



Office of the City Manager

ACTION CALENDAR

June 12, 2007

To: Honorable Mayor and
Members of the City Council

From: *PK* Phil Kamlarz, City Manager

Submitted by: Dan Marks, Director, Planning and Development Department

Subject: ZAB Appeal: 2629-2635 Ashby Ave - Wright's Garage

RECOMMENDATION

Adopt a Resolution affirming the decision of the Zoning Adjustment Board to approve Use Permit No. 06-10000098 to convert an existing three-unit commercial building (The Wright's Garage Building) into a 4 to 7 unit commercial building; and to change uses to one restaurant, one exercise/dance study, and up to 5 retail spaces, and dismissing the appeal.

FISCAL IMPACTS OF RECOMMENDATION

None

CURRENT SITUATION AND ITS EFFECTS

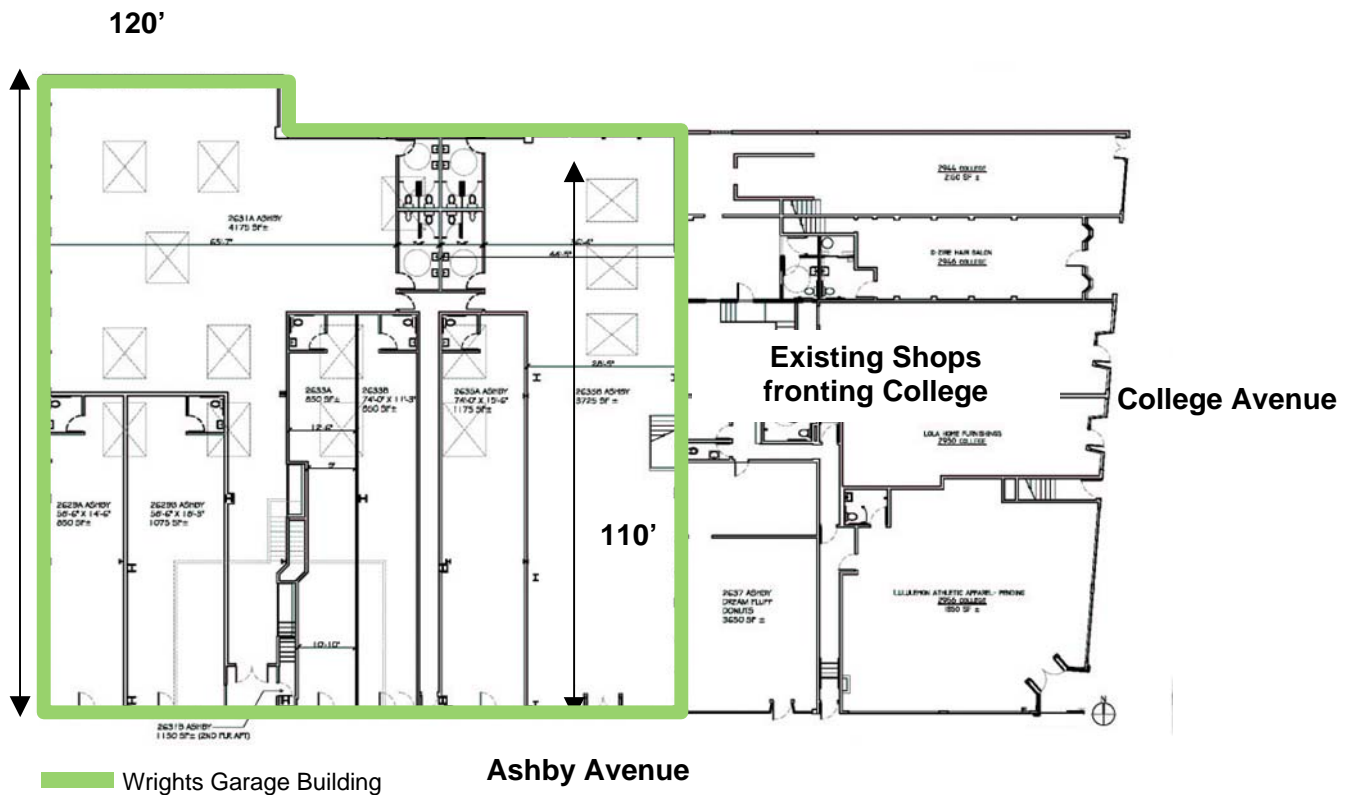
The subject site 2629-2635 Ashby Avenue, is developed with a 3-unit commercial building and second story residential unit and was previously dominated by an auto repair business. The entire building is vacant, and is undergoing City-mandated structural upgrades for the unreinforced masonry structure.

Land uses immediately surrounding the project site include a vacant lot, homes, commercial shops and a metered-public parking lot to the north; a 2-story, commercial/residential mixed use building to the east, commercial shops to the south across Ashby Avenue; and a single-family homes to the west.

The current building owner, John Gordon, has advertised the building for lease in its current configuration since he purchased the building in March 2005. After receiving numerous calls from prospective building tenants looking for smaller lease space, Mr. Gordon applied for the Use Permit in July 2006, to convert the 16,390 square foot ground floor spaces into smaller tenant spaces. Since he did not know exactly how many tenant spaces and of what size would be marketable, he requested flexibility in the initial build-out of the space, ranging from one to seven spaces of varying sizes.

On July 27, 2006, the City received an application to convert the vacant 3-unit commercial building at 2629-35 Ashby Avenue, just west of the College Avenue and

Ashby Avenue intersection in the Elmwood Commercial District. The subject building is 17,540 square feet (including the 1,150 square foot apartment unit on the second floor). The existing building has a depth of 110 to 120 feet, a depth that extends the length of five adjacent store fronts (see Figure 1 below). The building, which has been vacant for more than a year, most recently housed an auto repair and towing facility, a dry cleaner and a retail store (Sell-Your-Stuff on E-bay).





Between July 2006 and March 2007, the project was clarified and the application was modified to address concerns raised by the Zoning Adjustments Board and the neighborhood. Refer to the Background section of this report for the complete project chronology.

On March 8, 2007, the Zoning Adjustments Board discussed the project, asked questions of staff and the applicant, and approved the project (6-3-0-0) and granted the following permits (Findings for approval are included in the Background section of this report):

For Entire Project:

- Administrative Use Permit to convert an existing commercial building from its current 3 spaces to a minimum of 4 and a maximum of 7 spaces under BMC Section 23E.44.050B; and
- Use Permit to modify the location of the existing mezzanines, under BMC Section 23E.44.050A.

For a Proposed Restaurant:

- Use Permit, under BMC 23E.44.030 and BMC 23.E.44.040, to exceed the full-service restaurant quota by allowing one restaurant for a total of 9 restaurants in the District (7 permitted; 8 existing);

- Administrative Use Permit to permit sidewalk café seating, under BMC Section 23E.24.010.A;
- Use Permit to extend the hours of operation for a Full-Service Restaurant from the standard 7:00 am to 10:00 pm Monday - Sunday hours; to 7:00 am to 12:00 am Friday - Saturday), under BMC Section 23E.44.060A; and
- Use Permit, under 23E.16.040A to allow alcohol sales and service within a full-service restaurant.

For the Proposed Retail Area:

- Use Permit, under BMC 23E.44.030 and BMC 23.E.44.040 to exceed the clothing store quota by 2, allowing two additional clothing stores for a total of 14 clothing stores in the District (10 permitted; 12 existing, including Lululemon); and
- Use Permit, under BMC 23E.44.030 and BMC 23.E.44.040 to exceed the permitted size for two art/craft, gift/novelty, jewelry/watch shops (1,500 sq.ft. permitted; more than 1,500 sq.ft. proposed).

For the proposed Health Club/Dance Studio Area:

- Use Permit under BMC 23E.44.030 to a permit a gym/health club or dance, exercise (including yoga), or martial arts studio.

On March 14, 2007, the staff published the Notice of Determination for this Zoning Adjustments Board decision, establishing the appeal period.

On March 28, 2007, Raymond Barglow and The Elmwood Neighborhood Association (with two letters including one letter from Amber Vierling, Attorney for Elmwood Neighborhood Association and another letter from the Elmwood Neighborhood Association Board Members) filed an appeal with the City Clerk.

BACKGROUND

Project Chronology:

On July 27, 2006, KC Bowman of Bay Area Architects (“applicant”) representing the property owner, John Gordon, submitted a Use Permit (“UP”) application to convert the existing building into a multi-tenant commercial building with up to seven tenant spaces with a tenant mix that may include: one full-service restaurant with sale and service of alcohol; sidewalk café seating in association with the proposed restaurant; extended business hours (Sunday through Thursday: 7:00 a.m. to 12:00 a.m.; and Friday and Saturday 7:00 a.m. to 1:00 a.m.); two clothing stores in excess of the Elmwood Commercial District use quota limitations; three art/craft, gift/novelty, jewelry/watch shops in excess of the Elmwood Commercial District use and store size quota limitations; one book store in excess of the Elmwood Commercial District floor area quota limitations; and one gym/health club or dance, exercise (including yoga), or martial arts studio.

On October 19, 2006, the applicant presented the project to the Design Review Committee, and received a positive recommendation to the Zoning Adjustments Board.

On December 14, 2006, the Zoning Adjustments Board continued this Use Permit due to a lengthy agenda and request from Elmwood District business owners.

On January 2, 2007, John Gordon (property owner) withdrew the request to exceed the permitted size for a bookstore.

On January 11, 2007, the Zoning Adjustments Board opened the public hearing and took public testimony. The Board discussed the project, questioned the applicant, staff and the speakers, requested additional information from staff, and the continued the public hearing to January 25, 2007. Following the January 11, 2007 Board meeting the applicant modified the request to exceed operating hours for the restaurant as follows: Sunday through Thursday: 7:00am to 10:00pm (rather than midnight); and Friday and Saturday 7:00am to 12:00am (rather than 1:00 am.)

On January 17, 2007, Mr. Gordon, met with representatives of the Claremont-Elmwood Neighborhood Association, Willard Neighborhood Association, Bateman Neighborhood Association, and the Elmwood Merchants Group to discuss the project and the address the concerns raised at the January 11, 2007 ZAB Meeting.

On January 20, 2007, the applicant conducted an open house meeting at the project site.

On January 24, 2007, the applicant submitted "additional conditions of approval" drafted as a result of the neighborhood community meetings on January 17th and 20th for consideration by the Zoning Adjustments Board.

On January 25, 2007, the Zoning Adjustments Board continued the public hearing and took public testimony. Following the public comment period, the Board closed the public hearing. The Board discussed the project, requested additional information from staff, and continued the project to February 8, 2007.

On February 8, 2007, the Zoning Adjustments Board continued the project to March 8, 2007 at the request of staff.

On February 21, 2007, the applicant (1) withdrew the request to exceed the Elmwood District use quota limitation for "art/craft, gift/novelty and jewelry/watch shops" and (2) revised the proposed floor plan by designating specific areas for each of the three use categories (i.e., restaurant, dance/exercise, and retail).

On March 8, 2007, the Zoning Adjustments Board discussed the project, asked questions of staff and the applicant, and approved the project (6-3-0-0) based on the Zoning Ordinance findings.

On March 14, 2007, the staff published the Notice of Determination for this Zoning Adjustments Board decision, establishing the appeal period.

On March 28, 2007, Raymond Barglow and The Elmwood Neighborhood Association (with two letters including one letter from Amber Vierling, Attorney for Elmwood Neighborhood Association and another letter from the Elmwood Neighborhood Association Board Members) filed an appeal with the City Clerk.

Summary of Zoning Adjustment Board Meetings, Comments, and Action:

The Zoning Adjustments Board received verbal testimony from parties in opposition (majority) and in support (minority) of the project at their meetings on January 11th and January 25th, 2007. Of note, the public comment period closed at the January 25, 2007 meeting, and public testimony for this item was not considered at the February 8th and March 8th, 2007 Zoning Adjustments Board meetings. During this time period, staff received several letters (the majority in opposition) from individual property owners, area business owners, and Neighborhood groups. Staff also received a petition stating opposition to the project (368 signatures) and a summary of comments posted on KitchenDemocracy.com (dated February 5, 2007). The Zoning Adjustments Board received all of this written communication in its agenda packet prior to each hearing on this item, or at the actual Board meeting, depending on the time it was received.

In summary, public testimony at the Zoning Adjustments Board meetings and within the written materials presented support as well as opposition to the project. Comments supporting the project mentioned that new uses would stimulate more positive activity, the auto shop was not a good use for the site, the existing building is an eyesore, and neighborhood residents would like more uses to walk to, rather than drive (i.e., leaving the neighborhood to eat in Rockridge).

Comments raising concerns about the project focused largely on the proposed restaurant/lounge, such as: increased demand that the project/restaurant would have on parking in the area would be very significant; dramatic increase in overall traffic; and air quality and noise impacts that would harm property values and quality life for nearby residences. Testimony also included concerns that the requests to exceed quotas limitations was not justified, and did not comply with purposes of the Elmwood Commercial District, since the names of the business establishments were not known at this time; and that the CEQA analysis was not adequate.

During the Zoning Adjustments Board meetings, the Board deliberated the issues raised by the public, questioned the applicant, and requested additional staff work resulting in project continuances. Ultimately the applicant provided the Board a revised project description. The revised project: (1) located three "use zones", restricting the three primary uses to specific areas of the building; (2) Each "use zone" had a minimum and maximum size; and (3) the applicant could vary the number of tenant spaces only in the

retail use zone. As a result, (4) the range in the number of tenant spaces became smaller (i.e., 1 – 7, to 4 – 7); (5) removed use permit requests to exceed the quotas for a bookstore and an “art/craft, gift/novelty and jewelry watch “ shop; (6) limited the size and location of the proposed full-service restaurant; (7) reduced the requested operating hours for the restaurant; (8) limited the size and location of the proposed fitness establishment; and (9) and restricted employee and customer parking. The Zoning Adjustments Board discussed these changes in light of the community concerns and support, and concluded that the revised project would be an appropriate use in the Elmwood Commercial District. The Board modified two Conditions of Approval as indicated in the underlined text below:

28. Prior to issuance of a Zoning Certificate for each initial business license for any use in the subject building, the applicant shall submit to the Zoning Officer information showing the “tenant mix.” The tenant mix shall include the following information: total number of tenant spaces leased (not to exceed seven); name of each tenant; square footage of each tenant space; square footage of space remaining un-leased; and a current site plan designating the tenant space in question as well as all of those that have been leased to date. The tenant mix information shall be updated as each portion of the building is occupied during the initial lease-up of the building. The initial tenant mix shall include at least one (1) business that is not subject to quotas within the C-E District (see BMC 23.44.040). After the initial occupancy of the entire building, all unused quota slots shall be relinquished, and future changes in use are subject to the permit requirements of BMC 23E.44.030.

30. The property owner shall cooperate to the extent practical with the Elmwood Merchants Association and City of Berkeley Transportation Planning Department, on opportunities and strategies to improve parking supply in the District. Such strategies may include: (1) increasing capacity of the metered parking lot at the rear of subject property by providing parking attendants; or (2) entering into an agreement to use the Huntmont Parking Garage on weekends and evenings; or (3) acquiring and improving the vacant lot immediately north of the subject property for surface parking; or (4) increasing the Residential Permit Parking only hours for Districts B and D from 7:00 p.m. to 9:00 p.m.; or (5) increasing the operating hours of parking meters on College Avenue. Prior to issuance of the building permit for the full-service restaurant the applicant shall demonstrate to the Zoning Adjustments Board that access to additional parking in the neighborhood has been established by incorporating one or more of the above strategies or by other methods; OR the applicant shall provide a parking study demonstrating that parking generated by the proposed restaurant could be accommodated within the neighborhood.

Following discussion of the revised project, the Zoning Adjustments Board approved the revised project on March 8, 2007, with six (6) votes in favor and (3) votes opposed. The Board adopted the following "Findings" supporting their decision.

CEQA FINDINGS

1. The project is categorically exempt from the provisions of the California Environmental Quality Act (CEQA, Public Resources Code §21000, et seq.) pursuant to Section 15301 of the CEQA Guidelines (Class 1 "Existing Facilities"). The key consideration for the Class 1 Determination is whether the project involves negligible or no expansion of an existing use. This project would allow the applicant to modify the current configuration of building walls within an existing commercial building to allow the applicant to lease the existing commercial building to multiple retail tenants. There is no expansion proposed and the use is changing from a 3 unit commercial building to a commercial building with 4 to 7 units. There would be no increase in the size (square footage) of the existing building.

GENERAL NON-DETRIMENT FINDINGS

2. Pursuant to Berkeley Municipal Code Section 23B.44.030, the Zoning Adjustments Board finds that the proposed project to permit the conversion of an approximately 17,045 sq.ft. commercial building (The Wright's Garage Building) into a multi-tenant commercial building in the C-E District with 4 to 7 tenant spaces, 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, for the following reasons:
- A. The proposed uses would replace a long standing auto repair and towing operation (The Wright's Garage) that over the years became incompatible with the commercial character of the Elmwood Neighborhood Commercial District. Replacing this non-conforming use with "conforming" commercial uses would remove the noise, traffic congestion, and "dirty" atmosphere that has made it difficult for nearby commercial establishments to succeed. The existing two driveways and curb cuts would be closed thereby increasing the amount of on-street parking, by removing a pedestrian-unfriendly element of Ashby, and by assuring that damaged automobiles and tow trucks would no longer be stored at the site.
 - B. The existing building needs significant repairs and improvements to support the types of commercial establishments now allowed and encouraged in this commercial district. The open façade that once housed the auto repair shop would be converted into multiple store fronts consistent with architectural design found in the adjacent commercial spaces that provide a more enticing land use for pedestrian commercial traffic than the previous non-conforming auto repair use.
 - C. Mezzanines within the former auto-repair portion of the building would be relocated to the proposed "retail zone" of the project, allowing more flexible and attractive spaces to accommodate future retail tenants, where this type of space is better utilized and more desirable.
 - D. The operation of a yoga, gym, dance studio or health club would provide a service that is not currently available in the District, and would facilitate the reuse of a large, cavernous, and currently vacant portion of the building within the District.
 - E. The establishment of two additional clothing stores (exceeding the quota limitations) and two gift/novelty shops (exceeding only the size limitations)

- would provide additional diversity in an already thriving retail area and ensure a variety of sizes in tenant spaces not already available in the Elmwood. These uses would not displace existing “protected” uses, such as personal household services, then they would occupy space previously used by the non-conforming auto repair and towing operation.
- F. A full-service restaurant, as conditioned herein, would be located at the eastern most portion of the building (farthest from existing residences) and would not exceed 5,000 sq.ft., which is comparable to existing restaurants given that the proposed restaurant would include a bar/lounge area. Demand for parking would peak in the evening when the majority of shops and offices in the District are closed. Such a use would provide a full-service restaurant with bar/lounge, a service that is not currently available in the District. The proposed restaurant would also improve the pedestrian environment by adding outdoor seating. Additionally, the proposed use would provide an “anchor tenant” to facilitate the reuse of an existing building.
- G. As is typical of neighborhood commercial areas, re-use of existing buildings provides no on-site parking spaces; and the Zoning Ordinance requires none for this project. Parking generated by uses within the proposed project would be utilize existing on-street parking spaces and nearby public and private parking facilities. This situation is true of all Elmwood businesses. Parking demand generated by the proposed restaurant would increase in the evening hours peaking at 7-8pm Sunday to Friday and 6-9pm on Saturday. Parking demand for the District’s existing retail establishment create peaks in the afternoon (between 3-4pm Monday to Saturday and 1-2pm on Sunday). Without approval of any Use Permits, the proposed project could be converted into general retail uses, increasing parking demand at the current peak periods. The non-restaurant uses would increase parking demand by a small amount during the existing peak periods, and the proposed restaurant use would increase parking demand largely in the off-peak times. Recognizing that the parking supply is limited in the district due the densely populated commercial and residential uses, the proposed project is subject to multiple conditions provided herein to alleviate the parking demand generated by the proposed project.
- H. The Design Review Committee considered the proposed conversion on October 16, 2006 and has recommended approval of the project’s design.

OTHER REQUIRED FINDINGS

3. C-E District Findings for an **Administrative Use Permit to Convert an Existing Commercial Building**: Pursuant to Berkeley Municipal Code Section 23E.44.090, the Zoning Adjustments Board finds that:
- A. The proposed project would encourage an improved street frontage and pedestrian orientation of the District by converting a vacant auto shop with two curb cuts and driveways on a major commercial artery into a multi-tenant retail building with individual store fronts and no curb cuts/driveways on Ashby Avenue. The building is currently in poor condition and is undergoing structural upgrades. The existing building has an open building face with auto repair bays. The proposed project would convert that area to useable retail space with uses that are compatible with and serve the purposes of the District. Per the conceptual floor plan, the proposed fitness use would be located at the rear of the building, allowing retail uses and the proposed restaurant to occupy the proposed store fronts.
 - B. The design and character of the building would not be compromised by conversion of the building. The proposed facade changes would include building features and materials comparable to the surround storefronts. Additionally, the top floor apartment would be upgrade and continue in use as a residential dwelling unit.
 - C. The conversion of the existing building is compatible with the purposes of the C-E District because it would provide for additional retail establishments that are compatible with and serve the needs of the adjacent residential uses; the project would replace the auto repair shop which is not compatible with the immediately adjacent residences nor the neighborhood serving uses in the District; and would allow for additional retail establishments subject to the provisions of the C-E District.
 - D. By closing the auto shop space and adding new commercial store fronts, this project would extend the continuity of retail and compatible service facilities at the ground level from the corner of Ashby and College westerly to the edge of the commercial district.
 - E. As noted above, the conversion would improve the building façade by adding new store fronts and closing the open area previously used by the auto shop.
 - F. This permit would allow the conversion of the existing building into a multi-tenant commercial building with as few as 4 tenant spaces and up to 7 tenant spaces. Permitted land uses within the subject building would be subject the

provisions for use permits, administrative use permits and the quota limitations of the C-E District.

- G. The conversion of the building would involve construction activity that may create temporary odors and noise typical of construction activities. Per the recommended conditions of approval, construction activity would be limited to between the hours of 8:00 a.m. and 6:00 p.m. on Monday through Friday, and between 9:00 a.m. and noon on Saturday and no construction-related activity shall occur on Sunday. Additionally, all uses within the subject building would be regulated by the Berkeley Noise Ordinance. BMC Section 13.40.050 states that the maximum exterior noise level for properties zoned R-2 is 55dba from 7:00 am to 10:00 pm and 45dba from 10:00pm to 7:00am; and internal noise level maximums are 45 dba from 7:00 am to 10:00 pm and 40 dba from 10:00pm to 7:00am.

4. C-E District Findings for **Use Permit to Modify the Location of the Existing Mezzanines**: Pursuant to Berkeley Municipal Code Section 23E.44.090, the Zoning Adjustments Board finds that:

- The relocation of existing mezzanines would not disrupt the street frontage or pedestrian orientation of the District.
- The relocation of existing mezzanines would not allow for an increase in the gross floor area of the building. This permit would allow the applicant/owner to redistribute the mezzanine area to suit the needs of future tenants to better support the character of the building and the District.
- The relocation of existing mezzanines would allow the applicant/owner to redistribute the mezzanine area to suit the needs of future retail tenants. This portion of the permit is compatible with purposes of the District as it would further the opportunity to provide for additional retail outlets that are compatible with and serve the needs of the adjacent residential uses.
- Relocating mezzanine area would not disrupt the continuity of retail at the ground level. .
- Relocating mezzanine area would not interrupt the building façade.
- Parking is limited during peak periods in the C-E District. Relocating existing mezzanine area to suit the needs of future retail tenants is not expected to increase parking demand for the subject site.
- Relocation of mezzanine area within the existing building to suit the needs of future retail tenants would not directly relate to the domination of a specific use type.

- The relocation of the mezzanines would involve construction activity that may create temporary odors and noise typical of construction activities. Per the recommended conditions of approval, Construction activity shall be limited to between the hours of 8:00 a.m. and 6:00 p.m. on Monday through Friday, and between 9:00 a.m. and noon on Saturday and no construction-related activity shall occur on Sunday.

5. C-E District Findings for **Use Permit to Allow a Gym/Health Club or Dance, Exercise (including yoga), or Martial Arts Studio**: Pursuant to Berkeley Municipal Code Section 23E.44.090, the Zoning Adjustments Board finds that:

Allowing a gym/health club within the subject building is appropriate because it would facilitate leasing the unusually large, deep (over 100 feet), cavernous building atypical in neighborhood commercial districts. Such a use does not require street frontage, although it would require access from the commercial street. This access could be provided via an interior corridor as shown on the conceptual floor plan. Ideally, this type of use would allow the applicant/owner to reserve the street frontage for the retail merchants for whom storefront visibility is more essential. Allowing a gym/health club would be compatible with the design and character of the District as it would be located in a converted commercial structure within the District that would be retrofitted and upgraded to visually reinforce the existing building materials and features.

- A permit for a gym/health club would be compatible with the purposes of the District because it would provide a service not currently available in the District, would occupy an existing building converted to commercial uses, and would mostly serve nearby residents and employees, decrease the likelihood of generating high traffic or parking demands.
- The proposed use would not interrupt a continuous wall of building facades. The proposed use would be accommodated within a converted auto shop building that would create a continuous wall of additional store fronts (instead of an open area consisting of auto mechanic bays) along the existing building façade.
- The additional gym/health club would not generate traffic or parking demand significantly beyond the capacity of the District or significantly increase impacts on nearby residential streets because it does not introduce a new use with a higher parking demand, and because it would provide a personal service not currently provided within District; thus it is likely to attract area residents and employees who live and work in the District.
- Approval of this use permit would not result in domination by one specific use type because it would provide a gym/health club service, not currently provided, to District residents and employees.

- The proposed gym/health club would not generate objectionable odors or excessive levels of noise.

6. C-E District Findings for a Use Permit to Exceed the Full-Service Restaurant Quota by Allowing One Restaurant for a Total of 9 Restaurants in the District: Pursuant to Berkeley Municipal Code Section 23E.44.090, the Zoning Adjustments Board finds that:

- Allowing a full-service restaurant within the subject building is appropriate because it would facilitate leasing the unusually deep (over 100 feet) commercial space. Such a use would occupy almost one third of the building and would act as an “anchor tenant” to promote pedestrian activity for the store fronts within the subject building as well as the existing businesses on the south side of Ashby Avenue.
- Allowing a full-service restaurant would be compatible with the design and character of the District as it would be located in a converted commercial structure within the District that was retrofitted and designed to promote the existing building materials and features; and because it would provide additional food service options for District residents and employees.
- The proposed restaurant would provide a substantial anchor tenant for the conversion of the existing auto repair building. About 2/3rd of the subject building area was not considered when the City adopted the quota limitations were adopted for this District. The converted building area would add about 13,775 square feet of "new" commercial area to the District; therefore, the balance among goods and services in the District would not be upset by allowing an additional restaurant into the District. Surveys conducted by the applicant indicate that 42,000 residents live within one mile of the project site (73,000 within 1.5 miles). The full-service restaurant would promote the intent of the District by providing a land use to serve these residents (as well as District employees) within the neighborhood. The full-service restaurant would also compliment the existing land uses in the District by attracting pedestrians “around the corner” onto Ashby Avenue and providing evening activity in the District.
- As noted above, the proposed full-service restaurant would promote the continuity of retail and service facilities at the ground floor.
- The proposed use would not interrupt a continuous wall of building facades. The proposed use would be accommodated within a converted auto shop building that would create a continuous wall of additional store fronts (instead of an open area consisting of auto mechanic bays) along the existing building façade.

- As noted within the staff report, the full-service restaurant would generate peak parking demand during off-peak commercial hours of the District. Recognizing that the District is in short supply of parking spaces without regard to the time of day, due to the densely populated residential and commercial uses, several conditions of approval have been recommended for this project including a requirement for payment of subsidies of parking passes for all employees.
- The applicant intends to lease the space to a full-service restaurant that would include a bar/lounge or gathering area. This type of restaurant facility is not currently provided in the District.
- The proposed use would be subject to the City's Noise and Nuisance Ordinances, as well as additional conditions of approval related to ventilation of restaurant equipment and measures to prevent disturbance by patrons to the immediate neighbors.
- The proposed hour of operation would be consistent with an existing use in the District (Espresso Roma).
- A permit for a full-service restaurant would be compatible with the purposes of the District because it would provide a food service restaurant to serve the surrounding neighborhood, would be developed as part of, and in facilitation of, the conversion of an existing commercial building, would generate parking demand during non-peak commercial parking hours for the District, and would not contribute to the proliferation of one specific use type because the proposed restaurant would provide services not currently provided by other restaurants in the District. The applicant's intent is to lease the space to a full-service restaurant that would include a bar/lounge or gathering area. This type of restaurant facility is not currently provided in the District. Neighborhood and community support of a restaurant use is evidenced by the positive polling results posted on KitchenDemocray.com.

7. C-E District Findings for **Use Permit to Exceed Numerical Limitation by Allowing Two Clothing Stores for a Total of 14 Stores in the District:** Pursuant to Berkeley Municipal Code Section 23E.44.090 C, the Zoning Adjustments Board finds that:

- Allowing two clothing stores would be compatible with the design and character of the District as it would be located in a converted commercial structure within the District that was retrofitted and designed to promote the existing building materials and features. Currently, the District maintains several clothing stores that are successful in generating pedestrian activity and services to the District. Additional clothing stores would further promote the purposes of the District.

- A permit to allow two new clothing stores would be compatible with the purposes of the District because it would promote pedestrian activity, provide a retail service to the neighborhood, would be developed within an existing building that was converted for commercial uses, and it would not likely generate high traffic or parking demands as it would serve a need of area residents and employees.
- As mentioned above, clothing stores promote an active street frontage with window displays, which would promote pedestrian activity.
- The proposed use would not interrupt a continuous wall of building facades. The proposed use would be accommodated within a converted auto shop building that would create a continuous wall of additional store fronts (instead of an open area consisting of auto mechanic bays) along the existing building façade.
- The additional of two clothing stores would not generate traffic or parking demand significantly beyond the capacity of the District or significantly increase impacts on nearby residential streets because it does not introduce a new use with a higher parking demand, it would provide a retail service that is compatible with other uses in District, and it is likely to attract area residents and employees who live and work in the District.
- The proposed clothing stores would provide increased opportunities for leasing the existing Wright's Garage building from auto repair to commercial uses. The subject building area was not considered when the quota limitations were adopted for the District. The additional area of the building would add "new" commercial square footage to the District that was not considered when the quotas were created; therefore, the balance of the goods and services in the District would not be upset by allowing two additional clothing stores into the District.
- Clothing retail stores do not typically generate objectionable odors or excessive levels of noise.
- The proposed clothing stores would increase the opportunity to lease tenant spaces within the converted auto repair building. The subject building (as currently configured) has proven to be undesirable to retail stores, as it has been on the market for over a year. The majority of interest in the building, as well as surrounding tenant spaces, is from small retail outlets and fast food stores. This permit to allow two additional clothing stores would facilitate the renovation and conversion of the building, as the owner could open the market to boutique and smaller clothing stores, which are popular in the District. The subject building area was not considered when the quota limitations on clothing stores were adopted for the District. The additional area of the building would add "new" commercial square footage for purposes of the quota limitations;

therefore, the balance of goods and services in the District would not be upset by allowing two additional clothing stores into the District. The clothing stores would also compliment the existing land uses in the District by attracting pedestrians “around the corner” onto Ashby Avenue. Neighborhood and community support for new retail uses is evidenced by the positive polling results posted on KitchenDemocracy.com.

8. C-E District Findings for Use Permit to Exceed Floor Area Limitation by Allowing two Art/Craft, Gift/Novelty, Jewelry/Watch Shops over 1,500 square feet in size: Pursuant to Berkeley Municipal Code Section 23E.44.090 C, the Zoning Adjustments Board finds that:

- Allowing two art/craft, gift/novelty, jewelry/watch shops that could exceed the 1,500 square foot size limit is appropriate because it would increase the types of uses permitted for the site, would allow diversity in the types of “art/craft . . . ” stores within the Elmwood, which would facilitate leasing this uniquely large building. Such shops would also promote an active street frontage with window displays, which would promote pedestrian activity.
- Allowing art/craft, gift/novelty, jewelry/watch shops in excess of 1,500 square feet would be compatible with the design and character of the District as such stores would be located in a converted commercial structure within the District that was retrofitted and designed to promote the existing building materials and features.
- A permit to allow Art/Craft, Gift/Novelty, Jewelry/Watch Shops to exceed 1,500 square feet in size would be compatible with the purposes of the District because it would increase the diversity of shop sizes, thereby allowing the owner to attract diverse store types, thereby increasing street front interest and overall commercial health of the District. The diversity in shop sizes would thus encourage pedestrian activity on Ashby Avenue, and would be developed within an existing building that was converted for commercial uses, and it would not likely generate high traffic or parking demands as it would serve a need of area residents and employees.
- As mentioned above, art/craft, gift/novelty, and jewelry/watch shops stores promote an active street frontage with window displays, which would promote pedestrian activity.
- The proposed use would not interrupt a continuous wall of building facades. The proposed use would be accommodated within a converted auto shop building that would create a continuous wall of additional store fronts (instead of an open area consisting of auto mechanic bays) along the existing building façade.

- Art/craft, gift/novelty, jewelry/watch shops do not typically generate objectionable odors or excessive levels of noise.
- The proposed size increase for the art/craft, gift/novelty, and jewelry/watch shops would not result in the domination of this specific use type. Increasing the size of the available lease space for such a use would increase the probability of leasing to such businesses. Currently, the District has two available quota slots for art/craft, gift/novelty, and jewelry/watch shops, so no permit is needed to exceed the quota slots.
- The addition of art/craft, gift/novelty, jewelry/watch shops in excess of 1,500 square feet would not generate increased traffic or parking demand significantly beyond the demand that would have been generated by small shops since it does not introduce a new use with a higher parking demand. It would provide a retail service that is compatible with other uses in District, and it is likely to attract area residents and employees who live and work in the District.
- The proposed art/craft, gift/novelty, jewelry/watch shops in excess of 1,500 square feet would increase the opportunity to lease tenant spaces within the converted auto repair building. The subject building (as currently configured) has proven to be undesirable to retail stores, as it has been on the market for over a year. The majority of interest in the building, as well as surrounding tenant spaces, is from small retail outlets and fast food stores. This permit to increase the permitted size of art/craft, gift/novelty, jewelry/watch shops would facilitate the renovation and conversion of the building. The art/craft, gift/novelty, jewelry/watch shops in excess of 1,500 square feet would also compliment the existing land uses in the District by attracting pedestrians “around the corner” onto Ashby Avenue. Neighborhood and community support of new retail uses is evidenced by the positive polling results posted on KitchenDemocracy.com.

9. Use Permit for Extended Hours of Operation for Restaurant: Pursuant to Berkeley Municipal Code Section 23E.24.020 A, the Zoning Adjustments Board finds that:

- Staff has provided the general use permit and C-E District findings for the full-service restaurant above (see Discussion under 4A). The Zoning Ordinance requires no additional findings for extended operating hours. Of note, the extended hours (open till 12:00am on Friday and Saturday) would allow the proposed restaurant to better serve the neighboring community by increasing the District commercial activity later into the evening. The extended hours are not expected to burden the surrounding land residential uses because the restaurant would cater to and rely on the surrounding neighbors as customers;

the uses would be subject to the City Noise Ordinance to minimize noise impacts; and as a condition of approval, all activity beyond 10:00 pm would be limited to interior of the building (no outdoor dining after 10:00 pm).

10. **Administrative Use Permit for Sidewalk Café Seating:** Pursuant to Berkeley Municipal Code Section 23E.24.020 A, the Zoning Adjustments Board finds that:
 - A. The proposed outdoor seating area would be located along Ashby Avenue with a 7 foot clearance from the curb, which is adequate clearance for pedestrian activity.
 - B. The proposed outdoor seating area would not be permitted to block access to any existing utility meters, hydrants or other street hardware.
 - C. The proposed seating area would not obstruct the view of street traffic devices, such as crosswalk signals and traffic lights.
 - D. No alcohol service would be available to outdoor seating areas.

11. Pursuant to Berkeley Municipal Code Section 23E.16.040.B.2, the Zoning Adjustments Board makes the following findings of “**Public Convenience and Necessity.**”
 - A. The proposed establishment will promote the City’s economic health and contribute to multiple General Plan and District goals because the proposed uses would be consistent with the intent of providing neighborhood serving businesses and these uses are anticipated to generate additional business tax revenue. The proposed use would also contribute to the economic health of the other nearby businesses.
 - B. The economic benefits of the proposed restaurant establishment could not be reasonably achieved without the proposed sales and service of alcohol. It is unlikely that any full-service restaurant tenants would be interested in operating a restaurant without the ability to serve alcohol. The division of the tenant spaces within the existing building is difficult to design given the depth and overall size of the existing building. A large tenant, such as a full service restaurant, would be a viable use for the larger tenant space created by this conversion. Consistent with other full-service restaurants in the area, patrons of the proposed restaurant will have an expectation of alcohol service.
 - C. The proposed restaurant tenant is not known at this time; however, the applicant, Gordon Commercial, has not been party an alcohol-licensed establishment which has been subject to violations for complaints. Subject to

- the conditions herein, the restaurant tenant shall not be an establishment that has had an alcohol violation. Any restaurant tenant would have to be free of any violations, consistent with these findings and conditions of approval.
- D. The closest public park (Willard Park) and the closest Berkeley Unified Schools (Willard and Emerson) are more than 1,000 feet from the subject site. The Board does not foresee any detrimental impacts on public parks or schools in the area given the far distance, controlled service of alcohol by restaurant staff and the lack of off-site retail sales of beer and wine.
- E. The Berkeley Police Departments has indicated that the proposed sale and service of alcohol in connection with a full-service restaurant would not be expected to add crime in the area.

The Zoning Adjustments Board staff reports in the attached administrative record provide further information on the project.

RATIONALE FOR RECOMMENDATION

The appellants raised the following points in their appeal letters. Staff believes the following list of appeal bases encompasses all the issues raised in the appeal (staff's responses follow each point):

Issue 1: "The scope of the project is greater than the scope of the exemption and thus CEQA Guidelines §15301 does not apply; rather, the CEQA review process must be undertaken for this project and an Initial Study should be prepared for proper disclosure and analysis to occur."

Response 1: The Zoning Adjustments Board, prior to approving the project, found that the proposed project was exempt from CEQA (Public Resources Code §21000, et seq.) pursuant to §15301 of the CEQA Guidelines (Chapter 1, "Existing Facilities"). Section 15301 "Existing Facilities" allows for "...operation, repair, permitting, leasing, licensing, or minor alterations to existing public or private structures.... involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination..." The text of this exemption states, "The key consideration is whether the project involves negligible or no expansion of an existing use." The Use Permit would allow the applicant to modify the current configuration of building walls within an existing commercial building in order to lease the existing commercial building to multiple commercial tenants. Space formerly used for Wright's Garage would be replaced by retail space, an exercise/dance studio, and a portion of a large restaurant. There would be no building expansion, no increase in the square footage; the 3-unit commercial building (with an auto repair/towing, retail, and

household services use) would be converted into a minimum of 4 and a maximum of 7 commercial tenant spaces (with an exercise studio, restaurant, and 2 to 5 retail spaces. retail Clearly, the project involves no expansion of commercial use, a negligible expansion of retail use, certainly no expansion of the previous legal non-conforming auto repair/towing operation. Therefore, staff concludes that this project complies with the description of this CEQA Categorical Exemption, Section 15301.

The appeal letters also assert that multiple environmental impacts are associated with this project, and that an Initial Study should be conducted prior to approval of this project. Staff notes that CEQA would require an Initial Study only if reasonable evidence indicated that a potential significant environmental impact might be present. As explained below, the Board found no evidence of such impact, even after considering all of the staff analysis and public comments. The appellants have provided no additional evidence not already considered by the Board. Thus staff concludes that this issue is not an adequate basis for appeal.

The appellants assert that the Zoning Adjustments Board's CEQA determination is not supported by substantial evidence in applying a categorical exemption to this project because the areas of traffic and pedestrian circulation, noise, aesthetics, cumulative effects, crime, public health and safety, and cigarette smoke should be further analyzed. Staff notes the following considerations by the Zoning Adjustment Board's that provide the rationale for the Board's CEQA determination.

Air Quality: *The appellants assert that the project's impact on air quality was not analyzed, and the ventilation discussion was inadequate.*

Response: The Zoning Adjustments Board considered the potential land use compatibility issues associated with placing a restaurant and commercial uses immediately adjacent to residential uses. In fact, a neighbor requested in writing that the Board give special attention to potential auto and restaurant exhaust and air quality impacts. Planning staff discussed this request with the Environmental Health Department, and provide the Board a summary of that discussion in three staff reports: December 11, 2006, January 25, 2007 and March 8, 2007. As demonstrated in the staff reports, the Environmental Health Department determined that the project would be expected to generate typical exhaust associated with commercial and restaurant uses; and confirmed that the recommended Conditions of Approval included requirements that restaurant's ventilation incorporated the Best Available Technology. Additionally, as result of the Open House meeting on January 20, 2007,

the applicant agreed to even more stringent requirements on ventilation, at the request of a neighboring property owner. Findings and Conditions of Approval include these additional restrictions. Staff notes that many of Berkeley's new mixed use buildings incorporate a ground floor restaurant with numerous residential units above. In conclusion, Staff identifies no potential significant air quality impact.

Noise: *The appellants assert* that noise associated with the proposed uses would be a significant impact on the surrounding neighborhood.

Response: The Zoning Adjustments Board considered potential noise conflicts with the proposed land use. Staff provided the Board with information on the noise attenuation ability of the existing building walls, and confirmed that the proposed uses would not be expected to exceed the City of Berkeley Noise Ordinance limitations. Additionally, the Board included a standard Condition of Approval to confirm that noise associated with the final tenant mix would not exceed the City's noise ordinance. Thus Staff identifies no evidence of potential significant noise impacts.

Increased Crime and Public Safety: *The appellants assert* that the crime in the area would significantly increase due to the proposed operating hours and sale of alcoholic beverages.

Response: The Berkeley Police Department reviewed this project, and provided a memorandum to the Zoning Adjustments Board concluding that the proposed project would not be expected to increase crime in the area. The Police Department initially expressed concerns regarding the proposed hours of operation (Sunday through Thursday: 7:00am to 12:00am; and Friday and Saturday 7:00am to 1:00am). As a result of concerns expressed both by the Berkeley Police Department and the neighbors, the applicant reduced the requested operating hours (Sunday through Thursday: 7:00am to 10:00pm; and Friday and Saturday 7:00am to 12:00am). The Berkeley Police Department also recommended conditions of approval regarding the sale of alcohol for off-premises consumption, loitering prevention, hours of operation and graffiti removal, all which were incorporated to into the Findings and Conditions approved by the Zoning Adjustments Board. As a result, the Berkeley Police Department does not object to the revised hours of operation, and the Zoning Adjustments Board considered the recommendation of the Berkeley Police Department prior to approving the project. Thus, Staff identifies no evidence of potential significant impact on crime and public safety.

Aesthetics: *The appellants assert* that aesthetic impacts of the project were not considered.

Response: The Zoning Adjustments Board found that the project site, under its previous owner, was not well maintained, and that the proposed project would increase the aesthetics of the building by replacing the auto repair bays (which were open to the street) with new store fronts that would provide a consistent building wall along the street, and enhance the pedestrian experience. Additionally, the Design Review Committee considered this project at their meeting in December 2006 and provided a positive recommendation to the Zoning Adjustments Board. Thus, Staff identifies no evidence of potential significant impact on the aesthetic quality of the surrounding area.

Transportation. *The appellants provide numerous assertions that the parking, traffic and pedestrian environment would be significantly adversely affected by the proposed project.*

Response: As evidenced in the Zoning Adjustment Boards staff reports, staff acknowledges that the Elmwood District suffers from lack of parking and traffic congestion. The applicant did not complete a traffic analysis for this project; nor was he required to. Transportation Planning requires a traffic study when a project includes more than 10 units, an increase in 5,000 square feet of gross floor area, or results in more than 25 peak hour trips. This project does not meet any of these thresholds. The project does not require any waiver or reduction in required parking, thus a parking study was not automatically required.

However, at the request of the Zoning Adjustments Board, Land Use Planning and Transportation Planning Staffs provided analysis of the vehicle trip and demand for parking that would be generated by this project, submitted in the March 8, 2007 Staff Report (pages 8 and 9). This analysis concluded that the proposed project would generate 8 trips during the District's afternoon peak hour. Transportation Planning defines the District's peak hours as 3:00pm to 4:00 pm Monday through Saturday and 1:00pm to 2:00pm on Sunday. The proposed restaurant's peak hour would be in the evening, at which time most of the stores in the District are closed. However, the Zoning Adjustments Board recognized that the District lacks parking and imposed requirements that the applicant work with other District merchants to improve District parking conditions; and further required the applicant to secure off-site parking prior to the proposed restaurant improvements (if a portion of the building is leased to a full-service restaurant). Thus, Staff identifies no evidence of potential significant impact on traffic due to this project.

Cumulative Impacts: *The appellants assert that the Zoning Adjustments Board did not consider the cumulative impacts that may occur as a result of this project.*

Response: Staff notes that CEQA categorical exemption may not be used when the cumulative impact of successive projects of the same type in the same place, over time, are significant. Currently, staff is not aware of any other proposed projects within the Elmwood Commercial District. Informal discussions around possible expansion of Elmwood Hardware indicate a possible addition of four residential units; should this project materialize, the impact of four units would not be sufficient to generate a potential environmental impact in this already-developed urban area. Thus, staff concludes that it is speculative to consider other projects and therefore, finds no evidence that any cumulative impacts should be evaluated.

For the above reasons, staff believes that information in the record adequately supports the Zoning Adjustments Board's CEQA determination that that the project is categorically exempt. In addition, Staff identifies no evidence in the record that potential significant impact might result from this proposed project.

Issue 2: "The project must discuss the environmental effects from cigarette smoke since the outdoor seating will prevent smoking near the front of the restaurant."

Response 2: The City of Berkeley does not typically evaluate the effects that cigarette smoke might have on surrounding properties. Smoking cigarettes is not illegal; however, it is not permitted in certain public locations. The amount of cigarette smoke that would result from this project is not measurable. However, as a standard condition of approval, the business owners are responsible for taking reasonable measures to prevent disturbances by patrons. Such measures shall include signs reminding patrons of nearby residences and requests not to congregate or loiter near such residences nor operate vehicles in a noisy manner on residential streets. The operator must monitor the public areas near the establishment, keep such areas free of trash and litter, provide lighting, and otherwise attempt to prevent conduct that might disturb the peace and quiet of residences in the vicinity. As a result, staff does not consider this issue a sufficient basis for appeal.

Issue 3: "The project should be denied because it not only expands the use, it expands the use beyond the zoning ordinance."

Response 3: The proposed project involves conversion of a commercial building from a multi-tenant building with 3 tenant spaces, to multi-tenant building with 4 to

7 tenant spaces. No additional floor area would be created. In accordance with Berkeley Municipal Code (BMC) Section 23E.44.050B, the Zoning Adjustments Board acted within their authority to approve the conversion of the existing building from its current 3 spaces to a minimum of 4 and a maximum of 7 spaces. With regard to permitting uses “beyond the Zoning Ordinance,” BMC Section 23.E.44.040 specifically authorizes the Zoning Adjustments Board to grant a Use Permit for land uses that would exceed the “quota slots” within the District, with specific findings. To utilize this authority given it in the Zoning Ordinance in no way implies that the Board is going beyond the Zoning Ordinance. The Zoning Adjustments Board determined that the findings required to allow a project to exceed the “quota slots” could be made. This issue was discussed at length by the Board, and the Board found that exceeding District “quota slots” for this specific land uses would promote the re-use of the existing building, which would comply with the purposes of the District and result in a positive enhancement to the District.

Issue 4: “The project and Use Permits are inconsistent with Berkeley Municipal Code, Berkeley’s Zoning Ordinance and CEQA.”

Response 4: The appellant contends that a fair argument can be made that the proposed project would have several effects on the environment, and is therefore inconsistent with CEQA. As evidence, the appellant asserts that the proposed restaurant is too big, and would result in more traffic, noise, cars, and garbage in the area. Staff disagrees with this assertion. As indicated above, staff evaluated potential environmental issues prior to making the determination that the project is exempt from CEQA. The Zoning Adjustments Board considered these issues, and determined that, similar to other restaurants in the City of Berkeley, the proposed restaurant would be subject to conditions of approval that would alleviate land use issues associated with the restaurant to a level that is acceptable in a neighborhood commercial district.

The project is consistent with the Berkeley Municipal Code (including the Zoning Ordinance). Prior to approving the project, the Zoning Adjustments Board discussed at length their ability to allow the project to exceed the established “quota slots.” Pursuant to the required findings set forth in §23E.44.090 of the Zoning Ordinance, the Zoning Adjustments Board found that the request to exceed the quota slots for specific uses would allow for additional retail and food options for residents, visitors and employees of the District. The Board also considered that the conversion of the auto repair portion of the building in effect increased the readily available commercial floor area of the District by 6.75 percent, and that

more than half of the existing businesses in the District (56 of 74) are quota land uses.

Issue 5: "There is not substantial evidence showing that the findings were made."

Response 5: The Zoning Adjustments Board made 11 different sets of findings, related to the different permits required, as required by the Zoning Ordinance, for each Use Permit request. Findings are copied in the Background section of this report. Evidence supporting the findings was provided to the Board within the staff reports and attachments prepared for the hearings. The appellants have provided no evidence supporting their assertion.

Issue 6: "Furthermore, there is no merchant support, marketing surveys or other information indicating that another restaurant will receive patronage from surrounding residents."

Response 6: The Zoning Adjustments Board found that there was adequate marketing information, and support for the proposed project. The project applicant provided marketing survey information, dated January 8, 2007, to the Zoning Adjustments Board demonstrating the lack of restaurants with a lounge in the surrounding neighborhood, and the applicant also spoke at the public hearing concerning the interest in small lease spaces (verses the large existing space) from parties calling with interest in leasing the building. Evidence of patronage for the restaurant, and other proposed uses, was presented to the Board in the public comment, and the KitchenDemocracy.com summary, which demonstrated support from over 100 residents within 1 mile of the project site, is part of the record and was discussed by Board members.

Issue 7: "How is that website [*KitchenDemocracy*] relevant to this project? How did staff determine that the poll was a fair representation of the people most affected by the project?"

Response 7: The Zoning Adjustments Board discussed the validity of the comments provided via KitchenDemocracy.com at March 8, 2007 meeting. The Board confirmed that these comments, a summary of which was provided in the record on February 5, 2007, are not more or less valid than individual comment letters or the 368-person petition that was provided into the record on March 2, 2007. The Board considered all of these comments, both negative and positive, whether made in writing or in public testimony, when making their findings.

Issue 8: "Finding 2(A) states that changing the non-conforming use to conforming commercial use will remove traffic. The conclusion is not supported by substantial evidence because the garage is vacant and may not be re-

initiated as a garage in the future. As such there is less traffic with a vacant building than there would be with the proposed project. ”

Response 8: This appeal point is factually incorrect. The auto shop and towing use could today be “re-initiated” as a legal non-conforming land use. While the previous auto repair business ceased operation in August 2005, an automobile repair business could still operate on the property (through the issuance of a Zoning Certificate) because the nonconforming use has not been declared terminated by the Board pursuant to BMC Section 23C.04.030, and no new legally conforming use has occupied the property. Staff would obviously agree that a vacant building creates less traffic than any use, but a vacant building would be inconsistent with the purposes of any commercial district. The finding referred to by the appellant [Finding 2A] indicates that the proposed use would reduce traffic congestion because once the new use is established; the owner **may not** continue the previous non-conforming use. Hence, the project site would no longer be permitted to have tow trucks and autos associated with the auto repair garage on-site.

Issue 9: “The project must analyze the foreseeable cumulative impacts from the proposed project. Easing the quotas in contravention of BMC 22.E.44.030 and .040 will cause other projects within the C-E District to expect similar treatment, a process which will render a cohesive zoning scheme meaningless.”

Response 9: Staff strongly disagrees with this assertion. The Zoning Ordinance specifically allows the quota to be exceeded, and provides a process and findings to do so. Nothing in this process contravenes the Zoning Ordinance; quite the contrary. This process implements the Zoning Ordinance. The request to exceed the quota limitation requires a Use Permit, and is subject to specific findings by the Zoning Adjustments Board. Each Use Permit is considered by the Board on a case-by-case basis. In the case of the proposed project, the Board found that special circumstances relate to this project, which can be summarize as: a) the large size and depth of the building, b) the increase in the commercial area by converting the auto garage to commercial retail uses (which represents approximately 7% of the District’s total commercial area), and c) that market analysis provides evidence of lack of similar proposed uses within the area, and d) that there is evidence of substantial neighborhood support (from residents within 1.5 miles of the site) in the public testimony before the Board, correspondence received, and by the *KitchenDemocracy.com* summary comments. Staff notes that the Zoning Ordinance requires either marketing analysis or neighborhood support as an indication that the use exceeding the quota is justifiable and expected

to be successful. Contrary to the representations of the appellants, nothing in this finding requires a majority popular vote on the land use, but simply evidence of strong support, which staff finds was clearly apparent in the public comment on this project.

Issue 10: “Distinct aspects of this project, such as serving alcohol, including distilled spirits at a separate bar and lounge is likely to engender a nuisance – the restaurant will be open late and make sales of alcohol which will have undisclosed and unanalyzed impacts on noise, crime, public safety and the like.”

Response 10: The Zoning Adjustments Board determined that the proposed project is not expected to increase crime in the area. The Board’s determination was based on the Berkeley Police Department memo, which determined that no increase in crime is expected as a result of this project.

Issue 11: “The ZAB report acknowledges that the bar is above and beyond the eating portion of the restaurant which Staff likened to existing Elmwood restaurants.”

Response 11: The reports prepared for the Zoning Adjustments Board compare the size and type of service of the proposed restaurant versus existing restaurants in the District. This analysis indicates that the proposed restaurant, at 5,000 square feet, is approximately 1,000 to 1,750 square feet larger than the two largest restaurants in the District (Shen Hua 3,250 square feet and King Yen 3,900 square feet). The Zoning Adjustments Board determined the size of the proposed restaurant is appropriate because it would be similar to these existing restaurants, excluding the bar lounge area.

Issue 12: “A traffic study should be done because uses like the restaurant, exercise studio, and the other retail shops will likely generate a lot of trips, which may cause significant environmental effects on the environment including but not limited to pollution, lack of parking spaces, congestion, and other maladies.”

Response 12: As discussed in more detail above, the City does not require traffic analysis for projects of this size and type. Please review Issue 1, *Transportation*.

Issue 13: “The [traffic] studies that support ZAB’s determination must be provided in the interest of CEQA’s disclosure requirements.”

Response 13: The traffic and parking demand data was provided by Land Use Planning and Transportation Planning staff, at the request of the Zoning Adjustments Board. A complete traffic and parking analysis was not

required or prepared for this project. The Board's determination was based on evidence in the staff report and the clarification provided at the public hearing on March 8, 2007.

Issue 14: "The current project mandates that employees will be required to park outside of the immediate neighborhood as a condition of the lease. But, this "goal" is unenforceable and there may be a significant impact to the environment in the area of parking resulting in the neighborhood not having a place to park in front of their own house, impeding the expectations and comfort of the neighbors."

Response 14: Staff disagrees with this assertion. This condition was included in the project as a result of the Open House meeting conducted by the applicant on January 20, 2007. The "goal" as it is referred to the appellant, is in fact enforceable as a condition of leasing a business within the subject building. If residents determine that employees are parking on streets within the immediate neighborhood, planning staff will notify the business owner that they must instruct employees to park outside of the neighborhood. This condition is enforceable as it will be demonstrated as a condition of the lease agreement.

Issue 15: "The current project description is vague. For example the current project states that it will "work with the Elmwood merchants to provide a parking attendant at existing metered lot north of the subject building" and "will work with the owner of the Huntmont Garage" to lease parking spaces on the weekends. A vague commitment to work with another business is not sufficient description or mitigation of the significant impact to parking."

Response 15: The condition referred to by the appellant requires that the applicant provide evidence to the Zoning Adjustments Board that off-site parking has been secured prior to a proposed restaurant occupying the building. The Board recognized that the burden of solving the existing parking problems within the District should not fall solely upon the project applicant and that though no parking was required for this project, this project could be used as a catalyst to improve the parking in the District by organizing efforts the merchants and the owner of nearby parking garage.

Issue 16: "Additionally, Mr. Gordon states that he would not lease the restaurant space to a major commercial chain store; however, this is not an enforceable condition."

Response 16: The appellant is correct that requiring the proposed restaurant to be a "non-chain" restaurant is not an enforceable condition of approval; hence this was not made a condition of approval for the project.

Issue 17: “The findings and conditions state that the full service restaurant is appropriate because it would facilitate leasing the unusually deep (over 100 feet) commercial space. However, this conclusion states no reasons in support as to why a restaurant, as opposed to other commercial uses fits the depth mold more than others.”

Response 17: The Zoning Adjustments Board concluded that the proposed restaurant is a desirable tenant because it would facilitate leasing the space by providing an anchor tenant that would increase retail activity on Ashby Avenue. Presently, the stores on Ashby Avenue do not pull the pedestrians around the corner from the other shops on College Avenue.

Issue 18: “The discussion of sidewalk seating is inadequate because there is no analysis as to how that may impact noise. Further, the Findings and Conditions do not find that the sidewalk seating will comply with the BMC noise ordinance, which may be a significant effect on the environment and should be further discussed.”

Response 18: The Zoning Adjustments Board considered the required findings for approval of sidewalk seating per BMC 23E.24.020 A and included a condition of approval that a) requires that sidewalk seating not be permitted after 10:00pm, and another condition requiring that a noise analysis be completed to confirm that the final tenant mix will comply with the noise ordinance. Noise generated by patrons sitting at the sidewalk tables would not exceed noise ordinance limits. Even if not stated in Conditions of Approval, the City’s Noise Ordinance always applies to a commercial operation. Therefore, staff disagrees with the appellants’ assertion.

Issue 19: “There should be a condition that if the neighbors can show conclusively by the investigation of adequate noise measuring equipment at least an initial couple times in a week that noise standards have been exceeded, then the burden shifts to the permittee (Mr. Gordon) to abate the exceedance of the noise ordinance.”

Response 19: The Zoning Adjustments Board included standard conditions of approval to ensure compliance with the noise ordinance. The City of Berkeley has a procedure for residents to submit noise compliance to the Environmental Health Department, which evaluates these complaints and notifies the Land Use Planning staff if violations of Conditions of Approval have occurred.

Issue 20: “The proposed restaurant is too large for this neighborhood.”

Response 20: See Response 11.

Issue 21: “The granting of multiple non-specific use permits, especially for uses that exceed quota’d categories, without ANY information about the business, hours of operation, goods or services available, number of employees, or anything else, goes directly against the intentions and essence of the Elmwood Zoning Ordinance.”

Response21: See Responses 3 and 4.

Issue 22: “The granting of Use Permits without having more specific information about the businesses gives special rights to this applicant not given to other Elmwood merchants.”

Response22: Staff disagrees with this assertion. Any Use Permit “rides with the land,” which means it may be transferred by right to any other establishment that meets the conditions of the permit. Land use decisions are based on the proposed use, not the name of the operator. The Zoning Adjustments Board is not required to specify the exact business entity requesting a Use Permit. The Board was tasked with making all of the required findings, and providing parameters for all proposed business operations for each of the requested Use Permits, which is evidenced in the record. No special rights were provided to the project applicant.

Issue 23: “There was an assumption by the Zoning Board that this property was in some way “derelict” and had been vacant for an extended period.”

Response 23: The Zoning Adjustments Board did consider the use of the auto garage as less desirable use than the proposed retail uses. The Zoning Adjustments Board and Design Review Committee were supportive of the concept of creating new store fronts to replace the auto repair bays, which were not viewed as a pedestrian friendly storefront.

Issue 24: “This is the largest development project that the Elmwood will see in the next 100 years, and this is an opportunity for the City to re-define its commitment to neighborhoods, to small and family-owned businesses and to making sure that this neighborhood commercial district maintains its focus on serving the needs of the citizens immediately surrounding it first and foremost.”

Response 24: This project will mark a change at the College and Ashby intersection by improving this site with new retail store fronts, and closing the auto garage. The Zoning Adjustment Board made the required findings for each of the requested use permits, and included sixty-eight conditions of approval to ensure the project would not burden the surrounding neighborhood. The Elmwood District includes numerous examples of residential uses directly abutting commercial uses; the Board recognized

this land use pattern by including conditions to allow the two land uses to co-exist capably and complimentary to one another, as would be found in any developed urban area. The ZAB proceedings and the special finding required by the Zoning Ordinance are designed to ensure that future businesses in this neighborhood commercial area would focus neighborhood serving business.

Issue 25: “What we really need is the City to recognize that is responsible for creating a fertile environment for this neighborhood to flourish. We need the City to take an active role in finding real solutions for the parking and traffic flow problems that continue to keep our neighborhood choked, and to prevent developers from making those problems even greater.”

Response 25: See Response Number 1 (Transportation).

Issue 26: “The Elmwood Theatre, which was saved by the generous contributions of Elmwood merchants, will not be able to survive in an atmosphere in which customers have to struggle to find parking by show times.”

Response 26: Parking concerns for the District, including parking associated with the Theatre, were discussed at length by the Zoning Adjustments Board. As discussed above, the applicant is subject to compliance multiple conditions of approval regarding parking, including a stipulation that off-site parking must be secured prior to occupancy by the proposed restaurant.

Issue 27: “The public notice was inadequate, given the number of people who will be impacted by the project.”

Response 27: The appellants provide no evidence to support this assertion. Notices of the public meeting were posted on the project site, and sent to property owners within 300-feet of the project site. The Willard, Bateman and Claremont Neighborhood Associations were also notified. In addition, the Planning Department’s Website, the Kitchen Democracy website, and Save Elmwood website advertised the opportunities for public comment.

In summary, the objectives raised by the appellants are not unique to this proposal but would result from any reuse of the building. Any use would generate traffic, parking demand, the potential for noise, etc. There is nothing submitted as part of the appeal which documents how this specific project will have unique or higher impacts than other commercial activity. Traffic in the neighborhood Elmwood District is not primarily from commercial activity but is related to traffic moving from UC Berkeley, to and from Highway 13, etc.

ALTERNATIVE ACTIONS CONSIDERED

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

1. 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.
2. Remand to the Zoning Adjustments Board: If the Council determines that the facts ascertainable from the record prepared by the Zoning Officer warrant reconsideration of the application by the Zoning Adjustments Board, or if the applicant has submitted revisions to the application, the Council shall remand the matter to the Zoning Adjustments Board to reconsider the application, in which case it shall specify whether or not the Zoning Adjustments Board shall hold a new public hearing, and shall identify those issues which the Zoning Adjustments Board is directed to reconsider. (Council must specify issues that the Zoning Adjustments Board 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 Zoning Adjustments Board 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 appeal first appeared on Council agenda June 12, 2007
2. If none of the two actions shown above is taken by July 12, 2007 (30 days from the date the appeal first appears on the agenda- this is tolled during Council's recess), the decision of the Zoning Adjustments Board 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

Attachments:

- 1: Resolution
Exhibit A: Findings and Conditions
- 2: Approved Plans
- 3: Appeal Letters
4. Index to administrative record
- 5: Administrative Record

RESOLUTION NO. _____-N.S.

AFFIRMING THE DECISION OF THE ZONING ADJUSTMENTS BOARD TO APPROVE USE PERMIT No. 06-10000098 TO CONVERT AN EXISTING 3-TENANT COMMERCIAL BUILDING (WRIGHT'S GARAGE BUILDING) INTO A 4 TO 7 TENANT COMMERCIAL BUILDING; AND TO CHANGE UES TO ONE RESTAURANT, ONE EXERCISE/DANCE STUDIO, AND UP TO 5 RETAIL SPACES, AND DISMISSING THE APPEAL

WHEREAS, on July 27, 2006, the City received an application for conversion of the 3-unit Wrights Garage Building located 2629-2635 Ashby Avenue; and

WHEREAS, on October 19, 2006, the applicant presented the project to the Design Review Committee; and

WHEREAS, on October 19, 2006, the Design Review Committee forwarded a positive recommendation to the Zoning Adjustments Board with the expectation that the project will come back with specific tenant information and additional details (6-Yes, 0-No, 0-Abstain); and

WHEREAS, on October 26, 2006, the City deemed the application complete; and

WHEREAS, on November 30, 2006, the City released a public hearing notice; and

WHEREAS, on December 14, 2006, the Zoning Adjustments Board continued the public hearing to the January 11, 2007 due to requests from Elmwood District business owners, and the lengthy meeting agenda; and

WHEREAS, on January 11, 2007, the Zoning Adjustments Board held a public hearing, took testimony from the public, directed staff to conduct additional research on the District quota system, and continued the project at the request of the applicant, so that he could hold an Open House Community meeting to discuss issues raised during the public testimony; and

WHEREAS, on January 25, 2007, the Zoning Adjustments Board continued the public hearing, took additional testimony from the public, requested additional project details from the applicant, directed staff to conduct additional research on parking in the District, closed the public hearing and continued the Board's consideration of the project to the February 8, 2007 Board meeting; and

WHEREAS, on February 8, 2007, the Zoning Adjustments Board continued discussion of the project the March 8, 2007 meeting at the request of staff; and

WHEREAS, on February 21, 2007, the applicant submitted a revised project description including a refined floor plan that established three "use zones" restricting the location of proposed land uses within the building, and withdrawal of the request to exceed the numerical quota limitation for art/craft, gift/novelty and jewelry watch shops; and

WHEREAS, on March 8, 2007, the Zoning Adjustments Board considered the revised project description, and approved Use Permit No. 06-10000098 (6-Yes, 3-No, 0-Abstain); and

WHEREAS, on March 14, 2007, notice of the Zoning Adjustments Board decision was issued; and

WHEREAS, on March 28, 2007, Raymond Barglow and The Elmwood Neighborhood Association (with two letters, including one from Amber Verling, Attorney for The Elmwood Neighborhood Association and another letter from the Elmwood Neighborhood Association Board Members) filed an appeal with the City Clerk; and

WHEREAS, attached hereto are the findings and conditions adopted by the Zoning Adjustments Board (Exhibit A) 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 Staff report and correspondence presented to the 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 approve Use Permit No. 06-10000098, and dismissing the appeal.

NOW THEREFORE, BE IT RESOLVED that the Council of the City of Berkeley hereby affirms the decision of the Zoning Adjustments Board to approve Use Permit No. 06-10000098 for the project located at 2629-2635 Ashby Avenue based on the findings contained in Exhibit A, and dismisses the appeal.

