

November 2, 2004

The Benicia City Council meets the 1st and 3rd Tuesday of each month at 7:30 p.m. in the Council Chambers. Copies of Council Agendas are available in the City Clerk's office on the Friday afternoon before the Council meeting.

**MINUTES OF THE
SPECIAL MEETING - CITY COUNCIL
NOVEMBER 02, 2004**

The special meeting of the City Council of the City of Benicia was called to order by Mayor Steve Messina at 7:16 p.m. on Tuesday, November 02, 2004, in the City Council Chambers, City Hall, 250 East L Street, complete proceedings of which are recorded on tape.

ROLL CALL:

Present: Council Members Campbell, Patterson, Smith, Whitney, and Mayor Messina

Absent: None

PLEDGE OF ALLEGIANCE:

Mayor Messina led the pledge to the flag.

ANNOUNCEMENT OF CLOSED SESSION:

Lisa Wolfe, City Clerk, read the announcement of Closed Session:

ADOPTION OF AGENDA:

On motion of Vice Mayor Patterson, seconded by Council Member Whitney, and unanimously approved, the Agenda was adopted as presented, on roll call by the following vote:

Ayes: Council Members Campbell, Patterson, Smith, Whitney, and Mayor Messina

Noes: None

COMMUNICATIONS:

WRITTEN:

None

PUBLIC COMMENT:

None

CLOSED SESSION:

CONFERENCE WITH LEGAL COUNSEL - EXISTING LITIGATION

(Subdivision (a) of Government Code Section 54956.9)

Name of Claim: Allen Duschka

ADJOURNMENT:

Mayor Messina adjourned the meeting at 7:18 p.m.

**MINUTES OF THE
REGULAR MEETING - CITY COUNCIL
NOVEMBER 02, 2004**

The regular meeting of the City Council of the City of Benicia was called to order by Mayor Steve Messina at 7:41 p.m. on Tuesday, November 02, 2004, in the City Council Chambers, City Hall, 250 East L Street, complete proceedings of which are recorded on tape.

ROLL CALL:

Present: Council Members Campbell, Patterson, Smith, Whitney, and Mayor Messina

Absent: None

PLEDGE OF ALLEGIANCE:

Mayor Messina led the pledge to the flag.

ANNOUNCEMENTS/APPOINTMENTS/PRESENTATIONS/PROCLAMATIONS:

ANNOUNCEMENTS:

Action taken in Closed Session:

Mayor Messina stated that Council gave direction to Staff on settling claims with Allen Duschka vs. City of Benicia.

APPOINTMENTS:

RESOLUTION 04-167 - A RESOLUTION CONFIRMING THE MAYOR'S APPOINTMENT OF DONALD BASSO TO PEOPLE USING RESOURCES EFFICIENTLY (PURE)

Ayes: Council Members Campbell, Patterson, Smith, Whitney, and Mayor Messina

Noes: None

RESOLUTION 04-168 - A RESOLUTION CONFIRMING THE MAYOR'S APPOINTMENT OF DENNIS LUND TO PEOPLE USING RESOURCES EFFICIENTLY (PURE)

Ayes: Council Members Campbell, Patterson, Smith, Whitney, and Mayor Messina

Noes: None

PRESENTATIONS:

None

PROCLAMATIONS:

Mayor Messina presented the following proclamations:

- Recognizing the completion of the first phase of the Forrest Deaner Native Plant Botanic Garden and commending the California Department of Parks and Recreation for their special efforts in supporting the Native Plant Garden.

Vice Mayor Patterson stated that it was commented in the last work party at the State park that the State Park workers were there on their time off, and that they were basically doing hard labor and hard work on the park on their own time. One thing that is remarkable about the garden is that the workers have been consistently helpful in that manner. She wanted to recognize the contributions of the Rangers and the State workers.

Mr. Brogan encouraged the public to attend the November work party at the State Park. It will be held at the State Park on 11/6/04 from 9:00 a.m. to 11:00 a.m. at the area adjacent to the large picnic area ? of the way out to Dillon Point. For more information, contact Norma Deaner at 745-3906.

- Lung Cancer Awareness Month - November 2004

ADOPTION OF AGENDA:

Mayor Messina asked if there were any changes to the Agenda.

On motion of Council Member Whitney, seconded by Council Member Smith, and unanimously approved, the Agenda was adopted as presented on roll call by the following vote:

Ayes: Council Members Campbell, Patterson, Smith, Whitney, and Mayor Messina

Noes: None

COMMUNICATIONS:

WRITTEN:

There were three letters submitted to Council, all of which are on file with the original Agenda packet.

PUBLIC COMMENT:

1. Council Member Smith announced the following upcoming events:

- 11/4/04 - There will be a joint City Council and Planning Commission Workshop at the Dona Benicia Room at 7:00 p.m.
- 11/9/04 - There will be a Special City Council Meeting to discuss the Historic Preservation Commission (HPC) and the City's application to become Certified Local Government in Council Chambers at 6:30 p.m.
- 11/6/04 - Arts Benicia has an art exhibit, 'Cream III' opening up. They will host a reception related to the exhibit on 11/13/04.
- 11/13/04 - Benicia Historical Museum will host its annual auction and pasta-tasting event at the Vet's Hall.
- 11/14/04 - The Benicia Public Library will host the San Francisco Guitar Quartet.

- Benicia Old Towne Theatre Groups production of 'Run For Your Wife' continues for the next two weekends.
2. Vice Mayor Patterson discussed her and Staff's recent trip to Maryland to attend FEMA's training facility. There were intensive training exercises on how to respond to earthquakes. The training was very impressive. She was grateful to have the chance to attend. The Federal Government paid for the trip. California is ahead of a lot of states for obvious reasons. They learned some things from other states during the training.
 3. Council Member Campbell stated that we recently had a very successful 5K and 10K race that raised a lot of money for sports programs. He thanked the Police Department and City Staff for their efforts. He acknowledged Mr. Erickson for winning in his age group. He thanked the sponsors, Olson Company, Shea Homes, and Centex for their efforts.
 4. Steve Gizzi - Mr. Gizzi stated that it is apparent that the Council travel budget has increased substantially since his tenure. It must have been a nice trip that Vice Mayor Patterson and Staff took. He stated that we do not need the Benicia Herald anymore, since Council Member Smith makes his announcements. Mr. Gizzi stated that he also wanted to discuss the Lee project. He was initially concerned with the project. He has since met with the Lee's and participated in their public outreach process, which he commended them for. He is now very pleased with the outcome. The project, as proposed, is sensitive to the area. He gave the project his unconditional support. The project may have more parking spaces than necessary. It may need to be scaled back. He discussed his concern with including this parcel in any gateway project/study could have the effect of an ex post facto law. It is not fair to impose new requirements on the Lee's at this time.
 5. Vice Mayor Patterson stated that, as she said earlier, FEMA paid for the travel, food and training for her and Staff's trip to Maryland. Mr. Gizzi apologized for his comments.

CONSENT CALENDAR:

On motion of Council Member Whitney, seconded by Vice Mayor Patterson, and unanimously approved, the Consent Calendar was adopted as presented, on roll call by the following vote:

Ayes: Council Members Campbell, Patterson, Smith, Whitney, and Mayor Messina

Noes: None

The minutes of October 19, 2004 were approved.

Denial of the Claim Against the City by D. Michael Brown and Referral to Insurance Carrier was approved.

RESOLUTION 04-169 - A RESOLUTION REVISING THE TOTAL NUMBER OF BENICIA RESIDENTS THAT MAY SERVE ON PEOPLE USING RESOURCES EFFICIENTLY (PURE)

Approval to waive the reading of all ordinances introduced and adopted pursuant to this agenda.

PUBLIC HEARINGS:

Public Hearing continued from October 19, 2004 on General Plan amendment and zoning change for

1422, 1430 and 1440 East Second Street continued from October 5, 2004. The proposed mixed-use project is for 1430 and 1440 East Second Street:

Council Member Campbell excused himself from this portion of the meeting due to a conflict of interest.

Brenda Gillarde, Principal Planner, reviewed the Staff report on this item.

Council Member Smith stated that one of the letters Council received regarding this item was from Mr. Dean questioning the use of a planned development district. Council Member Smith asked Staff if it was possible to use another zoning designation such as neighborhood commercial or commercial office. Ms. Meunier stated that the reason the applicant made the choice of planned development was due to their consultation with Staff. This is an area with significant traffic issues. Their concern was that if there were medical/dental offices, the traffic generation related to those would be higher than desirable. Zoning it as planned development allowed them to tailor a set of uses that are low traffic generating for this location.

Proponent:

Mr. Delgado, Architect on the project, reviewed a slide-show presentation of pictures of surrounding buildings in the area of the project. He discussed how the project came to be. He stated that he and the applicants have met with the Police and Fire Departments, the Planning Department, etc. They have also had two neighborhood meetings in 11/03 and 1/04 that were attended by about 12 neighbors. None of the neighbors opposed the project. The applicants have met all requirements for this project. The applicant's attorney was present to answer any questions Council may have.

Public Comment:

1. Donald Dean - Mr. Dean stated that he is a professional Planner, with a Masters Degree in City and Regional Planning. He has 20 years of planning experience, most of which has been in the environmental field. He stated that he was perturbed to hear that there was a supplemental Staff report. He had called in earlier that morning, and was told there was not a supplemental report. He has not had a chance to review the report as of yet. Mr. Dean then reviewed the letter that he wrote to Council and submitted to the City Clerk (on file). He stated that if the City is doing a General Plan amendment, they are changing the Land Use plan of the City, which is the Land Use Constitution, which requires some kind of CEQA evaluation, which is a California State requirement. He does not think the exemption cited by Staff is valid. He is not arguing against development. He wants Council to think bigger. Not consider just three parcels, but what about all of Second Street between East Military up to McDonalds. We should not limit ourselves to spot zoning.
2. Council Member Smith asked Mr. Dean to respond to Staff's response to his letter with regards to zoning. Mr. Dean stated that the whole idea behind zoning is that you have standards that people adhere to. We are creating a special zone here, which might suit these applicants. What happens when the applicants move on? Are we overly restricting the next

occupants? Will we pay for this in the future because we don't allow ourselves enough flexibility for the next tenants?

3. Vice Mayor Patterson asked Mr. Dean how CEQA addresses the following: 1) some of the concerns he has discussed 2) the traffic issues, 3) urban design, and 4) the trees, which are designated to be removed, but can apparently be moved. She asked Mr. Dean, as a practitioner, how he would approach the above issues. Mr. Dean stated that advantage of an integrated CEQA process with our planning process is that you identify the issues up front. You identify them first, and that gives the Planning Commission, Design Review and Staff the things that need to be addressed. This could include parking, traffic, landscaping, access, safety issues, interface between the project and East Second Street, etc. There needs to be an interactive process between the applicant and the City that works to the advantage of both parties. Vice Mayor Patterson discussed the supplemental Staff report. She asked Mr. Dean how he would consider the suggestion of using the common sense approach and dismissing the need for CEQA with a General Plan amendment. Mr. Dean stated that if a project is obviously benign, there is no need for it to go through CEQA. But, in this particular case, the project does not fall under that category. The guidelines specifically say that General Plan amendments are not exempt. That is what he takes issue with.
4. Jim Ireland - Mr. Ireland stated that he has reviewed the project. He has been in commercial real estate for over 20 years. The project would be good for the City.
5. Helen Porter - Ms. Porter stated that she lives adjacent to the Lee's property. The project would be an asset to the City. It would look a lot better than it does at this time. She supports the project.
6. Jerry Porter - Mr. Porter stated that he lives adjacent to the proposed project, and he does not have a problem with it. He supports the project.
7. Jamie Smith - Mr. Smith stated that he thinks the project would be a great project for the City of Benicia.
8. William Pappas - Mr. Pappas stated that it seems like a good project. There will be a lot of trees around the property. The building looks like it will be pretty. He supports the project.
9. Peter Lee - Mr. Lee discussed how his parents came up with this project. The project comes with good intentions and good hearts. They just want to help the City. He stated that he is thankful for the City's support.
10. Belinda Smith - Ms. Smith stated that she is opposed to a General Plan amendment and rezoning. She is a professional Planner. She stated that it was mentioned in a Staff report that this is an evolving area from single-family residential to mixed-use. That would imply that there are foreseeable events in other development projects that we put in this area. That alone would warrant more review under CEQA. She stated that this is a discretionary project that the City is not obligated to approve. It is not a basis for making a decision on the General Plan amendment.

11. Jan Cox-Golovich - Ms. Cox-Golovich stated that Mr. Dean and Ms. Smith are on target when they say that the Second Street corridor needs a certain set of standards. She discussed the area near the affordable housing where there used to be a park. The Housing Authority promised to rebuild the park, but has yet to do so. Now they are talking about another parking lot. Nowhere in the Staff report do we talk about the impact of another parking lot on this corridor. She urged Council to either follow CEQA, or make the whole street part of some long-term study so that we have some restrictions about what kind of other projects can be there in the future. We are changing the street one-by-one, very slowly. Sometimes, this is the first area people see when they come into the City. This needs to be done right so we can be proud of it. Vice Mayor Patterson asked Ms. Cox-Golovich the following questions: 1) what her education was? She graduated from UC Davis with a degree in Political Science, 2) did she take some planning courses? Yes, 3) How long did she serve on the General Plan Oversight Committee? Three years, 4) how many years did she serve on the City Council? 3 years and 9 months, 5) did she have similar issues before her at that time with regards to General Plans and CEQA? Tons of them.

Vice Mayor Patterson stated that the issue is not the merits of the projects. She wanted to establish in the record that she has had two phone conversations with Mr. Delgado. He knows that she is looking for a proper planning process, she is not objecting to the concept of the project. She asked staff if this project was a non-conforming use. Ms. Gillarde stated that this project is a non-conforming use. A non-conforming use is a use that, under the existing zoning, is not one of the allowed uses. Vice Mayor Patterson asked if that was a violation. Ms. Gillarde stated that it would be a violation of what the existing zoning permits. Ms. Gillarde stated that the violation would be an 'illegal use'. Ms. Meunier stated that the process of legalizing the use is part of an enforcement action. Staff has been working with the Lees to bring them forward through the process. If the process does not result in approval of the project, Staff will have to take another look at it and possibly seek to have the dental lab abated, if the decision of the Council is that it is not an appropriate use for that location.

Mayor Messina asked for clarification on what uses are okay. Ms. Meunier stated that the site is currently zoned for single-family. Right now, there is a house that is rented, and a house that has been converted to a dental lab. The zone does not permit that use. This project began as a way to legalize the use.

Vice Mayor Patterson asked how long the illegal use has been going on. Ms. Meunier stated that this has been going on for approximately 3 years. Council Member Smith asked for a more clear date as to when the Lees opened the dental lab. Mr. Delgado confirmed that the Lees received the notice from the City on 11/2/2001, and they had started the business four months before that date.

Vice Mayor Patterson read an email she received from Mr. Bob Berman, a Benicia resident who also has an environmental consulting business in town. He is questioning the use of the Class 3 Categorical Exemption and its application to a General Plan amendment. (A copy of the letter is on file with the original Agenda packet.) Vice Mayor Patterson asked Staff to clarify the action is that is before the Council tonight. Ms. Meunier stated that the actions before the Council are a rezoning and General Plan amendment. The whole project is the rezoning and General Plan amendment together with a planned development approval by the Planning Commission and design review approval by the Design

Review Commission. Those actions together would permit this mixed-use building, the parking, and identify the adjacent house as one that could potentially be adaptively reused or fall in further planned development amendment; it could come forward with new development for that site. Vice Mayor Patterson stated that she called the Office of Planning and Research. She asked Ms. Meunier to describe the roll of the Office of Planning and Research in California. Ms Meunier stated that they serve as the clearinghouse for environmental review for the State. They also propagate CEQA guidelines and prepare the administrative regulations to implement the statutes for the Environmental Quality Act. She does not represent that as being their whole role. That is a very broad description. Vice Mayor Patterson stated that the Office of Planning and Research is responsible for developing the statutorily required CEQA guidelines as well as they are responsible for doing the CEQA guidelines and various revisions. That is why she called them, to get an understanding on the whole of the project. While Council has an approval function, we need to see the whole of the project. This project came to Council in bits and pieces. Council still does not have a complete package of the whole of the project. If Council were to approve this we would be taking action on the administrative record. Council's actions stipulate that we have seen the administrative record, when in fact we have not. She said she finds it difficult to take an action on the information that is in front of them, as the facts are not complete.

Vice Mayor Patterson asked for clarification on the percentage of area that is residential and commercial. Vice Mayor stated that she is interested in the corridor and not the parameter. It is the corridor people drive down and that is the significant entrance into the City. She asked Staff if they know how many parcels are fronting East Second, and what the current zoning is and the Land Use, and what could change with similar actions on the planned development and the General Plan amendment. Ms. Meunier stated that the area that we would look at extends from the freeway through to Military. On the west side there is a steep slope and then the public housing at the top. In the foreseeable future, she does not see Land Use changes in the area. There is a small area of houses that front on East Second that includes the three properties, the former O Street right-of-way, and two other homes that front onto East Second. It is really down to a small area that could potentially change. Staff looked at what was a logical break point. Vice Mayor Patterson stated that the Staff report suggests that the area is predominantly residential and that the change is minor, when in fact it is just the opposite. The corridor is not predominantly residential. There is a potential that the residential could change.

Vice Mayor Patterson asked Ms. Meunier about Staff's statement about 'significant traffic issues'. She stated that there is no actual discussion in the report as to what the significant traffic issues are. Ms. Meunier directed Vice Mayor Patterson to agenda page VII-A-49. She reviewed the information on that page. This is a heavily traveled street. Vice Mayor Patterson stated that as the reader, she does not get what is going on there. With a CEQA review, there would be a discussion, show the traffic maneuvers, etc. and then there would be a relationship discussion with the General Plan goals and policies and programs for traffic calming. This discussion would lead to suggested mitigation measures, with probably a mitigated negative declaration, that should include traffic calming and how they would be applied in the future for the Council's sense of the traffic calming measures. The applicant and owners would pay their share to provide that. There is nothing here that would indicate that. She wants to get at the specific problems with why not doing CEQA gets Council into this

confused state. While CEQA is a process and procedure, it does get at some specific things that Council is interested in. Vice Mayor Patterson stated that she had a question on page VII-A-3 on how the project contributes to the General Plan policy for traffic calming. She asked what the criteria are for establishing pedestrian friendly development with this project. Ms. Meunier stated that the commercial building is pulled to the property line with an intervening sidewalk, given the need to bring handicap accessible sloped sidewalk along the side of the building. The building has three strongly signaled entryways with peaked roof to maintain the orientation to the street. They are providing additional housing that is within walking distance to shopping and downtown. Vice Mayor Patterson clarified that the City does not currently have a criteria adopted for this. She then asked how the project contributes to developing traffic calming for East Second Street. Ms. Meunier stated that there needs to be a project done, which is why we collect traffic impact fees. The traffic-calming project will not be done in conjunction with the Lee project, as it needs to deal with the whole street. This project is not of a significant scale in terms of traffic volume in that area. It does not solve the problem nor does it significantly increase the issues in terms of the character of the street.

Vice Mayor Patterson stated that the thing that troubles her and the public that has testified is the cumulative impact. She had two problems with this project 1) that we don't have a CEQA document that talks about the potential cumulative impact, and 2) we don't have a vision through the planning process that would have evolved out of the CEQA discussion to help us have the vision for the corridor. She asked if Ms. Meunier was troubled that we don't have that. Ms. Meunier stated that we did go through the CEQA process. It did not reach the point of preparing an initial study leading to a mitigated negative declaration or an environmental impact report. Staff identified the project as a project subject to CEQA and then went through the tests for whether or not there was an appropriate categorical exemption. That is the decision that is before Council as part of the action tonight, to agree or disagree with. Ms. Meunier stated that she does not believe that the CEQA process is necessary in order to do good planning. If it is necessary in order to satisfy CEQA, it is a necessary tool. The City does a lot of good projects that are categorically exempt. Vice Mayor asked the City Attorney about the analysis of effects document on page VII-A- 7. It is kind of arranged like the CEQA checklist. Is this a comprehensive CEQA checklist? Ms. McLaughlin stated that this was not a comprehensive CEQA checklist. She stated that this checklist was put together as part of the supplemental Staff report. They were trying to give the option of going with the other CEQA exemption, the sort of common sense exemption which requires you to do a little more analysis than just saying yes or no. Vice Mayor Patterson asked if there is evidence of significance criteria that would help one reach the same conclusion that is reached in this document, which talks about no effect. Ms. McLaughlin stated that it was not in the supplemental Staff report. Vice Mayor Patterson asked if Ms. McLaughlin if she saw, in this document if there was any consistency with the General Plan. Ms. McLaughlin stated not that she could remember. There is some discussion about the relationship to the General Plan. Vice Mayor Patterson then read the written questions she submitted to Ms. McLaughlin, and Ms. McLaughlin's answers. See questions below in bold, followed by Ms. McLaughlin's answers:

What is the legal permissibility of describing the subject project as the "whole of the project" for Planning Commission action and then separating part of that project for Council consideration on legislative matters? In terms of the California Environmental Quality Act "CEQA," the environmental analysis must consider the whole of the project. For the approval of the project itself, the City's code

divides up approval responsibility. Each body approving a part of the project must make the appropriate environmental determination based upon the whole of the project. That is, a city body cannot make its environmental determination based solely on its part of the project approval.

What is the legal permissibility of providing a CEQA determination for the Design Review Board and Planning Commission and then finding another CEQA determination for the Council? I could not find any cases directly on point. Ideally, if this were a matter going to litigation it would be better to have each body using the same exemption. However, so long as each approving body makes a valid CEQA determination supported by the evidence, it should be legally okay.

What is the legal permissibility of using the "common sense" provision of CEQA when there is a "fair argument" by parties (elected official and citizens) challenging an exemption under Guidelines section 15061(b)(3)? The "common sense" provision of CEQA requires the City to support its decision to use it. The City has to show substantial evidence to support its contention there are no possibility of significant effects.

To what extent does *Davidon Homes v. City of San Jose* apply where it is held by the court that "If legitimate questions can be raised about whether the project might have a significant impact and there is any dispute about the possibility of such an impact, the agency cannot find with certainty that a project is exempt"? *Davidon Homes* distinguishes between the "common sense" exemption and the other categorical exemptions. As noted above the "common sense" exemption requires the City to show there is no possible significant effect. Other exemptions have, according to *Davidon*, the "implied" finding by the Resources Agency that there is no significant effect. Even with the implied finding, evidence can overcome the exemption. The discussion about cumulative impacts that you have suggested could overcome the exemption if the rest of the Council agrees with the facts.

Furthermore, to what extent does the *City of Santa Ana v. City of Garden Grove* apply in this case that "for an effect to be significant, the projected physical change need not be forthcoming immediately. Thus, the amendment of a general plan may produce significant effects "ultimately" if not directly"? This is the crux of the issue in this case! I understand one of your points to be that the proposed General Plan amendment may produce cumulative impacts.

In your considered legal opinion is there an adequate discussion of cumulative impacts in the documentation provided by the applicant or in the staff report? "It depends!" If no one were challenging the project, it is adequate. However, if we knew a lawsuit was coming, I would want a more detailed discussion of cumulative impacts.

Is it legally permissible to not discuss the potential of other properties being rezoned to PD with a general plan amendment? I do not understand this question. There have been a couple of other recent PD/General Plan amendments. They are the Leo Daniels project by Bob's Liquor and the East N Street project.

To what extent does the applicant's documentation represent a complete CEQA checklist? Project applicants have to fill out an abbreviated checklist of sorts. It is not a complete checklist as would be

used for an initial study. Staff does not take the applicant provided responses as authoritative. A copy of the applicant checklist is attached.

And finally, to what extent does *Architectural Heritage Assn. v. County of Monterey (2004)* Cal.App.4th apply in this instance, to wit: the fair argument made by an elected official and professional CEQA practitioners is substantial evidence? This case does apply in the current situation. This case discussed the situation where speakers on a project had a range of expertise that the Court found reliable enough to consider as part of the substantial evidence to support a finding that a building was a historic resource. The court stated, "that testimony constitutes substantial evidence, because it consists of "facts, reasonable assumptions predicated upon facts, and expert opinions supported by facts." You and some of our other professionals who reside in town would qualify under the standards set forth in this case. It is probably a good reminder that all folks with expertise should mention it when testifying on topic. It then may come down to a battle of the experts!

End of questions/answers

Vice Mayor Patterson asked Ms. McLaughlin if it is fair to say that there has been substantial evidence provided tonight to make a fair argument about why a CEQA would need to be done, which would be an initial study to determine whether or not a negative declaration or an Environmental Impact Report (EIR) is required.

Ms. McLaughlin stated that was a question that Council has to weigh out for themselves. However, she is satisfied that there is a fair argument. Council Member Whitney asked Ms. McLaughlin what her thoughts were on the letter (on file) from Mr. Berman. Ms. McLaughlin stated the question has to do with the exemption that deals with small structures. Mr. Berman's contention is that because of the square footage, the exemption does not comply. This project is in an urbanized area, so they took the larger square footages into consideration. Mr. Berman's second issue is with regards to the General Plan amendment. Ms. McLaughlin reviewed the rules for exemption. She stated that there might be exceptions to the exemptions. There may be different circumstances that make the exemption not applicable. Some of those may be the cumulative impacts and unusual circumstances for this project. Council Member Whitney asked to hear from the Lee's attorney. Mr. Alan Moore, Land Use Attorney for the Lee's, gave a brief overview on where they stand. He stated that the opinion that he issued was made part of the Agenda packet. He stated that the entire Administrative record for the project, back to 2001, needs to be recognized. All of the reports state that there are no significant effects from this project. He reiterated that if Council decides, based on the entire administrative record, that there are significant effects, they (the Lee's) will do further environmental review. He stated for the record that he is not here to file a lawsuit. He would like to hear what the significant effects are, because that is what CEQA requires. The project can be exempt if there are no significant effects. However, if the City finds significant effects, they will not challenge them. They will do the extra environmental review cheerfully, and hopefully in a timely manner. The Lee family has done everything that was asked of them. He is confident that if further review is done, it will say the same things that have already been said.

Council Member Smith asked Vice Mayor Patterson if she could explain the pedestrian-friendly

criteria. Vice Mayor Patterson stated that criteria was 'professional.' She stated that there is a lot of literature on what it is. The pedestrian needs to feel comfortable walking on streets. One of the first criteria is to try and get them away from the traffic with separators such as trees and landscaping. The second thing is that there aren't big open spaces that include vegetation or long expanse of a parking lot. Pedestrians need to have a sense that there are buildings near by and that it is interesting. It is important that you approach it from the urban design point of view. You can also approach it from what is now called new urbanism and designs. There is a lot of information on several websites, as well as written literature.

Mayor Messina asked Mr. Delgado to review how the project came about. Mayor Messina confirmed that in terms of massing and development, the project has not exceeded the limits. Mayor Messina asked Staff if there were any commercial uses allowed in single-family residences. Ms. Meunier stated that the following uses were allowed: conference and meeting facilities, religious assemblies, public or private school, bed and breakfast, and personal property sales (garage sale, etc.). Mayor Messina asked Mr. Delgado for the proposed timeline for doing the project. Mr. Delgado stated that they would like to proceed so they can begin in early 2005. Mayor Messina stated that in terms of the process, it seems like we have not followed a good process. He is troubled by the 'spot zoning.' It is not consistent with where we want to go with the General Plan. On the other hand, we have an applicant that has invested time and money has followed all directions from Staff; they have done what we have told them, etc. When he looks at the area, it is hard to say we have a vision, or have any uniformity. We are not doing it in the thoughtful manner that we should. In terms of looking at the project, he agrees with the comments of the Vice Mayor with regards to being pedestrian friendly. What he has the hardest time with is that we have given the Lee's and Mr. Delgado some direction and told them to follow the path. And in the end, we are making them the meat in the sandwich because it does not accomplish what we believe we should be doing as a Council. He has angst making the Lee's personally responsible and paying for it. He has a lot of angst with the process. His inclination at this point is to request some adjustments, but probably allow them to proceed, as he does not see any significant impacts. He is not sure how to deal with our internal planning process. He is not happy with the steps we have followed and the advice we gave.

Council Member Smith does not like being put in this position. CEQA is a tool that we should be using such that we have a complete record in front of us and we don't have to make judgment calls or it is much easier to make judgment calls on potentially adverse effects. Staff continues to err on the side of liberal exemptions to CEQA. He would prefer Staff err on the side of caution and use CEQA and give us more information to make these decisions. Two examples he thought of is that it is not apparent that a General Plan amendment requires CEQA but logically it makes it a more significant project when you are doing a General Plan amendment. He does not want to see another General Plan amendment that has not had an initial study. East Second Street is not identified as a gateway. But it is a more important thoroughfare than many. He shares the Mayor's concerns that the applicant has followed all Staff's directions. Put in a situation where he has to judge, without an initial study whether there are any potentially adverse affects, he is forced to conclude there are not. He believes the project is improving the gateway of East Second Street. We are replacing a dilapidated residence with a new one. We are mirroring the mixed-use pattern we are applying on First Street where we have commercial on the bottom and residential on the top. We are adding a residential unit as infill,

which is pedestrian-friendly, as called for by our General Plan. The neighbors support the project. The applicant has indicated they are willing to keep the trees and add more landscaping. He has put more time into this project than any other project since the Valero Improvement Project. He moved that we approve the project with three additional conditions: 1) rather than remove the two sycamore trees, they are moved elsewhere on site, 2) that the applicant give up the parking space closest to East Second and replace it with landscaping that would further shield it from pedestrians and motorists going by on East Second, and 3) that we put a moratorium on any future development on this section of East Second Street until we adopt some kind of specific plan or overlay district that addresses this area's status as a gateway.

Council Member Whitney said he would second this so we could have further discussion. It seems like there is a desire not to penalize the applicant and yet look to the future to create a cooperative effort. He thinks we are headed in a working direction. Between the Mayor and Council Member Smith we have some clarity and the Staff is getting direction on what we are looking for.

Vice Mayor Patterson stated that she wants to step back from the details of the project and focus on the fact that we have a General Plan. There was a lot of work put into the plan. We are missing an opportunity. We have an applicant that has essentially said they are willing to do a CEQA; we should take them up on it. In fact, most of what the testimony has been is that most of the areas probably don't rise to a level of significance that would trigger an environmental impact report. The particular areas of concern are really in consistency with the General Plan and the cumulative impacts, which are indeed significant. They can be addressed with mitigation measures. The mitigation measures will include things such as what would be the pedestrian friendly aspects, what would be the traffic calming program, what would it look like, how do we maintain the small town character as you come into the city? All of those would be addressed as mitigation policy measures in CEQA. And finally, the urban design guidelines; you would get the policies within that document. So, any other project would have a very clear picture of what is expected. The applicant saying that they were not going away and they are not going to litigate impressed her. When they are making an offer like that, we can get it right. This is her eleventh year of listening to 'well, we have made some mistakes, but we don't want to delay this applicant on this project, so we're going to go forward' and here we go again. She hopes that Council reconsiders the offer of the applicant. This (CEQA) will not take a long time to do. This is a particularly fine law firm with a lot of expertise. This can be done, and done correctly. It would send a message to the community that we are not going to continue doing what we have been doing. We are going to have a better planning process and have a vision of the General Plan. It will open up like a flower.

Mr. Erickson stated that Staff has done their best to process this application. All their work was done in good faith. They have followed the rules, applying their education, expertise, and past practice and knowledge that probably matches anyone in this room. They are not neophytes. They are doing their best. With the help of Council's articulated vision Council is giving tonight, perhaps we can use that to better process future applications.

Council Member Smith stated that this has to be the third or fourth project up here that he has asked Staff to err on the side of caution and they just don't do it.

Mayor Messina stated that in terms of pedestrian friendliness, this is our chance to make a statement in terms of what we want. He would rather we spend a little time coming up with a proposal that is pedestrian friendly, something that will set the standard. He proposed that those adjustments be made and it go back to the Traffic, Pedestrian and Bicycle Safety Committee and let them have a look at it. In terms of the moratorium, that concept bothers him. He would like to see an initial study before any General Plan amendments come back to Council. He would rather see it phrased that way rather than use the term 'moratorium.' In terms of where we want to go, we need a vision. We need to do better than what we are doing now.

Vice Mayor Patterson stated that this could be solved faster than what a moratorium could do by using CEQA as a planning tool. We would have the tools we need to have for future planning. This could be done within three to four months if we start tonight with the offer of the applicant. She has been in this business for a long time and has never had an applicant offer to do it right, never.

Mayor Messina stated that it is not fair to ask the applicant to pay for or address the City's problems. Vice Mayor Patterson stated that was the whole point of the General Plan. The problem with the amendment is that you are doing a Land Use change. We owe it to the community to do this. It troubles her a great deal that the applicant has gone through this and reaches this point at the eleventh hour. She cares about that a lot. She finds the comments from the City Manager very unhelpful. What she considers the effect of a flawed planning process is on the applicant. We need to make sure they get a fair deal. A fair deal is professional planning. She quoted Mr. Dean by saying 'a better planning process generally leads to a better, more successful development.' That is our goal for Benicia.

Council Member Smith stated that he would retract the moratorium condition of his motion. He asked Staff if there were any other pending projects in this area. Ms. Meunier confirmed that there were no pending projects in the area. Ms. McLaughlin stated that if Council adds the remaining two conditions, the project might have to go back to Design Review since they have already approved the site plan. The conditions may impact the layout. Council Member Smith stated that he would not take the two conditions back.

Vice Mayor Patterson suggested making a condition that there shall be traffic-calming measures that will be reviewed and approved by the Traffic, Pedestrian and Bicycle Safety Committee and their recommendation come back to Council. Council Member Smith stated that he would be comfortable with that since the project will have to go back to DRC anyway.

Ms. Meunier stated that this is an issue that she and the City Attorney have discussed. The site plan includes landscaping so the relocation of the sycamore trees would not be a significant change. The project includes more parking than the required amount. She believes she could make a finding that the project, as the Council has modified it, is substantially consistent with the action because it still meets the parking requirements. She believes it is within Staff's authority to make a finding of substantial consistency. Ms. McLaughlin concurred that the landscaping changes are not significant enough to send it back to DRC. Council Member Smith stated he would be happy to add the third

condition to send it to the Traffic, Pedestrian and Bicycle Safety Committee. Council Member Whitney stated that he would amend his second to include the three conditions.

Vice Mayor Patterson stated that she was voting no because we cannot make the decision under the CEQA element.

Council Member Smith confirmed that he was going with the 'common sense', not the section 15303.

RESOLUTION 04-170 - A RESOLUTION APPROVING AN AMENDMENT OT THE GENERAL PLAN LAND USE DIAGRAM FROM LOW DENSITY RESIDENTIAL TO BUSINESS AND PROFESSIONAL OFFICE ON THREE PARCELS LOCATED AT 1422, 1430 AND 1440 EAST SECOND STREET (APN'S 88-083-030, 88-083-040, 88-083-050) (PLN 04-79)

On motion of Council Member Smith, seconded by Council Member Whitney, the Above Resolution was adopted as amended on roll call by the following vote:

Ayes: Council Members Smith, Whitney, and Mayor Messina

Noes: Vice Mayor Patterson

Abstain: Council Member Campbell

INTRODUCTION AND FIRST READING OF AN ORDINANCE AMENDING CHAPTER 17.04 (TITLE, COMPONENTS, AND PURPOSES), SECTION 17.04.020B (COMPONENTS) OF THE BENICIA MUNICIPAL CODE TO REZONE THREE PARCELS LOCATED AT 1422, 1430 AND 1440 EAST SECOND STREET (APN'S 88-083-030, 88-083-040, 88-083-050) FROM SINGLE FAMILY RESIDENTIAL TO PLANNED DEVELOPMENT

On motion of Council Member Smith, seconded by Council Member Whitney, the above Introduction and First Reading of an Ordinance was approved on roll call by the following vote:

Ayes: Council Members Smith, Whitney, and Mayor Messina

Noes: Vice Mayor Patterson

Abstain: Council Member Campbell

Vice Mayor Patterson stated that she was voting no because it is inconsistent with law.

Mayor Messina called for a 5-minute break at 10:05 p.m.

The meeting resumed at 10:19 p.m.

UNFINISHED BUSINESS:

None

NEW BUSINESS:

Mayor Messina excused himself from this portion of the meeting due to a conflict of interest. Vice Mayor Patterson chaired this portion of the meeting.

Development potential of the City-owned property at East Second and East E Streets:

Karen Majors, Assistant City Manager, reviewed the Staff report on this item.

Council Member Smith asked if Staff had explored the existence and possible restoration of the creek that is on that site. Ms. Majors stated that they have found that the creek is really a drainage ditch that was enhanced by some leaky sprinklers. This caused some flora to grow in the area. This is not a high quality wetland area. It may be more cost effective to build over it and mitigate that with some enhancements of our waterfront. That is the difference between a freshwater and saltwater habitat. They would need to consult with regulatory agencies and have conversation with them. Staff did not want to move forward with that until they discussed it with Council.

Public Comment:

1. Sandra Shannonhouse - Ms. Shannonhouse stated that the property was in fact a wetland area. Her daughter rode a boat in the area in the 1980's. Before it was a drainage ditch, it was a wetland. After the City declined to do the proper environmental study, she sued the City. The lot was subsequently filled and became a gravel lot. She hopes we do this project right. The City deserves something down there that is first class. We have to look at this carefully. It is in the middle of Historic Benicia. We should consider if there are other things that can be there besides residences, such as a performing arts center. She is concerned about whatever development goes there that it will affect the historic houses on East E Street. She read a portion of testimony from John Merritt, Director of California Preservation Foundation, regarding her lawsuit in Solano County Superior Court. She is concerned about how any proposal will affect the whole historic area, especially the residences. We have to have some kind of a real segue between the Marina and First Street. Some kind of a walking path using landscaping to soften the area. It is a neglected street. Lets take our time and do this right. We need to get a really first class architect to do a first class project.

Vice Mayor Patterson asked for clarification from Staff on the first idea regarding development steps. Ms. Majors stated that between Staff, they could outline some steps that this project would need to go through. We need to determine what role the City will take in this process. We need to figure out how we are going to involve the community to make sure that it is a project we can all be proud of. Early on, we should have community conversations on what the project should look and feel like would be a beneficial process. Vice Mayor Patterson stated that it sounds like the charette approach would be best.

Council Member Campbell stated that first we need to figure out what we want the project to be.

Council Member Whitney stated that this is the last piece of developable real estate in that area. We need to get the community's input and start the dialogue.

Council Member Smith stated that we have more need for a community center or performing arts center than parking in that area. However, we need to wait until we get a clear signal from the BUSD on their decision on closing a site or leasing us a site. The 7-11 Committee is supposed to make a recommendation next month.

Vice Mayor Patterson stated that we would not have to defer it. We can begin the process. Council

gave Staff direction to pursue the charrette. We would be looking at one firm that we have worked with and possibly two others to obtain quotes from. Council will consider this item some time in December or the first of the year.

REPORTS FROM CITY MANAGER:

None

REPORTS FROM CITY COUNCIL COMMITTEES:

None

ADJOURNMENT:

Vice Mayor Patterson adjourned the meeting at 10:38 p.m.

Lisa Wolfe, City Clerk