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**FILED**  
**ALAMEDA COUNTY**

**JUL 10 2018**

**CLERK OF THE SUPERIOR COURT**  
By *[Signature]* Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF ALAMEDA

2902 ADELINE STREET NEIGHBORS,

No. RG17870319

Petitioner,

ORDER DENYING PETITION FOR WRIT  
OF MANDATE

v.

CITY OF BERKELEY, et al.,

Respondents,

REALTEX APARTMENTS, LLC,

Real Party in Interest.

The Petition of 2902 Adeline Street Neighbors for a writ of mandate, for declaratory judgment, and for injunctive relief, came on for hearing on July 3, 2018, Judge James Reilly presiding. Petitioner was represented by Babak Naficy. Respondent City of Berkeley was represented by Savith Iyengar of the Berkeley City Attorney's Office. Real Party in Interest Realtex Apartments, LLC, was represented by William J. Murray.

Having reviewed the record, and having considered the papers on file and the arguments of counsel, and good cause appearing, the Petition is DENIED.

1 I. INTRODUCTION

2 The Petition concerns a mixed-use development project at 2902-08 Adeline Street and  
3 1946 Russell Street in Berkeley, California (“Project”). Petitioner 2902 Adeline Street  
4 Neighbors (“Petitioner”) seeks a writ of administrative mandate under CCP §1094.5,  
5 ordering respondent City of Berkeley (“City”) to set aside its approval of Use Permit No.  
6 ZP2015-0177, which granted a density bonus to real party in-interest Realtex Apartments,  
7 LLC (“Realtex”) without requiring Realtex to provide additional low-income housing  
8 units.  
9

10 II. STANDARD OF REVIEW

11 Administrative adjudications are reviewable by administrative mandamus under CCP  
12 §1094.5. Under CCP §1094.5(b), the Court's inquiry is limited to whether the  
13 Respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair  
14 trial; and whether there was any prejudicial abuse of discretion. “Abuse of discretion is  
15 established if the court determines that the findings are not supported by substantial  
16 evidence in the light of the whole record.” (CCP §1094.5(c).)  
17

18 Because the City’s approval of Use Permit No. ZP2015-0177 does not involve a  
19 fundamental vested right, the Court applies the substantial evidence standard.  
20

21 III. EVIDENCE

22 The Project seeks to develop three contiguous parcels in Berkeley, CA, located at  
23 2902 Adeline Street, 2908 Adeline Street, and 1946 Russell Street. The Project requires  
24 the removal of a single family dwelling at 1946 Russell Street, the removal of a paved  
25 commercial lot at 2902 Adeline Street, and the removal of a commercial building with  
26 one dwelling unit at 2908 Adeline Street. (AR 2405.)

1 The Project involves the construction of a six-story, mixed-use building containing a  
2 commercial space with one commercial unit and four live/work units, and 50 dwelling  
3 units. (AR 2405, 3069-80.)

4 On July 22, 2015, August 5, 2015, and April 13, 2016, Realtex held open community  
5 meetings. (AR 227, 578.) Neighbors and community members were invited to meet with  
6 Realtex, review plans, and offer input. (AR 578.)

7  
8 On February 25, 2016, the Zoning Adjustment Board ("ZAB") considered the Project  
9 for preview. (AR 374.) On April 21, 2016, August 18, 2016, and September 15, 2016,  
10 the Project went before the City's Design Review Committee ("DRC"). (AR 374-380,  
11 1187, 1270.) On September 15, 2016, the DRC provided a favorable recommendation,  
12 and recommended the building be reduced in height, and gave the following condition:  
13 "If project is reduced in height and massing, it should return to the DRC for further  
14 review." (AR 1316-1317.)

15  
16 On October 27, 2016, the ZAB considered and approved the Project as Use Permit  
17 ZP2015-0177. (AR 1811.) On November 1, 2016, the City issued notice of the ZAB  
18 decision approving the Project. (AR 2380-2385.)

19 The City found that the Project qualified for a 35% density bonus under Government  
20 Code §65915, meaning the Project could exceed the maximum allowable residential  
21 density, and approved a use permit for additional stories that allowed for 25 additional  
22 residential units. (AR 1458, 3075-76.) The City also granted a concession to exceed the  
23 Floor Area Ratio ("FAR") limits. (AR 1460, 2380, 3071.)  
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1 As approved, the Project includes four units available to very low income households,  
2 four units available to low income households, and one unit available to moderate income  
3 households. (AR 3071.)

4 On November 15, 2016, Robert Lauriston appealed the ZAB decision on behalf of  
5 himself and 29 other signatories. (AR 3069, 2443-2456.)

6  
7 The appeal raised seven key points: (1) ZAB failed to interpret state law and the  
8 Zoning Code to maximize the number of affordable units; (2) ZAB failed to negotiate  
9 with Realtex for a better deal for the City; (3) ZAB refused neighbors' request for  
10 mediation; (4) ZAB failed to apply Government Code §65915(c)(3)(B) to require Realtex  
11 to provide sufficient replacement units for lower income residents; (5) the proforma is  
12 inaccurate; (6) ZAB's findings that the design is compatible with the neighborhood is  
13 unreasonable; and (7) approving more market-rate units than are required by law is  
14 contrary to city goals. (AR 2443-2456.)

15  
16 The City forwarded the appeal to the Planning Department. (AR 2457-2458.)

17 In support of its application, Realtex submitted to the City two signed notes by Susan  
18 Aw, "on behalf of the ownership" of 2902-2908 Adeline Street and 1946 Russell Street.  
19 One note states that 1946 Russell "is a vacant single family home that was never occupied  
20 by a low or very low income household. Prior to 2014 it was leased to one individual who  
21 paid \$2,000.00 per month in rent. The tenant was subject to income and credit screening  
22 prior to being qualified for the apartment, their monthly gross income was verified to be  
23 in excess of three times the rent." (AR 2460.) The other note states that 2902-2908  
24 Adeline "has been owner occupied since the pottery store was built in 1981. My family is  
25  
26

1 not categorized as low or very low income and the property has never been occupied by  
2 any low or very low income individuals.” (AR 2461.)

3 The Planning Department provided its findings and report to the City Council and  
4 recommended approval of the Project and Use Permit, including the density bonus and  
5 FAR concession. (AR 2634-2741.) With respect to the applicability of Government  
6 Code section 65915(c)(3)(B), at issue in this petition, the Planning Department’s report  
7 concluded that the requirement that Realtex replace low income units did not apply  
8 because (1) 2908 Adeline and 1946 Russell were both exempt from rent control based on  
9 their construction dates; (2) both units at 2908 Adeline had been owner-occupied since  
10 the date of construction, with the owners verifying their household income as above the  
11 lower income categories; and (3) the owners of 1946 Russell had verified that the  
12 dwelling had never been occupied by a lower income household. (AR 2637-2638.)

13  
14  
15 On March 7, 2017, the City continued the appeal to April 4, and then later continued  
16 it again to April 25. (AR 3069-70.)

17 On March 7, 2017, Petitioner submitted materials to the City addressing the Planning  
18 Department’s response to the appeal, including a purported list of past residents of 2908  
19 Adeline and 1946 Russell located through “public record searches,” online rental listings  
20 for 2908 Adeline Street #2 and #4, a screenshot listing the address of Susan Aw, as  
21 registered agent of Aw Pottery (located at 2908 Adeline Street) to be in Pleasant Hill  
22 (apparently last edited in 2011), and Facebook screenshots referencing Lee Lang Aw,  
23 apparent owner of Aw Pottery in Seattle, with a residence in Seattle, and Lee Hua Susan  
24 Aw, apparent owner of Aw Pottery in Atlanta, with a residence in Malaysia. These  
25  
26

1 materials were intended to show that 2908 Adeline and 1946 Russell were not owner-  
2 occupied. (AR 2577-2587.)

3 On April 25, 2017, 47 speakers appeared at the public hearing on the issues raised in  
4 the appeal. (AR 2812-13.) Berkeley resident Patrick Oh testified that approving the  
5 Project would send the message “that it is okay for future developers to go ahead and  
6 collude and displace people so that we can build.” (AR 2957.)

7  
8 At the May 2 hearing, Jerome Graham, who lives at 1940 Russell Street, offered  
9 public comment regarding the Project. He stated that his friend, Gabe Granau, and  
10 Granau’s fellow tenants, were forced to vacate 1946 Russell after owner Susan Aw raised  
11 the monthly rent from \$2,000 to \$4,000. (AR 3239-3241.) This rent increase was also  
12 referenced in the March 7, 2017 memo sent by Mr. Lauriston to the City. (AR 2577.)

13 On May 2, 2017, the City Council adopted Resolution No. 67,943-N.S., upholding the  
14 ZAB’s approval of Use Permit ZP2015-0177. (AR 3069-3089.)

15  
16 IV. ORDER

17 Government Code §65915(c)(3)(A) states, in relevant part:

18 An applicant shall be ineligible for a density bonus or any other incentives or  
19 concessions under this section if the housing development is proposed on any  
20 property that includes a parcel or parcels on which rental dwelling units are or, if  
21 the dwelling units have been vacated or demolished in the five-year period  
22 preceding the application, ... occupied by lower or very low income households,  
23 unless the proposed housing development replaces those units, and either of the  
24 following applies: (i) The proposed housing development, inclusive of the units  
25 replaced pursuant to this paragraph, contains affordable units at the percentages  
26 set forth in subdivision (b); (ii) Each unit in the development ... is affordable to,  
and occupied by, either a lower or very low income household.

Government Code §65915(c)(3)(B)(i) states:

1 If any dwelling units described in subparagraph (A) are occupied on the date of  
2 application, the proposed housing development shall provide at least the same  
3 number of units of equivalent size to be made available at affordable rent or  
4 affordable housing cost to, and occupied by, persons and families in the same or  
5 lower income category as those households in occupancy. If the income category  
6 of the household in occupancy is not known, it shall be rebuttably presumed that  
7 lower income renter households occupied these units in the same proportion of  
8 lower income renter households to all renter households within the jurisdiction, as  
9 determined by the most recently available data from the United States Department  
10 of Housing and Urban Development's Comprehensive Housing Affordability  
11 Strategy database.

12  
13 Petitioner argues that the City abused its discretion in approving the density bonus,  
14 and urges the Court to order the City to vacate its approval of the Project, on the ground  
15 that the City did not have substantial evidence to conclude that the units were owner  
16 occupied or that no prior tenants were low- or very-low income.

17  
18 Citing the list of past residents at 2908 Adeline provided to the City, Mr. Graham's  
19 public comment regarding other past residents of 1946 Russell, the information provided  
20 to the City about the property owners' apparent places of residence, and online rental  
21 listings for 2908 Adeline, Petitioner argues the City failed to adequately investigate  
22 whether past occupants were low income, and therefore did not, and could not, adduce the  
23 substantial evidence needed to grant the density bonus.

24  
25 In the absence of substantial evidence, Petitioner argues the City was subject to the  
26 rebuttable presumption, under section 65915(c)(3)(B), that at least 61.1% of past  
occupants were below median income, and must deny the density bonus unless Realtex  
provided a proportional number of units available to low-income or very-low income  
units.

1 Citing the owners' statements that the subject properties were owner occupied, or  
2 occupied by renters who were not low-income, the City contends the rebuttable  
3 presumption did not arise because it had substantial evidence of past occupants' income,  
4 thus it lawfully approved the density bonus.

5 The City contends that none of Petitioner's evidence was based on first-hand  
6 knowledge but instead consisted of hearsay (e.g., the testimony of Mr. Graham regarding  
7 his friend) and that the lists of past residents provided by Petitioner contained insufficient  
8 information about how the lists were constructed, when those individuals occupied the  
9 property, or whether they were low- or very-low income. The City also points out that  
10 not a single former resident of the properties testified before the City Council. Finally the  
11 City contends that information suggesting that the property owners live elsewhere is  
12 insufficient to demonstrate the property is not owner-occupied, because it is out of date  
13 (from 2011) and because the address for the registered agent of Aw Pottery is not relevant  
14 with respect to whether the subject property is owner-occupied.  
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17 In assessing whether substantial evidence exists, the court considers "all evidence  
18 presented, including that which fairly detracts from the evidence supporting the Board's  
19 determination." (California Youth Authority v. State Personnel Bd. (2002) 104  
20 Cal.App.4th 575, 586.) Evidence is not substantial merely because, viewed in isolation, it  
21 supports a challenged finding. Rather, the trial court must "consider 'the whole record' in  
22 reviewing the evidentiary basis for the administrative decision." (Bixby v. Pierno (1971)  
23 4 Cal.3d 130, 149, fn. 22.) "'Substantial evidence' must be of ponderable legal  
24 significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It  
25 must be reasonable in nature, credible, and of solid value; it must actually be 'substantial'  
26



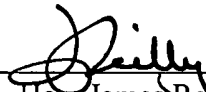
1 proof of the essentials which the law requires in a particular case.” (Yancey v. State  
2 Personnel Bd. (1985) 167 Cal.App.3d 478, 482–483.)

3 Having considered the evidence in the administrative record, the court finds that there  
4 was substantial evidence to support the City’s finding that the properties were owner  
5 occupied, or not currently or previously occupied by low- or very-low income renters.  
6

7 The petition is DENIED. The Petitioner’s requests for declaratory and injunctive  
8 relief are DENIED.

9 Respondent is ORDERED to submit a proposed Judgment to Department 514 no later  
10 than July 20, 2018.

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12  
13 Date: July 10, 2018



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Hon. James Reilly  
Judge of the Superior Court

Case Number: RG17870319

Case Name: 2902 Adeline Street Neighbors vs. City of Berkeley

**CLERK'S CERTIFICATE OF MAILING  
(CCP 1013a)**

I certify that the following is true and correct:

I am a Deputy Clerk employed by the Alameda County Superior Court. I am over the age of 18 years. My business address is 24405 Amador Street, Hayward, California 94544. I served this **Order Denying Petition for Writ of Mandate** placing copies in envelope(s) addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at **Hayward**, California, following standard court practices.

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Date: **JUL 10 2018**

Executive Officer/Clerk of the Superior Court

By   
Sharon Becerra, Deputy Clerk