

**LIST OF ATTACHMENTS FOR PUBLIC HEARING
ITEM NO. 2 – HOLD A PUBLIC HEARING AND
INTRODUCE ORDINANCE NO. 38.793, A TEXT
AMENDMENT TO SECTION 56 (NONCONFORMING
BUILDINGS AND USES) OF THE MILPITAS ZONING
ORDINANCE**

- A. Draft Ordinance No. 38.793**
- B. Planning Commission’s Staff Report from
12/8/2010 Meeting**
- C. Planning Commission’s Approved 12/8/2010
Meeting Minutes**

REGULAR

NUMBER: 38.793

TITLE: AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILPITAS, CALIFORNIA, AMENDING TITLE XI, CHAPTER 10, SECTIONS 2 AND 56 OF THE MILPITAS ZONING ORDINANCE TO INCORPORATE ADDITIONAL DEFINITIONS AND PROVISIONS RELATED TO NONCONFORMING USES

HISTORY: This Ordinance was introduced (first reading) by the City Council at its meeting of _____ upon motion by _____ and was adopted (second reading) by the City Council at its meeting of _____ upon motion by _____. The Ordinance was duly passed and ordered published in accordance with law by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST:

APPROVED:

Mary Lavelle, City Clerk

Jose S. Esteves, Mayor

APPROVED AS TO FORM:

Michael J. Ogaz, City Attorney

RECITALS AND FINDINGS:

WHEREAS, on October 27, 2010, the Planning Commission directed staff to initiate a Zoning Ordinance text amendment to incorporate additional provisions for nonconforming uses; and

WHEREAS, the Planning Division completed an environmental assessment for the project in accordance with the California Environmental Quality Act (CEQA); and

WHEREAS, the Planning Commission recommended to the City Council to determine that the proposed zoning text amendment is categorically exempt pursuant to Section 15061 of the CEQA Guidelines. The activity is covered by the general rule that CEQA applies only to projects which have the potential causing a significant effect on environment. The proposed Zoning Ordinance amendment includes a text change to Sections 2 (Definitions) and 56 (Nonconforming Buildings and Uses) of the Milpitas Municipal Code; and

WHEREAS, on December 8, 2010, the Planning Commission held a duly noticed public hearing on the subject application, and considered evidence presented by City staff and other interested parties, and recommends approval of the Zoning Code text amendment; and

WHEREAS, the City Council finds that the proposed Zoning Ordinance amendment is consistent with General Plan goals and objectives in that proposed text amendment encourages economic pursuit and promotes a stable development. The proposed text amendment will prevent blight by fulfilling potential long-term vacancies with uses that add to economic vitality and enhance the overall development; and

WHEREAS, the City Council finds that, with the inclusion of the amendment to the Zoning Ordinance, the document remains internally consistent; and

NOW, THEREFORE, the City Council of the City of Milpitas does ordain as follows:

SECTION 1. RECORD AND BASIS FOR ACTION

The City Council has duly considered the full record before it, which may include but is not limited to such things as the City staff report, testimony by staff and the public, and other materials and evidence submitted or provided to the City Council. Furthermore, the recitals set forth above are found to be true and correct and are incorporated herein by reference.

SECTION 2. AMENDMENT OF MILPITAS MUNICIPAL CODE TITLE XI, CHAPTER 10

Title XI, Chapter 10, Section 2.03 (“Definitions”) of the Milpitas Municipal Code is hereby amended with the addition of new definitional entries, to be placed between the terms “Instruction, group and private” and “Internet access studio or internet cafe,” to read as follows:

“Intensity” means the degree to which land is used, measured by a combination of the type of land used and the amount of land or floor area devoted to that use.

“Intensification of Use” means to alter the character of a use to the extent that the use generates new or different impacts on the health, safety, or welfare of the surrounding neighborhood, including but not limited to the level or amount of traffic, noise, light, smoke, odor, vibration, outdoor storage, or other similar conditions associated with the use.

SECTION 3. AMENDMENT OF MILPITAS MUNICIPAL CODE TITLE XI, CHAPTER 10

Title XI, Chapter 10, Section 56.02(C)(2), is hereby amended in its entirety to read as follows:

In all districts other than the R1, R2, and R1-H, a legal nonconforming building or structure may be added to or enlarged in a manner consistent with the criteria established in Table XI-10-57-.04-1 and if a Conditional Use Permit is obtained.

SECTION 4. AMENDMENT OF MILPITAS MUNICIPAL CODE TITLE XI, CHAPTER 10

Title XI, Chapter 10, Section 56.03 (“Nonconforming Use of Buildings and Structures”), is hereby amended in its entirety to read as follows:

XI-10-56.03 Nonconforming Use of Buildings and Structures

- A. The continuation or change of a nonconforming use of a building or structure shall meet the requirements provided below.
 - 1. Continuation of Existing Nonconforming Use. A legally established use that is no longer permitted in a particular zoning district because of a modification of this Chapter shall be allowed to continue indefinitely, absent discontinuation of the use for a year or more and failure to comply with the re-establishment provisions of Section XI-10-56.03(B) below.
 - 2. Discontinuation of Nonconforming Use. The nonconforming use of a building, structure or portion thereof, which is discontinued for a continuous period of one (1) year or more, may be replaced only with a conforming use, absent an approved nonconforming use reestablishment set forth in Section XI-10-56.03(B) below. Nonconforming uses which have been discontinued for a period of less than one (1) year may be replaced, if (1) with a nonconforming use of the same use classification as a matter of right or (2) a nonconforming use of a different use classification, subject to compliance with the findings and procedures set forth Section XI-10-56.03(B).
 - 3. Changes of Use Within the Same Use Classification. An existing, ongoing nonconforming use may be changed to a different use within the same use classification. For example, a nonconforming auto repair shop use may be changed to a tire shop use, since both uses fall within the same use classification (auto service uses).
 - 4. Change of Use to a Different Nonconforming Use Classification. An existing, ongoing nonconforming use may be changed to a nonconforming use of a different use classification only if it can be found that the proposed use is equivalent to or more appropriate than the existing nonconforming use at the project location. The proposed use may be allowed only by way of a conditional use permit and only if, in addition, all of the following findings can be made:
 - a. The proposed nonconforming use would not cause a nuisance to the surrounding properties and district (e.g., excessive parking demand, traffic, noise, etc.).
 - b. The proposed nonconforming use would be compatible with the general character of the surrounding neighborhood or district.
 - c. The proposed nonconforming use is necessary to allow gainful economic use of structures or improvements until such structures or improvements can be permanently converted to conforming uses.
- B. Re-establishment of Discontinued Nonconforming Uses Within the Midtown Specific Plan Area (Sunsetting Provision).
 - 1. Once discontinued for a year or more, nonconforming uses only within the Midtown Specific Plan Area may be re-established if all of the following findings can be made:

- a. The proposed re-establishment of a nonconforming use would not cause a nuisance to the surrounding properties and district (e.g., excessive parking demand, traffic, noise, etc.).
- b. The proposed re-establishment of a nonconforming use would be compatible with the existing general character of the surrounding neighborhood or district.
- c. The proposed re-establishment of a nonconforming use is necessary to allow gainful economic use of structures or improvements until such structures or improvements can be permanently converted to conforming uses.

In addition to the above findings, the re-establishment of a discontinued nonconforming use may only be approved by the Planning Commission by way of a conditional use permit, with the above additional findings, if (1) the proposed use lies within 500 feet of any residential use or (2) the proposed use would require conditional use permit review under current zoning requirements for the zoning district listed in the zoning map in existence at the time the use became nonconforming. The re-establishment of a discontinued nonconforming use may be approved administratively by Planning Division staff in all other circumstances, contingent on the existence of findings by Planning Division staff that the above listed grounds for re-establishment exist.

2. This Section XI-10-56.03(B) shall become inoperative June 16, 2014, and shall be considered repealed on that date, unless a later enacted ordinance that becomes effective on or before June 16, 2014, deletes or extends that date. All other provisions of Section XI-10-56.03 shall be unaffected by this sunset clause.

SECTION 5. SEVERABILITY

The provisions of this Ordinance are separable, and the invalidity of any phrase, clause, provision or part shall not affect the validity of the remainder.

SECTION 6. PUBLICATION AND EFFECTIVE DATE

In accordance with Section 36937 of the Government Code of the State of California, this Ordinance shall take effect thirty (30) days from and after the date of its passage. The City Clerk of the City of Milpitas shall cause this Ordinance or a summary thereof to be published in accordance with Section 36933 of the Government Code of the State of California.



MILPITAS PLANNING COMMISSION AGENDA REPORT

PUBLIC HEARING

Meeting Date: December 8, 2010

- APPLICATION:** **Zoning Amendment No. ZA10-0004, Zoning Text Amendment to Section 56 (Nonconforming Uses and Structures) of the Milpitas Zoning Ordinance.**
- APPLICATION SUMMARY:** An amendment to Section 56 to incorporate additional provisions and special findings to allow for transitioning of parcels with legal, non-conforming uses or structures.
- LOCATION:** Citywide
- APPLICANT:** City of Milpitas
- OWNER:** Not Applicable
- RECOMMENDATION:** **Staff recommends that the Planning Commission: Adopt Resolution No. 10-047 recommending approval of the amendments to the City Council.**
- PROJECT DATA:**
General Plan/
Zoning Designation: Citywide
- CEQA Determination:** Staff determined the project to be exempt pursuant to Section 15061 of the CEQA Guidelines. The activity is covered by the general rule that CEQA applies only to projects, which have the potential causing a significant effect on environment.
- PLANNER:** Cindy Hom, Assistant Planner
- PJ:** None
- ATTACHMENTS:**
- A. Underline and strikeout of amendments
 - B. Resolution No. 10-047
 - C. Ordinance No. 38.793 (Exhibit 1 to Resolution)

BACKGROUND

At its October 27, 2010, the Planning Commission considered an appeal to Staff's decision to deny the establishment of an auto repair facility in a location where city's nonconformance and mixed use district ordinances do not allow such establishments to locate. The Planning Commission upheld the Staff decision and directed staff to initiate a zoning text amendment that would provide provisions for nonconforming uses

Section 56 of the Zoning ordinance is intended to establish regulations for nonconforming buildings, structures, and uses. The purpose and intent of the regulations are to ensure the conversion of nonconforming uses to conforming standards and to the ultimate vision of the city's General Plan, but also to grant the ability of sites with legal, nonconforming buildings, structures, and uses to continue until such time they are converted and to allow for improvements that promote neighborhood compatibility or enhance the quality of the development without increasing the nonconformity.

With adoption of the Midtown Specific Plan and Transit Area Specific Plan, many parcels improved with buildings and existing uses were rendered nonconforming. Transition in these areas will not occur in the near future due to current economic conditions and this has lead to long term vacancies as well as unique site constraints.

Site constraints that affect the Midtown area include small parcel sizes. Parcels will need to be assembled in order for ideal development to occur. Also, there are instances where commercial buildings along Main Street were developed with single uses in mind such as auto repair centers. The Midtown Specific Plan also implemented a distance requirement in effort to prevent and discontinue over concentration of certain uses. However, given the age of the building and type of uses the buildings were intended for, it has created a constraint for these buildings and sites to convert to a conforming use that would be consistent with the underlying zoning.

Unlike the small parcels in Midtown, the Transit Area consist of large parcels and include multiple industrial buildings. While these parcels would require minimal assemblage, they still experience a difficult time turning over due to market conditions for housing and commercial development. Since these buildings are designed and intended for industrial uses, they can only attract certain tenants and types of uses.

Due to these issues, there are an increasing number of requests to re-establish nonconforming uses or continue nonconforming uses mainly in the specific plan areas.

PROJECT DESCRIPTION

The project consists of a zoning text amendment to Section 56 (Nonconforming Buildings and Uses) of the Milpitas Zoning Ordinance that establishes criteria that would to allow continuation of nonconforming uses or change of use throughout the city and criteria and process for reestablishment of nonconforming uses in the Midtown and Transit Specific Plan areas under certain circumstances. In addition, the consideration of a change of use to a different nonconforming use classification or reestablishment of a discontinued nonconforming use can be approved administratively by planning staff if the proposed use is not within 500 feet of any residential use or if the proposed use does not require a conditional use permit under current zoning requirements taking into consideration the previous zoning map designation applicable when the use became nonconforming.

The overall objective of the text amendment is to provide controlled flexibility to allow change of use or reestablishment of a nonconforming use in certain circumstances. A copy of the strikethrough and underline exhibit showing proposed text changes is provided in Attachment A. The proposed text amendments are briefly summarized in the section below:

Change of Use Within the Same Use Classification

As with the existing language within the nonconforming section, an existing, on-going nonconforming use may be changed to a use of the same classification (i.e. an automotive repair establishment may be changed to another automotive repair establishment if the use has not become discontinued for more than a year.

Change of use to a Different Nonconforming Use Classification

An existing on-going nonconforming use may change to a nonconforming use of a different use classification if the proposed use is equivalent to or more appropriate than the existing nonconforming use. The proposed use would have to demonstrate that it would not cause a nuisance to the surrounding area, is compatible with the general character of the neighborhood or district, and allows for the economic use of the structure and improvements until they are permanently converted to a conforming use. This provision applies to sites with uses that have not been discontinued.

Reestablishment of Discontinued Nonconforming Uses in Midtown and Transit Area.

A nonconforming use that was discontinued for a year or more in the Midtown and Transit Area may reestablish provided the proposed reestablishment of a nonconforming use would not create a nuisance to the surrounding properties, would be compatible with the general character of the surrounding neighborhood or district, contribute the economic vitality of the district until the site can be permanently converted to conforming uses.

Definitions

In addition to the above text changes, staff proposes to add definitions for the following terms:

“Intensification of use” – to alter the character of a use to the extent that the use generates new or different impacts on the health, safety, or welfare of the surrounding neighborhood, including but not limited to the level or amount of traffic, noise, light, smoke, odor, vibration, outdoor storage, or other similar conditions associated with the use.

“Intensity” – the degree to which land is used, measured by a combination of the type of land used and the amount of land or floor area devoted to that use.

ADOPTED PLANS AND ORDINANCES CONSISTENCY

General Plan

The table below outlines the project’s consistency with applicable General Plan Guiding Principles and Implementing Policies:

Table 1
General Plan Consistency

Policy	Consistency Finding
<i>2.a-I-3 Encourage economic pursuits which will strengthen and promote development through stability and balance.</i>	Consistent. The amendments to the Nonconforming Use and Structures Section of the Zoning Ordinance encourages economic pursuits and promotes a stable development in that it would allow uses that will fulfill vacancies and prevent blight. The proposed text amendment will allow spaces can be tenanted with uses that would add to the economic vitality and enhances the overall development.

Zoning Ordinance

The proposed text changes to the Zoning Ordinance provides for an internally consistent document. In addition, Section 2, Definitions, of the Zoning Ordinance was consulted to ensure that there were no conflicts.

ENVIRONMENTAL REVIEW

The Planning Division conducted an initial environmental assessment of the project in accordance with the California Environmental Quality Act (CEQA). Staff determined that the project is exempt pursuant to Section 15061 of the CEQA Guidelines. The activity is covered by the general rule that CEQA applies only to projects, which have the potential causing a significant effect on environment since the project consists of text amendment to the zoning ordinance.

PUBLIC COMMENT/OUTREACH

Staff publicly noticed the application in accordance with City and State law. As of the time of writing this report, there have been no inquiries from the public.

CONCLUSION

The proposed text amendments provides a further refinement of the zoning ordinance that helps streamline the process for nonconforming uses in areas that have not or have partially transitioned. It also would help prevent blight in areas that would otherwise remain vacant. The proposed text amendment will allow spaces can be tenanted with uses that would add to the economic vitality and enhances the overall development.

RECOMMENDATION

STAFF RECOMMENDS THAT the Planning Commission adopt Resolution No. 10-047 recommending approval to the City Council of approving ZA10-0004.

Attachments:

- A. Strike-through and underline exhibit for Parking regulation changes
- B. Resolution No. 10-047
- C. Ordinance 38.793

Chair Williams stated he would support this item with the additional conditions of approval.

Commissioner Tabladillo supports having a 6, 12, and 18 month review.

Mr. Otake read the additional conditions of approval as follows: 1) modification to No. 5 – The business operation shall be reviewed by the Planning Commission in six, twelve, and eighteen months, 2) the owner or designee shall prevent loitering in front of the property and keep the area free of garbage and tobacco-related litter, 3) the operator is prohibited from advertising or encouraging the use of unlawful controlled substances, and 4) the operator shall work with City staff as to product placement to minimize the exposure of minors to tobacco paraphernalia.

Motion to adopt Resolution No. 10-045 approving the project subject to the conditions of approval.

M/S: Tiernan, Tao

AYES: 4

NOES: 2 (Larry Ciardella and Gurdev Sandhu)

ABSENT: 1 (Sudhir Mandal)

ABSTAIN: 1 (John Luk)



**2. ZONING AMENDMENT
NO. ZA10-0004**

Cindy Hom, Assistant Planner, presented a request to consider an amendment to Section 56 (Non-conforming Uses and Buildings) of the Milpitas Zoning Ordinance. Ms. Hom recommended adopting Resolution No. 10-047 recommending approval of the amendments to the City Council.

Chair Williams commented he was a part of the Midtown Plan development and they were not envisioning there was going to be an economic downturn so therefore, their thoughts at that time was based upon a continued growth. He said he is very comfortable with staff having come up with new language to allow for flexibility. He also thanked staff for an excellent job.

Commissioner Tiernan feels staff did a fine job with this project. He stated this is a step in the right direction.

Chair Williams opened the public hearing.

Vince Wallace, 39111 Paseo Padre Parkway, Ste 310, Fremont, CA, stated he and his company can support the new ordinance. He said the intended use of the property he manages in the Midtown area is for auto repair.

Motion to close the public hearing.

M/S: Ciardella, Tiernan

AYES: 7

NOES: 0

ABSENT: 1 (Sudhir Mandal)

ABSTAIN: 0

Motion to adopt Resolution No. 10-047 recommending approval of the amendments to the City Council.

M/S: Sandhu, Ciardella

APPROVED
Planning Commission Minutes
December 8, 2010

AYES: 7

NOES: 0

ABSENT: 1 (Sudhir Mandal)

ABSTAIN: 0

**X. UNFINISHED
BUSINESS**

**1. TWENTY FOUR
MONTH REVIEW FOR
CONDITIONAL USE
PERMIT AMENDMENT
NO. UA08-0010**

Tiffany Brown, Junior Planner, presented a review of the approval which allows seating on the dance floor during restaurant/dining hours and allows the service of a full range of alcoholic beverages for the existing restaurant located at 78 Dempsey Road. Ms. Brown stated the restaurant is operating primarily as a night club and not a restaurant as permitted. Ms. Brown recommended scheduling a public hearing for the review and possible modifications to Conditional Use Permit conditions of approval.

Ms. Brown stated since January the Police Department has made approximately 30 arrests and has incident reports for drunk in public, drinking in public, fighting in public indoors and out, driving under the influence, under age drinking, and urinating in public. These incident reports are above normal for this type of establishment.

Chair Williams asked a Milpitas Police Department representative about the number of incidents at Club Bahia. Commander Armando Corpuz, Milpitas Police Department, stated in the last six (6) months there has been five (5) fights, minors found at the business, and a drunken driving accident at the business.

Commissioner Ciardella asked about incidents within the last six months. Commander Corpuz stated within the last year the police is aware of at least seven (7) assaults at the location. Some of the assaults were not reported by staff of Club Bahia but have been reported by witnesses at the business. Commissioner Ciardella asked if the incidents happened during the day or late evening. Commander Corpuz stated yes, there was one incident that happened late evening when a 15 year old run-away was found at the business. The business has called MPD to let them know there have been juveniles loitering around the business late at night and requested assistance. Commander Corpuz stated some fights have started inside the business and continued outside.

Commissioner Tao asked if Club Bahia has security. Commander Corpuz stated yes there is security at the business.

Commissioner Tabladillo asked what type of assaults has there been. Commander Corpuz stated most of the assaults have been misdemeanor assaults or fighting.

Commissioner Sandhu stated that six (6) months ago a resident had complained about this establishment and asked if any investigation was done. Mr. Lindsay stated yes and those issues at that time have been resolved.

Chair Williams asked staff if they have been to Club Bahia. Ms. Brown stated she has driven by Club Bahia at night and noticed a ticket booth outside and they were checking IDs of patrons prior to entry into the establishment.

Commissioner Tao asked if there have been excessive problems since 1992. Commander Corpuz stated this year, PD has had 25 to 30 incidents. Commander Corpuz also stated that in 2009 PD has experienced fights at the club and have been attacked as well. Commissioner Tao asked if the incidents have happened after midnight. Commander Corpuz stated most have happened after 11:00 p.m. Commissioner Tao asked how late the establishment serves food. Ms. Brown stated food service ends when the restaurant closes.

Commissioner Luk asked if the residents in the surrounding area complained about the

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Planning Commission Minutes

December 8, 2010