

Jacob, Melinda

Subject: FW: 1200 Ashby Avenue

-----Original Message-----

From: berkeleyspann [mailto:berkeleyspann@comcast.net]
Sent: Monday, June 15, 2009 9:42 AM
To: Sage, Aaron E.
Cc: Ross, Steven D.
Subject: 1200 Ashby Avenue

To: Zoning Adjustments Board and Housing Advisory Committee
From: Toni Mester, 2431 Tenth Street
June 15, 2009
RE: modifications to 1200 Ashby Avenue.

The following were my comments to HAC on June 13, 2009

I am a resident of Berkeley for 37 years and a homeowner on Tenth Street since 1979. I appealed the project known as 1200 Ashby Avenue because it physically encroached on the neighborhood to the detriment of the nearby property owners. But evidently the City Council thought that providing what they called "workforce housing" was more important than preserving the neighbors' peace and quiet, views, parking, sun, and the setback on Carrison Street.

I am opposed to public funding for this project because it was granted zoning concessions as a density bonus, most notably adding the fifth floor and removing the setback on Carrison Street so that the south wall of the building and the entrance to the parking garage goes right to the sidewalk, which is an affront to the adjacent houses.

The density bonus is intended as an incentive to private developers so that they will provide affordable housing by giving them more market rate units to compensate for the affordable units. This is the assumption under which this project was given the extra height and the width. Before acting on this application, the City Attorney should provide a public opinion on whether a project that combines private and public funds and intends to apply for public vouchers is allowed the density bonus.

If this is not illegal, it certainly is improper. On May 5, the City Council approved this project as "workforce housing" whatever that means. At the Planning Commission meeting on Wednesday night, one Commissioner wondered about the definition of "workforce housing."

Just eight days later, the developers submitted an elaborate modification of the interior layout including enlarging the courtyard and called it senior housing. They must have been planning this modification before the May 5 meeting. Either they misrepresented the project to the City Council or the City Council misrepresented the project to the public.

Either interpretation is deeply troubling. The deliberate withholding of information in the public arena is deceptive and unethical.

End of comments to HAC.

Additional comments:

6/18/2009

In my appeal, I criticized this project because it lacked communal rooms for childcare and meetings. After I filed my appeal, I realized that in changing the plans from condominiums to rentals, the developers did not add laundry facilities. Both communal rooms and laundry facilities are provided in this modification because either they are required by the Tax Credit Allocation Committee or commonly recognized as a required amenity.

In the future, the City of Berkeley should require childcare, meeting, and laundry facilities for all housing developments, which would help to define “workforce housing.”

I also criticized the courtyard for being too dark and narrow. Although the developers called my appeal a “charade”, I had showed their plans to three architects for their opinion on the livability of the interior units. Evidently the developers’ architect didn’t consider my critique a charade, because the inner courtyard has been enlarged in the modification to provide more sun.

However, enlarging the interior without setting back the exterior continues to demonstrate contempt for the neighborhood which violates one of the policies of the newly adopted Climate Action Plan, which states:

ENSURE THAT DENSE TRANSIT-SERVED CORRIDORS TRANSITION WELL INTO SURROUNDING LOWER DENSITY RESIDENTIAL ZONES IN ORDER TO PRESERVE THE CHARACTER OF INTERIOR NEIGHBORHOODS.

This building should be stepped down along the east side and set back from Carrison Street to comply with this new policy. The north east corner is a flat wall without significant architectural features or fenestration that was criticized by the Design Review Committee. Since that wall defines the approach to San Pablo Avenue from Dwight way, it should be re-designed for greater aesthetic appeal and to protect the value of the adjacent property to the east.

Thank you for your consideration of these points.

Toni Mester

Jacob, Melinda

From: Cynthia Scheinberg [cyns@mills.edu]
Sent: Tuesday, June 16, 2009 7:19 PM
To: Ross, Steven D.; Sage, Aaron E.
Subject: 1200 Ashby Avenue

Attached and pasted in below, please find our letter for the next ZAB meeting on 1200 Ashby Avenue. We have a previously scheduled vacation on the date of the meeting; we would appreciate getting any updates or materials on this project. Thanks--
Cynthia Scheinberg

June 15, 2009

Dear ZAB et al:

I write as a homeowner at 1194 Carrison Street in reference to the 1200 Ashby Arts development project. We have been cautious supporters for some kind of development on this site, though we have had concerns about the size, parking and traffic impact, and lack of setback/green-space in the proposed development. We have worked to be not overly negative about this project, while also voicing our concerns for the community/street life of Carrison Street. Through this process, we are tempted to say that anything we or other neighbors have voiced has been consistently ignored by ZAB and the City Council, making it difficult to muster the energy to stay involved in a project that will so intensely impact our lives in Berkeley. But, that said, we will try again in this letter to voice our concerns while finding a balance between “reasonable accommodation” of the neighborhood and the need for a viable development on the 1200 Ashby site.

With the sudden shift to senior housing in the proposal, we do have many concerns now about the ever-changing nature of the development: at first, condos (good owner stability for the neighborhood) then rentals for “workforce” so needed in Berkeley, (potentially less stability for the neighborhood) and now senior housing, an interesting idea, unclear how it would impact the neighborhood, unclear why and how the almost complete reduction in the project’s resident parking would work. We would certainly want much more information about the nature of this senior housing, the attendant services it would offer, and how the plan for such reduced parking

would actually function. We are eager to hear how this rather sharp change of function fits into the City's plans for this site as well. I would have appreciated more information from the developer about these changes in advance of the new proposal.

We note many of the issues other concerned individuals have mentioned regarding community space, laundry facilities, and green space/set backs in the development. We have yet to understand why the City can not request a few modifications in these areas to produce a viable development that meets some of the community's concerns; surely the rapid changes in the nature of this project proposal make it difficult for residents of Carrison street to fully understand the proposed impact; we certainly hope the City will make every effort to reveal relevant information to us, as well as consider adaptations to the project –specifically lower density, clear parking and traffic impact meliorations, and more set-backs--that make it more neighborhood friendly.

Sincerely,

Dr. Cynthia Scheinberg
Rabbi Eliahu J.Klein
1194 Carrison Street
Berkeley CA
94702
510-540-5805
cyns@mills.edu

Jacob, Melinda

To: sstarkers@aol.com; Sage, Aaron E.
Subject: RE: 1200 Ashby ZAB

-----Original Message-----

From: sstarkers@aol.com [mailto:ssstarkers@aol.com]
Sent: Wednesday, June 17, 2009 10:13 PM
To: Sage, Aaron E.
Subject: 1200 Ashby ZAB

Hello,

Regarding the latest proposed usage change to the 1200 Ashby project. The building was passed by approval from city council on the coat tails of Measure G. The developer received all variances to the detriment of the surrounding neighborhood. The new proposed usage does nothing to alleviate traffic/pollution issues which were deemed so important by the developers and staff. Therefore the granted variances need to be reassessed as does the design of the building.

If indeed the developer wants to build senior housing, then the design team needs to design a building that meets the requirements for that purpose and not try to recycle plans that were passed under the guise of serving the commuter corridor.

Every step of this process has only taken into consideration the developers' wants without regard to the neighborhood it will impact. There is no setback from the sidewalk, limited step down, a fifth story granted, reduction in retail space and reduction in parking. Considering city funds are now being requested to assist in the building of this project, consideration needs to be given to the residents of the impacted area.

Sincerely,

Eric and Lieza Stark
1226 Carrison Street
Berkeley, CA 94702

[Dell Days of Deals! June 15-24 - A New Deal Everyday!](#)

January 10, 2009

Dear Berkeley City Zoning Adjustments Board:

We write regarding the proposed development at 1200 Ashby Avenue. We live at 1194 Carrison Street, the house directly across the street from the site; we have lived in our home for 10 years, and we both tentatively support many aspects of the proposed project and also have grave concerns about the impact of the project on Carrison street, a quiet residential street that first attracted us to this south Berkeley neighborhood.

Obviously, a well designed residential and commercial project will help support the neighborhood; living across from the now vacant lot, we know first hand about the stolen cars, drug deals, and prostitution that have been attracted to that corner, and we are pleased to think of the positive impact Ashby Arts might have on that negative element in our neighborhood.

But we can't understand why certain aspects of the design that promise to impact traffic and parking (in particular) on Carrison Street have not been taken more seriously by ZAB. We would note we have an 8 year old child and so along with concerns about parking and traffic more generally, we also have concerns about her safety when our quiet street is turned into a major thoroughfare for potentially 200-300 new residents of Ashby Arts. We appreciate the changes the developers have made to try and mitigate the impact on Carrison Street, but there are a number of issues that would improve those plans from our perspective:

1) Why has the city deemed there can be no curb cut entrance off San Pablo (north)—when for years, the gas stations used the curb cuts that are still there?
Having entrance and exit options from San Pablo (and Ashby) would be the easiest way to make sure that Carrison Street is not consumed by traffic from the likely 200 + new residents in the development, not to mention the commercial traffic.

2) Given the current plans, **we would hope that only a right turn out of the development onto Carrison to San Pablo should be allowed, mitigating the traffic onto Carrison, and only cars from San Pablo (north) should be allowed to turn into the development from Carrison**. Indeed, Carrison already serves as a short cut for many cars from San Pablo to Ashby (east). The proposed development residents—increased because of the density bonus allowances-- will triple (at least) the cars on Carrison, making it a thoroughfare and completely changing the character of our neighborhood. We have been surprised that the City—though requesting some changes in this area-- has not been more protective of the huge traffic impact this extremely large project will have on our street.

3) We have no doubt that the 1200 Ashby commercial customers will do most of their parking on Carrison Street, as it does not seem that easy to enter into the commercial parking, and the number of spots may or may not be enough depending on the kind of commercial businesses that end up on the site; there is little parking on San Pablo or Ashby, so Carrison will obviously become the default parking lot for this site. We note that a food service/restaurant seems likely given the permit requests in the proposal; this would mean that night time parking and traffic would also be an issue for our street. We also note that there are not enough required residential spaces in the current proposal. **We suggest that residential parking be accessible from all entrances/exits of the project, to mitigate the Carrison street use, and we continue to urge that San Pablo Avenue not be off limits for entrance/exit to the site; the proposal should have at least the required number of parking spaces (117).**

4) We suspect we will have major problems parking anywhere near our home once the development is complete, and that our guests will never find a spot near our house. **We would certainly hope that the City would implement a residential permit parking system on our block, permits that would not be available to residents of Ashby Arts.**

5) **We are hopeful that the project will still be scaled down from its current size.** While bringing in much needed development to our area, the sheer number of units proposed promises to radically change the nature of our neighborhood, tripling (at least) the density in our neighborhood.

Because of our work schedules, we have found it difficult to attend a number of the recent ZAB meetings on this project , but we are concerned, particularly as we are one of the houses most likely to me most affected by this project. We hope ZAB will find a way to really listen to our concerns about the density changes to our neighborhood, the parking and traffic issues, and recognize that Carrison Street has been a little quiet gem in South Berkeley, one that should not be totally sacrificed in the name of a project that could still be modified. We are in support of the general move to put a residential development into this space, and there are many aspects to the 1200 Ashby project that are laudable; we simply hope that the City can also appreciate our concerns about the project as well, in order to create a “win win” situation for both the innovative developers as well as the home owners and tax payers like us who live on Carrison Street.

Sincerely,

Dr. Cynthia Scheinberg
Rabbi Eliahu J. Klein
1194 Carrison Street
Berkeley CA 94613

June 18, 2009

Stephen Wollmer
1823 'B' Berkeley Way
Berkeley CA 94703
(510) 843-2053
stephenwollmer@gmail.com

Berkeley Zoning Adjustments Board

Re: Use Permit Modification application of 1200 Ashby Avenue.

On June 11th, 2009 I filed an administrative mandate (CEQA) lawsuit (RG09457010) as an individual and on behalf of Neighbors on Carrison Street challenging the City's approval of the Project. I attach a copy of the charging allegations to this letter for your reference. The suit alleges numerous violations of City and State law, and was filed because for both Carrison Street and Berkeley in general the issues are important enough to resolve in court.

The Project modification before you removes the first cause of action (your failure to grant the required variance for FAR that exceeds the District maximum or to make findings to support the variance) as well as modifying the second cause of action to remove allegation "a" that the Project failed to provide sufficient below market rate units conforming to State standards to qualify for a density bonus. However, all other causes of action remain in the lawsuit; the City's failure to apply current State density bonus law and its determination that the Project is Categorically Exempt from CEQA are not affected by the Project modifications before you.

I offer some preliminary comments based on my review of the applicant's statement and other file materials on the modification. I'll offer further comments once the Staff Report is available.

Changes in Floor Area(s): Possibly the most disturbing thing in the application is that, although the applicant makes significant changes to the courtyard, retail space, parking area, and the unit size mix, there does not appear to be any attempt to eliminate or reduce their request for an waiver of the setback required where the project confronts residences across Carrison Street.

This failure gives lie to the applicant and Staff contention that Berkeley's requirement for a setback to confronting residences must be waived under the State density bonus law so as to not "physically preclude" use of the Project's entitled density bonus or incentives/concessions. It is quite clear that Staff and the applicant consider the provision in State law as a carte blanche for whatever project design they propose at the moment rather than actually applying State law to development standards that in fact physically preclude use of the Project's density bonus.

Full compliance with the Zoning Ordinance required setback amounts only 2,625 ft² (15-ft setback over 35-ft x 5-stories). The application notes a number of changes in floor area, including a reduction of 9,000 ft² in residential floor area to 'trim' 2-br units into 1-br units and remove the necessity for variance from FAR, but the proposed reduction in floor area is captured by the developer for the benefit of his bottom line and his tenants with nary a thought to their responsibilities to the surrounding neighborhood residents.

I respectfully request that you require a re-design of the south side of the project to incorporate a setback where the project confronts residences along Carrison Street. This modification can be directed by you and be made subject only to final design review and Council review.

Parking Reduction: The ZAB should consider adding conditions to any reduction in parking for the project to avoid overwhelming the limited amount of residential parking available in the neighborhood. As the Carrison Street neighborhood is not within a Residential Parking Permit zone, the potential for overflow parking from residents of 1200 Ashby Avenue must be considered when granting the requested reduction in Project parking. The Zoning Ordinance's discretionary 75% reduction in parking for senior projects is predicated on the assumption that seniors are less likely than other demographic groups to own or have regular access to a car, and therefore the ZAB **may** issue a use permit to reduce the District's residential parking requirement of one space per unit to one space per four units.

Project resident incomes will be restricted to comply with Section 8 limits (ranging between \$18,750 and \$48,240). However there is no prohibition under Section 8 on recipients owning or having regular use of a vehicle, so absent a condition imposed by the ZAB there is no assurance that the residents will in fact have 75% less vehicles. In fact, the result of the resident's limited incomes together with Project parking fees will encourage residents to retain their vehicles at the least possible cost (and carrying costs for a fully paid vehicle can be as little as \$50 per month) by declining Project parking and choosing instead to park their vehicles on the street. As your use permit to reduce the Project's parking requirements is at your discretion, I respectfully suggest the following two conditions on the Project's parking requirement:

- Similar to conditions for "car-free" housing in the downtown, impose a requirement that those residents who choose not to rent Project parking be required to sign an agreement that they will not own or have regular access to a vehicle.
- Although the surrounding neighborhood is not within a RPP zone, impose a condition that project residents will not be eligible for permits should a RPP come into force.

Additionally, two previous conditions should be re-visited given the requested modification as a senior project:

- Restrict the hours of operation of commercial uses to the standard District hours of 7:00 a.m. to 10 p.m. rather than the previously granted 6:00 a.m. to 12:00 a.m.
- Modify the use permit for alcohol sales to a Type 41 (beer and wine) rather than a the Type 47 (distilled spirits) that was previously granted to the Project.

Stephen Wollmer

1 Stephen Wollmer
1823 B Berkeley Way
2 Berkeley, CA 94703
Telephone: (510) 843-2053 (Voice)
3 email: stephenwollmer@gmail.com

4 In Pro Per

5
6 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
7 **IN AND FOR THE COUNTY OF ALAMEDA**
8

9 STEPHEN WOLLMER as an individual and on behalf
of NEIGHBORS ON CARRISON STREET, an
unincorporated association,

10 Petitioners and Plaintiffs

11 vs.

12 CITY OF BERKELEY, a California charter city;
BERKELEY CITY COUNCIL; and DOES 1-20,

13 Respondents and Defendants
14

15 R.B. Tech Center LP, a California limited partnership;
Memar Properties Inc., a California corporation;
16 Citycentric Investments LLC, a California Limited
Liability Company; and DOES 21-40,

17 Real Parties in Interest
18

No. RG09457010 Filed: 6/11/2009

**Assigned for all purposes to Judge Frank
Roesch, Department 31**

PETITION FOR PEREMPTORY WRIT OF
MANDATE AND COMPLAINT FOR
INJUNCTIVE RELIEF

[C.C.P. §1094.5; Publ. Resources Code §21168]

Action under the California Environmental
Quality Act (CEQA)

19 **CHARGING ALLEGATIONS**
20

21 First Cause of Action – Approval of the Project in violation of the City's Zoning Ordinance.

22 32. Unless otherwise required and provided for by law, the City of Berkeley Zoning Ordinance
governs land use approvals within the City of Berkeley.

23 33. The COUNCIL has a duty to comply with the requirements of the City of Berkeley Zoning
24 Ordinance in approving land use decisions.

25 34. In approving the Project, RESPONDENTS abused their discretion and failed to perform an act
26 which the law specially enjoins in the following respect:
27

1 a. Under Section 23B.44.030 of the CITY's Zoning Ordinance, in order to grant a variance, the
2 CITY is required to make specified findings that the variance is necessary because of special or
3 extraordinary circumstances, to preserve or allow substantial property rights and a determination that
4 under the case's particular circumstances the variance is not materially detrimental to the neighborhood
5 and will provide public benefit. CITY failed to grant the Project the necessary variance to exceed the
6 Zoning District's maximum Floor Area Ratio or to make the required findings in support of that variance.
7 The requirement under the State density bonus law to waive development upon applicant request does not
8 relieve the COUNCIL from the requirement under its own ordinance to make findings and grant the
9 variance. By allowing the Project to exceed the lawfully enacted Zoning Ordinance development
10 standards without a variance supported by required findings, PETITIONERS were deprived of their right
11 to contest the basis of the variance. Failure to grant the variance supported by the findings required by
12 law is an abuse of discretion.

13
14
15 Second Cause of Action – Violation of State Density Bonus Statute.

16 36. Government Code §65915 provides a program for encouraging the provision of housing for lower
17 income households by requiring local government to provide density bonuses, incentives, concessions
18 and to waive or modify zoning ordinance development standards that would otherwise physically
19 preclude the use of the density bonuses provided therein.

20 37. Government Code §65918 applies §65915 to Charter Cities.

21 38. By overwhelming majorities (the State Senate by 33:1 on 8/20/2008 and the State Assembly by
22 78:0 on 8/29/2008) the State Legislature passed and on September 27, 2008 the Governor signed AB
23 2280 (Saldana), amending the State density bonus law. The amended law became effective in all
24 jurisdictions on January 1, 2009. The amendments made both technical and substantive changes to the
25 law to clarify its purpose, facilitate its application, to resolve the many contradictions resulting from the
26 numerous amendments over the years since its initial passage in 1979 and to address certain issues arising
27 from *Friends of Lagoon Valley v. City of Vacaville et al.* (2007) 154 Cal.App.4th.

1 39. The Project was approved by the ZAB on or about January 22, 2009 and that approval was
2 affirmed by the COUNCIL on or about May 5, 2009. The Staff Report to COUNCIL acknowledged that
3 all Project approvals were subject to the amended State density bonus law.

4 40. §65915(c)(1) requires that the APPLICANT agree to and that the CITY ensure that rent for units
5 qualifying the Project for benefits under State law "shall be set at an affordable rent as defined in Section
6 50053 of the Health and Safety Code."

7 41. As most recently amended in 2008, §65915(f) defines a density bonus as: "For the purposes of
8 this chapter, "density bonus" means a density increase over the otherwise maximum allowable residential
9 density as of the date of application by the applicant to the city, county, or city and county."

10 42. As most recently amended in 2008, §65915(e) requires jurisdictions to grant waivers or
11 modifications of any development standard that would physically preclude a project's use of an entitled
12 density bonus and/or incentives and/or concessions.

13 43. As most recently amended in 2008, §65915(n) requires that any additional density bonus granted
14 by a jurisdiction must be permitted by a local ordinance.

15 44. As most recently amended in 2008, §65915(o)(2) defines maximum allowable residential density
16 as the maximum allowed under Zoning Ordinance and the General Plan Land Use Element. Where the
17 Land Use Element density differs from the Zoning Ordinance density, the density in the Land Use
18 element shall prevail.

19 45. BMC 23F.04.010 defines density bonus as follows: "An increase in the number of units
20 authorized for a particular lot of land beyond the maximum otherwise allowed by the Master Plan or this
21 chapter." ("Master Plan" refers to the CITY's 1977 Master Plan superseded by the City's 2002 General
22 Plan and its Land Use Element and "this chapter" refers to the City's Zoning Ordinance). While this
23 definition conformed to the definition of "density bonus" in the pre-Saldana State density bonus law, its
24 option to apply the maximum density under the Land Use Element or the Zoning Ordinance conflicts with
25 current State law, and in fact is a formulation considered, but not adopted, by the Legislature during their
26 deliberations on Saldana (AB 2280).
27

1 46. In approving the Project, RESPONDENTS abused their discretion and failed to perform an act
2 which the law specially enjoins in the following respects:

3 a. The Project's use permit Condition 68 allows the APPLICANT to receive the higher Fair Market
4 Rents available under the Federal Section 8 housing program rather than the rents under State standards
5 that they agreed to accept in exchange for benefits under the State density bonus law. The CITY's use
6 permit condition fails to ensure that the rents for the units are set at an affordable rent as defined in
7 Section 50053 of the State Health and Safety Code and thus is an abuse of discretion as it fails to proceed
8 in the manner required by State law.

9 b. Upon the APPLICANT's request under §65915(e), the CITY waived four Zoning Ordinance
10 development standards that would have required three variances (only two of which were actually
11 granted) and one use permit. State density bonus law requires jurisdictions to waive development
12 standards that physically preclude a project's use of their entitled density bonus and/or
13 incentives/concessions. However the justifications given in the Project's Findings and Conditions for
14 these waivers were based on accommodating the Project's design elements, including a "generous"
15 courtyard, a "public" plaza (mostly taken up with sidewalk seating for a cafe) and a 15-ft high commercial
16 ground floor and 9-ft high residential floors. These waivers were an abuse of discretion wherein the
17 CITY conferred benefits on the APPLICANT and his future tenants at the expense of adjacent neighbors
18 who have a beneficial interest in the strict enforcement of development standards, modified only as
19 necessary to comply with State law. CITY's failure to proceed in the manner required by State law is an
20 abuse of discretion.
21

22 c. The CITY's use permit granted the Project 24 market rate density bonus units (32.5%) based on
23 the 74-unit "base project" allowed by the CITY's Zoning Ordinance development standards and the
24 APPLICANT's commitment to provide 8 (10.8%) of the Project's 98 total units at prices affordable to
25 Very Low Income households. Under current State law the Project's density bonus entitlement must be
26 based on the maximum residential density that the CITY's General Plan Land Use Element allowed for the
27 Project's parcels(s). The Project's two parcels have a "maximum allowable residential density" of 31 units
28

1 (0 .785 acres @ 40 du/acre) under the CITY's Land Use Element; therefore the Project's legal density
2 bonus entitlement is 12 market rate density bonus units. Both the ZAB's approval and the COUNCIL's
3 affirmation of that approval failed to apply the current State law that requires that the Project's density
4 bonus entitlement be calculated based on the 31 units "maximum allowable residential density" under the
5 CITY's Land Use Element, rather than 74-unit Project allowed under the Zoning Ordinance's
6 development standards. Refusal to comply with State law is an abuse of discretion as it does not proceed
7 in the manner required by law.

8 d. The CITY's use permit in effect granted the Project 12 additional market rate density bonus units
9 beyond the Project's legal entitlement to 12 density bonus units absent any provision in CITY ordinances
10 permitting additional density bonus units. CITY's grant of additional density bonus units absent a local
11 ordinance as required by State law is an abuse of discretion as the action does not proceed in the manner
12 required by law.

13 e. The CITY's definition of density bonus must be modified to conform to the definition in State law
14 in §65915(f) and §65915(o)(2) to the extent that, as is the case with the Project: "Where the density
15 allowed under the zoning ordinance is inconsistent with the density allowed under the land use element of
16 the general plan, the general plan density shall prevail." The CITY refused to apply the current State
17 law's definition of "density bonus" and "maximum allowable residential density" to the Project, asserting
18 that language in the Land Use Element restricts the use of the densities therein to "areas" and thus does
19 not control densities allowed by the Zoning Ordinance development standards for specific parcels.
20 However the definition in the Zoning Ordinance, under which the Project's use permits were issued,
21 clearly states that, in the special area of density bonuses, such densities can and must be applied to "a
22 particular lot of land". In the Staff Report's response to PETIONER's appeal and testimony on this issue,
23 the CITY further asserted that the mandatory language in the State law's new definitions of density bonus
24 and maximum allowable residential density "does not specify how cities are to apply their general plan
25 density standards and there is nothing else in State law that prohibits the application of density standards
26 in the manner described above." As the CITY is a Charter City which chooses to not maintain
27

1 consistency between its General Plan and its Zoning Ordinance, it is the Zoning Ordinance's definition of
2 "density bonus" that controls the Project's use permit findings for a density bonus and not the
3 contradictory language in the General Plan Land Use Element. By failing to amend its Zoning Ordinance
4 definition of "density bonus" to conform to State law and then apply the amended definition to the
5 Project, the CITY abused its discretion because they have not proceeded in the manner required by law.

6
7 Third Cause of Action - The CITY's determination that the Project was exempt from CEQA as a Class 32
8 In-Fill project was incorrect. In deeming the Project consistent with General Plan policies and Zoning
9 Ordinance regulations, the CITY failed to evaluate the entire Project after granting it the waivers and
10 modifications of Zoning Ordinance development standards to include the Project's density bonus units. In
11 addition, the CITY should have, but did not, consider the Project's unusual circumstances and cumulative
12 impact as required by CEQA guidelines.

13
14 48. At all times pertaining to this action, the CITY has been under a duty to comply with the
15 requirements of Public Resources Code §§21000 et seq. (CEQA) and California Code of Regulations
16 §§15300 et seq. (CEQA Guidelines).

17 49. The 1200 Ashby Avenue Mixed Use Project, including its density bonus units and any granted
18 waivers and modifications to the CITY's Zoning Ordinance development standards, is the project within
19 the meaning of CEQA Guidelines §15303(h).

20 50. The CITY is the Lead Agency for the consideration of the Project within the meaning of Public
21 Resources Code §21067.

22 51. As authorized by Public Resources Code §21084, the Secretary of the Resources Agency
23 maintains a list of project categories "determined not to have a significant effect on the environment and
24 which shall, therefore, be exempt from the provisions of CEQA." These categories are contained in the
25 CEQA Guidelines §§15300-15333. All Categorical Exemptions are subject to the general exceptions
26 listed in §15330.2. Citing *McQueen v. Mid-Peninsula Regional Open Space* (1988) 202 Cal. App. 3d
27 1136, the online version of the Guidelines (<http://ceres.ca.gov/ceqa/guidelines/art19.html>), cautions

1 jurisdictions against the unreasonable expansion of exemptions: "[C]ategorical exemptions are construed
2 strictly, shall not be unreasonably expanded beyond their terms and may not be used where there is
3 substantial evidence that there are unusual circumstances (including future activities) resulting in (or
4 which might reasonably result in) significant impacts which threaten the environment."

5 52. CEQA Guidelines describes Class 32 Categorical Exemptions as "environmentally benign In-Fill
6 projects which are consistent with local general plan and zoning requirements. This class is not intended
7 to be applied to projects which would result in any significant traffic, noise, air quality, or water quality
8 effects. Application of this exemption, as all categorical exemptions, is limited by the factors described in
9 section 15300.2." [§15332 - Discussion]. The threshold criterion every project must meet for a Class 32
10 exemption is that "The project is consistent with the applicable general plan designation and all applicable
11 general plan policies as well as with applicable zoning designation and regulations." [§15332(a)].

12 53. Among the exceptions to use of Categorical Exemptions is any project where there are
13 cumulative impacts from projects of the same type in the same place [§1530.2(b)] and projects where
14 there are unusual circumstances which do not generally apply to the class of projects [§15330.2(c)].

15 54. The CITY's filed Notice of Exemption from CEQA states that the Project was consistent with the
16 applicable General Plan designation and policies and the applicable Zoning designation and regulations,
17 "with the exceptions of waivers/modifications and concessions pursuant State density bonus law
18 (Government Code Section 65915). The waivers/modifications are for height, floor area ratio, and
19 setbacks which would otherwise require variances."

20 55. The Notice of Exemption for the Project further states that the Project will not have any
21 significant impacts due to unusual circumstances, nor any cumulatively significant impacts.

22 56. The CITY's exemption of the Project from CEQA review denied PETIONERS the ability to
23 provide substantial evidence to support fair arguments of environmental impacts from the Project. In
24 approving the Project under a Categorical Exemption, RESPONDENTS abused their discretion and failed
25 to perform an act that the law specially enjoins in the following respects:
26

1 a. Staff amended the Class 32 exemption's requirement that "The project is consistent with the
2 applicable general plan designation and all applicable general plan policies as well as with the applicable
3 zoning designation and regulations." Staff appended the following words to the CEQA Guideline's
4 requirement cited above: "with the exception of waivers/modifications and concessions pursuant to State
5 density bonus law." But CEQA Guidelines [§15003(h)] requires that the lead agency "must consider the
6 **whole** of an action, not simply its constituent parts, when determining whether it will have a significant
7 environmental effect" [emphasis added]. PETITIONERS noted numerous areas where the Project was
8 inconsistent with General and Area Plan policies, including the overwhelming scale of the Project in
9 relationship to the built environment, its obstruction of views of San Francisco Bay and the
10 Berkeley/Oakland hills from residences and the public right-of-way, its contribution to already severe
11 traffic and parking problems in the area and its failure to provide substantial neighborhood-serving retail.
12 The Project was approved with waivers and modifications of four key development standards that protect
13 the adjacent residential neighborhood: height (60-ft vs. 50-ft), number of stories (5-stories vs. 4-stories),
14 Floor Area Ratio (3.3 vs. 3.0) and the required setback to confronting residential properties (Project built
15 to its lot-line along Carrison Street where a 15-foot setback is required).
16 The filed Notice of Exemption describes these development standards as "not "applicable" to the Project
17 for the purposes of the CEQA exemption because Section 65915 clearly renders them inapplicable in
18 order to allow the density bonus." Nothing in the State density bonus law exempts project modifications
19 to accommodate density bonus units from CEQA analysis, nor do the sections of the CITY's Zoning
20 Ordinance cited in the filed Notice of Exemptions have any authority to exempt any part of the Project
21 from CEQA analysis and review.
22 By amending CEQA Guidelines §15332 so as to exempt significant elements of the Project from General
23 Plan and Zoning Ordinance consistency analysis, the CITY acted in excess of its jurisdiction resulting in
24 an "unreasonable expansion of the exemption beyond its terms." The CITY's failure to analyze the
25 "whole of its action" is an abuse of discretion because it fails to proceed in the manner required by law.
26
27

1 b. The Project's location at Berkeley's sole intersection of two State Highways is an unusual
2 circumstance requiring careful CEQA analysis. In-Fill projects are considered Categorical Exempt
3 because their impacts have already been considered in a CEQA analysis during the adoptions of a
4 jurisdiction's General Plan and Zoning Ordinance. However, Berkeley's General Plan and Zoning
5 Ordinance do not and cannot consider the unusual circumstance of the Project's location at an intersection
6 that under all transportation study scenarios out to the year 2030 will operate at LOS F (Level of Service -
7 a common transportation planning metric, where an F, as in school, is a failing grade.) The traffic
8 contributed by the Project to this intersection will lead to increasing congestion and wait times at traffic
9 signals and cause spillover traffic onto residential streets. This "unusual circumstance" of the Project is
10 one that does not apply to the class generally making the CITY's determination that the Project is
11 Categorical Exempt an abuse of discretion as that determination does not proceed in the manner
12 required by CEQA Guidelines §153302(c) to consider "unusual circumstances" and the reasonable
13 possibility that such circumstances will have a significant impact on the environment.
14

15 c. In the CITY's analysis area for the Project (the C-W Zoning District along San Pablo Avenue
16 between Dwight Way and the Oakland border), there is already a significant overhang of permitted but
17 uncompleted projects with a total of 167 dwelling units. When completed, these units will almost double
18 the area's existing residential density of 171 units. Adding the Project's 98 dwelling units will result in a
19 cumulative increase of 265 dwelling units (154%) over the area's existing 171 residential units.
20 Furthermore, the Project is located less than 500 feet from the borders of Emeryville and Oakland, both
21 which have recent, approved but uncompleted and proposed projects in the immediate area. Public
22 Resources Code Section 21083(b)(2) requires that project impacts, even if individually limited, must be
23 "viewed in connection with the effects of past projects, the effects of other current projects and the effects
24 of probable future projects." The "cumulative impacts" of the Project make the CITY's determination that
25 the Project is Categorical Exempt an abuse of discretion, as it does not proceed the manner required by
26 CEQA Guidelines §153302(b) to consider the significant impacts on the environment from similar past,
27 current and future projects in the same area.
28

Jacob, Melinda

Subject: FW: 1200 Ashby

-----Original Message-----

From: michael larrick [mailto:mjlarrick@yahoo.com]

Sent: Thursday, June 18, 2009 7:44 AM

To: Ross, Steven D.

Subject: 1200 Ashby

Hello,

The CityCentric Investments request for \$1,381,450 from the Housing Trust Fund for Senior Housing is the latest deception by Ali Kashani and company to the neighborhood.

The large wooden sign in the lot on the corner of Ashby and San Pablo Avenues still advertises market rate condominiums coming soon. This was changed to rental units and the retail space was reduced to half of the original and now it is to be senior housing.

The City of Berkeley has pushed this project through over the nearly universal opposition by neighbors. Density on transit corridors seems to trump all other concerns. Every concession in size, set backs, parking, reduction of retail space, etc, density bonus legalities, etc, etc, has gone in favor of the developer. It is very difficult to get the community involved in the "democratic" process when the process appeared to be a conspiracy. Beginning with a series of, "Last on the Agenda" item meetings, continuing with staff huddling together like lawyers at a murder trial knocking down any concessions in favor of the neighborhood and ending with some embarrassing e-mails between developer and City staff.

The main reason that the project was forced upon the neighborhood was that it was going to reduce the number of car trips by the 37,000 people who commute to Berkeley each day. Linda Maio made the point in dismissing many other remedies for reducing carbon dioxide. We need to provide housing for workers. We need to reduce the number of commute trips for workers. Seniors do not work. Senior housing is not an efficient use of such an important transit corridor.

If the 1200 Ashby project is allowed change to Senior Housing, the arguments for approving the project are no longer valid. The project should have to go through a whole new process.

Our neighborhood has been neglected for decades. We only want what other areas of Berkeley have. We want a "town center". We want an influx of vitality. We want 1200 Ashby to be the hub of what we hope will be a real community with shops and street traffic, other than hookers. We want a building full of energized home owners (The original Kashani proposal) with a stake in the community. We want what neighborhoods like College Ave.(Elmwood), 4th St, Monterrey Market area and North Berkeley Solano Ave. have. We have waited a long time.

Senior housing is not what we need. It is what Kashani needs. There is Senior housing a few blocks south on San Pablo Ave. There is senior housing a few blocks north on San Pablo Ave. There is senior housing at Alcatraz and Sacramento. There is senior housing at Sacramento and Dwight.

The section 8 program should be shared across the City of Berkeley. We hear a lot about diversity but the section 8 vouchers are nearly exclusive to south and west Berkeley. They are most concentrated in our neighborhood.

We have been told through out the process that Ashby and San Pablo is an important corner in the City of Berkeley. The corner warrants this monster of a building because it is an important hub on a transit corridor. Measure G is constantly cited for a reason to build large projects on transit corridors in order to provide housing and retail for workers to eliminate a commute or provide the WORKER with a convenient, energy efficient means of transport. Senior housing is not a good use for this corner. It does not satisfy measure G and the arguments for approval of the original project do not apply to Senior Housing.

It is unfair to approve one project and change the project after approval at the last minute. The project should be completely reevaluated. The change is major.

Michael Larrick 1212 Carrison Street Berkeley

June 12, 2009

City of Berkeley
Housing Advisory Commission
Zoning Adjustments Board
2180 Milvia Street
Berkeley, CA 94704

RE: I Support the Ashby Arts Affordable Senior Project

Dear Board and Commission members,

Housing in Berkeley is no longer affordable. There is no more vacant land to put more housing on, so we must go vertical. This proposed project provides appropriate transit corridor densities and access to services. Coupled with the proposed "green" certification it is a sustainably designed infill project. Please provide the full requested Housing Trust Fund allocation to Ashby Arts. As a neighbor I am looking forward to the neighborhood benefits that the project will provide, including:

- Car Share
- Ashby/San Pablo intersection improvements
- Public plaza
- JOBS!

This blighted corner needs the investment this project will provide. Our senior citizens need nice, permanently affordable housing, such as is proposed with Ashby Arts. Please approve the funding request and project modifications!

Thank you,

Ashby Frashesh

3018 SAN PABLO AVE
BERK. 94702

June 12, 2009

City of Berkeley
Housing Advisory Commission
Zoning Adjustments Board
2180 Milvia Street
Berkeley, CA 94704

RE: Letter of Support for Ashby Arts Affordable Senior Project at 1200 Ashby

Dear Board and Commission members,

I am writing to express my support for the proposed project at 1200 Ashby Avenue (*Ashby Arts*). I supported this project as a market rate project, and I still support it as an affordable senior project. The project will be a great new focal point for this portion of San Pablo Avenue. This project will finally develop a piece of land that has been vacant and blighted for several years, and more if you include the gas station that used to be there. The proposed project will provide neighborhood-serving retail spaces and 98 for sale condominiums increasing the pride of ownership in our neighborhood. As a certified green building the project will be further the City's goals towards environmental sustainability.

Thank you for considering my comments. Please quickly complete whatever process is necessary so that our neighborhood can begin receiving the benefits that this project will provide.

Thank you,

MATER DINTAIR
3014 San Pablo
Berkeley 947-2

June 12, 2009

City of Berkeley
Housing Advisory Commission
Zoning Adjustments Board
2180 Milvia Street
Berkeley, CA 94704

RE: Support Ashby Arts Affordable Senior Project

Dear Board and Commission members,

Please provide the needed Housing Trust Fund allocation to Ashby Arts. As a local resident and project neighbor I am looking forward to the community and neighborhood benefits that the project represents, including:

- 9,300 square feet of neighborhood retail (and hopefully a cafe)
- More eyes and ears on the street
- Nice architecture
- Public plaza
- Green building

This corner has been vacant for far too long, and the previous gas station was not a neighborhood contribution. Our senior citizens need nice, permanently affordable housing, such as is proposed with Ashby Arts. Please help expedite this project!

Thank you,

Mary Puterbaugh
3016 San Pablo
Berkeley - CA 94702
Wajeha Imtiaz
3016 San Pablo
Berkeley - 94702

June 12, 2009

City of Berkeley
Housing Advisory Commission
Zoning Adjustments Board
2180 Milvia Street
Berkeley, CA 94704

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Thank you for considering my comments. Please quickly complete whatever process is necessary so that our neighborhood can begin receiving the benefits that this project will provide.

Thank you,

ABdul Kaliklic

2014 San Pablo

Berkeley 94702

June 12, 2009

City of Berkeley
Housing Advisory Commission
Zoning Adjustments Board
2180 Milvia Street
Berkeley, CA 94704

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- Green building

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Thank you,


3012 San Pablo Ave

June 12, 2009

City of Berkeley
Housing Advisory Commission
Zoning Adjustments Board
2180 Milvia Street
Berkeley, CA 94704

RE: I Support the Ashby Arts Affordable Senior Project

Dear Board and Commission members,

Housing in Berkeley is no longer affordable. There is no more vacant land to put more housing on, so we must go vertical. This proposed project provides appropriate transit corridor densities and access to services. Coupled with the proposed "green" certification it is a sustainably designed infill project. Please provide the full requested Housing Trust Fund allocation to Ashby Arts. As a neighbor I am looking forward to the neighborhood benefits that the project will provide, including:

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- Public plaza
- JOBS!

This blighted corner needs the investment this project will provide. Our senior citizens need nice, permanently affordable housing, such as is proposed with Ashby Arts. Please approve the funding request and project modifications!

Thank you,

Ann Beth de Gurdie
3018 SAN PABLO AVE
BERK. CA. 94702