August 18, 2014

Appeal Zoning Board Decision: 2401 Warring Street Use Permit #2013-0057

Dear Mayor Bates and Members of the Berkeley City Council,

We are appealing the decision of the Zoning Adjustments Board regarding 2401 Warring Street, to approve the conversion of an 11-unit rent controlled rooming housing to a triplex that will be treated as new construction and therefore be exempt from Rent Control under state law. As written, the decision effectively allows the elimination of rent stabilized housing without properly mitigating the loss of that housing as required by the Demolition Ordinance.

We are requesting that this decision be remanded to the ZAB to correctly identify this property as covered by the Rent Ordinance and make findings and conditions for this project consistent with the requirements of the Demolition Ordinance.

Finding 8 under Other Required Findings (page 2 and 3 of NOD) unfortunately does not do what the ZAB intended in approving this project. The finding is comprised of three separate statements, which we will address individually.

"The property owner is aware that the legal use of the building in the Planning Department records is single family home and therefore categorically exempt from the rental registration requirements by the Costa Hawkins Act."

The legal designation of the building in the Planning Department records of 2401 Warring Street as a single family home is not relevant in determining whether or not this property is and has been subject to the provisions of the Rent Ordinance and therefore protected under the Demolition Ordinance. (It might be relevant in determining whether a new Certificate of Occupancy is necessary, but that is a separate issue covered below.)

2401 Warring Street has been rented since at least 1984. The property has been used as an 11-unit rooming house and was registered continuously as such with the Rent Board from 1987 to 2013. Planning records show that a previous owner applied for a legal conversion to this use in 1986; the application was withdrawn with no explanation in the file. The "permitted" use is as a single family home. When this property sold most recently, it was listed as a multi-unit building.

There is no question that this property is covered by the Rent Ordinance. The fact that a previous owner did not follow through with a legal conversion to a rooming house does not change that status, nor does the fact that City did not follow through with enforcement to bring the building into compliance with zoning regulations. The Rent Ordinance was very consciously crafted to cover all rental units in existence at the time (1980), ***"permitted" or not.*** The Demolition Ordinance, which was enacted after the Rent Ordinance, was written to protect the housing stock under rent control, "permitted" or not, from demolition. This was done to avoid the loss of rent stabilized units through demolition, as newly constructed units have always been exempt from rent stabilization. When the Demolition Ordinance was adopted, nearly all of Berkeley rental units had the tenant protections offered by the Rent Ordinance. Using a single point in time to determine this or any property's status under the Rent Ordinance, rather than its history of use makes no sense, and such an interpretation of the rules puts thousands of rent stabilized units at risk.

Furthermore, there are very few instances under which a property is ***categorically*** exempt from Rent Stabilization. Exemption from the Rent Ordinance is situational or transitional: most of the rental housing goes in and out of exemption from rent stabilization. This property is a perfect example. If the property owner were to abandon the project and go back to ***using*** the property as a rooming house, he would have to register the units and abide by all the tenant protection provisions of the ordinance. If the property instead were to be ***used*** as a single-family home, it would be exempt from rent registration and the other provisions of the Rent Ordinance while it was being used that way. Government owned and constructed buildings and anything built or receiving a new Certificate of Occupancy after 1980 are the only properties that are ***categorically*** exempt.

"The property owner is also aware the proposed use of the building as a triplex will require a new Certificate of Occupancy upon the completion of construction, which would make the new units exempt from rental registration requirements under the Costa Hawkins Act."

In reviewing this project, the Rent Board staff concluded that even though the number of units was decreasing from 11 to 3, the actual habitable rent controlled space would remain the same, thus making this conversion acceptable under the Rent Ordinance, ***as long no new Certificate of Occupancy was required.*** If a new Certificate of Occupancy is required, this renovation becomes new construction. Since new construction is exempt from rent control under state law, the ZAB would need to make the findings required to eliminate "controlled rental units" under the Demolition Ordinance or deny the project.

A new Certificate of Occupancy is required when a property is converted from one occupancy classification to another. Conversion of the property from a rooming house with 11 separately rented rooms to a 3 unit property would not require a new Certificate of Occupancy. However, Planning staff has incorrectly determined that a new Certificate of Occupancy is required because the property is being converted to a triplex from a single family home, not a rooming house, even though it has been used as a rooming house for the last 27 years.

Requiring a "new" Certificate of Occupancy does nothing in practical terms to make sure the final project is safe and habitable—this is an extensive remodel and expansion, with lots of inspections throughout the construction. If the Planning Department had recognized the long standing use of the property as a rooming house, the conversion to a triplex would not be a change in occupancy classification, and no new Certificate of Occupancy would be required and there would be no need to make findings for the removal of controlled rental units.

"Based on the representation by the property owner and the Berkeley Rent Stabilization Board (RSB) staff at the July 24, 2014 public hearing, the property owner voluntarily agreed to register the upper two units (Units #B and #C) with the RSB. In addition, the property owner has agreed that, after establishment of an initial rent for each new tenancy, any subsequent rental increases will be consistent with the Rent Stabilization Ordinance."

This section of the finding is not legal or enforceable as written. The Rent Board has already determined, based on previous efforts to apply such language, that it lacks the authority to enforce such agreements. The Rent Ordinance specifically exempts new construction from rent regulation, regardless of whether an owner "volunteers" to register the property.

In order to mitigate the loss of existing tenant protections that will result from the elimination of "controlled rental units" under the Demolition Ordinance, the ZAB wanted to condition the approval of the project on the property owner agreeing to limit rent increases consistent with the Rent Ordinance. This condition will automatically be arrived at if a new Certificate of Occupancy is not required. Alternatively, the City could use the Rent Stabilization formula for annual rent increases and follow the enforcement and monitoring process applied to tenants living in "inclusionary" apartments.

The following language that was suggested by the Rent Board (but ignored by City staff) would mirror what our Rent Ordinance does, and be independently enforceable:

"The property owner shall limit future rent increases for tenancies in the two upper units (Unit #B and Unit #C) for the life of the building as follows: To mitigate the loss of existing tenant protections, after the establishment of an initial rent for each new tenancy, the property owner has agreed that any subsequent rent increases for tenancies in the two upper units (Unit #B and Unit #C) shall be limited to no more than 65% of the increase in the Consumer Price Index Consumer Price Index for All Urban Consumers (CPI-U) in the San Francisco-Oakland-San Jose region as reported and published by the U.S. Department of Labor, Bureau of Labor Statistics, for the twelve month period ending the previous June 30. This provision must be included in every new lease agreement that the property owner executes with the tenant(s) of the two upper units. To assure that the property owner abides by this condition, the property owner shall provide information about the tenancy and initial rents of the two upper units to the designated City of Berkeley Department within 15 days of the start of each new tenancy. This concession places no limitation on the property owner's right to set initial rents for all units in the building at market rates at the inception of each new tenancy."

The intent of this appeal is not to stop the project but to ensure that it is done correctly. We think the simplest solution to the problems Finding 8 creates is to treat this as a renovation of a multi-unit property that changes the number of units from 11 to 3. Alternatively, the Zoning Adjustment Board must make the findings to mitigate the eliminations of rent stabilized housing as required by the Demolition Ordinance.

Sincerely,

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