

Approved as to Form and Legality

Mark P. Wald
Oakland City Attorney's Office

OAKLAND CITY COUNCIL

RESOLUTION No. 80898 C.M.S.

INTRODUCED BY COUNCILMEMBER _____

RESOLUTION DENYING THE APPEALS AND UPHOLDING THE PLANNING COMMISSION'S APPROVAL FOR CONSTRUCTION OF 33 DWELLING UNITS OVER GROUND FLOOR COMMERCIAL AT 5248 TELEGRAPH AVENUE, OAKLAND (CASE FILE NUMBER CDV06-476& TPM-9212) WITH MODIFIED CONDITIONS OF APPROVAL, FINDINGS AND RECITALS

WHEREAS, the project applicant, Project Kingfish LLC, filed an application on September 19, 2006, to construct a 33 unit residential condominium building over ground floor commercial at 5248 Telegraph Avenue (Project); and

WHEREAS, the application, which included a Vesting Tentative Map, was deemed complete by operation of law on or about October 19, 2006, and thus was entitled to be processed in accordance with the rules, regulations, and ordinances then in effect (including without limitation, the Guidelines for Determining Project Conformity With the General Plan and Zoning Regulations ("Guidelines")); and

WHEREAS, the Design Review Committee of the Planning Commission considered the design aspects of the Project at a duly noticed public meeting on March 28, 2007; and

WHEREAS, the Applicant requested in a letter of March 28, 2007, that the Director of Planning determine that the project should be considered on the basis of a Best Fit zone of C-45 under the Guidelines; and

WHEREAS, the Director of Planning determined as reported in the Staff Report for the July 18, 2007 hearing at the Planning Commission that the project should be considered under a Best Fit zone of C-30 under the Guidelines; and

WHEREAS, the Staff Report to the Planning Commission that was considered at the Commission's hearing of July 18, 2007, recommended that the project be approved as under Best Fit zone C-30 under the Guidelines and

WHEREAS, the City Planning Commission took testimony and considered the Project at its duly noticed public meeting of July 18, 2007. At the conclusion of the public hearing, the Commission deliberated the matter and voted (6-0-0) to approve the Project, with modifications from the staff recommendation, which included a determination of a “best fit” zone of C-45, as requested by the Applicant, and the granting of a minor variance for a rear yard setback; and

WHEREAS, on July 27, 2007, the appellant, Bob Brokl representing STAND, filed an appeal of the Planning Commission decision to the City Council; and

WHEREAS, on July 30, 2007, the appellant, Stuart Flashman representing RCPC, filed an appeal of the Planning Commission decision to the City Council; and

WHEREAS, after giving due notice to the Appellants, the Applicant, all interested parties and the public, the Appeal came before the City Council for a public hearing on October 16, 2007; and

WHEREAS, the Appellants, the Applicant, supporters of the application, those opposed to the application and interested neutral parties were given ample opportunity to participate in the public hearing by submittal of oral and/or written comments; and

WHEREAS, RCPC and the Applicant, with the support and encouragement of the staff, have agreed that the project should be approved under Best Fit zone C-30 under the Guidelines with a variance granted from the provisions of Planning Code Section 17.46.150.B for rear height setback plane and an Interim CUP for density; and

WHEREAS, nothing in this decision of approval of the Project shall be deemed a precedent of any kind in consideration by the City of any other project proposed by Applicant or any other party to the east of the project on Claremont Avenue, or with respect to the pending Zoning Update Process in the Temescal District; and

WHEREAS, the Applicant has agreed to withdraw the rear yard variance, which was approved by the Planning Commission at the July 18, 2007 hearing on the item, and the proposed project shall meet the required rear yard setback of ten feet; and

WHEREAS, the public hearing on the Appeal was closed by the City Council on October 16, 2007

Now, Therefore, Be It

RESOLVED: That, the City Council, having heard, considered and weighed all the evidence in the record presented on behalf of all parties and being fully informed of the Project, application, the Planning Commission’s decision, and the Appeal, finds that the Appellants have **not** shown, by reliance on evidence already contained in the record before the City Council that the Planning Commission’s Decision of July 18, 2007 was made in error, that there was an abuse

of discretion by the Planning Commission or that the Commission's decision was not supported by substantial evidence in the record based on the July 18, 2007 Planning Commission Approved Staff Report (attached as Exhibit "A") and the October 16, 2007 City Council Agenda Report (attached as Exhibit "B"), hereby incorporated by reference as if fully set forth herein. Accordingly, the Appeals are denied, the Planning Commission's approval is upheld, subject to the findings contained in Exhibits "A" and "B", each of which is hereby separately and independently adopted by this Council in full; except where otherwise expressly stated in this Resolution; and be it

FURTHER RESOLVED: That, in support of the Planning Commission's decision to approve the Project, the City Council affirms and adopts as its findings and determinations (i) the July 18, 2007 Planning Commission Approved Staff Report (including without limitation the discussion, findings, conclusions and conditions of approval (each of which is hereby separately and independently adopted by this Council in full)), attached as Exhibit "A"; and (ii) the October 16, 2007 City Council Agenda Report, attached hereto as Exhibit "B" (including without limitation the discussion, findings, and conclusions (each of which is hereby separately and independently adopted by this Council in full)); except where otherwise expressly stated in this Resolution; and be it

FURTHER RESOLVED: That, an October 16, 2007 letter to the City Council from the Applicant's attorney included, in part, a Shadow study, supplemental traffic cumulative traffic analysis and height comparison diagram, all of which were considered by the City Council and which confirmed impacts to be less than significant; and be it

FURTHER RESOLVED: That, the Project is approved pursuant to the Best Fit Zone C-30 under the Guidelines, along with an Interim CUP for density, as detailed in the July 18, 2007 City Planning Commission Staff Report, which includes the recommendation for C-30, as reflected in the proposed findings in that report (as compared to the "Approved" Staff Report, which reflects C-45 as the Best Fit Zone); and be it

FURTHER RESOLVED: That, a variance for residential density is not required because an interim conditional use permit is being granted and the project does not exceed the density allowed in the portion of the project site designated Mixed Housing Type in the General Plan. The residential density allowed at the site under the applicable General Plan designations is 37.58 units, consisting of 35.20 units on the 78% of the site designated Community Commercial in the General Plan and 2.38 units on the 22% of the site designated Mixed Housing Type in the General Plan. Because the 33 residential units in the proposed project are less than the weighted average number of units allowed giving due consideration to the density allowed in each General Plan designation, and because the 33 residential units in the proposed project are fewer than are allowed solely on the part of the site designated Community Commercial, the project does not exceed the allowed residential density in the Mixed Housing Type designation; and be it

FURTHER RESOLVED: That, a minor variance for Rear Height Plane is granted, pursuant to Oakland Planning Code Section 17.148.050(a), based upon the findings below:

- A. That strict compliance with the specified regulation would result in practical difficulty or unnecessary hardship inconsistent with the purposes of the zoning regulations, due to unique physical or topographic circumstances or conditions of design; or as an alternative in the case of a minor variance, that such strict compliance would preclude an effective design solution improving livability, operational efficiency, or appearance.**

Strict compliance with the height reduction plane regulation would preclude an effective design solution in that it would significantly reduce the size and constrain the layout of several units at the rear of the upper two floors to such an extent that the only way to retain livable space in the affected area of the building would be to eliminate two units and consolidate the remaining space into fewer units with different configurations. With the design features required for this project, including large common living, utility and service areas, the strict application of the zoning ordinance would decrease the operational efficiency and livability.

- B. That strict compliance with the regulations would deprive the applicant of privileges enjoyed by owners of similarly zoned property; or, as an alternative in the case of a minor variance, that such strict compliance would preclude an effective design solution fulfilling the basic intent of the applicable regulation.**

Strict compliance with the height reduction plane regulation would preclude an effective design solution as the adjacent property to the north which has recently been developed for a civic use and the only area that would be affected is an adjacent parking area.

- C. That the variance, if granted, will not adversely affect the character, livability, or appropriate development of abutting properties or the surrounding area, and will not be detrimental to the public welfare or contrary to adopted plans or development policy.**

The proposed project with the variance will be consistent with the General Plan provisions for the area; granting of the variance would not adversely affect the abutting property as it has recently been developed for a civic use with parking in the area that would be affected and granting of the variance would not adversely affect the character, livability or appropriate development of the surrounding area as the surrounding area contains several taller buildings, both commercial and residential. Given the proposed project's location at the intersection of two wide North Oakland thoroughfares within the "Grow and Change Area" of the General Plan, and its suitable design as modified at and approved by the Design Review Committee on March 28, 2007, the proposed project is fully compatible with and will not adversely affect the livability or appropriate development of abutting properties and the surrounding neighborhood.

- D. That the variance will not constitute a grant of special privilege inconsistent with limitations imposed on similarly zoned properties or inconsistent with the purposes**

of zoning regulations.

The shape of the development site results in a minimal rear yard line that is directly adjacent to an existing civic activity, which does not require any required rear yard setback under the Zoning regulations and could potentially, be developed as such. The purpose of the height reduction plane is to allow a mutual openness between residential developments, which does not exist in this circumstance.

E. That the elements of the proposal requiring the variance (e.g., elements such as buildings, walls, fences, driveways, garages and carports, etc.) conform to regular design review criteria set forth in the design review procedure at Section 17.136.050.

The building as a whole has already been found to meet the design review criteria; the variance will allow the building to retain the overall shape that was approved in design review without having to change the design to incorporate a setback at the rear of the upper two floors; and be it

FURTHER RESOLVED: That, the following New Conditions of Approval are imposed on the Project:

1. The height of the building at the peak of the gable roof shall be reduced from 59' as proposed to 57'6".
2. The building shall be setback at the rear yard to comply with the requirements of Planning Code Sections 17.46.160.1 and 17.108.130.
3. The Applicant will continue to cooperate and use its best efforts with North Oakland Co-Housing LLC ("Co-Housing"), consistent with and subject to its purchase and sale agreement with Co-Housing, in order to facilitate Co-Housing's efforts to realize a co-housing program for this project, for the purposes of this condition, co-housing is defined as a set of physical characteristics in the project (large common meeting room, common utility, service, and recreation areas). In addition, co-housing incorporates a set of operating and legal agreements that establish member requirements, responsibilities, and standards, such as complete resident management and participatory decision making; and be it

FURTHER RESOLVED: That, the City Council finds and determines that this Resolution complies with CEQA and the Environmental Review Officer is directed to cause to be filed a Notice of Exemption with the appropriate agencies; and be it

FURTHER RESOLVED: That, the record before this Council relating to this application and appeal includes, without limitation, the following:

1. the application, including all accompanying maps and papers;

2. all plans submitted by the Applicant and his representatives;
3. the notice of appeal and all accompanying statements and materials;
4. all final staff reports, final decision letters and other final documentation and information produced by or on behalf of the City, including without limitation and all related/supporting final materials, and all final notices relating to the application and attendant hearings;
5. all oral and written evidence received by the City Planning Commission and City Council during the public hearings on the appeals; and all written evidence received by relevant City Staff before and during the public hearings on the application and appeal;
6. all matters of common knowledge and all official enactments and acts of the City, including, without limitation (a) the General Plan; (b) Oakland Municipal Code (c) Oakland Planning Code; (d) other applicable City policies and regulations; and, (e) all applicable state and federal laws, rules and regulations; and be it

FURTHER RESOLVED: That, the custodians and locations of the documents or other materials which constitute the record of proceedings upon which the City Council's decision is based are respectively: (a) Community & Economic Development Agency, Planning & Zoning Division, 250 Frank H. Ogawa Plaza, 2nd Floor, Oakland CA.; and (b) Office of the City Clerk, 1 Frank H. Ogawa Plaza, 1st floor, Oakland, CA; and be it

FURTHER RESOLVED: That, the recitals contained in this Resolution are true and correct and are an integral part of the City Council's decision.

In Council, Oakland, California, OCT 16 2007, 2007

PASSED BY THE FOLLOWING VOTE:

AYES- ~~ACUNA~~, BRUNNER, CHANG, NADEL, QUAN, REID, KERNIGHAN, AND

PRESIDENT DE LA FUENTE 7

NOES- 0

ABSENT- 0

ABSTENTION- 0
EXCUSED - BROOKS

ATTEST:

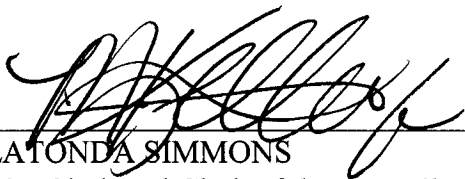

LATONDA SIMMONS
City Clerk and Clerk of the Council of
the City of Oakland, California

Exhibit A

[July 18, 2007 Planning Commission “Approved” Staff Report]

Location:	5248 Telegraph Ave. (See map on reverse)
Assessors Parcel Number:	014-1225-014-00 & -015-01
Proposal:	New Construction of a five story 33 unit residential condominium building over ground floor commercial.
Applicant:	Bill Lambert (510)550-4200
Owner:	Project Kingfish LLC
Planning Permits Required:	“Major” Design Review for a new building in excess of 25,000 square feet, Interim Conditional Use Permit for a C-30 “Best Fit” Zone, and to allow the density permitted within the Community Commercial General Plan area, Minor Variance for encroachment into the “height reduction plane” from the minimum required rear yard, and Tentative Parcel Map for new condominiums.
General Plan:	Community Commercial
Zoning:	C-28, Commercial Shopping District Zone
Environmental Determination:	Exempt, Section 15332 of the State CEQA Guidelines; in fill development projects. Exempt, Section 15183 of the CEQA Guidelines; projects that conform to the General Plan.
Historic Status:	Potentially Designated Historic Property (PDHP); rating: C2+/C3
Service Delivery District:	2
City Council District:	1
Date Filed:	9/19/06
Staff Recommendation:	Decision on application based on staff report.
Finality of Decision:	Appealable to City Council
For Further Information:	Contact case planner Peterson Z. Vollmann at 510-238-6167 or by e-mail at pvollman@oaklandnet.com .

PROJECT DESCRIPTION

The proposal is to construct a new five story 33 unit co-housing development. The project would have frontages on both Claremont and Telegraph Avenues, which would contain ground floor commercial spaces. The proposed parking garage will be located behind the ground floor commercial spaces and be accessed from Claremont Avenue. The proposed development will replace four existing structures, which are proposed for demolition (or relocation if possible). Three of the four existing structures are Potentially Designated Historic Structures with a rating of C2+ (the two Victorian structures on Telegraph) and C3 (Kingfish). The applicant had requested a “Best Fit” Zone of C-45 pursuant to Planning Code Section 17.01.100. Given the current re-zoning process for the Temescal area the Director of Development opted to grant a “Best Fit” zone of C-30 rather than the requested C-45 because of the current direction of that rezoning process. The C-30 Zone is listed in the General Plan Conformity Guidelines as an “other possible best fit zone” and in staff’s view is an appropriate designation for this project site.

This project had previously gone before the Design Review Committee on March 28th, 2007. The applicant's response to comments from that meeting will be outlined in the Design Review portion of this report.

PROPERTY DESCRIPTION

The subject site is an 11,777 square foot site containing frontages on the east side of Telegraph Avenue and the west side of Claremont Avenue. As stated above, the development site contains four existing structures, three of which are Potentially Designated Historic Structures with a rating of C2+ and C3. The surrounding uses include auto related commercial uses, civic buildings, and high and low density residential uses.

Historic Status

The Oakland Cultural Heritage Survey ("Survey") identifies properties that are historic or potentially historic properties. The rating system is based upon three different calculations. First properties are rated A through E, with "A" being a property of the highest importance, "B" is a property of major importance, "C" a property of secondary importance, "D" minor importance and "E" of no particular interest. Properties that contain a rating of C or higher are determined to be properties worthy of consideration for retention, and require special findings if any demolition or major alteration is proposed as part of a discretionary development application. The second system of rating is based upon whether or not a property is located within a district, and ratings are given out 1 through 3, with a rating of 1 indicating that a property is located within an Area of Primary Importance (API), a rating of 2 indicating that the property is located within an Area of Secondary Importance (ASI), and a rating of 3 indicating that the property is not located within a district at all. The third method for rating a property is a contingency rating that could be added to a property, which is identified as a lower case letter a through d, in which the lower case letter identifies that the property could be considered at a higher rating if it had not been for alterations that removed or damaged character defining elements of the structure.

The development site contains three Potentially Designated Historic Properties (PDHP), two of which are located on Telegraph Avenue and one located on Claremont Avenue. The two houses on Telegraph Avenue are rated C2+, which means that they are properties of secondary importance in an ASI, and the "+" identifies the properties as contributors to the district. The two houses in this instance are their own "mini district" because they have special relationship to one another (being of the exact same architectural style). Properties within ASI's are not eligible for the National Register. The property on Claremont, the Kingfish, is rated C3, which means that it is a building of secondary importance and not located within any district.

The current proposal would demolish or remove all of the buildings from the site. Planning Staff will require the developer to make a good faith effort to have the buildings moved prior to demolition. Given that the proposed demolition would remove two contributor buildings, staff recommends as a Condition of Approval that the advertisement of the buildings and number of

publications announcing the availability of the structures be increased from the normal standard condition of approval.

GENERAL PLAN ANALYSIS

The subject property is located within the Community Commercial General Plan Land Use Classification. This land use classification is intended to create, maintain, and enhance areas suitable for a wide variety of commercial and institutional operations along the City's major corridors and in shopping districts and centers. The Community Commercial districts may include Neighborhood Center uses and larger scale retail and commercial uses, such as auto related businesses, business and personal services, health services and medical uses, educational facilities, and entertainment uses. A small portion (22%) of the project site is within the Mixed Housing Type General Plan Area, but is slated to be modified under the update for the Temescal Area so that the entire site would be included as Community Commercial. The Community Commercial General Plan area allows an FAR of 5.0 and a residential density of one dwelling unit per 261 square feet of lot area and the Mixed Housing Type area allow for one dwelling unit per 1,089 square feet of lot area. The project site as broken down between the two separate land use classifications would allow a maximum density of 38 dwelling units (with a site classification solely of Community Commercial the maximum density would be 45 units). The proposed density of 33 dwelling units is consistent with the General Plan density.

Best Fit Zone

The subject property is located predominantly within the Community Commercial General Plan classification, which in the table for "Best Fit" Zones cites the C-30 Zone as a potential zone. The subject property is located within the C-28 Zone and while the proposed project is consistent with the General Plan, it is inconsistent with the C-28 Zone Regulations.

The General Plan Conformity Guidelines list three items for determining General Plan Conformity as follows:

- **Is the proposed activity and facility type permitted under the General Plan?** – The proposed activities (residential, retail) are permitted in the Community Commercial and Mixed Housing Type General Plan areas, and multi family residential permitted within both the Community Commercial General Plan and mixed Housing Type classifications. Non-residential facilities are permitted within the Community Commercial General Plan Area and silent in the Mixed Housing Type, in which case you defer to the zoning of C-28, in which it is permitted.

- **Is the proposed intensity or density less than or equal to the maximum permitted under the General Plan?** – The Community Commercial General Plan area allows residential density equal to one dwelling unit per 261 square feet of lot area and commercial development equal to a FAR (Floor Area Ratio) of 5.0. The Mixed Housing Type General Plan area allows up to one dwelling unit per 1,089 square feet of lot area. The project site as broken down between the two separate land use classifications would

allow a maximum density of 38 dwelling units. The proposed density of 33 dwelling units is consistent with the General Plan density.

- **Is the project consistent with Relevant General Plan policies?** – In order to answer this question the Guidelines refer you to “Checklist 4” of the document, which states the relevant policies, which are:

- **Policy 3.9 – Orienting Residential development – Residential developments should be encouraged to face the street and to orient their units to desirable sunlight and views, while avoiding unreasonably blocking sunlight and views for neighboring buildings, respecting the privacy needs of residents of the development and neighboring properties, providing for sufficient conveniently located open on-site open space, avoiding undue noise exposure.**

The proposed development faces Telegraph and Claremont Avenues, it does not unreasonably block sunlight to adjacent properties, and the area is not one that would be considered to have significant views (this is restricted to properties that contain a site slope of greater than 20%). Privacy and noise impacts would be no different than any other residential development that contains windows, and open space will be provided at individual units and common open space courtyards.

- **Policy N7.1 – Ensuring Compatible Development – New residential development in Detached Unit and Mixed Housing Type areas should be compatible with the density, scale, design, and existing or desired character of surrounding development.**

The subject property is not located within the Detached Unit or Mixed Housing Type areas, hence the citation is inappropriate.

- **Policy 7.2 – Defining Compatibility – Infrastructure availability, environmental constraints and natural features, emergency response and evacuation times, street width and function, prevailing lot size, predominant development type and height, scenic values, distance from public transit, and desired neighborhood character are among factors that could be taken into account when developing and mapping zoning designations or determining compatibility. These factors should be balanced with the citywide need for additional housing.**

The subject property is not located in an undeveloped area of the Oakland Hills, but is located within a developed urban area of the City, which contains existing infrastructure, streets, and pre-existing lot patterns. The proposed development is compatible with other mixed use developments on Telegraph Avenue and contains a design style that is contextual with the other period architecture in area surrounding area, and the site is located directly on a transit line (AC Transit 1 & 1R lines).

- **Policy 8.2 – Making Compatible Interfaces Between Densities – The height of development in Urban Residential and other higher density residential areas should step down as it nears lower density areas to minimize conflicts at the interface between the different types of development.**

The subject property is not located within one of the Urban Residential areas, which are usually zoned R-70, R-80, and R-90 Zones, and which typically do not contain a set height limit. The subject property is not located adjacent to any lower density zoning districts or uses. The adjacent buildings on Claremont Avenue are commercial buildings and the adjacent site on Telegraph is a civic building.

- **Policy 4.2 – Protection of Residential Yards – Action 4.2.1 – Lot Coverage Limits – Prepare a study of lot coverage or floor area ratio limits for single family residential zoning districts, with assistance from local architects, builders, and residents.**

The subject property is not located within a single family residential district.

If the answers to all of the above questions are yes, or if the General Plan is silent, you must then determine whether or not the proposed project is permitted under the zoning regulations. To determine this, the following to questions are applied:

- **Is the proposed activity and facility permitted under the zoning regulations?** – The proposed activities (residential and retail), and facilities (multi family residential and non-residential) are permitted under the C-28 regulations.
- **Is the project consistent with other regulations of the zone?** – This is where the project is not consistent with the regulations of the C-28 Zone. The proposed project contains a density higher than that permitted within the C-28 Zone, but is consistent with the density of the General Plan. The proposed project is also taller in height than permitted by the C-28 Zone, is consistent with the relevant General Plan policies as stated above.

When a proposed project is consistent with the relevant General Plan policies but not permitted under the zoning regulations, this constitutes an “express conflict” with the General Plan, and a “Best Fit Zone” may be applied. The applicant had requested a “best fit” zone of C-45 because it is one of the zones listed in the General Plan Conformity Guidelines, however; given the current status of the re-zoning process in the Temescal district the Zone of C-30 has been chosen for the area that the subject property is located within, and is shown in the Conformity Guidelines as “another possible zone”. Given this the Director has designated a “best fit” zone of C-30 for the project site. **At the public hearing on this item the Planning Commission granted the “best fit” zone of C-45 as requested by the applicant. This decision was based upon the General Plan Conformity Guidelines, which indicate the C-45 Zone as a “best fit” zone for the Community Commercial General Plan areas, and because the property is located at the junction of two major arterials which is consistent with the description of the C-45 Zone.**

ZONING ANALYSIS

The subject property is located within the C-28, Commercial Shopping District Zone, which is intended to create, preserve, and enhance major boulevards of medium-scale retail establishments featuring some specified higher density nodes in attractive settings oriented to pedestrian comparison shopping, and to encourage mixed-use residential and nonresidential developments, and is typically appropriate along major thoroughfares near residential communities. Given the reasons discussed above the Director designated the property as a “best fit” zone of C-30, District Thoroughfare Commercial Zone, which is intended to create, preserve, and enhance areas with a wide range of retail establishments serving both short and long term needs in convenient locations, and is typically appropriate along major thoroughfares. The main difference between the C-28 zone and the C-30 zone in terms of permitted building envelope is the allowed height within the two zones. The following table illustrates the differences between the height regulations of the C-28 zone and the C-30 “best fit” zone, as well as a reference to the current rezoning process for the Temescal District and the proposed height limits for the subject property.

Attribute	C-28	C-30	Proposed TEM	Project
Height	40 feet	None*	45’/55’ setback	45’/59’ setback**

* The C-30 Zone requires a residential building to be no more than 40 feet in height at the rear yard setback line, but it may increase in height two feet vertically per each one foot setback horizontally.

** The proposed project contains a pitched roof, and the top of the pitch reaches 59’ above grade, however the midpoint is at 55’ above grade, thus trying to remain consistent with the proposed future height regulations.

Density

The “best fit” C-30 Zone allows for a maximum density of one dwelling unit per 450 square feet of lot area. Given the site square footage of 11,777, the maximum number of dwelling units permitted under the Planning Code would be 26. The current C-28 zone contains the same density allowances as the C-30 Zone. The proposed project exceeds the permitted density under the Planning Code, but is consistent with the allowed General Plan density as described earlier in this report. An Interim Conditional use permit is required to achieve the increased density as set forth under the General Plan. The project site is located at the intersection of two North Oakland corridors and is located within an area designated as a “Grow and Change” area, which is where growth will be focused to lead Oakland into the next century. Correlated with transportation and infrastructure improvements, grow and change areas will emphasize significant changes in density, activity, or use, which are consistent with the land use diagram. Given the location of the project site, staff believes that the use permit for the increased density is appropriate for this site.

Open Space

The C-30 zone requires open space for dwelling units at a rate of 150 square feet per dwelling. Group open space may be substituted at a 2:1 ratio with private open space. The total open space requirement for the proposed 33 dwelling units is 4,950 square feet. The proposed project will contain 1,812 square feet of private open space (which counts for 3,624 square feet at 2:1). In

addition to the private open space, group open space is still required even with the full substitution of private open space at a rate of 30 square feet per unit, for a total of 990 square feet. The project proposes group open spaces in the amount of 1,935 square feet, thus meeting the open space requirement for the project.

Parking

The proposed project would include 33 residential units and less than 3,000 square feet of commercial retail space. The zoning requires one off street parking stall per dwelling unit, however, no off street parking is required for the commercial space since it is less than 3,000 square feet. The parking will be provided in the amount required by Code, located at the ground floor of the building with access off of Claremont Avenue. The garage itself will be tucked behind commercial spaces and a lobby entrance so that it will be shielded from public view, with the exception of the garage door.

Height Variance

The C-30 Zone sets a height limit at the rear setback line of 40 feet. The zone then allows the height of a building to increase by two feet in height per foot that it steps back from the rear property line. The proposed project would encroach into this "height reduction plane" setback at points along the rear elevation. The intent of this regulation is to require buildings to step down so that there can be a mutual sharing of openness between the rear yards of adjacent properties for residents to enjoy. Although the adjacent property that shares a rear yard is not a residential property, and currently contains an open parking lot and non residential rear yard, the intent of this regulation would not be served, as the future redevelopment of the adjacent lot over time could be likely, and the granting of this variance could negatively impact future development. Staff recommends, as a Condition of Approval, that the building be redesigned to meet the C-30 provisions for the rear yard setback and height reduction plane. The inclusion of this requirement would not dramatically impact the design of the building and only would cause the loss of minimal square footage.

KEY ISSUES

Design

The proposed project had gone before the Design Review Committee on March 28, 2007. At the meeting several design changes were recommended by staff and the Commissioners present at the meeting. At the meeting the following recommendations were made:

- Telegraph Ave. Façade – The Design Review Committee had recommended a more "urban" façade for the Telegraph Avenue elevation. Previously a large portion of the façade contained shingle and board and batten siding. The project was modified to include the shingles only on the bay projections and remove the board and batten siding. The back exterior wall now includes the use of heavy cement board siding to add a more urban look and durability. In addition, other measures were taken to reduce the bulk of

the Telegraph façade by providing more recesses into the building as recommended by the Design Review Committee.

- Claremont Ave. Façade – The only changes to the Claremont Avenue façade are that the garage door was increased in size to address safety issues with sight-distance issues with vehicles exiting the building, and the height of the building was slightly reduced to meet the intent of the proposed height regulations of the Temescal re-zoning process, which is a 45 foot tall base with a 55 foot maximum after setting the building back from the street.
- Exterior Materials – One of the items raised by staff at the Design Review Committee meeting was the issue of exterior materials. The reason this was an issue of concern is that the proposed project is removing three PDHP's from the property, and special findings are required regarding equal or better quality of design. While some of the materials have been altered at the upper level of the Telegraph Avenue elevation, staff still has concerns with the materials that are at the ground floor portions of the building on both street elevations. Currently the proposal is for stucco finish or cement panel tile. Staff recommends that the ground floor materials be stepped up in quality with a decorative ceramic or stone tile for the two story base of the building that is of very high quality and contains a dark earth tone color to match the Craftsman inspired design of the building. At a minimum, staff would recommend that the stucco base, if retained in the design, contain a smooth finish down to the tile bulk head, and without visible expansion joints.

ENVIRONMENTAL DETERMINATION

For purposes of environmental review under the California Environmental Quality Act (CEQA), the project meets the criteria for a Categorical Exemption under Section 15332 of the CEQA Guidelines. The project also complies with Section 15183, of the CEQA Guidelines for projects that are consistent with the General Plan or Zoning. The criteria for a Categorical Exemption under Section 15332 of the CEQA guidelines are as follows:

- 1) The project is consistent with the applicable general plan designation and all general plan policies as well as with applicable zoning designation and regulations.**

The proposed project is consistent with the Community Commercial General Plan designation by creating a mixed use development that contains ground floor commercial activities with dense residential use above.

- 2) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.**

The development site is located within the Oakland City limits, is less than five acres and is completely surrounded by urban uses.

- 3) The project site has no value as habitat for endangered, rare, or threatened species.**

The project site has been previously developed and does not contain any habitat for endangered, rare, or threatened species.

4) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.

The proposed project underwent a full traffic analysis by a qualified traffic consultant, which was reviewed by the Transportation Services Division of Public Works Agency and CEDA Planning staff, and it was determined that the project will not contribute to the reduction of Level of Service (LOS) below an acceptable level for any nearby intersection. With implementation of standard conditions of approval, the project would not result in any significant impacts on traffic, noise, air quality, or water quality.

5) The site can be adequately served by all required utilities and public services.

All required utilities are readily accessible on the surrounding streets, and the site will be adequately served by public services in the area.

CONCLUSION

Staff feels that the proposed project is a good reuse of the site as it provides the intensity envisioned for corridor development under the Oakland General Plan. The project is located in an area anticipated for growth and change as a manner of providing the density necessary to house a growing population in a area well served by public transportation, especially given the AC Transit Bus Rapid Transit line that runs along this portion of Telegraph Avenue. While the existing site contains potentially designated historic structures, the scale of those structures is no longer appropriate for an area that will be taking on the future anticipated population growth for the East Bay. Subject to the recommended project modifications and Conditions of Approval staff believes that the proposed project is appropriate and should be approved.

- RECOMMENDATIONS:**
1. Affirm staff's environmental determination.
 2. Approve the Major Design Review, and Interim Conditional Use Permit and Tentative Parcel Map subject to the attached findings and conditions, while denying the requested Minor Variance.

Prepared by:

PETERSON Z. VOLLMANN
Planner III

Approved by:

SCOTT MILLER
Zoning Manager

Approved for forwarding to the
City Planning Commission:

CLAUDIA CAPPIO
Director of Development

ATTACHMENTS:

- A. Project Plans
- B. Findings for Approval
- C. Conditions of Approval

ATTACHMENT B

Modifications to the Findings and Conditions of Approval as directed by the Planning Commission at the July 18, 2007 meeting are indicated in underlined type for additions and cross-out type for the deletions.

FINDINGS FOR APPROVAL

This proposal meets all the required Use Permit criteria (Sections 17.134.050 & 17.01.100B), and Design Review Criteria (Section 17.136.070), and Minor Variance Criteria (Section 17.148.050) but in staff's view does not meet the required Variance criteria (17.148.050), as set forth below and which are required to approve the application. This proposal does not contain characteristics that require denial pursuant to the Tentative Map Findings (Section 16.08.030 & 16.24.040) of the Oakland Subdivision Regulations. Required findings are shown in bold type; reasons the proposal satisfies them or not are shown in normal type.

17.136.050A - DESIGN REVIEW CRITERIA:

- A. The proposed design will create a building or set of buildings that are well related to the surrounding area in their setting, scale, bulk, height, materials, and textures.**

The proposed project will contain a mixed use structure containing ground floor commercial with 33 dwelling units above. The project site is located on Telegraph Avenue, which is a major transportation corridor and thoroughfare for the City of Oakland as well as the East Bay, and is designated as an area slated for growth and change under the General Plan. The General Plan vision for Telegraph Avenue is for a mixed use corridor with local and city wide serving commercial uses with high density housing above. The subject building is one of many larger buildings that are anticipated for the Telegraph Avenue corridor. The proposed design will use a cement plaster (stucco) or tile for the two story ground floor base, which is seen in other buildings in the surrounding area, and frame the ground floor commercial and residential lobby entrances. The upper levels will contain a mix of shingles and board and batten siding on the Claremont elevation, and cement board siding and shingle bays on the Telegraph elevation, which are materials consistent with Craftsman era architecture seen in the area. The project will also contain gable roofs with large eaves that will help to break down the visual bulk of the building.

- B. The proposed design will protect, preserve, or enhance desirable neighborhood characteristics.**

The proposed design will enhance the neighborhood character redeveloping an existing underutilized lot with a new mixed use development that incorporates high density housing above ground floor commercial on a transit corridor. The use of high quality exterior materials at the ground floor will provide a strong example for future developments along the corridor.

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C. The proposed design will be sensitive to the topography and landscape.

The subject area is flat.

D. If situated on a hill, the design and massing of the proposed building relates to the grade of the hill.

Not situated on a hill.

E. The proposed design conforms in all significant respects with the Oakland General Plan and with any applicable district plan or development control map which has been adopted by the City Council.

The construction of a mixed use development containing 33 residential dwelling units over a ground floor commercial space is consistent with the vision of the General Plan Community Commercial designation, to add commercial activities and high density residential uses along the Telegraph corridor. The proposed project is also consistent with the C-45 Zone, which has been determined as the best fit zone pursuant to the General Plan Conformity Guidelines. ~~proposed C-30 rezoning of the area under the Temescal zoning update process currently under way.~~

SECTION 17.134.050 –CONDITIONAL USE PERMIT FINDINGS:

A. That the location, size, design, and operating characteristics of the proposed development will be compatible with, and will not adversely affect, the livability or appropriate development of abutting properties and the surrounding neighborhood, with consideration to be given to harmony in scale, bulk, coverage, and density; to the availability of civic facilities and utilities; to harmful effect, if any upon desirable neighborhood character; to the generation of traffic and the capacity of surrounding streets; and to any other relevant impact of the development.

The proposed project will contain a mixed use structure containing ground floor commercial with 33 dwelling units above. The project site is located on Telegraph Avenue, which is a major transportation corridor and thoroughfare for the City of Oakland, and is designated as an area slated for growth and change under the General Plan. The existing site and neighboring lots along Telegraph are relatively underdeveloped and contain one and two story commercial and civic buildings. The General Plan vision for Telegraph Avenue is for a mixed use corridor with local and city wide serving commercial uses with high density housing above. The project is able to accommodate the density envisioned for the corridor while still providing ground floor commercial opportunities and one parking space per dwelling unit that will be tucked away behind the ground floor commercial and residential lobby. The proposed project underwent a full traffic analysis by a qualified traffic consultant, which was reviewed by the Transportation Services Division of Public Works Agency and CEDA Planning staff, and it was determined that the project will not contribute to the deduction of Level of Service (LOS) below an

FINDINGS

acceptable level for any nearby intersection.

- B. That the location, design, and site planning of the proposed development will provide a convenient and functional living, working, shopping, or civic environment, and will be as attractive as the nature of the use and its location and setting warrant.**

The development will provide for a functional living and shopping environment by providing housing and shopping opportunities that are within very close proximity to local and regional mass transit options with the AC transit Bus Rapid Transit line serving Telegraph Avenue and two BART stations (MacArthur & Rockridge) within very close proximity. The project will contain a four story base and the fifth story will be setback to reduce any visual/spatial impacts onto the corridor. The ground floor will contain a tall base that will contain a large amount of glazing within the commercial space and the residential lobby that will set the frame work for future ground floor commercial development.

- C. That the proposed development will enhance the successful operation of the surrounding area in its basic community functions, or will provide an essential service to the community or region.**

The development will facilitate the growth and change of the area to an area of dense urban housing with active ground floor uses on a major regional corridor.

- D. That the proposal conforms to all applicable design review criteria set forth in the DESIGN REVIEW PROCEDURE of Chapter 17.136 of the Oakland Planning Code.**

See Design Review findings above.

- E. That the proposal conforms in all significant respects with the Oakland General Plan and with any other applicable plan or development control map which has been adopted by the City Council.**

The construction of a mixed use development containing 33 residential dwelling units over a ground floor commercial space is consistent with the vision of the General Plan Community Commercial designation, to add commercial activities and high density residential uses along the Telegraph corridor. The proposed project is also consistent with the C-45 Zone, which has been determined as the best fit zone pursuant to the General Plan Conformity Guidelines. ~~proposed C-30 rezoning of the area under the Temescal zoning update process currently under way.~~

SECTION 17.01.100B – MINOR CONDITIONAL USE PERMIT FINDINGS FOR PROPOSALS CLEARLY IN CONFORMANCE WITH GENERAL PLAN BUT NOT PERMITTED BY ZONING REGULATIONS

- A. That the proposal is clearly appropriate in consideration of the characteristics of the proposal and the surrounding area.**

FINDINGS

The proposal is clearly appropriate to achieve the purposes of the General Plan as the property is located at the intersection of two North Oakland corridors and is located within an area designated as a “Grow and Change” area, which is where growth will be focused to lead Oakland into the next century. Correlated with transportation and infrastructure improvements, grow and change areas will emphasize significant changes in density, activity, or use, which are consistent with the land use diagram. Clearly, in both density and height, the project is consistent with the “Growth and Change” taking place in the surrounding area as envisioned by the General Plan.

B. That the proposal is clearly consistent with the intent and desired character of the relevant land use classification or classifications of the General Plan and any associated policies.

The subject property is located within the Community Commercial General Plan Land Use Classification. This land use classification is intended to create, maintain, and enhance areas suitable for a wide variety of commercial and institutional operations along the City’s major corridors and in shopping districts and centers. The Community Commercial districts may include Neighborhood Center uses and larger scale retail and commercial uses, such as auto related businesses, business and personal services, health services and medical uses, educational facilities, and entertainment uses. The maximum allowable density for the site is 125 units per gross acre, and 166.67 units per net acre. This is greater than the density allowed under the existing C-28 zoning of the site. The desired character for this portion of Telegraph Avenue is for high density residential uses over ground floor commercial uses, as it is located on a major regional transportation corridor that is well served by mass transit. The increased density in the area is required to accommodate current and future growth of the East Bay in a manner that allows densities to be developed along areas with good access to local and regional transportation options.

C. That the proposal will clearly promote implementation of the General Plan.

The proposal to construct 33 new residential dwelling units over ground floor commercial is consistent with the Community Commercial General Plan Area by developing a high density mixed use development that is located on a major local and regional transportation corridor.

Policy 3.5 of the Historic Preservation Element of the General Plan

For any project involving complete demolition of Heritage Properties or Potentially Designated Historic Properties requiring discretionary City permits, the City will make a finding that: (1) the design quality of the proposed project is at least equal to that of the original structure and is compatible with the character of the neighborhood; or (2) the public benefits of the proposed project outweigh the benefit of retaining the original structure; or (3) the existing design is undistinguished and does not warrant retention and the proposed design is compatible with the character of the neighborhood.

The proposed project will be of at least equal quality to that of the existing structures. The Kingfish building on Claremont is fairly limited in its exterior material and detail qualities and is rated a C structure more for its iconic stature in the neighborhood. The two Victorian era buildings on Telegraph Avenue are the C rated buildings that contain the exterior details that warrant preservation or new construction that is at least equal to that of the existing. The proposed project will use high quality exterior finishes such as shingles, recessed divided lite windows, and through Conditions of Approval a high quality smooth finish cement plaster base or high quality stone or ceramic tile base, which is appropriate for a building of this size. The proposed building's size will be compatible with the desired vision for this area as a transit oriented development that contains high density over ground floor commercial uses, and the incorporation of Craftsman inspired rooflines and details will relate to other Craftsman era buildings on the street and in the surrounding neighborhood.

16.08.030 - TENTATIVE MAP FINDINGS (Pursuant also to California Government Code §66474 (Chapter 4, Subdivision Map Act))

The Advisory Agency shall deny approval of a tentative map, or a parcel map for which a tentative map was not required, if it makes any of the following findings:

A. That the proposed map is not consistent with applicable general and specific plans as specified in the State Government Code Section 65451.

The proposal is consistent with the Community Commercial General Plan designation by creating 33 housing units and ground floor commercial on a transit corridor.

B. That the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans.

The proposal is consistent with the Community Commercial General Plan designation by creating 33 housing units and ground floor commercial on a transit corridor.

C. That the site is not physically suitable for the type of development.

The site is suitable for the proposed 33 units as it is located close to public utilities, transit, and contains ample open space and parking.

D. That the site is not physically suitable for the proposed density of development.

The proposed density is consistent with the General Plan density envisioned for the area.

E. That the design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat.

This site has been previously developed and does not contain any wildlife habitat or waterways.

F. That the design of the subdivision or type of improvements is likely to cause serious public health problems.

There should be no adverse health effects. This is in a residential and commercial development located in an existing neighborhood and it will introduce no new use classifications that are

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incompatible with the surrounding neighborhood.

- G. That the design of the subdivision or the type of improvements will conflict with easements, acquired by the public at large, for access through or use of, property within the proposed subdivision. In this connection, the governing body may approve a map if it finds that alternate easements, for access or for use, will be provided, and that these will be substantially equivalent to ones previously acquired by the public. (This subsection shall apply only to easements of record or to easements established by judgment of a court of competent jurisdiction and no authority is hereby granted to a legislative body to determine that the public at large has acquired easements for access through or use of property within the proposed subdivision.)**

There are no easements on this property at present to allow the public access to anything.

- H. That the design of the subdivision does not provide to the extent feasible, for future passive or natural heating or cooling opportunities in the subdivision**

The project is specifically designed to be set up for solar panels on the rooftops.

SECTION 16.24.040 – LOT DESIGN STANDARDS

This is not applicable as the proposal will merge the existing lots for a one lot subdivision for condominiums.

SECTION 17.148.050(a) – MINOR VARIANCE FINDINGS:

- A. That strict compliance with the specified regulation would result in practical difficulty or unnecessary hardship inconsistent with the purposes of the zoning regulations, due to unique physical or topographic circumstances or conditions of design; or as an alternative in the case of a minor variance, that such strict compliance would preclude an effective design solution improving livability, operational efficiency, or appearance.**

The Planning Commission finds that strict compliance with the rear setback requirement of the C-45 Zone would preclude an effective design solution improving livability because the rear yard of the subject site functions more as a side yard and the required rear yard would reduce the size of the proposed dwelling units.

- B. That strict compliance with the regulations would deprive the applicant of privileges enjoyed by owners of similarly zoned property; or, as an alternative in the case of a minor variance, that such strict compliance would preclude an effective design solution fulfilling the basic intent of the applicable regulation.**

The Planning Commission finds that strict compliance with the rear yard setback requirement of the C-45 Zone would preclude an effective design solution fulfilling the basic intent of the regulation, because the rear yard of the project site does not face out onto an adjacent rear yard of another residential development. The intent of the regulation is to allow for mutual openness

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of abutting residential rear yards, and since the building on the adjacent abutting lot is a fairly new civic use the intent of the regulation would not be fulfilled, and the design as proposed allows for a more functional living situation for the project.

- C. That the variance, if granted, will not adversely affect the character, livability, or appropriate development of abutting properties or the surrounding area, and will not be detrimental to the public welfare or contrary to adopted plans or development policy.**

The Commission finds that the granting of the rear yard variance would not affect the character or livability or appropriate development of the area since the abutting rear yard is not for a residential property and the reduced setback would not create any adverse impacts onto the adjacent lot.

- D. That the variance will not constitute a grant of special privilege inconsistent with limitations imposed on similarly zoned properties or inconsistent with the purposes of the zoning regulations.**

The Commission finds that the granting of the variance would not constitute a grant of special privilege because the proposal creates a superior design solution without impacting the adjacent neighbor. Other C-45 Zoned lots which are not residential do not require rear yard setbacks. In addition, the unique configuration and double frontage nature of the site results in a unique rear yard situation.

FINDINGS FOR DENIAL OF REQUESTED VARIANCE

SECTION 17.148.050(a) – MINOR VARIANCE FINDINGS:

~~E. That strict compliance with the specified regulation would result in practical difficulty or unnecessary hardship inconsistent with the purposes of the zoning regulations, due to unique physical or topographic circumstances or conditions of design; or as an alternative in the case of a minor variance, that such strict compliance would preclude an effective design solution improving livability, operational efficiency, or appearance.~~

~~Strict compliance with the rear setback and height reduction plane regulation would not preclude an effective design solution as the adjacent property to the north may at some time in the future be redeveloped, and this encroachment into this space would negatively impact the livability, by closing in the intended adjacent rear yards openness, of the subject site as well as any future development on the adjacent site.~~

~~F. That strict compliance with the regulations would deprive the applicant of privileges enjoyed by owners of similarly zoned property; or, as an alternative in the case of a minor variance, that such strict compliance would preclude an effective design solution fulfilling the basic intent of the applicable regulation.~~

~~The basic intent of the rear yard setback height reduction plane is to allow for a mutual sharing of openness and light into adjacent rear yards. The granting of this variance would not meet the intent of this Code Section because even though the adjacent lot today contains a civic property with a rear parking lot, future development of the site could include a mixed use structure that would share the openness of the adjoining rear yard that this project proposes to reduce.~~

~~G. That the variance, if granted, will not adversely affect the character, livability, or appropriate development of abutting properties or the surrounding area, and will not be detrimental to the public welfare or contrary to adopted plans or development policy.~~

~~The granting of the variance would adversely affect the appropriate development of abutting properties as the intended openness of the two adjacent rear yards would be reduced to an extent that would limit the intended availability to sunlight and openness as intended by the specified code regulation and would set a poor precedent for future development patterns along the block.~~

ATTACHMENT C

CONDITIONS OF APPROVAL

STANDARD CONDITIONS:

1. Approved Use

a. Ongoing

- i. The project shall be constructed and operated in accordance with the authorized use as described in the application materials, letter and/or staff report, and the plans dated **June 26, 2007**, and as amended by the following conditions. Any additional uses or facilities other than those approved with this permit, as described in the project description and the approved plans, will require a separate application and approval. Any deviation from the approved drawings, Conditions of Approval or use shall required prior written approval from the Director of City Planning or designee.
- ii. This action by the **City Planning Commission** ("this Approval") includes the approvals set forth below. This Approval includes: **Design Review, Minor Variances, and Tentative Parcel Map**

2. Effective Date, Expiration, Extensions and Extinguishment

a. Ongoing

Unless a different termination date is prescribed, this Approval shall expire **July 18, 2009** unless within such period all necessary permits for construction or alteration, or the authorized activities have commenced in the case of a permit not involving construction or alteration. Upon written request and payment of appropriate fees submitted no later than the expiration date of this permit, the Director of City Planning or designee may grant a one-year extension of this date, with additional extensions subject to approval by the approving body. Expiration of any necessary building permit for this project may invalidate this Approval if the said extension period has also expired.

3. Scope of This Approval; Major and Minor Changes

a. Ongoing

The project is approved pursuant to the Planning Code and Subdivision Regulations only and shall comply with all other applicable codes, requirements, regulations, and guide lines, including but not limited to those imposed by the City's Building Services Division, the City's Fire Marshal, and the Public Works Agency. Minor changes to approved plans may be approved administratively by the Director of City Planning or designee.

Major changes to the approved plans shall be reviewed by the Director of City Planning or designee to determine whether such changes require submittal and approval of a revision to the approved project by the approving body or a new, completely independent permit.

4. Conformance to Approved Plans; Modification of Conditions or Revocation

a. Ongoing

- i. The City of Oakland reserves the right at any time during construction to require certification by a licensed professional that the as-built project conforms to all applicable zoning requirements, including but not limited to approved maximum heights and minimum setbacks. Failure to construct the project in accordance with approved plans may result in remedial reconstruction, permit revocation, permit modification or other corrective action.
- ii. Violation of any term, Condition or project description relating to the Approvals is unlawful, prohibited, and a violation of the Oakland Municipal Code. The City of Oakland reserves the right, after notice and public hearing, to revoke the Approvals or alter these Conditions or to initiate civil and/or criminal enforcement and/or abatement proceedings if it is found that there is violation of any of the Conditions or the provisions of the Planning Code or Municipal Code, or the project operates as or causes a public nuisance.

5. Signed Copy of the Conditions of Approval

a. With submittal of a demolition, grading, and building permit

A copy of the approval letter and Conditions shall be signed by the property owner and submitted with each set of permit plans submitted for this project

6. Indemnification

a. Ongoing

- i. The project applicant shall defend (with counsel reasonably acceptable to the City), indemnify, and hold harmless the City of Oakland, the Oakland City Council, the City of Oakland Redevelopment Agency, the Oakland City Planning Commission and their respective agents, officers, and employees (hereafter collectively called the City) from any claim, action, or proceeding (including legal costs and attorney's fees) against the City to attack, set aside, void or annul, an approval by the City, relating to a development-related application or subdivision.. The City shall promptly notify the project applicant of any claim, action or proceeding and the City shall cooperate fully in such defense. The City may elect, in its sole discretion, to participate in the defense of said claim, action, or proceeding. The project applicant shall reimburse the City for its reasonable legal costs and attorney's fees.
- ii. Within ten (10) calendar days of the filing of a claim, action or proceeding to attack, set aside, void, or annul, an approval by the City of a development-related application or subdivision, the project applicant shall execute a Letter Agreement with the City, acceptable to the Office of the City Attorney, which memorializes the above obligations and this condition of approval. This condition/ obligations shall survive termination, extinguishment, or invalidation of the approval.

7. Compliance with Conditions of Approval

a. Ongoing

The project applicant shall be responsible for compliance with the recommendations in any submitted and approved technical report and all the Conditions of Approval set forth below at its sole cost and expense, and subject to review and approval of the City of Oakland.

8. Severability

a. Ongoing

Approval of the project would not have been granted but for the applicability and validity of each and court of competent jurisdiction, these Approvals would not have been granted without requiring other valid conditions consistent with achieving the purpose and intent of such Approval.

9. Job Site Plans

a. Ongoing throughout demolition, grading, and/or construction

At least one (1) copy of the approved plans, along with the Approval Letter and Conditions of Approval, shall be available for review at the job site at all times.

10. Special Inspector/ Inspections, Independent Technical Review, Project Coordination and Management

a. Prior to issuance of a demolition permit

The project applicant may be required to pay for on-call special inspector(s)/inspections as needed during the times of extensive or specialized plancheck review, or construction. The project applicant may also be required to cover the full costs of independent technical and other types of peer review, monitoring and inspection, including without limitation, third party plan check fees. The project applicant shall establish a deposit with the Building Services Division, as directed by the Building Official, Director of City Planning or designee.

11. Fire Services

a. Prior to issuance of water supply connection

The applicant shall submit approved building plans for project-specific needs related to fire protection including, but not limited to automatic extinguishing systems, water supply improvements and hydrants, fire department access, and vegetation management for preventing fires and soil erosion.

12. Underground Utilities

a. Prior to issuance of a building permit

The project applicant shall submit plans for review and approval by the Building Services Division and the Public Works Agency, and other relevant agencies as appropriate, that show all new electric and telephone facilities; fire alarm conduits; street light wiring; and other wiring, conduits, and similar facilities placed underground. The new facilities shall be placed underground along the project applicant's street frontage and from the project applicant's structures to the point of service. The plans shall show all electric, telephone, water service, fire water service, cable, and fire alarm facilities installed in accordance with standard specifications of the serving utilities.

13. Improvements in the Public Right-of-Way (General)

a. Approved prior to the issuance of a P-job or building permit

- i. The project applicant shall submit Public Improvement Plans for adjacent public rights-of-way (ROW) showing all proposed improvements and compliance with Conditions and City requirements including but not limited to curbs, gutters, sewer laterals, storm drains, street trees, paving details, locations of transformers and other above ground utility structures, the design specifications locations of facilities required by the East Bay Municipal Utility District

(EBMUD), street lighting, on-street parking and accessibility improvements compliant with applicable standards and any other improvements or requirements for the project as provided for in this approval. Encroachment permits shall be obtained as necessary for any applicable improvements, located with public ROW.

- ii. The project applicant shall submit public improvement plans that that comply City specifications. Review and confirmation of the street trees by the City's Parks and Recreation Division is required as part of this condition.
- iii. Planning and Zoning and the Public Works Agency will review and approve designs and specifications for the improvements. Improvements shall be completed prior to the issuance of certificate of occupancy.
- iv. Oakland Fire Department will review and approve fire crew and apparatus access, water supply availability and distribution to current codes and standards.

14. Payment for Public Improvements

a. Prior to issuance of a certificate of occupancy.

The project applicant shall pay for and install public improvements made necessary by the project.

15. Compliance Plan

a. Prior to issuance of a demolition, grading, or building permit

The project applicant shall submit to Planning and Zoning and the Building Services Division a **Conditions** compliance plan that describes each condition of approval, the City agency or division responsible for review, and how/when the project applicant has met or intends to meet the Conditions. The compliance plan shall be organized per step in the plancheck/construction process unless another format is acceptable to Planning and Zoning and the Building Services Division. The project applicant shall update the compliance plan and provide it with each item submittal.

AESTHETICS

16. Lighting Plan

a. Prior to the issuance of an electrical or building permit

The project applicant will submit a plan for exterior lighting that is visible from the exterior of the building for review and approval by the City Electrical Services Division and Planning and Zoning. The plan shall include the design and location and specifications of all lighting fixtures or standards. The plan shall indicate lighting fixtures that are adequately shielded to a point below the light bulb and reflector and that prevent unnecessary glare onto adjacent properties. All lighting shall be architecturally integrated into the site.

17. Exterior Materials Details

a. Prior to issuance of building permit.

The applicant shall submit for review and approval of the Planning and Zoning Division, plans that show the details of the exterior of each building including colors. These details shall include the labeling of all the materials and treatments proposed for the exterior of each building. The applicant shall also provide a material and color board for review and approval of the Planning

and Zoning Division. All materials and treatments shall be of high quality that provides the building with significant visual interest. Windows shall be articulated to provide a three inch minimum recess from the exterior building façade in order to create a sufficient shadow line. The final window details shall be submitted for review and approval.

In addition, the ground floor portions of the building (two story base) shall contain either a smooth finish cement plaster that contains no visual expansion joints, or a high quality stone or ceramic tile base that shall be approved by the Zoning Manager.

18. Landscape and Irrigation Plan

a. *Prior to issuance of building permit.*

The applicant shall submit for review and approval by the Planning and Zoning Division, a detailed landscape and irrigation plan prepared by a licensed landscape architect or other qualified person. Such plan shall show all landscaping on the site maintained by an automatic irrigation system or other comparable system. The landscaping plan shall include a detailed planting schedule showing sizes, quantities, and specific common and botanical names of plant species. Fire and drought-resistant species are encouraged.

The applicant shall provide one street tree (24 inch box) per 25 feet of linear frontage of the project site for review and approval of species, size at time of planting, and placement in the right-of-way, subject to review and approval by the PWA Tree Division and Building Services.

19. Landscaping Maintenance

a. *Ongoing.*

All landscaping areas and related irrigation shown on the approved plans shall be permanently maintained in neat and safe conditions, and all plants shall be maintained in good growing condition and, whenever necessary, replaced with new plant materials to ensure continued compliance with all applicable landscaping requirements. All paving or other impervious surfaces shall occur only on approved areas.

AIR QUALITY

20. Asbestos Removal in Structures

a. *Prior to issuance of a demolition permit*

If asbestos is found to be present in building materials to be removed, demolition and disposal is required to be conducted in accordance with procedures specified by Regulation 11, Rule 2 (Asbestos Demolition, Renovation and Manufacturing) of Bay Area Air Quality Management District (BAAQMD) regulations.

21. Dust Control

a. *Prior to issuance of a demolition, grading or building permit*

During construction, the project applicant shall require the construction contractor to implement the following measures required as part of Bay Area Air Quality Management District's (BAAQMD) basic and enhanced dust control procedures required for construction sites. These include:

BASIC (Applies to ALL construction sites)

- i. Water all active construction areas at least twice daily. Watering should be sufficient to prevent airborne dust from leaving the site. Increased watering frequency may be necessary whenever wind speeds exceed 15 miles per hour. Reclaimed water should be used whenever possible.
- ii. Cover all trucks hauling soil, sand, and other loose materials or require all trucks to maintain at least two feet of freeboard (i.e., the minimum required space between the top of the load and the top of the trailer).
- iii. Pave, apply water three times daily, or apply (non-toxic) soil stabilizers on all unpaved access roads, parking areas and staging areas at construction sites.
- iv. Sweep daily (with water sweepers using reclaimed water if possible) all paved access roads, parking areas and staging areas at construction sites.
- v. Sweep streets (with water sweepers using reclaimed water if possible) at the end of each day if visible soil material is carried onto adjacent paved roads.

22. Construction Emissions

a. Prior to issuance of a demolition, grading or building permit

To minimize construction equipment emissions during construction, the project applicant shall require the construction contractor to:

- i. Demonstrate compliance with Bay Area Air Quality Management District (BAAQMD) Regulation 2, Rule 1 (General Requirements) for all portable construction equipment subject to that rule. BAAQMD Regulation 2, Rule 1, requires an authority to construct and permit to operate certain types of portable equipment used for construction purposes (e.g., gasoline or diesel-powered engines used in conjunction with power generation, pumps, compressors, and cranes) unless such equipment complies with all applicable requirements of the "CAPCOA" Portable Equipment Registration Rule" or with all applicable requirements of the Statewide Portable Equipment Registration Program. This exemption is provided in BAAQMD Rule 2-1-105.
- ii. Perform low- NOx tune-ups on all diesel-powered construction equipment greater than 50 horsepower (no more than 30 days prior to the start of use of that equipment). Periodic tune-ups (every 90 days) should be performed for such equipment used continuously during the construction period.

TREE PERMITS

23. Tree Removal Permit

a. Prior to issuance of a demolition, grading, or building permit

Prior to receiving building permits, the project applicant must secure a tree removal permit, and abide by the conditions of that permit, prior to removal of any trees located on the project site or in the public right-of-way adjacent to the project.

24. Tree Removal During Breeding Season

a. Prior to issuance of a tree removal permit

To the extent feasible, removal of the trees and other vegetation suitable for nesting of raptors shall not occur during the breeding season of March 15 and August 15. If tree removal must occur during the breeding season, all sites shall be surveyed by a qualified biologist to verify the presence or absence of nesting birds or raptors. If the survey indicates that potential presences of nesting birds or raptors, the results would be coordinated with the California Department of Fish and Game (CDFG) and suitable avoidance measures would be developed and implemented. Construction shall observe the CDFG avoidance guidelines which are a minimum 500-foot buffer zone surrounding active raptor nests and a 250-foot buffer zone surrounding nests of other birds. Buffer zones shall remain until young have fledged.

25. Tree Protection During Construction

a. Prior to issuance of a demolition, grading, or building permit

Adequate protection shall be provided during the construction period for any trees which are to remain standing. Measures deemed necessary by the Tree Services Division in consideration of the size, species, condition and location of the trees to remain may include any of the following:

- i. Before the start of any clearing, excavation, construction or other work on the site, every protected tree deemed to be potentially endangered by said site work shall be securely fenced off at a distance from the base of the tree to be determined by the City Tree Reviewer. Such fences shall remain in place for duration of all such work. All trees to be removed shall be clearly marked. A scheme shall be established for the removal and disposal of logs, brush, earth and other debris which will avoid injury to any protected tree.
- ii. Where proposed development or other site work is to encroach upon the protected perimeter of any protected tree, special measures shall be incorporated to allow the roots to breathe and obtain water and nutrients. Any excavation, cutting, filing, or compaction of the existing ground surface within the protected perimeter shall be minimized. No change in existing ground level shall occur within a distance to be determined by the City Tree Reviewer from the base of any protected tree at any time. No burning or use of equipment with an open flame shall occur near or within the protected perimeter of any protected tree.

- iii. No storage or dumping of oil, gas, chemicals, or other substances that may be harmful to trees shall occur within the distance to be determined by the Tree Reviewer from the base of any protected trees, or any other location on the site from which such substances might enter the protected perimeter. No heavy construction equipment or construction materials shall be operated or stored within a distance from the base of any protected trees to be determined by the tree reviewer. Wires, ropes, or other devices shall not be attached to any protected tree, except as needed for support of the tree. No sign, other than a tag showing the botanical classification, shall be attached to any protected tree.
- iv. Periodically during construction, the leaves of protected trees shall be thoroughly sprayed with water to prevent buildup of dust and other pollution that would inhibit leaf transpiration.
- v. If any damage to a protected tree should occur during or as a result of work on the site, the project applicant shall immediately notify the Public Works Agency of such damage. If, in the professional opinion of the Tree Reviewer, such tree cannot be preserved in a healthy state, the Tree Reviewer shall require replacement of any tree removed with another tree or trees on the same site deemed adequate by the Tree Reviewer to compensate for the loss of the tree that is removed.
- vi. All debris created as a result of any tree removal work shall be removed by the project applicant from the property within two weeks of debris creation, and such debris shall be properly disposed of by the project applicant in accordance with all applicable laws, ordinances, and regulations.

CULTURAL RESOURCES

26. Archaeological Resources

a. Ongoing throughout demolition, grading, and/or construction

Pursuant to CEQA Guidelines 15064.5 (f), “provisions for historical or unique archaeological resources accidentally discovered during construction” should be instituted. Therefore, in the event that any prehistoric or historic subsurface cultural resources are discovered during ground disturbing activities, all work within 50 feet of the resources shall be halted and the project applicant and/or lead agency shall consult with a qualified archaeologist or paleontologist to assess the significance of the find. If any find is determined to be significant, representatives of the project proponent and/or lead agency and the qualified archaeologist would meet to determine the appropriate avoidance measures or other appropriate measure, with the ultimate determination to be made by the City of Oakland. All significant cultural materials recovered shall be subject to scientific analysis, professional museum curation, and a report prepared by the qualified archaeologist according to current professional standards.

In considering any suggested measure proposed by the consulting archaeologist in order to mitigate impacts to historical resources or unique archaeological resources, the project applicant shall determine whether avoidance is necessary and feasible in light of factors such as the nature

of the find, project design, costs, and other considerations. If avoidance is unnecessary or infeasible, other appropriate measures (e.g., data recovery) shall be instituted. Work may proceed on other parts of the project site while measure for historical resources or unique archaeological resources is carried out.

Should an archaeological artifact or feature be discovered on-site during project construction, all activities within a 50-foot radius of the find would be halted until the findings can be fully investigated by a qualified archaeologist to evaluate the find and assess the significance of the find according to the CEQA definition of a historical or unique archaeological resource. If the deposit is determined to be significant, the project applicant and the qualified archaeologist shall meet to determine the appropriate avoidance measures or other appropriate measure, subject to approval by the City of Oakland, which shall assure implementation of appropriate measure measures recommended by the archaeologist. Should archaeologically-significant materials be recovered, the qualified archaeologist would recommend appropriate analysis and treatment, and would prepare a report on the findings for submittal to the Northwest Information Center.

27. Human Remains

a. Ongoing throughout demolition, grading, and/or construction

In the event that human skeletal remains are uncovered at the project site during construction or ground-breaking activities, all work shall immediately halt and the Alameda County Coroner shall be contacted to evaluate the remains, and following the procedures and protocols pursuant to Section 15064.5 (e)(1) of the CEQA Guidelines. If the County Coroner determines that the remains are Native American, the City shall contact the California Native American Heritage Commission (NAHC), pursuant to subdivision (c) of Section 7050.5 of the Health and Safety Code, and all excavation and site preparation activities shall cease within a 50-foot radius of the find until appropriate arrangements are made. If the agencies determine that avoidance is not feasible, then an alternative plan shall be prepared with specific steps and timeframe required to resume construction activities. Monitoring, data recovery, determination of significance and avoidance measures (if applicable) shall be completed expeditiously.

28. Paleontological Resources

a. Ongoing throughout demolition, grading, and/or construction

In the event of an unanticipated discovery of a paleontological resource during construction, excavations within 50 feet of the find shall be temporarily halted or diverted until the discovery is examined by a qualified paleontologist (per Society of Vertebrate Paleontology standards (SVP 1995,1996)). The qualified paleontologist shall document the discovery as needed, evaluate the potential resource, and assess the significance of the find under the criteria set forth in Section 15064.5 of the CEQA Guidelines. The paleontologist shall notify the appropriate agencies to determine procedures that would be followed before construction is allowed to resume at the location of the find. If the City determines that avoidance is not feasible, the paleontologist shall prepare an excavation plan for mitigating the effect of the project on the qualities that make the resource important, and such plan shall be implemented. The plan shall be submitted to the City for review and approval.

GEOLOGY, SOILS AND SEISMICTITY

29. Geotechnical Report

a. Prior to issuance of a demolition, grading, or building permit

A site-specific design level geotechnical investigation for each construction site within the project area shall be required as part of this project. Specifically:

- i. Each investigation shall include an analysis of expected ground motions at the site from known active faults. The analyses shall be in accordance with applicable City ordinances and policies, and consistent with the most recent version of the California Building Code, which requires structural design that can accommodate ground accelerations expected from known active faults.
- ii. The investigations shall determine final design parameters for the walls, foundations, foundation slabs, and surrounding related improvements (utilities, roadways, parking lots, and sidewalks).
- iii. The investigations shall be reviewed and approved by a registered geotechnical engineer. All recommendations by the project engineer, geotechnical engineer, will be included in the final design, as approved by the City of Oakland.
- iv. Recommendations that are applicable to foundation design, earthwork, and site preparation that were prepared prior to or during the project's design phase, shall be incorporated in the project.
- v. Final seismic considerations for the site shall be submitted to and approved by the City of Oakland Building Services Division prior to commencement of the project.

HAZARDS AND HAZARDOUS MATERIALS

30. Phase I and/or Phase II Reports

a. Prior to issuance of a demolition, grading, or building permit

Prior to issuance of demolition, grading, or building permits the project applicant shall submit a Phase I environmental Site assessment report, and a Phase II report if warranted by the Phase I for the project site. The reports shall make recommendations for remedial action, if appropriate, and should be signed by a Registered Environmental Assessor, Professional Geologist, or Professional Engineer.

31. Lead-Based Paint/Coatings, Asbestos, or PCB Occurrence Assessment

a. Prior to issuance of any demolition, grading or building permit

The project applicant shall submit a comprehensive assessment report, signed by a qualified environmental professional, documenting the presence or lack thereof of asbestos-containing materials (ACM), lead-based paint, and any other building materials or stored materials classified as hazardous waste by State or federal law.

32. Environmental Site Assessment Reports Remediation

a. Prior to issuance of a demolition, grading, or building permit

If the environmental site assessment reports recommend remedial action, the project applicant shall:

- i. Consult with the appropriate local, State, and federal environmental regulatory agencies to ensure sufficient minimization of risk to human health and environmental resources, both during and after construction, posed by soil contamination, groundwater contamination, or other surface hazards including, but not limited to, underground storage tanks, fuel distribution lines, waste pits and sumps.
- ii. Obtain and submit written evidence of approval for any remedial action if required by a local, State, or federal environmental regulatory agency.
- iii. Submit a copy of all applicable documentation required by local, State, and federal environmental regulatory agencies, including but not limited to: permit applications, Phase I and II environmental site assessments, human health and ecological risk assessments, remedial action plans, risk management plans, soil management plans, and groundwater management plans.

33. Lead-based Paint Remediation

a. Prior to issuance of any demolition, grading or building permit

If lead-based paint is present, the project applicant shall submit specifications signed by a certified Lead Supervisor, Project Monitor, or Project Designer for the stabilization and/or removal of the identified lead paint in accordance with all applicable laws and regulations, including but not necessarily limited to: Cal/OSHA's Construction Lead Standard, 8 CCR1532.1 and DHS regulation 17 CCR Sections 35001 through 36100.

34. Asbestos Remediation

a. Prior to issuance of any demolition, grading or building permit

If asbestos-containing materials (ACM) is present, the project applicant shall submit specifications signed by a certified asbestos consultant for the removal, encapsulation, or enclosure of the identified ACM in accordance with all applicable laws and regulations, including but not necessarily limited to: California Code of Regulations, Title 8; Business and Professions Code; Division 3; California Health & Safety Code 25915-25919.7; and Bay Area Air Quality Management District, Regulation 11, Rule 2.

35. Other Materials Classified as Hazardous Waste

a. Prior to issuance of any demolition, grading or building permit

If other building materials or stored materials classified as hazardous waste by State or federal law is present, the project applicant shall submit written confirmation that all State and federal laws and regulations shall be followed when profiling, handling, treating, transporting and/or disposing of such materials.

36. Health and Safety Plan per Assessment

a. *Prior to issuance of any demolition, grading or building permit*

If the required lead-based paint/coatings, asbestos, or PCB assessment finds presence of lead-based paint, asbestos, and/or PCBs, the project applicant shall create and implement a health and safety plan to protect workers from risks associated with hazardous materials during demolition, renovation of affected structures, and transport and disposal.

37. Hazards Best Management Practices

a. *Prior to commencement of demolition, grading, or construction*

The project applicant and construction contractor shall ensure that construction best management practices are implemented as part of construction to minimize the potential negative effects to groundwater and soils. These shall include the following:

- i. Follow manufacture's recommendations on use, storage, and disposal of chemical products used in construction;
- ii. Avoid overtopping construction equipment fuel gas tanks;
- iii. During routine maintenance of construction equipment, properly contain and remove grease and oils;
- iv. Properly dispose of discarded containers of fuels and other chemicals.
- v. Ensure that construction would not have a significant impact on the environment or pose a substantial health risk to construction workers and the occupants of the proposed development. Soil sampling and chemical analyses of samples shall be performed to determine the extent of potential contamination beneath all UST's, elevator shafts, clarifiers, and subsurface hydraulic lifts when on-site demolition, or construction activities would potentially affect a particular development or building. The applicant is responsible to avoid, eliminate delays with the unexpected discovery of contaminated soils with hazardous materials

HYDROLOGY

EROSION & SEDIMENTATION CONTROL DURING CONSTRUCTION

38. Erosion and Sedimentation Control Plan [when grading permit required]

a. *Prior to any grading activities*

The project applicant shall obtain approval from the Building Services Division of a grading permit if required by the Oakland Grading Regulations pursuant to Section 15.04.780 of the Oakland Municipal Code. The grading permit application shall include an erosion and sedimentation control plan. The erosion and sedimentation control plan shall include all necessary measures to be taken to prevent excessive stormwater runoff or carrying by stormwater runoff of solid materials on to lands of adjacent property owners, public streets, or to creeks as a result of conditions created by grading operations. The plan shall include, but not be limited to, such measures as short-term erosion control planting, waterproof slope covering, check dams, interceptor ditches, benches, storm drains, dissipation structures, diversion dikes, retarding berms and barriers, devices to trap, store and filter out sediment, and stormwater retention basins. Off-

site work by the project applicant may be necessary. The project applicant shall provide any obtain off-site permission or easements necessary for off-site work. to present written proof thereof to the Public Works Agency. There shall be a clear notation that the plan is subject to changes as changing conditions occur. Calculations of anticipated stormwater runoff and sediment volumes shall be included, if required by the Director of Development or designee. The plan shall specify that, after construction is complete, the project applicant shall ensure that the storm drain system shall be inspected and that the project applicant shall clear the system of any debris or sediment.

b. Ongoing throughout grading and construction activities

The project applicant shall implement the approved erosion and sedimentation plan. No grading shall occur during the wet weather season (October 15 through April 15) unless specifically authorized in writing by the Building Services Division.

POST-CONSTRUCTION STORMWATER MANAGEMENT

Requirements in the following table apply to projects that create or replace 10,000 square feet or more of impervious surface.

39. Post-Construction Stormwater Pollution Management Plan

a. Prior to issuance of building permit (or other construction-related permit)

The applicant shall comply with the requirements of Provision C.3 of the National Pollutant Discharge Elimination System (NPDES) permit issued to the Alameda Countywide Clean Water Program. The applicant shall submit with the application for a building permit (or other construction-related permit) a completed Stormwater Supplemental Form for the Building Services Division. The project drawings submitted for the building permit (or other construction-related permit) shall contain a stormwater pollution management plan, for review and approval by the City, to limit the discharge of pollutants in stormwater after construction of the project to the maximum extent practicable. The post-construction stormwater pollution management plan shall include and identify the following:

- All proposed impervious surface on the site;
- Anticipated directional flows of on-site stormwater runoff;
- Site design measures to reduce the amount of impervious surface area and directly connected impervious surfaces;
- Source control measures to limit the potential for stormwater pollution; and
- Stormwater treatment measures to remove pollutants from stormwater runoff.

The following additional information shall be submitted with the post-construction stormwater pollution management plan:

- Detailed hydraulic sizing calculations for each stormwater treatment measure proposed; and
- Pollutant removal information demonstrating that any proposed manufactured/mechanical (i.e., non-landscape-based) stormwater treatment measure, when not used in combination with a landscape-based treatment measure, is capable of removing the range of pollutants typically removed by landscape-based treatment measures.

All proposed stormwater treatment measures shall incorporate appropriate planting materials for stormwater treatment (for landscape-based treatment measures) and shall be designed with considerations for vector/mosquito control. Proposed planting materials for all proposed landscape-based stormwater treatment measures shall be included on the landscape and irrigation plan for the project. The applicant is not required to include on-site stormwater treatment measures in the post-construction stormwater pollution management plan if he or she secures approval from the Planning and Zoning Division of a proposal that demonstrates compliance with the requirements of the City's Alternative Compliance Program.

Prior to final permit inspection

The applicant shall implement the approved stormwater pollution management plan.

40. Maintenance Agreement for Stormwater Treatment Measures

a. Prior to final zoning inspection

For projects incorporating stormwater treatment measures, the applicant shall enter into the "Standard City of Oakland Stormwater Treatment Measures Maintenance Agreement," in accordance with Provision C.3.e of the NPDES permit, which provides, in part, for the following:

- The applicant accepting responsibility for the adequate installation/construction, operation, maintenance, inspection, and reporting of any on-site stormwater treatment measures being incorporated into the project until the responsibility is legally transferred to another entity; and
- Legal access to the on-site stormwater treatment measures for representatives of the City, the local vector control district, and staff of the Regional Water Quality Control Board, San Francisco Region, for the purpose of verifying the implementation, operation, and maintenance of the on-site stormwater treatment measures and to take corrective action if necessary. The agreement shall be recorded at the County Recorder's Office at the applicant's expense.

41. Erosion, and Sedimentation, and Debris Control Measures

a. Prior to issuance of demolition, grading, or construction-related permit

The project applicant shall submit an erosion and sedimentation control plan for review and approval by the City. All work shall incorporate apply all applicable the "Best Management Practices (BMPsS) for the construction industry, and as outlined in the Alameda Clean Water Program pamphlets, including BMP's for dust, erosion and sedimentation abatement per Chapter Section 15.04 of the Oakland Municipal Code. The measures shall include, but are not limited to, the following:

BASIC (Applies to ALL construction sites)

- i. To ensure that sediment does not flow into the creek and/or storm drains, On sloped properties, the downhill end of the construction area must be protected with silt the project applicant shall install silt fencing (such as sandbags, filter fabric, silt curtains, etc.) and hay bales oriented parallel to the contours of the slope (at a constant elevation) to prevent erosion into the creek.
- ii. In accordance with an approved erosion control plan, the project applicant shall implement mechanical and vegetative measures to reduce erosion and sedimentation,

including appropriate seasonal maintenance. One hundred (100) percent degradable erosion control fabric shall be installed on all graded slopes to protect and stabilize the slopes during construction and before permanent vegetation gets established. All graded areas shall be temporarily protected from erosion by seeding with fast growing annual species. All bare slopes must be covered with staked tarps when rain is occurring or is expected.

- iii. Minimize the removal of natural vegetation or ground cover from the site in order to minimize the potential for erosion and sedimentation problems. Maximize the replanting of the area with native vegetation as soon as possible.
- iv. All work in or near creek channels must be performed with hand tools and by a minimum number of people. Immediately upon completion of this work, soil must be repacked and native vegetation planted.
- v. Install filter materials (such as sandbags, filter fabric, etc.) at the storm drain inlets nearest to the creek side of the project site prior to the start of the wet weather season (October 15); site dewatering activities; street washing activities; saw cutting asphalt or concrete; and in order to retain any debris flowing into the City storm drain system. Filter materials shall be maintained and/or replaced as necessary to ensure effectiveness and prevent street flooding.
- vi. Ensure that concrete/granite supply trucks or concrete/plaster finishing operations do not discharge wash water into the creek, street gutters, or storm drains.
- vii. Direct and locate tool and equipment cleaning so that wash water does not discharge into the creek.
- viii. Create a contained and covered area on the site for storage of bags of cement, paints, flammables, oils, fertilizers, pesticides, or any other materials used on the project site that have the potential for being discharged to the storm drain system by the wind or in the event of a material spill. No hazardous waste material shall be stored on site.
- ix. Gather all construction debris on a regular basis and place them in a dumpster or other container which is emptied or removed on a weekly basis. When appropriate, use tarps on the ground to collect fallen debris or splatters that could contribute to stormwater pollution.
- x. Remove all dirt, gravel, refuse, and green waste from the sidewalk, street pavement, and storm drain system adjoining the project site. During wet weather, avoid driving vehicles off paved areas and other outdoor work.
- xi. Broom sweep the street pavement adjoining the project site on a daily basis. Caked-on mud or dirt shall be scraped from these areas before sweeping. At the end of each workday, the entire site must be cleaned and secured against potential erosion, dumping, or discharge to the creek.
- xii. All erosion and sedimentation control measures implemented during construction activities, as well as construction site and materials management shall be in strict accordance with the control standards listed in the latest edition of the Erosion and Sediment Control Field Manual published by the Regional Water Quality Board (RWQB).

NOISE

42. Days/Hours of Construction Operation

a. Ongoing throughout demolition, grading, and/or construction

The project applicant shall require construction contractors to limit standard construction activities as required by the City Building Department.

- i. Construction activities (see below) are limited to between 7:00 a.m. AM and 7:00 p.m. PM Monday through Friday for all other cases, with pPile driving and/or other extreme noise generating activities greater than 90 dBA limited to between 8:00 a.m. and 4:00 p.m. Monday through Friday.
- ii. Any construction activity proposed to occur outside of the standard hours of 7:00 am to 7:00 pm Monday through Friday for special activities (such as concrete pouring which may require more continuous amounts of time) shall be evaluated on a case by case basis, with criteria including the proximity of residential uses and a consideration of resident's preferences for whether the activity is acceptable if the overall duration of construction is shortened and such construction activities shall only be allowed with the prior written authorization of the Building Services Division.
- iii. Construction activity shall not occur on Saturdays, with the following possible exceptions:
 - I. Prior to the building being enclosed, requests for Saturday construction for special activities (such as concrete pouring which may require more continuous amounts of time), shall be evaluated on a case by case basis, with criteria including the proximity of residential uses and a consideration of resident's preferences for whether the activity is acceptable if the overall duration of construction is shortened. Such construction activities shall only be allowed on Saturdays with the prior written authorization of the Building Services Division.
 - II. After the building is enclosed, requests for Saturday construction activities shall only be allowed on Saturdays with the prior written authorization of the Building Services Division, and only then within the interior of the building with the doors and windows closed.
- iv. No extreme noise generating activities (greater than 90 dBA) shall be allowed on Saturdays, with no exceptions.
- v. No construction activity shall take place on Sundays or Federal holidays.
- vi. Construction activities include but are not limited to: truck idling, moving equipment (including trucks, elevators, etc) or materials, deliveries, and construction meetings held on-site in a non-enclosed area.

43. Noise Control

a. Ongoing throughout demolition, grading, and/or construction

To reduce noise impacts due to construction, the project applicant shall require construction contractors to implement a site-specific noise reduction program, subject to city review and approval, which includes the following measures:

- i. Equipment and trucks used for project construction shall utilize the best available noise control techniques (e.g., improved mufflers, equipment redesign, use of intake silencers, ducts, engine enclosures and acoustically-attenuating shields or shrouds, wherever feasible).

- ii. Impact tools (e.g., jack hammers, pavement breakers, and rock drills) used for project construction shall be hydraulically or electrically powered wherever possible to avoid noise associated with compressed air exhaust from pneumatically powered tools. However, where use of pneumatic tools is unavoidable, an exhaust muffler on the compressed air exhaust shall be used; this muffler can lower noise levels from the exhaust by up to about 10 dBA. External jackets on the tools themselves shall be used where feasible, and this could achieve a reduction of 5 dBA. Quieter procedures shall be used, such as drills rather than impact equipment, whenever feasible.
- iii. Stationary noise sources shall be located as far from adjacent receptors as possible, and they shall be muffled and enclosed within temporary sheds, incorporate insulation barriers, or other measures to the extent feasible.
- iv. If feasible, the noisiest phases of construction (such as pile driving) shall be limited to less than 10 days at a time.

44. Pile Driving and Other Extreme Noise Generators

a. Ongoing throughout demolition, grading, and/or construction

To further mitigate potential pier drilling, pile driving and/or other extreme noise generating construction impacts greater than 90dBA, a set of site-specific noise attenuation measures shall be completed under the supervision of a qualified acoustical consultant. Prior to commencing construction, a plan for such measures shall be submitted for review and approval by the City to ensure that maximum feasible noise attenuation will be achieved. This plan shall be based on the final design of the project. A third-party peer review, paid for by the project applicant, shall be required to assist the City in evaluating the feasibility and effectiveness of the noise reduction plan submitted by the project applicant. A special inspection deposit is required to ensure compliance with the noise reduction plan. The amount of the deposit shall be determined by the Building Official, and the deposit shall be submitted by the project applicant concurrent with submittal of the noise reduction plan. The noise reduction plan shall include, but not be limited to, an evaluation of the following measures. These attenuation measures shall include as many of the following control strategies as feasible:

- i. Erect temporary plywood noise barriers around the construction site, particularly along on sites adjacent to residential buildings;
- ii. Implement “quiet” pile driving technology (such as pre-drilling of piles, the use of more than one pile driver to shorten the total pile driving duration), where feasible, in consideration of geotechnical and structural requirements and conditions;
- iii. Utilize noise control blankets on the building structure as the building is erected to reduce noise emission from the site;
- iv. Evaluate the feasibility of noise control at the receivers by temporarily improving the noise reduction capability of adjacent buildings by the use of sound blankets for example; and

- v. Monitor the effectiveness of noise attenuation measures by taking noise measurements.

45. Noise Complaint Procedures

a. Ongoing throughout demolition, grading, and/or construction

Prior to the issuance of each building permit, along with the submission of construction documents, the project applicant shall submit to the City Building Department a list of measures to respond to and track complaints pertaining to construction noise. These measures shall include:

- i. A procedure and phone numbers for notifying the City Building Services Division staff and Oakland Police Department; (during regular construction hours and off-hours);
- ii. A sign posted on-site pertaining with permitted construction days and hours and complaint procedures and who to notify in the event of a problem. The sign shall also include a listing of both the City and construction contractor's telephone numbers (during regular construction hours and off-hours);
- iii. The designation of an on-site construction complaint and enforcement manager for the project;
- iv. Notification of neighbors and occupants within 300 feet of the project construction area at least 30 days in advance of pile-driving activities about the estimated duration of the activity; and
- v. A preconstruction meeting shall be held with the job inspectors and the general contractor/on-site project manager to confirm that noise measures and practices (including construction hours, neighborhood notification, posted signs, etc.) are completed.

46. Interior Noise

a. Prior to issuance of a building permit

If necessary to comply with the interior noise requirements of the City of Oakland's General Plan Noise Element and achieve an acceptable interior noise level, noise reduction in the form of sound-rated assemblies (i.e., windows, exterior doors, and walls) shall be incorporated into project building design. Final recommendations for sound-rated assemblies will depend on the specific building designs and layout of buildings on the site and shall be determined during the design phase.

TRAFFIC / TRANSPORTATION

47. Construction Traffic and Parking

a. Prior to the issuance of a demolition, grading or building permit

The project applicant and construction contractor shall meet with the Transportation Services Division of the Public Works and other appropriate City of Oakland agencies to determine traffic

management strategies to reduce, to the maximum extent feasible, traffic congestion and the effects of parking demand by construction workers during construction of this project and other nearby projects that could be simultaneously under construction. The project applicant shall develop a construction management plan for review and approval by the City Transportation Services Division. The plan shall include at least the following items and requirements:

- i. A set of comprehensive traffic control measures, including scheduling of major truck trips and deliveries to avoid peak traffic hours, detour signs if required, lane closure procedures, signs, cones for drivers, and designated construction access routes.
- ii. Notification procedures for adjacent property owners and public safety personnel regarding when major deliveries, detours, and lane closures will occur.
- iii. Location of construction staging areas for materials, equipment, and vehicles (must be located on the project site).
- iv. A process for responding to, and tracking, complaints pertaining to construction activity, including identification of an onsite complaint manager. The manager shall determine the cause of the complaints and shall take prompt action to correct the problem. Planning and Zoning shall be informed who the Manager is prior to the issuance of the first permit issued by Building Services.
- v. Provision for accommodation of pedestrian flow.
- vi. Provision for parking management and spaces for all construction workers to ensure that construction workers do not park in on-street spaces.

UTILITIES AND SERVICES SYSTEMS

48. Reduced Water Use

a. Prior to issuance of a building permit

As feasible and applicable, the project applicant shall implement the following water-efficient equipment and devices into building design and project plans, consistent with the Landscape Water Conservation section of the City of Oakland Municipal Code (Chapter 7, Article 10): low-, ultra-low, and dual flush flow toilets and showerheads; water efficient irrigation systems that include drip irrigation and efficient sprinkler heads; evapotranspiration (ET) irrigation controllers; drought-resistant and native plants for landscaping; and minimization of turf areas.

49. Waste Reduction and Recycling

The project applicant will submit a Construction & Demolition Waste Reduction and Recycling Plan (WRRP) and an Operational Diversion Plan (ODP) for review and approval by the Public Works Agency.

a. Prior to issuance of demolition, grading, or building permit

OMC 15.34 outlines requirements for reducing waste and optimizing construction and demolition (C&D) recycling. Affected projects include all new construction, renovations/alterations/modifications with construction values of \$50,000 or more (except R-3), and all demolition (including soft demo). The WRRP must specify the methods by which the development will divert C&D debris waste generated by the proposed project from landfill disposal in accordance with current City requirements. Current standards, FAQs, and forms are available at www.oaklandpw.com/Page39.aspx or in the Green Building Resource Center. After approval of the plan, the project applicant will implement the plan.

b. Ongoing

The ODP will identify how the project complies with the Recycling Space Allocation Ordinance, OMC 17.118, including capacity calculations, and specify the methods by which the development will meet the current diversion of solid waste generated by operation of the proposed project from landfill disposal in accordance with current City requirements. The proposed program shall be implemented and maintained for the duration of the proposed activity or facility. Changes to the plan may be re-submitted to the Environmental Services Division of Public Works for review and approval. Any incentive programs shall remain fully operational as long as residents and businesses exist at the project site.

50. Stormwater and Sewer

a. Prior to completing the final design for the project's sewer service

Confirmation of the capacity of the City's surrounding stormwater and sanitary sewer system and state of repair shall be completed by a qualified civil engineer with funding from the project applicant. The project applicant shall be required to pay mitigation additional fees to improve stormwater and sanitary sewer infrastructure if required by the City. Improvements to the existing sanitary sewer collection system shall specifically include, but are not limited to, mechanisms to control or minimize increases in infiltration/inflow associated with the proposed project. Additionally, the project applicant shall be responsible for payment of the required installation or hook-up fees to the affected service providers.

SPECIFIC PROJECT CONDITIONS

51. Meter Shielding

a. Prior to issuance of building permits.

The applicant shall submit for review and approval by the Planning and Zoning Division, plans showing the location of any and all utility meters, transformers, and the like located within a box set within the building, located on a non-street facing elevation, or screened from view from any public right of way.

52. Tentative Parcel Map

a. Prior to issuance of a building permit

A Parcel Map shall be filed with the City Engineer within two (2) years from the date of approval of the Tentative Parcel Map, or within such additional time as may be granted by the Advisory Agency. Failure to file a Parcel Map within these time limits shall nullify the previous approval or conditional approval of the Tentative Parcel Map.

53. Compliance with Policy 3.7 of the Historic Preservation Element (Property Relocation Rather than Demolition)

a. Prior to issuance of a demolition permit

The project applicant shall make a good faith effort to relocate the building located at **5248 Telegraph Avenue, and 5244 Telegraph Avenue** to a site acceptable to the City. Good faith efforts include, at a minimum, the following:

- i. Advertising the availability of the building by: (1) posting of large visible signs (such as banners, at a minimum of 3’x6’ size or larger) at the site; (2) placement of advertisements in Bay Area news media acceptable to the City ;and (3) contacting neighborhood associations and for-profit and not-for-profit housing and preservation organizations;
- ii. Maintaining a log of all the good faith efforts and submitting that along with photos of the subject building showing the large signs (banners) to the Planning and Zoning Division;
- iii. Maintaining the signs and advertising in place for a minimum of **180** days; and
- iv. Making the building available at no or nominal cost (the amount to be reviewed by the Oakland Cultural Heritage Survey) until removal is necessary for construction of a replacement project, but in no case for less than a period of **180** days after such advertisement.

54. Building Modifications

a. Prior to issuance of a building permit

The proposed building shall be revised so that the project meets all the C-30 requirements for rear yard setback and the “height reduction plane” from the rear yard setback line.

APPROVED BY: City Planning Commission: _____ (date) _____ (vote)
City Council: _____ (date) _____ (vote)

Exhibit B

[October 16, 2007 City Council Agenda Report]

CITY OF OAKLAND

AGENDA REPORT

TO: Office of the City Administrator
ATTN: Deborah Edgerly
FROM: Community & Economic Development Agency
DATE: October 16, 2007

RE: **A Public Hearing and Adoption of a Resolution Denying the Appeal and Upholding the Planning Commission Approval for construction of 33 dwelling units over ground floor commercial at 5248 Telegraph Avenue (Case File No. CDV06-476 & TPM-9212)**

SUMMARY

On July 18, 2007, the Planning Commission approved a Design Review, Conditional Use permit, Vesting Tentative Parcel Map and Minor Variance to construct a mixed use development containing 33 dwelling units over ground floor commercial (CDV06-476)(Project).

On July 27, 2007, Bob Brokl, representing Standing Together for Accountable Neighborhood Development (STAND), filed an appeal of the Planning Commission's Approval of the Project to the City Council (Attachment A).

On July 30, 2007, Stuart Flashman, representing Rockridge Community Planning Council (RCPC), filed an appeal of the Planning Commission's Approval of the Project to the City Council (Attachment B).

The STAND appellant is arguing that the project does not qualify for a Categorical Exemption under CEQA because of required variances, potential cumulative impacts, and potential impacts to views. The appeal also argues against the use of a "Best Fit" zone for the property (C-45), and that the project is not consistent with the General Plan. In addition, the argument is made that there is no guarantee that the project will be developed or retained as co-housing.

The RCPC appellant is arguing specifically against the use of a "Best Fit" zone for the property (C-45) and that the proposed project is not consistent with the character of the neighborhood.

The arguments raised by the appellant are summarized below in the Key Issues portion of this report along with staff's response to each argument. For the reasons stated in this report, and elsewhere in the record, staff recommends the City Council adopt the attached Resolution denying the appeal, thereby upholding the Planning Commission's approval of the project.

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FISCAL IMPACT

The project involves a private development and does not request or require public funds and has no direct fiscal impact on the City of Oakland. If constructed, the project would provide a positive fiscal impact through increased property taxes, utility user taxes and business license taxes, while at the same time increasing the level of municipal services that must be provided.

BACKGROUND

PROJECT DESCRIPTION

The proposal is to construct a new five-story, 59 foot tall (55 feet to the midpoint of the gable), 33 unit co-housing development. The project would have frontages on both Claremont and Telegraph Avenues, which would contain ground floor commercial spaces. The proposed parking garage will be located behind the ground floor commercial spaces and be accessed from Claremont Avenue. The proposed development will replace four existing structures, which are proposed for demolition (or relocation if possible). Three of the four existing structures are Potentially Designated Historic Structures with a rating of C2+ (the two Victorian structures on Telegraph) and C3 (Kingfish), but not considered to be historic resources under CEQA. The applicant had requested a “Best Fit” Zone of C-45 pursuant to Planning Code Section 17.01.100. Given the current re-zoning process for the Temescal area the Director of Development opted to grant a “Best Fit” zone of C-30 rather than the requested C-45 because of the current direction of that rezoning process. At the public hearing on the project on July 18, 2007, the Planning Commission overruled the C-30 “Best Fit” Zone determination and granted the Best Fit Zone of C-45 as requested by the applicant.

PROJECT LOCATION AND ZONING

The subject site is an 11,777 square foot site containing frontages on the east side of Telegraph Avenue and the west side of Claremont Avenue. Telegraph Avenue is one of the widest streets in Oakland, measuring approximately 100 feet in width. Claremont Avenue is wider than average, with a width of 66 feet. As stated above, the development site contains four existing structures, three of which are Potentially Designated Historic Structures with a rating of C2+ and C3, but these are not considered historic resources under CEQA. The surrounding uses include auto related commercial uses, civic buildings, and high and low density residential uses.

The subject property is located within the C-28, Commercial Shopping District Zone, which is intended to create, preserve, and enhance major boulevards of medium-scale retail establishments featuring some specified higher density nodes in attractive settings oriented to pedestrian comparison shopping, and to encourage mixed-use residential and nonresidential developments, and is typically appropriate along major thoroughfares near residential communities.

Until the Planning Code is updated to reflect the general plan, the City Council has established a procedure in the General Plan Conformity Guidelines and Chapter 17.01 of the Planning Code to provide consistency between zoning and the general plan. During the review of the proposed

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project the applicant, pursuant to Planning Code Section 17.01.100B, had requested a “Best Fit” zone of C-45 to be applied to the project site due to an “express conflict” between the General Plan and the existing Zoning. The “express conflict” determination is made based upon the following process, as laid out in the General Plan Conformity Guidelines (Attachment C).

The General Plan Conformity Guidelines list three items for determining General Plan Conformity as follows:

- **Is the proposed activity and facility type permitted under the General Plan?** – The proposed activities (residential, retail) are permitted in the Community Commercial and Mixed Housing Type General Plan areas, and multi-family residential permitted within both the Community Commercial General Plan and mixed Housing Type classifications. Non-residential facilities are permitted within the Community Commercial General Plan Area, but are silent in the Mixed Housing Type General Plan Area. In such instance you defer to the existing base zoning of C-28, in which it is permitted.
- **Is the proposed intensity or density less than or equal to the maximum permitted under the General Plan?** – The Community Commercial General Plan area allows residential density equal to one dwelling unit per 261 square feet of lot area and commercial development equal to a FAR (Floor Area Ratio) of 5.0. The Mixed Housing Type General Plan area allows up to one dwelling unit per 1,089 square feet of lot area. The project site as broken down between the two separate land use classifications would allow a maximum density of 38 dwelling units. The proposed density of 33 dwelling units is consistent with the General Plan density.
- **Is the project consistent with Relevant General Plan policies?** – In order to answer this question the Guidelines refer you to “Checklist 4” of the document, which states the relevant policies:

- **Policy 3.9 – Orienting Residential development – Residential developments should be encouraged to face the street and to orient their units to desirable sunlight and views, while avoiding unreasonably blocking sunlight and views for neighboring buildings, respecting the privacy needs of residents of the development and neighboring properties, providing for sufficient conveniently located open on-site open space, avoiding undue noise exposure.**

The proposed development faces Telegraph and Claremont Avenues, it does not unreasonably block sunlight to adjacent properties, and the area is not one that would be considered to have significant views (this is restricted to properties that contain a site slope of greater than 20%). Privacy and noise impacts would be no different than any other residential development that contains windows, and open space will be provided at individual units and common open space courtyards.

- **Policy N7.1 – Ensuring Compatible Development – New residential development in Detached Unit and Mixed Housing Type areas should be**

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compatible with the density, scale, design, and existing or desired character of surrounding development.

The subject property is not located within the Detached Unit area and there are not any lower intensity houses directly adjacent to the site.

- **Policy 7.2 – Defining Compatibility – Infrastructure availability, environmental constraints and natural features, emergency response and evacuation times, street width and function, prevailing lot size, predominant development type and height, scenic values, distance from public transit, and desired neighborhood character are among factors that could be taken into account when developing and mapping zoning designations or determining compatibility. These factors should be balanced with the citywide need for additional housing.**

The subject property is not located in an undeveloped area of the Oakland Hills, but is located within a developed urban area of the City, which contains existing infrastructure, streets, and pre-existing lot patterns. The proposed development is compatible with other mixed use developments on Telegraph Avenue and contains a design style that is contextual with the other period architecture in the surrounding area. The site is located directly on a transit line (AC Transit 1 and 1R lines).

- **Policy 8.2 – Making Compatible Interfaces Between Densities – The height of development in Urban Residential and other higher density residential areas should step down as it nears lower density areas to minimize conflicts at the interface between the different types of development.**

The subject property is not located within one of the Urban Residential areas, which are usually zoned R-70, R-80, and R-90 Zones, and which typically do not contain a set height limit. The subject property is not located adjacent to any lower density zoning districts or uses. The adjacent buildings on Claremont Avenue are commercial buildings and the adjacent site on Telegraph is a civic building.

- **Policy 4.2 – Protection of Residential Yards – Action 4.2.1 – Lot Coverage Limits – Prepare a study of lot coverage or floor area ratio limits for single family residential zoning districts, with assistance from local architects, builders, and residents.**

The subject property is not located within a single family residential district.

If the answers to all of the above questions are yes, or if the General Plan is silent, you must then determine whether or not the proposed project is permitted under the zoning regulations. To determine this, the following questions are applied:

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- **Is the proposed activity and facility permitted under the zoning regulations?** – The proposed activities (residential and retail), and facilities (multi family residential and non-residential) are permitted under the C-28 regulations.
- **Is the project consistent with other regulations of the zone?** –The project is **not consistent** with the regulations of the C-28 Zone. The proposed project contains a density higher than that permitted within the C-28 Zone, but is consistent with the density of the General Plan. The proposed project is also taller in height than permitted by the C-28 Zone and the proposed density is also not permitted by C-28, but the project is consistent with the relevant General Plan policies as stated above.

Given that the project as proposed conformed to the relevant General Plan policies, but is not permitted under the C-28 zoning due to the limitations on building envelope (density and height), the Planning Director opted to grant a “Best Fit” zone of C-30, which is listed as an “other possible Best Fit zone” for the Community Commercial General Plan designation. Other reasons for choosing the C-30 zone were that the proposed zoning update at that time was moving forward with a recommendation of C-30, as well as the fact that other more intense corridors in North Oakland with a Community Commercial General Plan designation also contain C-30 Zoning designations. During the public hearing the Commission reversed the staff recommendation for C-30 and granted the “Best Fit” zone of C-45 as requested by the applicant.

The following table outlines the differences between regulations in the different zones:

Attribute/Zone	C-28	C-30*	C-45	Project
Height	40'	None* (160')	None	59'
Rear Yard	10'	10'	10'	5'
Density**	1:450 (26 units)	1:450 (26 units)	1:300 (39 units)	1:357 (33 units)
Parking	1 per dwelling	1 per dwelling	1 per dwelling	1 per dwelling
Open Space	150sq.ft./d.u.	150sq.ft./d.u.	150sq.ft./d.u.	168sq.ft./d.u.
Best Fit Zone	No	Possible	Yes	N/A
Variance Req'd	Height	Height Plane /Rear Yard	Rear Yard	N/A

* The C-30 Zone requires a residential building to be no more than 40 feet in height at the rear yard setback line, but it may increase in height two feet vertically per each one foot setback horizontally, which for the project site would allow up to a maximum of 160' in height.

**The maximum density for a project site is dictated by the maximum allowed under the General Plan, for this project site the maximum under the General Plan is 38 units by accounting for the split in the General Plan Designation of Community Commercial (78% of the lot), which allows for one dwelling per 261 square feet and Mixed Housing Type (22% of the lot), which allows for one dwelling per 1,089 square feet.

GENERAL PLAN

As discussed elsewhere in this report, and in the City Planning Commission Report, the project is consistent with the relevant policies of the general plan that encourage in-fill development along

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transit corridors, and higher densities in growth and change areas; specifically LUTE Objective N8; Housing Element Policy; Housing Element Actions 1.3.1 and 1.3.2.

CEQA DETERMINATION

The Planning Commission confirmed the determination that the project is exempt from CEQA pursuant to Section 15332 of the CEQA Guidelines (In Fill Development Projects), and, as a separate and independent basis, is also exempt pursuant to CEQA Guidelines Section 15183 (Projects Consistent with a Community Plan, General Plan, or Zoning).

Specifically, as a separate and independent basis from the other CEQA findings, pursuant to CEQA section 21083.3 and Guidelines section 15183, the City Council will also find that if it approves the project that: (a) the project is consistent with the Land Use and Transportation Element (LUTE) of the General Plan, for which an EIR was certified in March 1998; (b) feasible mitigation measures identified in the LUTE EIR were adopted and have been, or will be, undertaken; (c) the EIR evaluated impacts peculiar to the project and/or project site, as well as off-site and cumulative impacts; (d) uniformly applied development policies and/or standards (Standard Conditions of Approval) have previously been adopted and found to, when applied to future projects, substantially mitigate impacts. To the extent that no such findings were previously made, the City Council hereby finds and determines (in approving the project) that the Standard Conditions of Approval substantially mitigate environmental impacts; and (e) substantial new information does not exist to show that the Standard Conditions of Approval will not substantially mitigate the project and cumulative impacts.

PLANNING COMMISSION REVIEW

At the July 18, 2007 hearing, the Oakland Planning Commission took public testimony from various interested parties including the appellants, as well as others who were in support of the project. At the conclusion of the public hearing on the item the Commission voted unanimously to approve the project (6-0). During the public hearing the Planning Commission had decided to grant a “Best Fit” zone of C-45 as requested by the applicant, as well as grant a rear yard setback variance that Planning Staff had recommended be denied.

The Planning Commission granted the rear yard variance to reduce the setback from ten (10) feet to five (5) feet based upon meeting the minor variance criteria as set forth in Planning Code Section 17.148.050, as detailed in the approved Planning Commission staff report. This decision was largely based upon the configuration of the site and how it contains two frontages along major streets, the rear yard of the property is actually situated more as a side yard (in which five feet would be required for windows under the Building Code), and that the rear abutting property was in fact not a residential development being a recently established civic structure and activity. To further clarify, the project site has a unique physical circumstance in that it is essentially a through lot that contains two street frontages along Telegraph and Claremont Avenues, and has a relatively small “jog” in the lot that results in a lot line that qualifies as a rear lot line. All of these factors led the Commission to make the decision that as proposed the project served as a superior design solution, that the prescribed regulation would not serve the intent of the Code requirement, and that the unique lot configuration would not lead the variance to being

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considered a grant of special privilege, therefore meeting the required findings for a Minor Variance.

KEY ISSUES AND IMPACTS

The STAND appellant's letter is included as Attachment "A" and described below under **Section I**, and the RCPC appellant's letter is included as Attachment "B" and described below under **Section II**. The basis for the appeals, as contained in the appeal letters, is shown in bold text. A staff response follows each point in italic type.

SECTION I (STAND APPEAL)

- 1. The appellant argues that the project does not qualify for an in-fill CEQA exemption because of the requested a variance. The appellant argues that the project does not qualify for an in-fill exemption because of the required variance, and therefore does not comply with the in-fill criteria that a project must be "consistent with the applicable general plan designation and all applicable policies as well as with applicable zoning designation and regulations". The appellant argues that since the variance was granted, the project does not conform to the Planning Code since by definition a variance is an exception to the Code.**

This argument is incorrect because by meeting the required minor variance findings, which are expressly authorized by the Planning Code Chapter 17.148, the proposed project is indeed consistent with the Planning Code. The City's position has been upheld by the Alameda County Superior Court in Islamic Cultural Center of Northern California v. City of Oakland (Case No. RG03-133394), dealing with the Madison Street Lofts project (See Attachment D, page 9). The STAND appellant has not cited, nor could they, any legal authority to support their position. Therefore, exemptions are appropriate here.

- 2. The appellant argues that use of a "Best Fit" Zone is an illegal attempt to rezone the C-28 zoned property.**

The appellant asserts that the use of the Best Fit zone in this instance is incorrect since both the activity and facility type proposed by the project are both permitted in the C-28 Zone. The appellant cites general language from the overview section of the General Plan Conformity Guidelines, which states that, "There are two situations where Table 5 is used to select a 'Best Fit zone': 1) where the General Plan allows the activity/facility type, but the Zoning Regulations prohibit the activity/facility type". The appellant's assertion that since both Residential Activities and Multi-Family Facilities are permitted in the C-28 Zone, the use of a Best Fit zone is inappropriate.

This assertion is incorrect. The portion of the Conformity Guidelines that is cited in the appellant's letter is merely out of the overview section of the document (Attachment C, Page 3).

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The document later lays out the detailed process for determining conformity with the General Plan and the detailed process in which a "Best Fit" zone is applied. A "Best Fit" zone is applied when there is an express conflict between the General Plan and the Zoning, and is not limited to activity and facility types, but is also applied to other provisions of the Code that would otherwise not allow a project. If a project is deemed consistent with the General Plan, but the project itself is not permitted, then a Best Fit zone may also be applied. Specifically, the Procedures portion of the Conformity Guidelines focuses on whether or not there is a conflict between the General Plan and the existing zoning, which would create an express conflict between the two. This "Express Conflict" is created when a project clearly conforms with the General Plan, but is not permitted by the Zoning. The General Plan Conformity Guidelines provide a flow chart for Determining a Project's Conformity with the General Plan (Attachment C, Page 8), in which the several elements are reviewed beyond just the Activity and Facility types, such as density and intensity, which is the situation here.

After determining that the project is consistent with the General Plan you then have to determine whether or not the project is permitted by Zoning. If the project is permitted by zoning the proposal is permitted outright, if zoning requires a Conditional Use Permit, then the approval of a conditional use permit must be obtained. If the project is not permitted by zoning; this is an express conflict with the General Plan and the project can only be allowed by an Interim Conditional Use Permit or an approved application for a Rezoning (Ibid., Page 9).

Here, an express conflict was determined to exist because the proposed size of the building would not be permitted in the current C-28 Zone, even though the activity or facility type would be permitted. As a separate and independent basis, the density would also not be permitted in the C-28 Zone. Thus, there is an express conflict as the general plan allows both the size of building and density, but the current C-28 zoning does not.

The appellants also argue that the C-28 Zone was created as a Best Fit zone in the 1990's and should not be removed for a higher intensity zone. The Telegraph Avenue corridor through the Temescal area was zoned C-28 in 1992, and the superceding General Plan document was adopted in 1998. The subject area was specifically identified as Community Commercial, which is a higher intensity area than the Neighborhood Center areas (areas that the C-28 zones are appropriate for) most likely because it is located along a major transit corridor and its close proximity to a freeway underpass and existing uses such as a gas station, smog station, and fast food restaurant. Since the General Plan supercedes the previous zoning, C-28 is no longer a compatible zone for Community Commercial areas, and the C-30 Zone is one of the possible Best Fit zones; and the C-45 Zone is a Best Fit zone.

3. The appellant argues that the Planning Commission erred in their findings for a C-45 "Best Fit", after overturning the staff recommendation of C-30.

The determination of a "Best Fit" Zone was made by the Planning Commission, because the General Plan Conformity Guidelines clearly state that the C-45 Zone is one of the "best fit" zones for the Community Commercial General Plan Areas, whereas the staff recommendation

for C-30 was listed only as an “other possible zone”. The C-45 Zone is the only zone that is completely consistent with the proposed project in terms of building height as well as density. In addition, the stated intent of the C-45 Zone, “The C-45 zone is intended to create, preserve, and enhance areas with a wide range of both retail and wholesale establishments serving both long and short term needs in compact locations oriented toward pedestrian comparison shopping, and is typically appropriate to commercial clusters near intersections of major thoroughfares” clearly meets the description of the area in question being located at the intersection of Telegraph and Claremont Avenues. .

The appellant’s comments after the initial statement are primarily on the variances granted for the rear yard setback. The Planning Commission granted a Minor Variance to allow the rear yard to be reduced from ten feet to five feet. This decision was largely based upon the configuration of the site and how it contains two frontages along major streets, the rear yard of the property is actually situated more as a side yard (in which five feet would be required for windows under the Building Code), and that the rear abutting property was in fact not a residential development being a recently established civic structure and activity. To further clarify, the project site has a unique physical circumstance in that it is essentially a through lot that contains two street frontages along Telegraph and Claremont Avenues, and has a relatively small “jog” in the lot that results in a lot line that qualifies as a rear lot line. All of these factors led the Commission to make the decision that project as proposed served as a superior design solution, that the prescribed regulation would not serve the intent of the Code requirement, and that the unique lot configuration would not lead the variance to being considered a grant of special privilege, therefore meeting the required findings for a Minor Variance per Planning Code Section 17.148.050.

- 4. The appellant alleges that staff erred in not identifying the need for a side yard variance. The appellant argues that there are insufficient side yard setbacks opposite living room windows, per Planning Code Section 17.108.080, which requires increased setbacks when living room windows face onto side yards.**

This argument is wrong. This requirement is for “legally required living room windows”, which is a requirement for certain exposure into a living space of a dwelling unit. All of the living rooms in the development that have side facing windows also contain a window that faces out to a rear yard or to the street, which both meet the exposure requirements, and thus the increased side yard setbacks are not required for secondary windows.

- 5. The appellant alleges that the Commission abused its discretion allowing a five story building, which out of character for this section of Telegraph.**

Under this argument the appellant refers to requirements to make State Government Code findings for a variance, insinuating that a height variance was granted. This is incorrect, as no height variance was granted as part of this project. Under the C-30 “Best Fit” zone analysis a variance was required for a height reduction plane, for which staff recommended denial. When the Commission granted a “Best Fit” zone of C-45 the height reduction plane was no longer required. The argument that a five story building cannot be permitted because one is not

currently adjacent to the site is invalid. The subject area is designated as a “grow and change” corridor under the Oakland General Plan, and larger buildings are anticipated as the area grows and develops. In addition, the appellant argues that the context of the area is one and two story buildings, which is incorrect because across Claremont Avenue from the project site there is an apartment building that is four stories over a basement and approximately fifty feet in height, as well as other buildings that are three and four stories along Telegraph Avenue. Moreover, the project underwent design review and the required design review findings were made.

6. The appellant argues that the project could have an impact upon views, which would be a significant environmental impact, and therefore a categorical exemption cannot be used.

The argument that the project would create a significant impact due to the unusual height of the building is also incorrect. Specifically, the appellant states that the height of the building could impact views and degrade the existing visual character of the area since there are no other buildings this size, and that the historic Temescal Library across the street will be visually impacted and shaded. In order to invalidate an exemption under this theory, there must be both an “unusual circumstance” and a reasonable possibility of a significant environmental impact. Neither factor is present here.

First, there is nothing unusual about the height of the building. The argument that there are no other buildings in the area of a similar height is incorrect. There are other nearby buildings of similar height, one across the street, and others located within a few blocks to the south along Telegraph and Shattuck Avenues. Moreover, this is an area designated for “Growth and Change” in the general plan and an urban in-fill project, located along major transit corridors (containing one of the widest streets in the City), and close to freeway access, where increased height is appropriate and desirable. In addition, the project underwent design review and the required design review findings were made. Thus, there is nothing unusual about the building’s height.

*Second, there is not a reasonable possibility of a significant impact due to the height of the building. The City of Oakland’s Thresholds for Significance(Attachment E) state that a significant impact on views only applies to impacts on scenic vistas, or elements on a scenic highway, neither of which is the case here. The appellant merely contends that the project would block unspecified views. In addition, the Thresholds for Significance state that shadow impacts are limited to those that would “substantially impair the beneficial use of any public or quasi-public park, lawn, garden, or open space”, or “cast shadow on an historic resource, as defined by CEQA Section 15064.5(a), such that the shadow would materially impair the resource’s historic significance by materially altering those physical characteristics of the resource that convey its historical significance **and** that justify its inclusion on an historical resource list”. While the Temescal Library is a historic resource, the building is about 130 feet southwest of the project site and would only be shadowed by the project at sunrise. Such shadow would not alter any physical characteristics that make the building a historically significant structure. In short, it would not lose its eligibility as an historic resource.*

7. **The appellant claims that the three Potentially Designated Historic Structures (PDHP) with a City rating of C, may be listed in the California register and would therefore be considered a historic resource under CEQA.**

The appellant's claim that the subject buildings would be considered a historic resource under CEQA is incorrect. Moreover, the Appellant has provided no evidence, nor can they, to support its position. In the City of Oakland, an historical resource under CEQA is a resource that meets any of the following criteria:

- A) A resource listed in, or determined to be eligible for listing in, the California Register of Historical Resources;*
- B) A resource included in Oakland's Local Register of historical resources, unless, the preponderance of evidence demonstrates that it is not historically or culturally significant;*
- C) A resource identified as significant (e.g., rated 1-5) in a historical resource survey recorded on Department of Parks and Recreation Form 523, unless the preponderance of evidence demonstrates that it is not historically or culturally significant;*
- D) Meets the criteria for listing on the California Register of Historical Resources;*
- E) A resource that is determined by the Oakland City Council to be historically or culturally significant even though it does not meet the other four criteria listed here.*

Each of these criteria are discussed below:

- A) A resource listed in, or determined to be eligible for listing in, the California Register of Historical Resources;*

The buildings on the subject site (a) are not listed in the California Register of Historical Resources; and (b) have not been determined eligible by the State Historical Resources Commission for listing in the California Register of Historical Resources.

- B) A resource included in Oakland's Local Register of historical resources, unless, the preponderance of evidence demonstrates that it is not historically or culturally significant;*

Local Register Properties are those that meet the following:

- i) All Designated Historic Properties (Landmarks, Heritage Properties, Study List Properties, Preservation Districts, and S-7 and S-20 Preservation Combining Zone Properties); and*
- ii) Those Potential Designated Historic Properties that have an existing rating of "A" or "B" or are located within an Area of Primary Importance.*

Here, the buildings are rated C2 & C3, and are not Designated Historic properties. Therefore, the buildings are not considered historical resources under this criterion.

C) A resource identified as significant (e.g., rated 1-5) in a historical resource survey recorded on Department of Parks and Recreation Form 523, unless the preponderance of evidence demonstrates that it is not historically or culturally significant;

The only building on the property with a DPR Form 523 rating is the garage structure, which was evaluated under the Unreinforced Masonry Building program and the rating designation was a 6 which means that the structure is not significant.

D) Meets the criteria for listing on the California Register of Historical Resources;

The structures on the property do not meet the criteria for listing on the National Register of Historic Resources, which also means it does not meet the California Register of Historic Resources criteria. Structures that meet these criteria are generally those with a City of Oakland rating of A or B.

In order for a resource to meet the criteria for listing in the California Register, it must satisfy all of the following three provisions:

1. It meets one of the following four criteria of significance (PRC 5024.1(c) and CEQA Guidelines 15064.5):

i. the resource “is associated with events that have made a significant contribution to the broad patterns of California’s history and cultural heritage”.

The three PDHP’s on the subject property are not associated with any events that have made a contribution to the broad patterns of California’s history or cultural heritage.

ii. the resource “is associated with the lives of persons important in our past”.

The three PDHP’s on the subject property are not associated with the lives of persons important to California history.

iii. the resource “embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of an important creative individual, or possesses high artistic values”

The Kingfish pub on the site does embody some distinctive characteristics of vernacular commercial buildings of the era; however, there are no specific traits to the building that are architecturally significant. The other two PDHP’s on Telegraph Avenue have characteristics of Victorian era

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architecture, but are by no means comparable to other highly decorated and ornamented Victorian buildings of the same era. None of the buildings on the subject property were designed by important architects of record or possess high artistic values.

- iv. *the resource “has yielded, or may be likely to yield information important in prehistory or history” (this criterion applies primarily to archaeological sites).*

None of the buildings on the property have yielded important information to history or prehistory. City of Oakland Standard Conditions of approval deal with the instance in which important archeological finds may be discovered through grading, however unlikely it may be.

2. *The resource retains historic integrity;*

The buildings are largely intact and retain the original architectural integrity.

3. *It is fifty years old or older (except where it can be demonstrated that sufficient time has passed to understand the historical importance of the resource).*

The buildings are older than fifty years of age.

Given that the buildings on the property do not meet all of the required criteria, they may not be deemed eligible for the California Register.

- E) *A resource that is determined by the Oakland City Council to be historically or culturally significant even though it does not meet the other four criteria listed here.*

None of the buildings on the subject property have been determined to be historically or culturally significant by the Oakland City Council.

8. **The appellant argues that cumulative impacts must be studied and identified before the project can be approved.**

The appellant refers to potential cumulative impacts related to traffic and air quality, removal of historic resources, loss of views, and shading from five and six story buildings.

The subject proposal was subject to a Traffic Impact Study(Attachment F), which was reviewed by the Transportation Services Division of Public Works, and the study concluded that there were no impacts that would trip any of the City of Oakland CEQA thresholds of significance. The Traffic Impact Study also reviewed potential cumulative impacts to intersections in the future, based upon reasonable growth projections, and once again none of the cumulative Thresholds for Significance were tripped.

The appellant argues that the project impacts, along with those created by AC Transit's proposed Bus Rapid Transit (BRT) line, have not been studied. AC Transit has published a Draft Environmental Impact Statement/ Environmental Impact Report for the implementation of the Telegraph Avenue BRT line. The proposed BRT would generally eliminate one through lane of traffic in each direction. However there are no finalized design plans, assurance of full funding, or approvals from AC Transit, the City of Oakland and other public agencies. Transportation improvement projects, like the BRT, are not considered as part of the projected baseline conditions because they are too speculative. Thus, they are not required to be analyzed as part of any CEQA review.

Appellant has not provided, nor could they, any evidence relating to air quality impacts. There are no project specific air quality impacts, nor are there cumulative air quality impacts, as this is an urban infill, transit-oriented development, which is expressly encouraged under the City's General Plan and the Clean Air Plan. The project is consistent with the General Plan, and, in turn, the General Plan consistent with the Clean Air Plan. Moreover, the size of this project does not warrant a detailed, quantitative analysis under the Bay Area Air Quality Management District regulations, as the District does not recommend such a study for projects generating less than 2,000 vehicle trips per day.

As stated above, the buildings on the subject property are not historic resources under CEQA, so there would not be any cumulative impact to consider, and a significant view impact is one that would impact a scenic vista or scenic highway, neither of which is the case for the subject property. Also, there are no project-related shadow impacts or cumulative shadow impacts.

- 9. The appellants claim that the project is not in compliance with the General Plan because (a) the EIR for the Land Use and Transportation Element (LUTE) of the General Plan did not discuss variances, nor did it discuss height or densities that would exceed the amounts allowed; and (b) the density is not compatible with surrounding area.**

Densities are discussed in the Land Use and Transportation Element, and the proposed project is consistent with those densities as discussed earlier in this staff report. Furthermore, the General Plan LUTE identifies the subject property as being located within an area of "growth and change", which envisions development more intense than what exists on the site and surrounding area today. The appellant's statement that variances were not discussed in the LUTE EIR has little bearing on the proposed project since nothing in the General Plan documents state that variances shall no longer be granted, and variance procedures are typical of any municipality's zoning ordinance. The process for reviewing variance requests have been, and continue to be, processed under Section 17.148 of the Oakland Planning Code.

Moreover, as indicated in this report and the Planning Commission report, the project is consistent with and furthers numerous policies in the General Plan. The fact that a project may appear to not be fully consistent with each and every general plan policy is not a basis to

conclude the project is inconsistent with the general plan. Specifically, the Oakland General Plan states the following:

The General Plan contains many policies which may in some cases address different goals, policies and objectives and thus some policies may compete with each other. The Planning Commission and City Council, in deciding whether to approve a proposed project, must decide whether, on balance, the project is consistent (i.e., in general harmony) with the General Plan. The fact that a specific project does not meet all General Plan goals, policies and objectives does not inherently result in a significant effect on the environment within the context of the California Environmental Quality Act (CEQA). (City Council Resolution No. 79312 C.M.S.; adopted June 2005)

10. No Guarantee of the Co-housing component of the project in perpetuity.

The appellant argues that because the proposed co-housing project is not guaranteed to remain as co-housing, that the project should not have received approval for a five story building because it was being used to justify the larger building. This argument is incorrect, because while the discussion of co-housing was ongoing due to the nature of the proposal, it was not used in, or provided a basis for, making any of the required findings for granting of the land use permits, or for that matter any determination of a Best Fit zone. Moreover, as a practical matter, as pointed out at the Planning Commission hearing, the design of the common areas leads the development to be used in a co-housing manner.

SECTION II (RCPC APPEAL)

1. Planning Staff and the Planning Commission made an improper determination of a “direct conflict” between zoning and the General Plan.

The appellant argues that the General Plan outlines maximum densities for areas, and that a project that is less than the maximum density could also be consistent with the General Plan, and that the density permitted in the C-28 and C-30 zones are the same, so there is no justification for determination of an “express conflict” with the zoning and the General Plan, and therefore a “Best Fit” zone cannot be used. This is incorrect.

The LUTE provided a policy framework to guide the future development of the City into the 21st century. The zoning in many parts of the City is over 40 years old. Until a comprehensive zoning update is completed, the policies in the General Plan control where there is an express conflict with the zoning. This does not mean that the maximum density must be achieved for each project; nor does it mean that the maximum densities should not be achieved, if warranted. Here, it was determined that the maximum density was more appropriate for the site than the existing density permitted under C-28 zoning.

As outlined in this staff report, the “express conflict” was determined because of the size/massing of the building and the density. As detailed above, when using the General Plan Conformity Guidelines once a project is determined to meet the relevant General Plan policies, two questions are asked to determine whether or not there is a conflict: 1) Is the proposed activity and facility permitted in the zone; and 2) Is the project consistent with other regulations of the zone? The proposed project was consistent with the allowed activities and facilities, but the proposed project was not consistent with the C-28 Zone because of the building height, therefore there was a conflict between the General Plan and the Zoning, and since the C-28 Zone is not one of the possible “Best Fit” zones for Community Commercial, a C-30 zone, which is a possible Best Fit zone was chosen by staff to guide the allowed development of the site. During the hearing the Planning Commission opted to use the C-45 zone, which is a Best Fit zone for Community Commercial, as it allows both the density and building size.

*The appellant also argues that the existing C-28 Zoning was adopted specifically for this area after the most recent 1998 General Plan revision. This is incorrect, as the C-28 Zoning was adopted June 3, 1992 (Ordinance No. 11445 C.M.S.), **six years prior** to adoption of the General Plan LUTE, and this area was specifically designated as Community Commercial, which was envisioned as an area of higher intensity due to its location adjacent to a transit corridor and the freeway.*

2. Improper Determination that C-45 was the “Best Fit” zone for the site.

The appellant argues that the C-45 “Best Fit” zone is inappropriate for this location because of outright permitted uses in the C-45 such as custom manufacturing, administrative, and research services, which directly conflict with the C-28 limitations on ground floor uses that was specifically adopted for the area in 1999 (Ordinance No. 12138 C.M.S.), and because the height and residential development intensity is much greater than what is allowed in the area.

The fact that there may have been a minor, unrelated code amendment after adoption of the General Plan LUTE does not mean that the C-28 zoning was reaffirmed for this area. Moreover, the argument about the limitation on ground floor uses is incorrect, since the C-28 zone only includes this limitation for the area between I-580 and 52nd Street. The project site is north of 52nd Street and the ground floor limitations would not apply to this project site.

Nevertheless, outright permitted uses under C-45, such as custom manufacturing, administrative, and research services, for this site would require a new Interim CUP, which would be evaluated by staff and publicly noticed prior to any decision being rendered, ultimately appealable to the Planning Commission, as indicated in Condition of Approval #1.

3. Need to revise project and supporting findings to promote compatibility with surrounding community.

The appellant argues that the following project modifications should be made to make the project conform to the community character:

- 1) *Overrule the planning Commission's variance approval and restore the height setbacks as proposed in the staff report,*
- 2) *Drop the maximum building height from 59 feet to 55 feet,*
- 3) *Improve the project articulation to make it more in keeping with the general character of buildings in Rockridge and Claremont Avenue.*

The Planning Commission did not grant a variance for the height reduction plane, as stated by the appellant, as there was not a variance required. Once the Planning Commission granted a "Best Fit" Zone of C-45 the required height reduction plane was no longer required. The only variance granted as part of the project approval was the minor variance for a reduced rear yard setback. The justification for the rear yard variance is discussed above in this report. Staff believe that the proposed maximum 59 foot building height is appropriate for this site, along a major transit corridor, because it meets the spirit of the intended 55 foot height limit for the area (proposed under the Temescal rezoning; the mid line of the roof pitch meets the 55 foot limit, and allows for a gable roof, which, in turn provides for a roof style similar to others in the nearby area.

Staff also believes that there is adequate articulation to the building façade because of the breaks in the elevation for the interior courtyards, which break down the visual bulk and mass of the building. This site is not similar to other sites in the Rockridge or Claremont Avenue area because it is located at an intersection of two large streets, one of which, Telegraph Avenue, is a major transit corridor and major regional thoroughfare.

SUSTAINABLE OPPORTUNITIES

Economic: The project will expand the available housing inventory in the City of Oakland.

Environmental: Developing in already developed urban environments reduce pressure to build on agricultural and other undeveloped land. Sites near mass transit enable residents to reduce dependency on automobiles and further reduce adverse environmental impacts.

Social Equity: The project benefits the community and improves social equity by providing additional available housing to the City of Oakland as well as additional temporary jobs during the construction of the project.

DISABILITY AND SENIOR CITIZEN ACCESS

The Building Division of the Community and Economic Development Agency will require that the project conform to the Americans with Disability Act in all provisions to ensure equal access to this facility.

STAFF RECOMMENDATION AND RATIONALE

Staff recommends that the City Council adopt the attached Resolution denying the appeal, thereby upholding the Planning Commission's approval of the project. Staff recommendation is

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October 16, 2007

based on the following reasons: 1) The Project and the approval of the project comply in all significant respects with applicable general plan policies and review procedures; 2) The C-45 Zone is more appropriate than the C-30 Zone given that it is identified as the “Best Fit” zone and would allow the appropriate size and density envisioned in the general plan, with a Community Commercial General Plan designation in the North Oakland area ; and 3) the Project meets the CEQA In-Fill exemption requirements and there are no exceptions that would defeat the use of the exemption, and, as a separate and independent basis also exempt pursuant to CEQA Guidelines Section 15183 (Projects Consistent with a Community Plan, General Plan, or Zoning).

ALTERNATIVE CITY COUNCIL ACTIONS

The City Council has the option of taking one of the following alternative actions instead of the recommended action above:

1. Uphold the appeal and reverse the Planning Commission’s decision thereby denying the project. This option would require the City Council to continue the item to a future hearing so that Staff can prepare and the Council has an opportunity to review the proposed findings and resolution for denial.
2. Uphold the Planning Commission’s decision, except for the granting of the rear yard setback variance. This would require a redesign and possibly reduce the size of some of the units.
3. Uphold the Planning Commission’s decision, but impose additional conditions on the project and/or modify the project.
4. Continue the item to a future hearing for further information or clarification.
5. Refer the matter back to the Planning Commission for further consideration on specific issues/concerns of the City Council. Under this option, the item would be forwarded back to the City Council with a recommendation after review by the Planning Commission.

ACTION REQUESTED OF THE CITY COUNCIL

1. Affirm the Planning Commission's environmental determination that the Project is exempt from CEQA review pursuant to CEQA Guidelines sections 15332 (In-Fill exemption) and, as a separate an independent basis, 15183 (projects consistent with community plan, general plan, or zoning).
2. Adopt the attached Resolution denying the appeal, and thereby upholding the Planning Commission's approval of the Project.

Respectfully submitted,

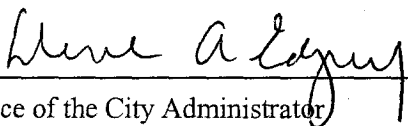


CLAUDIA CAPPIO

Development Director
Community & Economic Development Agency

Prepared by:
Peterson Z. Vollmann, Planner III
Planning & Zoning

APPROVED AND FORWARDED
TO THE CITY COUNCIL:



Office of the City Administrator

ATTACHMENTS:

- A. STAND appeal application submitted July 27, 2007.
- B. RCPC appeal application submitted July 30, 2007.
- C. General Plan Conformity Guidelines
- D. Islamic Cultural Center of Northern California v. City of Oakland (Case No. RG03-133394)
- E. Excerpt of City's Thresholds of Significance
- F. Excerpt from Traffic Impact Study (no appendices)

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MPW

REVISED

Approved as to Form and Legality

Revised
Oakland City Attorney's Office

OAKLAND CITY COUNCIL

RESOLUTION NO. _____ C.M.S.

INTRODUCED BY COUNCILMEMBER _____

RESOLUTION DENYING THE APPEALS AND UPHOLDING THE PLANNING COMMISSION'S APPROVAL FOR CONSTRUCTION OF 33 DWELLING UNITS OVER GROUND FLOOR COMMERCIAL AT 5248 TELEGRAPH AVENUE, OAKLAND (CASE FILE NUMBER CDV06-476& TPM-9212) WITH MODIFIED CONDITIONS OF APPROVAL, FINDINGS AND RECITALS

WHEREAS, the project applicant, ~~Roy Alper~~, of Project Kingfish LLC, filed an application on September 19, 2006, to construct a 33 unit residential condominium building over ground floor commercial at 5248 Telegraph Avenue (Project); and

WHEREAS, the application, which included a Vesting Tentative Map, was deemed complete by operation of law on or about October 19, 2006, and thus was entitled to be processed in accordance with the rules, regulations, and ordinances then in effect (including without limitation, the Guidelines for Determining Project Conformity With the General Plan and Zoning Regulations ("Guidelines")); and

WHEREAS, the Design Review Committee of the Planning Commission considered the design aspects of the Project at a duly noticed public meeting on March 28, 2007; and

WHEREAS, the Applicant requested in a letter of March 28, 2007, that the Director of Planning determine that the project should be considered on the basis of a Best Fit zone of C-45 under the Guidelines; and

WHEREAS, the Director of Planning determined as reported in the Staff Report for the July 18, 2007 hearing at the Planning Commission that the project should be considered under a Best Fit zone of C-30 under the Guidelines; and

WHEREAS, the Staff Report to the Planning Commission that was considered at the Commission's hearing of July 18, 2007, recommended that the project be approved as under Best Fit zone C-30 under the Guidelines and

WHEREAS, the City Planning Commission took testimony and considered the Project at its duly noticed public meeting of July 18, 2007. At the conclusion of the public hearing, the Commission deliberated the matter and voted (6-0-0) to approve the Project, with modifications from the staff recommendation, which included a determination of a “best fit” zone of C-45, as requested by the Applicant, and the granting of a minor variance for a rear yard setback; and

WHEREAS, on July 27, 2007, the appellant, Bob Brokl representing STAND, filed an appeal of the Planning Commission decision to the City Council; and

WHEREAS, on July 30, 2007, the appellant, Stuart Flashman representing RCPC, filed an appeal of the Planning Commission decision to the City Council; and

WHEREAS, after giving due notice to the Appellants, the Applicant, all interested parties and the public, the Appeal came before the City Council for a public hearing on October 16, 2007; and

WHEREAS, the Appellants, the Applicant, supporters of the application, those opposed to the application and interested neutral parties were given ample opportunity to participate in the public hearing by submittal of oral and/or written comments; and

WHEREAS, RCPC and the Applicant, with the support and encouragement of the staff, have agreed that the project should be approved under Best Fit zone C-30 under the Guidelines with a variance granted from the provisions of Planning Code Section 17.46.150.B for rear height setback plane and an Interim CUP for density; and

WHEREAS, nothing in this decision of approval of the Project shall be deemed a precedent of any kind in consideration by the City of any other project proposed by Applicant or any other party to the east of the project on Claremont Avenue, or with respect to the pending Zoning Update Process in the Temescal District; and

WHEREAS, the Applicant has agreed to withdraw the rear yard variance, which was approved by the Planning Commission at the July 18, 2007 hearing on the item, and the proposed project shall meet the required rear yard setback of ten feet; and

WHEREAS, the public hearing on the Appeal was closed by the City Council on October 16, 2007

Now, Therefore, Be It

RESOLVED: That, the City Council, having heard, considered and weighed all the evidence in the record presented on behalf of all parties and being fully informed of the Project, application, the Planning Commission’s decision, and the Appeal, finds that the Appellants have **not** shown, by reliance on evidence already contained in the record before the City Council that

the Planning Commission's Decision of July 18, 2007 was made in error, that there was an abuse of discretion by the Planning Commission or that the Commission's decision was not supported by substantial evidence in the record based on the July 18, 2007 Planning Commission Approved Staff Report (attached as Exhibit "A") and the October 16, 2007 City Council Agenda Report (attached as Exhibit "B"), hereby incorporated by reference as if fully set forth herein. Accordingly, the Appeals are denied, the Planning Commission's approval is upheld, subject to the findings contained in Exhibits "A" and "B", each of which is hereby separately and independently adopted by this Council in full; except where otherwise expressly stated in this Resolution; and be it

FURTHER RESOLVED: That, in support of the Planning Commission's decision to approve the Project, the City Council affirms and adopts as its findings and determinations (i) the July 18, 2007 Planning Commission Approved Staff Report (including without limitation the discussion, findings, conclusions and conditions of approval (each of which is hereby separately and independently adopted by this Council in full)), attached as Exhibit "A"; and (ii) the October 16, 2007 City Council Agenda Report, attached hereto as Exhibit "B" (including without limitation the discussion, findings, and conclusions (each of which is hereby separately and independently adopted by this Council in full)); except where otherwise expressly stated in this Resolution; and be it

FURTHER RESOLVED: That, an October 16, 2007 letter to the City Council from the Applicant's attorney included, in part, a Shadow study, supplemental traffic cumulative traffic analysis and height comparison diagram, all of which were considered by the City Council and which confirmed impacts to be less than significant; and be it

FURTHER RESOLVED: That, the Project is approved pursuant to the Best Fit Zone C-30 under the Guidelines, along with an Interim CUP for density, as detailed in the July 18, 2007 City Planning Commission Staff Report, which includes the recommendation for C-30, as reflected in the proposed findings in that report (as compared to the "Approved" Staff Report, which reflects C-45 as the Best Fit Zone); and be it

FURTHER RESOLVED: That, a variance for residential density is not required because an interim conditional use permit is being granted and the project does not exceed the density allowed in the portion of the project site designated Mixed Housing Type in the General Plan. The residential density allowed at the site under the applicable General Plan designations is 37.58 units, consisting of 35.20 units on the 78% of the site designated Community Commercial in the General Plan and 2.38 units on the 22% of the site designated Mixed Housing Type in the General Plan. Because the 33 residential units in the proposed project are less than the weighted average number of units allowed giving due consideration to the density allowed in each General Plan designation, and because the 33 residential units in the proposed project are fewer than are allowed solely on the part of the site designated Community Commercial, the project does not exceed the allowed residential density in the Mixed Housing Type designation; and be it

FURTHER RESOLVED: That, a minor variance for Rear Height Plane is granted, pursuant to Oakland Planning Code Section 17.148.050(a), based upon the findings below:

A. That strict compliance with the specified regulation would result in practical difficulty or unnecessary hardship inconsistent with the purposes of the zoning regulations, due to unique physical or topographic circumstances or conditions of design; or as an alternative in the case of a minor variance, that such strict compliance would preclude an effective design solution improving livability, operational efficiency, or appearance.

Strict compliance with the height reduction plane regulation would preclude an effective design solution in that it would significantly reduce the size and constrain the layout of several units at the rear of the upper two floors to such an extent that the only way to retain livable space in the affected area of the building would be to eliminate two units and consolidate the remaining space into fewer units with different configurations. With the design features required for this project, including large common living, utility and service areas, the strict application of the zoning ordinance would decrease the operational efficiency and livability.

B. That strict compliance with the regulations would deprive the applicant of privileges enjoyed by owners of similarly zoned property; or, as an alternative in the case of a minor variance, that such strict compliance would preclude an effective design solution fulfilling the basic intent of the applicable regulation.

Strict compliance with the height reduction plane regulation would preclude an effective design solution as the adjacent property to the north which has recently been developed for a civic use and the only area that would be affected is an adjacent parking area.

C. That the variance, if granted, will not adversely affect the character, livability, or appropriate development of abutting properties or the surrounding area, and will not be detrimental to the public welfare or contrary to adopted plans or development policy.

The proposed project with the variance will be consistent with the General Plan provisions for the area; granting of the variance would not adversely affect the abutting property as it has recently been developed for a civic use with parking in the area that would be affected and granting of the variance would not adversely affect the character, livability or appropriate development of the surrounding area as the surrounding area contains several taller buildings, both commercial and residential. Given the proposed project's location at the intersection of two wide North Oakland thoroughfares within the "Grow and Change Area" of the General Plan, and its suitable design as modified at and approved by the Design Review Committee on March 28, 2007, the proposed project is fully compatible with and will not adversely affect the livability or appropriate development of abutting properties and the surrounding neighborhood.

D. That the variance will not constitute a grant of special privilege inconsistent with

limitations imposed on similarly zoned properties or inconsistent with the purposes of zoning regulations.

The shape of the development site results in a minimal rear yard line that is directly adjacent to an existing civic activity, which does not require any required rear yard setback under the Zoning regulations and could potentially, be developed as such. The purpose of the height reduction plane is to allow a mutual openness between residential developments, which does not exist in this circumstance.

E. That the elements of the proposal requiring the variance (e.g., elements such as buildings, walls, fences, driveways, garages and carports, etc.) conform to regular design review criteria set forth in the design review procedure at Section 17.136.050.

The building as a whole has already been found to meet the design review criteria; the variance will allow the building to retain the overall shape that was approved in design review without having to change the design to incorporate a setback at the rear of the upper two floors; and be it

FURTHER RESOLVED: That, the following New Conditions of Approval are imposed on the Project:

1. The height of the building at the peak of the gable roof shall be reduced from 59' as proposed to 57'6".
2. The building shall be setback at the rear yard to comply with the requirements of Planning Code Sections 17.46.160.1 and 17.108.130.
3. The Applicant will continue to cooperate and use its best efforts with North Oakland Co-Housing LLC ("Co-Housing"), consistent with and subject to its purchase and sale agreement with Co-Housing, in order to facilitate Co-Housing's efforts to realize a co-housing program for this project, for the purposes of this condition, co-housing is defined as a set of physical characteristics in the project (large common meeting room, common utility, service, and recreation areas). In addition, co-housing incorporates a set of operating and legal agreements that establish member requirements, responsibilities, and standards, such as complete resident management and participatory decision making; and be it

FURTHER RESOLVED: That, the City Council finds and determines that this Resolution complies with CEQA and the Environmental Review Officer is directed to cause to be filed a Notice of Exemption with the appropriate agencies; and be it

FURTHER RESOLVED: That, the record before this Council relating to this application and appeal includes, without limitation, the following:

1. the application, including all accompanying maps and papers;
2. all plans submitted by the Applicant and his representatives;
3. the notice of appeal and all accompanying statements and materials;
4. all final staff reports, final decision letters and other final documentation and information produced by or on behalf of the City, including without limitation and all related/supporting final materials, and all final notices relating to the application and attendant hearings;
5. all oral and written evidence received by the City Planning Commission and City Council during the public hearings on the appeals; and all written evidence received by relevant City Staff before and during the public hearings on the application and appeal;
6. all matters of common knowledge and all official enactments and acts of the City, including, without limitation (a) the General Plan; (b) Oakland Municipal Code (c) Oakland Planning Code; (d) other applicable City policies and regulations; and, (e) all applicable state and federal laws, rules and regulations; and be it

FURTHER RESOLVED: That, the custodians and locations of the documents or other materials which constitute the record of proceedings upon which the City Council's decision is based are respectively: (a) Community & Economic Development Agency, Planning & Zoning Division, 250 Frank H. Ogawa Plaza, 2nd Floor, Oakland CA.; and (b) Office of the City Clerk, 1 Frank H. Ogawa Plaza, 1st floor, Oakland, CA; and be it

FURTHER RESOLVED: That, the recitals contained in this Resolution are true and correct and are an integral part of the City Council's decision.

In Council, Oakland, California, _____, 2007

PASSED BY THE FOLLOWING VOTE:

AYES- BROOKS, BRUNNER, CHANG, NADEL, QUAN, REID, KERNIGHAN, AND
PRESIDENT DE LA FUENTE

NOES-

ABSENT-

ABSTENTION-

ATTEST:

LATONDA SIMMONS
City Clerk and Clerk of the Council of
the City of Oakland, California

Exhibit A

[July 18, 2007 Planning Commission “Approved” Staff Report]

Exhibit B

[October 16, 2007 City Council Agenda Report]