



Office of the City Manager

CONSENT CALENDAR  
December 15, 2020

To: Honorable Mayor and Members of the City Council  
From: Dee Williams-Ridley, City Manager  
Submitted by: Farimah Brown, City Attorney  
Subject: *1444 Fifth Street, LLC v. City of Berkeley*, Case No. RG19032434

RECOMMENDATION

Adopt a Resolution approving the settlement of the action entitled *1444 Fifth Street, LLC v. City of Berkeley*, Case No. RG19032434.

FISCAL IMPACTS OF RECOMMENDATION

The settlement will require a payment of \$250,000 in attorneys' fees to the petitioners, who prevailed in the trial court, and is anticipated to result in payments into the City Housing Trust Fund in the amount of \$150,000.

BACKGROUND

This lawsuit arises from the City Council's approval of a housing development project located at 1444 Fifth Street. On May 28, 2019, the City Council approved a four-unit housing development located at 1444 Fifth Street following an appeal from the Zoning Adjustments Board's ("ZAB's") approval. In approving the development application, Council determined that the 1444 Fifth Street development and a previously approved, four-unit residential development on the adjacent parcel located at 1446 Fifth Street constituted a single "residential housing project" for purposes of applying the inclusionary housing requirements in Berkeley Municipal Code ("BMC") Chapter 23C.12, and that therefore all units were subject to the inclusionary housing fee under BMC section 23C.12.035.

On August 23, 2019, the applicants for the 1444 Fifth Street and 1446 Fifth Street permits filed a petition for writ of mandate seeking to vacate Council's May 28 disposition of the ZAB appeal. On September 23, 2020, the court granted the petition and issued a writ of mandate reversing the City Council's decision to require compliance with the inclusionary housing requirements, and finding that the City violated the Housing Accountability Act.

The settlement agreement resolves petitioners' claim for attorneys' fees under the Housing Accountability Act and includes a commitment to make a payment into the

Housing Trust Fund of \$15,000 per unit for anticipated future development on three adjacent parcels.

ENVIRONMENTAL SUSTAINABILITY

No significant environmental impacts are anticipated from approving the settlement agreement.

RATIONALE FOR RECOMMENDATION

Approval of the settlement agreement would limit the City's liability for additional attorneys' fees that may be occurred if litigation continues and would ensure payments into Housing Trust Fund for development on three parcels adjacent to the 1444 and 1446 Fifth Street parcels.

ALTERNATIVE ACTIONS CONSIDERED

Alternative actions considered include appealing the trial court's decision and challenging petitioners' eligibility for attorneys' fees under the Housing Accountability Act.

CONTACT PERSON

Farimah Brown, City Attorney, (510) 981-6998

Attachments:

1: Resolution

RESOLUTION NO. ##,###-N.S.

AUTHORIZING THE CITY ATTORNEY TO SETTLE 1444 FIFTH STREET, LLC V.  
CITY OF BERKELEY (ALAMEDA COUNTY CASE NO. RG19032434)

WHEREAS, on August 23, 2019, Petitioners 1444 Fifth Street, LLC and 1446 Fifth Street, LLC (“Petitioners”) filed an action in Alameda County Superior Court entitled *1444 Fifth Street, LLC et al. v. City of Berkeley et al.*, Civil Case No. RG19032434 (“Action”), alleging causes of action for writ of mandate, declaratory judgment, and injunctive relief, and seeking an order or judgment that the City must rescind the inclusionary housing fee applied to petitioners’ housing development project; and

WHEREAS, on September 23, 2020, the court granted a petition for writ of mandate and found that the City violated the Housing Accountability Act by imposing an additional condition on the housing development project requiring compliance with the City’s Inclusionary Housing Ordinance, Berkeley Municipal Code Chapter 23C.12; and

WHEREAS, Petitioners and the City wish to resolve the dispute giving rise to the action.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that the Council of the City of Berkeley authorizes the City Attorney to enter into the settlement agreement with the 1444 Fifth Street, LLC and 1446 Fifth Street, LLC enclosed herewith as Exhibit A.

Exhibits

A: Settlement Agreement and Release

## SETTLEMENT AGREEMENT AND RELEASE

This SETTLEMENT AGREEMENT AND RELEASE (“Settlement Agreement”) is made this 24<sup>th</sup> day of November, 2020, by and between Respondents and Defendants CITY OF BERKELEY and CITY OF BERKELEY CITY COUNCIL (collectively, “City”) and Petitioners and Plaintiffs 1444 FIFTH STREET, LLC and 1446 FIFTH STREET, LCC (“Petitioners”). The City and Petitioners are collectively referred to herein as the “Parties,” and are each individually referred to as a “Party.”

### RECITALS

A. On January 10, 2019, the City of Berkeley Zoning Adjustments Board approved Administrative Use Permit #ZP2018-0172, which authorized the construction of a four-unit residential housing development at 1444 Fifth Street, Berkeley, California (the “Project”). The Zoning Adjustments Board’s decision was appealed to the Berkeley City Council.

B. On May 28, 2019, the Berkeley City Council held a public hearing, and following the hearing, affirmed the Zoning Adjustments Board’s approval of Administrative Use Permit #ZP2018-0172. In addition, the City Council imposed a new condition of approval requiring the Project to pay an inclusionary housing fee under Berkeley Municipal Code Chapter 23C.12 (the “Inclusionary Housing Ordinance”). The City Council imposed the condition of approval after determining that the Project and a previously approved, separately owned project on the adjacent property at 1446 Fifth Street constituted a single “residential housing project” under the Inclusionary Housing Ordinance. The condition required the Project to comply with the Inclusionary Housing Ordinance on behalf of both the Project and the previously approved project on the adjacent 1446 Fifth Street parcel.

C. On August 23, 2019, Petitioners filed an action in Alameda County Superior Court entitled *1444 Fifth Street et al. v. City of Berkeley et al.*, Civil Case No. RG19032434 (“Action”) alleging causes of action for writ of mandate, declaratory judgment, and injunctive relief, and seeking an order or judgment that the City must rescind the inclusionary housing fee applied to the construction of the Project.

D. On September 23, 2020, following a hearing on the petition for writ of mandate, the Court entered judgment in favor of Petitioners (“Judgment”), attached hereto as Exhibit 1. The Court ruled that (1) the Inclusionary Housing Ordinance applies to residential housing projects proposed on the same legal parcel, but cannot be lawfully applied to separate legal parcels where each individual parcel can accommodate no more than four dwelling units; and (2) the application of the Inclusionary Housing Ordinance to the Project violated Government Code section 65589.5(j)(2), which obligated the City to inform Petitioners within 30 days of the completeness of their respective applications of any “applicable plan, program, policy, ordinance, standard, requirement, or other similar provision” with which the Project was “inconsistent, not in compliance, or not in conformity.”

E. Further, the Court enjoined the City from applying the Inclusionary Housing Ordinance in a manner contrary to the Court's order, from taking any action inconsistent with the Order to preclude the issuance of revised conditions of approval for Administrative Use Permit #ZP2018-0172, and from taking any further unlawful actions to preclude the development of the Project.

F. Petitioners and/or their principals, agents, and/or affiliates, have submitted or contemplate submitting applications for the construction of separate housing development projects on three separate legal parcels located adjacent to the Project site, located at 770 Page Street, 776 Page Street, and 1442 Fifth Street (collectively, "Undeveloped Parcels").

G. The Parties wish to resolve their dispute regarding the subject matter of the Action, and regarding the application of the Inclusionary Housing Ordinance to development of the Undeveloped Parcels.

NOW, THEREFORE, in consideration of the mutual covenants, conditions and terms contained in this Agreement, and good and valuable consideration, and in full and final settlement of the Action and to compromise on the disputed claims contained therein, the Parties agree as follows:

#### AGREEMENT

1. Incorporation of Recitals. The above recitals are incorporated herein by reference.

2. Payment by the City. Within 15 days of the date of execution of this Settlement Agreement, the City shall pay to Petitioners attorneys' fees and costs of suit incurred in the amount of \$250,000. Payment shall be made to 1444 Fifth Street, LLC.

3. Compliance with Judgment. The City shall not require compliance with the Inclusionary Housing Ordinance for construction of dwelling units on any legal parcel that can accommodate no more than four dwelling units under development standards in the Berkeley Zoning Ordinance. The City agrees that under the Judgment, the condition of approval applying the Inclusionary Housing Ordinance in Administrative Use Permit #ZP2018-0172 has been held to be unlawful and unenforceable, but that otherwise Administrative Use Permit #ZP2018-0172 remains valid and in full force and effect for the approved housing project now under construction on 1444 Fifth Street. The City further agrees that as currently configured and under the City's Zoning Ordinance and current development standards, the City may not apply the Inclusionary Housing Ordinance or impose an inclusionary housing fee under that Ordinance on the construction of new dwelling units on any of the Undeveloped Parcels.

4. Review of Applications for Development of Undeveloped Parcels. The City will comply with applicable provisions of the Berkeley Zoning Ordinance and state law in reviewing any application to construct a housing development project on the Undeveloped Parcels. The City shall consider and process a housing development application on each separate legal lot independently of a housing development application on any other legal

lot under currently applicable provisions of the Berkeley Zoning Ordinance and state law. The City shall not apply the Berkeley Zoning Ordinance to consolidate an application for a housing development on an Undeveloped Legal Parcel with one or more applications on another Undeveloped Parcel, including but not limited to compliance with the Inclusionary Housing Ordinance or California Environmental Quality Act. The City will accordingly process each application for a housing development project on an Undeveloped Parcel as follows:

a. The City shall schedule a public hearing before the Zoning Adjustments Board and shall approve or disapprove each application to construct a housing development project on in a separate legal lot within 60 days of the date the application is determined to be complete, or within 60 days of the completion of any environmental review process required under the California Environmental Quality Act, whichever is later.

b. The City Council shall schedule a public hearing on any appeal of a determination made by the Zoning Adjustments Board under Paragraph 4.a within 60 days of the date of mailing of the Notice of Decision, and shall decide any appeal within 30 days of the date of the public hearing.

c. If a proposed housing development project on one or more of the Undeveloped Parcels complies with the applicable, objective general plan and zoning standards in effect at the time an application is deemed complete, the City shall not conduct more than five public hearings in connection with the approval of the project.

d. Any deadline set forth in this Paragraph 4 may be extended by mutual agreement of the project applicant and the City.

5. Housing Trust Fund Contributions by Petitioners. Notwithstanding the Judgment or any other provision of this Agreement, Petitioners agree to make a payment into the City of Berkeley Housing Trust Fund for each unit of housing constructed on any of the Undeveloped Parcels. Petitioners agree to pay \$15,000 per unit of housing, payable within thirty (30) days of the issuance of Certificate of Occupancy.

6. Waiver of Right to Appeal. Each Party hereby waives its right to appeal any order or judgment entered in the Action.

7. Mutual Release. Except as otherwise expressly set forth in this Settlement Agreement, Petitioners and the City hereby release and forever discharge each other, together with their agents, representatives, trustees, employees, officers, directors, partners, stockholders, attorneys, successors, assigns, heirs, personal representatives and executors, and all persons, firms, associations, co-partners, co-venturers, insurers, contractors, engineers, subcontractors, subsidiaries, parents, affiliates, or corporations connected therewith, and each of them from any and all claims, debts, liabilities, demands, obligations, costs, expenses, and attorneys' fees relating to the Action or the claims or causes of action set forth therein.

It is understood and agreed that this is a full and final mutual release of the Action. The Parties agree, as further consideration and inducement for this Agreement, to waive the provisions of California Civil Code §1542 which provides as follows:

**“A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.”**

This Release and Waiver only releases and waives claims arising from actions, failures to act, events and occurrences taking place on or before August 23, 2019, and does not release or waive any claims arising out of actions, failures to act, events or occurrences taking place after that date.

Notwithstanding any potentially inconsistent provisions in this Section, if the City does not comply fully with Sections 2 through 4 of this Agreement, Petitioners reserve the right to take any and all appropriate legal action to enforce the requirements of the Housing Accountability Act, Gov. Code § 65589.5, including but not limited to proceeding to litigate the claims brought in the Action and seeking an award of any and all attorney’s fees, costs of suits, and fines authorized under the Housing Accountability Act.

8. Cooperation on Additional Documents. Each of the Parties agrees to execute and deliver to each of the other Parties all additional documents, instruments, and agreements required to take such additional actions as are required to implement the terms and conditions of this Agreement.

9. Authorization to Execute. Each Party represents that the individual signing this Settlement Agreement is authorized to bind the Party on whose behalf he or she signs.

10. Entire Agreement. As to the matters set forth herein, this Settlement Agreement is the entire, integrated agreement and understanding of the Parties.

11. Waiver, Modification, and Amendment. No breach of this Settlement Agreement or of any provision herein can be waived except by an express written waiver executed by the Party waiving such breach. Waiver of any one breach shall not be deemed a waiver of any other breach of the same or other provisions of this Agreement. This Agreement may be amended, altered, modified, or otherwise changed in any respect or particular only be a writing duly executed by the Parties or their authorized representatives.

12. Notice. Any notice, demand, request, or other communication required or permitted to be given under this Agreement, (a) shall be made in writing; (b) shall be delivered by one of the following methods: (i) by personal delivery (with notice deemed given when delivered personally); (ii) by overnight courier (with notice deemed given upon written verification of receipt); or (iii) by certified or registered mail, return receipt requested (with notice deemed given upon verification of receipt); and (c) shall be addressed as provided in this Section or such other address as such Party may request by notice in accordance with the terms of this Section.

Notice to Petitioners shall be provided as follows:

1444 5<sup>th</sup> Street, LLC and 1446 5<sup>th</sup> Street, LLC  
c/o WADLUND+ Design Studio  
805 Jones Street  
Berkeley, CA 94710

With copy to: Jennifer Hernandez  
Holland & Knight LLP  
50 California Street, Suite 2800  
San Francisco, CA 94111  
jennifer.hernandez@hklaw.com

Notice to the City shall be provided as follows:

City Attorney  
City of Berkeley  
2180 Milvia Street  
Berkeley, CA 94704  
attorney@cityofberkeley.info

13. Attorneys' Fees. In any proceeding at law or in equity to enforce any of the provisions or rights under this Settlement Agreement, the prevailing Party shall be entitled to recover from the unsuccessful Party all costs, expenses and reasonable attorneys' fees incurred in the enforcement proceeding by the prevailing Party (including, without limitation, such costs, expenses, and fees on any appeals) and if such prevailing Party shall recover judgment in any such action or proceeding, such costs, expenses, including those of expert witnesses, and attorneys' fees shall be included in and as part of the judgment.

14. Severability. If any part of this Settlement Agreement is found to be void, invalid or unenforceable, the remainder shall remain in full force and effect and shall be interpreted to carry out the Parties' intent with respect to their obligations and rights.

15. Drafting of Agreement. The Parties and/or their respective counsel have participated in the drafting and negotiation of this Settlement Agreement and, for all purposes, this Settlement Agreement shall be deemed to have been drafted jointly by all Parties.

16. Successors and Representatives. This Settlement Agreement shall be binding on and shall inure to the benefit of the successors and assigns of each Party.

17. Informed Consent. Each Party declares that prior to the execution of this Settlement Agreement, it and/or its duly authorized representatives have apprised themselves of sufficient relevant data, either through attorneys, experts or other sources of their own selection, in order to intelligently exercise their judgment in deciding whether to execute, and in deciding the contents of, this Settlement Agreement. Each Party states that



this Settlement Agreement is entered into freely and voluntarily, upon the advice and with the approval of its counsel.

18. Applicable Law. This Settlement Agreement shall be interpreted in accordance with California law, without reference to its choice of law provisions.

19. Execution in Counterparts. This Agreement may be executed in any number of counterparts, each of which may be deemed an original, and all of which together shall constitute a single instrument, notwithstanding that all the Parties are not signatories to the original or same counterpart. Photocopies or facsimiles shall constitute good evidence of such execution.

Dated: \_\_\_\_\_, 2020

1444 FIFTH STREET,LLC

By: \_\_\_\_\_  
Name: Matthew Wadlund  
Title: \_\_\_\_\_

Dated: \_\_\_\_\_, 2020

1446 FIFTH STREET, LLC

By: \_\_\_\_\_  
Name: Sean Kenmore  
Title: \_\_\_\_\_

Dated: \_\_\_\_\_, 2020

CITY OF BERKELEY

By: \_\_\_\_\_  
Name: Farimah Brown  
Title: City Attorney

APPROVED AS TO FORM:

\_\_\_\_\_  
Christopher D. Jensen  
Assistant City Attorney

