Palo AltoNeighborhoods

Subject: President Hotel: Conversion Not Legal / Loss of $7 Million in Fees

June 17, 2020

Dear City Council Members and Staff:

Despite housing being a top City priority, staff is recommending granting a waiver that would remove 75 units of housing at the President Hotel. The legal arguments claiming we must allow this conversion are incorrect. Worse, the parking solution proposed in the staff report means the City will lose about 7 million dollars of in-lieu fees. This huge loss of revenue during these difficult economic times makes no sense and demands Council attention. We detail below these issues:

- No zoning waiver is required by the Ellis Act
- The proposal violates the 2.0 FAR hotel limit
- Grandfathering does not override the 2.0 FAR hotel limit
- Keene's "by right" remark does not override the 2.0 FAR hotel limit
- We're failing to collect $7 million in parking fees
- We may end up with an office building

To avoid these major legal and financial errors, we recommend that you gather public comment on June 22 and then refer the waiver and other matters to the Planning Commission for further discussion, including on all matters below. We then also urge you to hold a closed session, possibly availing yourself of an independent legal review of the key issues, before taking any final action.

Thank you,

Sheri Furman and Rebecca Sanders
Co-Chairs, PAN (Palo Alto Neighborhoods) on behalf of the PAN Executive Committee

SPECIFIC ISSUES WITH THE PROPOSED WAIVER AND HOTEL APPROVAL

The Ellis Act

The core argument advanced by the applicant GCPA Owner LLC as to why the City should grant the waiver is on page 6 of the staff report and says:

> "under the Ellis Act, a local government may not prohibit an owner from taking its property out of residential rental use, nor may a city impose a "prohibitive price" or unconstitutional condition on a party exiting the residential rental business, or a burdensome constraint on the subsequent use of property after the owner exercises Ellis Act rights."

What the above does not say is that our City has no obligation whatsoever to relax its rules, by granting a waiver or any other means, just because an owner withdrew its property from residential rental use. In fact, section 7060.1 of the Ellis Act says the exact opposite:

> Notwithstanding Section 7060, nothing in this chapter does any of the following:
> …
> (b) Diminishes or enhances, except as specifically provided in Section 7060.2, any power which currently exists or which may hereafter exist in any public entity to grant or deny any entitlement to the use of real property, including, but not limited to, planning, zoning, and subdivision map approvals.

The two exceptions in the above citation are not relevant here. A simple example suffices to show what the Ellis Act actually governs. Suppose the owner of an apartment building on a residential parcel decides to no longer rent it out. The Ellis Act allows that. It does then not require the city to allow a hotel or any other non- residential use on the site. Were the Ellis Act to do so, chaos would abound. Instead, if the owner has no other use for the site and it becomes worthless, there has been no "taking" because it was the owner's own decision to withdraw from the rental market.

GCPA Owner LLC voluntarily opted to withdraw the President Hotel from the residential market after being told by the City that its hotel project might not be legal. The City has no burden whatsoever to then allow it a new use that's profitable, including that of a hotel, if such a hotel isn't legal.

GCPA Owner LLC's key statement above implies the City has done something wrong, but the City has merely imposed so far the very same set of rules for use on this building that others Downtown had prior to the 2018 purchase. No substantial burden was placed on the owner for exiting the residential retail business – in fact, a possible burden was removed by the option of the very waiver application it is utilizing.

It's is worth mentioning that GCPA Owner LLC could have enjoyed substantial revenue from the building by switching to a condominium model or to employer-owned multi-unit housing. It would have saved millions in parking fees, since the lack of parking for the residences was grandfathered. So even the

specious argument that the City must provide some other profitable use to an owner who opts to stop renting out units was satisfied in this case if no commercial use is allowed.

One irony about how the Ellis Act has been totally misconstrued in this matter deserves special notice. The applicant's own lawyer cites *Reidy v. City & County of San Francisco (2004) 123 Cal.App.4th 580, 587* in arguing why the Ellis Act applies to this case. That appeal court decision actually says the opposite of what the applicant and City are claiming (emphasis added):

> Following the 1985 enactment of the Ellis Act, appellate courts uniformly concluded that the Act bars local ordinances that condition a residential landlord's right to go out of business on compliance with requirements that are not found in the Ellis Act. The courts also uniformly concluded that a city retains its traditional police power to regulate the subsequent use of the property after the property's removal from the rental market. Thus, for example, if an ordinance requires a residential landlord to obtain a removal permit before removing a rent-controlled rental unit from the rental housing market by demolition or conversion, and further requires that the landlord must satisfy specified criteria before the removal permit will issue, the ordinance infringes on the landlord's decision to go out of the rental housing business and conflicts with the Ellis Act. However, the city retains the authority to regulate the particulars of the demolition and the redevelopment of the property after it is withdrawn from the rental market. (*Javidzad v. City of Santa Monica* (1988) 204 Cal.App.3d 524, 529-531 [251 Cal.Rptr. 350]; see also *First Presbyterian Church v. City of Berkeley* (1997) 59 Cal.App.4th 1241, 1252-1253 [69 Cal.Rptr.2d 710]; *Los Angeles Lincoln Place Investors, Ltd. v. City of Los Angeles* (1997) 54 Cal.App.4th 53, 64 [62 Cal.Rptr.2d 600]; *Bullock v. City and County of San Francisco* (1990) 221 Cal.App.3d 1072, 1102 [271 Cal.Rptr. 44] *(Bullock); City of Santa Monica v. Yarmark* (1988) 203 Cal.App.3d 153, 162-164 [249 Cal.Rptr. 732].)

In other words, the Ellis At is wholly irrelevant and cannot be used to justify granting the waiver.

The staff report does not provide this information at all.

The 2.0 FAR Limit on Hotels

The proposed hotel project with the ground floor retail is approximately 5.4 FAR, exceeding the city's limit of Downtown hotels to 2.0 FAR and is thus not legal. The staff report does not discuss this at all. Specifically, it makes no mention of Municipal Codes §18.18.060(a) Table 2 and §18.18.060(d)(2), which both state the limit. The first of those laws says:

	CD-C	Subject to regulations in Section:
Maximum Floor Area Ratio (FAR) for Hotels	2.0:1	18.18.060(d)

and the second says:

> (2) Hotels, where they are a permitted use, may develop to a maximum FAR of 2.0:1, subject to the following limitations:
>
> (A) The hotel use must generate transient occupancy tax (TOT) as provided in Chapter 2.33 of the Palo Alto Municipal Code; and
>
> (B) No room stays in excess of thirty days are permitted, except where the city council approves longer stays through an enforceable agreement with the applicant to provide for compensating revenues.

The 2.0 limit includes any other commercial activities such as restaurants and barber shops in the building, since those are limited to 1.0 FAR under §18.18.060(a) Table 2.

This 2.0 FAR hotel limit is also specifically mentioned on page 43 of the Comprehensive Plan 2030:

> Program L4.6.1: Explore increasing hotel FAR from 2.0 to 3.0 in the University Avenue/Downtown area and 2.5 in areas outside of Downtown.

Other staff reports for hotel projects do cite the relevant hotel FAR limit, as this excerpt from the Zoning Comparison Table (Attachment B) for 3200 El Camino (Parmani Hotel) report to the Council dated April 1, 2019 shows:

Max. Floor Area Ratio (FAR)	2.0:1 for hotels 18.18.060(d)	0:62:1 (16,603 sf)	1.99:1 (53,658 sf)

However, there is no mention in the President Hotel staff report of the Municipal Code's and Comprehensive Plan's Downtown 2.0 FAR hotel limit nor any mention that the proposal fails to comply with this limit.

Grandfathering Does Not Permit Hotel Use in Excess of 2.0 FAR

In some areas of town, it could be legal for a grandfathered use to change to a different use that also exceeds the FAR limits. But in Downtown, the grandfathered use law §18.18.120(a) explicitly states the opposite. First, it's important to understand that the residential use on the site was legal noncomplying because it exceeded the 1.0 FAR allowed for residential use Downtown but existed back in 1986. As a legal noncomplying use, it was allowed to continue under clauses (1) and (2) of the grandfathered use law. However, that very same law does not allow other noncomplying uses to be established. Rather, subsequent uses must conform with the law, as these clauses indicate:

> (3) If a legal noncomplying 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 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 use to a conforming use, shall not thereafter be used except to accommodate a conforming use.

Hotels are a conforming use when they conform to the law. But the law quoted earlier clearly states that hotels only conform if they are no larger than 2.0 FAR. So the proposed 5.4 FAR hotel is not a conforming use.

Based on all the above, the Council need not grant permission for any hotel use at the site larger than 2.0 FAR. Any simple reading of the Municipal Code makes that clear, and the current owner should have had no expectation of being able to develop a hotel larger than 2.0 FAR in the building.

The staff report does not discuss this at all.

Past Representations

GCPA Owner, LLC has asserted it relied on the City's representation that the building could become a hotel "by right." But here's what Former City Manager Jim Keene actually said at the Monday, June 11, 2018 Council Meeting:

> "We would point out that hotels though are uses permitted by right in the Downtown so our staff has been encouraging property owner representatives to provide generous relocation packages to tenants."

"Uses permitted by right" is explained in the Municipal Code at §18.04.030 (a)(143)(D) (underlining added):

> "Permitted use" means a use listed by the regulations of any particular district as a permitted use within that district, and permitted therein as a matter of right when conducted in accord with the regulations established by this title.

In other words, Keene's statement that hotels are "uses permitted by right" still requires such hotels to comply with the regulations in the Municipal Code. It would have been extraordinary for him to have meant that hotels can operate Downtown without being in accordance with the law. As shown above, the proposed hotel use violates the well-established Downtown 2.0 FAR legal limit on hotels. That limit is explicitly cited in the very regulation permitting hotels Downtown. Hence, Keene never said that a hotel in excess of 2.0 FAR was legal or was what he meant as "by right."

The staff report does not discuss this at all.

$7 Million Lost in In-Lieu Parking Fees

The proposal would pay the City for 76 in-lieu parking spaces, whereas we believe the City can collect in-lieu fees for up to 63 additional spaces. That would raise an additional $7.1 million in revenue for the City, based on the expected August increase in in-lieu fees.

The undercounting of 63 spaces stems from several issues:

1) Uncounted Hotel Floor Area

The staff report understates the parking needed by not counting all parts of the building being converted to hotel. Specifically, the table on page 2 of the Zoning Comparison Table (Attachment B) says that only 38,225 sq. ft. more of the building needs to be parked, which it calculates based on the five floors that had apartments. This ignores new hotel space on other floors, such as the former residential lobby, basement storage areas, and rooftop accessory areas, which also require parking as they are converting from residential to commercial use.

It's easy to estimate the uncounted space by adding up how much of the building is being counted for parking and comparing that to the total building's floor area. Here's that calculation:

Amount of New Hotel Floor Area Proposed to be Parked	38,225 sq. ft.	From page 2 of the Zoning Comparison Table
Existing Retail Floor Area Already Having Parking For decades, the building has paid into the assessment district for 39 spaces for this retail space	9,750 sq. ft. (estimate based on 250 sq. ft. per assessed space)	The 39 parking spaces are referenced in a June 5, 2018 letter from Amy French and also appear in assessment district financial records
Total Floor Area Being Parked	47,975 sq. ft.	The sum of the above
Total Floor Area Requiring Parking	50,540 sq. ft.	From page 1 of the Zoning Comparison Table and Page 6 (A004) of the latest project plans
Floor Area Requiring Parking But Not Providing Any	2,565 sq. ft.	

The unparked 2,565 sq. ft. requires 10 additional parking spaces. Charging the applicant for them would earn the City over a million dollars in extra in-lieu fees.

2) No Requirement for a 25% Reduction

The proposal also reduces the parking requirements for the new hotel part of the building by 25%, which represents another 38 parking spaces, losing the city over $4 million in in-lieu fees. The reduction is explained on page 8 of the staff report as follows:

> California Health and Safety Code Section 18962 requires that local jurisdictions provide a 25 percent reduction in parking requirements for conversion of a designated historical resource to any non-residential use.

Actually, that state law does not require such a reduction. Rather, it says (emphasis added):

> (a) For a development project in which a designated historical resource is being converted or adapted, a local agency shall provide the following reductions in required parking, unless otherwise required by a local historical preservation or adaptive reuse ordinance:

In other words, the City can freely adopt such an ordinance requiring full parking of historic buildings being converted to a non-residential use. In fact, our current Downtown Assessment District parking law at §18.18.090 already sets out rules for the parking of historic buildings. Specifically, §18.18.090(b)(2) grants a parking exemption for certain conversions of Category 1 and 2 historic buildings from residential to commercial use, but only if the building is 50 feet or less in height. Additionally, §18.18.090(d)(1) enables a designated historic structure to qualify for in-lieu parking. Both of these regulations relate to the President Hotel building and so the City can readily argue that a local parking ordinance indeed exists that takes into account the historical preservation of the President Hotel building and requires full parking.

If these existing regulations are deemed somehow not to meet the exemption allowed by the state law, the Council could restate the regulations in a separate ordinance to make them clearer. Doing so would end a 25% parking reduction never intended by our code for such situations.

3) Using a PC for Commercial Parking

The proposal further exempts 25 more parking spaces by saying they will be in the underground garage at 330 Everett. That building houses the Lytton Gardens Senior Community. Its garage is already partly in use as valet parking for the Epiphany Hotel. It is vital to note that the site is a PC (Planned Community) and its garage was never intended to serve as a parking facility for commercial hotels blocks away. PCs are supposed to provide benefits to the public. Specifically, §18.38.060(b) states that:

> Development of the site under the provisions of the PC planned community district will result in public benefits not otherwise attainable by application of the regulations of general districts or combining districts.

The parking of 25 President Hotel guest and employee cars under 330 Everett is not a "public benefit." And it clearly could be attained by other means, such as requiring the hotel to buy land and build parking. Even the payment of in-lieu fees for the 25 spaces provides more benefit to the public than waiving that requirement, since it would produce close to $3 million in funds for City-owned parking.

Furthermore, when the 330 Everett PC was prepared, it based its traffic impacts on a low number of trips from the occupants of the senior living facility. The approval did not examine nor even contemplate that the garage might instead have hotel cars going in and out.

In short, allowing the 330 Everett parking exemption is inconsistent with the existing PC, city goals, and the traffic considerations used for the PC.

4) Inconsistency in Building Size

Please note that the staff report says the building has 50,540 sq. ft. of floor area while the June 5, 2018 Amy French letter stated that the building is 60,971 sq. ft. in size, citing city records. That's a difference of some 10,431 sq. ft.. The latest plans show only 6,359 sq. of non-floor area in the building (mainly the basement parking area), leaving over 4,000 sq. ft. of unexplained space. If that space exists and needs to be parked, the additional in-lieu fees total almost another $2 million, so this should be thoroughly investigated.

The staff report contains no discussion of any of the above four issues nor of the resulting loss of millions of dollars in in-lieu funds for the City.

No Prohibition on Office

The City may hope to earn hotel tax on the proposed 100 new rooms, but the applicant, upon receiving a waiver, could then announce that hotels no longer "pencil out" and instead put in offices. Given other new hotel projects in Palo Alto and projections for decreased travel well into the future because of the pandemic, such a change would surprise no one. If the City intends to ignore the 2.0 FAR limit on hotels, why would it then be able to enforce any limit on office sizes?

The staff report does not discuss this at all nor what steps the City could take to prevent it.