




Office of the City Manager

ACTION CALENDAR  
January 22, 2013

To: Honorable Mayor and Members of the City Council  
From:  Christine Daniel, City Manager  
Submitted by: Eric Angstadt, Director, Planning & Development  
Subject: ZAB Appeal: 740 Heinz Avenue

RECOMMENDATION

Adopt a Resolution to affirm the decision of the Zoning Adjustments Board (ZAB) to approve Use Permit No. 11-70000020 to modify Use Permit No. 09-10000104, to enlarge the building footprint to create a new entrance lobby at the southwest corner of the building, delete the 49-car basement parking garage, and demolish 100% of the existing building to allow the construction of a new 100,000 square foot lab building.

FISCAL IMPACTS OF RECOMMENDATION

If the project proceeds, the City would receive from the applicant \$194,000 for the City's Housing Trust Fund and \$48,500 for the City's Childcare Fund, approximately \$100,000 in property tax revenue in the first year after construction (in 2012 dollars), in addition to an unknown amount of increased business license and sales taxes.

CURRENT SITUATION AND ITS EFFECTS

On September 27, 2012, the Zoning Adjustments Board (ZAB) held a public hearing and approved the application with conditions of approval by a 5-3-0-1 vote (Yes: Allen, Groves, Donaldson, Smart, Williams; No: Alvarez Cohen, Mikiten, Shumer, Absent: Hahn). On October 2, 2012, staff issued the notice of the ZAB decision. On October 16, 2012, Jeff Kaplan, representing the Friends of the West Berkeley Plan, and co-signed by 30 owners or tenants of properties within 300-feet of the site, filed an appeal with the City Clerk.

BACKGROUND

Existing Conditions: The project site consists of an approximately 10,000 square foot structure and associated surface parking lot. The existing brick and steel framed structure is approximately 74 feet in height, with a footprint that is approximately 120 feet by 80 feet. The east and west elevations are approximately 34 feet high, while the north and south elevations have parapets that step up from 34 feet at the corners to nearly 58 feet in the center of the elevation. Above the south parapet, the building has a two-story penthouse structure clad in corrugated transite (cement asbestos panels)

that adds approximately 16 feet to the overall height of the building, for a total height of approximately 74 feet.

Until the closure of the Durkee complex, the building was first used as a warehouse and later for furniture storage. The site and building have been vacant and unused since the mid 1990's.

The building is seismically unsafe<sup>1</sup> and a number of large cracks are visible within the structure, with some facade materials exfoliating from the walls. In 1991, the City of Berkeley added the building to the Unreinforced Masonry Structure (URM) register. For URM buildings, the City requires that the building's URM status appear on title for the property, that improvements be made to comply with the requirements of the URM Ordinance and that transfer of title or additional financing secured by the property require immediate compliance. Also in 2002, the City's Building Official declared the property a public nuisance as provided by Section 19.38.100 of the Berkeley Municipal Code. In 2003, a detailed evaluation by a structural engineer determined that the building posed a danger. Property owners that have not complied with the City's URM Ordinance are unable to obtain building permits and occupancy of this building is prohibited until required retrofit issues are addressed.

Project Approved in 2009: The City Council in July 2009 granted a Variance to exceed the MU-LI District height and story limit and approved a development project that would have developed the 1.4-acre site with approximately 82,000 square feet of research and development uses, 10,000 square feet of related storage area, within four levels and a maximum building height of 74 feet and a 49-stall sub-surface parking garage. The 2009 project, as approved, would have demolished 10,000 square feet of vacant warehouse and the associated parking area.

Additional aspects of the approved project included the following:

- The north and south facades of the building would have been retained and incorporated into the design of the new building;
- The building would have shared parking and loading areas, property management with the existing Aquatic Park Center;
- Creation of a new plaza area, and installation of landscaping and street trees; and
- Approximately 300 new jobs<sup>2</sup>.

As with the current proposal, the land would have remained under the ownership of Garr Land & Resource Management with a ground lease to Wareham Development.

2012 Use Permit Modification: On December 20, 2011, the applicant submitted a Use Permit Modification request that would have continued the four-story building plan and proposed use, but proposed the following modifications:

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<sup>1</sup> Berkeley, City of, 2001. Notice to Owner of Unreinforced Masonry Building. January 5.

<sup>2</sup> Based on the industry standard of three employees per 1,000 square feet.

- Addition of a new lobby on the exterior of the south façade. According to the applicant, this location would provide more logical access to the building and improve interior floor-plate efficiency. The lobby would be two stories with a usable green roof that would be accessible by the building tenants. The lobby interior would allow the public access to the existing southern wall and would also house a more comprehensive exhibit of the architectural history of the site than could be displayed on an external kiosk.
- Elimination of the executive parking below the building.
- Enhancement of the panel and window designs in the new walls including addition of a curved lintel design over the fourth floor windows.
- Bone white window color for the new and existing building elevations instead of the approved bone white for the new portions of the building and warm gray for the existing north and south facades.
- Increased floor area to 100,336, from enlargement of the first, third and fourth floors.

On March 8, 2012, the Zoning Adjustments Board (ZAB) held a public hearing and approved the proposed modifications with conditions of approval to restore the upper floor building setbacks that were present in the 2009 design and to provide window colors per the Design Review Committee (DRC) approval (Vote 7-0-0-2; Yes: Allen, Alvarez Cohen, Hahn, Kopelson, Mikiten, Shumer, Williams; Absent: Groves, Matthews).

Appeal and Council Remand: On March 20, 2012, Chris Barlow, representing the applicant, Wareham Development, filed an appeal with the City Clerk. The appeal asked that the Council revise the ZAB's approval to omit the conditions regarding setback and window color, on the basis that the setbacks would make the project less economically feasible if the area of the third and fourth floors is reduced as required, and that providing different window colors were not necessary to differentiate the addition from the existing building.

On May 29, 2012, the City Council did not consider the appeal of the ZAB decision; instead, the applicant presented a revised plan to the Council that would demolish 100% of the existing building to allow the construction of a new 100,000 square foot lab building. The Council remanded the application to the ZAB for consideration (Vote 7-2-0-0; Yes: Maio, Moore, Anderson, Capitelli, Wengraf, Wozniak, Bates; No – Arreguin, Worthington).

ZAB Remand: The ZAB held a public hearing in September 2012, to review a project that would continue many of the building features of the 2009 approved project, but would no longer retain the historic north and south facades or the below-grade, 49-space parking garage, and would add a two-story lobby with a usable green roof at the southwest corner of the building. The applicant cited higher construction costs and lower rents (when compared to 2009) as the basis for the change to the project. The ZAB concluded that that the modifications to the project did not require new variances,

but nevertheless repeated the 2009 variance analysis using 2012 conditions. In doing so, the ZAB concluded that the four-story, 97,000 net square foot research and development laboratory was the only financially viable project (out seven other development scenarios)<sup>3</sup>.

ZAB Hearing: On September 27, 2012, the ZAB held a Public Hearing in accordance with BMC Chapter 23B.32 and received public testimony from 7 speakers.

The ZAB determined that the change to the project required an Addendum to the EIR, as allowed by *CEQA Guidelines* Section 15164 which states: “The lead agency or a responsible agency shall prepare an addendum to a previously certified EIR if some changes or additions are necessary, but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred.” The EIR for the project was certified by the City in 2009 and CEQA does not require the City to certify an Addendum. Per *CEQA Guidelines* Section 15164(D), an Addendum need not be circulated for public review but can be included in or attached to the final EIR. In this case, the Addendum was released to the public on September 21, 2012.

The ZAB determined that the changes to the project were minor and that the proposed uses for the site, and square footage of the new structure would not be substantially altered with the currently-proposed project, and therefore that the project changes did not require major revisions in the EIR.

The ZAB also determined that since certification of the Final EIR, conditions in and around the project site have not changed such that implementation of the currently-proposed project would result in new significant environmental effects or a substantial increase in the severity of environmental effects already identified in the Final EIR.

Finally, the ZAB determined that no new information of substantial importance was identified in regard to the currently-proposed project or the project site such that the currently-proposed project would be expected to result in: 1) significant environmental effects not identified in the Final EIR or 2) more severe environmental effects than shown in the Final EIR.

In conclusion, the ZAB determined that the currently-proposed project would not require new mitigation measures previously determined to be infeasible, or mitigation measures which are considerably different from those identified in the Final EIR and that the currently-proposed project would require no new mitigation measures because no new impacts are expected beyond those identified in the Final EIR.

The ZAB adopted the CEQA Addendum and approved the Modification to the approved plan, with minor changes to the previously-approved Conditions, to reflect the modified project.

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<sup>3</sup> Based on financial data presented by the Applicant and peer-reviewed by EPS, a local Land Use Economics Firm, on behalf of the City.

The September 29, 2012, ZAB report may be found in Attachment 4, pages 207-359, and the Captioner's report of this meeting may be found in Attachment 4, pages 384-397.

#### RATIONALE FOR RECOMMENDATION

The issues raised in the appeal letter, and staff's responses, are as follows. For the sake of brevity, the appeal issues are not re-stated in their entirety; refer to the attached appeal letter for full text.

Issue 1: Inadequate EIR Addendum: The appeal states that the "Addendum was neither adequate, subject to public comment, nor was it certified, in compliance with CEQA" and that the project has undergone "significant project changes since receiving environmental review in 2009". [p. 1]

Response 1: As stated briefly above in this report, and more fully in Exhibit A, which is attached to this report, the modification of the project will not result in significant environmental impacts beyond those identified in the Final EIR, or involve a substantial increase in the severity of impacts already identified in the Final EIR. As no new impacts would occur, the project approval did not require the implementation of new or revised mitigation measures. Thus, the adoption of the Addendum was in compliance with CEQA.

The appeal does not offer any evidence to suggest how the Addendum was inadequate.

Issue 2: Increase in Building Height & Improper Approval of a Variance: [p. 1]

Response 2: The maximum building height approved by the ZAB in September 2012, is the same as approved by the City in 2009. In 2012, the ZAB concluded that the modifications to the project did not require a new height variance and it did not grant a new Variance in 2012. Instead, the ZAB updated the 2009 variance analysis to reflect 2012 conditions. In doing so, the ZAB concluded that the four-story, 97,000 net square foot research and development laboratory was the only financially viable project (out of seven other development scenarios)<sup>4</sup>.

The appeal does not offer any evidence to suggest how the Variance was approved improperly in 2009 and the time to challenge the Variance has long since expired.

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<sup>4</sup> Based on financial data presented by the Applicant and peer-reviewed by EPS, a local Land Use Economics Firm.

Issue 3: Health Risks from Lab Use: The appeal states that the approval was based on a “lack of review of potential risks to the surrounding environment and human health associated with laboratory use”. [p. 1]

Response 3: The research and development laboratory use approved by the ZAB in September 2012 is the same as approved by the City in 2009. According the application, the research and development laboratory uses intended for this building are the same as exist today in the Aquatic Park Center.

The appeal does not offer any evidence to suggest what health risks would occur from the research and development laboratory use.

#### ALTERNATIVE ACTIONS CONSIDERED

Pursuant to BMC Section 23B.32.060.B, the Council may (1) affirm the ZAB decision and dismiss the appeal, (2) set the matter for a public hearing, or (3) remand the matter to the ZAB.

#### Action Deadline:

Pursuant to BMC Section 23B.32.060.C, if none of the three actions described above has been taken by the Council within 30 days from the date the appeal first appears on the Council agenda, then the decision of the Board shall be deemed affirmed and the appeal shall be deemed denied.

#### CONTACT PERSONS

Debra Sanderson, Land Use Planning Manager, Planning & Development Department, (510) 981-7410

Greg Powell, Senior Planner, Planning & Development Department, (510) 981-7414

#### Attachments:

1: Resolution

Exhibit A: Findings and Conditions

Exhibit B: Project Plans, dated September 27, 2012

2: Appeal Letter, dated October 16, 2012

3: Index Administrative Record for January 22, 2013 Council Meeting

4: Administrative Record

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

AFFIRMING THE ZONING ADJUSTMENTS BOARD'S APPROVAL OF USE PERMIT NO. 11-70000020 TO MODIFY USE PERMIT NO. 09-10000104, TO ENLARGE THE BUILDING FOOTPRINT TO CREATE A NEW ENTRANCE LOBBY AT THE SOUTHWEST CORNER OF THE BUILDING, DELETE THE 49-CAR BASEMENT PARKING GARAGE, AND DEMOLISH 100% OF THE EXISTING BUILDING TO ALLOW THE CONSTRUCTION OF A NEW 100,000 SQUARE FOOT LAB BUILDING IN THE MIXED-USE, LIGHT INDUSTRIAL DISTRICT, AND DISMISSING THE APPEAL

WHEREAS, on December 20, 2011, Chris Barlow, of Wareham Development ("applicant") filed an application for a Use Permit (No. 11-70000020), to modify the approved project (Use Permit No. 09-10000104), to enlarge the building footprint to create a new entrance lobby at the southwest corner of the building, expand the 3<sup>rd</sup> and 4<sup>th</sup> floors, delete the 49-car basement parking garage, and revise building elevations ("project), in the Mixed-use, Light Industrial District (MU-LI); and

WHEREAS, on January 19, 2012, the Design Review Committee (DRC) conducted preliminary design review; and

WHEREAS, on January 19, 2012, the DRC generally accepted the design of the new south lobby and revised window plan on upper floors of all building elevations, however the DRC did not support the loss of the upper floor step backs nor the request to revise the approved window colors. The DRC's action was supported by the four members that were present (ayes: Allen, Williams, Goring, McCulloch; absent: Blake, Woltag, Olson); and

WHEREAS, on February 23, 2012, staff mailed 58 notices to adjoining property owners and occupants within 300 feet of the site, and to interested neighborhood organizations and posted a Notice of Public Hearing to inform the public of a meeting with the Zoning Adjustments Board (ZAB); and

WHEREAS, on March 8, 2012, the ZAB held a public hearing, adopted conditions of approval to require the redesign of the project to provide upper floor step-backs and to provide bone white windows for the new portions of the building and warm gray windows for the existing north and south facades, and approved the application by a 7-0-0-2 vote (Yes: Allen, Alvarez Cohen, Hahn, Kopelson, Mikiten, Shumer, Williams; Absent: Groves, Matthews); and

WHEREAS, on March 19, 2012, staff issued the notice of the ZAB decision; and

WHEREAS, on March 20, 2012, Chris Barlow, representing Wareham Development filed an appeal with the City Clerk; and

WHEREAS, on May 29, 2012, the City Council did not consider the appeal of the ZAB decision; instead, the applicant presented a revised plan to the Council that would

demolish 100% of the existing building to allow the construction of a new 100,000 square foot lab building. The Council then remanded the application to the ZAB for consideration (Vote 7-2-0-0; Yes: Maio, Moore, Anderson, Capitelli, Wengraf, Wozniak, Bates; No - Arreguin, Worthington; and

WHEREAS, on July 19, 2012, the DRC reviewed the modification, no quorum vote was reached on proposed modification and the design is presented to the ZAB without a recommendation from the DRC; and

WHEREAS, on September 27, 2012, the Zoning Adjustments Board (ZAB) held a public hearing and approved the application with conditions of approval by a 5-3-0-1 vote (Yes: Allen, Groves, Donaldson, Smart, Williams; No: Alvarez Cohen, Mikiten, Shumer, Absent: Hahn); and

WHEREAS, on October 2, 2012, staff issued the notice of the ZAB decision; and

WHEREAS, on October 16, 2012, Jeff Kaplan, representing the Friends of the West Berkeley Plan, and co-signed by 30 owners or tenants of properties within 300-feet of the site filed an appeal with the City Clerk; and

WHEREAS, on January 22, 2013, the Council considered the record of the proceedings before the ZAB, and the staff report and correspondence presented to the Council, and, in the opinion of this Council, the facts stated in, or ascertainable from this information, do not warrant further hearing.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that the Council hereby affirms the decision of the ZAB to adopt an Addendum to the EIR and approve Use Permit No. 11-70000020, adopts the findings and conditions in Exhibit A and the project plans in Exhibit B, and dismisses the appeal.

#### Exhibits

A: Findings and Conditions

B: Project Plans dated September 18, 2012