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OUR FILE NUMBER

22332.1

August 18, 2011

HAND DELIVERY

Mayor Helene Schneider
Members of City Council
City of Santa Barbara
735 Anacapa Street
Santa Barbara, California 93101

Re: Heidi Ferguson
903 W. Mission Street
MST2009-00388
Pamela Brandon's Appeal of ABR Final Approval dated May 16, 2011

Dear Mayor Schneider and Council Members:

On August 23, 2011, the City Council is scheduled to consider the appeal by Pamela Brandon of the ABR's Final Approval of a modest residential project at 903 West Mission Street. The property owner, Heidi Ferguson, has proposed improvements that include creation of a small apartment unit over a new garage structure. The development of a second residential unit on parcels measuring between 5,000 and 6,000 square feet is expressly permitted in the R-2 zone, and the City's ordinances provide for certain Modifications to zoning requirements to accommodate projects on constrained lots. Ms. Ferguson's project has been in process for two full years and on May 16, 2011, the ABR provided Final Approval, clearing the way for the issuance of a building permit. This final step in the process is the subject of Pamela Brandon's current appeal.

This is not the first time the City Council has been asked to review an ABR approval of the 903 West Mission project. Ms. Brandon's public campaign against Ms. Ferguson's project began more than a year ago with her appeal of the ABR's Preliminary Approval of the project. The ABR provided a positive concept review of the proposed design on May 17, 2010, and on July 28, 2010, the Staff Hearing Officer approved the project, which included Modifications of the open yard requirements and the setback requirements for one of the two corner (front yard)

setbacks. Following Staff Hearing Officer approval, Ms. Ferguson returned to the ABR for Preliminary Approval, which the ABR granted on August 23, 2010. Pamela Brandon appealed the ABR Preliminary Approval, and on October 19, 2010, after a lengthy public hearing and extensive consideration of standards for neighborhood compatibility and design, the City Council voted 3-2 to deny the appeal, providing several suggestions to Ms. Ferguson for inclusion in her final plans. Ms. Ferguson adjusted her plans to meet the Council's concerns and the ABR voted its Final Approval on May 16, 2011, approving the construction drawings as consistent with the design it had approved preliminarily in August 2010, as modified by the City Council's suggestions. The ABR's Final Approval required no further changes to the project. Ms. Brandon nevertheless has continued her campaign against the project by continuing to attack the project design – a design approved by the ABR and affirmed by the City Council more than a year ago.

Ms. Brandon's present appeal, filed on May 26, 2011, has almost nothing to do with the proper scope of appeal of an ABR Final Approval which, under the ABR Guidelines, must be focused solely on consistency between the applicant's construction drawings and the approved design. For these and the reasons that follow, we urge you to deny the appeal.

I. The Only Relevant and Proper Question on Appeal of an ABR Final Approval is Whether the Construction Drawings are Consistent with the Approved Design.

According to the ABR's Guidelines, preliminary review "is a formal review of an application prior to preparation of working drawings. . . . Preliminary Approval is the most important approval of plans and determines the site plan configuration and design that must be followed in the working drawings. . . . **[A] preliminary approval shall be considered to be "approval" of the project by the ABR and concludes the discretionary phase of project review.**" (Emphasis added.) By contrast, "Final Review is a formal review of completed working drawings, prior to submittal for a building permit. . . . The final plans will be approved if they are in substantial conformance with the plans given preliminary approval."

The ABR grants Preliminary Approval based upon its evaluation of neighborhood compatibility and design considerations, so if a Preliminary Approval is appealed, the City Council considers whether the ABR properly applied those standards. In this case, there was a long and thorough discussion among the Council Members on October 19, 2010, and the vote to deny Ms. Brandon's appeal resolved the question of whether the ABR's Preliminary Approval reflected proper application of the standards for design and neighborhood compatibility.

Because Preliminary Approval "concludes the discretionary phase of project review," an applicant may rely on that approval to proceed with preparation of construction drawings and the detailing of the project. In its final review, the ABR does not revisit design decisions voted in

the Preliminary Approval. Instead the ABR compares construction drawings with the preliminary plans already approved to ensure design consistency, making sure that the plans have detailed all requirements and conditions of approval, and confirming that all is in order for issuance of a building permit.

Under the ABR's Guidelines, an appeal of an ABR decision is limited to the scope of the ABR's action. The Preliminary Approval is the critical decision on the design elements, while "the Final Approval decision may be appealed **only on the basis that it is inconsistent with the Preliminary Approval.**" (Emphasis added.) Despite Ms. Brandon's present attempt to re-appeal design and compatibility issues that were resolved by the City Council in October 2010, the ABR's Final Approval now on appeal was a non-discretionary decision in which only the consistency between the preliminary plans and the final plans was at issue. Ms. Brandon can challenge only what was actually decided in the Final Approval, and that is all the City Council may consider in acting on the appeal.

II. The ABR Correctly Granted Final Approval of the Project's Plans as Consistent with the Approved Design.

The Final Approval decision of the ABR is fully consistent with its Preliminary Approval of the 903 West Mission project. First, the basic elements of the approved project have remained the same since the ABR provided Preliminary Approval and the City Council rejected Ms. Brandon's appeal of the ABR's Preliminary Approval. Second, the plans were modified between the City Council's action in October and the ABR's final approval in May specifically in response to concerns raised by Council Members (which responded, in part, to concerns raised by Ms. Brandon). These included redesigning the kitchen window on the southerly side of the new unit as a clerestory window that will not permit a direct view into the adjacent Brandon property, deletion of the cantilevered portion of the unit, reduction in overall height of the unit with a sloping roofline reduced by 16 feet at its easterly end and 8 feet at its westerly end (for an average reduction of 12 feet), and substitution of wooden siding on the southerly (Brandon) rear of the garage and new unit to reflect the siding of the existing residence. The design concerns raised by the Council modified the Preliminary Approval, and the modifications in the final plans are consistent with the Council's preferences.

III. The Brandon Appeal of the ABR Final Approval is Premised on Irrelevant and Improper Grounds.

The only proper ground for appeal – and the only question properly before the City Council at this time – is whether the ABR properly decided that the final plans, as presented by Ms. Ferguson for Final Approval, are consistent with the design approved by the ABR in August 2010 and affirmed by the City Council in October 2010. Ms. Brandon nevertheless focuses her

entire appeal on questions that either have been decided already or are not proper grounds for appeal, ignoring the fact that a victory on appeal will serve only to require the ABR to revisit its consistency finding and will not re-open the Preliminary Approval or subject the approved design to further scrutiny.

A. The “Voiding” and “Reinstatement” of the Preliminary Approval was a Procedural Issue Resolved Apart from the ABR Decision on Appeal.

In her leading ground for appeal, Ms. Brandon challenges the ABR’s Final Approval as “void.” In her view, Planning staff’s belated discovery of an error in its calculations should require the voiding of all prior discretionary decisions of the ABR and the City Council, including the ABR Preliminary Approval on August 23, 2010, the City Council’s denial of the appeal of that approval on October 19, 2010, and the ABR’s Final Approval on May 16, 2011. In fact there was some confusion about the potential consequences of staff’s error, but the question has been resolved and does not impact the ABR Final Approval now on appeal.

The ABR first voted Final Approval on March 7, 2011, but Planning staff then discovered that much earlier in the process, before either the ABR’s Preliminary Approval or the Staff Hearing Officer’s approval, staff had miscalculated one portion of the yard area impacted by a cantilevered section of the proposed new garage/apartment structure. The cantilever had been present in all of the plans reviewed and approved at each step in the process, but staff belatedly concluded that the cantilever created a zoning violation. Staff’s admittedly panicked reaction was to declare that it was revoking both the preliminary and final ABR approvals. After conferring with the City Attorney, and upon further consideration of the status of the project, as reported orally by staff at a subsequent ABR meeting, staff concluded that only the Final Approval on March 7, 2011 was problematic because the potential zoning violation would invalidate the central finding – that the construction drawings are complete and the project is ready for a building permit. To resolve staff’s concern, Ms. Ferguson authorized her architect of record, Clay Aurell of AB Design Studio, Inc., to adjust the design to be consistent with the open yard requirement by removing the cantilevered portion of the structure and thus removing the potential zoning violation. The ABR then voted a second Final Approval of the revised design on May 16, 2011. This is the approval that Ms. Brandon has now appealed.

The Final Approval of May 16, 2011 removed any doubt about the validity of the March 7, 2011 ABR vote prior to the revision of the plans and it resolved any potential impact of staff’s error by adjusting the design to harmonize with staff’s calculation as well as with the suggestions of the City Council. As the ABR concluded, the project as shown in the construction drawings is fully consistent with the Preliminary Approval and is fully eligible for a building permit because it meets all zoning requirements.

B. The Approved Plans Comply with the City's Zoning Ordinances.

Ms. Brandon's second ground for appeal is that the ABR should not have approved the final plans for the project because the placement of storage units in the garage area is "against city code." She cites Sections 28.18.060 and 28.18.075 of the Municipal Code, contending that the "interior setback" is compromised by the location of storage space within the proposed new garage structure. By her self-serving interpretation, because the ordinance allows only covered or uncovered parking within three feet of the property line, the location of storage space in the garage is improper. She also contends that the storage space for the second residential unit must be entirely related to the single parking space for that unit and cannot be "within the parking area" for the main house.

Nothing in the cited sections of the Code requires Ms. Brandon's interpretation. In fact the project provides three covered parking spaces within a single garage – two spaces that will be designated for the main residence and one that will be designated for the second unit. The proposed storage space is located at the back of the garage area and meets the basic requirement of Section 28.18.075 for "200 cubic feet of enclosed, weatherproof, lockable, and separate storage space . . . exclusively for the use of the occupants of the dwelling unit . . . accessible from the exterior of the unit for which it is provided." Location of the storage space adjacent to a parking space designated for the main residence compromises neither use, and the ordinance does not require the rigid relation of each unit's parking and storage as Ms. Brandon suggests.

Section 28.18.060 permits a garage structure for "covered parking" to be located within three feet of an interior setback. Ms. Brandon contends that a garage is not the same as "covered parking" and that the ordinance is designed to prevent the construction of an oversized structure to accommodate any other uses. In fact the garage is no larger than is required for its principal purpose and the location of storage within a garage structure is not prohibited by any City ordinance. Planning staff consistently has interpreted these ordinances to allow storage within a garage that meets the required interior setback of three feet.

Under these circumstances, the ABR correctly approved plans showing required storage located in the proposed garage structure.

C. The Project's Compatibility with the Neighborhood was Finally Decided in October 2010.

Ms. Brandon's third ground for appeal is that the plans for the project "fail to follow the ABR Guidelines and the Municipal Code in regards to neighborhood compatibility." She correctly states that Section 22.68.045 of the Municipal Code requires the ABR to consider neighborhood compatibility when it "reviews and approves or disapproves the design of a

proposed development project.” Indeed, the ABR did consider neighborhood compatibility extensively when it voted its Preliminary Approval of the project design in August 2010, making specific findings of compatibility with the eclectic architecture of the area in which the property is located. Ms. Brandon focused on neighborhood compatibility in her appeal of that Preliminary Approval, and the City Council, following a hearing on the appeal, deliberated the compatibility questions extensively. While members of the Council had differing views of the design and its compatibility, the majority of the Council prevailed in affirming the ABR’s Preliminary Approval. That vote provided finality to the ABR’s design approval. Nevertheless, Ms. Brandon is now attempting to re-open basic design questions.

The ABR Guidelines specifically state that Preliminary Approval “concludes the discretionary phase” of project review. Final Approval, then, is effectively ministerial. It results from a review of construction drawings compared with the approved design and a positive vote indicates only that the ABR has found consistency between the two. Because an appeal must be consistent with the scope of the action, the only question properly before the Council at this time is whether the ABR’s finding of consistency was correct. Ms. Brandon’s appeal improperly asks the City Council to revisit a decision finally made by both the ABR and the Council and no longer subject to appeal.

D. Alleged “Mishandling” of the Application and Review Process is Not a Proper Ground for Appeal of an ABR Final Approval.

Ms. Brandon’s fourth ground for appeal amounts to an allegation that the ABR Final Approval was somehow tainted by imperfections in the process. In effect, this contention is little more than a summary of her other three grounds for appeal. She does not contend that the ABR Final Approval is invalid because of alleged errors in the processing of the application, but she asks the Council “to make sure accurate information is required and made available to the public and to the design review boards and that design review decisions are made in a transparent and ethical manner.”

Ms. Brandon’s allegations are intended to create a cloud over the ABR’s decision, as though something happening earlier in the process, or separate from the ABR’s decision-making process, may have compromised the decision. In fact, however, the “errors” she describes were not fatal to the decision-making process and were corrected in due course. Decision-makers act upon the information available to them, and the burden is on decision-makers to inform themselves of relevant facts prior to making a decision. Each decision-maker weighs the significance of the facts as he or she understands them. Ms. Brandon wishes for a more perfect system in which every fact she considers important would have been uppermost in the minds of decision-makers, but that is not realistic, nor is it a reasonable ground for appealing a Final Approval of the ABR which, by its nature, is not even a discretionary decision. Nothing in the

history of this project suggests than any member of the Planning staff, the ABR, or the applicant's team deliberately misinformed others. Ms. Brandon's concern for transparency and ethical practices is laudable, but it is a concern that has nothing to do with the question on appeal.

IV. Conclusion.

While Ms. Brandon expresses great concern for neighborhood compatibility, her primary concern throughout the processing of Ms. Ferguson's project has been the fact that the proposed new structure will be visible from the Brandon property next door – a property for which there is an open enforcement case for an alleged illegal second unit that Ms. Brandon occupies. Even though the ABR and the City Council approved the design of the project long ago, Ms. Brandon has continued to urge citizens of the community to attend the hearing to speak against the design of Ms. Ferguson's project. Just as Ms. Brandon has failed to frame her appeal appropriately, she has failed to inform her supporters that the decision before the City Council concerns only the consistency of final plans with the approved design. The appeal hearing should not become a referendum on the popularity of the project.

Ms. Ferguson has spent more than two years in the process of trying to build a new garage and small apartment on her property – a use entirely consistent with the City's zoning ordinances and for which the Staff Hearing Officer approved the necessary Modifications for full zoning compliance a year ago. Ms. Ferguson has met every reasonable demand of her neighbor, Ms. Brandon, and has satisfied the stated concerns of decision-makers at each step in the process. The project has received all necessary approvals and is ready to move forward to issuance of a building permit. The appeal rests on grounds irrelevant to review of the ABR's Final Approval. For all of the reasons stated in this letter, the Brandon appeal should be denied.

We will attend the hearing on August 23 and will be available to answer any questions you may have at that time.

Very truly yours,



Susan M. Basham
for PRICE, POSTEL & PARMA LLP

SMB:lkh

cc: Heidi Ferguson
Clay Aurell