

Case File Number VM65-567; A96-143

November 15, 2000

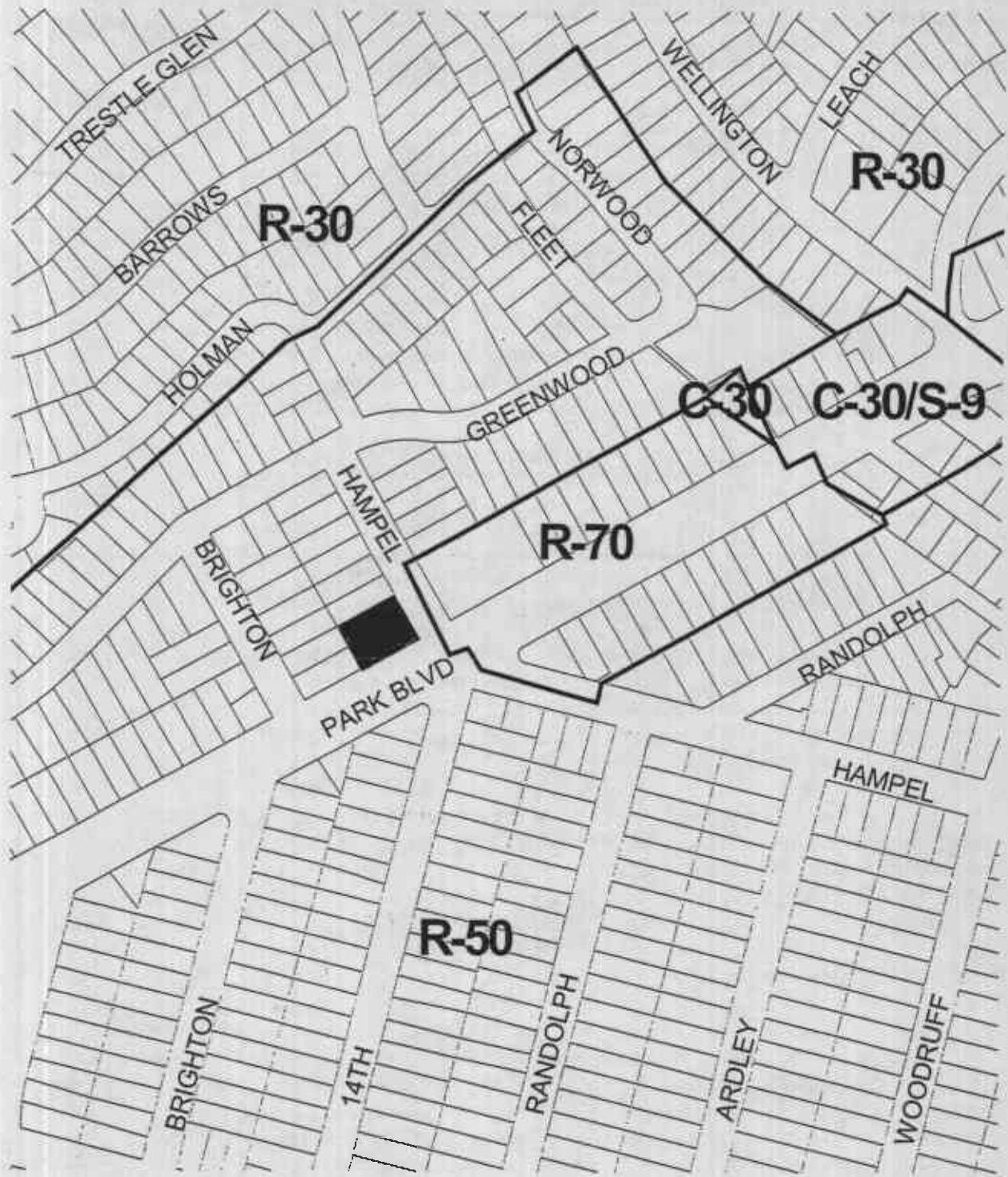
<b>Location:</b>	4035 Park Boulevard	00 NOV 15 13 PM 5:25 ENVIRONMENTAL SECTION
<b>Assessors Parcel Numbers:</b>	024-0533-007-00	
<b>Proposal:</b>	Modify conditions of approval for Major Variance VM65-567 for a service station and as resulting from recent decision by the California Court of Appeal.	
<b>Owner:</b>	Ali Shirazian (Tony's Service Station)	
<b>Planning Permits Required:</b>	Major Variance granted on appeal by City Council in 1965	
<b>General Plan:</b>	Detached Unit Residential	
<b>Zoning:</b>	R-50 Medium Density Residential	
<b>Environmental Determination:</b>	Environmental Determination: Exempt; Section 15261(b), State CEQA Guidelines; project approval predates CEQA.	
<b>Historic Status:</b>	Non-historic property (NHP); survey rating N/A	
<b>Service Delivery District:</b>	III - San Antonio/Lower Hills	
<b>City Council District:</b>	2	
<b>Staff recommendation:</b>	Modify conditions and continue monitoring on-site cleanup.	
<b>Case Planner:</b>	Crescentia Brown, Planner IV	

**SUMMARY:** In 1965, the City approved a Major Variance VM65-567 to allow the reconstruction and re-operation of a service station at 4035 Park Boulevard. The reopened service station closed in 1989 after the Loma Prieta earthquake caused faulty piping to release gasoline onto the site. The service station subsequently closed in 1989 due to contamination issues. In 1996, new owners of the property sought to reopen, modify the station's original design and operation, at which time off-site contamination was discovered. The City approved the owner's request to modify and reopen the service station. However it also added new conditions of approval that included that all on and off-site contamination be cleaned before the gas station could reopen and operate.

The owner appealed the Commission's decision to the Oakland City Council who upheld the new conditions. The applicant then filed suit against the City in Alameda County Superior Court alleging: (1) he had a vested right to operate the station, and that his rights had been violated by the City; (2) the City's new conditions were unlawful and unreasonable; and (3) the condition requiring full contamination clean-up prior to reopening of the station was unreasonable and unlawful. In 1998, Superior Court denied the station owner's request for a writ of mandate and ruled in the City's favor, and the owner subsequently appealed to the California Court of Appeal.

On July 5, 2000, the California Court of Appeal held that substantial evidence did exist to support the City's findings of public nuisance and that the City's imposition of new conditions was lawful and reasonable. However, the Court determined that the City had no right impose the condition that prohibited the owner from opening and operating the gas station due to contamination that remains off the project site. Therefore, Condition No. 15, adopted by the Commission on November 20, 1996, should be modified to delete reference to off-site contamination cleanup as a condition for reopening and operating the gas station. On October 11, 2000, the owner's attorney was notified in writing by the City Attorney's office that the owner has the right to reopen the station, provided all on-site contamination had been completed and provided that there was compliance with the other conditions of approval that have been upheld by the Court of Appeal. Staff recommends that the Planning Commission take the ministerial action to delete that portion of the Condition No. 15 relating to off-site contamination. Further, staff recommends that the Commission find that the site is still contaminated and remains a public nuisance. Also, it is recommended that the Commission amend Condition No. 18 to indicate that the applicant shall have the obligation of notifying the Commission when the on-site contamination has been fully remediated and when the applicant has complied with all other conditions of approval.

# CITY OF OAKLAND PLANNING COMMISSION



**Location Map**



APPLICANT: City Planning Commission  
ADDRESS / LOCATION: 4035 Park Blvc. ZONING DISTRICT: R - 50  
CASE FILE NO.: VM 65-567

### PROJECT BACKGROUND

On December 7, 1965, the Oakland City Council reversed a decision of the Oakland Board of Adjustments and approved Major Variance VM65-567. The variance allowed the reconstruction and re-operation of a service station at 4035 Park Boulevard. However, the reopened service station closed in 1989 after the Loma Prieta earthquake caused faulty piping to release gasoline onto the site. The service station subsequently closed in 1989 due to issues related to the gasoline contamination.

The current property owners of the property at 4035 Park Boulevard, Ali Shirazian (Tony's Service Station), referred to in this report as "the owner", acquired that property in approximately June 1996. The owners proposed reopening and modifying the station's original design and operation, and during the City's consideration of the owner's proposal, the off-site extent of the gasoline contamination was discovered. The City approved the owner's request to modify and reopen the service station; however it also added new conditions of approval to address the serious public nuisance created by the contamination.

### LITIGATION AND COURT DECISION

In 1997, the owner appealed the Commission's decision to the Oakland City Council. The City Council upheld the Commission's decision, including all of the new conditions that the Commission had imposed. Thereafter, the owner filed suit against the City in Alameda County Superior Court alleging: (1) he had a vested right to operate the station, and that his rights had been violated by the City; (2) the City's new conditions were unlawful and unreasonable; and (3) the condition requiring full contamination clean-up prior to reopening of the station was unreasonable and unlawful. In 1998, the Alameda County Superior Court denied the station owner's request for a writ of mandate and ruled in the City's favor. Within the time allowed by law, the station owner appealed the Superior Court's decision to the California Court of Appeal.

On July 5, 2000, the California Court of Appeal held that the substantial evidence did exist to support the City's two critical findings: 1) that the on-site contamination posed a public nuisance and 2) reopening the gas station before clean-up was complete "could complicate" the clean up efforts. Also, the Court found that the City's imposition of new conditions was lawful and reasonable.

However, the Court determined that the City had no right to impose the condition that prohibited the owner from opening and operating the gas station due to contamination that remains off the project site. The Court's decision found the condition unreasonable and unsupported by the findings, particularly because Mr. Shirazian, the current owner and appellant, was not responsible for cleaning up the off-site contamination. His right to open the gas station was precluded by a condition that he does not have the power to fulfill. In short, although the City had the power to condition the original variance and find public nuisance based on the evidence, the Court considers the condition, which a third party is responsible for, to be unreasonable.

Therefore, Condition No. 15, adopted by the Commission on November 20, 1996, shall be modified as follows:

15. Subject to Condition No. 18, all on-site toxic remediation work shall be completed to the satisfaction of the Alameda County Environmental Protection Services, prior to the commencement of any work for the reopening of the service station and prior to the issuance of any City building permits for this site.

18. That the Commission shall review Major Variance VM65-567 when the applicant indicates to the City and provides substantial evidence that the on-site contamination has been remediated. If at that time the Commission finds, based upon substantial evidence, that there is no longer a public nuisance due to on-site contamination, and that the owner has satisfied all other conditions of approval attached to this variance, the commission shall allow the reopening of the service station.

#### STATUS OF ON-SITE CLEANUP

Since 1997, when the City imposed conditions requiring clean-up of the site prior to reopening of the gas station, the Commission has held three compliance reviews on the status of the clean-up activities: March 1998, October 1998, and June 1999. (The Commission held additional hearings regarding blight conditions on the site in September 1999, November 1999 and February 2000 at which staff also reported on environmental cleanup status.) Each compliance review generally consisted of updates on the environmental workplan preparation and the site monitoring process.. The Alameda County Environmental Health Services Agency has primary jurisdiction over the petroleum clean-up activities

Some clean-up work commenced shortly after the contamination was originally discovered. Phase II clean-up commenced in August 1999 and included the installation of monitoring wells that gauge contamination levels in the soil over time. A November 9, 2000 letter from Tom Peacock of the Alameda Environmental Health Services Agency (Attachment A), which is based on Peacock's review of the Third Quarter 2000 Monitoring Report (August 29, 2000) on the contamination status, states that "there is still significant petroleum contamination on the above property, especially in the soil and groundwater under the northwest corner of the parcel. This corner is near the beginning of a sewer line that has allowed the migration of contamination down to Brighton Avenue.... As such, contamination levels are still too high." Leroy Griffin, City of Oakland Fire Services Agency, indicates in his memo dated November 10, 2000 that the project site sill contains significant soil contamination (Attachment B) and that he concurs in Peacock's conclusions. A map of the contaminated area is included as Attachment C of this report, which, when read in conjunction with a September 11, 2000 letter from Peacock to Desert Petroleum (Attachment D), indicates where there is significant amounts of contamination remaining.

#### RECOMMENDATION

Staff recommends that the Planning Commission:

1. Approve the staff report and modify Conditions of Approval No. 15 to read as follows:

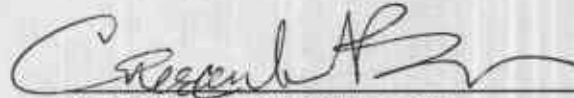
*15. Subject to Condition No. 18, all on-site toxic remediation work shall be completed to the satisfaction of the Alameda County Environmental Protection Services, prior to the commencement of any work for the reopening of the service station and prior to the issuance of any City building permits for this site.;*

and modify Condition of Approval No. 18 to read as follows:

*18. That the Commission shall review Major Variance VM65-567 when the applicant indicates to the City and provides substantial evidence that the on-site contamination has been remediated. If at that time the Commission finds, based upon substantial evidence, that there is no longer a public nuisance due to on-site contamination, and that the owner has satisfied all other conditions of approval attached to this variance, the commission shall allow the reopening of*

2. Find that the site is still contaminated and remains a public nuisance

Prepared by:



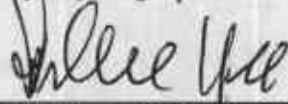
CRESCENTIA BROWN, AICP  
Planner IV

Approved by:



GARY PATTON  
Deputy Director of Planning and Zoning

Approved for forwarding to the  
City Planning Commission:



LESLIE GOULD  
Director of Planning and Zoning

**ATTACHMENTS:**

- a) Letter from Tom Peacock, Alameda County Environmental Health Agency, November 9, 2000.
- b) Letter from Leroy Griffin, Interim Fire Marshall, Fire Services Agency, November 10, 2000.
- c) August 8, 2000 Map of contaminated area (Third Quarter 2000 Monitoring Report dated August 29, 2000)
- d) Letter from Tom Peacock dated September 11, 2000