

# ATTACHMENT 1

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## FINDINGS AND CONDITIONS

JUNE 25, 2009

### 1200 Ashby Avenue

#### **Modification #09-7000010 (modifies Use Permit #07-10000133)**

#### CEQA FINDINGS

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1. The modified project is exempt from the provisions of the California Environmental Quality Act (CEQA, Public Resources Code §21084, et seq.) pursuant to the following sections of the CEQA Guidelines:

Section 15061(b)(3): It can be seen with certainty that there is no possibility that the proposed modifications may have a significant effect on the environment, because the modifications do not substantially alter the approved exterior building envelope, increase its height, or generate additional traffic. For the reasons stated in Findings 10 and 11 below, any unmet parking demand from the project will not be substantial enough to generate significant traffic or air quality impacts through vehicles searching for parking. The Court of Appeals has otherwise ruled that lack of parking is not an environmental impact.

Section 15305 (Class 5, "Minor Alterations in Land Use Limitations"): The proposed modifications are minor alterations to an existing land use entitlement for a site with an average slope of less than 20 percent, which do not result in any changes in land use or density.

Section 15332 (Class 32, "In-Fill Development Projects"):

- a. The modified project is consistent with the applicable General Plan designation and policies, and with the applicable zoning designation and regulations. The height and setback standards of the Zoning Ordinance are waived pursuant to State density bonus law (Govt. Code Section 65915; see Findings 3 and 4 below), and these standards are not "applicable" to the project for the purposes of the CEQA exemption because Section 65915 clearly renders them inapplicable in order to allow the density bonus.
- b. The modified project occurs within the Berkeley city limits on a project site of no more than five acres, and is surrounded by urban uses.
- c. The site is already developed and has no value as habitat for endangered, rare or threatened species.

- d. The modified project would not result in any significant effects relating to traffic, noise, air quality or water quality. Regarding traffic, the modified project will generate less traffic than the approved project, which did not exceed significance criteria for any intersections or residential streets, and will actually help reduce congestion at the Ashby/San Pablo intersection by dedicating land along the Ashby frontage of the site, which will allow the installation of a westbound left-turn lane and signal on Ashby. For the reasons stated in Findings 10 and 11 below, any unmet parking demand from the project will not be substantial enough to generate significant traffic or air quality impacts through vehicles searching for parking. The Court of Appeals has otherwise ruled that lack of parking is not an environmental impact.
- e. The site is already served by required utilities and public services, which will also adequately serve the project.

Furthermore, the modified project does not trigger any of the exceptions in CEQA Guidelines Section 15300.2. In particular, the modified project will not have any significant effects due to unusual circumstances, nor any cumulatively significant impacts (such as traffic), nor will it adversely impact any designated historical resources.

## GENERAL NON-DETRIMENT FINDINGS

- 2. Pursuant to BMC Section 23B.32.040, the Zoning Adjustments Board finds that the modified project will not, 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 modified project would provide 97 affordable senior housing units, and one affordable manager's unit, for the first 55 years of the project, and 15 units thereafter, thereby providing much-needed senior housing and helping to meet the City's affordable housing goals.
  - B. The modified project generates less traffic and provides more commercial parking than the approved project, and the proposed reduction in residential parking will not be detrimental for the reasons discussed in Finding 11 below.
  - C. The Design Review Committee has granted the proposed exterior changes a favorable recommendation. The enlarged community plaza and additional retail space and windows on San Pablo would improve the project's pedestrian friendliness and provide additional benefits to the neighborhood. Other changes, such as the enlarged elevator and stair towers and reduced setbacks at the

southeast corner of the fourth and fifth stories, are relatively minor and would not substantially increase the building's impacts on the neighborhood. On the whole, the modifications improve the overall building design and benefits to the neighborhood.

### DENSITY BONUS / AFFORDABLE HOUSING FINDINGS

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3. Pursuant to Government Code Section 65915(b) and BMC Section 23C.12.050.A, the Zoning Adjustments Board (ZAB) makes the following findings for density bonus entitlements:
  - A. The modified project is entitled to a density increase of 35 percent over the otherwise maximum allowable residential density under the Zoning Ordinance and General Plan Land Use Element, under the requirements of Government Code Section 65915(b) and (f), plus one additional concession or incentive, which the applicants have chosen not to request.
  - B. Under the City's methodology for implementing density bonuses under Section 65915, the "base project" for the proposed 98-unit project consists of commercial space and parking on the ground floor, and 75 residential units on the first, second, third, and fourth floors, with an average unit size of 925 square feet.
  - C. The applicants have committed that for the first 55 years, 98 units will be affordable for households earning no more than 60 percent of area median income (AMI). This commitment entitles the applicants to a minimum density bonus of 35 percent (27 units after rounding) with a total area of 24,981 square feet. The applicants have requested a density bonus of 30.7 percent (23 units) with a total area of 21,280 square feet.
  - D. The approval of a density bonus to promote the development of affordable housing at a location well-served by transit is consistent with the policies of the General Plan Housing Element (Policy H-16) and other West Berkeley Plan Policies cited in Finding No. 5, below.
4. In accordance with Government Code Section 65915, the ZAB hereby grants waivers and modifications to: a) allow five stories where four are normally allowed; and b) allow a building height of 60 feet, 3 inches where 50 feet are normally allowed. The ZAB also grants a Use Permit to waive the required 15-foot setbacks at the northeast and southeast corners of the site (Ashby Avenue and Carrison Street). The basis for these approvals is as follows.
  - A. This project is a "housing development" as defined in Government Code Section 65915(i) and qualifies for a 35 percent density bonus as stated in Finding 3.C above.

- B. Government Code Section 65915(e) allows the applicant to request waivers or modifications of development standards in order to construct a project proposed under State Density Bonus law. The law requires a local government to waive development standards if these standards would preclude construction of density units in a particular proposed project..
- C. The density bonus units cannot be accommodated within the otherwise maximum allowable residential building envelope of the C-W District, which allows up to four stories and a height of 50 feet, and requires 15-foot setbacks at the northeast and southeast corners of the site (on Ashby Avenue and Carrison Street), and therefore the C-W standards must be modified to accommodate the density bonus units. In this case, consistent with the applicant's request, the ZAB waives and/or modifies these standards for the following reasons:
1. The proposed fifth story is the most appropriate, and least detrimental, way to accommodate the density bonus units because it maintains other amenities and mass reductions in the project, such as an interior courtyard, a community plaza on San Pablo Avenue, and a three-story height at the southeast corner of the building. In addition, the five-story height is consistent with other approved mixed-use projects on commercial corridors in the City and the immediate vicinity (e.g., 2747 San Pablo Ave.).
  2. The fifth story allows for interior courtyards and gardens that provide better natural light and ventilation to the units, thereby reducing energy consumption and greenhouse gases. A four-story building of similar size would not be able to provide courtyards of the same size and quality, since a greater portion of each floor would have to be devoted to residential space instead.
  3. The building height of 60 feet, 3 inches is necessary to provide a 15-foot ceiling in the ground floor commercial space, which enhances the quality and viability of the space and thereby benefits the neighborhood, and 9-foot ceilings on the residential floors, which is considered the minimum ceiling height in residential construction and enhances natural light and quality of life for residents, thereby helping to discourage resident turnover.
  4. The reduced setbacks at the northeast and southeast corners of the building are necessary to accommodate part of the project's density bonus. Without these setbacks, amenities currently proposed in the project, such as an interior courtyard, a community plaza on San Pablo Avenue, and a three-story height at the southeast corner of the building, would have to be reduced or eliminated.
5. The modified project is a "housing development project" as defined in Government Code Section 65589.5(h)(2)(B), because it consists of residential uses and nonresidential uses which are limited to neighborhood commercial uses and to the first floor of a five-story building. The project's nonresidential uses qualify as "neighborhood commercial" uses because the project's largest possible commercial space will be

6,090 square feet, which is too small for a region- or area-serving business. In addition, the applicants have requested flexibility to allow up to 8 commercial tenants, in which case the largest space would be far less than 6,090 square feet.

#### OTHER REQUIRED FINDINGS

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6. **(C-W General Findings)** Pursuant to BMC Section 23E.64.090.B, the Zoning Adjustments Board finds that:
1. The modified project is consistent with the purposes of the C-W District in that it provides additional commercial spaces that will primarily serve area residents and/or businesses (purpose B), provides low income housing that will support local retailers and transit lines (purpose G), and appropriately intensifies development on an underutilized site (purpose H).
  2. The modified project is compatible with the surrounding uses and buildings in that its height steps down from five to three stories at the southeast corner and steps back 8 to 10 feet along the east property line, in order to minimize impacts on the adjacent residential uses. Furthermore, the proposed residential and commercial land uses are similar to those of surrounding properties.
  3. The modified project is consistent with the West Berkeley Plan's goals to "encourage infill buildings on vacant and low intensity use sites along [San Pablo Avenue] Corridor" (Urban Design Policy 1.8), and "foster the continued vitality of West Berkeley's neighborhood and regional serving retail trade, in as pedestrian-friendly a manner as possible" (Land Use Policy 2.E). In addition, the project will "use tools such as increased building setbacks or upper story step backs, landscaping, and other means to reduce the impacts of differences in scale, style, and site plan" (Physical Form Policy 4.2).
  4. The modified project is supportive of an increase in the continuity of retail and service facilities at the ground level to the degree feasible and does not substantially degrade, but rather enhances, the existing urban fabric of the street and area, because it provides new street-fronting commercial space on the vacant site and maximizes the pedestrian orientation of San Pablo Avenue by locating the two driveways on Ashby Avenue (for commercial parking) and Carrison Street (for residential parking), rather than San Pablo.
  5. The modified project provides an intensity of development which does not underutilize the property, because it proposes a floor area ratio (2.94) that is higher than most development located along San Pablo.
  6. The modified project meets applicable performance standards for off-site impacts, including the City's thresholds of significance for traffic impacts.

7. The modified project does not exceed the amount and intensity of use that can be served by available traffic capacity and potential parking supply, as stated in Finding 1(d) of the CEQA findings above, and Finding 9 below.

- 7. (C-W Node Findings)** Pursuant to BMC Section 23E.64.090.C, the Zoning Adjustments Board finds that the modified project supports the development of a strong retail commercial, pedestrian oriented environment at the Ashby/San Pablo node, for the following reasons:
- A. The modified project provides 9,551 square feet of new street-fronting commercial space with generous ceiling heights of 15 feet, relatively large, prominent and continuous doors and windows along San Pablo Avenue, and, for the 6,090-square-foot area at northwest corner of the building depth, a generous depth of at least 50 feet.
  - B. The modified project maximizes the pedestrian orientation of its longest frontage on San Pablo Avenue by placing an 16' by 31' community plaza adjacent to the sidewalk, and by locating the two driveways on Ashby Avenue (for commercial parking) and Carrison Street (for residential parking), so as not to interrupt the San Pablo frontage with parking or driveways.
  - C. The northwest corner of the building is designed to highlight the Ashby/San Pablo intersection as a prominent gateway into the City, by increasing the height at that corner to create a "tower" feature.
  - D. In accordance with Section 23E.64.040.E, the proposed commercial uses would be limited to retail sales, personal/household services, and food and alcohol service, all of which rely on, and generate, pedestrian activity.
- 8. (New Floor Area)** Pursuant to BMC Section 23E.64.050, the Zoning Adjustments Board finds that the proposed floor area will not be detrimental because the project's height and bulk scheme minimize impacts on the adjacent residential neighborhoods, and because the project has been reviewed and accepted by the Design Review Committee to ensure an attractive design.
- 9. (Commercial Parking Waiver)** Pursuant to BMC Section 23E.64.080.H, the Zoning Adjustments Board finds that a reduction in required commercial parking from 22 to 18 spaces will not be detrimental because at least 30 percent of the total on-street parking spaces on the five nearest block faces are generally available during the afternoon, and in combination with the on-site parking, these spaces should be adequate to prevent any excessive impact on the neighborhood parking supply. In addition, the provision of a shared vehicle for project residents and employees, the relatively good transit service at the site, and the neighborhood-serving character of the proposed commercial space, will help encourage walking and biking trips to the site, and reduce the project's off-site parking demand.

10. **(Mechanical/Architectural Projections)** Pursuant to BMC Section 23E.04.020.C, the Zoning Adjustments Board finds that the modified rooftop projections would not be detrimental because they are limited in size and height in relation to the overall building, they are not substantially visible from the immediately surrounding properties, and their design has been reviewed and accepted by the Design Review Committee.
11. **(Residential Parking Waiver)** Pursuant to BMC Section 23E.64.080.G, the Zoning Adjustments Board finds that a reduction in the required parking for senior housing units from 97 to 24 spaces will not be detrimental based on the modified project's reduced traffic generation, parking demand data from the Institute of Traffic Engineers (ITE), the high level of AC Transit bus service at the site, the site's proximity to basic goods and services such as the Berkeley Bowl West supermarket and Walgreen's, and the parking demand reduction measures required in conditions 72 and 74-77 below. The parking reduction also supports General Plan Policy T-16, which encourages reduction or elimination of residential parking requirements in locations served by transit.

#### MODIFIED/ADDITIONAL CONDITIONS

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Pursuant to BMC Section 23B.32.040.D, the Zoning Adjustments Board modifies and/or attaches the following conditions to this Permit:

41. **(Child Care Fees)** In accordance with a schedule determined by the Office of Economic Development (OED), the applicant shall pay an initial portion of the child care mitigation fees required under BMC Chapter 22.20 prior to occupancy, and shall pay the remainder of the required fees after occupancy. Unless such fees are specifically reduced or waived by the Zoning Adjustments Board pursuant to BMC Section 22.20.090, the required fees shall be \$9,874.

#### **Inclusionary Housing Requirements:**

##### **68. Affordability Requirements.**

- A. **Number of Below Market Rate Units.** The project shall provide for fifteen (15) below market rate dwelling units ("BMR Units"), which are required to comply with both the City's Inclusionary Housing requirements (BMC Chapter 23C.12) and the State Density Bonus Law (Government Code Section 65915). The BMR Units shall be as shown on the attached annotated floor plans dated June 18, 2009, unless the selection of other units is authorized in writing by the City, pursuant to BMC Chapter 23C.12 and the Regulatory Agreement.
- B. **Regulatory Agreement.** Prior to the issuance of a certificate of occupancy, the applicant shall enter into a Regulatory Agreement that implements BMC Chapter 23C.12, Government Code Section 65915, and this Use Permit. The Regulatory

Agreement may include any terms and affordability standards determined by the City to be necessary to ensure such compliance. Rents, sales prices, and income qualifications for the BMR Units shall be as set forth in the following Table and paragraphs of this condition.

**Table 1. Affordability Requirements Under Govt. Code § 65915 and BMC Chapter 23C.12.**

	Year	A		B	
		Condominium Units		Rental Units	
		Qualifying Household Income	Maximum Housing Payments	Qualifying Household Income	Maximum Housing Payments
1	1-30 (Govt. Code § 65915)	15 units: 80% AMI	15 units: 30% of 70% AMI	8 units: 50% AMI 7 units: 81% AMI*	8 units: 30% of 50% AMI or Section 8 rents 7 units: 30% of 81% or Section 8 rents*
2	31+ (BMC 23C.12)	15 units: 80% AMI	15 units: 3 times 80% AMI	If Section 8 subsidies are available, same as above. If Section 8 subsidies are not available, 15 units at 81% AMI	If Section 8 subsidies are available, same as above. If Section 8 subsidies are not available, 15 units at 30% of 81% AMI

\* – In the rental scenario, 8 of the affordable units are being used to qualify the project for a State density bonus (10% of the base project @ Very Low Income level), and are subject to State maximum housing payment standards for the first 30 years (row 1), and to the less restrictive City standards thereafter (row 2). The other 7 units are subject only to the City standards for the life of the project.

C. Affordability and Income Qualification Requirements for Units Providing Qualification for Density Bonus Under Government Code Section 65915 (Density Bonus). For purposes of qualifying the project for a density bonus under Government Code Section 65915, the affordability requirements indicated in Row 1 of Table 1 above shall apply for 30 years from the issuance of a certificate of occupancy by the City of Berkeley. This 30-year period of deeper affordability is required in addition to the affordability requirements mandated by the City’s Inclusionary Housing Ordinance, BMC Chapter 23C.12, set forth in Row 2 of Table 1, which apply for the life of the project. In addition, the following provisions shall apply:

1. Maximum homeowner payment or rent, as applicable, shall be adjusted for the family size appropriate for the unit as defined in Health and Safety Code Section 50052.5(h), provided, however, that if the household size standards in Table 2 of this Condition would result in a lower housing payment for a particular unit or units than under Section 50052.5(h), the standards in Table 2 shall be applied to such unit or units.
2. Rent shall include a reasonable allowance for utilities, as published and updated by the Berkeley Housing Authority, including garbage collection, sewer, water, electricity, gas, and other heating, cooking and refrigeration

fuels. Such allowance shall take into account the cost of an adequate level of service. Utilities do not include telephone service. Rent also includes any separately charged fees or service charges assessed by the lessor which are required of all tenants, other than security deposits.

3. Sales Price shall be calculated based upon a maximum monthly housing payment which includes mortgage principal and interest, property taxes, fire and casualty insurance covering replacement value of the improvements, property maintenance and repairs, a reasonable allowance for utilities as described above in subsection C.2 and homeowner association fees.

D. Berkeley Inclusionary Housing Ordinance Requirements. At the termination of the affordability period required by Government Code Section 65915, and for the remaining life of the project, the project affordability shall be determined pursuant to the City's Inclusionary Housing Ordinance, BMC Chapter 23C.12, as set forth in Row 2 of Table 1. In addition, the following provisions shall apply:

1. After 30 years, the requirement that 8 BMR Units be rented at rates that are affordable to households with an income level of not more than 50% of the AMI shall apply only if rental subsidies are available from the federal Section 8 Housing Program or an equivalent program. If no rental subsidies are available, all of the Inclusionary Units shall be subject to the rent ceiling and income qualification for households earning no more than 81% of the AMI. Gross rents shall include an allowance for utility costs, as published and updated by the Berkeley Housing Authority, in accordance with the Inclusionary Housing Ordinance.
2. Gross rent levels of units rented pursuant to the Section 8 Program or its equivalent shall be determined by the regulations of that Program.
3. These requirements apply regardless of whether the residential part of the project is held in condominium or undivided ownership, and regardless of whether an underlying condominium map has been filed.
4. For BMR Units that are sold as condominiums, allowable sale prices shall be determined in accordance with City Council Resolution No. 61,497-N.S.

E. Determination of Area Median Income (AMI).

1. The "AMI" (Area Median Income) shown in Table 1 shall be based on the income standards for the Oakland Primary Metropolitan Statistical Area reported by the United States Department of Housing and Urban Development (HUD). In the event HUD discontinues establishing such income standards, AMI shall be based on income standards determined by the California State Department of Housing and Community Development (HCD). If such income standards are no longer in existence, the City will designate another appropriate source or method for determining the median household income.
2. Except as stated in Paragraph C.1 above, the applicable AMI for the purpose of determining the allowable rent and allowable sales price for each

unit (but not for the purpose of determining eligibility for occupancy of an inclusionary unit) shall be determined in accordance with Table 2 below:

**Table 2. Determination of AMI Based on Unit Size**

<b>Unit Size</b>	<b>Applicable AMI Standard</b>
Under 400 sq. ft	AMI for a one person household
400-599 sq. ft.	AMI for one person household plus one quarter of the difference between the AMI for a one person household and for a two person household
600-699 sq. ft.	AMI for one person household plus one half of the difference between the AMI for a one person household and for a two person household
700-849 sq. ft.	AMI for a two person household
850-999 sq. ft.	AMI for a three person household
1,000-1,199 sq. ft.	AMI for a four person household
1,200 sq. ft or more	AMI for a six person household

F. In the event BMR rental units are sold into individual condominium ownership and are subsequently rented out, they shall be rented at levels in accordance with the affordability and eligibility requirements that would apply to BMR units that are rented to households with an income not exceeding 81% of AMI.

G. If the City, based upon this project, is awarded an Infill Infrastructure Grant pursuant to State Proposition 1C (Health and Safety Code Section 53545.12, et. seq.), the inclusionary housing agreement shall be modified to require whatever additional affordability provisions may be required pursuant to the award. In addition, the inclusionary housing agreement may also, with the applicant's written agreement, be modified to require additional affordability provisions, as necessary for any other public grant the City may be awarded based upon this project. This paragraph shall be null and void beginning two years after the effective date of this Use Permit.

**71.** Prior to issuance of a building permit, the applicant shall elect in writing to exercise either Use Permit #07-10000133 without the modifications herein sought (except that Condition 68 of Use Permit #07-10000133 shall be modified to reflect the requirements of this Condition 68 as stated above) or Modification #09-70000010. Upon such election, the alternative entitlement shall be forever relinquished by the applicant and extinguished by the City.

**72.** Plans submitted for a building permit shall include a secure on-site bicycle parking room (or rooms) for residents, adequate to accommodate at least 10 bicycles, and a bulletin board or display case in the residential lobby for the purpose of providing bus schedules and other relevant transit information. The building manager shall update this information regularly to ensure it is accurate.

**At All Times:**

73. 97 dwelling units shall be occupied only by persons over the age of 62. In the event that the Zoning Ordinance is amended to define younger persons as “seniors” for the purposes of qualifying for lower parking requirements, such younger age shall apply.
74. Parking spaces shall be leased separately from dwelling units at an additional cost, provided that they may only be leased to project residents. Prior to issuance of a certificate of occupancy, the applicant shall provide sample rental agreements for dwelling units and parking spaces to the Zoning Officer demonstrating that such units and spaces are leased separately.
75. Upon signing lease agreements with project residents, the applicant shall provide residents with a transit information packet including bus schedules, route maps, and other relevant information.
76. The applicant shall make any surplus commercial parking spaces available to residents and/or visitors on evenings and weekends.
77. Project residents and commercial tenants shall be ineligible for Residential Preferential Parking (RPP) permits should the project site and/or adjacent area(s) be designated as part of an RPP zone in the future.
78. All conditions of Use Permit #07-10000133 shall remain in effect except as modified herein.