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October 27, 2025

Via Email and Hand Delivery

Mayor Adena Ishii and City

Councilmembers Rashi Kesarwani, Terry
Taplin, Ben Bartlett, Igor Tregub, Shoshana
O'Keefe, Brent Blackaby, Cecilia
Lunaparra, and Mark Humbert
2180 Milvia Street, 1st Floor
Berkeley, CA 94704
council@berkeleyca.gov

City Clerk Mark Numainville

2180 Milvia Street, 1st Floor
Berkeley, CA 94704
clerk@berkeleyca.gov

Re: Appeal to City Council of 2425 Durant Avenue Use Permit #ZP2024-0162

Dear Mayor Ishii, City Councilmembers Kesarwani, Taplin, Bartlett, Tregub, O'Keefe, Blackaby, Lunaparra, and Humbert, and City Clerk Numainville:

Our law office represents the Building and Construction Trades Council of Alameda County, AFL-CIO ("Trades Council") and the Northern California Carpenters Regional Council ("Carpenters"). We are writing on behalf of the Trades Council and Carpenters to appeal the approval by the City of Berkeley ("City") Zoning Adjustment Board ("ZAB") of Use Permit #ZP2024-0162 for the 2425 Durant Avenue project ("Project").¹ The Trades Council submitted comments to the ZAB ahead of its October 9, 2025 hearing and appeared at the hearing to oppose approval of the Use Permit as presented.²

The Project is proposed by Yes Duffy Architects, 1250 Addison Street, 105, Berkeley, CA 94702 ("Applicant"). The Applicant applied for Use Permits from the City to demolish three existing residential buildings, including 19 rent-controlled dwelling units, and construct an approximately 148,940-square-foot residential building containing 169 dwelling units, including extremely low income, very low income, low income, and moderate income units on a 9750-square-foot lot.

¹ City of Berkeley Zoning Adjustments Board Notice of Decision, 2425 Durant Avenue, Date of Board Decision October 9, 2025, Date Notice Mailed October 14, 2025, Appeal Period Expiration October 28, 2025 ("Notice of Decision").

² Letter from Trades Council to ZAB re Application for Approval of 2425 Durant Project dated October 9, 2025.

This appeal is timely filed within fourteen (14) days of the City's October 14, 2025 mailing of the Notice of Decision, pursuant to Berkeley Municipal Code ("BMC") section 23.410.020. This appeal is accompanied by payment of the requisite fee of \$3000.³

In particular, this appeal pertains to the Applicant's requested "Concessions" under the California State Density Bonus Law, Cal. Gov. Code § 65915 *et. seq.* ("SDBL"), which are as follows:

1. Concession from the "**Apprenticeship Requirements**" in establishing Healthcare and Apprenticeship Standards for Private Development, as required by BMC Section 13.107.040.
2. Concession from the "**Health Care Expenditures**" in establishing Healthcare and Apprenticeship Standards for Private Development, as required by BMC Section 13.107.050.
3. Concession from the "**Prevailing Wage Requirements**" in the Southside Plan as required by BMC Section 13.108(A).

Items 1 and 2 above are part of the City's HARD HATS Ordinance, which was adopted on May 2, 2023 and became effective on January 1, 2024. Item 3 above is part of the City's Southside Plan, as amended and adopted in November of 2023. For the reasons that follow, the concessions requested by the Applicant are improper under the SDBL and City policy and should be denied.

I. The City Should Not Grant Concessions that Waive Local Labor Standards

The City should not grant concessions under the SDBL that waive local labor standards. The Applicant is pursuing a novel and unorthodox strategy of using SDBL concessions to avoid three construction labor standards, namely, the requirement to participate in an apprentice training program, the requirement to provide health care, and the requirement to pay a living wage. The Trades Council and Carpenters have never encountered such concession requests before and are not aware of any project that has received similar concessions from the City (or any city). The requested concessions are an attempted misuse of the SDBL to avoid important labor standards that the City enacted to protect public health and safety.

During the October 9, 2025 ZAB meeting, a Commissioner stated that another project – or perhaps multiple projects – received concessions as to the HARD HATS Ordinance. After the meeting, we attempted to verify this with City staff and were told that was not the case (note that the projects referenced during the meeting predated the HARD HATS Ordinance).⁴

Subsection 65915(d)(1) of the SDBL provides:

(d)(1) An applicant for a density bonus pursuant to subdivision (b) may submit to a city, county, or city and county a proposal for the specific incentives or concessions that the applicant requests pursuant to this section, and may request a meeting with the city, county, or city and

³ Notice of Decision, page 3; BMC section 23.410.030.

⁴ On October 21, 2024, our office made California Public Records Act request to the City seeking all records relating to whether the City has, at any time, granted any State Density Bonus concessions or waivers relating, in any way, to the City's HARD HATS Ordinance. We will supplement this letter in the event a response is received.

county. The city, county, or city and county shall grant the concession or incentive requested by the applicant unless the city, county, or city and county makes a written finding, based upon substantial evidence, of any of the following:

- (A) The concession or incentive would have a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon public health and safety or on any real property that is listed in the California Register of Historical Resources and for which there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact without rendering the development unaffordable to low-income and moderate-income households.
- (B) The concession or incentive would have a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon public health and safety or on any real property that is listed in the California Register of Historical Resources and for which there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact without rendering the development unaffordable to low-income and moderate-income households.
- (C) The concession or incentive would be contrary to state or federal law.⁵

Subsection 65915(k) of the SDBL defines a “concession or incentive” as either (1) a reduction in site development standards or a modification of zoning code requirements or architectural design requirements that exceed the minimum building standards approved by the California Building Standards commission, for example, a reduction in setback and square footage requirements and in the ratio of vehicular parking spaces; (2) approval of mixed-use zoning; or (3) other regulatory incentives or concessions that result in identifiable and actual cost reductions to provide for affordable housing costs or for rents to be set at the statutory rate.⁶

By providing these examples, the Legislature clearly contemplated that concessions under the SDBL should relate to the physical characteristics of the development such as the location, number of units, design, or site improvements, or other aspects of the development that would “result in identifiable and actual cost reductions.”

This is supported by the legislative intent of the SDBL, which is focused on allowing developers to include more total units in affordable housing projects than would otherwise be allowed by local zoning ordinances, and to cover some of the financing gap in affordable housing.⁷ Notably, the Legislature also intended to “ensure that any additional benefits conferred upon a developer are balanced with the receipt of a public benefit in the form of adequate levels of affordable housing.”⁸ In other words, the Legislature was mindful of the need to balance housing density with social benefits.

The requested prevailing wage concession is doubly in conflict with the intent of the SDBL because, in addition to threatening the health and safety of construction workers, the concession would reduce their wages and make the very housing they are building less affordable to them. This outcome would be antithetical to the intent and policy of the SDBL, which is ultimately to make housing more affordable.

⁵ Cal. Gov. Code § 65915(d)(1).

⁶ Cal. Gov. Code § 65915(k).

⁷ Cal. Gov. Code § 65915(u)(1)

⁸ Cal. Gov. Code § 65915(u)(2).

Historically speaking, the SDBL waivers and concessions that have been granted by the City over the years have not posed this problem.

The SDBL should not be misused to allow developers to avoid minimum labor standards or other social benefits, especially where there has been no demonstration of an actual financial benefit that would result in more affordable housing.

II. The City Should Request Reasonable Documentation to Support the Concessions

The SDBL “does not prohibit a local government from requiring an applicant to provide reasonable documentation to establish eligibility for a requested density bonus.”⁹ This includes incentives or concessions.¹⁰ Moreover, the local government is also tasked with “provid[ing] the applicant with a determination as to the following matters:

- (II) If the applicant requests a parking ratio pursuant to subdivision (p), the parking ratio for which the applicant is eligible.
- (II) If the applicant requests a parking ratio pursuant to subdivision (p), the parking ratio for which the applicant is eligible.
- (III) If the applicant requests a parking ratio pursuant to subdivision (p), the parking ratio for which the applicant is eligible.

In the case of *Schreiber v. City of Los Angeles (Schreiber)*, the Court of Appeal recognized that “[a] city or county is not prohibited from requesting or considering information relevant to cost reductions.”¹¹ This is the case even though the statute places the ultimate burden of proof on the local government.¹² Accordingly, the City can and should take the position that the Applicant has not yet provided adequate information for the City to make a determination as to its requested concessions, and require the Applicant to provide reasonable documentation in support of same.

Here, the Applicant has not provided any evidence or information whatsoever to substantiate its requested concessions. The section of the application relating to the concessions reads as follows, in its entirety:

A concession is a modification of a development standard that reduces the cost of providing affordable housing. The City may only deny the concession if it finds that the concession would have a specific adverse impact upon public health and safety, or the physical environment, or on any real property listed in the California Register of Historical Resources, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low-income, very-low income, and moderate-income households, or if the concession would be contrary to State or Federal law.

⁹ Cal. Gov. Code § 65915(a)(2).

¹⁰ Cal. Gov. Code § 65915(b)(1).

¹¹ *Schreiber*, 69 Cal.App.5th at 557.

¹² Cal. Gov. Code § 65915(d)(4); *Schreiber v. City of Los Angeles* (2021) 69 Cal.App.5th 549, 556-557

(“This subdivision does not prohibit a local government from requiring an applicant to provide reasonable documentation to establish eligibility for a requested density bonus, incentives or concessions, as described in subdivision (d), or waivers or reductions of development standards, as described in subdivision (e).”)

The project is entitled to 3 concessions (or incentives) under Government Code Section 65915(d), and an unlimited number of waivers under Section 65915(e).

1. **Concession.** Exemption from the “Apprenticeship Requirements” in Establishing Healthcare and Apprenticeship Standards for Private Development, as required by BMC Section 13.107.040 2.
2. **Concession.** Exemption from the “Health Care Expenditures” in Establishing Healthcare and Apprenticeship Standards for Private Development, as required by BMC Section 13.107.050 3.
3. **Concession.** Exemption from the “Prevailing Wage requirements” in the Southside Plan as required by BMC Section 13.108(A)

The ZAB findings similarly do not provide any rationale whatsoever that would link the requested concessions to cost savings. Instead, the ZAB makes summary conclusions by referencing back to the law without any analysis or explanation.¹³ Therefore, the Trades Council and Carpenters respectfully request that the City remand this matter to the ZAB to request reasonable documentation from the Applicant in support of the requested concessions, so the City can determine whether they should be granted.

III. The Requested Concessions Would Not Result In Identifiable and Actual Cost Reductions

The SDBL provides that when an applicant for a density bonus submits a proposal for specific incentives or concessions, the local government shall grant such incentives or concessions unless the local government makes a written finding based on substantial evidence that “the concession or incentive does not result in identifiable and actual cost reductions, consistent with subdivision (k), to provide for affordable housing costs...”¹⁴

As explained above, the Applicant has not provided any information at all regarding how the requested concessions would result in identifiable and actual cost reductions. Even though the law places the ultimate burden of proof on the City, the City may request information from the Applicant to make an initial *prima facie* showing of how the concessions would, in some way, actually save development costs. Here, given the importance of the labor standards in the HARD HATS Ordinance and the Southside Plan, the City should exercise this option.

IV. The Requested Concessions Would Have a Specific, Adverse Impact Upon Public Health and Safety

The SDBL also provides that when an applicant for a density bonus submits a proposal for specific incentives or concessions, the local government shall grant such incentives or concessions unless the local government makes a written finding based on substantial evidence that “the concession or incentive would have a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon public health and safety... and for which there is no feasible method to satisfactorily mitigate or avoid the

¹³ ZAB 2025-10-09 Findings, Page 6 of 11.

¹⁴ Cal. Gov. Code § 65915(d)(1)(A).

specific, adverse impact without rendering the development unaffordable to low-income and moderate-income households...”¹⁵

Working in construction is a particularly dangerous occupation. The construction industry is responsible for roughly 20% of all workplace fatalities in the U.S. despite employing only 10% of the U.S. workforce. Unfortunately, in recent years, there has been a disproportionately high number of construction worker fatalities in Berkeley specifically.¹⁶

This is, in large part, why the City of Berkeley adopted the HARD HATS ordinance requiring health care expenditures and apprenticeship participation. Section 13.107.020 of the ordinance states that it was adopted to ensure apprentices are competently trained, to enhance the good health of construction workers working in the City, and to promote retention and growth of a skilled labor pool in the City. The staff report recommending adoption of the ordinance echoed these concerns.

Waiving the requirement to participate in an apprentice training program, the requirement to provide health care, and the requirement to pay a living wage would therefore have a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon public health and safety.

(a) Health Care:

The construction industry has one of the highest injury rates among all occupations due to the nature of the work, which involves manual labor, working at heights, and exposure to hazardous materials. According to the Bureau of Labor Statistics, the construction industry accounted for 1,008 fatal work injuries in 2020, the highest of any industry sector.¹⁷

Research underscores the additional dangers faced by workers without health coverage. A recent publication from the UC Berkeley Labor Center found that California construction workers were 2.6 times more likely than other California workers to be uninsured, and that California construction workers and/or their dependents account for a disproportionately high percentage of spending on Medicaid/CHIP.¹⁸ In addition, the Center for Construction Research & Training’s analysis of nationwide data found that the high uninsured construction worker rate is driven by non-union-signatory employers.¹⁹ Finally, a 2009 study conducted by Harvard Medical School and Cambridge Health Alliance found that uninsured, working-age Americans have a 40% higher risk of death compared to those with insurance.²⁰ For construction workers, whose jobs already involve elevated hazards, the absence of health coverage magnifies these risks.

¹⁵ Cal. Gov. Code § 65915(d)(1)(B); see also, Cal. Gov. Code § 65915(d)(3) (“This subdivision shall not be interpreted to require a local government to grant an incentive or concession that has a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon health or safety, and for which there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact.”)

¹⁶ See, <https://www.berkeleyside.org/2019/06/17/family-files-wrongful-death-lawsuit-after-construction-worker-fatality-in-berkeley>.

¹⁷ See, <https://www.bls.gov/opub/ted/2022/a-look-at-workplace-deaths-injuries-and-illnesses-on-workers-memorial-day.htm>.

¹⁸ See, <https://laborcenter.berkeley.edu/the-public-cost-of-low-wage-jobs-in-californias-construction-industry/>.

¹⁹ See, https://public.tableau.com/shared/KXZ6KK49F?:display_count=n&:origin=viz_share_link.

²⁰ See, <https://news.harvard.edu/gazette/story/2009/09/new-study-finds-45000-deaths-annually-linked-to-lack-of-health-coverage/>.

This is precisely why the City of Berkeley adopted health care expenditure requirements in the HARD HATS Ordinance, to ensure that contractors in the City are not shirking their responsibility to address the health care needs of workers and their families. Allowing the Applicant to avoid this requirement would undermine the City's protective framework and place workers' health at greater risk.

(b) Apprenticeship:

State and federal oversight of apprenticeship programs extends back more than 80 years. In California, construction apprenticeship program standards require several years of on-the-job training for specific work processes, a ratio of apprentices to journey-level employees, hours of classroom training, including health and safety training, and a living wage. Notably, construction employers are less likely in the absence of a collective bargaining agreement to invest in employee training than is the case in other industries.²¹

The HARD HATS Ordinance attempts to level this playing field by requiring all contractors working on the Project to participate in either a joint labor-management apprenticeship program or a program that meets minimum graduation standards. By doing so, the City is ensuring that all apprentices on large development projects in the City are well trained and competently supervised, which is of utmost importance to public health and safety.

(c) Prevailing Wages

There is a robust statistical connection between wage rates – including living wage and prevailing wage rates – and job safety. In California, this is reflected in our “dual wage” workers compensation system, where higher-paid employees have a lower workers’ compensation insurance rate than lower-paid employees. This is because higher-paid employees are less likely to produce adverse workers’ compensation losses, because their superior training and experience results in safer job sites.

A 2019 study in the publication *Public Works Management & Policy* found that repealing state prevailing wage laws actually contributed to workplace hazards.²² Doing so increased construction injury rates across various types of injuries, from 11.6% to 13.1% as the seriousness of injuries increased. Disabilities also increased by 7.5% to 8.2%.

By requiring prevailing wages to be paid in the Southside Plan, the City is promoting the use of a skilled, stable workforce – one less prone to accidents and workers’ compensation claims. This not only protects workers but incentivizes responsible contractors who maintain high safety standards. Exempting the Project from the Southside Plan’s prevailing wage requirement would directly undermine these protections.

For the reasons set forth in sections (a), (b), and (c) above, allowing contractors working on the Project to avoid the City’s health care expenditure, apprenticeship participation, and prevailing wage requirements would have a specific, adverse impact upon public health and safety, and the Applicant’s request for these concessions should be denied.

²¹ Waddoups, C. Jeffrey. 2014. “Union Coverage and Work-Related Training in the Construction Industry.” *Industrial & Labor Relations Review*. 67:2 (532-555).

²² Li, Z., Zorigtbaatar, C., Pleités, G., Fenn, A., & Philips, P. (2019). The Effect of Prevailing Wage Law Repeals and Enactments on Injuries and Disabilities in the Construction Industry. *Public Works Management & Policy*, 24(4), 368-384. <https://doi.org/10.1177/1087724X18822600> (Original work published 2019).

V. Conclusion

The Trades Council and Carpenters respectfully request that City Council either reverse the ZAB decision approving the Use Permit with the proposed concessions, reverse the ZAB decision with respect to the proposed concessions but approve the remainder of the Use Permit, or remand the matter to the ZAB to reconsider the application in light of the foregoing.²³ Additionally, the Trades Council and Carpenters request that City Council direct staff to request supporting documentation from the Applicant and confer with the Applicant regarding the grounds for its requested concessions, and, if appropriate, request that the Applicant voluntarily agree to rescind its request in order to promote health and safety and the public benefits that would otherwise derive from the Project.

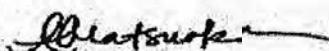
The Trades Council and Carpenters request that the City schedule a hearing on this appeal before the City Council at the earliest feasible date.²⁴ The Trades Council and Carpenters reserve the right to submit additional correspondence and evidence concerning this appeal prior to the hearing date.²⁵

Thank you for your consideration of this appeal. Feel free to contact the undersigned with any questions or concerns.

Sincerely,



Jolene Kramer



Andrea Matsuoka

cc. City of Berkeley Planning Department, via e-mail only (planning@berkeleyca.gov)

²³ BMC section 23.410.040(G).

²⁴ BMC section 23.410.040(A).

²⁵ BMC section 23.410.040(F).