



# Memorandum

**TO:** PLANNING COMMISSION

**FROM:** Stephen M. Haase

**SUBJECT:** SEE BELOW

**DATE:** April 26, 2005

COUNCIL DISTRICT: 7

**SUBJECT: GP04-07-02/C05-007 PROTEST OF A MITIGATED NEGATIVE DECLARATION FOR TWO LAND USE APPLICATIONS PROPOSED ON A 0.88-ACRE SITE LOCATED AT THE NORTHWEST CORNER OF STORY ROAD AND MCLAUGHLIN AVENUE (1145 STORY ROAD):**

- 1. A GENERAL PLAN AMENDMENT FROM INDUSTRIAL PARK WITH MIXED INDUSTRIAL OVERLAY TO GENERAL COMMERCIAL LAND USE DESIGNATION; AND**
- 2. A CONFORMING REZONING FROM IP INDUSTRIAL PARK TO CN COMMERCIAL NEIGHBORHOOD ZONING DISTRICT.**

## BACKGROUND

This staff report addresses the protest of a Mitigated Negative Declaration for two proposals: (1) a General Plan amendment to change the Land Use/Transportation Diagram designation from Industrial Park with Mixed Industrial Overlay to General Commercial; and (2) a Conforming Rezoning from IP Industrial Park to CN Commercial Neighborhood zoning district. Both of these proposals are for a 0.88-acre site located at the northwest corner of the intersection of Story Road and McLaughlin Avenue (1145 Story Road). If the Planning Commission upholds the Director's decision to adopt a Mitigated Negative Declaration, the proposed General Plan amendment would be considered by the Planning Commission immediately following this item. A staff report for the General Plan amendment and Conforming Rezoning will be available prior to the public hearing.

The existing subject site currently contains one unoccupied gas station and an equipment rental building. Restaurant, retail, and other commercial properties surround the site on all sides of the intersection.

## **CEQA Mitigated Negative Declaration Requirements**

A Mitigated Negative Declaration (MND) can be prepared only in conformance with the California Environmental Quality Act (CEQA) of 1970, as amended. Public Resources Code Section 21064.5 and CEQA Guidelines Section 15070 state that a MND may be prepared if the Initial Study identifies a potentially significant effect for which the project proponent has made or agrees to make project revisions that clearly mitigate the effects. Additionally, an MND may not be used if any substantial evidence indicates that the revised project with mitigation may still have a significant effect on the environment.

## **Mitigated Negative Declaration**

On March 1, 2005, the Director of Planning, Building and Code Enforcement (PBCE) completed an Initial Study, and circulated an MND for the proposed project to property owners and occupants within 1,000 feet of the project site. The MND and Initial Study were available at the following locations: (1) at the Department of Planning, Building and Code Enforcement; (2) online on the Department's website; (3) at the Main Martin Luther King Jr. Library; and (4) at the East San José Carnegie Branch Library. The public review period began on March 1, 2005, and ended on March 21, 2005.

## **Letter of Protest**

On March 21, 2005, one letter protesting the adequacy of the MND was submitted to the Department of PBCE, Planning Services Division. The letter was filed by Gregory P. O'Hara, representing the firm Thelen Reid & Priest LLP, Attorneys at Law, on behalf of Asian Square, Inc. The issues raised in the letter are discussed and addressed in the Analysis section, below. The letter itself is attached to this report (Attachment 1).

## **MND Protest Hearing Procedure**

San Jose Municipal Code Section 21.06.030 sets forth the MND protest hearing procedure. If, after reviewing the protest, the Director of Planning adopts the Negative Declaration, the Planning Commission must hold a noticed public hearing on the MND protest to consider all relevant information and materials concerning whether the project may have a significant effect on the environment. The action of the Planning Commission in considering the protest is limited to environmental issues. If the Commission finds there is a "fair argument" based on substantial evidence that the project may have a significant effect on the environment, the Commission must require the preparation of an Environmental Impact Report. If the Planning Commission finds that the project will not result in a significant impact on the environment and upholds the action of the Director, the Negative Declaration becomes final, and no further City administrative appeals on the matter may be considered.

## **ANALYSIS**

The following are responses to the concerns raised in the letter of protest noted above.

**Response to Comments Received from Gregory P. O'Hara dated March 21, 2005  
(Attachment 1).**

***Comment No. 1, Legal Standard: The Fair Argument Test:***

*As set forth in more detail below, there is substantial evidence in the record that the Project will have a significant impact on human health and the environment. However, the record compiled by the City to date does not contain sufficient evidence on which to base the determination that any effect or potential effect on the public or the environment can be adequately mitigated through the measures identified in the Draft Mitigated Negative Declaration.*

*The California Environmental Quality Act ("CEQA"), Pub. Res. Code §21000 et. seq., contains a strong presumption in favor of requiring the preparation of an EIR. This presumption is reflected in the "fair argument" standard under which an agency is required to perform an EIR if there is substantial evidence in the record that supports a fair argument that the proposed project may have a significant impact on the environment...*

*As set forth below, there is substantial evidence in the record to support a fair argument that the Project may have a significant adverse impact on the environment. Therefore, a full EIR is required for the Project.*

**Response to Comment No. 1:**

Staff does not dispute the information related to the "fair argument" standard contained in the comment. However, the above comments are the conclusions of the protestant and do not provide substantial evidence that there will be significant impacts. CEQA Guidelines Section 15064 sets forth the criterion for determining when an EIR is required: "If there is substantial evidence, in light of the whole record before a lead agency, that a project may have a significant effect on the environment, the agency shall prepare a draft EIR."

Section 15064 goes on to provide the following guidance to assist an agency in determining whether a significant effect will occur:

- The lead agency shall consider the views of the public, but before requiring the preparation of an EIR, the lead agency must still determine whether environmental change itself might be substantial.
- The existence of public controversy over the environmental effects of a project will not require preparation of an EIR if there is no substantial evidence before the agency that the project may have a significant effect on the environment.
- If the lead agency determines that a significant effect will occur, but the project includes measures to avoid the effects or mitigate the effects to a less-than-significant level, then a mitigated negative declaration shall be prepared.
- Argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous, or evidence that is not credible, shall not constitute substantial

evidence. Substantial evidence shall include facts, reasonable assumptions predicated on facts, and expert opinion supported by facts.

Another important fact regarding CEQA is that its purpose is focused on the disclosure of information as to the effects of a proposed project. While the pre-existing background conditions of a project area should be examined and disclosed, CEQA's primary focus is the *changes* to the physical environment that a project will cause, that the environmental impacts resulting from the project be described, and that mitigation for such impacts be disclosed *if* it is determined that the impact is significant.

The City of San José (Lead Agency) has determined that the mitigation measures included as part of the proposed project adequately mitigate all potentially significant impacts of the project to a less than significant level, as further described below and in the MND. These mitigation measures were identified in the Initial Study document that was circulated for public review from March 1, 2005 to March 21, 2005. Therefore, the City has determined that an EIR is not required for the proposed project.

***Comment No. 2, Existing Environmental Contamination At And Around The Property***

***A. The Project Site May Result in the Exacerbation of Existing Soil and Groundwater Contamination:***

*A review of the file from the County of Santa Clara, Department of Environmental Health relating to the Property ("County File") reveals that soil and groundwater contamination at the site was discovered as early as 1988. A copy of the County File is submitted herewith, bearing document identification numbers CF000001 through CF001237 (note that numbers COF000139 – CF000154 have been intentionally omitted). Investigation into the source, nature and extent of contamination at and around the Property has occurred sporadically. Although the contamination was first discovered in 1988, it appears that the first substantive work to investigate the environmental impact of the contamination on the Property was not conducted until 2000. See CF000048.*

**Response to Comment No. 2:**

Hazardous materials testing first began on the project site in 1986 when the underground tanks were removed from the site.<sup>1</sup>

***Comment No. 3, Mitigation for Chemicals on the Site:***

*The Initial Study prepared with respect to the Property recites at least a portion of the history of the investigation into the contamination on and around the property. Neither the Initial Study nor the draft Mitigated Negative Declaration, however, account for or otherwise adequately address the fact that the full nature and extent of the contamination at the site remains unknown. As discussed more fully below, the impacts or potential impacts relating to the proposed Project*

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<sup>1</sup> Story Road and McLaughlin Avenue, Initial Study. February 2005. Appendix A, p. 2

*cannot be fully evaluated and all appropriate mitigation measures cannot be considered because the plume of the soil and groundwater contamination has not been delineated.*

*Furthermore, the conditions at the site are such that a change in the use and redevelopment of the subject Property could reasonably be expected to affect the current status of the groundwater. Numerous investigative and monitoring reports have identified the presence of contaminants in the groundwater near the Property. It is important to note, however, that the property owner, as responsible party, has not completed even preliminary investigations into the types of contaminants that may be present at and near the Project site. See, e.g., CF000007, CF000020, and CF000052. Without a basic understanding of what chemicals exist at and beneath the site, it is impossible to “mitigate” the impacts of a change in use and redevelopment of the Project site.*

### **Response to Comment No. 3:**

The thrust of this comment is that the analysis of hazardous materials impacts in the Initial Study is inadequate because the full extent of existing contamination is not presently known. Based on the substantial amount of testing and study that has occurred to date, as documented in the Initial Study, the City disagrees with this conclusion. For the following reasons, the City believes that the Initial Study complies with the requirements of CEQA because it discloses the following:

1. The names and types of chemicals associated with the existing contamination;
2. The extent of existing contamination based on the best available information, such information includes the results of testing and ongoing monitoring;
3. The nature of the proposed project as it may impact, or be affected by, the existing contamination; and
4. The specific steps that will be taken, all of which are standard practice and required by law, to avoid exposure of construction workers and future occupants of the site to unsafe concentrations of hazardous materials.

While the limits of existing, known contamination have not been delineated in full detail, such detailed delineation is irrelevant with regard to the sole issue under CEQA, which is whether the project would create a significant hazard to the public. Specifically, the specific degree to which the contaminated groundwater plume may have migrated does not affect the conclusions that are stated in the Initial Study. Regardless of the size of the plume, the project will undertake all required testing and remediation to avoid exposure of the public to unsafe levels of hazardous materials. The City will not allow occupancy of the site unless and until remediation has been completed to the extent deemed necessary by the applicable regulatory agencies. One of these agencies, the Santa Clara County Department of Environmental Health (SCCDEH), has informed the City (in a letter dated April 14, 2005)<sup>2</sup> that the proposed project can proceed while remediation is ongoing. No development application for the subject site is pending with the City of San Jose, however future development or redevelopment of the site with commercial uses

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<sup>2</sup> County of Santa Clara, Department of Environmental Health, letter to Ben Corrales, April 14, 2005

would be required to incorporate the mitigation measures stated in the Mitigated Negative Declaration and would not present a significant impact to health or human safety and the environment.<sup>3</sup>

Although not relevant to the conclusions of the Initial Study regarding hazardous materials, it is important to note that the author of this comment represents the property owner adjacent to the project site, who has refused all requests to allow testing on their property<sup>4</sup>; which testing would allow the regulatory agencies to determine the extent of off-site groundwater contamination.

***Comment No. 4, Shallow Depth to Groundwater Could Lead to Encounter with Contaminants:***

*The depth to groundwater in the general vicinity of the Property is approximately 10 feet. See, e.g. CF000166 and CF000928. As the depth to groundwater in this area is so shallow, any change in use or construction activity occurring at the site as a result of the proposed Project could lead to an encounter with known and unknown contaminants at and around the Project site. The effect such an encounter may have on the Property, adjacent properties, neighbors and the general public has not been considered or addressed. As the responsible party has not yet investigated whether chemicals other than petroleum products (e.g., solvents from the removed waste solvent tank) exist at the site, neither the proponent of the Project nor the agency has sufficient information to engineer adequate mitigation measures to protect human health and the environment. See, e.g., CF000052).*

**Response to Comment No. 4:**

The depth to groundwater in the general vicinity of the property has historically<sup>5</sup> fluctuated between 8.52 feet to 16.78 feet. The average depth to groundwater per monitoring well over the last five years varies from 9.48 to 13.46 feet. According to Table 1 (see CF001607) depth to groundwater on monitoring well MW-1 has fluctuated from 9.79 to 11.49 feet; for MW-1A depth to groundwater has oscillated from 10.50 to 16.78 feet; for MW-2 the depth to groundwater has varied from 8.52 to 10.45 feet; for MW-3 the difference has been approximately 2 feet, being 10.75 feet the shallower depth to groundwater and 12.43 feet the deepest; for monitoring well MW-4 the depth to groundwater has fluctuated from 9.99 to 12.46 feet.

It is not anticipated that groundwater will be encountered during construction because foundations, footings and utility trenching will not extend to groundwater that is encountered at approximately 11 feet below ground surface.<sup>6</sup> There is no indication that solvents would be a primary constituent of concern at the site. In fact, the Santa Clara Valley Water District (SCVWD) and the SCCDEH both have concurred with this conclusion through their review of the monitoring and sampling results to date. Further, it should be noted that groundwater from shallow aquifers such as those in question below the project site is not used for drinking water in the urban areas of the Santa Clara Valley. Water provided to the project site has its source in local county reservoirs and out of area imports. Given all the information gathered, the City of

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<sup>3</sup> Santa Clara Valley Water District, Jim Crowley, e-mail to Ben Corrales, April 12, 2005

<sup>4</sup> See CF000001 to CF000003

<sup>5</sup> Conor Pacific. Fourth Quarter 2005 Groundwater Monitoring Wells, Table 1. January 28, 2005 (CF001067)

<sup>6</sup> Conor Pacific letter to Stephen Haase, April 20, 2005 (attached)

San Jose does not have substantiated, that there would be a negative effect on adjacent properties, neighbors or the general public.

***Comment No. 5, Conduit Study Needed:***

*The Santa Clara County Department of Health (“DEH”) has requested that the responsible parties prepare a “conduit study” to determine whether, and to what extent, the contaminants are being transported to sensitive areas through subsurface “conduits.” CF000020. From our review of the county record, it does not appear that such a study has been conducted.*

**Response to Comment No. 5:**

The purpose of the conduit study is to locate potential mitigation pathways and determine the probability of the plume encountering preferential pathways and conduits that could spread the contamination.

A request was placed in September 2001 by the SCVWD (not the SCCDEH) for a conduit study at the site (CF0000020). The conduit study was conducted in 2002, and the results were reported to the SCVWD in the “Groundwater Investigation and Well Search” report dated August 5, 2002 by Conor Pacific (CF000415-482). This report was included in the documents accompanying the MND protest letter, and is available, as public record, at the Department of Planning, Building and Code Enforcement, Planning Services Division, City Hall. No wells were identified in the well search/conduit study that would result in significant hazardous materials impacts at the project site.

***Comment No. 6, Hydrology and Water Quality:***

*The Draft Mitigated Negative Declaration states that the Project will not have a significant impact on hydrology and water quality and, therefore, no mitigation measures are required for this resource. This finding is directly contrary to the numerous reports and communications in the County file. The responsible party has twice requested that the site be designated a “low risk groundwater site,” and twice the DEH has rejected that request, most recently in 2001 because the groundwater beneath the site still contained, among other things, concentrations of benzene (a known carcinogen) at levels 4000 times the federal and state requirements. CF000022, CF000024. Groundwater is a natural resource of the State and measures must be taken to ensure its protection. See, State Water Resources Control Board Resolution No. 92-49 (a draft of which is attached hereto, bearing document identification numbers SR000001 through SR000254). Nearly all waters of the State have a beneficial designated use or are potential sources of drinking water. See, State Water Resources Control Board Resolution No. 88-63. See, SR000045. The groundwater contamination at the Project site poses a significant impact on a resource of the State. The full impact of the Project on the water quality in the area is not known and, at a minimum, standards need to be considered to protect water quality in the area.*

**Response to Comment No. 6:**

Please refer to Response 1. Hydrology and Water Quality are described in the Initial Study, which is a disclosure document under CEQA. The project would not further degrade

groundwater quality in the project area, and remediation of the groundwater will occur once access is obtained to the adjacent properties, per the requirements of the regulatory agencies. The project will not create additional contamination or negatively impact existing contamination at the site. Based on this, the Initial Study correctly states that the project would have a less than significant impact on groundwater supplies and water quality standards.

***Comment No. 7, Removal of Contaminated Soils:***

*Furthermore, neither the environmental reports generated to date nor any mitigation measure proposed identify or address the nature and extent of the removal of contaminated soils at or around the Property. To be comprehensive, any review of the Project should necessarily include a review and evaluation of the remediation of the soil in the area and the effect the remedial plan will have on the environment and the surrounding area. It is premature to approve a change in use or redevelopment on the Project without a full EIR to understand and effectively mitigate the impacts to natural resources, human health and the environment. As the record on this issue is not yet fully developed and there is a fair argument that the existing contamination at the site could be affected by the redevelopment activities suggested by the Project, the adoption of the draft Mitigated Negative Declaration as proposed is not appropriate.*

**Response to Comment No. 7:**

Soil samples were taken in the year 2000 and again in 2002 upon removal of the underground storage tanks located on the site. Mitigation measures listed in the Initial Study (pages 37 and 38) include soil sampling and excavation, particularly in the area of the former sump, as recommended in the Phase I Environmental Site Assessment. This sampling would include testing for solvents and the addition of any new detected contaminants to a regular monitoring program, as required by the regulatory agencies. Mitigation measures in the Initial Study related to asbestos and lead paint contamination also indicate that excavated soils will be characterized prior to off-site disposal. These mitigation measures, which are part of the proposed project and dictated by local, state, and federal law, will reduce impacts from contaminated soil to a less than significant level, as stated in the Initial Study. For these reasons, the Mitigated Negative Declaration is the appropriate environmental document for the proposed project.

***Comment No. 8, Indoor Air Quality Concerns:***

*The Property is currently known to be contaminated with several pollutants, including the suite of compounds generally referred to as BTEX (i.e., benzene, toluene, ethyl benzene, and xylene). Benzene is a known carcinogen and both federal and state agencies have designated acceptable standards or maximum contaminant levels (MCLs) for the presence of benzene in water. The MCL for benzene in water in the State of California is currently 1 part per billion (ppb). Benzene has historically been detected in the groundwater in the vicinity of the Project at levels of between 4,000 and 5,000 ppb and, needless to say, is a contaminant of particular concern. Benzene is known to migrate through soil in vapor form and intrude into the occupied building structures overlaying the benzene plume. The inhalation of indoor air impacted by benzene can be a significant health threat, and the draft mitigated negative declaration does not address the potential impact of a change in use or how it will be mitigated.*

**Response to Comment No. 8:**

A preliminary evaluation of site data does not support the assertion that indoor air quality will be a concern for this site. In their protest letter, TRP used Maximum Contaminant Levels (MCLs) for drinking water as an indicator of indoor air quality concerns. Evaluating potential indoor air quality concerns using MCLs for drinking water is not an accepted or appropriate method of assessing indoor air quality concerns at this site. The San Francisco Bay Regional Water Quality Control Board, however, has developed environmental screening levels (ESLs) that would indicate that indoor air quality would be a concern for a commercial development that has low to moderate permeability soils beneath it. A final evaluation of site-specific concerns will be conducted using accepted industry standards and techniques as the site moves toward regulatory closure. It is not anticipated, but if a concern is identified, remedial measures would be taken as appropriate, per State and local regulations and requirements.

***Comment No. 9, Solvent Contamination from Waste Tank:***

*In addition, the Project site is known historically to have contained a solvent waste tank. Solvent waste tanks are generally known to be a source of chlorinated solvent or volatile organic solvent contamination. A comprehensive investigation of the presence of chlorinated solvents or volatile organic compounds (VOCs) in the soil and groundwater in the area has not yet been conducted, although the DEH has requested the investigation. VOCs and solvents are also known to migrate and volatilize into occupied spaces and structures over plume areas. Indoor air standards for commercial structures with respect to indoor air quality are more stringent than indoor air standards for industrial structures. Approval of the Project necessarily invokes the application of more strict indoor air quality standards. Neither the effect of the environmental contamination on indoor air quality standards nor the standards themselves have been considered or reviewed with respect to the Project. As such, the current Mitigated Negative Declaration is not adequate and a full EIR is required.*

**Response to Comment No. 9:**

The regulatory agencies (SCVWD and SCCEHS) have determined that the contaminants of concern on the project site and adjacent property are petroleum hydrocarbons, not solvents. Regardless, as stated on page 38 of the Initial Study, prior to project construction, soil and groundwater samples will be taken and any soil found to be affected by contaminants will be excavated and removed from the site. Soil and groundwater will be tested for solvents as well, as a precautionary measure, and any detected contaminants not already included in the current monitoring program would be added to the list of substances to be analyzed.

As stated in Response 8, the hazardous materials specialists for the project have determined that contaminant vapors are not a concern for commercial development on the site. Further, the remediation of the site, including soil and groundwater clean-up per local, state, and federal laws and as described in the Initial Study, would reduce potential hazardous materials impacts on the site to a less than significant level.

***Comment No. 10, Incomplete Characterization of the Site:***

*With respect to the mitigation of hazardous materials related to the Project, the Draft Mitigated Negative Declaration states only that the City should incorporate any soil and groundwater contamination analysis derived from the environmental review process into development proposals. Without knowing the full extent of the contamination at and around the Property, the City is not in a position to effectively propose any necessary mitigation measures regarding the contamination at the site. The Santa Clara Valley Water District (SCVWD) first became involved in the investigation of the contamination at the Property as early as March 1988. CF000048. It is undisputed that the investigation of the Property and surrounding area is not yet complete and the nature and extent of the contamination has not been fully defined. Specifically, the Santa Clara Valley Water District has requested that the property owner conduct a conduit study and, to date, this work has not yet been done.*

**Response to Comment No. 10:**

As stated in Response 5, a conduit study was conducted in 2002 and the results were reported to the SCVWD in the "Groundwater Investigation and Well Search" report dated August 5, 2002 (CF000415-471). No wells were identified in the well search/conduit study that would be a concern to the project site.

As stated in Response 3, the extent of the groundwater contamination on the adjacent property has not yet been determined due to the unwillingness of the adjacent property owner(s) to allow access to their property. Once access is allowed, a groundwater well is installed, and the extent of the contamination is determined, a plan for remediation can be prepared and implemented. It should be noted that the SCCDEH, who is currently the responsible agency for the contamination at the project site, does not object to the development of sites prior to completion of investigation and cleanup activities, as long as the development does not impede or delay current or future corrective actions (letter dated April 14, 2005).

***Comment No. 11, Solvent Contamination from Soil and Groundwater:***

*In addition, although the site was known to contain a solvent tank, an investigation of the soil and groundwater for contamination related to solvents has not been performed. As stated above, the proposed change in use and redevelopment of the Project site necessarily involves the review and application of more stringent indoor air quality standards. Accordingly, an indoor air quality impact analysis should be conducted in addition to a complete risk assessment to analyze the effect the soil and groundwater contamination may have on the new development. Without this information, the record is insufficient to make an informed decision regarding the impact(s) of the Project on the environment and whether any such impact can be addressed through mitigation measures.*

**Response to Comment No. 11:**

Please refer to Responses 2, 3, 4, and 5. The Initial Study prepared for the project accurately describes the hazardous materials issues for the site and identifies appropriate mitigation for potential impacts according to all local, state, and federal laws.

***Comment No. 12, Understanding the Types and Extent of Contaminants:***

*Without an understanding of the types and extent of contaminants at and around the Project site, and an understanding of the conduit transportation of those contaminants, it is impossible to determine whether proposed mitigation measures will adequately protect human health and the environment. For instance, the proposed mitigation measures suggest the wetting of soil to prevent dust migration, but the proposed mitigation measure does nothing to address the potential volatilization (vaporizing) of benzene to neighbors and the surrounding area during construction. Furthermore, the draft mitigated negative declaration is silent on mitigation measures to prevent indoor air contamination from benzene and VOCs and to address state and federal standards for indoor air quality.*

**Response to Comment No. 12:**

As stated previously in Response 8, based on SFRWQCB environmental screening levels (ESLs), levels of benzene and other chemicals in the groundwater do not reach levels of concern for commercial properties underlain by soils of low to moderate permeability. A final evaluation of site-specific concerns will be conducted using accepted industry standards and techniques as the site moves toward regulatory closure. If an unanticipated concern is identified, remedial measures would be taken per local, state, and federal regulations.

***Comment No. 13, Traffic:***

*The Initial Study and draft Mitigated Negative Declaration conclude that the Project will have no significant impact on the environment. However, there is no evidence in the record on which to base this conclusion. The Initial Study states that a traffic report was not prepared for the Project “as any future commercial uses are not expected to generate more traffic over that generated by previously permitted uses on the site.” (Initial Study, February 2005, p. 54). No factual support for this conclusory statement was provided. The methodology for determining whether a traffic study is necessary must focus on whether or not the proposed use will create or could create a potential impact on the environment in the future. Unsupported speculation regarding the comparison between anticipated traffic levels and current traffic levels related to the current use of the Property (which is vacant and unoccupied) is not an adequate basis for the determination set forth in the draft Mitigated Negative Declaration.*

**Response to Comment No. 13:**

Please also refer to Responses 1 and 3.

The City of San José Public Works<sup>7</sup> and Department of Transportation<sup>8</sup> reviewed the proposed project and concluded that the number of new PM peak hour trips resulting from the proposed land use would be below the exemption threshold for the project area. Therefore, the project was exempt from a TRANPLAN computer model traffic impact analysis for the proposed General

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<sup>7</sup> Department of Public Works, Letter to Ben Corrales, October 1, 2004

<sup>8</sup> Department of Transportation, Letter to Laurel Prevetti, October 12, 2004

Plan amendment. A traffic distribution analysis was conducted for the project and it was concluded that the previously permitted uses of the site (gas station and equipment rental business), would have generated more traffic than the currently proposed commercial development. For this reason, the project was determined to be in conformance with the City of San Jose Transportation Level of Service Policy (Council Policy 5-3) and would not therefore, result in a significant traffic impact.

***Comment No. 14, Egress/Ingress:***

*At an operational level, we anticipate egress/ingress to the site will be problematic due to the existing lane configuration of McLaughlin Avenue and Story Road, which is currently served by right in/right out only at both driveway locations.*

**Response to Comment No. 14:**

If a future development application were submitted to the City of San José, the Department of Public Works has stated that they would require the project applicant to include widening of Story Road to an ultimate 120 foot right-of-way as part of the project, which would improve traffic flow at the intersection. In addition, the City would receive an irrevocable offer of dedication of seven feet along the McLaughlin Avenue street frontage. The requested street widening and frontage dedication would be included as part of the project design and would be considered, by the Department of Public Works, to be adequate improvements to allow acceptable ingress/egress at the site.

***Comment No. 15, Access Easement:***

*As additional commercial development is introduced west of the subject site, traffic will increase, and without the benefit of an access easement through the adjacent property, the intensification of this site will only compound an existing situation. At a minimum, a traffic study should be conducted so that the City can make an informed decision regarding the effect of the Project on traffic in the vicinity and ensure the appropriate mitigation measures are taken.*

**Response to Comment No. 15:**

Analysis of the impact of traffic generated by future commercial projects west of the project site is beyond the scope of the Initial Study and would be purely speculative. The City has made an informed decision regarding the effect of the project on traffic conditions, based on their knowledge of the existing and potential traffic in the area and their future plans for improvements to the street network. As stated in the Initial Study on page 56, access for emergency vehicles to the site would be adequate even if the additional access easement through the adjacent property is not constructed.

Please also refer to Response to comment 14.

***Comment No. 16, Summary of Previous Comments:***

*As explained above, the Initial Study does not adequately address material evidence in the record concerning threats to the environment in order to allow a reasonable conclusion that the Project will not have a significant effect on the environment or otherwise ensure that all necessary and appropriate mitigation measures will be taken. The proposed Project effects a change in use and redevelopment of a site that has been under investigation for environmental contamination for the past seventeen years. The nature and extent of the contamination remains unknown. The effect that the change in use and redevelopment of the Property will have on the soil and groundwater contamination as well as the effect that the contamination may have upon natural resources and persons exposed to it as a result of the construction and redevelopment of the Property also remains unknown. Approving a change in the current zoning and use of the Property will likely have a significant impact on the environment. Because the record in this action does contain an adequate amount of information on all relevant issues, the City simply cannot make an informed decision as to whether any and all impacts related to the Project will be significant or whether they can be appropriately mitigated. Based on the foregoing, we respectfully request that the City require a full EIR for the project.*

**Response to Comment No. 16:**

This comment is a summary of earlier comments. Please see the responses to those comments, above.

**CONCLUSION**

Based upon a review of the comments above, none of the comments present substantial evidence of a “fair argument” (according to CEQA Guidelines Sections 15064, 15070 and 15369.5) that the project may result in significant environmental impacts according to the CEQA Guidelines and the City’s thresholds of significance. Therefore, as described in the responses above, the Mitigated Negative Declaration meets the requirements of CEQA, and an EIR is not required.

## **RE-CIRCULATION OF A NEGATIVE DECLARATION PRIOR TO ADOPTION**

The CEQA Guidelines (Section 15073.5) state that a lead agency is required to re-circulate a negative declaration when the document must be substantially revised after public notice of its availability has previously been given pursuant to Section 15072, but prior to its adoption. As used in this section, a “substantial revision” of the negative declaration means:

- 1) A new, avoidable significant effect is identified and mitigation measures or project revisions must be added in order to reduce the effect to insignificance; or
- 2) The lead agency determines that the proposed mitigation measures or project revisions will not reduce potential effects to less than significance and new measures or revisions must be required.

Re-circulation is not required under the following circumstances:

- 1) Mitigation measures are replaced with equal or more effective measures pursuant to Section 15074.1.
- 2) New project revisions are added in response to written or verbal comments on the project’s effects identified in the proposed negative declaration which are not new avoidable which are not new avoidable significant effects.
- 3) Measures or conditions of project approval are added after circulation of the negative declaration which are not required by CEQA, which do not create new significant environmental effects and are not necessary to mitigate an avoidable significant effect.
- 4) New information is added to the negative declaration which merely clarifies, amplifies, or makes insignificant modifications to the negative declaration.

The letter protesting the adoption of the Mitigated Negative Declaration does not require “substantial revision” of the Mitigated Negative Declaration, as defined above. The comments do not require re-circulation of the Mitigated Negative Declaration because none of the comments discussed above: identifies a new avoidable, significant effect; provides evidence that the project would result in any impact of greater severity than already identified in the Initial Study; or determines that the proposed mitigation measures will not reduce potential environmental effects to a less than significant level. For these reasons, the Mitigated Negative Declaration, as currently written, satisfies the requirements of CEQA and does not require re-circulation.

## **ALTERNATIVE ACTION**

The alternatives available to the Planning Commission are to: (1) uphold the Mitigated Negative Declaration for the proposed project; (2) order revision, and if required, re-circulation of the Mitigated Negative Declaration; or (3) require the preparation of an EIR.

## **RECOMMENDATION**

The Director of Planning, Building & Code Enforcement recommends that the Planning Commission uphold the Mitigated Negative Declaration prepared for the proposed project.

Stephen M. Haase, AICP, Director  
Planning, Building and Code Enforcement

### Attachments

cc: Ms. Kim H. Nguyen  
Gregory P. O'Hara  
Miro Design Group  
Jodi Starbird  
Stuart D. Kirchick