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To: the Berkeley City Council

From: David Ramin, Shari Serant and DuMayeron

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Purpose: Appeal Against the Decision of the Zoning Adjustments Board
of 06-23-05 for USE PERMIT 04-1000090

Project location: 2901 Otis Street

We appeal to the Berkeley City Council in objection to the decision by the Zoning Adjustments Board to approve Use Permit **04-1000090** concerning the demolition/alternations of the property at 2901 Otis Street.

The grounds for this appeal are as follows:

1. CEQA and Structure of Merit Status

On July 11, 2005, 2901 Otis Street was declared a Structure of Merit by the Landmarks Preservation Commission. We request that an **Environmental Impact Report** be made before the demolition/alternations on 2901 Otis are begun. This is in accordance with the California Environmental Quality of the California Code of Regulations Act, Chapter 2.6, § 21084.1. Historical resource; substantial adverse change¹.

The Structure of Merit status of the property contradicts the ZAB Notice of Decision (mailed 07-05-2005), Attachment 1: Findings and Conditions, Section 1 which states that the project is categorically exempt from CEQA because the existing dwelling is not a designated historical resource. This has changed.

The Notice of Decision in that Section 1 also states the proposed project is exempt from CEQA pursuant to Section 15303 of the CEQA Guidelines² which covers "New Construction or Conversion of Small Structures." The language of the Guidelines reads that the exemption of buildings is "where only minor modifications are made in the exterior of the structure." As the project is a demolition/alteration where more than 50% of the existing building will be destroyed, we certainly don't think the magnitude of this project is merely a "minor modification." (The Decision also mistakenly references 15303(b) which is actually about altering existing duplex or multiple family dwellings, which 2901 Otis is not, as it is presently single family dwelling. We are sure they meant to reference 15303(a) about single family dwellings.)

2. Parking in a Backyard

There is a contradiction in the ZAB application of the Berkeley Building Codes in the approval of this project caused by the size of the proposed building (three units) and the small size of the lot which forces the developers to place parking in the backyard. The development's required three parking spaces is mandated by Section 23D.40.080 R-4 "Multi-Family Residential District Provisions, Parking -- Number of Spaces." But

placing a parking lot of the proposed size in the backyard³ is not allowable without certain stipulations addressed in Berkeley Zoning Code Section 23D.12.80, "Site Location and Screening of Parking Spaces and Driveways"⁴.

Part A of Section 23D.12.80 says the proposed addition of parking must be approved by a Traffic Engineer, which hasn't happened. One of the contentions against this project is that it will unfavorably affect on street parking in an already impacted neighborhood. Perhaps a Traffic Study would responsibly shed light on this. The present dwelling of two bedrooms being expanded to three units with a new total of nine bedrooms is a major change that hasn't been addressed.

And yet at the same time Part A of Section 23D.12.80 also states that locating off-street parking in a required yard must meet all the requirements of this section which also includes Part D: "The total area of pavement devoted to off-street parking spaces, driveways and other vehicle-related paving shall not exceed 50% of any required yard area which abuts a street." The proposed lot is over too big for this part of the code. The proposed parking lot is too big and the proposed building has too many units for the small size of the lot.

We imagine the purpose of this section of the code is to prevent residential areas from having inordinate quantities of the limited outdoor recreation space taken up with parking. The code is being violated here, detracting from the quality of life, the safety and comfort the Zoning Code addresses.

3. Procedural Violations

This project has been plagued by irregular procedures. The ZAB approval of the project occurred on 06-23-2005 and final LPC ruling took place weeks later on 07-11-2005. This violates the Berkeley Zoning Code section 23B.32.040 "Findings for Issuance and Denial and Conditions" which the ZAB claims to be in compliance with in their Notice of Decision, Attachment 1, "General Non-Detriment Finding" under their number 2. The Zoning Code⁵ states that ZAB "Prior to approving any Use Permit the Board must also make any other findings required by either the general or District regulations applicable to that particular Use Permit." The ZAB did not follow this guideline in pushing this project through.

Gisele M. Sorenson, Senior Planner, in her memo to the LPC dated July 11, 2005, states that the project was already (as of October 25, 2004) in violation of the Permit Streamlining Act (PSA) deadline. We were told at the LPC meeting that ZAB felt compelled to act because of this. Yet at the time ZAB went and ruled ahead of the LPC they were already 8 months behind.

4. Inaccurate ZAB Notice of Decision

This may be a minor mistake, but the plans approved in the ZAB Notice of Decision dated July 1, 2005 are not the plans approved at the ZAB meeting of June 23, 2005. The

alternations the developers made towards retaining portions of the porch on the first and proposed second story are absent from the final approved version. Instead the earlier March 2, 2005 version is the one pictured and approved. We have contacted the ZAB staff (Aaron Sage - planner) about this, thinking it may be a mistake on their part, but have not heard back from them two weeks later.

5. In Conclusion: Neighborhood Sentiments

Many of us in the neighborhood of this project have been largely left out of the process until recently. Purchasing the building at tax auction in the summer of 2003, the developers evicted the previous owners who had been resident there for over 50 years. It was not until the Spring of 2004 that one of the developers, Xin Jin, came around and went door-to-door with completed building plans seeking neighborhood approval. Some approved but some stated undecided. There were no other communications from the developers to the residents until the ZAB hearing was posted in the neighborhood a year later in the early Spring of 2005. Neighborhood opposition was registered and protection for the existing building and neighborhood sought through initiating Structure of Merit Status by petitioning the LPC. Several meetings with some of the developers occurred but no agreement nor compromise was reached. It has been a very contentious process that still continues.

Many of us believe that if the developers of projects such as this must sincerely seek community input during the design process, they will have smoother sailing. Instead they have made their decisions and designed their project without much community input and now are caught up in having to defend their plans. The developers have had their money tied up in this project for a while. But on the other hand, we in the community opposed to this project have also had to spend many hundreds of hours in meetings, researching, writing, canvassing, collecting signatures and so on. There needs to be a smoother process in Berkeley with more and earlier disclosure. A fairer process that is more inclusive of all the interests and stakeholders in situations like this.

Part of the lack of disclosure on the part of the developers that the city maybe should be aware of is that the developers have been involved with litigation with the previous owners until just recently. The developers have not had "Quiet Title" to 2901 Otis Street until May, 2005. Before that time they were engaged in California Superior Court as Case Number RGO31121143: Eric Geleynse, Xin Jin and Danny Tran -vs- Ernest Hatch and Virginia Hatch, et al. This lack of a Quiet Title may have limited the developer's legal options to build and their financial ability to get money with a "cloud" on the title. Is this a factor in the mitigation of the length of this project's application process?

End Notes

¹ **California Environmental Quality of the California Code of Regulations Act, Chapter 2.6: General, § 21084.1. Historical resource; substantial adverse change**

A project that may cause a substantial adverse change in the significance of an historical resource is a project that may have a significant effect on the environment. For purposes of this section, an historical resource is a resource listed in, or determined to be eligible for listing in, the California Register of Historical Resources. Historical resources included in a local register of historical resources, as defined in subdivision (k) of Section 5020.1, or deemed significant pursuant to criteria set forth in subdivision (g) of Section 5024.1, are presumed to be historically or culturally significant for purposes of this section, unless the preponderance of the evidence demonstrates that the resource is not historically or culturally significant. The fact that a resource is not listed in, or determined to be eligible for listing in, the California Register of Historical Resources, not included in a local register of historical resources, or not deemed significant pursuant to criteria set forth in subdivision (g) of Section 5024.1 shall not preclude a lead agency from determining whether the resource may be an historical resource for purposes of this section.

² **Title 14. California Code of Regulations, Chapter 3. Guidelines for Implementation of the California Environmental Quality Act, Article 19. Categorical Exemptions, 15303. New Construction or Conversion of Small Structures**

Class 3 consists of construction and location of limited numbers of new, small facilities or structures; installation of small new equipment and facilities in small structures; and the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure. The numbers of structures described in this section are the maximum allowable on any legal parcel. Examples of this exemption include, but are not limited to:

(a) One single-family residence, or a second dwelling unit in a residential zone. In urbanized areas, up to three single-family residences may be constructed or converted under this exemption.

(b) A duplex or similar multi-family residential structure, totaling no more than four dwelling units. In urbanized areas, this exemption applies to apartments, duplexes and similar structures designed for not more than six dwelling units.

³ **Berkeley Zoning Code Section 23F.04.010 Definitions**

Yard: A required open area on a lot that is between a property line and a setback line. A yard is unoccupied and unobstructed from the ground upward by any portion of a building or structure, or by the presence of a parking space, except as otherwise permitted in Section 23D.04.030. Specified Yard areas are as provided in individual District Sections of this chapter and defined as follows:

Front Yard: A yard extending across the full width of the front of a lot from the front lot line to the front setback line.

Rear Yard: A yard extending across the full width of the lot between the rear lot line and the rear setback line.

Side Yard: A yard between the side lot line and the side setback line, and extending from the front lot line to the rear lot line.

⁴ **Berkeley Zoning Code Section 23D.12.080 Site Location and Screening of Parking Spaces and Driveways**

- A. No portion of an off-street parking space may be located in the required yard abutting a street, unless such location is authorized by an AUP, approved by the Traffic Engineer, and meets all of the requirements in this section.

- D. The total area of pavement devoted to off-street parking spaces, driveways and other vehicle-related paving shall not exceed 50% of any required yard area which abuts a street.

⁵ **Berkeley Zoning Code Section 23B.32.040 Findings for Issuance and Denial and Conditions**

- A. The Board may approve an application for a Use Permit, either as submitted or as modified, only upon finding that the establishment, maintenance or operation of the use, or the construction of a building, structure or addition thereto, under the circumstances of the particular case existing at the time at which the application is granted, will not be detrimental to the health, safety, peace, morals, comfort or general welfare of persons residing or working in the area or neighborhood of such proposed use or be detrimental or injurious to property and improvements

of the adjacent properties, the surrounding area or neighborhood or to the general welfare of the City.

B. Prior to approving any Use Permit the Board must also make any other findings required by either the general or District regulations applicable to that particular Use Permit.

C. The Board shall deny an application for a Use Permit if it determines that it is unable to make any of the required findings, in which case it shall state the reasons for that determination.

D. The Board may attach such conditions to any Use Permit as it deems reasonable or necessary to achieve the purposes of this Ordinance, and which otherwise promote the municipal health, safety and welfare. (Ord. 6478-NS § 4 (part), 1999)