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May 3, 2023

ELECTRONIC MAIL ONLY

Fatema Crane
Secretary
Landmarks Preservation Board
City of Berkeley
2180 Milvia Street
Berkeley, CA 94704

Re: 2132-2154 Center Street
May 4, 2023 Landmarks Preservation Commission Meeting, Item No. 9
File No.: 061351.0001

Dear Ms. Crane:

We submit this letter in regard to Item No. 9 on the May 4, 2023 agenda of the Landmarks Preservation Committee (“LPC”) on behalf of Core Berkeley Oxford, LLC, applicant of the above-referenced housing development project for 485 units located at 2132-2154 Center Street (“the Project”). As set forth in the staff report, the LPC is considering a demolition referral for the Project application, and, as part of that process is considering whether or not to initiate a landmark or structure of merit designation for the building.

Background:

The May 4 meeting follows the March 30, 2023 LPC meeting in which the LPC voted 4-2 to place tonight’s item on the agenda since there was not a sufficient quorum to take action on an initiation. The Agenda for March 30 noticed the item as follows: “Consider the proposal to demolish a commercial building that is more than 40 years old, in accordance with Berkeley Municipal Code (BMC) Section 23.326.070(C).” The staff report for the March 30 meeting described the item as “Demolition Referral: Use Permit (#ZP2022-0135) under Senate Bill 330 to demolish a mixed-use building originally constructed in 1904 and remodeled in 1925 and identified as contributor to a historic district (APN#: 057-2031-015-00).” Moreover, the staff report states that the use permit for the housing development project cannot be considered until the LPC conducts its review. (Staff Report at p. 2.)

The agenda for the May 4 meeting relies on the March 30 staff report, but describes the item as “Consider initiating City Landmark or Structure of Merit designation consideration for a

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building located in the potential Shattuck Avenue Historic District and found to be a Contributing Property, in accordance with BMC Section 3.24.120.”

Limitations of SB 330 and Government Code § 65913.10(a)

Pursuant to Government Code section 65913.10(a) (adopted as part of SB330), the LPC has no jurisdiction to determine the historic status of the site since the site was not designated by the City at the time the Project’s application was deemed complete. Here, the Project submitted a preliminary application on June 6, 2022, and its formal application was deemed complete on March 17, 2023. As such, the determination of whether 2132-2154 Center Street is a historic site for the purposes of the City of Berkeley law, was that it was not a landmark or structure of merit, since it was not designated as such on June 6, 2022 (per Gov. Code §65589.5(h)(5).

Government Code section 65913.10(a) provides as follows:

For purposes of any state or local law, ordinance, or regulation that requires the city or county to determine whether the site of a proposed housing development project is a historic site, *the city or county shall make that determination at the time the application for the housing development project is deemed complete. A determination as to whether a parcel of property is a historic site shall remain valid during the pendency of the housing development project for which the application was made unless any archaeological, paleontological, or tribal cultural resources are encountered during any grading, site disturbance, or building alteration activities.* [emphasis added]

Here, there was no City historic designation at the time the application was deemed complete. So, the “determination” is that “the site” is not a landmark or structure of merit. Section 65913.10(a) goes on to provide that “[a] determination as to whether a parcel of property is a historic site ***shall remain valid during the pendency of the housing development project*** for which the application was made....” [emphasis added] In other words, the determination (i.e., that the site is not a landmark/structure of merit) is, and remains, valid during the entire pendency of the project itself. As such, the LPC has no jurisdiction to make a determination as to landmark status at this time since the determination is to remain valid “during the pendency of the housing development project.” If the Project is approved, it will remain “pending” for the life of the Project. Any attempt at a designation at this time would be void *ab initio*, in violation of Section 65913.10(a), unnecessarily impede the processing of the Project, and would negatively affect the City’s Housing Element.

In addition, SB 330 limits the City to five public hearings in regards to a housing development project such as the Project. The staff report from the March 30, 2023 LPC meeting

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acknowledges, the first LPC meeting was held pursuant to an SB330 application. As such, it was one of the five allowed hearings. (Gov. Code § 65905.5.) The Project is preparing an environmental impact report and will need to hold at least one meeting before the Design Review Committee, Zoning Adjustments Board, and, if appealed, the City Council. Having two LPC meetings for an issue that it has no present jurisdiction over will mean preclusion of later hearings in front of bodies with actual authority to consider the Project.¹

The City appears to claim the May 4 LPC hearing is not pertinent to the pending project application, and, as such, is not a “hearing in connection with the approval of that housing development project” as set forth in Government Code section 65905.5. In other words, the City’s position is that tonight’s hearing would not count as one of the five hearings on the Project. This position, is contradicted by how the March 30 meeting was noticed, as well as the analysis in the staff report, which is being used for the May 4 meeting. Since the Project application precipitated these meetings, and since the City’s position appears to be that use permit on the Project cannot move forward until the referral to the LPC,² the May 4 meeting would be the second of the five allowed hearings.

A better course of action would be to table any consideration of local designation until after the Project receives final approval or is withdrawn.

While the City acknowledged that a designation, if adopted, would not affect the Project’s processing (see Staff Report at p. 2; and July 8, 2020 Planning Department Memorandum [attached]), noting that the City is divested of the ability to impose conditions related to historic resource preservation (e.g., no structural alteration permit can be required), we are unconvinced that a prospective designation might be raised in connection with later approvals such as a master sign permit, final design review or building permit in violation of Section 65913.10(a).

Designation Would Contradict the Adopted Housing Element and Constrain Housing

The Project site is listed in the City’s recently adopted Housing Element, now certified by the California Department of Housing and Community Development, as a “housing opportunity site” with a realistic capacity of 485 dwelling units. A landmark designation would impose a constraint on housing, since this opportunity site, would be required to obtain a structural alteration permit – an additional discretionary approval – were this Project to not go forward. Such action would be inappropriate given recent certification by HCD, based on the Housing

¹ In addition, the LPC’s action is unnecessary as staff has already determined that the building is an historical resource for CEQA purposes. See Staff Report at p. 3.)

² The applicant does not concur with the City’s position that the LPC referral must be completed prior to consideration of the use permit given SB 330’s requirements.

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Element as adopted (and revised), which included the Project site in the inventory without such constraints.

For the reasons stated, we respectfully suggest that this agenda item be removed and no further consideration of 2132-2154 Center Street be made unless and until the City takes final action regarding the Project and/or the application is withdrawn.

Sincerely,

FENNEMORE WENDEL



Todd A. Williams

TAWI/tawi

Attachment

cc: Sharon Gong
Sara Stephens, Deputy City Attorney
Brian Heaton, HCD Senior Housing Accountability Manager Brian.Heaton@hcd.ca.gov
Mark Rhoades
Jonathan Kubow

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Office of the City Attorney

MEMORANDUM

July 8, 2020

To: Jordan Klein, Interim Planning Director

From: Farimah Brown, City Attorney
Chris Jensen, Assistant City Attorney

Re: Impact of SB 330 on Landmarks Preservation Commission Review of Housing Development Projects

The Land Use Planning Division has requested an opinion as to whether SB 330 (2019) limits the authority of Landmarks Preservation Commission (“LPC”) to conduct historic resource evaluations of applications for housing projects.

SB 330 applies to any “housing development project,” which is defined as any residential development, mixed-use development with at least two-thirds of the square footage designated for residential use, or transitional housing or supportive housing development. (Gov. Code § 65589.5(h)(2).)

Where the requirements of SB 330 apply, determinations as to whether the site of the proposed project is historic site must be made “at the time the application for the housing development project is deemed complete.” (Gov. Code § 65913.10(a).) That determination “shall remain valid during the pendency of the housing development project for which the application was made unless any archaeological, paleontological, or tribal cultural resources are encountered during any grading, site disturbance, or building alteration activities.” (*Ibid.*)

“Deemed complete” is defined in two different ways in SB 330. Government Code section 65905.5(b)(1) provides that “deemed complete” means “the application has met all of the requirements specified in the relevant list compiled pursuant to Section 65940¹ that was available at the time when the application was submitted.” (Gov. Code § 65905.5(b)(1).) However, Government Code 65589.5(h)(5) states: “Notwithstanding any other law, until January 1, 2025, ‘deemed complete’ means that the applicant has

¹ Government Code section 65940 provides that “[e]ach public agency shall compile one or more lists that shall specify in detail the information that will be required from any applicant for a development project.” (Gov. Code § 65940(a).)

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submitted a preliminary application pursuant to Section 65941.1.” (Gov. Code § 65589.5(h)(5).) Until January 1, 2025, section 65589.5(h)(5) controls, “[n]otwithstanding any other law.”

Government Code section 65941.1 defines the requirements for a “preliminary application,” which include information about “[a]ny historic or cultural resources known to exist on the property.” (Gov. Code § 65941.1(a)(9).) Upon providing this information about known historic or cultural resources, along with the other information listed in section 65941.1, the application must be “deemed complete,” as set forth in Government Code section 65589.5(h)(5). Government Code section 65913.10(a) prohibits the City from imposing additional historic or cultural resources protections after this time.

Taken together, these provisions of SB 330 have the effect of divesting the LPC of jurisdiction to require applicants to comply with any cultural or historic resource preservation requirements after the time that a “preliminary application” for a housing development project is deemed complete. LPC and the City are prohibited by state law from denying or imposing conditions on a housing development project based on any cultural or historic resources protections imposed after the date on which the application was “deemed complete,” and any historic resources information required as part of the preliminary application must be limited to the identification of resources that are “known to exist” at the time of the application. Demolition referrals for commercial buildings that are over 40 years old are still required under the Zoning Ordinance, but cannot lead to the imposition of conditions of approval on the project if the LPC acts after the application is deemed complete.

SB 330 does not impact the LPC’s jurisdiction over purely commercial projects or any other project that does not meet the definition of a housing development project under Government Code section 65589.5(h)(2). In addition, SB 330 does not limit the City’s obligation to assess the impact of a proposed project on cultural resources under CEQA and to impose measures to mitigate any adverse impact on cultural resources. (See Gov. Code § 65913.10(c).)