



Office of the City Manager

SUPPLEMENTAL AGENDA MATERIAL

Meeting Date: July 18, 2006

Item Number: 24

Item Description: 1201 San Pablo Avenue / 1100 Harrison Street

Please see the attached report that provides additional information for the Council's consideration.

CONSENT CALENDAR

July 18, 2006

To: Honorable Mayor and
Members of the City Council

From: Phil Kamlarz, City Manager

Submitted by: Dan Marks, AICP, Director of Planning and Development

Subject: ZAB Appeal – 1201 San Pablo Avenue – Use Permit No. 05-10000029–
SUPPLEMENTAL MATERIALS ITEM 24

RECOMMENDATION

Adopt a Resolution affirming the decision of the Zoning Adjustments Board (ZAB) to approve Use Permit No. 05-10000029 to construct a 30-unit, mixed-use project, and dismissing the appeal.

BACKGROUND

The proposed project (Use Permit #05-10000029) includes construction of a 29,665 square foot mixed-use building containing 30 residential units (6 Inclusionary), up to 5 ground floor commercial units and 38 parking spaces. The applicant requested two concessions under the State Density Bonus Law (Chapter 65915) but no density bonus units. The project is in the West Berkeley Commercial Zoning District.

In response to questions from a Council member, staff highlights the following information from the record. Documents are attached for convenience.

1. Request for concessions under Chapter 65915 (State Density Bonus Law): In the ‘Density Bonus and Concessions Statement’ (Page 533 of Admin Record), the applicant explicitly invokes section 65915 by requesting a 15% density bonus and two concessions. He subsequently withdrew his request for the bonus, but continued to request the two concessions. As stated in the July 18, 2006 staff report to the Council (page 4) per California Government Code Section 65915, this project is entitled to two incentives or concessions plus a density bonus of 15%, however, the applicant declined the density bonus of additional units, but requested concessions (1) for a fifth floor to increase the floor area of five west-facing units on the fourth floor and (2) to alter the distribution and size of the Inclusionary units.

2. Applicant’s Statement of Financial “Need”: The applicant’s ‘Affordability Statement’ (P.230 of Admin Record) provides an early financial basis for the project. The July 18, 2006, Council report on page 5, provides that ‘the ZAB allowed the two concessions and accepted the applicant’s argument that the proposed configuration of the 30-unit project was better than the 44-unit project that used the entire density bonus.’ Because the ZAB accepted this analysis, Staff did not require more.

3. Legality of granting concessions without granting Density Bonus units: The ZAB's action to approve the project as proposed is supported by statements made in a recent letter from the July 10, 2006 Department of Housing and Community Development regarding Application of State Density Bonus Law (attached). This letter states that 'an applicant is not required to request both a density bonus and a concession in order to be eligible for the other'.
4. Requirement to equally disperse affordable units throughout a project: The Zoning Ordinance (Section 23C.12.040.D) requires that the inclusionary units be reasonably dispersed throughout the project. The City has approved other projects, notably 2041 Center Street, that did not have affordable units on every floor. In this case, like 2041 Center Street, the applicant's configuration of units, i.e. no market-rate units on the fourth/fifth floor facing west, was allowed by the ZAB as one of the concessions allowed by State Density Bonus Law.
5. Additional Documents: Staff recently discovered that an attachment referenced in the Council report was missing. To resolve any potential confusion, staff has also provide the July 15, 2005 City Attorney opinion regarding yards that should inserted into the record after page 548.

Attachments:

- 1: Density Bonus and Concessions Statement
- 2: Affordability Statement
- 3: July 10, 2006 Letter from Department of Housing and Community Development regarding Application of State Density Bonus Law
- 4: July 15, 2005 City Attorney Opinion Regarding Yards

DENSITY BONUS AND CONCESSIONS STATEMENT

This project is entitled to a 15% density bonus and to two concessions. These numbers have been determined, based on several discussions with Tim Strohane and Debbie Sanderson.

The 15% density bonus is being used, in the manner set forth in the AFFORDABILITY STATEMENT that accompanies this submission.

One of the two concessions is being used in asking for the fifth floor of the building. This floor, though effectively a mezzanine, does not technically qualify as such under the standards of the Berkeley Zoning Code, despite its modest size and its fitting within the envelope of this four-plus story building.

This is a modest concession request. This fifth floor occurs only in the center of the building, away from both the west property line (San Pablo Avenue) and that to the east (abutting Kains Street residences). Indeed, neither from San Pablo Avenue nor from the abutting Kains Street residences is it possible even to see this fifth floor.

The other concession is being held in abeyance, to be used if needed, depending on certain determinations that will be made by the Planning Department in the course of processing this application.

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LAND USE PLANNING

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AFFORDABILITY STATEMENT

The project complies with the Berkeley Inclusionary Ordinance Requirement, in the following manner, worked out in consultation with Tim Stroshane and Ken Baar.

The units are for sale condominium units and because of cost of construction (see calculations of per square foot cost of residential construction below) will be sold to moderate income families (120% of AMI). The number of inclusionary units was determined as follows: Given a 15% density bonus for which the project qualifies by designating 20% of the units as inclusionary for moderate income families, we divided the total number of units (30) by 1.15, to come up with 26 units as the basic number in the project for which the inclusionary requirement applies and 4 extra units as the 15 % density bonus. Hence, 5 units have been designated as inclusionary:

- (1) Unit # 6: The northwest corner unit on the second floor (890 sf, two bedrooms, one bath, and one parking space)
- (2) Unit # 12: The southeast interior unit adjacent to the southeast corner unit on the second floor (954 sf, two bedrooms, one bath, and one parking space)
- (3) Unit # 17: The northwest interior unit adjacent to the northwest corner unit on the third floor (932 sf, two bedrooms one bath, and one parking space)
- (4) Unit # 19: The southwest interior unit adjacent to the southwest corner unit on the third floor (932 sf, two bedrooms, one bath, and one parking space)
- (5) Unit # 34: The northeast interior unit adjacent to the northeast corner unit on the fourth floor (789 sf, one bedroom, one and one-half baths, and one parking space)

In designating these above units, care has been given to distributing them throughout the project and to make them typical of the units available. Most units are two bedroom (25 out of 30 total) and four of the five above are two bedroom. The average size of all units in the project is 921 square feet and the average of the above five units is 899 square feet. All residential units are provided with one parking space, as are all the inclusionary units.

CALCULATIONS OF COST OF RESIDENTIAL CONSTRUCTION

Total Commercial Square Footage in Project: 3935 square feet

Total Residential Square Footage in Project: 27633 square feet

Let C = Cost per square foot of commercial space
 R = Cost per square foot of residential space

Assume that the residential space is twice the cost of the commercial space (tenant improvements are not included in the costs used here).

Hence, $C = R/2$

Assume that overall project costs (hard and soft) are \$8,500,000.00 (See brief synopsis of costs below).

Therefore,

$$\$8,500,000.00 = 27,633 R + 3935 C$$

$$\$8,500,000.00 = 27,633 R + 3935(R/2)$$

$$\$8,500,000.00 = 27,633 R + 1967.5 R$$

$$\$8,500,000.00 = 29,600 R$$

$$R = \$8,500,000.00/29,600 = \$287.00 \text{ per square foot}$$

Note that a 15% developer's profit has not been yet added to the square foot cost determined above.

Adding this 15%, we get

$$1.15 \times \$287.00 = \$330.00 \text{ per square foot cost of residential units}$$

Now, take for example the 890 square foot unit designated as inclusionary:

$$\$330.00/\text{sf} \times 890 \text{ sf} = \$293,700.00$$

Hence, the total cost of this unit, \$293,700.00, is greater than the maximum allowed cost, \$266,400.00, permitted in selling to moderate income families.

COST SYNOPSIS FOR PROJECT

Hard cost	\$6,000,000.00
Land cost	1,300,000.00
Loan cost	700,000.00
Architects, engineers, permits, etc.	500,000.00
TOTAL COST	\$8,500,000.00

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

1800 Third Street, Suite 430
P. O. Box 952053
Sacramento, CA 94252-2053
(916) 323-3177
FAX (916) 327-2643



July 10, 2006

Mr. James E. Hart
1337 Josephine Street
Berkeley, CA 94703-1113

Dear Mr. Hart:

RE: Application of State Density Bonus Law

This letter responds to your May 24, 2006 correspondence regarding a project and request pursuant to Government Code Section 65915 et. seq., State density bonus law (SDBL). The Department of Housing and Community Development (Department) appreciates the opportunity to respond to this inquiry.

The Department understands the application proposes to reserve 20 percent of the units for occupancy by moderate-income households, and requests the two concessions or incentives to contribute to the feasibility of the housing development as authorized by SDBL. The units for moderate-income households must meet the criteria specified in subsections (b) and (c) of Section 65915 in order to be eligible for the use of SDBL.

Local governments have a responsibility to significantly contribute to the feasibility of developing housing for lower- and moderate-income households, including granting incentives or concessions even where an applicant has not elected to accept a density bonus under SDBL. This responsibility is expressed in the intent language of SDBL, Government Code Section 65917, as well as other State housing and planning statutes including housing element law, in particular, Government Code Sections 65583(c) 2 and 3 and Government Code Section 65913 et. al. Further, subsection (g) of Section 65915 expressly allows an applicant to elect a lesser density bonus. Although subsection (b) states a city or county shall grant a density bonus and concessions or incentives for qualifying projects, an applicant is not required to request both a density bonus and a concession in order to be eligible for the other. Interpreting the statute to require a developer to request both a density bonus and a concession or incentive is clearly inconsistent with subsections (b) and (g), and is further contradictory to the intent of the law. This is particularly true whereby the requirement to incorporate the additional bonus units would jeopardize project feasibility.

Mr. James E. Hart
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Further, an applicant is not explicitly required to submit financial data such as a financial proforma under SDBL and particularly where the application is requesting the entitled concessions and incentives under subsection (d) of Government Code Section 65915. However, an applicant might be required to submit general financial data to demonstrate a waiver or reduction is necessary to make housing units economically feasible, but when requesting a waiver or reduction under subsection (e) due to local development standards that preclude a development eligible under SBDL.

The Department hopes this information is helpful to address housing needs in Berkeley. If you have any questions or need additional assistance, please contact Paul McDougall at (916) 445-5854.

Sincerely,



Cathy E. Creswell
Deputy Director

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JUL 18 2005

LAND USE PLANNING



Office of the City Attorney

July 15, 2005

To: Dan Marks, Director of Planning & Development
Mark Rhoades, Manager, Land Use Planning
Debra Sanderson, Principal Planner

From: Manuela Albuquerque, City Attorney
By: Zach Cowan, Assistant City Attorney

Re: COMMERCIAL SETBACKS IN C-ZONED PARCEL
ABUTTING AND CONFRONTING RESIDENTIAL DISTRICTS

This responds to your opinion request of June 1, 2005, which is attached.

ISSUE

Does BMC section 23E.04.050 define all of the setbacks for a C-zoned lot abutting or confronting a residential zoning district, or just the setback applicable to the yard or yards abutting or confronting a residential zoning district?

SHORT ANSWER

BMC section 23E.04.050 defines the setbacks only for the yard or yards abutting or confronting a residential zoning district.

DISCUSSION

BMC section 23E.04.050 (Special Yard Requirements for C- Lots Abutting Residential Zones) states:

- A. Any structure that is located in a commercial District that abuts or confronts a lot or lots in a residential District shall conform to the following yard setback requirements unless otherwise specified by the provisions of an individual District:

- B. The minimum width of any side yard shall be five (5) feet;
- C. The minimum depth of any rear yard shall be ten (10) feet, or ten percent (10%) of the depth of the lot, whichever is greater;
- D. The minimum depth of any front yard, or the minimum width of any side yard on the street side, shall be the same required yard as specified for the adjacent residential District.
- E. The Board may approve a Use Permit authorizing yards smaller than those required above if it finds that such smaller yard would provide greater privacy or improved amenity to a lot in the residential District.

We agree that this language suffers from a degree of ambiguity and is in need of interpretation. In addition to the ambiguities pointed out in your opinion request, it is ambiguous in at least the following respects:

- “Any structure that is located in a commercial District that abuts or confronts a lot or lots in a residential District...” The literal language of this phrase applies to “a commercial district that abuts or confronts a lot or lots in a residential District”—that is, to the entirety of the commercial district, rather than to an individual lot or building in the commercial district. This is not a viable construction of the ordinance, because it would nullify setback provisions in commercial districts across the board, since all commercial districts abut or confront residential districts.
- The references to “any” yard in subdivisions B, C and D suggest that these provisions do not necessarily apply to “every” yard, as the language of subdivision A could be interpreted.
- The Zoning Ordinance normally and consistently uses the terms “abutting” and “confronting” to refer to lots and yards, not buildings. Thus the reference to a “structure” that abuts or confronts in subdivision A is anomalous.

However, in our opinion, the dispositive factor is that the language of the predecessor provisions in the former Zoning Ordinance unambiguously applied only to the yard that abuts or confronts a residential district. Section 9.6 (C-1 district regulations) states:

No yards shall be required except the following:

(a) Where the side of a lot abuts on any "R" District, the side yard shall be not less than five (5) feet and shall be increased by two (2) feet for each story by which the height of the building exceeds three (3) stories.

(b) Where the rear of a lot abuts on any "R" District, the rear yard shall be not less than five (5) feet and shall be increased by two (2) feet for each story by which the height of the building exceeds three (3) stories.

(c) Where the street frontage of a lot is adjacent to any "R" District, the front yard depth or side yard width on the street side adjacent to the "R" District shall not be less than required for such "R" District.

(d) Where a lot has frontage on two (2) streets and both such frontages are adjacent to "R" Districts, the front yard depth and side yard width on the street side adjacent to the "R" District shall not be less than that required for such "R" District.

(e) As an alternative to (c) and (d), the rear of side yard abutting such "R" District shall not be less than ten (10) feet and shall be increased by two (2) feet for each story by which the height of the building exceeds three (3) stories.

(f) The yards specified above may be reduced where it is determined that a lesser required yard would provide greater privacy or improved amenity to property in the "R" District subject to the issuance of a Use Permit in each case.

Provisions that refer to this issue in other subchapters of chapter 9, for specific C Districts also refer to the specific yard abutting a "R" District. (See, §§ 9A.5; 9B.5; 9C.5; 9D.6(c); 9E.5(g); 9F.5(e); 9G.6(f); 9H.5(d).) The C-2 regulations (§10.3) simply refer to section 9.6.

When the zoning ordinance was being revised in the mid- and late 1990's, the acknowledged intention was not to make substantive changes except as expressly noted, but to reorganize, clarify and make non-substantive technical changes. The Planning Commission, Council and City Attorney, as well as the public, relied on this understanding in reviewing the revised Zoning Ordinance.

Thus, when the Council was considering the revised (current) Zoning Ordinance, it explicitly did not intend to make substantive amendments, except in those few specific instances that were expressly noted. One of the specific substantive

Setbacks in C-Zoned Lots Abutting or Confronting Residential Districts

July 15, 2005

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changes that it considered related to BMC §23E.04.050. The Planning Commission had recommended that the Council delete subdivision section 23E.04.050.E (former section 9.6(f)), so that the setback requirements could not be reduced with a Use Permit. Staff recommended against this proposal (see attachment A), and ultimately the Council agreed with staff. However, even though a change to this specific provision was under discussion, there was no discussion of extending the increased setback requirement to yards that do not abut residential districts. Thus it is quite clear that in adopting the current language the Council did not intend to change the effect of this provision.

In conclusion, because section 23E.04.050 is ambiguous, it requires interpretation. Until recently the City's longstanding interpretation of this section as currently written was consistent with the language of its predecessor provision in the former Zoning Ordinance. Since the City Council did not intend to change the substance of the predecessor provision when it adopted section 23E.04.050 the City's longstanding interpretation is appropriate.

Nevertheless, we strongly advise that you immediately take clarifying amendments to the Planning Commission and City Council, to eliminate the ambiguity of this section and potential future confusion.

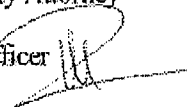
cc: City Clerk

index: V.B.3.a.



Planning and Development Department
Land Use Division

To: Manuela Albuquerque, City Attorney

From: Mark Rhoades, Zoning Officer 

Copy: Dan Marks, Director of Planning and Development
Debbie Sanderson, Principal Planner
Zack Cowan, Assistant City Attorney
Steve Solomon, Senior Planner

Date: June 1, 2005

Re: A request for a legal opinion concerning BMC Section 23E.04.050.A, *Special Yard Requirements for C- Lots Abutting Residential Zones*

The Zoning Officer is seeking a legal opinion on the interpretation of BMC Section 23E.04.050.A (Zoning Ordinance), Special Yard Requirements for C- Lots Abutting Residential Zones. The provision is intended to protect residential lots where a commercial structure is proposed to be located in an adjacent commercial zoning district. The division has a long history and practice of interpreting this provision for projects. Your office has recently questioned the Land Use Planning Division's long-standing interpretation of this section. We would like your formal opinion of two related questions:

1. What is the correct interpretation of this section? And,
 2. If this interpretation differs from that we have been using, when shall the corrected interpretation be applied to zoning permit cases that are in process after we receive your opinion?
1. *What is the correct interpretation of Section 23E.04.050.A, Special Yard Requirements for C- Lots Abutting Residential Zones*

Section 23E.04.050, in part, reads:

- A. Any structure that is located in a commercial District that abuts or confronts a lot or lots in a residential District shall conform to the following yard setback requirements unless otherwise specified by the provisions of an individual District:
- B. The minimum width of any side yard shall be five (5) feet;
- C. The minimum depth of any rear yard shall be ten (10) feet, or ten percent (10%) of the depth of the lot, whichever is greater;

D. The minimum depth of any front yard, or the minimum width of any side yard on the street side, shall be the same required yard as specified for the adjacent residential District.

The Zoning Ordinance in subsection A provides setback protection for "residential lots" from "commercial structures." Subsection A specifies that the law applies to a commercial structure (not the commercial lot). Subsection A then describes the relationship in question, "abuts or confronts a lot or lots in a residential district." The term "structure" is specifically used in reference to the commercial district, and the term "lot or lots" is used in reference to the residential district. Therefore the section applies to the relationship of a commercial structure (and not the entire commercial lot) to an abutting or confronting residential lot.

Subsections B, C, and D then go on to describe the structure's required setbacks from the abutting or confronting residential lot, in rear, front, and side yard terms. Each of subsections B, C, and D use the term "any" for the applicability of the yard in question. When the term "any" is used in conjunction with the language in subsection A, it can only be read as applying to "any" yard of the commercial structure that abuts or confronts a residential lot.

The application of this standard could still apply to more than one yard. In some cases only the rear yard might abut the residential lot. In some cases only the front yard would confront a residential lot. In other cases, the extensions of the non-residential structure's front and rear yards, as well as the side yard might abut or confront a residential lot. The only case where all four setbacks (in the cases of relatively standard rectangular lots) might apply to a non-residential structure is where that structure is completely surrounded by residential lots. This would be an "island" of commercial zone.

The development standards for Berkeley's commercial zoning districts generally do not have setbacks requirements for structures. The most important policy reason for this is urban design. It is not desirable, generally, to have setback in commercial districts. The City's stated desire for an urban form that contributes to commercial street frontages and the pedestrian environment by having commercial buildings placed right at the edge of the sidewalk. In fact, the General Plan is very specific to this point. Policy UD-28 (Commercial Frontage) states,

Commercial buildings on streets with public transit generally should have no appreciable setback from that street's sidewalk, except in the case of occasional plazas or sitting areas that enhance the area's pedestrian environment.

The Zoning Ordinance is consistent with this policy. In the standards for all commercial district (23e.36 -- 23E.68), section 070 states:

No yards for main buildings, accessory buildings or accessory structures shall be required, except that:

1. When a lot is adjacent to an abutting or confronting lot in a residential zone, the requirements of Section 23E.04.050 and 23E.04.060 shall apply to require additional yard and building feature standards.

The only other exceptions in the Zoning Ordinance to this rule are in the newly adopted UASP zoning standards that require an average two-foot setback at the street frontage to allow for wider pedestrian access. Therefore, Section 23E.04.050.A must be read narrowly, and for the specific circumstance where a "structure" "abuts or confronts" a residential property line.

2. *If the legal interpretation of the application of this section differs from the one used by the division historically, when is the corrected interpretation applied to open zoning permit cases?*

Is this determination to be applied a) only to projects that are determined complete after the date of your interpretation, as would an ordinance revision; or b) to any permit that is in process, not yet acted upon by the ZAB?