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January 11, 2024

Via Email and US Mail

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Chairperson Yes Duffy
Vice Chairperson Kimberly Gaffney
Members: Igor Tregub; Michael
Thompson; Cecilia Lunaparra
Shoshana O'Keefe; Charles Kahn
Alyssa Please; Debra Sanderson
Zoning Adjustments Board Secretary
Land Use Planning Division
1947 Center Street, 2nd Floor
Berkeley, CA 94704
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Via Email Only

Sharon Gong
Email: sgong@cityofberkeley.info

Re: Agenda Item No. 4: 2113-15 Kittredge Street Project (Use Permit #ZP2022-0144)

Dear Zoning Adjustments Board Chairperson Duffy, Vice Chairperson Gaffney,
Board Members, Ms. Gong:

We are writing on behalf of **East Bay Residents for Responsible Development** ("East Bay Residents" or "EBRRD") regarding Agenda Item No. 4, the 2113-15 Kittredge Street Project (Use Permit #ZP2022-0144; APN057-2030-009) ("Project") proposed by Christian Cerria and 2115 Kittredge Street LLC (collectively "Applicant").¹ The Applicant is requesting Use Permits from the City of Berkeley ("City") to demolish the commercial building on a landmarked site (preserving the front façade), and construct an 18-story (203 feet, with 8-foot, 4-inch parapet), 160,734-square-foot, mixed-use building with 211 dwelling units (including 22 Very Low-Income Density Bonus qualifying units), and a 24,273-square-foot live theater

¹ City of Berkeley, Zoning Adjustments Board, Staff Report for Board Action (January 11, 2024) (Item #4 ZAB 2024-01-11) 2113-15 Kittredge Street Use Permit #ZP2022-0144. Available at https://berkeleyca.gov/sites/default/files/documents/2024-01-11_ZAB_Item%204_2113-15%20Kittredge_Staff%20Report%20and%20Attachments.pdf ("Staff Report"). 6899-003acp

January 11, 2024

Page 2

space with 355 seats, a full stage and backstage, fly area, and practice support spaces. The project site is located on the north side of Kittredge Street, within the Downtown Mixed-Use District (C-DMU), Core Sub-Area, as identified in the City's Downtown Area Plan ("DAP").

East Bay Residents urges the Zoning Adjustments Board ("ZAB") to continue tonight's hearing and remand the Project to staff due to the City's failure to comply with the California Environmental Quality Act ("CEQA") and the Project's failure to demonstrate consistency with General Plan and DAP workforce standards. The Project proposes to convert a commercial building to a residential, mixed-use development. The staff report recommends that the Project be found categorically exempt from CEQA pursuant to Section 15332 ("Infill Development Projects") and Section 15331 ("Historical Resource Restoration/Rehabilitation") of the CEQA Guidelines. This recommendation is unsupported by the record and should not be adopted.

First, a CEQA exemption is inapplicable to the Project because there is substantial evidence in the record demonstrating that the Project has potentially significant impacts from hazardous materials and on historical resources which require mitigation. Mitigated categorical exemptions are prohibited by CEQA.² "If a project may have a significant effect on the environment, CEQA review must occur and only then are mitigation measures relevant... Mitigation measures may support a negative declaration but not a categorical exemption."³

With regard to hazards, there is substantial evidence demonstrating that the Project site has potentially significant impacts from soil contamination that exceed health-based residential environmental screening levels ("ESL") and hazardous waste screening criteria.⁴ The Staff Report and soil investigations conclude that mitigation is required to clean the contamination to safe levels before the Project can proceed and staff have included the mitigation as a condition of approval.⁵

² *Salmon Pro. & Watershed Network v. County of Marin* ("SPAWN") (2004) 125 Cal.App.4th at 1102; *Azusa Land Recl. Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal. App.4th 1165, 1198-1201.

³ *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1102 ("SPAWN").

⁴ Staff Report, p. 9; Summary of Phase II Subsurface Investigation, Downtown Berkeley Adaptive Reuse Project, 2115 Kittredge Street in Berkeley, California (November 8, 2022), p. 6 of 9. Available at:

https://documents.geotracker.waterboards.ca.gov/regulators/deliverable_documents/5291501700/2023-03%20ltr-rpt-PhII%20Investigation-0424-002-001-Final.pdf

⁵ *Id.*

With regard to historical resources, the Project may result in a substantial adverse change in the significance of the historic resource of the California Theatre, rendering an exemption inapplicable.⁶ Moreover, the measures required by the Landmarks Preservation Commission “that ensure restoration and rehabilitation of the retained portion of the historic structure, as well as documentation and salvage of the property in its current form” constitute mitigation measures under CEQA.⁷

Second, the City lacks substantial evidence to conclude that the Project would not result in significant effects relating to traffic, noise, air quality, or water quality, or that the Project complies with the General Plan.⁸ These are prerequisites for a CEQA exemption and facial requirements for the Class 32 exemption.⁹

With regard to water quality, the City lacks substantial evidence to conclude that the Project will not have significant effects because the site is under active investigation by the San Francisco Bay Regional Water Quality Control Board (“Water Board”), which concluded in November 2023 that “[b]ased on the available data, *it is unclear if the contamination threatens to adversely affect the beneficial uses of groundwater and/or human health.*”¹⁰ There is no evidence in the record demonstrating that either the Water Board or the City have provided evidence resolving the uncertainty identified by the Water Board that water quality and public health impacts may be significant. Rather, the Phase II soil investigation concluded that “soil remediation may be required during grading,”¹¹ demonstrating that there may be significant water quality and public health impacts which requires mitigation.

⁶ 14 CCR § 14300.2(f) (“[a] categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historical resource.”).

⁷ City of Berkeley Landmarks Preservation Commission Staff Report, 2113 Kittredge Street – California Theater (Oct. 5, 2023), p. 8 of 10. Available at:

https://berkeleyca.gov/sites/default/files/documents/2023-10-05_LPC_Item%207_2113-2115%20Kittredge_Combined%20Staff%20Report%20and%20Attachments_2.pdf

⁸ *Banker’s Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 269 (lead agency must provide “substantial evidence to support [their] finding that the Project will not have a significant effect”).

⁹ 14 Cal. Code Regs. (“CCR”) § 15332(a), (d).

¹⁰ San Francisco Bay Regional Water Quality Control Board, Site Cleanup Program (SCP) Recovery of Oversight Costs at the Former California Theatre, 2115 Kittredge Street, Berkeley, Alameda County (November 16, 2023). Available at:

https://documents.geotracker.waterboards.ca.gov/regulators/deliverable_documents/9991040885/2023-11-30_CRA%202115%20Kittredge_Executed.pdf (emphasis added).

¹¹ Summary of Phase II Subsurface Investigation, Downtown Berkeley Adaptive Reuse

Project, 2115 Kittredge Street in Berkeley, California (November 8, 2022), p. 6-7 of 9. Available at:

https://documents.geotracker.waterboards.ca.gov/regulators/deliverable_documents/5291501700/2023-03_ltr-rpt-PhII%20Investigation-0424-002-001-Final.pdf

6899-003acp

The City also lacks substantial to conclude that the Project will not have significant effects on air quality and public health from the Project's air emissions. The City did not disclose the Project's greenhouse gas ("GHG") emissions and has not prepared a health risk analysis to determine the extent of air contaminants released during Project construction and operation that may impact human health. Absent this evidence, staff's determination that air quality impacts are less than significant to support a Categorical Exemption is not supported by substantial evidence in the record.

Finally, the Project has not demonstrated consistency with General Plan and DAP policies to promote the welfare of local workers and sustainable economic development.

The ZAB should remand the Project to prepare a legally adequate environmental impact report ("EIR") to adequately analyze and mitigate the Project's potentially significant environmental impacts before the Project can lawfully be approved.

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 labor organizations **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 EBRRD live, work, and raise their families in the City of Berkeley and Alameda County. They would be directly affected by the Project's impacts. Individual members may also work on the Project itself. They will therefore be first in line to be exposed to any health and safety hazards that may exist on the Project site.

The organizational members of EBRRD also have an interest in enforcing the City's planning and zoning laws and the State's environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there. Indeed, continued degradation can, and has, caused restrictions on growth that reduce

future employment opportunities. Finally, EBRRD's members are concerned about projects that present environmental and land use impacts without providing countervailing economic and community benefits.

II. THE PROJECT IS NOT EXEMPT FROM CEQA BECAUSE THERE IS SUBSTANTIAL EVIDENCE OF POTENTIALLY SIGNIFICANT ENVIRONMENTAL IMPACTS WHICH REQUIRE MITIGATION

To rely on a categorical exemption, the City must determine, based on substantial evidence, that approval of the Project would not result in any significant effects on the environment.¹² Exemptions must be narrowly construed and are not to be expanded beyond the scope of their plain language.¹³ An agency may not rely on a categorical exemption if mitigation measures would be necessary to reduce potentially significant effects to less than significant levels.¹⁴ “An agency should decide whether a project is eligible for a categorical exemption *as part of its preliminary review of the project*’ without reference to or reliance upon any proposed mitigation measures.”¹⁵ If an activity may have a significant effect on the environment, the activity is not exempt from CEQA, CEQA review must occur, and only then are mitigation measures relevant.¹⁶

A. The Project’s Soil Contamination Results in Significant Hazardous Materials and Public Health Impacts Requiring Mitigation

There is substantial evidence demonstrating that the Project has potentially significant impacts from soil contamination that exceed health-based residential ESLs and hazardous waste screening criteria.¹⁷

The Phase II Subsurface Investigation conducted for the Project identified a number of hazardous contaminants impacts onsite demonstrating a potentially significant environmental impact with respect to public health. **Lead was**

¹² Pub. Res. Code §§ 21080(b)(9); 21084(a); *Banker’s Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 269 (lead agency must provide “substantial evidence to support [their] finding that the Project will not have a significant effect.”)

¹³ *Castaic Lake Water Agency v. City of Santa Clarita* (1995) 41 Cal.App.4th 1257.

¹⁴ *SPAWN*, 125 Cal.App.4th at 1102; *Azusa Land Recl. Co.*, 52 Cal. App.4th at 1198-1201.

¹⁵ *Id.* at 1106 (internal citations omitted) (emphasis added).

¹⁶ *SPAWN*, 125 Cal.App.4th at 1107.

¹⁷ Staff Report, p. 9; Summary of Phase II Subsurface Investigation, Downtown Berkeley Adaptive Reuse Project, 2115 Kittredge Street in Berkeley, California (November 8, 2022), p. 6 of 9. Available at:

https://documents.geotracker.waterboards.ca.gov/regulators/deliverable_documents/5291501700/2023-03_Itr-rpt-PhII%20Investigation-0424-002-001-Final.pdf
6899-003acp

January 11, 2024

Page 6

detected in soil samples, and the concentration in one of the soil samples exceeded the residential ESL and hazardous waste screening criteria.¹⁸ Additionally, several volatile organic compounds (“VOCs”) were detected in each of the soil-vapor samples at concentrations above laboratory reporting limits.¹⁹ **Benzene and bromodichloromethane were detected at concentrations exceeding the residential ESLs**, but below the commercial/industrial ESLs.²⁰ Chloroform was detected at a concentration above the conservative commercial/industrial ESL.²¹

Residential ESLs are health-protective screening thresholds for subsurface contaminants at project sites intended for residential use. As the Water Board explains:

Residential Land Use should be used to evaluate sites for unrestricted future land-use. This includes sites to be used for residential developments, hospitals, day care centers and other sensitive purposes (DTSC 2002). ESLs listed under this category incorporate assumptions regarding long-term, frequent exposure of children and adults in a residential setting.²²

If contamination exceeds a residential ESL for a proposed residential project, it constitutes a significant impact requiring disclosure and mitigation in a CEQA document.²³ The Project’s exceedances of residential ESLs constitute a significant environmental impact which require remediation, mitigation, and analysis in an EIR before the Project can be approved. The City cannot rely on a CEQA exemption.

¹⁸ Summary of Phase II Subsurface Investigation, Downtown Berkeley Adaptive Reuse Project, 2115 Kittredge Street in Berkeley, California (November 8, 2022), p. 6 of 9. Available at: https://documents.geotracker.waterboards.ca.gov/regulators/deliverable_documents/5291501700/2023-03_Itr-rpt-PhII%20Investigation-0424-002-001-Final.pdf.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² San Francisco Bay Regional Water Quality Control Board, *User’s Guide: Derivation and Application of Environmental Screening Levels (ESLs)* (2019), p. 2-12. available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwis3eyyxNaDAXoMEQIH6PCA0QFnoECDgQAQ&url=https%3A%2F%2Fcanvas.eee.uci.edu%2Fcourses%2F35369%2Ffiles%2F14524449%2Fdownload%3Fdownload_frd%3D1&usg=AOvVaw2yRfXhcKKP99AYVFLz6NIC&opi=89978449 (last visited 1/11/24).

²³ *Comtys. for a Better Env’t v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 110-111 (when impact exceeds significance threshold, agency must disclose in EIR that impact is significant); *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960; *CBE v. SCAQMD*, 48 Cal.4th at 327 (impact is significant because exceeds “established significance threshold for NOx ... constitute[ing] substantial evidence supporting a fair argument for a significant adverse impact”).
6899-003acp

1. The Need for Mitigation of the Site's Soil Contamination Impacts Does Not Support a CEQA Exemption

The City has acknowledged that the site's soil contamination impact is significant and has included mitigation in the Project's conditions of approval which require site cleanup.²⁴ The City is therefore precluded from relying on a categorical exemption under *SPAWN*.

The Phase II Subsurface Investigation concluded that "soil remediation may be required during grading."²⁵ The Conditions of Approval in the Staff Report provide that preparation of a Soil and Groundwater Management Plan is required, but the full remediation plan has not been provided for public review.²⁶ The site's exceedances of residential ESLs must be remediated to levels that are below residential ESLs before the Project can be approved. The Soil and Groundwater Management Plan will therefore include remediation that constitutes mitigation under CEQA.

A "mitigation measure" is a measure designed to minimize a project's significant environmental impacts.²⁷ CEQA defines mitigation to include:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments, including through permanent protection of such resources in the form of conservation easements.²⁸

²⁴ Staff Report, p. 9.

²⁵ *Id.* at 7 of 9.

²⁶ Staff Report, p. 12 of 28.

²⁷ Pub. Res. Code § 21002.1(a).

²⁸ 14 CCR § 15370.

Here, the City seeks to rely on standard conditions of approval which it asserts are “requirements of the project and not mitigation.”²⁹ While a citywide requirement to prepare a soil management plan for all projects may be standard, the requirement to implement site-specific measures to reduce a significant contamination impact at a particular project site, as here, is mitigation unique to the project. Under CEQA, the additional remediation of soil contamination in the SGMP would constitute mitigation measures to “rectify[] the impact by...restoring the impacted environment.”³⁰

Agencies are prohibited from relying on mitigated categorical exemptions.³¹ The Court in *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, held that the CEQA Guidelines does not authorize consideration of mitigation measures in connection with a categorical exemption, and held that if mitigation measures are needed to avoid potentially significant impacts, then at a minimum a mitigated negative declaration must be prepared.³² The court in *SPAWN* similarly held that if there is a reasonable possibility of a significant effect on the environment, then the project must be reviewed under CEQA and mitigation measures may be considered only as part of that CEQA review.³³

The City’s reliance on the standard condition of approval is dissimilar to the *Walters v. City of Redondo Beach* case where the court held that a condition of approval requiring compliance with local noise standards was not a mitigation measure defeating the use of a categorical exemption, when the city found the project would meet those standards and imposed conditions of approval to ensure that it would do so.³⁴ Here, the standard condition of approval requires the Applicant to conduct additional environmental review in a Soil and Groundwater Management Plan and to potentially conduct additional remediation to mitigate the Project’s existing soil contamination. The City cannot escape CEQA review by relying on conditions of approval to conduct its environmental review.

Moreover, the court in *Berkeley Hillside* clarified that “a finding of environmental impacts must be based on the proposed project as actually

²⁹ City of Berkeley, Standard Conditions of Approval, Ordinance No. 12899 C.M.S, (2020) p. 2. Available at: <https://cao-94612.s3.amazonaws.com/documents/Standard-Conditions-of-Approval-December-2020.pdf>.

³⁰ 14 CCR § 15370.

³¹ *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 CA4th 1098, 1102.

³² (1997) 52 CA4th 1165, 1200.

³³ 125 CA4th at 1102.

³⁴ (2016) 1 CA5th 809.

approved.”³⁵ The SGMP may find additional environmental impacts and require additional remediation. Therefore, the Staff Report’s conclusions as to environmental impacts are not based on the proposed Project as approved, but are based on future environmental review and remediation under a Soil and Groundwater Management Plan. Future remediation, mitigation, and environmental review cannot be the basis to support a categorical exemption.

The remediation associated with the SGMP to reduce contamination to levels that do not exceed residential ESLs constitutes mitigation measure, thus precluding reliance on a categorical exemption for Project approval. An EIR must be prepared which includes the analysis of the SGMP, to adequately characterize, analyze, and mitigate the Project’s potentially significant hazardous contamination impacts.

B. The Project May Result in Potentially Significant Historic Resources Impacts Which Require Mitigation

The CEQA Guidelines provides that “[a] categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historical resource.”³⁶ Here, the Project may result in a substantial adverse change in the significance of the historic resource of the California Theatre, so an exemption is inapplicable. Moreover, the measures required by the Landmarks Preservation Commission for the Project “that ensure restoration and rehabilitation of the retained portion of the historic structure, as well as documentation and salvage of the property in its current form” constitute mitigation measures under CEQA.³⁷ “If a project may have a significant effect on the environment, CEQA review must occur and only then are mitigation measures relevant... Mitigation measures may support a negative declaration but not a categorical exemption.”³⁸ Here, the City is improperly relying on mitigation measures to support approval of the Project under a categorical exemption, in violation of CEQA.

³⁵ *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1105.

³⁶ 14 CCR § 14300.2(f).

³⁷ City of Berkeley Landmarks Preservation Commission Staff Report, 2113 Kittredge Street – California Theater (Oct. 5, 2023), p. 8 of 10. Available at: https://berkeleyca.gov/sites/default/files/documents/2023-10-05_LPC_Item%207_2113-2115%20Kittredge_Combined%20Staff%20Report%20and%20Attachments_2.pdf

³⁸ *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1102 (“SPAWN”).
6899-003acp

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

If an activity may have a significant effect on the environment, the activity is not categorically exempt from CEQA.³⁹ A lead agency must provide “substantial evidence to support [their] finding that the Project will not have a significant effect.”⁴⁰ The City failed to meet that standard here, because there are several impact areas in which the record contains no evidence to support the City’s reliance on the proposed Class 31 or Class 32 exemptions.

Additionally, the Project fails to meet the facial requirements for a Class 32 exemption. CEQA Guidelines Section 15332 provides an exemption from CEQA for “benign infill projects that are consistent with the General Plan and Zoning requirements” of a municipality and that satisfy the following criteria:⁴¹

- (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 Project fails to meet the requirements of Section 15332(a) and (d) because the record lacks substantial evidence that the Project will not result in significant effects to water quality, public health, and air quality. The Project may also result in inconsistencies with the General Plan. For these reasons, the Project fails to qualify for the Infill Exemption.

³⁹ *SPAWN*, 125 Cal.App.4th at 1107.

⁴⁰ *Banker’s Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 269.

⁴¹ 14 CCR § 15332.
6899-003acp

A. The City Lacks Substantial Evidence to Conclude that the Project Will Not Have Significant Effects on Water Quality

The Project site is listed on the State Water Resources Control Board's Geotracker database as "Pending Review as of 10/20/2023" as the Former California Theatre (Global ID: T10000021433).⁴² On November 16, 2023, following the Phase II Subsurface Investigation, the San Francisco Bay Regional Water Quality Control Board advised the Applicant that "[b]ased on the available data, it is unclear if the contamination threatens to adversely affect the beneficial uses of groundwater and/or human health. These beneficial uses include municipal supply, agricultural supply, and industrial service and process supply."⁴³ Absent additional review and remediation, the City lacks substantial evidence that water quality impacts are less than significant to allow for approval of the Project under an Infill Exemption.

B. The City Lacks Substantial Evidence to Conclude the Project Will Not Have Significant Effects on Air Quality and Public Health

An exemption is improper, where, as here, the Project may result in significant air quality impacts.⁴⁴ The Staff Report for the Project does not contain a quantified health risk analysis ("HRA" or "health risk assessment") to evaluate the Project's potentially significant air quality and public health impacts from construction and operation. Absent a health risk assessment, the record does not contain substantial evidence that toxic air contaminants from construction and operation will be reduced to less than significant levels.

The Staff Report provides that the Applicant is required to prepare a "health risk assessment that demonstrates the project's on-site emissions of diesel particulate matter during construction will not exceed health risk screening criteria after a screening-level health risk assessment is conducted in accordance with current guidance from BAAQMD and OEHHA. The health risk assessment shall be submitted to the Land Use Planning Division for review and approval prior to the issuance of building permits."⁴⁵ However, this HRA has not yet been prepared, and

⁴² State Water Resources Control Board Geotracker, Former California Theatre (T10000021433). Available at: https://geotracker.waterboards.ca.gov/profile_report?global_id=T10000021433.

⁴³ San Francisco Bay Regional Water Quality Control Board, Site Cleanup Program (SCP) Recovery of Oversight Costs at the Former California Theatre, 2115 Kittredge Street, Berkeley, Alameda County (November 16, 2023). Available at:

https://documents.geotracker.waterboards.ca.gov/regulators/deliverable_documents/9991040885/2023-11-30_CRA%202115%20Kittredge_Executed.pdf

⁴⁴ 14 CCR § 15332(d).

⁴⁵ Staff Report, Conditions & Findings, p. 17 of 28.

is not included in the record before the ZAB. Therefore, the City lacks substantial evidence to support a finding that the Project's air quality and health impacts from toxic air contaminants will be less than significant.

The Staff Report fails to adequately analyze the Project's air quality and health risk impacts. The Project may result in significant air quality and health risk impacts which may be only discovered after approval under the exemption. The Project should be remanded to Staff to prepare a legally adequate environmental impact report, including a health risk assessment to analyze the Project's potentially significant air quality and public health impacts before the Project can lawfully be approved.

Condition 40 requires the following measures:

Air Quality - Diesel Particulate Matter Controls during Construction. All off-road construction equipment used for projects with construction lasting more than 2 months shall comply with one of the following measures:

- A. The project applicant shall prepare a health risk assessment that demonstrates the project's on-site emissions of diesel particulate matter during construction will not exceed health risk screening criteria after a screening-level health risk assessment is conducted in accordance with current guidance from BAAQMD and OEHHA. The health risk assessment shall be submitted to the Land Use Planning Division for review and approval prior to the issuance of building permits; or
- B. Consistent with the assumptions included in the Air Quality Assessment prepared by ESA on November 2023 (Refer to Appendix X), all off road equipment shall be equipped with Tier 4 engines and the most effective Verified Diesel Emission Control Strategies (VDECS) available for the engine type as certified by the California Air Resources Board (CARB). The equipment shall be properly maintained and tuned in accordance with manufacturer specifications.

In addition, a Construction Emissions Minimization Plan (Emissions Plan) shall be prepared that includes the following:

- An equipment inventory summarizing the type of off-road equipment required for each phase of construction consistent with equipment list included in the Air Quality Assessment, including the equipment manufacturer, equipment identification number, engine model year, engine certification (tier rating), horsepower, and engine serial number. For all VDECS, the equipment inventory shall also include the technology type, serial number, make, model, manufacturer, CARB verification number level, and installation date.

- A Certification Statement that the Contractor agrees to comply fully with the Emissions Plan and acknowledges that a significant violation of the Emissions Plan shall constitute a material breach of contract. The Emissions Plan shall be submitted to the Public Works Department for review and approval prior to the issuance of building permits.⁴⁶

As discussed above, the fact that a Standard Condition of Approval requires analysis of impacts does not demonstrate that a project has no significant effects. The results of the HRA will demonstrate whether or not there is a significant health risk posed by the Project's air emissions, information required by CEQA.⁴⁷ And if those effects are significant prior to mitigation, a CEQA exemption will be inapplicable.

The City cannot rely on a categorical exemption absent substantial evidence concluding that air quality and public health impacts are less than significant without supporting evidence. The City must prepare an EIR to adequately analyze and mitigate the Project's potentially significant environmental impacts with respect to air quality and public health.

C. The City Lacks Substantial Evidence to Conclude that the Project Will Not Have Significant Effects from Greenhouse Gas Emissions

The City lacks substantial evidence to support a determination that greenhouse gas ("GHG") emissions impacts are less than significant so as to support a categorical exemption. CEQA requires that in order to qualify for a categorical exemption, the City must demonstrate, based on substantial evidence, that there are no "significant effects" of the Project on the environment.⁴⁸ Here, the City has not demonstrated that GHG emissions impacts are less than significant. Therefore, the City lacks substantial evidence to support reliance on the proposed exemptions.

The Staff Report includes analysis of the Project's GHG impacts for construction only, and includes no relevant analysis regarding operational GHG impacts.⁴⁹ Moreover, the claim by the Landmarks Preservation Commission that the Project will be "powered sustainably" is not supported by substantial evidence, nor is the Landmarks Preservation Commission, the City's historical resource

⁴⁶ Staff Report, Conditions & Findings, p. 17 of 28.

⁴⁷ *Sierra Club v County of Fresno* (2018) 6 Cal.5th 502, 518–522 (CEQA requires an analysis of human health impacts).

⁴⁸ *Banker's Hill*, 139 Cal.App.4th at 269.

⁴⁹ Staff Report, Air Quality Assessment, Appendix A, p. 6 of 45.
6899-003acp

committee, an expert in analyzing GHG emissions.⁵⁰ The record contains no study quantifying GHG impacts, no evidence that the source of energy for the Project is “sustainably” sourced, and does not demonstrate that, if so, it would reduce the Project’s GHG impacts to less than significant levels in order to rely on a CEQA exemption.

The City must remand the Project to Staff to prepare a legally adequate EIR to adequately analyze and mitigate the Project’s potentially significant environmental impacts with respect to GHG emissions.

IV. THE PROJECT MAY RESULT IN NONCONFORMANCE WITH THE GENERAL PLAN AND ZONING

The Project has not demonstrated conformance with General Plan workforce policies. Housing development projects in the City must implement the goals and policies of the General Plan, including Policy ED-4, which includes 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.⁵¹

General Plan Economic Development and Employment (“ED”) 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.**
- B. Provide labor market information from data sources and industry sectors to local educational institutions and training agencies for adults and youths.**

⁵⁰ Berkeley Landmarks Preservation Commission, Agenda, (Oct. 5, 2023). Available at: https://berkeleyca.gov/sites/default/files/legislative-body-meeting-agendas/2023-10-05_LPC_Agenda_Linked_0.pdf.

⁵¹ Berkeley General Plan (April 23, 2002), p. I-1. 6899-003acp

- 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**

General Plan ED 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.**
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

⁵² Berkeley General Plan Economic Development and Employment Element, Policy ED-1, p. ED-5 (emphasis added).
6899-003acp

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 for the majority of the trades, or healthcare expenditures, the Project fails to comply with these General Plan policies. As proposed, the Project is not required to use apprentices or provide healthcare benefits to its construction workers,⁵⁵ and the Applicant has not agreed to use a skilled local construction workforce to construct the Project. The Project may therefore be built with low-wage, out-of-area⁵⁶ workers who lack the livable wages, health benefits, stability, and basic standard of living that Berkeley has committed to ensuring for all of its workers on all housing developments constructed in the City. If so, the Project would be detrimental to the health, safety, peace, morals, comfort, and general welfare of the City and its residents, especially its local construction workforce, and may fail to comply with General Plan workforce policies.

By contrast, providing a local skilled and trained workforce, including apprenticeship commitments and providing healthcare expenditures for

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

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

⁵⁵ The Project does not appear to be subject to Berkeley’s Helping Achieve Responsible Development with Healthcare and Apprenticeship Training Standards (“HARD HATS”) Ordinance, Berkeley Municipal Code (“BMC”) Chapter 13.107, given the Project’s SB 330 application.

⁵⁶ Statement by Councilmember Hahn, Berkeley City Council Hearing (September 20, 2022 6 PM): City Councilmember Hahn, in favor of the HARD HATS Ordinance, said that the ordinance is necessary because workers are “being bussed in from the Central Valley” which deprives them of time with their families and loved ones, and prevents them from being able to take their children to school in the morning.

construction workers would implement the policies laid out in the General Plan Economic Development and Employment Element.⁵⁷⁵⁸

A. The Applicant Should Consider Including Voluntary Healthcare and Apprenticeship Training Standards in Line with the HARD HATS Ordinance

The Project is not required to comply with the HARD HATS Ordinance due to its effective date. However, East Bay Residents recommends that the Project include voluntary commitments to provide construction apprenticeship training opportunities for Berkeley and Alameda County residents, local hire, and healthcare expenditures for its construction workforce that are in line with the General Plan's workforce goals and consistent with City's new HARD HATS Ordinance.

The Ordinance went into effect on January 1, 2024 to implement apprenticeship program requirements and healthcare security for workers on General Plan area projects. In enacting the HARD HATS Ordinance, the City was striving **"to promote the general welfare."**⁵⁹ Among the many general welfare concerns cited by the City was the detrimental role that the homebuilding industry plays in perpetuating income inequality by using low wage construction workers:

Homebuilding is supposed to reduce the number of people waiting in line for housing they can afford. But when the homebuilding industry itself generates excessive very low and low wage construction employment, that just increases the number of people needing subsidies from the taxpayer. Low wage employment is in fact a problem in both the residential and commercial construction markets.⁶⁰

The HARD HATS staff report explained that "[t]he creation and utilization of apprenticeship along with the commitments to paid healthcare act to both recruit and retain an adequate base of construction workers and to be a pipeline for future

⁵⁷ The City has authority to impose conditions of approval on the Project to ensure consistency with the General Plan's economic and workforce policies. Local agencies have broad discretion to construe general plan policies in light of the plan's purposes, and to weigh and balance general plan policies when applying them. *Eureka Citizens for Responsible Gov. v. City of Eureka* (2007) 147 Cal.App.4th 357, 373-74.

⁵⁸ SB 330 projects must be consistent with the general plan and zoning. Gov. Code § 65589.5, subd. (j)(1).

⁵⁹ BMC § 13.107.112.

⁶⁰ HARD HATS Staff Report pp. 4-5.
6899-003acp

supervisors and licensed independent contractors.”⁶¹ It further provided that “[r]equiring contractors on major projects in Berkeley to employ apprentices results in a higher volume of apprentice training, and thus, an increase in the construction labor force available to carry out the construction anticipated by the general plan, and especially that targeted by the Housing Element.”⁶²

The Applicant has not committed to apprenticeship or healthcare standards for its construction workforce, without which the Project may perpetuate precisely the problems that the City’s General Plan workforce standards, general welfare zoning code sections, and the new HARD HATS Ordinance seek to remedy.

B. Utilizing a Skilled Construction Workforce Promotes the Goals Set Forth in the Regional Housing Needs Assessment

One of the main rationales for the HARD HATS Ordinance was to increase the housing supply through the use of a local skilled and trained labor force. Berkeley has been assigned a Regional Housing Needs Assessment (“RHNA”) of roughly 9,000 units of housing to produce over an eight year period, or over 1,100 units per year.⁶³ The City has concluded that Berkeley does not have an adequate supply of construction workers to build over 1,100 housing units per year while also building, altering, and maintaining public and private commercial nonresidential buildings and infrastructure.⁶⁴ Only 1,250 construction sector employees lived in Berkeley in 2018.⁶⁵ City staff have previously concluded that Berkeley cannot rely on contractors to reliably import surplus skilled construction workers from other cities,⁶⁶ and that construction jobs – particularly residential construction jobs - have lost their competitive edge relative to other jobs in the Bay Area regional economy.⁶⁷ To meet its General Plan goals, Berkeley seeks to create working conditions that will help to overcome the construction labor market’s failures to make construction jobs attractive enough to recruit and retain productive trade workers.

At the September 20, 2022 hearing on the HARD HATS Ordinance, City Councilmembers explained that there is a “shortage of qualified local construction workers” and that is one reason why it is hard to get housing built.⁶⁸

⁶¹ *Id.*

⁶² *Id.*

⁶³ HARD HATS Staff Report, p. 80.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Statement by Councilmember Hahn, Berkeley City Council Hearing (September 20, 2022 6 PM). 6899-003acp

Councilmember Hahn explained that Berkeley should “develop more labor, have working conditions, and pay, and benefits that you need to live in the Bay Area.”⁶⁹ Further Councilmember Hahn asserted that Berkeley needs to expand the available workforce of people who are able to build housing and other projects, and “to ensure they have protections.”⁷⁰ Mayor Arreguin noted that the “key to addressing the significant shortage of housing is addressing the shortage of a skilled and trained workforce.”⁷¹ The Applicant has not demonstrated that the Project will help meet this goal of addressing the housing shortage by utilizing local skilled and trained construction workers.

C. Promoting Jobsite Health and Safety

Berkeley Mayor Arreguin stated in the September 20, 2022 hearing on the HARD HATS Ordinance, that it is “unacceptable to build housing on the backs of low wage workers” and noted that there is exploitation of our construction workforce.⁷² The Mayor cited to projects in Berkeley where there is wage theft, OSHA violations, unsafe workplace conditions, and worker exploitation.⁷³ The Mayor emphasized the importance of enabling the Berkeley construction workforce to access healthcare through the implementation of measures in the HARD HATS Ordinance. The Applicant should consider providing healthcare expenditures to its construction workers to help reduce the risks of injury and illness to construction workers.

V. THE PROJECT IS INCONSISTENT WITH THE DOWNTOWN AREA PLAN

The Project does not conform with the Downtown Area Plan because it fails to provide “significant community benefits” as required by the Plan. The Downtown Area Plan provides that “All new buildings *shall* deliver significant community benefits, many of which should be in proportion to building height.”⁷⁴ The Downtown Area Plan requires projects above 75 feet to include significant community benefits in the form of affordable housing, supportive social services, green features, open space, transportation demand features, job training, and/or

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Statement by Mayor Arreguin, Berkeley City Council Hearing (September 20, 2022 6 PM).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ City of Berkeley, Downtown Area Plan (2012) p. LU-12. Available at: <https://berkeleyca.gov/sites/default/files/2022-03/Downtown-Area-Plan.pdf> (emphasis added). 6899-003acp

employment opportunities.⁷⁵ The applicable public benefit requirements are to be included as conditions of approval and the owner shall enter into a written agreement that shall be binding on all successors in interest.⁷⁶ This Project has not demonstrated consistency with the Downtown Area Plan for failure to include community benefits as conditions of approval.

VI. THE PROJECT MAY BE DETRIMENTAL TO THE GENERAL WELFARE AND INCONSISTENT WITH THE ZONING ORDINANCE

In order to approve a Use Permit, under Berkeley Municipal Code Section 23.406.040, the ZAB must find that 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.

The zoning code mandates that use permits for housing projects developed within the City cannot be approved if they are detrimental to the health, safety, peace, morals, comfort, or general welfare of the City, its residents, workers and visitors, to the surrounding neighborhood, or are inconsistent with zoning.⁷⁷ The Project is inconsistent with these requirements and fails to meet the City's goals for ensuring a stable and viable construction workforce.

The Staff Report lacks substantial evidence that the Project would not be detrimental to the general welfare. The ZAB therefore lacks the evidence necessary to support the findings to issue a use permit under the City's zoning ordinance. The ZAB should not approve the Project until the Applicant provides substantial evidence demonstrating that the Project will not be detrimental to the City, its residents, and its workers, and until the Project fully complies with the General Plan and DAP.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Berkeley Municipal Code Section 23.406.040(E).
6899-003acp

VII. CONCLUSION

The record lacks substantial evidence demonstrating that the Project qualifies for a CEQA exemption or that it complies with the General Plan and DAP. The ZAB should remand the Project to prepare a legally adequate EIR to adequately analyze and mitigate the Project's potentially significant environmental impacts with respect to hazardous materials, historic resources, water quality, public health, air quality and GHG emissions before the Project can lawfully be approved.

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

Sincerely,

/s/

Kelilah D. Federman
Christina Caro

:kdf