



Office of the City Manager

ACTION CALENDAR  
November 27, 2007

To: Honorable Mayor and Members of the City Council

From: *PK* Phil Kamlarz, City Manager

Submitted by: Dan Marks, Director, Planning and Development

Subject: Tract Map Appeal: 1423 Walnut Street

RECOMMENDATION

Conduct a public hearing and adopt a resolution affirming the Notice of Decision (NOD) for converting five (5) units at 1423 Walnut to condominiums. The 50-day action period expired on July 6, 2007 without action by the Planning Commission as required by State law and the applicant declined the Planning Department's request for an extension of the time period. Therefore, this five-unit residential condominium conversion project was approved, with conditions, by operation of law on July 6, 2007.

FISCAL IMPACTS OF RECOMMENDATION

The condition listed on the NOD stated that the project is subject to the full affordable housing mitigation fee, per Berkeley Municipal Code (BMC) 21.28.060.A.

CURRENT SITUATION AND ITS EFFECTS

The residential condominium conversion project was approved on July 6, 2007 by operation of law (Gov. Code Section 66452.4(a)). Larry Neal, applicant, requested a written certification of approval. This is allowed pursuant to Gov. Code Section 66452.4(b). Staff issued the Notice of Decision on August 8, 2007. The applicant disagrees with conditions of map approval establishing a full fee for conversion rather than a reduced fee and appealed on August 17, 2007. Staff believes the fee was properly determined. The Tentative Tract Map is valid for 24 months.

BACKGROUND

The former applicant, Rena Rickles, submitted a Request for Selection (RFS) to convert to condominiums on September 5, 2005. BMC Section 21.28.050.A lists one of the eligibility requirements:

“At no time within ten years of the time the application is filed shall an owner of the property have filed with the City of Berkeley a statement of intent to go out of the rental business...” (i.e., a filing under the Ellis Act)

The letter accompanying the RFS stated that although the owner filed an intent to remove property from the rental market pursuant to the Ellis Act in March 2001, the

application was withdrawn prior to the 120-day expiration. The letter went on to say that all tenants remained on the premise for the next 1-3 years and the rents were restored.

On January 4, 2006, based in significant part on this latter representation, the project was selected to begin the condominium conversion process. The selection letter from the Planning Department stated the selection was contingent on verification of the applicant's claims in the RFS application. On January 30, 2006, Ms. Rickles submitted additional information to support her argument that no tenants were displaced when the owner filed under the Ellis Act. As noted above, an Ellis Act filing would have disqualified the property from the condominium conversion process for ten years. The documents submitted by Ms. Rickles include a letter from the owner, dated June 14, 2001, to the Rent Stabilization Board rescinding the Ellis Act filing and a notarized acknowledgement, called a "Removal of Constraints of Real Property," filed by the Rent Stabilization Board on July 9, 2002. When the owner filed under the Ellis Act, the Rent Stabilization Board placed constraints on the property and recorded the notice with the Alameda County Recorder. The "Removal of Constraints" filed by the Rent Stabilization Board eliminated the previous constraints and effectively recognized the property as not removed from the rental housing business.

On April 11, 2006, Ms. Rickles submitted a Request for Local Law Compliance application and required materials. On May 25, 2006, Ms. Rickles submitted a letter addressing the Planning Department staff's concerns regarding the project's eligibility. Planning Department staff was not convinced the project met the Ellis Act restriction under BMC21.28.050.A. From the documents submitted by Ms. Rickles and subsequent meetings between the Planning Department and Rent Stabilization Board staff concluded that if the Ellis Act filing did not displace any of the tenants, the project would be eligible to continue with the condominium conversion process. Planning Department staff determined the project could continue with the condominium conversion process and notified the applicant of such on June 11, 2006.

A new applicant, Mr. Neal, took charge of the project and submitted the Map Application on April 17, 2007. Under State Subdivision Map Act law, the City is required to act on such an application within 50 days, or a map is "deemed approved" (Gov. Code Section 66452.4(a)). During a May 30, 2007, interdepartmental meeting concerning the City's Condominium Conversion Program, the project was mentioned and a Rent Stabilization Board staff member in attendance questioned whether the project was eligible. As noted above, the Rent Stabilization Board had removed the constraints on the property because the owner claimed no tenants were harmed with the Ellis retraction, and the Planning Department has relied on this action. However, further investigation by Rent Stabilization Board staff indicated that at least one tenant had in fact been forced to move because of the Ellis Act filing. Therefore, the constraints were removed in error due to false information from the owner. Nonetheless, because the eligibility determination had already been made and the application had been accepted, it was too late to remedy this error.

In the midst of the eligibility discussion, a problem was discovered in a section of the Condominium Ordinance. BMC 21.28.065.B.1 stated,

“If the owner converting the property agrees to limit future rent increases for current tenants to no more than 65% of the increase in the Consumer Price Index for all Bay Area Consumers after conversion, then the affordable housing fee shall not exceed 12.5% of the sales price of the unit.”

The Planning Department interpreted this section to say that if units were vacant or owner-occupied, they could not qualify for a reduction in the affordable housing mitigation fee and would therefore be subject to the full mitigation fee. The City Attorney confirmed Planning Department staff's interpretation. However, after discussing this interpretation with Housing Department and Rent Stabilization Board staff, it became clear that this was not the intent of the ordinance. The intent was to allow owner-occupied and vacant units to receive the reduced fee. The Planning Department subsequently began the process of modifying the ordinance to reflect the intent and City Council adopted the amendment on July 10, 2007. In order to avoid assessing the higher fee in a manner inconsistent with the intent, staff asked several applicants for extensions on their projects to allow for the ordinance amendments.

On July 16, 2007, Be Tran of the Planning Department left a voicemail for Larry Neal to request an extension. Mr. Neal expressed his reluctance to grant an extension due to the date of the next Planning Commission meeting (September 5, 2007) and a pending sale on one of the units. Mr. Neal thought it was unfair to ask his clients to grant an extension to the action date when the Planning Department had not requested one prior to the expiration date. Mr. Neal was informed of pending amendments to the Condominium Ordinance and of other projects' acceptance of extensions to allow for project approval under the ordinance amendments. Mr. Neal would not agree to request an extension, and notified the City that the project was approved by operation of law, consistent with Gov. Code Section 66452.4.

The City of Berkeley issued a Notice of Decision (NOD) on August 8, 2007 deeming the project approved by operation of law on July 6, 2007, and required payment of the full housing mitigation fee at the time of sale of the unit(s). Consistent with state law, this project is subject to the ordinance in effect at the date of approval and therefore units without a tenant are subject to the full affordable housing mitigation fee. Additionally, the applicant did not indicate to the City that the owners would agree to limit their future rent increases on unit(s) with sitting tenants, and therefore did not qualify for the 12.5% cap on the mitigation fee on the unit(s) with a tenant. Should the applicant withdraw his tentative map approval, he would not be eligible to proceed with a new map because of the Ellis Act determination described above.

#### RATIONALE FOR RECOMMENDATION

The appellants have raised the following points (staff's response follow each point):

Issue: "Since the project was approved by operation of law, rather than through the hearing process, it is our position that the City is legally proscribed from imposing any conditions or requirements on the project, including without limitation all conditions and requirements described in the Notice of Decision in the four bullet points on pages 1-3. Such conditions might have been imposed in connection with a project that was approved through the normal process, and the applicant would have had the opportunity to be appraised in advance of any such conditions or requirements and respond to and comment upon them during the public process. However, since that opportunity was not afforded and the project was approved by operation of law, we submit that none of the conditions or requirements enumerated in the Notice are appropriate, nor are any others."

Response: Subdivision Map Act states that when a project is approved by operation of law, it "shall be deemed to be approved, insofar as it complies with other applicable requirements of this division and any local ordinances..." (Civil Code Section 66452.4(a)). BMC Section 21.28.050 discusses the eligibility requirements of projects. One of those requirements is:

"The owner must agree that, at the time of sale of each unit, an affordable housing fee, as described in Section 21.28.060, shall be paid to the City" (BMC Section 21.28.050.D.).

In order to be eligible to convert into condominiums, the applicant must agree to pay the affordable housing mitigation fee. The applicants and owners of the project have known about this eligibility requirement and had opportunity to discuss this with staff and request modification appraise from the time of the RFS to the Map Application stage. If the Planning Commission hearing had taken place, the City may have placed further project specific conditions on this Map, not just those required by the Condominium Ordinance. Since the hearing did not occur, the City cannot place conditions not required by law. But in order to obtain approval of the Final Map, the conditions of the condominium ordinance must be satisfied.

Issue: "Without waiving the position taken in Item No.1, to the extent that it is determined appropriate that conditions or requirements may be imposed by the City in connection with the "deemed approved" status of this project, we submit that certain of the conditions and requirements are sufficiently vague and ambiguous such that the applicant cannot ascertain how and to what extent they will be applied by the City. For example, it is unclear how the City intends to calculate the affordable housing fee under BMC Section 21.28.060. First, there is the issue of what ordinance will be applied: the ordinance in effect at the time that the application was

approved, the ordinance amendments that have already been enacted and will take effect today (August 17, 2007) and/or possible new amendments that are clearly contemplated and might be in place by the time that the Council is able to schedule a hearing on this appeal. Second, representatives of my client have been informed by City staff that the City intends to interpret the housing fee calculation (the capitalized value) in a manner that would result in payment of exorbitant and confiscatory fees, fees that well exceed 50% of the market value of the units. Our interpretation of the ordinance, on the other hand, which is based upon the most logical and literal reading of the formula contained in Section 21.28.060.A., results in a fee that is far lower than has been intimated by City staff. Third, to which units and in what precise manner will fees be applied to each unit, and is there any residual Ellis Act "issue"? (For example, what units are considered owner occupied and what units are tenant units?) In short, we do not know for sure how the fees will be calculated, and thus we must appeal in order to seek and obtain clarity as to this critical point."

Response: The ordinance applicable to this project is the ordinance in effect at the date of approval by operation of law. The NOD was issued after the applicant requested for the approval and Gov. Code Section 66452.4(b) says,

"Once a tentative map is deemed approved pursuant to subdivision (a), a subdivider shall be entitled, upon request of the local agency or the legislative body, to receive a written certification of approval."

The section states project approval occurred when the 50-day period expired and no action was taken. It is required by state law to apply the law in effect at the time of decision unless there is specific language in the ordinance to the contrary. The Condominium Ordinance amendments adopted on July 10, 200 and effective on August 9, 2007 were not in effect at the time of project approval and do not apply to this project.

The issue of the affordable housing mitigation fee raised by the appellant centers on how the City applies the formula described in BMC Section 21.28.060.A (060.A). Plain language of this section of the ordinance refers to "the capitalized value of the increase in the monthly cost of the condominium unit compared to the rental unit for a tenant with the median income for the City of Berkeley." Capitalization of value calculations are employed routinely in real estate and planning practice to estimate the market value of real property based on a stream of income or costs over a period of time. Section 060A has been part of the condominium conversion ordinance since 1997, and since its adoption the City has

interpreted this section as an annualized calculation--that is, one that takes the difference between monthly rental and ownership costs of the property and multiplying them by 12 before dividing by the mortgage rate (the capitalization rate in the formula). A sample calculation in a 1997 staff report clearly indicates to the City Council staff's interpretation of 060.A's language as annualizing the monthly data specified in the ordinance prior to calculating the fee. Staff has continued this practice when providing estimates of the fee to interested property owners considering condominium conversion since that time.

The City recognizes the members of 1423 Walnut Limited Liability Company (LLC) residing in 1423 Walnut as owner-occupants. In addition, forms submitted by the applicants and owners called 1423 Walnut, LLC members owner-occupants.

Issue: "To the extent that BMC Section 21.28.065.B.1 is applied to this project, we believe that such application may be inconsistent with the provisions of the Costa Hawkins Rental Housing Act, specifically Civil Code Section 1952.52(a)(3)(B)(ii), if the 65% rent cap is inappropriately utilized with respect to units that would qualify for this exemption under Costa Hawkins. Once again, this is an issue that may resolve itself through further clarification, but we raise it here to preserve our rights in the event that a mutually agreeable resolution of the issues contained herein does not occur."

Response: The 65% rent cap is consistent with Costa-Hawkins because it is voluntary. In any event, this issue is not raised in this case because the applicant has never agreed to limit the rents or protect the tenants.

#### ALTERNATIVE ACTIONS CONSIDERED

None. A public hearing is required by Government Code section 66452.5(a).

#### CONTACT PERSON

Debra Sanderson, Land Use Planning Manager, Planning Department, 981-7417

#### Attachments:

- 1: Resolution: Exhibit A: Notice of Decision & Exhibit B: Tentative Tract Map
- 2: Appeal Letter
- 3: Index to Administrative Record
- 4: Administrative Record
- 5: Public Hearing Notice
- 6: 300' Mailing List

RESOLUTION NO. ##,###-N.S.

AFFIRMING THE NOTICE OF DECISION WITH CONDITIONS FOR CONVERTING  
FIVE UNITS AT 1423 WALNUT STREET TO CONDOMINIUMS

WHEREAS, on September 5, 2005 the Planning Department received a Request for Selection application from Rena Rickles to convert five residential units to condominiums at 1423 Walnut; and

WHEREAS, on January 4, 2006, the project was selected and Planning Department staff requested additional documentation to support Ms. Rickles' claims regarding tenant and rent history; and

WHEREAS, on January 30, 2006, Ms. Rickles submitted additional documentation; and

WHEREAS, on April 11, 2006, Ms. Rickles submitted a Request for Local Law Compliance application and required materials; and

WHEREAS, on May 25, 2006, Ms. Rickles submitted a letter addressing the Planning Department staff's concerns regarding the project's eligibility; and

WHEREAS, on June 11, 2006, Planning Department staff notified Ms. Rickles of the project's eligibility; and

WHEREAS, on April 17, 2007, Larry Neal, new applicant, submitted the Map Application for the project; and

WHEREAS, on May 30, 2007, Planning Department staff learned from the Rent Stabilization Board that the project was not qualified to convert to condominiums due to tenant displacement from the filing of the Ellis Bill; and

WHEREAS, on July 6, 2007, the project was deemed approved by operation of law due to the City's failure to act on the project within 50 days; and

WHEREAS, on July 21, 2007, Mr. Neal requested a written certification of approval for the project; and

WHEREAS, on August 8, 2007, the City issued a Notice of Decision (NOD) stating the project was deemed approved by operation of law and listing conditions required by the Condo Ordinance in order to obtain final map approval; and

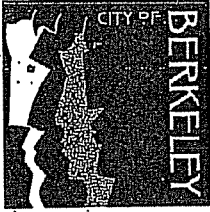
WHEREAS, on August 17, 2007, the applicant appealed the NOD due to disagreement over the condition of a full affordable housing mitigation fee; and

WHEREAS, attached hereto is the NOD for this project (Exhibit A) that are included by reference as though fully incorporated herein; and

WHEREAS, attached hereto is a reduced copy of the approved tentative tract map (Exhibit B) that is included by reference as though fully incorporated herein; and

WHEREAS, the Council has considered the record of the NOD; the recent Staff report and correspondence presented to the City Council, and, in the opinion of this Council, the facts stated in, or ascertainable from this information, warrant affirming the NOD and its conditions to approve the tentative map and dismissing the appeal.

NOW THEREFORE, BE IT RESOLVED that the Council of the City of Berkeley hereby affirms the NOD to approve Tentative Tract Map 7887.



RECEIVED  
AUG 08 2007  
LAND USE PLANNING

Planning and Development Department  
Land Use Planning Division

August 8, 2007

Applicant: Larry Neal, Attorney  
16 Ridge Place, Pleasant Hill, CA 94523

## NOTICE OF DECISION

1423 Walnut

### CONVERSION OF FIVE-UNIT TENANCY-IN-COMMON PROJECT TO FIVE CONDOMINIUM UNITS

#### TENTATIVE TRACT MAP #7887

Tentative Tract Map #7887 for the conversion of a five-unit Tenancy-in-Common Project to five condominium units is hereby approved by operation of law, under Section 66452.4 of the California Government Code, as the 50-day period expired on July 6, 2007. Approval of the Tentative Map is valid for a period of 24 months; if the Final Tract Map is not filed before 24 months, the approval shall terminate. The Final Map must satisfy requirements of the Subdivision Map Act and Berkeley Municipal Code (BMC), including but not limited to:

- The affordable housing fee shall be the capitalized value of the increase in the monthly cost of the condominium unit compared to the monthly cost of the rental unit for a tenant. Monthly homeownership costs will be determined by adding mortgage payments, taxes, and homeowners association fees. Mortgage payments will be the current average fixed rate thirty-year mortgage as reported by the San Francisco Federal Home Loan Bank applied to ninety-five percent of the purchase price. The rent shall be the current market rent at the time of filing the application. The capitalized value shall be determined by dividing the increase in monthly housing payments by the mortgage interest rate (BMC Section 21.28.060(A)).
- The affordable housing fee for conversion of a rental unit shall be based on the actual sales price, provided that the sales price is no lower than ninety percent of the appraised value of the unit as a condominium at the time of sale. If units are sold at prices below this level, the affordable housing fee must be paid in the same amount as if the unit were sold at ninety percent of appraised value. Owners shall have the option of paying the fee at any time prior to sale of any

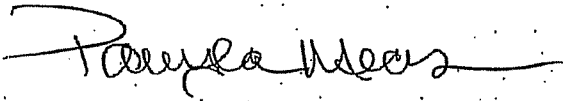
unit, based on the full appraised value of each unit. Where a unit is occupied by an owner prior to conversion to condominiums, the fee may be based either on the appraised value of the unit as a condominium at the time of conversion or on the actual price at the time of sale at the discretion of the owner (BMC Section 21.28.060(B)).

- An appropriate document or documents, in a form required by the City, indicating the amount of the portion of the affordable housing fee attributable to each unit, and which is owed to the City, shall be executed and recorded with the County Recorder. Such documents shall indicate a lien in favor of the City in an amount equal to the affordable housing fee for that unit. Upon payment to the City of the fee amount, a release of the lien shall be filed by the City with respect to each unit for which the fee has been paid (BMC Section 21.28.060(D)).
- The following conditions apply to any conversion of rental units:
  1. The owner shall offer and continue to offer the exclusive right to purchase each rental unit in the building to the tenant thereof upon the terms set forth in the application, without change, for a period of not less than one year from the date of final approval by the California Department of Real Estate, or the date the first unit in the building is offered for sale, if no approval by the California Department of Real Estate is required.
  2. The owner shall satisfy the affordable housing fee requirements by paying the fee, or having recorded documents in a form required by the City, indicating the indebtedness to the City and a willingness to pay at time of sale or refinancing, as described in Section 21.28.060.
  3. No tenant, shall at any time after the submission of the conversion application be evicted for the purpose of occupancy by the owner, or by occupancy by any relative of the owner so long as the unit remains the tenant's principal place of residence. In the event the tenant does not exercise his or her right to purchase within the time period set forth in this section, the owner may transfer the unit without any price restriction to the tenant or any other person. However, in the event such transfer is to someone other than the tenant, the transfer shall be expressly made subject to the rights of the tenant to continue to occupy the unit as provided for in this section.
  4. Where improvements are required as conditions of approval of the tentative map or parcel map or by City ordinance, any required improvement plan submitted pursuant to Chapter 21.44 shall include an analysis of potential harmful impacts on tenants of the repair and alteration process due to noise, blocked access, temporary displacement, increased rents, or other harms, and a plan for mitigation of harmful impacts.
  5. Where the owner proposes or intends to make improvements other than pursuant to Section 21.28.120.B.4, the owner shall submit to the Planning Commission an analysis of potential harmful impacts on tenants of the repair and alteration process due to noise, blocked access, temporary displacement, increased rents, or other harms, and a plan for mitigation of harmful impacts.
  6. The owner shall provide all prospective buyers with a report on the seismic safety of the property (BMC Section 21.28.120(B)).

The approval by operation of law is subject to appeal to the City Council. It may be appealed by the subdivider or other persons aggrieved by the approval for a period of ten (10) days from the date of this notice. Such appeal must be filed in writing with the City Clerk. The approval by operation of law may also be certified or reviewed by the City Council for a period of twenty-one (21) days from the date of the approval.

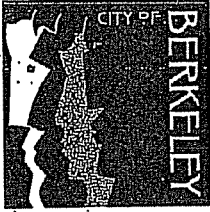
The approval of the Tentative Tract Map will expire twenty-four (24) months from the date of the approval by operation of law subject to the conditions described in Section 66452.6 of the State Subdivision Map Act. An extension to the expiration date may be approved as provided in Section 21.16.080 of the Subdivision Ordinance.

Approved by



Pamyla Means, City Clerk

Cc: Public Works Department  
Engineering Division, Ted Zupan, Associate Civil Engineer  
Planning and Development Department  
Land Use Planning Division, Be Tran, Assistant Planner  
Building and Safety, Joan MacQuarrie, Building Official  
Engineer: Bay Area Land Surveying, Inc.  
1828 Bonita Road, Richmond, CA 94806



RECEIVED  
AUG 08 2007  
LAND USE PLANNING

Planning and Development Department  
Land Use Planning Division

August 8, 2007

Applicant: Larry Neal, Attorney  
16 Ridge Place, Pleasant Hill, CA 94523

## NOTICE OF DECISION

1423 Walnut

### CONVERSION OF FIVE-UNIT TENANCY-IN-COMMON PROJECT TO FIVE CONDOMINIUM UNITS

#### TENTATIVE TRACT MAP #7887

Tentative Tract Map #7887 for the conversion of a five-unit Tenancy-in-Common Project to five condominium units is hereby approved by operation of law, under Section 66452.4 of the California Government Code, as the 50-day period expired on July 6, 2007. Approval of the Tentative Map is valid for a period of 24 months; if the Final Tract Map is not filed before 24 months, the approval shall terminate. The Final Map must satisfy requirements of the Subdivision Map Act and Berkeley Municipal Code (BMC), including but not limited to:

- The affordable housing fee shall be the capitalized value of the increase in the monthly cost of the condominium unit compared to the monthly cost of the rental unit for a tenant. Monthly homeownership costs will be determined by adding mortgage payments, taxes, and homeowners association fees. Mortgage payments will be the current average fixed rate thirty-year mortgage as reported by the San Francisco Federal Home Loan Bank applied to ninety-five percent of the purchase price. The rent shall be the current market rent at the time of filing the application. The capitalized value shall be determined by dividing the increase in monthly housing payments by the mortgage interest rate (BMC Section 21.28.060(A)).
- The affordable housing fee for conversion of a rental unit shall be based on the actual sales price, provided that the sales price is no lower than ninety percent of the appraised value of the unit as a condominium at the time of sale. If units are sold at prices below this level, the affordable housing fee must be paid in the same amount as if the unit were sold at ninety percent of appraised value. Owners shall have the option of paying the fee at any time prior to sale of any

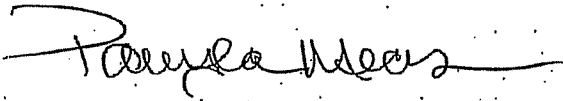
unit, based on the full appraised value of each unit. Where a unit is occupied by an owner prior to conversion to condominiums, the fee may be based either on the appraised value of the unit as a condominium at the time of conversion or on the actual price at the time of sale at the discretion of the owner (BMC Section 21.28.060(B)).

- An appropriate document or documents, in a form required by the City, indicating the amount of the portion of the affordable housing fee attributable to each unit, and which is owed to the City, shall be executed and recorded with the County Recorder. Such documents shall indicate a lien in favor of the City in an amount equal to the affordable housing fee for that unit. Upon payment to the City of the fee amount, a release of the lien shall be filed by the City with respect to each unit for which the fee has been paid (BMC Section 21.28.060(D)).
- The following conditions apply to any conversion of rental units:
  1. The owner shall offer and continue to offer the exclusive right to purchase each rental unit in the building to the tenant thereof upon the terms set forth in the application, without change, for a period of not less than one year from the date of final approval by the California Department of Real Estate, or the date the first unit in the building is offered for sale, if no approval by the California Department of Real Estate is required.
  2. The owner shall satisfy the affordable housing fee requirements by paying the fee, or having recorded documents in a form required by the City, indicating the indebtedness to the City and a willingness to pay at time of sale or refinancing, as described in Section 21.28.060.
  3. No tenant, shall at any time after the submission of the conversion application be evicted for the purpose of occupancy by the owner, or by occupancy by any relative of the owner so long as the unit remains the tenant's principal place of residence. In the event the tenant does not exercise his or her right to purchase within the time period set forth in this section, the owner may transfer the unit without any price restriction to the tenant or any other person. However, in the event such transfer is to someone other than the tenant, the transfer shall be expressly made subject to the rights of the tenant to continue to occupy the unit as provided for in this section.
  4. Where improvements are required as conditions of approval of the tentative map or parcel map or by City ordinance, any required improvement plan submitted pursuant to Chapter 21.44 shall include an analysis of potential harmful impacts on tenants of the repair and alteration process due to noise, blocked access, temporary displacement, increased rents, or other harms, and a plan for mitigation of harmful impacts.
  5. Where the owner proposes or intends to make improvements other than pursuant to Section 21.28.120.B.4, the owner shall submit to the Planning Commission an analysis of potential harmful impacts on tenants of the repair and alteration process due to noise, blocked access, temporary displacement, increased rents, or other harms, and a plan for mitigation of harmful impacts.
  6. The owner shall provide all prospective buyers with a report on the seismic safety of the property (BMC Section 21.28.120(B)).

The approval by operation of law is subject to appeal to the City Council. It may be appealed by the subdivider or other persons aggrieved by the approval for a period of ten (10) days from the date of this notice. Such appeal must be filed in writing with the City Clerk. The approval by operation of law may also be certified or reviewed by the City Council for a period of twenty-one (21) days from the date of the approval.

The approval of the Tentative Tract Map will expire twenty-four (24) months from the date of the approval by operation of law subject to the conditions described in Section 66452.6 of the State Subdivision Map Act. An extension to the expiration date may be approved as provided in Section 21.16.080 of the Subdivision Ordinance.

Approved by



Pamyla Means, City Clerk

Cc: Public Works Department  
Engineering Division, Ted Zupan, Associate Civil Engineer  
Planning and Development Department  
Land Use Planning Division, Be Tran, Assistant Planner  
Building and Safety, Joan MacQuarrie, Building Official  
Engineer: Bay Area Land Surveying, Inc.  
1828 Bonita Road, Richmond, CA 94806

RECEIVED

APR 1 11 2007

APR 11 2007

1	CITY MONUMENT
2	RECORDS FOOTPRINT
3	200' BOUNDARY LINE
4	BACKSIGHT CORNER
5	FORWARD-SIGHT CORNER
6	PROPERTY LINE
7	TRAIL LINE
8	TRAIL LOT LINE

**BENCHMARK:**  
BRASS PIN OF CITY MONUMENT AT THE INTERSECTION OF WAINUT STREET AND ROSE STREET, CITY OF BERKELEY, CALIFORNIA. ELEVATION 247.745.

**BASIS OF BEARING:**  
MONUMENT LINE IN ROSE STREET, TAKEN AS NORTH 89° 00' 00" E, AS SHOWN ON TRACT MAP 3005 (60 N. 40), ALAMEDA COUNTY RECORDS.

GRAPHIC SCALE  
(IN FEET)  
1 inch = 30 ft.

**A ONE LOT SUBDIVISION FOR CONDOMINIUM CONVERSION PURPOSES - 5 UNITS**

THE NORTHERN 25 FEET 4 INCHES OF LOT 10 AND THE SOUTHERN 24 FEET 8 INCHES OF LOT 9, BLOCK 3, MAP OF THE RESUBDIVISION OF BLOCKS 3 AND 4 OF THE ANTISELL TRACT, (1 M. 189), CITY OF BERKELEY, COUNTY OF ALAMEDA, STATE OF CALIFORNIA.

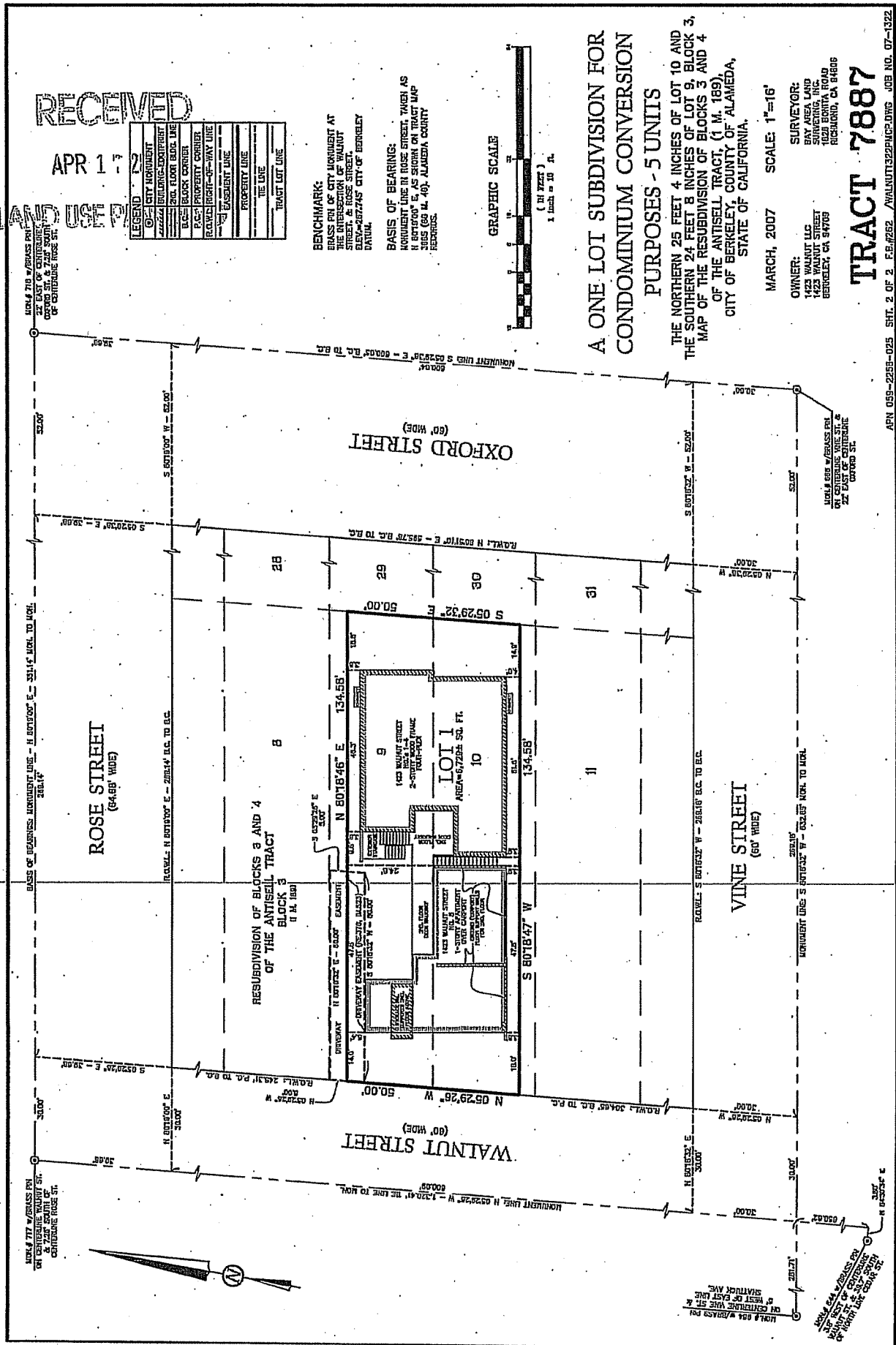
MARCH, 2007 SCALE: 1"=16'

**OWNER:**  
WALNUT LLC  
1423 WALNUT STREET  
BERKELEY, CA 94709

**SURVEYOR:**  
DANIEL L. WILSON  
SURVEYING FIRM  
1023 BORTTA ROAD  
RICHMOND, CA 94806

**TRACT 7887**

APN 059-2255-025 SH. 2 OF 2 F.S.#252 /VALNUT122PRPCS.DWG JOB NO. 07-1322



WENDEL  
ROSEN  
BLACK  
& DEAN  
LLP  
ATTORNEYS AT LAW

CITY OF BERKELEY  
CITY CLERK DEPT  
07 AUG 17 PM 1:29

1111 Broadway, 24<sup>th</sup> Floor  
Oakland, CA. 94607-4036

Post Office Box 2047  
Oakland, CA 94604-2047

Telephone: (510) 834-6600  
Fax: (510) 834-1928  
lhausrath@wendel.com

August 17, 2007

**VIA HAND DELIVERY**

Pamyla Means, MMC  
City Clerk  
CITY OF BERKELEY  
2120 Milvia Street  
Berkeley, CA 94704

Re: *1423 Walnut/Condominium Conversion/Tentative Tract Map #7887*

Dear Ms. Means:

This office represents the owners of 1423 Walnut LLC, the entity that owns the property located at 1423 Walnut. Please accept this letter as an appeal of the Notice of Decision dated August 8, 2007. The appeal fee of \$561.00 is enclosed.

The Notice of Decision indicates that Tentative Tract Map #7887 for conversion to five condominium units has been approved by operation of law. While our client is, of course, happy to receive this approval, the Notice nevertheless raises certain issues with which we disagree, and addresses certain other issues in a vague manner such that we are not certain about the effect or implication of the approval. Thus, we believe that an appeal of the approval to the City Council is appropriate. At the outset, we wish to make abundantly clear that we hope to resolve all outstanding issues and questions with this City prior to such time that this appeal might be scheduled before the City Council. In fact, we welcome a full dialogue and discussion with the City at the earliest opportunity about these issues and questions, and I have had some discussions in this regard. Nevertheless, in order to preserve all legal and other rights, this appeal is being submitted.

The outstanding issues and questions which we address by way of this appeal are as follows:

1. Since the project was approved by operation of law, rather than through the hearing process, it is our position that the City is legally proscribed from imposing any conditions or requirements on the project, including without limitation all conditions and requirements described in the Notice of Decision in the four bullet points on pages 1 - 3. Such conditions might have been imposed in connection with a project that was approved through the

Pamyla Means, MMC  
City Clerk  
CITY OF BERKELEY  
August 17, 2007  
Page 2

WENDEL, ROSEN, BLACK & DEAN LLP

normal process, and the applicant would have had the opportunity to be apprised in advance of any such conditions or requirements and respond to and comment upon them during the public process. However, since that opportunity was not afforded and the project was approved by operation of law, we submit that none of the conditions or requirements enumerated in the Notice are appropriate, nor are any others.

2. Without waiving the position taken in Item #1, to the extent that it is determined appropriate that conditions or requirements may be imposed by the City in connection with the "deemed approved" status of this project, we submit that certain of the conditions and requirements are sufficiently vague and ambiguous such that the applicant cannot ascertain how and to what extent they will be applied by the City. For example, it is unclear how the City intends to calculate the affordable housing fee under BMC Section 21.28.060. First, there is the issue of what ordinance will be applied: the ordinance in effect at the time that the application was approved, the ordinance amendments that have already been enacted and will take effect today (August 17, 2007) and/or possible new amendments that are clearly contemplated and might be in place by the time that the Council is able to schedule a hearing on this appeal. Second, representatives of my client have been informed by City staff that the City intends to interpret the housing fee calculation (the capitalized value) in a manner that would result in the payment of exorbitant and confiscatory fees, fees that well exceed 50% of the market value of the units. Our interpretation of the ordinance, on the other hand, which is based upon the most logical and literal reading of the formula contained in Section 21.28.060.A., results in a fee that is far lower than has been intimated by City staff. Third, to which units and in what precise manner will fees be applied to each unit, and is there any residual Ellis Act "issue"? (For example, what units are considered owner occupied and what units are tenant units?) In short, we do not know for sure how the fees will be calculated, and thus we must appeal in order to seek and obtain clarity as to this critical point.

3. To the extent that BMC Section 21.28.065.B.1 is applied to this project, we believe that such application may be inconsistent with the provisions of the Costa Hawkins Rental Housing Act, specifically Civil Code Section 1952.52(a)(3)(B)(ii), if the 65% rent cap is inappropriately utilized with respect to units that would qualify for this exemption under Costa Hawkins. Once again, this is an issue that may resolve itself through further clarification, but we raise it here to preserve our rights in the event that a mutually agreeable resolution of the issues contained herein does not occur.

We have asked for specific clarification as to how the City intends to apply the affordable housing fee to this project, but we have not received clarification to date that sufficiently responds to our requests. Thus, we must file this appeal. Further, as noted above, it may be that – notwithstanding our Item # 1 which would, if resolved in our favor, prevent the City from imposing any affordable housing fees or other conditions – that the parties after further discussions can arrive at a mutually agreeable resolution of appropriate fees and conditions, and that certainly is our hope. But we do need to have such a dialogue soon, and do we do need to have a discussion that will result in a reasonable and equitable result that at the same time allows

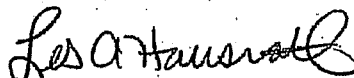
Pamyla Means, MMC  
City Clerk  
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Page 3

WENDEL, ROSEN, BLACK & DEAN LLP

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Very truly yours,

WENDEL, ROSEN, BLACK & DEAN LLP



Les A. Hausrath

LAH:mmj

cc: 1423 Walnut LLC  
Zachary D. Cowan, Esq.  
Daniel Marks

## Index for 1423 Walnut Street

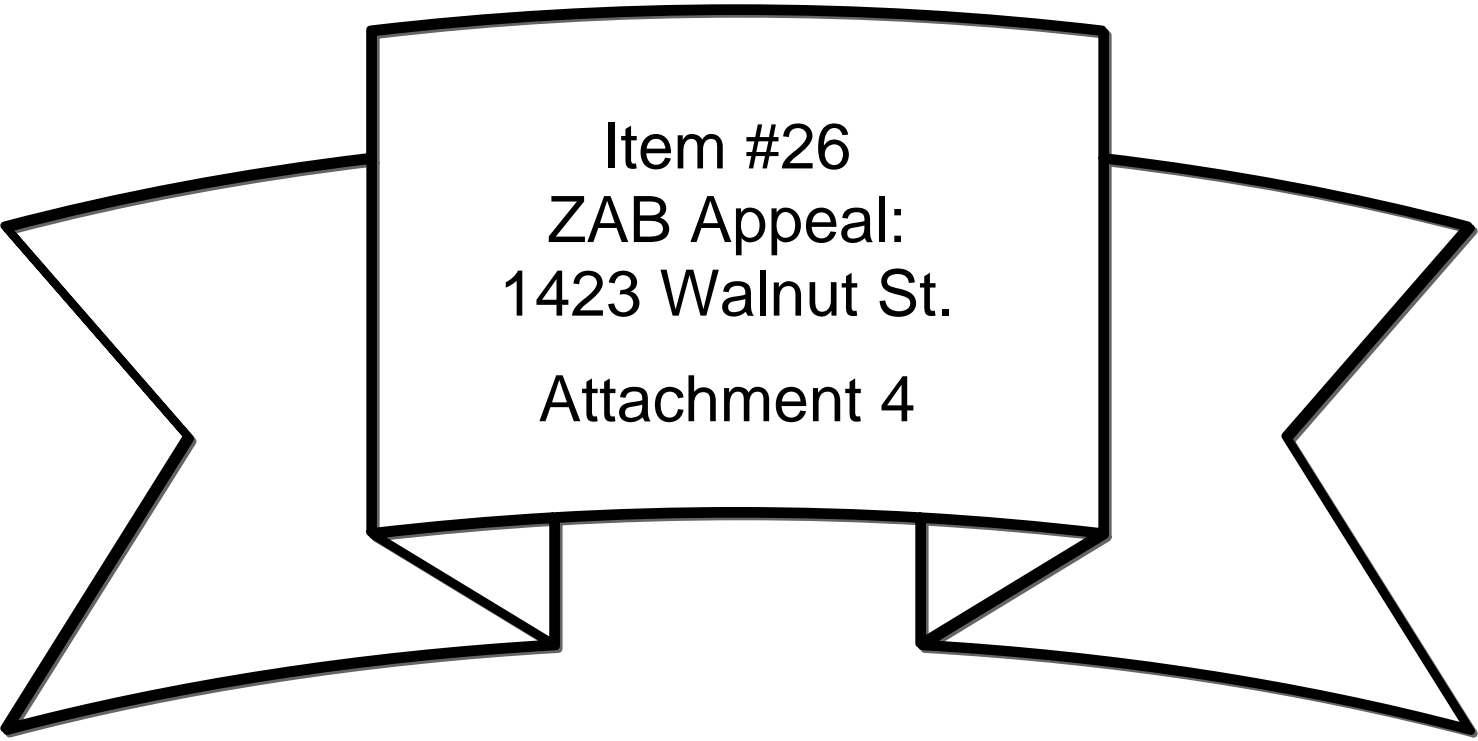
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Item #26  
ZAB Appeal:  
1423 Walnut St.  
Attachment 4

Attachment 4 to this report, ZAB appeal 1423 Walnut St. is on file and available for review at the City Clerk Department, or can be accessed from the City Council Website.

**City Clerk Department**  
2180 Milvia Street  
Berkeley, CA 94704  
(510) 981-6900

or from:

**The City of Berkeley, City Council's Web site**  
<http://www.ci.berkeley.ca.us/citycouncil/>



# Attachment 5

**NOTICE OF PUBLIC HEARING - BERKELEY CITY COUNCIL  
CITY COUNCIL CHAMBERS, 2134 MARTIN LUTHER KING JR. WAY  
TRACT MAP APPEAL: 1423 WALNUT  
TUESDAY, NOVEMBER 6, 2007 AT 7:00 P.M.**

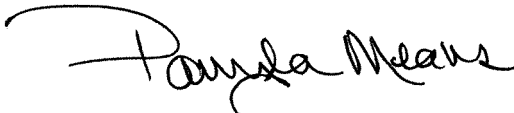
The Department of Planning is proposing ... to conduct a public hearing on an appeal of the Notice of Decision (NOD) for Tract Map 7887, approved by operation of law, to convert five (5) units at 1423 Walnut to condominiums.

For further information, please contact Debbie Sanderson at 981-7410.

Written comments should be mailed or delivered directly to the City Clerk, 2180 Milvia Street, Berkeley, CA 94704, in order to ensure delivery to all Councilmembers and inclusion in the agenda packet. Comments received no later than Monday, October 29 2007 will be included in Council agenda packets. Comments received thereafter will be submitted to Council as supplemental communications at the meeting. For further information, call Pamyla Means, MMC, City Clerk, 981-6900. FAX: (510) 981-6901. TDD: (510) 981-6903.

**Published:** [Publication Date in Newspaper]

~~~~~  
I hereby certify that the Notice for this Public Hearing of the Berkeley City Council was posted at the display case located near the walkway in front of Council Chambers, 2134 Martin Luther King Jr. Way, as well as on the City's website, on [Enter Date].



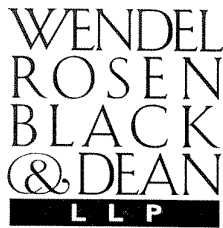
Pamyla Means, MMC, City Clerk

# Attachment 6

|                                                |               |                        |
|------------------------------------------------|---------------|------------------------|
| MCNEIL GEORGE & SALSKAMCNEIL J                 | 059 225801700 | 2155 VINE ST           |
| MCNEIL GEORGE & JOANNA S                       | 059 225802000 | 2155 VINE ST           |
| PEICK SUSAN                                    | 059 225802200 | 1815 FOURTH ST D       |
| GARRETT LEE FJ LEE LIMITED LIABILITY COMPA     | 059 225801000 | 1859 GREENWICH ST      |
| BERKELEY SOC OF FRIENDS                        | 059 225801900 | 2151 VINE ST           |
| GOLDBERG GLORIA A TR                           | 059 226100900 | 1562 MARIN AV          |
| RIZZO A R & LESSER WENDY                       | 059 225801500 | 2163 VINE ST           |
| BANFIELD JULIE P                               | 059 225802300 | 1427 WALNUT ST         |
| EARLY DAVID & LEV MARLA S TRS                  | 059 225801600 | 2157 VINE ST           |
| SMITH JOHN S                                   | 059 225801400 | 1438 OXFORD AVE        |
| SPRINGER HELEN TR                              | 059 225702100 | 1447 OXFORD ST         |
| NEMETH TEREZIA C                               | 059 225702200 | 1148 FRANCISCO ST      |
| BROWN ROBERT A & CYNTHIA D                     | 059 225801300 | 1436 OXFORD ST         |
| LEE BING G & SUI H TRS                         | 059 225802100 | 1518 BONITA AV 1       |
| SCHMIER KENNETH J & ERIC S                     | 059 225702300 | 1475 POWELL ST 201     |
| OWSLEY JOHN W                                  | 059 225801200 | 1430 OXFORD ST A       |
| FARNADY KATHLEEN A                             | 059 225700100 | 2200 ROSE ST           |
| PRETARI DONALD D JR                            | 059 225700200 | 2206 ROSE ST           |
| EXEC DIRECTOR ROSEVINE INC                     | 059 225702400 | 2730 TELEGRAPH AV      |
| FORD JOHN E & AYRES TONI A                     | 059 225801100 | 1428 OXFORD ST         |
| OKATES TRACY                                   | 059 225802400 | 1425 WALNUT ST         |
| TIMOTHY G ALLEY ALLEY T G & L G & JUDITH R & J | 059 225702500 | 14 YALE CR             |
| COMMON AREA OF TRACT 3665                      | 059 225802900 | 383 15TH ST            |
| MATHIAS NEVILLE & LAARNI T                     | 059 225800200 | 2136 ROSE ST           |
| ZUSALIM AGUS & ELIZABETH TRS                   | 059 225800800 | 1416 OXFORD ST         |
| FLYNN WILLIAM J ETAL                           | 059 225702700 | 1419 OXFORD ST         |
| PINKAVA JAN J & KAY Z                          | 059 225800600 | 1408 OXFORD ST         |
| RUE ELL ENTERPRISES INC                        | 059 226100102 | 2437 DURANT AV         |
| WHITTEN JULIANA B                              | 059 225802700 | 1419 WALNUT            |
| COMMON AREA OF PM 6670 40 & 41                 | 059 225804200 | 1412 OXFORD ST         |
| COMMON AREA OF PM 7651 50 & 51                 | 059 225805200 | 1409 WALNUT ST         |
| SULLIVAN JOHN & NANCY                          | 059 225800500 | 1404 OXFORD ST         |
| JEWISH FEDERATION OF THE GREAT                 | 059 226100101 | 401 GRAND AV           |
| HOMEOWNERS ASSOC COMMON AREA OF TRACT 2328     | 059 225704000 | 1409 OXFORD ST         |
| SLEZKINE YURI & LITTLE LISA C                  | 059 225800300 | 2140 ROSE ST           |
| PEYTON RUTH                                    | 059 225800400 | 1400 OXFORD ST         |
| SERENA & C ORLOFF 1423 WALNUT LLC              | 059 225802500 | 1195 EUCLID AV         |
| LEWIS SIMON A & STEWART SUZANN                 | 059 225800900 | 1422 OXFORD ST         |
| BRENNER ALFRED J & JADERSTROM                  | 059 225702600 | 69 OXFORD CT           |
| BERKELEY SOC FRIENDS                           | 059 225801800 | 2151 VINE ST           |
| DEROIA VIRGINIA M TR                           | 059 226100800 | 1481 SHATTUCK AV       |
| RUEGG & ELLSWORTH                              | 059 226100600 | 2437 DURANT AV         |
| HENRY F WONG WONG WILLIAM H & HENRY F          | 059 226101000 | 1579 SCENIC AV         |
| HOMEOWNERS ASSOC COMMON AREA OF TRACT 3496     | 059 226102000 | 1440 WALNUT ST         |
| COMMON AREA OF PM 7385 41 & 42                 | 059 225704300 | 979 REGAL RD           |
| EAST BAY MUNICIPAL UTILITY DIS                 | 059 226100500 | 375 11TH ST.           |
| WOLAN STEVEN C & LINDA J & MOD                 | 059 226100403 | 1442-A WALNUT ST 399   |
| BALDOCK JEANNE                                 | 059 225702900 | 1415 OXFORD ST         |
| PISANI ROBERT TR & BAHMANVINCE                 | 059 225802600 | 300 EL TOYONAL         |
| TENANT                                         | 059 225802500 | 1423 WALNUT ST, UNIT 3 |
| TENANT                                         | 059 225802500 | 1423 WALNUT ST, UNIT 4 |
| TENANT                                         | 059 225802500 | 1423 WALNUT ST, UNIT 5 |

BERKELEY CA 94709  
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BERKELEY CA 94710  
SAN FRANCISCO CA 94123  
BERKELEY CA 94709  
ALBANY CA 94706  
BERKELEY CA 94709  
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BERKELEY CA 94709  
BERKELEY CA 94708  
OAKLAND CA 94607  
BERKELEY CA 94709  
BERKELEY CA 94709  
ORINDA CA 94563  
BERKELEY CA 94709  
BERKELEY CA 94709  
BERKELEY CA 94709





ATTORNEYS AT LAW

CITY OF BERKELEY  
CITY CLERK DEPT  
07 AUG 17 PM 1:291111 Broadway, 24<sup>th</sup> Floor  
Oakland, CA 94607-4036Post Office Box 2047  
Oakland, CA 94604-2047

Telephone: (510) 834-6600

Fax: (510) 834-1928

lhausrath@wendel.com

August 17, 2007

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CITY OF BERKELEY  
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LAH:mmj

cc: 1423 Walnut LLC  
Zachary D. Cowan, Esq.  
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