

July 5, 2017

To: Zoning Adjustments Board

Re: Appeal of Final Design Review, #DRCF2017-005 approval

ZAB Members:

You've received in your packet the May 30, 2017 multi-point appeal letter of Design Review approval for the "Berkeley Honda" project at 2777 Shattuck and adjacent properties. This supplement letter provides additional information that has come to light since that original appeal letter was sent.

The additional information is relevant to point #4 of the appeal, which discussed encroachments on the "Triangle" portion of the property.

To summarize:

- a. Berkeley Honda representatives presented to the Design Review Committee a design for parking and auto display use of the Triangle which assumed that several encroachments of the private parking use into the Public Right of Way—ranging from about two to about six feet—would be allowed to continue.
- b. Utilization of the extra space created by these encroachments helped define the design of the Triangle and accommodated the required parking count Honda has to achieve to meet its use permit obligations for the project. The design also placed several "solar light standards" in the Public Right of Way to illuminate automobiles for sale displayed on the Triangle.
- c. At the Design Review Committee meeting, neighbors raised the issue of these encroachments in their testimony.
- d. However, City staff verbally provided the Design Review with inaccurate information / advice about the encroachments. **The effect of this inaccurate information was to stop Committee discussion of the encroachments and their impact on the design.**

e. When the Committee Chair asked about the relevance of the encroachments, DRC staff secretary Anne Burns stated that it “*would appear*” that the property had an existing encroachment “*in the approved use permit that was maintained.*” This is taken directly from a recording of the DRC meeting. Here is the full quote from Burns: “**So there was already an encroachment onto the sidewalk, previously, which it would appear in the approved use permit that was maintained.**” (*sic*)

f. This assurance ended Committee discussion on whether encroachments should be taken into account in the design. The approved design and Committee action assumed that the encroachments were legal. As a result, the approved design functions only with the encroachments in place.

g. Burns appears to have been in error in her assumption that the existing encroachments had previously been approved.

h. As we explain below, the encroachments had not been approved by the City, had not been “grandfathered” into the site, do not appear to be legal and would not be permitted by City Staff as part of the design.

As a result, the design has to change. It is now a new design for the Triangle, and it should be sent back to the Design Review Committee for public hearing and action.

What is the additional information neighbors obtained that supports this conclusion? At the suggestion of Anne Burns, the neighbors asked City of Berkeley Public Works staff about the encroachments.

Those staff in their responses made it clear that parking spaces and other features of the proposed design would typically not be allowed to encroach onto the Public Right of Way.

This is the key relevant statement from Vincent Chen, Associate City Engineer: “**It appears the private parking extending into the public ROW and the new solar lights and poles would not be approvable...**”

The full context of Chen’s observation is contained in the emails reproduced at the bottom of this communication.

Once the Public Works staff had made clear that the encroachments were unlikely to comply with the Berkeley Municipal Code, the project architect for Berkeley Honda then hastily redesigned the Triangle parking lot, relocating several parking spaces, in an apparent effort to address at least the parking encroachment.

He sent this revised plan to City staff. On the revised plan the solar light standards are still proposed to be located in the Public Right of Way. This current design has not been seen or reviewed by City committees.

And the “new” design still cannot work because it still includes an impermissible encroachment (the solar light standards).

The design has also been substantially changed in terms of reconfiguration of the parking lot and auto sales “display” areas from what the public and the DRC saw and considered in May.

In light of this information, the new design for the Triangle should be sent back to the Design Review Committee for a new Final Design Review. The revised plan should be reviewed, and the applicant should be asked to present a design that places the “solar light standards” within the private property.

The public should have a chance to see and comment on the final draft design, with encroachments removed, before it is approved. The venue for that review should be a re-hearing at the Design Review Committee.

The City also needs to review the functionality of the revised parking arrangement for the Triangle presented by Mr. Trachtenberg. Every parking space on the Triangle is required as part of the Honda use permits. With the 2 to 6 foot zones of encroachment into the Public Right of Way removed, are the parking spaces shown on the architect’s new plan actually of sufficient size, with sufficient back-up / turning area, to accommodate the required parking count? These dimensions need to be carefully examined.

Sincerely, Steven Finacom on behalf of the appellants.

Partial Transcript of May, 2017, DRC meeting discussion of Honda parking design. This is the section where encroachments were discussed.

Burton Edwards, Chair: *“A number of the speakers had questions about the car parking and landscaping outside of the property line in Triangle in the public right of way. I have no answer to that. I don’t know what you are or are not allowed to do in that respect...”*

Anne Burns, DRC Staff: *“But actually, it’s in the perusal binder, it’s on line, the attachments that came with the drawings had the approved use permit set, and it is consistent, I believe it is on the set that ZAB approved, but in the public right of way is a different issue, they do need to get an encroachment permit, certainly Public Works, all the building permits are being routed to Public Works as well, and transportation, fire department, building and safety for safety issues. **So there was already an encroachment onto the sidewalk, previously, which it would appear in the approved use permit that was maintained.**”* (emphasis added)

Brief comment (inaudible) from member of the DRC.

Anne Burns: *“Right, and it’s in the approved use permit on the site plan that was approved, the eight and a half by eleven (sheet). We will make sure Public Works is aware.”*

Burton Edwards: *“ZAB has approved what is being presented?”*

Burns: *“Yes.”*

Edwards: *“And it may be that there are certain encroachment permits that are required as part of the process.”*

Burns: *“And so that’s with Public Works, but it is included in the sheets.”* (Inaudible further comment)

Theresa Clarke, DRC member: *“All the surveys show the encroachments.”*

Burton Edwards: *“I don’t know (inaudible)...clarifying that.”*

Text of communications between Honda neighbors and City staff regarding the encroachments on the Triangle. All these communications occurred in the weeks after Design Review.

Steven Finacom wrote to City staff on behalf of the neighbors. Anne Burns, Diana Aikenhead, and Vincent Chen responded from the City.

(Email #1)

Steven Finacom to Diana Aikenhead and Vincent Chen, June 16, 2017:

"Hello Diane Aikenhead and Vincent Chen:

I am writing to you at the suggestion of Anne Burns regarding City procedures on encroachments on public property in general, and one project in particular.

This concerns a planned business development at 2777 Shattuck Avenue, where Berkeley Honda proposes to occupy both a building, and a privately owned parking lot across the street.

The parking lot is a triangle bordered by Shattuck, Adeline, and Stuart Street. it's typically known through this permitting process as "the triangle".

In recent submittals to the City for final design review, the applicants included a land survey that showed that the private parking lot in "the triangle" encroaches at several points onto publicly owned adjacent property (the sidewalk areas are very wide on this block, particularly on the Adeline frontage).

According to the survey, at two points the encroachment is about two feet into the public right of way; at a third point, it extends SIX feet into the public right of way. Portions of several parking spaces overlap the encroachment area.

When neighbors of the development raised this issue at the Design Review Committee hearing, we were told by Anne that these encroachments for the project had been approved by the City and were not on the table for discussion.

When I followed up with Anne, she sent me this helpful clarification:

*"There are some encroachments that can be done administratively by Public Works, and some that are major encroachments that need to go to Council. **I believe the encroachments shown on the triangle site are existing, most likely, non-conforming, and remaining.** I did find in the Use Permit Staff Report that any new landscape on the public right-of-way would need to be reviewed and approved by Public Works. I also see where Diana Aikenhead in Public Works has been reviewing the building permit. She might be able to help you with any questions, or she might also refer to Vincent Chen who processes the City's encroachment permits." **(emphasis added)***

So, I am writing to both of you at her suggestion to ask for more clarification, and also cc'ing her so she can see these questions.

My follow-up questions are as follows:

- (1) who decides which encroachments are major, and which are minor, and which need Council action? Is there any sort of written policy on this?*
- (2) Has a determination been made regarding the encroachments at "the triangle"? If so, when was it made and by whom?*
- (3) my impression is that no one can claim a proscriptive easement on public land, no matter how long they have encroached--so even though the encroachments are existing, they should have to go through an approval or review process at some point. Am I correct?*
- (4) have the current encroachments on the public ROW adjacent to "the triangle" parking gone through any formal approval process recently, or in the past? If so what have been the determinations on whether the encroachments would be allowed?*
- (5) are there any other recent or precedent-setting examples of sites in the City of Berkeley where private property owners have been*

allowed to claim and confirm encroachments of 2-6 feet in depth on the public ROW, or along a public street?

(6) In light of Anne's explanation, I should also ask about the status of Public Works review of the private landscaping proposed for the public ROW adjacent to "the triangle", particularly along the Adeline side. At the DRC meeting the applicant stated that the extensive raised planters proposed for this area would be "hand watered". Is that standard City practice?

(7) Finally, some of the sidewalks adjacent to "the triangle" are in very poor condition, with heaving and breakage from tree roots; this is especially the case along Stuart Street between Shattuck and Adeline, which is also a sidewalk that is part of a "Safe Routes to School" project by the City.

As part of the proposed private development of 2777 Shattuck and "the triangle", will the City require the property owner to repair the sidewalks when making improvements to the adjacent site? I ask because my impression is this determination would typically fall with Public Works.

For context, I am writing on behalf of about a dozen neighbors of the property who have filed an appeal of the Final Design Review approvals. My questions to you are intended to clarify these issues and to make sure that the appeal arguments are as accurate as possible.

I hope my questions have been clear. I thank you in advance for your response"

(Email #2)

The above email was also cc'd to Anne Burns. She immediately replied to all on June 16:

“Steve: I had mentioned at the DRC meeting that the encroachments were indicated on the approved use permit drawings. Public Works will review the building permit.”

(Email #3)

Diana Aikenhead then responded to Finacom’s original email with this message on June 26:

“The Encroachment Permit is administered by Vincent Chen. Attached is the Encroachment Permit ordinance, and the Application Form required. The approval criteria for an encroachment permit is found in BMC 16.18.080. The Director of PW (or his designee – usually the City Engineer) is tasked with the responsibility to classify the Encroachment as major or minor; this decision shall remain final. If it is a Major encroachment permit, it must be approved by Council. If it is a minor encroachment, it can be approved by staff after a public process.

Vincent can answer any details regarding specific permits that have been issued by the City; I’m not sure which encroachments you are specifically referring to. The parking lot project at 2747 Adeline (B2017-02213) has not been reviewed yet, and no decisions regarding encroachments or encroachment permits have been made. You are correct that existing encroachments are not “grandfathered” in, and they would need to be removed, relocated, or a permit obtained for them, provided that the criteria is met.

The project will be required to replace any damaged sidewalk associated with the project. The landscaping/planters in the public

right-of-way are under the authority of our Parks Department. They may approve the landscaping without irrigation.

Regards, Diana Aikenhead.”

(Email #4)

On June 26 Steven Finacom wrote back to Diana Aikenhead and Vincent Chen:

“Hello Diane (and Vincent Chen):

Thank you for your informative note. It is most helpful.

*I've attached a screenshot of the survey map for the 2737 Adeline "triangle" parking lot. The survey map shows that there are encroachments of 2.1 feet onto the sidewalk area at the south end (Stuart Street frontage) of the parking lot, and two **encroachments ranging from 2.3 feet to 6.0 feet** onto the City ROW on the west (Adeline Street) side of the parking lot. All of these involve actual private parking spaces that have been extended into the City ROW, and appear to continue in the currently proposed project. These are the encroachments I'm interested in.*

The original survey map is part of the plan set / submittal for the 2777 Shattuck project, which is found here on the City's website: http://www.ci.berkeley.ca.us/uploadedFiles/Planning_and_Development/Level_3_-_Commissions/Design_Review_Committee/2017-05-18_DRC_ATT1%20_2777%20Shattuck%20_%20Project%20Plans.pdf

Steve Finacom"

(Email #5)

The same day, June 26, Vincent Chen also responded:

“Hello Steve,

*There are no encroachment permits issued by Public Works for these encroachments nor have any encroachment applications been received. In order to approve an encroachment permit the applicant must provide justification per BMC 16.18.080. In addition 16.18.030 lists types of encroachments that are specifically prohibited. **It appears the private parking extending into the public ROW and the new solar lights and poles would not be approvable based on these sections of the BMC. (emphasis added)***

Vincent”

(Email #6)

Diana Aikenhead then wrote on June 28 to Steven Finacom and Vincent Chen:

“I talked to the architect last night, told him that there was no way we would approve private parking in the prow, and he sent this revision immediately. I have not reviewed the median plans yet, but this looks much better.*

Diana”

(* prow stands for “Public Right of Way”.)

Attached to Aikenhead’s email was a new site plan for the Triangle that was apparently sent by Honda project architect David Trachtenberg to her.

It showed an reconfiguration of the parking spaces on the Triangle from the design approved by the Design Review Committee, and also substantially altered the dimensions of the car display area.

(Email #7)

The final communication was a follow-up email from Vincent Chen to Diana Aikenhead, Anne Burns, and Steve Finacom. The “it” he is referring to is the revised site plan submitted by Trachtenberg.

“It does look better. Also the solar light poles cannot be in the PROW and bollards next to ADA parking should be removed. Vincent Chen.”