



Z O N I N G
A D J U S T M E N T S
B O A R D
M E M O R A N D U M

FOR BOARD ACTION
MAY 11, 2023

1598 University Avenue

Use Permit #ZP2022-0099 to demolish a non-residential structure and construct a 127,492 square-foot, eight-story (89 feet- 2 inches) mixed-use residential building containing 207 dwelling units (21 Very Low-Income) and 5,943 square foot commercial space, with 39 automobile parking spaces and 92 bicycle parking spaces, utilizing State Density Bonus

RE: Changes to Conditions of Approval related to Affordable Housing Provisions and Street Trees

New SB 330 Preliminary Development Project Vesting Date

On May 2, 2023, the project applicant contacted staff to submit a new SB 330 preliminary development project application, superseding the preliminary housing development project application submitted in January 2022. The new preliminary application presents a project that is the same as the project before ZAB. The number of units or the size of the project has not changed. Staff invoiced the applicant for the new preliminary application, and the invoice was paid on May 5, 2023. Submittal of all the information listed in the pre-app form and payment of the permit processing fee freezes fees and development standards as of May 5, 2023, unless exceptions per Government Code § 65889.5(o) are triggered.

Table 3: Project Chronology

Date	Action
January 26, 2022	SB 330 complete preliminary housing development project application submitted
July 7, 2022	SB 330 Use Permit Application submitted
August 24, 2022	Application deemed incomplete
September 22, 2022	Application resubmitted
October 20, 2022	Application deemed incomplete
November 1, 2022	Application resubmitted
December 1, 2022	Application deemed incomplete
December 23, 2022	Application resubmitted
January 23, 2023	Application deemed complete
February 2, 2023	LPC hearing
April 20, 2023	DRC hearing
May 3, 2023	Plans Resubmitted
May 4, 2023	Public hearing notices mailed/posted
May 5, 2023	SB 330 complete preliminary housing development project application submitted (supersedes previous)
May 11, 2023	ZAB hearing

The new vesting date affects the affordable housing mitigation fee and inclusionary housing requirements, Berkeley Municipal Code (BMC) 22.20.065 and 23.328, respectively. The Findings and Conditions will be revised to remove reference to BMC 22.20.065, which was repealed. The affordable housing conditions will be revised to require full compliance with all applicable provisions of BMC Chapter 23.328, Inclusionary Housing, and Council Resolution 70,698 (both are attached to this memo), which include elements such as a regulatory agreement, income requirements, approval of a final Affordable Housing Compliance Plan prior to issuance of a building permit, and timing of any required in-lieu payments.

BELOW MARKET RATE UNITS

1. ~~Affordable Housing Mitigation Fee (AHMF): Consistent with BMC 22.20.065 and fee resolution No. 68,074-N.S., the applicant shall provide a schedule, consistent with a schedule approved by the City Manager or her designee, outlining the timeframe for payment of the AHMF, or provide an alternative to the fee payment as permitted by the BMC. Payment of the AHMF may be reduced if paid prior to the building permit per resolution No. 68,074 N.S., and shall be paid no later than prior to the issuance of a certificate of occupancy for the project.~~

2. ~~Number of Below Market Rate Units. The project shall provide 17 (Very Low Income) below market rate rental dwelling units ("BMR Units"), which are required to comply with the State Density Bonus Law (Government Code Section 65915). The BMR Units shall be designated in the Regulatory Agreement and shall be reasonably dispersed throughout the project; be of the same size and contain, on average, the same number~~

~~of bedrooms as the non-BMR units in the project; and be comparable with the design or use of non-BMR units in terms of appearance, materials and finish quality. The designation of BMR Units shall conform to the addresses assigned to the building by the City.~~

- ~~3. Regulatory Agreement. Prior to the issuance of a building permit, the applicant shall enter into a Regulatory Agreement that implements Government Code Section 65915 and this Use Permit. The Regulatory Agreement may include any terms and affordability standards determined by the City to be necessary to ensure such compliance. The maximum qualifying household income for the BMR Units shall be 50 percent of area median income (AMI), and the maximum housing payment shall be 30 percent of 50 percent of AMI, as set forth in the following paragraphs of this condition. If the BMR units are occupied by very low-income tenants receiving a rental subsidy through the Section 8 or Shelter Plus Care programs, the rent received by the project sponsor may exceed the restricted rent to the payment standards allowed under those programs so long as the rent allowed under the payment standards is not greater than the market rents charged for comparable units in the development. The applicant shall submit the Regulatory Agreement to the Housing and Community Services Department (HHCS) via email to affordablehousing@cityofberkeley.info for review and approval.~~
- ~~4. Affordable Housing: Below Market Rate Program. In addition, the following provisions shall apply:
 - A. Maximum rent shall be adjusted for the family size appropriate for the unit pursuant to California Health & Safety Code Section 50052.5 (h).
 - B. Rent shall include a reasonable allowance for utilities, as published and updated by the Berkeley Housing Authority, including garbage collection, sewer, water, electricity, gas, and other heating, cooking and refrigeration fuels. Such allowance shall take into account the cost of an adequate level of service. Utilities do not include telephone service. Rent also includes any separately charged fees or service charges assessed by the lessor which are required of all tenants, other than security deposits.
 - C. BMR units will be provided for the life of the project under Section 22.20.065.~~
- ~~5. Determination of Area Median Income (AMI).
 - The "AMI" (Area Median Income) shall be based on the income standards for the Oakland Primary Metropolitan Statistical Area reported by the United States Department of Housing and Urban Development (HUD). In the event HUD discontinues establishing such income standards, AMI shall be based on income standards determined by the California State Department of Housing and Community Development (HCD). If such income standards are no longer in existence, the City will designate another appropriate source or method for determining the median household income.~~

- ~~The applicable AMI for the purpose of determining the allowable rent for each unit (but not for the purpose of determining eligibility for occupancy of an inclusionary unit) shall be determined in accordance with the following table:~~

U N I T S I Z E	AMI Standard
Studio unit	AMI for a one-person household
One-bedroom unit	AMI for a two-person household
Two-bedroom unit	AMI for a three-person household
Three-bedroom unit	AMI for a four-person household

6. ~~Nothing in these conditions shall be interpreted to prohibit, or to require modification of the Use Permit or Regulatory Agreement to allow, the provision of additional BMR units, or additional affordability, than are required in the foregoing provisions.~~

7. ~~Affordable Housing. Nothing in conditions 24-32 shall be interpreted to prohibit, or to require modification of the Use Permit or Regulatory Agreement to allow, the provision of additional BMR units, or additional affordability, then are required in the foregoing provisions.~~

8. ~~Affordable Housing. Dwellings that are approved as rental units, but in which a condo map is approved prior to issuance of an occupancy permit, shall be subject to the affordability requirements within BMC 23.328.~~
 - A. ~~Residential housing projects for the construction of five or more Dwelling Units;~~
 - B. ~~Residential housing projects for the construction of one to four new Dwelling Units, when such Units are added to an existing one to four-unit property, which has been developed after August 14, 1986, and the resulting number of units totals five or more. All Units in such a property are subject to the requirements of this chapter;~~
 - C. ~~Residential housing projects proposed on lots whose size and zoning designation is such to allow construction of five or more Dwelling Units.~~

9. ~~Affordable Housing – Density Bonus. If a density bonus was granted for the project, the regulatory agreement shall reflect the number of qualifying units set forth in Section 65915(f)(4) that are needed to support the bonus that was granted.~~

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Affordable Housing Requirements

10. Project shall comply with BMC Chapter 23.328 Inclusionary Housing, effective April 1, 2023 and Resolution 70,698-N.S. Adopting Regulations for Voucher Program and Establishing an In-Lieu Fee to Support the Provision of Affordable Housing Pursuant to Berkeley Municipal Code 23.328 and Rescinding Resolution 70,668-N.S (attached).

Conditions of Approval – Street Trees

Pursuant to BMC Section 23.204.060(12), the project shall provide sidewalk amenities necessary to comply with current city standards. Improvements may include pedestrian-scaled lighting, street trees, benches and bicycle racks. In consultation with the City's consulting arborist, the following conditions have been added to ensure the protection of existing street trees throughout the construction of the building. The memo from the City's consulting arborist is attached.

Prior to Issuance of Any Building & Safety Permit (Demolition or Construction)

XX. Tree Protection. Tree protection fencing shall be shown on all demolition, site, landscaping, grading, and utility plans, and shall be installed prior to demolition, grubbing, or grading around the five existing Crepe Trees located along California Street. Fences shall be 6 feet in height, composed of chain link with posts sunk into the ground. Fences are to remain until all grading and construction is completed.

At All Times:

XX. Tree Protection – Inspections. Inspections by the City's consulting arborist may be conducted throughout demolition and construction to ensure compliance with tree protection measures.

Attachments:

- Council Resolution No. 70,698-NS
- Berkeley Municipal Code Chapter 23.328 Inclusionary Housing
- Arborist Memorandum – May 5, 2023

Staff Planner: Katrina Lapira, klapira@cityofberkeley.info, (510) 981-7488

RESOLUTION NO. 70,698-N.S.

ADOPTING REGULATIONS FOR VOUCHER PROGRAM AND ESTABLISHING AN IN-LIEU FEE TO SUPPORT THE PROVISION OF AFFORDABLE HOUSING PURSUANT TO BERKELEY MUNICIPAL CODE CHAPTER 23.328 AND RESCINDING RESOLUTION 70,668-N.S N.S.

WHEREAS, Berkeley Municipal Code (“BMC”) Chapter 23.328 establishes a requirement that 20% of Residential Units (as defined) in market-rate developments be offered for rent or sale at affordable rents or prices, as defined (“Affordable Units”); and

WHEREAS, BMC Chapter 23.328 authorizes the City Council to establish by resolution preferences for renting Affordable Units offered for rent to tenants receiving assistance under the Section 8 Program (42 U.S.C. Section 1437f), the Shelter Plus Care Program (42 U.S.C. Section 11403 *et. seq.*), or similar state or federally funded rent subsidy programs; and

WHEREAS, BMC Chapter 23.328 authorizes developers of market-rate housing to pay a fee in lieu of complying with the requirement to provide on-site affordable housing (“In-Lieu Fee”); and

WHEREAS, BMC Chapter 23.328 authorizes the City Council to establish the In-Lieu Fee by resolution, and further authorizes the Council to differentiate among types, classes, and locations of Housing Development Projects to the extent permitted by law; to establish separate fees and criteria for the provision of units that are affordable to Very Low Income Households and units that are affordable to Low Income Households; and to establish the method for calculating the In-Lieu Fee; and

WHEREAS, the City retained Street Level Advisors to provide analysis and recommendations for updating the City’s affordable housing requirements, the scope of which included a financial feasibility study of the City’s affordable housing mitigation fees; and

WHEREAS, Street Level Advisors prepared a Financial Feasibility Analysis dated April 27, 2021, which determined that an In-Lieu Fee of \$45 per square foot of the residential Gross Floor Area (as defined in BMC Section 23.106.030) would be financially feasible; and

WHEREAS, Street Level Advisors recommended certain modifications to the fee that would not adversely impact the financial feasibility of housing development projects, such as charging a lower / tiered fee for smaller projects; and

WHEREAS Street Level advisors identified an equivalent rate if the In-Lieu fee were to be calculated based on an assumed 80/20 ratio of gross and net square feet of residential area in typical housing development projects of \$56.25 per square foot of Residential Unit Floor Area.

WHEREAS, this Resolution supersedes Resolution No. 70,668-N.S.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley as follows:

1. All Affordable Units shall be offered to tenants in accordance with Council-adopted eligibility preference criteria. All Very Low-Income Units, comprising a portion of the Affordable Units authorized and provided for by BMC Chapter 23.328, must be offered to tenants receiving assistance under the Section 8 Program (42 U.S.C. Section 1437f) or the Shelter Plus Care Program (42 U.S.C. Section 11403 *et. seq.*) before being marketed to other income-eligible households. The allocations shall be divided equally between the Section 8 Program (50%) and the Shelter Plus Care Program (50%). The majority of the Very Low-Income units shall be designated for the Shelter Plus Care Program when there is an uneven number of units.
2. The initial In-Lieu Fee authorized and provided for by BMC Chapter 23.328 shall be \$56.25 per square foot of the Residential Unit Floor Area) of a Housing Development Project (as defined in BMC Chapter 23.328) and shall be automatically increased biennially based on changes to the California Construction Cost Index unless otherwise provided for by BMC Chapter 23.328 or by this Resolution.
3. Housing Development Projects subject to BMC Chapter 23.328 may provide less than the required number of Affordable Units in the Housing Development Project and pay a proportionately reduced In-Lieu Fee, calculated as follows: the fee per square foot multiplied by the total Residential Unit Floor Area of a Housing Development Project, multiplied by the percentage of the applicable requirement remaining after accounting for any on-site Affordable Units provided. Projects that provide no on-site Affordable Units will have an applicable requirement multiplier of one.
4. For Housing Development Projects of less than 12,000 square feet of Residential Unit Floor Area, the In-Lieu Fee shall be calculated as follows:

Residential Unit Floor Area	Fee per Square Foot
≥12,000	\$56.25
11,000-11,999	\$53.75
10,000-10,999	\$51.25
9,000-9,999	\$48.75
8,000-8,999	\$46.25
7,000-7,999	\$43.75
6,000-6,999	\$41.25
5,000-5,999	\$38.75
4,000-4,999	\$36.25
3,000-3,999	\$33.75
2,000-2,999	\$31.25
1,000-1,999	\$28.75
<1,000	\$26.25

BE IT FURTHER RESOLVED, Resolution No. 68,074-N.S. is hereby rescinded and is of no force or effect on any Housing Development Project that obtains a building permit after the effective date of this resolution, but shall continue to apply to those projects that were approved and subject to its provisions or the provisions of predecessor resolutions and ordinances addressing the same subject matter.

BE IT FURTHER RESOLVED, the rescission of Resolution No. 70,668-N.S and this Resolution shall be effective upon the effective date of contemporaneously adopted amendments to BMC Chapter 23.328.

The foregoing Resolution was adopted by the Berkeley City Council on February 14, 2023 by the following vote:


Ayes: Hahn, Humbert, Kesarwani, Robinson, Taplin, Wengraf, and Arreguin.

Noes: Harrison.

Abstain: Bartlett.

Absent: None.

Attest: 
Rose Thomsen, Deputy City Clerk


Jesse Arreguin, Mayor

Chapter 23.328

INCLUSIONARY HOUSING

Sections:

- 23.328.010 Findings and Purpose.**
- 23.328.020 Definitions.**
- 23.328.030 Affordable Housing Requirements.**
- 23.328.040 Waiver or Modification of Affordable Housing Requirements.**
- 23.328.050 Implementation.**

23.328.010 Findings and Purpose.

- A. The State of California has established a Regional Housing Needs Allocation (RHNA) process under which it allocates a "fair share" of the regional housing need, updated periodically, to each local jurisdiction. The "fair share" allocated to Berkeley increased significantly based on the regional housing needs determination finalized in late 2021. The sixth cycle of the RHNA for the San Francisco Bay Area allocates to Berkeley a "fair share" that calls for adequate sites for 8,934 housing units for the period from 2023 to 2031, including sites for 2,446 Very Low Income units, 1,408 Low Income units, and 1,416 Moderate Income units.
- B. The Bay Area suffers from a shortage of affordable housing. As the Bay Area region experiences increased economic growth and a high demand for housing, housing prices continue to rise, which leads to displacement of low income residents and exacerbates the shelter crisis that has led to unacceptably high rates of homelessness in the City of Berkeley and the Bay Area region.
- C. In 1990, the City established the Housing Trust Fund program to pool available funding for affordable housing development. The Housing Trust Fund program is funded by federal, state, and local revenues, including by in-lieu and mitigation fees paid by developers of market-rate housing projects under the City's existing affordable housing ordinances.
- D. The City Council hereby finds that there is a legitimate public interest in the provision of affordable housing to address the crises of displacement, homelessness, and lack of housing affordability in the City, and that there is a significant and increasing need for affordable housing in the City to meet the City's regional share of housing needs under the California Housing Element Law.
- E. The City Council further finds that the public interest would best be served if new affordable housing were integrated into new market-rate residential developments to facilitate economically diverse housing, while also providing alternative options to the on-site construction of affordable housing such as the payment of fees to replenish the City's Housing Trust Fund program and allowing for the construction of affordable housing on land dedicated by market-rate housing developers.

F. The City Council intends that this Ordinance be construed as an amendment to the City's existing affordability requirements, and that the repeal and re-enactment of any requirement shall not be construed to relieve a party of any outstanding obligation to comply with the requirements applicable to any previously approved Housing Development Project. (Ord. 7853-NS § 2, 2023)

23.328.020 Definitions.

- A. "Affordable Unit" means a Residential Unit that is in perpetuity affordable to Very Low Income Households or Lower-Income Households, as defined in California Health and Safety Code sections [50052.5](#) and [50053](#).
- B. "Affordable Housing Compliance Plan" means an enforceable commitment by an Applicant to comply with the requirements of this Chapter that identifies the number and type of Affordable Units, the amount of In-Lieu Fees, and/or the parcels of land (or portions thereof) that will be provided and/or paid by the Applicant to comply with those requirements.
- C. "AMI" means the area median income applicable to the City of Berkeley, as defined by the U.S. Department of Housing and Urban Development, or its successor provision, or as established by the City of Berkeley in the event that such median income figures are no longer published by the U.S. Department of Housing and Urban Development.
- D. "Applicant" means any individual, person, firm, partnership, association, joint venture, corporation, entity, combination of entities or authorized representative thereof, who applies to the City for any Housing Development Project.
- E. "Housing Development Project" means a development project, including a Mixed-Use Residential project (as defined in [23.502.020\(M\)\(13\)](#)), involving the new construction of at least one Residential Unit. Projects with one or more buildings or projects including multiple contiguous parcels under common ownership or control shall be considered as a sole Housing Development Project and not as individual projects.
- F. "Housing Trust Fund" means the program to finance low and moderate-income housing established by Resolution No. 55,504-N.S., or any successor fund established for the same purpose.
- G. "Lower-Income Household" means a household whose income does not exceed the low-income limits applicable to Alameda County, as defined in California Health and Safety Code section [50079.5](#) and published annually pursuant to Title [25](#) of the California Code of Regulations, Section [6932](#) (or its successor provision) by the California Department of Housing and Community Development.
- H. "Regulatory Agreement and Declaration of Restrictive Covenants" means, for the purposes of this Chapter, a legally binding agreement recorded against the property to codify the requirements and conditions of a Housing Development Project providing Affordable Units.
- I. "Residential Unit" means, for purposes of this Chapter, any Dwelling Unit, any Live/Work Unit, or any bedroom of a Group Living Accommodation (GLA) except a GLA in a University-recognized fraternity, sorority or

co-op; provided, however, that for purposes of this Chapter, "Residential Unit" shall not include any Accessory Dwelling Unit or Junior Accessory Dwelling Unit.

J. "Residential Unit Floor Area" means, for the purpose of this Chapter, the floor area of the Residential Unit(s) of a Housing Development Project.

1. Residential Unit Floor Area shall be measured from the interior of the walls of each unit. The Residential Unit Floor Area shall exclude areas that are not habitable residential square footage such as:

- (a) Balconies, whether private or open to all residents
- (b) Storage lockers not located within residential units
- (c) Vehicular (e.g., automobile or motorcycle) and bicycle parking areas that are separate areas from the residential unit
- (d) Other qualifying areas that are not associated with residential units, upon approval of the Zoning Officer.

2. For Residential Units consisting of Group Living Accommodations, Residential Unit Floor Area shall also include common rooms/lounges and supporting facilities such as kitchens and restrooms.

K. "Very Low Income Household" means a household whose income is no more than 50% of AMI, as defined in California Health and Safety Code section [50105](#). (Ord. 7853-NS § 2, 2023)

23.328.030 Affordable Housing Requirements.

A. *Requirement to Construct Affordable Units.*

1. Except as otherwise provided in this Chapter, no permit for the construction of any Housing Development Project shall be issued unless at least 20% of the Residential Units are Affordable Units. When the calculation results in a fractional unit, an Applicant will round up to the nearest whole unit. The Affordable Units shall have the same proportion of unit types (i.e., number of bedrooms) and average size as the market rate units (provided, however, that no Affordable Unit may have more than three bedrooms).

2. In lieu of providing Affordable Units pursuant to Paragraph 1, an Applicant may propose an alternative mix of unit-types to comply with this Chapter by providing Affordable Units that comprise at least 20% of the Residential Unit Floor Area of the Housing Development Project in order to achieve a mix of Affordable Units including two-bedroom or three-bedroom units. The City Manager or their designee may approve the proposed alternative mix of unit- types that meet the requirements of this section.

3. Affordable Units shall be (a) reasonably dispersed throughout the Housing Development Project; and (b) comparable to other Residential Units in the Housing Development Project in terms of appearance, materials,

and finish quality. Residents of Affordable Units shall have access to the same common areas and amenities that are available to residents of other Residential Units in the Housing Development Project.

4. The City Manager or their designee shall adopt rules and regulations (a) establishing the affordable sales price or affordable rent for each Affordable Unit, consistent with the requirements of Health and Safety Code sections [50052.5](#) and [50053](#); and (b) ensuring that Affordable Units are sold or rented to Very Low Income and Lower Income Households, consistent with the requirements of this Chapter.

5. *Rental Units.*

(a) At least 50% of the required Affordable Units in the Housing Development Project shall be offered at a rent that is affordable to Very Low Income Households, up to a maximum requirement of 10% of the total units in the Housing Development Project if the project provides more Affordable Units than are otherwise required by this Chapter.

(b) In determining whether a unit is affordable to Very Low Income or Low Income Households, maximum allowable rent for any affordable unit shall be reduced by an amount equal to the value of the City-published utility allowance provided for Tenant-paid utilities and any other mandatory fee imposed by the property owner as a condition of tenancy.

(c) Any percentage increase in rent of an occupied Affordable Unit shall not exceed the lesser of 65% of the increase in the Consumer Price Index for All Urban Consumers (CPI-U) in the San Francisco-Oakland-San Jose region as reported and published by the U.S. Department of Labor, Bureau of Labor Statistics, for the twelve-month period ending the previous December 31, or 65% of the percentage increase in AMI for the same calendar year. In no event, however, shall the allowable annual adjustment be less than zero (0%) or greater than seven percent (7%).

(d) Affordable Units designated for Very Low Income Households shall be offered for rent to tenants receiving assistance under the Section 8 Program (42 U.S.C. Section 1437f), the Shelter Plus Care Program (42 U.S.C. Section 11403 et. seq.), or any similar state or federally funded rent subsidy program prior to being offered to other potential tenants. The Council may establish related program requirements by resolution.

(e) The owner of any Affordable Unit offered for rent must report to the City annually the occupancy and rents charged for each Affordable Unit, and any other information required pursuant to rules and regulations adopted by the City Manager or their designee.

6. *Ownership Units.* Inclusionary units in ownership projects shall be sold at a price that is affordable to an appropriate-sized household whose income is no more than 80 percent of the AMI.

7. All Affordable Units shall be subject to a recorded affordability restriction requiring in perpetuity that each Affordable Unit be sold at an affordable sales price or offered for rent at an affordable rent, as defined in this Chapter.

8. Affordable Live/Work Units shall be proactively marketed by the Applicant and/or owner to income-eligible persons performing a work activity permitted in the district where the project is located whose type of work causes them to have a requirement for a space larger in size than typically found in residential units.

9. An Affordable Unit that is constructed to qualify for a density bonus under Government Code section [65915](#) that otherwise meets the requirements of this Chapter shall qualify as an Affordable Unit under this Chapter.

B. *Option to Pay In-Lieu Fee.*

1. In lieu of providing some or all of the Affordable Units required under this Chapter (including any fractional units), an Applicant may elect to pay a fee, the amount of which the City Council may establish by resolution ("In-Lieu Fee"). The City Council may by resolution differentiate among types, classes, and locations of Housing Development Projects to the extent permitted by law; may establish separate fees and criteria for the provision of units that are affordable to Very Low Income Households and units that are affordable to Low Income Households; and may establish the method for calculation of the In-Lieu Fee.

2. In-Lieu Fees shall be applied to the Residential Unit Floor Area of a Housing Development Project. For Live/Work units, the In-Lieu Fee shall be applied to the Residential Unit Floor Area that is designated as non-workspace in the zoning permit approvals consistent with BMC section [23.312.040](#).

3. In-Lieu Fees shall be estimated as part of the preliminary Affordable Housing Compliance Plan and finalized at the time of building permit issuance, consistent with the final Affordable Housing Compliance Plan.

4. In-Lieu Fees shall be paid prior to the issuance of the first Certificate of Occupancy, or if no Certificate of Occupancy is required, prior to the initial occupancy of the Housing Development Project.

5. Up to 15% of In-Lieu Fees collected may be used to pay for administration of the In-Lieu Fee or the Housing Trust Fund program. At least 85% of In-Lieu Fees collected shall be deposited into the City's Housing Trust Fund program.

C. *Option to Dedicate Land.*

1. At the discretion of the City Manager or their designee, the requirements of this Chapter may be satisfied by the dedication of land in lieu of constructing Affordable Units within the Housing Development Project if the City Manager or their designee determines that all of the following criteria have been met:

(a) Marketable title to the site is transferred to the City, or an affordable housing developer approved by the City, prior to issuance of building permit of the Housing Development Project pursuant to an agreement between the Applicant and the City.

(b) The site has a General Plan designation that authorizes residential uses and is zoned for residential development at a density to accommodate at least the number of Affordable Units that would otherwise be required under Paragraph A.

- (c) The site is suitable for development of the Affordable Units, taking into consideration its configuration, physical characteristics, location, access, adjacent uses, and applicable development standards and other relevant planning and development criteria including, but not limited to, factors such as the cost of construction or development arising from the nature, condition, or location of the site.
 - (d) Infrastructure to serve the dedicated site, including, but not limited to, streets and public utilities, are available at the property line and have adequate capacity to serve the maximum allowable residential density permitted under zoning regulations.
 - (e) The site has been evaluated for the presence of hazardous materials and for the presence of geological hazards and all such hazards are or will be mitigated to the satisfaction of the City prior to acceptance of the site by the City.
 - (f) The value of the site upon the date of dedication is equal to or greater than the in-lieu fee that would otherwise be required under Paragraph A. The value of the site shall be determined pursuant to the program guidelines approved by the City Manager or their designee.
2. The City shall solicit proposals from affordable housing developers to construct restricted income units on the site dedicated to the City, but if the City is unable to obtain a qualified affordable housing developer to construct a viable affordable housing development on the property within two years of its solicitation or to commence construction within five years, the City may sell, transfer, lease, or otherwise dispose of the dedicated site for any purpose. Any funds collected as the result of a sale, transfer, lease, or other disposition of sites dedicated to the City shall be deposited into a fund designated for use in the City's Housing Trust Fund program. (Ord. 7853-NS § 2, 2023)

23.328.040 Waiver or Modification of Affordable Housing Requirements.

- A. The City Manager or their designee may waive or modify up to fifty percent of the requirements of this Chapter at their sole discretion where any of the following conditions are established:
- 1. A project providing low- or moderate-income housing is funded in whole or in part by the City's Housing Trust Fund program;
 - 2. The implementation of the requirements of this Chapter would violate the rights of any person under the California or United States Constitutions, any federal law, or any state law governing a matter of statewide concern and applicable to a charter city; or
 - 3. The benefits of the project to the City outweigh the detriment of foregoing the provision of Affordable Housing or the contribution of In-Lieu fees to the Housing Trust Fund program. In weighing the benefits and detriment to the City, the following factors may be considered:
 - (a) The impact of the requirements of this Chapter on the feasibility of a Housing Development Project;

- (b) Other economically beneficial uses of the Applicant's property;
 - (c) The burdens the Housing Development Project places on the City in terms of increased demand for affordable housing, childcare, public facilities or amenities, or other impacts which reasonably may be anticipated to be generated by or attributable to the Housing Development Project; and
 - (d) The impact on the Housing Trust Fund program of foregoing the payment of any In-Lieu fee that would otherwise be made.
- B. Waivers or modifications greater than fifty percent of the amount which otherwise would be required by this Chapter shall be subject to the approval of City Council.
- C. The Applicant shall bear the burden of proof to establish eligibility for a waiver or modification of the requirements of this Chapter. (Ord. 7853-NS § 2, 2023)

23.328.050 Implementation.

- A. The Applicant for any Use Permit or Zoning Certificate for a Housing Development Project shall submit a preliminary Affordable Housing Compliance Plan to the Zoning Officer at the time of application. The preliminary Affordable Housing Compliance Plan shall be incorporated as a condition of approval of any Use Permit or Zoning Certificate issued to the Applicant. No building permit may be issued for the project until the final Affordable Housing Compliance Plan is approved.
- B. The Applicant must execute a Regulatory Agreement and Declaration of Restrictive Covenants to regulate all Affordable Units provided in a Housing Development Project. No building permit may be issued for the project until the Regulatory Agreement and Declaration of Restrictive Covenants are executed.
- C. The Affordable Housing Compliance Plan and/or Regulatory Agreement and Declaration of Restrictive Covenants may be amended administratively, provided that the Zoning Officer finds them to be in full compliance with the provisions of this ordinance and State law, prior to issuance of Certificate of Occupancy.
- D. The City Manager or their designee may promulgate additional rules and regulations consistent with the requirements of this Chapter.
- E. The City Council may by resolution establish fees for the implementation and administration of this Chapter and may establish administrative penalties for violations of this Chapter.
- F. *Exemptions.* The following types of Housing Development Projects and Residential Units are exempt from this Chapter:
1. A Housing Development Project for which either a building permit was issued on or before April 1, 2023 or a preliminary application including all of the information required by subdivision (a) of California Government Code section [65941.1](#) was submitted on or before April 1, 2023 shall be subject to this Chapter's requirements that were in place as of the preliminary application's submittal date but shall otherwise be

exempt from this Chapter. This exemption shall expire upon the occurrence of any of the circumstances defined in paragraphs (2), (6), or (7) of subdivision (o) of California Government Code section [65589.5](#) or in subdivision (d) of California Government Code section [65941](#).

2. A Housing Development Project with 5,000 square feet or less of Residential Unit Floor Area, unless it is part of a larger Housing Development Project. This exemption shall expire on April 1, 2025, or at such time as the City Council modifies or repeals this exemption, whichever date is sooner.
3. A Residential Unit that replaces a unit existing as of April 1, 2023 that has been destroyed by fire, earthquake or other disaster, or that was previously subject to a mitigation fee or inclusionary housing requirement.
4. A Residential Unit existing as of April 1, 2023 that is expanded, renovated, or rehabilitated. (Ord. 7853-NS § 2, 2023)

The Berkeley Municipal Code is current through Ordinance 7854-NS, and legislation passed through February 28, 2023.

Disclaimer: The City Clerk's Office has the official version of the Berkeley Municipal Code. Users should contact the City Clerk's Office for ordinances passed subsequent to the ordinance cited above.

[City Website: www.berkeleyca.gov](http://www.berkeleyca.gov)

[Code Publishing Company, A General Code Company](#)



MEMORANDUM
Planning and Development Department

DATE: May 5, 2023
TO: Katrina Lapira, Associate Planner
FROM: Darya Barar, Consulting Urban Forester
SUBJECT: 1589 University Ave. – Arborist Comments

I reviewed Insideouts Landscape Architecture’s landscape plan dated March 16, 2023. Based on my review of the plans I recommend the applicant be required to preserve the five crepe myrtle street trees growing along California Street.

Trees should be protected for the entire construction period with fencing. Fencing shall completely enclose the TREE PROTECTION ZONE and shall be erected prior to demolition, grubbing, or grading (Figure 1). Fences shall be 6 ft. chain link with posts sunk into the ground. Fences are to remain until all grading and construction is completed.

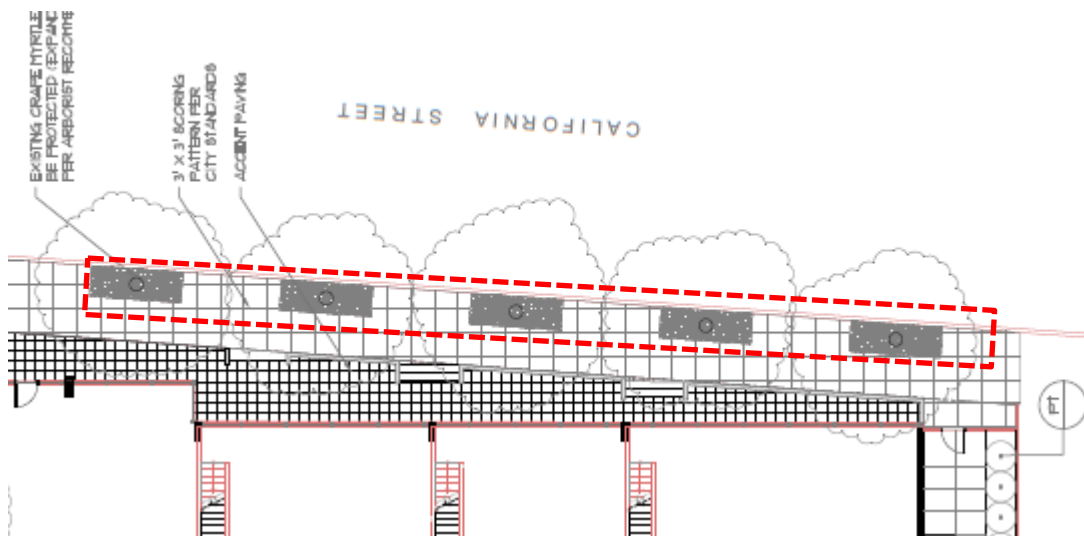


Figure 1. Fence trees to be preserved with 6 ft. chain link with posts sunk into the ground for the duration of construction.

The current plans show seven trees to be planted on University Avenue. Trees should be planted in accordance with the City’s tree planting standards. Flexi-pave shall be used instead of tree grates. Irrigation is required to be placed in the tree wells. No root barriers shall be used.

Jacob, Melinda

From: Zoning Adjustments Board (ZAB)
Subject: FW: 1598 University Ave

From: Larry Mandella <larry.mandella@comcast.net>
Sent: Tuesday, May 9, 2023 4:56 PM
To: Zoning Adjustments Board (ZAB) <Planningzab@cityofberkeley.info>
Subject: 1598 University Ave

WARNING: This is not a City of Berkeley email. Do not click links or attachments unless you trust the sender and know the content is safe.

Dear Members of the Zoning Adjustments Board,

My comment concerns the project at 1598 University Ave.

I have lived in Berkeley since 1968 and our family has lived in our current home since 1974 on Addison St., directly behind the proposed project.

My primary concern is the impact of an eight story building adjacent to the houses just south of the project. The current plan has a step down from 8 to 7 to 6 stories on the West wing of the U-shaped building. On the East wing, the step down is only 8 to 7 stories.

I strongly would like to see the developers match the East wing step-down to the one on the West Wing, thus making them both 8 to 7 to 6 stories. The height and mass of this project will greatly impact those of us living the closest to it. I believe it would make a significant difference for the walls nearest us to be as low as possible.

Thank you for your consideration in your deliberations.

Larry Mandella,

1543 Addison St., Berkeley

Jacob, Melinda

From: Zoning Adjustments Board (ZAB)
Subject: FW: Agenda Item No. 4: 1598 University Mixed-Use Project (6031)
Attachments: 6031-010j - 1598 University Ave ZAB Comments.pdf

From: Lorrie J. LeLe <ljlele@adamsbroadwell.com>
Sent: Tuesday, May 9, 2023 4:37 PM
To: Zoning Adjustments Board (ZAB) <Planningzab@cityofberkeley.info>; Lapira, Katrina <KLapira@cityofberkeley.info>
Cc: Aidan P. Marshall <amarshall@adamsbroadwell.com>
Subject: Agenda Item No. 4: 1598 University Mixed-Use Project (6031)

WARNING: This is not a City of Berkeley email. Do not click links or attachments unless you trust the sender and know the content is safe.

On behalf of East Bay Residents for Responsible Development, we submit the attached comments on Agenda Item No. 4.

We are also providing you with a Dropbox link which contains the referenced documents for your convenience.

<https://www.dropbox.com/scl/fo/rk2jxl8nmnu56xdn64ukt/h?dl=0&rlkey=hajtr9f6bjaod5ng8z8twv4r8>

If you have any questions, please contact Aiden Marshall – amarshall@adamsbroadwell.com

Thank you,

Lorrie LeLe

Legal Assistant

Adams Broadwell Joseph & Cardozo

520 Capitol Mall, Suite 350

Sacramento, CA 95814

ljlele@adamsbroadwell.com | Phone: 916.444.6201 Ext. 10 | Fax: 916.444.6209 |

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Of Counsel
MARC D. JOSEPH
DANIEL L. CARDOZO

May 9, 2023

Via Email and Overnight Mail

Yes Duffy, Chairperson
Kimberly Gaffney, Vice Chairperson
Igor Tregub, Member
Michael Thompson, Member
Holly Scheider, Member
Shoshana O'Keefe, Member
Charles Kahn, Member
Brandon Yung, Member
Debra Sanderson, Member
Zoning Adjustments Board
Planning and Development
1947 Center Street, 2nd Floor
Berkeley, CA 94704
Email: zab@cityofberkeley.info

Via Email Only

Katrina Lapira, Associate Planner
Email: klapira@cityofberkeley.info

Re: Agenda Item No. 4: 1598 University Mixed-Use Project (File No. DRCP2022-0008; ZP2022-0099)

Dear Chairperson Duffy, Vice Chairperson Gaffney, Members: Tregub, Thompson, Schneider, O'Keefe, Kahn, Yung, Sanderson, and Ms. Riemer:

We are writing on behalf of East Bay Residents for Responsible Development ("East Bay Residents" or "EBRRD") to provide comments on the 1598 University Mixed-Use Project (File No. DRCP2022-0008; ZP2022-0099) proposed by 1598 University Avenue, LLC/NX Ventures/Trachtenberg Architects ("Applicant"). The City of Berkeley ("City") Zoning Adjustments Board ("ZAB") will consider approval of the Project at the May 11, 2023, ZAB meeting. The ZAB will consider approval of the following Use Permits:

- Use Permit to demolish two non-residential buildings, under Berkeley Municipal Code (BMC) Section 23.326.070
- Use Permit to establish a mixed-use residential building, under BMC Section 23.204.020

6031-010j

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- Use Permit to create 5,000 square feet of new floor area in the University Commercial District, under BMC Section 23.204.030(A)
- Use Permit to establish residential uses on the ground floor, under BMC 23.204.060(B)(3)
- Use Permit to reduce the rear setback (interior) to provide greater privacy along the side setback (south) that abuts residential district, under BMC 23204.060.
- Administrative Use Permit for projections that exceed the maximum building height limit, under 23.304.050(A)

The Project consists of the demolition of an existing non-residential structure and construction of a 134,409 square-foot, eight-story mixed-use residential building containing 207 dwelling units (including 21 very low-income units) and 5,787 square foot commercial space, with 39 parking spaces and 92 bicycle parking spaces. The Project is seeking a 50% Density Bonus by providing 15% of the base project units as affordable to very-low income households. The Project site is located at 1598 University Ave., Berkeley, CA 94703 (APN 056 200300100).

The staff report for the ZAB hearing includes a recommendation that the ZAB find the Project categorically exempt from the provisions of the California Environmental Quality Act¹ (“CEQA”) pursuant to CEQA Guidelines Section 15332 (“Class 32” or “Infill Development Project”).² But, as explained herein, and in comments East Bay Residents submitted in advance of the Project’s Preliminary Design Review,³ the City cannot rely on the Class 32 exemption due to the Project’s potentially significant impacts of air quality, noise, traffic, and public health. Since the City defers its own analysis of the Project’s environmental impacts until after Project approval, the staff recommendation that the Project is exempt from CEQA is not supported by substantial evidence and fails to comply with CEQA. Rather, the Project’s substantial size, 24-month construction period, and its proximity to sensitive receptors indicate that the Project’s impacts may be potentially significant, precluding reliance on the Class 32 Exemption. As a result, an environmental impact report (“EIR”) must be prepared for this Project.

Additionally, the Project Applicant has not made a commitment to ensure the Project is built with local skilled and trained workforce, or provide workforce benefits for City of Berkeley or East Bay residents. The Project thus fails to demonstrate consistency with the workforce and economic requirements of the City

¹ Pub. Resources Code (“PRC”) §§ 21000 et seq.

² 14 Cal. Code Regs. (“CCR” or “CEQA Guidelines”) §§ 15000 et seq.; Staff Report.

³ Letter from East Bay Residents re: Comments on Agenda Item IV.2 – Preliminary Design Review for the 1598 University Mixed-Use Project (File No. DRCP2022-0008; ZP2022-0099) (April 20, 2023).

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of Berkeley General Plan (“General Plan”). Inconsistency with applicable General Plan and local plan workforce policies precludes reliance on the Class 32 Exemption, which requires that projects be consistent with the applicable general plan designation and “all applicable general plan policies.”⁴

The ZAB also lacks the evidence necessary to approve the Project’s requested Use Permits. As required by BMC Section 23.406.040(E), the ZAB must find that the proposed structure will not be detrimental to the health, safety, peace, morals, comfort, or general welfare of persons and adjacent properties to approve the Use Permits. But because the City has deferred environmental review until after approval of the Use Permits, the ZAB lacks substantial evidence to support a conclusion that the Project is exempt from CEQA and will not be detrimental to the general welfare.

East Bay Residents respectfully requests that the ZAB remand the Project to staff to prepare an environmental impact report (“EIR”) pursuant to CEQA. The EIR must contain the necessary supporting analysis to fully disclose and mitigate the Project’s adverse impacts, including but not limited to construction and operational air quality and public health impacts, hazardous materials, noise, and land use impacts. The Project should also incorporate workforce standards which are consistent with the City’s General Plan and Specific Plan workforce goals and policies.⁵

I. STATEMENT OF INTEREST

East Bay Residents for Responsible Development (“ERRBD” or “East Bay Residents”) is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential impacts associated with Project development. The association includes the UA Plumbers and Pipefitters Local 342, International Brotherhood of Electrical Workers Local 595, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, and their members and their families who live and/or work in the City of Berkeley and Alameda County.

The individual members of East Bay Residents live, work, and raise their families in the City of Berkeley and Alameda County. They would be directly affected by the Project and its impacts. The organizational members of Residents

⁴ 14 CCR 15332(a).

⁵ We reserve the right to supplement these comments at later hearings and proceedings on the Project. Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield (“Bakersfield”)* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

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also have an interest in enforcing public interest, health and safety, labor and environmental laws that encourage sustainable development and ensure a safe working environment for its members. East Bay Residents' members are also concerned about projects that are built without providing opportunities to improve local recruitment, apprenticeship training, and retention of skilled workforces, and without providing lifesaving healthcare expenditures for the construction workforce.

II. LEGAL STANDARD

CEQA has two basic purposes, neither of which the City has satisfied in this case. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental impacts of a project before harm is done to the environment.⁶ The EIR is the “heart” of this requirement,⁷ and has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”⁸ To fulfill this purpose, the discussion of impacts in an EIR must be detailed, complete, and “reflect a good faith effort at full disclosure.”⁹ An adequate EIR must contain facts and analysis, not just an agency’s conclusions.¹⁰

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring imposition of mitigation measures and by requiring the consideration of environmentally superior alternatives.¹¹ CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures to address all potentially significant impacts identified in the agency’s CEQA analysis.¹² Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon an EIR or other environmental document to meet this obligation.

⁶ Cal. Code Regs., tit. 14, § 15002, subd. (a)(1) (“CEQA Guidelines”); *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal.App.4th 1344, 1354 (“*Berkeley Jets*”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

⁷ *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

⁸ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

⁹ CEQA Guidelines, § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

¹⁰ *See Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 568.

¹¹ CEQA Guidelines, § 15002, subd. (a)(2) and (3); *Berkeley Jets*, 91 Cal.App.4th, at p. 1354; *Laurel Heights Improvement Ass’n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.

¹² Pub. Resources Code, §§ 21002-21002.1.

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Under CEQA, mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments.¹³ A CEQA lead agency is precluded from making the required CEQA findings to approve a project unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved. For this reason, an agency may not rely on mitigation measures of uncertain efficacy or feasibility.¹⁴ This approach helps “insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.”¹⁵

Following preliminary review of a project to determine whether an activity is subject to CEQA, a lead agency is required to prepare an initial study to determine whether to prepare an EIR or negative declaration, identify whether a program EIR, tiering, or other appropriate process can be used for analysis of the project’s environmental effects, or determine whether a previously prepared EIR could be used with the project, among other purposes.¹⁶ CEQA requires an agency to analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.¹⁷ A negative declaration may be prepared instead of an EIR when, after preparing an initial study, a lead agency determines that a project “would not have a significant effect on the environment.”¹⁸

III. THE CITY LACKS SUBSTANTIAL EVIDENCE TO SUPPORT A CEQA INFILL EXEMPTION

The City improperly determined that the Project qualifies for Infill Exemption under CEQA Guidelines Section 15332. CEQA is “an integral part of any public agency’s decision making process.”¹⁹ It was enacted to require public agencies and decision makers to document and consider the environmental implications of their actions before formal decisions are made.²⁰ CEQA requires an agency to conduct adequate environmental review prior to taking any discretionary action that may significantly affect the environment unless an exemption applies.²¹

¹³ CEQA Guidelines, § 15126.4, subd. (a)(2).

¹⁴ *Kings County Farm Bureau v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).

¹⁵ *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

¹⁶ CEQA Guidelines, §§ 15060, 15063, subd. (c).

¹⁷ See, e.g., Pub. Resources Code, § 21100.

¹⁸ *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597; Pub. Resources Code § 21080(c).

¹⁹ Pub. Resources Code § 21006.

²⁰ *Id.*, §§ 21000, 21001.

²¹ *Id.*, § 21100(a); see also CEQA Guidelines § 15004(a).

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Thus, exemptions must be narrowly construed and are not to be expanded beyond the scope of their plain language.²²

CEQA requires an agency to analyze whether a project conforms with the applicable land use plan, policy, or regulation of an agency with jurisdiction over the project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect.²³ Here, the Project fails to conform with the General Plan.

A. The Infill Exemption

Section 15332 of the CEQA Guidelines provides an exemption from CEQA for projects characterized as in-fill development meeting the following conditions:

- (a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.
- (b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.
- (c) The project site has no value as habitat for endangered, rare or threatened species.
- (d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.
- (e) The site can be adequately served by all required utilities and public services.

The infill exemption requires a lead agency provide “substantial evidence to support [their] finding that the Project will not have a significant effect.”²⁴ "Substantial evidence" means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency.²⁵ If a court locates substantial evidence in the record to support the City's conclusion, the City's decision will be upheld.²⁶

²² *Castaic Lake Water Agency v. City of Santa Clarita* (1995) 41 Cal.App.4th 1257.

²³ CEQA Guidelines Appendix G, XI Land Use and Planning.

²⁴ *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 269.

²⁵ CEQA Guidelines § 15384.

²⁶ *Bankers Hill Hillcrest*, 139 Cal.App.4th at 269.

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The Project fails to meet the requirements of Section 15332(a) and (d) because, as discussed below, the Project is likely to result in inconsistencies with the Berkeley General Plan and may result in potentially significant impacts to public health, air quality, and noise. The record demonstrates that neither the City nor the Applicant have provided substantial evidence demonstrating that the Project qualifies for the infill exemption. By contrast, there is substantial evidence supporting a fair argument that the Project would result in potentially significant environmental effects that require preparation of an EIR.

B. The City Lacks Substantial Evidence to Conclude that the Project Satisfies the Infill Exemption Criteria

i. The City Lacks Substantial Evidence to Support a Conclusion that the Project Will Not Result in Significant Noise and Vibration Impacts

The City failed to provide substantial evidence that the Project will not result in significant noise and vibration impacts. Instead, the Project's proposed conditions of approval propose to require improperly deferred analysis of the Project's noise and vibration impacts after the Project is approved, in violation of CEQA.

First, the Staff Report provides no information regarding the baseline noise levels against which to determine the significance of noise from Project construction and operation. The City thus does not have substantial evidence in the record to support a determination that noise and vibration impacts are less than significant.

Second, the Findings and Conditions in Attachment 1 of the Staff Report provide that the Project applicant "shall submit screening level analysis prior to, or concurrent with, demolition building permit. If a screening level analysis shows that the project has the potential to result in damage to structures, a structural engineer or other appropriate professional shall be retained to prepare a vibration impact assessment (assessment)... This study shall establish the baseline condition of these structures, including, but not limited to, the location and extent of any visible cracks or spalls."²⁷ This condition represents improperly deferred analysis. "By deferring environmental assessment to a future date, the conditions run counter to that policy of CEQA which requires environmental review at the earliest feasible stage in the planning process."²⁸ The City requires the Applicant to analyze noise and vibration impacts after project approval. This contravenes the purposes of

²⁷ Staff Report, Attachment 1, pg. 9 of 25.

²⁸ *Sundstrom* (1998) 202 Cal.App.3d 296, 305.

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CEQA, which requires environmental review at the earliest feasible stage in the planning process. The City must prepare an EIR to adequately analyze and mitigate potentially significant noise and vibration impacts.

ii. Substantial Evidence Supports a Fair Argument that the Project Will Result in Significant Noise Impacts

Substantial evidence supports a fair argument that the Project’s noise impacts would exceed the City’s noise significance thresholds. Section 13.40, Community Noise, of the Berkeley Municipal Code establishes the City’s standards for on-site operational noise and construction noise. Section 13.40.050 sets limits for exterior noise generated on a property, as measured at any other property. Table 13.40-1²⁹ shows the City’s exterior noise limits that cannot be exceeded for more than 30 minutes in any hour.

Table 13.40-1. EXTERIOR NOISE LIMITS

(Levels not to be exceeded more than 30 minutes any hour)

Zoning District	Time Period	Noise Level (dBA)
R-1, R-2, R-1A, R-2A, and ESR	7:00 a.m. – 10:00 p.m.	55
	10:00 p.m. – 7:00 a.m.	45
R-3 and above	7:00 a.m. – 10:00 p.m.	60
	10:00 p.m. – 7:00 a.m.	55
Commercial	7:00 a.m. – 10:00 p.m.	65
	10:00 p.m. – 7:00 a.m.	60
Industry	Anytime	70

Exterior noise generated on a property also cannot exceed the following limits for shorter periods of time in a given hour:

- The noise standard for that land use as specified in Table 13.40-1 plus 5 dBA for a cumulative period of more than 15 minutes in any hour; or
- The noise standard for that land use as specified in Table 13.40-1 plus 10 dBA for a cumulative period of more than 5 minutes in any hour; or

²⁹ Berkeley, Municipal Code Section 13.40.050.

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- The noise standard for that land use as specified in Table 13.40-1 plus 15 dBA for a cumulative period of more than 1 minute in any hour; or
- The noise standard for that land use as specified in Table 13.40-1 plus 20 dBA for any period of time.

Section 13.40.060 of the Berkeley Municipal Code sets interior noise limits for multi-residential uses as shown in Table 13.40-2. These standards apply within dwellings with their windows in normal seasonal configurations.

Table 13.40-2. INTERIOR NOISE LIMITS

Zoning District	Time Interval	Allowable Interior Noise Level (dBA)
All	10:00 p.m. – 7:00 a.m.	40
	7:00 a.m. – 10:00 p.m.	45

Section 13.40.070 of the Berkeley Municipal Code sets standards for construction noise. This section prohibits construction activity between the hours of 7:00 PM and 7:00 AM on weekdays, and between 8:00 PM to 9:00 AM on weekends and holidays, such that the resulting noise creates a noise disturbance across a residential or commercial property line. Table 13.40-3 (“Maximum sound levels for nonscheduled, intermittent, short-term operation (less than 10 days) of mobile equipment”) lists the City’s maximum sound levels for mobile equipment that apply to construction activity “where technically and economically feasible” during permitted hours of construction (Section 13.40.070.B of the Berkeley Municipal Code).

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Table 13.40-3.

	R-1, R-2 Residential	R-3 and above Multi-Family Residential	Commercial/Industrial
Weekdays 7:00 a.m. to 7:00 p.m.	75 dBA	80 dBA	85 dBA
Weekends 9:00 a.m. to 8:00 p.m. and legal holidays	60	65	70

Table 13.40-3 lists the City’s maximum sound levels for stationary equipment that apply to construction activity “where technically and economically feasible” during permitted hours of construction (Section 13.40.070.B of the Berkeley Municipal Code).

Table 13.40-4.

	R-1, R-2 Residential	R-3 and above Multi-Family Residential	Commercial/Industrial
Weekdays 7:00 a.m. to 7:00 p.m.	60 dBA	65 dBA	70 dBA
Weekends 9:00 a.m. to 8:00 p.m. and legal holidays	50	55	60

The Project would likely exceed the construction noise thresholds set forth above. Noise from temporary construction activity can be estimated using the Federal Highway Administration’s Roadway Construction Noise Model (RCNM). The model applies a typical list of equipment used in multi-story residential developments during each phase of construction. Impact or sonic pile drivers, if used to install foundations, would be the loudest individual noise source. This equipment can generate noise levels exceeding 100 dBA within 50 feet.³⁰ Pile

³⁰ City of Berkeley, Ashby and North Berkeley BART Stations Transit-Oriented Development Zoning Project, Draft Environmental Impact Report SCH#2020110320, October 2021, pg. 4.8-10, available

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drivers are most often used to set pile foundations for new concrete buildings that are at least six stories in height. Since the proposed Project would allow a building up to eight stories tall, it is reasonably foreseeable that pile drivers could be used in construction.

The aforementioned noise impacts would not be substantially attenuated by distance, as sensitive residential receptors are located adjacent to the Project site:³¹



As a result, construction noise impacts on these residential receptors could potentially reach 100 dBA, depending on the construction equipment used. The Project's construction noise impacts would thus potentially exceed significance thresholds in BMC Section 13.40.070, and the City's record lacks any evidence that noise levels would not exceed these levels. Therefore, substantial evidence demonstrates that a Class 32 exemption is inapplicable and the City lacks substantial evidence to support the exemption.

iii. The City Lacks Substantial Evidence to Support a Conclusion that the Project Will Not Result in Significant Air Quality and Public Health Impacts

The City lacks substantial evidence to support the conclusion that the Project will not result in significant air quality and health risk impacts because the City

at https://files.ceqanet.opr.ca.gov/266033-3/attachment/EyFhr7s1b9vpYiN2os0U2JXH1_Z1NDR1zkMAQg4tNWn7pnT65Bisli6o1b3px8VW1r5aRigVUN_t7OF40

³¹ DRC Meeting Staff Report, Figure 1: Vicinity Map, pg. 3, available at https://berkeleyca.gov/sites/default/files/documents/2023-04-20_DRC_Item%20IV.2_1598%20University.pdf.

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failed to conduct a health risk analysis. Absent a health risk analysis, the City cannot conclude that air pollution and public health impacts are less than significant to support reliance on a Class 32 Infill Exemption. Moreover, readily available facts demonstrate that the Project is likely result in significant air quality and health risk impacts requiring preparation of an EIR.

As explained in EBRRD’s prior comments, the City failed to prepare a health risk analysis (“HRA”) to quantify the health impact of the Project’s construction and operational emissions on sensitive receptors located near the Project site, violating CEQA’s requirement to disclose the health impacts of a project. In *Sierra Club v. County of Fresno*, the California Supreme Court affirmed CEQA’s mandate to protect public health and safety by holding that a CEQA document fails as an informational document when it fails to disclose the public health impacts from air pollutants that would be generated by a development project.³² As the Court explained, “a sufficient discussion of significant impacts requires not merely a determination of whether an impact is significant, but some effort to explain the nature and magnitude of the impact.”³³ The Court concluded that the county’s EIR was inadequate for failing to disclose the nature and extent of public health impacts caused by the project’s air pollution. As the Court explained, the EIR failed to comply with CEQA because after reading the EIR, “the public would have no idea of the health consequences that result when more pollutants are added to a nonattainment basin.”³⁴

Here, by failing to produce any analysis of the Project’s health risk, the City fails to disclose the Project’s potential health risks. These risks are potentially significant – the Office of Environmental Health Hazard Assessment’s (“OEHHA”) risk assessment guidelines recommend a formal health risk analysis (“HRA”) for short-term construction exposures to TACs lasting longer than 2 months and exposures from projects lasting more than 6 months should be evaluated for the duration of the project.³⁵ In an HRA, lead agencies must first quantify the

³² (2018) 6 Cal.5th 502, 518–522.

³³ *Id.* at 519, citing *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 514–515.

³⁴ *Id.* at 518. CEQA’s statutory scheme and legislative intent also include an express mandate that agencies analyze human health impacts and determine whether the “***environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.***” (Public Resources Code § 21083(b)(3) (emphasis added).) Moreover, CEQA directs agencies to “take immediate steps to identify any critical thresholds for the ***health and safety of the people*** of the state and take all coordinated actions necessary to prevent such thresholds being reached.” (Public Resources Code § 21000(d) (emphasis added).)

³⁵ Office of Environmental Health Hazard Assessment (OEHHA), Risk Assessment Guidelines: Guidance Manual for Preparation of Health Risk Assessments, February 2015 (OEHHA 2015), Section 8.2.10: Cancer Risk Evaluation of Short Term Projects, pp. 8-17/18;

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concentration released into the environment at each of the sensitive receptor locations through air dispersion modeling, calculate the dose of each TAC at that location, and quantify the cancer risk and hazard index for each of the chemicals of concern.³⁶ Following that analysis, then the City can make a determination of the relative significance of the emissions. Here, the Project is located in close proximity to residential receptors, and construction is expected to last for over two months. Without the requisite analysis of the Project's health risk impacts, a finding that impacts would be less-than-significant and that the Project is exempt from CEQA would not be supported by substantial evidence.

The City may argue that standard conditions of approval in the staff report would ensure health risk and air quality impacts would be less than significant. However, CEQA requires the assessment of the severity of a project's impacts prior to mitigation, not after mitigation.³⁷ Therefore, that argument would be a red herring.

Moreover, even when the standard conditions of approval are considered, they are not adequate to ensure that construction emissions and the health risk posed by exposure to construction TAC emissions would be less than significant. The staff report includes the condition that the Project will either prepare an HRA prior to issuance of the building permits, or "[a]ll construction equipment shall be equipped with Tier 2 or higher engines and the most effective Verified Diesel Emission Control Strategies (VDECS) available for the engine type (Tier 4 engines automatically meet this requirement) as certified by the California Air Resources Board (CARB).³⁸ But the requirement to use "Tier 2 or higher" construction equipment fails to ensure that the Project's construction TAC emissions will be reduced to levels of insignificance because Tier 2 equipment provides far lower emissions reductions than the most effective emissions-reducing currently on the market – Tier 4 Final equipment.

The United States Environmental Protection Agency's ("USEPA") 1998 nonroad engine emission standards were structured as a three-tiered progression. Tier 1 standards were phased-in from 1996 to 2000 and Tier 2 emission standards were phased in from 2001 to 2006. Tier 3 standards, which applied to engines from 37-560 kilowatts (kW) only, were phased in from 2006 to 2008. The Tier 4 emission

<https://oehha.ca.gov/air/crnrr/notice-adoption-air-toxics-hot-spots-program-guidance-manual-preparation-health-risk-0>.

³⁶ *Id.*

³⁷ *Lotus v. Dept of Transportation* (2014) 223 Cal. App. 4th 645, 651-52.

³⁸ Staff Report, Attachment 1, Findings and Conditions, pg. 17 of 25.

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standards were introduced in 2004, and were phased in from 2008 – 2015.³⁹ The Tier 4 emission standards—phased-in from 2008 through 2015—introduce substantial reductions of NOx (for engines above 56 kW) and PM (above 19 kW), as well as more stringent HC limits. CO emission limits remain unchanged from the Tier 2-3 stage.⁴⁰

The City’s reliance on Tier 2 construction equipment to reduce the Project’s construction DPM and other TAC emissions to less than significant levels is not supported by substantial evidence due to the limited efficacy of Tier 2 equipment and because the Condition does not obligate the Applicant to use the more effective Tier 4 equipment mentioned in the Condition.

iv. The City Lacks Substantial Evidence to Support a Conclusion that the Project Site Will Conform with the General Plan

CEQA requires an agency to analyze whether a project conforms with the applicable land use plan, policy or regulation of an agency with jurisdiction over the project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect.⁴¹ The Housing Accountability Act (“HAA”) also requires a showing of substantial evidence demonstrating that a housing project is consistent, compliant, and in conformity with applicable plans, programs, policies, ordinances, standards, requirements, or other similar provisions in order to be deemed consistent with those land use policies.⁴²

The Project is inconsistent with the General Plan Economic Development & Employment Element, and thus cannot be approved, or deemed consistent with the General Plan, until consistency is demonstrated with substantial evidence.⁴³ The General Plan Economic Development and Employment Element Policy (ED-1) (Employment and Training) provides that the City must “[i]ncrease the number of jobs that go to Berkeley citizens by coordinating economic development efforts with employment placement.”⁴⁴ Further, the General Plan provides that the City

³⁹ Emission Standards, Nonroad Diesel Engines, *available at:*

<https://www.dieselnet.com/standards/us/nonroad.php#tier3>

⁴⁰ <https://www.dieselnet.com/standards/us/nonroad.php#tier3>.

⁴¹ CEQA Guidelines Appendix G, XI Land Use and Planning.

⁴² Govt. Code § 65589.5(f)(4).

⁴³ SB 330 requires conformance with applicable, objective general plan and zoning standards. Gov. Code § 65905.5. (a).

⁴⁴ Berkeley General Plan Economic Development and Employment Element, p. ED-5. Available at: https://berkeleyca.gov/sites/default/files/documents/12_Economic%20Development%20and%20Employment%20Element-FINAL.pdf.

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intends to “[w]ork with job training programs and encourage training for life skills, job readiness, and specific target industries.”⁴⁵ The Project does not include any commitment to provide local construction jobs to Berkeley or East Bay residents, and the record does not contain any evidence demonstrating that the Applicant proposes to contribute to apprenticeship or other construction job training programs, or take any other measures to comply with these General Plan policies in relation to the Project’s construction workforce. The Project is therefore inconsistent with those policies.

Housing development projects in the City must also implement the goals and policies of the General Plan, including the following:

- 1) Ensure that Berkeley has an adequate supply of decent housing, living wage jobs, and businesses providing basic goods and services.
- 2) New housing will be developed to expand housing opportunities in Berkeley to meet the needs of all income groups.⁴⁶

The City has determined that “it is in the City of Berkeley’s economic interest to support a pipeline of skilled workers to accomplish the construction objectives and policies of the Berkeley General Plan.”⁴⁷ The Project should support this goal by including community benefits such as local hire and healthcare and workforce benefits for its construction workers. Without specific commitments from the Applicant to ensure compliance with these policies, the Project is likely to be detrimental to the general welfare, violates the General Plan, and should not be approved. Since the record is devoid of substantial evidence demonstrating compliance with these General Plan policies, the Project therefore also fails to meet the facial requirements for a CEQA Class 32 exemption.

IV. THE PROJECT MAY BE DETRIMENTAL TO THE GENERAL WELFARE OF THE CITY, RESIDENTS, AND WORKERS

In order to approve the Project’s requested Use Permits, under Berkeley Municipal Code Section 23.406.040, the Zoning Adjustments Board must find that

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ City of Berkeley, Agenda and Staff Report, Berkeley City Council, Council Consent Item 14 Helping Achieve Responsible Development with Healthcare and Apprenticeship Training Standards (HARD HATS), <https://berkeleyca.gov/sites/default/files/city-council-meetings/2022-09-20%20Agenda%20Packet%20-%20Council%20-%20WEB.pdf> (“HARD HATS Staff Report”) (Sept. 20, 2022) p. 7.

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the proposed project:

- i. Will not be detrimental to the health, safety, peace, morals, comfort, or **general welfare** of persons residing or visiting in the area or neighborhood of the proposed use; and
- ii. Will not be detrimental or injurious to property and improvements of the adjacent properties, the surrounding area or neighborhood, or to the general welfare of the City.

And BMC Section 23.204.060(E) requires certain findings to be made to approve an AUP or Use Permit for a project in the C-U district:

To approve an AUP or Use Permit for a project in the C-U district, the review authority must make the findings in Section 23.406.040 (Use Permits) and find that the proposed use or structure:

1. Is compatible with the purpose of the district;
2. Is compatible with the surrounding uses and buildings;
3. Does not interfere with the continuity of retail and service facilities at the ground level; and
4. Does not exceed the amount and intensity of use that can be served by the available traffic capacity and potential parking supply.

Further, the ZAB may approve a Use Permit for demolition of a non-residential building or structure only if the ZAB finds that “demolition will not be materially detrimental to the commercial needs and public interest of any affected neighborhood or the City of Berkeley”⁴⁸

A. The Project May Be Detrimental to the General Welfare Due to Potentially Significant Environmental and Public Health Impacts

As shown above, the Project may result in potentially significant air quality, public health, and noise impacts which may pose a detriment to the health, safety, and general welfare of the City of Berkeley. Regarding noise, the Project’s potentially significant noise and vibration impacts contravene the City’s Municipal Code which provides that “[c]ertain sound levels and vibrations are detrimental to the public health, welfare, safety, and quality of life, and are contrary to the public interest.”⁴⁹ Significant noise impacts from Project construction and operation may be “detrimental to the health, safety, peace, morals, comfort, or general welfare of

⁴⁸ *Id.* at § 23.326.070(D)(1).

⁴⁹ BMC § 13.40.010.

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persons residing or visiting in the area or neighborhood of the proposed use.”⁵⁰ In order to approve a Use Permit, under Berkeley Municipal Code Section 23.406.040, the ZAB must find that the proposed project is not detrimental to the health or general welfare of the City’s residents. Here, because the Project’s noise and vibration impacts were not analyzed or mitigated and are potentially significant, the City cannot make the necessary non-detriment finding.

Absent disclosure and mitigation of the Project’s potentially significant impacts in an EIR, the City lacks the evidence necessary to support the non-detriment findings required to approve the Use Permits.

B. The Project May Exceed the Amount and Intensity of Use that Can Be Served By the Available Traffic Capacity and Potential Parking Supply.

To approve the Project’s Use Permits, BMC Section 23.204.060(E) requires the ZAB to find that the Project does not exceed the amount and intensity of use that can be served by the available traffic capacity and potential parking supply. But the City has not supplied evidence to support this finding, and the staff report’s draft Findings and Conditions do not address this determination.

Here, the proposed use may not be adequately served by the available traffic capacity and potential parking supply due to the Project’s inadequate parking facilities. The Project proposes an eight-story mixed-use residential building with 207 dwelling units and 5,787 square foot commercial space, but only provides 39 parking spaces (27 residential, 12 commercial) and 92 bicycle parking spaces. This design will leave many residents without parking, and lead them to seek street parking in the neighborhood.⁵¹ This impact will unduly burden parking supply in the neighborhood. This type of impact is described in the University Avenue Strategic Plan: “the University Avenue Study Area must provide for the needs of visitors, as well as the merchants and residents working and living in the area... Most merchants in the University Avenue area, though, perceive a parking shortage and consider it a disadvantage to be located there.”⁵² The City must gather evidence that the parking supply will not be exceeded before the ZAB can approve the Use Permits.

⁵⁰ BMC § 23.406.040.

⁵¹ See City of Berkeley, University Avenue Strategic Plan (1996), pg. x (Immediate Action Item 3 – Expanding Parking Opportunities: “New mixed-use infill development will also generate increased parking demand, which could most effectively be met through a couple of strategically located parking sites”), available at https://berkeleyca.gov/sites/default/files/2022-03/University-Ave-Plan_Cover_Summary.pdf.

⁵² *Id.* at 60.

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C. The Project May Be Detrimental to the General Welfare for Failing to Provide Adequate Employment Training and Placement Facilities and Amenities

Municipal Code Section 22.20.020 defines detrimental impacts to include, *inter alia*, increased demand for workforce housing, training, and benefits: “The increased demand for affordable housing, child care and public services, ***adequate employment training and placement facilities and amenities***, and the other impacts generated by development projects, unless mitigated, are detrimental to the City’s public health, safety and general welfare.”⁵³ Under Section 22.20.020, a detriment to the general welfare occurs when the City fails to mitigate the impacts of a development project, including the increased demand for housing, workforce training, and public services that may result from the Project.⁵⁴ Pursuant to Municipal Code Section 22.20.020, the Project’s impacts to the general welfare for failure to provide employment training, placement facilities, and amenities, require mitigation.⁵⁵

As explained above, the ZAB may approve a Use Permit for demolition of a non-residential building or structure only if the ZAB finds that “demolition will not be materially detrimental to the commercial needs and public interest of any affected neighborhood or the City of Berkeley”⁵⁶ Here, the ZAB cannot make the necessary findings that demolition of the existing structure and construction of the Project is in the public interest, because the Applicant has not provided any evidence demonstrating that Project construction will provide “adequate employment training and placement facilities and amenities” for its construction workforce. In contrast, the addition of community and workforce benefits related to Project construction would promote the general welfare.

Housing projects that are constructed with low-wage or uninsured construction workers are detrimental to the health, safety, peace, morals, comfort, and general welfare of their communities. If the Project were constructed with low-wage or uninsured construction workers, it would be similarly detrimental to persons residing or visiting the City and the Project’s Downtown neighborhood, as well as to the general welfare of the City. The City should request the Applicant

⁵³ BMC § 22.20.020(G) (emphasis added).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at § 23.326.070(D)(1).

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voluntarily include community benefits in the Project's conditions of approval, including local hire provisions and healthcare standards and benefits in order to promote, and avoid detriment to, the general welfare of the City.

Examples of such conditions were recently adopted for the 2065 Kittredge Street Project, an eight-story, mixed-use building at 2065 Kittredge Street with 187 dwelling units, 4,993 square feet commercial space and 43 parking spaces. On January 31, 2023, the City Council voted unanimously to affirm the Zoning Adjustments Board's decision to approve the project's Use Permit with modified conditions of approval. In approving the 2065 Kittredge Street Project, the Berkeley City Council determined that failing to implement General Plan policies ED-1 (Employment and Training), ED-5 (Element Objectives), and ED-12 (Promoting Berkeley) related to Project construction could result in a detriment to the general welfare. The Applicant for the 2065 Kittredge Project voluntarily agreed to add the following language to the project's findings and conditions of approval:

1. The applicant shall evaluate the feasibility of implementing one or more of the following workforce programs for construction of the Project, but is not required to implement any said program:
 - a. Participate in a joint labor-management apprenticeship program for each trade engaged in construction of the Project;
 - b. Participate in an apprenticeship program approved by the State of California Division of Apprenticeship Standards that has a graduation rate of 50% or higher and has graduated an average of thirty (30) apprentices annually for the five (5) years immediately preceding the Covered Project. The applicant will also maintain at least the ratio of apprentices required by California Labor Code section 1777.5 for the duration of the project; or
 - c. Make and require its subcontractors to make hourly contributions to the California Apprenticeship Council ("CAC") for every apprenticeable craft hour worked on the Project of at least the apprenticeship contribution rate for the classification of "plumber, pipefitter, steamfitter" in Alameda County.
 - d. The applicant shall evaluate the feasibility of making Health Care Expenditures of twenty (20) percent to or on behalf of each construction worker working on the Project in addition to their regular hourly wages during the period of employment. The Health Care Expenditures may be made to a health plan in which the construction worker is enrolled, to the construction worker's health savings account, and/or to the construction worker in the form of cash. Prior to the issuance of a certificate of occupancy, the applicant shall submit a report to the City Manager all steps taken to comply with this condition, as well as the results of the applicant's feasibility

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evaluation, and which, if any, program is implemented for the Project, whether Health Care Expenditures are implemented for the Project, and the number of construction worker recipients of Health Care Expenditures for the Project.

2. The applicant shall make a good faith effort to attempt to meet a thirty (30) percent goal of all workers on the Project construction site be residents of living within ten (10) miles of the Project site and that, if the applicant fails to achieve such goal, documentation showing good faith efforts made to achieve the goal must be furnished to the City of Berkeley. This paragraph does not negate the requirement by the applicant to meet any other applicable requirements required by law.
3. The applicant shall, before obtaining a certificate of occupancy for the Project, furnish an affidavit to the City of Berkeley disclosing the number of union workers for each craft, apprentices, contractors, contractors' business addresses, number of local workers living within ten (10) miles of the Project site, and Berkeley residents working on the construction workforce for the Project.⁵⁷

The City Council concluded that the inclusion of these voluntary workforce conditions were consistent with General Plan policies ED-1 (Employment and Training), ED-5 (Element Objectives), and ED-12 (Promoting Berkeley). In this case, such conditions would be consistent with the same General Plan policies, as well as with the Municipal Code general welfare requirements. The City should confer with Applicant about the feasibility of incorporating these or similar voluntary construction workforce conditions into the Project to bring the Project in closer conformance with General Plan and Specific Plan.

D. The Project May Be Detrimental to the General Welfare for Failing to Hire Locally

Absent evidence demonstrating that the Applicant has committed to hire locally, the Project may be detrimental to the general welfare of Berkeley residents. Local hire commitments are a critical way not only to hire local residents, but to use

⁵⁷ Berkeley City Council, Annotated Agenda (January 31, 2023)

[https://berkeleyca.gov/sites/default/files/city-council-meetings/2023-01-31 Annotated Agenda - Council.pdf](https://berkeleyca.gov/sites/default/files/city-council-meetings/2023-01-31%20Annotated%20Agenda%20-%20Council.pdf).

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project hiring needs to target opportunities to low-income residents and people of color who might not otherwise benefit from new development.⁵⁸

Empirical studies demonstrate that local hire programs help address the fragmentation inherent in the development process, establishing better communication among developers, employers, community organizations, local job training resources, and the workforce development system that can provide job readiness and job retention support services.⁵⁹ Here, the Project Applicant has not made a commitment to ensure the Project is built with a local skilled and trained workforce. The Project may therefore be detrimental to City goals and the Berkeley community – particularly to its highly qualified construction workforce, who may not have the opportunity to build much-needed housing in their own community. In order to assess the Project’s compliance with Municipal Code general welfare standards and General Plan policies, the City should ask the Applicant to provide evidence related to its proposed local hire percentage for the construction workforce, and inquire whether the Applicant would consider a specific local hire percentage as a community benefit for the Project.

E. The Project May Be Detrimental to the General Welfare for Failing to Provide Healthcare to Construction Workers

The City has several local workforce policies intended to promote the health and viability of its workforce, including payment of livable wages, health benefits, and paid sick leave for certain workers,⁶⁰ and is in the process of considering an ordinance related to construction workforce benefits, including healthcare.⁶¹

While providing construction worker healthcare is not a binding requirement for the Project, providing workforce healthcare promotes the health, safety, and general welfare of local workers and is consistent with the City’s values and policies. The Project has not committed to provide healthcare standards or benefits for the construction workers building the Project. This may result in a detriment to

⁵⁸ Kathleen Mulligan-Hansel, *Making Development Work for Local Residents: Local Hire Programs and Implementation Strategies that Serve Low-Income Communities*, (July 2008). Available at: https://s3.amazonaws.com/proggov21-uploads/uploads/asset/asset_file/Making_Development_Work_Local_Residents_Mulligan-HanselPWF2008.pdf.

⁵⁹ *Id.*

⁶⁰ See City of Berkeley Workforce Standards and Enforcement, available at <https://berkeleyca.gov/doing-business/operating-berkeley/workforce-standards-and-enforcement> (last visited 4/26/23).

⁶¹ See HARD HATS Staff Report, <https://berkeleyca.gov/sites/default/files/city-council-meetings/2022-09-20%20Agenda%20Packet%20-%20Council%20-%20WEB.pdf>.

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the general welfare of the City and its residents, including in particular, to its construction worker residents. If the Project does not provide healthcare for its construction workers, the Project leaves the responsibility of providing for the health, safety, and welfare of the workers and the community on the workers themselves, or on taxpayer-funded public assistance, thus externalizing the cost of construction. This may perpetuate existing income and healthcare inequities for construction workers, potentially causing a detriment to the general welfare by failing to provide for the health and safety of its workers. The City should inquire as to whether the Applicant would provide healthcare benefits to its construction workers as a community benefit of the Project.

F. The City Lacks Substantial Evidence to Support Land Use and Non-Detriment Findings

Project construction will increase the local demand for a construction workforce. The Project's lack of workforce standards and worker healthcare may exacerbate the existing demand for local affordable housing and public services by construction workers that currently receive low pay without benefits. Without mitigation, these impacts may remain significant and the ZAB would be unable to make the necessary findings that the Project complies with the General Plan and zoning code. To comply with the General Plan Economic Development and Employment Element, the City must ensure that new housing developments provide jobs that go to Berkeley residents and provide job training programs and job readiness.

Moreover, the Municipal Code provides that the "Zoning Ordinance establishes *minimum* requirements to promote the public health, safety, and general welfare."⁶² The Municipal Code also provides that, "[t]o the extent possible, it is the government's responsibility to balance the responsibility to ensure the health, safety, and general welfare of the public at large in a fiscally and environmentally sustainable manner."⁶³ It is therefore the responsibility of the Zoning Adjustment Board to promote the general welfare beyond the minimum required by law. Here, the ZAB must require the Project to include community benefits like those detailed herein, otherwise, the Project contravenes the Municipal Code and General Plan.

⁶² BMC § 22.104.030.

⁶³ *Id.* at § 2.09.020.

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V. THE PROJECT IS INCONSISTENT WITH THE CITY'S HOUSING ELEMENT

The Project proposes to construct an eight-story residential building containing 207 dwelling units (21 Very Low-Income unit).⁶⁴ The Project is seeking a 50% Density Bonus by providing 15% of the base project units as affordable to very low-income households. More affordable units must be provided for the Project to be consistent with the City's Housing Element and state law.

The Regional Housing Needs Assessment is the California State-required process that seeks to ensure cities and counties plan for enough housing in their Housing Element cycle to accommodate all economic segments of the community.⁶⁵ Accordingly, the Housing Element of the City's General Plan identifies the City's housing conditions and needs, evaluates the City's ability to meet its Regional Housing Needs Allocation ("RHNA"), establishes the goals, objectives, and policies of the City's housing strategy, and provides an array of programs to create mixed-income neighborhoods across the City.⁶⁶ The Housing Element, which was amended on February 17, 2023, states that "the City has a remaining RHNA of 5,033 units (1,923 very low income; 852 low income; 1,227 moderate income; and 1,031 above moderate income units)... The City must identify adequate site capacity for this remaining RHNA."⁶⁷ Accordingly, Policy H-1 – Extremely Low, Very Low, Low and Moderate-Income Housing – provides: "Increase the number of housing units affordable to Berkeley residents with lower income levels."⁶⁸ Projects that do not contribute to the City's RHNA are inconsistent with the City's Housing Element, a primary goal of which is to meet the RHNA.

Further, Berkeley Municipal Code Section 23.328.010 provides that residential housing projects constructing five or more dwelling units must include at least 20 percent of the total number of dwelling units within the project as inclusionary units. As an alternative to providing inclusionary units required in an ownership project, the applicant may elect to enter in an agreement with the City to pay fees in-lieu of providing below-market rate units.⁶⁹

⁶⁴ https://berkeleyca.gov/sites/default/files/documents/2023-03-16_DRC_Item%20VII.1_1598%20University_SB330%20Project%20Plans.pdf

⁶⁵ Cal. Gov. Code Section 65580 – 65589.9; see City of Berkeley, Adopted 2023-2031 Housing Element, available at https://berkeleyca.gov/sites/default/files/documents/Berkeley_2023-2031%20Housing%20Element_02-17-2023v2_0.pdf.

⁶⁶ *Id.*

⁶⁷ *Id.* at 107.

⁶⁸ *Id.* at 15.

⁶⁹ Effective July 1, 2022, the fee is set at follows: Paid at Certificate of Occupancy: \$46,185 per rental unit; or Paid at building permit: \$43,185 per rental unit.

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However, the City has failed to meet its RHNA in previous cycles. Under the 5th RHNA Cycle from 2015-2023, Berkeley was required to plan for 2,959 units.⁷⁰ This includes 532 at very low income, 442 at low income, 584 at moderate income, and 1,401 at above moderate income. The Housing Element states that 3,742 units have been built, or 126% of the target. However, the targets for affordable housing were missed, with 309 very low income (58%), 130 low income (29%), and 106 moderate income (18%) units completed. 3,197 units of above moderate, or market rate housing was built, which was 228% of the goal.

Here, the Project fails to provide the recommended 20% affordable units, contributing to the City's pattern of overproducing market-rate housing but underproducing affordable housing. Only 15% of the base Project would be affordable, and only 10% of the total density bonus Project would be affordable. Although the Project will likely have to pay an in-lieu fee, the Project would not be consistent with the Housing Element because it places the burden on the City to identify adequate sites to construct affordable housing, and the record lacks evidence demonstrating that the City will utilize the in-lieu fee to supply the Project's allocated affordable units in the timeframe necessary to meet its RHNA.⁷¹ Further, it is unclear whether merely paying an in-lieu fee would result in the necessary affordable housing development the City needs to meet its RHNA. The City adopted the affordable housing mitigation fee on June 28, 2011 (Ordinance 7,192-N.S.), well before 2015-2023 RHNA cycle commenced, yet the City's RHNA was not met.⁷² Therefore, the Project must provide the recommended affordable units in order to be consistent with the City's Housing Element and state law.

The Project is one of several other projects proposed by the Applicant, which similarly fail to contribute an adequate percentage of affordable units. The Applicant also proposes to construct the 2900-2920 Shattuck Avenue Project,⁷³ a ten-story residential building containing 221 dwelling units (22 Very Low-Income unit).⁷⁴ The 2920 Shattuck Avenue project is seeking a 46.25% Density Bonus by providing only 14% of the base project units as affordable to very low-income

⁷⁰ City of Berkeley, Adopted 2023-2031 Housing Element, pg. D-8.

⁷¹ *Id.* at 107.

⁷² 2015-2023 Berkeley Housing Element, pg. 62, available at https://berkeleyca.gov/sites/default/files/documents/2023-05-11_ZAB_Item%204_1598%20University_Combined%20Staff%20Report%20and%20Attachments.pdf; see Resolution 68,074 – N.S.

⁷³ Use Permit #ZP2022-0116 (APN: 053 159000501).

⁷⁴ City of Berkeley, Zoning Project Application, 2920 Shattuck Ave. Berkeley CA 94705, APN 053 159000501, (Sept. 4, 2022), https://www.dropbox.com/s/528twax3fw4fw9p/2022-09-04_APP_PCKT_2920%20Shattuck.pdf?dl=0 (“Application Packet”), pdf pg. 2108 of 2143.

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households.⁷⁵ The Applicant also proposes the 3000 Shattuck Avenue Project, a 10-story (114 feet) mixed-use building utilizing a Density Bonus, with 166 dwellings, including 17 Very Low-Income units, and 1,043 square-feet of commercial space.⁷⁶ By proposing 17 Very Low Income (VLI) Below Market Rate (BMR) units on site (15 percent of the 111-unit base density), the 3000 Shattuck project is eligible for a 50 percent density bonus, or 56 additional units.⁷⁷ In sum, these projects each offer only 10% of the total units as affordable. These projects' inadequate provision of affordable housing – well below the recommended 20% – is a cumulative issue that the City must address before considering approval of this Project.

VI. CONCLUSION

As is discussed herein, the City lacks substantial evidence to rely on a Class 32 Infill Exemption for Project approval due to potentially significant environmental and public health impacts. The Project does not conform with the Berkeley General Plan for failing to support the general welfare through workforce and labor standards, and affordable housing. As a result, the Project cannot be approved until the City complies with CEQA and prepares an initial study and EIR for the Project.

Thank you for your attention to these comments. Please include them in the record of proceedings for the Project.

Sincerely,



Aidan P. Marshall

APM:ljl

⁷⁵ City of Berkeley, Zoning Project Application, 2920 Shattuck Ave.

⁷⁶ May 11, 2023 ZAB Agenda, available at https://berkeleyca.gov/sites/default/files/legislative-body-meeting-agendas/2023-05-11_ZAB_Agenda_Linked.pdf.

⁷⁷ 3000 Shattuck Avenue May 11 ZAB Staff Report, pg. 12, available at https://berkeleyca.gov/sites/default/files/documents/2023-05-11_ZAB_Item%205_3000%20Shattuck_Combined%20Staff%20Report%20and%20Attachments.pdf.

Communications

From: David Kellogg <david.kellogg@gmail.com>
Sent: Monday, May 8, 2023 11:33 AM
To: Zoning Adjustments Board (ZAB)
Cc: Lapira, Katrina
Subject: Public Comment: Original submission date questions & CEQA violations - #ZP2022-0099

WARNING: This is not a City of Berkeley email. Do not click links or attachments unless you trust the sender and know the content is safe.

Dear ZAB,

Please be aware that I will be submitting this project to HCD's Housing Accountability Unit for the following issues as, unfortunately, the planner and the Planning Department failed to respond to my request for information (copied below).

1. The record contains conflicting information about the original submission date.

As you may know, the original submission date is a critical date with legal significance. It is important that the actual submission date be acknowledged, so that the timelines of state housing law can be properly measured.

The initial incompleteness letter (dated 8/24/22) from the planner includes a claim that the initial submission date was "July 25, 2022" (a Monday). However, the City's Accela system includes multiple indicia, including filenames and fee receipts, that indicate the actual submission date was the preceding Friday, July 23, 2022. Moreover, there are no indicia (other than the incompleteness letter) that support the 7/25/22 date.

If July 23, 2022 is the actual submission date, the project would have been deemed completeness and the initial incompleteness letter barred by state law.

While it is possible there is an innocent explanation behind this apparent discrepancy, neither the planner nor the Planning Department generally has responded to my inquiry for clarification on the submission date.

Because I have not received any response, I intend to forward this issue to HCD's Housing Accountability Unit for further investigation.

I suggest ZAB also investigate.

2. Planning/ZAB have violated PRC 21080.1/.2, even when applying the City's admitted completeness date (which may be incorrectly late, see above).

The staff report for the ZAB hearing indicates this project was deemed complete in January 23, 2023 and that staff *recommends* this project be found to be exempt from CEQA (as an "infill development project").

More than 30 days have passed since 1/23/23, and the lead agency (ZAB) has still not complied with PRC 21080.1 by issuing a *determination* that the project is in fact exempt from CEQA. Thus, the deadline of PRC 21080.2 has been violated.

Sincerely,
David Kellogg

----- Forwarded message -----

From: **David Kellogg** <david.kellogg@gmail.com>
Date: Fri, Apr 28, 2023 at 11:57 AM
Subject: Question on original submission date - #ZP2022-0099
To: <klapira@cityofberkeley.info>, <isaiah@trachtenbegarch.com>

Dear Katrina Lapira,

Since the online records are inconsistent, I am writing to clarify the original submission date of #ZP2022-0099.

1. In accella, the initial fees paid date is listed as 7/22/2022.
2. In acella, the filename for the initial submission is "2022-07-22_APP_PCKT_1598 University.pdf". Dates within that PDF appear to either match or predate the 7/22/2022 date.
3. In your August 24, 2022 incompleteness letter, there is a statement that the application was "submitted on July 25, 2022."

Since the submission date is a critical date with legal significance, it is important that it be properly listed. As an example, if 7/22/2022 were the proper date, then the August 23, 2022 incompleteness letter would have been improper, as the project would have been deemed complete a few days prior.

Best,
David Kellogg

Communications

From: Elizabeth Kowal <kowalathome@msn.com>
Sent: Sunday, May 7, 2023 10:13 PM
To: Harrison, Kate; Lapira, Katrina
Cc: David Ushijima; Ching/Battles; Toni Mester; Steven F; John Dalrymple; Christopher Kroll
Subject: CONCERN ABOUT UPCOMING ZAB MEETING Re: 1598 University Ave.
Attachments: letter to DRC and Berkeley City Council 41123.docx; 6031-009 Agenda IV.2 1598 University DRC Comments.pdf; DRC 1598 University Apr. 20th 2023.pdf

WARNING: This is not a City of Berkeley email. Do not click links or attachments unless you trust the sender and know the content is safe.

Hello,

I'm very concerned about the upcoming ZAB meeting planned for May 11, 2023. I do not have experience working with this process and I'm not sure to whom I should be addressing these concerns. I'm hoping you can help me with these questions.

I did not think that the 1598 University Project Proposal would be brought up in front of the ZAB committee until there was follow through on the conditions and design recommendations brought forward by the Design Review Committee on April 20th, including setting up a meeting with neighbors regarding their strong concerns about privacy, shadowing, trees, step backs, safety, etc. Neighbors have not had the time to prepare for this meeting, when we thought this follow-up was coming first.

I especially do not understand how this project could be placed on a Consent Calendar when these serious concerns have not yet been addressed!

The 1598 proposed building project came up in front of the Design Review Committee on April 20th. Our neighborhood group had been meeting for the year prior and many of us attended the meeting and participated. Many other neighbors sent letters and comments. Letters were sent from members of other groups also, including the East Bay Residents for Responsible Development and members of the Berkeley Neighborhood Council.

A copy of our Change.Org Petition, "Let's Welcome New Neighbors Not New Towers" was also submitted. It is signed by 90 neighbors objecting to the project as it is being proposed. We included the name and email addresses of the signers and some of their comments.

Sign the Petition
change.org



I have emailed Anne Burns to make sure all of these letters have been included in the ZAB packet. I was told that the DRC is part of ZAB, and the materials would be included. Neighbors who wanted to address the ZAB committee directly have not had time to send in their comments.

Have the DNC recommendations been placed as conditions on the developer? How does this accountability work?

Thank you for your time and attention.

I look forward to hearing from you as soon as possible.

Sincerely,
Elizabeth Sharada Kowal

p.s.

Many serious concerns have been communicated by Berkeley residents, including the lack of inclusive affordable housing so that teachers and city workers can continue living in this historically diverse neighborhood; the lack of a city wide plan on the implementation of the density bonus, the inappropriateness of building this project at this important location, an established pedestrian and wheelchair hub and pathway to Ohlone Park, BART, NB Senior Center; the need for a review to make sure the project is in full compliance with CEQA, inadequate parking impacting nearby seniors and residents with disabilities, street safety concerns, privacy concerns for immediate neighbors, lack of objective standards to set policy protecting all Berkeley residents and specific design recommendations including building configuration changes to allow for more open space and benches for pedestrians en route to BART.

I'm including a few letters that were submitted to the DRC committee that I have available. Hopefully the others will be included also.

From E. Kowal:

From John Dalrymple:

David Ushijima
Neighborhood D4 Resident:

4/11/23

Dear Members of the City of Berkeley Design Review Committee and The Berkeley City Council
Comments concerning the proposed project at 1598 University which will be reviewed at the
DRC meeting on 4/20/23.

Overview:

Hundreds of neighbors have been speaking for over a year, and most of us share strong ideas about the proposed project at 1598 University Avenue. Our neighborhood petition opposing the current project design has 88 signatures.

Our neighbors want new, affordable, inclusive housing so that teachers and city workers can keep living here! This proposed project includes approximately 90% market rate apartments. **We don't want you to allow (and even encourage) developers to pay an in-lieu fee to avoid placing additional inclusive affordable housing here, in this location. We are fighting to preserve our historically diverse neighborhood. We want to welcome and enable working class families to continue to be members of our community. Most of our longer-term residents could not afford to move into the neighborhood today!**

We are disappointed that you have not done the work necessary to come up with the mandated objective standards that would determine reasonable shadowing limits for the immediate neighborhood.

Design Review Issues:

We are asking for neighborhood participation in creating a design that is pedestrian, bicycle, and wheelchair friendly. This location is already an important and established city-wide hub and pedestrian corridor connecting to the North Berkeley BART station, Ohlone Greenway, and the North Berkeley Senior Center. With much of the BART parking being converted to housing, we need a pedestrian-friendly cityscape more than ever. It is not safe to cross at University and Sacramento Streets with multiple turn lanes, trucks, and busses. The light at California Street is the only nearby safe crossing for children, seniors, and everyone else.

To encourage people to get out of their cars we need to have a welcoming cityscape with benches and shade to allow seniors, parents with small children and disabled community members to rest as needed. We don't want an ugly sheer wall narrowing and shadowing sidewalks. We are asking for more setbacks, open space, and trees for pedestrians and for neighboring homes directly abutted by this tall building.

Please stop the developer from decreasing the size of the original retail space plan. We need a practical retail area that is move-in ready to meet the needs of this quickly expanding community.

This building design will lead to a parking crisis for the many seniors and individuals with disabilities living nearby. 36 spaces for 245 bedrooms will not even cover the expected handicapped parking spaces needed. Even with new residents not qualifying for neighborhood parking passes, parking will be greatly impacted leading to hardship for some existing residents. We are asking you to move towards your goal of minimizing cars in Berkeley while also protecting vulnerable residents.

Summary of Requests:

- Affordable housing in the building, appropriate for working class families!
- Complete the required Objective Shadow-Study and publish city-wide objective policy and rules to inform construction design.
- Create a pedestrian safety and parking safety plan for the immediate neighborhood which includes a school, a church, and many senior residents with disabilities.
- Include an indoor loading and unloading dock so that trucks do not cause a dangerous double-parking problem.
- Change design to include open space and setbacks for pedestrians and residents. Consider eliminating the ineffective interior proposed courtyard designed just for residents and add open space to benefit the whole community in this important city-wide hub.
- Increase parking to accommodate seniors and residents with disabilities.
- Demand that the original sized, mandated retail space be move-in ready for an appropriate business such as a restaurant/café.
- Include neighborhood participation in tree selection, bird safe glass, position of any balconies, etc.

Thank you for your time and attention,
Elizabeth Sharada Kowal and Constantine Philipides, Addison Street
(Long term residents, small business owner and public-school parents)
kowalathome@msn.com

ADAMS BROADWELL JOSEPH & CARDOZO

KEVIN T. CARMICHAEL
CHRISTINA M. CARO
THOMAS A. ENSLOW
KELILAH D. FEDERMAN
RICHARD M. FRANCO
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Of Counsel

MARC D. JOSEPH
DANIEL L. CARDOZO

April 20, 2023

Via Email and Overnight Mail

Janet Tam, Chair

Kimberly Gaffney, Vice-Chair

Members Steve Finacom, Charles Kahn, Lillian Mitchell

Diana Pink, Cameron Woo

c/o Secretary of the Committee, Anne Burns

City of Berkeley Design Review Committee

1947 Center Street, 3rd Floor,

Berkeley, CA 94704

Email: aburns@cityofberkeley.info

Email Only

Jordan Klein, Director

Planning and Development Department

Email: jklein@cityofberkeley.info

Katrina Lapira, Associate Planner

Planning and Development Department

Email: klapira@cityofberkeley.info

**Re: Comments on Agenda Item IV.2 – Preliminary Design Review for
the 1598 University Mixed-Use Project (File No. DRCP2022-0008;
ZP2022-0099)**

Dear Chair Tam, Vice-Chair Gaffney, Mr. Finacom, Mr. Kahn, Ms. Mitchell, Ms. Pink, and Mr. Woo:

We are writing on behalf of East Bay Residents for Responsible Development (“East Bay Residents” or “EBRRD”) to provide comments on the 1598 University Mixed-Use Project (File No. DRCP2022-0008; ZP2022-0099) proposed by 1598 University Avenue, LLC/NX Ventures (“Applicant”). The City of Berkeley (“City”) Design Review Committee (“DRC”) will conduct Preliminary Design Review of the Project at the April 20, 2023 DRC meeting.

The Project consists of the demolition of an existing non-residential structure and construction of a 134,409 square-foot, eight-story mixed-use residential building containing 207 dwelling units (including 21 very low-income units) and 5,787 square foot commercial space, with 39 parking spaces and 92 bicycle parking spaces. The Project is seeking a 50% Density Bonus by providing 15% of the base

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project units as affordable to very-low income households. The Project site is located at 1598 University Ave., Berkeley, CA 94703 (APN 056 200300100).

The Project seeks the several Use Permits:

- Use Permit to demolish two non-residential buildings, under Berkeley Municipal Code (BMC) Section 23.326.070
- Use Permit to establish a mixed-use residential building, under BMC Section 23.204.020
- Use Permit to create 5,000 square feet of new floor area in the University Commercial District, under BMC Section 23.204.030(A)
- Use Permit to establish residential uses on the ground floor, under BMC 23.204.060(B)(3)
- Administrative Use Permit for projections that exceed the maximum building height limit, under 23.304.050(A)

The DRC meeting staff report includes a recommendation that the Zoning Adjustments Board find the project categorically exempt from the provisions of CEQA¹ pursuant to Section 15332 of the CEQA Guidelines (“Infill Development Project”).² As discussed herein, the City cannot find the Project exempt from CEQA due to the Project’s potentially significant impacts of air quality, noise, traffic, and public health. Since the City has not released any analysis on the Project’s environmental impacts, the staff recommendation that the Project is exempt from CEQA is not supported by substantial evidence. Rather, the Project’s substantial size, 24-month construction period, and its proximity to sensitive receptors indicate that the Project’s impacts may be potentially significant. As a result, an environmental impact report (“EIR”) must be prepared to adequately analyze and mitigate these impacts.

Further, the Project’s design is inconsistent with the neighborhood context due to its massing and lack of adequate parking. The Project is also inconsistent with the City’s affordable housing and workforce goals. EBRRD respectfully requests that the DRC not recommend approval of the Project until these flaws have been resolved.

¹ Public Resources Code § 21000 et seq., and California Code of Regulations, Section 15000, et seq.

² Staff Report, pg. 8, available at https://berkeleyca.gov/sites/default/files/documents/2023-04-20_DRC_Item%20IV.2_1598%20University.pdf.

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I. STATEMENT OF INTEREST

East Bay Residents for Responsible Development is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential impacts associated with Project development. The association includes the UA Plumbers and Pipefitters Local 342, International Brotherhood of Electrical Workers Local 595, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, their members and families, and City and Alameda County residents.

The individual members of East Bay Residents live, work, and raise their families in the City of Berkeley and Alameda County. They would be directly affected by the Project and its impacts. The organizational members of Residents also have an interest in enforcing public interest, health and safety, labor and environmental laws that encourage sustainable development and ensure a safe working environment for its members. Residents' members are also concerned about projects that are built without providing opportunities to improve local recruitment, apprenticeship training, and retention of skilled workforces, and without providing lifesaving healthcare expenditures for the construction workforce.

II. THE CITY MUST COMPLY WITH CEQA

The staff report includes a recommendation that the Zoning Adjustments Board ("ZAB") find the Project categorically exempt from the provisions of CEQA³ pursuant to Section 15332 of the CEQA Guidelines ("Infill Development Project").⁴ East Bay Residents requests and urges the City to comply with CEQA by preparing an environmental impact report ("EIR") for the Project.

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an EIR, except in certain limited circumstances.⁵ The EIR is the very heart of CEQA.⁶ "The foremost principle in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."⁷

³ Public Resources Code § 21000 et seq., and California Code of Regulations, Section 15000, et seq.

⁴ Staff Report, pg. 8, available at https://berkeleyca.gov/sites/default/files/documents/2023-04-20_DRC_Item%20IV.2_1598%20University.pdf.

⁵ See, e.g., PRC § 21100.

⁶ *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.

⁷ *Communities. for a Better Env. v. Cal. Res. Agency* (2002) 103 Cal. App.4th 98, 109 ("CBE v. CRA"). 6031-009

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CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.⁸ “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR ‘protects not only the environment but also informed self-government.’”⁹ The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”¹⁰

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation measures.¹¹ The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.”¹² If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.”¹³

Under CEQA, mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments.¹⁴ A CEQA lead agency is precluded from making the required CEQA findings to approve a project unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved. For this reason, an agency may not rely on mitigation measures of uncertain efficacy or feasibility.¹⁵ This approach helps “ensure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.”¹⁶

⁸ 14 Cal. Code Regs. § 15002(a)(1).

⁹ *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.

¹⁰ *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal. App. 4th 1344, 1354 (“*Berkeley Jets*”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

¹¹ 14 CCR § 15002(a)(2) and (3); see also *Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at pg. 564.

¹² 14 Cal. Code Regs. §15002(a)(2).

¹³ PRC § 21081; 14 CCR § 15092(b)(2)(A) & (B).

¹⁴ CEQA Guidelines, § 15126.4, subd. (a)(2).

¹⁵ *Kings County Farm Bureau v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).

¹⁶ *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935. 6031-009

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CEQA identifies certain classes of projects which are exempt from the provisions of CEQA, called categorical exemptions.¹⁷ Categorical exemptions apply to certain narrow classes of activities that generally do not have a significant effect on the environment.¹⁸ “Thus an agency’s finding that a particular proposed project comes within one of the exempt classes necessarily includes an implied finding that the project has no significant effect on the environment.”¹⁹ “It follows that where there is any reasonable possibility that a project or activity may have a significant effect on the environment, an exemption would be improper.”²⁰

CEQA exemptions must be narrowly construed and are not to be expanded beyond the scope of their plain language.²¹ They should not be construed so broadly as to include classes of projects that do not normally satisfy the requirements for a categorical exemption.²² Erroneous reliance by a lead agency on a categorical exemption constitutes a prejudicial abuse of discretion and a violation of CEQA.²³ “[I]f the court perceives there was substantial evidence that the project might have an adverse impact, but the agency failed to secure preparation of an EIR, the agency’s action must be set aside because the agency abused its discretion by failing to follow the law.”²⁴

To qualify for a categorical exemption, a lead agency must provide “substantial evidence to support [its] finding that the Project will not have a significant effect.”²⁵ “Substantial evidence” means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency.²⁶ If a court locates substantial evidence in the record to support the

¹⁷ PRC § 21084(a); 14 CCR §§ 15300, 15354.

¹⁸ PRC § 21084(a); 14 CCR §§ 15300, 15354; *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 380.

¹⁹ *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115.

²⁰ *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1191 (“*Azusa Land Reclamation*”), quoting *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 205–206.

²¹ *Castaic Lake Water Agency v. City of Santa Clarita* (1995) 41 Cal.App.4th 1257.

²² *Azusa Land Reclamation* (1997) 52 Cal.App.4th 1165, 1192.

²³ *Azusa*, 52 Cal.App.4th at 1192.

²⁴ *Dunn-Edwards Corp. v. Bay Area Air Quality Mgmt. Dist.* (1992) 9 Cal.App.4th 644, 656).

²⁵ *Banker’s Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 269.

²⁶ CEQA Guidelines § 15384.

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agency's conclusion, the agency's decision will be upheld.²⁷ If, however, the record lacks substantial evidence, as here, a reviewing court will not uphold an exemption determination.

Section 15332 of the CEQA Guidelines provides an exemption from CEQA for projects characterized as in-fill development meeting the conditions:

- (a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.
- (b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.
- (c) The project site has no value as habitat for endangered, rare or threatened species.
- (d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.
- (e) The site can be adequately served by all required utilities and public services.

CEQA also contains several exceptions to categorical exemptions. In particular, a categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to "unusual circumstances,"²⁸ or where there is a reasonable possibility that the activity will have a significant effect on the environment, including (1) when "the cumulative impact of successive projects of the same type in the same place, over time is significant."²⁹ An agency may not rely on a categorical exemption if to do so would require the imposition of mitigation measures to reduce potentially significant effects.³⁰

Here, the City has presented no evidence supporting its assumption that a Class 32 Exemption or any other CEQA exemption are inapplicable to the Project. Moreover, the Project's size and scope indicate that the Project may have potentially significant effects on air quality, health risk, traffic, and noise – impacts which disqualify the Project from a Class 32 exemption.³¹

²⁷ *Bankers Hill Hillcrest*, 139 Cal.App.4th at 269.

²⁸ 14 CCR § 15300.2(c).

²⁹ 14 CCR § 15300.2(b).

³⁰ *Salmon Pro. & Watershed Network v. County of Marin* ("SPAWN") (2004) 125 Cal.App.4th 1098, 1198-1201.

³¹ The Project's potentially significant effects also create exceptions to an exemption under 14 CCR § 15300.2(b), (c).

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A. Health Risk

The City lacks substantial evidence to support its reliance on an exemption without analyzing the health risk impacts of Project construction and operation to workers and nearby sensitive receptors.

CEQA requires analysis of human health impacts. CEQA Guidelines Section 15065(a)(4) provides that the City is required to find a project will have a significant impact on the environment and require an EIR if the environmental effects of a project will cause a substantial adverse effect on human beings.³² The Supreme Court has also explained that CEQA requires the lead agency to disclose the health consequences that result from exposure to a project's air emissions.³³

The Project's construction would likely increase health risks in the surrounding community by contributing Toxic Air Contaminants ("TACs") such as Diesel Particulate Matter ("DPM") during construction.³⁴ During the Project's construction, heavy equipment and diesel trucks would emit DPM, and during operations, a backup generator, if proposed, would emit DPM. DPM has been linked to a range of serious health problems including an increase in respiratory disease, lung damage, cancer, and premature death.³⁵ The Project's emissions of DPM would impact numerous sensitive receptors, including residents in residential buildings located adjacent to the Project site.

For development projects like this one, the Office of Environmental Health Hazard Assessment's ("OEHHA") risk assessment guidelines recommend a formal health risk analysis ("HRA") for short-term construction exposures to TACs lasting longer than 2 months and exposures from projects lasting more than 6 months should be evaluated for the duration of the project.³⁶ In an HRA, lead agencies must first quantify the concentration released into the environment at each of the sensitive receptor locations through air dispersion modeling, calculate the dose of each TAC at that location, and quantify the cancer risk and hazard index for each of

³² 14 CCR § 15065(a)(4); PRC § 21083(b)(3), (d).

³³ *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 516, 523.

³⁴ 39655 of the California Health and Safety Code; California Air Resources Board, <https://ww2.arb.ca.gov/resources/overview-diesel-exhaust-and-health>.

³⁵ California Air Resources Board, <https://ww2.arb.ca.gov/resources/overview-diesel-exhaust-and-health>.

³⁶ Office of Environmental Health Hazard Assessment (OEHHA), Risk Assessment Guidelines: Guidance Manual for Preparation of Health Risk Assessments, February 2015 (OEHHA 2015), Section 8.2.10: Cancer Risk Evaluation of Short Term Projects, pp. 8-17/18; <https://oehha.ca.gov/air/crnrr/notice-adoption-air-toxics-hot-spots-program-guidance-manual-preparation-health-risk-0>.

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the chemicals of concern.³⁷ Following that analysis, then the City can make a determination of the relative significance of the emissions.

Here, the Project is located in close proximity to residential receptors, and construction is expected to last for 24 months. Without the requisite analysis of the Project's health risk impacts, a finding that impacts would be less-than-significant and that the Project is exempt from CEQA would not be supported by substantial evidence.

B. Noise

Regarding noise, the Project's construction and operation may generate noise impacts that exceed applicable significance thresholds, making a CEQA exemption inapplicable. Further, the Project includes several sources of potential sleep-disturbing operational noise sources, including mechanical equipment, open space areas, balconies, and roadway traffic noise. Noise from these sources would likely have an acute impact on the sensitive residential receptors located adjacent to the Project site. Without analysis of noise from the Project's construction and proposed operations, the City lacks substantial evidence to find the Project exempt.

In sum, since the City has not prepared analysis on the Project's environmental impacts, the staff recommendation that the Project is exempt from CEQA is not supported by substantial evidence. Rather, the scale of development proposed by the Project and its proximity to sensitive receptors indicate that the Project's impacts are potentially significant. As a result, an EIR must be prepared to adequately analyze and mitigate these impacts.

III. THE PROJECT IS INCONSISTENT WITH THE NEIGHBORHOOD CONTEXT

The DRC staff report states that the DRC will consider the Project in the "neighborhood context."³⁸ The Project proposes a 134,409 square-foot, eight-story mixed-use residential building in a neighborhood containing 1-3 story residential and commercial structures. Despite being located adjacent to 1-3 story residential buildings, the Project's design fails to include any step-backs on its north, west, and east sides.

³⁷ *Id.*

³⁸ Staff report, pg. 6.
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The Project design also fails to include adequate parking facilities. The Project proposes 207 dwelling units and a 5,787 square foot commercial space, but the current design only provides 39 parking spaces (27 residential, 12 commercial) and 92 bicycle parking spaces. This design will leave many residents without parking, and lead them to seek street parking in the neighborhood. This impact will unduly burden parking supply in the neighborhood.

Per Berkeley Municipal Code Section 23.204.060(E), to approve a use permit for a project in the C-U district, the review authority must find that the proposed use or structure “[d]oes not exceed the amount and intensity of use that can be served by the available traffic capacity and potential parking supply.” This provision indicates that compatibility with the neighborhood’s parking supply is essential for a project to be consistent in the neighborhood context. Since the Project’s current design would only provide parking for a small percentage of its residents, the design is incompatible with the neighborhood. Thus, the Design Review Committee should not recommend approval of the Project’s design to the Zoning Adjustments Board.

IV. THE PROJECT IS INCONSISTENT WITH THE CITY’S HOUSING ELEMENT

The Project proposes to construct an eight-story residential building containing 207 dwelling units (21 Very Low-Income unit).³⁹ The Project is seeking a 50% Density Bonus by providing 15% of the base project units as affordable to very low-income households. More affordable units must be provided for the Project to be consistent with the City’s Housing Element and state law.

The Regional Housing Needs Assessment is the California State-required process that seeks to ensure cities and counties plan for enough housing in their Housing Element cycle to accommodate all economic segments of the community.⁴⁰ Accordingly, the Housing Element of the City’s General Plan identifies the City’s housing conditions and needs, evaluates the City’s ability to meet its Regional Housing Needs Allocation (“RHNA”), establishes the goals, objectives, and policies of the City’s housing strategy, and provides an array of programs to create mixed-income neighborhoods across the City.⁴¹ The Housing Element, which was amended

³⁹ https://berkeleyca.gov/sites/default/files/documents/2023-03-16_DRC_Item%20VII.1_1598%20University_SB330%20Project%20Plans.pdf

⁴⁰ Cal. Gov. Code Section 65580 – 65589.9; see City of Berkeley, Adopted 2023-2031 Housing Element, available at https://berkeleyca.gov/sites/default/files/documents/Berkeley_2023-2031%20Housing%20Element_02-17-2023v2_0.pdf.

⁴¹ *Id.*

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on February 17, 2023, states that “the City has a remaining RHNA of 5,033 units (1,923 very low income; 852 low income; 1,227 moderate income; and 1,031 above moderate income units)... The City must identify adequate site capacity for this remaining RHNA.”⁴² Accordingly, Policy H-1 – Extremely Low, Very Low, Low and Moderate-Income Housing – provides: “Increase the number of housing units affordable to Berkeley residents with lower income levels.”⁴³ Because the City has not produced and is not expected to produce enough affordable housing to meet its RHNA, projects that do not contribute to the City’s RHNA are inconsistent with the City’s Housing Element, a primary goal of which is to meet the RHNA.

Berkeley Municipal Code Section 23.328.010 provides that residential housing projects constructing five or more dwelling units must include at least 20 percent of the total number of dwelling units within the project as inclusionary units. As an alternative to providing inclusionary units required in an ownership project, the applicant may elect to enter in an agreement with the City to pay fees in-lieu of providing below-market rate units.⁴⁴

Here, the Project fails to provide the recommended 20% affordable units. Although the Project will likely have to pay an in-lieu fee, the Project would not be consistent with the Housing Element because it places the burden on the City to identify adequate sites to construct affordable housing, and the record lacks evidence demonstrating that the City will utilize the in lieu fee to supply the Project’s allocated affordable units in the timeframe necessary to meet its RHNA.⁴⁵

A. THE PROJECT IS INCONSISTENT WITH GENERAL PLAN WORKFORCE GOALS AND MAY BE DETRIMENTAL TO THE GENERAL WELFARE OF THE CITY, RESIDENTS, AND WORKERS

The Berkeley General Plan’s Economic Development and Employment Element includes a number of policies and actions that are intended to support job training, a local workforce, increase social and economic equity, and gather economic and demographic information pertaining to the Berkeley economy.⁴⁶

⁴² *Id.* at 107.

⁴³ *Id.* at 15.

⁴⁴ Effective July 1, 2022, the fee is set at follows: Paid at Certificate of Occupancy: \$46,185 per rental unit; or Paid at building permit: \$43,185 per rental unit.

⁴⁵ *Id.* at 107.

⁴⁶ Berkeley General Plan Economic Development and Employment Element, GP Policies ED-1, ED-5, ED-12.

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The record lacks evidence demonstrating that the Project Applicant has made a commitment to build the Project using a local skilled and trained workforce, to provide apprenticeship training opportunities, or to provide healthcare for its construction workforce. These shortcomings render the Project inconsistent with Berkeley's General Plan policies and goals which seek to ensure that Berkeley has an adequate supply of decent housing and living wage jobs. Unless these inconsistencies are mitigated,⁴⁷ Project construction would be detrimental to the general welfare of the City, its residents, and its workers, in violation of the City's zoning code.⁴⁸

The Berkeley General Plan Economic Development and Employment Element provides that it is the Policy (ED-1) of the City to "Increase the number of jobs that go to Berkeley citizens by coordinating economic development efforts with employment placement."⁴⁹ Further, the General Plan provides that the City intends to "[w]ork with job training programs and encourage training for life skills, job readiness, and specific target industries."⁵⁰

Additionally, housing development projects in the City must implement the goals and policies of the General Plan, including promoting:

- 1) Availability of basic goods and services that are affordable to local residents.
- 2) Employment for local residents at living wages.⁵¹

Policy ED-1 (Employment and Training) provides that it is the Policy of the City to "**Increase the number of jobs that go to Berkeley citizens by coordinating economic development efforts with employment placement** through the following actions:

A. Work with job training programs and encourage training for life skills, job readiness, and specific target industries, including industrial companies in West Berkeley.

⁴⁷ Gov. Code § 65905.5. (a).

⁴⁸ BMC §§ 23.406.040(E)(1); 22.20.020.

⁴⁹ Berkeley General Plan Economic Development and Employment Element, pg. ED-5. Available at: https://berkeleyca.gov/sites/default/files/documents/12_Economic%20Development%20and%20Employment%20Element-FINAL.pdf.

⁵⁰ *Id.*

⁵¹ *Id.* at Policy ED-4, p. ED-7.

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B. Provide labor market information from data sources and industry sectors to local educational institutions and training agencies for adults and youths.

C. Coordinate City employment and job training programs with the University of California, Vista College, and other local educational institutions.

D. Encourage the University to hire Berkeley residents.

E. Encourage the Berkeley Unified School District to provide education and job skills appropriate to jobs in Berkeley and the region.

F. Create a collaborative process among the City, employers, and local disability/minority organizations to provide access to economic and artistic opportunities and development services for all people through education, technical assistance, and economic incentives.

G. Develop and implement employment programs to assist citizens with temporary and permanent employment.

H. Establish agreements with major employers to provide job training for Berkeley youth similar to the Bayer biotech agreements.

I. Strengthen and improve the administration and performance of the First Source Program, and establish better links between the First Source Program and the Office of Economic Development.

J. Consider development of an ordinance that requires that a percentage of Berkeley residents be hired for publicly funded construction jobs.⁵²

The Berkeley General Plan Economic Development and Employment Element Objectives provides the following City development objectives:

- 1. Provide a variety of jobs with varied skill levels for residents of Berkeley.**
2. Promote community and neighborhood values.
3. Support businesses that are independent, locally owned, and neighborhood-serving.
- 4. Encourage environmentally sustainable business.**
- 5. Promote revitalization in neighborhoods and communities that have historically higher-than-average rates of unemployment.**
- 6. Promote a strong industrial base as a vital foundation of a stable economy.**
- 7. Increase social and economic equity in land use decisions.**

⁵² Berkeley General Plan Economic Development and Employment Element, Policy ED-1, pg. ED-5 (emphasis added).
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8. Support culture and the arts in Berkeley.
9. Promote general retail businesses and a variety of cultural, recreational, entertainment, and public sector activities in the Downtown to ensure that the Downtown will remain a vital, attractive, and unifying center for the city.⁵³

Policy ED-12 (Promoting Berkeley) requires the City to promote Berkeley as a location for appropriate business, visitor, and conference destination through specific actions, including “[d]evelop, maintain, and distribute economic and demographic information pertaining to the Berkeley economy.”⁵⁴

Insofar as the Project does not include any commitment to provide construction jobs to local Berkeley or East Bay residents and does not contribute to any apprenticeship or other construction job training programs, or healthcare expenditures, the Project fails to demonstrate consistency with these General Plan policies. Providing a local skilled and trained workforce would implement the policies laid out in the General Plan Economic Development and Employment Element, which the City enacted to promote the general welfare.

V. CONCLUSION

The design of this Project is inconsistent with the neighborhood due to its massing and inadequate parking. The Project must also be approved in full compliance with CEQA, which is necessary to inform the public about the Project’s effects on the environment, and to eliminate or substantially lessen all significant effects on the environment where feasible. To adequately analyze and mitigate this Project’s potentially significant environmental impacts, the City should require an EIR to be prepared for this Project. Without providing local construction workforce standards, the Project is also inconsistent with workforce goals of the General Plan’s Economic Element, and is contrary to the general welfare.

This Project should not be recommended for approval until the City is presented with substantial evidence demonstrating that the Project will comply with CEQA, the zoning ordinance and General Plan.

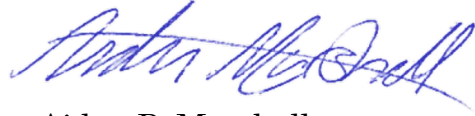
Thank you for considering our comments. Please place this comment letter in the record of proceedings for this matter.

⁵³ Berkeley General Plan Economic Development and Employment Element, Element Objectives, pg. ED-5 (emphasis added).

⁵⁴*Id.* at Policy ED-12(C), pg. ED-10.
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Sincerely,



Aidan P. Marshall

To: City of Berkeley, Design Review Committee
Cc: Councilmember Kate Harrison, Mayor Arreguin, University Business Association
From: David Ushijima
Date: April 11, 2023

Re: Apr. 20th, DRC review of 1598 University Ave. project

The intersection of University and California Avenues is a key node along the major Western entrance to the city as identified in the University Ave. Strategic Plan.¹ That plan, which was adopted by Council in 1997, was extensively developed with merchants and residents over several years. It emphasized the need **to focus efforts on activating the key commercial nodes along University Ave, a corridor that has long suffered from lack of planning oversight and neglect.**

I urge the DRC members to **treat the review of 1598 University as a once-in-a-generation opportunity to improve what can be a vital mid-University Ave. corridor.** Currently the project as submitted requires multiple improvements in the ground floor design in order to improve the quality of life not only in this mid-University Ave. community but along the major corridor leading to the Downtown district and UC Berkeley.

The five blocks along this stretch of University (beginning at the entrance to the Santa Fe/Ohlone pedestrian and bicycle path near Acton St., and proceeding East on University through the Sacramento St. intersection and then through the intersections at California St. and McGee Streets) currently are experiencing some of the highest retail vacancy rates in the city. (12.8% in 2022)².

With the development of North Berkeley BART station and other new developments coming online, **the city's planners have a once-in-a-generation opportunity to influence new project designs and activate the key commercial nodes along this corridor in order to improve both the commercial and the neighborhood environments along University Ave. for generations to come.**

The proposed project is also critically located on the most important bicycle and pedestrian pathway connecting the Western Downtown residential communities south of University and east of Sacramento St. to the Ohlone Greenway and the North Berkeley BART station. The entire East side side of the project will front the major bicycle boulevard (California St.) that is a key part of Berkeley's Bicycle/Pedestrian plan³. The California St. Bicycle Boulevard also is a

¹ University Ave. Strategic Plan:

<https://berkeleyca.gov/your-government/our-work/adopted-plans/university-avenue-strategic-plan>

² <https://www.berkeleylive.org/2023/04/07/shop-talk-barberella-inspired-hair-salon-has-moved>

³ <https://berkeleyca.gov/your-government/our-work/adopted-plans/berkeley-bicycle-plan> ;

key part of BART's North Berkeley BART Access Plan and the Berkeley-El Cerrito Corridor Access Plan⁴. As such **the streetscape along the California side of the project should be made more amenable to both pedestrian and bicycle travelers.**

While this project is being portrayed by the developers and architects as encouraging community engagement and enriching the streetscape, in actuality, in terms of street level project design, it falls far short of that goal.

I urge the DRC members to require ground-level improvements to the proposed design which will improve, activate, and enhance the surrounding streetscape, community, and key commercial node located near the corner of University Ave. and California Street. The building's ground floor design should be revised to be more welcoming and accommodating to both pedestrian foot traffic and bicycle and other multi-modal forms of transportation.

In looking at the proposed plans as submitted to the DRC, I urge the DRC to consider the following improvements:

- **The public art that is portrayed on the East-facing wall** (Dwg. A0.0, A 3.1) **needs to be re-thought**. It was not selected with any input from the residential and retail community. None of the nearly 100 signees of the 1598 University Ave. neighborhood petition likes the artwork that is illustrated in the drawings.
- **The narrow "on-site public plaza area"** shown along the north-east side of the building in the Ground Level Floor Plan (Dwg. A.1), **should be widened and extended**. It is far too narrow to benefit passing pedestrians. If possible, the sidewalk along this side should be widened to encourage pedestrian patronage of the proposed retail businesses. Also a **loading zone that has been positioned to block the northeast corner of that plaza area should be moved**, as it will discourage any casual gathering of neighbors and community members at that key corner of the building.
- **While the ground-level columns on the East and North sides of the building are shown covered with ivy or other vine-like plant growth to enhance the green appearance of the street-level façade** (Dwg. A 0.0, A 3.9, Dwg MAT), **the Landscape Site Plan (Dwg. L 2.0) or the plant list does not include the requirement for vine-like plants**. The vine-like plants should be a requirement.
- Both the California St. and University Ave. ground level frontages are shown as having tenant-supplied movable **tables and chairs for seating** (Conceptual Rendering Dwg. A 3.9). To avoid having streetside seating being solely dependant on securing a restaurant

⁴ www.bart.gov/beccap

tenant for the retail space, **permanent built-in bench seating should be built along the street frontage** similar to that used in the interior courtyard. While extensive attention is paid to the interior courtyard for residents, **equal attention should be given to the streetscape seating which will affect the entire community.**

- **The street trees along the University Ave.** frontage of the building which are labeled on the Ground Level Floor Plan *“to be determined by survey, city forester, and project landscape architect”* (Dwg. A 2.1) need to be specifically **selected to create a rich, green streetscape environment friendly to pedestrians and bicyclists.**
- **The existing trees that are illustrated on the East elevation** (Dwgs. A3.1, A3.8, A3.9) and the **North elevation** (Dwg. A3.2) **are not adequate to provide shade or attractive greenery** to the pedestrians and bicyclists traveling along California St. or University. The Landscape Site Plan (Dwg. L 2.0) calls for the “existing Crepe Myrtles” on California St. to be protected. However those trees are deciduous and do not provide a rich, green streetscape all year round, nor do they provide shade or shelter to pedestrians along the sidewalk. They should be replaced with taller, fuller evergreen perennial trees that provide a much richer, more welcoming streetscape environment.

5/8/23, 3:56 PM

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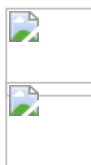
Let's Welcome New Neighbors, Not New Towers!

88 have signed. Let's get to 100!

At 100 signatures, this petition is more likely to be **featured in recommendations!**

At 100 signatures, this petition is more likely to be **featured in recommendations!**

Recent signers



Barbara Loften signed this petition



laurel hunter signed this petition

Take the next step!

5/8/23, 3:56 PM

Petition · Let's Welcome New Neighbors, Not New Towers! · Change.org



Say NO to a 210-Unit Tower at 1598 University; tell the City we don't want 8-story buildings lining University Avenue, overwhelming neighborhoods!

A private developer—already applying for permits to build more Towers abutting Berkeley neighborhoods—has asked the City to approve an 8-story, 210-unit tower on the SW corner of University and California. **Let's put the needs of neighborhoods first, not the needs of developers!**

The building would be much taller than anything in this part of the city:



Numbers are building over 3 stories: Green are existing, Red is this proposed one.

Parking Crisis: Only 36 spaces provided for 245 bedrooms!! A major hardship for seniors and neighbors with disabilities. This will have a severe impact on the neighborhood! A traffic safety concern for neighbors, nearby churches and schools, and kids playing in the street.

Unfair Shadowing: This building will block sunlight on surrounding homes, yards, and solar panels for hours daily. **Tell the City Council to agree on objective shadowing standards that would give neighborhoods a voice on new state mandates!** Councilmembers are willfully avoiding this; tell them our vote depends on it! Sunlight is crucial for healthy living things.

Lack of Affordable Housing: 90% of units will be high-priced market-rate! We don't need another Tower, what we need is more affordable housing to protect and re-build the diversity of our historic neighborhood and meet the needs of current and new residents!

Who to contact, NOW—don't wait, comments needed ASAP!

Contact Katrina Lapira in the City Planning Department: KLapira@cityofberkeley.info , 510-981-7488, 1947 Center Street, 2nd Floor, Berkeley, CA 94704

Contact Councilmember Kate Harrison: KHarrison@cityofberkeley.info

Ask that "1598 University Avenue" be redesigned to preserve solar access and neighborhood life.

Mailing list for organizing opposition to this building: To subscribe, if you have a Google account, go to <https://groups.google.com/d/forum/1598universitytower> and click on "Ask to join group". (If you're not offered "Ask to join group" but are offered "For access, try logging in" click that to log in to Google, after which you should see "Ask to join group"). If you want to subscribe but also want to not have a Google account (which means you will receive emails but won't be able to use the Web interface to the 1598universitytower forum), please send an email to 1598universitytower+managers@googlegroups.com with a Subject Line like "1598universitytower Subscribe Request" from the email address you wish to subscribe.

Take the next step!

Name	City	State	Postal Code	Country	Signed On
California Street at University Avenue Neighbors				US	2022-07-29
Mark Van Valkenburgh	Berkeley	CA	94703	US	2022-08-06
Judy Caldeira	Elk Grove	CA	95624	US	2022-08-06
Bill Kristy	Berkeley	CA	94703	US	2022-08-07
Kevis Goodman	Berkeley	CA	94703	US	2022-08-09
M.E. Lawrence	Berkeley	CA	94710	US	2022-08-10
Nancy Richerson	Berkeley	CA	94702	US	2022-08-13
Mahalakshmi Parameswaran	BERKELEY	CA	94703	US	2022-08-13
Bentley Drake	Gualala	CA	95445	US	2022-08-13
Keshav Lincoln	Annapolis		21401	US	2022-08-13
Shelbi Lane	Dallas		75270	US	2022-08-14
Sydni Cutburth	Belton		64012	US	2022-08-14
Lillian Holtgrave	Springfield		62702	US	2022-08-14
Demontez Stimage	Hammond		70401	US	2022-08-14
Thomas Wood	Berkeley	CA	94703	US	2022-08-14
Ruth Dart	Berkeley	CA	94703	US	2022-08-14
Lucia Rodriguez	Berkeley	CA	94703	US	2022-08-15
Laura Brainard	Inverness	CA	94937	US	2022-08-21
ed valenzuela	Berkeley	CA	94702	US	2022-08-26
Roberto Miranda	Berkeley	CA	94703	US	2022-08-26
Kiki Calenzuela	Berkeley	CA	94703	US	2022-08-26
Mary Richerson	Berkeley	CA	94702	US	2022-08-26
kathleen richerson	Alameda	CA	94501	US	2022-08-27

David Ushijima	Berkeley	CA	94703	US	2022-08-27
Barbara Shayesteh	Berkeley	CA	94702	US	2022-08-27
Elizabeth Arenas	Berkeley	CA	94707	US	2022-08-27
Cheryl Chinn	Berkeley	CA	94702	US	2022-08-28
Wanie Biggs	Berkeley	CA	94702	US	2022-08-28
Linda Banks	Bellmawr		8031	US	2022-08-28
Adam Kaluba	Burleson		76028	US	2022-08-28
Laurie Rolfe	Berkeley	CA	94703	US	2022-09-08
Daisy White	Michigan City		46360	US	2022-09-08
anet Daniel				US	2022-09-08
Kalvin Yuwen				US	2022-09-08
Alejandro Beltran	Lubbock		79414	US	2022-09-08
Tobie Lurie	Berkeley	CA	94702	US	2022-10-14
Charlene Woodcock	Berkeley	CA	94709	US	2022-10-14
Harvey Smith	Berkeley	CA	94703	US	2022-10-14
Marcia Poole	Berkeley	CA	94703	US	2022-10-14
Isabelle Gaston	Berkeley	CA	94707	US	2022-10-14
Barbara Fisher	Berkeley	CA	94702	US	2022-10-14
Art Goldberg	Carmel-by-the-Sea	CA	93923	US	2022-10-14
Larisa Cummings	Berkeley	CA	94703	US	2022-10-21
Aurora Maramag	Berkeley	CA	94703	US	2022-10-29
Margaret Fauchier	Berkeley	CA	94703	US	2022-10-29
Elizabeth Kowal	Berkeley	CA	94703	US	2022-11-01
Jose Ramirez	Berkeley	CA	94703	US	2022-11-02

Jeanette Badal	Berkeley	CA	94703	US	2022-11-04
Zhen Yang	Berkeley	CA	94703	US	2022-11-05
Cymbre Potter	Berkeley	CA	94702	US	2022-11-14
John Ruiz	Berkeley	CA	94702	US	2022-11-14
Serina Garst	Berkeley	CA	94703	US	2022-11-16
Erica Garcia	Lancaster		93535	US	2022-11-16
Trista Thomas	Lexington		60629	US	2022-11-16
Summer Brenner	Berkeley	CA	94703	US	2022-11-16
Anne-Lise Francois	Berkeley	CA	94703	US	2022-11-16
lynn adler	Berkeley	CA	94708	US	2022-11-16
Susan Moon	Berkeley	CA	94707	US	2022-11-16
M.I. Lawrence-Smail	Berkeley	CA	94703	US	2022-11-16
Michael Weber	Berkeley	CA	94703	US	2022-11-16
nora shourd	berkeley	CA	94703	US	2022-11-16
Marilyn Mulford	Berkeley	CA	94703	US	2022-11-16
Melissa Riley	berkeley	CA	94703	US	2022-11-17
Ivan Avila	Modesto		95354	US	2022-11-17
Lois Yuen	Berkeley	CA	94707	US	2022-11-17
Julian Amado	Berkeley	CA	94703	US	2022-11-17
Deon Jackson	Ta		33603	US	2022-11-17
Taha Saffarniya	Dallas		75270	US	2022-11-17
Rick Adams	Cincinnati		45211	US	2022-11-17
Steven M	Brandon		39047	US	2022-11-17
Aidan VanDuyne	Channahon		60410	US	2022-11-17

Alana Shindler	Berkeley	CA	94705	US	2022-11-17
Shirley Carrie Brewin	Berkeley	CA	94704	US	2022-11-17
Antonia Langenhoff	Berkeley	CA	94703	US	2022-11-18
Nicholas Phelps	Berkeley	CA	94702	US	2022-11-20
Ariel H	California	CA	94702	US	2022-11-21
James Whitta	Berkeley	CA	94703	US	2022-11-23
Richard Graham	Berkeley	CA	94707	US	2022-12-09
Gregory Williams	Memphis		38126	US	2022-12-09
Soo Hey	Clifton		7014	US	2022-12-09
Ryan Thacker	Beckley		25801	US	2022-12-09
Foresha Benton	Rochester		14610	US	2022-12-09
Michal Elnadav	Brooklyn		11230	US	2023-02-05
G. Diane Matthews-Marcelin	Carson		90746	US	2023-03-14
laurel hunter	san francisco	CA	94111	US	2023-04-05
Barbara Loften	Berkeley	CA	94703	US	2023-04-05
Nina Fairles	Berkeley	CA	94707	US	2023-04-05
Susan Korbel	Berkeley	CA	94703	US	2023-04-06

