

Supplemental Communications (1)

*The following are communications received after the packet was published on **August 26**, by noon, **August 31**.*

Commissioner Steve Martinot

August 31, 2020

To the Planning Commission:

I have been a member of the Zoning Ordinance Review Project, (ZORP) as one of the members of that subcommittee since it was formed. Our task was the review a revision of the Zoning Ordinance (ZO) then in progress, to express an opinion as to whether it met its goals of making the various elements of the ordinance coherent, and provide it with greater definitude. This was an important project given the fact that the ZO had been modified and amended enumerable times, to the point where its provision were scattered all over the BMC, and were in need for reorganization to render the whole coherent.

During the course of this project, I raised an issue about which I would like to acquaint the Planning Commission. For this reason, I am copying the two communications I sent to the ZORP so that you can see them. One was sent on Oct. 7, 2019. The second was sent June 8, 2020.

The issue I raised concerned several of the sections in the ZO in which the agent granting an AUP was given discretionary power. In the first communication, I raised the question of how the agent was chosen, and what were their relation to the community or neighborhood that would be affected by the enterprise permitted. Furthermore, were their any mechanisms for feedback from the community to the Planning Dept. Agent that would give the community a voice in the way he made his decision.

In my second communication, I further elaborated on these issues, and pointed out those sections of the ZO in which a zoning agent was given discretionary power, and argued that this gave the agent the power to determine subjectively what kind of permit a neighborhood project was to receive.

It seemed to me that if the purpose of revising the ZO was to clarify it and make it more coherent for those who would use it for Berkeley development, this element of subjectivity in the ZO left the process of permitting open to a certain amount of corruption, as well as introduce elements of uncertainty and non-definitude into the Code, in contradiction to the stated purpose of the project.

At the last meeting of the ZORP, when I raised the issue of excising those clauses that referred to an AUP in which a zoning agent was given discretionary authority, or was required to make a subjective judgment in granting an AUP, I was told the this present stage of ZO revision was simply for the purposes of clarification, and not for changing or amending its substance. Substantial changes would be considered in the next stage of revision.

I responded that it seemed to me that removing aspects of the code that were subjective was a step toward definitude and away from indeterminacy, and therefore was proper to stage 1.

In sum, the issues I am raising with respect to some (not all) of the provision for an AUP are, (1) who chooses the agent to make an AUP judgment, (2) what are that person's connection to the community, (3) to what extent can the community participate in making a judgement that would concern them and how can that be structured and made democratic, and (4) what could be

substituted for the need of an agent to make a subjective decision about what would affect a neighborhood.

I am forwarding my two communications to previous meetings to ensure that the issue is addressed, and that no one says that it should have been addressed in stage 1.

On this score, I might mention that, though I was able to find a definition of AUP and zoning agent in the original glossary, these two terms seem to have been deleted from the revised glossary.

Communication #1 -- October 7, 2019

To the ZORP subcommittee:

Reading through the revision of the Zoning Ordinance that we are working on, some questions occurred to me concerning the AUP, as it appeared in the table of allowed land uses (p. 9/202). There were only three categories in which an AUP was required. But they all had a special character. An AUP was sufficient for permitting a large family day care center, a use for "high impact urban agriculture," and a Columbarium. These are all land uses of a social nature, rather than providing residence. Yet they would have special importance for any neighborhood. It seemed strange to me that projects of social impact would only involve an administrative use permit rather than be the purview of the ZAB (which issues Use Permits). The following thoughts are the result of pursuing that issue.

A Columbarium, for instance, whose name derives originally from a dovecote, now refers to public storage of cinerary urns. Its presence could possibly elicit a variety of religious issues. To deal with those issues administratively might run the risk of being discriminatory. Similarly, a day care center provides an important service to low income families especially. It would probably need funding, and thus be included in the city budget in some capacity. To deal with this kind of neighborhood service administratively could run the risk of acting in a discriminatory manner on a class basis. We have seen a propensity toward this kind of discrimination on the part of City Council recently in its reticence toward funding such services in South Berkeley. I'm not sure what would be defined as "urban agriculture," but that is probably an issue that will arise as we go along.

I understand that the primary issue of permits has already been discussed in this subcommittee, and that the present phase of this project is not one of changing content, or amending it, but rather to discuss form. Nevertheless, I am forwarding some of my thoughts on this specific matter, so that we can think about them. If this revision of the Zoning Ordinance is to be more accessible to people, it must also be clearer on the relation it establishes between the people and the city, and be more transparent as to "process" and decision-making. In addition, in the text we are now reading, at various points it presents what it calls "Potential Phase 2 Amendments." These are included in the text we have been given to think about. So we have a precedent for the inclusion of thoughts on content, even during this phase. I am adding my own thoughts in light of this sentiment, as potential amendments to content.

In light of my questions, and the appearance of AUP in the table we have before us, I revisited the section on permits to get definitions or descriptions of the AUP process.

An Administrative Use Permit is defined (in Sect. 23.406.020 A) as follows. “An AUP is a discretionary permit approved by the Zoning Officer to ensure that a proposed project will not adversely impact neighboring properties or the general public.”

An AUP is a use permit issued by an individual who makes a discretionary decision that will affect a neighborhood socially. It therefore becomes important how a Zoning Officer is chosen, but even more important whether the neighborhood to be affected by his/her decisions has any influence or input into whatever decision the Zoning Officer makes. What interactions does the Zoning Officer have with the neighborhood to be affected by his/her decision? In the case of a UP, ZAB holds a public hearing, which allows the neighborhood to have some input into the process of issuing the permit. It has a chance to appear and give testimony or grievance on it. But if what the Zoning Officer will rule on will affect a neighborhood socially, then input becomes all the more important.

Thus, we have the questions, how is a Zoning Officer chosen? And what is the relation between a Zoning Officer and the people to be affected or impacted by the Zoning Officer’s decision?

Sect. 23.402.030A states that the Zoning officer is designated by the City Manager from among the Planning Department Employees. If the act of designating a Zoning Officer will impact other people, then some input or participation in how the Zoning Officer is chosen would be warranted. However, nothing is said, as far I could see, about any relation or interaction between the Zoning Officer and the community to be affected by his/her decisions. Nevertheless, that Zoning Officer will be making decisions that will affect a neighborhood socially.

It would seem advisable that some form of neighborhood dialogue or interaction be organizationally authorized for the Zoning Officer on matters of social impact. It doesn’t seem to call for a ZAB hearing, since the projects on which a Zoning Officer would approve would be beyond its purview. But some form of local neighborhood hearing would be called for.

It would not be in the community’s interest to depend on a single city employee to make unilateral decisions on it. Since a day care center would be something very important for working families, and possibly budgeting, to leave the decision up to a city officer might prove to favor city finances rather than community services. For that reason too, the community should participate in the decision-making.

Indeed, the Berkeley Mission Statement says (in part), “Our mission is to ... initiate innovative solutions, embrace respectful democratic participation, [and] respond quickly and effectively to neighborhood and commercial concerns.”

This would also hold for high impact urban agriculture which, presumably, would include land use by gardening cooperatives. There are several in Berkeley at present, and they contribute to an extant movement for food sovereignty. Their social importance should thus get them a place at a negotiating table with city zoning.

(Parenthetically, the concept of resident coops is not dealt with in this zoning code, and perhaps should be.)

In these cases of land use where only an AUP is require, to the extent there is no interaction between the Zoning Officer and the community, there will be conflict, precisely because the Zoning Officer will be placed in a despotic position. It is ironic that the Zoning Officer’s charge is to prevent adverse impact on “neighboring properties or the general public,” while being him/herself a source of potential adverse impact.

Therefore, it becomes important that some organized venue in which discussions or dialogues can proceed between a community and a Zoning Officer be established, that is, provided for in the Zoning Ordinance.

The ordinance states that “for special neighborhood or community significance,” Zoning officer can refer the case to ZAB. But it would seem more appropriate, more efficient, and more democratic, if a procedure were defined in which the Zoning Officer would refer the case to the neighborhood instead. That is, open it in some organized fashion for public discussion prior to referring it to ZAB.

It is true that if people feel that the AUP is wrongly granted or withheld, they can appeal to the ZAB, and then to the City Council. But since the purpose of this revision of the Zoning Ordinance is to provide greater transparency and efficiency to the permitting process, administrative discretion is not always more efficient than open public participation. Some more democratic procedure is warranted whereby the community could have a voice and participation in determining who the Zoning Officer was to be, and how his/her decisions were to be made.

What does "detriment" mean?

There is an additional aspect of Zoning Officer function that pertains to establishing dialogue between the Zoning Officer and the neighborhood. In Sect. 23.402.020-E it states, “Zoning officer will find proposed project not detrimental to health, safety, peace, morals, comfort or welfare of people in the area of neighborhood.” That is, the Zoning Officer is charged with protecting the community of the neighborhood against detriment inherent in or threatened by a project.

The real problem with this clause is that there is no objective standard by which to measure detriment in the city code. If there are no objective standards or definitions of "detriment," how is a Zoning Officer to make such a finding? If it is part of the duties of a Zoning Officer to protect a neighborhood against detriment, then there would have to be “applicable standards” concerning detriment, as well as what is reasonable. Without any objective standard, the Zoning Officer can only make his determination subjectively, or through possible dialogue with the community. The only standard given is that the Zoning Officer must find additions (to buildings or property) do not unreasonably obstruct sunlight, air, and views. (Sect. 23.202.020.D.2.a)

There is, at present, an attempt to define and give some objective character to the concept of "detriment." Dean Metzger, in particular, has been working on this issue for a while. I paraphrase some of his thinking on this matter.

He proposes the following standards for detriment. For new, remodel or an infill projects, if it reduces sun and light more than 51% of what already exists on adjoining properties, or shading windows, interior rooms or open space at different times of the year; it is a detriment and unreasonable. Similarly, if it increases the amount of on-street parking above 25%; if it increases the vehicle street traffic in a residential neighborhood by more than 25% measured by the projected increase in vehicle trips; if it exceeds the density standards of the Berkeley General Plan; if it radiates out-door lighting beyond the property line; if it obstructs or reduces an existing property owners view of either the hills or the bay by 51%; or if it is found to exceed the existing carbon foot print of the current use of the land by more than 51%, then it is a detriment and unreasonable.

I am not offering this as a proposal, but simply as a sample of the kind of standard establishment that might be feasible.

By-right

There is a problem with by-right. It is totally biased in favor of a property owner, which in this case means the developers. The developers are out for profit, and the neighborhoods are clamoring for affordable housing. Affordable housing economically de-prioritizes the issue of profitability. Therefore, a pro-property bias is essentially in opposition to those interests of the people and the neighborhoods.

This potential difference in perspective between a neighborhood and a Zoning Officer brings up an additional issue. Among the "Potential Phase 2 Amendments," a phasing out of AUPs in favor of "by right" uses is mentioned. For instance, Amendment B-1, p. 160/202, states, "If a use or structure complies with all applicable standards, allow the project by-right without an AUP. This would establish a clear bias in favor of developers, and property owners who wished to cash in on the housing crisis that Berkeley and the Bay Area is experiencing."

The rationale is that this will make permitting easier and more efficient. But the implicit meaning in phasing out the AUP in favor of by-right is phasing out any community or the neighborhood interests from consideration in these zoning decisions, more than is already the case. One has an inherently discriminatory situation to the extent the neighborhood is not given some priorities in decision making that balance or are equal to those of the developers.

By right gives impunity to property owners (aka developers), which is what has led to the present crises. Neighborhoods have been clamoring for resolution of three crises (affordable housing, homelessness, and displacement). To the extent the city wants to "phase out" the voice of the neighborhoods, which is already too submerged in these processes, it is seeking to resolve the crises the neighborhoods are speaking about by simply silencing the neighborhoods. This is not only discriminatory, it is outrageously anti-democratic.

Steve Martinot

Communication #2 – June 8, 2020

Some reservation concerning the revision of the Zoning Code

I understand that the project now before us is to review the revision of the zoning code with respect to coherence and clarity of content. Where the original code had been chaotic, because an evolved set of regulations constructed over many years, and thus revealing a piecemeal evolution, this revision aims at bringing related aspects of the zoning code for easier comprehension. The purpose is to allow a person (developer, home owner, renovator, etc.) to find the relevant information for their project formulated in clear presentation with respect to the Zoning Code.

I would say that, with respect to the zoning regulations for each category of regulations, the text is for the most part successful. What this subcommittee has been asked to evaluate is the success of the formal aspect of this project, without looking at substance, that is, at what might need to be changed to rectify inconsistencies or possible contradictions in standards. Such changes would require City Council ordinances.

There is one aspect of these codes that I find to be both formal, pertaining to regulations and rules, and which stand outside the substance of rules and regulations as inconsistent with them, or contradicting the intent of the revision. That is a subjective element that appears through out, as if of the same material or pragmatic character as a regulation. As subjective, however, it remains external to the formularistic character of the revision, which is focused on the quantitative and well-defined. It therefore sits as an anomaly within the code and its attempt to be clear.

Specifically, what I am referring to is the inclusion of an AUP for permitting certain kinds of projects or developments. An AUP, or Administrative Use Permit, is a permit issued by an agent of the Planning Dept. without the need to present the project to the ZAB, which will make a permit determination according to the regulations extant. For a permit to be the responsibility of a PD agent means that this person will estimate on their own, as a reviewing authority, whether the project should be permitted or not. That is, this agent has discretionary power over something that will be brought to bear on a neighborhood without the neighborhood, or its residents, having an avenue of influence, or input, or of opposition, as they would in a ZAB hearing.

This is not the cases for all reference to an AUP. For some, the context in which the discretionary judgment of the PD agent is sufficiently constrained as to be essentially objective.

But for those instances where this is not the case, and discretion is the case, then along with individual judgment that does not necessarily enter into dialogue with residents who will be affected by the project and its authorization or non-authorization by the agent, it introduces a subjective element into the code that is at variance or incommensurate with the revision's goals.

And what this means is that a city official, rather than obey the desires or preferences of the immediate neighborhood, can allow developments that contradict what the neighborhood might desire. And this, clearly, would have ramifications with respect to city politics. It could possibly open a door to corruption, as well as a short-circuiting of obedience to the spirit of the Code.

In terms of the project's parameters, to include a subjective element that a person seeking to respect the regulations would have to encounter would be little short of an obstruction. It doesn't belong in the code in its present incarnation. This is not a question of something being changed by City Council ordinance. There is an ethic involved in including it that is contrary to the ethic envisioned by the revision project insofar as allows the subjectivity of a city official or agent to play what purports to be an objective role.

The easiest way to rectify this would be to remove all propositions or statements that contain (overt or not) to the discretion of a city or Planning official.

In addition, upon removing those references, a different approach to those decisions in question might be developed, one which formalized participation of the neighborhoods to be affected, and provided a basis in demographic reality for whatever decision was called for in those cases.

Some examples of "subjectivity" in the code

What I did was search certain terms, to see what kind of information or process was associated with each. The terms I used were terms associated with uses that could be permitted by AUP. If an AUP was sufficient, it meant that a single individual was given the power to permit or deny an aspect of project (subject to appeal, of course).

The terms I searched were discretion, discretionary permit, zoning administrator, zoning officer, review authority, and protected use.

The concepts that signified a reliance on the subjectivity of the agent, officer, administrator or review authority were requirements that s/he find conditions probable or possible in the future. That is, there was a prophetic element to the judgment the zoning agent was given to make, and which would then inherently be associated with a desire. It would be more honorable, in that case, to locate the desire used to make the judgment in the community or neighborhood, and not in an agent associated with the business of city administration.

General categories of discretion in general had to do with exemption from environmental review on the discretionary opinion of the zoning officer, concessions on variants from established regulations for the sake of incentives (for developers) [a condition that would open review to corruption], and the desirability of modifying the established terms of the zoning ordinance to fit a certain situation.

How can that which is discretionary be exempt from review?

Instances of notice

For example, the term "incentive" is used, and has discretionary significance regarding approval of "density bonus" issues. (edoc, p249). "Incentive" is a key term in the density bonus section. City is not required to deny incentives though it violate another section of ZO.

In inclusionary housing, if the costs per unit go beyond "expected returns," then a discretionary modification in the use permit can be made. (P238) There is definitely an imbalance of power in this one.

For both manufacturing and commercial districts, an AUD can be obtained for projects if a Zoning Administrator finds the project is compatible with the "purposes" of the district (but according to whom?). (P34) That means the ZA interprets the written statement of purposes for the district, and passes on projects in the terms of that interpretation.

All statements in the text that refer to a project being compatible with the purposes of the district fall into the same pit of individual judgement by a zoning officer or administrator.

Zoning officer determines that intensification of use will not increase any impact regulated under environmental performance standards. P27

-- how can an agent of the Planning Dept determine that a future use will not have impact transcending environmental performance standards? It involves imagining a future.

Similarly, a ZO can permit a modification in a commercial district if it serves as a buffer between a commercial and a residential district, and does not impinge on the Residential.

AUP subject to "substantial" findings and neighborhood compliant. p146,

Other aspects of subjectivity

conditioned on sense of the future – p15, p21,
consideration of potential detriment (???) – p22,
RA must find no adverse impact to near uses – p25
will not be hazardous or detrimental to person living near – p31
unlikely under reasonably foreseeable circumstances – p33
modification will not underuse the property – p46
would not obstruct sun, air, and views -- p47, p107, p158
intensity of use not beyond traffic capability – p61, p63, p67, p70, p83, p86
will not dominate area commercial use – p78, p86
no detriment to industrial character of area – p146, p180
traffic generated by the use (circular) – p192
several instances of foresight required re: parking availability – 192, 196, 198, 202, 204,
205, 206, 211

Suggestion

My suggestion for this phase 1 revision of the zoning code is that every instance of AUP that contains a subjective element be removed from the code, and included in a different section, perhaps to be dealt with in stage 2 or 3.

What would be important in defining such code instances is how to determine which agent from which department would make the determination, or exercise discretion on an issue, that is, how that person would be chosen, and what their responsibility to the immediate community would be? Instead of absolute discretion, which becomes a form of bureaucratic or autocratic control, some method of polling the immediate community should be written into the code, perhaps even including referenda run by the relevant section of the Planning Dept.

Steve Martinot