



July 1, 2013

Mayor Bates & Berkeley City Council  
2180 Milvia Street  
Berkeley, CA 94704

Re: July 2, 2013, Agenda Item 17: Zoning Amendments to BMC Chapter 23C.08 —  
Demolition and Dwelling Unit Controls

Honorable Mayor Bates & Councilmembers:

I am chair of the Preservation Action Committee (PAC) for the Berkeley Architectural Heritage Association (BAHA). It recently came to BAHA's attention that you are considering amending Zoning Ordinance Chapter 23C.08. Please accept this correspondence as BAHA's initial comments regarding the proposed amendment.

In view of the complexity of the changes to the Ordinance, both BAHA and the interested public need further time to evaluate the potential effects of the proposed amendment on Berkeley's cultural resources and ask that you postpone any further deliberations to give the public sufficient time for input.

**A. The Proposal Should be Continued to Allow for More Evaluation**

The proposed changes to the ordinance are very complex and we do not see in staff's documentation any detailed discussion regarding the potential negative impacts on historic resources. Not all historically significant buildings in Berkeley have been officially designated as landmarks, but many have been identified as eligible for landmark status because of their age and historic significance through building surveys over the past 30+ years. Changes to the Demolition Ordinance may, unintentionally, ease the current barriers to demolishing them without adequate notice or public hearings.

Example: Currently, the Demolition Ordinance, subsection A, applies to "a building containing one or more dwelling units." But the proposed change would apply just to "a building constructed prior to June 1980 on a property containing two or more dwelling units." What is the intent regarding historic *one-unit* properties?

Similarly, the draft's paragraph 23C.08.020.A.3 is new and difficult to understand in the context of evaluating its potential impact on historic resources: "The demolition is necessary to permit construction of special housing needs facilities [meaning what?] such as, but not limited to [!], childcare centers and affordable housing developments that serve the greater good of the entire community."

Existing paragraph 23C.08.020.A.2 speaks of "... construction approved pursuant to this Ordinance [sic] of at least the same number of dwelling units as the demolished structure." But the draft's comparable paragraph 23C.08.020.A.4 instead says, "... construction approved pursuant to this Chapter [sic] of at least the same number of dwelling units [and omits the words 'as the demolished structure']." Isn't the present version clearer and technically better, partly because approvals of new construction involve "[Zoning] Ordinance" chapters *other than* 23C.08?

The draft's subsection 23C.08.030.E states: {Alternatively [sic], the Zoning Officer may issue an AUP for a conversion which eliminates a dwelling unit if he/she finds that the conversion will restore or brings the building closer to the original number of dwelling units [...] provided the conversion meets the requirements of A.2., B. [sic] C. and D. of this section." But it's unclear *to what* this provision would be an "alternative." Furthermore, why does the draft's subsection 23C.08.030.E authorize approval by a Zoning Officer-issued AUP, whereas approval in other situations would require a Board-issued Use Permit?

## **B. The Proposed Amendment to the Demolition Ordinance May Invite Demolition of Historic Resources**

On page one of the letter, dated June 27, 2013 and addressed to you from the chairperson of the Rent Stabilization Board, she offers the opinion that specific proposed changes to the Demolition Ordinance will act as an incentive for developers to demolish existing buildings as a way to remove sitting tenants, who currently enjoy protection under Rent Control. No ordinance should make it economically advantageous to demolish Berkeley's older buildings, given the number and historic significance of so many of them. The preservation of these buildings depends, in part, upon continued use by low-income tenants who enjoy Rent Control provisions. In many instances, we find that the current Demolition Ordinance and Rent Control prevents developers from terminating the tenancies, demolishing older buildings, and replacing them with buildings that will provide a higher return on investment (ROI). The developer improves his ROI, but at the expense of lower-income families and historic resources.

## **C. There Has Been No CEQA Review of the Proposed Amendment**

- 1. The City Is Required to Produce Evidence That the Proposed Demolition Ordinance Amendment Will Not Adversely Impact Historic Resources**

Zoning Amendments are considered “projects” under the California Environmental Quality Act if they may cause either a direct change to the environment or a reasonably foreseeable indirect change to the environment. Pub. Resources Code § 21065; CEQA Guidelines §§ 15357, 15377, and 15378. The City must first conduct CEQA review, and any CEQA exemption determination must be supported by substantial evidence. In *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, the appellate court considered whether the city had sufficiently considered the potential environmental impacts before adopting an ordinance to complete geological testing. In concluding that the city had failed to conduct proper environmental review, the court stated that:

There is no indication that any preliminary environmental review was conducted before the exemption decision was made. The agency produced no evidence to support its decision and we find no mention of CEQA in the various staff reports. A determination which has the effect of dispensing with further environmental review at the earliest possible stage requires something more. We conclude the agency’s exemption determination must be supported by evidence in the record demonstrating that the agency considered possible environmental impacts in reaching its decision.

(*Id.* at p. 117.)

Here, we do not see anything that suggests the City of Berkeley has completed environmental review. If it has completed environmental review, we need to know the outcome of that review. Because the amendment may result in easing the ability of developers to demolish structures that may not be designated as landmarks, but are eligible for such designation, it may present a direct or indirect impact on the viability of these structures and any landmark structures near them.

## **2. BAHA Has Standing to Raise CEQA Objections to the Demolition Ordinance Amendment**

BAHA’s mission includes preservation of historic resources. It actively works with the City and residents to preserve older Berkeley structures that are worthy of preservation because of their historic, cultural, and/or their architectural significance. BAHA’s large membership consists primarily of Berkeley residents who wish to see these older structures preserved for future generations. As a nonprofit public benefit corporation, BAHA has standing to raise CEQA issues for the same reasons as the Petitioners, who challenged an ordinance on CEQA grounds, in *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 44:

On the record before this court, there is no compelling policy reason why Rialto Citizens should not have public interest standing to challenge the City’s project approvals on CEQA and non-CEQA

grounds raised in the petition. As the Lawrence declaration shows, Rialto Citizens is a nonprofit public benefit corporation formed for the purpose of promoting "social welfare through advocacy for and education regarding responsible and equitable environmental development." And by its writ petition, Rialto Citizens seeks to enforce the City's public duties to comply with CEQA and the Government Code in considering and approving the project.

(*Id.* at p. 54.)

BAHA seeks a continuance of this matter so that it will not only have time to review the Demolition Ordinance Amendment's potential impacts on historic structures and its consistency with the City's General Plan, but also so the City has time to conduct an Initial Study to determine if an environmental impact report is required.

Thank you for considering our comments and request for a continuance.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Leila H. Moncharsh".

Leila H. Moncharsh, J.D., M.U.P.  
Chair, Preservation Action Committee  
Berkeley Architectural Heritage Association