

2701 Shattuck Avenue

Use Permit #12-10000039 to construct a 29,909 square foot, 60'5-story, mixed-use building to include 67 dwelling units, a 1,956 square foot, full serve restaurant with incidental service of beer and wine, and 32 parking spaces.

I. Findings for Denial

A. Pursuant to Berkeley Municipal Code Sections 23B.32.040, General Non-Detriment Finding, and 23E.52.090, C-SA District Findings, the Zoning Adjustments Board **cannot** find that the construction of a project described above, under the circumstances of the particular case existing at the time at which the application is granted, will not be detrimental to the health, safety, peace, morals, comfort or general welfare of persons residing or working in the area or neighborhood of such proposed use or be detrimental or injurious to property and improvements of the adjacent properties, the surrounding area or neighborhood or to the general welfare of the City, for the following reasons:

1. **Project is out of scale with the existing development in the District:** Aside from the storage building at Ward and Shattuck, the proposed project would be the tallest building on Shattuck Avenue south of the Downtown District. While the storage building is roughly the same height as the proposed project, the storage building is separated from the dwellings to the east by over 50', and has a smaller footprint than the proposed project. The proposed project also would be taller and provide a smaller setback than a recently approved project at 2711 Shattuck Avenue. The building at 2711 Shattuck Avenue would be 50' tall and would be setback from the property line to the east by over 49'. Therefore, the ZAB finds that this project is not compatible in design or character with the existing, or approved development within the District. In addition, for the reasons stated above, the ZAB finds that this project does not comply with the following General Plan Policies:
 - a. Policy LU-27 Avenue Commercial Areas, Action F: Encourage sensitive infill development of vacant or underutilized property that is compatible with existing development patterns.
 - b. Policy H-16 Transit-Oriented New Construction: Encourage construction of new medium and high density housing on major transit corridors and in the Downtown consistent with zoning and compatible with the scale and character of these areas.
2. **Project does not provide an adequate transition to the Residential District to the East:** Regarding the 4th and 5th floors at the northeast corner of the site, the project does not take into consideration the scale of the abutting properties, and does not protect the adjacent residential properties' access to light and air. Since 1999, the City has approved 29¹ mixed-use housing developments in the Avenue Commercial areas². Of these, like the proposed project, 16 abut a residential district, and 4³ abut a low or low-medium density residential area (R-1, R-1A or R-2). For these 4 projects, to address the non-detriment finding, and to ensure conformance to applicable General Plan Policies, building mass was

1 This does not include projects in the Telegraph Avenue District, projects with fewer than 10 units or any senior housing project.
2 C-1, C-SA & C-W.
3 1201 San Pablo, 1800 San Pablo, 2747 San Pablo & 3075 Telegraph.

clustered towards the commercial street, but to transition to the adjacent residential district, building height was lower, and upper floors were setback further, to reduce apparent mass. For example, for the 51-unit mixed-use housing development at 1800 San Pablo Avenue, the 3rd floor is setback 25' and the 4th floor is setback 38' from the residential property line.

The ZAB recognizes that this project does offer a varied setback from the Residential District to the east, such that all residential floors (floors 2-4) would be setback at least 16'-10" at the northeast corner of the site to as much as 41' at the southeast corner of the site, and that the 5th floor would be setback at least 28'-10". However, at the northeast corner, even though setback, the revised building height at this corner is 52'. Therefore, the ZAB finds that this height/setback would represent a greater height, with much less setback to this height, than any other project recently approved at similarly situated sites, and that this height/setback is not compatible in design or character with the adjacent residential neighborhood. In addition, for the reasons stated above, the ZAB finds that this project does not comply with South Shattuck Strategic Plan Strategy 2, which calls for "development that is compatible with zoning requirements and the scale of the development on adjacent residential streets", and for buildings taller than 3 stories, the plan calls for a design that takes "into consideration the land use and urban design context, including the use and scale of abutting properties, and adjacent residential properties' need for access to light and air". Further, the ZAB finds that this project does not comply with BMC Section 23E.52.090.B.2, which requires that a proposed use or structure must be compatible in design and character with the District and the adjacent residential neighborhoods.

- 3. Project is out of scale with the Adjacent Residential District:** Pursuant to Section 23E.52.090.B.2, a proposed structure must be compatible in design and character with the District and the adjacent residential neighborhoods. The R-2 District abutting the site to the east contains mostly single-family residences, with a few duplex or multi-family properties located on Ward or Walker Street. The residential buildings to the east along Derby Street include 1 and 2-story buildings; the residential buildings to the southeast along Ward Street are mostly 2-story buildings. Because the 4th floor of the proposed building would be 52' in height and setback from the residential district to the east by only 16'-10", the ZAB finds that the project is not compatible in scale with the adjacent residential neighborhoods. In addition, for the reasons stated above, the ZAB finds that this project does not comply with General Plan Policy LU-3 Infill Development, which calls for "infill development that is architecturally and environmentally sensitive, embodies principles of sustainable planning and construction, and is compatible with neighboring land uses and architectural design and scale".
- 4. Design Alternatives Rejected by Applicant:** At its meeting of September 26, 2013, the ZAB recommendation was that as many as 12 units should be removed from the 4th and 5th floors at the northeast corner of the site or alternatively that the entire 5th floor could be removed to make the development compatible with existing development patterns and to provide a transition to the residential district to the east. The applicant rejected these recommendations and instead responded with a new plan that would remove only three units from the 5th floor, as well as provide an increased setback to the stair at the northeast corner of the site.

Despite these changes, the ZAB finds that a project at this site could be in scale with the adjacent residential neighborhood, and would thus minimize impacts on the adjacent residential uses, by providing a transition in building height from 5 stories along Shattuck Avenue to 3 stories at the northeast corner of the site, to provide a lower building height towards the east. After taking into consideration the changes made to the project to provide a setback to the stair at the northeast corner of the site, the ZAB concludes that fewer than 12 dwelling units need to be removed from the project to provide this transition. The ZAB concluded that this transition to the residential district to the east could be accomplished by removing 3 additional dwelling units from the 4th floor of the project which would lower the building height at the northeast corner from 52' to 42' and would allow a minimum separation of 28'-10" from the adjacent residential district to the east to both the 4th and 5th floors.

This option was also rejected by the Applicant on November 4, 2013. Thus, because the project is not compatible with existing development patterns and does not provide a transition to the residential district to the east, the ZAB cannot make the required finding that it will not be detrimental.

B. Applicability of Government Code 65589.5: 65589.5 limits the ability of a local agency to deny certain housing development projects. Government Code Section 65589.5(j) states:

"When a proposed housing development project complies with applicable, objective general plan and zoning standards and criteria, including design review standards, in effect at the time that the housing development project's application is determined to be complete, but the local agency proposes to disapprove the project or to approve it upon the condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by substantial evidence on the record that both of the following conditions exist:

(1) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.

(2) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density."

In this case, for the reasons stated above in Section I.A, of this document, including, but not limited to, the project's non-compliance with General Plan Policy LU-27 which call for development that is compatible with existing development patterns and BMC Section 23E.52.090.B.2, which requires that a proposed use or structure must be compatible in design and character with the District and the adjacent residential neighborhoods, the project does not comply with applicable, objective general plan or zoning standards, and thus findings pursuant to 65589.5 are not required for this project.