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City of San Jose Planning Commission hearing
June 24th, 2009

COMMISSIONER ZITO: Good evening. My name is Jim Zito, 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, June 24th, 2009. 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 validation table at the back, and at the bottom of the stairs near the audiovisual technician. Deposit the completed cards in the basket near the planning technician. Please include the agenda item number, not the file number, for reference. Example, 4A, 6E, whatever. 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 chamber. State your name for the record, and each speaker will have two minutes. After 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 commissioner questions will not reduce the speaker's time allowance. The public hearing will then be closed and the Planning Commission will take action on the item. 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 raised at this public hearing or in written correspondence delivered to the city, or prior to, the public hearing. The Planning Commission's action on rezoning, prezonings, general plan amendments and code amendments is only advisory to the City Council. The City Council will hold public hearings on these items. First order of business tonight is roll call. And let the record show that all commissioners are present. Second order of business is 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. To effectively manage the Planning Commission agenda, and to be sensitive to concerns regarding the length of public hearing, the Planning Commission may determine either, A, to proceed with remaining agendized items past 11:00 p.m, continue this hearing to a later date certain, or defer remaining items to the next regularly scheduled Planning Commission meeting date. Decisions to be heard by the Planning Commission no later than 11:00 p.m. Staff, on deferrals.

SPEAKER: Thank you, Mr. Chair. Contrary of the overhead, staff is recommending deferral on item 3A, on the public hearing calendar, that's file number PD 08-051, which is an appeal of the planning director's decision to approve a planned development permit for the installation of a slim line monopole with associated equipment for property

located at 1720 Ocala Avenue. And staff is requesting that deferral, Mr. Chair, because we realize we need to do some additional outreach and work with the property owner. So we're recommending deferral to July the 22nd to give us ample time. Some of the commissioners noted that there was not a project sign apparently posted on the site. So we need to back up and do outreach work, so that's it for staff recommendation.

COMMISSIONER ZITO: So this would be a staff-recommended deferral?

SPEAKER: This is staff-recommended deferral. Although I should say for the record, though, that we did speak to the applicant, they're agreeable, and we let the appellant know and those neighbors that we had contact information for. Thank you.

COMMISSIONER ZITO: Very good. Commission have any questions or comments or concerns on deferrals? Seeing none, is there a motion on deferrals? So there's a motion to defer item 3A, PD 08-051, and a second. All those in favor? [ayes] Any opposed? Seeing none, that motion carries unanimously. Okay. Consent calendar. 2, consent calendar. The 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 public, unless it 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 items individually, please come to the podium at this time. Staff, on consent.

SPEAKER: Thank you, Mr. Chair. No additional staff comments at this time.

COMMISSIONER ZITO: Commissioner Platten.

COMMISSIONER PLATTEN: Move adoption of the consent calendar.

COMMISSIONER ZITO: There is a motion and second on the consent calendar. For the record, first of all, are there any questions, comments or concerns? Commissioner Cahhan.

COMMISSIONER CAHAN: Thank you, Mr. Chair. I had some questions about 2A, one is if the grass area on the other side of the McDonald's is going to remain, so there's McDonald's, there's a parking lot on one side, and there's a grass area on the other.

SPEAKER: Thank you, Mr. Chair. I can't speak positively on that. But again, as noted on the various plan sheets and on the landscaping plan, virtually the entire site of the existing McDonald's sits on is going to be reworked and new landscaping installed. So to the extent that helps, with regard to the to where the particular area is that you're concerned about. Because this is only dealing with a portion of the larger shopping center. And so there will be new landscaping and so forth immediately adjacent to the new McDonald's. But I'm not sure about the area that you're referring to.

COMMISSIONER CAHAN: It was unclear to me, from the plans here, where the existing one is versus where the proposed one is. I could see where the proposed one is but I can't tell where that is in relation to the existing, so when I was at the site, I couldn't tell if that big grass area was then going to be turned into a parking lot?

SPEAKER: Actually, Mr. Chair, if you would look, I think, at sheet 3C, that might be the best sheet to give you a sense of where the existing building and how the existing parking is arranged. Again, that's sheet C-3.

COMMISSIONER ZITO: Sheet C-3, okay.

SPEAKER: Because at the current time and the current configuration, the parking is very much along the perimeter of the existing -- under the existing site plan under the key and onward into the shopping center. There's virtually all parking spaces. And so C-3 is showing the existing situation. And then --

COMMISSIONER CAHAN: So if you see on there, you can see the big grass area. On C-3. Is that going to be replaced with a whole parking lot?

SPEAKER: Mr. Chair, is that the area to the right of the existing building? If it's the area to the right of the existing building, if you go back then to -- well, sheet L-1 would actually give you some landscaping.

COMMISSIONER ZITO: So before we go any further, the question here is do we need to pull that item?

COMMISSIONER CAHAN: That's what I --

COMMISSIONER ZITO: Why don't we do that and give staff a little bit of opportunity to research that question, as well. Are there any other questions on any other items on consent? Seeing none, I have a question -- just a question for clarity, and I think this would clear things up. I had questioned staff a little bit earlier before the meeting about this. And this had to do with the fact that this is an industrial site and asking for a C.U.P. for a church or a religious congregation. And on 2B, correct? 2B, CPA 02-074-02. Last meeting or maybe the meeting prior there was a GPA that was asking for a mixed industrial overlay for a religious congregation. And staff's recommendation was to deny it. And here, the staff is recommending that we approve the conditional use permit. I understand that there is already the mixed industrial overlay and I'm guessing that that's the reason why staff is asking to approve it.

SPEAKER: Thank you, Mr. Chair. Actually, that's correct. There's a church existing there already. And it was approved with the mixed industrial overlay. There is mixed industrial overlay on the property. And so this particular project is just a request to add playground equipment and essentially augment that existing church use. But then along with that at this time, they're asking for additional time on their existing C.U.P. So that is essentially extending the life of their C.U.P. is also included in this particular application.

But you're correct, Mr. Chair, there's existing mixed industrial overlay, the church has been existing there for some time.

COMMISSIONER ZITO: So at the risk of extending this meeting further, I'm going to pull 2B as well, and I don't believe there is anything left on consent. I would just like the commission to weigh in on those two issues, for 2B. So therefore the motion to approve consent is moot, if both items have been pulled. We go on to item 3 which is the 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 a later agenda for public hearing time management purposes. And we will take items 2A and 2B first. Item 2A, CP-08-014. Conditional use permit to allow the demolition of an existing restaurant building and the construction of a new 5167 square foot restaurant building with a drive-through use and 24 hour operation on a 1.15 gross acre in the CG general commercial district located on the northwest corner of McKee Road and Highway 680. Is the applicant present? You do not have to make a statement if you don't want to. You could just make yourself available for answering questions. But you're welcome to come up and identify yourself, please.

SPEAKER: Good evening, commissioners and staff and the public. My name is Margaret Trujillo, I'm the area construction manager of the McDonald's Corporation. I also have here, if there's any questions, our area Real Estate manager and our owner operator representative, and I'd be happy to address any questions you have about the landscape. Thank you.

COMMISSIONER ZITO: So Commissioner Cahan.

COMMISSIONER CAHAN: Thank you, Mr. Chair. So I do have questions about the landscaping. Is that grass area going to be taken out?

SPEAKER: No, most of it is going to be -- may I proper you with the colored landscaping to show you?

COMMISSIONER ZITO: We'll have you put it on the overhead.

SPEAKER: Okay.

COMMISSIONER ZITO: It's not intuitive how that needs to --

SPEAKER: So you can see, from this colored landscape plan, the area over here, which is the same area where the existing grass area is. Will be maintained for the most part. There is going to be an accessible path of travel through the middle of it. But we've actually increased the amount of landscape to the specific site by 677 square feet. We've also increased the amount of landscape to the front of the building as well.

COMMISSIONER CAHAN: So the trees that you are proposing to take out you will be replanting?

SPEAKER: Yes, we are going to be replanting additional trees and also work with Public Works to plant street trees.

COMMISSIONER CAHAN: I would like to comment that I think your idea of having a two-lane drive through is great. When I was there, it was very crowded trying to get into that one lane drive-through. So I do see that as being a good idea for that site. And Mr. Chair, I'm not sure if it's appropriate for me to ask this question.

COMMISSIONER ZITO: You won't know unless you ask.

COMMISSIONER CAHAN: But I'm wondering in the handicapped accessibility will include an automatic door opener.

COMMISSIONER ZITO: That's usually something that staff would consider. Go ahead, staffer.

SPEAKER: Thank you, Mr. Chair. I think that that's a fairly standard requirement but we'll confirm that with building division. But I think that that's pretty -- I think that that's pretty standard because of fire code requirements and otherwise. But we'll confirm that.

COMMISSIONER CAHAN: As a mom I'm frequently going places with my stroller. And I frequently see signs that say handicap. They have a handicap sign but there's no way of getting into the building without using your hands and pulling the door open. Thank you.

COMMISSIONER ZITO: Okay. I see no further questions.

SPEAKER: Okay.

COMMISSIONER ZITO: Thank you. Motion to close public hearing? Second? All in favor? Any opposed? Seeing none, okay. Staff. Anything further?

SPEAKER: No, Mr. Chair.

COMMISSIONER ZITO: Okay. Do we have a motion on item 2A? Commissioner Do.

COMMISSIONER DO: Thank you, Mr. Chair. I move we approve the conditional use permit to allow the demolition of an existing restaurant building and the construction of a new 5167 square foot restaurant building with a drive through use with 24 hour operation on a 1.15 gross acre site in the CG general commercial zoning district as recommended by staff.

COMMISSIONER ZITO: There's a motion and second. Any further discussion?
Commissioner Cahan.

COMMISSIONER CAHAN: Thank you, Mr. Chair. I do believe that it's actually, that the existing -- I'm sorry. There is different writings on different parts of the document and I thought I heard him say that the new one would be 5167 square feet.

COMMISSIONER ZITO: According to the --

SPEAKER: Mr. Chair, the new one is actually smaller than the old.

COMMISSIONER ZITO: Right. We're exchanging a 5167 -- oh, yeah, we're not -- we're demolishing a 5167, if I remember correctly -- there it is. Yes, right here, it says we're demolishing a 5167 and we're building a 4491. According to the staff report.

COMMISSIONER CAHAN: Is that what you read?

COMMISSIONER DO: No, I read the motion as it was written by staff, and I think it is incorrectly written. So I think that the motion should be revised to reflect the correct square footage.

COMMISSIONER ZITO: Fair enough.

COMMISSIONER DO: So the motion should be revised to change 5167 to 4491 square foot. Thank you for pointing that out.

COMMISSIONER ZITO: Yes, thank you. And building the drive-through, et cetera. Okay, good catch. Any further comment? Seeing none, let's vote by light. That motion passes unanimously. Okay, on to 2B. And 2B, conditional use permit amendment to replace 24 parking spaces with an outdoor play area and to allow renewal of two previously approved permits, one CP02074, for church uses with the maximum of 820 seats, and two, CPA0207401, for an existing childcare center on 5.23 gross acres, located in the south side of Eden Park Place, approximately 1100 feet West of Silicon Valley Boulevard. Staff.

SPEAKER: Thank you, Mr. Chair. Jody Clark, senior planner. There's really no additional staff report other than I'd like to update the staff recommendation. We are recommending the conditional use permit amendment to replace 24 parking spaces with an outdoor play area and to allow renewal of two previously approved permits, the first one being CP02074, for church uses with a maximum of 820 seats, and the second one being CPA02074-01, for an existing childcare center. Thank you.

COMMISSIONER ZITO: Okay, is the applicant present? No applicant. Okay. Are there any questions from the commission on this? Seeing none, the two questions I have are, one, you know again, my concern is, while there is a mixed industrial use overlay on this property, I'm just wondering how -- how prudent it is to expand its use, and also, I

was a little bit concerned about the duration of the permit being ten years. So I was wondering if staff could expand a little bit on those. Again, with the consideration that the primary use of that area is in -- supposed to be industrial, and if the types of uses go in there when the economy rebounds, that may be in conflict with that use, you know, where do we stand?

SPEAKER: Let me just speak to -- Mr. Chair, let me speak to your two questions regarding expansion and the time frame. There actually really isn't an expansion here. They already are approved to have 200 children. It's basically on the first page of the plan set, there is a table on the top left-hand side. There are children, 100 children already allowed. They're currently 6 to 12 years old. The proposal is that they'd like to have the same 100 children, the second line, but they'd like to have them from 2 to 12 years old. So we're expanding the age range. But that's not something we normally regulate. They're really the same number of children. We are adding the playground so you'll see on the third ground, it's the playground, that says 100 children but that's the same 100 children. Then there is the use area which is 100. That is staying the same. So it is a total of 200 children. 100 of the younger children and 100 of the youth for a total of 200 which is what they currently have. So we're just changing the ages a little bit, adding the playground.

COMMISSIONER ZITO: Well, that's the key element, though, the adding the outside playground was the concern I had.

SPEAKER: They are adding the playground, yes, but they are not expanding the number of children. I guess that's what I wanted to clarify. As far as the time frame, this permit doesn't actually expire in the 2011. I've got the October 25th, 2011. Because we were going through this process with the playground area, you know, we sort of between staff and the applicant, just wanted to sort of wrap in this renewal. And so we did put in a ten-year extension and we normally do five years. We certainly could entertain a change to that. We could just do the standard five years. We could do seven years, you know, if you wanted to think of 2011 plus five years.

COMMISSIONER ZITO: Two plus five, uh-huh.

SPEAKER: I mean I think we're open to that sort of conversation.

COMMISSIONER ZITO: My only concern was again, entrenching this use at this site. Whereas, if the adjacent uses become, how can I say, hostile from an environmental perspective, especially with the outdoor playground, is this something that we really want to do?

SPEAKER: Mr. Chair, yes, I would -- the deputy City Attorney may need to help me here, but going back to the discussion that we had previously, once a use like this has been allowed in -- here, and as long as they're operating in compliance with their conditions, it would be pretty challenging to just say you can't be here anymore. And so even though we have a time limit on the condition, it would -- the city would have to

come up with very strong rationale or they would need to not be operating in compliance with their approved permits for us to just say at the end of five years that they need to go away. So counsel may want to weigh in more on that.

SPEAKER: You want me to weigh in more?

COMMISSIONER ZITO: Sure, If you feel there is anything more to add.

SPEAKER: Thank you, Mr. Chair. So as staff alluded to, the zoning code has a provision that once the city has granted an entity a C.U.P., it runs with the land. And there's a presumption that even if there is a term condition in that C.U.P., it's more of a check-in, back in to see if conditions have changed, to see if the conditions need to be tweaked to deal with changing circumstances that may exist at that time. But there is a rebuttable presumption that they would be entitled to a renewal. And so I think that's what staff was alluding to is that at that point staff would need to present or someone would need to present to the commission that there had been seriously changed circumstances so that the use now creates a problem and it may be the type of situation that you're alluding to, that now there are, you know, hazardous materials in the area, it's hard to speculate what those would be. But the key condition for the commission is what do you feel is an appropriate period of time to check back in with this use. But there would be a presumption that the C.U.P. would continue.

COMMISSIONER ZITO: Okay.

SPEAKER: Laurel Prevetti: If I might, I'd like to just add that the question before you for this conditional use permit is do you think a portion of the parking lot should be converted to a play area.

COMMISSIONER ZITO: Uh-huh.

SPEAKER: Laurel Prevetti: And if that's the portion of the permit that gives you concern, that is one of the issues before you, and so you can make your decision separating out the elements, if there's a particular element that the commission is concerned with.

COMMISSIONER ZITO: So the two that I'm concerned with is that one and the extended period of the permit for check-in. But there are other commissioners so I'll let them have a opportunity to talk. Commissioner Cahan.

COMMISSIONER CAHAN: Thank you, Mr. Chair. I had concern when I read that they wanted to put in artificial turf in the play area, after hearing reports that many of those turfs are found to have high levels of lead in them. And I just wanted to ensure that the children would be safe in that play area.

COMMISSIONER ZITO: Staff.

SPEAKER: Mr. Chair, I would presume -- I mean, staff's presuming that because this is operating as a daycare center, that they would also be cognizant of the hazards that may exist if they're using artificial turf. And there again, I guess the commission could include a condition, in the approved -- if you're so inclined to approve the resolution, you could add a condition that it not be turf and that it be natural grass or whatever. Staff's not in a position Mr. Chair to speak to the health hazards of artificial turf. That's sort of beyond our scope. But certainly if there's a commission concern you could impose a condition that it be some other material.

COMMISSIONER ZITO: Right.

SPEAKER: Or that the applicant is required to ensure that it is safe would be another option, Mr. Chair.

COMMISSIONER ZITO: Right. So I'm not sure if we have the expertise on this commission either to say from an environmental health and safety perspective what is appropriate or not. But I think well reasoned, you make the statement and we could condition it to say that you know, to the -- what's this -- how do we usually state that? To the -- to the discretion of the director --

SPEAKER: The satisfaction?

COMMISSIONER ZITO: There you go -- the satisfaction of the director, they use materials that are known not to be hazardous, or something to that effect, in the resolution.

COMMISSIONER CAHAN: Yes, I agree with that. And I don't believe the all-turf has the lead, and perhaps they may not be aware that there is even an issue of turf potentially having lead. So I just wanted to bring that up as an issue so that then they can become aware and do any proper testing, should they deem that appropriate.

COMMISSIONER ZITO: Okay. So just, I guess, certainly a point to staff, to work with the applicant to investigate that to the extent necessary, at least, if not making it a recommendation in the motion.

COMMISSIONER CAHAN: Unless we can make a recommendation that it's a lead-free material.

COMMISSIONER ZITO: Okay. Commissioner Jensen. Thank you, Commissioner Cahan. Commissioner Jensen.

COMMISSIONER JENSEN: Thank you, Mr. Chair. I would agree with Commissioner Cahan, and I would just mention that some of those sites that have unhealthy types of artificial turf include public schools. So I wouldn't want to rely on the knowledge base of folks to ensure that they knew that there was some unsafe materials out there. I would caution against going with actual turf. Because then that would be the permanent

removal of parking spaces in an industrial area, and I don't think we want to do that. I think the purpose of the artificial turf is to ensure that we have something that can be turned back to its original configuration. I'm also concerned about the ten-year permit extension. And I'd like to get item 2 under conditions precedent under time limit to be modified to reflect, in addition to the spelling corrections, for a period of five years only. So that we're consistent with past behavior, it's nice that they came early, but it's still five years. Thanks.

COMMISSIONER ZITO: Okay. And if the maker of the motion would want to put that in, then that would make sense.

COMMISSIONER JENSEN: Okay, then I'll make a motion.

COMMISSIONER ZITO: Here we go.

COMMISSIONER JENSEN: Approve a conditional use permit to replace 24 parking spaces with a new enclosed playground for an existing day care center on a 5.23 gross air site in an IP industrial park zoning district as recommended by staff, with the modifications that the term of the permit be five years, and that the appropriate language be included to ensure the healthiness of the artificial turf that is being provided.

COMMISSIONER ZITO: I think staff pointed to two other points would be the renewal of the two prior permits.

COMMISSIONER JENSEN: Okay, again, I'm –

COMMISSIONER ZITO: With the -- in your case with the exception that we go five years instead of 10.

COMMISSIONER JENSEN: Yeah, yeah, so -- and renewal of two previous permits CP02-074 for church uses with a maximum of 820 seats, and CPA-02-074 for an existing daycare center with a maximum term extension of five years.

SPEAKER: Second.

COMMISSIONER ZITO: There is a motion and second. Would you like to speak any further on your motion?

COMMISSIONER JENSEN: I would just like to also express the same concern that Commissioner Zito expressed, regarding putting inappropriate uses. And I see a comment in here that says that there's so much parking, that the research and development facilities will be -- the children will be protected from the research and development facilities that exist onsite. And I would say that that's kind of a false hope. Having worked at numerous R&D facilities when there's an emergency or when something inappropriate happens with release of chemicals. There's really no such place as a safe place. On the other hand, having a daycare center directly across the street from

the park is fabulous. I'd prefer that they take the kids across the street and play in the park rather than play in a parking lot. That is certainly their prerogative. Thank you.

COMMISSIONER ZITO: Thank you, Commissioner Jensen. Commissioner Kamkar.

COMMISSIONER KAMKAR: Thank you, Mr. Chair. I'd like to throw in my two cents' worth. I agree with Commissioner Jensen and Commissioner Cahan. I guess the lead content would be in the rubber and the paint and they add rubber -- the rubber pellets to control the bounce, you know, of the thing. And the more rubber pellets, I guess, brings up a secondary issue with these and that's the heat during summer. Sometimes five, ten, 20° hotter in the summer than it is right on top of the turf than on neighboring land. And then the third issue which is probably one of my most concern would be how hygienic is it? During winter months supposedly the rain washes down some of the contamination that is built. But during summer months, if you fall and you scratch and you get yourself raspberries, that stuff may not go away soon enough for the next person. I like Commissioner Jensen's idea of going across the street to the park, you know. So I just wanted to throw that two cents' worth in, thank you.

COMMISSIONER ZITO: Thank you, Commissioner Kamkar. Any further comments from the commission? Seeing none, there's a motion and a second. Let's vote by light. What are we waiting on? Commissioner Platten. Okay, so we have -- that motion carries 6-0-1 with Commissioner Platten abstaining.

SPEAKER: Mr. Chair, just to note we'll need to revise the resolution on this one, then.

COMMISSIONER ZITO: I understand. Just for the record, Commissioner Platten, is there any kinds of conflict of interest?

COMMISSIONER PLATTEN: No conflicts of interest to me. It is evident to me that there is enough safety issues here that we don't know how we should vote on the issue, and perhaps it ought to be sent back to review. So based on all the comments raised by the commissioners, I don't feel qualified to vote one way or the other.

COMMISSIONER ZITO: Okay, fair enough. I just want to state for the record if there was any kind of a conflict. Okay. Thank you for that. Public hearing. Generally public hearing items -- we've already gone there. Everything was pulled off consent. 3B. CP09-025. Conditional use permit to allow entertainment at an existing drinking establishment, A. P. stumps, with late night use until 2:00 a.m. in the D.C. downtown primary commercial zoning district located at/on the north side of West Santa Clara Street 100 feet westerly of north San Pedro Street. Staff.

SPEAKER: Thank you, Mr. Chair. Sally Zarnowitz, project manager, downtown development review. As noted, this is an application for a conditional use permit for public eating, drinking and entertainment establishment for late night use until 2:00 a.m. The Planning Commission -- a little background on this. The Planning Commission approved a conditional use permit in 1997 for a term of five years. And so this

application, as an untimely renewal, is reviewed as a new conditional use permit. Moving to the project description to increase the economic viability of this downtown business, the business is offering entertainment in the form of karaoke and live and DJ music associated with special events provided on the outside patio until 11:00 p.m. The general hours of operation of the business are from 11:30 a.m. to 2:00 a.m. Monday to Friday and 5:00 to 2:00 a.m. Saturday and Sunday with food service and outside entertainment, again, as noted ending at 11:00 a.m. The project analysis for this project reviewed it for conformance with the general plan and also the guidelines for the evaluation of night clubs and bars which pertain to entertainment uses. Noting in the city council policy that night clubs should be encouraged throughout the downtown corridor to promote a diversity of uses, provided that they do not adversely impact existing or planned residential uses or conflict with other general plan goals and policies. And speaking to I think the issue of noise, or the noise element in the general plan recognizes the full -- that the full attainment of noise standards may not be achievable in the environments of a vibrant downtown core area, and the downtown strategy 2000 EIR includes a discussion of noise from substantial cultural events that could occur for extended periods of time over, say, a long weekend or several days, and noting that noise from such events is less predictable than, say, daily construction activities. But even so mitigation measures have been identified in this C.U.P. to address potential short term noise, and those are consistent with recommendations from the Downtown Strategy 2000. However, those are carefully regulating sound by limiting outside entertainment hours and notifying nearby residents and providing a contact person to handle any concerns. In addition, the police department is neutral on this conditional use permit, as long as the permit includes the appropriate conditions noted in the memo regarding hours, security, and compliance with the ABC license and entertainment permit. So at this time staff is recommending approval of the conditional use permit with special conditions as noted in the resolution. Thank you.

COMMISSIONER ZITO: Thank you, staff. Is the applicant present? Please approach the podium. Please state your name. You'll have up to five minutes.

SPEAKER: Good evening, commission. Hello, my name is Yvonne Lee, I'm here on behalf of AP Stump LLP, also known as AP Stump's Chop House. I have been with the company since the opening in 1998. I am very proud to work with such a beautiful restaurant with its lovely decor, wonderful patio and amazing location. We at AP Stump's have always prided ourselves in service not only to our customers, but to the community. The owners, Andy Pavesich and Jim Stump, have worked together with numerous charities, including March of Dimes, Diabetes Society, Live Oak Adult Nutrition and Day Care Center, just to name a few. And no matter how -- what has come our way they've always managed to maintain the quality of business that has been offered to Downtown San Jose for the past 11 years. Our goal is to continue to be San José's premier downtown dining establishment and provide superior food, service and entertainment to our city. Thank you so much for your time and consideration.

COMMISSIONER ZITO: Thank you. Seeing no questions from the commission, there is one other speaker card. John de Loretto. Please approach, state your name. You have up to two minutes.

SPEAKER: Good evening, commissioners and staff. I'm John de Loretto, managing director of the adjacent theater on San Pedro Square. We share a common courtyard area with AP Stump's, and this conditional use permit as it is written will effectively put us out of business. And I'd like to explain why.

COMMISSIONER ZITO: Please.

SPEAKER: We are chartered by the San José redevelopment association to host guest companies to perform in our theater. And the way we survive is to have -- to sell concessions at these events. We share a courtyard area that is within 100 feet of a full-tilt rock band, blasting away from 4:00 to 7:00 every Friday night during the current period of time already before the conditional use permit has been -- has been approved. This sound level comes through on a direct line of sight basis to our second story facility. It comes through the single-pane glass doors that we have that open up onto the same courtyard area, it comes through the windows that are on the second floor, that are on a direct line of sight within 100 feet of this, again, full rock bands, and it actually shakes the walls. I have submitted to Sally Zarnowitz testimony from our guest company, David Coppel, whose current production of Shakespeare's A Midsummer Night's Dream, prominently reviewed in the San José Mercury, writes that his clientele in the left-seating area, I had a good majority of our patrons were sitting had a great difficulty hearing the actors over the music din coming from AP Stump's. The music often obscures the lines the actors were speaking. With Shakespeare, it is essential to understand the characters, plot, and the attractiveness from one chief pleasures of coming to see Shakespeare's play is poetic language. In addition, the music itself, the vibrations generated from the speakers, were felt by those who sat against the back wall, and they remarked about it to me after the performance.

COMMISSIONER ZITO: Mr. de Loretto, your time is up, but we have commissioners --

SPEAKER: The walls were shaking.

COMMISSIONER ZITO: I understand. But we have several commissioners who have questions for you, which I think will give you more opportunity to explain your situation. Commissioner Jensen.

COMMISSIONER JENSEN: Thank you, Mr. Chair. Mr. de Loretto, you mentioned in your e-mail to Ms. Zarnowitz on April 30th that there was going to be a meeting on or about May 1st to discuss that and discuss negotiations. And in your further e-mails I didn't see any reference to that. Can you tell me where that is?

SPEAKER: Yes, there was one solution made. Their solution was to provide moving blankets stapled to our second-story windows that have had negligible effect, except to serve as an eyesore on a 100-year-old landmark building.

COMMISSIONER JENSEN: Okay, so the one thing that they offered, you accepted, and you have tried it out and it didn't work very well?

SPEAKER: Correct, and we have let them know, as well, and we have had no further response.

COMMISSIONER JENSEN: Okay, thank you.

COMMISSIONER ZITO: Thank you, Commissioner Jensen. Commissioner Do.

COMMISSIONER DO: Thank you, Mr. Chair. You know, with any kind of facility that houses this kind of performance, I would assume that you would need to do so in a space that is acoustically insulated, or have some acoustical insulation and so on, so forth. Has that been something that you had considered regardless of what your neighbors may or may not do? I mean, because I'm assuming that if you hold such, you know, things like place and so on, so forth, even traffic noise, the noise of an ambulance, the noise of fire trucks, those are all disturbing to those events. So I'm just wondering how that is viewed by your business. Thank you.

SPEAKER: We have music downstairs at O'Flaherty's, we have jets flying overhead. We have sirens going by. None of this seem to disturb our clientele. No frequency of noise associated with a rock band, maybe have been -- also, some of us have been to a rock concert, especially an outdoor rock concert, a concert in the patio, the music level, the intensity of the sound can be rather loud. Also it has a lot of bass frequency. These transfer right through brick walls such as is on our building. And furthermore, and finally, it's constant. This is not something that's transitory. It is a song that goes on for three, four, five, ten minutes perhaps, and this is what serves as the biggest detriment.

COMMISSIONER ZITO: Okay. I have a couple of questions. Mr. de Loretto, you can for the sake of the commission, I guess the basic question is, who was there first? So was -- were you there, was your use there first, or was it stumps outdoor rock concert there first?

SPEAKER: They just started these concerts a year ago. And they had one or two last season and they started up at the beginning of May. And we tried to be as communicative as possible from that get-go.

COMMISSIONER ZITO: Okay. What would be your remedy?

SPEAKER: We have no problem with their acoustic music which they have on Thursday nights and sometimes on Saturdays. There is acoustic music all up and down the corridor there on San Pedro Street. We favor live music to enliven and energize the downtown

area. We put on fine arts that is complementary to all of that which occurs. This entertainment permit, as I understand it, would allow them to use a full rock band, which they seem to think is a necessary adjunct to their existing revenue stream. We find it completely in conflict with our core business. In fact on Friday nights alone that represents one-third of our business. So to answer the question directly we would have no problem with acoustic music if we could define the permit as such.

COMMISSIONER ZITO: All right. And what about days of use, if you will? Are there -- are you seven day a week venue or are you primarily a weekend venue or how does that -- when do you think would be the most conflicts?

SPEAKER: We are primarily a weekend venue. We have events that sometimes occur on Wednesdays, although less now ever since the cinema of San Pedro started its thing and inhibited our clientele from our guest companies from wanting to book Wednesday nights, which is why we are so scared with what might happen now with these events. But Thursday, Friday, Saturday and Sunday matinees are our prime areas. We're usually done by 10:00, 11:00 p.m.

SPEAKER: Commissioner Zito: Each night, Thursday through Sunday. Thank you for that. I see no further question from the commission.

SPEAKER: Thank you for your attention.

COMMISSIONER ZITO: Certainly. Applicant, you may come up and speak to us for up to another five minutes, I think it would be good if you could address the concerns.

SPEAKER: The only thing I'd like to address is we've been working very carefully with San José police department, John Van Eck. He has been to our events many a time. We have kept the noise level down. We have actually walked over to the theater. I have sat in their lobby. I have heard nothing. I don't understand quite what he means by "these rock bands." The bands we hire are not rock bands. They're cover bands, you know, '60s, '70s, '80s, just trying to -- it's for our type of clientele. I mean, our clientele is middle aged. It's not young kids, it's not teenagers. We're more a fine dining establishment. So we are trying to draw that kind of crowd. We are over at 11:00, and like I say, we are doing everything we can to work with San José PD to make sure that we're following all the rules.

COMMISSIONER ZITO: Okay. Are there any questions from the commission?
Commissioner Jensen.

COMMISSIONER JENSEN: Thank you. So first, you're right, it is people exactly like me. Because -- my apologies, Mr. de Loretto -- but I was there at most of the ones that you provided fliers for. Has Stumps considered, since blankets on the windows are not working, has Stumps considered alternatively acoustical treatments that may assist the theater? Because, obviously, we want a vibrant downtown that includes a lot of things. And the patio that Stumps has is beautiful, and it's a fantastic place to have music. And

Left Coast Live was the last time I was there, and it was fabulous. So have you considered a way to be able to work with your next-door neighbor?

SPEAKER: Yeah, I mean, like you know, we tried to help with the blanket things and that. But unfortunately, the buildings are so old. I mean, it's brick buildings. And you know, we're not right next to him. We are off and to the side. And the last band we had when they were over with next door, Britannia Arms was blasting over our music. So I don't understand why we're being targeted. We're not the only ones that are having live entertainment or live music, I should say recorded music that is loud. Because they blasted over us last weekend.

COMMISSIONER JENSEN: But Mr. de Loretto indicated that the music from Britannia arms for whatever reason isn't making its way into the theater. And perhaps it's the glass windows, on the second floor where the theater is. I've had the pleasure of attending a number of events at the theater, as well. Maybe it's just the way -- but is Stumps open to continuing the discussion and trying to find --

SPEAKER: Yes.

COMMISSIONER JENSEN: Okay, great. You're open to continuing the discussion. Great, thank you.

COMMISSIONER ZITO: Any other questions? Seeing none, thank you very much. There's a motion to close public hearing. Is there a second? All in favor? Any opposed? Seeing none, public hearing is closed. Staff. Seems the main issue here is compatibility with adjacent uses. Especially noise.

SPEAKER: Thank you, Mr. Chair. Well, staff is available to answer any specific questions. But I think also, just to address some of the discussion that you've heard tonight. There could be maybe some options and the City Attorney might also want to address any of these. But one consideration would be whether or not there would be a noise analysis that would, for instance, have mitigation associated with it, that would, you know, sort of address how the conflict between -- could be addressed. And that is, that seems to us as one option. Another one would be, maybe I should have started with, you know, to limit the outside amplified music. Not allow it at all, not allow that outside entertainment at all as part of the conditional use permit. Those are sort of three options that the commission we think would think about and that could maybe help to start the discussion. Go ahead.

SPEAKER: Thank you, Mr. Chair. I think one other fact that might or might not be important or relevant to the commission is the fact that both -- the properties are both -- both properties are owned by the same property owner. So I think that that may or may not be helpful. But I think it's interesting that the same property owner owns both buildings. Another issue I think that the Commission was talking about, and could actually come out of the noise report, and it goes back to Commissioner Do's question earlier of Mr. de Loretto, is whether or not the theater space is acoustically treated or not.

I think that that, you know, there is some certain factual data base points that staff doesn't have, commission doesn't have that might actually be helpful, and so perhaps the noise analysis could help identify what measures -- actually get real sound readings and where are the sensitive places and what kinds of mitigation measures might actually work, rather than trying to guess. You know, whether it's moving blankets and so forth. But you know, at some point, it's sort of nice in a way that we have an issue for our downtown, whether our competing vie brand uses, that's probably a good thing. But it's also a challenge, in terms of, you know, is one use more important than the other, to what extent is it the obligation of the stumps operation to acoustically treat the theater space if it wasn't already so treated. So it's not an easy issue, Mr. Chair, but certainly perhaps one option would be getting more information.

COMMISSIONER ZITO: So let me ask two questions, please. First of all, is reading the background, it sounds like they're way out of permit. It's been seven years.

SPEAKER: Yes.

COMMISSIONER ZITO: So they're operating without permit, essentially, is that correct?

SPEAKER: Correct, that's correct, Mr. Chair.

COMMISSIONER ZITO: So we're in that situation where the longer we extend this, the longer they're working without permit. I guess the second question and I mean no offense by this, but does staff, due to my ignorance, does staff actually have the expertise in-house to do a noise assessment, and make recommendation?

SPEAKER: No, Mr. Chair. No, Mr. Chair, when staff is making that recommendation it would really be stumps, the applicant it would be incumbent upon the applicant to hire somebody with the appropriate expertise, and do the analysis. That's not something that - we can review staff reports and typically understand them, but we don't know how to write them.

COMMISSIONER ZITO: I'll let Commissioner Jensen ask her question then I'll come back to one of mine. Commissioner Jensen.

COMMISSIONER JENSEN: Thank you, Mr. Chair. When you mention noise analysis that would include mitigation, would that noise analysis include the vibrations that are occurring inside the building?

SPEAKER: Yeah, typically, yeah, typically noise consultants also have the ability to do vibration analysis. They're typically the ones that would do vibration analysis if a project is next to a railroad tracks. So certainly a noise consultant would have that same expertise, typically.

COMMISSIONER JENSEN: And if such an expert was hired by the applicant, would the neighboring facility have the opportunity to weigh in on the choice of vendors, since there's always the question if you go out and hire somebody is it going to be somebody who's going to give you the answers you want.

SPEAKER: Mr. Chair, that would typically be between the two neighboring operators. Staff wouldn't typically direct who they should hire but certainly it seems like it would be beneficial and helpful under the circumstance if there could be some agreement as to appropriate noise consultant, hiring the appropriate noise consultant. It's not something staff would dictate though, Mr. Chair.

COMMISSIONER JENSEN: Well, I agree that it's actually a good problem to have. Like the problem where we don't have enough parking spaces, it's a good problem to have that we have two vibrant uses that are competing for the same space and probably the same clientele. And I want to see us find a way, and perhaps Mr. Platten in his don't cut the baby in halfway, can find a motion that will allow us to mover forward and provide at least some of what stumps needs, so that they're no longer out of compliance. And I'm going to assume that their being out of compliance is one of those redevelopment agency was handling the permits and it got lost in the shuffle things, that staff has warned us about previously.

COMMISSIONER ZITO: Frankly, that was one of the questions I was going to come back to.

COMMISSIONER JENSEN: Okay, well then I'll just leave the assumption and let you ask the question.

COMMISSIONER ZITO: Uh-huh.

COMMISSIONER JENSEN: So I don't know exactly how to word something that would allow us to move forward with at least part of your request to allow you to have perhaps acoustical music, but maybe not black pearl, but don't tell him I said that. And allow the theater to continue, you know, to have their customers working, enjoying their theater performances in peace.

COMMISSIONER ZITO: If you're intending to make a motion –

COMMISSIONER JENSEN: Actually, Chris was -- you know I'm not as good with words. If Chris could make a motion to roll in all the various thoughts that are going around.

COMMISSIONER ZITO: Before you do it, I'd like to understand the impact, and I usually won't want to jump ahead of the commissioners who want to speak, but just want to understand the impact if we defer this item due to this particular conundrum that we're in. And I know we tend to really shy away from that word defer as much as we can, but it seems that we are in a conundrum where there's competing uses, if you will, there are

conflicting uses. And if it can be resolved by getting additional professional assistance, then maybe that's something we want to do.

SPEAKER: I was just going to note for the commission that probably the important point is the commission doesn't have the authority to direct code enforcement to not go forward with enforcement activity. I'm not aware that they have a pending complaint, but I think the chair has identified the issue, that if the use is operating out of compliance, there's no assurances that the commission could give the property owner that code enforcement activity would not ensue, since they're not in compliance.

SPEAKER: Mr. Chair, one other, perhaps, additional comment that might be helpful is the fact that the applicant can always come back and request an amendment, too. So if for some reason you decided to go forward and, say, truncate their initial request to some extent, they could always come back at a later date with an amendment.

COMMISSIONER ZITO: Okay, fair enough.

SPEAKER: If I could also add, the commission under the First Amendment couldn't dictate the type of music. But certainly the commission would have the ability to say acoustic music only, and no amplified music. Because that doesn't dictate the type of music, but just the technology, I suppose, to be used.

COMMISSIONER ZITO: So that's not what I'm making a motion, because I can't, but something to the effect that we could agree to approve a permit with acoustic music only until such time as there's a study done that would identify mitigation for different types of --

COMMISSIONER JENSEN: I'm not sure we would even have to go that far. You know, the applicant wants to be able to continue to have cover bands coming in. So it's incumbent upon them to be able to move out from underneath acoustic as quickly as possible.

COMMISSIONER ZITO: Commissioner Kamkar.

COMMISSIONER KAMKAR: Thank you, Mr. Chair. I was there on Friday night and I was visiting them. And there was a couple of items that I noticed. The manager there was very gracious and showed me the -- I guess the back door, the back door patio, where the performance was going on, and yes, it was loud. And I noticed a couple of, I guess what you would call low-hanging fruits here, as far as ways to improve. And maybe as I help Commissioner Platten if he's working on a motion, is I noticed the iron gate that separated the back patio from the alleyway. It didn't have any kind of a -- any kind of an insulation on it, it was just iron gate. So maybe fiberglass, something that's see-through yet thick enough to help some, you know, with the noise. Maybe even double it up, you know, something that you know doesn't take the egress and the fire exit, you know, function of it away. But it takes away the noise. The other item would be, if the property owner agrees, some sort of a planting on the wall, just like did sound walls on the free way where ivy is growing on it, it works and that's why they recommend it. So some sort

of an ivy on the building wall itself to try to cancel some of the noise vibrations, you know. So those are two items that quickly jumped out at me, even though it was nighttime and you know. So I think there can be compromise worked out, especially between the two operators and maybe supporting each other's business you know and come up with a solution. Because I like to see us promoting entertainment, you know, and downtown as well. And especially if it could be accommodating both neighbors. Thank you.

COMMISSIONER ZITO: Thank you, Commissioner Kamkar. Commissioner Platten.

COMMISSIONER PLATTEN: Thank you, Mr. Chairman. Let me speak to staff first, to make sure we're clear with regards to what we're trying to do. Darryl, if you would please. In the proposed conditions, on 16 is the language for the compliance review, and the staff proposal is a one-year review after date of issuance of the permit, and there's nothing said in there with respect to the noise regulation. That comment is contained up front in the memo page number 6, in which it's stated, "The purpose of said review will be to assess compliance with terms and conditions of this permit" -- this is the important part -- "including the careful regulation of sound to ensure compatibility with adjacent uses." One is, I think that language needs to be explicit in the condition. That is to say, we need to add into the condition, "careful regulation of sound to ensure compatibility with adjacent uses." Two, I want you to be very careful with this one, Darryl, I want to cut the compliance review period down as short as possible. Especially because if we're going to resolve this issue, we've got to resolve it in these summer months going into a holiday period, because clearly, that's both a period for theater and a period for dinner use, in which there is going to be more likely than not the opportunity for conflict between the two uses. I want a realistic estimate from you and staff with regards to, A, how soon can we do a compliance review, and B, what kind of language would you suggest from staff to ensure that we have compatibility of mutually uses, can we just lift the language from the memo and put that in as the condition. Those are the two questions.

SPEAKER: Thank you, Mr. Chair. On page 6 of the resolution, under section 6 which is called noise and acoustics, condition A is starting to get at what, Mr. Chair, at what Commissioner Platten was indicating. So that condition could perhaps be beefed up. I mean, it might be helpful for staff to try to articulate the fact that with regard to the downtown, and noise issues downtown, it's a very delicate balance that the city has tried to strive for, in terms of having a vibrant, exciting, multifaceted diverse downtown. So the noise issue, as Sally indicated previously, in the environmental impact report for the downtown strategy plan, acknowledges, you know, that downtown is going to be noisy. And so we've tried fairly hard to not have the same kind of standards, I guess in a way, we've tried to be more flexible perhaps downtown. And so that's why typically this is the kind of condition you would see, in the night clubs, it comes right out of the night club policy. But certainly in this specific case it sounds like it probably warrants trying to -- being beefed up a little bit more so that there's a little more -- a little more content to it, or something more for performance reasons, what it is that we are actually trying to attain.

COMMISSIONER PLATTEN: Good. Now, the second half of that is, can you give me a realistic estimate, Darryl, on time period, short of a year? Is 120 days enough, is that too soon?

SPEAKER: Mr. Chair, that would be to do the noise analysis?

COMMISSIONER PLATTEN: Exactly and have a compliance hearing. I want to get both of these -- both of these owners here operating cohesively.

SPEAKER: Mr. Chair, would I think that certainly 120 days is ample time. Just -- just to make sure that there's quad time for selection, hiring a noise consultant, and so forth, if that's the intent of the commission.

COMMISSIONER ZITO: So I could see that being adequate for getting a report to us. I'm not sure if it was the intent of Commissioner Platten that we would actually be able to implement a resolution to the problem as well. In other words, the study comes back and says they do this treatment to the wall or whatever.

COMMISSIONER PLATTEN: It's just a question of getting the report to compliance review.

COMMISSIONER ZITO: Just the report.

SPEAKER: 120 days should be ample, Mr. Chair. We would certainly strive to try to do that much more quickly, if at all possible.

COMMISSIONER PLATTEN: If it please the chair, I'd move that we suspend the rules and permit applicant and the theater owner to comment, if they desire, on this road.

COMMISSIONER ZITO: So suspended. Do either of you have a comment about the discussion so far regarding what we are possibly proposing as a resolution here? Please approach so that you're on record.

SPEAKER: And if I understand the discussion right now, it is to go ahead and issue the C.U.P., it would have some type of limitation for the first 120 days, such as, and the commission hasn't discussed this, but such as only acoustical noise for the next 120 days and then come back after 120 days after a noise report has been done to put a more permanent C.U.P. in place.

SPEAKER: We have no problem with working and trying to do whatever we can to be able to still have the live bands, and yet still make it so everybody's happy. But I'd also like to see, you know, we've gone through so much expense to do this with advertising and getting permits and you know, getting -- once we get the conditional use permit, we can get our entertainment permit, which are not cheap, because you have to buy one for each manager, each owner. But I'd also like to see, is there anything he can do, as far as seeing -- having someone come out like we are if we have to hire this noise analyst

person, for him to see what else he can do to make his theater more acoustic, also? I don't think -- if we're going to work together I'd like to see him carry a little bit of the burden also. I have no problem with trying to make it work.

COMMISSIONER ZITO: I think that's fair, to an extent but you both seem to have the same landlord.

SPEAKER: Well I was going to say the unfortunate thing he's not before the commission asking for anything, so this commission doesn't have the authority to start imposing conditions.

SPEAKER: Okay, so that's how it works. I'm just -- first time I've ever had to deal with anything like this so I'm learning. It's a learning curve for me.

COMMISSIONER ZITO: It's your permit.

SPEAKER: Got it. But as far as landlords, we get nothing from our landlord. Ing everything we do is out of our own expense, just so you know. It's not that our landlord pays for any of that.

SPEAKER: That's the nature of landlords.

SPEAKER: Excuse me?

SPEAKER: That's the nature of landlords.

COMMISSIONER ZITO: So what I'm hearing is you're amenable to potential conditions in the short term until we can get this issue rectified.

SPEAKER: Absolutely.

COMMISSIONER ZITO: Would you like to make -- come up, please, Mr. de Loretto.

SPEAKER: Just to -- thank you. Just to reiterate, we welcome acoustic music. We see live rock music such as black pearl and the other bands that have occurred on all these other nights as fundamentally problematic, because of the line of sight nature of our second floor windows and the fact that the brick walls are shaking. So I appreciate the limitation of acoustic music only until we can get some other resolution at hand.

COMMISSIONER ZITO: Okay. And I think, though, that you may have cut either the under or overtone of the Commission here, that while it is Ms. Lee's permit, and it is her responsibility we would hope that, to the extent possible, that both of you would work together to try to alleviate any -- to coexist, to allow both venues to exist the way that they see best fit.

SPEAKER: Agreed.

COMMISSIONER ZITO: Okay, appreciate that.

SPEAKER: Thank you.

COMMISSIONER ZITO: Commissioner Platten, anything further?

COMMISSIONER PLATTEN: Yes, if we can move to close public hearing, then.

COMMISSIONER ZITO: Second, okay.

COMMISSIONER PLATTEN: I have a motion.

COMMISSIONER ZITO: Please.

COMMISSIONER PLATTEN: What we will move to do is to strike, on page 7 of 8, on the conditions number 16, the words "within one year" and substitute "within 120 days." I am loath to adjust 6A on the previous page because I think we pay intrude upon content, and kind of music, which I believe counsel has indicated it could be a First Amendment issue on. I think the parties understand what we're trying to do here and what's necessary is that we have the proper sound report as soon as practicable but certainly within 120 days so we've got compliance review to deal with that. Therefore the motion would be, conditional use permit would be approve to allow entertainment in existing drinking establishment, AP stump's, with late-night use until 2:00 a.m. in the DC downtown primary commercial zoning district located at the north side of West Santa Clara County Street 100 feet westerly of North San Pedro street containing the correction or the modification or correction to the paragraph as indicated.

COMMISSIONER ZITO: Is there a second? Okay. There's a second. So let me first make sure that staff understands what we're asking.

SPEAKER: Mr. Chair, I think so. Essentially what we're asking for, what the commission is asking for is that the compliance hearing basically would be within 120 days as opposed to one year. I thought I heard the motion to say that we would leave condition 6A alone the way it is.

COMMISSIONER PLATTEN: Correct.

SPEAKER: So I think staph got it, Mr. Chair, thank you.

COMMISSIONER ZITO: Maker of the motion, does that in any way -- how can I say -- condition the applicant with getting some sort of a noise study?

COMMISSIONER PLATTEN: Applicant bears all fees and costs in the compliance review. So if applicant doesn't do the job, they leave it at their own risk.

COMMISSIONER ZITO:

COMMISSIONER PLATTEN: That's the condition of the C.U.P. That's the purpose of the C.U.P.

COMMISSIONER ZITO: Does the commission -- so we've got a couple of questions. Commissioner Do.

COMMISSIONER DO: Thank you, Mr. Chair. The trouble I have with this issue is we're talking about a downtown area here and we're talking about an area that is -- that is where we actually try to encourage activities and noise or sound, basically a liveliness in the area. And so I think that if you choose to locate a business that requires silence, that requires sound control, basically, in such an area, then it's incumbent on that business to do what it takes. I mean, as an architect I design theaters. And you would have to design theaters that are acoustically sound proofed. You can't -- you can't just take any building, in this area, and expect it to perform as a theater. And so regardless of whether your neighbor is an AP stump or another restaurant or night clubs or whatever, I don't see that it should be incumbent on the applicant to make the noise study to prove -- unless there are some -- unless we have some broad policy that governs the level of sound that is permitted in the area. And it doesn't sound like we do. Because it sounds like there are businesses in the neighborhood that already have amplified sound and so on. So I think that the trouble for me is that I think that it's not necessarily an applicant's issue. Because I think that they are located in the right area and the activity that they're trying to do is consistent with such an area. So that -- so for that reason, but so -- I guess I'm unclear on the motion as to -- the motion doesn't impose any additional condition on the applicant other than the reduction of the compliance review time, is that correct?

COMMISSIONER PLATTEN: Well, that may or may not be. We have to wait and see what the study is. What the condition requires under 6A is compatibility with adjacent uses. You are quite correct, Mr. Commissioner, that we each have to accept that this is a downtown area, and there will be intervening or supervening activity which could spill over, if you will, for lack of a better term among mixed uses within the downtown area. I think what we've got to do is try to objectify this process as much as possible. That's what compliance review is intended to do. If applicant demonstrates that compliance review, a reasonable level of tolerance based on their activity, no problem. If, as a result of the study, it shows that they could do a few things to obviate some noise, we've solved the problems, the neighbors go down the road hand in hand. Either way we've got to objectify the result and the way to do that is through the compliance review.

SPEAKER: Mr. Chair, I think just to add to that, is that as staff, we've been here talking about other options and there may be some simple solutions such as which way are the speakers pointing. Where are the speakers located, so we don't, since we're not really noise experts we can't speak to that, and so that's really what we need assistance for is that there may be some fairly simple, straightforward solution that would address the issue, and not require some sort of a major you know renovation of the theater building. But we just don't have enough expertise to know what precisely could we do that might easily fix the situation and have better compatibility.

SPEAKER: Commissioner Zito: Precisely. Director.

SPEAKER: Laurel Prevetti: There has been as part of the compliance review required, I would suggest that if it is the desire to have a noise study, that that be worded in the motion, so that way, the condition is very clear to anybody who picks up on this, we may not have the same staff working on this project during the compliance review. So if there are any other explicit pieces you really suggest we capture, I would suggest the motion be amended.

COMMISSIONER PLATTEN: Page 7 of 8 we add the words "including a noise study."

COMMISSIONER ZITO: Okay. The seconder okay with that? I see a yes. Two yeses. Two seconders. That has been added to the motion. Commissioner Do, do you want –

COMMISSIONER DO: Thank you, Mr. Chair. I would ask for another clarification. What do we consider the noise study to do? The noise study, Friday night they generated a decibel level of X or whatever. So what are they -- so what is it that we expect so we would have a noise study?

COMMISSIONER ZITO: So let me see if I can address that, all right?

COMMISSIONER DO: Sure.

COMMISSIONER ZITO: The purpose of all noise conditions is to ensure compatibility with adjacent uses, right? Again if the maker of the motion disagrees with this, please jump in with this. But it's to ensure compatibility with adjacent uses so therefore if the noise study shows at the face of the theater we've got 90 decibels, for instance and that's what the noise study shows then it would be up to staff to say, 90 decibels is too high, it needs to be 70 decibels and mitigation needs to occur and then the expert would say here's what it would take to get you down to 70 decibels so the report hopefully would identify how to bring the use of this site, which is in question, that the C.U.P. for this site, to bring it in conformance, so it does not create an incompatible use with adjacent uses. And make those recommendations as such, and then it would be up to the applicant to make their case as to yes, no, or whatever. Does that sound –

COMMISSIONER DO: So then we are, in effect, put it entirely -- put the responsibility of making -- of creating a sound level that is acceptable to the theater, completely on the applicant?

COMMISSIONER ZITO: Not exactly. Because it will be up to staff to make that judgment as well. Not just the adjacent -- the decision of is it compatible is a staff decision, to the satisfaction of the director, typically.

COMMISSIONER DO: Okay, thank you.

COMMISSIONER ZITO: Does anybody disagree?

COMMISSIONER PLATTEN: I agree with the chair, that that captures the essence of the motion.

COMMISSIONER ZITO: Okay.

SPEAKER: I think Commissioner Do articulated his position and his concern very well. And I think staff heard it. I think Commissioner Do's concern, as I heard it, is yes, you may do a noise study and yes, there may be activities that you could undertake to lessen the noise that emanates off the site. But Commissioner Do's concern is, is that appropriate for this site, in the downtown, you know, I think what I heard Commissioner Do saying, is that maybe a hospital shouldn't be located next door. That when you go to site your use, you should decide if the downtown is an appropriate place for your use if you need it to be very quiet. I think staff heard that and I think they're also very sensitive to the fact that they're not going to assume that the applicant needs to reduce the sound level to zero. So I think they are hearing the balance that this commission is going to want them to make.

COMMISSIONER ZITO: Right. And from my perspective, I know that my concern is that we want -- we don't want to encourage some uses to the detriment of others. Right? We want to have that balance, and while a hospital isn't probably a good adjacent use, two inclusions are. So we are not excluding one, in other words, prohibiting one through the condition of allowing another use to, how could I say, overwhelm it.

SPEAKER: And unfortunately it is this applicant who is before us. Because I also heard Commissioner Do say, it may be that some of the mitigation, it didn't mean in the CEQA sense, that some of the enhancements for noise reduction might be more appropriate on the other site. That was also his concern. But unfortunately, this is the application before us. I just some of the noise reduction died, at this time.

SPEAKER: Thank you, Mr. Chair. First I want to make sure that the noise study is both a noise and vibration study. And staff had implied that a good noise study person would do a vibration study and I would like that to be articulated if possible. Would the maker of the motion be open? Thank you.

COMMISSIONER ZITO: Second, yes.

COMMISSIONER JENSEN: And second with regard to building and designing a new theater in an empty parking lot, on an empty parking lot, yes, if you were designing a theater from you would do all the current high tech tools that you could do in order to prevent the airplane noises overtime, but the fact is we have an historic downtown an adaptive reuse is a really good way to preserve our historic buildings. We have to find a way to allow compatible uses as the chair pointed out two entertainment uses to live side by side, and enjoy each other's company. And again, the clientele that you serve is very similar in demographic. So with all due respect to Commissioner Do, this is not a new building, the theater was a theater long before amplified music showed up in the downtown area. And I mean, heck, I went to that theater, oh, 20 years ago, and there was

no amplified music in the downtown area. So I think it's inappropriate to tell the theater that just because they want to have appropriate noise levels, that they're not allowed to do so. And I believe that there can be appropriate acoustic treatments. And I don't care to get into an argument with you about this. But there are obviously appropriate acoustic treatments that can be done to the windows. Obviously a single pane window is going to be very difficult to prevent sound from coming in. But there are a number of treatments that could be done to provide the clientele at the theater an enjoyable atmosphere and allow amplified music on the patio which brings me to my other question. I agree with Commissioner Platten, that we don't want to dictate the type music by saying you can't play rock 'n' roll. That is not what the staff had indicated. They said we had the ability to dictate, no amplified music on the patio. If we allow for 120 days, amplified music on the patio, we have done nothing to support the adjacent business, in what is their busiest time period when the acoustic study is being performed.

SPEAKER: I thought I heard part of the reason for not imposing that was to that the study could be done, to see –

COMMISSIONER JENSEN: Right but for 120 days, is it going to be a 120 day study?

SPEAKER: No, but again, the commission can address that. But I think I heard staff indicate that it might be as simple as moving the direction of the speakers. But unless they have the speakers to use, they can't test those theories. So I think that was the point of not accepting the notion of only acoustic music.

COMMISSIONER ZITO: But to Commissioner Jensen's point, if we allow it to go for the full 120 days we've essentially impaired the majority of –

SPEAKER: Exactly. So the commission should discuss that. I'm just noting that to perform the study with the amplified music, a complete band might hinder the ability to perform the study.

COMMISSIONER JENSEN: An I'm struggling with that too, because obviously you don't want a band to be told okay, you're here for the night of the amplified study so could you keep it toned down a little? But I'm concerned. I don't -- is that going to be acceptable to go 120 days with the existing situation, knowing that at the end of 120 days we're all going to be coming back and reviewing this over again? You can suffer through vibrating walls?

COMMISSIONER ZITO: So am I hearing a question to the –

COMMISSIONER JENSEN: A yes or no with would suffice.

COMMISSIONER ZITO: Let me first see if the commission wants to suspended the rules to have a response, is that okay? Is that okay? Okay, you can -- Mr. de Loretto, what is your feeling on the 120 days. Please come up to the podium. We're trying to accommodate your concerns as best as possible here.

SPEAKER: Thank you. Among the things we've tried to do to work with AB stumps is, we've shared with them our calendar to give them an idea of when our events are more sensitive and when events are less sensitive. They have an idea of what nights are more problematic for us. And it would help us -- rock music, they call it rock the patio for a reason -- is problematic for us when we're having Shakespeare. It's not problematic when we're dark and it's not problematic when we're having live jazz, for example. And we have shared the calendar. And I would be open to allowing them to have rock music when we don't have a sensitive night. In return, I would think it would be a demonstration of flexibility and teamwork if we could get their compliance to have acoustic music on those nights where we are sensitive.

COMMISSIONER ZITO: So sir, the question simply was a matter of time. Unfortunately, we cannot consider your schedule versus their, from a perks perspective because the permit goes with the land.

SPEAKER: I wish I could say I was comfortable with that time frame but it is problematic, to answer your question most truthfully.

COMMISSIONER ZITO: That's what we're looking for. So 120 days would be a problem. So we're going to have to grapple with what is an appropriate time frame if not the 120. I see some lights there. Thank you Mr. de Loretto. Commissioner Jensen you want to yield the floor until we get some other feedback or we have some other comments.

COMMISSIONER JENSEN: Well, I'm struggling with this. And you know, I think obviously both uses are going to want Friday and Saturday night. And so, I think that's a real challenge. I'm interested to hear what the other commissioners have to say.

COMMISSIONER ZITO: Okay. Commissioner Platten.

COMMISSIONER PLATTEN: I think we've got to do two things here. We've got to presume that both parties are going to conduct themselves in good faith. Number 1. Number two, I think the two parties, because of the issue are going to move as quickly as possible to get that compliance study done. It has to be done within 120 days. Doesn't mean it can't be done in three days or six weeks or a lot quicker than 120 days oop do what they do best, serve food and put on plays. So I think we've got to use a rule of reason here and assume that based upon the time they spent, the money that AP stumps is going to spend, the fact that this is a serious issue that we ought to assume unless somebody here is really lying to us, that they're going to move quickly. as much as I want to protect everybody from the get go we can't do that unless we can objectify what the reasonable levels should be. I think with all due respect we sort of chewed this worm to death. We should tell the parties get it done and let's have it happen .

COMMISSIONER ZITO: Thank you, Commissioner Platten. Commissioner Kamkar.

COMMISSIONER KAMKAR: Thank you, Mr. Chair. I think in light of what the council also said is, you know it is in everybody's favor to move as fast as possible. Code enforcement you know can do whatever they are going to do until this is resolved. So I also don't see 120 days to be an issue because it can be done much sooner and it's to everybody's benefit for it to get done sooner. So I'm comfortable with the 120 days, language to be in there.

COMMISSIONER ZITO: I'm going to weigh in on that. Normally I'd be okay with that. But the fact is that all the responsibility is on the applicant, and the adjacent use has no say, in other words, the 120 days is four months. That means November 1st when you count the months. July, August, September, October. Technically, the applicant can come back on October 20th with a review. Not saying that they would do this, not saying that there was any reason they would be vine dickive by any means. But bottom line, if it stalls out that far, summer is gone and part of the fall is gone, and the -- Mr. de Loretto's adjacent use can't do anything about it. Yes, they can play rough. There is no, right now the way the motion is stated, they are going to operate as normal until the study is done and brought to staff and staff evaluates that study. There is no -- essentially no change to their permit. Okay, so that's -- that is the concern, and so the adjacent property then would essentially have to endure that for the four months. And not to say that they wouldn't get the study done sooner, not to say that staff wouldn't work sooner. But again, worst case scenario is we're talking November 1st as it's currently written or the way the motion's currently stated. Counsel.

SPEAKER: So the commission does not believe that there are any conditions within the permit that, if they were operating very loudly, that the -- any neighboring property owner could not call the police, and ask them to have them turn down the noise? Is there a concern that they cannot do that?

COMMISSIONER ZITO: I'll leave that question to the commission. There are several -- that's a good rhetorical question.

SPEAKER: I'm just talking about the 120 days, it says that condition number 6 that the windows and doors have to remain shut when the interior imlufd music is played, all noise has to stop by 11:00 p.m, all exterior noises have to be stopped at midnight, et cetera, et cetera.

COMMISSIONER ZITO: Where does that public, carefully regulated, that is the general
—

SPEAKER: Page 5 of 8, concurrent condition number 2.

COMMISSIONER ZITO: 2, okay. Operated in a manner that does not create public or private nuisance, right, uh-huh.

SPEAKER: So I'm just wondering for the next 120 days is the commission at all concerned that if you know, unlike what Commissioner Platten was assuming that

everybody will act in good faith, your concern not that they would but if somebody were vindictive is there a concern that the adjacent uses could not call the police to address excessively loud noise?

COMMISSIONER ZITO: You have a C which says exterior amplified music shall stop by 11. Why do you shut the doors, if you're going to have it cease anyway? There are conditions that are subject to interpretation. We are interested in having a vibrant downtown. To what do the police have a way, to the alternate I'm providing entertainment? So those kinds of -- it has to do with objectivity versus subjectivity. I think that's where we tend to trip. Some of us are conservative, some are liberal in that area. Request the police do something about it? We don't know.

SPEAKER: I normally do not get involved in these discussions. I'm just trying to get to you a resolution.

COMMISSIONER ZITO: Sure, sure.

SPEAKER: Another resolution you have is split the baby. Somebody gets Thursday, Friday, somebody gets Saturday, Sunday. For the next 120 days. I'm trying to get you to make a decision on the next 120 days, on a decision you are going to be comfortable in making a long term C.U.P. Whatever the commission feels comfortable for the next 120 days.

COMMISSIONER ZITO: Commissioner Cahan.

COMMISSIONER CAHAN: Thank you, Mr. Chair. I would like to believe that both parties would act quickly. But I must look at past history. And the permit for AP stumps expired November 5th, 2002. In December of 2008, they were told that they needed to apply for an entertainment permit and did not file until April 29th of 2009. So I would say that they have not acted in the past quickly on matters of import. So I'm concerned that they would not act quickly on this agreement, either. I'm wondering if we could add a friendly amendment to limit music to acoustic music only Except when needed for the noise testing for the next 120 days.

COMMISSIONER ZITO: That's -- okay. If the maker of the motion feels that that's objective enough.

SPEAKER: At this time, I think the motion has been hijacked.

COMMISSIONER PLATTEN: So I'm going to move to withdraw the motion and let somebody else frame it.

COMMISSIONER ZITO: Fair enough. The motion has been withdrawn. So we are without a motion. Commissioner Kamkar.

COMMISSIONER KAMKAR: You know, I would like where Commissioner Cahan is going. Why can't we say, the original motion with the acoustic friendly amendment, you know, Saturday and Sunday I'm sorry, for Friday and Saturday. Other nights, that doesn't affect them, you know, they can nonacoustic music you know for purpose of testing or something, try to accommodate something for 120 days. I'm sure AP stumps will act diligently to make that smaller. I think there's incentive in there for parties to act. And so –

COMMISSIONER ZITO: So are you making a motion?

COMMISSIONER KAMKAR: I am making a motion.

COMMISSIONER ZITO: And could you restate the motion as best as possible? And I'll try to –

COMMISSIONER KAMKAR: Not really. Well, I'm going to give it a shot. I guess I take the staff's motion –

COMMISSIONER ZITO: You mean Commissioner Platten's motion?

COMMISSIONER KAMKAR: Commissioner Platten's motion and then with the friendly amendment that Commissioner Cahan suggested, where we would limit the music –

COMMISSIONER ZITO: There is no friendly amendment. You're framing a new motion.

COMMISSIONER KAMKAR: I'm refrigerate a new motion. I'm taking the motion and I'm adding no, I guess, acoustic music for Friday and Saturday ton exterior patio.

COMMISSIONER ZITO: Okay, so you're limiting the type of music to accuse dick on Friday and Saturday for the 120 days until the study can be delivered and analyzed by staff.

COMMISSIONER KAMKAR: For 120 days or as soon as the stied is available.

COMMISSIONER ZITO: Available, right. And I assume your motion includes all the additional friendly amendments that have been offered prior.

COMMISSIONER KAMKAR: That's correct, because I think we were close.

SPEAKER: So if I could restate that motion.

COMMISSIONER ZITO: And there's a second.

SPEAKER: If I understand the motion.

COMMISSIONER ZITO: Thank God somebody was taking notes.

SPEAKER: Mr. with 120 day review or compliance period to include a noise and vibration study with the additional limitation that acoustic music would be allowed, only acoustic music would be allowed Friday evenings or sit all Fridays, the entire day?

COMMISSIONER KAMKAR: Friday evening.

SPEAKER: Friday evening and Saturday evening on the exterior patio and then the other conditions stay in place with regard to music on the interior.

COMMISSIONER KAMKAR: That's correct.

COMMISSIONER ZITO: Does everybody understand that motion and I understand there's a second. Commissioner Platten, your light's on. Your light's off. Any further comment from the commission? Okay. We touched on one item that I wanted to get into more and if staff could offer a potential explanation for, how can I say, tardiness of the renewal of the permit. Do we know why it was seven years?

SPEAKER: Yes, staff doesn't really have an explanation for why. I think that Sally had indicated that there had been an open code case that was recently resolved but why it took so long. I think -- staff would point out though for the benefit of the Commission that their coming in for a permit is really as a result of the program that we've started that code enforcement started to basically go around and confirm that all of the various downtown entertainment establishments have proper permits in place. And so you know, we have seen some of those, we're likely to probably see more in the future. But as far as why, staff has -- we can't explain that for the applicant.

COMMISSIONER ZITO: I appreciate that. Because we've seen that lately where a lot of applicants have come in and been tardy in their renewals. Just ask that maybe in future staff report there is further discussion on that. Because as you see it does weigh heavily on our consideration. Based on what we think is the intent of the applicant.

SPEAKER: Right. And again that would be a good question for the applicant because it's really up to the applicants to file the application. Staff can do the best we can with what we know but it's really --

COMMISSIONER ZITO: Does that provide a revenue opportunity for the city also? Considering overall the city is in the dire straits that it's in wouldn't timely renewal of permits in general have some impact on that?

SPEAKER: Laurel Prevetti: Mr. Chair, no. The permit fees just cover the service of the staff reviewing the application. It is not a revenue source that pays for other city services.

COMMISSIONER ZITO: Okay, just curious with that, because that would make it even more important. Not specific to this applicant but just in general that we are starting to

see that. I would like that to be more diligent. There is a motion and second on the floor. Let's vote by light. That motion passes unanimously.

SPEAKER: And Mr. Chair again we would need to revise the resolution for this one again.

COMMISSIONER ZITO: We would. Thank you very much. Okay, that brings the public hearing elements to a close. We're at item 4, petitions and communications. Public comments to the commission on nonagendized items. 5, referrals from City Council, boards, commissions or other agencies.

SPEAKER: Laurel Prevetti: There are none.

COMMISSIONER ZITO: Item 6, good and welfare.

SPEAKER: Laurel Prevetti: Yesterday they passed two very important pieces of work that you are familiar with one is the green buildings ordinance which implements the existing green building policy so we're very excited about that. Secondly, they also considered the Alum Rock form based zoning which you've also heard so those parameters have now been heard and we will begin drafting the ordinance to go forward. So really wanted to recognize and thank the council for the support of those key initiatives. Thank you.

COMMISSIONER ZITO: Director, just curious. With the confirmation on the form based zoning, did you hear anything significant or dorsing the commission went qums.

SPEAKER: Laurel Prevetti: The continual had a very full meeting, the comentsd were at a high level and they did not get into the level of the parameters.

COMMISSIONER ZITO: Okay. The commissioners report from the committees, nor manY Mineta San José international airport. Commissioner Campos.

COMMISSIONER CAMPOS: Thank you, Mr. Chair. We have not had a meeting will probably meet in the fall.

COMMISSIONER ZITO: All right. 2, envision San José 2040 general plan update process. Commissioner Kamkar.

COMMISSIONER KAMKAR: We did meet on Monday. One was one topic was how we other means of transportation for example bike lanes. And there was a list of pretty much every city -- every street within the city and caught up in different categories some of it that we are going to keep as they are. Some of it we are either going to expand because of you know, expected transportation, and some we were going to actually contract down, narrow down by simply restriping the lanes to accommodate alternative means of transportation. The second topic was regarding the arts, and how we can have a, I guess, a vibrant arts and culture in our downtown and in our city. So those were the

two areas. And Monday's was the initiation of phase 2 of this envision 2040 meeting. So we're done with phase 1, and we're again, you know, getting into the heart of the matter, if you will. Thank you.

COMMISSIONER ZITO: Okay, thank you. Review of synopsis, 6 C from our June 10th meeting. Commissioner Platten.

COMMISSIONER PLATTEN: Yes, Mr. Chairman, the front page erroneously suggests that I was absent for the entire meeting which is inaccurate.

COMMISSIONER ZITO: Yes –

SPEAKER: Mr. Chair, we will fix that absolutely.

COMMISSIONER ZITO: I believe Commissioner Platten was present for the vote on 3A. Where does it say that? I'm sorry? Yes. Correct. But there should have been a statement in here saying that Commissioner Platten had become present at that point. Just an actual statement. So I agree. Thank you for pointing that out, Commissioner Platten. I also had that noted. So is there a motion to accept with changes? Motion and second, all in favor, any opposed? We have an abstention because Commissioner Jensen was absent. Rights. So that motion carries with Commissioner Jensen abstaining. Subcommittee report on outstanding business. So first, E-1, approve a protocol regarding the deferral and continue -- oh, do you want to do -- I'm sorry, I missed that. My bad. So 6D is, consider study session dates and/or topics. There was a list that was given us. And of course, thank you.

SPEAKER: Mr. Chair, as you probably note on your calendar, I think we've got one more study session scheduled for July. And then, after that, yes, for July 22nd is the habitat conservation plan. And actually on the list that staff provided we believe that items 1 and 2 on this potential topics list, the endangered and reemerging species, wildlife protection and corridors, both of those can be going to the heart of that but subsequent to that July meeting, what's the pleasure of the commission in terms of future topics and so forth? Thank you.

COMMISSIONER ZITO: Let's hear from Commissioner Cahan.

COMMISSIONER CAHAN: Thank you, Mr. Chair. I'm wondering if the commission would like to have a study session where it's essentially just a communicative session, where as commissioners we discuss the environmental issues and how we as a commission can make an impact on that, and ways in which -- this is going back to the idea of having an environmental standing committee, and so this would be a discussion before that, of what -- if we want to see that, and what that environmental issues might be that we'd away want to talk about.

COMMISSIONER ZITO: So are you suggesting a brainstorming session amongst the commissioners?

COMMISSIONER CAHAN: Yes, exact.

COMMISSIONER ZITO: How do you feel about that? Commissioner Do.

COMMISSIONER DO: I think I'd offer a suggestion on that, I think a related issue on green design or environmental issues may be more in the sense of good urban planning practices or smart growth practices and so on, so forth. I think it's more -- I'm extremely interested in green building practices but I don't know if it's completely or directly relevant to what this commission does in the sense of land use policies and that type of thing. So-d but I do think that things like you know the whole concept of new urbanism for example, smart growth, form based zoning all those things I think are highly relevant to what we do and understanding of urban planning practices would be helpful. So I just throw that out, not -- not to change or supersede or anything like that. Thank you.

COMMISSIONER ZITO: Okay. So let me ask this question, Commissioner Cahan. There's three that I think kind of falls within there that were suggested, water supply urban runoff and green building. Would you want to have your I guess you call brainstorming session in addition to those or including those or how would you view that?

COMMISSIONER CAHAN: I'm -- hmm. Let me tailor that and think about it.

COMMISSIONER ZITO: Okay, I'll let some other -- director.

SPEAKER: Laurel Prevetti: If I may, one of the things we also typically do in the fall is set a retreat. So it may be a more jentzed discussion would be set for a retreat. These are quite meaty, we have so much technical data that we don't have the opportunity for the discussion that I'm hearing the commission would be very interested in having. In addition, we can also provide to you some other resources on these topics, our general plan update task force for example is going to be tackling water supply in September. So there may be some other venues for commissioners to also learn about these issues. And then finally, on the urban or good urban design, good urban planning, this would be a fabulous topic as well, either for a retreat or for a study session. So I think you know, it is probably time to start thinking about our retreat as well. So we have some other avenues, so that we can have the kind of conversation you're interested in. Thank you.

COMMISSIONER CAHAN: And sounds like the retreat might be the appropriate venue for that.

COMMISSIONER ZITO: So again back to the items 3 through 8 because we think 1 and 2 would be addressed in our July 22nd study session. But Commissioner Kamkar.

COMMISSIONER KAMKAR: Thank you, Mr. Chair. A couple of items. One under number 5, green building, I would be interested in myself and my colleagues, have a feel for when we ask for solar panels, when we ask for tankless water heaters, when we ask for some of these green building practices as to how much they -- how much is the cost of

adding these things to a building that doesn't have it, just so we have a feel for it? I don't think we can include that in our study session. And then the second topic that came to my mind, as the director mentioned, retreat. I wish we could have field trips where we get to see some of the products that we have specified certain zoning, and see how they turned out. Get a feel for when we specify a density of 50 or a density of 80, what does that look like? What does that feel like? You know, whether it's parking, whether it's open space, whether it's just privacy, you know, what are we specifying so we have a better feel for it? It's not just numbers on a piece of paper but it's true feel. I wish if we could, you know, have some kind of field trips, thank you.

COMMISSIONER ZITO: Okay. Commissioner Jensen.

COMMISSIONER JENSEN: Thank you, Mr. Chair. I'd like to go back to Commissioner Cahan's request for a brainstorming session regarding the scope, depth and breadth of a subcommittee on environmental issues. And support her request and indicate that the purpose of a brainstorming session would be to identify those areas such as smart design and urban growth and some of the new urban technologies and key phrases and catch words that are being thrown about in there rather than doing that brainstorming here, I would like to indicate that I would personally benefit from the opportunity to have the entire commission weigh in on what it thinks and the Planning Commission environmental subcommittee might be able to address.

COMMISSIONER ZITO: So this has come up on a couple of occasions I thought. I want to ask counsel weigh in on one aspect, what we do in some of my other organizations that I'm part of, we ask the enlightened ones to go out and put together a chart more or less, and I use that word loosely, a mission statement that says, what is it that you're trying to accomplish on this subcommittee? A subcommittee requires the commission to make a dedicated commitment as well. And that would come back to the commission for consideration. As far as do we want to have a subcommittee, is this the appropriate thing to do and so on. And opposed to ban tearing it apart, put something of substance together that we could consider as a commission to say yes, this is where we want to go maybe with these particular tweaks or whatever and this is what a subcommittee would do. So I'm going to ask counsel to guide us, if that's the will of the commission, how best to do that. And I'll also ask the director to weigh in.

SPEAKER: Thank you, Mr. Chair. Given that, and I'll defer to the director on this as well, given that I don't have a good sense of what the commission views its role to be in this regard, and I'm not sure the commission does, as well, because I'm hearing from different commissioners that you'd like to sit and brainstorm about what a subcommittee of this -- on this topic would do or look like. I don't -- since -- I wouldn't know how to put anything together for you, because I don't know what you're thinking about. And I don't know if staff has -- if the director has a better idea. The parameters that I would note for the commission, if I could, and I'll have a better sense of what Brown Act regulations would apply, depending upon the scope of how this subcommittee would operate, but one thing I would like to note for the commission, is of course, the fact that it's a land use commission, not sort of a legislative advisory commission to the council.

So the council looks to this commission for its recommendation and report on land use issues as opposed to more broader environmental legislative proposals. So that's why I'm -- I probably would benefit from attending such a brainstorming session. If I did attend I probably would note and try to guide you more towards the roles set forth for the planning commission, both in the city charter and the City's municipal code. So that's -- I would steer the commission into those areas, in terms of staying focused on its role under the city charter and the City's municipal code. That said, I would be happy to attend a brainstorming session and provide input on how the discussion fits, or can be aligned with the charter, and the municipal code mission for this commission. And again, I don't know if the director has a better sense of what would be an appropriate scope for an environmental committee, subcommittee for this commission.

SPEAKER: Laurel Prevetti: Thank you, Mr. Chair. I'd like to just reinforce a couple of points that the counsel has made. This is a commission set forth by city charter that is intended to provide specific land use recommendations to our city council on specific applications or new policies general plan et cetera as well as to sit as a quasijudicial body for a matter such as the conditional use permits, some of which you've heard tonight. Within your decision making and consideration you balance a lot of different factors, including that of the environment. The larger policies are set forth in our general plan, and I'm happy to say that we probably have -- this city is going in a very positive direction in terms of both environmental sustainability and leadership in that area, as well as sound urban design. This is probably the best time to be a Planning Commissioner, quite honestly, given the kind of legislative support we have at the city council at this particular moment. So I think, since I'm sensing that there's a very strong interest on the part of the commission, if I may, I would like to recommend that the Commission perhaps hold a study session on August 12th with just a very simple agenda of, let's have the discussion, an open-ended discussion about the environment, have it be a two-way dialogue with staff, so we can raise issues in terms of what's currently our practice and our policy, what are other departments doing, so that way we do not create duplication. But I have to really reenforce this when it first came up, and it appeared that director Joe Horwedel reinforced that as your last meeting. New requirements that are outside the scope of the charter are going to be very, very challenging. But to that end I would recommend that at our earliest convenience we have the discussion so we can at least understand better the interests of the commission. Thank you.

COMMISSIONER ZITO: I think that sounds very good that we have a study session that begins the discussion. That sounds -- I like that idea. And if a subcommittee is to come out of that, it certainly -- we could get the formation. And what I was asking counsel before certainly with the director's assistance is to get the parameters of that subcommittee if there is in fact to be one. That's a good idea. We are talking about that possibility of that discussion August 12th. Does anybody have a comment or concern about that? Sounds good. Got some smiles as well, good. No? Okay, I'm sorry, I'm sorry, Commissioner Cahan.

COMMISSIONER CAHAN: Thank you, Mr. Chair.

COMMISSIONER ZITO: I thought the smile was good.

COMMISSIONER CAHAN: I will be out of town on August 12th. I don't think I'll be able to make it back from Maryland for that meeting. So I ask if it is in August, it's on the 26th.

COMMISSIONER ZITO: Doesn't seem to be a problem.

COMMISSIONER CAHAN: And additionally one of the reasons I wanted to have this brainstorming session, is I absolutely want to make sure there is no Brown Act violation and we don't end up discussing environmental issues that might come before us with four or more commissioners.

COMMISSIONER ZITO: Uh-huh, fair enough. So I'm going to move that to the 26th, it sounds like. Again, any comments or concerns? All right, so we'll do that. How about some of these other items. Do we want to agendaize any of these other items for different dates? Does anybody want to take a stab at this? Go ahead. Commissioner Kamkar.

COMMISSIONER KAMKAR: Thank you, Mr. Chair. I think they're all great. I think we just go one by one and put them in available spots.

COMMISSIONER ZITO: Let me leave it to staff that you fill in as best you can and come back with the available dates.

SPEAKER: Sure, we'll put them in logical dates. Thank you.

COMMISSIONER ZITO: How about topics, anybody see anything missing from this list? Okay. Anything further on study session or even retreat?

SPEAKER: I was going to ask the commission if dates had been bantered about for the retreat?

COMMISSIONER ZITO: We want to bring it a little earlier in the fall? We've gone as late as November.

SPEAKER: It would help the staff know the date that works, because then the task force of lining up the room and et cetera, et cetera.

COMMISSIONER ZITO: Anybody have a -- Commissioner Do.

COMMISSIONER DO: Could we have a list of dates and exchange by e-mail? Because I don't have my calendar.

COMMISSIONER ZITO: Usually we have the study-what do we call, the restreet, excuse me, on the same week as we have a meeting, so that if people have to travel out of town, they won't miss one or the other. So typically it would be, let's say if it was

September 9th, it would be the week of September 23rd, November, the same. My personal preference would be after school starts but before it gets too dark. So I would say toward the end of September would make more sense to me, maybe the week of the 23rd, that would be my personal –

SPEAKER: And Mr. Chair, we could agendaize this for the next meeting too and allow you all to check your calendars if you're focused on one of those two weeks in September, people can check calendars and –

COMMISSIONER ZITO: I'm just throwing something out for discussion. Yeah, so if people want to come back and discuss based on that starting point. Okay? Okay, great. Okay, subcommittee reports on outstanding business. E-1, approve the protocol regarding the deferral and continuance of the Planning Commission agenda item.

SPEAKER: Laurel Prevetti: Thank you, Mr. Chair. How this came from Rules and Open Government committee also discusses the concepts that the subcommittee came up with and staff attempted to put this into a very simple protocol that outlines five key steps as well as identify towards the bottom of the page some potential criteria or rationale for deferral. One of the items that came out of the subcommittee discussion was the idea that there are also continuances and what the differences are there. The whole goal here is to be much more transparent both for staff, applicants as well as the commission, as to why items might be deferred. So with that, staff does have a recommendation before you, if the Commission is ready to consider it. Thank you.

COMMISSIONER ZITO: Commissioner Cahan.

COMMISSIONER CAHAN: Thank you, Mr. Chair. Am I reading it correctly, that we would not be able to defer something after it -- we started hearing the issue?

SPEAKER: Laurel Prevetti: We call those continuances. So you still have the ability to not make a decision on the given evening, and in that case we just call it a continuance.

COMMISSIONER CAHAN: Okay, thank you.

COMMISSIONER ZITO: It's just very semantic in a sense of whether it's continuance or deferral. So once the item has been started it's a continuance. Before that it's a deferral.

SPEAKER: Actually it's a continuance of the public hearing, Mr. Chair.

COMMISSIONER ZITO: Of the public hearing.

SPEAKER: That's what it is, a continuance of the public hearing.

COMMISSIONER ZITO: Does that alleviate your concern?

COMMISSIONER CAHAN: Yes, thank you.

COMMISSIONER ZITO: I think that -- first of all I want to thank staff and Laurel specifically of putting this together based on our random thoughts that evening. And what the purpose is, is to give us a structure to work with. And essentially if we're going as a commission going to defer or continue an item, we will state why it was deferred or continued, based on these criteria. And it does not -- as it states here but not limited to. If we find other criteria that it doesn't meet we can say the item needs to be continued or needs to be deferred. But the point is, we say why. And before it may have been more subjective, now we can be more objective. And we've also asked staff in the staff reports to state why. So now in the deferral list it's going to state this item was deferred by, whether it be the applicant or staff, and why. So all those will be part of this. I think it makes for more, how can I say, sunshine if you will, of why things are happening, and who brought them forward. And would leave less question as to our motive or our reasoning behind these kinds of things. Commissioner Do.

COMMISSIONER DO: Thank you, Mr. Chair. I'd just like to move to approve the protocol regarding the Planning Commission deferral of agenda items.

COMMISSIONER ZITO: There's a motion and second. Any further comments concerns questions? Seeing none, I'd like to vote by light on this one. And I would assume before we finish that that means also communicating back to Rules, as the result of this vote. Okay, that motion passes unanimously. And again, thank you staff, and director, for your hard work on this. Okay. We're at item 6 F and before we have that item, I'd like to say this is my last meeting as chair. And -- did I miss one? I'm sorry, gosh I'm rushing. 6 E 2, offsale of alcohol process full service grocery, anything on that?

SPEAKER: No comment, Mr. Chair.

COMMISSIONER ZITO: I think we've dispensed with that. Again 6 F, this is my last meeting as chair and I want to thank the commission for asking me to be chair. It is my privilege and my pleasure to do so. And I thank you for your support in having me do this and hopefully, I've met your expectations as what a chair needs to do. So just want to make that comment for the public record. 6F, rescission of Planning Commission vote taken on May 13th, 2009, for election of the chair of the Planning Commission. There were several items beforehand. First of all there was a memo that I put out to the commission, and I want to state some corrections, for the record. I had stated in here that we would do a reconsider vote or motion. And upon further review of Robert's rules, a motion to reconsider would not be tenable. Reconsider requires that the motion be made the night that the original motion occurred. So therefore, the whole discussion on a motion to reconsider is moot. So it will be a motion to rescind. A motion to rescind does not have to be made by -- by either party. It can be made by anyone on the commission. It does have to be seconded, and it requires a two thirds vote to pass because of the fact there were not enough time to put a statement of the motion in the record ahead of time. That's just motion to rescind, not any motion after that. So it is debatable. The whole subject of rescinding the motion to rescind is debatable. So basically at this point I'll ask for a motion, Commissioner Platten.

COMMISSIONER PLATTEN: Yes, Mr. Chairman, I move we rescind the Planning Commission vote taken on May 13th, 2009 for the election of chair of Planning Commission.

COMMISSIONER ZITO: There is a motion and second. Is there any debate on this item? Seeing none, we vote by light. That motion passes unanimously. So the motion to elect Commissioner Do as chair has been rescinded, and therefore, we now go to the second order of business, which is the election of the chair. And I will state that again, look at Robert's rules, I will open the floor for nominations for chair. Nominations do not have to be seconded. According to Robert's rules. So for whatever matter that is, you do not have to second. When we have all the nominees, essentially identified, at that point I'll give each nominee the opportunity to address the commission for two minutes. And at that point we will vote. So we have Commissioner Platten.

COMMISSIONER PLATTEN: Thank you, Mr. Chair, Mr. Chairman. I nominate Commissioner Do for the position of chair.

COMMISSIONER ZITO: Okay, Commissioner Do, do you accept the nomination?

COMMISSIONER DO: Thank you, Mr. Chair. Yes, I accept the nomination. Thank you.

COMMISSIONER ZITO: Commissioner Jensen.

COMMISSIONER JENSEN: I'd like to nominate vice chair Matt Kamkar.

COMMISSIONER ZITO: Commissioner Kamkar do you accept the nomination?

COMMISSIONER KAMKAR: Thank you, Mr. Chair. Yes I do.

COMMISSIONER ZITO: Are there any other nominations. Be Commissioner Kamkar.

COMMISSIONER KAMKAR: Thank you, Mr. Chair. I know you said in your letter this item is not debatable.

COMMISSIONER ZITO: The item on rescission has now been made. I had mentioned earlier because it was a rescission vote it was debatable. If you want to make comment about the vote for chair itself, that's -- that's in order, you can make that.

COMMISSIONER KAMKAR: Thank you.

COMMISSIONER ZITO: And I also remind you I'm going to give both nominees two minutes to talk about why we should vote for them one way or the other.

COMMISSIONER KAMKAR: Okay. Would this be my two minutes?

COMMISSIONER ZITO: No.

COMMISSIONER KAMKAR: No.

COMMISSIONER ZITO: If it's specifically on the item of nomination.

COMMISSIONER KAMKAR: No, no, this is just -- this is regarding what we're doing, you know, and I just want to, I guess, let our chair and let our colleague know, is that I think the very fact that we just rescinded the vote means something was wrong. Why do we have to rescind the vote that was done properly? Something was wrong, some things were not done properly. And I think proper way to do this is to have an investigation, find out what happened, why did it happen? I know in my opinion, it wasn't the first time it had happened. So I think these things need to be cleared up before we go ahead and just, you know, allow the same action that happened, happen again. It would be, you know, I know our City Attorney calls it curing. It feels to me more like condoning, you know. And you know, I think I'm not, you know, I guess my -- I'm upset, you know, and my being upset is not directed at, you know, that all commissioners, it's directed at basically one person. But I feel that you know, the rules of the Commission are being abused and that's not what we're trying to accomplish. I think the administration, I think the staff, I think everybody's trying to show to the TV audience, anybody that's present in our chamber right now, that, you know, we want everything to be on the up and up. We want Brown Act to be followed. We want Robert's rules of order to be followed. We have a task force, you know, a task force that have been created just to look at these procedures, you know, and just next door there's a meeting going on where our mayor is leading it, you know, and is getting input from ethics, you know for ethics commission and for -- so I think the proper thing do is to suspended the voting for chair, and this hasn't happened -- this has happened before. The investigation, complete investigation, and once that's done then, you know, resume with the election of the chair.

COMMISSIONER ZITO: Are you offering us a substitute motion?

COMMISSIONER KAMKAR: That's correct.

COMMISSIONER ZITO: If you are and there's a second, I think it takes two-thirds vote to allow the voting to take place. There is a second and please state your motion i'm sorry.

COMMISSIONER KAMKAR: My motion is to suspended voting on a chair until it is determined an impartial investigation has been done as to what happened, why did we have to rescind the -- why did we have to rescinds a previous vote?

COMMISSIONER ZITO: And what would we do with about chair and vice chair?

COMMISSIONER KAMKAR: The vice chair has been duly elected. I will leave my position as the current vice chair, the new vice chair moves in, you stay as the chair until this has been cleared up, you know, and again, this is not the first time as far as the chair

remaining a chair until a new chair is elected, has happened. There's precedent for that. And I've been a commissioner for only three years on the Planning Commission but this has happened in my tenure.

COMMISSIONER ZITO: So there's a motion on the floor, a substitute motion on the floor to essentially suspended voting on chair, to leave the current chair in place and to allow the vice chair which was duly elected in last meeting to ascend to the vice chair.

COMMISSIONER KAMKAR: Unanimous.

COMMISSIONER ZITO: Unanimous. Discussion will be on that motion at this point. We have some lights. Commissioner Cahan on that motion.

COMMISSIONER CAHAN: Thank you, Mr. Chair. Does that mean I can't comment on the comments made?

COMMISSIONER ZITO: You can comment on the motion that Commissioner Kamkar just made. And once that vote's taken either way, either it will pass or it will fail and we'll go back to the original motion. If it fails we go back to the original motion.

COMMISSIONER CAHAN: Okay. I don't have comments at this time.

COMMISSIONER ZITO: Okay. Commissioner Do on the motion of this -- on the substitute motion.

COMMISSIONER DO: Yes, thank you, Mr. Chair. I -- on the substitute motion, I would argue against the motion. I think that it's to the commission's credit that the commission unanimously rescinded the earlier vote. And I think that the reason for, I speak of myself on that, the reason is not because I personally, or I suspect that other commissioners may share my feelings, that it's not because we felt that there was something that is wrong by principle. I think that -- and I think counsel made that clear in her memorandum to us, which is that it is, that it's to be on the safe side, did commission should act in this manner. And I think the commission to its credit has done that. So I don't think that investigation will do anything other than just blow the whole issue out of proportion. And I'm not saying this because I believe that I will be elected or because I think that because I really long to be in that position. I -- I just simply don't think that it's in the Commission's interest, in the City's interests, I think the city has expanded a lot of resources. I assume that legal staff time is not cheap and I assume that they spend time investigating so far, and that this is their recommendation and their recommendation is to -- they didn't recommend us to go further than that. And so in -- and so I'm making an argument against this motion, because I really think that it's -- it accelerates a situation that does not warrant such acceleration. Thank you.

COMMISSIONER ZITO: So I'll just quickly comment just so for the record, I did ask staff and counsel to investigate this, once those allegations surfaced. This -- this vote does not -- is not a result of that investigation. This -- because the investigation has not

been completed. I'm going to let counsel address the Commission on some of the questions that came up, and on the status, if she knows, of said investigation.

SPEAKER: Thank you, Mr. Chair. So allegations had been made of potential Brown Act concerns in connection with the May 13th vote that the Commission took on the selection of its chair. And that allegation has been forwarded to the City Attorney, who is looking into the matter. I am not the person assigned, because I'm the person assigned to advise you as the Planning Commission. So I'm not the person that's looking into the allegation. However, as the person who advises the Planning Commission, I think as one of our other -- as the chair noted, the fact that I had asked staff to place this item on your agenda, is in no way reflective of whether or not anyone has determined that there is an actual Brown Act issue. And I wanted to specifically note if I may that the Brown Act does specifically provide that the fact that the Commission would take a subsequent action that's intended to cure or correct an action that may have been taken in violation of the Brown Act it says and I think I'll quote it, "shall not be construed or admissible of evidence as a violation of this chapter," which means a violation of the Brown Act. So to the complergrs who noted that I requested this action be taken purely as a precautionary measure, to the extent that there was any sort of a cloud on the prior vote, I simply wanted to remove that cloud and have a clean record for this Commission and that's my advice to the commission. Again it has absolutely nothing to do with any investigation that may be taking place in terms of allegations that have been made. So thank you for the opportunity to clarify that.

COMMISSIONER ZITO: So if I could ask, and could you choose to answer any way you see fit, could the commission expect to get some results of that request for an investigation?

SPEAKER: Well, under the Brown Act there's a provision that says that the person who has demanded that corrective action be taken or it says actually, within 30 days of receipt of a demand, that a potential, you know, violation be examined, that the legislative body shall cure or correct, and that's what you all have done this evening, and then we need to inform the demanding party of the actions that were taken to correct or cure the particular challenged action. So the report under the Brown Act would actually go to the demanding party.

COMMISSIONER ZITO: Okay. So let me ask one other question. Assuming we go ahead and re-appoint a chair, we get to that point, if the report comes back, and I'm not saying it will, but if it comes back, with some allegation of wrongdoing, is there anything that the Commission can do to, at that point, re-rectify, if you will, or does this vote stand on its own?

SPEAKER: Thank you, Mr. Chair. This vote stands on its own, and that's the purpose of this vote. So whatever comes out of any examination of a prior action would pertain to that prior action. This action that you're taking this evening would stand on its own.

COMMISSIONER ZITO: So does everybody on the commission understand that? Okay. That regardless of what is found, this vote is complete and separate from any investigation. And the decision on whether to either suspended the voting or to go ahead with the voting, is going to stand on its own. Okay. With that, Commissioner Kamkar. On the question of the substitute motion.

COMMISSIONER KAMKAR: Thank you. Thank you, chair. You know, I'm not convinced that having a revote for a chair is -- takes precedence over what has happened. You know, I mean, what's the difference? Why can't this vote be taken first week of July, when the investigation supposedly will be complete? I mean, what are we serving? To me, it's like if I break and enter into your home, and then the remedy being, well, we're just going to fix the lock and we're going to give you a key, so we don't charge you for breaking, you know, that doesn't stop the real issue of I entered your house illegally. I know you've cured the breaking portion but that's not the issue. The issue is not, you know, whether the vote -- whether there was four votes, you know, for a person or not. It was. But that vote was decided on outside of public's purview. That vote was decided on -- you look at the tape that comes out, you look at the interviews, if there's any investigation going on nobody contacted me. I have no idea an investigation is going on. You know and I think I would be one of the seven people that they would want to talk to. So it just appears like it's being white washed. And I'm not sure that's what we want to associate our commission and our city with. You know, I think we need to take this issue more seriously, you know, I'm not saying delay it for a year, I'm saying delay it until the investigation is complete, and it's thorough, and then, you know, I nominate Commissioner Do. You know, it's not -- it's not about me, it's about you know, the process that we all abide by, but some people don't. And, you know, that's -- that I think is the crux of the issue.

COMMISSIONER ZITO: Thank you, Commissioner Kamkar. Commissioner Cahan.

COMMISSIONER CAHAN: Thank you, Mr. Chair. First I'd like to say that I was extremely hesitant to support the motion for rescission because the remedy for Brown Act violation is to do the vote over again, to rescind it and then do the vote over again. And I was afraid that if we did rescind it, it would be taken as some admission of guilt, when that is not the intent. However, I did decide to support it, because I wanted the public to feel that they had a fair and transparent commission in front of them. And that we could provide that by having a new vote. I am not sure what waiting for the investigative results, how that would make a difference in the new election. I understand that there is a desire for some sort of -- there's a desire for an investigation. There's a desire to find out if there's wrongdoing. And then there's a desire for that wrongdoing to be out in the public. However, I don't think that that's this body's authority to do that. Nor do I think that delaying the vote would be any sort of remedy to any potential wrongdoing. So I think there are two different issues. I think that redoing the vote is a matter of showing the transparency, I'm quite confident that none of us have discussed it since it was advised by counsel that no commissioners have any Brown Act violation on this, and thorough Brown Act information was sent out to all of us so that we could have

a clear understanding. And I think that if there's any legal recourse necessary, that that will be taken care of by legal channels. Thank you.

COMMISSIONER ZITO: Thank you, Commissioner Cahan. Commissioner Jensen.

COMMISSIONER JENSEN: Thank you. I just wanted to get clarification from counsel that she said, I apologize, I'm not sure I completely understood. You said within 30 days of the allegation there must be a cure or a clarification. And I thought you said that this revote would be, in fact, that cure.

SPEAKER: As far as I know, the vote this evening was done in accordance with all Brown Act rules and requirements. So one remedy of a potential or an alleged Brown Act violation is for the legislative body to rescind the prior action and take it again within the public hearing context. The Brown Act doesn't necessarily condemn the result. It condemns the process to the extent that the process may have taken place outside the public view. So the Brown Act does not require a different result. It requires appropriate public process. And to the best of my knowledge, the revote this evening, there's been no allegation of any Brown Act concerns. So my hope that the act this evening is in fact a cure. To the extent that it turns out that there is or was any Brown Act issues in connect to the May 13th vote of the commission.

COMMISSIONER JENSEN: And then would that then be the report that would be provided to the complaining party, that the complaint was cured by a revote?

SPEAKER: I believe under the Brown Act, that is some of the information that must be provided to the complaining party, which is, what actions were taken to diswreaf or cure any potential Brown Act violation.

COMMISSIONER JENSEN: Does that mean the investigation would be halted?

SPEAKER: I'm not aware, again boilings, I'm not intimately involved in any quote unquote investigation. So unfortunately I can't speak to whether any ongoing investigation would be halted.

COMMISSIONER JENSEN: Okay, and the reason I ask is because you maids it clear that this revote would make this cured. And so I just wanted to make sure I understood specifically what it was we were going to be curing, and what the full extent of that cure might be. Thank you.

SPEAKER: Right. So aside from the status of any examination or investigation, again, I, as the advisor to the Planning Commission, would still recommend as a precautionary action, that the commission go ahead and cure the vote. And so those are actions that are on the agenda this evening.

COMMISSIONER ZITO: Thank you, counsel. Commissioner Platten.

COMMISSIONER PLATTEN: Thank you, Mr. Chairman. I will be oppose being what we do here tonight is absolutely consistent on those occasions in the immediate past here in the City of San José when similar allegations have been paid against the city council and I can recall at least two instances, one in the Tropicana center matter and the other in thely Saigon matter were simply curative role is taken by the council and a revote was had. I think that's appropriate. We've done that. That's a process, repair, I 30 we need to vote on this and move on.

COMMISSIONER ZITO: Commissioner Kamkar.

COMMISSIONER KAMKAR: Thank you, Mr. Chair. Question for counsel. Do you recall when was the last time a Planning Commission decision was rescinded?

SPEAKER: I'm not aware. I'm not recalling. At least it's as long as I have advised the commission, that there's been an action to rescind. But again, there may have been one but I'm not recalling it right now.

COMMISSIONER KAMKAR: Okay. And then the second question is, you mentioned something about legislative body, election of officers. Chair and vice chair. Is that considered a legislative action?

SPEAKER: Well, in this instance really, it's a selection. I mean, it's more an administrative task that this body needs to select somebody under its bylaws to run the meetings. So it's not the same as an election by the public electorate in that manner again it is selecting somebody to run your meetings.

COMMISSIONER KAMKAR: Thank you.

COMMISSIONER ZITO: This was an intriguing alternative that I didn't expect and my concern is this. It's difficult for me to vote on a cure when we don't know that there's a problem. It's difficult for me to feels comfortable with the fact that we may just reiterate what happened on May 13th, if there are allegations outstanding. And without knowing - if it comes back as many of us expect that nothing happened, that it was just an investigation and proved nothing, then that clears the air. But if it comes back and says that there was wrongdoing, if you will, then we have essentially voted and reiterated a vote that was essentially perpetrated incorrectly, if you will. And to that reason it's interesting to me to say, well, let's hold off and find out what the rest of the story is. I mean we've he talked about that earlier today in votes. One of the commissioners said they abstained because they didn't have enough information to vote on something. To me, the cure would be for this commission to elect a chair and vice chair in such a manner that maintains the integrity of this commission, free of all allegations of all hints of wrongdoing, and to come back later and to think the possibility is that the attorney is going to come by and say, we did our investigation and regardless of the cure you, you redid the vote and therefore the issue was dead. I agree with Commissioner Platten, it had been done that way with the council two times before with different circumstances. But I don't see how that brought light to the investigation and brought credence to the

investigation and that's reply concern. So for that reason, I'm going to support the substitute motion, regardless of how it turns out. Commissioner Platten.

COMMISSIONER PLATTEN: Thank you, Mr. Chair. With all due respect, I think your argument or your concern is better directed at the state legislature because that may be the flaw in the Brown Act itself.

COMMISSIONER ZITO: May be true.

COMMISSIONER PLATTEN: And I think nothing mean report that appears in the newspaper is easily cured in accordance with the act, council has done it, every major public agency that I've dealt with in my own practice as an attorney frequently has these kind of curative votes. That's what the legislature provided, that's the remedy, I think we ought to do it and move on.

COMMISSIONER ZITO: Okay. Commissioner Kamkar.

COMMISSIONER KAMKAR: Mr. Chair, you know, I appreciate Commissioner Platten's opinion on this. But I think we're belittling what has happened. This is not just a report in a number are newspaper. All seven of us know, sitting here know what happened. The reason we're discussing it is it wasn't kosher. It wasn't –

COMMISSIONER ZITO: Mr. Kamkar, with all due respect, I understand your personal feelings but I think we need to limit that . Okay? I appreciate what you're saying, but I don't think it's appropriate at this point. Any further comments on the substitute motion? Substitute motion requires five out of seven votes to pass. Let's vote by light. That motion fails with commissioners casms, Do, Platten and Cahan opposing. The next item on the agenda is the statements. I'll give you two minutes. Commode.

COMMISSIONER DO: Thank you, Mr. Chair. I really don't have anything to add to the subject. It's really not a new subject, it's revisiting an old issue. I'm sorry about what happened that put a lot of people through a lot of trouble and I'm happy that we cured that and we're moving on. That's all. Thank you.

COMMISSIONER ZITO: Commissioner Kamkar.

COMMISSIONER KAMKAR: Thank you, Mr. Chair. Mr. Chair, I've served this city for a little over 13 years in a volunteer position. Three of them as a Planning Commissioner, the other ten as other commission. Served in a vice chair role this year, and couple times, you know, when you couldn't make it, I acted as the chair. And I just feel that this nonpolitical commission has become political, you know, and being politicized, and I'm deeply sorry, you know, for us allowing it to happen. I hope you will support misnomination. Thank you.

COMMISSIONER ZITO: Before we take the vote, I would like to make this comment. A lot of my e-mail, I retract that my other statement is part of the public record and needs

to remain in public record, just the point of order, if you will. Commissioner Cahan, what nature is –

COMMISSIONER CAHAN: Thank you, Mr. Chair. We get to ask questions of the candidates, is that correct?

COMMISSIONER ZITO: We haven't in the past. I don't know if we want to go that route. Does anybody have an objection to questions to the candidates? Seeing no objections, go ahead.

COMMISSIONER CAHAN: Thank you.

COMMISSIONER ZITO: I could only ask you to be equal with your questions. I assume you're going to have questions for both candidates.

COMMISSIONER CAHAN: Yes. So I first, Commissioner Kamkar, so you have had the opportunity to work at the controls, and do you feel confident in your ability to run the meetings efficiently?

COMMISSIONER KAMKAR: I believe so, and thank you for asking these questions. In my capacity as a traffic appeals commissioner, I served as the chair. In my outgoing year. In my capacity as the small business commissioner, I acted as the chair twice. I was asked to remain as the chair, to be honest with you. I wasn't running or planning to do it. But I was asked, you know, by 90% of the vote, to remain as the chair, because they felt I was fair in conducting the meeting, and in raising the issues, and, you know, not bringing an agenda to the table. So -- and I know the two times that I felt that I did a good job. Nobody told me, you know, no, we're not going to want you here anymore. So I'm assuming that I did a good job.

COMMISSIONER CAHAN: Okay, thank you. And Commissioner Do, you have had the opportunity to sit with the chair at the controls, and do you feel confident in your ability to run the meeting at the controls, having had the opportunity to sit right with the chair?

COMMISSIONER DO: Thank you, Mr. Chair. I think that the honest answer is that there will be a learning curve for me. I think, I try in the last few meetings, I tried to pay very close attention to what the chair -- how the chair goes about running the meeting. And the processing of the motions and all of that. I'm not a stranger at running meetings. I run my company. I do have a lot of meetings and I also make a lot of public presentations to agencies. I'm not a stranger to that. If I have a fault it may be that I tend to be overly efficient at things and I need to be -- and I am aware of that. And I will attempt to balance that with the need to show respect and to be inclusive and all of that. Thank you.

COMMISSIONER ZITO: Any further questions?

COMMISSIONER CAHAN: No, thank you.

COMMISSIONER ZITO: Any other commissioners call for questions of the candidates? Seeing none, if I could ask the technician to set this up as we did last time, excellent. Okay, we know the process, please vote by light. Result of the vote is Commissioner Do, 4, Commissioner Kamkar, 3. Commissioner Do will sit as chair starting next meeting. Thank you. Congratulations, Commissioner Do. I don't believe there are any other items on the agenda. There's a move for adjournment. Is there a second? Okay, all in favor? [ayes]

COMMISSIONER ZITO: Any opposed? Seeing none, we are adjourned and again, thank you.

Thank you.