


Office of the City Manager

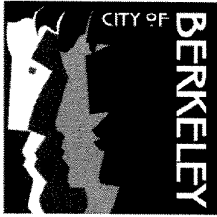
## TO BE DELIVERED AGENDA MATERIAL

**Meeting Date:** July 19 2005

**Item Number:** 44a


**Item Description:** 1698 University Avenue – Appeal of Zoning Adjustment Board’s decision

  
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City Manager Signature



Office of the City Manager

ACTION CALENDAR  
July 19, 2005

To: Honorable Mayor and  
Members of the City Council  
From:  Phil Kamlarz, City Manager  
Subject: 1698 University Avenue – Appeal of Zoning Adjustment Board’s decision

RECOMMENDATION

Adopt a Resolution affirming the decision of the Zoning Adjustments Board (ZAB) to approve the project with revised Findings and Conditions, and dismissing the appeal.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

On October 28, 2004, the ZAB approved demolition of a single-story commercial building (“Tune-up Masters”) and construction of a five-story mixed-use building with 25 condominium dwelling units (including four affordable housing units), 2,852 square feet of ground-floor commercial space (including a quick-service restaurant), and 32 parking spaces. Based on staff’s understanding of State density bonus requirements at the time, the approved project included a bonus of 25 percent (5 units) over the maximum residential density allowed under the Zoning Ordinance (20 units). Notice of the ZAB’s decision was issued on November 4. On November 18, Amber Vierling, Esq. of Fairfield, California appealed the decision to the City Council on behalf of the Association for Responsible Development (“ARD”), and Robin Kibby of 1679 Addison Street appealed on behalf of herself.

After the ZAB’s approval, it came to staff’s attention that for condominium projects providing housing affordable to “moderate income” households (i.e., those earning between 81 and 120 percent of area median income), such as the proposed project, the minimum density bonus required by State law at the time of project approval was 10 percent (2 units), not 25 percent. This oversight was mainly due to the fact that the project was originally proposed and considered as a rental project, and was later changed to a condominium project during the review process. State law changed on January 1, 2005, such that the minimum density bonus for the proposed project increased from 10 percent to 15 percent (3 units).<sup>1</sup>

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<sup>1</sup> Govt. Code Section 65915(g)(2) provides a minimum density bonus of 5 percent for condominium projects with 10 percent of the units reserved for “moderate income” households, and an additional 1 percent bonus for each 1 percent increase above 10 percent of the percentage of affordable units. Since the City’s inclusionary ordinance requires 20 percent of the units to be reserved for “moderate income” households, the density bonus is increased from 5 percent to 15 percent.

On January 25, 2005, the Council considered the appeals of the first ZAB decision. Because the density bonus that had been approved by ZAB was not consistent with the State laws in effect when the decision was made, the Council remanded the project to the ZAB to revisit this issue. This could have involved changing the physical size of the project to eliminate two units, approving the same project with additional concessions or incentives to allow the two units, or some alternative in between. At that time, staff explained to the Council that in order for the size of the project to remain unchanged, the ZAB would have to consider either adjusting the required affordability level or grant additional concessions subject to financial analysis, as described below. The Council also directed the ZAB to require construction of a sidewalk bulb-out prior to completion of the project, and a "left turn only" sign at the project's exit driveway, and dismissed the balance of the appeal points.

After the Council's remand the applicant decided to continue to seek approval of the project as approved by the ZAB. This required that the applicant request to retain the 2 units on the fifth story as an additional concession. Accordingly the applicant began working with the Housing Department to determine whether this concession would be necessary to provide for the project's affordable housing costs at the "moderate income" level. On March 10, 2005, the ZAB opened a public hearing to consider this request. Analysis by the Housing Department showed that a concession allowing approximately 1.6 units would be required to provide for the affordable housing costs of the 4 inclusionary units, but that if the affordability of one of the units were limited to 90 percent of area median income (rather than 120%), the project's affordable housing costs would be increased equivalent to the value of the additional 0.4 unit requested by the applicant. The applicant agreed to this increased affordability, and the ZAB approved the concession allowing 2 units subject to the following finding:

In accordance with Government Code Section 65915, the ZAB hereby grants the requested Use Permit and Variance for the fourth and fifth stories for the following reasons:

- a) Based on the zoning standards in effect at the time the project was deemed complete, the maximum residential floor area allowed on this parcel is 20,818 square feet. Based on the proposed gross area per unit of 1,046 square feet, the maximum floor area would accommodate 20 units. Thus, for the purposes of calculating the density bonus and affordable housing requirements for this project, the "otherwise maximum allowable residential density," or "base project," is 20 units.
- b) The project will provide 20 percent of the base project units (four units) at prices affordable to households whose incomes are at or below 120% of the Oakland PMSA median income. Therefore, under Section 65915(g)(2), the project qualifies for a 15-percent density bonus over the base project (three units). In addition, pursuant to Section 65915(d), the applicants have requested an additional concession of two units, and have agreed to increase the affordability of one of the affordable units, as discussed below.

- c) Analysis by the City's Housing Department showed that a concession of approximately 1.6 units would be required to provide for the project's affordable housing costs. Accordingly, the project being approved contains 2 additional units, because it is impossible for the City to grant a fraction of a unit. Furthermore, analysis showed that providing one of the four affordable units at a price affordable to households earning no more than 90% (as opposed to 120%) of the Oakland PMSA median income would increase the project's affordable housing costs equivalent to the value of the additional 0.4 units being approved by the City. In accordance with this analysis, the ZAB is requiring, and the applicants have agreed to provide, three units affordable to households earning no more than 120% of area median income, and one unit affordable to households earning no more than 90% of area median income.
- d) The ZAB finds, based on the analysis provided by the City's Housing Department, on the increased affordability agreed to by the applicants, and on increases in construction costs between October 2004 and April 2005, that the requested concession of two units is required to provide for the project's affordable housing costs. Furthermore, as discussed in the initial study, mitigated negative declaration, and staff reports for the proposed project, the project as proposed and approved would not have a specific adverse impact, as defined in paragraph (2) of subdivision (d) of Government Code Section 65589.5, upon public health and safety or the physical environment or on any real property that is listed in the California Register of Historical Resources, which there is no feasible method to satisfactorily mitigate or avoid. In addition, none of the other requirements of Section 65589.5(d) for reducing the density of the project can be met. Therefore, pursuant to Section 65915(d), the requested concession must be granted.
- e) The density bonus and concession units cannot be accommodated within the otherwise maximum allowable residential building envelope of the C-1 District, which allows up to three stories, and therefore the C-1 height standard must be modified. Based on the preference expressed by the Zoning Adjustments Board for a small fifth story with greater setbacks on the other residential stories, rather than only four stories but with smaller setbacks on the other stories, the applicant has requested that the project include a fourth story with approximately 6,400 square feet and a fifth story with approximately 2,700 square feet.

The fifth story normally requires a Variance, but the findings for Variances (Section 23B.44.030) cannot be made in this case. However Section 65915 requires the City to accommodate bonus units by waiving or modifying zoning standards. In this case, consistent with the applicant's request and the ZAB's preference as described above, the ZAB waives and/or modifies the applicable height limits in the C-1 District to the extent necessary to accommodate the bonus and concession units permitted by Section 65915.

The ZAB also approved revised Use Permit conditions to address the Council's concerns about the sidewalk bulb-out and "left turn only" sign, as follows:

(Condition 12) Plans submitted for building permit shall include a sign reading "Left Turn Only" visible to drivers exiting the garage, subject to the specifications and approval of the Office of Transportation.

(Condition 43) Prior to issuance of occupancy permit or final inspection, the bulb-out shown on the approved site plan shall be completed pursuant to the instructions and requirements of the Office of Transportation and Public Works Department, including the requirement to obtain an engineering permit. The Office of Transportation shall have authority to relocate the bulb-out to the University frontage if it deems necessary to comply with the University Avenue Strategic Plan, or other applicant plans or standards.

Notice of this second ZAB decision was mailed on May 25, and on June 8, Robin Kibby, Andrea Banduhn, Steven Saylor, Robert and Diane Leech, Michael Popso, Gene Poschman, and Stephen Wollmer appealed the decision to the City Council.

The ZAB determined that the proposed mixed-use housing project as approved was consistent with the Zoning Ordinance and General Plan as modified pursuant to State density bonus law. In addition, the ZAB adopted an Initial Study and Mitigated Negative Declaration after determining that the project would not have a significant effect on the environment subject to certain mitigations that were also incorporated into the project's conditions of approval.

In their findings, the ZAB addressed a number of more specific issues including General Plan consistency, variance findings (for density bonus modifications), shadowing and views, nearby designated landmarks, CEQA, and University Avenue Strategic Plan (UASP) goals.

State density bonus requires the City to grant the project a density bonus for additional units by waiving or modifying Zoning Ordinance development standards to accommodate the additional building area necessary to construct the floor area for those units. In addition, state law requires that the City grant additional concessions or incentives for the project unless the City can show that those concessions or incentives would not be necessary due to the project's financial feasibility. The project was granted a number of Zoning Ordinance waivers and/or modifications to achieve the state mandated density bonus. Many of these waivers and modifications would typically require the issuance of a variance.

Variances generally require that the ZAB make four findings for approval. One of those findings is similar to the non-detriment finding for use permits, and the ZAB made that finding for this project. The other findings deal with the preservation of an applicant's substantial property rights, and extraordinary site circumstances. Those findings cannot generally be made for a project of this nature and therefore the State's density bonus requirements (which supersede the City's zoning requirements) are the justification for granting these waivers and modifications.

The ZAB determined the project would not have detrimental shadow impacts based on the “site’s location on the south side of University, where the majority of shadows will fall on the public right-of-way rather than adjacent buildings,” and based on “the degree to which the nearest landmark, Fox Commons, is already shaded during the morning by existing vegetation and buildings.” Given State density bonus requirements, the ZAB expressed a preference for “a small fifth floor and greater setbacks on the other floors, rather than no fifth floor but smaller setbacks on the other floors,” and found that this massing “minimizes the perception of height and bulk in order to make it more compatible with the adjacent areas.”

Relevant to historic resources, the ZAB also determined:

The project will not have a substantial adverse impact on any of the nearby landmarks due to its distance from them, which is adequate to address any concerns about aesthetic compatibility from the project’s greater height and bulk, and to the degree to which the nearest landmark, Fox Commons, is already shaded during the morning by existing vegetation and buildings.

In addition, the ZAB found that the project would not have detrimental view impacts “given the flat terrain and built-up character of the surrounding area.” No substantial evidence of a significant view impact (such as photos) has been provided, and in any case, private views are generally not afforded the same protection for projects in commercial zoning districts. Projects in residential zoning districts are afforded greater protections for views based on the findings for a major residential addition.

The IS/MND adopted by the ZAB addresses a number of issues including air quality, traffic and public services. The potential for air quality impacts of development under the General Plan have been analyzed and mitigation measures adopted. The project will not generate enough trips to cause a significant increase in traffic congestion. The project is consistent with the General Plan, and development foreseen under the General Plan was not projected to cause any significant impacts on public services. The ZAB therefore found that the project would not have any significant effects on the environment.

The traffic study upon which the MND/IS was based included a major project at 1719 University Avenue that was under construction at the time of this project’s review, and therefore the IS/MND considered some cumulative traffic impacts. However, the discussion of cumulative impacts is one generally reserved under CEQA for EIRs, and not for negative declarations. The MND/IS also discussed cumulative air quality impacts, pointing out that this analysis has already been performed as part of the environmental review of development foreseen under the General Plan. Except for two spaces, the project fully satisfies the Zoning Ordinance parking requirement, and no substantial evidence of significant environmental effects from lack of parking has been provided.

The ZAB also determined that the project was consistent with many of the goals and actual zoning requirements of the UASP as follows:

The project is consistent with General Plan policies LU-13 and LU-27 and University Avenue Strategic Plan goals 1 and 4 because it establishes new commercial space at the sidewalk, encouraging pedestrian activity and providing a desired neighborhood service (a café);

The project is consistent with General Plan policies LU-25, H-16 and H-19 and University Avenue Strategic Plan goal 3 because it provides it provides four for-sale dwellings at below-market-rate prices, thereby helping the City to achieve its housing production goals, and it creates an attractive new development likely to attract long-term, neighborhood-oriented residents;

The project is consistent with several new zoning requirements adopted to implement the University Avenue Strategic Plan, including the size of the commercial entries, the ceiling height of one of the commercial spaces, the amount of commercial space, and the provision of a bulb-out, street lighting and street trees.

Pursuant to Berkeley Municipal Code Section 23E.36.090.B, the Zoning Adjustments Board finds that the proposed project is compatible with the purposes of the C-1 District and with the surrounding uses and buildings because it provides pedestrian-oriented commercial space and housing on an underutilized site, it provides a food service use that will benefit the adjacent neighborhoods, it will not unduly impact traffic congestion, sunlight, views, or have other significant physical impacts, and its massing minimizes the perception of height and bulk in order to make it more compatible with the adjacent areas; in addition, the proposed project will not interfere with the continuity of retail and service facilities at the ground level, but improves that continuity by replacing auto-oriented commercial space that is separated from the sidewalk by driveway and parking area with pedestrian-oriented commercial space that abuts the sidewalk.

In May 2005, while this matter was still pending before the ZAB on remand, ARD<sup>2</sup> filed a lawsuit against the City challenging the Council's alleged approval of the project. Prior to the lawsuit the City Attorney's office informed ARD's attorney, Amber Vierling, that the City had in fact not approved the project, that the Council had remanded the ZAB's approval back to the ZAB, and the applicant had as yet obtained no entitlements. Nevertheless, ARD went forward with its lawsuit, and to date has declined to dismiss it. Nevertheless, the pending lawsuit is premature.

#### RATIONALE FOR RECOMMENDATION

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<sup>2</sup> ARD is an unincorporated association comprised of various individuals, including but not limited to: Dr. Meredith Sabini, Mike Kuroki, Jay Ifshin, and Diane and Robert Leech.

The appeal by Robin Kibby, et al, raises the following issues. Staff's responses follow each issue.

Issue 1: The Council remand on January 25, 2005 directed that the ZAB consider the project's density bonus under the provisions of Government Code Section 65915 in effect on October 28, 2004, yet the ZAB decision on April 28, 2005 is based on the current provisions of Section 65915 and thus violates the Council remand.

Response: The ZAB and the Council are obligated to apply the law in effect at the time of their decision. The Council may not by resolution insulate the City from changes in state law. In any case, whether the previous or current density bonus provisions are applied to the project, the size of the project would not be affected. This is due to the fact that under both versions of Section 65915, the project's affordable housing costs remain the same, and both sets of provisions state that a requested concession must be granted unless the city finds that the concession is not required in order to provide for the project's affordable housing costs, or that it causes certain "specific adverse impacts."<sup>3</sup> Because the Housing Department's analysis showed that neither a ten-percent density bonus nor a fifteen-percent bonus would provide for the project's affordable housing costs, and no specific adverse impacts as defined in State law have been identified, an additional concession of adequate value to provide for the project's affordable housing costs would be required under either version of the statute.

Issue 2: "Whether under the previous law, or the new version (the previous law provided for one concession or incentive, the revised law for two), the Zoning Adjustments Board has exceeded the number of incentives or concessions allowed by the Density Bonus Law. The staff report of March 25, 2005 to the Zoning Adjustments Board which the Zoning Adjustments Board relied on in its approval of this project does not recognize the state limit on the number of concessions or incentives that are required." [Appellants go on to quote from staff report and from previous and current provisions for concessions and incentives.]

Response: The ZAB granted the project one concession, a Variance to allow two units on the fifth floor, in addition to the required density bonus, and therefore did not exceed the number of required concessions under both the previous and current density bonus provisions. The appeal does not provide any explanation of how this concession exceeds the number required by State law. It should be noted that the definition of "concession or incentive" in State law gives cities considerable latitude in selecting concessions, including "reduction in site development standards or a modification of zoning code requirements," "direct financial incentives," "waiver of fees or dedication requirements," and "other regulatory

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<sup>3</sup> Govt. Code Section 65915(d)(1).

incentives or concessions proposed by the developer or the city . . . that result in identifiable, financially sufficient, and actual cost reductions.”<sup>4</sup>

Even if the ZAB had granted more concessions than required by State law, this would not violate State law, as the numbers of concessions stated in Section 65915(d) are minimum requirements, not limits as the appellants claim. State law states that “nothing in this section [65915] shall be construed to prohibit a city . . . from granting a density bonus greater than what is described in this section for a development that meets the requirements of this section or from granting a proportionately lower density bonus than what is required by this section for developments that do not meet the requirements of this section.”<sup>5</sup>

Issue 3: “The Berkeley staff policy of “full compensation” for affordable housing costs is not in and is not required by the State Density Bonus Law, Government Code Section 65915-18 and more specifically there is nothing in section 65915(f) cited by Housing Department staff or 65915(d) which in any way requires such a policy.”

Response: The appellants’ claim contradicts the plain language of Section 65915. As stated above, Section 65915(d)(1) states that a requested concession must be granted unless the city finds that the concession is not required in order to provide for the project’s affordable housing costs, or that the concession would cause certain “specific adverse impacts.” The City’s methodology of determining the additional costs from the required affordable units, and then determining whether a requested concession would provide for those costs, is mandated by Section 65915(d)(1). The appeal does not provide any explanation of how staff’s methodology is inconsistent with Section 65915(d)(1).

Issue 4: “The pro forma analysis for 1698 University on which the full compensation policy is based is flawed and does not support the density bonus finding (section 2 on pages two and three of Attachment 1 dated April 28, 2005).”

Response: The appeal provides no further explanation of how the pro forma analysis is flawed. When an applicant requests that the City grant additional concessions or incentives for a density bonus project the City requires that the applicant prepare a project pro forma analysis. The pro forma analysis is necessary to determine whether or not the concessions are necessary due to the project’s provision of affordable units, and how that affects the project’s financial feasibility. The City’s review process for a pro forma is a rigorous one, where assumptions for profit and loss are reviewed and tested by the Housing Department. The City required extensive documentation from the applicant to support their assumptions. City then tested and the ZAB reviewed that pro forma analysis based on the City’s

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<sup>4</sup> Govt. Code Section 65915(l)

<sup>5</sup> Govt. Code Section 65915(n)

experience with housing projects. Issue 5: “The General Non-Detriment Findings [see Attachment X, pp. 1-2] are not possible because of the existence of the 5<sup>th</sup> story which requires a variance which the staff report admits cannot be made.”

Response: As stated previously in this report, variances generally require that the ZAB make four (three?) findings for approval. One of those findings is similar to the non-detriment finding for use permits, and the ZAB made that finding for this project. The only reason a variance could not be issued under the Zoning Ordinance was because other findings unrelated to detriment could not be made. But the absence of a variance does not by itself render a project detrimental, nor is it evidence of detriment.

The appellants’ claim contradicts the plain language of Section 65915. As noted in the first paragraph and paragraph D of finding 1, the fifth story was approved under a separate finding pursuant to density bonus law, and was not subject to the City’s normal Use Permit and Variance findings. The following provisions of Section 65915 make it clear that the density bonus and concession requirements supercede the City’s zoning requirements:

“The granting of a density bonus shall not be interpreted, in and of itself, to require a general plan amendment . . . zoning change, or other discretionary approval.”<sup>6</sup>

“The granting of a concession or incentive shall not be interpreted, in and of itself, to require a general plan amendment . . . zoning change, or other discretionary approval.”<sup>7</sup>

“The City . . . shall establish procedures for waiving or modifying development and zoning standards that would otherwise inhibit the utilization of the density bonus on specific sites. These procedures shall include, but not be limited to, such items as minimum lot size, side yard setbacks, and placement of public works improvements.”<sup>8</sup>

“In no case may a city . . . apply any development standard that will have the effect of precluding the construction of a development meeting the criteria of subdivision (b) at the densities or with the concessions or incentives permitted by this section.”<sup>9</sup>

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<sup>6</sup> Govt. Code Section 65915(g)(2)

<sup>7</sup> Govt. Code Section 65915(k)

<sup>8</sup> Govt. Code Section 65915(d)(3)

<sup>9</sup> Govt. Code Section 65915(e)

Issue 6: “The awarding of additional density bonus units as a [sic] incentive or concession is not a “regulatory incentive” under the State Density Bonus Law section 65915(l).” [Appeal goes on to quote from Section 65915(l).]

Response: The appellants appear to argue that State law prohibits the use of concessions and incentives that provide additional development potential (e.g., units) as a means of offsetting affordable housing costs. Government Code Section 65915(1) defines concession/incentive in 3 paragraphs, of which paragraph 1 is the key:

- (1) A reduction in site development standards or **a modification of zoning code requirements** or architectural design requirements that exceed the minimum building standards approved by the California Building Standards Commission as provided in Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code, **including, but not limited to**, a reduction in setback and square footage requirements and in the ratio of vehicular parking spaces that would otherwise be required that results in identifiable, financially sufficient, and actual cost reductions.

This does not prevent the consideration of extra units as a concession. The first clause simply refers to modification of zoning ordinance requirements, and is thus essentially open-ended. The qualification about cost reductions only refers to setbacks, square footage and parking reductions. The policy is that amenities should not be reduced willy-nilly, but only if doing so actually saves money. Since 65915(n) allows more units, whether under rubric of concession/incentive or “extra density bonus units”, treating them as a concession/incentive at least requires consideration of whether they are actually financially necessary.

Berkeley has understood the definition of “concession/incentive” as including extra units beyond the minimum density bonus. This is consistent with the intent of Section 65915(n): that nothing in this section “shall be construed to prohibit a city... from granting a density bonus greater than what is described in this section...” This is also consistent with the state’s model density bonus ordinance, which expressly defines additional units as a concession or incentive. The drafter’s comment on this provision is that the touchstone for incentives is that they should be “the most meaningful development incentives for housing developers”.

Issue 7: “The awarding of 2 additional density bonus units to 1698 Avenue [sic] Project with 3 of its 4 condominium units at 120% of AMI and the fourth at 90% violates Berkeley’s inclusionary housing statute and is inimical to the goal of real affordable housing.”

Response: The appeal does not explain how the affordability levels approved by the ZAB violate the inclusionary ordinance (BMC Chapter 23C.12). In fact, providing one of the inclusionary units at a price affordable to households earning 90 percent of area median income (AMI) exceeds the City's inclusionary requirements, which, under current market conditions, would otherwise require prices affordable to households earning 120 percent of AMI.<sup>10</sup> Whether the existing inclusionary requirements satisfy the goal of "real affordable housing" is beyond the scope of the ZAB's review of this project.

Issue 8: "Under the State Density Bonus Law, section 65915(d)(2) prior version and 65915(d)(3) revised version, it is required that the Council as the legislative body shall enact procedures for carrying out the Density Bonus Law including means of compliance with the law and establishment of procedures for waiving or modifying development and zoning standards. The wording is the same under both the 2004 version of the law and the 2005 revision."

Response: The City ordinance implementing density bonus is BMC 23C.12.050. The Council has consistently applied the current density bonus procedures for several years. In 2002 staff presented these procedures to the ZAB and the Planning Commission in a memo and in workshops facilitated by the Zoning Officer, and the memo was also provided to the Council. The Council has also approved several housing projects on appeal, where the appeals challenged the density bonus procedures applied by staff and the ZAB. The staff reports for these projects explained the procedures by which the density bonus provisions were carried out, and the Council's approval of the projects and denial of the appeals constitutes approval of the procedures. The City is currently holding density bonus discussions that may lead to revised procedures. In addition, the City's current procedures have already been challenged and upheld in court for a previous project (2700 San Pablo Avenue). In any case failure to adopt procedures does not invalidate density bonus. This would be contrary to law's intent.

Issue 9: "The awarding of additional density bonus units and/or the decreased affordability of the inclusionary units is directly counter to language in Berkeley's inclusionary ordinance (23C.12.040.F.1) which requires cost reductions for the inclusionary units through "Reduction in floor area or in the interior amenities of the Inclusionary Units" (City language) and under the State Density Bonus requirement under section 65915(l) for incentive or concession to "result(s)s [sic] in identifiable, financially sufficient, and actual cost reductions." Neither

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<sup>10</sup> Section 23C.12.070.A.2 provides that for ownership projects, "where the per unit cost of development exceeds the allowable inclusionary sales price (80 percent AMI), the price may be set at the cost of development as defined below, but may not in any case exceed a price that is three times a gross household income of 120 percent of area median income."

developer nor Staff has identified any cost reductions as required by City Ordinance and/or State law.”

Response: The reference to Section 23C.12.040.F, and the appellants’ argument that concessions and incentives are limited to direct reductions in the costs of the inclusionary units, are ill founded for several reasons. First, Section 23C.12.040.F may only be applied when “the direct construction and financing costs of the Inclusionary Units, excluding marketing cost and profit (and also excluding land costs if a Density Bonus or equivalent incentive is provided), exceed the selling prices allowed for Inclusionary Units by this Chapter.” According to the information submitted to the Housing Department, construction and financing costs for the project would be approximately \$243 per square foot, while selling prices for the inclusionary units would range from about \$296 to \$316. Therefore, the project would not be eligible for the cost reduction measures under 23C.12.040.F.

Second, even if Section 23C.12.040.F could be applied to the project, it is clearly applied only at the request of the applicant and subject to the Board’s discretion, and not required as stated by the appellants. The provision states, “Where the applicant demonstrates, and Staff concurs . . . the Board may approve [cost reduction measures].” The net effect of the appellants’ argument would be fewer affordable housing units that are of lesser quality than market rate units in the same building. If the City consistently applied this idea there could be great disparity between affordable and market rate units and potentially differentiating those units in a manner inconsistent with the intent of the Inclusionary Ordinance.

Third, as discussed above in the response to Issue 6, the intent of State law is not to allow only concessions and incentives that decrease project costs directly by using measures such as those listed in 23C.12.040.F, but also to allow concessions and incentives that offset the affordable housing costs by increasing project revenues through modified development standards. The approval of extra units to increase project revenues is therefore consistent with the definition of “concession and incentive.”

Issue 10: “The pro forma document in Attachment 2 of the Staff Report dated April 28<sup>th</sup>, 2005 improperly grants the developer a sales price for the State Density Bonus units based upon City affordability standards rather than State affordability standards (the City bases household size on unit square footage, while the State bases household size upon number of bedrooms). This increased sales price for the inclusionary units above required State Density Bonus affordability makes the project ineligible for State Density Bonus units under section 65915(b)(4), waivers of City of Berkeley Zoning Ordinance development standards under section 65915(e), or State Density Bonus incentives or concessions under section 65915(e)(2)(B).”

Response: Although the appellants refer to the sales price for the density bonus units, staff assumes that they intended to refer to the sales prices for the inclusionary or affordable units. The density bonus units are not subject to affordability restrictions because they are intended to provide an incentive to affordable housing development by offsetting the costs of the affordable housing.<sup>11</sup>

The appellants are correct in that the City determines the appropriate household size (and thus the income level and sales price) for an inclusionary unit based on the unit's floor area, while State law refers to federal (HUD) regulations that determine family size based on the number of bedrooms<sup>12</sup>. However, the appellants have not provided any explanation as to how the inclusionary sales prices derived under the City's procedures fail to comply with the State affordability requirements. Neither Section 65915, nor the Health and Safety Code section that defines "persons and families of low to moderate income," provide any formula for determining what sales price would be "affordable" to such persons and families. Therefore, there is no basis for the assertion that the City's procedures conflict with State requirements.

In any event, because the project was granted a density bonus and concession based on assumed compliance with the affordability requirements of Section 65915, the lower bedroom-based sales prices will be required through the inclusionary agreement that must be signed pursuant to condition 10 of the project's Use Permit. Although condition 10 does not specifically refer to State regulations for setting the inclusionary prices, it does require compliance with Chapter 23C.12 of the Zoning Ordinance, which incorporates the State density bonus provisions in Section 23C.12.050. Based on the references to State law in the project's findings and in the inclusionary ordinance, the approved Use Permit provides a clear basis for requiring the inclusionary prices to conform to State regulations if those regulations happen to result in lower inclusionary prices than the City's procedures would require.

The appellants also claim that the project is ineligible for a density bonus or concession because the pro forma staff used to determine whether an additional concession would be justified included higher sales prices for the inclusionary units than State law requires. However, the pro forma was merely a tool to analyze the necessity of a concession based on current market conditions, and not a binding statement of the final inclusionary sales prices. As noted above, if State law requires lower inclusionary prices, these will be applied in the project's

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<sup>11</sup> According to Govt. Code Sections 65915 (g)(1) and (2), "The density bonus shall not be included when determining the number of housing units that is equal to [5 or 10] percent of the total [i.e., the affordable units]."

<sup>12</sup> Govt. Code Section 65915(b)(4), Health and Safety Code Section 50093. The City's inclusionary procedures were recently modified to use floor area rather than bedrooms, because many new developments had unusually small bedrooms and were thus able to charge more for inclusionary units than was intended by the inclusionary ordinance.

inclusionary agreement, and the project will still be entitled to a 15-percent density bonus.

The use of higher inclusionary sales prices in the pro forma does not make the project ineligible for the concession granted by the ZAB, because the higher prices decrease the project's affordable housing costs in the pro forma, thereby reducing the amount of concession required to provide for these costs under Section 65915(d)(1). If lower inclusionary prices had been used in the pro forma, affordable housing costs would have increased and the applicant would have been eligible for a larger concession. Therefore, the use of higher inclusionary prices than required by State law will have resulted in a concession that does not fully provide for the project's affordable housing costs as required by State law. If this occurs, staff anticipates that the applicant will opt to proceed with the project as approved by the ZAB, rather than incur additional delays in trying to modify the concession.

Issue 11: "Other problems exist including granting use permits and variance for the project under section 65915(e) without making the required findings of demonstrated economic necessity under section 65915(f), the detriment of the project, and general failure to follow specific sections of the State Density Bonus Status as well as the City's own rules."

Response: The only Use Permits and Variances granted under Section 65915 were the Use Permit for a portion of the fourth story, to allow the three density bonus units, and a Variance for the fifth story, to allow the two concession units. Only the Variance, as the requested concession, was subject to the requirement to demonstrate economic necessity, and this was done as stated in Finding 2 above. The ZAB made all of the required findings under the Zoning Ordinance, including detriment, for the portions of the project that were not approved pursuant to density bonus law. As noted above, the density bonus and concession portions of the project are not subject to the City's standard findings.

In the absence of more specific information, staff is unable to respond to the appellants' claim of a "general failure to follow specific sections of the State Density Bonus Status as well as the City's own rules."

In summary, the appeal fails to establish that the ZAB's decision violates either State or local laws. The ZAB determined, based on the facts of the case, that the requested concession was required to provide for the project's affordable housing costs, and revised the project's findings and conditions accordingly. The approved Use Permit provides a clear basis for requiring the inclusionary prices to conform to State regulations if those regulations happen to result in lower inclusionary prices than the City's procedures would require, and the use of higher inclusionary sales prices in the pro forma does not make the project ineligible for the concession granted by the ZAB. The ZAB approved revised conditions to address the Council's concerns about the sidewalk bulb-out and "left turn only" sign. Because the ZAB has fully complied with the

Council's remand of January 25, 2005, further consideration of the ZAB's decision is not warranted and the appeal should be dismissed.

#### ALTERNATIVE ACTIONS CONSIDERED

Pursuant to BMC Section 23B.32.060, the Council may take one of the following actions on appeals of ZAB decisions:

1. Affirm ZAB Decision: If the Council determines that the facts ascertainable from the record prepared by the Zoning Officer do not warrant further hearing, the Council shall affirm the decision of the ZAB and dismiss the appeal, in which case the application is approved.
2. Set for Public Hearing: If the Council determines that the facts ascertainable from the record prepared by the Zoning Officer warrant further hearing, the Council shall set the matter for a public hearing.
3. Remand to ZAB: If the Council determines that the facts ascertainable from the record prepared by the Zoning Officer warrant reconsideration of the application by the ZAB, or if the applicant has submitted revisions to the application, the Council shall remand the matter to the ZAB to reconsider the application, in which case it shall specify whether or not the ZAB shall hold a new public hearing, and shall identify those issues which the ZAB is directed to reconsider. (Council must specify issues that the ZAB is directed to investigate and reconsider. A new decision may be appealed in the normal manner unless otherwise directed by Council. If 60 days pass, and the ZAB has made no subsequent decision, then the original decision and the original appeal of that decision shall be placed back on the Council agenda in the same manner as a new decision and appeal.)

#### Action Deadlines:

1. Date appeals first appeared on Council agenda: July 19, 2005
2. If none of the three actions shown above is taken by October 12, 2005 (30 days from the date the appeal first appears on the agenda, excluding summer recess), the decision of the ZAB is deemed affirmed.
3. A public hearing must commence within 60 days of the date the vote to hold a hearing is taken.

#### CONTACT PERSON

Mark Rhoades, Land Use Planning Manager, (510) 981-7411

Approved:



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Daniel Marks  
Director, Planning and Development

ATTACHMENTS:

1. Draft Resolution
2. Appeal Letter
3. Administrative Record, Part 1 (Appeal Letters, Staff Reports, Memos, and Project Plans)
4. Administrative Record, Part 2 (Correspondence)
5. Administrative Record, Part 3 (Environmental Site Assessments, Phases I and II)

RESOLUTION NO. N.S.

AFFIRMING THE DECISION OF THE ZONING ADJUSTMENTS BOARD TO ADOPT REVISED FINDINGS AND CONDITIONS FOR USE PERMIT #03-10000025 TO MAKE THE PROJECT CONSISTENT WITH STATE DENSITY BONUS LAW, REQUIRE CONSTRUCTION OF A SIDEWALK BULB-OUT PRIOR TO COMPLETION OF THE PROJECT, AND REQUIRE A "LEFT-TURN ONLY" SIGN AT THE PROJECT'S EXIT DRIVEWAY, AND DISMISSING THE APPEAL

WHEREAS on March 19, 2003, a Use Permit application was filed to demolish an existing commercial building and construct a five-story mixed use building; and

WHEREAS, over the next eighteen months, the project underwent extensive public review, including pre-application meetings with interested neighbors, seven meetings with the Design Review Committee, two public "workshops" with the Zoning Adjustments Board (ZAB) during which nineteen community members spoke, and several design meetings with a "core" group of neighbors; and

WHEREAS, the review process resulted in significant changes to the project, including a reduction in the number of dwelling units from 43 to 25, a change from rental units to condominiums, a reduction in the building's height from 64 to 50 feet, a reduction in the building's gross floor area from about 31,500 square feet to about 28,300 square feet, additional north and south setbacks on the fourth and fifth stories, an increase in the number of parking spaces from 16 to 32, and a commitment to construct a sidewalk "bulb-out" at University and McGee; and

WHEREAS on October 7, 2004, 288 public hearing notices were posted in the project vicinity and mailed to residents, owners of property and neighborhood organizations expressing interest within 300 feet of the project; and

WHEREAS on October 28, 2004, the ZAB opened a public hearing to consider the project; and

WHEREAS a total of nine community members spoke during the hearing, two of which described themselves as project supporters, and seven as opponents; and

WHEREAS on October 28, 2004, the ZAB, based on evidence that the project would not have any substantial adverse impact on the environment or on nearby historical resources, and after allowing the required 20-day public comment period, adopted a mitigated negative declaration in accordance with Article 6 of the California Environmental Quality Act Guidelines; and

WHEREAS on October 28, 2004, the ZAB, after closing the public hearing, approved the requested Use Permit; and

WHEREAS, based on staff's understanding of State density bonus requirements at the time, the approved project included a bonus of 25 percent over the maximum residential density allowed under the Zoning Ordinance.

WHEREAS on November 4, 2004, notice of the ZAB's decision was issued; and

WHEREAS after issuance of the ZAB's decision, it came to staff's attention that for condominium projects providing affordable housing for "moderate income" households (i.e., those earning between 80 and 120 percent of area median income), such as the proposed project, the minimum density bonus required by Government Code Section 65915(g)(2) at the time of project approval was 10 percent, not 25 percent, and therefore the project as approved by the ZAB was inconsistent with the applicable State density bonus law at that time; and

WHEREAS on November 18, 2004, Robin Kibby of 1679 Addison Street, and Amber Vierling of Fairfield, California (on behalf of the "Association for Responsible Development"), appealed the ZAB's decision to the City Council; and

WHEREAS on January 1, 2005, Government Code Section 65915 was amended to require a minimum density bonus of 15 percent for the proposed project; and

WHEREAS on January 25, 2005, the Council remanded the project to the ZAB to adopt changes necessary to make the project consistent with the provisions of Government Code Section 65915, and to require construction of the sidewalk bulb-out prior to completion of the project and a "left turn only" sign at the project's exit driveway on McGee Street, and dismisses all other appeal issues; and

WHEREAS after the Council's decision, the applicant decided to request a Variance to allow the two units on the fifth story as an additional concession under Government Code Section 65915(d)(1), and began working with the Housing Department to determine whether this concession would be necessary to provide for the project's affordable housing costs at the "moderate income" level; and

WHEREAS on March 10, 2005, the ZAB opened a public hearing to consider the applicant's request; and

WHEREAS analysis by the Housing Department showed that a concession allowing approximately 1.6 units would be required to provide for the affordable housing costs of the four inclusionary units, but that if the affordability of one of the units were increased to 90 percent of area median income, the project's affordable housing costs would be increased equivalent to the value of the additional 0.4 unit requested by the applicant; and

WHEREAS the applicant agreed to this increased affordability, and on April 28, 2005, the ZAB approved the concession allowing two units subject to the attached finding #2 ("Exhibit A"); and

WHEREAS on April 28, 2005, the ZAB also approved revised Use Permit conditions to address the Council's concerns about the sidewalk bulb-out and "left turn only" sign; and

WHEREAS on May 25, 2005, notice of the ZAB's decision was issued; and

WHEREAS on June 8, 2005, Robin Kibby, Andrea Banduhn, Steven Saylor, Robert and Diane Leech, Michael Popso, Gene Poschman, and Stephen Wollmer appealed the ZAB's decision to the City Council; and

WHEREAS the appeal fails to establish that the ZAB's decision violates density bonus law or fails to substantially comply with the Council's remand of January 25, 2005; and

WHEREAS attached hereto are the findings and conditions of approval applicable to this permit ("Exhibit A") that are included by reference as though fully incorporated herein; and

WHEREAS attached hereto is a reduced copy of the approved plans (dated November 3, 2004 and marked as "Exhibit B") that are included by reference as though fully incorporated herein; and

WHEREAS the Council has considered the record of the proceedings before the Zoning Adjustments Board; the recent Staff reports and correspondence presented to the City Council, and, in the opinion of this Council, the facts stated in, or ascertainable from this information, warrant affirming the decision of the Zoning Adjustments Board to adopt the mitigated negative declaration and approve the subject Use Permit, and dismissing the appeal; and

NOW THEREFORE, BE IT RESOLVED that the Council of the City of Berkeley after reviewing the public record and the proceedings of the Zoning Adjustments Board (ZAB) and exercising its own independent judgment hereby adopts the findings and conditions of approval contained in the ZAB Notice of Decision, dismisses the appeals, and affirms the Zoning Adjustment Board's decision to approve Use Permit #03-10000025 for the project located at 1698 University Avenue based on the findings, and subject to the conditions of approval and approved plans contained in Exhibits "A" and "B", and dismisses the appeals.