Summary Title: 2585 E Bayshore Road: Approval of Retail Preservation Waiver

Title: QUASI-JUDICIAL. 2585 E Bayshore Road: Approval of the Planning and Development Services Director's Determination to Authorize a Waiver From the Retail Preservation Ordinance. Environmental Assessment: Exempt in Accordance With the California Environmental Quality Act (CEQA) Guidelines Section 15061(b)(3)

From: City Manager

Lead Department: Planning and Development Services

Recommendation
Staff recommends that the City Council accept the Director’s decision approving the subject waiver request.

Executive Summary
This report transmits the Planning & Development Services Director’s (Director) tentative approval of a waiver from the retail preservation ordinance for the subject property located at 2585 East Bayshore Road. The building, constructed in 1969, was converted to a day care center use in 2012 and the City Council adopted the Retail Preservation Ordinance on March 20, 2017.

The applicant presented the required evidence indicating that (1) the permitted retail or retail-like uses are not viable; (2) the proposed use will support the purposes of the zoning district and Comprehensive Plan land use designation; and (3) the proposed use will encourage active pedestrian-oriented activity and connections. Therefore, the Director tentatively approved the waiver. The Council may accept this decision on Consent, or alternatively, three councilmembers may pull this item and require a future public hearing before Council.
Background
Pursuant to the Retail Preservation Ordinance, and specifically Section 18.40.180(c)(1) of the Palo Alto Municipal Code (PAMC), “…the following shall be grounds for a request for waiver or adjustment of the requirements contained in this section:

(A) Economic Hardship. An applicant may request that the requirements of this section be adjusted or waived based on a showing that applying the requirements of this section would effectuate an unconstitutional taking of property or otherwise have an unconstitutional application to the property; or

(B) Alternative Viable Active Use. Except in the GF or R combining districts, an applicant may request that the requirements of this Section 18.40.160 be adjusted or waived based on a showing that:

- permitted retail or retail-like use is not viable,
- the proposed use will support the purposes of the zoning district and Comprehensive Plan land use designation, and
- the proposed use will encourage active pedestrian-oriented activity and connections.”

Applicants must provide substantial evidence to support their application and bear the burden of proof. The Director renders a tentative decision, which is then placed on the City Council’s consent agenda. The Council may accept this decision on Consent, or alternatively, three councilmembers may pull this item and require a future public hearing before Council.

The subject site is located on East Bayshore Road and directly adjacent to the Baylands area. Palo Alto Municipal Code Section 18.20.030 details permitted and conditionally permitted land uses within the Research Office Light Manufacturing [ROLM(E)(D)(AD)] district. In this area, all retail and retail-like uses require a Conditional Use Permit (CUP). The exception to this is automobile dealerships, which are a permitted use. Attachment C provides an abridged zoning table with the permitted and conditionally permitted uses within the ROLM(E) zoning district along with supportive excerpt code sections.

The property’s ROLM base zoning district provides for a limited group of office, research, and manufacturing uses in a manufacturing/research park environment. Office uses can be accommodated but should not predominate in the district. The ROLM subdistrict Embarcadero (E) (previously the E stood for environmental sensitivity) modifies the site development regulations of the ROLM district to apply to smaller sites in areas with limited access or with environmental sensitivity due to their proximity to the Palo Alto Baylands. The combining district of (D) requires site and design review intended to provide a process for review and approval of development in environmentally and ecologically sensitive areas, reducing distributions to the applied areas. The intent of the review is to assure that use and development will be harmonious with other uses in the general vicinity and will be compatible with environmental and ecological objectives in accordance with the Palo Alto Comprehensive...
Plan. The automobile dealership (AD) combining district modifies the regulations of the ROLM district, in this case. The intent of the AD overlay is to create and maintain areas accommodating automobile dealerships primarily engaged in new and used automobile sales and service on a citywide and regional basis.

Discussion
The property owner applied for a waiver from ground floor retail protections on March 2, 2020. The site has a 15,927-sf single-story office building constructed in 1969. The building was originally and mainly utilized for office uses for nearly 40 years. Following the economic downturn of 2008 and the depressed real estate market, the owner worked with the subject day care use to avoid a vacancy situation. In 2012, Council approved a Site and Design Review application to convert the use of the building and site to day care center use. No Conditional Use Permit was required at that time. Since then, the Code has changed to require a CUP for day care center uses in the ROLM zone. The current day care center user, the Mustard Seed Learning Center, indicated to the property owner they will not be renewing their lease of the site.

The applicant seeks to return the building and site to its original and long-term general business office use. This use is allowed in the ROLM(E) zoning district and is consistent with the Comprehensive Plan land use designation of Research/Office Park. A portion of the parking lot at the site (approximately 18 spaces) was converted into an outdoor play area for the day care use; however, this area can be converted back to parking to meet the requirements for a general business office use.

The Research Office Light Manufacturing (ROLM) with combining (E)(D)(AD) zoning districts do not allow retail or retail-like uses by right, nor is the intent of the zoning district to populate retail and retail-like uses. To establish retail or retail-like uses on the site would require the approval of a Conditional Use Permit (CUP), given the site’s zoning.

Alternative Viable Active Use
To obtain a waiver on the basis of an alternative viable active use per PAMC Section 18.40.180(c)(1)(B), an applicant must show that (1) the permitted retail or retail-like use is not viable; (2) the proposed use will support the purposes of the zoning district and Comprehensive Plan land use designation; and (3) the proposed use will encourage active pedestrian-oriented activity and connections. Here, the applicant has provided evidence that the first two conditions are met and asserts that the third is inapplicable.

1 Council staff report April 9, 2012 link: https://www.cityofpaloalto.org/civicax/filebank/documents/29148; minutes link: https://www.cityofpaloalto.org/civicax/filebank/documents/30155
Regarding retail viability, the applicant presents the closure of their tenant Mustard Seed Learning Center, a conditionally permitted retail-like use, as evidence that retail uses are not viable at this location. Mustard Seed Learning Center partially occupied the building on site and was unable to continue with their business, citing economic hardship and location concerns. The Site & Design approval limited the total number of children enrolled at Mustard Seed Learning Center to 117 after a traffic study was conducted and in consideration with traffic queuing concerns on E Bayshore Rd, which prevented the tenant from expanding their operations to fully occupy the building. Mustard Seed Learning Center has reduced their operations at the site significantly, resulting in a greater portion of the building being unoccupied today. The applicant asserts this pending closure illustrates that retail and retail-like uses on-site are neither viable nor suitable in this location.

In addition, the applicant engaged the services of a professional commercial broker to assess the site. The broker specializes in site selection locations for retail tenants. In Attachment B, Exhibit D, the broker stated in this professional opinion: “Presently, I cannot identify a retail tenant that would occupy that property.” The letter includes additional analysis regarding appropriate uses for the site.

Secondly, the zoning district does not envision or readily-allow retail or retail-like uses. The underlying zoning, which does not allow retail use as of right, and Comprehensive Plan land use designation suggests the City did not and does not intend for retail uses to proliferate in this location. As the area has developed, the site has become surrounded primarily by research and office uses.

The building’s original and long-term use as a general business office is permitted in the ROLM(E) zoning district and is consistent with the Comprehensive Plan land use designation of Research/Office Park. By contrast, retail and retail-like uses are only permitted through the issuance of a conditional use permit.

Staff analyzed the five conditionally permitted uses: Commercial Recreation, Eating and Drinking Services (no drive-in/take-out services), Retail Services, Day Care Centers, Personal Services. Given the site’s remote location, lack of customers in the immediate area, and lack of transit options, it is not a desirable location for most of these uses. Of these, the Commercial Recreation uses are typically limited/restricted due to parking requirement based on PAMC 18.52.040(c) Table 1 and the required traffic analysis submitted during the CUP process to ensure no local impacts are generated on local public streets. This process would be similar to the process that limited the Mustard Seed day care center use to an enrollment of 117 where the business felt 200 students was more economically viable. Retail Eating & Drinking Services along with Retail Services are found to be problematic at this location as E Bayshore Road is not a retail corridor, it is an office and light manufacturing corridor/cluster which is consistent with the areas land use designation. The same finding can be applied to Personal Services, that
includes but is not limited to beauty shops, day spas, laundry and cleaning services, art and dance studios are retail-like uses, which are more viable within retail and pedestrian heavy areas.

The applicant argues that the final requirement – that the proposed use encourages active pedestrian-oriented activity – is not applicable here because the site is not suited to pedestrian activity and none currently exists. The location is not readily accessible to pedestrians, is not near public transit, and does not have any pedestrian amenities, nor a development pattern/design at a pedestrian scale. Thus, it would be unreasonable to require a pedestrian-serving use.

**Economic Hardship**

As an alternative, the applicant also requested a waiver based on economic hardship per PAMC Section 18.40.180(c)(1)(A). To obtain a waiver on the basis of economic hardship, an applicant must show that the retail preservation ordinance would effectuate an unconstitutional taking of property or otherwise have an unconstitutional application to the property. The applicant’s constitutional arguments include both that the retail preservation ordinance would unconstitutionally frustrate the owner’s reasonable, investment-backed expectations and that the application of the ordinance to the property would be unconstitutionally arbitrary and capricious in a manner akin to illegal spot-zoning. In short, the applicant argues that the retail preservation ordinance cannot constitutionally be applied to its property because there are only five retail or retail-like uses that would be possible under the ordinance, and that all of them require a CUP, which would subject the property to uncertainty and burdens not shared by other sites with similar zoning.

**Director’s Decision**

The Director reviewed and approved the waiver request including the supporting information that was provided in Attachment B. The Director believes the request meets the standards of Section 18.40.160(c)(1)(B). In accordance with the provisions of the ordinance, the Director’s decision letter is included with this report as Attachment A. Also, the establishment of the day care center use in 2012 was not well received by all; in fact, several owners of neighboring properties were concerned about the use conversion at that time. Because of the aforementioned reasons and that Mustard Seed Learning Center will cease operations, leaving the property vacant, and retail use is unlikely in this location, staff supports the requested waiver.

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2 The applicant has also provided reasoning related to the inapplicability of an automotive dealership use. The Municipal Code Chapter 18.30(F) clearly states that the (AD) combining district is intended to be applied to limited manufacturing zoning district parcels located within ¼ mile of the San Antonio Road/Highway 101 intersection. The subject property is not within this ¼ mile radius.
Policy Implications
Ratifying the Directors' decision to approve the waiver for the subject property can provide future guidance, through precedent, for sites outside core retail areas of the City and within zoning districts and land use designations that are not intended to contain retail and retail-like uses. The affirmation of the Director's decision will also avoid continued discussion related to ‘unconstitutional application’ of the Retail Preservation Ordinance.

Resource Impact
The recommendation in this report has no significant budget or fiscal impacts. Day Care Center use is not retail use per se, with no anticipated loss in sales tax. If the Council grants relief from the retail preservation ordinance through the requested waiver, the applicant will be able to return the building to the long-standing general business office use. The conversion to daycare center occurred before the advent of the City’s Retail Preservation Ordinance. The majority of the building is vacant and would likely continue to be vacant unless the waiver is granted, which may have marginal fiscal impacts to the City’s tax base and other unquantifiable benefits to area businesses.

Timeline
Council’s acceptance of this determination takes place immediately and is final. A request to pull this item from the consent calendar would result in a future public hearing before City Council on a date yet to be determined.

Environmental Review
This determination is exempt from the provisions of the California Environmental Quality Act (CEQA) in accordance with Section 15061(b)(3) of the CEQA Guidelines in that it can be seen with certainty that there is no possibility the decision to waive this property from the City’s retail preservation ordinance will not cause a significant effect on the environment.

Attachments:
Attachment A: Director’s Tentative Approval of Waiver
Attachment B: Applicant’s Waiver Request
Attachment C: Zoning Code Excerpts
Daniel Cunningham  
3197 Park Blvd  
Palo Alto, CA 94306

Subject: 2585 E Bayshore Retail Preservation Waiver Determination 20PLN-00048

Mr. Daniel Cunningham,

In accordance with Palo Alto Municipal Code Section 18.40.160 (c)(1)(b), your request for a waiver from the City's retail preservation ordinance is tentatively approved. This determination will be placed on the City Council's August 10, 2020 consent calendar agenda. If three or more council members vote to pull the item from the consent agenda, you will be notified of a future public hearing regarding your request. If approved on the consent agenda, this decision will be final.

This determination is based on information provided to the City, including information regarding the former tenant, the surrounding land uses and zoning, the limited options for retail and retail-like uses, and the fact that retail and retail-like uses must apply for and receive conditional use permits in order to occupy the subject premises. The City also noted that the current tenant, a retail-like use, discontinued their lease due to economic viability issues at that location. In terms of encouraging active pedestrian-oriented activity and connections that are conducive to retail uses, the existing site's location and surrounding network of roads and sidewalks does not promote these objectives. Adoption of the retail preservation ordinance required the subject location remain as retail even though it was never developed, intended, or approved to be a retail use.

Based on the aforementioned information, I find that retail and retail-like uses are not viable at this location at this time.

Any future uses shall comply with the underlying zoning for permitted and conditionally permitted uses, and other applicable provisions of the municipal code, and would, therefore, be consistent with the purposes of the zoning district and consistent with the City's Comprehensive Plan.

If you have any questions regarding this determination, please do not hesitate to contact me.

Sincerely,

Rachael Tanner  
Assistant Director of Planning & Development Services

On behalf of Jonathan Lait  
Director of Planning and Development Services
**Certificate Of Completion**

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Subject: Please DocuSign: 2585 E Bayshore Retail Preservation Waiver Determination 20PLN-00048

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Envelope Originator:

- Madina Klicheva
- 250 Hamilton Ave
- Palo Alto, CA 94301
- Madina.Klicheva@CityofPaloAlto.org
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  - Madina.Klicheva@CityofPaloAlto.org
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**Signer Events**

- Rachael Tanner
  - Rachael.Tanner@CityofPaloAlto.org
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February 26, 2020

Mr. Jonathan Lait
Director of Planning and Community Development
City of Palo Alto
250 Hamilton Avenue
Palo Alto, CA 94301

Re: Retail Preservation Ordinance -- Waiver for 2585 East Bayshore Road

Dear Mr. Lait:

The property owner at 2585 East Bayshore Road ("Owner") respectfully requests a waiver under the Retail Preservation Ordinance ("RPO"), § 18.40.180(c) of the Palo Alto Municipal Code ("PAMC"), in order to return the subject property to its original use for office purposes.

I. Summary.

The property is located east of US Highway 101 on East Bayshore Road past the northbound freeway off-ramp. A map showing the property location and nearby uses is attached as Exhibit A.

The property is designated Research/Office Park in the 2030 Comprehensive Plan and is located in the ROLM zoning district ("ROLM District"), subject to a number of Combining District overlays. The nearby uses are office, light industrial, and research, along with a church and flying school. There are neither nearby retail uses nor retail pedestrian traffic in the area. In the ROLM District, retail or retail-like uses are not permitted except for a few listed uses, but those are allowed only with approval of a conditional use permit ("CUP"). See PAMC § 18.20.030(a).

The property has a single-story 15,927 sq. ft. building and a 48-parking stall capacity. It was designed and constructed in 1969 as an office building and was used exclusively for office purposes for over 40 years. In 2010, Loren Brown purchased the building as the intended future headquarters for his construction company, Vance Brown, Inc ("Vance Brown"). More detailed information on Vance Brown’s history in Palo Alto, the acquisition of the 2585 East Bayshore property, and the soon-to-expire Mustard Seed lease are provided in the Statement of Loren Brown, attached as Exhibit C ("Loren Brown Statement").

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1 Research, Office, and Limited Manufacturing ("ROLM") District (see PAMC, Chapter 18.20, § 18.20.010 et seq.). A description of applicable planning and zoning designations for the property is attached as Exhibit B.
Following the 2008 economic downturn, the Palo Alto real estate market was historically
depressed with no prospective office tenants and few tenants of any kind. While the design and
location of the building are not conducive to retail or retail-like uses, in order to avoid a vacancy
situation, the Owner in 2010 negotiated with the Mustard Seed Learning Center ("Mustard
Seed"), an after-school learning program/child-care provider, as a potential tenant. Following a
lengthy City approval process, in April 2012 the City conditionally approved a day-care use on
the property based on Mustard Seed’s anticipated operations, including a limitation to 117
students. The Owner and Mustard Seed then entered into a ten-year lease, commencing July 21,
2012.

This lease was granted before the RPO was proposed and adopted. Had the Owner been aware
that new zoning restrictions for retail and retail-like uses would be adopted and applied to a day-
care center use in the ROLM District, it would not have entered into the lease. Because the day-
care center under the RPO is a listed Retail-Like Use, the property is now permanently
prohibited from all base uses normally permitted as a matter of right in the ROLM District (see
PMAC 18.40.180(a)), unless this waiver application is granted.

The Mustard Seed lease expires in 2022. The tenant has notified the Owner that it will not renew
the lease at that time, and has also expressed a desire to be relieved from the lease sooner if
possible. See Loren Brown Statement, p. 2. The Owner desires to return the building to its
original intended purpose as the Vance Brown headquarters. Id. Even if the lease is not
terminated early, at its expiration Vance Brown desires to keep its headquarters in a more
affordable area in Palo Alto than its current location, by re-locating to the 2585 East Bayshore
property when the lease expires.

As noted, the terms of the RPO prevent the Owner from returning this property to office use
unless it obtains an RPO waiver. This places the Owner in an unfair and untenable position.
Because the RPO prohibits the conversion to any non-retail use, this means that all base uses
normally permitted as a matter of right in the ROLM District (such as office) are off limits to the
Owner. Denial of a waiver would thus deprive the Owner of any base use in the District, and
force the Owner to attempt to maintain a non-viable retail use in a zoning district where retail
uses were never intended and do not exist today. Furthermore, the grant of a CUP for the limited
retail or retail-like uses even allowed in the District is entirely discretionary and City approval
would not be assured.

These are severe restrictions that no other property owner in the ROLM District faces. It would
effectively render the property an island in the District being treated differently than all other

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2 At that time, a day-care center was an allowed use in the ROLM District subject to site and design review.
However, the zoning regulations have since been amended to require a CUP for this kind of use in the District.
See PMAC § 18.20.030(a)(Table 1); see also § 18.04.125.1 (defining day care centers as a "Retail-Like use").

3 Mustard Seed had approximately 80 students with a staff of 10, but was hopeful of expanding the student
propulsion to 200 or more. However, the City’s 2012 approval limited the student population to 117, and the
day-care population has not been able to expand.

4 Loren Brown Statement, p. 2. The RPO provisions were initially adopted by the City on an interim basis in 2015,
and a permanent basis in 2017.
properties, where landowners may undertake base uses permitted as a matter of right, including office uses, consistent with the basic purposes of the District.

Being required to keep the property in retail or retail-like uses in the ROLM District that has no current retail amenities, and is geographically separated from any true retail-centered areas in Palo Alto, is problematic because:

- There are only 5 retail or retail-like uses allowed in the ROLM District, and none of those are allowed as a matter of right -- meaning that in each case obtaining a discretionary CUP, in a substantial and expensive permitting process, would also be necessary; and

- As documented in the report of Mr. Mike Costa of Cushman & Wakefield, attached as Exhibit D ("Costa Report"), none of those uses would be economically viable because the property is located in an exclusively office, research and industrial area with no existing retail uses and no pedestrian traffic.

For the reasons described below, the Owner respectfully requests the City to grant the requested waiver under the RPO.

II. A WAIVER SHOULD BE GRANTED FOR 2585 E. BAYSHORE.

Section 18.40.180(c)(1) of the RPO provides two grounds for granting a waiver: (i) Alternative Viable Active Use, and (ii) Economic Hardship. As explained below, a waiver may be granted for 2595 East Bayshore under both standards.

A. Alternative Viable Active Use.

The Alternative Viable Active Use ("AVAU") standard provides for a waiver where the permitted retail or retail-like use is not viable; the proposed use will support the purposes of the zoning district and Comprehensive Plan land use designation; and the proposed use will encourage active pedestrian-oriented activity and connections. See PAMC § 18.40.180 (c)(1)(B). The current application clearly meets the first two standards and the third is inapplicable in the circumstances.

1. The permitted retail or retail-like use is not viable.

The property is located in an area entirely unsuitable for retail or retail-like uses. The zoning and planning regulations do not provide for such uses in the ROLM District, and in fact there are no retail or retail-like uses adjacent to or near the property. See Costa Report. The current day-care lease (approved for only 117 students) cannot be economically sustained and the tenant intends

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5 There are no retail or retail-like uses allowed as a matter of right in the ROLM District. Only five retail or retail-like uses are allowed with a CUP (retail services, eating and drinking services, personal services, commercial recreation, day-care centers)
to vacate the property and find a more sustainable site as soon as it can. Loren Brown Statement, p. 2.

As noted above, the property is designated as Research/Office Park in the 2030 Comprehensive General Plan and is included in the East Bayshore and San Antonio Road/Bayshore Corridor Employment District. In addition to being zoned ROLM, it is subject to the ROLM(E) sub-district regulations due to limited access and environmental sensitivity. See PAMC § 18.20.101(c). It is also subject to the “D” and “AD” combining district overlay regulations.

None of these planning and zoning designations encourage retail uses in this area. In fact, the Comprehensive Plan recognizes that retail uses are generally not suitable in the Research/Office Park area or the East Bayshore Employment District. See Comprehensive Plan at 33-34 (retail services may be included in the Research/Office Park district, “but only if they are found to be compatible with the surrounding area through the conditional use permit process” (emphasis added)). The ROLM zoning is consistent with the Comprehensive Plan. PAMC §18.20.030.

Consistent with the property’s land use designations, there is no existing retail use or ground-level foot pedestrian traffic in the vicinity of the property. Nearby uses include office, research or light manufacturing functions, except for a school and church. See Exhibit A. For example, businesses and organizations along East Bayshore Road include the Stanford Flying Club, Blackstone Discovery (an IP consulting company), ICO RALLY (business office/electronic materials) and the Bay Area Christian Church and school. The property also abuts sensitive PF(D) open-space areas to the rear. None of these uses qualifies as retail or retail-like uses and none would support retail use at the subject property. See also Costa Report, p. 2.

Based on economic and locational concerns, the current day-care tenant will not renew the lease in 2022 and strongly desires to be released from the lease. Loren Brown Statement, p. 2. The Costa Report further supports the conclusion that this area and its dominant office-based rental structure make retail and retail-like uses problematic and unsustainable. In addition, the property was not developed or constructed to provide parking to support retail uses, but for office building use.

2. The proposed office use will support the purposes of the zoning district and Comprehensive Plan land use designation.

The Owner wishes to return the property to the original office-based purpose that existed for over 40 years, and utilize it as the main office of the Vance Brown construction company. The company’s current offices on Park Boulevard are not sufficient to support its continued success and growth, and the company wishes to remain in an affordable area in Palo Alto by using its own property at 2585 East Bayshore as a headquarters. Loren Brown Statement, p. 2.

The planning and zoning designations clearly contemplate office use, along with light industrial use, in the district where the property is located. The Comprehensive Plan generally describes

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6 The nearest "retail" or "retail-like" uses appear to be two auto dealerships and an auto body shop located approximately 1/3 mile away on Embarcadero Road. A former large restaurant (Ming’s) at the corner of Embarcadero Road and East Bayshore has ceased business and that property is now used for automobile storage.
the Research/Office Park land use designation as allowing: "Office, research and manufacturing establishments whose operations are buffered from adjacent residential uses..." as well as "mixed-uses that would benefit from the proximity to employment centers..." Comp. Plan at 33-34. Additionally, the East Bayshore and San Antonio Road/Bayshore Corridor Employment District is intended to maintain such uses and does not include retail: Policy L-5.4 aims to “[m]aintain the East Bayshore and San Antonio Road/Bayshore Corridor areas as diverse business and light industrial districts.” Emphasis added.

Similarly, the ROLM District “provides for a limited group of office, research and manufacturing uses in a manufacturing/research park environment” and “is primarily intended for land use designated for research and office park use by the Palo Alto Comprehensive Plan...” PAMC § 18.20.010(b) (emphasis added).

In sum, the proposed office use for the Vance Brown headquarters is consistent with the Comprehensive Plan and zoning regulations. Returning the property to its original office use would support the purpose of the zoning district and Comprehensive Plan land use designations, while denying a waiver and requiring the Owner to maintain a non-viable retail or retail-like use would not.

3. The proposed use will not encourage active pedestrian-oriented activity and connections as none currently exists.

The requirement that an applicant show the proposed use will “encourage active pedestrian-oriented activity” presupposes that local pedestrian activity exists in the area for retail purposes that could be encouraged. Here, the nearby uses are all office and light industrial businesses that discourage local retail pedestrian activity, and as a result there is no such activity. Costa Report, p. 2.

There is precedent that this provision may be found inapplicable for the current application. This would be similar to the waiver granted for 425 Portage Avenue, when the Director found that, “In terms of encouraging active pedestrian-oriented activity and connections, the existing site does little to advance and promote these objectives.”7 The same finding should apply here.

B. Economic Hardship.

As an alternative ground, a waiver can also be granted if applying the RPO to a property

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7 See July 5, 2017 letter from Hillary Gitelman to D&B Properties, attached as Exhibit E. In that matter, the Director’s approval of a waiver was later affirmed by the City Council. This was the first waiver considered under the AVAU test adopted by the Council in March 2017 to ameliorate the stringent nature of the Economic Hardship test. See City Council Staff Report, Feb. 13, 2017, p. 7 (amendments “[m]odify the waiver/hardship provisions to include a process that is less stringent than the constitutional takings standard used in the interim ordinance ”), available at https://www.cityofpaloalto.org/vc/vcflb/documents/55798. The interim urgency RPO initially passed in 2015 included only the “economic hardship” standard as a ground for waiver or adjustment.
"would effectuate an unconstitutional taking of property or otherwise have an unconstitutional application to the property." PAMC § 18.40.180(c)(1)(A).

The City has recognized that this standard is difficult to meet, as reflected in the City’s amendment to the interim RPO to include the more flexible standard of an “alternative viable active use.” Nonetheless, given the facts and circumstances involved with the 2585 East Bayshore site and the ROLM(E) sub-district, such constitutional standards are also satisfied here.8

1. Unconstitutional Taking.

While the property is currently leased, that situation is temporary and will not continue as the Loren Brown Statement indicates. Given the (i) particular location of the property just off the freeway on East Bayshore Road, (ii) base uses allowed under the applicable planning and zoning regulations for this area that do not include retail, and (iii) physical as-built situation existing in this area with no nearby retail uses or retail pedestrian activity, there is no basis to find that a retail or retail-like use could succeed in this location or meet the property owner’s legitimate investment-back expectations when the property was acquired.9

The building was purchased in 2010 under legitimate investment-backed expectations for office use commensurate with the ROLM(E)(D)(AD) District regulations and 40 years of prior office building use. The lease to Mustard Seed was an interim measure to avoid vacancy in the face of a collapsed market for office or similar uses. The Owners expectations would be unconstitutionally frustrated if the property is now constrained to only five limited retail or retail-like uses, each requiring a discretionary CUP, with no ability to undertake base uses normally permitted as of right in the ROLM District.

This situation is not be based on any rational planning goal for promotion of the public interest in this particular area,10 but is due simply to the unanticipated enactment of the RPO in 2015 (three years after the Mustard Seed lease) with broad “retail-like use” definitions and an application and restrictive effect throughout the entire City rather than in just core retail areas.

2. Other Unconstitutional Application.

In addition, denying a waiver would “otherwise have an unconstitutional application to the property” in these circumstances, by producing an arbitrary and capricious result amounting to a

8 It may be uncertain whether this requirement applies to this property. The February 13 Staff Report, p. 7, indicates that the “economic hardship” requirement was primarily intended to apply to the GF and R combining districts, which do not apply to 2585 East Bayshore.

9 In determining whether a regulatory taking has occurred, courts consider several factors, including (1) the economic impact of the regulation, (2) the extent to which the regulation interfered with the property owner’s investment-backed expectations, and (3) the character of the government action. See Penn Central Transportation Co. v. New York City 438 U.S. 104 (1978); Kavanau v. Santa Monica Rent Control Bd. (1997) 16 Cal.4th 761, 775.

10 In adopting the RPO, the City did not undertake a comprehensive City-wide study of all zoning districts and their suitability for preserving retail or retail-like like uses.
denial of substantive due process.\textsuperscript{11} In contrast to every other property in the ROLM(E)(D)(AD) District, all of which may as a "matter of right" undertake any base use allowed in that District, the property at 2585 East Bayshore would be sharply limited to no base uses at all, and have only a narrow range of five retail or retail-like uses that would require obtaining a CUP from the City. Among other things, obtaining an CUP is a burdensome and time-consuming process in which the City has discretion to deny the permit and there is no guaranty of success.\textsuperscript{12} In effect, through the operation of the RPO, the 2585 East Bayshore property alone would be singled out and restricted in the ROLM District -- in effect "spot-zoned" for uses not even permitted without a CUP -- in contrast to other property owners in the District.

For all these reasons, the application of the RPO and denial of a waiver under these circumstances would be arbitrary and capricious, and would deny the Owner's due process and equal protection\textsuperscript{13} rights under the U.S. and California Constitutions. However, in the event a waiver is granted under the AVAU standard, the more complicated issues of an unconstitutional application of the RPO to the subject property may be avoided.

\section*{III. Conclusion.}

The Owner respectfully requests that a waiver be granted to allow the Owner to return the property to its originally intended use as a new office headquarters for the Vance Brown construction company.

Sincerely,

\begin{center}
Ronald E. Van Buskirk
\end{center}

Cc: Mr. Loren Brown  
Mr. Dan Cunningham  
Mr. Ken Hayes

\textsuperscript{11} See Avenida San Juan Partnership v. City of San Clemente (2011) 201 Cal. App. 4th 1256, 1268 (finding city's imposition of low-density land use restrictions on parcel located in higher density zoning district to be arbitrary and capricious, because the restrictions effectively created "an island of minimum lot size zoning in a residential ocean of substantially less restrictive zoning," and also awarding damages for a regulatory takings claim); see also Hamer v. Town of Ross (1963) 59 Cal.2d 776, 783 (invalidating city's one-acre minimum lot size requirement on "island" surrounded by developed lots of less than one acre). Zoning regulations violate substantive due process principles if they are arbitrary and unreasonable, having "no substantial relation" to public health, morals or general welfare. Lingle v. Chevron, 544 U.S. 528, 541.

\textsuperscript{12} In other cases where the City has granted a waiver or adjustment under the RPO, the properties in question were zoned to allow retail and retail-like uses as a matter of right. See Exhibit F summarizing previous RPO waiver applications.

\textsuperscript{13} For example, in contrast, a special waiver from the RPO was granted in January 2019 for the 3703-3709 El Camino Real housing project by amending the housing regulations to allow a waiver simply by finding that project to be "in the public interest." See Exhibit F.
Exhibit A

Property Location
Exhibit B

Current Land Use Regulations
2585 East Bayshore Road
2585 E. BAYSHORE ROAD

CURRENT LAND USE REGULATIONS

PALO ALTO COMPREHENSIVE PLAN

Research/Office Park

The City’s Comprehensive Plan 2030 (CP 2030) designates the property as “Research/Office Park.” This designation permits retail services only if they are compatible with the surrounding area:

“Office, research and manufacturing establishments whose operations are buffered from adjacent residential uses... Other uses that may be included are educational institutions and child care facilities. Compatible commercial service uses such as banks and restaurants and residential or mixed-uses that would benefit from the proximity to employment centers, will also be allowed. Additional uses, including retail services, commercial recreation, churches and private clubs may also be located in Research/Office Park areas, but only if they are found to be compatible with the surrounding area through the conditional use permit process.” CP 2030 at 33-34, emphases added.

East Bayshore and San Antonio Road/Bayshore Corridor Employment District

The Property is also within the East Bayshore and San Antonio Road/Bayshore Corridor Employment District. The Employment Districts represent

“a development type not found in other parts of the city. These Districts are characterized by large one- to four-story buildings, with some taller buildings, separated by parking lots and landscaped areas. The Districts are accessed primarily by automobile or employer-supported transit, though future changes in land use and tenancy could support a shift toward transit, pedestrian and bicycle travel.” CP 2030 at 20.

The Comprehensive Plan describes the East Bayshore and San Antonio Road/Bayshore Corridor Employment District as

“serving] a specific economic role. Its [sic] relatively low-cost space provides opportunities for a variety of service industries and start-up businesses that could not feasibly locate in the higher cost areas.” Id. at 195.

The following Comprehensive Plan policies are pertinent to the East Bayshore Employment District:

- **Policy L-5.4:** Maintain the East Bayshore and San Antonio Road/Bayshore Corridor areas as diverse business and light industrial districts.
• Policy B-7.7: Seek to balance increases in costs for business space with the need for rehabilitation and replacement of outdated space in the San Antonio Road and East Bayshore areas.

ZONING CODE

Zoning

The Property is zoned Research Office Limited Manufacturing (“ROLM”). The ROLM district provides for

"... a limited group of office, research and manufacturing uses in a manufacturing/research park environment, where uses requiring larger sites and available natural light and air can locate. Office uses can be accommodated, but should not predominate in the district. The ROLM district is primarily intended for land designated for research and office park use by the Palo Alto Comprehensive Plan and located east of El Camino Real.” PAMC §18.20.010(b).

Under current code provisions, retail uses and day care centers are permitted in the ROLM district only with a conditional use permit. See PAMC §18.20.030.

Combining District Overlays

The Property is also subject to the following Combining District Overlays in the Zoning Code:

• ROLM -Embarcadero (ROLM(E) sub-district): Modifies the site development regulations of the ROLM district to apply to smaller sites in areas with limited access or with environmental sensitivity due to their proximity to the Palo Alto Baylands in the Embarcadero Road area. PAMC §18.20.10(c).

• Site and Design (D): Provides a process for review and approval of development in environmentally and ecologically sensitive areas, including established community areas which may be sensitive to negative aesthetic factors, excessive noise, increased traffic or other disruptions. PAMC §18.30(G).10.

• Auto Dealership (AD): "The automobile dealership (AD) combining district is intended to modify the regulations of the service commercial (CS) and general manufacturing (GM or GM(B)) districts to create and maintain areas accommodating automobile dealerships primarily engaged in new and used automobile sales and service on a citywide and regional basis.” PAMC § 18.30(F).10.

Site and Design Review

Site and design review is required in the (D) overlay district prior to "the issuance of any permit or other approval for the construction of any building or the establishment of any

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1 Palo Alto Municipal Code (“PAMC”) §18.20.010 et seq.
use." PAMC §18.30(G).040 (emphasis added). Generally, the Site and Design Review Process involves review and approval by the planning commission, architectural review board, and City Council. See PAMC 18.30(G).020-.070. No building permit or other permit or approval for building construction or use of the site can be issued until the plans have been approved by the city council or by the director of planning and community environment. PAMC §18.30(G).070.
CITY OF PALO ALTO
COMPREHENSIVE PLAN
2030
Exhibit C

Statement of Loren Brown
Statement of Loren Brown

The following statement is submitted in support of the application by 2585 East Bayshore, LLC for a waiver from the Palo Alto Retail Preservation Ordinance ("RPO").

Applicant Background

The property owner is 2585 East Bayshore, LLC. I am the majority owner of 2585 East Bayshore, LLC and also the principal owner of Vance Brown, Inc. ("Vance Brown" or the "Company"), a commercial general contractor serving Palo Alto/Stanford and surrounding communities. The Company was founded in 1932 and has operated continuously in Palo Alto for its entire existence. It has been located in South Palo Alto (in the Park Boulevard area) for the past 70 years, including at 3197 Park Boulevard since 1995.

When Vance Brown first located to Park Boulevard, the area was lightly populated by local service businesses (Pacific Ready Mix, Lloyd's Towing, Bleibler Iron Works, Jost Sheet Metal, etc.). However, over time, virtually all of the local service businesses have been replaced by high tech firms (Tcn Cont, Agilent, Cloudera, WeWorks, Softbank, etc.). This has put significant pressure on space and rents in the area. Since 1995, the Company has seen its rent increase by almost 700%.

Acquisition of 2585 East Bayshore

In 2010, a rare opportunity arose to purchase the 2585 East Bayshore property which has a single-story 15,927 sq. ft. building and a 48-parking stall capacity. The building was designed and constructed in 1969 as an office building and was used exclusively for office purposes for over 40 years. We purchased the property in 2010 as the intended future headquarters for Vance Brown. The Company foresaw a need for future expansion space and an opportunity for lower rents, along with the ability to control its real estate fate and remain in Palo Alto. We elected to purchase the building and lease it until expansion space for the Company was required.

Generally, the design and location of the building are not conducive to retail or retail-like uses. However, in 2010-2011, the office space market remained depressed from the 2008 financial crisis and very few tenants were looking for space, and we considered interim options to avoid a vacancy situation.

Mustard Seed Lease

1 VBI's recent projects include a number of projects at Stanford (Stanford Stadium, Maples Pavilion renovations, Stanford Alumni Center, Escondido Village Graduate Residences, Stanford Hospital Parking Structure 4) and in Palo Alto generally (Evvia Estiatorio, Bird Dog, Tin Pot Creamery, Gunn High School Library and Science Classrooms, Channing House renovations, Avenidas renovations, Junior Museum and Zoo, Palo Alto YMCA, Nixon Elementary School renovations, International School of the Peninsula, Castilleja School, Palo Alto High School Gymnasium, Palo Alto Medical Foundation Clark Building, Elks Club, Palo Alto Hills Golf and Tennis Club renovations).
As of 2010, the Mustard Seed Learning Center's lease in existing space in another building was expiring, and Mustard Seed showed interest in the 2585 East Bayshore building. While Mustard Seed's population of approximately 80 students was small relative to the building and its configuration, Mustard Seed was hopeful of expansion to 200 students or more.

In 2010, a day-care use was an allowed use as of right in the ROLM District, subject to Site and Design Review. Mustard Seed sought and obtained necessary site and design review approvals from the City in April 2012, although it was restricted to 117 students. Mustard Seed executed a ten-year lease with 2585 Bayshore, LLC, effective July 19, 2012.

However, we would not have entered into the lease with Mustard Seed for a day-care use in this location had we known or been advised that the RPO would be enacted three years later and restrict future use of the property to retail or retail-like uses.

**Current Situation**

Mustard Seed has not been able to grow at 2585 East Bayshore. It also has not been successful in seeking to sublet any part of the building. Basically, due to costs, excessive space and the location, Mustard Seed has indicated that it will not renew the lease in 2022. It would also like to vacate the space early due to economic and other reasons.

At this time, Vance Brown needs expansion space and would utilize the entire building. As noted above, Vance Brown has outgrown its current space at 3197 Park Boulevard, and the nature of that area has changed significantly with many high-tech firms driving rents higher than service businesses can afford. Relocation to 2585 East Bayshore would result in lower rents for Vance Brown, but still provide significantly higher rents to the building owner than day-care rents.

Vance Brown's use is classified as General Business under the Municipal Code. The underlying ROLM zoning considers General Business as a use allowed as of right. By re-locating to 2585 East Bayshore, the Company would pay a higher rent than a day-care use would be willing to pay; would have long-term security for a continued Palo Alto business presence; and would have expansion capacity in a single location which is already configured for office uses. Given the nature of the ROLM District and this particular area, there are no nearby retail or retail-like uses, and there is no retail foot traffic of any kind.

It is my understanding that, absent a waiver, the RPO would not permit a General Business use at 2585 East Bayshore, because it restricts replacement to only Retail or Retail-Like Uses. The effective prohibition of a General Business use would result in a significant economic hardship to both the building owner and Vance Brown, and require the Company to explore alternative and affordable expansion options in other areas.

Loren Brown
2585 East Bayshore LLC

Date: 2-25-2020
Exhibit D

Report of Mike Costa
Cushman & Wakefield
February 18, 2020

Mr. Loren Brown
2585 East Bayshore, LLC
c/o Vance Brown Construction
3197 Park Blvd
Palo Alto, CA 94301

Re: Potential Uses of 2585 East Bayshore Road

Dear Mr. Brown:

You requested my opinion regarding the potential for retail and retail-like uses in the ROLM District east of the freeway in the vicinity of 2585 East Bayshore Road in Palo Alto. I have looked at existing uses and rent structures for this area, as well as the property and building at 2585 East Bayshore itself.

As explained in this letter, it is my opinion that retail or retail-like uses are not suitable or viable for this location and are unlikely to locate there. Among other things, the general office and R&D rent structure in this area is too high for such uses; there are no existing retail or retail-like uses in the vicinity; the area lacks retail foot traffic or potential for such foot traffic; and the building itself is designed and constructed for general office use and is not readily suitable for retail or retail-like uses.

I have been a commercial/retail broker on the mid-peninsula for over 25 years. Generally, I specialize in site selection locations for retail tenants. Presently, I cannot identify a retail tenant that would occupy this property. In my judgment, the primary uses for the building, given its location, size and configuration, would be office and R&D.

Background

You have provided the following background information on the property and structure at 2585 East Bayshore:

The property has a single-story 15,927 sq. ft. building with a 48-parking stall capacity. The building was designed and constructed in 1969 as an office building and was used exclusively for office purposes until 2012. In 2010, the current ownership purchased the building as the intended future headquarters for the Vance Brown construction company (Vance Brown, Inc.), when the need for expansion occurred.

At the time you purchased the building, the Palo Alto real estate market was historically depressed following the 2008 economic downturn. Generally, there were few prospective office tenants in the market at that time. I understand that in order to avoid a vacancy, and to wait for the growth of Vance Brown to catch up to the size of the building, a 10-year lease was signed in 2012 with the Mustard Seed Learning Center ("Mustard Seed"), an after-school learning program/child-care provider, as an interim measure, after the City granted necessary site and design approvals.¹

¹ I understand that as of 2012, a day-care center was an allowed use in the ROLM District subject to site and design review, but current zoning regulations require a conditional use permit for this kind of use.

No warranty or representation, expressed or implied, is made as to the accuracy of the information contained herein, and same is submitted subject to errors, omissions, change of price, rental or other conditions, withdrawal without notice, and to any special listing conditions, imposed by our principals.
This lease was undertaken before the City adopted its retail preservation ordinance or RPO in 2015. I am generally familiar with the RPO from my work with numerous landlords and tenants for retail uses. Because the day-care center under the RPO is a listed Retail-Like Use, unless a waiver is granted, the property will remain prohibited from any use normally allowed as a matter of right in the ROLM District. You have indicated that the property would not have been purchased, nor the interim lease to Mustard Seed granted, if it had been known that new zoning regulations in the form of the RPO would subsequently be imposed in the ROLM District.

I understand the Mustard Seed lease expires in July 2022 and the tenant has indicated it will not renew the lease at that time. The tenant has also expressed a desire to be relieved from the lease earlier, if possible, so it may re-locate to more economic and efficient space. Because the school is limited by the 2012 approvals to only 117 students, the building size/configuration are unsuitable to a child-care use for the long term.

You have also indicated that the company has outgrown its current space at 3197 Park Boulevard and desires to re-locate to the 2585 East Bayshore building as the Vance Brown headquarters.

Analysis

I understand that the RPO prevents you from returning this property to office use unless you obtain a waiver from the City. In my judgment, this limitation significantly restricts the sale or lease of your property. In comparison, nearby landowners in the ROLM District can undertake the basic uses permitted in that district as a matter of right, including primary uses such as office and R&D.

As I stated previously, this is not a retail location. Generally, retail tenants require retail co-tenancy, adequate parking, signage, and above all foot traffic in the area. Furthermore, potential non-office retail-like uses, such as schools, day care, church, and health & fitness, generally cannot afford the typical rent structure commanded currently in this area. The rental rates for these kinds of uses would be 50% to 70% below that of an office tenant, and normally the leases would only be short term. In addition, they would be considered much higher risk tenants as compared to office users.

Basically, the 2585 East Bayshore property is an “off the freeway” property surrounded by office, R&D and wetlands. There are no existing retail uses or any potential for such long-term uses. In my opinion, such uses are not viable there, and it only makes sense for this property to be productive utilized for an office or R&D facility as it has been for most of its history.

Very truly yours,

Mike Costa
Senior Director - Retail
Cushman & Wakefield
Lic. 00415216

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No warranty or representation, expressed or implied, is made as to the accuracy of the information contained herein. and same is submitted subject to errors, omissions, change of price, rental or other conditions, withdrawal without notice, and to any special listing conditions, imposed by our principals.
Exhibit E

Hillary Gitelman Letter
(425 Portage)
July 5, 2017

Lund Smith
D&B Properties
3260 Ash Street
Palo Alto, CA 94306

Subject: 425 Portage Avenue: Retail Preservation Waiver Determination

Dear Mr. Lund,

In accordance with Palo Alto Municipal Code Section 18.40.160 (c)(1)(b), your request for a waiver from the city’s retail preservation ordinance is tentatively approved. This determination will be placed on the City Council’s August 14, 2017 consent calendar agenda. If pulled by three or more councilmembers, you will be notified of a future public hearing on the request. If accepted on consent, this decision will be final.

The determination is based on information provided to the city, including effort over the last 16 months to lease the property, information on tenant/broker inquiries, surrounding land uses, substandard parking spaces to support retail and retail-like uses, testimony from your last tenant, and, a ten year history of previous land uses. It is further noted that the last tenant’s transition from warehousing to retail services was not authorized by the city and would not have been approved due to the lack of required on-site parking to support retail services. Adoption of the retail preservation ordinance required the subject location remain as retail even though it was never developed, intended or approved to be a retail use.

Based on the foregoing information, I find that retail and retail-like uses are not viable at this location at this time. Any future non-retail or retail-like uses that comply with the underlying zoning for permitted and conditional uses, and other applicable provisions of the municipal code, would be consistent with the purposes of the zoning district and consistent with the city’s Comprehensive Plan. In terms of encouraging active pedestrian-oriented activity and connections, the existing site does little to advance and promote these objectives. To the extent a future tenant requires building improvements or upon site redevelopment, the city through it’s discretionary design review process will encourage design elements that enhance pedestrian connections, as appropriate.

If you have any questions regarding this determination, please do not hesitate to contact me, or Assistant Director, Jonathan Lait.

Sincerely,

[Signature]

Hilary Greenman
Director

City of Palo Alto.org
Exhibit F

Prior RPO Wavier Applications
# Previous Waivers/Adjustments to Retail Preservation Ordinance

## Property | Year | Background | Zoning/Surrounding Uses | Supporting Evidence Submitted /Arguments | Outcome
---|---|---|---|---|---
100 Addison Ave. | 2016 | Building on property was occupied by Addison Antiques, a retail use, until June 30, 2015. Since then, the owners had been unsuccessfully trying to lease the building to a new retail or retail-like use. 
[NOTE: This request was made under the Interim RPO adopted on May 11, 2015, which did not include the Alternative Viable Active Use (AVAU) standard] | Zoning RT-35 (Residential Transition), a specific zoning created under the South of Forest Area (SOFA) Coordinated Area Plan Allows a mix of uses as of right, including office and retail. | Applicant Arguments
- At the time of the application, only a few retail uses existed in the area (including Anthropologie at 999 Alma, which was vacating).
- Without the foot traffic from Anthropologie, retail use not sustainable.
- The RPO alleged resulted in a "partial" regulatory taking (citing Penn Central and other takings cases).
- A lack of interest by prospective retail tenants 
[Applicant had not identified a specific replacement use] | Staff recommend denial for failure to show economic hardship to the point of an unconstitutional taking. On 8/22/2016, City Council denied the waiver. Council also directed staff to include in the permanent ordinance an additional standard to evaluate future waivers.

425 Portage Ave. | 2017 | Vacant warehouse building Previous tenant, Pet Food Depot, used the building for pet food storage and distribution, although there were some on-site retail sales. Pet Food Depot was operating at the time the Interim RPO was adopted, but later discontinued operations. There was no proposed replacement tenant at the time of the application. | Zoning “Service Commercial (CS),” allows all retail uses as of right (except shopping centers), also allows admin office services professional and general business offices (PAMC 18.16.040.) | Applicant Arguments
- Retail and retail-like uses were not viable due to “a location whose surrounding uses lack retail vibrancy, accessibility, and visibility” and
- A lack of interest by prospective retail tenants 
[Applicant had not identified a specific replacement use] | Waiver Granted Planning Director issued tentative approval of the waiver request on July 5, 2017. City Council approved the waiver on November 6, 2017.

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The matter was originally on the City Council's consent agenda for June 20, 2016, with a recommendation for denial, but was removed from the consent calendar by 3 members of the Council.
| 999 Alma St. | 2017 | Site vacated by Anthropologie store in 2016 and had been vacant for over a year at the time of City Council hearing. The proposal was to split the 10,000 sq. foot building into two uses: office and retail, each with 5,000 sq. ft., with the office located in the rear of the building. Requested a waiver under the AVAU standard. | Zoning: RT-35 allows a mix of uses, including office and retail (see 100 Addison, above). Subject to South of Forest Coordinated Area Plan (SOFA II) which is intended to promote continuation of a mixed use walkable area with a wealth of older buildings. Surrounding Uses: Primarily residential. No other retail tenants along Alma Street on the same block. | Applicant Arguments: • Entire building could not support retail or retail-like use due to the lack of surrounding retail uses. • Received no offers from retail users to lease the entire building. | Waiver Granted. On November 7, 2017 City Council granted the waiver to allow 5,000 square feet of medical office use at the rear of the building. |
| 3705 El Camino Real | 2019 | Request to waive retail preservation requirement for large affordable housing project on a site containing, among other things, 7,000 square feet of retail space. Project involved approval of Affordable Housing Combining District (AH) Overlay regulations to modify development standards of the underlying district. The AH Combining District regulations allowed City Council to approve waiver from RPO upon finding that such an action is in the public interest. | Zoning: Neighborhood Commercial ("CN"), allowing for a range of permitted and conditionally permitted office uses, retail uses, and residential uses. Retail services and eating and drinking services are permitted as of right (PAMC 18 16 040). Surrounding uses: In lieu of ground floor retail, applicant proposed to provide community amenity space, vehicle and bicycle parking, and other ancillary ground floor uses. | Waiver Granted. City Council approved the request under the new AH Combining District regulations. These zoning code amendments relaxed the standard for retail conversion for this type of project and allowed the City Council to exempt the project from having to obtain a waiver under the RPO under a “public interest” standard. |
| public interest (PAMC § 18.30(J) 010 et seq) | A diverse range of uses, including one and two-story retail buildings and multi-family residential apartments |
March 24, 2020

Mr. Samuel Gutierrez  
Planning and Community Development Department  
City of Palo Alto  
250 Hamilton Avenue  
Palo Alto, CA 94301

Re: Retail Preservation Ordinance -- Waiver for 2585 East Bayshore Road

Dear Samuel:

Thank you for holding a telephone conference with us last Friday. During the call, you raised several questions regarding potential alternative retail-like uses of the property and we wanted to respond as promptly as possible.

Automobile Dealership

We do not believe an automobile dealership is a viable option either legally or as a practical matter.

Legally, auto dealerships are not permitted uses in the ROLM(E) district. See § 18.20.030(a)(Table 1) (list of permitted uses). The language of the Code appears definitive on this point.

This conclusion is not changed because of the (AD) designator shown on the zoning map which appears to be in error. Under Section 18.04.030(32) ("Combining Districts"), special combining district regulations apply "only in combination with a general district." Emphasis added. On their face, the Automobile Dealership Combining District regulations (§18.30(F)) “modify the regulations of the service commercial (CS) and general manufacturing (GM or GM(B) districts” (see § 18.30(F).010),1 and also apply to limited manufacturing zoning district parcels located within ¼ mile of the San Antonio Road/Highway 101 intersection (see § 18.30(F).020). However, these provisions do not include or apply to the ROLM(E) District, and a City

1 The GM district is a general district and is broken out distinctly from the ROLM District in Table 1 (§18.20.030).
Manager’s 2005 report confirms that the AD combining regulations were not intended to apply to parcels near the Highway 101/Embarcadero Road interchange.²

This is confirmed by the fact that the automobile dealerships located on Embarcadero Road are in different zones as follows: Mercedes Benz - CS(D); Audi - PC-4846;³ and Anderson Honda - PC-4847. In contrast, the ROLM(E) Districts on Embarcadero Road and East Bayshore Roads are made up entirely of office buildings and there are no auto dealerships in these districts.

As a practical matter, 2585 East Bayshore has an existing 16,000 sf building on an approximately 1-acre site. There are office-type buildings immediately adjacent to the site on both the North and South, and the rear of the property abuts protected open space. This site is far too small to reasonably accommodate an economically viable automobile dealership which includes adequate space for employees, guest parking, car display, exterior sales and display areas, drive throughs, car wash areas, service department, parts department, and the like.

**Commercial Recreation**

While Commercial Recreation⁴ is a retail-like use permitted in the ROLM(E) District with a CUP,⁵ there are several reasons why it could not be a viable alternative use for 2585 East Bayshore.

First, the site lacks sufficient parking to support the building occupant densities for various Commercial Recreation uses listed in the Building Code (i.e. “exercise rooms”, “locker rooms”, “bowling centers,” and the like). These occupant load factors are listed in the 2019 California Building Code Table 1004.5 (Maximum Floor Area Allowances per Occupant). For example, exercise rooms require 50 gross sf per occupancy, and for 16,000 sf this would mean parking for 320 occupants (parking established in the Chapter 18.52 Parking and Loading Requirements at 1 space for each 4-person capacity). The site cannot provide parking for 320 occupants.

As you know, the Mustard Seed (MS) day care center was restricted by the CUP to 117 children. It was the lack of sufficient parking on the site that resulted in a building occupancy cap of only 117 persons (Building Code Table 1004.5 would allow a greater day care density). But with that limitation MS found it very difficult to be profitable (even if they could have generated higher demand). The building was simply too large and the rent too high without a much larger enrollment, as it would be for any commercial recreational use.

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³ For example, the Audi dealership is in the PC-4846 district, see https://www.cityofpaloalto.org/civicax/filebank/documents/43478
⁴ “Commercial Recreation” means a use providing recreation, amusement, exercise or entertainment services, including theaters, bowling lanes, billiard parlors, skating arenas, gymnasiums, exercise studios or facilities, fitness centers, martial arts studios, group movement instruction, and similar services, operated on a private or for-profit basis, but excluding uses defined as personal services or outdoor recreation services. § 18.04.030(33).
⁵ See §§ 18.04.030(125.1(F)), 18.04.030(a)
Renting only part of the building to a tenant that would still use up all of the parking capacity is not a viable option, even if a commercial recreational tenant for partial occupancy could be found. The Cushman & Wakefield Report, submitted with the application, confirms that health & fitness uses could not afford the market rent structure for space in this area – a health and fitness tenant would need to pay rents 50-70% above market for Health and Fitness. Report, p. 2. Cushman & Wakefield also concluded that Commercial Recreational uses would involve shorter term leases with higher tenant risks.

Such uses would also be contingent upon processing a successful CUP application, a costly and uncertain burden not faced by any other landowner in the ROLM(E) District. This would involve a number of issues. For example, while the existing daycare center is an E occupancy under the Building Code, conversion to a use like a fitness studio, dance studio or gym would be considered an A3 occupancy, making it stricter and more costly to convert. The costs associated with going from a Risk Category II to a Risk Category III under the § 1604.5 Risk Categories in the Building Code are significant and are infeasible for such uses as an economic matter.

**Conclusion**

The property was used for its intended office purpose for over 40 years. It was purchased in 2010, before the RPO was enacted, with the specific intention to relocate the Vance Brown headquarters there when the company’s expanding size warranted its use. Vance Brown has now reached that point. The current daycare tenant will not renew the lease in 2022 and desires to terminate the lease early. The site and structure work well as an office building because of the building size and the available parking, whereas retail and retail-like uses will not work for a variety of reasons.

We look forward to your consideration of these points and would be pleased to discuss any questions with you.

Sincerely,

/S/

Ronald E. Van Buskirk

Cc: Loren Brown
    Dan Cunningham
    Ken Hayes
## Table 1
**Industrial/Manufacturing District Land Uses**
(Table Truncated Specifically for ROLM(E) District PAMC 18.20.030)

[P = Permitted Use  CUP = Conditional Use Permit Required  **Highlight** = Retail & Retail Like]

<table>
<thead>
<tr>
<th>ACCESSORY AND SUPPORT USES</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Accessory facilities and activities customarily associated with or essential to permitted uses, and operated incidental to the principal use.</td>
<td>P</td>
</tr>
<tr>
<td>Automatic Teller Machines</td>
<td>P</td>
</tr>
<tr>
<td>Home Occupations, when accessory to permitted residential uses.</td>
<td>P</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>EDUCATIONAL, RELIGIOUS, AND ASSEMBLY USES</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Religious Institutions</td>
<td>P</td>
</tr>
<tr>
<td>Colleges and Universities</td>
<td>P</td>
</tr>
<tr>
<td>Private Clubs, Lodges, or Fraternal Organizations</td>
<td>CUP</td>
</tr>
<tr>
<td>Private Schools (K-12)</td>
<td>CUP</td>
</tr>
<tr>
<td>Health Care Services</td>
<td></td>
</tr>
<tr>
<td>Convalescent Facilities</td>
<td>CUP</td>
</tr>
<tr>
<td>Medical Office</td>
<td>CUP</td>
</tr>
<tr>
<td>Medical Research</td>
<td>P</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>MANUFACTURING AND PROCESSING USES</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Manufacturing</td>
<td>P</td>
</tr>
<tr>
<td>Recycling Centers</td>
<td>CUP</td>
</tr>
<tr>
<td>R&amp;D</td>
<td>P</td>
</tr>
<tr>
<td>Warehousing and Distribution</td>
<td>P</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>OFFICE USES</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative Office Services</td>
<td>P</td>
</tr>
<tr>
<td>Financial Services</td>
<td>CUP</td>
</tr>
<tr>
<td>Professional and General Business Office</td>
<td>P</td>
</tr>
</tbody>
</table>

| PUBLIC/QUASI-PUBLIC USES |  |
Utility Facilities essential to provision of utility services but excluding construction/storage yards, maintenance facilities, or corporation yards | CUP

<table>
<thead>
<tr>
<th>RECREATION USES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commercial Recreation</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>RESIDENTIAL USES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Multiple-Family</td>
</tr>
<tr>
<td>Residential Care Homes</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>RETAIL USES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eating and Drinking Services, excluding drive-in and take-out services</td>
</tr>
<tr>
<td>Retail Services</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>SERVICE USES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Day Care Centers</td>
</tr>
<tr>
<td>Emergency Shelters for the Homeless</td>
</tr>
<tr>
<td>Small Family Day Care</td>
</tr>
<tr>
<td>Large Family Day Care</td>
</tr>
<tr>
<td>Personal Services</td>
</tr>
<tr>
<td>Automobile Service Stations, subject to site and design review in accord with the provisions of Chapter 18.30(G)</td>
</tr>
<tr>
<td>Off-site new vehicle storage for auto dealerships located in Palo Alto</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>TEMPORARY USES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Temporary Parking Facilities, provided that such facilities shall remain no more than five years</td>
</tr>
</tbody>
</table>
18.04.030 Definitions

(a) Throughout this title the following words and phrases shall have the meanings ascribed in this section.

(125) “Retail service” means a use open to the public during typical business hours and predominantly engaged in providing retail sale, rental, service, processing, or repair of items primarily intended for consumer or household use.

(A) “Extensive retail service,” as used with respect to parking requirements, means a retail sales use having more than seventy-five percent of the gross floor area used for display, sales, and related storage of bulky commodities, including household furniture and appliances, lumber and building materials, carpeting and floor covering, air conditioning and heating equipment, and similar goods, which uses have demonstrably low parking demand generation per square foot of gross floor area.

(B) “Intensive retail service“ as used with respect to parking requirements, means any retail service use not defined as extensive retail service.

(125.1) “Retail-like use” means a use generally open to the public during typical business hours and predominantly engaged in providing services closely related to retail services, including but not limited to:

(A) Eating and drinking services, as defined in subsection (47);

(B) Hotels, as defined in subsection (73);

(C) Personal services, as defined in subsection (114);

(D) Theaters;

(E) Travel agencies;

(F) Commercial recreation, as defined in subsection (33);

(G) Commercial nurseries;

(H) Auto dealerships, as defined in subsection (12.5); and

(I) Day care centers, as defined in subsection (42).

18.30(F).040 Permitted Uses

The following uses shall be permitted in the (AD) combining district:

(a) Automobile dealerships.

(Ord. 4845 § 3 (Exh. A. (part)), 2004)
18.40.180 Retail Preservation

(a) Conversion of Retail and Retail-Like Uses Prohibited.

(1) Any ground floor Retail or Retail-Like use permitted or operating as of March 2, 2015 may be replaced only by another Retail or Retail-Like use, as permitted in the applicable district.

(A) A ground floor Retail or Retail-Like use in the RT-35 district on properties with frontage on Alma Street between Channing Avenue and Lincoln Avenue may additionally be replaced by a Private Educational Facility use, provided that such use shall not be thereafter replaced by an Office use.

(2) The phrase 'use permitted or operating' as used in this section means:

(A) A lawfully established use conducting business, including legal non-conforming uses.

(B) An established use conducting business without required city approvals, but is a permitted or conditionally permitted use in district.

(C) For parcels vacant on March 2, 2015, the last use that was lawfully established, or established without required permits, and permitted or conditionally permitted in the district.

(b) Non-conforming Uses.

(1) The requirements imposed by subsection (a) shall not apply to Retail or Retail-like uses that are no longer permitted or conditionally permitted in the applicable district.

(2) Nothing in this section shall modify the provisions of Chapter 18.70 regarding the expansion, change, discontinuance, or termination of a non-conforming use.

(c) Waivers and Adjustments; and Exemptions.

(1) Grounds. The following shall be grounds for a request for waiver or adjustment of the requirements contained in this section:

(A) Economic Hardship. An applicant may request that the requirements of this section be adjusted or waived based on a showing that applying the requirements of this section would effectuate an unconstitutional taking of property or otherwise have an unconstitutional application to the property; or

(B) Alternative Viable Active Use. Except in the GF or R combining districts, an applicant may request that the requirements of this Section 18.40.160 be adjusted or waived based on a showing that: the permitted retail or retail-like use is not viable; the proposed use will support the purposes of the zoning district and Comprehensive Plan land use designation; and the proposed use will encourage active pedestrian-oriented activity and connections.

(2) Documentation. The applicant shall bear the burden of presenting substantial evidence to support a waiver or modification request under this Section and shall set forth in detail the factual and legal basis for the claim, including all supporting technical documentation. Evidence in support of a waiver under subsection (c)(1)(B) must demonstrate the viability of existing and future uses on the site, based on both the site characteristics and the surrounding uses; specifically whether a substitute use
could be designed and/or conditioned to contribute to the goals and purposes of the zoning district. Examples of such evidence include:

(A) A 10-year history of the site's occupancy and reasons for respective tenants vacating the site;

(B) A map that indicates all the existing surrounding uses, both residential and non-residential, within one City-block; include the corresponding zone district on the map;

(3) Any request under this section shall be submitted to the Director together with supporting documentation. The Director, in his or her sole discretion, may act on a request for waiver or refer the matter to the City Council.

(A) A decision by the Director shall be placed on the City Council's consent calendar within 45 days.

(B) Removal of the recommendation from the consent calendar shall require three votes, and shall result in a new public hearing before the City Council, following which the City Council shall take action on the waiver request.

(C) The decision of the Council is final.

(4) Exemptions. The provisions of this Section 18.40.180 shall not apply to:

(A) A 100 percent affordable housing project not within the Ground Floor (GF) and/or Retail (R) combining districts or on a site abutting El Camino Real. A "100% affordable housing project" as used herein means a multiple-family housing project consisting entirely of affordable units, as defined in Section 16.65.020 of this code, available only to households with income levels at or below 120 percent of the area median income, as defined in Chapter 16.65, except for a building manager's unit.

(B) A 100 percent affordable housing project on a site abutting El Camino Real in the CN and CS zone districts outside the Retail (R) combining district. A "100% affordable housing project" as used herein means a multiple-family housing project consisting entirely of affordable units, as defined in Section 16.65.020 of this code, available only to households with income levels at or below 120 percent of the area median income, as defined in Chapter 16.65, and where the average household income does not exceed eighty percent of the area median income level, except for a building manager's unit.

(d) Reconstruction.

Any ground floor Retail use existing on or after March 2, 2015 may be demolished and rebuilt provided that the portion of square footage used as Retail use on or after March 2, 2015 is not reduced except that Retail square footage may be reduced by the minimum amount needed to provide access to any new upper floor and/or lower level.

(e) Applicability to Current Requirements.

Nothing in this section shall alter requirements of site-specific Planned Community zoning ordinances or adopted conditions of approval. Nothing in the section shall be construed to waive the requirement for a conditional use permit or other entitlement where such requirements currently exist.