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The City Council of the City of Palo Alto met on this date in the Council Chambers at 7:05 p.m.

PRESENT: Beecham, Burch, Cordell, Freeman, Kishimoto, Kleinberg, Morton, Mossar, Ojakian

City Attorney Gary Baum indicated Oral Communications was inadvertently left off the agenda under Government Code section 54954.3, which was a required portion of the meeting. He recommended the Council pass a motion to add Oral Communications to the agenda.

**MOTION:** Council Member Beecham moved, seconded by Kleinberg, to add Oral Communications to the agenda as an emergency item, since it was inadvertently omitted from the agenda.

**MOTION PASSED** 9-0.

SPECIAL ORDERS OF THE DAY

1. Vote and Appointment of Candidates to the Human Relations Commission

FIRST ROUND OF VOTING FOR THE HUMAN RELATIONS COMMISSION

VOTING FOR ANDREW FREEDMAN:

VOTING FOR THEODORE GLASSER: Morton

VOTING FOR MARK HEYER: Burch, Morton, Ojakian

VOTING FOR JOHN KLINESTIVER: Beecham, Kishimoto, Mossar

VOTING FOR COREY LEVENS:

VOTING FOR WINIFRED LEW: Cordell, Freeman, Kishimoto, Kleinberg, Ojakian

VOTING FOR ANN OZER:

VOTING FOR DARYL SAVAGE: Beecham, Burch, Cordell, Freeman, Kleinberg, Mossar

VOTING FOR BRIAN WAX:

City Clerk Donna Rogers announced that Daryl Savage was appointed to the term ending March 31, 2008, with six votes on the first ballot and Winifred Lew

was appointed to the term ending March 31, 2007, with five votes on the first ballot.

2. Vote and Appointment of Candidates to the Planning and Transportation Commission

FIRST ROUND OF VOTING FOR THE PLANNING AND TRANSPORTATION COMMISSION

VOTING FOR DANNY DYKWEL:

VOTING FOR DANIEL GARBER: Beecham, Burch, Cordell, Freeman  
Kishimoto, Kleinberg, Morton,  
Mossar, Ojakian

VOTING FOR COREY LEVENS:

VOTING FOR BONNIE PACKER: Burch, Morton, Ojakian,

VOTING FOR PAULA SANDAS: Beecham, Cordell, Freeman,  
Kishimoto, Kleinberg, Mossar

City Clerk Donna Rogers announced that Daniel Garber was appointed with nine votes and Paula Sandas was appointed with six votes to the term ending July 31, 2009.

Vice Mayor Kleinberg expressed appreciation to Bonnie Packer for her contributions, thoughtfulness, and time in serving on the Planning and Transportation Commission.

ORAL COMMUNICATIONS

Eve Agiewich, 3427 Janice Way, spoke regarding homelessness.

Bob Gaebler, 1525 Montalto Drive, Mountain View, spoke regarding Notice of Fraud and conflict – Brown Unruh Act violation BP Code violation 17200 – 17208.

Roger Smith, 270 Tennyson Avenue, spoke regarding parks in Palo Alto.

Faith Bell, Bell’s Book Store, spoke regarding the store’s 70th Anniversary.

Norman Carroll, 425 High Street, #120, spoke regarding the need for blood donations.

Herb Borock, P.O. Box 632, spoke regarding the Brown Act.

Trina Lovercheck, 1070 McGregor Way, spoke regarding an irresponsible *Daily News* article blaming the homeless for affecting local businesses.

### CONSENT CALENDAR

Council Member Morton moved, seconded by Cordell, to remove Item No. 3 from the Consent Calendar to become Item No. 6A.

Council Member Kishimoto stated she would not be able to participate in Item No. 5 due to a potential conflict of interest because she lived on Embarcadero Road.

**MOTION:** Council Member Mossar moved, seconded by Kleinberg, to approve Item Nos. 4-6 on the Consent Calendar.

### LEGISLATIVE

4. Resolution 8548 entitled "Resolution of the Council of the City of Palo Alto Approving the Execution of Supplement No. 4 to the Northern California Power Agency Joint Powers Agreement Wherein Such Supplement No. 4 Provides for the San Francisco Bay Area Rapid Transit District to Become a Signatory Party to the Northern California Joint Powers Agency Joint Powers Agreement and Authorizing the City Manager to Execute Supplement No. 4 to the Northern California Power Agency Joint Powers Agreement"



5. Resolution 8549 entitled "Resolution of the Council of the City of Palo Alto Authorizing the Filing of an Application for Federal Surface Transportation Program Funding for Street Rehabilitation Project for Embarcadero Road"

### ADMINISTRATIVE

6. Agreement for Base Map Cooperative Use Between the County of Santa Clara and the City of Palo Alto

**MOTION PASSED** 9-0 for Item Nos. 4 and 6.

**MOTION PASSED** 8-0 for Item No. 5, Kishimoto not participating.

6A. (Item No. 3) Ordinance Amending Section 12.16.020 of Chapter 12.16 of Title 12 of the Palo Alto Municipal Code by Establishing Underground Utility District No. 41 (*1<sup>st</sup> Reading 7/11/05, Passed 8-0, Freeman absent*)

Jack Barrie, 657 Bryson Avenue, said approximately 65.5 percent of the land owners on Bryson Avenue were against the underground electrical project.

Christopher Glazek, 656 Bryson Avenue, said the underground utility project would hurt him financially because he had been unemployed due to a permanent disability.

Richard Chou, 578 Bryson Avenue, said the out-of-pocket cost estimates made by the City for each homeowner of District 41 ranged from \$4,000 to more than \$10,000, which would incur a fiscal burden for the individual homeowner and was excessive for the project.

Mary Howland, 547 Bryson Avenue, urged the Council to postpone or vote against the formation of District 41. She also suggested having the lines come in from the back.

Michael Arne, 538 Bryson Avenue, said the process taken for putting out the questionnaires was inadequate, especially when compared to what other cities with utilities in the State of California had as their criteria. Pacific Gas and Electric (PG&E) and the City of Manhattan Beach both required 60 percent positive signing on a petition before they would form such a district.

Sung Sook Lee, wife of Chul Choo Lee, 567 Bryson Avenue, concurred with the comments of the previous speakers.

Troy G. Parker, 600 Bryson Avenue, said he felt the City of Palo Alto Utilities (PAU) had misrepresented the dollar amount compared to the estimate indicated in the survey.

Jay Jeffries, 2569 Webster Street, said he could not make an informed decision based on what little information he had received.

Cindy Hsiang Hsu, 557 Bryson Avenue, said the underground utility project would pose an undue financial hardship.

William Birdsey, 2563 Webster Street, said he did not have an idea what was going to happen from a technical or supply issue, and wondered whether the project required reworking the rest of the electricity in his home to bring it up to code.

Mary Emard, 548 Bryson Avenue, concurred with the comments of her neighbors. As a single parent, she too found it financially difficult to finance the bill.

Herb Borock, P.O. Box 632, said in past years most of the undergrounding was paid by the general utility customer because of other undergrounding associated with the district and the streets, with a small proportion paid by the individual customers. One way to mitigate the project was to charge the customers the amount indicated in the first Capital Improvement Project (CIP).

Robert Stock, 521 Colorado Avenue, expressed support for the underground utility project.

Robert Smith, 2291 Greer Road, reminded everyone the Underground Utility District (UUD) was a longstanding effort of the City. Whatever the Council did that evening would be precedent setting. If reasonable changes were needed they should be responded to.

Council Member Morton said he understood the residents received notice and what appeared to be a ballot, which informed the neighbors of undergrounding in their district. He asked if the residents could vote to opt out of being a member of that district.

Electrical Engineering Manager Tomm Marshall said the vote was an advisory to Council, and it was up to them whether or not to proceed with the underground district. Staff's role was to propose a district, hold a public meeting, send out a mailer that explained what was going on in the district, and present an advisory vote to the Council.

Council Member Morton asked whether the Council had ever voted not to proceed with a UUD.

Mr. Marshall said no.

Council Member Morton asked how the costs were established.

Mr. Marshall said staff went to each home and prepared an estimate based on what they found.

Council Member Morton clarified it was an onsite estimate with staff's best guess as to what a contractor would bid for the jobs.

Mr. Marshall said that was correct.

Council Member Morton said the City made available a ten-year loan to homeowners who chose to take advantage of it, which was then added to the property tax bill. He believed Santa Clara County allowed seniors to defer their property taxes until their house was sold. He asked whether a similar sort of thing took place in cases of hardship.

Mr. Marshall said yes. There was a State program in place whereby homeowners could defer their property taxes.

Council Member Morton asked whether the UUD would qualify for a deferral.

Mr. Marshall said the deferral was based on income and any senior could apply for a property tax deferral based on income.

Council Member Morton said as he listened to the speakers there was some question as to the use of the easement and how and where the connections were made. He asked staff for further explanation about that.

Mr. Marshall said staff determined the issue of a rear easement was not something they would suggest because of safety issues, especially with the use of a conduit and not being able to encase it. It would also pose difficulty in gaining access to the transformers and other equipment if put in the rear of the house.

Council Member Morton asked what the expected reconnection costs would be after the new undergrounding was completed.

Mr. Marshall said the estimates given included reconnection costs.

Council Member Morton clarified some of the estimates were higher because staff had already built in what the homeowner would have to pay in addition to the trenching.

Mr. Marshall said that was correct.

Council Member Morton asked how large the turnout was for the public meeting.

Mr. Marshall said approximately 12 people attended.

Council Member Morton asked whether many of the neighbors' issues were addressed.

Mr. Marshall said staff conducted a presentation and answered a number of questions at the public meeting.

Vice Mayor Kleinberg said when the Council took up the issue previously, she asked whether it was within the Council's authority to decide not to do an underground district. She asked for further clarification on the issue.

City Attorney Gary Baum said the Council could vote to reject staff's recommendation to impose the UUD or vote to change the boundaries of the district. Neither would be consistent with past policy, but the Council had the authority to make policy and direct staff how to proceed.

Vice Mayor Kleinberg said she had previously understood the Council was bound to vote for the district and did not have the authority to override a UUD. Hypothetically, if the City had undergrounded 99 out of 100 districts, would the Council have the authority not to underground the last district.



City Manager Frank Benest said the Council had the authority to change City policy, although it was against the existing policy.

Vice Mayor Kleinberg said Council's authority that evening was to change the policy in order to postpone or reject staff's recommendation to underground in the proposed district. She asked whether the Council had to have an affirmative vote about a policy change or could they just defer the undergrounding.

Mr. Baum said the Council could direct staff not to underground, defer underground, look at other financing mechanisms, or return the next year. It did not require a policy decision.

Vice Mayor Kleinberg asked would that work for the agenda if the Council voted to defer the UUD until the policy could be reviewed again.

Assistant City Manager Emily Harrison reminded the Council that if they chose to defer the proposed UUD they should do so for all upcoming UUDs.

**MOTION:** Vice Mayor Kleinberg moved, seconded by Cordell, to defer all new proposed Underground Utility Districts (UUD), including this district, until the policy matter is taken to the Policy and Services (P&S) Committee for review of the undergrounding policy and finance methods and brought back to the Council.

Council Member Cordell said her understanding about the process was approximately 40 years prior when the Council voted to underground, and each time a district was considered, the Council would decide whether to go forward. A survey was conducted to get an advisory opinion from the residents in the district. Unless the advisory opinion process was simply *pro forma* it was significant, influential, and could be determinative of what the Council did district by district. The exorbitant expenses today were not in existence 20, 30 or 40 years prior.

Council Member Kishimoto expressed support for the motion and would like to see the process fine-tuned in terms of communicating the potential costs to residents.

Council Member Freeman asked how the cost per household could change so drastically over time if the UUD was a citywide project that went from district to district.

Mr. Marshall said the costs were particularly high in District 38 because of a lack of competition between contractors to provide services. There were only two contractors willing to do it in that District, which drove up the costs.

Council Member Freeman said the UUD was a utility function and believed the reserves were designed to even out the costs of utilities. She asked whether there was any way the City could even out the costs to homeowners.

Ms. Harrison said staff anticipated looking at a number of financing issues. The City Attorney indicated in other jurisdictions where Pacific Gas and Electric (PG&E) did undergrounding, they added it to the rate base so the customers paid it over time.

Council Member Freeman suggested a varying rate scale for retired persons, and those on fixed or low incomes. Her concern was the UUD projects had been going on for the past 40 years, there were a number of streets that were not undergrounded; although other streets were being re-undergrounded. She would like to see a time certain in approximately three months when staff would come back to Council with additional information.

Ms. Harrison said staff would move with all rapidity on the issue. She reminded Council the Electric Engineering and Operations Division of Utilities was presently in challenge mode.

Council Member Mossar said at a prior hearing on the issue, she understood the City's present infrastructure was in need of repair, maintenance, and upgrade, and staff was reluctant to spend money to do the upgrading then turn around and spend additional monies undergrounding utilities. She asked whether her assessment was correct.

Mr. Marshall said that was correct. Staff had deferred maintenance in the proposed district.

Council Member Mossar asked whether the area could potentially experience power outages if the undergrounding was deferred or not done at all.

Mr. Marshall said that was possible.

Council Member Mossar asked whether the decision to defer the UUD for the proposed district would create a problem for staff in terms of maintenance.

Mr. Marshall said it would depend upon the delay. Staff planned to begin construction in the next fiscal year, which would allow time to bring additional information to the Council and still keep that schedule.

Council Member Mossar expressed support for the motion. She reminded her colleagues of the responsibility to maintain the system, which was not simply a beautification issue.

Council Member Ojakian asked for further clarification of the City's infrastructure problems.

Mr. Marshall said the utility poles were deteriorating due to age and rot.

Council Member Ojakian asked what the difference was to the average homeowner between replacing the poles and doing the undergrounding of the wires.

Mr. Marshall said there was no charge to the homeowner to replace the utility poles.

Council Member Ojakian asked what the difference in cost was to the City between replacing the poles and doing the undergrounding of the wires.

Mr. Marshall said it was less expensive to replace the poles. It would cost the City approximately \$10,000 to \$15,000 for the work the Utility Department did in the street for each home. A pole serving four or five homes costs approximately \$5,000 per pole.

Council Member Ojakian asked what year undergrounding began.

Mr. Marshall said it began in 1965.

Council Member Ojakian asked what the timeframe was to underground the entire City.

Mr. Marshall said there were various timeframes. There was a movement in the early 80's to accelerate to undergrounding, which went through a series of Council meetings before going back to the original schedule of 60 to 70 years for completion.

Council Member Ojakian said the original intent was to have a program that would take a period of time because of the varying aspects.

Mr. Marshall said the City had to cooperate with SBC Communications who had a limit on how much they could spend on undergrounding as set by the California Public Utilities Commission (CPUC).

Council Member Ojakian said PG&E had a similar program, which was discontinued.

Mr. Marshall said he believed the program was still in effect.

Council Member Ojakian said he did not believe PG&E was doing the program at the same speed with which they had done so in the past.

Mr. Marshall said he could not really speak to the issue, but believed they were still moving forward.

Council Member Ojakian expressed opposition to the motion. He believed City policy was the way to go and wanted to see the UUD program continue. He preferred a motion to defer undergrounding in the proposed district to give the P&S and/or Finance Committees an opportunity to look at an array of financing mechanisms.

Council Member Beecham said one key problem with the UUD was the failure to communicate. He would support deferring the matter and sending it to the P&S Committee to look at all financing mechanisms.

Mayor Burch said the City decided a number of years prior the desirability of undergrounding the entire City for aesthetic as well as safety reasons, and for better control by the Utilities Department and the CPUC. The question that came up most was the cost to connect. He had asked the City Attorney about the possibility of offering a variety of financing measures, and expressed support for a motion to that affect.

Council Member Morton said he would prefer his colleagues forego the process of sending the item to the P&S Committee, but instead decide whether or not to change policy. He asked whether the City would honor the request of everyone on Bryson Avenue to take out a loan.

Mr. Marshall said the City would honor such a request.

Council Member Morton said since the district had already been set up, staff would need to reopen a portion of the hearing to allow those who previously did not opt to take out a loan the ability to do so.

Mr. Marshall said that was correct.

Council Member Morton expressed support for the motion.

Vice Mayor Kleinberg said the original motion was not to recommend the P&S Committee consider a revocation of City policy. Rather, it was a motion to ask the P&S Committee to defer the proposed district until they could look at the policy with respect to financing mechanisms. Council Member Cordell had pointed out some issues of equitability, while others mentioned it was a matter of communication.

**SUBSTITUTE MOTION:** Mayor Burch moved, seconded by Morton, to have this issue return to the Council in late September, early October, with suggestions on financing mechanisms.

Council Member Freeman clarified the original motion included all UUD's going forward, while the substitute motion deferred just the proposed district. She asked Mayor Burch which one he meant.

Vice Mayor Kleinberg said there was another district in the pipeline and staff had asked the Council to include all others as well.

Council Member Freeman asked for clarification of the substitute motion.

Mayor Burch said the substitute motion was to have the matter return to the Council in late September, early October with financing options.

Council Member Freeman asked how many districts were in the pipeline between now and the end of September.

Ms. Harrison said there was one district already approved and set to be awarded a contract.

Council Member Freeman expressed support for the substitute motion. She said the reason some items went to committees was to vet ideas and allow people to speak about them.

Council Member Kishimoto expressed opposition to the substitute motion.

**SUBSTITUTE MOTION PASSED:** 5-4, Cordell, Kishimoto, Kleinberg, Mossar no.

#### AGENDA CHANGES, ADDITIONS, AND DELETIONS

**MOTION:** Vice Mayor Kleinberg moved, seconded by Ojakian, to continue Item No. 7 to September 19, 2005 and Item No. 9 to August 1, 2005.

**MOTION PASSED:** 8-0, Morton absent.

Council Member Freeman asked why Item No. 7 was not being heard that evening and whether there was a time restriction.

**MOTION:** Vice Mayor Kleinberg moved, seconded by Burch, to hear Item No. 11 concurrently with Item No. 10.

Council Member Morton stated he would not participate in Item Nos. 10 and 11 due to ownership of SBC and Comcast stock.

Council Member Mossar stated she would not participate in the Item Nos. 10 and 11 due to ownership of telecommunications stock in her mother-in-law's Trust Fund.

Council Member Ojakian stated he would not participate in Item Nos. 10 and 11 because of his wife's ownership in Comcast, SBC, Verizon and AT&T stock, as well as other ancillary telecommunications operations.

Ms. Harrison said Council's direction to staff was to return within a year with a report. She also noted the equipment for the trial was not intended to last into perpetuity. A decision was needed but it did not have to be that evening.

**MOTION PASSED** 6-0, Morton, Mossar, Ojakian not participating.

### UNFINISHED BUSINESS

7. Public Hearing: Notice of Intent to Award License to Place Telecommunications Equipment on Property Located on the South Side of Colorado Avenue Near the Intersection of Colorado Avenue and Simkins Court; Update on ZOU re Telecommunications *(Staff requests item to be continued to 09/19/05)*

**Item continued to September 19, 2005.**

### PUBLIC HEARINGS

8. Public Hearing: Consideration of a Request for Site and Design Review of a New 77,956 Square Foot Office Building, Including 4,023 Square Feet of Exempt Floor Area, with at Grade Parking and Related Site Improvements Located on a 5.66-acre Site Located at 2300 East Bayshore Road and 2450 Watson Court. Applicant: Hoover Associates Along with Jim Baer of Premier Properties on Behalf of Richard Peery. Zone District: LM(D)(3). Environmental Assessment: An Initial Study Has Been Completed and a Mitigated Negative Declaration is Proposed

City Attorney Gary Baum said he had been working on the litigation against the City concerning a prior application for 2300 East Bayshore Road, and would turn the matter over to Senior Deputy City Attorney Donald Larkin.

Director of Planning and Community Environment Steve Emslie said the project before the Council had two antecedent projects. The first being the zone change that was accomplished several years prior and approved by the Council to change the Planned Community (PC) zone for the former Scott's Restaurant site to Light Manufacturing (LM)(D)(3) with a D-Overlay, and the vacant industrial buildings adjacent to the Scott's Restaurant that were owned by the Peery-Arrillaga Group. The applicants had subsequently submitted a site and design application for an office project in compliance with the zoning, which was reviewed and approved with conditions by the Planning and Transportation Commission (P&TC), reviewed and denied by the Architectural Review Board (ARB), and ultimately denied by the Council. He clarified the reference "to deny without prejudice" as indicated in the staff report (CMR:337:05) should be stricken. The revised project was in compliance with the existing zoning. The LM(D)(3) was the least intense zone, required the least amount of site coverage and was in compliance with the Baylands Master Plan (BMP), which recognized the existing developed area might continue to

remain commercial and job producing.

Senior Deputy City Attorney Donald Larkin said questions came up with regard to the denial with prejudice on the submittal of a substantially similar application. Section 18.77.020 (d) of the zoning ordinance stated, "If an application is denied, the director or city council may specify that a substantially similar application may not be accepted within twelve months prior to the date of such denial". The ordinance applied to certain applications but not to site and design review. The denial with prejudice in regard to site and design review was made to provide additional guidance to the applicant but was not binding on the City.

City Planner Chris Riordan said the project involved a new two-story office building with at-grade parking located on a 5.6-acre site at 2300 East Bayshore Road and 2450 Watson Court. The approximately 42,000 square feet of existing office buildings would be removed. The allowable .3 Floor Area Ratio (FAR) would allow for the construction of a 73,932 square foot building and would equal 77,956 square feet, with the additional 4,023 square feet of exempt FAR set aside for onsite employee amenities that would facilitate the reduction of employee vehicle use. The applicant also proposed to incorporate a cafeteria and recreation areas into the building; however, the details were not included on the plans since the building was being constructed as a shell building. Any future tenant improvements would be the responsibility of the occupants. Staff added a Condition of Approval (COA) that the exempt floor area be clearly shown on any plans submitted for a building permit. As stated in the staff report (CMR:337:05), the Architectural Review Board (ARB) conducted two preliminary reviews of both the building and landscape design of the project. The ARB was generally supportive of the proposed design and commented on the projects improved effort to achieve the goal of serving as the gateway to the Baylands and meeting the objectives of the BMP. The P&TC also reviewed the project, was supportive of it, and recommended Council approve the application and Mitigated Negative Declaration (MND). The P&TC was also supportive of the proposed Transportation Demand Management (TDM) Plan and commented favorably on the Baylands Interpretive Garden (BIG); making the statement that the design of the landscape would further the objectives of the BMP. The P&TC did express; however, some concern about the height and extent of the proposed mechanical screening and requested the ARB, during their review of the project attempt to minimize the extent and height of the screening. The P&TC also added a COA that the driveway on East Bayshore Road be limited to vehicular ingress to avoid potential traffic impacts. Staff recommended the Council approve the MND on the findings that the project would not result in significant environmental impacts, and approve the site and design review application based on the findings of the draft Record of Land Use Action (ROLUA).

Associate Planning Engineer Heba El-Guendy said the Traffic Impact Analysis  
07/25/05

(TIA) evaluated four scenarios: the existing, background, background plus project, and accumulative analysis. The four scenarios as well as the significant impact criteria were consistent with the Congestion Management (CM) program as developed by the County of Santa Clara. Staff evaluated the existing conditions analysis using the highest volume year of 2001, and conservatively used those same volumes to come up with the 2008 volumes by applying a compounded growth rate that was consistent with the Comprehensive Plan (Comp Plan). The background plus project considered the net new trips by the proposed project giving credit for existing uses. The accumulative analysis for 2015 was from staff's model forecast, which took into consideration the growth, and traffic on the local and regional level, as well as all pending and approved projects within the City limits. Despite the fact the project had no significant impacts, it was conditioned to contribute towards improvements recently implemented or would be needed in the future under the accumulative analysis scenario.

Planning and Transportation Commissioner Karen Holman said the project was an important one as it was at the entrance to the Baylands. The P&TC, on a 5-1 vote, found the project to be consistent with zoning, the BMP, and the Comp Plan. The applicant furthered those goals by adding the following COA: 1) the 4,023 square feet of exempt space be maintained as ancillary space; 2) the TDM program be made a commitment; 3) more indigenous plantings be added to the landscaping; 4) story poles be erected on site for the ARB review; and 5) to include the dedication of the pedestrian/bicycle path as shown on the plan. Additionally, the P&TC included a recommendation that the ARB look at minimizing the roof screen height and the extent of lateral screening, which was then 70 percent of the building primer. As a separate motion that passed on a 4-3 vote, the P&TC moved to allow ingress only on the East Bayshore driveway.

Architectural Review Board Chairperson Judith Wasserman said the ARB denied the project at one time because as a gateway location, the building did not meet the criteria, was contrary to the Baylands in terms of materials, colors and massing, and did not offer much in the way of green practices. The project before the Council that evening met all of the criteria and had a 12.5-kilowatt photovoltaic project on top of it. The dedicated bike lane was a major factor in the ARB's considerations, and the architecture of the building had come to be quite compatible. The ARB did address the two requests from the P&TC; one on the height of the screening which included screening of the photovoltaics as well as the mechanical equipment, and the other addressed the planting material and its compatibility with the Baylands, which extended further into the project than simply the Interpretive Gardens.

Mr. Emslie said the one area where the P&TC and staff disagreed was regarding the restriction of the right in, right out driveway to ingress only. Staff's recommendation included retaining an ingress/egress driveway as it did not justify a gap in the congestion, and studies showed it was not



warranted. Secondly, staff felt the project was superior with at least two points of access for both ingress and egress.

Mayor Burch declared the Public Hearing open at 8:52 p.m.

Jim Baer, 172 University Avenue, spoke on behalf of the applicant who was unable to attend. He said the proposed project had created a required TDM program, dedicated a significant portion of its land to connect the overpass bicycle/pedestrian bridge from Embarcadero Road through to Watson Court without a nexus, embraced sustainability features like no other private office in Palo Alto, took on the notion of gateway and Baylands compatibility and took what was approved as a complementary site plan and transformed it into an entire vision of the gateway. The challenges of being progressive about transportation, sustainability, and being a uniquely attractive contemporary design with materials found by the ARB unanimously to be compatible with the Baylands captured the language to which the Council had directed.

Council Member Cordell said the Council denied the project in November 2004. The developer sued the City and was presently in litigation. The same developer had come back with a revised project for Council's approval, but was still in litigation for the earlier denial. She asked whether Council's approval of the project before them had any impact on the litigation.

Mr. Larkin said the new application was unrelated to the litigation.

Council Member Cordell said it defied logic since the litigation was the direct result of Council's denial of the applicant's first project.

Mr. Larkin said he could not speak as to why the applicant would continue with the litigation.

Sheri Furman, 3094 Greer Road, said because the project was being developed as a shell building, the Council should consider the type of permitted use that should go in as a business and the projected accuracy of traffic impacts since the buildings had been vacant for a period of time.

James Hager, 3160 Maddux Drive, suggested the Council delay the project until more information could be obtained.

Robert Moss, 4010 Orme Street, said he was opposed to the project. He believed traffic impacts would be significant and severe.

Diane Sekimura, 2082 Sandalwood Court, said there were a number of errors in the MND. The TIA used improper trip generation data in its analyses, thereby reporting incorrect statistics and conclusions. The TIA also failed to analyze the reasonable expected worst-case traffic scenario if other permitted uses occurred at the site.

Angelica Volterra, P.O. Box 1724, said approval of the MND should be denied as it did not comply with the California Environmental Quality Act (CEQA) and did not ensure that all significant/potentially significant project impacts were mitigated.

Toni Stein, 800 Magnolia, Menlo Park, urged the Council not to approve the project until proper mitigations were included. The magnitude of the project would cause issues with the need for a signal light at Watson Court.

Georganna Hynes, 140 Azalia Drive, East Palo Alto, suggested using the site to build a car dealership. She urged the Council to study the project further before voting on it.

Jim Baer addressed the issue of traffic impacts. He said if trip generation was based on an average as opposed to the curve, the difference was 110 PM peak hour trips versus 162, which equaled less than two trips per minute and three trips per minute respectively. In relationship to the gap analysis, there were 221 left turn gaps, which was 2-1/2 times the number of gaps necessary for 110 cars to exit and make the left turn, and 2 times the number for 162 cars to do the same. There were 254 right turn opportunity gaps, which was 14.9 times the number of gaps necessary to make a right turn out of Watson Court. He believed the project had done more on a voluntary basis in meeting the needs checklist.

Mayor Burch declared the Public Hearing closed at 9:25 p.m.

Council Member Kishimoto asked whether the flow of traffic on East Bayshore Road was based on 2005 data or extrapolated data from 2001.

Ms. El-Guendy said the volumes on Watson Court were based on the 2005 survey. On East Bayshore Road, they were done under four analysis scenarios: 2001 volumes; background for 2008; background plus project including the project trips with no credit; and 2015 cumulative volumes.

Council Member Kishimoto clarified 2008 volumes were calculated on the extrapolated 2001 data and not the actual 2005 data.

Ms. El-Guendy said that was correct. Despite that volumes had decreased from 2001 to the present, a 1.2 compounded yearly growth rate was applied to come up with the 2008 volumes.

Council Member Kishimoto asked for clarification of the recommendation for ingress only on East Bayshore Road.

Mr. Emslie said staff suggested modifying the recommendation to retain East Bayshore driveway as ingress and egress.

Council Member Kishimoto believed it was customary in a site and design review for there to be a fixed number of parking spaces. She asked for clarification on the issue.

Mr. Emslie said the project far exceeded the impervious coverage limitation on the site, and the flexibility for future parking was important in that location due to limited offsite parking opportunities.

**MOTION:** Council Member Kishimoto moved, seconded by Cordell to accept the staff, Architectural Review Board, and Planning and Transportation Commission recommendation to: 1) approve the Mitigated Negative Declaration (Attachment Q of CMR:337:05) for the project at 2300 East Bayshore Road, with a finding that the project would not result in significant environmental impacts; and 2) approve the Site and Design Review application to allow the construction of a new office building in the LM(D)(3) Limited Industrial Combining District, based on the findings in the draft Record of Land Use Action (Attachment A). Further, to direct staff to return in September with an analysis to designate medical/dental, private school and other high-traffic uses, as a conditional use permit (CUP) as part of the LM Zoning Ordinance Update (ZOU).

Council Member Kishimoto said members of the public raised a number of valid issues regarding traffic impacts. She believed there was a significant difference between 110 PM peak hour trips versus 241. The way the zoning was currently written the City could have 241 PM peak hour trips even though the TIA indicated there would not be that much additional traffic.

Mr. Emslie said the motion coincided with staff's anticipated timeframe to bring to Council the LM zones as well as the other industrial zones. There were recommendations for changes of certain permitted uses to conditionally permitted uses, which would give the City the discretion to impose additional conditions.

Council Member Morton said he heard from a number of speakers that people would like to see an auto dealership at East Bayshore Road and Watson Court. He asked what effect would there be if the City changed the zoning possibilities of the LM(D)(3) in the application.

Mr. Larkin said even if the Council made changes to the pending application, the zoning would not be subject to those changes.

Council Member Morton asked if the Council approved the motion on the table would the pending project be exempt from those changes.

Mr. Larkin said no. There was no use proposed as part of the application. If Council proposed to make medical uses subject to a CUP, it would apply to the project.

Council Member Morton said he was bothered by the project's first denial because the City did not have a standard for gateway projects. He asked whether the requirement of plantings compatible with the Baylands and a dedicated bike path were legal requirements or simply requests consented to by the applicant.

Mr. Larkin said as part of the site and design review the P&TC, the ARB, and the Council looked at the environmental design and ecological balance that went along with development in an environmentally sensitive area. In doing so, conditions would be put on the developer that met certain standards.

Mr. Emslie said staff did not feel there was a nexus to require dedication for the bike path; however, the applicant agreed to it. The condition could be imposed subject to the applicant's concurrence.

Council Member Morton clarified there was a fair amount of consensus from the applicant's second application to meet the City's gateway project.

Mr. Emslie said that was correct.

Council Member Morton asked if the Council decided the contributions agreed to by the applicant were not enough and required further decisions about the City's use permits and modifications of the LM(D)(3) zone, would that defer the applicant even longer.

Mr. Emslie said he did not believe so. The application could be approved on its own merits. If the Council decided to change use rules it would apply district wide, including the proposed building or any other building that changed use from an office to one more intense. Uses were only grandfathered in when they were established, and the proposed building was months away from being occupied.

Council Member Kishimoto clarified the motion was to adopt staff's recommendation with additional language to direct staff to return in September with an analysis to designate medical/dental, private school and other high-traffic uses, as a conditional use permit (CUP) as part of the LM ZOU.

Council Member Morton asked if the Council directed staff to come back in September with proposed changes to the LM ZOU, could that be done in a separate motion.

Council Member Kishimoto said the motion was a direction to staff to conduct the analysis and return in September. If her colleagues did not agree with that happening on a timely basis, she would vote against the project.

Council Member Morton asked if staff had any hope or expectation that the

pending litigation would end if the project was approved.

Mr. Larkin said he was not involved in the litigation. It was a question for the applicant to answer.

Council Member Cordell urged her colleagues to support the motion. It was not a delay in the project, but something staff said they could comply with in terms of the September time period and would not disrupt the developer's timeline. She also advocated for other possible uses for the building, specifically the medical/dental uses. She said one of the speakers spoke about the fitted curve equation and asked whether there was merit to the argument presented.

Ms. El-Guendy said in addition to the information presented by Mr. Baer, it was well known practice for general office use to draw on the average trip generation rates. In review of the Institute of Traffic Engineers (ITE) graphs the difference between the survey points and the fitted curve for general office use was very small. For other uses such as retail, the difference was quite significant and more appropriate for the fitted curve.

Council Member Freeman said when looking at traffic impacts, staff should take into account the worst-case scenario. She was reminded of severe traffic impacts from the International School and how the City had built a new entrance to the school that cut through the Baylands. In the previous case, it appeared staff chose the lightest trip generation rate scenario.

Ms. El-Guendy said it was common practice to utilize the average trip generation rate rather than the fitted curve for certain uses. If the City chose to make a change, it would need to be consistent for all projects.

Council Member Freeman clarified the only way to use the fitted curve was if the project was retail oriented.

Ms. El-Guendy said it was one of the uses.

Council Member Freeman asked would the same apply if the project was a medical/dental office or school.

Ms. El-Guendy said the fitted curve would apply for a school use, but would not apply for a medical/dental use.

Council Member Freeman said there was the possibility the project could become a school; however, staff chose to utilize the average trip generation rate.

Ms. El-Guendy said if the project were to become a school the applicant would have applied for a permit.

Mr. Emslie said it had been the City's practice to use the general office use as the trip generation rate. The analysis before the Council complied with that practice.

Council Member Freeman recommended when staff returned in September with the LM ZOU, the City's practice of using the average trip generation rate should be evaluated. The traffic congestion and the mitigations made after the fact had been proven time and again.

Mr. Emslie said staff agreed with Council Member Freeman's comment and expected it would be part of the analysis that was ongoing with the ZOU.

Council Member Freeman asked whether the MND was in violation of CEQA.

Mr. Larkin said no.

Mr. Emslie concurred.

Council Member Freeman expressed concern about the ingress/egress at Embarcadero and East Bayshore Roads. She asked if the Watson Court entry was 900 feet from the traffic light, how many feet was the new ingress from the traffic light.

Ms. El-Guendy said it was approximately 450 feet.

Council Member Freeman asked approximately how many cars fit into 450 feet.

Ms. El-Guendy said each car took approximately 25 feet. In distributing the project trip generation, staff assigned a very small number of trips off the access driveway. Most of the right turn movements were from Watson Court.

Council Member Freeman asked how the assignment of right turn only would be determined.

Ms. El-Guendy said it was determined by the site plan layout and the number of parking spaces closest to the access relative to Watson Court.

Council Member Freeman asked whether the ingress or egress had any fire safety issues associated with it.

Ms. El-Guendy said it was preferable to have two access locations for a site plan because of emergency services.

Council Member Freeman asked whether it was possible to designate a right turn only from the driveway.

Ms. El-Guendy said presently it was designated as a right turn in, right turn out. There was a condition on the project that provided a channeled island that prevented motorists from making a left turn.

Council Member Freeman asked whether the motion would require a CUP if a tenant other than general office use was retained.

Council Member Kishimoto said the motion would not require a CUP, but it did direct staff to come back with an analysis and set of recommendations about doing so.

**MOTION PASSED 9-0.**

Mayor Burch asked Mr. Baer whether he had authority to speak on behalf of the applicant as to what affect the approved motion had on the pending litigation.

Jim Baer said he was not involved in the litigation and could not speak on behalf of the applicant.

9. Public Hearing: License Agreement Between the City of Palo Alto and Acterra for Operation of a Native Plant Nursery and Restoration of a 0.53 Acre Portion of a City-Owned 7.7-Acre Parcel Adjacent to Foothills Park *(Staff requests item to be continued to 08/01/05)*

**Item continued to August 1, 2005.**

REPORTS OF OFFICIALS

**ITEM NOS. 10 AND 11 WILL BE HEARD CONCURRENTLY.**

10. Recommendation to Terminate Fiber to the Home Trial and to Discontinue Monitoring of Financing Methods in Other California Jurisdictions
11. Colleagues Memo from Council Members Beecham and Kishimoto Regarding Revised Approach for Fiber to the Home

Council Member Morton stated he would not participate in Item Nos. 10 and 11 due to ownership of SBC and Comcast stock.

Council Member Mossar stated she would not participate in the Item Nos. 10 and 11 due to ownership of telecommunications stock in her mother-in-law's Trust Fund.

Council Member Ojakian stated he would not participate in Item Nos. 10 and 11 because of his wife's ownership in Comcast, SBC, Verizon and AT&T stock, as well as other ancillary telecommunications operations.

**MOTION:** Council Member Beecham moved, seconded by Kishimoto, to terminate the Fiber to the Home Trial (FTTH) Trial.

Manager of Telecommunications Blake Heitzman said the first portion of Council's direction to staff was to continue the Fiber to the Home (FTTH) trial for one year with an evaluation on whether to continue it further. Staff recommended termination of the FTTH trial beginning the early part of December 2005 or when the equipment delivering current services failed. Reasons for closing the FTTH trial included: 1) the trial had served its purpose as a pilot project that demonstrated its functionality; and 2) the trial was never meant to be a commercial operation. It had no dedicated support staff, no service contract with the equipment supplier, and no equipment replacement fund. Staff anticipated working with the trial participants to help them find other sources before the period ended.

Deputy Director Administrative Services Joe Saccio said the second portion of Council's direction was to continue the monitoring of financing methods used in other California jurisdictions. While there had not been significant progress on financing methods, the experience in other localities was informative. The City of Lompoc had a two-phase program. The first was to build a wireless system, and the second was to build an FTTH system. Completion was expected in four months. A local write-in campaign against the wireless and FTTH enterprises had been initiated. Letters were written to Lompoc's Council opposing the use of City resources for telecommunications and opposed City competition with the private sector. Although there was strong opposition from incumbent providers and taxpayer associations, Lompoc's Council and a large number of residents were in favor of building the FTTH system. The Local Agency Formation Commission (LAFCO) because of a technicality temporarily stopped Truckee-Donner Public Utility District. Based on their charter, Truckee-Donner was not allowed to use electric funds to fund non-electric projects. It did appear the District would proceed with its financing plan that first used bridge financing and eventually issued Revenue Certificates of Participation. Alameda Power and Telecom had gone through three different financings with a fourth planned in 2009 to construct a fiber/coaxial system. These financings included a \$10 million loan from the Electric Utility and a \$2.2 million loan from the City's Redevelopment Agency. Staff found the FTTH projects in California costly in terms of private financing, high interest rates, and favored discontinuing looking at other cities in California.

Council Member Beecham said the Colleagues Memo authored by Council Member Kishimoto and himself recommended action that was consistent with the bulk of staff's recommendation to terminate the FTTH trial. In addition, the memo recommended the City begin the process to issue a Request for Proposal (RFP) that would solicit ideas from the private sector on a build out of a 100 Megabit per second system within Palo Alto. In consultation with staff, the first step would be for staff to return to Council with legal and



financial issues regarding the issuance of the RFP. He believed there were still substantial benefits to the community of an alternative, ultra high bandwidth competitive and open system. The United States continued to lag other nations in residential access to ultra high bandwidth and there was little comprehensive competition at the local level.

Council Member Kishimoto acknowledged there was little choice but to shut down the FTTH trial. The trial was successful. It produced satisfied customers, rock solid service, and City staff proved it could install and service the equipment. She believed the RFP was critical to Palo Alto's future. Palo Alto was a community of innovators and people who valued their neighborhood. She hoped her colleagues would support the motion.

City Manager Frank Benest said staff recognized the potential upside for Palo Alto if they were to find a way to achieve a successful FTTH project. There continued to be sufficient legal, financial and other concerns that militated against proceeding with FTTH efforts at the present time. The first concern involved financial exposure. In most cases a private operator would require the City to back any debt to build out the system. Because staff could not use the Electric Fund, the General Fund (GF) would be put at risk for up to \$40 million. In addition, any costs related to preparing and issuing the RFP, evaluating proposals, and negotiating franchise agreements would be GF costs and could not be borne by the Electric Fund. Staff believed the administrative, legal, and outside expertise costs would be significant. Because the private operator would take over dark fiber operations, the City would lose any opportunity to recoup the initial \$3 million investment. The City's GF would be exposed if the private operator went out of business leaving the City obligated for running the ongoing operations. The second concern involved legal issues. Any private operator would have to function under the same rules as Comcast and be required to pay for a franchise. The franchise required a payment of five percent of gross revenues on any cable and video services, plus Utility Users Tax (UUT) on any telephone service. From a legal perspective, the City could be inviting Federal Communications Commission (FCC), and California Public Utilities Commission (CPUC) regulations of the Electric Utility as well as dark fiber and other telecom operations. Accordingly, the City might need a vote of the people to amend the City Charter in order to address issues related to the venture. The final issue involved administrative hurdles that would require the City to layoff employees or have those employees hired by the private operator. The bigger issue; however, concerned the workload. The RFP would significantly impact Electrical Engineering and Operations, the Administrative Services Department and the City Attorney's Office. Staff acknowledged the upside opportunity and the enthusiasm for the proposed venture, and the City Manager generally supported strategic investments in Palo Alto's future; however, given the financial, legal and administrative barriers, staff did not believe proceeding with the proposed RFP was worthy of the required City resources and risks involved to the GF.

Jeff Hoel, 731 Colorado Avenue, expressed support for the FTTH trial. He believed the staff report (CMR:319:05) was incomplete as it did not take into account what the cities of Fontana, Loma Linda, and Ontario had done about FTTH.

Mark Heyer, 726 Marion Avenue, said the FTTH trial had achieved its purpose and believed it was time to shut it down. In the first round of business planning for the project staff focused unduly on a frontal attack on the incumbent providers. If instead, they had focused on a scaled down more sophisticated approach to the business plan, Palo Alto would have the benefit of economic development, educational opportunities, energy management, security, and traffic reduction. He encouraged Council to support the Colleagues Memo.

Bob Smith, 2291 Greer Road, said the problem involved difficulty in mounting a project that would assemble together services that were effectively competitive against the incumbent providers.

Arthur Keller, 3881 Orina Way, said he did not believe there was any reason to shut down the current FTTH trial. Doing so would send the message that Palo Alto was not interested in FTTH.

Andy Paggio, 2708 Gasper Court, said he favored discontinuing the FTTH trial, but not the service. He supported moving forward with the RFP.

Peter M. Allen, 1127 Hopkins Avenue, said he took part in the FTTH trial and found the service and reliability invaluable to him and his family.

Sanford Forte, 280 College Avenue, said the original impetus behind FTTH was visionary. He favored the continuance of the trial because there was much merit in a well ran broadband service. Canceling the project would risk losing institutional memory. If the City chose to move forward it must consider the following: 1) the business model should not be a plain service at risk from incumbent pricing attacks; 2) the business plan must take into consideration disruptive and convergent technologies such as distributed content models and wireless technologies; 3) must gauge real risks without selling blue sky; 4) must pursue a public/private partnership; and 5) must keep the process inclusive.

Michael Eager, 1960 Park Boulevard, urged the Council to move forward with the RFP, show some vision, and keep the FTTH trial because it was symbolic and made a statement that Palo Alto had a hand in the game.

David Harris, 455 Margarita Avenue, recommended cutting the universality requirement as the demand for FTTH varied from place to place. He preferred to see proposals made from small groups founded by their members or residents themselves, and allow the use of dark fiber as an available resource.

Robert Moss, 4010 Orme Street, said there was no reason to stop the existing FTTH trial. It costs the City nothing and would actually make a profit. More importantly, as long as the trial continued both SBC and Comcast were motivated to provide some minimum level of service.

Derwin Cox, 2600 E. Bayshore Road, recommended the City not sell the system to a single provider but keep the model they already had, manage dark fiber services, and lease it to small companies like his.

Council Member Beecham said the anticipation was the open system would be available to services similar, which Mr. Cox and other firms like his spoke about. The City Manager mentioned the financial exposure of up to \$40 million to build out the entire system. He believed it could be done for less in the private industry, and any proposal the City received should consider a modular approach and/or with minimal upfront capital costs to reduce their risks as well as the City's. The City Manager mentioned the inability to use Electric Funds, which he supported. If the City moved forward, any fiber system must have a fire/brick wall between it and any other operating utility. He believed the City had not made sufficient benefit out of the dark fiber opportunity either through marketing or in the flexibility in how the rates were established. He did expect there to be franchise fees and welcomed them; however, he did not believe those fees in a UUT would prevent services. He did agree there were regulatory issues the City must pay attention to. He was aware of the workload costs, and would need to know what they were and how to fit them into the workload.

**MOTION:** Council Member Beecham moved, seconded by Kishimoto, to terminate the Fiber to the Home Trial (FTTH) Trial.

**MOTION PASSED** 6-0, Morton, Mossar, Ojakian not participating.

**MOTION:** Council Member Beecham moved, seconded by Kishimoto, to direct staff to return to the Council to discuss legal and financial issues regarding the issuance of the Request For Proposal (RFP) for the construction and operation of a minimum 100 Megabit per second Citywide infrastructure providing access to service to all residential and commercial residents and open to all providers.

Council Member Freeman said she did not recall limiting the review of different financing methods to those used just by California jurisdictions. She asked whether that was part of the previous motion or did it include other states.

Mr. Saccio said he recalled the motion was restricted to California jurisdictions. In the staff report dated July 19, 2004 (CMR:360:04), staff looked at and reported on the two experiments in Utah. The discussion

focused around California because of Proposition 218 and the unique law relative to other jurisdictions and places in the country.

Council Member Freeman expressed support for the Colleagues Memo. She said Palo Alto individually spent money for synchronizing traffic lights, and state-of-the-art police and fire telecommunications when it already had the dark fiber and the infrastructure for a data utility system.

Vice Mayor Kleinberg confirmed the proposal to staff for the RFP would require the system to be a publicly owned infrastructure.

Council Member Beecham said the motion directed staff to return to Council with a discussion of the legal and financial issues and an insight toward issuing a RFP for the system as described in the Colleagues Memo.

Vice Mayor Kleinberg confirmed the RFP would be a publicly-owned fiber.

Council Member Kishimoto said that was the intent.

Council Member Beecham said what was proposed in the Colleagues Memo was to have a City-owned system.

**INCORPORATED INTO MOTION WITH THE CONSENT OF THE MAKER AND SECONDER** to add the words “to become a public-owned fiber” to the motion.

Vice Mayor Kleinberg asked why the RFP was not limited to fiber technology.

Council Member Beecham said one option discussed was an operation called Current Connections, which was a technology for putting out data over AC power lines.

Vice Mayor Kleinberg asked whether Council Member Beecham was referring to the possibility of Google responding to the RFP.

Assistant City Manager Emily Harrison said staff did not know whether Google might be interested in responding to a RFP.

City Attorney Gary Baum said staff had made the assumption collectively it was telecom/cable like companies that would be responding.

Vice Mayor Kleinberg asked whether the ultimate plan was that the entire community would bear the cost of the venture, or was that just one financing option.

Director of Administrative Services Carl Yeats said certainly there could be the option of a public/private venture that was structured so the utility would be

returned to the City after a period of time to make back the initial investment. Another format could be the issuance of debt to build out the utility.

Vice Mayor Kleinberg said one possibility could include the entire community paying for the infrastructure through a public/private venture.

Mr. Yeats said when the matter was previously before Council, staff suggested doing the build-out in an area-by-area network based on small assessment districts. The current path was to go with a RFP.

Vice Mayor Kleinberg asked if the staff were to work on the RFP, what would have to be deferred, for what period of time, and which departments would be involved.

Ms. Harrison said the departments included Electrical Engineering and Operations (EEO) in the Utilities Department, the City Attorney's Office, the Administrative Services Department, as well as the participation of the City Auditor and City Manager's offices. The bulk of the time estimated in the EEO by the telecom group was approximately 500 to 600 hours. The other departments were looking at between 40 to 100 hours depending on how the RFP was structured.

Vice Mayor Kleinberg asked what matters would need to be deferred in order to do the work.

Ms. Harrison said staff had not discussed what would be deferred, other than the telecom group.

Vice Mayor Kleinberg said a major concern of the City Manager was the burden on City staff.

Mr. Benest said there was no doubt other priorities would be affected if the Council wanted to come back within a certain time.

Vice Mayor Kleinberg asked whether additional legal staffing would be required to deal with the regulatory issues.

Mr. Baum said he did not anticipate adding staff, but did anticipate approximately \$35,000 to \$50,000 in outside counsel.

Vice Mayor Kleinberg asked if staff had estimated or evaluated the possibility of a legal fight.

Mr. Baum said assuming Comcast/SBC did not come out a winner, a lawsuit was a near certainty based upon other communities' experiences. The cost would be difficult to estimate and could not be handled in-house.

Council Member Cordell confirmed if the Council followed the recommendation to issue a RFP it was likely the City would be subject to some legal challenges.

Senior Assistant City Attorney Grant Kolling said yes it was highly probable.

Council Member Cordell asked what the likelihood was the City would prevail.

Mr. Kolling said the risk of losing could be minimized if the City required the successor to compete on the same terms that Comcast and SBC were required to do. If a RFP could be tailored in such a way as to allow the successor to comply with federal law constraints, it would level the playing field.

Mr. Baum said in order to have a level playing field the entire community would have to be covered. The modularity concept probably would not work. In addition, Palo Alto had an I-Net that would require the successor company to build one or provide an equal financial contribution, plus the Public, Educational, and Governmental Access (PEG) Channel and all the other components the cable company was required to provide. Although it would constrain what was being asked for in the RFP, it was needed in order to make the venture as legally defensible as possible.

Council Member Cordell said the visionary concept of FTTH was good; however, the reality of it was better. She believed there was a certainty of litigation, of expending substantial sums of money, and a huge amount of time consumed by staff. Now was probably not the time given the times, which were riddled with litigation regarding the issue. She stated an opposition to the motion.

Council Member Beecham said the issues raised by the City Attorney were real. A part of the potential success of the venture was how well the City found a route to take that respected the rights and limitations others expected, yet still uncovered a way to provide the services for the community. He expressed optimism that staff could find something that would satisfy the needs of the community.

Council Member Kishimoto said the legal challenges were a very serious threat; however, there were potential ways to share some of the risks. Even if the incumbent providers threatened litigation, she did not believe the City's only choice was to roll over and allow them to take over.

**MOTION PASSED** 5-1, Cordell no, Morton, Mossar, Ojakian not participating.

#### COUNCIL COMMENTS, QUESTIONS, AND ANNOUNCEMENTS

Council Member Freeman noted her concerns regarding the Downtown North area where the roundabouts would have crushed granite and the signage for “no parking” on sweep day.

ADJOURNMENT: The meeting adjourned at 11:10 p.m.

ATTEST:

APPROVED:

\_\_\_\_\_  
City Clerk

\_\_\_\_\_  
Mayor

NOTE: Sense minutes (synopsis) are prepared in accordance with Palo Alto Municipal Code Sections 2.04.180(a) and (b). The City Council and Standing Committee meeting tapes are made solely for the purpose of facilitating the preparation of the minutes of the meetings. City Council and Standing Committee meeting tapes are recycled 90 days from the date of the meeting. The tapes are available for members of the public to listen to during regular office hours.