

Variences

## Orinda Association, et al v. Board of Supervisors 182 CA3d 145

SCOTT, Associate Justice.

This appeal is from a judgment in an action consolidating petitions for writ of mandate brought by appellants Friends of the Orinda Theatre (Friends), Berkeley Architectural Heritage Association (BAHA), and the Orinda Association (the Association) to challenge various aspects of a proposed mixed-use office/commercial/retail development complex known as "the Crossroads," to be built in the downtown area of Orinda adjacent to the Highway 24 freeway.

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The Association's petition sought a writ of mandate compelling the Board and the Planning Commission to vacate their approval of the development plan and zoning variances for the proposed Project.

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### II

The development which **Crossroads Associates** proposes to build, and which is the subject matter of this litigation, originally consisted of a building complex to be located on a two-acre block in downtown Orinda next to the Highway 24 freeway, and on an adjacent street known as Bryant Way, which was to have been abandoned by the County and purchased by the developer. As initially designed, the complex ranged in height from 1 to 5 stories, with an average elevation of 42 feet instead of the 35 feet mandated by applicable zoning ordinances, and had approximately 114,823 square feet of office, commercial, retail and theatre space. Approximately 59 percent of this area was to be used for commercial office space, 27 percent for so-called retail and service facilities, and the remainder divided between three movie theatres, a community meeting room, and a restaurant/lounge. The Project was designed as a complex of buildings of varying heights articulated

as a single unit through connecting passageways, courtyards and landscaping. Originally designed to go up to five stories in height in the office portion directly adjacent to the freeway, the complex also featured two levels of underground parking, street level pedestrian access, a large interior court, a "town square" at the corner of Moraga Way and Brookwood Road, an "arrival plaza" along Brookwood Road near a surface parking lot, large lobby areas, and sloping pitched roofs. A focus of substantial controversy during hearings before both the Planning Commission and Board was the proposed abandonment of Bryant Way. Less than two weeks before the final public hearing of the Board to consider the Project on August 21, 1984, [\[FN1\]](#) the developer submitted a redesigned proposal for the Project. This new proposal eliminated Bryant Way from the Project and retained it as a public street; reduced the square footage of the \*1152 entire Project to just over 108,000 square feet; redistributed throughout the Project some 26,000 square feet of building which the original proposal had situated on Bryant Way; reduced interior courtyard and terrace areas by 10 to 20 percent; eliminated the fifth floor mezzanine on the Bryant Way side but added a third story on one side of the Project; substantially increased overall Project density as measured by the ratio of floor space to lot area; reduced the average building height by approximately 6 to 12 feet at the highest points, and by approximately 4 feet overall; increased the total amount of building mass above the 35-foot zoning limit; added 3,000 to 4,000 square feet of office space on the ground floor; and reduced retail space by 2,093 square feet while increasing office space by 326 square feet overall, for a new ratio of 60 percent office space to 40 percent retail space. Although the height of the complex from the ground level to the eave of the roof varied from 22 to 38 feet, the peak of the roof itself reached the height of 55 feet in most parts of the complex, and the height of the Bryant Way elevation was 64 feet. The tallest point in the complex, the elevator tower, reached 70 feet. In addition, the amount of space in the revised Project identified as "retail" included what Wallace called "quasi-office-retail," such as title companies, real estate and insurance offices, and stock brokerages.

Currently, the Project site is occupied by the Theatre and Bank Building, four other small buildings used for office and retail purposes, and a gas station. Almost half of the area of the site is a surface parking lot.

The Orinda Theatre was designed by Alexander Aimwell Cantin (1877- 1964). One of California's first registered architects, he was involved in designing several important buildings in San Francisco. It was originally constructed in 1941; the adjoining Bank Building, built in 1947 by the same architect and in the same "Art

Deco" or "Moderne" style, forms a unified architectural unit with the Theatre. The tower on the Theatre forms an identifying landmark clearly visible from the Highway 24 freeway. The Theatre is 40 feet high in the front and 45 feet high in the rear; its sign tower is 75 feet in height. With 750 seats, it is the last large, old-style theatre in Contra Costa County.

The interior of the theatre is decorated in both the foyer and the auditorium with wall and ceiling murals by Anthony T. Heinsbergen (1895-1981), one of the leading decorative artists of the period. Heinsbergen designed interiors and painted murals for such buildings as the Paramount Theatre in Oakland; the Interstate Commerce and Labor Department Buildings in Washington D.C.; the Los Angeles City Hall; the Biltmore Hotel in Los Angeles; the Sir Francis Drake Hotel in San Francisco; and the Fox-Wilshire and Pantages Theatres in Hollywood. His work was the subject of an exhibit by the Smithsonian Institution which toured the United States in 1972-74.

On August 13, 1982, acting on a nomination by Friends and BAHA, the California State Historical Resources Commission voted unanimously to recommend that the Theatre and Bank Building be listed in the National Register of Historic Places. The State Office of Historic Preservation found that the Theatre was "an outstanding example of its genre," with a "remarkable" interior of "high artistic value" and "exceptional quality," and that although the two buildings were less than 50 years old, they were both of "exceptional importance." The properties were subsequently certified by the Department of the Interior as eligible for inclusion on the National Register of Historic Places.

### III

The proposed Crossroads project is governed by three levels of applicable local land-use regulations: the Contra Costa County Zoning Ordinance (Zoning Ordinance), the Orinda General Plan (General Plan), and the Orinda Central Business District Design Guidelines (Design Guidelines).

The Zoning Ordinance sets out the basic restrictions on buildings in "community business" (C-B) districts in the County, the procedures for review of development proposals and the standards for granting of variances. **Included in the Zoning Ordinance is a provision stating that no building or part thereof may exceed 35 feet above "the average existing natural ground level at the center of all walls of the building."** [\[FN4\]](#)

[FN4](#). The following provisions of the Zoning Ordinance are pertinent to this litigation:

84-49.204: "Purposes. The purposes of this chapter's regulations are to enhance and stabilize the retail sales and personal services activities within central areas and to foster development of ever more attractive, higher quality retail shopping areas, creating more concentrated, easily accessible retail shopping and personal services central areas for the benefit of businesses and consumers alike."

84-49.802: "Maximum Building Height. No building or structure or part of it hereafter erected or moved on a lot or building site in this district shall exceed thirty-five feet above the average existing natural ground level at the center of all walls of the building."

84-50.1606: "Review, approval, changes, conditions. [¶] (a) Review. The zoning administrator shall review development plan applications, for approval, modification, or denial, in public hearing pursuant to and otherwise regulated by the land use permit provisions of Chapter 26-2. [¶] (b) Approval. In approving the application, he shall find that it is consistent with the purpose of this district and that it is architecturally compatible with other uses in the vicinity, both inside and outside the district. [¶] (c) Changes. When any plan has been approved by the zoning administrator, it shall not thereafter be changed except with his approval after review, for which he may schedule a public hearing. [¶] (d) Conditions. **The zoning administrator may impose reasonable conditions and limitations in addition to the requirements listed in this article, to carry out the purpose of this district.**" 26-2.2006: "Variance, conditional use and special permits--Variance permit standards. An application for a variance permit is an application to modify zoning regulations as they pertain to ... setback, auto parking space, building or structure height, or any other regulation pertaining to the size, dimension, shape or design of a lot, parcel, building or structure, or the placement of a building or structure on a lot or parcel. The division of the planning agency hearing the matter either initially or on appeal shall find the following conditions that must exist prior to approval of an application: [¶] (1) **That any variance authorized shall not constitute a grant of special privilege inconsistent with the limitations on other properties in the vicinity and the respective land use district in which the subject property is located;** [¶] (2) **That because of special circumstances applicable to the subject property because of its size, shape, topography, location or surroundings, the strict application of the respective zoning regulations is found to deprive the subject property of rights enjoyed by other properties in the vicinity and within the identical land use district;** [¶] (3) **That any variance authorized shall substantially meet the intent and purpose of the respective land use district in which the subject property is located. Failure to so find shall result in a denial.**"

The General Plan was adopted in October 1972 by the County Planning Commission and in January 1973 by the County Board of Supervisors as a revision of a general plan originally adopted in 1959 for Orinda. It was formulated by the County Planning Department together with an advisory committee of community and public representatives, including members of the appellant Association. Despite dramatic changes in the Orinda area since 1959,

including the completion of the Highway 24 freeway, the opening of the BART system, and the tremendous population growth in the San Francisco Bay Area in general and the County in particular, the General Plan states that "the basic goals of the 1959 Orinda General Plan remain unchanged. **The revised plan proposes the continued development of a low density, suburban residential community, including supporting community-oriented services and facilities.**" The various headings of the General Plan cover such topics as "Land Use, Commercial and Office," "Community Facilities," and "Office Development." The principal themes repeatedly stressed throughout the General Plan are that commercial development in Orinda should be "locally-oriented" as opposed to "regional," compatible with the existing "village character" of Orinda, and "low-line."

Thus, under the heading "Land Use, Commercial and Office," the General Plan states the following relevant guiding principles: **"Business development in the Orinda Planning Area should be limited to neighborhood and \*1155 community service and retail types. Regional commercial developments should not be permitted.... [¶] The central business area should be improved to create better pedestrian orientation and more adequate parking. [¶] A limited amount of locally-oriented new office space should be provided for the central business area that complements existing land uses. [¶] The appearance of the central business area, especially the main entrance to Orinda, should be made more attractive."** Similarly, under "Community Design," the General Plan states that future development should be "visually and functionally compatible with the existing character of Orinda," and that development in the business district should be "of 'low-line' architecture and complementary to existing development and terrain."

In the section entitled "Land Use Proposals," under the headings "Commercial and \*\*694 Office Development" and "Community Shopping," the General Plan states that future development in Orinda's central business area--which includes the site proposed for development by Crossroads Associates--should maintain the "distinctive village character that is appropriate to the community," defined as being characterized by a "compact pattern of development, low buildings, heavy tree coverage, narrow pavements, and frequently older structures." Indeed, the General Plan goes so far as to state that "[a]lthough some of these features individually work against the area as a convenient place to park and shop and do business to a degree, the general plan regards the retention of the

district's village character as most important...." With regard to the types of businesses to be located in the central Orinda area, the General Plan states that these should be "those which serve the convenience needs of the residents. In keeping with the goals of this plan, it is important that further development in the central area be of the type that is unique and appropriate for Orinda; i.e., those business uses that are of a community nature and cater to local needs."

Finally, under "Community Facilities," the General Plan states goals of particular relevance to the controversy over the fate of the Theatre and Bank Building: to "obtain maximum benefit from existing public structures and facilities"; to "acquire easily accessible civic, cultural, and recreational facilities large enough to handle present and expected future demand"; and that "structures of historic significance should be preserved wherever possible."

The Design Guidelines are far more detailed than the General Plan. Their stated purpose is to provide "a tool with which to improve the efficiency and quality of life for the occupants and users of the Orinda Central Business District." They establish "[s]pecific design guidelines ... for future development of new or existing structures."

**To this end, the Design Guidelines set forth a large number of specific provisions under the headings "Site Planning" and "Architectural Design,"** relating to such matters as "location of buildings relative to street access and parking," "parking access," "location of buildings relative to adjacent structures," "outdoor pedestrian spaces," "landscaping," "architectural character and style," "building massing and shape," "building scale" and "form," "building integrity and public visibility," and "color and materials." The overall thrust of the guidelines, repeatedly emphasized under all of these topics, is to preserve \*\*695 the "rural" or "semi-rural" "village character" of Orinda. [\[FN6\]](#)

[FN6.](#) Thus, under "Architectural Design," the guidelines state: "Due to the topography of Orinda, the Central Business District is located such that it is viewed from above by much of the community residential area. In order to retain a semi-rural character for future development, it is important to recognize this condition in the future design of buildings in the Central Business District. ... [¶] ... There is presently nothing resembling an architectural character or style which could be considered unique or distinctive for Orinda. There are, however, several buildings that exemplify the type of quiet, dignified quality, and informal building type that the Commission believes is the most suitable on which to build an architectural character for the community. These buildings ... are characterized by several basic features, all of which help to create residential images in a downtown setting to reinforce the transition from a small compact semi-rural business

district to surrounding residential neighborhoods. [¶] The indicated buildings all have sloping roofs which conceal mechanical equipment, have wood and/or masonry exterior walls, have visual penetration (i.e. they are interesting and inviting to enter), are of quality construction, and are appropriate for a semi-rural community like Orinda. Although strict adherence to these building types is not suggested, the above enumerated features which make them superior to other buildings in the Central Business District must be noted and incorporated in new applications. The Commission will tend to discourage the artificiality of simulated architectural styles." Similarly, under "Building Scale," the Design Guidelines state: "Buildings should be designed to be compatible in scale with adjacent structures in the community, and to comply with the intent of the Orinda General Plan: to retain a 'Village Character' scale. The existing 'Village Character' is created by the human scale of development: the compact pattern of development, low buildings, heavy tree coverage, narrow pavements, and many older buildings in the District. Large buildings can be designed to blend with smaller structures by articulating facades, by providing visual penetration to interior spaces and courts, and by the use of overhangs, indentations, arcades, trellises, decks, terraces, etc., to model the exterior."

Under the heading "Variances," the Guidelines provide: "Variances to the requirements in the zoning ordinance will be considered by the Planning Commission if appropriate findings can be made. [¶] The Commission will encourage the inclusion of significant amounts of open space, landscaping, and buildings of variable height. The provision of parking, at or above ordinance requirements, will help solve neighborhood parking problems, and will be encouraged. Parking below ground level could make a higher density development possible, and the Commission encourages applicants to examine all possibilities early in the planning stage."

#### IV

The Draft EIR on the Project, consisting of a 115-page report with a separate 125-page "Appendix Supplement," was completed and distributed in or about June 1983. The review period was from July 13, 1983, through August 29, 1983.

**The Draft EIR made the following pertinent determinations: the height variance sought by the developer would constitute an unjustified "special privilege and would set an adverse precedent"; the large amount of office space in the proposed project would primarily be available to "larger office users not providing locally-oriented services," which would be "inconsistent with General Plan policies calling for limited expansion of office area and locally-oriented offices"; and, "[d]espite many excellent features, the project is a megastructure** in concept, with density, building mass, and height which are inconsistent with the General Plan and the ... Design Guidelines, in terms of 'low-line' architecture, 'village character,' existing neighborhood character, and

compatibility with adjacent development." The Draft EIR proposed that the Project be redesigned to reduce height, density, mass and large-scale office space in conformance with the Zoning Ordinance and General Plan. In connection with these findings, the Draft EIR stated that the Project as proposed would induce large-scale growth in the Orinda area by setting a precedent for converting the central business district "away from local community services to areawide or regional services"; and that it would significantly and permanently alter the character of the neighborhood, contrary to the goals of the Design Guidelines.

\*1158 With regard to the Theatre and Bank Building, the EIR found that "there can be \*\*696 no doubt that the Orinda Theatre/American Trust Bank Building complex has important cultural/historic value for the community and in general--value which cannot be replaced by contemporary development. Therefore, removal of these buildings as proposed would result in significant environmental impact." In its discussion of mitigation measures to reduce this environmental impact, the Draft EIR identified four possible choices aside from not building the Project: (1) redesigning the Project to retain the Theatre and Bank Building intact and separate from the Project; (2) redesigning the Project by incorporating the Theatre and Bank Building into the Project; (3) redesigning the Project to incorporate the Theatre only, but removing the Bank Building; and (4) preserving certain "fixtures, artifacts, and other interior materials" from the Theatre and Bank Building for display in the Project or elsewhere. The Draft EIR recognized that this last mitigation measure "would not be responsive to the overall significant impact of removal of the buildings," and that it was not even clear whether any or all of the interior features of the Theatre could be preserved in view of the nature of the materials used and the expense of removing them. The Draft EIR therefore recommended "a study of the cost and potential for preservation of the murals and other interior features" in order to "provide sufficient basic information, based on professional opinion, to assist the Planning Commission and staff in understanding the limitations of this mitigation alternative."

Finally, the Draft EIR considered alternatives to the proposed Project, including no project, development in conformance with the General Plan and Zoning Ordinance, and development retaining the Theatre and Bank Building. Included in this section of the Draft EIR were drawings and figures showing three alternative project designs: one in the same style as the developer's proposed Project but in conformity with the 35-foot height limitation of the Zoning Ordinance; one retaining and incorporating the Theatre and Bank Building and in the same general architectural style as those buildings; and one submitted by the developer quite similar in design to the proposed Project except that it incorporated the Theatre.

The Draft EIR noted that both of the alternative project designs retaining the Theatre had heights exceeding the 35- foot limitation; that a design using the Theatre's "art deco" style "might be inconsistent with the standards of the Design \*1159 Guidelines"; that the developer's alternative, although saving the Theatre, exhibited the same inconsistencies with the General Plan noted in the proposed Project, including excessive office space for non-locally oriented businesses and high density; and that any design in which the Theatre is retained would have reduced underground parking and limited options for street-level pedestrian access to the interior of the project

## V

The proposed Project and the Draft EIR were discussed in numerous public meetings of the Planning Commission and the Board between July 25, 1983, and September 18, 1984. On February 16, 1984, the Planning Commission voted to certify the EIR, and on May 14, 1984, it gave conditional approval to the Project, including the proposed demolition of the historic buildings. The Findings of the Planning Commission state that all alternatives for preserving the Theatre and Bank Building were infeasible, and that the significant environmental impact would be mitigated by a "detailed study" of the possibility of preserving unspecified interior items in the Theatre. Friends, BAHA, the Association, and Crossroads Associates all appealed various aspects of the Planning Commission's decision to the Board.

The Board conducted a series of hearings on the parties' appeals relating to the Crossroads project. During this period, Crossroads Associates redesigned the project to eliminate the need for abandoning Bryant Way as a public street. The Board did not require preparation of any subsequent or supplemental EIR on this redesign, but simply approved the redesigned Project as presented by the developer at the meeting of August 21, 1984. On September 18, 1984, the Board adopted findings rejecting the various \*1160 mitigation proposals of the EIR regarding height, mass, density, and concentration of non- local office space, adopting the "study" proposal regarding the possibility of preserving unspecified items in the Theatre and Bank Building, and stating that none of the proposed alternatives was feasible because of the impact on the "unique and desirable" design features of the proposed Project. Thereafter, the parties filed their petitions for writ of mandate. Prior to the decision of the Board approving the Project, Crossroads Associates obtained a permit from the County Building Inspection Department to proceed with the demolition of the Theatre and Bank Building. The permit was issued without any environmental review or with any reference to the proceedings before the Board or the Planning Commission.

## VI

The Association's petition for writ of mandate is concerned with the alleged conflict between the proposed Project and the applicable land-use regulations. The Association contends generally that the Project approval given by the County Board and Planning Commission, including the height variance, was unlawful.

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...this court must determine on the basis of a review of the entire administrative record whether the findings issued in connection with the County's approval of the Project in this case are supported by substantial evidence, whether the findings are in compliance with all statutory and regulatory criteria and requirements, and whether they bridge the analytic gap between \*\*699 the raw evidence and the ultimate decision. ([Topanga Assn. for a Scenic Community v. County of Los Angeles, supra, 11 Cal.3d at pp. 515, 518, 113 Cal.Rptr. 836, 522 P.2d 112; Broadway, Laguna etc. Assn. v. Board of Permit Appeals \(1967\) 66 Cal.2d 767, 772-773, 59 Cal.Rptr. 146, 427 P.2d 810](#) [findings issued by city and county board of permit appeals in connection with zoning variance did not meet the requirements of the municipal planning code; award of variance was therefore unlawful.

## VII

The provision of the Zoning Ordinance applicable to the Project at issue states that "[n]o building or structure or part of it" erected thereafter shall exceed 35 feet above average existing ground level. (Zoning Ordinance, art. 84-49.802, emphasis added.) The grant of variances to owners of property covered by comprehensive zoning plans is governed by [Government Code section 65906](#), which states: "Variances from the terms of the zoning ordinances shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property \*1163 of privileges enjoyed by other property in the vicinity and under identical zoning classification. [¶] Any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges inconsistent

with the limitations upon other properties in the vicinity and zone in which such property is situated. [¶] A variance shall not be granted for a parcel of property which authorizes a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property. The provisions of this section shall not apply to conditional use permits."

The average height of the Project as originally proposed was 55 feet; as revised, the proposed building height was somewhat lower, with an overall average height of 50 feet. Over 30 percent of the Project's total floor space, or 33,350 square feet, would be located above the 35-foot height limit established by the Zoning Ordinance. A height variance is actually required for virtually every part of the proposed structure.

The Board issued lengthy findings in support of the decisions to approve the Project and to grant the height variance. These findings state that the variance does not constitute the grant of a special privilege because "similar variances" have been granted in the vicinity "based upon the particular design considerations" and "in conformity with the general policy of the County to encourage attractive designs"; the variance is "appropriate" in order "to enable applicants to conform with the ... Design Guidelines and to create architectural designs meeting the desired aesthetic and design standards of the community"; alternative designs for the Project in conformity with the Zoning Ordinance not requiring any variance "would be unacceptable \*\*700 from an aesthetic and community character standpoint"; the Project site "poses unusual design difficulties primarily because it does not share the semi-rural environment of other parts of Orinda"; due to the "special circumstances and design problems" arising from the Project's "size and proximity to the adjacent freeway," a "strict application" of the applicable zoning regulations "would deprive the subject property of rights enjoyed by other properties in the vicinity," which could conform to the 35-foot height limit "without suffering the adverse affects [sic ] caused for this site by the freeway, and the variance is necessary to enable this Project site to enjoy the same levels of uses that could be developed in these other areas within the same district while preserving an acceptable design in the public interest"; neighboring properties are screened from the adjacent freeway by this site and will benefit from the "buffering" effect of the building masses of this Project, protecting them against the "noise, exhaust fumes and visual obtrusiveness of the freeway"; "[t]he variance granted will substantially meet the intent and purpose" of the zoning district, which is "to enhance and

stabilize" existing retail sales and personal services activities within \*1164 central areas, and to "foster development of even more attractive, higher quality retail shopping areas" that are more concentrated and easily accessible; and the Project "enhances the visual quality, convenience and diversity of local business establishments and replaces a large ... block which is primarily devoted to paved parking areas and outdated structures with a carefully integrated mixed-use Project ... in keeping with the overall village character of the Project vicinity."

Significantly, the Board found that the 35-foot height limitation imposed by the Zoning Ordinance "is not the predominant purpose of the C-B district and that the primary concern [of the applicable land-use regulations] is the acceptability of design and orientation of projects to the surrounding area.... The dominant purpose of the C-B district is not to impose narrow and unsuitable height/bulk/density limitations but to encourage retail and office enhancement and distinguished architecture of the nature embodied in the Project as approved." The Board specifically found that although the height variance enables portions of the proposed Project to exceed an average height of 35 feet above grade, and to reach a height of 64 feet, "the proper interpretation of the height limitation is to allow interior portions of the structure to exceed an average height of 35 feet measured at the midpoint of exterior walls and that the variance granted is not the equivalent of a 25-foot height variance.... [A] project conforming to the zoning height limitation ... and other standards with the same or greater intensity of use and square footage could be accommodated on the site, at the expense of providing an attractive design and configuration. The Project, as approved, is compatible with the scale of surrounding uses through the use of appropriate roof treatments, articulated structures, open courtyards and terrace designs incorporated into the approved design ... and the revised design under which the Board has affirmed the granting of the variance."

In sum, the Board found that the design of the Project was so attractive and had so many perceived compensating benefits, that it was positively good for the height, mass and density of the Project to exceed the express limitations set by applicable land-use regulations. In the Board's own words, "[a]lthough the overall height and bulk of the Project is substantial, ... [t]he height variance, as granted, allows for a design which improves the attractiveness, comfort and convenience of the Project both to its office users and its retail customers."

Echoing these findings, respondents' central argument to this court is that the Design Guidelines set forth a more flexible standard for granting variances in order to encourage the development of projects with significant amounts of open space,

landscaping, and buildings of variable height; that \*1165 the Design Guidelines therefore \*\*701 modify the stricter variance standards and height limitations of the Zoning Ordinance; that the articulated structure and courtyards provided by the proposed Project meet the goals and standards of the Design Guidelines; that a handsome Project could not be designed within the limits set by the Zoning Ordinance; and that the height variance for the proposed Project is justifiable on this basis. However, there is absolutely nothing in the Design Guidelines to suggest that buildings anywhere near as high as those proposed for this Project--up to nearly 70 feet in height, or twice the height of the limits imposed by the Zoning Ordinance--would be in compliance with other express goals and standards, such as preservation of a "semi-rural" or "village character" and compatibility of scale with existing adjacent structures. Neither is there any indication in the Design Guidelines that buildings within the 35-foot height limit could not easily meet its stated design goals and aesthetic standards. Indeed, the very opposite conclusion is suggested by the illustrative drawings included in the Design Guidelines and the examples of desirable existing buildings cited therein.

In the absence of a specific "bonus" or "merit" system of zoning enacted by the municipal or county legislature, a variance applicant may not earn immunity from one code provision merely by overcompliance with others. Otherwise, the board charged with reviewing development proposals "would then be empowered to decide which code provisions to enforce in any given case; that power does not properly repose in any administrative tribunal.12" ([Broadway, Laguna etc. Assn. v. Board of Permit Appeals, supra, 66 Cal.2d at p. 779, 59 Cal.Rptr. 146, 427 P.2d 80.](#)) The Supreme Court's footnote 12 adds: "Discretionary power to disregard a basic planning code regulation whenever the board believes that the objectives of that regulation have been fulfilled in a particular building would probably prove impossible to control and might well undermine the entire zoning plan. ..." ([Id. at pp. 779-780, fn. 12, 59 Cal.Rptr. 146, 427 P.2d 80.](#))

The Board's findings attempt to address the three conditions which, under the Zoning Ordinance, must be met before a variance may be granted: first, the absence of any "special privilege" inconsistent with the limitations imposed on other properties in the vicinity; second, the existence of "special circumstances" because of which the strict application of the zoning regulations would deprive the subject property of rights enjoyed by other properties in the vicinity; and third, the compliance of any authorized variance with the "intent and purpose" of the applicable land-use district. (Zoning Ordinance, art. 26-2.2006.) These conditions are derived directly from the language of [Government Code section 65906](#). However, under Topanga, the Board's findings must include facts sufficient to

show that \*1166 these three conditions have been met. ([Topanga Assn. for a Scenic Community v. County of Los Angeles, supra, 11 Cal.3d at 515, 518-522, 113 Cal.Rptr. 836, 522 P.2d 112.](#))

Moreover, the language of both the Zoning Ordinance and [Government Code section 65906](#) "emphasizes disparities between properties, not treatment of the subject property's characteristics in the abstract. [Citations.] It also contemplates that at best, only a small fraction of any one zone can qualify for a variance. [Citation.]" ([Topanga Assn. for a Scenic Community v. County of Los Angeles, supra, 11 Cal.3d at p. 520, 113 Cal.Rptr. 836, 522 P.2d 112,](#) original emphasis.) The facts set forth in the required findings must address "the critical issue whether a variance was necessary to bring the [owner of the subject parcel] into substantial parity with other parties holding property interests in the zone. [Citation.]" ([Id. at pp. 520-521, 113 Cal.Rptr. 836, 522 P.2d 112.](#)) Thus, data focusing on the qualities of the property and Project for which the variance is sought, the desirability of the proposed development, the attractiveness of its design, the benefits to the community, or the economic difficulties of developing the property in conformance with the zoning regulations, lack legal significance and are simply irrelevant to the controlling issue of whether \*\*702 strict application of zoning rules would prevent the would-be developer from utilizing his or her property to the same extent as other property owners in the same zoning district. ([Ibid; Broadway, Laguna etc. Assn. v. Board of Permit Appeals, supra, 66 Cal.2d at pp. 773-781, 59 Cal.Rptr. 146, 427 P.2d 80.](#))

It is apparent that the Board's findings in this case primarily deal with desirable project design, amenities, benefits to the community, and the alleged superiority of the proposed Project design to ones developed in conformity with zoning regulations, rather than with presenting the required comparative information about surrounding properties. The findings state that "height and other similar variances" have been granted "on several occasions" in the past on property in the Project vicinity based upon "design considerations"; however, no specific examples are provided. [\[FN11\]](#)

[FN11.](#) In fact, the evidence in the record regarding variances granted to other properties in the vicinity indicates that every previous request for a variance from the 35-foot height limitation has been denied, and that the only buildings higher are either in different zoning areas with more liberal regulations or were built before the creation of the C-B district.

The only discussion in the Board's findings which actually addresses the substance of the "special circumstances" requirement relates to the greater proximity of the Project site to the freeway in comparison with other parcels in the central business district of Orinda. Although the findings state that "[p]rotection against the noise, exhaust fumes and visual obtrusiveness of the freeway cannot be accomplished effectively with vegetation," there is no affirmative showing whatsoever that the proposed Project's height of between 50 and 70 feet is necessary to provide an adequate "buffer" against \*1167 the asserted noise, exhaust fumes and visual impact of the freeway, or that a 35- foot building would not adequately provide any desired buffering. [\[FN12\]](#)

[FN12.](#) To the contrary, the uncontroverted evidence in the record establishes that a 35-foot building would block the visual impact of the freeway; a building higher than 35 feet would have no more noticeable noise abatement impact than a building only 35 feet in height; the completed Project would create more noise in the surrounding area than now exists without any "buffering"; increased automobile traffic generated by the scale of the Project itself would have a greater impact on undesirable fumes and decreased air quality in the vicinity than now exists, even with the freeway; and existing businesses adjacent to the freeway near the Project site have operated successfully for many years despite the absence of the alleged "buffering" provided by buildings over 35 feet in height, and would be more threatened by the increased congestion created by the size of the proposed development.

Most important, there is no showing that any buffering at all is necessary to permit the owners of this property to enjoy privileges enjoyed by other property in the vicinity. This is the showing required by law; all the findings with respect to this Project's perceived desirability are actually irrelevant and superfluous. ([Gov.Code, § 65906.](#)) "Speculation about neighboring land ... will not support the award of a variance. The party seeking the variance must shoulder the burden of demonstrating before the zoning agency that the subject property satisfies the requirements therefor. [Citation.]" ([Topanga Assn. for a Scenic Community v. County of Los Angeles, supra, 11 Cal.3d at p. 521, 113 Cal.Rptr. 836, 522 P.2d 112.](#)) The respondent developer failed to carry this burden.

In sum, the findings of the Board fail to support the conclusion that all applicable legislative requirements for a height variance have been satisfied. Since there has been no affirmative showing that the subject property differs substantially and in relevant aspects from other parcels in the applicable zone, we conclude that the variance granted by the Board amounts to the

kind of "special privilege" explicitly prohibited by [Government Code section 65906](#). ([Topanga Assn. for a Scenic Community v. County of Los Angeles, supra, 11 Cal.3d at p. 522, 113 Cal.Rptr. 836, 522 P.2d 112.](#))