



Z O N I N G A D J U S T M E N T S B O A R D S T A F F R E P O R T

FOR BOARD ACTION
JANUARY 22, 2009

1200 Ashby Avenue

Use Permit #07-10000133 to construct a 5-story mixed use building with 98 residential condominium units, 7,770 square feet of ground-floor commercial space, and 114 parking spaces on a 34,210 square-foot lot; (C-W, AS)

I. Background

At the December 11, 2008 meeting, the Zoning Adjustments Board held a public hearing and continued the project to tonight's meeting, in order to allow staff additional time to provide revised density bonus calculations and a revised inclusionary housing condition. In addition, the applicants have withdrawn their request for a concession under State density bonus law to not provide any inclusionary units on the fifth floor. These items are discussed further below. In addition, staff has prepared revised findings and conditions to address the above changes, changes to State density bonus law that took effect on January 1, and other changes discussed on December 11 (see Attachment 1).

II. Issues and Analysis

A. Changes to State Density Bonus Law

The State density bonus statute, Government Code Section 65915, was amended effective January 1. Following is an analysis of the most substantial amendments and how they affect this project.

1. Waivers and Modifications: The following amendments to subsection 65915(e) provide further clarification on the nature and use of "waivers and modifications" of development standards (new text **bold underlined**, deleted text ~~stricken through~~):

(e) (1) In no case may a city, county, or city and county apply any development standard that will have the effect of **physically** precluding the construction of a development meeting the criteria of subdivision (b) at the densities or with the concessions or incentives permitted by this section. An applicant may submit to a city, county, or city and county a proposal for the waiver or reduction of development standards **that will have the effect of physically precluding the construction of a development meeting the criteria of subdivision (b) at the densities or with the concessions or incentives permitted under this section,** and may request a meeting with the city, county, or city and county. [Non-amended text omitted for brevity.] Nothing in this subdivision shall be interpreted to require a local government to waive or reduce development standards that would have an adverse impact on any real property that is listed in the California Register of Historical Resources, **or to grant any waiver or reduction that would be contrary to state or federal law.**

(2) A proposal for the waiver or reduction of development standards pursuant to this subdivision shall neither reduce nor increase the number of incentives or concessions to which the applicant is entitled pursuant to subdivision (d).

~~—(f) The applicant shall show that the waiver or modification is necessary to make the housing units economically feasible.~~

Staff has consistently advised the ZAB and City Council that State law provides them with discretion in determining what waivers or modifications should be granted, based on their assessment of the least detrimental means of accommodating a project's density bonus, taking into account voluntary amenities within the project that improve the overall quality and appearance of the project and reduce its detriment, such as courtyards, setbacks and commercial space. The density bonus findings already provided to the ZAB for this project (see Attachment 1, p. 4, Finding 4.C) follow this approach.

The addition of the word "physically" to subsection (e)(1) does not require applicants to eliminate all voluntary amenities in order to accommodate density bonus units before the City may waive or modify a development standard. Such an interpretation would compel projects with below market rate units that qualify for density bonuses to have fewer amenities than projects that do not, and would require projects with larger density bonuses (i.e., more or more affordable below market units) to have fewer amenities than projects that provide fewer or less affordable units. Staff finds no basis for this interpretation. This is contrary to the purposes of the Zoning Ordinance and General Plan, the intent of Section 65915 and Section 65008, which prohibits discrimination in land use approvals on the basis of affordability. It should also be noted that in designated nodes in the C-W District (as is the case here) dwelling units are prohibited on the ground floor of buildings. Thus it could not be argued that the proposed ground floor uses should

be replaced with dwelling units in order to minimize the need for waivers or modifications.

It should also be noted that the addition of subsection (e)(2), and the deletion of subsection (f), make it clear that waivers and modifications are not subject to the financial analysis that may be required for concessions or incentives, which are granted in addition to the density bonus and can be denied if they are not necessary to provide for the project's affordable housing costs. This amendment eliminates an internal contradiction in Section 65915 and should address concerns that some ZAB members have expressed regarding the financial necessity of the waivers and modifications requested for this project.

2. General Plan Density Standard: The amendments to Section 65915 also include the following:

- (o) For purposes of this section, the following definitions shall apply:
 - (2) "Maximum allowable residential density" means the density allowed under the zoning ordinance **and land use element of the general plan**, or if a range of density is permitted, means the maximum allowable density for the specific zoning range **and land use element of the general plan** applicable to the project. **Where the density allowed under the zoning ordinance is inconsistent with the density allowed under the land use element of the general plan, the general plan density shall prevail.**

The Land Use Element of the City's 2002 General Plan designates San Pablo Avenue within the "Avenue Commercial" land use classification, an area the Plan defines as having a population density ranging generally from 44 to 88 persons, or 20 to 40 dwelling units, per acre. The Plan also states that this density standard is not to be applied to individual projects:

Because the General Plan land use classifications describe a range of land uses and development intensities in a relatively large area, they are not intended to be used as standards to determine the maximum allowable density on a specific parcel. Allowable densities and uses in each zoning district are established in the more detailed and specific Zoning Ordinance. (pp. LU-22-23)

Based on the above language, in 2002 staff developed an approach for determining compliance with the General Plan density standard over a large section of the applicable land use classification, rather than for a specific project site. This approach was upheld in court on the 2700 San Pablo project, and has been used on several housing projects since. Following this approach, staff calculated the population density for the portion of San Pablo Avenue from Dwight Way to the Oakland city limit. There are 167 existing residential units in this area, 171 units that have been approved but not built, and 98 units proposed as part of this project, for a total of 436 units. Based on a total land area within

this corridor of 45 acres, the population density including approved projects and the proposed project would be about 9.7 units per acre, which is well below the maximum density of 40 units per acre specified in the General Plan. Based on this information, the project complies with the General Plan density standard and with the amendments to Section 65915(o)(2).

Staff sees no basis for any claim that subsection (o)(2) as amended supercedes the above caveat in the General Plan and requires the City to apply its General Plan density standards to specific project sites when calculating density bonuses. Such an interpretation would effectively prohibit the City from applying its own density standards as intended in the General Plan.

B. Revised Density Bonus Calculations:

As stated at the last meeting, minor revisions to the project's density bonus calculations were necessary due to project revisions that occurred after the last calculations were prepared in July 2008. As shown in the revised calculations (see Attachment 2), the "base project" is still 74 units, and the inclusionary requirement has not changed. However, as discussed further in Section B below, for the rental scenario of the project, the applicants have modified the project's affordability so that the project is eligible only for a 32.5 percent density bonus, rather than 35 percent as stated previously. For the condo scenario, the project remains eligible for a 35 percent bonus. Because the applicants have requested a bonus of 32.4 percent, and because the bonus allows physical construction and cannot be changed after construction has begun, the attached calculations use only the smaller bonus.

C. Inclusionary Housing Condition:

The inclusionary housing condition provided at the December 11 meeting was not correct, and a revised condition is included in the attached findings and conditions (see Attachment 1, Condition 68). This condition contains the following table summarizing the affordability requirements of the project's 15 inclusionary units in both a condominium and rental scenario:

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.

The above table reflects modifications to the applicants' affordable housing proposal since the last meeting. Previously the applicants proposed 8 units for households earning 50% of area median income (AMI) or less, and 7 units for households earning 60% of AMI or less. These levels were intended to help the City qualify for a State grant under Proposition 1C. Although the City was not awarded the grant in the first round of applications, it may be eligible in future rounds, and the attached condition of approval includes language allowing the project's affordability to be deepened as necessary to meet grant program requirements (see paragraph G).

In their current proposal, for the condo scenario, the applicants have changed the affordability of all 15 units to 80% AMI. For the rental scenario, they have retained 8 units at 50% AMI for the first 30 years, and changed the remaining 7 units to 81% AMI for the life of the project.

Staff has worked with the Housing Department and City Attorney's office to ensure that the attached condition of approval contains the appropriate language to ensure compliance with the applicable City and State affordability requirements. Staff will provide a revised distribution plan for the inclusionary units, including the fifth floor, at the meeting.

VI. Recommendation

Because of the project's consistency with the Zoning Ordinance and General Plan, and minimal impact on surrounding properties, Staff recommends that the Zoning Adjustments Board APPROVE Use Permit #07-10000133 pursuant to Section 23B.32.040 and subject to the Findings and Conditions distributed on December 11, 2008, as modified in Attachment 1.

Attachments:

1. Revised Findings and Conditions
2. Revised Density Bonus Calculations
3. Support Correspondence Submitted by Applicants
4. Other Correspondence

Staff Planner: Aaron Sage, AICP, asage@ci.berkeley.ca.us, (510) 981-7410