



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Joseph Horwedel

SUBJECT: SEE BELOW

DATE: November 13, 2006

COUNCIL DISTRICT: 6
SNI AREA: None

SUBJECT: PDC03-060. PLANNED DEVELOPMENT REZONING OF A 0.15 GROSS ACRE SITE LOCATED ON EAST SIDE OF BIRD AVENUE APPROXIMATELY 490 FEET NORTHEASTERLY OF SNYDER AVENUE TO ALLOW A HALF-STORY OFFICE WITHIN AN EXISTING ACCESSORY BUILDING.

REASON FOR SUPPLEMENTAL MEMO

At the City Council hearing of November 18, 2003, the subject project proposing living space in an accessory building was continued to allow development of a City policy for "granny flats" or secondary units. The continuance was anticipated to be of only 6 months. The Second Unit Pilot Ordinance, approved by the Council in December 2005, was found not to be applicable to this project. Therefore, this Planned Development Rezoning is being brought forward for City Council final action hearing at this time. The original staff report to the Planning Commission and the Commission's transmittal memo to the Council are attached.

RECOMMENDATION

The Planning Director recommends that the City Council DENY the subject rezoning, consistent with Planning Commission's recommendations, for the reasons stated below.

OUTCOME

Should the City Council approve the Planned Development Rezoning, a 530 square-foot half-story living space with a bathroom constructed in a 1,442 square foot accessory building without benefit of permits will be allowed on this property, which would be inconsistent with accessory buildings allowed under the Zoning code for single family residential lots. This future development would be subject to additional Development Permits.

BACKGROUND

On July 3, 2003, the applicant, Stanley Davis, filed a Planned Development Rezoning to allow an existing accessory building that contains a living space in the form of a 530 square foot second floor, half story with a bathroom to be located in the rear yard of an existing single family home, within a

1,442 square foot building with a height of 21 feet. A 912 square-foot single-story garage, 18 feet in height, was approved by the Director of Planning in 1998. The three-foot extension in height to 21 feet, the addition of the second story, and the conversion of the interior to living space were made without benefit of Planning or Building permits. The existing zoning of R-1-8 Single-Family Residence District does not allow living space in an accessory building.

The Planning Commission held two public hearings on the subject rezoning. The Director of Planning had recommended denial of the rezoning for the following reasons (see attached staff report):

1. **Lack of General Plan Conformance:** The proposed zoning is not consistent with the adopted San José 2020 General Plan Land Use/Transportation Diagram Medium Low Density Residential (8 DU/AC) in that a finished second floor in an accessory structure with plumbing and electrical fixtures may easily be converted to a second dwelling unit which would exceed the maximum allowable density in violation of the General Plan Designation.
2. **Impairment of Adjacent Properties or the General Welfare of the Neighborhood:** The Zoning Code limitations on the use and design of accessory structures on single-family lots are intended to ensure that these structures are clearly secondary to the residence and that they do not become an additional, separate use in the rear yard of a single-family house. The subject project creates a separate living space that has the potential to facilitate a variety of future uses and use violations which could result in impacts on surrounding properties. Use of the accessory building for a business or a living unit, could result in overflow parking and generally increase the amount of traffic and activity proximate to the rear yards of surrounding residences.
3. **Inappropriate Exceptional Treatment of the Property:** If approved, the project would allow a single property to enjoy benefits not available to other similarly- situated single-family properties in the same neighborhood and throughout the City.

On September 24, 2003, the Planning Commission held a public hearing. The Commissioners generally indicated that the Zoning Ordinance would need to be revised in order to allow living spaces in accessory structures, which could possibly provide some much needed affordable housing in the City. However, the Commissioners also recognized the fact that the proposed project could not be approved under the Zoning ordinance in place at that time. The Commission voted unanimously to continue the application to October 22, 2003, given the complexity of the issues. The Commission also appointed two Commissioners to comprise a subcommittee that would work with Planning staff and the City Attorney's office to explore possibilities of expanded use of accessory structures, to provide input into the ongoing discussions regarding the possibility of a secondary unit ordinance for the City.

At the public hearing of October 22, 2003, the Commissioners echoed the same concern about limitation of use of accessory buildings, but, with the understanding that the project did not meet the current Code, voted 7-0-0 to recommend that the Council deny the subject rezoning for the reasons identified by the Planning Director. The Commission also noted the issue of secondary units and uses in accessory buildings warranted further study to develop a citywide approach. (See attached memorandum from the Planning Commission)

The City Council hearing was originally set for October 21, 2003, but the project was continued to November 18, 2003, following the second hearing by the Planning Commission. At the hearing of November 18, 2003, the project was continued, for a time anticipated to be no longer than 6 months, to allow for the development of a citywide policy for the "granny flats" or secondary units, so that the subject proposal could be reviewed against any such policy which might provide for its possible approval. The property changed ownership in February of 2005.

The Second Unit Pilot Ordinance was approved by the City Council in December 2005. Staff has analyzed the project in light of the Pilot Program and has found it not to be applicable to nor allow for support of this project, since the approximately 914 square-foot, 21-foot tall accessory building exceeds the allowable size of 600 square feet and the 16 foot height limit under the Second Unit Pilot Program. The Pilot Program also restricts secondary units to being constructed within the main residence building envelope, and not within a few feet of a side or rear property line, where a garage can be located. The 5-foot rear setback for this accessory building does not meet the criterion of the Pilot Program which would require a minimum a of 20 foot rear setback. Therefore, this Planned Development Rezoning is being brought forward to the City Council for public hearing at this time for its final action.

ANALYSIS

The proposed rezoning of the site from R-1-8 Single Family Residence District to A(PD) Planned Development Zoning District, as conditioned, is not consistent with the San José 2020 General Plan Land Use/Transportation Diagram designation of Medium Low Density Residential (8 DU/AC) as is discussed in more details in the attached original staff report and transmittal memorandum from the Planning Commission to the City Council. The project also does not conform to the Secondary Unit Pilot Program as approved by the City Council in December 2005.

POLICY ALTERNATIVES

Not applicable.

PUBLIC OUTREACH/INTEREST

- Criteria 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- Criteria 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criteria 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

Although this item does not meet any of the above criteria, staff followed Council Policy 6-30: Public Outreach Policy. A notice of the public hearing was distributed to the owners and tenants of all properties located within 1000 feet of the project site and posted on the City website. The rezoning was also published in a local newspaper, the Post Record. This staff report is also posted on the City's website. Staff has been available to respond to questions from the public.

COORDINATION

This project was coordinated with the Department of Public Works, Fire Department, Police Department, Environmental Services Department and the City Attorney.

FISCAL/POLICY ALIGNMENT

This project is not consistent with applicable General Plan policies and City ordinances as further discussed above and in the attached staff report.

COST SUMMARY/IMPLICATIONS

Not applicable.

BUDGET REFERENCE

Not applicable.

CEQA

Exempt under the provisions of Sections of 15303(e) of California Environmental Quality Act.


JOSEPH HORWEDEL, SECRETARY
Planning Commission

For questions please contact Susan Walton at 408-535-7847.

Attachments: Planning Commission Staff Report, City Council Memo.

CITY OF SAN JOSÉ, CALIFORNIA
Department of Planning, Building and Code Enforcement
801 North First Street, Room 400
San José, California 95110-1795

Hearing Date/Agenda Number
09/24/03/ Item: 4.d.

File Number
PDC03-060

Application Type
Planned Development Rezoning

Council District
6

Planning Area
Willow Glen

Assessor's Parcel Number(s)
264-45-049

STAFF REPORT

PROJECT DESCRIPTION

Completed by: Anastazia Aziz

Location: East side of Bird approximately 490 feet northeasterly of Snyder Avenue

Gross Acreage: 0.19

Net Acreage: 0.19

Net Density: 8 units per acre

Existing Zoning: R-1-8

Existing Use: Residential

Proposed Zoning: A(PD) Planned
Development

Proposed Use: To allow a 530 square-foot half-story living space with a bathroom
constructed in an accessory structure without benefit of permits.

GENERAL PLAN

Completed by: AA

Land Use/Transportation Diagram Designation
Medium Low Density Residential (8 DU/AC)

Project Conformance:
 Yes No
 See Analysis and Recommendations

SURROUNDING LAND USES AND ZONING

Completed by: AA

North: Single-family residential

R-1-8 Residential

East: Single-family residential

R-1-8 Residential

South: Single-family residential

R-1-8 Residential

West: Single-family residential

R-1-8 Residential

ENVIRONMENTAL STATUS

Completed by: AA

Environmental Impact Report found complete
 Reuse of Negative Declaration

Exempt
 Environmental Review Incomplete

FILE HISTORY

Completed by: AA

Annexation Title: Willow Glen

Date: 10/1/36

PLANNING DEPARTMENT RECOMMENDATIONS AND ACTION

Approval
 Denial

Date: _____

Approved by: _____
 Action
 Recommendation

APPLICANT/DEVELOPER

OWNER

Stan Davis
1023 Bird Avenue
San José, CA 95125

PUBLIC AGENCY COMMENTS RECEIVED	Completed by: AA
Department of Public Works	
See attached memorandum	
Other Departments and Agencies	
See attached Compliance Order dated March 29, 2001 and Appeals Hearing Board Resolution #03-054 dated January 23, 2003.	
General Correspondence	
See attached correspondence.	
ANALYSIS AND RECOMMENDATIONS	

BACKGROUND

The applicant, Stan Davis, is requesting a Planned Development Rezoning to allow an accessory structure that contains a living space in the form of a 530 square foot second-floor, half-story with a bathroom. The existing zoning is R-1-8 Residence District which allows single-story accessory structures and does not permit living space, or more than two plumbing fixtures in accessory structures.

The property is 0.19 gross acres in area, which is characteristic of lot sizes in the neighborhood, and is generally flat and trapezoidal in shape. The project site is developed with a single-family residence used for residential purposes and a detached garage. The existing single-family residence was built in 1876 and is listed on the City's Historic Inventory as a *contributing structure*. The parcel is bounded by single-family residences with rear yard accessory structures to the north, east, south, and west.

The property has been the subject of numerous permits and Code Enforcement actions as described below.

Permit History Prior to Code Enforcement Action

Special Use Permit application File No. SP98-026 allowing modifications to a legal non-conforming historic residence and construction of a 912 square-foot accessory structure was submitted in April, 1998. Development Variance application File No. V98-017 allowing the accessory structure to exceed the maximum 16-foot height limit and File No. V98-018 allowing a front perimeter fence in excess of the 3-foot maximum height limit were submitted in July 1998. The applicant indicated a desire to increase the height of the accessory structure in order to match the roof pitch of the Eastlake Victorian historic residence existing on the site and indicated a second floor would not be incorporated in the design. On August 13, 1998, the Director of Planning approved SP98-026, V98-017 and V98-018 permitting modifications to the residence, a single-story accessory structure 18 feet in height and a front perimeter fence 6 feet in height.

Subsequent to the approval of the above development applications, the applicant applied for building permits and modified the design of the accessory structure to include a pull-down staircase which provided access to an attic storage area in the rafters of the structure. The building plan set did not include the construction of a floor. Planning staff approved the revised building plans in the context of a plan conformance review.

Code Enforcement History

On March 7, 2001 an advertisement placed on behalf of the applicant in the Willow Glen Resident advertised the subject property for sale and described the property as including a three-car garage with an au paire guesthouse on the second-floor, half story above the garage (see attached).

On March 22, 2001, Code Enforcement received a complaint that a room built over the garage of the subject property was being prepared for illegal occupancy by a tenant. No plumbing, electrical or building permits had been issued to allow the construction of the second floor half story in the accessory structure.

On March 29, 2001, Code Inspector Bouja inspected the subject property and observed that a second-floor, half-story accessed by a permanent staircase with a bathroom, kitchen and wall heater had been added to the garage without permits.

On April 2, 2001, Compliance Order 200105355 (see attached) was issued to the property owner instructing the owner to either demolish or legalize all unpermitted additions/alterations, including the second floor half story in the garage with kitchen and bathroom.

On April 11, 2001, Building Inspector Ted Buryn inspected the subject property and found that the second floor half story of the accessory structure had been converted to an "office" space with a kitchen and bathroom without the required permits.

On January 23, 2003, the Hearings Appeal Board found in Resolution 03-05 (see attached) that the property owner had not complied with the provisions of the Compliance Order and had failed to perform in good faith towards correction of the Municipal Code violations found on the property. Additionally, the Board found that the non-permitted building alterations on the subject property could pose a potential health and safety hazard to the occupants of the subject property and to neighboring properties because the quality of building, electrical, and other related installations could not be verified. The Board ordered that a Development Variance application for the subject non-permitted building alterations be submitted to the Planning Department.

Permit History After Code Enforcement Action

On February 12, 2003, a Development Variance (File No. V03-001) was filed for the subject property. The proposed drawings illustrated a second dwelling unit with bathroom and kitchen on the second-floor, half story of the accessory unit. On March 21, 2003, subsequent drawings were submitted that showed a toilet and a sink in separate rooms within the unpermitted second-floor, half story of the accessory structure. The application indicated that the second-floor, half story of the accessory structure is proposed for a game room or a home office and not for use as a dwelling unit.

On April 18, 2003, the Director of Planning denied the subject variance because the property did not meet the findings required to approve a Development Variance as described below.

Development Variance Provisions of Title 20

Section 20.100.1300 (1)(a) gives the Director of Planning and the Planning Commission on appeal the authority to grant Development Variances to "... the height, number of stories, frontage, setback, coverage, density, area, off-street parking, fencing, loading and landscaping requirements and regulations of this Title." Upon making the required findings, the Director or Planning Commission (on appeal) may approve a Development Variance to allow the addition of a half-story to an accessory building. Title 20 provides no authority for a Development Variance that allows an accessory building that does not meet the Zoning Code definition of such a structure [see Section 20.200.010 (A)]; consequently, the proposed Variance cannot approve the use of this structure for an office, play room or other "living space" and cannot authorize retention of existing heating or air condition systems. By definition, an accessory structure cannot contain living space or "conditioned" space (i.e., space that is heated and/or air conditioned). The Code allows approval of a Development Variance for an increase in the allowed number of stories based on specific findings; however, in this case, the facts did not support the required findings.

Actions by the Director of Planning and the Planning Commission

On April 18, 2003, the Director of Planning denied the Variance application. On April 25, 2003, the applicant appealed the decision of the Director of Planning. On June 25, 2003, the Planning Commission voted unanimously to uphold the Director's Decision to Deny the Development Variance Permit and made the following findings in denying the Permit.

1. The property *does not* exhibit special circumstances uniquely applicable to the subject property, such as size, shape, topography, location or surroundings in that the site is characteristic in size and shape with other properties in the immediate area and is generally flat and does not contain any unusual topographic features. Expressly excluded from any consideration are:
 - a. the personal circumstances of the petitioner;
 - b. or of any changes in the size or shape of the subject property made or occurring while the subject property was situate in the zoning district in which it is situate at the time of the filing of the petition, regardless of whether such changes were caused by the petitioner or his predecessors in interest, the strict application of the requirements and regulations prescribed in this Title and referred to in Subdivision A of Section 20.100.1300, deprives such property of privileges enjoyed by other property in the vicinity of an in same zoning district as the subject property, and
2. The Variance, subject to such conditions as may be imposed thereon, *will* impair:
 - a. the utility or value of adjacent property or the general welfare of the neighborhood, and;
 - b. the integrity and character of the zoning district in which the subject property is situate in that the use of 530 square feet of second floor area in an accessory structure for a home office use impairs the integrity and character of the residential zoning district. The proposed square

footage exceeds the allowed 100 square foot limitation of home occupations in accessory structures and the second floor of the accessory structure is not permitted.

3. The proposed project is **not** consistent with the adopted San José 2020 General Plan Land Use/Transportation Diagram Medium Low Density Residential (8 DU/AC) in that a finished second floor in an accessory structure with plumbing and electrical fixtures may easily be converted to a second dwelling unit which would exceed the maximum allowable density in violation of the General Plan Designation.

On July 3, 2003, the applicant filed the subject Planned Development Zoning application.

GENERAL PLAN CONFORMANCE

The proposed modification to the existing rear yard accessory structure on this single-family lot is not consistent with the adopted San José 2020 General Plan Land Use/Transportation Diagram Medium Low Density Residential (8 DU/AC) in that a finished second floor in an accessory structure with plumbing and electrical fixtures may easily be converted to a second dwelling unit which would exceed the maximum allowable density in violation of the General Plan Designation.

ENVIRONMENTAL REVIEW

Under the provisions of Section 15303(e) of CEQA this project is exempt from the environmental review requirements of Title 21 of the San José Municipal Code, implementing the California Environmental Quality Act of 1970, as amended in that the project consists of minor modification and conversion of an existing small structure from one use to another.

PUBLIC OUTREACH

Hearing notices were mailed to property owners within 1,000 feet of the subject property in conformance with the Public Outreach Policy. Staff has been available to discuss the project with members of the public.

ANALYSIS

Following the Planning Commission action in June 2003, to uphold the Director of Planning's denial of a development variance for this use, the remaining procedural avenue open to the applicant was to file for a Planned Development Zoning. Staff has worked with the applicant to take this project through the process, although staff has indicated the relevant facts and concerns regarding future precedent and applicability to like single-family parcels remains virtually unchanged, as described below.

Zoning Regulations

The purpose of Title 20 of the Municipal Code (the Zoning Code) is to promote and protect the public peace, health, safety and general welfare. Title 20 includes regulations for the R-1-8 Residence Zoning District in regard to both allowed uses and development standards. The R-1-8 District limits residential uses to one single-family residence per lot. Second units are prohibited. A residential accessory

building is defined by Section 20.200.010 as “a separate and subordinate building the use of which is purely incidental to that of the main building and which shall not contain living space”. Section 20.200.630 further clarifies that living space includes a room designed for living, sleeping, eating, study, home office, sewing room or recreational room. The development standards of the R-1-8 District are intended to guide and protect the character of the single-family neighborhoods to which it is applied.

Role of the Development Variance

The Zoning Code provides the Development Variance process to ensure flexibility where a parcel of land has unique characteristics that would make it unfair to apply the same development regulations applicable to other properties. Such unique characteristics may not involve the personal circumstances of the property owner or changes that the property owner has made to the property. This process is designed to treat properties in the same Zoning District equitably, but to prevent unique property characteristics from resulting in inequitable treatment. In regard to the currently proposed accessory building, both the Director of Planning and the Planning Commission determined that there were no unique property characteristics that would justify the approval of a Variance to the requirements of the R-1-8 Residence District.

Role of the A(PD) Planned Development Zoning District

The Planned Development Zoning District allows development standards and use regulations to be designed to meet the needs of a specific project on an individual property. This process is typically used where the unique standards of a custom-designed Zoning District can better implement the goals of the General Plan for that property. As an example, high-density, transit-oriented development adjacent to light rail stations is typically approved through the Planned Development Zoning process because the City has no standard zoning districts that would accommodate the type of development that the General Plan envisions for these areas.

The Planned Development Zoning District is not intended as a method to allow one property in a single-family neighborhood to enjoy privileges that are denied to hundreds of other similarly-situated properties in the same Zoning District and within the same General Plan designation. Staff receives frequent inquiries from homeowners in this neighborhood and others like it desiring to implement uses in accessory structures on single-family lots that are not allowed by the R-1 Zoning Districts. In the current case, there is no appropriate land use justification for treating this property differently from other single-family properties in the area, or in the City as a whole. The goals of the General Plan of preserving existing residential neighborhoods are not furthered by a Planned Development Zoning to approve an illegally-constructed living space that is likely to be used as second dwelling unit, contrary to the density provisions of the site’s Medium Low Density Residential (8DU/AC) General Plan designation. Allowing this property (with its illegally implemented structure and use) to enjoy unique benefits, but denying those same benefits to similar properties would be an inappropriate use of the Planned Development Zoning process.

Impairment of Adjacent Properties or the General Welfare of the Neighborhood

The limitations on the use and design of accessory structures on single-family lots are intended to ensure that these structures are clearly secondary to the residence and that they do not become an additional, separate use in the rear yard of a single-family property. The subject 530 square-foot, second-floor, one and one half story accessory structure with a permanent staircase and finished interior, creates a separate

living space that has the potential to facilitate a variety of future uses and use violations which could result in impacts on surrounding properties. Use of the accessory building for a business or a living unit, could result in overflow parking and generally increase the amount of traffic and activity proximate to the rear yards of surrounding residences.

Possible Amendment to Title 20

Based on the above analysis, staff does not believe that the proposed accessory building and half-story living space are suitable for this site; however, if the proposal were determined to be suitable for this site, it would necessarily also be suitable for other similarly situated properties citywide throughout the R-1-8 Residence District. The more appropriate method for the City to allow living space and second floors in accessory structures on single-family properties would be to consider an amendment to Title 20, the Zoning Code, to change the development standards of the R-1-8 District and other R-1 Residence Districts so that these benefits would be made available equitably to similarly situated properties. Such a Code change would ultimately be decided by the City Council

Revised Plans

The plans submitted for this proposed rezoning are internally inconsistent, proposing the accessory building living area as a single-family detached residence on one sheet and an office on the other. Should the City Council choose to approve this proposed rezoning, the project will need to be referred back to staff so that the plans can be corrected and appropriate development standards can be drafted for the proposal.

Conclusion

Based on the above analysis, staff concludes that there is no basis to support the rezoning of the property to A(PD) Planned Development to allow living space on the second floor of a half-story in an accessory structure and that such approval would be detrimental to surrounding properties and to the integrity of Title 20.

RECOMMENDATION

Planning staff recommends that the Planning Commission forward a recommendation to the City Council to deny the subject rezoning for the following reasons:

1. The project does not conform to the General Plan Land Use designation.
2. The project has the potential to be incompatible with adjacent properties.
3. The project would allow a single property to enjoy benefits not available to other similarly-situated single-family properties in the same neighborhood and throughout the City.



File No: PDC03-060
District: 06
Quad No: 99

Scale: 1"=250'
Created on 06/23/03





Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Stephen M. Haase

SUBJECT: SEE BELOW

DATE: October 29, 2003

COUNCIL DISTRICT: 6

SUBJECT: PDC03-060. PLANNED DEVELOPMENT REZONING OF A 0.15 GROSS ACRE SITE LOCATED ON EAST SIDE OF BIRD AVENUE APPROXIMATELY 490 FEET NORTHEASTERLY OF SNYDER AVENUE TO ALLOW A HALF-STORY OFFICE WITHIN AN EXISTING ACCESSORY BUILDING.

RECOMMENDATION

The Planning Commission voted 7-0-0 to recommend that the City Council DENY the subject rezoning.

BACKGROUND

On September 24, 2003, the Planning Commission opened the public hearing to consider a Planned Development rezoning from R-1-8 Residence Zoning District to A(PD) Planned Development Zoning District to allow a half-story office within an existing accessory building.

The applicant, Mr. Davis, spoke in support of the project and stated he disagreed with Planning staff's recommended denial. He indicated that a Planned Development Zoning is an appropriate process to allow living space in accessory structures and stated that other property owners are able to file a Planned Development Rezoning application should they wish to pursue a similar use in accessory structures. Mr. Davis also indicated that State law permits second units as of right in single family residential zoning districts and expressed concern that the City attorney's office had not fully responded to his queries regarding how this law is implemented in San Jose. He said the neighborhood's integrity would not be undermined in any way by allowing the second floor of his accessory structure to function as a home office. He stated that his assistant employee collects papers and uses the office two to four hours a week.

Three members of the public spoke in opposition to the proposal. All three stated they were extremely concerned that Mr. Davis knowingly violated the City's laws and procedures and had now filed an application to legalize his home office. They further stated that Mr. Davis had deceived his immediate neighbors and the City by requesting permits originally only for a garage with a taller pitched roof to match his historic home, while he intended to finish the second story space for living space purposes.

One citizen stated that she had illegally converted an accessory structure to a studio apartment for a relative 10 years ago, but removed the illegal studio apartment fixtures and converted the structure back into an accessory structure that met the Zoning Code requirements after citation by the City's Code Enforcement Department. She indicated that should Mr. Davis' request be approved, she would pursue permits for a separate studio apartment in her accessory structure.

The Planning Commission then closed the public hearing.

Commissioner Zito asked for clarification from the City Attorney regarding the rationale and findings that the Commission would have to make in order to support the proposal. He questioned how adding square footage to an existing residence for the purpose of a home office differed from allowing a home office in an accessory building.

Staff explained that the Commission's recommendation to Council must be clearly based on the Council's adopted land use policies found in the General Plan. Additionally, staff clarified that Planned Development zonings must be very clear in terms of permitted uses and must further goals and policies in the General Plan. Staff stated that the subject property is designated *Medium Low Density Residential (8DU/AC)* in the General Plan and an office with employees as a commercial use would not conform to this General Plan designation. Staff expressed concern that this property would enjoy benefits other similar properties in the surrounding single-family area do not enjoy, and reiterated that the Commission would need to make findings to support a home office in an accessory structure, and be able to articulate how the use would further the goals of the General Plan.

In response to a Commissioner question, staff clarified the Development Variance process and stated certain findings such as a property's unique topography or shape need to be made in order to support a variance. Staff explained that a variance was filed for this particular proposal (File No. V03-001) and was denied because the findings could not be made.

Commissioner Zamora asked staff to discuss the subject proposal's conformance with the General Plan goals. He suggested the proposal would facilitate work opportunities near residences and would reduce commuting. He also stated that home offices and living space in accessory structures are requested by residents all the time and that it may be time to consider a change in the Code to allow conditioned living space in accessory structures. Commissioner Zamora also mentioned the General Plan's "Two Acre Rule" and questioned whether a second unit could be approved by increasing the density on the site using that Discretionary Alternate Use Policy.

Staff stated that the proposal does not meet the General Plan designation of *Medium Low Density Residential (8DU/AC)*. The City Attorney reminded the Commission of the need to work within the existing policies and regulations approved by City Council. While the General Plan includes a Discretionary Alternate Use Policy that provides that parcels under two acres may be developed at a higher or lower density range, the Plan prefaces use of this "Two Acre Rule" as appropriate to respond to site characteristics or constraints, neighborhood compatibility issues, and isolated infill opportunity sites. Staff indicated that under this policy it would not be appropriate to allow a second dwelling unit through the Planned Development Zoning process for a single family property located within a large neighborhood of similarly-situated properties that would not enjoy the same benefit. Staff stated that a Council Committee is reviewing the issue of second units and that the Council welcomes statements and recommendation from the Commission regarding policy issues. Staff reiterated that all current projects should be reviewed by staff and the commission in light of existing General Plan policies, the Zoning Ordinance and other Council approved policies. Staff concluded that in this case the subject proposal does not conform to Council approved policies or the Zoning Code.

Staff further clarified that a home office within a separate dwelling unit would need to conform to the home occupation provisions of Title 20. The applicant has indicated that his proposed use generally conforms to the home occupation requirements, except that he has an employee, an assistant, who works on the site an average of 2 to 4 hours per week. Under the City's home occupation requirements, only occupants of a dwelling may be employees or volunteers of a business operated in a dwelling as a home occupation. Based on this clarification from the applicant, staff concludes that even with approval of the garage structure on this site as a second dwelling unit, the applicant's proposed office use would not be allowed as a home occupation.

Commissioner Zito stated that good law changes start somewhere. He expressed concern that living space is not allowed in accessory structures, yet a property owner may expand a single-family residence to accommodate a home office. In his opinion, a large home with five bedrooms and a home office would likely generate the same parking problems as a residence with a home office in an accessory structure. He opined that the location of the living space should not make a difference in how the proposal is evaluated. He also said that an in-law unit or second dwelling unit could make sense and help provide affordable housing, income to a homeowner and infill housing in centrally-located neighborhoods. He also pointed out that the Evergreen Specific Plan permits carriage house units with livable space in some areas.

Commissioner Levy agreed with Commissioners Zito and Zamora that the City needs to take a close look at accessory structures and so-called granny flats. He stated that the nature of the City is changing and that more people work from their homes and that land must be used efficiently to stay within the Urban Growth Boundary. He said the current Council policies may be out of date, but that the Planning Commission must delineate and make decisions within the bounds of the existing policies. He continued to say that there may be times to "bend the rules", but he felt this particular application with its history of permit violations was not an appropriate one. Commissioner Levy introduced a motion to recommend denial of the subject rezoning.

Commissioner Dhillon stated that he believes the Planned Development Zoning process is expensive and onerous. He stated that the Zoning Code should be amended to allow living space in accessory structures and which would be applied equitably to all properties within the City.

Commissioner Zamora stated that he couldn't support the motion to deny the rezoning. He stated that this applicant has experienced significant delays and is trying to get permits to correct his errors. He said that the integrity of the main house is beautiful, and felt a denial of 580 square feet of living space in an existing accessory structure was not appropriate.

Commissioner Zito again stated that the existing Code restrictions placed on accessory structures did not make sense. He did not support "breaking" the law, but working to fix it. He stated that although he doesn't agree with the current regulations, residents and developers should follow the law. He noted that this applicant had violated the Code and the law on several occasions.

Commissioner Levy agreed that the applicant's proposal is clearly not in line with the General Plan or Zoning Ordinance and that he felt it is clear the Ordinance should be updated. However, he cautioned that if this application were approved under the current Code, it would send the wrong message to other citizens. He stated that there are many reasons to deny the subject application and that the applicant lacks credibility.

Commissioner Campos stated that the Commission should practice forgiveness and learning from mistakes. He added that he felt the Commission needed to make a statement about the extremely restrictive code regulations that govern the uses of accessory structures. He felt that Council and the City should look seriously at this issue and explore amending the Zoning Code.

The Commission then voted on the motion to recommend denial and it failed 3-4-0 (Zamora, James, Campos, and Dhillon opposed).

Commissioner Dhillon requested that staff develop appropriate development standards restricting the use of the accessory structure for home occupation use only. He also questioned whether the accessory structure could be attached to the existing residence. Staff stated attaching the house and the garage via an addition could compromise the historic status and integrity of the residence and that to incorporate the two structures with an integral roof structure would be a significant challenge.

Commissioner Zito asked why the Deputy Director had recommended that the applicant file a Planned Development Zoning if it did not conform with the City's policies and regulations, and if staff could not support it. Staff stated that the applicant was advised to file a Planned Development Zoning as a means to exhaust administrative remedies. Staff stated that the applicant, Mr. Davis was advised that the Planning Department would not support a Planned Development Zoning for this proposal.

Commissioner Dhillon stated that the Commission could forward a recommendation to Council and that the Council would make the final decision. He felt the Commission should recommend the proposal be approved as living space, not for commercial use, and felt that this proposal would make a good second unit.

Commissioner Zito echoed that he felt that changes to the Zoning Ordinance are warranted that that the Commission should provide a resolution or formal statement to the Council. He felt that given the current economic climate, alternative solutions for family members and home offices need to be accommodated in the City.

Commissioner Zamora stated that he felt the current proposal is in line with General Plan policies because it will improve people working close to home and increase the number of housing units.

Commissioner James stated he felt it was a good idea to recommend a change to the Zoning Ordinance regarding the use of accessory structures to Council.

Commissioner Platten recommended the Commission defer their decision to October 22, 2003 because the issues were difficult to frame and that the questions were still unresolved.

Chair James agreed that deferring further discussion to October 22, 2003 was warranted.

The Commission voted 7-0-0 to defer the application to October 22, 2003. The Commission also appointed Commissioners Zito and Dhillon to comprise a subcommittee to work with Planning staff and the City Attorney's office to develop recommendations for Zoning Code changes to forward to the Council's Building a Strong Economy (BSE) Committee to enhance flexibility in on-site living space in single-family neighborhoods.

On October 22, 2003 the Commission reopened the public hearing. Staff gave a brief supplemental staff report. Staff clarified that there are three possible use scenarios for approval of a proposed Planned Development Zoning that would allow the applicant to retain the 530 square-foot half story and office use that the Commission appeared to be considering. These scenarios included: 1) use of the half story for a home office within the accessory building; 2) use of the half story for a commercial office within the accessory building; and 3) connection of the garage to the house and use of the half-story space as a home office incorporated within the residence. Staff further stated three additional pieces of correspondence had been received since the last Commission hearing. Additionally, staff noted that the applicant was informed verbally prior to submitting the Planned Development zoning that staff did not support rezoning the property, but the applicant the right to exhaust all potential administrative remedies. Staff also cited a July 31, 2003 letter sent to the applicant that stated staff did not support the subject rezoning and recommended the applicant withdraw the application. The letter further stated that the subject application would be set for the September 24, 2003, Planning Commission hearing with a denial recommendation if a withdrawal was not received in a timely manner.

The applicant, Mr. Davis, was not in attendance at the hearing. Four members of the public spoke in opposition to the project citing that the use of the second floor of the accessory structure as a home office or other type of living space was illegally constructed, did not meet Code and should be denied. One member expressed disappointment with the Commission for appearing determined to find a solution to Mr. Davis that was not in conformance with City policies.

The Commission then closed the public hearing.

Commissioner Zito stated that he and Commissioner Dhillon met with staff to work on recommending a solution to the larger problem of acceptable uses of accessory structures. He continued to say that he and Commissioner Dhillon have made some progress with respect to this issue, but that work to date would not support the second-story living space in the accessory structure that the subject rezoning proposes.

Commissioner Levy recommended that the Commission accept staff's recommendation and recommend denial of the subject rezoning. He stated the living space was blatantly illegal and that the applicant disregarded the law when constructing it. He continued to say that the Commission must abide by the City's current goals and policies, and send the right message to the Council and the community. The use of the structure as proposed is illegal and not justified for this single parcel and that a broader study of accessory structures and secondary living units is warranted.

Commissioner Zamora indicated he supported the motion to deny with regret. He supported the effort to explore the expanded uses of accessory structures and felt that the current Zoning Code is too limiting. He stated that he believes current guidelines and polices for accessory structures and secondary living areas is too constrained. He said that allowing a wider variety of uses in accessory structures could relieve congestion and further General Plan goals to accommodate affordable housing in the City.

Commissioner Zito agreed with Commissioner Zamora and stated that the City's effort to study issues related to secondary units and accessory structures working with a Council Subcommittee was the appropriate method to propose a change to the laws. He felt it was time to find creative solutions to accommodate a wider variety of uses in accessory structures.

Commissioner Campos also reluctantly supported the motion. He said that San Jose is a large city with diverse family types with differing needs. He also said he looks forward to a change in the General Plan and the Zoning Code to correct the problems of overly restrictive uses of accessory structures and lack of granny units.

Chair James agreed that there is an urgent need for affordable housing in the City and second units could be an appropriate tool to use to alleviate the problem. He also looks forward to City policies and regulations changing to support living space in accessory structures and second units on single-family lots.

The Commission voted 7-0-0 to recommend denial of the proposed rezoning.

HONORABLE MAYOR AND CITY COUNCIL

October 29, 2003

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PUBLIC OUTREACH

A notice of the public hearing was distributed to the owners and tenants of all properties located within 1,000 feet of the project site.

COORDINATION

As standard procedure in the development review process, this project was coordinated with the Department of Public Works, Fire Department, Police Department, Environmental Services Department and the City Attorney.

CEQA

Under the provisions of Section 15303(e) of CEQA this project is exempt from the environmental review requirements of Title 21 of the San Jose municipal Code, implementing the California Quality Act of 1970, as amended in that the project consists of minor modification and conversion of an existing small structure from one use to another.

STEPHEN M. HAASE, AICP
Secretary, Planning Commission

c: Stan Davis, 1023 Bird Avenue, San Jose, 95125

