

# Memorandum

**TO:** HONORABLE MAYOR AND  
CITY COUNCIL

**FROM:** Joseph Horwedel

**SUBJECT:** SEE BELOW

**DATE:** April 5, 2010

Approved

Date

4/15/10

**COUNCIL DISTRICT:** 3  
**SNI AREA:** 13<sup>th</sup> Street

**SUBJECT:** CP07-053. Appeal of the Planning Commission decision to approve the expansion of two legal non-conforming guesthouses to include up to 27 guest rooms (total) on a 0.29 gross acre site located at the southeast corner of N. 5<sup>th</sup> Street and E. St. John Street (96 & 98 N. 5<sup>th</sup> Street)

## **RECOMMENDATION**

The Director of Planning, Building and Code Enforcement recommends the City Council uphold the Planning Commission's decision to approve the subject Conditional Use Permit, allowing for the expansion of the two existing legal non-conforming guesthouses to allow a total of 27 guest rooms.

## **OUTCOME**

Should the City Council approve the subject request, the site would be permitted to operate two expanded legal non-conforming guesthouses for up to 27 guest rooms (total). Should the City Council deny the proposed Conditional Use Permit, the proposed guesthouses would continue the legal non-conforming use of up to 16 guest rooms and one three-bedroom apartment distributed within two contiguous buildings.

## **BACKGROUND**

On February 23, 2010, the Planning Commission held a public hearing to consider the proposed Conditional Use Permit (File No. CP07-053). The Director of Planning recommended the approval of the Conditional Use Permit (CUP) because the property size and shape, together with conditions included in the resolution (see attached), are sufficient to find that the proposed use at

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the location will not affect the peace, health, safety, morals or welfare or persons residing or working in the surrounding area. In addition, it was found that the proposed project conforms to the parking requirements as identified in the Zoning Ordinance in that the no additional parking is required since the expansion constitutes an expansion less than 40% of the existing legal use.

The applicant's representative, Jeffrey B. Hare gave a brief presentation on the background of the request, noting that his client has been working cooperatively with Code Enforcement staff to resolve the use issue in order to obtain final occupancy permits. Four speakers spoke against the proposal: Don Gagliardi, Michael McGettigan, Patti Phillips of the Horace Mann Neighborhood Association and Jonathan Miller of the Hensley Historic District Neighborhood Association. They were concerned with the condition of the buildings in so much as it could impact the quality of the neighborhood and the safety of the guesthouse residents.

Some of the Planning Commissioners concurred with the neighbors' concerns regarding the operation beyond the legal non-conforming status while awaiting a decision on this CUP application. Other Commissioners noted that the conditions included in the resolution adequately addressed any such concerns. Upon closing the public hearing, the Commission voted 4-3-0 (Commissioners Jensen, Zito and Kamkar opposed) to approve the subject permit request.

On March 3, 2010, an appeal was filed Michael McGettigan (see attached Notice of Appeal), and determined by staff to be a valid appeal.

### ANALYSIS

The appellant cited six reasons for the appeal (see attached appeal form and letter). The analysis section of this report identifies the specific concern raised by the appellant followed by a response from staff.

*1) The Public Hearing Notice sent out January 29, 2010 regarding the hearing on this, incorrectly described the project as 'an expansion of a legal non-conforming guest house'; since the building was already substantially converted from 16 rooms and an apartment without permits, the description should have read 'an expansion of an illegal nonconforming guesthouse...'*

As noted in the background section of the Planning Commission staff report, a Legal Non-Conforming Letter (LNC05-018) established the legal residential occupancy for 96 N. Fifth Street as a Guesthouse with eight rooms, and the legal residential occupancy for 98 N. Fifth Street as a guesthouse with eight rooms and a three bedroom apartment. This use was determined to have been legally established without the requirement for a Conditional Use Permit, having been legally established prior to the Zoning Ordinance requirement for issuance of a Conditional Use Permit for a guesthouse use. While the intensity of the use has been expanded without the benefit of permits, the Conditional Use Permit application in question is the appropriate means to legally expand the use and obtain occupancy permits.

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*2) Permits were not obtained for the existing alterations to the building.*

As noted above, while the intensity of the use has been expanded without the benefit of permits, the Conditional Use Permit application in question is the appropriate means to legally expand the use and obtain occupancy permits. The owner and applicant is working cooperatively with Code Enforcement staff to obtain Building Permits and Occupancy Permits.

*3) It is my understanding that, if a building is altered or reconfigured, then the current code comes in to play. If this is so, the existing parking arrangements are inadequate.*

As noted in the Planning Commission staff report, pursuant to Section 20.90.210 of the Ordinance, no structure constructed, or use instituted, prior to November 19, 1965 shall be required to meet the off-street parking requirements of the Ordinance unless there is a substantial change in the structure or in the use of the structure or land. Substantial change in this context is defined as an expansion of the use that would result in an increase in parking, per current Ordinance parking standards, of over 40%. Since the proposed use is not considered a substantial change in the use per this definition, the expansion is not required to meet the current off-street parking requirements of the Zoning Ordinance.

*4) There is also the question of the number of bathrooms required for 27 guest rooms; the staff were unable to answer that question. If the applicant had gone through the proper permitting process, this would have been determined.*

As noted in the Planning Commission hearing, the questions before the Commission and City Council on appeal are limited to those related to the land uses in question, namely the expansion of a legal non-conforming guesthouse use. The California Building Code establishes minimum numbers of bathroom fixtures at the building permit conformance phase of the permitting process, after consideration of the Conditional Use Permit.

*5) The basement has been converted to living quarters – is this legal?*

The California Building Code establishes legal egress requirements for all habitable spaces, including sleeping rooms. Because the finished floor of the first floor of the building located at 98 N. Fifth Street is more than six feet above grade, this floor of the building is technically considered a story. Basement as well as first floor living quarters can be established as legal as long as they meet the requirements of the Building Code. The building has not been cited for egress violations to the Building Code at this time, and will receive final occupancy permit compliance review at the Building Permit phase of the project, following receipt of the appropriate Conditional Use Permit (if approved).

*6) We already have five board and care facilities, including the one under discussion, within two blocks of City Hall. These facilities heavily impact our property values and quality of life.*

San Jose Zoning Ordinance considers board and care facilities to be residential service facilities, where the operator receives compensation for the provision of "personal services" (such as supervision, protection, assistance, therapy, non-medical care, etc.) in addition to the provision of housing. In contrast, the proposed Conditional Use Permit pertains to the expansion of a legal non-conforming guesthouse rather than a residential service facility. The guesthouse operator does not receive compensation for the provision of personal services in addition to housing.

Some of the current residents of this guesthouse may have special needs and participate in off-site programs run by independent agencies; however, the guesthouse functions as a form of housing available to a broad range of people.

### CONCLUSION

Based on evaluation of the facts provided in the Planning Commission staff report, Planning staff recommends approval of the subject Conditional Use Permit to allow the expansion of legal non-conforming residential uses that will facilitate the creation of a mix in housing types serving a wide variety of economic and social segments of the community within an existing mature neighborhood with adequate urban services adjacent to the Downtown Core.

### ALTERNATIVES

The City Council in their review of the project can take the following actions:

1. Uphold the Planning Commission's decision to approve the subject Conditional Use Permit, allowing for the expansion of the currently legal non-conforming guesthouse. This action would also bring it out of the non-conforming status and into a conforming status by virtue of it now being under a use permit; or
2. Deny the project as suggested by the appellant, limiting the use to the established legal non-conforming intensity as set forth in the April 6, 2007 letter issued by the Department of Planning, Building and Code Enforcement. Said letter establishes the legal non-conforming intensity of eight rooms and one apartment in one building and eight rooms in the other building. This letter provides additional guidance and can be found with the Planning Commission staff report attached to this Council memorandum.

### PUBLIC OUTREACH

- 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 published, posted on the City's web site, and distributed to the owners and tenants of all properties located within 500 feet of the

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project site. A sign has been posted on the project site. A community meeting was held on February 19, 2009 at the 13<sup>th</sup> Street Neighborhood Advisory Committee SNI meeting. This staff report has been posted on the City website and staff has been available to discuss the proposal with members of the public.

### COORDINATION

Preparation of this memorandum has been coordinated with the City Attorney's Office.

### CEQA

Exempt

  
JOSEPH HORWEDEL, DIRECTOR  
Planning, Building and Code Enforcement

For questions please contact Jeannie Hamilton at 408-535-7850

#### Attachments:

- Draft City Council Resolution
- Notice of Appeal
- Planning Commission Resolution, Staff Report & Attachments
- Correspondence

cc: Michael McGettigan, Appellant  
Nezih Sabankaya, Applicant

## RESOLUTION NO.

Resolution of the City Council of the City of San José granting, subject to conditions, a Conditional Use Permit to use certain real property described herein for the purpose of legalizing an expansion of two legal non-conforming Guesthouses to include up to 27 guest rooms on a 0.29 gross acre site located at the southeast corner of E. St. John Street and N. Fifth Street (96 and 98 N. Fifth Street).

## FILE NO. CP07-053

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SAN JOSÉ:

WHEREAS, pursuant to the provisions of Chapter 20.430 of Title 20 of the San José Municipal Code, on July 9, 2007, an application (File No. **CP07-053**) was filed for a Conditional Use Permit for the purpose of legalizing an expansion of two legal non-conforming Guesthouses to include up to 27 guest rooms, on that certain real property (hereinafter referred to as "subject property"), situate in the R-M Multiple Residence Zoning District, located at 96 and 98 N. Fifth Street, San José, and

WHEREAS, the subject property is all that real property described in Exhibit "A," which is attached hereto and made a part hereof by this reference as if fully set forth herein; and

WHEREAS, on February 24, 2010, the Planning Commission approved the application, from which decision a property owner has appealed to this City Council; and

WEREAS, pursuant to and in accordance with Chapter 20.100 of Title 20 of the San José Municipal Code, this City Council conducted a hearing on said application on April 27, 2010, notice of which was duly given; and

WHEREAS, at said hearing, this City Council gave all persons full opportunity to be heard and to present evidence and testimony respecting said matter; and

WHEREAS, at said hearing this City Council received and considered the reports and recommendation of the Director of Planning, Building and Code Enforcement; and

WHEREAS, at said hearing, this City Council received in evidence a development plan for the subject property entitled, "Contemporary Victorians Inc., 98 North Fifth Street, San Jose, CA 95112", dated June, 2007. Said plan is on file in the Department of Planning, Building and Code Enforcement and is available for inspection by anyone interested herein, and said

development plan is incorporated herein by this reference, the same as if it were fully set forth herein; and

WHEREAS, said hearing was conducted in all respects as required by the San José Municipal Code and the rules of this City Council;

NOW, THEREFORE:

After considering evidence presented at the Public Hearing, the City Council finds that the following are the relevant facts regarding this proposed project:

1. The proposed project occupies the 0.29 gross-acre site.
2. The project site is comprised of two residential properties (two lots) including 96 and 98 N. Fifth Street.
3. The subject structures are currently used as guesthouses.
4. The legal residential occupancy has been established for 96 N. Fifth Street as a guesthouse with eight rooms, and for 98 N. Fifth Street as a guesthouse with eight rooms and a three bedroom apartment (File No. LNC05-018).
5. The existing residential structures were built before 1915. There are two additional non-residential accessory structures in the rear yard area.
6. The existing buildings are not listed on the City of San Jose Historic Resources Inventory.
7. There are two parking spaces on the site.
8. The site has a designation of General Commercial on the adopted San Jose 2020 General Plan Land Use/Transportation Diagram.
9. The General Plan includes an Alternate Discretionary Use Policy that allows the reuse or expansion of non-conforming residential properties if to do so would preserve the existing structures and established neighborhood character.
10. The project furthers the Urban Conservation/Preservation Major Strategy because it avoids development at the fringe of the City which could divert services from existing neighborhoods;
11. The project furthers the Housing Major Strategy because it provides housing opportunities to meet the needs of a wide variety of economic segments of the community in a neighborhood with adequate urban services.
12. The subject site is located in the R-M Multiple Residence Zoning District.
13. Under the provisions of Section 15301 of the State Guidelines for Implementation of the California Environmental Quality Act, this project is found by the Director of Planning to be 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. The project will not have a significant adverse effect on the environment.
14. The subject site is generally surrounded by residential uses to the north across St. John Street; commercial office uses to the east; residential, religious assembly and City of San Jose

Employee parking garage uses to the west; and religious assembly, office and residential uses to the south.

15. The applicant is requesting to legalize the expansion of the legal non-conforming use two, 8-room guesthouses (one with a three bedroom apartment) within the existing structures to facilitate a combined total of 27 guest rooms. The existing 3 bedroom apartment would be eliminated.
16. Shared kitchen/dining facilities on the main floor and a shared basement laundry facility are located in the basement of Building #1. A storage area is located in the basement of Building #2.
17. Per Chapter 20.150 of the San Jose Municipal Code, any legal non-conforming use may be expanded only upon issuance of an in compliance with a Special Use Permit, or Conditional Use Permit for uses which would require a Conditional Use Permit. Expansion includes, but is not limited to, the intensification of a use with or without an increase in floor area. Per Table 20-50 of the San Jose Municipal Code, a Guesthouse is a conditional use in the R-M Multiple Residence Zoning District, therefore, the proposed expansion of the legal non-conforming Guesthouse use requires approval of a Conditional Use Permit.
18. Two parking spaces are currently provided on-site. Per Chapter 20.90 of the San Jose Municipal Code, the increase in parking of 40% as a result of the expansion would not be considered a substantial change in the use, and therefore the project is not required to meet the off-street parking requirements of the Code.
19. Notices of the public hearing for this project were sent to all tenants and property owners within 500 feet of the subject property.
20. The City Council Agenda is posted on the City of San José website, which includes a copy of the staff report. Staff has been available to discuss the project with members of the public.

This City Council concludes and finds, based upon an analysis of the above facts that:

1. The proposed project conforms to the City's General Plan.
2. The proposed project complies with all applicable provisions of the Zoning Ordinance.
3. The proposed project is in compliance with the California Environmental Quality Act.

Finally, based upon the above-stated findings and subject to the conditions set forth below, the City Council finds that:

1. The proposed use at the location requested will not:
  - a. Adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding area; or
  - b. Impair the utility or value of property of other persons located in the vicinity of the site;  
or
  - c. Be detrimental to public health, safety or general welfare; and

2. The proposed site is adequate in size and shape to accommodate the yards, walls, fences, parking and loading facilities, landscaping and other development features in this title, or as otherwise required in order to integrate said use with the uses in the surrounding areas; and
3. The proposed site is adequately served:
  - a. By highways or streets of sufficient width and improved as necessary to carry the kind and quality of traffic such use would generate; and
  - b. By other public or private service for facilities as are requested.

In accordance with the findings set forth above, a Conditional Use Permit to use the subject property for said purpose specified above and subject to each and all of the conditions hereinafter set forth is hereby granted. This Council expressly declares that it would not have granted this permit except upon and subject to each and all of said conditions, each and all of which conditions shall run with the land and be binding upon the owner and all subsequent owners of the subject property, and all persons who use the subject property for the use conditionally permitted hereby.

## CONDITIONS

This Conditional Use Permit shall have no force or effect and the subject property shall not be used for the hereby permitted uses unless and until all things required by the below-enumerated precedent conditions shall have been performed or caused to be performed and this Resolution has been recorded with the County Recorder.

1. **Acceptance of Permit.** Per Section 20.430.290(B), should the permittee fail to file a timely and valid appeal of this Permit within the applicable appeal period, such inaction by the permittee shall be deemed to constitute all of the following on behalf of the applicant:
  - a. Acceptance of the Permit by the permittee; and
  - b. Agreement by the permittee to be bound by, to comply with, and to do all things required of or by the permittee pursuant to all of the terms, provisions, and conditions of this permit or other approval and the provisions of Title 20 applicable to such Permit.
2. **Permit Expiration.** This Conditional Use Permit shall automatically expire two years from and after the date of adoption of the Resolution by the City Council, granting this Permit, if within such two-year period, the proposed use of this site or the construction of buildings has not commenced, pursuant to and in accordance with the provisions of this Conditional Use Permit. The date of adoption is the date the Resolution granting this Conditional Use Permit is approved by the City Council. However, the Director of Planning may approve a Permit Adjustment to extend the validity of this Permit for a period of up to two years. The Permit Adjustment must be approved prior to the expiration of this Permit.
3. **Use Authorization.** This Conditional Use Permit authorizes the following uses to be implemented on the property subject to the terms of this permit:
  - a. Guesthouse for up to nine (9) guest rooms located at 96 N. Fifth Street.
  - b. Guesthouse for up to eighteen (18) guest rooms located at 98 N. Fifth Street. This takes into consideration the removal of the legal non-conforming three bedroom apartment.

4. **Sewage Treatment Demand.** Chapter 15.12 of Title 15 of the San José Municipal Code requires that all land development approvals and applications for such approvals in the City of San José shall provide notice to the applicant for, or recipient of, such approval that no vested right to a Building Permit shall accrue as the result of the granting of such approval when and if the City Manager makes a determination that the cumulative sewage treatment demand of the San José-Santa Clara Water Pollution Control Plant to treat such sewage adequately and within the discharge standards imposed on the City by the State of California Regional Water Control Board for the San Francisco Bay Region. Substantive conditions designed to decrease sanitary sewage associated with any land use approval may be imposed by the approval authority.
5. **Permittee Responsibility.** The permittee shall ensure that the use/s authorized by this Permit are implemented in conformance with all of the provisions of this Permit.
6. **Nuisance.** The use shall be operated in a manner that does not create a public or private nuisance. Any nuisance must be abated immediately upon notice by the City.
7. **Conformance with Plans.** Except as noted in Condition #8 below, construction and development shall conform to approve development plans entitled, "Contemporary Victorians Inc., 98 North Fifth Street, San Jose CA 95112", dated June 2007 on file with the Department of Planning, Building and Code Enforcement.
8. **Permit Adjustment Required.** Within 60 days of the issuance of this permit, the applicant shall secure a Permit Adjustment to address the following items. The improvements shall be implemented within 90 days of the issuance of this permit.
  - a. All rooms shall have an identified use (i.e. living room, sitting room, etc.)
  - b. The total number of guest rooms shall be correctly identified (Building #1 identifies 19 guest rooms although the maximum number allowed is 18).
  - c. Unless specifically required by the Uniform Building Code, each guestroom shall have no more than one doorway entrance (i.e. rooms #4 and #14 in building #1 have two entrances).
  - d. Front and side exterior elevations shall be photo-documented on plans and inappropriately secured windows shall be compatibly repaired or replaced to the satisfaction of the Director of Planning.

Failure to secure said Permit Adjustment by the applicant/developer shall cause this development to be in non-compliance with this Conditional Use Permit.
9. **Conformance with Municipal Code.** No part of this approval shall be construed to permit a violation of any part of the San José Municipal Code.
10. **Protection of Storm Drains.** No hazardous materials, paint, rinse water, or construction sediments or debris shall be allowed to enter the public right-of-way or any storm drain inlet.
11. **Anti-Graffiti.** The permittee shall remove all graffiti from buildings, fences, and wall surfaces within 48 hours of defacement.
12. **Fire Department Comments.** The permittee shall meet all requirements of the Fire Department at the Building Permit stage.

13. **Building Comments.** Prior to the issuance of a Building Permit, the following requirements must be met to the satisfaction of the Chief Building Official:
  - a. *Construction Plans.* This Permit File Number, CP07-053, shall be printed on all construction plans submitted to the Building Division.
  - b. *Conformance Review.* A construction plan conformance review is required.
14. **Maintenance.** The site and public right-of-way frontage shall be maintained free of litter, refuse, and debris.
15. **Noise.** Per Table 20-85 of the Zoning Ordinance the sound pressure level generated by the use on the property shall not exceed 55 decibels at the property line.
16. **Cooking Facilities.** Per Part 2 Chapter 20.30 of the Zoning Ordinance all cooking facilities must be in a single, common kitchen available for use by residents of both buildings. No rooms shall have any cooking facilities.
17. **Discretionary Review.** The Director of Planning maintains the right of discretionary review of requests to alter or amend structures, conditions or restrictions of this Conditional Use Permit incorporated by reference in this Permit in accordance with the San José Municipal Code.
18. **Separate External Entryways.** Per Part 2 Chapter 20.30 of the Zoning Ordinance no more than three guest rooms may have separate external entryways if proposed in the future.
19. **Minimum Length of Occupancy.** The minimum term for rental or lease of each room shall be at least 30 days.
20. **Construction Hours.** Construction shall be limited to the hours of 7:00 a.m. to 7:00 p.m. Monday through Friday for any on-site or off-site work within 500 feet of any residential unit.
21. **Recycling.** Scrap construction and demolition debris shall be recycled in conformance with CDDD program. Integrated Waste Management staff at 277-5533 can provide assistance on how to recycle construction and demolition debris from the project, including information on available haulers and processors.
22. **Street Cleaning and Dust Control.** During construction, the developer shall damp sweep the public and private streets within and adjoining the project site each working day sufficient to remove all visible debris and soil. On-site areas visible to the public from the public right-of-way shall be cleaned of debris, rubbish, and trash at least once a week. While the project is under construction, the developer shall implement effective dust control measures to prevent dust and other airborne matter from leaving the site.
23. **Parking.** On-site parking is to be utilized only for the subject Guesthouses on the subject site.
24. **Trees.** No trees are authorized for removal with this permit. No tree larger than 56 inches in circumference, at a height of 24 inches above the natural grade, shall be removed without a Tree Removal Permit issued by the Director of Planning. Removal of any non-ordinance sized trees at the site shall require approval of a Permit Adjustment, subject to the discretion of the Director of Planning, Building, and Code Enforcement.

25. **Maximum Occupancy.** The project operator shall comply at all times with the occupancy limit provided by the San José Fire Department.
26. **Community Relations Manager.** The permittee shall post contact information for the community relations manager in a prominent location within the establishment near the primary entrance.
27. **Revocation, Suspension, Modification.** This Conditional Use Permit may be revoked, suspended or modified by the Planning Commission, or by the City Council on appeal, at any time regardless of who is the owner of the subject property or who has the right to possession thereof or who is using the same at such time, whenever, after a noticed hearing in accordance with Part 2 of Chapter 20.430 of Title 20 of the San José Municipal Code, it finds:
  - a. A violation of any conditions of the Conditional Use Permit was not abated, corrected or rectified within the time specified on the notice of noncompliance; or
  - b. A violation of any City ordinance or State law was not abated, corrected or rectified within the time specified on the notice of violation; or
  - c. The use as presently conducted creates a nuisance.

In accordance with the findings set forth above, a Conditional Use permit to use the subject property for said purpose specified above is hereby **approved**.

**ADOPTED** this 27<sup>th</sup> day of April 2010, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

VACANT:

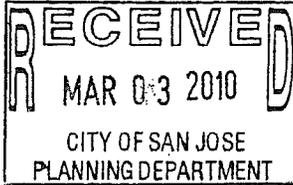
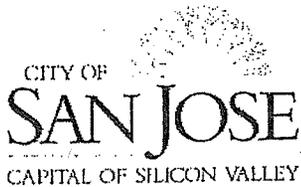
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CHUCK REED  
Mayor

ATTEST:

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LEE PRICE, MMC  
City Clerk



**CITY OF SAN JOSE**  
 Planning, Building and Code Enforcement  
 200 East Santa Clara Street  
 San José, CA 95113-1905  
 tel (408) 535-3555 fax (408) 292-6055  
 Website: www.sanjoseca.gov/planning

**NOTICE OF PERMIT APPEAL**

**TO BE COMPLETED BY PLANNING STAFF**

FILE NUMBER <i>CP07.053</i>	RECEIPT # _____
PROJECT LOCATION <i>96 &amp; 98 N. FIFTH STREET</i>	AMOUNT <i>100.00</i>
	DATE <i>3-3-10</i>
	BY _____

**TO BE COMPLETED BY PERSON FILING APPEAL**

PLEASE REFER TO PERMIT APPEAL INSTRUCTIONS BEFORE COMPLETING THIS PAGE. THIS FORM MUST BE ACCOMPANIED BY THE APPROPRIATE FILING FEE.

THE UNDERSIGNED RESPECTFULLY REQUESTS AN APPEAL FOR THE PROPERTY WHICH IS LOCATED AT:

*98 N 5TH ST, SAN JOSE, CA 95112*

REASON(S) FOR APPEAL (For additional comments, please attach a separate sheet.):

*See Attachment.*

**PERSON FILING APPEAL**

NAME <i>MICHAEL McGETTIGAN</i>	DAYTIME TELEPHONE _____
ADDRESS <i>" "</i>	CITY <i>SAN JOSE</i>
	STATE <i>CA</i>
	ZIP CODE <i>95112</i>
SIGNATURE <i>[Signature]</i>	DATE _____
RELATIONSHIP TO SUBJECT SITE: (e.g., adjacent property owner, property owner within one thousand (1,000) feet) <i>Property Owner Within 1,000 ft</i>	

**CONTACT PERSON (IF DIFFERENT FROM PERSON FILING APPEAL)**

*467.02-022*

NAME <i>" "</i>	CITY <i>" "</i>	STATE <i>" "</i>	ZIP CODE <i>" "</i>
DAYTIME TELEPHONE ( )	FAX NUMBER ( )	E-MAIL ADDRESS _____	

**PROPERTY OWNER**

NAME _____	DATE _____
ADDRESS _____	CITY _____
	STATE _____
	ZIP CODE _____

PLEASE CALL THE APPOINTMENT DESK AT (408) 535-3555 FOR AN APPLICATION APPOINTMENT.

1. The Public Hearing Notice sent out 1/29/10 regarding the hearing on this, incorrectly described the project as 'an expansion of a legal non-conforming guest house'; since the building was already substantially converted from 16 rooms and an apartment without permits, the description should have read 'an expansion of an illegal non-conforming guest house.....'
2. Permits were not obtained for the existing alterations to the building.
3. It is my understanding that, if a building is altered or re-configured, then the current code comes in to play. If this is so, the existing parking arrangements are inadequate.
4. There is also the question of the number of bathrooms required for 27 guest rooms; the staff were unable to answer that question. If the applicant had gone through the proper permitting process, this would have been determined.
5. The basement has been converted to living quarters - is this legal?
6. We already have 5 board and care facilities, including the one under discussion, within 2 blocks of city hall. These facilities heavily impact our property values and quality of life.

## RESOLUTION NO. 10-004

Resolution of the Planning Commission of the City of San José granting, subject to conditions, a Conditional Use Permit to use certain real property described herein for the purpose of legalizing an expansion of two legal non-conforming Guesthouses to include up to 27 guest rooms on a 0.29 gross acre site located at the southeast corner of E. St. John Street and N. Fifth Street (96 and 98 N. Fifth Street).

### FILE NO. CP07-053

BE IT RESOLVED BY THE PLANNING COMMISSION OF THE CITY OF SAN JOSÉ:

WHEREAS, pursuant to the provisions of Chapter 20.430 of Title 20 of the San José Municipal Code, on July 9, 2007, an application (File No. **CP07-053**) was filed for a Conditional Use Permit for the purpose of legalizing an expansion of two legal non-conforming Guesthouses to include up to 27 guest rooms, on that certain real property (hereinafter referred to as "subject property"), situate in the R-M Multiple Residence Zoning District, located at 96 and 98 N. Fifth Street, San José, and

WHEREAS, the subject property is all that real property described in Exhibit "A," which is attached hereto and made a part hereof by this reference as if fully set forth herein; and

WHEREAS, pursuant to and in accordance with Chapter 20.430 of Title 20 of the San José Municipal Code, this Planning Commission conducted a hearing on said application, notice of which was duly given; and

WHEREAS, at said hearing, this Planning Commission gave all persons full opportunity to be heard and to present evidence and testimony respecting said matter; and

WHEREAS, at said hearing this Planning Commission received and considered the reports and recommendation of the Director of Planning, Building and Code Enforcement; and

WHEREAS, at said hearing, this Planning Commission received in evidence a development plan for the subject property entitled, "Contemporary Victorians Inc., 98 North Fifth Street, San Jose, CA 95112", dated June, 2007. Said plan is on file in the Department of Planning, Building and Code Enforcement and is available for inspection by anyone interested herein, and said development plan is incorporated herein by this reference, the same as if it were fully set forth herein; and

WHEREAS, said hearing was conducted in all respects as required by the San José Municipal Code and the rules of this Planning Commission;

NOW, THEREFORE:

After considering evidence presented at the Public Hearing, the Planning Commission finds that the following are the relevant facts regarding this proposed project:

1. The proposed project occupies the 0.29 gross-acre site.
2. The project site is comprised of two residential properties (two lots) including 96 and 98 N. Fifth Street.
3. The subject structures are currently used as guesthouses.
4. The legal residential occupancy has been established for 96 N. Fifth Street as a guesthouse with eight rooms, and for 98 N. Fifth Street as a guesthouse with eight rooms and a three bedroom apartment (File No. LNC05-018).
5. The existing residential structures were built before 1915. There are two additional non-residential accessory structures in the rear yard area.
6. The existing buildings are not listed on the City of San Jose Historic Resources Inventory.
7. There are two parking spaces on the site.
8. The site has a designation of General Commercial on the adopted San Jose 2020 General Plan Land Use/Transportation Diagram.
9. The General Plan includes an Alternate Discretionary Use Policy that allows the reuse or expansion of non-conforming residential properties if to do so would preserve the existing structures and established neighborhood character.
10. The project furthers the Urban Conservation/Preservation Major Strategy because it avoids development at the fringe of the City which could divert services from existing neighborhoods;
11. The project furthers the Housing Major Strategy because it provides housing opportunities to meet the needs of a wide variety of economic segments of the community in a neighborhood with adequate urban services.
12. The subject site is located in the R-M Multiple Residence Zoning District.
13. Under the provisions of Section 15301 of the State Guidelines for Implementation of the California Environmental Quality Act, this project is found by the Director of Planning to be 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. The project will not have a significant adverse effect on the environment.
14. The subject site is generally surrounded by residential uses to the north across St. John Street; commercial office uses to the east; residential, religious assembly and City of San Jose Employee parking garage uses to the west; and religious assembly, office and residential uses to the south.

15. The applicant is requesting to legalize the expansion of the legal non-conforming use two, 8-room guesthouses (one with a three bedroom apartment) within the existing structures to facilitate a combined total of 27 guest rooms. The existing 3 bedroom apartment would be eliminated.
16. Shared kitchen/dining facilities on the main floor and a shared basement laundry facility are located in the basement of Building #1. A storage area is located in the basement of Building #2.
17. Per Chapter 20.150 of the San Jose Municipal Code, any legal non-conforming use may be expanded only upon issuance of an in compliance with a Special Use Permit, or Conditional Use Permit for uses which would require a Conditional Use Permit. Expansion includes, but is not limited to, the intensification of a use with or without an increase in floor area. Per Table 20-50 of the San Jose Municipal Code, a Guesthouse is a conditional use in the R-M Multiple Residence Zoning District, therefore, the proposed expansion of the legal non-conforming Guesthouse use requires approval of a Conditional Use Permit.
18. Two parking spaces are currently provided on-site. Per Chapter 20.90 of the San Jose Municipal Code, the increase in parking of 40% as a result of the expansion would not be considered a substantial change in the use, and therefore the project is not required to meet the off-street parking requirements of the Code.
19. Notices of the public hearing for this project were sent to all tenants and property owners within 500 feet of the subject property.
20. The Planning Commission Agenda is posted on the City of San José website, which includes a copy of the staff report. Staff has been available to discuss the project with members of the public.

This Planning Commission concludes and finds, based upon an analysis of the above facts that:

1. The proposed project conforms to the City's General Plan.
2. The proposed project complies with all applicable provisions of the Zoning Ordinance.
3. The proposed project is in compliance with the California Environmental Quality Act.

Finally, based upon the above-stated findings and subject to the conditions set forth below, the Planning Commission finds that:

1. The proposed use at the location requested will not:
  - a. Adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding area; or
  - b. Impair the utility or value of property of other persons located in the vicinity of the site; or
  - c. Be detrimental to public health, safety or general welfare; and
2. The proposed site is adequate in size and shape to accommodate the yards, walls, fences, parking and loading facilities, landscaping and other development features in this title, or as otherwise required in order to integrate said use with the uses in the surrounding areas; and

3. The proposed site is adequately served:
  - a. By highways or streets of sufficient width and improved as necessary to carry the kind and quality of traffic such use would generate; and
  - b. By other public or private service for facilities as are requested.

In accordance with the findings set forth above, a Conditional Use Permit to use the subject property for said purpose specified above and subject to each and all of the conditions hereinafter set forth is hereby granted. This Planning Commission expressly declares that it would not have granted this permit except upon and subject to each and all of said conditions, each and all of which conditions shall run with the land and be binding upon the owner and all subsequent owners of the subject property, and all persons who use the subject property for the use conditionally permitted hereby.

### CONDITIONS

This Conditional Use Permit shall have no force or effect and the subject property shall not be used for the hereby permitted uses unless and until all things required by the below-enumerated precedent conditions shall have been performed or caused to be performed and this Resolution has been recorded with the County Recorder.

1. **Acceptance of Permit.** Per Section 20.430.290(B), should the permittee fail to file a timely and valid appeal of this Permit within the applicable appeal period, such inaction by the permittee shall be deemed to constitute all of the following on behalf of the applicant:
  - a. Acceptance of the Permit by the permittee; and
  - b. Agreement by the permittee to be bound by, to comply with, and to do all things required of or by the permittee pursuant to all of the terms, provisions, and conditions of this permit or other approval and the provisions of Title 20 applicable to such Permit.
2. **Permit Expiration.** This Conditional Use Permit shall automatically expire two years from and after the date of adoption of the Resolution by the Planning Commission, or by the City Council on appeal, granting this Permit, if within such two-year period, the proposed use of this site or the construction of buildings has not commenced, pursuant to and in accordance with the provisions of this Conditional Use Permit. The date of adoption is the date the Resolution granting this Conditional Use Permit is approved by the Planning Commission. However, the Director of Planning may approve a Permit Adjustment to extend the validity of this Permit for a period of up to two years. The Permit Adjustment must be approved prior to the expiration of this Permit.
3. **Use Authorization.** This Conditional Use Permit authorizes the following uses to be implemented on the property subject to the terms of this permit:
  - a. Guesthouse for up to nine (9) guest rooms located at 96 N. Fifth Street.
  - b. Guesthouse for up to eighteen (18) guest rooms located at 98 N. Fifth Street. This takes into consideration the removal of the legal non-conforming three bedroom apartment.

4. **Sewage Treatment Demand.** Chapter 15.12 of Title 15 of the San José Municipal Code requires that all land development approvals and applications for such approvals in the City of San José shall provide notice to the applicant for, or recipient of, such approval that no vested right to a Building Permit shall accrue as the result of the granting of such approval when and if the City Manager makes a determination that the cumulative sewage treatment demand of the San José-Santa Clara Water Pollution Control Plant to treat such sewage adequately and within the discharge standards imposed on the City by the State of California Regional Water Control Board for the San Francisco Bay Region. Substantive conditions designed to decrease sanitary sewage associated with any land use approval may be imposed by the approval authority.
5. **Permittee Responsibility.** The permittee shall ensure that the use/s authorized by this Permit are implemented in conformance with all of the provisions of this Permit.
6. **Nuisance.** The use shall be operated in a manner that does not create a public or private nuisance. Any nuisance must be abated immediately upon notice by the City.
7. **Conformance with Plans.** Except as noted in Condition #8 below, construction and development shall conform to approved development plans entitled, "Contemporary Victorians Inc., 98 North Fifth Street, San Jose CA 95112", dated June 2007 on file with the Department of Planning, Building and Code Enforcement.
8. **Permit Adjustment Required.** Within 60 days of the issuance of this permit, the applicant shall secure a Permit Adjustment to address the following items. The improvements shall be implemented within 90 days of the issuance of this permit.
  - a. All rooms shall have an identified use (i.e. living room, sitting room, etc.)
  - b. The total number of guest rooms shall be correctly identified (Building #1 identifies 19 guest rooms although the maximum number allowed is 18).
  - c. Unless specifically required by the Uniform Building Code, each guestroom shall have no more than one doorway entrance (i.e. rooms #4 and #14 in building #1 have two entrances).
  - d. Front and side exterior elevations shall be photo-documented on plans and inappropriately secured windows shall be compatibly repaired or replaced to the satisfaction of the Director of Planning.

Failure to secure said Permit Adjustment by the applicant/developer shall cause this development to be in non-compliance with this Conditional Use Permit.
9. **Conformance with Municipal Code.** No part of this approval shall be construed to permit a violation of any part of the San José Municipal Code.
10. **Protection of Storm Drains.** No hazardous materials, paint, rinse water, or construction sediments or debris shall be allowed to enter the public right-of-way or any storm drain inlet.
11. **Anti-Graffiti.** The permittee shall remove all graffiti from buildings, fences, and wall surfaces within 48 hours of defacement.
12. **Fire Department Comments.** The permittee shall meet all requirements of the Fire Department at the Building Permit stage.

13. **Building Comments.** Prior to the issuance of a Building Permit, the following requirements must be met to the satisfaction of the Chief Building Official:
  - a. *Construction Plans.* This Permit File Number, CP07-053, shall be printed on all construction plans submitted to the Building Division.
  - b. *Conformance Review.* A construction plan conformance review is required.
14. **Maintenance.** The site and public right-of-way frontage shall be maintained free of litter, refuse, and debris.
15. **Noise.** Per Table 20-85 of the Zoning Ordinance the sound pressure level generated by the use on the property shall not exceed 55 decibels at the property line.
16. **Cooking Facilities.** Per Part 2 Chapter 20.30 of the Zoning Ordinance all cooking facilities must be in a single, common kitchen available for use by residents of both buildings. No rooms shall have any cooking facilities.
17. **Discretionary Review.** The Director of Planning maintains the right of discretionary review of requests to alter or amend structures, conditions or restrictions of this Conditional Use Permit incorporated by reference in this Permit in accordance with the San José Municipal Code.
18. **Separate External Entryways.** Per Part 2 Chapter 20.30 of the Zoning Ordinance no more than three guest rooms may have separate external entryways if proposed in the future.
19. **Minimum Length of Occupancy.** The minimum term for rental or lease of each room shall be at least 30 days.
20. **Construction Hours.** Construction shall be limited to the hours of 7:00 a.m. to 7:00 p.m. Monday through Friday for any on-site or off-site work within 500 feet of any residential unit.
21. **Recycling.** Scrap construction and demolition debris shall be recycled in conformance with CDDD program. Integrated Waste Management staff at 277-5533 can provide assistance on how to recycle construction and demolition debris from the project, including information on available haulers and processors.
22. **Street Cleaning and Dust Control.** During construction, the developer shall damp sweep the public and private streets within and adjoining the project site each working day sufficient to remove all visible debris and soil. On-site areas visible to the public from the public right-of-way shall be cleaned of debris, rubbish, and trash at least once a week. While the project is under construction, the developer shall implement effective dust control measures to prevent dust and other airborne matter from leaving the site.
23. **Parking.** On-site parking is to be utilized only for the subject Guesthouses on the subject site.
24. **Trees.** No trees are authorized for removal with this permit. No tree larger than 56 inches in circumference, at a height of 24 inches above the natural grade, shall be removed without a Tree Removal Permit issued by the Director of Planning. Removal of any non-ordinance sized trees at the site shall require approval of a Permit Adjustment, subject to the discretion of the Director of Planning, Building, and Code Enforcement.

25. **Maximum Occupancy.** The project operator shall comply at all times with the occupancy limit provided by the San José Fire Department.
26. **Community Relations Manager.** The permittee shall post contact information for the community relations manager in a prominent location within the establishment near the primary entrance.
27. **Revocation, Suspension, Modification.** This Conditional Use Permit may be revoked, suspended or modified by the Planning Commission, or by the City Council on appeal, at any time regardless of who is the owner of the subject property or who has the right to possession thereof or who is using the same at such time, whenever, after a noticed hearing in accordance with Part 2 of Chapter 20.430 of Title 20 of the San José Municipal Code, it finds:
- a. A violation of any conditions of the Conditional Use Permit was not abated, corrected or rectified within the time specified on the notice of noncompliance; or
  - b. A violation of any City ordinance or State law was not abated, corrected or rectified within the time specified on the notice of violation; or
  - c. The use as presently conducted creates a nuisance.

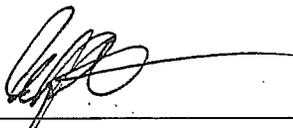
**ADOPTED** and issued this 24<sup>th</sup> day of February 2010, by the following vote:

AYES: CAHAN, CAMPOS, DO, PLATTEN

NOES: JENSEN, KAMKAR, ZITO

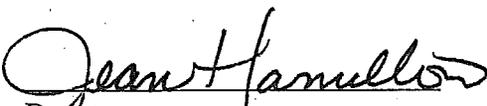
ABSENT: NONE

ABSTAIN: NONE

  
\_\_\_\_\_  
Chairperson

ATTEST:

Joseph Horwedel, Secretary

  
Deputy

#### NOTICE TO PARTIES

*The time within which judicial review must be sought to review this decision is governed by the provisions of the California Code of Civil Procedure Section 1094.6.*

**STAFF REPORT**  
**PLANNING COMMISSION**

**FILE NO.:** CP07-053

**Submitted:** 07/09/07

**PROJECT DESCRIPTION:** Conditional Use Permit to legalize an expansion of two legal non-conforming guesthouses to include up to 27 guest rooms on a 0.29 gross acre site.

**LOCATION:** Southeast corner of E. St. John Street and N. Fifth Street (96-98 N. Fifth Street)

Existing Zoning	R-M Multiple Residence
General Plan	General Commercial
Council District	3
Annexation Date	Original City 1850
SNI	None
Historic Resource	No
Redevelopment Area	No
Specific Plan	No

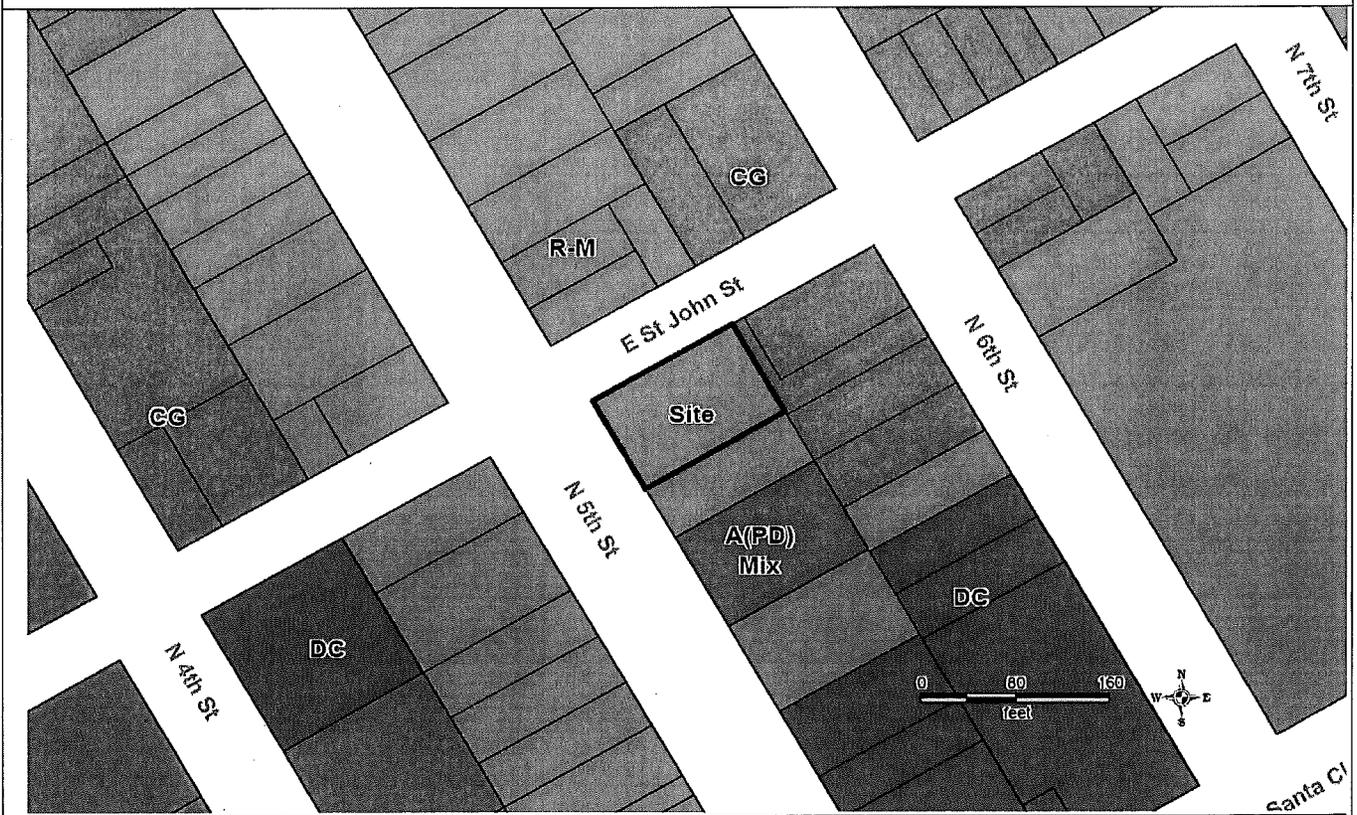
**AERIAL**



# GENERAL PLAN



# ZONING



## **RECOMMENDATION**

Planning staff recommends the Planning Commission approve the proposed Conditional Use Permit for up to 27 guest rooms for the following reasons:

1. The subject site has a General Plan Land Use Diagram designation of General Commercial, however as a developed parcel of two acres or less which has an existing urban land use, the project is deemed to be in conformance with the General Plan regardless of how it is designated.
2. The project conforms to the General Plan in that: it furthers the Urban Conservation/Preservation Major Strategy because it avoids development at the fringe of the City which could divert services from existing neighborhoods; and it furthers the Housing Major Strategy because it provides housing opportunities to meet the needs of a wide variety of economic segments of the community in a neighborhood with adequate urban services.

## **BACKGROUND**

On May 22, 2007, the property became the subject of a Code Enforcement violation for undertaking changes to the structure(s) to accommodate the expansion of the guesthouse use without benefit of permits. On July 9, 2007 the applicant, the Sabankaya Family Trust, filed a Conditional Use Permit (CUP) to legalize an expansion of two legal non-conforming guesthouses on a 0.29 gross acre site, located on the southeast corner of E. St. John Street and N. Fifth Street. A large guesthouse is defined by the Zoning Ordinance as a building used to accommodate 11 or more guest rooms for a fixed period of at least thirty consecutive calendar days in exchange for an agreed payment of a fixed amount of compensation based on the period of occupancy.

This area of the City has not been the subject of historic resources surveys. Estimated to have been built at the turn of the 20<sup>th</sup> Century, the existing structures appear on 1915 Sanborn Maps, but are not currently listed on the San Jose Historic Resources Inventory. Because no substantial exterior changes are proposed to the structures, no evaluation was required for environmental review of the application.

The property is located in the R-M Multiple Residence Zoning District. The San Jose Zoning Ordinance identifies a guesthouse as a Conditional Use in this Zoning District. A Legal Non-Conforming Letter (LNC05-018) established the legal residential occupancy for 96 N. Fifth Street as a Guesthouse with eight rooms, and the legal residential occupancy for 98 N. Fifth Street as a guesthouse with eight rooms and a three bedroom apartment. This use was determined to have been legally established without the requirement for a Conditional Use Permit, having been legally established prior to the Zoning Ordinance requirement for issuance of a Conditional Use Permit for a guesthouse use. Pursuant to Section 20.150.050.A of the Zoning Ordinance, any legal nonconforming use may be expanded only upon issuance of an in compliance with a Special Use Permit, or Conditional Use Permit for uses which would require a Conditional Use Permit. This project meets the definition of expansion in that it includes the intensification of a use, albeit without an increase in floor area.

The site is located approximately one block north of City Hall, surrounded by a mix of uses including: residential uses to the north across St. John Street; commercial office uses to the east; residential, religious assembly and City of San Jose Employee Parking Garage uses to the west; and religious assembly and residential uses to the south.

**PROJECT DESCRIPTION**

The project proposes the internal reconfiguration of the two existing subject guesthouses. While most of the alterations have already been made without the benefit of permits, the project proposal includes further interior alterations to conform to the maximum number of rooms allowed under this Conditional Use Permit. The legalization of the proposed 11 room expansion of the guesthouses includes the following: 1) the addition of ten guest rooms, with shared kitchen, dining and laundry facilities within the building located at 98 N. Fifth Street (Building #1) for a total of 18 guest rooms, and 2) the addition of one guest room with storage area within the existing structure located at 96 N. Fifth Street (Building #2) for a total of nine guest rooms. While some guest rooms with the shared laundry facility are located in the basement of Building #1, no living area is proposed in the basement of Building #2. The former three bedroom apartment in Building #2 was previously converted into separate guestrooms. The attached plan set does not include floor plans to identify the legal non-conforming layout, therefore the table below has been provided to help better indentify the proposed changes which have already been made.

*Building #1; 98 N. Fifth Street*

Legal Non-Conforming Use	Proposed Use
8 Guest Rooms	(+10) 18 Guest Rooms
One 3-bedroom Apartment	---

*Building #2; 96 N. Fifth Street*

Legal Non-Conforming Use	Proposed Use
8 Guest Rooms	(+1) 9 Guest Rooms

The project does not propose any exterior changes to the structures. The site also includes two accessory structures: one garage/recreation room and one patio cover structure all of which are proposed to remain. Building Permits, more clearly delineating the scope of work, will be required to be obtained through the Code Compliance process in order to legalize the internal alterations in conformance with this Conditional Use Permit. This permit includes a special condition to require modifications to the plan set within 60 days of approval to fix items on the plans such as room numbering errors, internal partitioning and door placement to avoid potential future issues of additional room subdivision. Additional requirements at the Building Permit stage of the project may require further action on the part of the applicants, including the possibility of a Lot Line Adjustment to address existing lot lines on the project site with respect to Building Code requirements.

**ANALYSIS**

The analysis section of this report addresses the following key issues: 1) General Plan conformance, 2) Zoning Ordinance conformance, and 3) environmental review.

**General Plan Conformance**

The subject site is designated General Commercial on the San José 2020 General Plan Land Use/Transportation Diagram. The intent of the designation is to support a wide variety of commercial uses. Since parcels of two acres and less in size may be too small to be separately identified on a map of the scale of the official Land Use/Transportation Diagram, any developed parcel of two acres or less is

deemed to be in conformance with the General Plan regardless of how it is designated. For the purpose of the General Plan, a developed parcel is defined as one which has an existing urban land use.

The Urban Conservation/Preservation Major Strategy works with the Greenline/Urban Growth Boundary, the Urban Service area and the level of service level policies to support the conservation of existing mature neighborhoods. At a minimum, the City will strive to maintain adequate levels of service for existing neighborhoods by avoiding development at the fringe of the City which could divert these services. The proposed expansion of legal non-conforming guesthouse uses will support this strategy by being centrally located within walking distance of Downtown services and Light Rail Transit.

The Housing Major Strategy works with the Growth Management Major Strategy to focus on encouraging a variety of affordable infill developments which the City can serve without overwhelming the City's fiscal resources. The Housing Major Strategy seeks to provide a variety of housing opportunities to meet the needs of the community in neighborhoods which are stable and have adequate urban services. The Housing Conservation and Rehabilitation Policies recognize that conservation and rehabilitation of the existing housing stock is an important means of meeting the objective of providing housing opportunities for all San Jose residents. Together with conforming to the land use and housing policies of the General Plan, the proposed project is well placed to take advantage of commercial services, transit opportunities and other amenities, therefore furthering this strategy.

### **Zoning Ordinance Conformance**

The Guesthouse use on this property was determined to have been legally established prior to the San Jose Zoning Ordinance requirement for issuance of a Conditional Use Permit for a guesthouse use. Per Chapter 20.150 of the Ordinance, any legal non-conforming use may be expanded only upon issuance of an in compliance with a Special Use Permit, or Conditional Use Permit for uses which would require a Conditional Use Permit. Expansion includes, but is not limited to, the intensification of a use with or without an increase in floor area.

The Ordinance defines Guesthouse as follows: where guestrooms are provided for a fixed period of at least thirty consecutive calendar days in exchange for an agreed payment of a fixed amount of compensation based on the period of occupancy. The project meets this definition. In addition, Section 20.30.120 of the Ordinance lists various restrictions which apply to guesthouses, as discussed below.

*1. Meals and housekeeping services may be provided with the lodging, but only to resident guests.*

Kitchen, dining, and laundry facilities are provided for independent use by guesthouse residents only. No meals or housekeeping services are provided with the lodging. Residents are, however, allowed to entertain personal guests within the guesthouse buildings and site.

*2. All cooking facilities must be in a single, common kitchen; no rooms shall have any cooking facilities.*

All cooking facilities are located in a single, common kitchen on the main floor of Building #1, located at 98 N. Fifth Street. This kitchen is also for the use of residents in Building #2. No rooms are proposed to have any cooking facilities. The draft resolution contains a condition prohibiting cooking facilities in guest rooms.

3. *No services may be provided to non-residents.*

The project is not a residential service facility, therefore there are no social or medical services provided. Meals services are not provided to non-residents.

4. *All required state licenses must be maintained.*

Because the guesthouse use is an independent living facility, no state licenses are required.

5. *No more than three guest rooms may have separate external entryways.*

While the project does not propose separate external entryways for any of the guest rooms, the draft resolution includes a condition limiting the number of any future proposed separate entryways to three.

### Parking and Site Design

Pursuant to Section 20.90.210 of the Ordinance, no structure constructed, or use instituted, prior to November 19, 1965 shall be required to meet the off-street parking requirements of the Ordinance unless there is a substantial change in the structure or in the use of the structure or land. Substantial change in this context is defined as an expansion of the use that would result in an increase in parking, per current Ordinance parking standards, of over 40%. Under the current code, the existing legal non-conforming use of the two guesthouses is compared with the proposed expansion as follows:

***Existing legal non-conforming use:***

- 1) 16 guest rooms @ 1 space per unit = 16,
  - 2) A three-bedroom apartment @ 2.25 spaces per unit = 3, rounded up,
  - 3) One employee (1 space each = 1).
- TOTAL REQUIRED= 20

***Proposed expanded use:***

- 1) 27 guest rooms @ 1 per unit = 27,
  - 2) One employee (1 space each = 1)
- TOTAL REQUIRED= 28

Since the proposed use is limited to a 40% expansion of the use, it is therefore not considered a substantial change in the use per this definition, and hence is not required to meet the current off-street parking requirements of the Zoning Ordinance. The site plan indicates two open staff parking spaces and a two-car garage without a minimum driveway, currently utilized for storage, proposed to remain. The backyard is currently utilized as common open space for the guesthouse residents.

### **Environmental Review**

The Director of Planning, Building and Code Enforcement has determined that this project is exempt from environmental review pursuant to the California Environmental Quality Act (CEQA) Section 15301(e)(1). Under this section, projects qualifying for exemption include those that involve the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination. The types of

"existing facilities" itemized are not intended to be all-inclusive of the types of projects which might fall within this Class. The key consideration is whether the project involves negligible or no expansion of an existing use. Examples include but are not limited to interior or exterior alterations involving such things as interior partitions, plumbing, and electrical conveyances; or an expansion of 50 percent of the floor area of a structure before an addition. In this instance, the project qualifies under this exemption in that it consists of interior alterations and proposes an increase from 16 guest rooms and one three-bedroom apartment to 27 rooms for an overall increase of approximately 30 percent of the use before the expansion, constituting a negligible expansion of use at the time the determination was made.

### PUBLIC OUTREACH

A noticed community meeting was held on February 19, 2009 as part of the 13<sup>th</sup> Street Neighborhood Advisory Committee SNI Meeting, where community members expressed concern about the nature of the independent living environment, active use of the project open space by residents and guests, and drug use within the neighborhood in general. The applicant spoke and provided information about the independent living environment and kitchen facilities. Specific project restrictions related to most of these concerns have been addressed in the analysis section of this report. The project applicant stated in the meeting that while the guesthouse does not tolerate drug and alcohol use, management does not have control over general drug use in the area.

A notice of this Planning Commission public hearing was mailed to the owners and tenants of all properties located within 500 feet of the project site and posted on the City website. A sign notifying the public of the proposed development was posted on site. This staff report is also posted on the City's Website. Staff has been available to respond to questions from the public.

### CONCLUSION

Planning staff recommends approval of the subject Conditional Use Permit it would allow the expansion of legal non-conforming residential uses that will facilitate the creation of a mix in housing types serving a wide variety of economic segments of the community, and the conservation of an existing mature neighborhood with adequate urban services adjacent to the Downtown Core.

**Project Manager:** Sally Zarnowitz

**Approved by:**



**Date:** 2/11/10

<p><b>Owner/Applicant:</b> Nezih Sabankaya 98 N. Fifth Street San Jose CA 95112</p> <p>Jeffrey B. Hare Attorney at Law 501 Stockton Avenue San Jose CA 95126</p>	<p><b>Attachments:</b> Resolution Plans Correspondence</p>
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March 18, 2010

FRED BUZO  
COUNCIL AIDE, DISTRICT 3  
CITY OF SAN JOSE  
200 EAST SANTA CLARA STREET  
SAN JOSE, CA 95113

RE: APPLICATION FOR CONDITIONAL USE PERMIT  
CP07-053 FOR 96 – 98 NORTH 5<sup>TH</sup> STREET (SABANKAYA)

Dear Mr. Buzo:

The purpose of this letter is to provide you with some additional background information pertaining to my client's application for a Conditional Use Permit (CP07-053) to legalize expansion of two legal, nonconforming guesthouses to include up to 27 guest rooms at 96 and 98 North 5<sup>th</sup> Street (Victorians). On February 24, 2010, the Planning Commission voted to approve the CUP; the matter has been appealed to the City Council. The matter is tentatively scheduled to be heard on April 27, 2010.

It is important to keep this CUP application in the proper context. Since acquiring the property in 1992, the owners have complied with every requirement put forth by the City of San Jose, up to and including the requirement to apply for this CUP as a way to resolve the discrepancy between the historical uses of the property and the current requirements under the Zoning Code. In other words, this application for a CUP was a specific recommendation made by the City following the completion of the Legal Nonconforming Use Letter issued in April, 2007.

In addition, it is important to keep in mind that the specific use and operation of this property – providing independent living housing for mentally disabled adults – would qualify for a Reasonable Accommodation. The owners originally filed a Request for Reasonable Accommodation, but City Staff advised that the project met the applicable requirements for the CUP and that no Reasonable Accommodation would be necessary.

The following facts and chronology may prove helpful:

1. The buildings have been at this location since at least 1915, and the property containing the two buildings has been zoned since 1929 for apartment use, including rooming and fraternity houses. Current zoning is R-M Multiple Residence.
2. The current owners (Sabankayas) purchased the property in 1992, and immediately requested an inspection by the City of San Jose. An inspection report dated October 16, 1992, noted that the two buildings had been modified (by previous owners) to 33 rooms, and the owners were instructed to consult the Planning Department regarding the legal process and zoning requirements to allow the increased number of rooms for occupancy.
3. City records show that the Sabankayas were issued Residential Occupancy Permits, Nos. 317 and 74, in 1996 and 1998, respectively. Although it was well-known that the property contained approximately 32 rooms between the two buildings, the City described the two properties as each having eight guest rooms and with 96 having a 3-bedroom apartment. At the same time, the owners were paying a Business License Tax based on 32 rooms.
4. The City determined that the Guesthouse use was established at this property prior to the requirement under the City Zoning Ordinance for a CUP for this use. (Staff Report).
5. The owners worked with Code Enforcement to address a number of issues from 1999 – 2000, and had complied and/or abated most of them. As of September, 2000, the only remaining issues were to obtain the permits for occupancy of the half-story and the balconies. (Letter from City of San Jose, 9/19/2000).
6. In 2001, the Redevelopment Agency announced it was considering acquiring the property as part of a Greater Downtown Housing Sites acquisition project. At or about the same time, the RDA notified the owners that they were considering acquiring the property as a relocation site for the Donner House. As a consequence, Code Enforcement notified the owners that the City was suspending any further code compliance action with respect to the property.
7. In or around 2004, the RDA notified the owners they intended to widen N. 5<sup>th</sup> Street and install a wide sidewalk back to the right-of-way, construct a parking garage, and install the art sculptures.
8. In or around 2005, Code Enforcement conducted an inspection. In addition to routine inspection items, the City noted that there was a discrepancy between the number of rooms under the Residential Occupancy Permit and the actual number of rooms in the buildings, and stated that the owners would need to apply for a Conditional Use Permit to resolve the discrepancy.

9. In July, 2005, the owners submitted a Legal Nonconforming Use Letter Application as a prelude to filing the application for the CUP.
10. On April 6, 2007, the City issued a Legal Nonconforming Use Letter, which concluded that the Guesthouse use predated the Zoning Ordinance requirement for a CUP, and that the historical, legal, nonconforming use was based on the eight guestrooms per building and the apartment.<sup>1</sup>
11. In July, 2007, the owners submitted an application for a Conditional Use Permit and a Reasonable Accommodation application. City Staff determined that the project, which included a request for up to 27 rooms (a decrease from 32 rooms), met all requirements under the City's code for this use, and that no Reasonable Accommodation application was necessary.

At least one criticism voiced by a member of the Planning Commission concerned the amount of time it has taken to bring the CUP forward for public hearing and review. The owners were ready to commence the process back in 2001, when the RDA identified the property in its Greater Downtown Housing Sites review of potential acquisitions, and shortly afterwards, reviewed the property as an alternative relocation site for the Donner House. Shortly thereafter, the RDA commenced a major street widening project and construction of the parking garage. Shortly after completion of the improvements, the City approached the owners to continue the discussion over the CUP, and it was as a result of these discussions that the application for Legal Nonconforming Use Letter was submitted in mid-2005. It took almost two years for City Staff to complete the LNC, but within a very short period of time after the Letter was released, the owners submitted the CUP application in 2007.

Since submitting the application, there have been at least three changes in Planning Staff, and there were certain complications arising from discrepancies in the City's records as to the lot line, which are still currently being resolved. Early on, the owners complied with City Outreach requirements by meeting with the 13<sup>th</sup> St. NAC, and I personally discussed the project at length with the President of the Horace Mann Neighborhood Association, offering to come to the HMNA meeting to answer questions. She declined the offer stating there was no need and assuring me she would let me know if there were any problems or issues.

The appeal, filed by a single individual who attended the Planning Commission meeting on February 24, sets forth six (6) grounds. The first challenges "legal" status of the nonconforming use, a point that has been addressed by Planning Staff. The second alleges that alterations were made without permits, but as set forth in Michael Hannon's e-mail to the Planning Commission ("cc" to District 3), dated February 23, 2010, notes that there have been no complaints since 2005. I personally have toured the property

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<sup>1</sup> Although the description of "Eight Guest Rooms and Apartment" appears on the records, there are no floor plans available to show what this would have looked like. The property consisted of approximately 33 rooms at the time it was purchased in 1992. Also, based on minimum square foot requirements per person, the legal occupancy limit could have easily exceeded 50 – 60 persons or more.

Fred Buzo, District 3  
March 18, 2010  
Page 4

since that time with representatives of Code Enforcement, Building and Fire, as well as Planning. The third point of the appeal takes issue with Planning Staff's parking analysis. As a point of fact, most of the residents do not own or drive cars, there are five on-site parking spaces (two covered), and there is plenty of street parking in addition to public parking lots in the vicinity.

The fourth point in the appeal notes that Staff could not answer the question of how many bathrooms were required for 27 guest rooms. I'm sure we will be able to get the answer. The fifth point questions whether the "basement" living units are "legal." The City has inspected these rooms several times, and as a point in fact, it is not a "basement" but a "half-story," which is very common throughout the City. The rooms meet all building and fire code requirements. Again, the CUP is designed to legalize the number of rooms.

The sixth point in the appeal makes a general allegation against the number of board and care facilities in the area, and asserts that these facilities "heavily impact our property values and quality of life." We are prepared to address this and similar allegations at the appropriate time.

#### Conclusion

The Victorians have provided affordable and safe, independent living housing for mentally disabled adults for the past 18 years. Many of the residents have been there for almost the entire duration. Some are fortunate enough to have jobs, others go to school, and they live together as a community for support. City Planning Staff recognized that this facility fulfills a critical housing need in the downtown area – a need that unfortunately exceeds supply. The owners have taken, and will continue to take, all reasonable steps to address the legitimate concerns of the neighborhood.

We will be prepared and happy to answer any questions you may have. Thank you for your time and consideration.

Very truly yours,

Jeffrey B. Hare

cc: Clients

April 6, 2007

Nezih Sabankaya  
98 N. 5<sup>th</sup> Street  
San Jose, CA 95112

**RE: 96-98 N. 5<sup>th</sup> Street, San Jose, CA – Assessor's Parcel No. 467-19-071  
File No. LNC05-018**

Dear Nezih Sabankaya:

This letter is in response to your application requesting confirmation of the legal nonconforming status for: (1) the legal residential occupancy of the structures located at 96 and 98 N. 5<sup>th</sup> Street, including use of the basement at 98 N. 5<sup>th</sup> St.

**Zoning and General Plan:** The subject property is zoned R-M Multiple Residence. The General Plan Land Use/Transportation Diagram designation is General Commercial. To obtain a copy of the permitted uses in the aforementioned zoning district, please access our website online at [http://www.sanjoseca.gov/planning/pdf/zoning\\_code.pdf](http://www.sanjoseca.gov/planning/pdf/zoning_code.pdf).

**Zoning History:** The subject property is part of the Original City. The first zoning established in San Jose in 1929 identifies this property as zoned for Apartment (including multiple dwellings, and rooming and fraternity houses.) The zoning on the property since 1929 has remained as multi-family, specifically R-4 and currently R-M Multiple Residence.

**Site History:** The following information was provided with the application and supplemented by staff research:

- **1915-1955**, Sanborn Maps of San José identify the structure currently addressed at 98 N. 5<sup>th</sup> St. as having 2 dwellings in it and the structure currently addressed at 96 N. 5<sup>th</sup> St. as being a single dwelling.
- **1966**, Sanborn Maps of San José identify both structures currently addressed 98 N. 5<sup>th</sup> St. and 96 N. 5<sup>th</sup> St. as being rooming houses. These maps do not indicate number of rooms.
- **1996, Residential Occupancy Permit #317** issued for structure currently addressed as 96 N. 5<sup>th</sup> St. for eight (8) rooms.
- **1998, Residential Occupancy Permit #74** issued for structure currently addressed as 98 N. 5<sup>th</sup> St. for one (1) apartment and eight (8) rooms.

Based on the review of relevant historical land use data including Sanborn Maps for the City of San Jose, Residential Occupancy Permits issued by the City of San Jose, and Building Permits issued by the City of San Jose, staff has concluded that the legal residential occupancy for 98 N. 5<sup>th</sup> St. is a Guesthouse with one (1) apartment and eight (8) rooms on the 1<sup>st</sup> and 2<sup>nd</sup> floors of the

Nezih Sabankaya  
April 6, 2007  
Subject: LNC05-018, 96-98 N. 5<sup>th</sup> St.  
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structure. There is evidence of a Building Permit No. 26365 issued on July 15, 1957 allowing the conversion of the basement area to a rumpus room. There is no evidence presented or found that allowed for the subsequent conversion of the basement to sleeping rooms.

Additionally, based on the review of relevant historical land use data including Sanborn Maps for the City of San Jose, Residential Occupancy Permits issued by the City of San Jose, and Building Permits issued by the City of San Jose, staff has concluded that the legal residential occupancy for 96 N. 5<sup>th</sup> St. is for a Guesthouse with eight (8) rooms.

The property owner and any potential buyer or lessee should be aware that when the legal nonconforming use is discontinued for a period of more than six months but less than 18 months, reinstatement of the use requires the approval of a Special Use Permit. A residential legal nonconforming use discontinued for more than 18 months deemed terminated can be reinstated with a Special Use Permit. Expansion or intensification of the legal nonconforming use requires approval of a discretionary permit, both for the use and the building and/or site improvements from the Department of Planning, Building and Code Enforcement. No additional nonconforming uses may be added to the property. Additional conforming uses may only be added with an approved development permit. This legal nonconforming status may be revoked and the use may be subject to a Conditional Use Permit or terminated if the use creates an adverse impact on the surrounding uses.

As this letter is confirmation of the legal nonconforming status of the use at both 96 and 98 N. 5<sup>th</sup> St., the current property owner and/or lessee should retain a copy in their files as the question of legal nonconforming status may be raised in the future. The confirmation of legal nonconforming status is based upon the information provided to us and available as of this date. However, should we receive new or revised information at any time, this information could alter the official legal nonconforming status of this property.

Should you have any further questions regarding the above matter, please feel free to contact me, Jean Hamilton, at (408) 535-7850.

Sincerely,



Jean Hamilton  
Acting Deputy Director

cc: Peggy Rollis, Code Enforcement  
Mollie McLeod, Code Enforcement

March 5, 2009

To Whom It May Concern:

This letter is in regard to the proposal to expand the facilities at 98 North Fifth Street, San Jose, 95112. Essentially, many residents of this neighborhood are vehemently opposed to the approval of this petition.

The illegal activities of the boarding house's tenants have significantly contributed to the blight of the surrounding area and have negatively influenced the livability of the neighborhood. Over the years, there have been numerous examples of the difficulties stemming from the inhabitants of this boarding house.

Use of drugs and alcohol on our property (personally witnessed)

Disposal of drug paraphernalia on our premises

Vandalism, e.g. intentional breakage of exterior lights and graffiti

Public urination

Loitering

Curbside disposal of furniture and mattresses

Although we have reported these problems to the police, the situation has progressively worsened. We are disappointed and frustrated that conditions have not improved, even with the relocation of City Hall only one block away. In light of these circumstances, we request that you seriously consider our opposition to this proposal. The expansion of the boarding house is certain to only damage and harm our neighborhood even further.

Sincerely,

Anonymous

**Samonsky, Ella**

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**From:** Jeffrey Hare [jbhlaw@pacbell.net]  
**Sent:** Thursday, February 19, 2009 9:29 PM  
**To:** Butler, Lee; Samonsky, Ella; jerry.yoshida@sanoseca.gov  
**Subject:** 96 - 98 No. 5th Street (Victorians)

Lee, Ella and Jerry:

Thank you for your continuing support of the process as we move forward with the approval process to bring the Victorians into compliance. A couple of constructive comments as we go to the Planning Commission (Date??)

First, I think it is a serious mistake to attempt to avoid the fact that most of the residents of the Victorians are high functioning mentally disabled adults. Don Gagliardi as much as accused the City Staff, in front of the 13<sup>th</sup> Street NAC, of trying to "hide the ball" on this issue. From Day One, we have always made this fact very clear, the original application included a request for Reasonable Accommodation based on this fact, and most of the neighbors and residents are already well aware of this fact. At the same time, we have to recognize that since not every resident of the Victorians is classified as a mentally disabled individual, to classify the whole group this way would violate certain privacy rights as well as anti-discrimination laws. This facility has provided much-needed housing for persons with special needs in cooperation with the County Department of Mental Health for over a quarter century. So, we need to be very clear on this subject, but stay within the law.

Second, in response to certain neighbors' concerns about the conduct and appearance of individual residents of the facility, the owners/managers do what they can – within the confines of the law – to regulate and encourage good behavior both on and off the premises. Violations of both State and local laws, as well as house rules, are subject to disciplinary actions. This is necessary for the operation of the facility, and frankly goes much further than what is required of any other residential facility in the downtown area. As a consequence, we need to be careful not to "micromanage" the tenants in a way that is different in any way than any other residential facility. For example, one woman complained that she wanted drapes or curtains. I cannot imagine the City requiring drapes or curtains of any of the downtown residential facilities, whether it is the Axis, The 88, the residential units above the Mission Ale House, or the Senior Center on North 4<sup>th</sup> Street. As a point in fact every effort is made to ensure that the residents of the Victorians understand and practice good neighborly habits. However, these types of issues are inappropriate for consideration under the CUP.

Third, allegations of drug use and other inappropriate conduct were raised. As a point in fact, this conduct was known to the owners/management and disciplinary action was taken to remove these individuals from the site. Other houses in the immediate vicinity have a lengthy history of illegal drug activity, and in some cases, these non-residents have been identified and observed coming onto the Victorian property to attempt to sell the residents illicit drugs. To the casual neighbor, it is not always clear who is a resident or not. Since the use of illegal, controlled substances can have disruptive and possibly deadly consequences when combined with an individual's prescription medication, the use of the former is of utmost concern to the owners/managers of the facility, and every reasonable step is taken to prevent and/or control this type of behavior, either on or off the premises.

Fourth, it is important to again remember that because most of the residents of this facility are individuals with mental disabilities, they and their housing rights are protected under both State and Federal laws. Moreover, since they are independent, they are entitled to a wide latitude of privacy rights, and any attempt to curtail, restrict or limit their freedom to move about in any way that is more restrictive than other individuals in the downtown area (or anywhere, for that matter), would be

vigorously opposed by advocates for mental health and others. This is why we say that we will do all that we can – within the limits of the law – to ensure that the residents of the Victorians conduct themselves in a proper and neighborly manner.

Finally, these types of land uses are extremely sensitive, and tend to generate a high degree of scrutiny and “NIMBYism.” Most – and I emphasize “most,” of the allegations and reports of problems have, in my lengthy experience of dealing with these issues, have been based on misinformation, lack of understanding, or fear. The truth is that most mentally disabled adults are extremely fearful of “others” who are not like them, and they seek the comfort and company of their peers in community living environments. They are more often victims of abuse, discrimination, and misconduct by others who live nearby. The Sabankaya family has over 35 years of working closely with this population, and they know how to manage these individuals better than just about anyone in the County of Santa Clara. They take care of these people because very, very few others are willing to do so.

If I can answer any questions or be of any assistance, please do not hesitate to contact me.

Very truly yours,

Jeff

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