



CITY OF MILPITAS AGENDA REPORT (AR)

Item Title:	Conduct a Public Hearing and Consider Adoption of Resolution of the City Council Upholding the Planning Director's Appeal and finding that the nonconforming industrial use at 1831-1841 Tarob Court was discontinued for a continuous period of more than one year, and in accordance with City of Milpitas Municipal Code Section XI-10-56.03(A), cannot be replaced with a different nonconforming industrial use
Category:	Public Hearings-Community Development
Meeting Date:	8/13/2019
Staff Contact:	Ned Thomas, Planning Director, 408-586-3273
Recommendations:	<ol style="list-style-type: none">1) Conduct a public hearing and move to close the hearing following comments.2) Consider the Exemption in accordance with the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines Section 15378(b)(5) (Not a Project).3) Adopt a resolution upholding the Planning Director's appeal and finding that the previous nonconforming industrial use located at 1831-1841 Tarob Court was discontinued for a continuous period of more than one year, and in accordance with City of Milpitas Municipal Code Section XI-10-56.03(A), cannot be replaced with a different nonconforming industrial use.

Background:

On July 19, 2018, George L. Quinn Jr. (the "Applicant") contacted the Planning Department seeking approval to lease the property at 1831-1841 Tarob Court (the "Property") to an electric car manufacturer. Prior to adoption of the Transit Area Specific Plan (TASP) in 2008, the City's General Plan had designated the subject site for industrial uses. Concurrent with the adoption of the TASP in 2008, the City Council also rezoned the property to Multi-Family Very High Density Residential (R4).

A car manufacturer is not an allowable use in the R4 Zoning District. Therefore, the property owner sought to install the car manufacturing use pursuant to the Nonconforming Buildings and Uses provisions in the Milpitas Municipal Code Section XI-10-56.03 (Discontinuation of Nonconforming Use), which states that if a nonconforming use at a particular site has been discontinued for a period of less than one (1) year, it may be replaced with a nonconforming use of the same use classification as a matter of right. In this case, staff found that more than one year had passed since the most recent legal nonconforming industrial tenant vacated on January 31, 2017. However, the Applicant asserted that the cessation of nonconforming use was interrupted by a short-term lease with Stratford Schools, commencing on December 13, 2017, which purportedly established a warehousing/wholesale use of school record storage that ended the cessation of a period of industrial use onsite. Thereafter, Stratford Schools applied for a Conditional Use Permit (CUP) to establish a school use, and that application was later withdrawn. Apart from the Stratford School, the Property has been vacant since January 2017.

On August 3, 2018, the Planning Department issued a letter of determination rejecting the Applicant's interpretation of the Municipal Code (see Attachment F). Staff determined that use of the premises for records storage did not qualify as a warehousing use within the meaning provided in the Municipal Code and, therefore, was not a legal nonconforming use. Staff concluded that since the last known industrial use of the building was discontinued as of January 31, 2017, the prior nonconforming use of the site was discontinued for a continuous period of more than one (1) year or and could only be replaced with a conforming use.

On August 14, 2018, the Applicant appealed staff's determination to the Planning Commission. The Applicant did not dispute Staff's interpretation rejecting Stratford Schools' onsite storage as a continuation of legal conforming industrial uses. Instead, the Applicant argued that, despite the site's extended vacancy and the fact that no industrial tenant had used the site since January 2017, a series of deferred maintenance and tenant improvements undertaken while the Property was vacant during 2017 and 2018 constituted a "continued" industrial use of the property.

On September 26, 2018, the Planning Commission held a public hearing to consider the Applicant's appeal. It was undisputed that no industrial user had operated on the site since the last industrial tenant vacated the premises in January 2017; however, in his appeal before the Planning Commission, the Applicant asserted that above-referenced maintenance and tenant improvements, together with listing the Property for purposes of securing an industrial tenant, amounted to an ongoing "industrial use" of the vacant site, thereby preserving its legal nonconformity. Staff disagreed with this assertion in that maintenance, tenant improvements, and marketing are not equivalent to the "industrial use" of a property, and these criteria are not included in the Municipal Code for the purpose of determining the continuation of a non-conforming uses. In addition, there has been no dispute that industrial use of the Property is nonconforming and has been since the 2008 TASP adoption and associated rezoning, nor has the Applicant asserted that he lacked proper notice and knowledge of the Property's TASP designations and current zoning. Nevertheless, at the conclusion of the public hearing, the Planning Commission voted to uphold the appeal and overturn Staff's August 3, 2018 determination.

On September 27, 2018, the Planning Director filed this appeal (the "Council Appeal") of the Planning Commission's September 26 decision on the grounds that the Planning Commission improperly approved an expired nonconforming use contrary to the Milpitas Municipal Code Section 56 - Nonconforming Buildings and Uses. The Planning Commission's decision fails to enforce the City's adopted and established nonconforming use regulations, which, as stated in the Council Appeal, is contrary to the goals and policies of the TASP and prevents its timely implementation (see Attachment B). The Planning Director's appeal was scheduled for public hearing before the City Council on October 16, 2018, but the item was subsequently withdrawn because the property owner and the City entered into negotiations for purchase of the property by the City for planned roadway improvements. Those negotiations continued through June 2019 until the applicant abruptly withdrew from the discussions due to a disagreement over the cleanup of contaminated soils on the site.

Basis of the Council Appeal:

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, as specified in Milpitas Municipal Code Section XI-10-56.03. Section XI-10-56.03 provides that "[a] legally established use that is no longer permitted in a particular zoning district because of a modification of [the Zoning Code] shall be allowed to continue indefinitely, *absent discontinuation of the use for a year or more.*" (Emphasis added). As outlined below, this Council Appeal addresses several issues relevant to the Council's determination regarding this primary question.

Issue #1: Nonconforming Buildings and Uses Ordinance

A legal nonconforming use refers to a use that was legal for a particular site at the time it was instituted, but which does not conform to subsequently enacted zoning or other regulations. Cities and counties commonly establish legal nonconforming use ordinances and regulations to establish parameters for the continuation of nonconforming uses while encouraging conversion to conforming uses. Consistent with these principles, the City's legal nonconforming use ordinance, per Milpitas Municipal Code Section XI-10-56, *et seq.* (the "Ordinance"), provides a set of guidelines to assist property owners in managing the eventual transition of their existing nonconforming uses to uses that conform to the current zoning classifications.

Essentially, the Ordinance provides a narrowly tailored exception to ordinary rules governing permitted and conditionally permitted uses under the City's Zoning Code. In that vein, the Ordinance clearly encourages *conforming* uses, while recognizing that until nonconforming buildings, structures and uses are converted, improvements to them which promote their compatibility with their neighborhoods, enhance the quality of

development, and do not increase nonconformity should be encouraged and allowed.” (See Milpitas Municipal Code Section XI-10-56.01).

Here, despite the absence of continuing industrial activities onsite, the Applicant has asserted that industrial uses did not cease for more than a year because building improvements and listing the Property for leasing during the course the site’s vacancy amounts to an ongoing industrial use.

Staff does not agree with this interpretation of the Nonconforming Buildings and Uses Ordinance. Nothing in the Ordinance specifies nor contemplates the activities the Applicant describes as a demonstration of the continuation of legal nonconforming uses. Although the Ordinance allows routine maintenance and repairs of nonconforming buildings or structures, it does not suggest that merely undertaking such actions constitute continuation of the legal nonconformity. Regarding the Applicant’s building and maintenance activities, the Ordinance allows such improvements only as a **limitation** on ongoing conforming uses, **not** evidence that an otherwise discontinued nonconforming use is ongoing. (See Milpitas Municipal Code Section XI-10-56.02).

The Ordinance’s intent and purpose is to enable existing nonconforming uses to continue without expansion or alterations that enhance their permanence. To that end, the Ordinance specifies that any repairs, maintenance or aesthetic improvements are allowed “provided that no structural alterations shall be made except those required by law or ordinance.” (See Milpitas Municipal code Section XI-56.02.A).

Similarly, the Applicant has provided no support for his assertion that listing the Property for potential leasing with an industrial tenant amounts to a continued industrial use of the site. Neither the Ordinance nor the cases cited in the Applicant’s Planning Commission appeal suggest that mere marketing efforts (nor those efforts coupled with the Applicant’s maintenance and other improvements) constitute a continuation of legal nonconforming uses. Although the Applicant’s attempts to obtain an industrial tenant may show his intermittent interest in continuing an industrial use if one could be secured, they do not constitute a continuation of the industrial use itself. The Applicant’s evidence of a listing agreement with a commercial brokerage, the posting of a “for lease” sign for an industrial user at the Property, or a letter of intent with a prospective tenant that never proceeded to a signed lease agreement do not alter this conclusion. To the extent the Applicant’s intentions might be relevant, the facts show his intent to abandon industrial uses when Stratford Schools leased the Property and commenced an application process to convert the site to nonindustrial school uses (see Issue #4 on the next page).

Under the Ordinance, where legal nonconforming uses cease, a property owner has a one year period to institute a new legal nonconforming use in order to continue its legal nonconforming status. If the owner fails to do so, the legal nonconforming status lapses and ordinary rules governing permitted and conditionally permitted uses apply. The Ordinance does not contemplate that routine maintenance or unsuccessful efforts to market the property amount to a continuation of the legal nonconforming use or extend the one year period for re-instituting a ceased use.

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

At the September 26, 2018 Planning Commission meeting, the Applicant’s attorney, Andrew L. Faber, asserted that the Applicant’s above-described building and marketing activities constituted a continued industrial use under the Zoning Code’s general definitions. Specifically, the Applicant asserted industrial use of the Property continued because Milpitas Municipal Code XI-10-2.03, defines “use” as “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.” Because this definition does not “require” occupancy, the Applicant has asserted that mere “maintenance” amounts to continued industrial use.

Staff disagrees with the Applicant’s interpretation. Although the Code’s general definition does allow maintenance to occur within any “use” category, it does not suggest that mere maintenance constitutes continuation of a particular use. This provision merely recognizes that occupation or maintenance activities to support an underlying allowed use, such as industrial, commercial, residential, also are allowed. It does not mean that such activities alone perpetuate that use, particularly when the underlying use is nonconforming.

As described above, a legal nonconforming use is an exceptional category of uses, subject to very specialized restrictions that are designed to discourage permanency of the nonconformity. The Municipal Code's general definition of "use" does not, and is not intended to, address the peculiarities of legal nonconforming uses, which are specifically addressed in Section 56 - Nonconforming Buildings and Uses ordinance of the Milpitas Municipal Code.

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

In its appeal before the Planning Commission, the Applicant implied that Planning Department staff were aware of the repairs and maintenance that were made to the Property in 2017 and 2018. Apparently, the Applicant hoped this would lead to an inference that the City staff implicitly authorized or endorsed these alterations for purposes of prolonging the nonconforming use of the building. There is no factual support for this inference. Whether or not Planning staff are called upon for review depends on the nature of the changes being proposed by an applicant. In the interest of streamlining the permitting process, interior tenant improvements such as plumbing and electrical work or the replacement of a roof do not require discretionary Planning review nor a building permit plan check by Planning staff. Any City review of the permit requests would not likely have revealed any particular intent regarding the use of the Property, but even if it had, the fundamental facts underlying this Council Appeal are unchanged. The Applicant's pursuit of the improvements, permitted or not, did not constitute continuation of the industrial legal nonconforming use of the Property.

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

Throughout the course of the Applicant's appeal to the Planning Commission, the Applicant repeatedly asserted that pursuit of a new industrial tenant and improving the Property for continuation of nonconforming industrial use has been the Applicant's objective since the last industrial tenant vacated the site in January 2017. This argument apparently was advanced in an effort to show that the Applicant had not intended to abandon his industrial uses, even though he had not actually continued them. The evidence, however, shows that the Applicant did intend to abandon further industrial use of the Property and install Stratford Schools as a nonindustrial, conforming, conditionally permitted use in the R4 zoning designation. As noted above, the Applicant leased the Property to Stratford Schools on December 13, 2017 on a month-to-month term. Then, on February 8, 2018, Stratford Schools, applied for a Conditional Use Permit (CUP) to operate a school on the Property, a conditionally permitted use in the R4 zoning district. Ultimately, Stratford Schools withdrew their CUP application on June 29, 2018 after deciding not to undertake the California Environmental Quality Act (CEQA) study that would be required for the project. Nonetheless, the Applicant's support for Stratford Schools plans for the Property clearly demonstrate the Applicant's willingness and desire to abandon the previous industrial use.

Issue #5: Availability of economically viable conforming use of the Property consistent with the R4 zoning classification and the TASP

In his appeal to the Planning Commission, the Applicant asserted that Staff's determination that the legal nonconforming industrial use had lapsed deprived the Property of all economically viable use. Staff sees no basis for this assertion. At this juncture, there is no reason to believe that the Property cannot be developed as prescribed by the TASP development standards for Multi-Family Very High Density Residential (R4). The Applicant asserts that the TASP-planned extension of Milpitas Boulevard which would bisect the Property precludes such development; however, Staff is optimistic that a successful residential proposal could be developed. As of the writing of this report, the Planning Department has not received any residential development proposals from the Applicant nor have they been approached for any preliminary conversations.

The City remains receptive to any proposal for conforming use development on the Property, as evidenced by adjacent properties to the site either entitled for R4 development or that are currently under development. These developments include 355 Sango Court, a 100-unit affordable housing project directly west of the property and 1980 and 1992 Tarob Court and 551 Lundy, where construction has already begun for approximately 200 townhomes.

In an attempt to ascertain whether the multifamily residential development community would be interested in developing the Property, Staff spoke with representatives from DR. Horton, True Life Companies and Summerhill Homes who all agreed that there was residential development potential on the site even after a portion of the Property was dedicated to roadway construction.

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

In his September 26 appeal hearing, the Applicant persuaded the Planning Commission that his maintenance and marketing activities demonstrated sufficient evidence of continued industrial use to allow such nonconforming uses to proceed into the future. In this Council Appeal, Staff believes that the Planning Commission decision erred in failing to rigorously enforce the Nonconforming Buildings and Uses Ordinance despite significant evidence and legal support for Staff's determination that the Property's legal nonconforming status had lapsed under the terms of the Ordinance in the Municipal Code.

The potential adverse consequences of failing to rigorously enforce the Ordinance and the Municipal Code are worth noting. As discussed above, the Ordinance is intended to facilitate the transition of nonconforming uses to conforming uses. The importance of fulfilling this intention is particularly apparent in the TASP area, where the future of the surrounding neighborhood and the ultimate buildout of high density residential uses within walking distance of the BART station and ultimately, the realization of the goals of the greater TASP require the eventual conversion of nonconforming uses. The neighborhood surrounding the Property is rapidly transitioning from former industrial uses to residential uses as prescribed by the TASP. Fundamentally, the noise, odors, vibrations and traffic patterns of industrial uses are incompatible with the residential community already in use or under construction. To interpret the Ordinance in a manner that allows the Property's lapsed industrial nonconforming use to resume could establish a virtually permanent state of land use incompatibility in this important planning area.

Notwithstanding the TASP goals and the on-the-ground land use transition that is occurring in TASP area, if the Applicant demonstrated that legal nonconforming uses had not been discontinued for over a year, the industrial uses could proceed consistent with the Nonconforming Buildings and Uses Ordinance. But, as expressed in this Council Appeal, Staff does not find that to be the case. As a result, in Staff's view, it would be an error to uphold the Planning Commission's incorrect interpretation of the Nonconforming Buildings and Uses Ordinance in the Municipal Code and its application to the Property.

Conclusion: For the reasons described in this report and as demonstrated in the record before the Council, Planning staff recommends the City Council adopt a resolution reversing the Planning Commission decision and upholding the original Planning Department determination that the nonconforming industrial use at the subject property had been discontinued for a continuous period of more than one year, and in accordance with City of Milpitas Municipal Code Section XI-10-56.03(A), cannot be replaced with a different nonconforming industrial use at 1831-184 Tarob Court in the Transit Area Specific Plan. All of these properties were rezoned from industrial to residential in the adoption of the TASP.

Policy Alternative:

Alternative 1: Concur with the Planning Commission's decision and allow the subject site to be occupied by a new nonconforming use consistent with its previous use prior to adoption of the Transit Area specific Plan.

Pros: None.

Cons: Doing so is inconsistent with the City's Municipal Code. Further, there is a high risk of potential land use conflicts between an industrial use at the subject site and the surrounding residential uses.

Reason not recommended: The duly adopted Transit Area Specific Plan designates the subject site for high density residential development based on its proximity to the new Milpitas BART Station. The decision by the Planning Commission is contrary to the principles of effective land use planning and TASP implementation.

Recommendations:

1. Conduct a public hearing and move to close it following comments.
2. Consider the exemption in accordance with CEQA.
3. Adopt a Resolution to reversing the Planning Commission decision and upholding the original Planning Department determination that the previous nonconforming industrial use located at 1831-1841 Tarob Court was discontinued for a continuous period of more than one year, and in accordance with City of Milpitas Municipal Code Section XI-10-56.03(A), cannot be replaced with a different nonconforming industrial use.

Attachments:

- A. Resolution for Approval of Planning Director's Appeal
- B. Resolution for Denial of Planning Director's Appeal
- C. Appeal Form
- D. Planning Commission Staff Report 9/26/2018
- E. Planning Commission Meeting Minutes 9/26/2018
- F. Staff Letter of Determination 8/3/2018
- G. Applicant's Appeal of Staff Determination 8/14/2018
- H. Geomax Attorney Letter to Council 10/14/2018
- I. City Attorney's Response to Geomax Attorney Letter to Council 10/14/2018