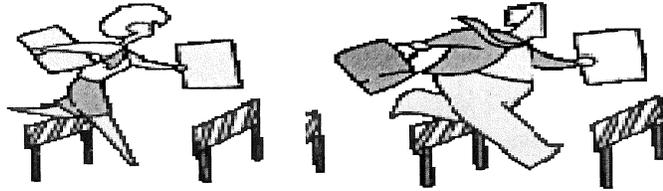




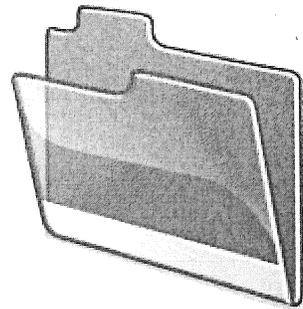
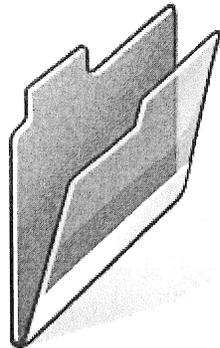
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10/16/2018
Agenda Item No. 11



ATTACHMENT RELATED TO AGENDA ITEM AFTER AGENDA PACKET DISTRIBUTION





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October 16, 2018

Honorable Mayor Tran, Vice Mayor Grilli and Members of the City Council
Milpitas City Hall
455 E. Calaveras Blvd
Milpitas, CA 95035
San Jose, CA 95113-2233

Re: October 16, 2018 City Council Agenda, Item #11
Appeal of Planning Commission Determination 1831 Tarob Court

Dear Mayor Tran, Vice-Mayor Grilli and Councilmembers:

This letter addresses the October 14, 2018 letter of Andrew Faber, Esq., regarding agenda item 11 on the October 16th City Council agenda item (the "Appeal"). Mr. Faber represents Mr. George Quinn, the owner of the property that is the subject of the Appeal. We are providing this response to address issues Mr. Faber has raised regarding the City's process concerning the Appeal.

The points Mr. Faber raises, and our responses to each, are as follows:

1. **Status of Planning Director as "Appellant."**

Mr. Faber asserts that the Planning Director's appeal is improper under Milpitas Municipal Code Section I-20-5.02 because he was acting in his official capacity and cannot be an "aggrieved" party. Mr. Faber asserts that the Appeal violates due process because it is not in compliance with the Municipal Code.

The Appeal, however, is expressly authorized by, and in strict compliance with, provisions of the Milpitas Municipal Code other than the section Mr. Faber cites. Milpitas Municipal Code Section I-20-6.03 empowers the City Manager, the City Council or any member of the City Council to appeal any decision of any officer, board, commission or department. The Code does not require that the appellant in this context be "aggrieved." Rather, this type of appeal requires only that its subject matter "should be reviewed and decided by the City Council in the interest of the City." *Id.* This provision of the Municipal Code is consistent with established case law, which supports a city representative ability to appeal city's own internal decision to its city council in accordance with a city's ordinances. (*See e.g., Breakzone Billiards v. City of Torrance*, 81 Cal.App.4th 1205, 1239)(2000)(no due process violation a member of the City Council, appealed a Planning Commission decision and later participated in the City



BEST BEST & KRIEGER
ATTORNEYS AT LAW

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Council decision on the appeal). Where, as here, the City has complied with its own procedures, as established by its own, carefully drawn ordinance, there is no due process concern associated with the Planning Director's role as the appellant. (*Id.*; *Cohan v. City of Thousand Oaks*, 30 Cal. App. 4th 547, 559(1994)).

Mr. Faber cites several cases for the proposition that the Appeal violates due process because it is not in strict compliance with the Municipal Code. Although the cases Mr. Faber cites might be instructive if there were no ordinance expressly authorizing this appeal, they do not apply here. Acting at the direction of the City Manager, and under her delegated authority, Planning Director's role as an appellant is proper under the Municipal Code Section I-20.6.03.

2. **Validity of the Appeal Without Paying Filing Fee**

Mr. Faber asserts that the Appeal is invalid because the Planning Director failed to pay a fee when filing the Appeal. Mr. Faber asserts that the Municipal Code does not explicitly authorize a filing fee waiver and, therefore, the Appeal does not conform with due process.

Although Mr. Faber is correct that Milpitas Municipal Code Section I-20-5.03 requires a filing fee for an appeal by an "aggrieved" party, appeals by City staff the City Council or individual Council members may be filed without payment of a fee. As noted above, such appeals are authorized and governed by Milpitas Municipal Code Section I-20-6.03, which states that "the City Manager, City Council or any member of the City Council is empowered to appeal any decision of any officer, board, commission or department of the City of Milpitas within the time limits allowed by law and without fee." Section I-20-6.03 further provides that "[n]o further formality in the case of appeals under this section need be met, and the requirements of Section I-20-5.03 and I-20-5.04 are specifically declared to be inapplicable to an appeal under this section."

3. **Due Process Considerations of Planning Staff Role and The Staff Report.**

Mr. Faber asserts that the Planning staff's report violates due process and that staff has a "conflict of interest" in advising the City Council. The record, however, does not reflect any bias that undermines a fair process or the ability of the City Council to make an impartial and balanced decision on the Appeal. The examples Mr. Faber asserts as evidence of staff's bias do not reflect the totality of the record. For example, Mr. Faber has expressed concern that the agenda and agenda-related materials only provide Council with a path to uphold the Appeal; however, the matter was agendized in a manner that would allow Council action either to uphold or deny the Appeal, and the packet includes alternative resolutions that would allow either decision to be made on October 16. In addition, although Mr. Faber has objected to staff's omission of certain documents from the record, it is our understanding that the documents Mr. Faber has described in his communications with staff and this office already are included in



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supplemental agenda materials posted on the City's website. The City intends for all documentary and other evidence to be fully presented to the Council.

Mr. Faber also asserts that the staff report must be "stricken" from the record because it portrays a staff position that not neutral or objective. However, to raise a serious due process claim, the complaining party must establish "an unacceptable probability of actual bias *on the part of those who have actual decisionmaking power* over [his] claims." (*Breakzone Billiards v City of Torrance*, 81 Cal. App. 4th 1205, 1236 (2000)(*emphasis added*); see also *U.S. v. State of Oregon*, 44 F.3d 772 (1994)). Here, the City Council is the body with actual decision making power, and no evidence of bias has been asserted or demonstrated.

As is inherent in an appeal, Mr. Faber and his client disagree with the appellant Planning Director's interpretation of the facts and the applicable principles of law. The presence of such a disagreement does not mean there is improper bias or evidence of a due process violation. The purpose of the public hearing process is to provide both the appellant and Mr. Faber and his client the full and fair opportunity to present these differing positions to the City Council. It is the Council's role, as an unbiased, neutral arbiter, to evaluate these differing assertions and reach its own, independent conclusions. As always is the case with a public hearing on appeal, Mr. Faber and his client are free to present any arguments or additional evidence they may wish, including any of the discussion and debate that occurred at the Planning Commission hearing. The City Council will have the opportunity to fully and fairly evaluate all of the evidence, together with arguments for and against the appeal, at the public hearing. Planning staff's involvement in that process does not compromise the ability of the Council to reach a fair decision.

4. **Role of the City Attorney.**

Mr. Faber asserts that neither the City Attorney, nor any member of the City Attorney's firm, may advise the City Council on the Appeal because of the need to separate "prosecutorial" and "advice" functions of legal counsel. Specifically, Mr. Faber asserts that due process requires that the Council obtain legal advice from attorneys who have not been involved in any way in the staff process.

The principles Mr. Faber cites do not apply here. In this case, any advice provided to staff or the Planning Commission did not involve a "prosecutorial" role where the City Attorney's firm functioned as an advocate. The California Supreme Court has made a clear distinction between a situation where an attorney acts as an advocate and a mere advisor. In *Today's Fresh Start, Inc. v. Los Angeles County Office of Education*, the California Supreme Court held that the general counsel of a governing board did not act as an advocate because the hearing was not a classic adversarial hearing, with a prosecutor and defendant. The counsel had not presented evidence, examined no witnesses, and made no arguments. Instead, she merely



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advised the board on its duties and agency staff on their powers and responsibilities. (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education*, 57 Cal.4th 197 (2013)).

Similarly, throughout this process, the City Attorney's firm has acted as a mere advisor to staff and the Planning Commission. There has been no classic adversarial hearing with a prosecutor and a defendant. There is no risk of improper commingling of prosecutorial and advice functions, because there has been no prosecutorial proceeding. As a result, there is no need for the City to retain different counsel to advise the City Council on the Appeal.

We hope you find this information helpful.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Chris Diaz'.

Christopher J. Diaz
City Attorney for the City of Milpitas
for BEST BEST & KRIEGER LLP



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October 14, 2018

[VIA E-MAIL]
City Council
City of Milpitas
455 E. Calaveras Blvd.
Milpitas, CA 95035

Re: October 16, 2018 Agenda Item #11
Appeal of Planning Commission Determination 1831 Tarob Court
Our File No.: 01475-015

Procedural Objections to Hearing

Dear Mayor Tran and Councilmembers:

The Owners have a vested right to continue the legal, nonconforming use of the Property for industrial purposes. Due to the denial by Staff of this right, they are losing over \$50,000 in rent each month, not to mention the added costs of maintaining a vacant property against vandalism, homelessness, etc.

Because they have a vested right to maintain the use, any hearing that would take away such rights must be conducted in accordance with the Constitutional principles of Due Process and fundamental fairness. This has been recognized repeatedly by the Courts.

In this case, conducting the agendized hearing in front of the City Council would violate the owners' Due Process rights in three respects:

- 1) The Council has no jurisdiction to hear the Planning Director's appeal, since it does not comply with the City's Municipal Code.
- 2) Due Process requires a fair tribunal that is advised by persons who have no conflicts of interest. In this matter, the entire Planning Staff has an obvious conflict of interest and cannot fairly advise the Council.

- 3) Similarly, Due Process requires that the Council obtain legal advice from attorneys who have not been involved in any way in the Staff process. We believe that such independence of counsel has not occurred here.

We are not seeking a delay in the hearing, as every day that the City refuses to allow an industrial tenant in the building inflicts significant damage on the Owners. Rather, we believe that this hearing should be canceled, the appeal dismissed and the decision of the Planning Commission allowed to stand. If the hearing does go forward, then the Staff Report should be stricken from the record, Staff should not be allowed to make a presentation, and independent legal advice must be provided to the Council.

1. Background.

This matter first arose when Geomax came to the City Planning Staff with a legal, nonconforming industrial use tenant, NIO USA, Inc., an electric car company that recently went public, and wanted to do hardware and software prototyping in the building. The Planning Staff responded with a letter by then Acting Planning Director, Jennifer Garner, dated August 3, 2018, making a formal Determination that the Property had discontinued its legal, nonconforming industrial use for over a period of one year. Because of the City's Determination, Geomax was not able to finalize the pending lease with NIO and continues to suffer damages in an amount over \$50,000.00 per month in rent and triple-net costs that the tenant would have paid. In addition, since January 2017 when the prior tenant vacated, Geomax has invested over \$860,000 in maintenance, repair, and tenant improvements to make the building "market ready" for a new industrial tenant, which will be lost if they are not allowed to continue their industrial use of the Property.

Ms. Garner's Determination stated that her decision was "appealable to the Planning Commission in accordance with the Milpitas Municipal Code, including, without limitation, Table XI-10-64.02-1." Her Determination also stated that: "Any Planning Commission decision on such an appeal may be appealed to the City Council in accordance with Milpitas Municipal Code I-20-5.02." Geomax properly appealed Ms. Garner's determination to the Planning Commission. On September 26, 2018, the Planning Commission sat through a full presentation by the Planning Staff regarding their recommendation. After hearing Geomax's arguments and receiving further input from Planning Staff, and the Planning Director, the Planning Commission voted to grant Geomax's appeal, finding that Geomax had adequately maintained their industrial use of the Property to allow for continued industrial use.

The next day the Planning Director in his official capacity appealed the Planning Commission's decision to City Council. We object to the Planning Director's appeal and the City Council hearing, as discussed in further detail below, because the Director's appeal does not comply with the governing appeal procedure in the City's Municipal Code and thus is invalid.

2. **The Planning Director's appeal of the Planning Commission's decision is invalid and violates Due Process, because it is not explicitly authorized under the Milpitas Municipal Code.**

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An appeal of a Planning Commission decision violates Due Process unless it is in strict compliance with the City's Municipal Code. (*See Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, 1028; *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 559. The courts in these cases found that the city council as a body and a city councilmember were not eligible to appeal a Planning Commission decision because they were not provided the authority to appeal under their respective city codes.

Here, the City Council would violate the Owners' Due Process right by hearing the Planning Director's appeal, because said appeal did not strictly comply with the Milpitas Municipal Code.

a. The Planning Director is not an "aggrieved" person eligible to appeal a Planning Commission decision under Code Section I-20-5.02.

The Planning Director's appeal was improper and invalid under Municipal Code Section I-20-5.02, because he was acting in his official capacity, and cannot be "aggrieved" by the Planning Commission's decision. Under Section I-20-5.02 ("Appeals to Council") of the Milpitas Municipal Code, "[a]ny person **aggrieved** by any final decision of any board commission, or department head to the City of Milpitas may appeal the decision to the City Council by filing written notice of the appeal with the City Clerk within twelve (12) calendar days of the date of said decision and paying the required fee. This time limit shall be strictly enforced." (emphasis added.)

No plain meaning or legal definition of "aggrieved" would apply to the Planning Director to allow him to appeal the Planning Commission's decision. For example, a standard legal reference, Black's Law Dictionary (9th ed.), defines "aggrieved" as follows: "*adj.* (Of a person or entity) having legal rights that are adversely affected; having been harmed by an infringement of legal rights."

The courts' interpretation of "aggrieved" in the context of appealing a civil action under Code of Civil Procedure Section 902 also negates the notion that the Planning Director could appeal as an "aggrieved" person. The courts have held that a person is "aggrieved" if their "rights or interests are injuriously affected by the judgment," where their "interest must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment." (*See Pacific Merchant Shipping Assn. v. Board of Pilot Commissioners etc.* (2015) 242 Cal.App.4th 1043, 1062; *In re K.C.* (2011) 52 Cal.4th 231, 236; *Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 153; *County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 737.)

The Planning Director's position does not meet any definition or legal interpretation of "aggrieved," discussed above; therefore, he is not eligible to appeal under Section I-20-5.02 of the Milpitas Municipal Code. The Planning Director appealed the Planning Commission's decision in his official capacity, which precludes him from claiming any individual injury as a result of the decision. He does not claim or assert any personal injury, potential liability, loss of legal rights or interests, or unfair treatment. Instead he puts forward his appeal as an "exper[t] in the principles and practices of urban planning and land use regulation" to "ensure full implementation of the TASP." As held in *In re K.C.*, however, merely taking a position on a matter at issue, without contesting the loss of a personal right does not make a person "aggrieved."

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In essence, it's the Planning Director's job to take certain positions on planning issues, and the Planning Commission's job to agree or disagree in any given case. He may not like the Commission decision, but he suffers no legal injury as a result.

This division of duties between the Director and the Commission is explained clearly in the Planning Commission By-Laws. Section 6.13 of the Bylaws lays out the Planning Staff's and Planning Commission's respective roles in relation to each other. The Planning Staff is "to provide the Commission with the information it needs to make an independent decision" and "to provide a professional recommendation supported with analysis." The Planning Commissioners are to "review the information provided by staff," alongside information provided by the general public and the applicant, and are to "make an independent decision which is in the best interests of the City and in conformance with applicable laws and regulations." The Bylaws also acknowledge in section 6.01 that opinions between Commissioners and Staff may differ and that "discussion and resolution of such differences are often the basis for crafting land use decisions that are most appropriate for the City and its neighborhoods."

Because the Planning Director cannot and does not provide any basis for being "aggrieved" his appeal to the Planning Commission is improper. That the Planning Commission may disagree with the Planning Staff's opinions and recommendations from time to time is not only expected but discussed in the Planning Commission Bylaws as part and parcel of a fair process. The Planning Director cannot rightly claim that such denial constituted an infringement of his legal rights.

b. The Planning Director's appeal is invalid for failure to submit the requisite filing fee, under Milpitas Municipal Code Section I-20-5.02.

The Planning Director's appeal is also invalid because he failed to pay the filing fee required by the Municipal Code. The Notice of Appeal says "Fee waived/Internal Appeal." Section I-20-5.03 requires that "the appellant shall pay to the City at the time of filing the notice of appeal the sum adopted or amended by resolution of the Milpitas City Council." We requested a copy of the referenced resolution. It provides an appeal fee of \$100 (which Geomax had to pay for its appeal, by the way). It has no provision for a waiver of fees for an "internal appeal."

Since the Municipal Code does not explicitly authorize the waiver of a filing fee for an appeal by the Planning Director, such waiver does not conform with Due Process. (*See Woody's Group*, 233 Cal.App.4th at 1025-27.) Finally, we note that even if the City has some other, noncodified, policy of allowing such fee waivers, such a policy is irrelevant and not consistent with Due Process. (*See id.* at 1028.)

3. The Planning Staff's Report violates Due Process and should be stricken from the record because the Planning Staff cannot both be an advocate for the Planning Director and a neutral adviser to the City Council.

As in judicial proceedings, the constitutional guarantee of procedural Due Process and fairness applies to administrative hearings before the City Council. (*See Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) Cal.App.4th 731, 737; *Nightlife Partners, Ltd.*

City Council
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v. City of Beverly Hills (2003) 108 Cal.App.4th 81, 90; *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 816.)

The courts have emphasized that it is not enough for a City to show that the decision-makers are unbiased; rather, the entire process has to be fair and also *appear* to be fair. As explained by the *Quintero* court:

“[D]ue process in an administrative hearing also demands an appearance of fairness and the absence of even a *probability* of outside influence on the adjudication.” (*Id.* at 814.) (emphasis in original.)

It is apparent in this matter that the Planning Staff has been so entrenched in advocating for their initial determination, at every level of the process thus far, that they cannot rightly provide unbiased, neutral advice to the City Council. The courts have held that procedural fairness requires “internal separation between advocates and decision makers...to ensure the impartiality of administrative adjudicators,” and this separation extends to the advisors to the decision-makers. (*Morongo Band of Mission Indians*, Cal.App.4th at 737-38; *see also Nightlife Partners*, 108 Cal.App.4th at 91-92; *Quintero*, 114 Cal.App.4th at 813.)

It is obvious that the entire Planning Division Staff has a conflict of interest. With their Director as the appellant, how could they possibly write an unbiased, neutral evaluation of the evidence presented by the Owners? We assume that the Staff Report, like the one for the Planning Commission was written by a Planning Division staffer, with review by others in the Planning Division, possibly including the Planning Director himself and his predecessor, who wrote the original Determination. Anyone in the Planning Director’s chain of command, including his subordinates and superiors, would have a clear conflict of interest.

The bias of the Staff presentation to the Council in the Agenda Packet is apparent from their Staff Report that reads more like a legal brief for the Planning Director, but here are a few examples:

- A) They have agendized the matter only for consideration of a resolution granting the appeal, not even anticipating the possibility that the appeal might be denied.
- B) They provide only one resolution to the Council, to grant the appeal. They do not provide any path for denial (e.g., “If the Council finds certain facts to be true, then the Owners have not discontinued the nonconforming use for a continuous period of one year and the appeal must be denied.”)
- C) In spite of a specific written request from this office, they gave the Council in the Agenda Packet not one of the documents that we had presented to the Planning Commission, not even including our original appeal letter and a subsequent letter from this office presenting our case.
- D) They provide no explanation of the reasoning of the majority of the Commissioners who disagreed with the Staff Determination, nor any explanation of how the Planning Commission erred.

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October 14, 2018

- E) They demean and belittle every single one of the Owners' arguments, with pejorative language (e.g., reference to "mere marketing efforts"). Are we really that stupid?

In *Nightlife*, the plaintiff submitted an application to renew its business permit. The assistant city attorney advised the city and the plaintiff that the application was incomplete and suggested that the city deny the application, which it did. (*Nightlife Partners*, 108 Cal.App.4th at 84.) At the hearing on the plaintiff's administrative appeal, the same assistant attorney acted as counsel to the hearing officer. The court in *Nightlife* affirmed the trial court's holding that the assistant city attorney's active participation in both the renewal application process and the administrative hearing constituted "actual bias." Moreover, the court held that because the assistant city attorney acted "as both an advocate to the city's position and as an adviser to the supposedly neutral decision-maker...there was a clear appearance of unfairness and bias."

The facts and holding in *Nightlife* directly apply here to show that the Planning Staff has overlapped the roles of advocate for the appellant and adviser to the decision-makers. In this matter, as stated at the beginning of the letter, Geomax came to the Planning Staff with an industrial use tenant which Staff rejected through a letter stating their Determination. In fact, the Planning Staff report to the City Council states that, "The primary question before the City Council is whether staff appropriately determined that the Applicant's prior legal nonconforming industrial use of the Property was discontinued for a period of one year or more," demonstrating Planning Staff's direct involvement in the determination on appeal to the City Council.

The Planning Staff then provided a full presentation to the Planning Commission contesting all of the arguments made by Geomax and strongly supporting the determination on appeal to the Planning Commission, as well as the position now presented for appeal by the current Planning Director.

Their bias towards the Appellant Planning Director is so clear that their advice to the City Council cannot be taken as a neutral, objective analysis. Thus the Staff Report must be stricken from the Record, and Staff must not provide advice to the Council in any hearing.

4. The Council must also obtain unbiased legal advice.

The City is represented by an outside law firm as City Attorneys. We cast no aspersions on the firm, which we respect. But we note that the Planning Commission was represented by Partner 1 from that firm, while Partner 2 normally advises the Council. We assume that Partner 1 and/or Partner 2 and/or other Firm lawyers also have been involved in working with Staff on this matter, in connection with helping formulate or review the original Determination, the Staff Report (or the one to the Planning Commission), Staff's testimony, etc. They may also have been consulted in relation to the preparation and/or filing of the appeal by the Planning Director.

We have no direct knowledge of this involvement, but it would be normal for a City Attorneys' office to be so involved in such matters. Assuming any such involvement, no attorney from the Firm may advise the Council at any hearing on this matter.

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October 14, 2018

The cases discussed above deal very specifically with the required separation of the “prosecutorial” and “advice” functions of legal counsel. They must be performed by separate attorneys; an attorney cannot be both prosecutor and advisor, and cannot switch roles from one meeting to the next. (*See, e.g., Quintero*, 114 Cal.App.4th at 817.) A recent case holds squarely that one partner from a law firm cannot act as an advocate in a matter and another one from the same firm act as an advisor to the decision-maker. (*See Sabey v. City of Pomona* (2013) 215 Cal.App.4th 489, 498.)

For the foregoing reasons, we request that:

- 1) The appeal submitted by the Planning Director be dismissed and the Planning Commission decision be allowed to stand.
- 2) If the hearing does go forward, the Staff Report should be stricken from the Record, the Planning Staff not be allowed to participate, and any legal advice to the Council must be provided by a law firm that has not been involved in any way in the proceedings.

We request that this letter be made part of the record.

Very truly yours,

BERLINER COHEN, LLP



ANDREW L. FABER

E-Mail: andrew.faber@berliner.com

ALF

CC: [VIA E-MAIL]

George Quinn

Chris Diaz, Esq., City Attorney

Julia Edmunds-Mares, City Manager

Ned Thomas, Planning Director

Mary Lavelle, City Clerk



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October 15, 2018

[VIA E-MAIL]

City Council
City of Milpitas
455 E. Calaveras Blvd.
Milpitas, CA 95035

City Clerk's Office

OCT 15 2018

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Re: October 16, 2018 Agenda Item #11
Appeal of Planning Commission Determination 1831 Tarob Court
Our File No.: 01475-015

**Owners' Opposition to Appeal by Planning Director that Seeks
to Terminate Existing Industrial Use**

Dear Mayor Tran and Councilmembers:

This letter is submitted on behalf of the Owners, Geomax, to explain our position on the merits in opposition to the Planning Director's appeal of the Planning Commission decision. We have also submitted a letter dated October 14, 2018 objecting to the process on procedural grounds. Nothing in this letter is intended to waive any of our procedural objections.

In this letter, we will explain some of the background of this matter, and the reasons why the Planning Commission correctly decided that the existing legal, nonconforming use of the Property may be continued. We will then discuss each of the points raised by the Staff Report in turn, to demonstrate how they rely upon incorrect factual assumptions and legal interpretations.

Background

Geomax is a local business, a partnership between George Quinn, Jr., and Max Gahrahmat. Some 40 years ago, they bought four parcels of land on Tarob Court (the subject Property, and

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the three parcels immediately south of it on the west side of the street), and built one industrial building on each parcel. Construction has been done with appropriate permits, and applicable fees have been paid to the City. All buildings are well-maintained and attractively designed and landscaped. Geomax has been a good, tax-paying citizen of the City of Milpitas for 40 years. This Property has always been industrial. The building is in excellent condition, and is suitable only for industrial-type uses.

All four buildings have consistently been used for light industrial purposes consistent with their M1 zoning. However, in 2008, the City adopted the Transit Area Specific Plan, which gave all four properties multi-family residential zoning. The TASP does not contain any language preventing existing industrial uses. In fact, it specifically states:

“Existing land uses are permitted to remain in place and continue operations. Existing buildings or land uses which become nonconforming as a result of the new zoning and land use classifications are governed by the provision in the Zoning Code regarding nonconforming buildings and uses.” (p. 3-15).

Thus, while the TASP contemplates an eventual conversion of uses, it is 100% consistent with the intent and policy of the TASP for existing industrial uses to continue. This should be obvious, since owners of such properties have a vested right under the law to continue such uses. In his appeal, the Planning Director states that he “believes that the Planning Commission acted contrary to the goals and policies” of the TASP. But his belief is incorrect: allowing a continuation of existing industrial uses is clearly consistent with the goals and policies of the TASP.

The problem with the TASP for *this* Property is that the TASP shows two roads running right through the Property, one north to south to cross the creek, and one east to west to connect Tarob and Sango Courts. In addition, a 5.1-acre park is shown that would wipe out the Geomax building that abuts the Property to the South. It appears that this Property bears more impact than any other such property in the entire TASP area.

Although the TASP was adopted 10 years ago, the City has undertaken no actions to provide further specifications for these planned improvements, or to acquire the land for them. Since they are area-wide improvements, a developer cannot be forced simply to dedicate the property to the City as the condition of approval of any kind of future development.

The Owners have acted at all times to support the intent of the TASP

It is obvious that the intent of the TASP is to have this area go residential ultimately. The Owners don't disagree.

According to the testimony in front of the Planning Commission, the Owners had leases coming due in the 2015-2017 time frame on these buildings, so they did solicit offers from residential developers. There was a lot of interest. They even went into contract with one company in the year before the tenant of the Property vacated in January 2017. That developer spent a lot of money on the contract and drew up plans, but gave up after learning from the City

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Staff that there were no definite plans regarding the location, timing, or acquisition strategy of the City for the two roads through the Property nor the 5-acre park shown on the TASP right to the south that would also impact the Property. They concluded that development at this time is infeasible, and they walked away after having spent a lot of time and energy to plan a residential development.

And contrary to the statements in the Staff Report about R4 development on this Property, George Quinn was told by the Interim Planning Director a few months ago that there is no way that the City will allow residential use on this Property, because of the potential roads and a possible expanded park usage of the Property by the City (which is not shown on the TASP).

So, the effect of the TASP, and the delays by the City in implementing it, have made the Property unmarketable for residential uses for which it is now zoned.

The Staff Report Misapplies the City's Code on Nonconforming Uses

The Staff Report cites the City's nonconforming use Code Section, but surprisingly does not quote the relevant portion. Thus, Section XI-10-56.03(A)(1), reads in part:

"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."

The omitted Code Section is really important. The term "discontinuation" of a nonconforming use is defined in the next subsection as follows:

"(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..." (emphasis added)

Thus, the criterion for loss of nonconforming uses is solely the discontinuance of the use "for a continuous period of one (1) year or more." Nowhere in the Staff Report is this alleged one-year period specifically identified.

The Staff Report continues to make the fundamental error of concluding that use and vacancy are the same concepts. That is not the case, and the City's Zoning Code very clearly separates the two concepts.

Significantly, the term "use" is defined in the Zoning Code, which states:

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“‘Use’ means the purpose for which land or a building is arranged, designed or intended, or for which either land or building is or may be occupied or maintained.” (Sec. XI-10-2.03)

Furthermore, the same distinction appears in the M1 Zoning District definition: “The M1 Light Industrial District is reserved for the construction, use and occupancy of buildings and facilities....” (Section XI-10-7.01, emphasis added).

Therefore, in order to find that the nonconforming uses have been discontinued, the City Council would have to make findings, supported by substantial evidence in the record that such uses have been discontinued “for a continuous period of one (1) year or more.” Mere vacancy or speculation as to the intent of the owners will not suffice to establish the discontinuance of use.

It would obviously be unfair to adopt Staff’s position that vacancy implies a discontinuation of use, and we cited cases in our appeal letter that stand for this proposition. This Property, like all properties, is subject to market forces. In fact there was evidence presented to the Planning Commission that the median marketing time for buildings in this area of Milpitas and the adjacent business park in San Jose was 490 days (and, of course, since that is the median, half of the listings took longer to market).

The Owners have made ongoing efforts to continue industrial uses

As summarized in my letter to the Planning Commission of September 25, 2018, the Owners have undertaken continuing, substantial steps to market the property for industrial uses. These include:

- When the long-term tenant moved out on Jan. 31, 2017, the Property was immediately listed with two real estate brokerages for industrial use, and remains so listed today. The Property has been shown to a number of prospective tenants.
- The repairs and improvements cost the owners over \$862,000. The plans for the repairs were “APPROVED BY PLANNING DIVISION” on July 18, 2017. The repairs were extensive, since the vacating tenant had been in possession for decades. The Building Department inspected all repairs, and imposed certain added requirements. Their final signoff was on May 24, 2018. The Staff at the Planning Commission implied that these repairs were somehow inconsistent with the existing industrial use. On the contrary, they were necessary to make the building “market ready” for new industrial tenants, after it had been used for chip manufacturing for decades. For example:
 - The existing roof was 40 years old, leaking, and had multiple patches and holes due to the tenant’s roof equipment. It had to be replaced. This does not constitute “increasing the nonconformity” as the Staff Report to the Commission states (p. 8), but rather was necessary in the brokers’ view to market the Property to new industrial users.
 - The bathrooms and exterior access needed updating to comply with Disability Access laws (required by the City).

- Industrial and warehousing tenants need some office space, so provision for such space was made within the existing envelope, without expanding the building.
- These improvements were begun, and many of them completed, by December, 2017.
- The City's final signoff on the improvements was on May 24, 2018, after compliance with City requirements from the Building Department for additional fire alarm and disabled access construction.
- In summary, the improvements to the building are compatible with continued industrial use. They were all permitted by the City and did not constitute an expansion of the structure.

Although the Staff Report to the Planning Commission was incorrect in focusing on intent, in actuality the owners never intended to discontinue industrial use. In fact they continued to negotiate with prospective industrial users throughout 2017 and into 2018. But even if they did so intend, the maximum period of such "abandonment" would be for the six and one-half months of the Stratford license/lease. As soon as Stratford became discouraged by the City and gave up, the owners immediately brought to the City the NIO lease, for EV car computer testing and prototyping, a very clean light industrial use. So under no interpretation was there "discontinuance of the industrial use for a "continuous period of one (1) year or more."

Analysis and Rebuttal of Arguments in the Staff Report

As discussed in our letter of October 14, 2018, the Staff Report for this hearing is far from an objective analysis of the situation. It reads more like a legal brief for the Planning Director's appeal. It is based on suppositions and misstatements of facts and on a faulty interpretation of the City's own Municipal Code. Below we respond to each of the "issues" identified in the Staff Report.

"Background"

The Staff, in discussing the Planning Commission hearing only presents their own argument, and is unfair to the Commission by not fairly summarizing the concerns and reasoning that were expressed by the majority who voted to uphold Geomax's appeal. The Commissioners spent a lot of time on this hearing and asked many questions of Staff and of Geomax.

"Basis of the Council Appeal"

The Staff neglects to say that, as we explained above, the term "discontinuance of use" is defined in the Code as requiring that the use be "*discontinued for a continuous period of one (1) year or more,*"

"Issue #1: Nonconforming Buildings and Uses Ordinance"

This is the crux of Staff's argument. They argue that because the building has been vacant for over a year, the industrial use has ceased. As explained earlier in this letter, that is simply not a proper interpretation of the Zoning Code. The Zoning Code nowhere says "If a nonconforming

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industrial building is vacant for a year, then nonconforming uses cannot be reinstated,” but Staff acts as though it does (and frankly, if the Code did so state, it would probably be struck down by the courts as unconstitutional).

Staff derides the Owners’ efforts to invest in the building for industrial use, market the building, and negotiate with industrial users as “mere marketing efforts.” This is a very “ivory tower” view of property management that finds no support in the record. The evidence is uncontradicted that the Owners have not discontinued the industrial use for a continuous period of one year.

“Issue #2: The meaning of “use” in the context of the Nonconforming Buildings and Uses Ordinance”

Staff asserts the definition of “use” in Zoning Code Sec. XI-10-2.03 does not apply to nonconforming uses. This conclusion comes out of the blue and finds no support in the Zoning Code itself. There is no separate definition of “use” as applied to a nonconforming use, and Staff cannot simply create one in order to win their case here.

“Issue #3: City permitting process for building repairs and maintenance”

At the Planning Commission, we were specifically asked by a Commissioner whether the Planning Staff was aware of the repairs and improvements proposed by the Owners. In response, we entered into evidence the face page of the Plan set that showed “APPROVED BY PLANNING DIVISION 7/18/17.” All \$862k of repairs and improvements were done with knowledge of the Planning Staff, and with appropriate permits from the Building Department, which finally signed off on them in May 24, 2018. For some reason, the Staff wants to minimize their knowledge of these extensive investments being made by the Owners to make the building attractive and market ready for industrial tenants.

“Issue #4: Stratford Schools’ efforts to pursue a nonindustrial use via Conditional Use Permit application”

The Staff Report misinterprets the cause and effect of the six-month Stratford license/lease. The Owners were approached by Stratford initially to use one-half of the building for records storage, and to use the small office space for a pre-school. Agreeing to this, in the Owners’ minds, did not constitute abandoning industrial uses. They and their brokers have been involved with many properties in which tenants store records, supplies, furniture, cars, etc., all under the rubric of industrial uses.

The Staff Determination that such use would not constitute “warehouse and wholesale” use is unsupported, in that “warehouse and wholesale” is not a category understood in the real estate world. Presumably it just means no retailing out of the warehouse, which would be typical for a company storing its own supplies or records.

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In any event, the Stratford license/lease was for warehouse use and was believed by the owners to be for nonconforming industrial use. In fact that is the substance of the claim made by George Quinn that is rebutted in the Staff Determination that Geomax appealed. This is based on his experience as a developer and broker. He and Max Gahrahmat have a lot of experience developing warehouse properties. Perhaps he is incorrect -- at least as the Code is interpreted by City Staff -- but it is certainly true that he had no intent to abandon industrial uses.

Furthermore, Stratford never actually moved into the Premises. Their lease was only for six months, and they gave it up when they became discouraged by the Staff's requirements for them to obtain a use permit. Evidence presented to the Planning Commission also showed that the Owners were negotiating with a machine shop to use the Property in December 2017, and as soon as Stratford terminated the lease in June, 2018, the brokers brought in the pending NIO offer.

“Issue #5: Availability of economically viable conforming use of the property consistent with the R4 zoning and the TASP”

Staff cites to other residential development in the neighborhood, but ignores the fact that those other properties are not burdened by having roads shown on the TASP that would take a majority of the available land area, nor a 5-acre park.

The cited conversations with developers are meaningless. Sure, they might be interested in the Property at some time in the future if the City (i) decides where the roads will go and how much land will be chewed up by them, (ii) decides when the City will acquire the property, (iii) decides whether the City will pay fair market value, or try to coerce a partial dedication from a developer, and (iv) the City amends the TASP to not take the five acres for a park. George Quinn had actually talked to all three of the named companies in his efforts to do residential marketing of the Property.

As explained above, the Owners tried to attract residential developers. At this time, there are no viable R4 uses for the Property. At some point in the future, when the City starts to implement this part of the TASP and resolves the issues mentioned in the preceding paragraph, residential development might be possible if any of this Property is left over. But the City cannot force the Owners to keep the Property vacant in the meantime; that would clearly be illegal as a taking of property without just compensation. In fact, the proposed 5-year NIO lease would allow the Owners to continue to use the property, while giving the City time to decide how it wants to proceed.

The proper conclusion is that not allowing industrial uses to continue will amount to a taking of all economic uses of the Property.

“Issue #6: Implications of failing to enforce the legal Nonconforming Use Ordinance”

The Staff argues for “rigorous” enforcement of the nonconforming use ordinance, as though the Owners are some kind of scofflaws that need to be reined in. Instead, however, the Staff should be advocating “fair” enforcement of the ordinance, consistent with the words of the TASP and of the Owner's vested right accumulated through 40 years of good stewardship of their Property.

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Staff also argue that the light industrial uses will be incompatible with new residential uses. But the TASP doesn't say that at all; rather the TASP allows existing uses to remain, consistent with the Zoning Code. The proposed use by NIO is a clean, indoor, high tech operation. And nowadays good planning typically does allow such a mix of uses, to encourage live-work villages and reduce vehicle miles traveled. In fact, the TASP is working well in this area; as Staff notes, there has been considerable transit-oriented residential development nearby. It will work best if it is administered fairly, and if the City decides what it wants to do with the planned roads and park.

We request that this letter be made part of the record. Assuming we are given sufficient time to present our case, all statements of fact herein either are supported by the extensive record in front of the Planning Commission, or will be adduced at the Council hearing.

Very truly yours,

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