the montero foundation shopping center that has seen four other restaurants that have occupied the exact same space I'm in come and go in the last four years. Two grocery stores now working on the third. Countless are retail stores and a real estate firm. We now have a vibrant and the hardest thing to do on a Friday night or Thursday night or Saturday night is find parking. You're going to get noise created from that. You come in on the 8:00 parking lot is parked. You're going to get noise, part of the deal. We are listening to our customers needs and wants. And this is what our customers want. And need from us in order to be able to provide from them and the community at large a better place, a better community. No one wants to see a shopping center that's boarded up as it had been for a while because there are no tenants that are willing to take a chance on it. We took a chance on that. We just want the same thing back. All I ask is that the commissioners and the staff be fair and look at the facts and not opinion on the matter and I think a lot of the opinions that have been stated have been done in such a manner to basically make it seem as if they are a fact. You guys have black and white numbers, you guys can look at them and I appreciate that. Thank you.

>> Commissioner Cahan: We have a question for you from Commissioner Kamkar.

>> Commissioner Kamkar: Thank you, Madam Chair. Can you please explain to me why instead of the weekend you are asking for two other, or any two 67 days, you know I don't quite understand that.

>> Yes, absolutely. Does your birthday fall on a Friday or Saturday every single year?

>> Commissioner Kamkar: No.

>> Exactly. I can dictate thursday, why not come out on a Thursday night? The restaurant lends itself to -- for somebody to rent my restaurant out on a Friday night let's say for 100 people it's going to cost them \$7,000. Not many people have \$7,000 to spend on a Friday night about. But if they could come on a Thursday start at 9:00 and then go a little bit later that's feasible for me and for them at a much lower cost. Fridays for myself are very busy. I can't close down my operation at a loss. And that's why the floating days. I can't -- I can't Fridays --

>> Commissioner Kamkar: So you rather have like let's say someone's birthday let's say on a Tuesday, an then close early on a Friday, you know, than have Friday, Saturday you know the later hours?

>> Well, it's a floating day, I mean I think the assumption -- and what people are assuming is that I'm going to turn into a night club.

>> Commissioner Kamkar: Sorry to cut you off. I'm not suggesting that you're going to --

>> No I know.

>> Commissioner Kamkar: If my birthday falls on a Tuesday and you choose to open later on Tuesday, how do you compensate for that, are you going to open earlier on a Friday or Saturday?

>> I can that's not my goal. I work 75, 90 hours a week. I'm not looking to make it 108 or 110. The thing is that when my customers need it for me that's when I want to provide it for them. On a Friday night if I don't want to stay open until 1:30, I won't, I don't. Same thing on a Saturday. But if on a Tuesday someone wants to rent out the restaurant and go until 1:30, then yeah I will do that for them if given that opportunity.

>> Commissioner Kamkar: Thank you.

>> Any more questions?

>> Commissioner Cahan: There are no more questions at this point, you will have another five minutes at the end.

>> Not a problem. Appreciate it.

>> Commissioner Cahan: I will call the first three names. If you will come up up and line up, Gina Castillo, Jorge Sanchez and Sergio Sanchez. You may begin. And for all of you as you begin, if you would, you will state your name.

>> My name is Gina Castillo. I have family living in that neighborhood and I've been contemplating living in that neighborhood. I've been to mechanism cone Lindo, it speaks to my culture just even become in the patio outside and seeing the custom doors it's something that is standard it's something that is build and like speaks to the Mexican culture which I really enjoy and love. And I love the way that patio feels outdoors and I love the food there, and I love the ambience that the restaurant offers. So I understand the concerns of the neighborhood. But I also understand the way you know people want to celebrate. People want to celebrate their birthdays, their graduations, their birthdays, baptisms, things of that nature, where you don't want to be subject to close to a certain hour because even if you're not loud like you don't want to say that you have to close at midnight or at 10:00 p.m. because of a law that's fair, that maybe doesn't need to be there. I understand like if I ever had a business I would want it to be open. And I want it to have offers for -- if I wanted to like hold a graduation party or

anniversary party there, I want to have an option and I would have to go to a restaurant that offered the later night. Because that's what I would want to do. And I think that Mexico Lindo offers a great ambience a great menu a great staff and I would love for it to be open later. I don't know if anybody has any questions.

>> Commissioner Cahan: No questions, thank you.

>> Good evening commissioners, my name is George Sanchez and I come here kind of dual roles. I've been a resident in the Evergreen area since '86 when Coyotes roamed the whole hillside. I also attended Evergreen college and see the area develop as it has. I welcome what Mexico Lindo is doing. I embrace what they are doing and I also come here as a fellow restaurant owner. I understand his plight. I understand what he has to do to make things succeed. Working the 70, 80 hours a week work week. And giving his patrons what we need, patrons don't work, the way you think they work. Patrons want what you can give them, if they're looking at dining on a Tuesday, Wednesday, Thursday at 10:00, that's what they're going to look for. If they are not going to get it there, they'll go somewhere else. Where will they go? They'll go to Willow Glen, yeah, they'll go to Santana Row, maybe they'll come to downtown. But I think in -- being in this position, in the before, and having several conditional use permit in my establishments, there's guidelines in those conditional use permit, there's regulations and rules that he has to follow. And if he doesn't follow well he won't have a conditional use permit. But that's why we have those rules. That's why we give businesses the chance to be successful businesses. You know, the businesses that are out there surviving and doing well are out there because they follow the rules. And the businesses that don't follow the rules will not have that permit very long. I think you've seen them. And other than that, that's all I say. Thank you.

>> Commissioner Cahan: Thank you. Going to call the next three names to line up. Haresh cambani, Pam Hudson, Alex malanbranche.

>> Hello, good evening, my name is Sergio Sanchez. I'm a very active agent in the community and one of the things that took place over this last week was we had a Cinco de Mayo fund raiser for the Ontero foundation. The community embraced it. One of the things that a lot of our patrons and our partners came to say is wow, this new

leaf coming in and Mexico Lindo, most of all for the foundation itself we were able to raise more than \$1400 on that given night and it probably would have gone more had we been able to extend the hours but we respected the rules and laws, but these funds the restaurant entreesed the whole event, it's all very successful, all our partners were wishing to do it again, and all it did was bring joy to the misplaced children. We welcome them and we've only been there for about five months but they've definitely brought the plaza to life.

>> Commissioner Cahan: Thank you.

>> Good evening. My name is Haresh comebani. I'm a resident at 4929 East Bon court. , this is within 400 feet radius of East Bon court. I would like to oppose this appeal. One of the things that surprised us all was despite significant dialogue between both ends, the resolution that got passed, we sort of accepted as a balanced resolution, letting Mexico Lindo operate on Fridays and Saturdays until 10. This was a surprise to all of us. I have a few points. Number one, the late night use. It is not just the fact that noise is contained indoors. When the patrons leave the restaurant at 1:30 p.m. and start boarding those cars, there is definitely significant noise that emanate from the exodus of party goers and this is definitely severe during summer months when we keep our windows open. You know, to breathe in. So this is a huge noise challenge. Second one which has been addressed before is patio past 10:00 p.m. is also where we could actually hear conversations going on, on the patio, in our bedrooms. And we've heard you know, patrons cursing, and you know, swearing and having generally a good time. You don't want that kind of foul language, you know, come into your children's bedroom. And there will be other, you know, people who would talk about the safety on the road. And this is well documented, that this is going to create safety hazards.

>> Commissioner Cahan: Thank you. Your time is up but we do have a question for you from Commissioner Kamkar.

>> Commissioner Kamkar: Thank you, Madam Chair. Are you on the restaurant side of the court or on the other side of the court?

>> Restaurant side. The patio faces my house.

>> Commissioner Kamkar: Got it. And then the other questions is, you live in a court and the traffic coming out of the restaurant goes out, you know, probably unless one of your neighbors, how would the traffic and the safety part affect you? Can you explain that to me?

>> The -- the whole Silver Creek valley road is a very windy road with you know, steep uphill and down hills. And so on, so forth. Definitely, you know we believe that there could be the second senses in which people could drive under the influence, and create safety hazards for themselves and other drivers who are driving on the roads.

>> Commissioner Kamkar: Point, you know, I accept that. But so could somebody who's coming back from Santana Row or coming back from downtown. Or Willow Glen, traveling on the same road.

>> Oh, of course.

>> Commissioner Kamkar: What is probably the difference?

>> There is a correlation here where if you have this kind of environment up beyond certain hours, again we have initially wanted a complete ban of use of the restaurant past midnight. You know we've succumbed to a compromise we thought was fair to let the restaurant operate beyond 12:00 on two days of the weekend. Right? I'm fully in support of the staff resolution that stands, not to reverse that. That's all we are saying. So it has created enough safety, you know, covenants in those rules, that should cover it for us.

>> Commissioner Kamkar: I understand, thank you.

>> Hi, I'm Pam Hudson, I'm one straight back from East born up on the map there. I'm the one who submitted this document which you all received through Jenny Nussbaum. I'm not going to read it. I'm going to highlight some important points I think are important for your consideration this evening. First of all, we think you should uphold

the decision at the commissioner hearing. about what would happen and in fact we have a traffic incident and a D.U.I. and an arrest that happened during this very appeal period. And how we found out about it was concerned members of our community letting us know subsequent, we had to go get a police report which is also in the document I submitted to you. I blacked out the people's names because I didn't want to violate their privacy but the case number is listed there and in this document. And that happened less than a half mile of this restaurant. The point is on the safety of this road, we saw wrecks all the time. There was one this week, someone hit the palm tree in the center divide. Two days before that on the curve on Silver Creek valley road, three crashes. They have cops hiding in the bushes. It is a known problem and we asked for a traffic study to be done and that was not done. That was a compromise from us, we felt because we live in that environment every day with those concerns. When you add drinking on top of it statistics say this happens within five mile radius of your home. This brings us to where our homes are. We submitted the statistics back at the last hearing. Those are, you can look those up, those are statistics provided by the police department and other entities who track that information. Last but not least permits need to be enforceable. When you go to a rolling two nights a week, how are you going to enforce that? The burden is already on us as residents to look for things that are happening in our community. For example the D.U.I. incident. If we weren't bringing it to your attention, who would be? The police aren't out there. Someone had to call the police to come. That person sat on the side of the road there for at least 40 minutes before something happened. Which is our whole point. We're a bedroom community, we're not in an environment where this can really be supported. We thought the two nights late night was enough. Thank you.

>> Commissioner Cahan: Thank you, I have a question for from you Commissioner Kamkar.

>> Commissioner Kamkar: Thank you, Madam Chair. Do you hear the noise from the restaurants from your vantage point from your home?

>> When my windows are open, yes I do.

>> Commissioner Kamkar: Would you say you are 600 feet away from the restaurant?

>> My fact sense line is just within the circle of your notification, my backyard fence.

>> Commissioner Kamkar: Thank you.

>> Commissioner Cahan: I'm going to call the next three names to line up. Ron McLeavey Kim McLeavey and Lawrence Castillo.

>> My name is Alex Malbranche, I live on a street that kind of overlaps the Mexico Lindo at the bottom there. I guess our response to the appeal is on file with the Planning Commission. So I'm just going to have out a few points. One of our worse fears came to be with a D.U.I. incident involving Mexico Lindo patrons on March 8, 2012. This is what Pam was referring to here, and a copy of that police report I guess is on file also. This incident illustrates a key point that we, the opposition, have about late night hours. People are simply not going out to eat dinner here in this neighborhood past 10:00 p.m. In this particular case it appears people went out to eat, hung out until closing time, drank too much and in turn, got into the accident. Luckily there was not a fatality but there was a D.U.I. arrest. While the appellant states this neighborhood or his neighborhood is boring and sleepy we happen to like it that way. This is why we paid that kind of money to purchase into Silver Creek. We like it quiet. I personally moved from Cupertino to Silver Creek. This is what we like. We want a safe neighborhood for our kids and families wild the worries of more drunken drivers top road right in our backyard. The incident and the document happened within one half mile of the restaurant. We request that the permit stand as approved on February 8th.

>> Commissioner Cahan: Thank you.

>> Good evening. My name is Ron McElvie. Canyon creek shopping center. As a rebuttal to the appeal the Planning Department mailed the hearing notice to residents 500 feet from the restaurant. This translates to only 36 residents. It was up to the small group of neighbors to communicate what the intention was for this project. The residents opposing this permit have been actively involved in meetings and community awareness since

September of 2011 and have set up an e-mail chamber and a petition. We have nearly 500 signatures from the Evergreen zip codes strongly opposing this strongly 125 signatures from our closely surrounded zip codes. The rest are from out of the area customers. There was a noise study done but the noise study was done in early March and there was not much activity on the patio so of course there was no excess noise. I am concerned that a rolling two nights a week will be difficult or impossible to track. How would this be monitored? The nearest home is just over 450 feet straight up the hill. Noise travels directly into our bedroom windows. There's a riparian corridor between the houses and Mexico Lindo which makes it much quieter than a populated area. Many of the residents have young children and we all work. Being awoken from the late night police department is on record as being opposed to this. They do not have resources to support the surveillance efforts that will be required for late night operations, as you know there was a D.U.I. and police record filed very recently, we're concerned about further incidents on our dangerous roads. For this reason the added security is necessary to assure the serenity of our beautiful area. In closing we moved to the Evergreen foothill area to escape the noise and busyness of city life. We director's original approval and thought it was a good compromise for all involved. I'm hopeful that you'll uphold the director's original approval. Thank you.

>> Commissioner Cahan: Thank you.

>> Hi. My that is Kim McElvie and I live at 4945 residents move for a peaceful existence in a rural neighborhood area with a good quality of life and away from the metropolitan activities. And a late night drinking establishment changes the entire community atmosphere and attracts late night strangers onto our already dangerous roads. Captain Mark Bastillas who leads the late night patrol personally attended the meeting with us. to voice his personal opposition and noted that clientele changes dramatically after 10:00 p.m. in the location essentially becomes a bar. Additionally I'd like to quote a letter written by the San José police vice unit officer Christine Zarotti. The San José police department is opposed to the conditional use permit for drinking establishment puts staff extra officers in the late night hours to handle the increased demands and calls for service and criminal activity that comes from late night establishments. Any police related activity that was directly from her letter. So why are we considering putting a late night drinking establishment in a rural neighborhood shopping center whit increases criminal activities? The police say they aren't staffed to respond to this and most local homeowners are

not the patrons after 10:00 p.m. We welcome the restaurant but we ask for your consideration to continue the limitation and the limited usage till 10 p.m. We also ask that you do not allow audio on the back patio. The dining patrons are fine but they are using a late night audio sound system and it actually starts at 6:00 p.m. and goes until 10:00 p.m. and I do have examples of what it sounds like. We support the neighbors across restaurant than we do. If it's a restaurant the diners may eat their meals in the serene setting that we can all enjoy and not with the loud music.

>> Commissioner Cahan: Thank you.

>> That is generating a bar setting.

>> Commissioner Cahan: Thank you very much. I will call the last name speaker card names. Steve barrier and Guillermo Mortas.

>> The villages is a gated community in the Evergreen area for people 55 and over. I want to tell you I do not represent the villages, but speaking on behalf of Mexico Lindo. I have been to Mexico Lindo several times, wonderful place, wonderful atmosphere. I have had a retirement party, on occasion, actually two occasions I asked for a certain date and the management of Mexico Lindo couldn't provide that date for us paws there was another party coming in so we had to reschedule. The other thing I can tell you is I was over there at Cinco de Mayo and you know, since I've been over there I've never experienced any problems at all but I would think if you were going to have a problem it would be on the occasion like Cinco de Mayo or a certain occasion like that. But I've never seen any problems over there at all. I've been over there and had dinner and I can tell you they don't stay open as far as late every night. They close early. When there's no participants there and no customers there. I can't speak of all -- I can't speak for all of the villagers but the ones I've talked to really enjoy Mexico Lindo they appreciate the fact that they're there because there are three or four restaurants there before Mexico Lindo established itself. I hope you allow it to stay open later, and that's really all I have to say. Thank you.

>> Commissioner Cahan: Thank you.

>> Hi, my name is Steve byer about opposition of this and I'm here to state formally for the record that that's not true. We have no position for or against this issue. We don't believe it's our business and we don't appreciate that we've been brought into the matter. And I just wanted to formally state that for the record.

>> Commissioner Cahan: Thank you for that clarification.

>> Hello, my name is Guillermo montez, I've been a resident here all my life. I'm Latino many times we have been to that restaurant up in the Hill borne area, six or seven different restaurants in the last seven years and to see to see what he's doing its an inspiration for all of us. I'm sympathetic to D.U.I.s, D.U.I.s everywhere, heavily drinking there. I have an opportunity to go out quite a bit whether it's restaurants turning into night clubs but I've been here a few times, many times and the reason they need to stay open a bit more longer is to make it. To make it. And it's time for that restaurant to make it in that community, it really is, it is Latino owned, Northern California, San José, California it's time for them to have a chance and let's give them that chance, thank you very much.

>> Commissioner Cahan: Thank you. Okay. And that's the end of our speaker cards. So you may have another five minutes if you'd like. I want to thank everybody that spoke on behalf or against it. Obviously it takes a lot of time to prepare what you prepared and I appreciate that one way or the other. As stated, which was news to me from the ranch HOA, they are obviously it's been stated before in staff's notes that they are against it. Obviously formally no they're not. You may have one member that's on the board that might be against it but just because they're against it doesn't mean that the entire community at large is. Some Silver Creek I don't know if they stand against it, I live in the Silver Creek country club and they don't speak for me. I also have a lot of friends that live in the country club and I know they don't speak for them as well. The noise levels with the PA system on the patio, yeah we had a fund raiser on Thursday, it was Cinco de Mayo on Saturday, it was loud. That is not indicative of the noise on the patio. I don't know if you've been to the restaurant but the noise on the patio lends itself to be beautiful. If 10:00 and ask them sorry you have to go, I'm going to start losing customers, I'm going to start losing business. My P. A. system, if you actually hear the speakers on the pat you what we actually hear what we have on a daily basis, you can't hear it past the patio. They are old, they are worn and the noise generated is

talking. Does that talk elevate at times? It does in regular conversation. People talk, the noise raises. The signatures that they acquired, I looked at that list. It was an e-mail campaign. The signatures that I acquired were people coming into the restaurant and knowing what I'm on my Facebook page I have 770-something "like"s. On a petition. As well. And whether people sign things anonymously, how much weight does that carry? My signatures are actually people, with their addresses, and I would like to know how they got the 50% on that, because a lot of them were right from the neighborhood itself. I never stated that it's a bedroom community, and that it's boring and sleepy so from the record, I did not say that. And I want to know how many mailboxes have been taken out from the country club itself, people leaving the country club. I don't know how many stories, of how many mailboxes taken out, people leaving the country club itself drinking. That's what the country club does, I'm not saying it's a drinking establishment but people do go there to drink. It's a fact. Just like my restaurant is a restaurant and it has a bar. People come there to drink and eat, same thing as the country club, people go there to drink and eat. Doesn't mean I should be held at a different standard than the country club. If someone goes out there at 9:30, I can't ask them to leave at 10:00, they would not come back. Music out there after 10:00 is nonexistent. From 6:00 to 10:00 p.m. is well within the operation of any establishment within the city limits. Hi a customer one time come into the restaurant, had one Margarita, walked out fell down passed out, called the paramedics, ambulance came, turns out she had meds in her that she shouldn't have been drinking. It is not my responsibility to ask customers if they are mixing meds. We do talking and reacting and I've cut many people off for that reason. But if people are mixing things with what they're drinking that's beyond our responsibility and our scope of expertise. We're not doctors. Luckily we had nurses on hand at the strait that were able to handle the situation until the paramedics came and obviously the lady left completely embarrassed. It's obviously that the city nurse and obviously against better judgment, she was tinkering with her meds and had a Margarita and passed out. That being said we do our due diligence to provide a great atmosphere, an ambience, a family atmosphere. We want to continue to do that. My plan isn't to do be there two years, three years, four years, it's to be there 20, 25. My dad has had the Mexico Lindo on fox and cherry for 25 years. For Mexican like my dad who has an education of a third grader in Mexico to do what he has done that is a great inspiration for myself. I want to offer the same thing for my little brothers and other young kids that come into the restaurant as well. That being said, I thank you for your time.

>> Commissioner Cahan: I have a question for you from Commissioner Kline.

>> Sure.

>> Commissioner Kline: Sir I'm very impressed with your work ethic and what you've been able to do there.

>> Thank you.

>> Commissioner Kline: I just want to make a few comments and a question. I don't know the restaurant business and I wouldn't pretend to do what you are doing, asking even an intelligent question so these are questions to get information. Seems like you had access indoor and outdoor to midnight, Monday through Friday and Saturday et cetera. This seems to be coming to us with a recommendation to extend to 10:00 to et cetera to 10:30. Between the balance of those two which would be a better business model for you?

>> Patio to midnight.

>> Commissioner Kline: I would think so too and I don't know your business at all.

>> That's why I appealed the original decision.

>> Commissioner Kline: If this decision goes the other way, you would have lost an enormous amount of business to my way of thinking just assuming and again I don't know your restaurant or your business. I would think that would probably run you out of business.

>> Yes, absolutely.

>> Commissioner Kline: Isn't that a pretty big risk that you're taking appealing this or even not appealing it but even asking for the permit in the first place?

>> Well, the patio was never an issue with the permits. The patio was never --

>> Commissioner Kline: It is now.

>> It is now, absolutely it is. So obviously that was never a foresight on my behalf because I was never looking to change anything for the patio. The patio use was staying the way it was permitted ten years ago.

>> Commissioner Kline: You realize what we're going to decide, I can't predict what we're going to decide, you're stuck with this. This is a risk my business move on your part.

>> Yes.

>> Commissioner Kline: I just want to make sure you understood that.

>> I do understand that.

>> Commissioner Kline: Good, I want you to understand this is a conditional use permit, it runs with the land. It looks like you're an amazing business owner. An Irish club owner could move in and be a horrible owner and be outrageous noise. Do you roifs this is not actually about you, it is about the land itself, this goes beyond, I hope you stay in business for 25 years, you look like a fantastic owner. It is with the land not with the business.

>> I understand that, absolutely.

>> Commissioner Kline: Again looks like you're doing a great job and hope that you will be very, very successful.

>> Thank you I appreciate that and also I wanted to state obviously with the land use itself, there are two other restaurants in that same shopping center as well, their patio uses are still to midnight so restricting mine to 10:00 would be obviously not in -- wouldn't be congruent with the rest of the policy in that same shopping center.

>> Commissioner Cahan: Commissioner Kamkar has a question for you.

>> Commissioner Kamkar: Thank you, Madam Chair. So following on Commissioner Kline's line of thought, is the patio also 10:00 on weekends, too? Will the patio from 12:00 go back to 10:00 for the weekends also?

>> Seven nights -- seven days a week.

>> Commissioner Kamkar: So the 1:30 is only for the inside for those two nights. Second question is, can you talk about your management plan as far as D.U.I.s is concerned, supposedly the police report says this one person came out of your establishment. How has been your record otherwise? How long have you been here and has there been any other issues that you know of?

>> We've been there 19 months. That I know of, no other issue. Like I said we try and do our due diligence. I've driven people home myself that they were fine and then all of a sudden they're not you know. And it happens. And I live -- I have my car available and I'll take people home I'm I'll drive people home that to me is not a problem, we call cabs. It's just this one lady took it upon herself and actually the circumstances of the night, they were supposed to be going home with somebody else you know, when they got outside they obviously changed their mind and decided to go their separate ways. I captain decide or I can't -- I can only do what I can do for them. Beyond that it's accountability for their -- I mean for own actions to a certain degree, you know.

>> Commissioner Kamkar: Thank you.

>> Commissioner Cahan: I've been to your establishment a number of times.

>> Appreciate it.

>> Commissioner Cahan: And actually the food is wonderful, the drinks are fun, and I appreciate you have heavy food to help counter those big yummy drinks that you have. One thing that I wanted you to address, you're also appealing the issues with having security. And if you could speak to that. That would be helpful.

>> Yes. The plan -- my plan is, like I've been stating before, if my item was to turn it into a club, absolutely, security's warranted not a problem. But what we're hoping to create is more of a family events. When there's family events I don't know if you've ever had a birthday party. Is there security warranted, maybe for some families you need security, you know but for the general population people don't. So that's more the line of thinking. Obviously if there was a club or something like that, absolutely I would have absolutely no problem hiring security outside and inside but what we're trying to lend our cells is to our customers' needs which are usually family events or corporate events where everybody know themselves or each other. When people know each other the energy is good. You know there isn't that thistle or animosity or whatever, because everybody is there to celebrate a common event whether it be a birthday a graduation whether it be a retirement. So I don't feel that security is warranted in that manner. I mean I had my you know ten year high school reunion a few years back at AP stump's we had the whole downstairs. There's no security down there. I mean everybody was there from the school everybody to have a good time, there was no security needed. Obviously I completely agree with the decision of having security. If that's -- if the business I was trying to do was the club thing, I appreciate my restaurant, a lot of work goes into it. I do not want to trash my restaurant you know? And that's not -- or the neighborhood or the community itself. That's not my goal. I'm not going to be there 25 years if that's how I run my business.

>> Commissioner Cahan: Do you happen to know how late megabyte is open?

>> Megabyte generally closes at 10:00. The operating owner, manager, if he had the opportunity to stay open later because of a large party woe do it in a technical second.

>> Commissioner Cahan: Around for clarification of what Commissioner Kline asked you, you would prefer to go back to your original hours.

>> If --

>> Commissioner Cahan: If this appeal does not go through?

>> If my use was going to be restricted to 10:00, I would rather go to the original. I don't see the net loss of hours. I'm obviously trying to move forward and not backwards and having a net loss of operating hours in my eye would be going backwards.

>> Commissioner Cahan: Thank you, I see no other questions from the commissioners.

>> Thank you.

>> Commissioner Cahan: Okay and we will go ahead and close public comment now. All in favor, okay. And staff.

>> Thank you, Madam Chair. Staff has worked very hard to find the right balance to facilitate greater opportunities for success for this restaurant. And also carefully craft conditions that would allow the commercial use and the residential use to peacefully coexist. So as evidenced by the number of conditions that are in here, we've obviously taken great care to find that right balance. I did want to comment on a few key issues that were brought up by variation speakers. One of the concerns was, you know, there was a statement made you know, that there's a lot of traffic going by late at night, that might be people returning from the neighborhood, from downtown and other venues. And that traffic will make some noise. While that is a true statement staff figures the bigger issue at hand might be walking loud voices in the parking lot the starting of the car, windows rolled down, stereo on perhaps or people loitering. That's different from someone returning from an area out of town or they're just driving by. So that's why we think it is important to have some level of restaurant management staff have control

over what happens. This commission did consider a conditional use permit for the Lou's village project over at Lincoln and willow I think about a year ago or so. We included conditions there about management staff and I want you to know that these conditions in this were identical to that. We are merely saying that after midnight, the applicant needs to take some reasonable care to make sure that their employees or certain employees or at least have some level of some training in how to deal with security issues and have the public relations skills to be able to deal with issues that might arise with loud patrons in the parking lot and be able to handle that discretely so it doesn't create a problem. And so it was a condition that we thought was very reasonable and very affordable. On the part of the property owner, they could monitor with cameras so they don't necessarily have to leave their posts in the restaurant, to go monitor the parking lot. They could go look at the camera. If there was a problem they didn't need to go out there. If there was maybe the manager could have a conversation with the people loitering in the parking lot. It was something that staff thought was very reasonable. The commission thought that was something very reasonable to include as part of that project. We do have a condition in the permit that deals with noise, and while it's difficult to enforce a particular noise standard since most residents don't have handy-dandy phone app that provides clear accurate decibel rating level and noise averaging level and have the ability to do that, we thought it was important to have a condition that could be applied in more easily gauged and that was to put a condition in there that any noise after 10:00 p.m. should not be audible from a north hearing perspective inside a residential unit with the window closed, anything up to 10:00 to the time of closing. That is something staff feels is a reasonable condition. We did put some measures in place to try to make sure that to the extent that the patio's closed that is their opportunity to allow the restaurant to open, stay open late past midnight and not create a disturbance and staff feels that can be the case if the doors are closed. So there's a condition number 20 that requires that there be adequate ventilation, air conditioning and so forth so that even on warm days the doors can be closed and noise is not going to emanate outside the building. So therefore that kind of takes care of any noise issues late night within the building. The issue becomes what happens when the people leave and they're going out to the parking lot and that's the trickier thing to deal with. That is somewhat outside the control of the management staff. While they can have the best intentions you can't control a patron that gets in their car revs up their engine, loiters for a few minutes. That's a very difficult thing to address. That's why we feel the conditions in here are appropriate. With respect to the business model and whether or not it's advantageous for the applicant to take advantage of this particular planned development perit or frankly not do that but go with the status quo under

the existing permit they do have simply choose not to implement it by not being open past midnight. The current status quo, they can have the current patio open until midnight discretion to implement this permit it's not by the act of this commission. If the commission can late night use, in which case they can continue to do the patio at 10:00. And so it's once they've made that decision that they're going to make the decision that they're going to be open past midnight that this particular permit becomes effectuated and you can't go back one week and implement this permit and go back to the status quo. It is either an all or nothing, you either implement the permit or you choose not to.

>> Commissioner Cahan: Commissioner Kline has a question related to specifically what you're talking about now.

>> Commissioner Kline: I understood, I could be wrong but his existing use allows him to be open on the patio until 12:00 and this change actually rolls back to 10:00 p.m. Therefore he can continue to use lo overtended midnight on Tuesday or Thursday let's say and starts exercising the conditions in this permit, then the 10:00 p.m. in his patio also kicks in, is that correct?

>> That is correct.

>> Commissioner Kline: All right, so in other words once he tries to stay open one night he loses all the 10 to -- all the 10 to 12 every single day of the week for the rest of the --

>> Essentially, yes.

>> Commissioner Kline: Okay, so that wasn't clear, I don't think it's stated correctly but I get to the point, thank you.

>> And the only other final point that I want to indicate is that Silver Creek country club does have a clubhouse that does not have a permit to be open past midnight. So I just want to state that for the record. That concludes our comments and I'd like to ask if Mr. UKUBU has anything to add.

>> Just a few more comments. The first one has to do with the noise report that was prepared by the consultant. Noise report said, the after-midnight uses weren't going to be a nuisance. It was a good noise report, and what dated was some of the measurements were done over 24 hour periods. The DNL. And then some of them were weighted. I think the thing that's difficult to measure is the specific noise sources like, as Mike said, after a special event when people come out with party horns and things like this, that's almost impossible to measure. And if you combine that with the idea of having floating days, then there's no at all for the residents. And also, that after 10:00, 11:00, the ambient noise level is not so low that this latest rising noise source becomes more of a nuisance.

>> Commissioner Cahan: Commissioner Kamkar.

>> Commissioner Kamkar: Thank you, Madam Chair. I want to ask staff regarding the minus nine hours that the applicant brought up regarding you know, and I think it's probably minus 11 because for seven days a week you lose two hours. That's 14 hours. And then you add three hours for the weekend, 14 minus two, 11, how is that a balance? I understand what you're trying to do but it seems like we didn't achieve it, number 1 and second item I'd like you to address is the ambient noise. We have a a sparrow on the tree next to our house, doesn't let us sleep. Talk about ambient noise, you know. Are and also I play soccer, as you know. A soccer field is 300 feet long if you will. And if you're 500, 600 feet away I mean sometimes I -- I'm the referee and I whistle and they don't hear me, you know. So I'm having a little bit of a hard time understanding how good conversation, now I can understand if the yelling and you know, partying you know, screaming that I can understand. But conversation, 500 feet away. Again, if we were in an enclosed building like this, I can see the echo and -- but if you're in a wide open place, just can't understand the, you know, the flowing river that's back there, you know, the crickets, you know, the -- how could conversation be so, you know, invasive in that environment?

>> I cannot speak to your conversation but with music and party horns and things some of those can be pretty noisy and those probably are going to create some sort of nuisance on the residential areas to the West and North. But as far as the conversation, I know one of the -- somebody mentioned that's in their testimony and I haven't had any experience with that, I couldn't speak to that. Mike, if you want to add something.

>> Well, I'm not sure I can add anything that's really scientific, other than I can say as an avid camper when noise levels go down you can hear distances from far away. If it's not abated through sound walls and so forth. So that does rise to be an issue. And as Sal had indicated, because of the fact there is such a quiet ambient noise level, after 10:00, it is something you can hear a pin drop. We're not trying to mitigate for the pin drop. We're trying to mitigate the larger more significant issues. With respect Mr. Kamkar's Commissioner Kamkar's comment about hours of operation and taking away prime hours. I'm not entirely sure whether or not the patio would be used until 10:00 every night, seven days of the week anyway. But I think that probably the prime hours that they probably would be used is when we were actually allowing them to be used open the weekends. And the late night within the restaurant itself. So I think they would be able to take full advantage of those extended hours. There may be operating hours that might be more restrictive but they might become probably a nonissue because I suspect that probably a lot of times the patio is not being used late night anyway except for only occasionally during the week.

>> Commissioner Kamkar: You know one other question I have is, you know I'm not sure if I understood you correctly when you said it's one way or the other. You know can this commission suggest you know compromises where maybe patio hours could be set at maybe 11:00 and then keeping the rest of the conditions as staff has proposed, or is it all or nothing?

>> Well, the Planning Commission certainly has the discretion to change the conditions that are worded in the permit. This is a de novo hearing, you have a full right to change any of the conditions that are identified in the permit to any extent you feel is appropriate. But as far as the implementation of this, if the commission decides to approve or uphold the appeal and allow a variation or I'm sorry uphold the director's decision, that the applicant still has the ability after that decision to decide whether or not they want to implement the permit or just essentially ignore it and go back with the status quo.

>> Commissioner Kamkar: If they choose to ignore it, can they invoke it at a later time and then be stuck with it, or --

>> I believe the permit is set up that they have up to two years to implement the permit. So essentially they have two years to essentially decide. And then after two years, that decision's made de facto in terms of whatever they happen to be doing at that time.

>> Commissioner Kamkar: The decision goes away.

>> That's correct.

>> Commissioner Cahan: Commissioner Kline.

>> Commissioner Kline: I don't know how that restaurants work but I know it is not a science. Sometimes managers lose track of time, employees lose track of time. And it happens that one night the restaurant stays open until 12:30. Neighbors, rightly, say hmm, just implemented the permit, didn't he? And therefore now he's restricted to 10:00 every night on his patio. Is that what I hear?

>> Maybe the assistant director would like to weigh in, or else counsel, with respect to that, on the issuance or sort of an accidental occurrence. Whether that would constitute implementation of the permit if it's issued as such.

>> Renee Gurza: So if it happens to be accidental, I don't think it would be interpreted as a gotcha. I mean it would be the actual operations, the normal operations and ongoing operations, in terms of what permit is the applicant operating under. As the planning division noted after two years if the permit wasn't implemented by actually operating under that permit, the decision would be made for the applicant. Because this permit would go

away after 24 months. If it's not implemented. But in terms of would one accidental being open past midnight trigger a gotcha I think we would look at the ongoing operations of the site, and not one accidental occurrence.

>> Laurel Prevetti: And if I may just add, unlike other use permits and development permits that the commission has seen there is no need for a building permit or some other type of activity that would then signal in fact implementation of this permit. So we would be looking for other signals such as you know advertisement that if you're interested in a party, or some type of special event, and want to be open past hours, then that would be a pretty clear signal that the restaurant owner intends fully to implement the new permit.

>> Renee Gurza: I suppose I should add that if there are several accidents then that would be certainly something we would look at that maybe it isn't so accidental. I mean but to get to your question, if there was one accident over a period of a year, no, we wouldn't use that as a gotcha. But if there were 30 you know, then we'd start to assume that maybe the operations have changed.

>> Commissioner Cahan: Okay. Commissioner Platten.

>> Commissioner Platten: Yes, I have a motion. I move that we uphold the director's decision to approve the planned development permit to allow late night after midnight operations until 1:30 a.m. for the indoor area of the restaurant only but reverse the director's decision and modify the conditions to permit outdoor patio use until 11 fipple p.m. for an existing public eating establishment on the 4.38 gross acre site.

>> Commissioner Kamkar: I would second that motion assuming that the rest of the staff recommendations are held steady.

>> Commissioner Platten: That's correct.

>> Commissioner Kamkar: Second.

>> Laurel Prevetti: Madam Chair if I could ask a clarification. Would 11:00 p.m. on the patio be seven days a week?

>> Commissioner Platten: Yes.

>> Laurel Prevetti: Thank you.

>> Commissioner Cahan: Commissioner Platten would you like to speak to your motion?

>> Commissioner Platten: No, I don't think we need to.

>> Laurel Prevetti: One more clarification if I may. The hours of operation for the indoor would be 1:a.m. on Fridays and Saturdays and on the other holidays and dates mentioned in condition 5, so exactly as the condition currently reads?

>> Commissioner Platten: That's, we're upholding the director's decision with respect to those conditions, yes.

>> Laurel Prevetti: Thank you.

>> Commissioner Cahan: Commissioner Kline.

>> Commissioner Kline: There were several statements today about the actual business itself and I would like the director to clarify that as a conditional use permit this isn't about the actual business, but goes with the land, and the fact is that we hope he's -- and a little bit even Leo can jump in here, that this is not about the business. We hope this business is successful.

>> Laurel Prevetti: Absolutely. This is a permit that runs with the land. And you know, we always hope our local businesses succeed. So again, I think what we're hearing is that not only staff but also the commission is trying to find that balance point, or any business that would operate in this location.

>> Commissioner Cahan: So this is a bit of a conflicting issue. Because we want two things to be successful here. We want your business to be successful and we want your neighbors to have a successful living experience, where they are. And your restaurant is a fabulous restaurant. I think it's a real benefit to your community, because you really don't have a lot of nice, sit-down restaurants in your area. You have megabyte and then the country club and then the rest of the ones that I've seen in that area are pretty much a fast-food kind of place. So I think that it's great that you're there and certainly I would like to see you succeed there for many, many years. And then there's the conflict of it is a quiet area, and so we want to make sure that your neighbors are able to have a good night's sleep and a thorough sleep, some people go to bed pretty early. And I can understand their concerns. And I appreciate that you continue to try to help with the D.U.I., preventing any D.U.I.s and that area that center really needs to have success. I know you have had a number of grocery stores. I'm not certain if new leaf is actually going to succeed or not. We want as many of the businesses there including yours to be successful, not just Starbucks. We appreciate your being there and we hope you can thrive. With that we'll take a vote. Okay, and that motion passes with all commissioners present voting in favor of and one abstention from Commissioner Bit-Badal. Thank you. Okay, petitions and communication of communications.

>> Laurel Prevetti: We have none this evening.

>> Commissioner Cahan: Referrals from boards, commissions or other agencies.

>> Laurel Prevetti: We have none.

>> Commissioner Cahan: Good and welfare, report from the city council.

>> Laurel Prevetti: The city council has considered the budget, operating budget as well as the capital budget. Your report to be council will be made public in the next day or so and we'll provide you a copy of that. It will also be available online if you are interested in seeing it sooner so thank you very much for the comments to the council. I believe their hearing is next week so if you're interested in participating in the study session you would certainly be welcome to do so. And that concludes staff's report. Thank you.

>> Commissioner Cahan: The commissioners report from Norman Y. Mineta San José international airport noise advisory committee, I have no report on that. Review and approve synopsis from 5-2-12. I do not believe we received that synopsis. Did we? Okay, I think we're going to have to defer that item. Subcommittee formation reports and outstanding business? Seeing none, commission calendar and study sessions.

>> Laurel Prevetti: We have no changes to the commission's calendar.

>> Commissioner Cahan: Okay and as Commissioner Bit-Badal makes her way in here, after having to recuse ourself, we are adjourned.