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February 5, 2024

Via Email and Hand Delivery

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Taplin, Ben Bartlett, Kate Harrison,
Sophie Hahn, Susan Wengraf,
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Re: Appeal to City Council re 2113-15 Kittredge Street (Use Permit #ZP2022-0144)

Dear Mayor Arreguín, Members: Kesarwani, Taplin, Bartlett, Harrison, Hahn, Wengraf, Humbert and Mr. Numainville:

We are writing on behalf of **East Bay Residents for Responsible Development** (“East Bay Residents” or “Residents”) to appeal the Zoning Adjustment Board’s (“ZAB”) January 11, 2024 approval of the 2113-15 Kittredge Street Project (Use Permit #ZP2022-0144; APN057-2030-009) (“Project”).¹ Residents submitted comments to the ZAB ahead of the January 11, 2024 hearing on the Project.² The

¹ **Exhibit A:** City of Berkeley, Zoning Adjustments Board Notice of Decision, 2113-2115 Kittredge Street Use Permit #ZP2022-0144 (Date of Board Decision: January 11, 2024, Date Notice Mailed: January 22, 2024, Appeal Period Expiration: February 5, 2024, Effective Date of Permit (Barring Appeal or Certification: February 6, 2024)), (hereinafter “Notice of Decision”).

² **Exhibit B:** Letter from ABJC to ZAB re *Agenda Item No. 4: 2113-15 Kittredge Street Project (Use Permit #ZP2022-0144)* (Jan. 11, 2024).

February 5, 2024

Page 2

Project is proposed by Christian Cerria and 2115 Kittredge Street LLC (collectively “Applicant”). The Applicant requested Use Permits from the City of Berkeley (“City”) to demolish the commercial building on the 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 space with 355 seats, a full stage and backstage, fly area, and practice support spaces. Construction is proposed to take place for 37 months from September 2024 until October 2027. The Project is within 1,000 feet of Berkeley High School within the C-DMU Core Sub-Area and the Downtown General Plan Designation.³

This appeal is timely filed within 14 days of the City’s January 22, 2024 mailing of the Notice of Decision of the ZAB decision, pursuant to Berkeley Municipal Code (“BMC” or “Municipal Code”) Section 23.410-1. This Appeal is taken from the following ZAB actions, and is accompanied by payment of the required appeal fee of \$1500:

- Use Permit under BMC Section 23.326.070(A) to demolish a non-residential building.
- Use Permit under BMC Section 23.204.020(A) to construct a new mixed-use development.
- Use Permit under BMC Section 23.204.020(A) to construct dwelling units
- Administrative Use Permit under BMC Section 23.204.020(A) to construct a theater (live).
- Use Permit under BMC Section 23.204.030(B)(1) to create new floor area of 10,000 square feet or more.
- Use Permit under BMC Section 23.204.130(E)(1) to exceed the maximum building height limits, up to 75 feet (plus 5-foot parapet, by right).
- Administrative Use Permit under BMC Section 23.304.050(A) to exceed building height limits with rooftop architectural elements which exceed the maximum height limit for the district.
- Use Permit under BMC Section 23.04.130(E)(3)(b) to modify side and rear setback requirements.
- Use Permit under BMC Section 23.310.020(B) to commence alcoholic beverage service of distilled spirits.

³ 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”).

- Use Permit under BMC Section 23.310.030(A) for alcoholic beverage service, including distilled spirits when incidental to a food service.
- Administrative Use Permit under BMC Section 23.302.020(E)(4) to allow outdoor uses in a commercial district not abutting a residential district.
- Determination that the Project is categorically exempt from the California Environmental Quality Act (“CEQA”) pursuant to Section 15331 (“Historical Resource Restoration/Rehabilitation”) and Section 15332 (“Infill Development Projects”) of the CEQA Guidelines.⁴

This Appeal was prepared with the assistance of air quality and hazardous materials experts Matt Hagemann, P.G., C.Hg and Paul E. Rosenfeld, Ph.D. of Soil Water Air Protection Enterprises (“SWAPE”), whose comments are included in the SWAPE Comments (“SWAPE Comments”). The SWAPE Comments and Mr. Hagemann’s and Dr. Rosenfeld’s expert curriculum vitae (“CV”) are attached hereto as **Exhibit C**.

I. SUMMARY OF REASONS FOR APPEAL

Residents appeal the ZAB’s actions pursuant to BMC Sections 23.410.030 and 23.406.040(E) on the grounds that:

- 1) The Project may result in significant effects on air quality, public health, hazardous materials/water quality, historic resources and GHG emissions, rendering CEQA exemptions inapplicable and requiring preparation of an environmental impact report (“EIR”);**
- 2) The City lacks substantial evidence to demonstrate that the environmental effects of the Project are less than significant to support reliance on CEQA Exemptions;**
- 3) The Project violates CEQA and the Climate Action Plan for failure to quantify the Project’s operational greenhouse gas emissions;**
- 4) The City has not demonstrated that the Project is consistent with General Plan policies to promote the welfare of local workers and sustainable economic development.**

⁴ Notice of Determination, p. 1-2 of 5.

For the reasons explained herein and in Residents' January 11, 2024 comments to the ZAB⁵, the City has not made, and cannot make, the necessary findings to support approval of the Project's Conditional Use Permits or exempt the Project from environmental review under CEQA. The City Council should uphold this appeal and remand the Project to Staff to prepare a legally adequate environmental impact report ("EIR") to remedy the deficiencies detailed herein and to adequately analyze and mitigate the Project's potentially significant environmental impacts before the Project can lawfully be approved.

First, the ZAB's reliance on CEQA exemptions for Project approval was inconsistent with law and unsupported because substantial evidence demonstrates that the Project may result in significant environmental impacts requiring mitigation. If an activity may have a significant effect on the environment, the activity is not categorically exempt from CEQA.⁶ Mitigated categorical exemptions are also prohibited by CEQA.⁷ "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."⁸

There is substantial evidence demonstrating that the Project's air quality and health risk impacts are significant and require mitigation. The City did not prepare a health risk assessment to quantify the Project's air quality and health risk impacts, in violation of CEQA.⁹ Resident's air quality and hazardous materials expert SWAPE conducted a health risk assessment demonstrating significant air quality and health risk impacts.¹⁰ SWAPE's quantitative health risk assessment found that the Project results in an excess cancer risk over the course of a residential lifetime (30 years) of approximately 107 in one million.¹¹ The infant and lifetime cancer risks exceed the BAAQMD threshold of 10 in one million, resulting in a significant environmental impact.¹²

⁵ See Exhibit B: Letter from ABJC to ZAB re *Agenda Item No. 4: 2113-15 Kittredge Street Project (Use Permit #ZP2022-0144)* (Jan. 11, 2024).

⁶ Pub. Res. Code §§ 21080(b)(9); 21084(a); *Salmon Pro. & Watershed Network v. County of Marin* ("SPAWN") (2004) 125 Cal.App.4th.

⁷ *SPAWN*, 125 Cal.App.4th at 1102; *Azusa Land Recl. Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal. App.4th 1165, 1198-1201.

⁸ *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1102 ("SPAWN").

⁹ *Sierra Club v County of Fresno* (2018) 6 Cal.5th 502, 518–522 (CEQA requires an analysis of human health impacts).

¹⁰ SWAPE Comments, p. 9-10.

¹¹ *Id.*

¹² SWAPE Comments, p. 9-10; *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 CEQA

Substantial evidence also demonstrates 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, resulting in a significant impact which precludes reliance on a categorical exemption.¹³ Project-specific 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, demonstrating that the Project is not exempt from CEQA.¹⁴

Additionally, the Project results in a substantial adverse change in the significance of the historic resource of the California Theatre, rendering an exemption inapplicable.¹⁵ 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.¹⁶

Finally, the ZAB failed to require the Project to demonstrate consistency with City planning documents, including the City’s Climate Action Plan, which requires an analysis of the Project’s greenhouse gas emissions, the Downtown Area Plan and the General Plan’s Economic Development and Employment (“ED”) Element, which includes City policies to increase social and economic equity in land use decisions through community and workforce benefits, such as the use of a local skilled and trained workforce.

The Municipal Code prohibits the City from approving a use permit if the project is “detrimental to the health, safety, peace, morals, comfort, or general welfare of persons residing or visiting in the area or neighborhood of the proposed

document 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”).

¹³ 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 (hereinafter “Phase II Subsurface Investigation”).

¹⁴ *Id.*

¹⁵ 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.”).

¹⁶ 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

February 5, 2024

Page 6

use.....or to the general welfare of the City.”¹⁷ The Housing Accountability Act also authorizes disapproval of a housing project where the project has a specific, adverse unmitigated impact upon public health or safety,¹⁸ or is inconsistent with the general plan or zoning ordinance in jurisdictions with a current Housing Element,¹⁹ and requires projects to comply with CEQA.²⁰ The Project’s significant environmental impacts with respect to health risk, hazards, and historical resources demonstrate a failure to comply with CEQA and result in a public detriment to the health, safety, comfort and general welfare of the community surrounding the Project. Moreover, the Project’s failure to demonstrate consistency with the CAP, Downtown Area Plan and General Plan results in additional public detriment.

In order to approve a Project under CEQA categorical exemptions, the City must demonstrate based on substantial evidence that the Project does not result in significant environmental impacts.²¹ The City failed to meet that standard here, because there are several impact areas in which Residents’ experts provided substantial evidence of significant impacts, or in which the record contains no evidence to support the City’s reliance on the proposed Class 31 or Class 32 exemptions.

For these reasons stated herein, the Project fails to qualify for CEQA exemptions and the ZAB’s decision to approve the Project was contrary to law.

II. REQUESTED ACTION ON APPEAL

The City Council should reverse the decision of the ZAB, vacate the Project approvals, and remand the Project to staff to prepare a legally adequate EIR. The City Council may take action on the subject of an appeal or any aspect of an appealed project (de novo review) pursuant to BMC Section 23.410.040(E)(1).²² The Municipal Code grants the City Council the authority to:

- Modify, reverse, or affirm, wholly or partly, any decision, determination, condition or requirement of the prior review authority; or

¹⁷ BMC § 23.406.040(E)(1)(a), (b).

¹⁸ Gov. Code § 65589.5(d)(2).

¹⁹ Gov. Code § 65589.5(d)(5).

²⁰ Gov. Code § 65589.5(e).

²¹ *Banker’s Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 269.

²² Berkeley Municipal Code (“BMC”) Section 23.410.040(E)(1).

- For appeals to the City Council, remand the matter to the prior review authority to reconsider the application, and/or any revisions to the application submitted after the review authority's action.²³

Additionally, the Council should remand the Project to Staff to confer with the Applicant about including voluntary conditions in the Project which implement workforce standards that satisfy zoning code, General Plan and Downtown Area Plan requirements. The conditions should include public benefits such as apprenticeship opportunities, local hire provisions, and healthcare, which promote the general welfare. Such conditions would be consistent with the Municipal Code and would ensure compliance with the General Plan and Downtown Area Plan.

III. 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 Residents live, work, and raise their families in the 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 the recruitment, training, and retention of skilled workforces.

IV. THE ZAB'S RELIANCE ON CEQA EXEMPTIONS WAS CONTRARY TO LAW AND UNSUPPORTED BECAUSE THE PROJECT RESULTS IN SIGNIFICANT ENVIRONMENTAL IMPACTS WHICH REQUIRE MITIGATION

In approving the Project, the ZAB improperly relied on categorical exemptions pursuant to Section 15331 ("Historical Resource Restoration / Rehabilitation") and Section 15332 ("Infill Development Projects") of the CEQA Guidelines.

²³ *Id.* at 23.140.040(G).

In order 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.²⁴ Exemptions must be narrowly construed and are not to be expanded beyond the scope of their plain language.²⁵ 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.²⁶ “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.”²⁷ 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.²⁸ The ZAB failed to comply with CEQA by approving the Project in reliance on unsupported exemptions.

A. The Project May Result in Significant Air Quality and Health Risk Impacts Requiring Mitigation

CEQA requires that an EIR must be prepared, whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact.²⁹ Substantial evidence includes “fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.”³⁰ A significant environmental impact is defined as a substantial or potentially substantial adverse change in the environment.³¹ The environment refers to the physical conditions “existing within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance.”³²

Substantial evidence, as detailed herein and in the SWAPE Comments’ health risk assessment, demonstrates that the Project may result in significant air quality and health risk impacts requiring preparation of an EIR to adequately analyze and mitigate such impacts before the Project can lawfully be approved.

²⁴ 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.”)

²⁵ *Castaic Lake Water Agency v. City of Santa Clarita* (1995) 41 Cal.App.4th 1257.

²⁶ *SPAWN*, 125 Cal.App.4th at 1102; *Azusa Land Recl. Co.*, 52 Cal. App.4th at 1198-1201.

²⁷ *Id.* at 1106 (internal citations omitted) (emphasis added).

²⁸ *SPAWN*, 125 Cal.App.4th at 1107.

²⁹ PRC § 21151; 14 CCR § 15064(f); *Citizens for Responsible Equitable Env’t Dev. v. City of Chula Vista (“CREED”)* (2011) 197 Cal.App.4th 327, 330-31; *Communities for a Better Env’t v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319 (“*CBE v. SCAQMD*”).

³⁰ PRC § 21080(e)(1) (emphasis added); *CREED*, 197 Cal.App.4th at 331.

³¹ PRC §§ 21068, 21100(d); 14 CCR § 15382.

³² PRC § 21060.5.

i. *Residents' Expert Health Risk Assessment Found Significant Health Risk Impacts from Project Construction Emissions*

Construction of the Project over 37 months or 1,125-days will result in a significant health risk impact requiring mitigation. Residents' air quality expert SWAPE conducted a quantitative health risk assessment, using the emissions data provided by the City, which found significant cancer risks associated with Project construction. Specifically, SWAPE's health risk assessment determined that the Project will result in an excess cancer risk of 102 in one million for infants (0-2). The excess cancer risk over the course of a residential lifetime of 30 years is 107 in one million. The excess cancer risk for children (2-16) exceeds the BAAQMD threshold of 10 in one million. The cancer risk associated with Project construction exceeds BAAQMD threshold of 10 in a million. BAAQMD's 2022 CEQA Guidelines also states that "An excess cancer risk level of more than 10 in a million" results in a cumulatively considerable impact under CEQA.³³ Here, the Project results in a significant air quality and health risk impact for an exceedance of BAAQMD thresholds. If an impact exceeds an established significance threshold, it constitutes a significant impact requiring disclosure and mitigation in a CEQA document.³⁴

CEQA requires that an EIR must be prepared, whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact.³⁵ Substantial evidence includes "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact."³⁶ Here, substantial evidence from Resident's experts' health risk assessment supports the determination that the Project results in significant air quality and health risk impacts requiring preparation of an EIR before the Project can lawfully be approved.

³³ Bay Area Air Quality Management District 2022 CEQA Guidelines, p. 5-13. Available at: https://www.baaqmd.gov/~media/files/planning-and-research/ceqa/ceqa-guidelines-2022/ceqa-guidelines-chapter-5-project-air-quality-impacts_final.pdf?rev=de582fe349e545989239cbbc0d62c37a&sc_lang=en.

³⁴ *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").

³⁵ PRC § 21151; 14 CCR § 15064(f); *Citizens for Responsible Equitable Env't Dev. v. City of Chula Vista* ("CREED") (2011) 197 Cal.App.4th 327, 330-31; *Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319 ("*CBE v. SCAQMD*").

³⁶ PRC § 21080(e)(1) (emphasis added); *CREED*, 197 Cal.App.4th at 331.

ii. The City Failed to Conduct a Health Risk Assessment, in violation of CEQA and Regulatory Guidance

CEQA requires an analysis of human health impacts from exposure to a project's air emissions.³⁷ The City failed to perform an analysis of the Project's health risk resulting from exposure to the Project's construction and operational emissions, in violation of CEQA. The City's reliance on a condition of approval (Condition 40) to mitigate health risk from construction emissions does not excuse the City of the duty to disclose the severity of the Project's health risk when evaluating whether the Project qualifies for a CEQA exemption.

The City's decision to forego an analysis of health risk impacts is also inconsistent with regulatory guidance on evaluating health risk. The California Office of Environmental Health Hazard Assessment ("OEHHA") recommends a formal health risk assessment for construction exposures lasting longer than 2-months, and "[e]xposures from projects lasting more than 6 months should be evaluated for the duration of the project."³⁸ Here, Project construction will last longer than 37 months, which is significantly longer than the two-month short-term threshold set by OEHHA to trigger the need for a quantitative health risk analysis ("HRA"). Because Project construction will last more than six months, the OEHHA guidance specifies that cancer exposure from Project construction "should be evaluated for the duration of the project."³⁹ The City failed to conduct an HRA for the duration of the project as recommended by OEHHA.

The ZAB violated CEQA by approving the Project without evaluating health risk for the duration of the Project. An EIR must be prepared which includes a quantitative HRA.

a. The City's Failure to Prepare a Health Risk Analysis Constitutes Impermissibly Deferred Analysis

CEQA requires disclosure of the severity of a project's impacts and the probability of their occurrence *before* a project can be approved.⁴⁰ In *Bozung v.*

³⁷ *Sierra Club*, 6 Cal.5th at 518–522.

³⁸ 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>.

³⁹ OEHHA 2015 p. 8-18.

⁴⁰ 14 CCR §§ 15143, 15162.2(a); *Cal. Build. Indust. Ass'n v. BAAQMD* (2015) 62 Cal.4th 369, 388-90 ("*CBIA v. BAAQMD*") (disturbance of toxic soil contamination at project site is potentially significant

Local Agency Formation Commission, the Supreme Court upheld “the principle that the environmental impact should be assessed as early as possible in government planning.”⁴¹ A study conducted after approval of a project will inevitably have a diminished influence on decision-making.⁴² Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA.⁴³

Here, the ZAB relied on compliance with a post-approval condition, Condition 40, to avoid pre-approval disclosure of the Project’s health risk impacts from construction emissions (and failed entirely to evaluate the Project’s health risk from operational emissions), in violation of CEQA. Condition 40 provides that projects with construction lasting more than 2 months shall either (1) prepare a health risk assessment, or (2) use Tier 3 or VDECS-equipped off-road construction equipment.⁴⁴ Both of these actions would occur after Project approval. Thus, any health risk assessment would not be considered by the decision maker or the public prior to Project approval, and would instead be utilized as a “post hoc rationalization” to support the City’s past decision to approve the Project. This approach is prohibited by CEQA.

Moreover, Condition 40 provides no certainty that a health risk assessment will ever be prepared and submitted to the Land Use Planning Division. Instead, under Condition 40, the Applicant may just use Tier 4 or VDECs construction equipment to avoid a health risk assessment entirely. Skipping disclosure of impacts and jumping straight to mitigation is a clear violation of CEQA.⁴⁵

The City similarly cannot rely on Condition 40’s option to utilize Tier 4 or VDECs construction equipment as a “design feature” of the Project to avoid disclosure of environmental impacts, because disclosure of an impact required by CEQA cannot be collapsed with mitigation.⁴⁶ Even if the use of Tier 4 or VDECs

impact requiring CEQA review and mitigation); *Madera Oversight Coalition v. County of Madera* (2011) 199 Cal. App. 4th 48, 82; *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.* (“*Berkeley Jets*”) (2001) 91 Cal.App.4th 1344, 1370-71; CEQA Guidelines, Appendix G.

⁴¹ (1975) 13 Cal.3d 263, 282.

⁴² *Sundstrom v. County of Mendocino*, supra, 202 Cal.App.3d 296, 307.

⁴³ *Id.*; *No Oil, Inc. v. City of Los Angeles*, supra, 13 Cal.3d 68, 81; *Environmental Defense Fund, Inc. v. Coastside County Water Dist.* (1972) 27 Cal.App.3d 695, 706.

⁴⁴ Staff Report, p. 17 (Condition 40).

⁴⁵ *Lotus v. Dept. of Transportation* (2013) 223 Cal.App.4th 650 (CEQA document may not compress analysis of impacts and mitigation measures into a single issue, and must incorporate all measures designed to reduce potentially significant project impacts into legally binding mitigation plan).

⁴⁶ *Id.*

construction equipment were successful to reduce health risk below levels of significance, the City must still disclose to the public and decision makers whether the Project's unmitigated emissions would exceed applicable thresholds of significance. The City failed to perform this necessary analysis and cannot lawfully defer the analysis until after Project approval.

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

There is substantial evidence in the City's own studies 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.⁴⁷ 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.⁴⁸

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 detected in soil samples, and the concentration in one of the soil samples exceeded the residential ESL** and hazardous waste screening criteria.⁴⁹ Additionally, several volatile organic compounds ("VOCs") were detected in each of the soil-vapor samples at concentrations above laboratory reporting limits.⁵⁰ **Benzene and bromodichloromethane were detected at concentrations exceeding the residential ESLs**, but below the commercial/industrial ESLs.⁵¹ Chloroform was detected at a concentration above the conservative commercial/industrial ESL.⁵²

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

⁴⁷ Staff Report, p. 9; Phase II Subsurface Investigation, p. 6 of 9.

⁴⁸ *Id.*

⁴⁹ Phase II Subsurface Investigation, p. 6 of 9.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

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.⁵³

If contamination exceeds a residential ESL for a proposed residential project, it constitutes a significant impact requiring disclosure and mitigation in a CEQA document.⁵⁴ 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 where, as here, hazardous materials impacts remain significant and require mitigation.

i. Mitigation Precludes Reliance on 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.⁵⁵ 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."⁵⁶ 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.⁵⁷ 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. The fact that Condition 20(b) requires cleanup oversight by the City's

⁵³ 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=2ahUKEwis3eyvxNaDAXoMEQIH6PCA0QFnoECDgQAQ&url=https%3A%2F%2Fcanvas.eee.uci.edu%2Fcourses%2F35369%2Ffiles%2F14524449%2Fdownload%3Fdownload_frd%3D1&usg=AOvVaw2vRfXhcKKP99AYVFLz6NIC&opi=89978449 (last visited 1/11/24).

⁵⁴ *Comtys. for a Better Env't*, 103 Cal.App.4th at 110-111 (when impact exceeds significance threshold, agency must disclose in EIR that impact is significant); *Schenck*, 198 Cal.App.4th at 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").

⁵⁵ Staff Report, p. 9.

⁵⁶ *Id.* at 7 of 9.

⁵⁷ Staff Report, p. 12 of 28.

Toxic Management Division (“TMD”) does not change the underlying fact that the Project site contains contaminations at levels exceeding residential significance thresholds which require mitigation.

A “mitigation measure” is a measure designed to minimize a project’s significant environmental impacts.⁵⁸ 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.⁵⁹

Here, the City seeks to rely on standard conditions of approval which it asserts are “requirements of the project and not mitigation.”⁶⁰ 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.”⁶¹ Moreover, CEQA does not allow the lead agency to compress the analysis of impacts and mitigation measures into a single issue to avoid disclosure of a potentially significant impact.⁶²

Agencies are prohibited from relying on mitigated categorical exemptions.⁶³ 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

⁵⁸ Pub. Res. Code § 21002.1(a).

⁵⁹ 14 CCR § 15370.

⁶⁰ 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>.

⁶¹ 14 CCR § 15370.

⁶² *Lotus*, (2014) 223 Cal.App.4th at 656.

⁶³ *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 CA4th 1098, 1102.

measures are needed to avoid potentially significant impacts, then at a minimum a mitigated negative declaration must be prepared.⁶⁴ 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.⁶⁵

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.⁶⁶ 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 approved."⁶⁷ 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.

C. 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

⁶⁴ (1997) 52 CA4th 1165, 1200.

⁶⁵ 125 CA4th at 1102.

⁶⁶ (2016) 1 CA5th 809.

⁶⁷ *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1105.

of a historical resource.”⁶⁸ 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.⁶⁹

“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.”⁷⁰ Here, the City is improperly relying on mitigation measures to support approval of the Project under a categorical exemption, in violation of CEQA.

V. 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.⁷¹ A lead agency must provide “substantial evidence to support [their] finding that the Project will not have a significant effect.”⁷² 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:⁷³

⁶⁸ 14 CCR § 14300.2(f).

⁶⁹ 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

⁷⁰ *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1102 (“SPAWN”).

⁷¹ *SPAWN*, 125 Cal.App.4th at 1107.

⁷² *Banker’s Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 269.

⁷³ 14 CCR § 15332.

- (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, CAP, and Downtown Area Plan. For these reasons, the Project fails to qualify for the Infill Exemption or any other categorical exemption.

A. 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.⁷⁴ 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.⁷⁵ Moreover, the claim by the Landmarks Preservation Commission that the Project will be “powered sustainably” is not supported by substantial evidence.⁷⁶ 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

⁷⁴ *Banker’s Hill*, 139 Cal.App.4th at 269.

⁷⁵ Staff Report, Air Quality Assessment, Appendix A, p. 6 of 45.

⁷⁶ 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.

so, it would reduce the Project's GHG impacts to less than significant levels in order to rely on a CEQA exemption. Moreover, the Landmarks Preservation Commission is the City's historical resource committee, not a qualified expert in analyzing GHG emissions.⁷⁷ The Commission's conclusion that the Project's GHG emissions would be less than significant does not constitute substantial evidence.⁷⁸

The record contains no study quantifying operational 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 Council should uphold this appeal and 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.

B. 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).⁷⁹ 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."⁸⁰ 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 a categorical exemption.

⁷⁷ 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.

⁷⁸ PRC 21082.2(c); 14 CCR 15384(b) (substantial evidence includes reasonable assumptions predicated on facts and expert opinion supported by facts).

⁷⁹ State Water Resources Control Board Geotracker, Former California Theatre (T10000021433). Available at: https://geotracker.waterboards.ca.gov/profile_report?global_id=T10000021433.

⁸⁰ 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

C. 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.⁸¹ As discussed above, 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 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.

VI. THE CITY FAILED TO ANALYZE GREENHOUSE GAS IMPACTS PRIOR TO ZAB APPROVAL AND THE PROJECT CONTRAVENES THE CITY’S CLIMATE ACTION PLAN

As discussed above, the Staff Report is silent with respect to analysis of the Project’s operational greenhouse gas emissions. The City’s failure to analyze the significance of the Project’s GHG emissions is both a violation of CEQA and of the City’s Climate Action Plan.

Pursuant to CEQA Guidelines § 15064.4 subdivision (a), “A lead agency shall make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project. A lead agency shall have discretion to determine, in the context of a particular project, whether to:

- (1) Quantify greenhouse gas emissions resulting from a project; and/or
- (2) Rely on a qualitative analysis or performance-based standards.”

Here, the City quantified construction-related GHG emissions,⁸² but failed to quantify operational GHG emissions, thus failing to follow the first method. Utilizing the second method, a qualitative analysis, an agency may adopt an area wide plan to reduce greenhouse gas emissions and determine that a project’s incremental contribution to climate change is not significant if the project complies

⁸¹ 14 CCR § 15332(d).

⁸² Staff Report, Air Quality Assessment, Appendix A, p. 6 of 45.

with the requirements of the previously adopted plan.⁸³ The City of Berkeley's CAP is the relevant area wide plan for the reduction of GHGs.

Conformance with the CAP requires a new project to "report projected GHG emissions."⁸⁴ The Berkeley CAP requires "that new projects achieve a minimum point level on an appropriate green building checklist (e.g., GreenPoint Rated Checklist for residential buildings or LEED checklist for nonresidential) **and report projected GHG emissions.**"⁸⁵ The Staff Report did not include either a quantified operational GHG analysis or a report of projected operational GHG emissions. Rather, the Air Quality Assessment's Modeling files left the operational greenhouse gas analysis tables for "Operations Emissions Details" completely blank. The City therefore failed to analyze operational greenhouse gas emissions through either quantitative analysis or "report projected GHG emissions," as required by the CAP. This omission is a violation of CEQA and the CAP.

In *Mission Bay Alliance v. Office of Community Inv. & Infrastructure* (2016) 6 CA5th 160, 198, the court upheld an EIR's analysis that was based on determining consistency with a locally adopted climate strategy and GHG reduction plan.⁸⁶ Here, in order to demonstrate consistency with the Berkeley Climate Action Plan, the Project is required to quantify and "report projected GHG emissions."⁸⁷ The City must therefore quantify and report the Project's operational GHG emissions in order to comply with CEQA and the Climate Action Plan. The ZAB failed to require this analysis before approving the Project. The City Council should uphold this appeal and remand the Project to staff to circulate a legally adequate EIR containing an operational GHG analysis before the Project can be reconsidered for approval.

VII. 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.

⁸³ 14 CCR § 15183.5, subd. (b).

⁸⁴ City of Berkeley Climate Action Plan, p. 59.

⁸⁵ City of Berkeley Climate Action Plan, p. 59.

⁸⁶ *Mission Bay Alliance v. Office of Community Inv. & Infrastructure* (2016) 6 CA5th 160, 198.

⁸⁷ City of Berkeley Climate Action Plan, p. 59.

2) New housing will be developed to expand housing opportunities in Berkeley to meet the needs of all income groups.⁸⁸

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.

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.⁸⁹

⁸⁸ Berkeley General Plan (April 23, 2002), p. I-1.

⁸⁹ Berkeley General Plan Economic Development and Employment Element, Policy ED-1, p. ED-5 (emphasis added).

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 the Downtown will remain a vital, attractive, and unifying center for the city.⁹⁰

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.”⁹¹

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,⁹² 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-area⁹³ workers who lack the

⁹⁰ Berkeley General Plan Economic Development and Employment Element, Element Objectives, p. ED-5 (emphasis added).

⁹¹*Id.* at Policy ED-12(C), p. ED-10.

⁹² 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.

⁹³ 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

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 construction workers would implement the policies laid out in the General Plan Economic Development and Employment Element.⁹⁴⁹⁵

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.**"⁹⁶ 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:

time with their families and loved ones, and prevents them from being able to take their children to school in the morning.

⁹⁴ 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.

⁹⁵ SB 330 projects must be consistent with the general plan and zoning. Gov. Code § 65589.5, subd. (j)(1).

⁹⁶ BMC § 13.107.112.

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.⁹⁷

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 supervisors and licensed independent contractors.”⁹⁸ 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.”⁹⁹

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.¹⁰⁰ 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.¹⁰¹ Only 1,250 construction sector employees lived in Berkeley in 2018.¹⁰² City staff have previously concluded that Berkeley cannot rely on contractors to reliably import surplus skilled construction workers from other cities,¹⁰³ and that construction jobs – particularly residential construction jobs -

⁹⁷ HARD HATS Staff Report pp. 4-5.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at p. 80.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

have lost their competitive edge relative to other jobs in the Bay Area regional economy.¹⁰⁴ 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.¹⁰⁵ 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.”¹⁰⁶ Councilmember Hahn further 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.”¹⁰⁷ Mayor Arreguin noted that the “key to addressing the significant shortage of housing is addressing the shortage of a skilled and trained workforce.”¹⁰⁸ 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.¹⁰⁹ The Mayor cited to projects in Berkeley where there is wage theft, OSHA violations, unsafe workplace conditions, and worker exploitation.¹¹⁰ 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.

¹⁰⁴ *Id.*

¹⁰⁵ Statement by Councilmember Hahn, Berkeley City Council Hearing (September 20, 2022 6 PM).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

VIII. 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.”¹¹¹ 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 employment opportunities.¹¹² 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.¹¹³ This Project has not demonstrated consistency with the Downtown Area Plan for failure to include community benefits as conditions of approval.

IX. THE PROJECT IS DETRIMENTAL TO THE GENERAL WELFARE AND INCONSISTENT WITH THE ZONING ORDINANCE¹¹⁴

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.

¹¹¹ 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).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ The Applicant may argue that the zoning code’s general welfare standard is not an objective standard within the meaning of SB 330. This is incorrect, as compliance with CEQA, including mitigating or demonstrating the absence of significant, detrimental environmental and public health effects, and compliance with the General Plan, are objective requirements under the Housing Accountability Act. Gov. Code § 65589.5(d)(2) (disapproval authorized where housing project has would have a specific, adverse unmitigated impact on public health or safety); § 65589.5(e) (projects subject to HAA must comply with CEQA); § 65589.5(d)(5) (disapproval authorized where project is inconsistent with general plan or zoning ordinance in jurisdictions with current Housing Element).

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.¹¹⁵ The Project is inconsistent with these requirements and fails to meet the City's goals for ensuring a stable and viable construction workforce.

The Municipal Code prohibits the City from approving a use permit if the project is "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.....or to the general welfare of the City."¹¹⁶ The Housing Accountability Act also authorizes disapproval of a housing project where the project has a specific, adverse unmitigated impact upon public health or safety,¹¹⁷ or is inconsistent with the general plan or zoning ordinance in jurisdictions with a current Housing Element.¹¹⁸

There is substantial evidence demonstrating that the Project's significant environmental impacts with respect to health risk, hazards, and historical resources are likely to result in a public detriment to the health, safety, comfort and general welfare of the community surrounding the Project. The Project's failure to demonstrate consistency with the CAP, Downtown Area Plan and General Plan may result in additional public detriment that the ZAB failed to consider.

The ZAB lacked substantial evidence to support the findings to issue a use permit under the City's zoning ordinance. The City Council should uphold this appeal and remand the Project to staff to prepare an EIR and to require the Applicant to provide substantial evidence demonstrating that the Project will not be detrimental to the City, its residents, and its workers, and that the Project will fully comply with the General Plan and Downtown Area Plan.

X. CONCLUSION

For the reasons stated herein, the City Council should reverse the ZAB's January 11, 2024 decision approving the Project and 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

¹¹⁵ BMC § 23.406.040(E).

¹¹⁶ BMC § 23.406.040(E)(1)(a), (b).

¹¹⁷ Gov. Code § 65589.5(d)(2).

¹¹⁸ Gov. Code § 65589.5(d)(5).

February 5, 2024
Page 28

Project can lawfully be approved. The Council should also require the Applicant to demonstrate compliance with applicable General Plan and Downtown Area Plan policies.

Thank you for considering this appeal.

Sincerely,



Kelilah D. Federman

Attachments
KDF:acp