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May 28, 2002

To the Berkeley City Council:

On Behalf of the Sierra Club, Urban Creeks Council, Friends of Strawberry Creek, and Center for Biological Diversity, we submit this appeal to this Council the decision of the Zoning Adjustments Board ("ZAB") on April 11, 2002, notice of which was mailed on May 14, 2002, approving a use permit, and a variance to the Creeks Ordinance, to applicant Geoffrey Holton (representing Mark and Freya Read) for a project at 2323 Glen Avenue ("Project").

The proposed Project is a major residential addition of 824 square feet to an existing single-use family residence, requiring issuance of a Use Permit, and a Creek Variance at 2323 Glen Avenue (Use Permit # 00-20000171 and Variance 01-10000065).

We concur with the City Attorney's opinions (conveyed at the 4/11/02 hearing and before) that:

- 1) the City's Creeks Ordinance **does** apply to the Project site; and
- 2) that additions to existing structures, such as the residential expansion being proposed **are not** exempted under the Creek Ordinance.

We are appealing the ZAB's decision because we are in strong disagreement with a number of the ZAB's findings, and - along with many neighbors in the area - have written in numerous letters stating our concerns about this project. Moreover, we concur with the City Staff's original recommendation to deny the Use Permit, and agree with their findings. However, we also feel there are additional concerns that the Notice of Decision highlights, that clearly suggest that the ZAB's approval of the Use Permit, and issuance of the variance to the Creeks Ordinance, were not justified.

As such, we are appealing the ZAB's 4/11/02 decision to 1) approve the use permit through the issuance of a variance; and 2) adopt a mitigated negative declaration pursuant to the California Environmental Quality Act (CEQA). The grounds of this appeal and brief summary are presented below.

I. The Approval of the Variance In this Case Is Not Supported By Substantial Evidence

We believe that issuing a variance to the Creek Ordinance for this property sets a dangerous precedent. The decision would create a precedent that if an applicant is in a small house or lot that can be enlarged only by violating the Ordinance, then they will be allowed to so.

The approval of the variance violates Government Code section 65906, which states that:

Variations from the terms of the zoning ordinances shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification.

The approval also violates Berkeley City Code section 23B.44.030, which requires findings supported by substantial evidence on the record that:

- a) There are exceptional or extraordinary circumstances or conditions applying to the land, building or use referred to in the application, which circumstances do not apply generally to land, buildings and/or uses in the same District;
- b) The granting of the application is necessary for the preservation and enjoyment of substantial property rights of the subject property's owner; and
- c) The establishment, maintenance or operation of the use or the construction of a building, structure or addition thereof, to be approved will not, under the circumstances of the particular case, materially affect the health or safety of persons residing or working in the neighborhood of the property of the applicant and will not...be materially detrimental to the public welfare or injurious to property or improvements in said neighborhood; and that the granting of the Variance will promote the municipal health, welfare and safety and benefit the City as a whole.

Here, the findings by ZAB in support of the variance approval are not supported by substantial evidence. Moreover, as part of this appeal, we intend to submit evidence demonstrating that the variance approval in this case violates each of these requirements.

1. No Substantial Evidence Supports ZAB's Finding that this Property Possesses "Exceptional Circumstances or Conditions" Justifying a Variance

ZAB's decision summarily rejects the City Staff's finding that the Project site does *not* constitute an "exceptional circumstance." Variances are supposed to be issued only in truly exceptional circumstances - we do not believe this is one, and certainly the evidence as presented has not substantiated ZAB's claim that this is an exceptional circumstance. The purpose of the Creek Ordinance is to protect creeks and to buildings themselves, and thus it sets an *absolute* setback distance of 30 feet. This cannot be ignored at the whim of every project applicant who happens to want a bigger house or structure.

2. No Substantial Evidence Supports ZAB's Finding that the Granting of the Application is Necessary for the Preservation and Enjoyment of Substantial Property Rights

The project applicant's claims that an expansion of their residence on-site is necessary for "substantial enjoyment of property rights." is invalid. The property owners purchased the property several years *after* the Creek Ordinance was implemented, including the clause regarding the minimum 30-foot setback. They purchased the property with full knowledge that it had building size limitations and lot size limitations -- those conditions both existed at the time of purchase, just as they are now. While the applicants state that "someone" in City Planning "told" them when they purchased the property that they would be able to expand on the property, there is no written record of this, and the zoning restrictions that were then in place clearly show that any expansion would violate the City's Creek Ordinance. Moreover, they have been told by the City Planning Department - since they first applied for this project over two years ago - that the City would not support it, and would recommend denial of the Use Permit because of the requirement of a variance to the Creek Ordinance.

The zoning codes did not allow such an expansion when the applicants purchased the property, yet they chose to purchase it in spite of that fact. Our creeks, zoning ordinances, and neighboring properties should not bear the burden of any failure to discover applicable law.

3. No Substantial Evidence Supports ZAB's Finding that this Project Will Not Be Materially Detrimental to the Public Welfare or Injurious to Property or Improvements in the Neighborhood

The ZAB's decision explicitly rejects the City Staff's findings that there may be environmental risks related to the unstable soil and geological conditions at the Project site, and that "...Granting of the Variance is detrimental to the health, safety, peace, morals, comfort, or general welfare of persons residing or working in the area or neighborhood and detrimental or injurious to property and improvements of the adjacent properties, the surrounding area or neighborhood or to the general welfare of the City..."

Intensifying development on the Project site could put downstream properties at risk, The ZAB barely discussed such potential impacts in the 4/11/02 hearing, and the Notice of Decision simply dismisses the potential for any impacts at all in its Environmental Findings.

The potential risk to downstream properties are very real ones. A failing culvert on Strawberry Creek - over which several houses are built - is a glaring example of what eventually happens to culverts, and the danger which having structures on top of them imposes. The soils report prepared for the 2323 Glen Ave site, as well as general USGS information and surveys of landslides in the area, clearly shows that this site sits in a highly unstable geological area, both site-specific (soil is essentially all "fill," and the site is in subject to landslides), and more general (the site sits less than 200 feet from the Hayward fault). In sum, there is no evidence on the record that this additional development adjacent to the culverted stream will not cause adverse impacts to the surrounding properties.

II. The Variance Approval Does Not Comply with CEQA

1. The Mitigated Negative Declaration Fails to Address Potential Adverse Impacts Identified By The City's Staff Report

The ZAB ignored the findings of the City staff report that the Project had the potential for significant adverse impacts to downstream properties, and to threatened species habitat and water quality overall. Intensifying development on the Project site could put downstream properties at risk, and could irreparably harm threatened species habitat. This, in turn, could trigger violations of the Endangered Species Act, as well as water quality violations. The ZAB barely discussed such potential impacts in the 4/11/02 hearing, and the Notice of Decision simply dismisses the potential for any impacts at all in its Environmental Findings.

As discussed above, the potential risks to downstream properties and threatened species habitat are very real. A failing culvert on Strawberry Creek - over which several houses are built - is a glaring example of what eventually happens to culverts, and the danger which having structures on top of them imposes. The soils report prepared for the 2323 Glen Ave site, as well as general USGS information and surveys of landslides in the area, shows that this site sits in a highly unstable geological area, both site-specific (soil is essentially all "fill," and the site is in subject to landslides), and more general (the site sits less than 200 feet from the Hayward fault).

2) The Mitigated Negative Declaration Ignores the Potential Cumulative Impacts From Approval of this Variance

The ZAB failed to adequately analyze the cumulative impacts - either from a zoning perspective, or from an environmental perspective - of issuing a variance to the Creek Ordinance at this site. Instead, the Notice of Decision findings state that "the project does not have impacts that are cumulatively considerable."

The issuance of a variance at this site based on the reasoning that this property must be allowed to develop as fully as neighboring properties establishes a precedent that could be used by additional sites along the creek, or along *other* Berkeley creeks. If similar variances were issued for each of these properties, the potential cumulative adverse impacts on Berkeley creeks, and on the long-term objective of the Creeks Ordinance would be considerable. The ZAB failed to analyze these potential cumulative impacts, again simply stating - with no supporting evidence - that these impacts are "not cumulatively considerable," in spite of the very real and extensive potential environmental impacts posed by the Project, as discussed in point 2, above.

3. The Mitigated Negative Declaration Fails to Address Alternatives to Encroachment on the Stream Corridor

The Mitigated Negative Declaration assumes that the only alternative for increasing living space on the property is to build outward, thereby enlarging the development "footprint" and encroaching on the creek channel, in violation of the Creek Ordinance. The ZAB variance approval does not discuss any alternatives to the development proposal, including the logical possibility of adding an additional story to the subject property in order to avoid the creek channel. Even if such an alternative would also require a variance, it must be considered under CEQA since it would likely have much

less impact on the surrounding physical environment, including the creek channel.

III. The Variance is Inconsistent with the Berkeley General Plan

The Variance approval creates an exception to the Berkeley Creek Ordinance for situations where the creek setback requirements limit a property owner's ability to develop property in a similar manner to other properties in the neighborhood. This precedent is inconsistent with the new environmental element of the Berkeley General Plan, which incorporates the findings and policy of the Creek Ordinance.

IV. The Project Applicant's Easement Claim is Without Merit

The project applicant's claim that an easement granted to the property owners in 1930 gives the current owners the right to avoid current zoning restrictions is invalid. We concur with the City Attorney's opinion (stated at 4/11/02 hearing, and in that the City has the right to exercise and apply new ordinances in spite of past easements.

Background of Appeal

The proposed Project is a major residential addition of 824 square feet to an existing single-use family residence, requiring issuance of a Use Permit, and a Creek Variance at 2323 Glen Avenue (Use Permit # 00-20000171 and Variance 01-10000065). The project applicant is Geoffrey Holton working on behalf of Mark and Freya Read (the owners of the property).

The permits that were requested are:

- Use Permit to construct a 829 sq ft addition to an existing single-family residence, pursuant to Section 23D.16.030;
- Use Permit to reduce the required rear yard setback from 18-feet to 17-feet, pursuant to Section 23E.96.070.C;
- Variance to reduce the required 30-foot setback from a Creek to eight feet, pursuant to Section 17.08.050

The site is on a 5,460 sq. ft. lot in north Berkeley, and the parcel covers a culverted portion of Codornices Creek. The current residence has a footprint of 1,252 sq. feet, and an overall gross floor area of 1,020 sq. ft. The proposed addition would increase the footprint to 1,691 square feet, and the gross floor area to 1,849 square feet.

The project requires a Variance to the City of Berkeley's Creeks Ordinance, because the parcel sits over a culverted portion of the creek, and therefore any addition to the structure falls within the "minimum 30-foot setback" of the Creeks Ordinance. The City of Berkeley's City Attorney, as well as the City Planning Staff, have both agreed that the Creeks Ordinance applies to this parcel, in that culverted sections of City creeks are included in the Creeks Ordinance domain.

Codornices Creek is currently listed as "critical habitat" for the federally-listed, threatened species Steelhead trout (*Oncorhynchus mykiss*), and this species has been officially captured and identified in the lower reaches of the creek.

The project was presented to the ZAB, for public hearing and vote, on April 11, 2002. In the Staff Report prepared for ZAB (dated 4/11/02), the City Planning Department recommended that the ZAB vote to **deny** the project, based on the following findings:

- II. The parcel does not present an exceptional or extraordinary circumstance that does not apply to parcels in the vicinity because there are many similarly situated parcels along the Codornices Creek. In addition, the argument presented by the applicant that the 'presence of Codornices Creek, which triggers the Variance requirement, is the 'extraordinary circumstance,' is flawed because the creek Ordinance was specifically written to address parcels similar to the present application.
- III. The variance is not necessary for the preservation and enjoyment of substantial property rights of the subject property's owner because the parcel is already developed with a 1,020 sq ft single-family residence.
- IV. Granting of the Variance is detrimental to the health, safety, peace, morals, comfort, or general welfare of persons residing or working in the area or neighborhood and detrimental or injurious to property and improvements of the adjacent properties, the surrounding area or neighborhood or to the general welfare of the City, because it would conflict with the policies set forth in the City's Creek Ordinance, specifically the policy to prevent additional development on or near a culverted creek and the finding made by the City that 'it is in the interest of the City of Berkeley to encourage the removal of culverts and channels, prevent channel riprapping, and to restore natural watercourses whenever safely possible.' [this quote is taken from the CoB's Creek ordinance] Therefore, allowing development on this site is in direct conflict with the purpose and intent of the Creek Ordinance because it

would permit further capital investment within the 30-foot setback that was established by the Creek Ordinance.

At the hearing, the ZAB voted to **approve** the Use Permit, and to **issue a Variance to the Creek ordinance**, stating that the City's interpretation (Staff and Attorney) of the Creeks Ordinance was wrong or irrelevant. The ZAB decision to approve the Use Permit and issue the variance was based on the following findings (taken from Notice of Decision, mailed May 14, 2002):

- 1) The lot is exceptional in that it is unusually shaped, in the form of a piece of pie, with over 40% of the lot within the 20-foot front yard setback, instead of the twenty percent normally found in R-1 lots;
- 2) The granting of the permit is necessary for the enjoyment of substantial property rights, in that the house is already on the culverted creek that bisects the lot, the applicants have gone to great lengths to avoid building of the existing culvert, and the proposed addition is to increase the present house to be commensurate with average house sizes of neighboring residences;
- 3) There is no detrimental impact from the proposed addition in that the parcel's situation, downhill from the street, allows such addition without blocking any views or light to adjacent properties.

The Notice of Decision also discusses the Environmental findings, stating that, "...the Environmental Initial Study and Mitigated Negative Declaration are adequate and necessary to protect the environment because:

- 1) The project does not have the potential to degrade the quality of the environment, reduce the habitat of a fish or wildlife species, eliminate a plant or animal community, impact the range or reduce the number of an endangered plant or animal species or impact major periods of California history or pre-history.
- 2) The project does not have impacts that are cumulatively considerable.
- 3) The project does not have environmental effects that will cause substantial effects on humans.

On Behalf of the Sierra Club, Urban Creeks Council, Friends of Strawberry Creek, and Center for Biological Diversity, we submit this appeal to the City Council because -as stated above - we believe that the approval of the variance in this instance establishes a bad precedent with the potential to undermine Berkeley's Creek Ordinance and the

considerable efforts of numerous persons both within and outside the City government to preserve and restore Berkeley's native creeks. Moreover, as discussed above, we believe that ZAB's findings approving the variance and adopting a mitigated negative declaration for this project are not supported by substantial evidence. Instead, we concur with the City Staff's original recommendation to deny the Use Permit based on specific findings that this variance application does not comply with state or local law. As stated, we intend to submit additional evidence supporting the City Staff's findings indicating that this variance should not have been approved.

Thank you for your attention to this matter.

Very truly yours,

Michael W. Graf

Note: Please send all correspondence about this Project, hearings, and related materials, to the following two contacts:

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Dated: 5/27/02 Steven D. Bloom
for Sierra Club

Dated: 5/27/02 Yon Yin
for Urban Creeks Council

Dated: 5/27/02 Jane Y. King
for Friends of Strawberry Creek

Dated: 5/27/02 (see Attachment A: Electronic Signature)
for Center for Biological Diversity

Attachment A: Electronic Signature for Center for Biological Diversity

At 2:53 PM -0700 5/27/02, Brent Plater wrote:

>Hi Julie, you can sign on The center and Brent Plater as an individual.

>

>Brent Plater

>Attorney

>Center for Biological Diversity

>PO Box 40090

>Berkeley, CA 94704

>P: 510-841-0812

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><http://www.biologicaldiversity.org>

Date: Mon, 27 May 2002 17:30:30 -0700

From: Brent Plater <bplater@biologicaldiversity.org>

Subject: RE: Appeal of 2323 Glen Ave Decision - Creek Protection!

To: "JLamont" <jlam@dnai.com>

Importance: Normal

X-Priority: 3 (Normal)

Status: U

No, I will not be there, I am in Tucson all week. Here is an electronic copy of my sig.

A handwritten signature in black ink that reads "Brent Plater". The signature is written in a cursive, slightly slanted style. The first letter 'B' is large and prominent, followed by 'rent' and 'Plater'.

Attachment B: Photographs of Failing Culvert on Strawberry Creek



Failing Culvert at Strawberry Lodge on Strawberry Creek



Failing Culvert at Strawberry Lodge on Strawberry Creek