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October 22, 2002

Mayor Shirley
Berkeley City Council Members
2180 Milvia Street
Berkeley, CA 94704

Re: 1155-63 Hearst Avenue; Appeal; Request to Set for Public Hearing

Dear Mayor Dean and Council Members:

This office represents the proponents of the affordable housing application at 1155-63 Hearst Avenue that the Zoning Adjustments Board ("ZAB") denied on July 11, 2002.¹ Because all of the five findings in support of denial violate legal, factual and/or procedural standards, this Council must set this matter for public hearing.

The arguments and documents supplied by the project's opponents and their attorney, if anything, buttress the Staff recommendation that the record on this matter mandates that it be set for public hearing.

THE PROPOSAL WOULD INCREASE HOUSING FOR LOW AND VERY LOW INCOME FAMILIES; EXISTING LOW INCOME TENANTS ARE PROTECTED

Alice Landis, owner of 1155-63 Hearst Avenue notified each of her tenants of her plans, offered relocation expenses to all low-income tenants as well as an option to occupy the new units when constructed. (See letters of August 25, 2001 and June 8, 2002) Currently, three of the six units are market rate; three are under Rent Control and upon vacancy, would be market rate.

Under the application before you, four units—two 1-bedroom, one 2-bedroom and one 3-bedroom would become permanent affordable units. This represents a significant increase in permanent affordable housing over the present three one-bedroom units under rent control.

THE PROPOSAL MEETS R-3 ZONING AND THE GENERAL PLAN

Contrary to the allegations of opponents and their attorney, the application before the ZAB, met the requirements of the R-3 District (the zoning on the date the application was deemed "complete") and the General Plan. Both the 1977

¹ The Appeal Notice filed August 6, 2002, by Lynda Hart and all arguments contained therein, are hereby incorporated by reference.

and 2000 Draft General Plan defines R-3 Zoning as “High Density Residential” allowing 100 dwelling units per acre. This project complies with that standard.

NONE OF THE FIVE FINDINGS IN THE ZAB DECISION CAN BE SUSTAINED

Finding “1” lacks legal and factual basis

To be sustained, Finding No. “1”, must meet both criteria of California Government Code (“GC”) 65589.5 (d) (1). It meets neither. The first prong requires a housing element that has been adopted and revised “in accordance with Section 65588 and this article.” According the Housing and Community Development letter served upon the City on August 1, 2002, Berkeley’s Housing Element did not at the time of the ZAB decision at issue, nor does it now, comply with the requisite Government Code sections or Article 10.6. Nor, can opponents’ argument succeed that since no appeals were filed regarding the Housing Element, it can be presumed valid. The 90-day challenge applies to the “adoption” of the plan. The fact that the General Plan’s adoption was not challenged does not, in any legal sense render the Housing Element valid. The State’s letter makes it clear that the Housing Element as adopted and revised is not valid and is subject to legal challenge.

The second prong, that this project is not needed for Berkeley to meet its share of the regional housing need for affordable housing is likewise invalid for the following reasons:

--The ZAB incorrectly counted units approved by or pending before the ZAB as opposed to units “actually approved for construction.”(See State HCD letter October 11, 2002 to Patrick Hart) Reliance on legally incorrect data cannot support a finding.

--The number of affordable units approved for construction do not meet Berkeley’s share of regional affordable housing.

--The thrust of the ZAB’s inquiry was incorrect. The ZAB assumed that since this project provided only four units, its impact on the regional need for affordable housing was minimal. By that logic, only large affordable housing projects are subject to the protections of the State’s affordable housing laws. That logic is unreasonable. The reasonable inquiry, in accordance with the purposes behind the State’s affordable housing statutes is that once it is determined that Berkeley has not met its share of the regional housing need, then every affordable housing proposal, no matter how small is needed.

Findings “2”- “5” cannot be sustained for the reasons set out in the August 6, 2002 appeal letter as well as the reasons set out below.

For Finding “2” to be sustained, the factual and legal underpinnings of Finding “1” must be sustainable. For the reasons stated above, they cannot. Finding “2” essentially applies R-2A Zoning requirements (the re-zoning which occurred after the application was deemed complete) to an R-3 project. The

application did not require requests for Variances; nor was there any evidence on the record as whether there was any basis to grant or deny Variances for the project. Since there was no notice, evidence or application for an R-2A project, this finding is completely irrelevant to the application and appeal before you.

The mere inclusion of Findings “3” and “4” violates procedural due process standards. These Findings were added by Staff, after the hearing as a preemptive strike against any “takings” claims by appellants. Staff admitted to the ZAB prior to the adoption of these two findings that there had been no evidence on the record regarding these findings. Two ZAB members suggested omitting these findings because there was no evidence to support them. They further suggested that omitting those findings would “help” the majority’s case. This advice was ignored.

CONCLUSION

The proposed project for 1155-63 Hearst Avenue deserves your consideration. It will provide significantly more permanent affordable housing, including the desperately needed affordable family housing, on this site. They will agree to re-design the project to reduce by as much as three feet throughout the project allowing an increase of solar access. The owners have worked hard to come to an agreement with the neighbors. They reduced their proposal from 20 to 14 units, the square footage by 40% on the third floor, and changed building configurations to expand useable open space.

The Findings adopted are neither factually nor legally sufficient. There are important policy issues at stake. This Council, which unanimously voices support for affordable housing, must on procedural, legal and policy grounds, hear this matter.

Thank you in advance for your courtesy and attention to the very crucial issues raised in this appeal.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Rena Rickles".

RENA RICKLES, Esq.

Alice Landis
c/o 610 Logan Lane
Danville, CA 94526

Wayne Corey
1159B Hearst Avenue
Berkeley, CA 94702

DELIVERED BY HAND

June 8, 2002

Dear Wayne,

As promised, this is an update to keep you informed about the estimated time frames as we continue on our use permit application to build 14 new units on this site.

The Zoning Adjustments Board will hear our development application on June 13th. They could choose to approve, deny or continue their deliberations at that time. In either case we expect that a formal written decision could still take a couple of months.

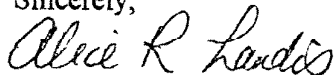
When we receive official permission from the City of Berkeley to demolish and build, we will provide all tenants with 30 days written notice as required by law. Tenants experiencing difficulty with this deadline will be accommodated on a case-by-case basis.

If you feel that you would qualify for relocation expenses for low-income tenants (Qualified under Section 8 guidelines), please notify my daughter Lynda Hart so that we can take steps to comply with all applicable laws.

I appreciate the cordial relationship we have had over the years and would like to offer you right of first refusal on our new units as soon as they are completed. If you are interested in occupying the new apartments, please keep me informed of current addresses.

If you have any questions or concerns after my visit today, regarding the new development, please contact Lynda Hart at 925 743 0427 or email Lyndahart246@cs.com. Dorothy Amiri will still handle tenancy issues.

Sincerely,



Alice R. Landis

Date: August 25, 2001

To: Tenants
1155-1163 Hearst Avenue, Berkeley.

From: Alice Landis, Owner

As most of you know, I am looking into the possibility of constructing new rental units on this site. This will require a stringent application process with the City of Berkeley, meetings with neighbors, architects and engineers to develop and revise plans, which may take several months or more.

We are hoping to replace the existing units with new apartments built to current standards. This will include upgraded building codes, which will be seismically appropriate, more energy efficient and better suited to handle modern appliances and computers. The preliminary plans include two 3 bedroom 2 bath, six 2 bedroom 2 bath, two 2 bedroom 1 bath and four 1 bedroom 1 bath apartments.

As the application process progresses we will keep you informed as to the possible time of demolition and will make every effort to work with you to make your moving experience as painless as possible.

Please acknowledge that you have reviewed the plans and indicate objections/support for the project by signing and dating where indicated. Thank you for your cooperation.

Alice R. Landis
Alice Landis
Owner

<i>Wayne Cory</i>	<i>1159 B Hearst Ave</i>	<i>8-25-01</i>
Tenant	Address	Date

I have no objections

I do have objections _____

Comments _____

§ The *Draft General Plan* has three residential land use designations, Low-, Medium- and High-Density Residential, whereas the 1977 *Master Plan* has four residential designations. In addition, the 1977 *Master Plan* residential land use designations do not have names, and are instead solely designated by their maximum allowable residential density, including 0-10 dwelling units per acre (du/acre), 11-20 du/acre, 21-40 du/acre and 41-100 du/acre.

§ In addition to maximum residential densities for residential districts, the *Draft General Plan* establishes allowable floor area ratio (FAR) standards for non-residential districts, and allowable uses and zoning compatibility for each land use designation. The 1977 *Master Plan* does not utilize FAR, allowable uses or zoning compatibility for any land use designations.

**Table III-1
 2000 DRAFT GENERAL PLAN LAND USE DESIGNATIONS
 ALLOWABLE DEVELOPMENT INTENSITY AND ZONING**



Designation	FAR ^a	Maximum Residential Density	Allowable Uses	Zoning Compatibility ^c
Low-Density Residential	N/A	9 du/acre ^b	Residential, community service, recreational, open space	R-1, ES-R
Medium-Density Residential	N/A	26 du/acre	Residential, community service, recreational, open space	R-1A, R-2, R-2A
High-Density Residential	N/A	100 du/acre	Residential, community service, office, institutional, recreational, open space, ground floor commercial, where allowed by zoning	R-3, R-4
Neighborhood Commercial Mixed Use	0.8 to 3.0	N/A	Commercial, residential, office, community service, institutional	CN, CE, CNS, CSO, CS-A
Avenue Commercial Mixed Use	3.0 to 4.0	N/A	Commercial, residential, office, community service, institutional	CSA, C-1, CT, CW
Downtown Mixed Use	3.0 to 6.0	N/A	Medium-density and high-density housing, regional and local serving arts, entertainment, retail, office, cultural, open space, civic, institutional and facilities	C-2
Manufacturing Mixed Use	1 to 1.5	N/A	Light manufacturing, light industrial, residential, retail, office	MUR
Manufacturing	2.0	Residential not allowed	Manufacturing, industrial, laboratory, wholesale, waste disposal, retail, office, construction-related, auto-related	M, MM, MULI
Open Space	0.5	Residential not allowed	Parks, recreational facilities, school yards, community services, facilities necessary for the maintenance of the areas	(N/A)
Institutional	4.0	N/A	Institutional, government, educational, recreational, open space, natural habitat, public service	(N/A)
Waterfront	0.5	Residential not allowed	Open space, recreational, waterfront-related commercial and visitor services, boating and water transit facilities	(N/A)

^a Floor Area Ratio, which is determined by dividing the total floor area of the building by the area of the parcel.

^b Dwelling units per acre.

^c Zoning Compatibility identifies existing zoning designations that are consistent with the *General Plan* land use classification. Source: City of Berkeley, 2000.

**Table III-2
 DRAFT GENERAL PLAN LAND USE MAP AND 1977 MASTER PLAN
 ANALOGOUS LAND USE DESIGNATIONS**

2000 Draft General Plan	1977 Master Plan
Low-Density Residential	0-10 du/acre
Medium-Density Residential	11-20 du/acre 21-40 du/acre
High-Density Residential	41-100 du/acre
Neighborhood Commercial Mixed Use	Commercial Service District
Avenue Commercial Mixed Use	Commercial/Residential District
Downtown Mixed Use	Central
Manufacturing Mixed Use	Special Industrial District
Manufacturing	Industrial
Open Space	Recreation/Institution
Institutional	Recreation/Institution
Waterfront	n/a

Source: City of Berkeley, 2000, *Draft General Plan*; City of Berkeley, 1977 *Master Plan*.

§ The 1977 *Master Plan* sets a Central district designation for the Downtown area. The *Draft General Plan* sets a Downtown district which reflects the 1990 Downtown Plan area. The allowable density in the Downtown district is an FAR of 3.0 to 6.0, which is consistent with the Downtown Plan for this area.

(2) Land Use Element Objectives. The policies of the Land Use Element are intended to achieve the following objectives:

1. Maintain the character of Berkeley.
2. Maintain and enhance Berkeley's residential areas.
3. Maintain and enhance Berkeley's commercial areas and the Downtown.
4. Maintain and protect Berkeley's remaining industrial areas.
5. Minimize the impacts and maximize the benefits of the University of California on the citizens of Berkeley.
6. Establish the waterfront area west of the freeway (I-80) as a recreational and open space resource.

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HPD

PAGE 02/03

STATE OF CALIFORNIA - BUSINESS, TRANSPORTATION, AND HOUSING AGENCY

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

Division of Housing Policy Development

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October 11, 2002

Mr. Patrick and Mrs. Lynda Hart
610 Logan Lane
Danville, California 94526

Dear Mr. and Mrs. Hart:

RE: Denial of Housing Development Application on Hearst Avenue, Berkeley

This is in response to your letter of October 7, 2002 regarding your appeal of the denial by the Zoning Adjustment Board (ZAB) of the City of Berkeley of your proposed housing development on Hearst Avenue. We appreciate the opportunity to communicate with you, however, please keep in mind that this communication does not constitute legal advice.

Assuming the development qualifies as housing for very low-, low-, or moderate-income housing under Government Code Section 65589.5(h)(2), the City is required to base its denial on one of findings listed under subdivision (d) of Section 65589.5. The ZAB relied on paragraph (1) of this subdivision which requires the following finding:

The jurisdiction has adopted a housing element pursuant to this article that has been revised in accordance with Section 65588 and that is in substantial compliance with this article, and the development project is not needed for the jurisdiction to meet its share of the regional housing need for very low, low-, or moderate-income housing (Section 65589.5(d)(1)).

As to the first component of this requirement, compliance with Article 10.6, the ZAB appears to have made no finding at all. The Department of Housing and Community Development (Department) in fact has determined, by an August 1, 2002 letter, that the City's adopted housing element is not in compliance with Article 10.6 and there appears to be no substantial evidence on the record before the ZAB to the contrary.

As to finding that "the development project is not needed for the jurisdiction to meet its share of the regional housing need...", the ZAB relied on the fact that 74 affordable units have been approved by the ZAB this year and "the 75 affordable units pending Board action." As demonstrated by its action on the project in question, the status of a pending action is no guarantee of eventual development approval. This Department considers a project as counting toward reducing a locality's regional share only upon the issuance of building permits for the construction of the units. These units that are constructed or under construction and being used to reduce the locality's obligation toward the regional housing need cannot be counted twice. The ZAB made no finding as to units actually built in the City during the applicable planning period. Again there appears to be no substantial evidence on the record supporting the ZAB finding.

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PAGE 03/03

Mr. Patrick and Mrs. Lynda Hart
Page 2

The ZAB found that the application for approval of the proposed development was deemed complete prior to the rezoning of the property to a lower density. If the application demonstrates it "complies with applicable, objective general plan and zoning standards and criteria" in effect at that time, its denial would be subject to the two-part findings requirement of subdivision (j) of Section 65589.5. The locality must find that the denial required to avoid "a significant, quantifiable, direct, and unavoidable impact, [upon the public health or safety] based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." The ZAB did find an adverse impact from the project, referring to certain provisions in the City Code, however it is unclear whether these standards meet the criteria of paragraph (j)(1) and it does appear that no mitigation finding was made as required by paragraph (2).

Also, the finding to deny your use permit application, based on development standards in the R-2A zoning, district appears directly contrary to well founded recommendations from the City's Planning and Development Department to not downzone your property (October 24, 2001 memorandum to the Planning Commission).

We hope the above information is helpful. Also, we thank you for your interest in contributing to the State's critical housing needs.

Sincerely,



Paul Mc Dougall
Housing Policy Representative

cc: Steve Barton, Housing Director, City of Berkeley
Carol Barrett, Planning and Development Director, City of Berkeley