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CITY OF BERKELEY
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City Clerk
Mayor Shirley Dean
City Council Members
City of Berkeley
2180 Milvia Street
Berkeley, CA 94704

August 6, 2002

Re: Appeal: Notice of Decision Dated 7.23.2002 Use Permit #011-1000087

GENERAL ALLEGATIONS:

1. The evidence does not support the findings⁵ 1 through 3 as set out in the Notice of Decision from the Zoning Adjustments Board hearing, which took place on July 11, 2002.
2. As such the findings do not support the ZAB decision on that date.
3. Acting as it did, the ZAB acted without or in excess of its jurisdiction.

SPECIFIC ALLEGATIONS:

To be further augmented by the date of the City Council review.

We object to the decision of the Zoning Adjustments Board, which denied our application for Use Permits at 1155-63 Hearst Avenue, for the following reasons:

Finding #1. The ZAB has not proven that this development with four affordable units "is not needed" for the jurisdiction to meet its share of the regional housing need for very low, low, or moderate-income housing. Although the City of Berkeley "continues to make progress towards meeting its share of the regional housing need for very low, low or moderate-income housing by the target year of 2006." the units "approved for construction" as of the date of the ZAB decision do not meet the regional goals in the housing element.

The housing element, which was adopted by City Council on December 18, 2001 "does not comply with state housing element law" (Gov Code Article 10.6), according to the Department of Housing, Division of Housing Policy Development letter dated August 1, 2002. Therefore the goals outlined in the housing element cannot be used to deny our affordable housing development under CA Gov Code Section 65589.5.d.1.¹

¹ The staff report for June 27, 2002 p.16, correctly states the facts and conclusions of the law on this issue.

Finding #2. In addition, if the ZAB contends that the down zoning, which was approved by City Council on April 18, 2002, applies to our development application then Gov Code Section 6589.5.j. must also apply. If “the local agency proposes to disapprove the project or approve it upon the condition that it be developed at a lower density, the local agency shall base its decision . . . upon written findings supported by substantial evidence on record that both of the following conditions exist.” “The housing development project would have a specific, adverse impact upon the public health or safety” . . . “specific, adverse impact means a significant, quantifiable, direct and unavoidable impact based on objective, identified written public health or safety standards, policies or conditions as they existed on the date the application was deemed complete.” Finding #2 does not meet this standard. Non-compliance with the R2 zoning ordinance does not constitute a specific adverse impact upon public health and safety. Non-quantified, non-specific “detriment to health, safety peace . . . general welfare of persons residing or working in the area” is not an identified written public health or safety standard. Furthermore, since the Zoning Adjustments Board found that only Gov Code Section 65589.5.d.1 applied to our application and not Gov Code section 65589.5.d.2, it is impossible for them now to assert that there is a “specific adverse impact upon the public health and safety.”

Finding #3. This finding should be set aside since is no discussion or correspondence on record or testimony on this code and the applicant was never informed from the date of the application until the ZAB decision on July 11, 2002 that compliance with this code was required.

This code does not even apply to this application. It applies to property that is being “Eliminated through Conversions or Changes of Use.” The appropriate code, BMC 23C.08.020 allows demolition “necessary to permit construction . . . of at least the same number of dwelling units as the demolished structure.”

If BMC 23C.08.030.D were to apply, findings 3a,b and c do not. Finding 3(a) is completely wrong on the facts. The dwelling units to be eliminated are not all affordable to persons of very low, low or moderate income as defined by HUD guidelines. Three of the current 6 units are now at market rates. The remaining 3 units can be raised to market rates upon any vacancy, thereby making none of these units affordable in the long term. In contrast, four of the proposed but rejected units will be permanently affordable to very low-income families.

In addition, in finding 3(b) the assertion that the “elimination of six dwelling units will adversely affect the supply of housing in the City by reducing the affordable housing stock by six units” is erroneous as explained in the previous paragraph. It also overlooks the fact that a total of 14 units will be built in addition to the replacement of the previous six – hardly the “adverse affect on the supply of housing” asserted in this finding.

Finding 3 (c) that, “the applicant has not shown that they cannot make a fair return on their investment by maintaining the existing buildings” can be refuted.² Admitting to a ZAB member’s question that there “was no evidence to support Finding 3 (c),” staff stated that it creatively added this finding to rebut any claim of “taking” and place the burden on the appellant to prove a taking.

Had this issue been discussed, appellant had available tax returns showing a loss in 2001 and less than 1% return on investment for the previous three years. If this code section had been discussed, testimony taken, and it applied to our application, this requirement would have been met.

Finding #4. Staff admitted at the July 11, 2002 meeting that this finding was neither in the record or discussed but was inserted to bolster the decision reached.

Since the City does not have a housing element that is in compliance with state law, Policy H-21 referring to demolition of housing units is not applicable. The letter to Weldon Rucker, dated August 1, 2002, from the State Department of Housing, indicates that in the Policies and Actions and the Housing Program “no significant changes have been made to address the statutory requirements described in our previous letter.” At present BMC 23C.08.020 applies since this is current local code and not part of a document that is not in compliance with state law. This allows demolition of dwelling units that will be replaced by at least the same number of units. (see finding #3)

Finding # 5. The Zoning Adjustments Board has indicated that this project is denied, “without prejudice should the applicant submit a project that conforms to the development standards of the R2A district.” The board heard testimony and accepted in their findings that Gov Code Section 65589.5.d.1 applied to our project **because under 65589.5.i. “the reduction in allowable densities” would have a substantial adverse impact on the viability” of our project.** The staff report, housing department and applicant’s testimony proved that it is economically impossible for us to build to the R2A requirements. The Zoning Adjustments Board affirmed that even at ten units, which is the maximum allowable under R2A with a 25% density bonus, the development would not be feasible.

The City of Berkeley is in violation of CA. Gov. Code Section 65589.5 subjecting it to attorneys’ fees and costs. By down zoning from R3 to R2A after our application was complete and delaying then denying our application which is under the protection of Gov Code Section 65589.5, the City of Berkeley is in fact in violation of that code and if the “denial of the development or the imposition of restrictions on the development is the subject of a court action...the burden of proof shall be on the local legislative body.” The City will be at risk for all costs. “If the expense of preparing the record is borne by the petitioner and the petitioner is the prevailing party, the expense shall be taxable as costs.”

² There was no testimony or evidence presented to support this finding.

Finally, the down zoning and denial of our Use Permit application is a “taking “ of our property. We have suffered substantial losses due to the City of Berkeley’s down zoning of our lot and subsequent denial of our application to create a viable investment. The record of the Zoning Adjustments Board confirms that the down zoning has adversely impacted our ability to make a fair return on our property and we have lost the potential for several millions of dollars in future rents and appreciation.

This Appeal is also based upon the Belief that this Decision , under the facts of this case and Federal and/or California law and Constitution, constituted an impermissible taking entitling appellants to compensation.

The July 11, 2002 ZAB decision, which relied upon the downzoning of appellant’s property, after acquisition of title and after the application now under appeal became final (a decision to which appellant’s have filed a timely court challenge). The downzoning , in combination with the Decision at issue, did not advance a legitimate public interest because it prevented an increase of both market rate and affordable housing on the site. The downzoning and the decision at issue denied the owner of practically all viable use of her land. Here, all credible evidence proved that building on this property according to limitations imposed by the decision now under appeal was financially infeasible.

The evidence and argument in support of this belief are included but not limited to the items outlined below:

- The only public interest supporting the decision to downzone appellant’s property was political. This is an election year. To appease an angry group of voters, the City Council downzoned the property now under appeal. This is not a “legitimate” public interest.
- The application which the ZAB denied conformed in all respects to the zoning regulations in effect (R3) at the time the application was “deemed complete.”
- The only detriment finding – Finding #2 (the pre-requisite to denying a Use Permit) is that the proposed project does not meet the R2A development standards.
- Applicant’s financial pro-forma proved that the development standards which resulted from the downzoning from R3 to R2A (ZAB decision now under appeal denied this application unless the application was reduced to comply with R2A development standards), was financially infeasible.
- The fact that at least two of the presented finding (finding “3c” and “4”) were not based upon any written or testimonial evidence but were added to “bolster” a decision already made, provides further proof that the decision did not advance a legitimate public interest.
- The remaining permissible use: building housing in conformance with R2A standards was not found to be economically viable by the City of Berkeley’s own Housing Office and the City of Berkeley’s Planning Department. These

conclusions by both city departments resulted from their independent analysis (i.e. outside developers and contractors not associated with appellants) as ordered by the Zoning Adjustments Board.

- By denying the appellants the ability to make a reasonable profit as opposed to an operating loss, the ZAB frustrated appellants "profit expectation"
- By finding (essentially predetermining even before considering a Variance Application) that Variances could not be made to allow the R3 lot coverage, residential density, parking requirements and open space, the ZAB decision denied appellants economic use of their property.
- The Zoning Adjustments Board decisions finding # (1) by implication if not specifically, found that it would not be financially feasible to build on the subject site in accordance with the limitations set by the decision now under appeal.
- Simply stated, the remaining permissible use of appellant's land, as a result of this decision, is not economically viable.
- By rendering the decision that it did, by allowing appellants to reapply only if appellants submitted a project that conformed to the R2A district (finding "5"), the ZAB caused appellants significant financial loss, in an amount to be proven at trial.

For the foregoing reasons we respectfully request that this City Council overturn this factually and legally erroneous decision.

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