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June 4, 2013

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Via E-Mail

Mayor Bates and Members of the City Council
2180 Milvia Street
Berkeley, CA 94704

Re: Zoning Amendments to BMC Chapter 23C.08 – Demolition and Dwelling Unit Controls

Dear Mayor Bates and Members of the City Council:

I am writing on behalf of Equity Residential to comment on the proposed amendments to Chapter 23C.08 of the Berkeley Municipal Code.

Equity Residential is the applicant for the Acheson Commons project, which would allow 205 new dwelling units, the conversion of 16,824 square feet of office use to residential, and the reuse of approximately 30,000 square feet of existing commercial space in downtown Berkeley ("Acheson Project"). The Acheson Project would also require either the relocation or the demolition of two brown shingle residential structures located on Walnut Street. There are eight units in the brown shingle structures, although most of the units have been vacant for 10 years. Whether these buildings are relocated or demolished, they would be subject to the proposed ordinance. While Equity greatly appreciates the efforts of City Staff to bring greater clarity to an area that has been subject to some differing opinions, I write to express some concerns and recommend key revisions.

We believe that the Acheson Project exemplifies the conflicting policies that the City is seeking to resolve. It is a sustainable, mixed use, high density project in precisely the location the City Council directed such projects when it adopted the Downtown Area Plan. The Project will increase the housing stock, provide affordable units on-site, and promote a walkable, livable city by further activating the downtown area. Potentially standing in its way, however, are eight units in two dilapidated brown shingle buildings, most of which have been vacant for ten years. These units are not contributing to Berkeley's housing stock nor are they providing affordable housing. Due to uncertainty in the Berkeley Municipal Code, however, the units are challenging the ability to build out the area as envisioned in the

Downtown Area Plan. If changes are needed to the Code, which we are not sure is the case, we implore the Council to carefully balance these competing needs.

Before addressing the proposed ordinance, I would like to briefly weigh in on a difference in view between the City Attorney's Office and the Rent Stabilization Board over the interpretation of the term "controlled rental unit." We believe that the City Attorney has taken a reasoned and consistent position that is supported in the Municipal Code that the term "controlled rental unit" does not include units that are no longer "available for rent." That does not simply mean that units are vacant, but rather that such units are effectively no longer part of the rental market. For example, with the brown shingles Equity owns on Walnut, the buildings have been mostly vacant for a decade, they have become dilapidated and are boarded up. They have been in a state of disrepair and vacancy since before Equity's ownership and the cost to repair the units and put them back on the market would not justify the cost. The units are effectively no longer part of the rental housing stock and thus are not "controlled rental units." The City Attorney's view is supported by the plain language of the Municipal Code and we believe takes a reasoned and balanced approach. The Rent Stabilization Board, on the other hand, would essentially create rental units into perpetuity no matter how unused they become or how long they have been off the market. Such an interpretation is not only contrary to language in the Code, but it will also hamper development of new housing that will increase the housing stock. As for the Acheson Project, under the current code, the demolition findings set out in Section 23C.08.030 are not applicable because the brown shingles are not controlled rental units.

- **Requiring Replacement Units at 60% AMI is Not Roughly Proportional to the Impact of Removing Rent Controlled Units**

The supposed purpose of the proposed ordinance is to mitigate for the loss of rent controlled units that are demolished. However, as drafted, the proposed ordinance does not replace rent controlled units, as it could and should, but rather it would create new below market rate units to be rented to households with no greater than 60% of the area median income (AMI). A rent controlled unit is a much different tool for promoting and preserving affordable housing than a below market rate (BMR) unit. For example, any resident can rent a rent controlled unit, but a prospective tenant of a BMR unit must demonstrate income eligibility, among other things. The initial rent for a rent controlled unit can be set at whatever level the market allows, but rent increases are controlled. This allows units to approximate market trends, but it protects tenants from big swings in market rates. The rent for a BMR unit, on the other hand, is set strictly based on affordability. In Equity's view, these two mechanisms are not the same and it is inappropriate to require that rent controlled units be replaced by BMR units, particularly at such a low level.

In fact, it is not only inappropriate, but it goes further than what the City can legally require. Fundamental land use law dictates that an exaction not only have a "nexus" to a project's impact, but also that the exaction be "roughly proportional" to the impact. If the impact is loss of rent controlled units, then the mitigation with the clearest nexus and proportionality would be to require that the same number of new replacement units be subject to requirements that are equivalent to rent control. To change affordable housing tools and to require that BMR units affordable at 60% AMI replace rent controlled units goes too far, is disproportionate and unreasonable mitigation. This is particularly true in situations like Equity's where the units being "lost" are no longer even part of the rental market.

The fact that the requirement in the proposed ordinance is not "roughly proportional" to the impact can be seen by way of example. In the case of the Acheson project, the existing units are vacant and thus any new tenancy would be at market rate. Currently, the units are in a dilapidated state, but if they were renovated to "like new" conditions, market rate is currently approximately \$3.75 / square foot. This is a conservative assumption as a review of recent listings shows that apartments in the area in buildings built before 1980 are renting for more than \$4.00 / square foot.[1] (copies of example listings are attached as Exhibit A) Assuming the units are in the range of 850 sf to 999 sf, the market rate would be between approximately \$3,100 and \$3,800 per month. While that would be the market rate, we calculate the restricted rental rate for such an apartment for the various income levels as follows:

- 60% AMI: \$1,205/month
- 81% AMI: \$1,626/month
- 120% AMI: \$2,409/month

Thus, the City would be losing rent controlled units that would generate an initial rental rate of over \$3,000 per month, yet it proposes that the replacement units be rented at approximately one-third this market rate. Even if a more reasonable "moderate" level is used (81% to 120% AMI), that would still be significantly below market rate. As this shows, the proposed ordinance over-mitigates for the loss and thus does not meet the "rough proportionality" test articulated by the courts. We propose two alternatives below.

> **If Anything, The Proposed Ordinance Should Require that Replacement Units Either be Subject to the Requirements of Rent Control or be Affordable at a "Moderate" Level**

<u>Replacement Units Should be Subject to the Same Affordability Levels as in the Demolished Building, Which Could Include the Requirements of Rent Control</u>. We believe that a more

[1] Examples of current listings on Craigslist for apartments built before 1980 include the following:
1. 3 bedroom for \$3,395@770 sf = \$4.41/sf; located at 2240 Blake Street
2. Studio for \$1,800@450 sf = \$4.00/sf; located at 1709 Shattuck Avenue
3. 1 bedroom for \$1,750@450 sf = 3.89/sf; located at 2828 College Avenue

reasonable approach that more accurately mitigates for the loss of units is to set the affordability level in the replacement unit at the same level as the lost unit. In the case where demolished were subject to the rent control ordinance, replacement units would be subject to rent control requirements, including the limitation on rental increases to approximately 65% of the Consumer Price Index. This approach would most fairly promote the City's goal of preserving the affordability levels that exist prior to the demolition of units subject to rent control. This is also consistent with the draft ordinance proposed by Planning Staff that was presented to the Planning Commission, which proposed that replacement units be "at the same affordability levels as exist in the building to be demolished." We interpret "same affordability level" to mean that if the unit to be demolished was rent controlled, the replacement unit would be subject to the same requirements.

We understand that there may be some concern that the Rent Stabilization Ordinance does not apply to new buildings and thus that the replacement units would not be subject to rent control. However, without modifying the Rent Stabilization Ordinance, we would propose that the new units would be subject to requirements equivalent to those set out in that ordinance. We do not believe there is a legal impediment to this approach, the Rent Board has the experience and tools to regulate and enforce rent controlled units and this approach would place the fairest and most proportional burden on new projects.

If Inclusionary Units are Required, They Should be set at the "Moderate" Level. Alternatively, Equity recommends changing the affordability level to "moderate," or 81% to 120% of AMI. In Equity's view and experience, such an affordability level better approximates a rent controlled unit.

Rent controlled units start out at market rate and only become more affordable as a tenant remains in a unit and permitted rent increases do not keep pace with market rate increases. That is, rent controlled units start out at market rate and initially may be affordable to those with comparatively high incomes. As a tenant remains in a unit, the rent is "stabilized" and becomes more affordable the longer the duration of the tenancy (this also depends on how the market behaves). This makes replacing a rent controlled unit with an inclusionary unit inherently inexact, but it also highlights why using 60% AMI is problematic and the "moderate" level of 81% to 120% AMI is more appropriate. For example, the initial rental rate in a rent controlled unit may start out being affordable to only those with an income in excess of 120% AMI, but as time passes and rent increases are limited, the rent may become more "affordable," such as at the 81% AMI level, or even less. Only those rent controlled units with very long tenancies approach or get below the 60% AMI affordability that the City proposes.

It should be noted that for a city like Berkeley, 81% to 120% AMI affordability is not market rate. The reason for this is that AMI is a regional calculation and includes areas of the Bay Area with a much lower median income than Berkeley. Berkeley's market rate rent is also comparatively high. For that reason, in the example above, an 850 sf unit rented at the 120% AMI level is approximately a 25% reduction from market rate.

Taking these factors together, even requiring "moderate" affordability is a significant reduction from market rate, but it is much closer to approximating the effect of a rent controlled unit. For these reasons, if the City Council deems it necessary to require replacement BMR units rather than units subject to rent control requirements, we recommend that they be set at a "moderate" level.

Equity believes that either of the above two approaches would better balance the City's competing goals of promoting sustainable growth in the Downtown Area while also preserving affordable housing stock. To put a finer point on this balance, if the City is too aggressive, it may threaten the viability of some projects, resulting in less development, fewer new units and more underutilized parcels. With the Acheson Project, under Equity's proposal, the eight "lost" vacant units would be replaced with eight units subject to rent control requirements within the new 205 unit project, which would also include an additional 18 affordable units at 60% AMI. Clearly this is a win-win result for both development in the Downtown Area and the promotion of affordable housing.

- **The Costa Hawkins Act May Prohibit the Proposed Ordinance**

As a further reason to require that the mitigation be replacement rent controlled units, not BMR units, the Costa Hawkins Act creates a legal problem for the City's proposed ordinance. The Costa Hawkins Act prevents the City from setting the initial rent, with some exceptions that are not applicable here. In particular, the statute provides: "an owner of residential real property may establish the initial rental rate for a dwelling or unit." Cal. Civ. Code § 1954.53(a). As established by *Palmer/Sixth Street Properties v. City of Los Angeles*, Costa Hawkins prohibits cities from requiring that rental projects include affordable units. The City of Berkeley, like several other jurisdictions, responded to the *Palmer* decision by amending its inclusionary housing ordinance to require that rental projects pay an affordable housing mitigation fee, unless the project proponent elects to include the units on-site. Key to this "fix" is that the only legal mandate is to pay a fee, since fees are not prohibited by Costa Hawkins, but the developer – *at its sole discretion* – has the option of building the units instead of paying the fee.

Under the proposed ordinance, however, the City would be requiring that a project provide on-site below market rate units (i.e., with the initial rent set at below market rate), in contravention of Costa Hawkins which provides the right of the owner to "establish the initial rental rate." Unlike BMR units, rent controlled units do not violate Costa Hawkins because the initial rate is set by the owner. Thus, to avoid this issue with the Costa Hawkins Act, the City should require that the replacement units be subject to rent control requirements, not affordable unit requirements.

* * * *

Thank you for your thoughtful consideration of this matter.

Sincerely,

Miles H. Imwalle

CC: Eric Angstadt, Planning & Development Director
Jane Micallef, Health, Housing and Community Services, Director
Jay Kelekian, Rent Stabilization Board, Executive Director
Zach Cowan, City Attorney
Greg Powell, Senior Planner
Dan Golovato, Equity Residential
Peter Solar, Equity Residential
Mark Rhoades, Rhoades Planning Group

Enclosure

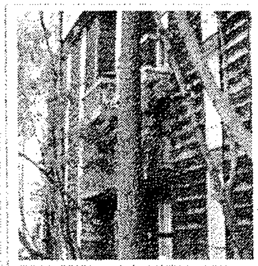
EXHIBIT A

- $3395 / 3br - 770ft² - Gorgeous 2-story remodels 4 blocks from UCB AVL 7/1, 8/1, 8/15!! B304 (berkeley)

2240 Blake Street

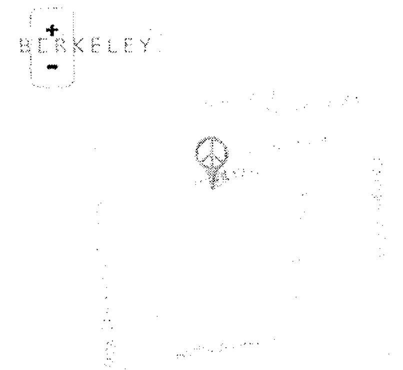
Rent: $1695 | Bedrooms: 1 | Walk Score: 86 | Available: 06/01/2013

Listing Features: $1450-$3495, ..., 1 bedroom, 2 bedroom ..., 3 bedroom 2 bath, Available August 1, Available August 15, Available July 1, Available June ..., Available June 15, Available September ..., studio



Enjoy quiet neighborhood living in this gem centrally located in South Berkeley between Telegraph and Shattuck.

- 4 Blocks from Campus
- Covered, secure parking
- On-Site Laundry
- Elevator on-site
- 48 unit Shingle Building on a quiet residential street
- Parking Available
- Quiet Neighborhood
- Walking Distance to Downtown
- Internet and Cable Ready
- Structural Retrofit
- New Windows
- Central Alarm System



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2240 Blake street

3BR 770ft²apartment

Completely Remodeled --2240 Blake Street Berkeley CA

3 Bedroom -- $3195-$3395 + Utilities per month AVL 7/1, 8/1, or 8/15

for more information contact Natasha at kapoor.acuna@gmail.com

For a virtual tour of one of our remodeled units please visit this link: http://www.youtube.com/watch?v=wLcLdLqTBok

2240 Blake street (google map) (yahoo map)

- cats are OK - purrr
- it's NOT ok to contact this poster with services or other commercial interests

Posting ID: 3847994952 Posted: 2013-06-03, 9:34PM PDT email to a friend

- $1800 / 450ft² - Just renovated beautiful studio apartment (berkeley north / hills)

450ft² apartment

Beautiful studio apartment available, located in the Gourmet Ghetto just minutes from cafes, restaurants, grocery stores, and coffee shops. Easy access to BART, public transportation, downtown, and just minutes from UC Berkeley campus northside.

→ 1709 Shattuck Avenue

Fully Remodeled units with two closet, brand new stove, carpet, floors, bath, and more.

- $1750 / 1br - 450ft² - Beautiful top floor space in Elmwood Area AVL 8/1:c15 (berkeley)

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College Ave at ashby ave

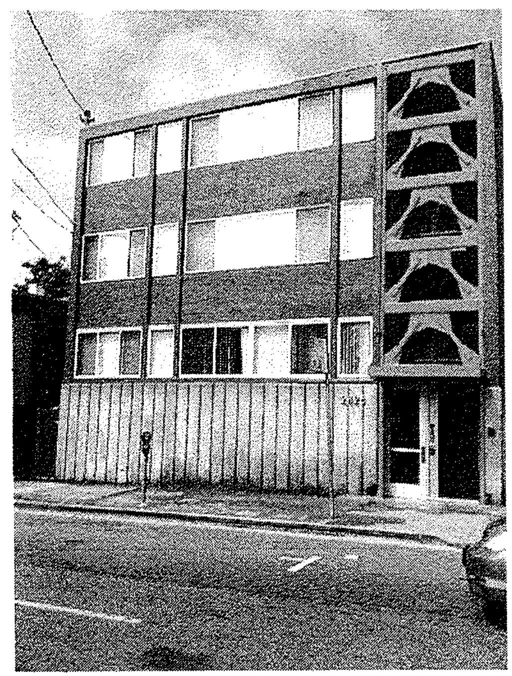
1BR 450ft² apartment

| hclark@cca.edu

2828 College Avenue, Apt 15, Berkeley, CA

AVAILABILITY: August 1, 2013, top floor 450 sq feet street $1,750

1 Bedroom Apartment $1,750/month



sample photos below

Bedrooms	1
Bathrooms	1 full
Sq Footage	n/a
Parking	**avail**able
Pet Policy	possible with references
Deposit	required

DESCRIPTION