



# City of Palo Alto

## City Council Staff Report

(ID # 9960)

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**Report Type: Action Items**

**Meeting Date: 4/1/2019**

**Summary Title: Grandfathered Facilities Ordinance (First Reading)**

**Title: PUBLIC HEARING: Adoption of an Ordinance Amending Section 18.18.120 (Grandfathered Uses and Facilities) of the Palo Alto Municipal Code to Adjust Regulations Pertaining to Noncomplying Facilities. California Environmental Quality Act (CEQA): This Ordinance is Within the Scope of the Comprehensive Plan. Environmental Impact Report (EIR) certified and adopted on November 13, 2017 by Council Resolution No. 9720; the Ordinance is Also Exempt From Environmental Review Under CEQA Guidelines Sections 15061(b)(3) and 15305**

**From: City Manager**

**Lead Department: Planning and Community Environment**

### **Recommendation**

Staff recommends the City Council adopt on first reading the attached ordinance amending Section 18.18.120 of the Palo Alto Municipal Code to allow non-complying (grandfathered) facilities in the Commercial Downtown zoning district to convert an existing use to another permitted use, except for a conversion from residential uses to non-residential uses. The attached ordinance requires a property owner asserting that the City's regulations are pre-empted by state or federal law to provide documentary evidence sufficient to support that assertion and creates a process for the City Council to consider a waiver of such regulations.

### **Executive Summary**

The subject ordinance modifies regulations that restrict the type of land uses that are permitted in noncomplying buildings Downtown. A noncomplying building is one that does not meet current development standards, such as height or maximum floor area. Downtown has regulations that are different from other parts of the City. Current Downtown regulations preclude the change from one land use to another in a noncomplying building. This is a relatively new requirement and is believed to have been adopted initially as result of an administrative error that occurred in 2016. Prior to this time, land uses in noncomplying

buildings could be replaced with any other permitted or, if approved, conditionally permitted use. The subject ordinance corrects this apparent error while furthering the City's policy in support of preserving housing.

The Planning and Transportation Commission recommended that the non-complying (grandfathered) facilities provision be amended to allow such facilities to convert existing uses to other uses consistent with the zoning, except for the conversion of existing housing units to any non-residential use. The PTC further recommended the removal of a provision in the attached ordinance allowing the City Council to consider a property owner's assertion that the City's regulations conflict with State law. Staff recommends retention of this provision to preserve City control over the application of its land use regulations and to support the City's position in the event of litigation.

### **Background**

The zoning code regulates the size and use of property in the City. Overtime, with changes in policy direction, codes are amended and some buildings or uses no longer comply with the zoning code. When this occurs, the building or use is considered noncomplying (other terms include nonconforming and grandfathered). The zoning code anticipates these conditions and generally allows for the limited continuation of such buildings or uses. Palo Alto treats noncomplying buildings and uses differently in the Downtown district than it does for the rest of the City.

In 2016, a large number of amendments were made to the zoning code, including the chapter regulating Downtown noncomplying buildings (also called facilities) and uses. The written form in which amendments are typically presented to decision-makers is by showing the existing regulatory text and using a strikeout format for text being deleted and underlining for text being added. The 2016 text amendment to the noncomplying facilities language sought to memorialize prior Council direction related to minor changes in the building envelope (size/area) of noncomplying buildings. However, other text was changed without being shown in strikeout or underline formatting. This language prevents a Downtown property owner from changing the type of land use that exists in a noncomplying building to another use. For instance, a restaurant is not able to convert to a retail store, despite both uses being permitted by the code and having the same parking requirement. Although the new language was duly enacted by the Council, because the change was inadvertent, no policy discussion occurred at that time.

Staff learned of this apparently inadvertent change last summer and first proposed to restore the code to the original language at the City Council's December 10, 2018 meeting<sup>1</sup>. Staff

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<sup>1</sup> Staff report: <https://www.cityofpaloalto.org/civicax/filebank/blobdload.aspx?t=62472.03&BlobID=67962>  
Minutes: <https://www.cityofpaloalto.org/civicax/filebank/documents/68556>

presented a temporary ordinance to Council without a recommendation from Planning and Transportation Commission (PTC) to allow Council action before the end of the year. Staff worked on this timeline to provide the Council with an opportunity to expedite a resolution for the large number of Downtown properties<sup>2</sup> unexpectedly impacted by this language and to allow the Council the option of responding to a time-limited offer from a specific property owner affected by this language to provide certain benefits to its tenants. City Council, in its review, declined to act on the temporary ordinance and directed staff to present a permanent ordinance to the PTC. Council also directed that the ordinance include a restriction on the conversion of existing residential uses to a non-residential use as well as an exception that allows a waiver from this provision upon a finding that the requirement violates State law.

### Planning and Transportation Commission Review

On January 30, 2019<sup>3</sup>, the PTC conducted a public hearing and considered an ordinance that reflected Council's direction. In its review, the PTC recommended non-residential uses in non-complying buildings be allowed to convert to other permitted or conditionally permitted uses. The Commission also supported the policy to restrict existing housing units from converting to non-residential uses. However, the Commission did not favor legislating a waiver or similar process to address the potential for pre-emption by state or federal law.

During its deliberation, although staff provided general advice favoring a waiver process, the Commission expressed frustration with staff's inability to provide analysis of specific legal risks in a public forum. In the absence of this information, the PTC approved another motion encouraging the City Council to receive a legal opinion regarding the proposed waiver provision. The City Attorney's Office received this request and will respond as appropriate to the City Council.

### **Discussion**

The attached ordinance amends Palo Alto Municipal Code (PAMC) section 18.18.120 (b)(2). This is the section that regulates noncomplying buildings in the Downtown and presently prohibits the conversion of an existing use to any other permitted, or conditionally permitted use. The subject ordinance would amend section 18.18.120(b) to allow noncomplying buildings to

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<sup>2</sup> The City has 257 CD zoned properties (not include airspace subdivisions). Staff estimates that over 40% of those properties exceed the maximum floor area ratio (FAR) allowed in the district, which is 1.0 for commercial and 1.0 for residential, or 2.0 for a mixed-used development. Properties that received transferred development rights, or TDRs, may extend up to a maximum 3.0 FAR. Twelve (12) Downtown properties contain multi-family residential housing units in mixed-use or stand-alone buildings and provide 188 units (plus an additional 54 condominium units). This unit count does not include two-family or single-family homes. Four properties are listed as an historic resource containing 141 units; two of these properties exceed allowed FAR and contain 121 residential units.

<sup>3</sup> Staff report: <https://www.cityofpaloalto.org/civicax/filebank/documents/68694>  
Draft minutes: <https://www.cityofpaloalto.org/civicax/filebank/documents/69663>

convert to any other permitted or conditionally permitted use, except that nonconforming buildings in residential use would be prohibited from converting to non-residential uses. An excerpt of the ordinance is provided below:

18.18.120 Non-complying (Grandfathered) Uses and Facilities

...

(b) Non-complying (Grandfathered) Facilities

- (1) Any noncomplying facility existing on August 28, 1986 and which, when built, was a complying facility, may remain as a legal noncomplying grandfathered facility and shall not be subject to the provisions of Chapter 18.70.
- (2) The legal noncomplying grandfathered facilities in subsection (1) shall be permitted to remodel, improve, or replace site improvements on the same site ~~for continual use and occupancy, by the same use,~~ provided such remodeling, improvement, or replacement complies with all of the following:
  - (A) shall not result in increased floor area;
  - (B) shall not relocate below grade floor area to above grade portions of the building;
  - (C) shall not result in an increase of the height, length, building envelope, building footprint, or any other increase in the size of the improvement;
  - (D) shall not increase the degree of noncompliance, except pursuant to the exceptions to floor area ratio regulations set forth in Section 18.18.070;
  - (E) The Director may approve minor changes to the building's footprint, height, length, and the building envelope through Architectural Review of minor aesthetic architectural improvements and to improve pedestrian-orientation provided there is no increase to the degree of any non-complying feature.
  - (F) The residential portion of any legal noncomplying facility shall not be converted to a non-residential land use or reduced in area or number of units. An applicant asserting that the operation of this subsection (F) is preempted by state or federal law shall submit a statement of its position with all supporting documentary evidence at the time it applies for a change of use. The City Council shall hold at least one noticed public hearing in accordance with the procedures set forth in PAMC 18.77.080 to consider

whether to waive or adjust the requirements of one or more provisions of Titles 18 or 21. The City Council may seek additional information including, without limitation, third party peer review paid for at the applicant's expense.

The portion of the text being deleted in subsection (2) restores the code to the pre-2016 standard. This amendment provides the path for Downtown property owners with noncomplying buildings to change from an existing use to another permitted or conditionally permitted use. It addresses issues currently experienced by numerous properties, including the former Cheesecake Factory and the former North Face site. It also provides clarity for a majority of other Downtown properties that currently do not comply with today's development standards. The first sentence of subsection (F) prohibits the conversion of a residential use in a noncomplying building to a non-residential use and prevents a reduction to the number of housing units.

The remaining sentences in subsection (F) establish a waiver process, of the type that the Council directed and the Planning Commission objected to. With respect to the Commission, staff contends a waiver provision is in the best interest of the City and the public and recommends that the Council enact it.

In general, it is permissible for a city to prohibit converting from residential to non-residential uses. In practice, however, a restriction of this type will often apply in combination with other local laws that further restrict changes in land uses. These might include, for example, historic preservation requirements and restrictions on converting rental housing to ownership housing (often called "condo conversion" restrictions). If a property owner claims that the combination of City regulations, as applied to that owner's property, violates the owner's rights under pre-emptive state or federal law, the waiver provision in subsection (F) will serve several important purposes.

First, a waiver provision will require the property owner to present all of its claims and supporting evidence to the City Council first, for the Council's evaluation and consideration, before seeking relief in Superior Court. This gives the City Council and the public it serves the opportunity to fully understand the arguments and evidence of a property owner who claims local law violates its rights. And if litigation is filed later, the City can seek to limit the scope of the dispute to evidence submitted to the City as part of its administrative hearing.

Second, and most important, if the Council is persuaded during the administrative hearing that the combination of City land use regulations acts to impermissibly burden or violate pre-emptive state or federal law, the City Council will have an opportunity to decide how to adjust City land use regulations to comply with state and federal law *while also advancing the public*

*interest to the maximum extent possible.* In other words, where there is a legal problem, it is often the case that there is more than one way to solve it. As the elected representatives of the community, the City Council is in the best position to understand and give expression to the community's best interest. Therefore, it is the Council, not the property owner or the court, that should have the first and primary opportunity to fashion a solution, with the public interest foremost in mind. The waiver provision gives the Council this opportunity. Without the waiver provision, the property owner would skip the Council and go straight to court, where the legal issues and proposed remedies would be framed by the property owner and potentially determined by the court. The City would be a represented party but likely not in a decision-making role.

Finally, the waiver provision will protect the City's laws from "facial" challenge, a kind of challenge that often can be filed quickly, based solely on the language of an ordinance. With the waiver language, a property owner who claims they are harmed by the City's laws will need to establish a violation of their rights based on the facts of a specific development application (often called an "as applied" challenge). By removing one type of potential challenge, the waiver provision may bolster the City's ability to defend its local laws against legal challenge.

Whether to include a waiver provision is a policy decision for the Council to make.

### **Policy Implications**

The ordinance seeks to restore a prior regulatory framework that appears to have been inadvertently changed several years ago. The policy is also updated to reflect the City's interest in preserving housing opportunities. While not supported by the PTC, the ordinance includes a waiver provision that allows the Council to consider adjustments to the zoning code or subdivision law in the event an owner persuades the Council that the new policy impermissibly burdens or violates pre-emptive state or federal law. Without the waiver, staff is concerned the ordinance is at a higher risk of a receiving a facial challenge and that a resolution to any particular property would be decided by a Court as opposed to the City Council.

### **Resource Impact**

Land use policy influences how property is used and those decisions may result in adjustments to various taxes and permit fees collected by the City. This ordinance, however, restores and updates a long standing city policy and is not anticipated to have a significant budgetary or fiscal impact.

### **Timeline**

Following adoption of the subject ordinance, staff will return one more time to present the second reading of the ordinance on Council consent calendar. Thereafter, the ordinance would be effective on the 31<sup>st</sup> day following second reading adoption.

**Environmental Review**

Because staff was unaware of the language restricting changes in use at the time, the Comprehensive Plan Environmental Impact Report (EIR) was prepared assuming that non-complying facilities could freely convert to other permitted uses. As a result, this proposed ordinance is within the scope of the Comprehensive Plan EIR certified and adopted on November 13, 2017 by Council Resolution No. 9720. Alternatively, the Ordinance is exempt from environmental review under CEQA Guidelines Sections 15061(b)(3) and 15305.

**Attachments:**

**ORD Amending PAMC Section 18.18.120 (CD-C - Grandfathered Uses and Facilities) March 2019 (DOCX)**

**\*\* NOT YET ADOPTED \*\***

*DRAFT*

Ordinance No. \_\_\_\_\_

Ordinance of the Council of the City of Palo Alto Amending Section 18.18.120 (Grandfathered Uses and Facilities) of Chapter 18.18 (Downtown Commercial District) of Title 18 (Zoning) of the Palo Alto Municipal Code (PAMC) to Adjust Regulations Relating to Noncomplying Facilities.

The Council of the City of Palo Alto ORDAINS as follows:

**SECTION 1.** Findings and declarations. The City Council finds and declares as follows:

- A. Section 18.18.120 of the Palo Alto Municipal Code governs permissible noncomplying uses and facilities in the Downtown Commercial zone district.
- B. In 2016, the provisions of Section 18.18.120 governing noncomplying facilities seeking to remodel, improve, or replace site improvements were updated to: 1) allow minor modifications to building envelope through Architectural Review; and 2) require that such facilities maintain continual use and occupancy for the same use.
- C. The requirement that noncomplying facilities maintain continual use and occupancy for the same use has resulted in potentially unintended consequences, including the inability to change among similar permitted and conditionally permitted uses in noncomplying facilities, such as a change from eating and drinking services to retail uses.

**SECTION 2.** Section 18.18.120 (Grandfathered Uses and Facilities) of Chapter 18.18 (Downtown Commercial (CD) District) of Title 18 (Zoning) is hereby amended to read as follows:

**18.18.120 Non-complying (Grandfathered) Uses and Facilities**

(a) Non-complying (Grandfathered) Uses

- (1) The following uses and facilities may remain as legal noncomplying (grandfathered) uses, and shall not require a conditional use permit or be subject to the provisions of Chapter 18.70:
  - (A) Any use which was being conducted on August 28, 1986; or
  - (B) A use not being conducted on August 28, 1986, if the use was temporarily discontinued due to a vacancy of 6 months or less before August 28, 1986; or
  - (C) Any office use existing on April 16, 1990 on a property zoned CD and GF combining, which also existed as a lawful conforming use prior to August 28, 1986, notwithstanding any intervening conforming use.
- (2) The ~~legal noncomplying grandfathered~~ uses in subsection (1) shall be permitted to remodel, improve, or replace site improvements on the same site, for continual use

and occupancy by the same use, provided such remodeling, improvement, or replacement complies with all of the following:

- (A) shall not result in increased floor area;
  - (B) shall not relocate below grade floor area to above grade portions of the building;
  - (C) shall not result in an increase of the height, length, building envelope, building footprint or any other increase in the size of the improvement. For purposes of this section, "building envelope" shall mean the three dimensional shape and size occupied by an existing building. It is not the maximum, buildable potential of the site;
  - (D) shall not increase the degree of noncompliance, except pursuant to the exceptions to floor area ratio regulations set forth in Section 18.18.070; or
  - (E) in the case of medical, professional, general business or administrative office uses of a size exceeding 5,000 square feet in the CD-S or CD-N district that are deemed legal noncomplying grandfathered pursuant to subsection (1), such remodeling, improvement, or replacement shall not result in increased floor area devoted to such office uses.
  - (F) The Director may approve minor changes to the building's footprint, height, length, and the building envelope through Architectural Review of minor aesthetic architectural improvements and to improve pedestrian-orientation provided there is no increase to the degree of any non-complying feature.
- (3) If a legal noncomplying grandfathered use deemed existing pursuant to subsection (1) ceases and thereafter remains discontinued for 12 consecutive months, it shall be considered abandoned and may be replaced only by a conforming use.
- (4) A use deemed legal noncomplying grandfathered pursuant to subsection (1) which is changed to or replaced by a conforming use shall not be reestablished, and any portion of a site or any portion of a building, the use of which changes from a legal noncomplying grandfathered use to a conforming use, shall not thereafter be used except to accommodate a conforming use.

(b) Non-complying (Grandfathered) Facilities

- (1) Any noncomplying (grandfathered) facility existing on August 28, 1986 and which, when built, was a complying facility, may remain as a legal noncomplying grandfathered facility and shall not be subject to the provisions of Chapter 18.70.
- (2) The legal noncomplying grandfathered facilities in subsection (1) shall be permitted to remodel, improve, or replace site improvements on the same site ~~for continual use and occupancy, by the same use,~~ provided such remodeling, improvement, or replacement complies with all of the following:
  - (A) shall not result in increased floor area;
  - (B) shall not relocate below grade floor area to above grade portions of the building;
  - (C) shall not result in an increase of the height, length, building envelope, building footprint, or any other increase in the size of the improvement;
  - (D) shall not increase the degree of noncompliance, except pursuant to the exceptions to floor area ratio regulations set forth in Section 18.18.070;
  - (E) The Director may approve minor changes to the building's footprint, height, length, and the building envelope through Architectural Review of minor

aesthetic architectural improvements and to improve pedestrian-orientation provided there is no increase to the degree of any non-complying feature.

(F) The residential portion of any legal noncomplying facility shall not be converted to a non-residential land use or reduced in area or number of units. An applicant asserting that the operation of this subsection (F) is preempted by state or federal law shall submit a statement of its position with all supporting documentary evidence at the time it applies for a change of use. The City Council shall hold at least one noticed public hearing in accordance with the procedures set forth in PAMC 18.77.080 to consider whether to waive or adjust the requirements of one or more provisions of Titles 18 or 21. The City Council may seek additional information including, without limitation, third party peer review paid for at the applicant's expense.

**SECTION 3.** If any section, subsection, sentence, clause, or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have passed this Ordinance and each and every section, subsection, sentence, clause, or phrase not declared invalid or unconstitutional without regard to whether any portion of the Ordinance would be subsequently declared invalid or unconstitutional.

**SECTION 4.** The Council finds that the Ordinance is within the scope of and in furtherance of the Comprehensive Plan 2030 which was evaluated in that certain Final Environmental Impact Report ("Final EIR") certified and for which findings were adopted by Council Resolution Nos. 9720 and 9721 on November 13, 2017, all in accordance with the California Environmental Quality Act ("CEQA"). Pursuant to Section 15168 of the State CEQA Guidelines, the City has determined that no new effects would occur from and no new mitigation measures would be required for the adoption of this Ordinance. The Council further and alternatively finds, that even if this Ordinance were not within the scope of the Comprehensive Plan 2030, it would be exempt from environmental review under Sections 15061(b)(3) and 15305 of the State CEQA Guidelines.

**SECTION 5.** This Ordinance shall be effective on the thirty-first date after the date of its adoption.

INTRODUCED:

PASSED:

AYES:

NOES:

ABSENT:

ABSTENTIONS:

NOT PARTICIPATING:

ATTEST:

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

\_\_\_\_\_  
Mayor

APPROVED AS TO FORM:

APPROVED:

\_\_\_\_\_  
Deputy City Attorney

\_\_\_\_\_  
City Manager

\_\_\_\_\_  
Director of Planning & Community  
Environment