Rent Stabilization Board

DATE: June 27, 2013

TO: Honorable Mayor and Members of the City Council

FROM: Lisa Stephens, Chair, Berkeley Rent Stabilization Board

SUBJECT: Agenda Item 17: Zoning Amendments to BMC Chapter 23C.08 – Demolition and Dwelling Unit Controls

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The Berkeley Rent Stabilization Board finds that the new language in the proposed revisions to the Demolition Ordinance, 23C.08.020 Section A. 4a, b and 5 is unacceptable for a variety of reasons, and will have consequences that we believe you do not intend. **We are asking that you adopt the original draft language presented to you on June 4th, or postpone your decision, so that we have the opportunity to work with you to develop an acceptable alternative that meets our shared original intent.**

The original draft language that was before you on June 4th and 11th was the result of five years of discussion, most recently at our joint 4 x 4 Committee meetings in March and May, and reflects the direction staff was given in the Council referral adopted at the December 6, 2011 City Council meeting. This discussion was initiated by the Rent Stabilization Board in the hope of resolving conflict over how the current Demolition Ordinance is being interpreted. In allowing more latitude for pre-1980 housing to be demolished, our mutual goal was that the existing affordability of the units demolished be maintained in the new housing built, and that sitting tenants are fully protected. The replacement language in 23C.08.020 Section A. 4a, b and 5 you are considering adopting will now make it economically advantageous to demolish perfectly good housing of any size, with no real or effective way of ensuring the long term level of affordability that older housing covered by the Rent Ordinance currently provides. If the revised ordinance is passed, developers will also now have additional incentives to remove sitting tenants.

Maintaining Affordability of Replacement Housing

The affordability standard proposed in Section 5a of the June 4 draft was agreed to by both City and Rent Board staff as a way to achieve our mutual goal of retaining the current affordability of the units to be demolished and replaced. "*Affordable to households with incomes no greater than 60% of area median income*" is an objective, easy to interpret, enforceable standard. This affordability standard was agreed upon because it is close to the current average affordability of

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all housing units covered by the Rent Ordinance, including units that have been decontrolled and set at a market rate. If the affordability standard is based on the rent for all units that have not received a vacancy increase, the standard would be a lower percentage of AMI[1].

There are many ways to establish an objective affordability standard that is clear and enforceable; determining what is "fair" is subjective, particularly given that state-imposed vacancy decontrol has created an inherent unfairness in our housing market not supported by the majority of Berkeley citizens. By law, owners of rent controlled properties are guaranteed a "fair return on investment" *without vacancy decontrol.* At the June 4th meeting, a majority of the Council was willing to support an affordability standard of 50% of AMI, the standard used in the Affordable Housing Fee Ordinance. Ironically, the developer who sent letters to Council objecting to the 60% of AMI standard as unfair and illegal subsequently agreed at the June 13th Zoning Adjustments Board meeting to provide eight replacement units at 50% of AMI *or better* in their Acheson Commons project.

The language in the latest draft (4b) not only provides no guarantee of any level of permanent affordability for replacement units, it establishes a formula that is too easy to "game," provides added incentive to the developer to empty the building of long-term tenants, and is illegal under both local and state law.

The concept of "last known rent" as a means of establishing the affordability of a replacement unit takes any actual determination of affordability away from the city, leaving it to the scruples of the individual landlord/developer. An unscrupulous landlord/developer can easily cleanse a unit of its old rent, by a number of means both legal and illegal, often resulting in the displacement of longer-term tenants. Even if the landlord acts in perfectly good faith, after the initial tenant vacates the "affordable" unit, the rent is allowed to go to "market rate." Market rate for a newly constructed unit in Berkeley is two to three times the market rate for existing older decontrolled units.[2]

<u>Proposed Rent Increase Restrictions Illegal Under State/Local Law</u>

Also problematic is what happens after the rent goes to market rate in this proposal. After the new rent is established, the unit would then be recontrolled, and rent increases limited to the Rent Board's Annual General Adjustment (AGA).

Council made this change in response to concerns raised by Equity Residential that the affordability standard of 50% of AMI violates Costa-Hawkins. Neither the Rent Board Legal Department nor the City Attorney shares this opinion.

California Civil Code Section 1954.50, the Costa-Hawkins Rental Housing Act, was intended to create vacancy decontrol/recontrol for rental units in rent-controlled jurisdictions. Newly constructed units accompanied by a certificate of occupancy are exempt from the rent-setting provisions of the Rent Control Ordinance. A "replacement unit" as contemplated by the

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1 Average rent for a 1bdrm rent controlled unit is $706; average rent for a 1bdrm decontrolled unit is $1282.
2 This estimate was confirmed by the representative for Equity Residential when he testified before Council on the Acheson Commons project.

proposed ordinance would be new construction, and therefore could not be subject to a decontrol/recontrol requirement, particularly one directly linked to the AGA provisions of the Rent Control ordinance. Because replacement units are, in fact, new construction, rent increases for such units could not be controlled by an action taken by the Rent Board, such as the adoption of an AGA. Rather than creating a safer standard, this new proposal is in clear conflict with both the Rent Control Ordinance as well as Costa-Hawkins.

In-Lieu Fee

Maintaining or increasing the number of affordable units, preferably in the same neighborhood, was one of the principles of the existing Demolition Ordinance and the Neighborhood Preservation Ordinance that the new ordinance must embody. The option of asking developers to pay a fee in lieu of replacing the demolished units does not achieve this, and therefore was never really considered as an adequate mitigation. Some level of in-lieu fee might be possible; the potential impact of this versus replacement on the affordable housing stock has not been explored.

The current cost of building a new unit of affordable housing is $400,200 a unit.[3] Since the goal should be a one- to-one replacement of the demolished housing at the same level of affordability, any fee the Council sets needs to be substantially higher than the current $20,000 Affordable Housing Mitigation Impact fee.

The new draft language also does not address what happens to sitting tenants if the developer decides to pay the fee rather than build replacement units.

Please postpone your decision if you cannot adopt the original draft revisions to the Demolition Ordinance presented to you on June 4th. We will work with you to develop an alternative that will keep replacement housing affordable and protect sitting tenants.

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3 Bay Area Affordable Housing Nexus Fee Study, October 2010, pg. 22