

CITY OF BERKELEY
CITY CLERK DEPT

Wednesday June 8, 2005

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To: Berkeley City Clerk

From: Robin Kibby, Andrea Banduhn, Steven Saylor, Robert and Diane Leech,
Michael Popso, Gene Poschman, and Stephen Wollmer

Re: Appeal to the City Council of Zoning Adjustments Board decision on Use Permit
#03-100025 – 1698 University Avenue.

This is to formally appeal the above Zoning Adjustments Board decision to the City Council under section 23B.32.050 of the Zoning Ordinance. The grounds are as follows.

1. The January 25, 2005 Council remand to the Zoning Adjustments Board with regard to which version of the State Density Bonus law states that it is to be consistent with the provisions of Government Code 65915 in effect when the project was previously considered by the Zoning Adjustments Board i.e. the law in effect on October 28, 2004. The staff report to Zoning Adjustments Board of March 10, 2005 states that the remand will be considered under law in effect prior to the changes made by SB 1818 effective January 2005. There has been nothing in writing from the City Attorney either to the Council or to the Zoning Adjustments Board on the legal basis for the Zoning Adjustments Board not following the Council resolution. This project was approved by Zoning Adjustments Board under the new version of the law and thus violates the Council remand.
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. The staff report reads:

The State Density Bonus Law states that the applicant may request and the City must grant concessions and incentives unless it finds that the requested [incentives or] concessions are **not required to provide for affordable housing costs or for rents for the "targeted units."** Targeted units are the affordable units that qualify the project for entitlements under Section 65915. (Section 65915(d)(1)). It should be noted that section 65915 is quite clear that if a local agency denies a request for a concession or incentive, the burden of demonstrating the fact that it is not financially required is on the agency, not the applicant. Moreover, a local agency is liable for attorney's fees and costs if such a finding is invalidated by a court. (Section 65915 (d)(3).) (bold added)

2004 wording of the law:

- (b) A city, county, or city and county shall either grant a density bonus and at least one of the concessions or incentives identified in subdivision (k), or provide other

incentives or concessions of equivalent financial value based upon the land cost per dwelling unit, when the applicant for the housing development agrees or proposes to construct at least any one of the following....

Revised law provisions:

65915(d)(2) The applicant shall receive the following number of incentives or concessions:

(A) One incentive or concession for projects that include at least 10 percent of the total units for lower income households, at least 5 percent for very low income households, or at least 10 percent for persons and families of moderate income in a condominium or planned development.

(B) Two incentives or concessions for projects that include at least 20 percent of the total units for lower income households, at least 10 percent for very low income households, or at least 20 percent for persons and families of moderate income in a condominium or planned development.

(C) Three incentives or concessions for projects that include at least 30 percent of the total units for lower income households, at least 15 percent for very low income households, or at least 30 percent for persons and families of moderate income in a condominium or planned development.

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 sections 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.

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). The finding reads:

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.

5. The General Non-Detriment Findings are not possible because of the existence of the 5th story which requires a variance which the staff report admits cannot be made.

6. The awarding of additional density bonus units as a incentive or concession is not a “regulatory incentive” under the State Density Bonus Law section 65915(l). The section reads:

For the purposes of this chapter, concession or incentive means any of the following:

(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.

(2) Approval of mixed use zoning in conjunction with the housing project if commercial, office, industrial, or other land uses will reduce the cost of the housing development and if the commercial, office, industrial, or other land uses are compatible with the housing project and the existing or planned development in the area where the proposed housing project will be located.

(3) Other **regulatory incentives** or concessions proposed by the developer or the city, county, or city and county that result in identifiable, financially sufficient, and actual cost reductions. (emphasis added)

7. The awarding of 2 additional density bonus units to 1698 Avenue 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.

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.

The city, county, or city and county shall establish procedures for carrying out this section, that shall include legislative body approval of the means of compliance with this section. The city, county, or city and county shall also 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.


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) in identifiable, financially sufficient, and actual cost reductions." Neither developer nor Staff has identified any cost reductions as required by City Ordinance and/or State law.

10. The pro forma document in Attachment 2 of the Staff Report dated April 28th, 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).

11. Other problems exist including granting use permits and variances 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 Statute as well as the City's own rules.

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(ROBIN KISSEY)