

PROCLAMATION CALLING A SPECIAL MEETING OF THE BERKELEY CITY COUNCIL

In accordance with the authority in me vested, I do hereby call the Berkeley City Council in special session as follows:

MONDAY, MAY 1, 2023

3:00 P.M.

REDWOOD ROOM – 2180 MILVIA STREET, BERKELEY, CA 94704

TELECONFERENCE LOCATION - 1404 LE ROY AVE, BERKELEY 94708

JESSE ARREGUIN, MAYOR

Councilmembers:

DISTRICT 1 – RASHI KESARWANI
DISTRICT 2 – TERRY TAPLIN
DISTRICT 3 – BEN BARTLETT
DISTRICT 4 – KATE HARRISON

DISTRICT 5 – SOPHIE HAHN
DISTRICT 6 – SUSAN WENGRAF
DISTRICT 7 – RIGEL ROBINSON
DISTRICT 8 – MARK HUMBERT

This meeting will be conducted in a hybrid model with both in-person attendance and virtual participation. For in-person attendees, face coverings or masks that cover both the nose and the mouth are encouraged. If you are feeling sick, please do not attend the meeting in person.

*Remote participation by the public is available through Zoom. To access the meeting remotely: Join from a PC, Mac, iPad, iPhone, or Android device: Please use this URL: <https://cityofberkeley-info.zoomgov.com/j/1611791416>. If you do not wish for your name to appear on the screen, then use the drop down menu and click on "rename" to rename yourself to be anonymous. To request to speak, use the "raise hand" icon by rolling over the bottom of the screen. To join by phone: Dial **1-669-254-5252** or **1-833-568-8864 (Toll Free)** and enter Meeting ID: **161 179 1416**. If you wish to comment during the public comment portion of the agenda, Press *9 and wait to be recognized by the Chair.*

Please be mindful that the meeting will be recorded and all rules of procedure and decorum apply for in-person attendees and those participating by teleconference or videoconference.

To submit a written communication for the City Council's consideration and inclusion in the public record, email council@cityofberkeley.info.

This meeting will be conducted in accordance with the Brown Act, Government Code Section 54953 and applicable Executive Orders as issued by the Governor that are currently in effect. Any member of the public may attend this meeting. Questions regarding this matter may be addressed to Mark Numainville, City Clerk, (510) 981-6900. The City Council may take action related to any subject listed on the Agenda.

Preliminary Matters

Roll Call

Public Comment - Limited to items on this agenda only

CLOSED SESSION:

The City Council will convene in closed session to meet concerning the following:

1. **1. CONFERENCE WITH LEGAL COUNSEL – EXISTING LITIGATION PURSUANT TO GOVERNMENT CODE SECTION 54956.9(d)(1):**

a. *Stachl v. City of Berkeley*, Alameda County Superior Court Case Number RG20074265

2. **CONFERENCE WITH LEGAL COUNSEL – ANTICIPATED LITIGATION PURSUANT TO GOVERNMENT CODE SECTION 54956.9(d)(3):**

a. Significant exposure to litigation; see April 22, 2023 letter from David H. Blackwell on behalf of Mevlarumi LLC, owners of 2023-25 Shattuck Ave., attached as required by *Fowler v. City of Lafayette*, 46 Cal. App. 5th 360 (2020)

b. *Alejandres v. City of Berkeley*, California Civil Rights Department Case No. #202209-18233514

3. **CONFERENCE WITH LABOR NEGOTIATORS; GOVERNMENT CODE SECTION 54957.6**

Negotiators: Dee Williams-Ridley, City Manager, Anne Cardwell, Deputy City Manager, LaTanya Bellow, Deputy City Manager, Aram Kouyoumdjian, Human Resources Director, Dawud Brewer, Employee Relations Manager, Jonathan Holtzman, Renne Public Law Group.

Employee Organizations: Berkeley Fire Fighters Association Local 1227 I.A.F.F., Berkeley Fire Fighters Association, Local 1227 I.A.F.F. / Berkeley Chief Fire Officers Association; Berkeley Police Association; Public Employees Union Local 1

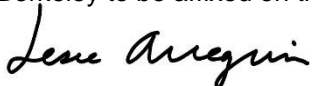
OPEN SESSION:

Public Reports of actions taken pursuant to Government Code section 54957.1.

Adjournment

I hereby request that the City Clerk of the City of Berkeley cause personal notice to be given to each member of the Berkeley City Council on the time and place of said meeting, forthwith.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the official seal of the City of Berkeley to be affixed on this 27th day of April, 2023.


Jesse Arreguin, Mayor

Public Notice – this Proclamation serves as the official agenda for this meeting.

ATTEST:



Mark Numainville, City Clerk

This meeting will be conducted in accordance with the Brown Act, Government Code Section 54953 and applicable emergency Executive Orders issued by the Governor. Any member of the public may participate in the public comment portion of this meeting. Questions regarding this matter may be addressed to Mark Numainville, City Clerk, (510) 981-6900.

NOTICE CONCERNING YOUR LEGAL RIGHTS: *If you object to a decision by the City Council to approve or deny an appeal, the following requirements and restrictions apply: 1) Pursuant to Code of Civil Procedure Section 1094.6 and Government Code Section 65009(c)(1)(E), no lawsuit challenging a City decision to deny or approve a Zoning Adjustments Board decision may be filed and served on the City more than 90 days after the date the Notice of Decision of the action of the City Council is mailed. Any lawsuit not filed within that 90-day period will be barred. 2) In any lawsuit that may be filed against a City Council decision to approve or deny a Zoning Adjustments Board decision, the issues and evidence will be limited to those raised by you or someone else, orally or in writing, at a public hearing or prior to the close of the last public hearing on the project.*

Any writings or documents provided to a majority of the City Council regarding any item on this agenda will be made available for public inspection at the public counter at the City Clerk Department located on the first floor of City Hall located at 2180 Milvia Street.

COMMUNICATION ACCESS INFORMATION:

To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at (510) 981-6346(V) or (510) 981-7075 (TDD) at least three business days before the meeting date.



Communications

Council rules limit action on Communications to referral to the City Manager and/or Boards and Commissions for investigation and/or recommendations. All communications submitted to Council are public record. Copies of individual communications are available for viewing at the City Clerk Department and through [Records Online](#).

Item #2a: CONFERENCE WITH LEGAL COUNSEL – ANTICIPATED LITIGATION PURSUANT TO GOVERNMENT CODE SECTION 54956.9(d)(3):

1. Tuija Catalano, on behalf of Reuben, Junius & Rose LLP

Communications – May 1, 2023 (Closed Session)

Council rules limit action on Communications to referral to the City Manager and/or Boards and Commissions for investigation and/or recommendations. All communications submitted to Council are public record.

Item #2a: CONFERENCE WITH LEGAL COUNSEL – ANTICIPATED LITIGATION PURSUANT TO GOVERNMENT CODE SECTION 54956.9(d)(3):

1. Tuija Catalano, on behalf of Reuben, Junius & Rose LLP

Benado, Tony

From: Tuija Catalano <tcatalano@reubenlaw.com>
Sent: Monday, April 24, 2023 10:49 AM
To: Darrow, Brendan; All Council
Cc: Stephens, Sara; Massimino, Rosanne; Brown, Farimah F.; Blackwell, David; Eduardo@marchcapitalfund.com
Subject: City Council - Communication for Closed Session on May 2, 2023
Attachments: Ltr to City Council closed session re AHMF (for 5-2-2023 hearing).pdf

Follow Up Flag: Follow up
Flag Status: Flagged

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.

Brendan,

Attached please find a letter written by David Blackwell at Allen Matkins that we would like to have included in the Council packets for the May 2, 2023 closed session discussion on the application of the Affordable Housing Mitigation Fee to the 2023-2025 Shattuck Street project. Please include this in the materials the Council will receive ahead of the hearing.

Please let me know if you have any questions or if you need anything from the project sponsor team prior to the closed session hearing.

Thanks,



Tuija Catalano
 Partner
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Cell: (925) 404-4255
Email: tcatalano@reubenlaw.com

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Allen Matkins

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David H. Blackwell
E-mail: dblackwell@allenmatkins.com
Direct Dial: 415.273.7463 File Number: 393876.00001/4893-4655-5230.3

Via Electronic Mail

April 22, 2023

City Council
City of Berkeley
2180 Milvia Street
Berkeley, CA 94704

council@cityofberkeley.info

**Re: May 2, 2023 Hearing, Closed Session
2023-2025 Shattuck Avenue
Imposition of AHMF on Density Bonus Units**

Dear Mayor Arreguin and Council Members:

On behalf of Mevlararumi LLC, the owner and developer of the above-referenced affordable housing project, this correspondence addresses the imposition of the City of Berkeley's affordable housing mitigation fee ("AHMF")¹ on the project's bonus units awarded under the State Density Bonus Law ("DBL," Gov. Code § 65915 *et seq.*). For the reasons set forth below, imposing such a fee on bonus units would be contrary to the substance and intent of the DBL. As such, March Capital Management requests that the Council direct Staff to refrain from applying the AHMF on the project's bonus units and to revise the fee calculation in the January 18, 2023 letter issued by Staff to the project sponsor.

I. Relevant Factual Background

The project was approved by the Zoning Adjustments Board in June 2020. The conditions of approval for the project's Use Permit include a condition requiring compliance with AHMF. The base project included 35 units, and application of the DBL yielded a total of 48 units, of which 4 are on-site affordable units.

¹ Municipal Code section 22.20.065.

Subtracting the four affordable units,² the City's imposition of the AHMF on the remaining 44 units results in an affordable housing fee of \$1,112,888. If the AHMF was instead imposed on the 35-unit base project, the fee would be \$596,190. As a result, the current AHMF fee as noted in Staff's January 18, 2023 letter unlawfully exceeds the legal amount by \$516,698, as explained below.

II. Relevant DBL Background

The DBL "is a powerful tool for enabling developers to include very low, low, and moderate-income housing units in their new developments." (*Wollmer v. City of Berkeley* (2011) 193 Cal. App. 4th 1329, 1339.) The DBL is one of several California statutes designed to implement "an important state policy to promote the construction of low-income housing and to remove impediments to the same." (*Bldg. Indus. Ass'n v. City of Oceanside* (1994) 27 Cal. App. 4th 744, 770; Gov. Code § 65582.1(f).)

When the Legislature adopted the DBL, it declared that California's housing shortage crisis must be addressed and that the State should rely on local governments to provide the necessary increased housing stock "provided, that such local discretion and powers not be exercised in a manner to frustrate the purposes of this act." (Notes to Stats. 1979, ch. 1207, at 4738, sec. 3 (Cal. 1979).) The author of a successful 2002 amendment to the DBL noted that "too many local governments have undercut [the DBL] by layering density bonus and second unit projects with unnecessary and procedural obstacles." (A.B. 1866 Bill Analysis, at 3-4 (Cal. Aug. 28, 2002).)

The DBL has been amended throughout the years, in large part to address the "procedural obstacles" created by local governments. Assembly Bill 2501 expressly addressed these obstacles by creating procedural safeguards for applicants, including the addition of subdivision (r) to Section 65915 to expressly reaffirm that the DBL "shall be interpreted liberally in favor of producing the maximum number of total housing units" in a housing project. This clear Legislative intent is also expressed in Government Code section 65917:

In enacting this chapter it is the intent of the Legislature that the density bonus or other incentives offered by the city, county, or city and county pursuant to this chapter shall contribute significantly to the economic feasibility of lower income housing in proposed housing developments. In the absence of an agreement by a developer in accordance with Section 65915, a locality shall not offer a density bonus or any other incentive that would undermine the intent of this chapter.

In addition, the DBL preempts any local regulations that are in conflict. For example, in *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal. App. 4th 807, 823-24, the court held that a local ordinance's imposition of a higher threshold for a project to qualify for a density bonus

² Affordable housing fees cannot be imposed on the affordable units. (Gov. Code § 65915.1.)

would be preempted by the DBL and therefore void. The preemption issue is discussed in Section IV below.

III. Density Bonuses Must be Granted Without Conditions or Restrictions

The DBL provides for density bonuses, incentives, and development standard waivers. A city may deny a housing developer's request for incentives or waivers if certain findings are made. (Gov. Code, § 65915(d),(e).)

There is no basis, however, to deny or conditionally approve a density bonus request itself. To the contrary, a city *must* grant a requested density bonus for any housing development that provides the requisite number of affordable units. (Gov. Code, § 65915(b).) The number of bonus units that must be awarded is formulaic. (Gov. Code, § 65915(f).) As recently described by the Fourth District:

the density bonus allows for additional units, above the maximum allowed by zoning, to be added to a project based on the amount of affordable housing included in the project. Subdivision (f) of section 65915 includes tables that prescribe a density bonus percentage, which progressively increases as a developer agrees to add a greater percentage of affordable units in the project. The higher the percentage of affordable units, the higher the percentage of the density bonus allowing a developer to exceed the zoned density.

(Bankers Hill 150 v. City of San Diego (2022) 74 Cal. App. 5th 755, 769–70.)

Attempts by local agencies to dilute or impair the award of bonus units have been rejected by the courts. Following the *Friends of Lagoon Valley* case discussed above, the First Appellate District "recognized that section 65915 imposes a clear and unambiguous mandatory duty on municipalities to award a density bonus when a developer agrees to dedicate a certain percentage of the overall units in a development to affordable housing." (*Latinos Unidos Del Valle De Napa Y Solano v. County of Napa* (2013) 217 Cal. App. 4th 1160, 1167.)

In *Latinos Unidos*, the County's density bonus ordinance excepted from the number of affordable units that would qualify for a density bonus award those units required to comply with the County's inclusionary zoning ordinance. Rejecting the County's approach, the appellate court held:

The county's ordinance, which fails to credit low-cost units satisfying the county's inclusionary requirement toward satisfying the density bonus requirements, fails to comply with the state law. To the extent the ordinance requires a developer to dedicate a larger percentage of its

units to affordable housing than required by section 65915, the ordinance is void.

(*Latinos Unidos*, 217 Cal. App. 4th at 1169.)

Therefore, both the DBL and the judicial opinions applying the DBL require that bonus units be awarded, without strings attached, to a project that provides the requisite number of affordable units. Any action by the City to the contrary is preempted and void. (*Ibid.*)

IV. Applying the AHMF to Bonus Units is Preempted by the DBL

Nothing in the DBL allows a local agency to impose a fee on a qualifying project's bonus units. As recognized by the California Chapter of the American Planning Association:

Most experts agree that inclusionary requirements cannot be imposed on the density bonus units themselves. The reasoning is that the Legislature intended to give developers market-rate units in exchange for affordable units.³

Although a city generally has the ability to adopt and impose fees on projects under its police powers, these police powers must not conflict with statutes such as the DBL. If they do, they are preempted by the state law. (*Latinos Unidos*, 217 Cal. App. 4th at 1169.)⁴ Citing *Latinos Unidos*, the Second Appellate District recently held that: “A local ordinance is preempted if it conflicts with the density bonus law by increasing the requirements to obtain its benefits.” (*Schreiber v. City of Los Angeles* (2021) 69 Cal. App. 5th 549, 558.) That is precisely what imposition of the AHMF does: it increases the requirements to obtain the benefits of the DBL, and is therefore preempted.

“These cases provide a helpful lens through which to evaluate the practical effects of local ordinances upon the operation of the SDBL. Local agencies should maintain an awareness of potential unintended impacts of local inclusionary requirements on SDBL applications.” (9/2/22 Letter of Technical Assistance from HCD to City of West Hollywood.)

As discussed above, a city *must* award bonus units to a qualifying project. This award is based on a sliding scale expressly set forth in the DBL. (Gov. Code, § 65915(f).) A city may not unilaterally reduce the bonus amount, nor may it condition the bonus award. The AHMF does just that, and directly undermines the bonus award by adding significant direct costs upon each bonus unit, increasing the overall development costs of a DBL project and conflicting with the DBL.

³ CCAPA's Answers to Frequently Asked Questions Regarding SB 1818 (Hollingsworth) – Changes to Density Bonus Law – 2005.

⁴ See also 102 Ops.Cal.Atty.Gen 9 (2019).

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law

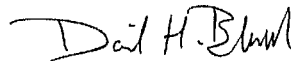
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April 24, 2023
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Imposing a fee on bonus units would interfere with the application of the DBL in Berkeley, and "housing units for lower-income households would not be built and the purpose of the density bonus law to encourage such development would not be achieved." (*Wollmer*, 193 Cal. App. 4th at 1347.) Clearly, "imposing 'costs' on a developer attempting to build affordable units is hostile to the letter and spirit of the density bonus law." (*Id.* at 1344 [emphasis added].)

Please recall that the express purpose of the DBL is to incentivize developers to provide affordable housing by providing density bonuses, incentives, and development standard waivers. "In other words, the Density Bonus Law rewards a developer who agrees to build a certain percentage of low-income housing with the opportunity to build more residences than would otherwise be permitted by the applicable local regulations." (*Latinos Unidos*, 217 Cal. App. 4th at 1164.) The Legislature's intended result is the production of more affordable housing throughout the State. (*Friends of Lagoon Valley*, 154 Cal. App. 4th at 824.) Therefore, local attempts to impair a developer's exercise of the DBL through the imposition of procedural hurdles or fees is contrary to the clear legislative intent and the applicable law.

Therefore, the AHMF must not be applied to the project's bonus units and we respectfully ask the City Council to direct Staff to revise the January 18, 2023 fee calculation letter for the project.

Very truly yours,



David H. Blackwell

cc: Eduardo Sagues
Tuija Catalano, Reuben, Junius & Rose, LLP
Farimah Brown, City Attorney
Brendan Darrow, Assistant City Attorney

