

LAW OFFICES
FERGUSON & BERLAND

A PROFESSIONAL CORPORATION

1816 FIFTH STREET • BERKELEY, CALIFORNIA 94710

37

MICHAEL C. FERGUSON
WILLIAM S. BERLAND

TELEPHONE (510) 548-9005
FAX (510) 548-3143

May 18, 2004

RECEIVED AT
COUNCIL MEETING OF:

MAY 18 2004

OFFICE OF THE CITY CLERK
CITY OF BERKELEY

Berkeley City Council
2120 Milvia Street
Berkeley, CA 94704

RE: Appeal of Denial of Parcel Map 8276 for Subdivision of
One Lot Into Two Lots at 1331 Seventh Street

Dear Members of the City Council:

This is the reply of Stephen Block ("Block") to Phil Kamlarz's report ("the Report") that contains Mr. Kamlarz's analysis of the issues raised in Block's appeal, together with Mr. Kamlarz's recommendations to the City Council as to what it should do along with a proposed City Council Resolution. The Report is factually flawed and it fails to adequately address the points raised in Block's letter appeal brief (Block's Brief, pages 190-200 of the City's Administrative Record). Consequently, the City Council should grant Block's appeal and allow the requested subdivision of the 7th street property for all of the reasons in Block's brief.

A. The Report mischaracterized Block's request for relief.

The Report stated that Block requested that consideration of this appeal be continued so that use permit #A920 could be referred to ZAB for review and revocation and/or modification. (See the Report: page 1, "SUMMARY"; page 6, "Response 7," item 2; page 6, "OPTIONS FOR ACTIONS ON APPEAL"; Page 7, "RATIONALE FOR RECOMMENDATION.") That characterization is incorrect.

What Block requested in his communications with staff was that the City Council grant his appeal at this hearing (May 18th). (See Block's Brief and Berland's letter to Wolf, May 15, 2004, said letter attached as Exhibit 1.) Block has never "requested" that the appeal be continued. Block did say that if the City Council believed that the Use Permit should be revoked, there was a procedure specifically designed for that purpose, Section 12B.60.020 of the Berkeley Municipal Code. (See Block Brief.) Block said that if the City Council wanted to avail itself of that procedure, he would agree to continue the hearing on his appeal to September 21, 2004. (See Exhibit 1, attached.)

Furthermore, Block has never stated that section 12B.60.020 permits the City Council to send the use permit to ZAB for review or modification. Block has consistently stated that the

only power the City Council has under section 12B.60.020 is to initiate *revocation* proceedings. (See Block's Brief and Exhibit 1, attached.) As Block has previously stated, section 12B.60.020 is a very specific ordinance that provides for a single and very specific remedy. That ordinance permits and provides only for revocation proceedings. Therefore the Report is in error when it suggested that Block requested that the use permit be sent to ZAB for review and modification.

B. The Report failed to note in its Response 1 that the City failed to mail or send out the Declaration of Restrictions.

The Report discussed the issuance of the use permit for 950 Gilman Street and 1331 Seventh Street. (See the Report, Page 3, "Response 1.") In that discussion, although the Report noted that the use permit required the City to prepare a declaration of restrictions to be recorded, and that the City prepared one, the Report fails to note that the City did not mail or send out the declaration of restrictions to be signed by the owner of the Seventh Street and Gilman properties. This is an important fact that demonstrates the City's responsibility in failing to obtain a recorded notice of the restrictions related to the use permit.

C. The Report failed to respond to Block's argument that the use permit is void as to the Seventh Street property under Government Code 27281.5.

The Report ignored Block's argument that the use permit as to the Seventh Street property is void because of the failure to record it as required by Government Code 27281.5. (See the Report, page 3-4, "Response 1.") The Report offered no explanation as to why that code section should not or did not apply. Apparently the author believed that by not addressing the issue, it would go away.

The Report did acknowledge that Block was an innocent bona fide purchaser with no knowledge of the use permit. "It would appear that the subdivider was not given notice of the parking restrictions relating to 1331 Seventh Street." (See the Report, page 4.) Even though Block did not have actual knowledge, the Report argued that he had constructive knowledge because a land use index card for the Seventh Street property referred to the relationship with the Gilman property. The Report claimed that:

Despite this, it should be noted that a land use index card maintained by the Land Use Planning Division for 1331 Seventh Street specifically referred to the relationship with 950 Gilman Street. The index card and files relating to 950 Gilman Street included records of use permit #A920. An adequate due diligence review of these public records by the subdivider would have revealed the restrictions relating to the use of 950 Gilman Street and 1331 Seventh Street. (The Report, page 4.)

This argument completely ignores the effect of section 27281.5 on the use permit. Since the use permit is invalid by operation of law because it was never recorded, the existence of an index card for the Seventh Street property is irrelevant. By the terms of the statute, the use permit is of no effect on Block.

Even if the land use index card could be considered, it does not have the effect of imparting constructive knowledge to Block. The Report incorrectly stated that an "adequate due diligence" would have disclosed the existence of the land use index card. (See the Report, page 4, "Response 2.") The Report offered no evidentiary support for this claim. That is because there is none. The reality is that an adequate due diligence performed by the purchaser of a vacant lot in an industrial/commercial district such as we have in this case would not include a review of a land use index card. (See letter from Don Yost, attached as Exhibit 2 and letter from Don Deibel, attached as Exhibit 3.)

Don Yost, a respected real estate broker in Berkeley and one who is very familiar with the Property, states that it is his opinion that in doing an adequate due diligence for building and use issues for 1331 Seventh Street, he would not even go to the City of Berkeley to look at their files or records. (See Yost letter, attached as Exhibit 2.) For a vacant lot such as the Seventh Street property, he would rely on a title report to show whether there were any building or property restrictions and the zoning of the area to identify the possible uses to which the land could be put. Mr. Yost was even interested in purchasing the Property for himself prior to Block's purchase, and Mr. Yost states that he did not go to the City to look at any records relating to the Property because he would have expected there to be none. (See Yost letter, attached as Exhibit 2.)

Don Deibel, an experienced real estate developer, states that it is his opinion that a standard due diligence relating to a purchase and/or development of 1331 Seventh Street would not include an examination of a land use index card for that property nor a request to see such a card. Mr. Deibel, with all of his experience in the real estate industry, has never even seen nor heard of such a card. (See Deibel letter, attached as Exhibit 3.)

D. The Report failed to adequately address the laches issue.

The Report stated that the doctrine of laches was not relevant because the City is not seeking equitable relief. (See the Report, page 5, "Response 3.") The Report missed the issue. The question is not whether the City is now seeking equitable relief. The question is whether the City during the 17 years that the use permit was in existence ever sought equitable relief. Of course it did not do so. Even when the City discovered that the use permit was being violated by the existing uses at the Gilman property and that the use permit had not been recorded, the City took no action, equitable or otherwise, to remedy the matter. One year after this discovery, the City has still chosen not to correct this problem. This failure to seek relief constitutes laches.

The Report claimed that there has been no undue delay with respect to the subdivider. (See the Report, page 5, "Response 3.") Again the Report has missed the issue. The question is whether the City unduly delayed in correcting the use permit violations that were taking place and/or delayed in failing to record the use permit after it learned of its mistake in failing to have the use permit recorded.¹ The Report failed to address these issues.

E. The Report incorrectly maintained that the City made no representations to the subdivider.

The Report claimed that the City made no representations to Block. (The Report, page 5, "Response 4.") Of course the City made no affirmative representations, but it did make representations through its silence. By not revealing the terms of the use permit, the City led Block to believe that there were no unusual conditions that affected the property. Furthermore, when the City did discover that the use permit had not been recorded, it continued to remain silent in that it took no steps to record a notice to a prospective purchaser. The City also remained silent in that it failed to enforce the building code violations once they were discovered and it failed to enforce the use permit conditions that applied to the Gilman property.

F. The only justification the Report gave for denying the subdivision is that the subdivision would violate the terms of the use permit.

The Report argued that the request for a subdivision also violated the Zoning Ordinances. (See the Report, page 5, "Response 6.") However, the only reason given in the Report as to why the Zoning Ordinances are allegedly being violated is because the conditions of the use permit are not being met. This is a bootstrap argument. The Report is saying that since you are violating the use permit, you are violating the Zoning Ordinances. But if the use permit is invalid, or is not in effect, then there is no violation of the Zoning Ordinances. As is pointed out in this letter, indeed the use permit is invalid and unenforceable for a variety of reasons.

G. The Report incorrectly stated that the City Council has the authority under section 23B.60.020 to refer the use permit to ZAB for review and modification or revocation.

The Report stated that the City Council has the authority under section 23B.60.020 to send the use permit to ZAB and that ZAB has the authority to impose any remedy available at

¹ The City knew as of May 15, 2003, of the use permit issues and of the claimed effect of the use permit on the Seventh Street property. See the Memorandum of Mark Rhoades of May 15, 2003, attached as Exhibit 4.

law or in equity. (See the Report, page 6, "Response 7.") The Report is incorrect. As explained earlier in this letter, the City Council only has the authority to commence revocation proceedings and nothing more. (See section 23B.60.020.)

H. The Report has attached to it a proposed City Council Resolution that contains errors.

The Report has attached to it a proposed City Council Resolution that contains a number of inaccuracies. The proposed resolution incorrectly states that the City Council referred the use permit to ZAB for review and revocation or modification. As pointed out earlier in this letter, this cannot happen because the City Council only has the authority to initiate revocation proceedings. It does not have the authority to initiate modification proceedings.

If the City Council elects to initiate *revocation* proceedings, it must do so in a very specific manner. Section 23B.60.020 provides that the City Council resolution must contain all of the following items:

1. Identify the Use Permit;
2. Identify the property to which the Use Permit refers;
3. Set forth the reasons for the proposed revocation [In Block's letter brief he sets forth a number of violations that would serve as reasons for the proposed revocation.];
4. Fix a time and place for a hearing on the proposed revocation; and
5. The resolution shall refer the matter for a public hearing before ZAB.

Conclusion.

The City Council should grant Block's appeal and allow the subdivision. Block is an innocent purchaser of the Seventh Street property. He had no idea that there were any use restrictions associated with the property. It would be extremely unfair to apply the terms of the use permit to Seventh Street under the circumstances of this case.

Furthermore, it would be unlawful to apply the use permit to the Seventh Street property. The use permit was never recorded, and therefore is invalid as to Block, an innocent purchaser. In addition, the City repeatedly failed to enforce the terms of the use permit by issuing building permits and allowing uses that were inconsistent with the use permit. This resulted in an invalidation of the use permit. Finally, when the City discovered a year ago that the terms of the

use permit were being violated (See Memorandum of Mark Rhoades, attached as Exhibit 4), and that the use permit had not been recorded, it took no action to correct the situation. Accordingly, the City should not now be allowed to enforce this use permit as to the Seventh Street property.

Respectfully submitted,

FERGUSON & BERLAND

A handwritten signature in black ink, appearing to read "WS Berland", with a long horizontal flourish extending to the right.

William S. Berland

wsb/jp

Enc.

LAW OFFICES
FERGUSON & BERLAND
A PROFESSIONAL CORPORATION
1816 FIFTH STREET • BERKELEY, CALIFORNIA 94710

MICHAEL C. FERGUSON
WILLIAM S. BERLAND

TELEPHONE (510) 548-9005
FAX (510) 548-3143

May 14, 2004

VIA E-MAIL, FACSIMILE & U.S. MAIL

Mr. Christopher Wolf
Land Use Planning Division
City of Berkeley
2120 Milvia Street
Berkeley, CA 94704

RE: 1331 Seventh Street
Appeal of Denial of Parcel Map 8276

Dear Mr. Wolf:

I have just reviewed the report of Phil Kamlarz to the City Council (“the Report”) regarding the above-captioned matter.

The Report contains several errors. In the Summary, it states “*Consistent with the subdivider’s request, consideration of the appeal should be continued to allow use permit #A920 to be referred to the ZAB for review and revocation or modification.*” (emphasis added.)¹ As you know, Mr. Block has never requested that the appeal should be continued, nor has he ever requested that the Conditional Use Permit be referred to ZAB for review and modification.

Mr. Block has repeatedly said, in my letter brief to you and in my conversations with you and in my letters to you regarding the City’s request for a continuance, that the City, at the hearing on May 18, 2004, should grant his appeal and permit the subdivision as requested. I did point out in my letter brief that the City does have the power *to pass a resolution to initiate proceedings to revoke* the Conditional Use Permit at issue in this case. Note that “to pass a resolution to initiate proceedings to revoke” is in italics. That is because that is the only power that the City has under the Ordinance referred to in my brief, Section 23B.60.020A of the Zoning Ordinance.

¹ See also Response 7(2), page 6, of the Report, which states “Refer use permit #A920 to the ZAB pursuant to Section 23B.60.020A of the Zoning Ordinance for review and revocation or modification.”

Mr. Christopher Wolf
May 14, 2004
Page 2

In my letter brief, I made it clear that Block wants the City to approve his application for the subdivision at the hearing now set for May 18th. However, "In the event that the City decides that in order to approve it [the subdivision] the old Use Permit must be revoked, Block is willing to agree to continue this hearing before the City Council so that the Council can pass a resolution referring the revocation of the Use Permit to the Board of Adjustments."

After you received my brief, you telephoned me to say that you were going to probably recommend that the City pass a resolution to initiate proceedings to revoke the Conditional Use Permit, and you wanted to know if Mr. Block would agree to continue the City Council hearing on his appeal for a couple of months. I told you that he would do so, and I wrote to you confirming that he would do so, *only if the City passed a resolution to initiate revocation proceedings pursuant to Section 23B.60.020A*. Under this Ordinance, the only avenue available to the City is to pass a resolution to initiate revocation proceedings. It cannot refer the matter to ZAB for review or modification. I also told you, and wrote to you, that even if you recommended to the City Council that it pass a resolution to initiate revocation of the Conditional Use Permit, Mr. Block was going to press the City Council for approval of his subdivision at the May 18th hearing.

I hope that this clears up any confusion you may have had, and the errors in Mr. Kamlarz's Report to the City Council. Mr. Block will not agree to continue the hearing on his appeal if the City refers the Conditional Use Permit to ZAB for review and revocation or modification. Mr. Block will agree to continue the hearing only if the City Council passes a resolution pursuant to Section 23B.60.020A *to revoke* the Conditional Use Permit.

I want to add a brief note about the telephone conversation we just had while I was writing this letter. After I reviewed the points with you that I was making in this letter, you stated that it was your understanding that Section 23B.60.020A permits the City Council to refer the Conditional Use Permit to ZAB for review and revocation or modification. You based your understanding on your reading of Section 23B.60.030. That section provides that if ZAB makes any of the findings set forth in Section 23B.60.030, it may revoke or modify a use permit. As I explained to you in our phone conversation, your reading of that section is incorrect. Section 23B.60.030 does not apply to or modify Section 23B.60.020. Section 23B.60.030 applies to the general procedures set up to modify or revoke under Section 23B.60.010. However, Section 23B.60.030 does not apply to Section 23B.60.020 because the latter is a very limited special proceeding instituted by the City Council. It refers to and provides only for proceedings *to revoke* a use permit.

Mr. Christopher Wolf
May 14, 2004
Page 3

Once again, and to repeat what I said to you today in our phone call, Mr. Block will only agree to continue the May 18th hearing if the City Council passes a resolution to revoke the Conditional Use Permit pursuant to Section 23B.60.020.

Sincerely,

FERGUSON & BERLAND

A handwritten signature in black ink, appearing to read 'W. S. Berland', with a long horizontal flourish extending to the right.

William S. Berland

wsb/jp

NORHEIM & YOST

2332 FIFTH STREET SUITE "C" BERKELEY, CA 94710
COMMERCIAL REAL ESTATE BROKERAGE, DEVELOPMENT & INVESTMENT

TEL: (510) 527-3400 FAX: (510) 665-1390
e-mail: dy@noryst.com

May 18, 2004

To Whom It May Concern:

I have been asked by Stephen Block to describe what "due diligence" I would do for the acquisition and development issues with respect to the purchase of a vacant commercial lot such as 1331 Seventh Street, Berkeley, California.

The property is a vacant lot with out foundations or construction rubble, nothing to suggest that a building had ever been there. It is an unimproved vacant lot.

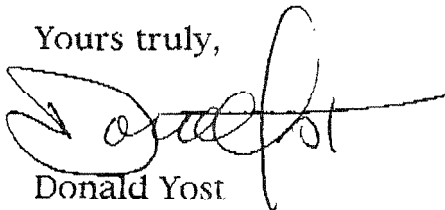
I am familiar with the Seventh Street property. It was offered to our firm by the listing broker Peter McNally from the firm of Robinson/McNally. I had considered purchasing it before Mr. Block bought it. It was presented to me as a vacant parcel, zoned MUII and ready for development. The purchase would include an easement for egress to Eighth Street through an adjacent lot to the East.

With respect to a lot such as 1331 Seventh Street, My due diligence would consist of the following three items: (1) a physical inspection of the property, (2) a review of the preliminary title report for the property, and (3) a verification of the applicable zoning that applied to the the Property.

I would not (and did not) go to the City to look at any files because I did not believe there would be any relevant building department files in Building or use permit history in Zoning since the Property was an unimproved vacant lot. I intended to rely upon my inspections and the title report to disclose whether there were any easements, encumbrances, or restrictions on the use of the property.

If I had seen a building on the Property, or evidence that a building had once been on the Property, I would have gone to the various City departments to determine the previous uses for the property and to review the building file.

Yours truly,



Donald Yost

Urban Housing Group

777 California Avenue
Palo Alto, CA 94304
Tel: 650 856 8500
Fax: 650 213 8183

May 17, 2004

Berkeley City Council
CITY OF BERKELEY
2120 Milvia Street
Berkeley, CA 94704

Dear Berkeley City Council:

I have worked in the real estate development industry for over 20 years and have been involved with many transactions relating to the purchase and/or development of residential property in the Bay Area.

In my experience as a veteran real estate developer, I have never heard of a land use index card system, nor has any of my standard due diligence included the examination of a land use index card system.

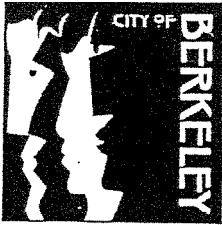
Sincerely,

URBAN HOUSING GROUP



Daniel M. Deibel
Director of Development

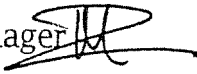
DD/mg



Planning and Development Department
Current Planning Division

PLEASE MAKE
A LOCATIONAL
FILE.

To: Phil Kamlarz, Deputy City Manager
 Jim Hynes, Assistant to the City Manager

From: Mark Rhoades, Planning Manager 

CC: Carol D. Barrett, AICP, Director of Planning and Development

Date: May 15, 2003

Re: Information Relevant to 1331 Seventh Street and Parking Requirements for 950 Gilman Street

1331 Seventh Street

Attached is information relevant to the property at 1331 Seventh Street. The attachment is the use permit that was issued by the City in 1986, which requires this property to provide 76 parking spaces for manufacturing and office space expansions at 950 Gilman Street. The property at 1331 Seventh Street was purchased by the owners of 950 Gilman Street expressly for the purpose of providing parking for the 950 Gilman Street property. The owner agreed to file a deed restriction on the property that also requires this condition.

If the property at 1331 Seventh Street is sold, the lack of parking will render the buildings at 950 Gilman Street unusable until the parking situation is resolved.

The remedies to remove the parking restriction for this lot are as follows:

- Eliminate floor area at 950 Gilman Street
- Apply for a variance to eliminate the parking requirement (staff does not believe that the variance findings can be made because the parcels at (950 Gilman are not oddly configured, nor would it be denying the owner of economic use of the property at 950 Gilman Street. This would be an owner-imposed situation).
- The owners could find another lot in the vicinity of 950 Gilman Street on which to provide the required parking.

Please let me know if you have any questions about this information.

Thank you.