

CITY OF BERKELEY
CITY CLERK DEPT
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Friday, April 28, 2006

Berkeley City Clerk
2180 Milvia Street,
Berkeley, MA 94704

Re: Appeal of Zoning Adjustments Board decision on Use Permit #05-1000029 for 1201 San Pablo Avenue/1100 Harrison Street

City Clerk:

We, the undersigned, are writing to formally appeal the Zoning Adjustment Board's decision on Use Permit #05-1000029 for 1201 San Pablo Avenue/1100 Harrison Street. We are appealing the decision based on the following items:

- I. The staff acted in violation of the State Density Bonus when it awarded concessions for a fifth story for the project and for unequal inclusionary units.
- II. The State Density Bonus law requires financial data be filed relating to the concessions, incentives and development standards.
- III. The ZAB approval of the unequal distribution of the inclusionary units is in violation of the City of Berkeley's inclusionary ordinance.
- IV. The project does not conform to the setbacks required by the Berkeley Zoning Ordinance.
- V. The traffic report prepared by the developer is out of date, and does not adequately address the traffic impacts generated by the proposed project.

I. State Density Bonus Concessions and Incentives:

The ZAB acted in violation of the State Density Bonus statute when it awarded concessions for the fifth story for the project and unequal inclusionary units because the developer did not seek a density bonus, was not an applicant for a density bonus, and declined a density bonus for the 1201 San Pablo/1100 Harrison project.

A. The Zoning Adjustments Board Staff Report for Board Action April 6, 2006
states:

“As mentioned in the project description, the applicant has **declined the density bonus** and instead has only requested two concessions: 1) to the maximum number of stories allowed and 2) to alter the distribution of the inclusionary units. In either case, a variance or granting of a concession would be required. The applicant has pursued the concessions, as the project does not present circumstances to grant a variance.” Page 11 of 14 (bold added)

B. California Density Bonus Statute, Section 1—65915(a)

The first sentence of the California Density Bonus Statute, Section 1—65915(a) says:

“(a) When **an applicant seeks a density bonus** for a housing development within, or for the donation of land for housing within, the jurisdiction of a city, county, or city and county, that local government shall provide the applicant incentives or concessions for the production of housing units and child care facilities as prescribed in this section. All cities, counties or cities and counties shall adopt an ordinance that specifies how compliance with this section will be implemented.” (bold added)

It is impossible to both seek a density bonus, and, as described in the Staff report, decline a density bonus. It is clear that when the applicant does not “seek a density bonus” the local government does not have the authority to grant concessions such as a fifth story or unequal inclusionary units; items which require variances. The staff position, that a developer can trade the density bonus for concessions, has no basis in the State Density Bonus Statute, and is in direct violation of that statute.

C. California Density Bonus Statute, Subsection 65915(d)(1)

Further, subsection 65915(d)(1), the main subsection of the California Density Bonus Statute covering incentives and concessions, clearly restricts the granting of concessions and incentives to “An applicant for a density bonus...” When a developer has not made an application for a density bonus there can be no request for concessions as is the case in 1201 San Pablo/1100 Harrison. The subsection reads as follows:

“(d) (1) An applicant for a density bonus pursuant to (b) may submit to a city, county, or city and county a proposal for the specific incentives or concessions that the applicant requests pursuant to this section, and may request a meeting with the city, county, or city and county.”

Subsection (b), referred to in subsection (d) above, gives the same relationship between the density bonus and incentives or concessions, and refers back to subsection (d).

(b) (1) A city, county, or city and county shall grant one density bonus, the amount of which shall be as specified in (g), and incentives or concessions, as described in (d), when a applicant for a housing development seeks and agrees to construct a housing development, excluding any units permitted by the density bonus awarded pursuant to this section..."

The statute does not say the applicant gets the density bonus "or" the concessions and incentives. The concessions and incentives are a direct result of seeking a density bonus.

The City cannot grant concessions based upon the density bonus for variances when the developer is not an applicant for a density bonus. The developer has declined the density bonus and, therefore, has declined the incentives.

D. Possible Staff Responses

We have anticipated possible staff responses to this argument. Possible responses are as follows:

1. Although the applicant declined the density bonus, he somehow, somewhere really applied for it, or the statute somehow allows for applying for the density bonus, and then waiving one's application.

Comment: The clear purpose of the incentives and concessions is to accommodate the density bonus. The ruse of applying for it, and then waiving it, and then getting the concessions has no basis in the statute.

2. It is far better for the neighbors of the development to keep the size of the building smaller than to have density bonus units added to the fifth or sixth story.

Comment: While this rationale may be true, such a situation does not allow the City to simply waive the requirements of the state statute.

3. The City has given concessions to at least one other building when no density bonus was given.

Comment: This fact may also be true, but one violation of a state law does not justify a second, third or fourth violation of the same provision.

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4. By providing inclusionary units and being theoretically entitled to a density bonus, the developer has in effect applied for it, even when, in fact, he has not applied for it.
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Comment: Applying for the density bonus is a deliberate act, not a byproduct, incidental or accidental action.

5. Although the Staff Report uses the term “concessions” what really is being given is a waiver or modification of “development standards”. In contrast to “concessions”, “development standards” can be given even when there is no application for a density bonus.

Comment: While the statute may lack clarity among concessions, incentives, development standards, and zoning code requirements, development standards are clearly identified as concessions or incentives.

65915 (l) “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 ratio of vehicular parking spaces that would otherwise be required that results in identifiable, financially sufficient, and actual cost reductions.”

6. Despite the Staff Report use of the term “concessions”, again, what was meant was “development standards”. Subsection 65915 (e) and 65915 (f) which deal with development standards in relationship to making the housing units “economically feasible” somehow provides a non-concession status to development standards which allows them to be modified without requiring an application for a density bonus.

Comment: The argument in item 5 above is compelling, but it might be that subsection 65915 (e) clearly refers to that above quoted subsection 65915 (b) concerning the amount of the density bonus and the related concessions and incentives. 65915 (b) also refers to 65915 (d), quoted previously, specifying “An applicant for a density bonus...”

“(e) In no case may a city, county or city and county 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. ”

Further, subsection (e) is tied to subsection (f) which requires that if a development standard is going to be modified or waived that the applicant show, not the local government, that the waiver or modification of the development standard “is necessary to make the units economically feasible.”

“(f) The applicant shall show that the waiver or modification is necessary to make the housing units economically feasible.”

No such economic pro-forma has been made. To quote the Adjustments Board Staff Report for Board Action April 6, 2006 which references 65915(d)(1) dealing with concessions and not development standards:

“The City hasn’t reviewed a financial pro-forma prepared by the applicant. As the applicant has developed many other mixed use projects, and has requested concessions to present what he believes will be a financially sound project, staff recommends that in this case, review of a financial pro-forma is not necessary to grant the concessions.” Page 12

There can be no valid staff argument related to “development standards” as a means for granting the concessions.

II. Financial Data Supporting Concessions

- A. Even if the concessions granted to 1201 San Pablo/1100 Harrison were in conformance with the state law, the total absence of financial data relating to the concessions, incentives and development standards, as required by subsection 65915 (f), makes the ZAB approval of the project not in conformance with the state law.

As quoted in the preceding section, the Staff Report for Board Action April 6, 2006 is clear that there was no financial data provided by the developer to support the need for the concessions.

“The City **hasn’t reviewed a financial pro-forma** prepared by the applicant. As the applicant has developed many other mixed use projects, and has requested concessions to present what he **believes** will be a financially sound project, staff recommends that in this case, review of a financial pro-forma is not necessary to grant the concessions.” Page 12 (bold added)

In regards to findings for concessions and incentives, the California Density Bonus Statute states:

(l) 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 **results in identifiable, financially sufficient, and actual cost reductions.**

(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.
(bold added)

The City position that the “developer believes” bears no relationship to the requirements of Government Code 65915 and the Council should set the appeal for a hearing to rectify this clear breach of the State statute.

III. Unequal Distribution of Inclusionary Units

- A. In its approval of 1201 San Pablo/1100 Harrison with the inequities in the inclusionary units in contrast to market units, the ZAB is in direct violation of the City of Berkeley’s inclusionary ordinance and rational City policy. The approval should not have been allowed, and the Council should examine alternatives. The applicable provision of the Zoning Ordinance reads:

“Section 23C.12.040 Requirements Applicable to all Inclusionary Units

D. All Inclusionary Units **shall be reasonably dispersed** throughout the project, be of the same size and contain, on average, the same number of bedrooms as the non-Inclusionary Units in the project; and be comparable with the design or use of non-inclusionary units in terms of appearance, materials and finish quality.”

If the Council does not review this decision with regards to 1201 San Pablo/1100 Harrison, the Council can expect the first concession that any developer who actually receives a density bonus will demand is unequal inclusionary units. This concession defeats the requirement that inclusionary units be “reasonably dispersed throughout the project”

While the concession granted to allow unequal inclusionary units is not valid under the State Density Bonus Statute because the developer did not apply for a density bonus, the issue deserves appeal on the basis that this instance is at least the second time that such a discrimination has been allowed. The Council should not allow it again.

1. The Staff Report for Board Action April 6, 2006 states”

“It is important to note that while the Inclusionary Units would not match the market rate units for size or location, the project would provide proportionate access to private open space, number of bedrooms and design in terms of appearance, materials and finish quality for both the market-rate and Inclusionary units.” Page 12

The table supplied on page 8 of the Staff Report for Board Action April 6, 2006 clearly shows the inequity in the distribution of the units.

- a. Only 2 of the 6 inclusionary units face west, the more desirable, sunnier exposure with a view. One of the units is on the 2nd floor where the difference in exposure in terms of light and views is minimal. The other is on the 3rd floor.
- b. Only one of the six inclusionary units is on the most desirable 4th floor, but it faces east.
- c. None of the largest units, 2 bedroom, 2 bath, western-facing penthouses on the fourth and fifth floors, are inclusionary units.
- d. The bulk of the inclusionary units, 3 of the six units are on the 3rd floor. 29% of the square footage on that floor is dedicated to inclusionary units.
- e. The percentage of square footage on the most desirable top floor for inclusionary units is only 7.8%.

The developer has designated the best, largest units as the market rate units, and designated less desirable units as the inclusionary units. At a minimum, one of the east facing inclusionary units on the lower floors should be swapped for one of the 2 bedroom, 2 bath units on the 4th floor. Granting this concession tells developers that it is acceptable to use the less profitable units to fulfill inclusionary unit requirements, creating two classes of units, market rate and inclusionary, within a project rather than having no distinction between the two types of units.

IV. City of Berkeley Zoning Ordinance Required Setbacks

The proposed project does not conform to current setbacks required under the City of Berkeley Zoning Code. The proposed project provides a five foot (5') rear setback. It should also be noted that the project address has never been clearly defined. The Notice of Decision currently has both addresses (1100 Harrison St. and 1201 San Pablo), and this has implications for determining setback requirements for the building. Legally, the project may only have one address.

This project is currently in the C-W zone abutting a residential R-2 Zone. Section 23E.04.050 Special Yard Requirements for C-Lots Abutting Residential Zones of the City of Berkeley Zoning Ordinance 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":*
- 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 on the street side, shall be the same required yard as specified for the adjacent residential District.*

The Zoning Ordinance takes these measurements from what is considered the street front of the building.

Assuming that 1201 San Pablo is the street front (and the community was told this during the Design Review meetings), then a 10' setback should be provided at the rear (east) property line instead of the proposed five foot (5') setback. Although the lot depth is fifty feet (50'), the setback rule stated above in Section 23E.04.050 Line C states that it shall be ten feet (10') or ten percent (5'), whichever is **greater**. This states that the required setback for the project should be ten feet (10') instead of the proposed five feet (5'). An additional 5' setback should be provided along Harrison St. instead of what is currently being provided for now.

Assuming, however, that 1100 Harrison St. is the front of the building, then according to Section 23E.04.050 Line D above the front yard setback (along Harrison Street) should be the same as required for the adjacent residential district or R-2 zone. The required setback information is stated in Section 23D.28.070 Development Standards R-2 Zone of the Zoning Code. It states:

D. The Main Building shall be set back from the respective lot lines, and shall be separated from one another, as follows:

Story	Yard location				Building separation*
	Front	Rear*	Side*	Street side*	
1st	20	20	4	10	8
2nd	20	20	4	10	12
3rd	20	20	6	10	16

* See Section 23D.28.070.D.1 through 4 for yard and building separation reductions

This chart states that the front yard setback (along Harrison St.) should be twenty feet (20') which is substantially greater than what is proposed.

In either way the front of the building is determined, the required setbacks should be provided as per the Zoning Code. The building does not provide the required setbacks in either interpretation. **The applicant has not asked for a setback variance** or concession, and there is no mention of this in the Staff Report or Notice of Decision. This project should not be granted a setback concession for something that has not been asked for or ruled upon by the Zoning Adjustments Board and in violation of the zoning code. We state that this project is not consistent with and in violation of the current applicable City zoning regulations.

V. Negative Traffic Impacts on the Neighborhood

The traffic findings from the City, as outlined on page 2 of Findings and Conditions, states:

“It is not expected that this project would have an impact on the nearby intersections or that the project would exceed the City’s standard for Level of Service”.

After a review of the submitted traffic report, we contend that the proposed traffic volume has been underestimated. The Executive Summary on page 1, paragraph 2 of the report states that “It is anticipated that the project will add 29 vehicle trips to the local street system during the AM and 51 during the PM peak hour.” These values were calculated (Table 6, page 13) based on one car per unit. Most of today’s households have 2 or more cars, and is assumed that these additional cars will be parked in an already parking-impacted neighborhood. Additionally, this calculation does not take into consideration visitors to and from the project.

Moreover, the existing traffic volume is misrepresented in that the study was performed in January 2005 when Marin was a 4-lane arterial (page 6). Marin has since been converted to a 2-lane arterial, merging eastbound from two lanes to one at Stannage Avenue, with the overflow spilling onto Stannage Avenue. Neighbors have noticed a significant increase in traffic in the neighborhood since Marin was modified.

Secondly, we do not find the traffic flow issues have been sufficiently analyzed and/or addressed. Traffic flow at intersections is rated on a Level of Service (LOS) scale from A to F. LOS is based on average delay (sec/veh) to get through the intersection and volume to capacity ratio. LOS A indicates very low delay, LOS F indicates excessive delays. From Table 4, page 12, the *existing* LOS for westbound/left is E (unstable operation/significant delays) in the AM and F (worst case- excessive delay) in the PM. In the 5th paragraph, page 1, of the Executive Summary, it is stated

“The project will add to the delay for both side-street approaches, but it is anticipated that vehicles will seek other less congested routes when confronted by high delays on the minor street approaches.”

Due to the changes in the level of traffic and following more detail within the traffic report, we request that the traffic analysis be performed again before any approval of the project goes forward.

VI. Conclusion

The 1201 San Pablo/1100 Harrison Street project violates numerous city codes and state laws. The traffic report does adequately study or address the real impacts this project has on the adjacent residential neighborhood. For these reasons, we strongly urge the City Council to set the appeal for a hearing on this project to address these blatant breaches of zoning law. If the City Council does not set this project for a hearing, we will seek legal action to insure that this project conforms to all applicable city and state zoning codes.

Sincerely,



Susan Pinto
1215 Stannage Avenue
Berkeley, CA 94706

Additional Signatures attached

Appeal of the Zoning Adjustments Board Use Permit #05-10000029 for 1201 San Pablo/1100 Harrison
 Friday, April 28, 2006

Print Name	Signature	Address	Phone Number
1 SUSAN M. PINTO	<i>Susan M. Pinto</i>	1215 STANNAGE AVENUE	510.558.8789
2 Prakash Pinto	<i>Prakash Pinto</i>	1215 Stannage Avenue	510.558.8789
3 Beth Bernstein	<i>Beth Bernstein</i>	1217 Stannage Avenue	510-528-3140
4 Mary Ward	<i>Mary Ward</i>	1206 Stannage Avenue	510.527.1533
5 <i>John Wobesky - POZ</i>	<i>John Wobesky - POZ</i>	1220 Stannage Ave.	510 528 3130
6 <i>Nelle Borzini</i>	<i>Nelle Borzini</i>	1110 HARRISON ST.	510.528.5218
7 Katherine Cullinane	<i>Katherine Cullinane</i>	1211 Stannage Ave	510 528 3372
8 Matthew Cullinane	<i>Matthew Cullinane</i>	1211 Stannage Ave	510 528 3372
9 Ryan Weber	<i>Ryan Weber</i>	1206 Kains Ave	415 792 5774
10 TERRENCE DILLON	<i>Terrence Dillon</i>	1223 STANNAGE AVE	(510) 525-6105
11 SUSAN COHEN	<i>Susan Cohen</i>	1214 Stannage Ave	510-528-2877
12 LINDA SIKORSKI	<i>Linda Sikorski</i>	1223 STANNAGE	510-525-6105
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