



Fair Campaign Practices Commission  
Open Government Commission

## CONCURRENT MEETING OF THE FAIR CAMPAIGN PRACTICES COMMISSION AND THE OPEN GOVERNMENT COMMISSION

### MEETING AGENDA

July 16, 2020

7:00 p.m.

Pursuant to Executive Order N-29-20 issued by the Governor on March 17, 2020, this meeting will be held telephonically. Members of the public interested in attending will be able to observe and address the meeting using the following information:

Please use the following link to join the webinar:

<https://us02web.zoom.us/j/86293245819>

Or Telephone:

US: +1 669 900 9128

Webinar ID: 862 9324 5819

Secretary: Samuel Harvey, Deputy City Attorney

### **The Commission may act on any item on this agenda**

1. Call to Order 7:00 p.m.
2. Roll Call.
3. Public Comment. *Comments on subjects not on the agenda that are within the Commissions' purview are heard at the beginning of meeting. Speakers may comment on agenda items when the Commission hears those items.*
4. Approval of minutes for the June 18, 2020 concurrent regular meeting

### **Fair Campaign Practices Commission Agenda**

5. Reports.
  - a. Report from Chair.
  - b. Report from Staff.
6. Approval of public campaign financing program certification application; discussion and possible action.
7. Regulations defining a "minor violation" for staff approval of public financing applications; discussion and possible action.
8. Regulation of officeholder accounts and potential direction to Ad Hoc Subcommittee on Officeholder Accounts; discussion and possible action.

### Open Government Commission Agenda

9. Reports.
  - a. Reports from Chair.
  - b. Reports from Staff.
10. Complaint filed by Martin and Olga Schwartz alleging violations of the Open Government Ordinance relating to Zoning Adjustments Board proceedings; discussion and possible action.
11. Adjournment.

### Communications

None

This meeting is being held in a wheelchair accessible location. To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at 981-6418 (V) or 981-6347 (TDD). Please refrain from wearing scented products to this meeting.

Communications to Berkeley boards, commissions or committees are public record and will become part of the City's electronic records, which are accessible through the City's website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to a City board, commission or committee, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service or in person to the secretary of the relevant board, commission or committee. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the secretary to the relevant board, commission or committee for further information. **SB 343 Disclaimer:** Any writings or documents provided to a majority of the Commission regarding any item on this agenda will be made available for public inspection at the City Attorney's Office at 2180 Milvia St., 4<sup>th</sup> Fl., Berkeley, CA.



Fair Campaign Practices Commission  
Open Government Commission

## DRAFT MINUTES

June 18, 2020

### CONCURRENT REGULAR MEETING OF THE FAIR CAMPAIGN PRACTICES COMMISSION AND THE OPEN GOVERNMENT COMMISSION

Pursuant to Executive Order N-29-20 issued by the Governor on March 17, 2020, this meeting was held telephonically.

Secretary: Samuel Harvey, Deputy City Attorney

Members Present: Brad Smith (Chair), Jedidiah Tsang (Vice Chair), Janis Ching, Dean Metzger, Patrick O'Donnell, Patrick Sheahan

Also Present: Samuel Harvey, Staff Secretary / Deputy City Attorney  
Michael MacDonald, City Clerk

1. **Call to Order**

Chair Called the meeting to order at 7:02 p.m.

2. **Roll Call**

Roll call taken.

3. **Public Comment (items not on agenda)**

No speakers.

4. **Approval of minutes for the May 21, 2020 concurrent regular meeting**

- a. Public comment: No speakers.
- b. Commission discussion and action

*Motion to approve minutes pending confirmation of details of one motion by Secretary (M/S/C: Smith/Ching; Ayes: Metzger, O'Donnell, Ching, Sheahan, Tsang, Smith; Noes: none; Abstain: none; Absent: Blome, McLean.)*

5. **Changing meeting start times to 6 p.m. while meetings are held telephonically during the COVID-19 shelter-in-place order**

- a. Public Comment: No speakers.
- b. Commission discussion, no action taken

**Fair Campaign Practices Commission Agenda**

6. **FCPC Reports**

- a. Report from Chair.
- b. Report from Staff.

7. **Approval of public campaign financing program certification applications**

- a. Public comment: No speakers.
- b. Commission discussion and action.

*Motion to approve public campaign financing program certification application for Deborah Matthews (M/S/C: O'Donnell/Ching; Ayes: Metzger, O'Donnell, Ching, Sheahan, Tsang, Smith; Noes: none; Abstain: none; Absent: Blome, McLean.)*

*Motion to approve public campaign financing program certification application for Richard Illgen (M/S/C: O'Donnell/Ching; Ayes: Metzger, O'Donnell, Ching, Sheahan, Tsang, Smith; Noes: none; Abstain: none; Absent: Blome, McLean.)*

8. **Regulations defining a "minor violation" for staff approval of public financing applications**

- a. Public comment: No speakers.
- b. Commission discussion and action.

*Motion to have staff compile input from commissioners and return at a subsequent meeting with draft language for the commission to consider (M/S/C: Ching/Metzger; Ayes: Metzger, O'Donnell, Ching, Sheahan, Tsang, Smith; Noes: none; Abstain: none; Absent: Blome, McLean.)*

**Open Government Commission Agenda**

9. **OGC Reports**

- a. Report from Chair.
- b. Report from Staff.

10. **Councilmember office budget relinquishments and grants to organizations**

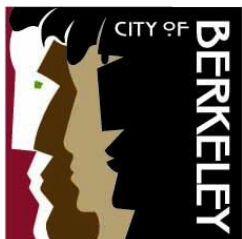
- a. Public comment: No speakers.
- b. Commission discussion and action.

*Motion to approve and send recommendation to Council after amending recommendation by striking a single sentence referencing use of campaign funds to make donations to non-profit organizations. (M/S/C: Metzger/Sheahan; Ayes: Metzger, O'Donnell, Ching, Sheahan, Tsang, Smith; Noes: none; Abstain: none; Absent: Blome, McLean.)*

11. **Adjournment**

*Motion to adjourn. (M/S/C: O'Donnell/Ching; Ayes: Metzger, O'Donnell, Ching, Sheahan, Tsang, Smith; Noes: none; Abstain: none; Absent: Blome, McLean.)*

The meeting adjourned at 9:03 p.m.



Fair Campaign Practices Commission

INFORMATION CALENDAR  
July 28, 2020

To: Honorable Mayor and Members of the City Council

From: Fair Campaign Practices Commission

Submitted by: Brad Smith, Chairperson, Fair Campaign Practices Commission

Subject: Fair Campaign Practices Commission FY2020-2021 Work Plan

INTRODUCTION

The Fair campaign Practices Commission (FCPC) has updated its work plan, which outlines Commission objectives for the upcoming fiscal year. This work plan includes ongoing compliance review of campaign statements; ongoing review of alleged violations of BERA; receiving due process training for hearing complaints; finding ways to reduce the number of pages printed in commission packets; review of BERA's enforcement procedures; establish guidelines for approval of applications for public financing; developing guidelines to avoid preventing a candidate from receiving public funds for minor violations of BERA; and to work collaboratively with the City Council to develop policy related to Officeholder Accounts.

CURRENT SITUATION AND ITS EFFECTS

At the regular meeting on May 21, 2020, the Fair Campaign Practices Commission unanimously approved the FY2020-2021 Work Plan, which will be used to guide the Commission's work throughout the year.

**Action:** M/S/C (Blome/O'Donnell) to approve work plan with changes and to prepare and submit an Information Report to City Council.

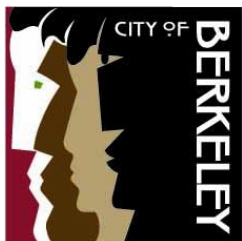
**Vote:** Ayes: Metzger, O'Donnell, Ching, Blome, McLean, Sheahan, Tsang, Smith; Noes: none; Abstain: none; Absent: none.

BACKGROUND

See attached Work Plan.

ENVIRONMENTAL SUSTAINABILITY

No environmental impacts or opportunities were identified as a result of this recommendation.



Fair Campaign Practices Commission

POSSIBLE FUTURE ACTION

Based on Commission research and public hearings, new initiatives and recommendations to City Council may be submitted to City Council at such time deemed necessary.

FISCAL IMPACTS OF POSSIBLE FUTURE ACTION

Unknown, but none expected.

CONTACT PERSON

Samuel Harvey, Commission Secretary, City Attorney's Office (510) 981-6998  
Brad Smith, Chairperson, (510) 926-2047

Attachment: 1: Fair Campaign Practices Commission Work Plan

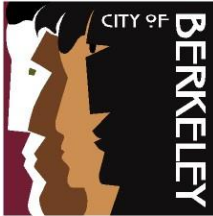


Fair Campaign Practices Commission

**Work Plan  
Approved May 21, 2020**

- Ongoing compliance review of campaign statements.
- Ongoing review of alleged violations of BERA.
- Receive due process training for hearing complaints.
- Find ways to reduce the number of pages in commission packets.
- Review BERA enforcement procedures and make recommendations if appropriate.
- Establish guidelines for approval of applications for public financing.
- Develop guidelines to avoid preventing a candidate from receiving public funds for minor violations of the Berkeley Fair Elections Act.
- Work collaboratively with the City Council to develop policy related to Officeholder Accounts.





City Clerk Department

**DATE:** July 16, 2020

**TO:** FAIR CAMPAIGN PRACTICES COMMISSION

**FROM:** Mark Numainville, City Clerk

**SUBJECT:** Certification of Public Financing Program Participant

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Pursuant to the Fair Elections Act of 2016, the Fair Campaign Practices Commission is required to certify candidates as participants in the City's public financing program. As of July 9, 2020, the following request has been received and is recommended by staff for approval as noted:

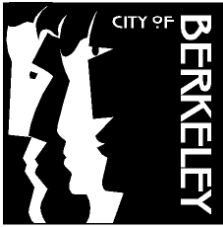
<b>Application for Participation/Qualifying Request for Funds; Matching Request for Funds</b>	
<b>Submitted By:</b>	Cheryl Davila
<b>Qualified Contributions:</b>	\$1,550.00
<b>Eligible Matching Funds:</b>	\$9,300.00
<b>Recommendation:</b>	Certify candidate to participate in the program. Approve 6:1 matching public funds in an amount not to exceed \$9,300. The \$50 contribution from Chadidjah McFall was incorrectly coded as cash when the contribution was received by check. The correction has been made.

Basic glossary of terms:

Application for Participation	Required form for participating candidates that certifies they will follow the regulations and requirements of the program.
Qualifying Request	In order to qualify to receive public matching funds, a candidate must collect at least 30 contributions (from 30 unique contributors) of at least \$10 totaling \$540.
Matching Request	Campaign committees participating in the Public Financing Program submit a Matching Request with all required documentation in order to receive Public Matching Funds.
Qualified Contribution	A contribution that is eligible for the 6-to-1 match from the Fair Elections Fund. A Qualified Contribution is a contribution of \$50 or less from a natural person resident of Berkeley.

Attachment

1. Cheryl Davila: Application, Qualifying and Matching Request.



City Clerk Department  
 2180 Milvia Street  
 Berkeley, CA 94704  
 (510) 981-6900  
[www.cityofberkeley.info](http://www.cityofberkeley.info) | [elections@cityofberkeley.info](mailto:elections@cityofberkeley.info)

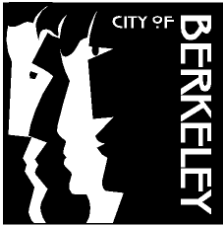
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 Filing ID:  
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## FAIR ELECTIONS ACT FORM

### APPLICATION FOR PARTICIPATION IN PUBLIC FINANCING PROGRAM

(Berkeley Municipal Code Chapter 2.12 – Election Reform Act)

OFFICE SOUGHT		
OFFICE City Council	COUNCIL DISTRICT (IF APPLICABLE) 2	
ELECTION CYCLE 11/03/2020		
CANDIDATE INFORMATION		
LAST Davila	FIRST Cheryl	M.I.
COMMITTEE INFORMATION		
NAME OF CAMPAIGN COMMITTEE ReElect Cheryl Davila for City Council 2020		FPPC I.D. No. 1385748
CANDIDATE CERTIFICATION		
<p>Under penalty of perjury, I hereby certify:</p> <p>I have complied with the restrictions of Berkeley Municipal Code Chapter 2.12 (Election Reform Act) during the election cycle to date; and</p> <p>My campaign committee has filed all campaign finance reports required by law during the election cycle to date and that they are complete and accurate; and</p> <p>I will comply with the requirements of Chapter 2.12 during the remainder of the election cycle and, specifically, if certified as an eligible participating candidate, will comply with the requirements applicable to participating candidates.</p>		
Cheryl Davila CANDIDATE SIGNATURE		02/07/2020 DATE SIGNED



City Clerk Department  
 2180 Milvia Street  
 Berkeley, CA 94704  
 (510) 981-6900  
[www.cityofberkeley.info](http://www.cityofberkeley.info) | [elections@cityofberkeley.info](mailto:elections@cityofberkeley.info)

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**FAIR ELECTIONS ACT FORM  
 INITIAL QUALIFYING DECLARATION FOR PUBLIC FUNDS  
 BY CANDIDATES FOR MAYOR OR CITY COUNCIL**

<b>OFFICE SOUGHT</b>			
OFFICE City Council		COUNCIL DISTRICT (IF APPLICABLE) District 2	
ELECTION CYCLE 11/03/2020			
<b>COMMITTEE INFORMATION</b>			
NAME OF CAMPAIGN COMMITTEE ReElect Cheryl Davila for City Council 2020		FPPC I.D. No. 1385748	
STREET ADDRESS		APARTMENT/SUITE/FLOOR	
CITY Berkeley	STATE CA	ZIP CODE 94710	
TELEPHONE (510) 841-4198	EMAIL ADDRESS cdavila@cheryldavila.vote		
<b>CANDIDATE DECLARATION</b>			
<p>I hereby declare that the following information is true and correct:</p> <ul style="list-style-type: none"> <li>• All information on the attached Qualified Contribution Receipts is complete and accurate to the best of my knowledge.</li> <li>• I understand that the Commission shall verify that the qualified contributions meet all of the requirements and restrictions prior to the disbursement of funds.</li> <li>• I understand that if I submit any contributions that are not from the person(s) identified on the receipt I shall be liable to pay the Fair Elections Fund the entire amount in addition to any penalties.</li> <li>• All Qualified Contributions, of any dollar amount, eligible for matching Fair Elections funds must be publically disclosed with the contributor information required under Sections 2.12.280 and 2.12.283.</li> <li>• I understand that all campaign filings must be current in order for a disbursement of Fair Election funds to be released.</li> </ul>			
Cheryl Davila CANDIDATE SIGNATURE		07/06/2020 DATE SIGNED	

**INITIAL QUALIFYING REQUEST FOR FAIR ELECTIONS FUNDS PAYMENT**

In order to participate in the Public Financing Program, a candidate must collect at least 30 Qualified Contributions from at least 30 unique contributors of at least \$10.00 and no more than \$50.00 each, for a total dollar amount of at least \$540.00.

All approved Qualified Contributions are matched at a 6:1 ratio. For all public matching funds requests, a candidate must submit the following documentation:

- Qualified Contributions List (below).
- Receipt for Qualified Contribution for Fair Elections Funds.
- Evidence of each contribution received, such as electronic copies of contributor checks, credit card authorizations, or online payment receipts.
- Electronic copies of itemized deposit slips.
- Complete contributor information (full name, address, occupation, and employer) as required by BERA and the Political Reform Act.

	Last Name	First Name	Address	Zip Code, City	Occupation	Employer	Payment Method	Date Received	Date Deposited	Deposit Batch #	Amount of Contribution
1.	Smith	Harvey		94703 Berkeley	Retired	Oakland Unified School District	Check	06/15/2020	06/15/2020	6/19/2020	50.00
2.	Garcia De La Noceda	Maria		94702 Berkeley	Interpreter	IEC Corte Madera, CA	Check	06/05/2020	06/05/2020	5.30.2020 6.1.2020	50.00
3.	Wilkinson	Margaret		94703 Berkeley	Retired	Retired	Check	06/05/2020	06/05/2020	5.30.2020 6.1.2020	50.00
4.	Sochet	Marty		94707 Berkeley	Retired Psychologist	Marty Sochet Berkeley, CA	Electronic	06/01/2020	06/01/2020	5.30.2020 6.1.2020	50.00
5.	Stankov-Hodge	Marina		94702 Berkeley	Nurse	Highland Hospital	Electronic	05/31/2020	05/31/2020	5.30.2020 6.1.2020	50.00
6.	Babitt	Laura		94710 Berkeley	Controller	REL Acoustics, Ltd.	Electronic	05/30/2020	05/30/2020	5.30.2020 6.1.2020	50.00
7.	Walsh	Helen		94707 Berkeley	Self employed at Digital Media	Self Employed, Digital Media, Berkeley California	Electronic	05/30/2020	05/30/2020	5.30.2020 6.1.2020	50.00
8.	Drescher	Anushka		94702 Berkeley	Student	Student	Electronic	05/30/2020	05/30/2020	5.30.2020 6.1.2020	50.00
9.	Gor	Nilang		94703 BERKELEY	PD Engineer	Audentes Therapeutics	Electronic	05/30/2020	05/30/2020	5.30.2020 6.1.2020	50.00
10.	Ellis	Gretchen		94703 Berkeley	Trainer	Stand! For Families Free of Violence	Electronic	05/30/2020	06/01/2020	5.30.2020 6.1.2020	50.00
11.	Watson	Rochelle		94707 Berkeley	Non-Profit National Organizer	Friends of Sabeel North America	Electronic	05/30/2020	05/30/2020	5.30.2020 6.1.2020	50.00
12.	Denney	Carol		94702-1637 Berkeley	Musician/Cartoonist	Self Employed	Electronic	05/30/2020	05/30/2020	5.30.2020 6.1.2020	50.00
13.	Thomas	Stephanie		94707 Berkeley	Retired	Retired	Electronic	05/29/2020	05/29/2020	5.30.2020 6.1.2020	50.00
14.	Wilkinson	Tony		94703 Berkeley	Retired	Retired	Check	05/29/2020	06/05/2020	5.30.2020 6.1.2020	50.00
15.	Sorgen	Phoebe		94708 Berkeley	Teacher	Berkeley Adult School	Electronic	05/27/2020	05/27/2020	5.30.2020 6.1.2020	50.00
										Subtotals	750.00

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Last Name	First Name	Address	Zip Code, City	Occupation	Employer	Payment Method	Date Received	Date Deposited	Deposit Batch #	Amount of Contribution
16.	Pritchett	Andrea	94710 Berkeley	Teacher	Berkeley Unified School District	Check	05/20/2020	05/27/2020	5.27.2020	50.00
17.	Williams	Lewis	94707 Berkeley	Retired	Retired	Check	05/12/2020	06/05/2020	5.30.2020 6.1.2020	50.00
18.	Reedy	Patricia	94707 Berkeley	Dances educator	Luna Dance Institute	Check	05/08/2020	05/17/2020	5.30.2020 6.1.2020	50.00
19.	Olivenbaum	Linda	94703 Berkeley	Retired	Retired	Check	04/24/2020	05/17/2020	5.30.2020 6.1.2020	50.00
20.	Anderson	Maxwell	94703 Berkeley	Retired	Retired	Check	04/24/2020	05/17/2020	5.30.2020 6.1.2020	50.00
21.	Hauer	Glen	94702 Berkeley	Retired	Retired	Check	04/24/2020	05/12/2020	5.30.2020 6.1.2020	50.00
22.	Brotsky	Ellen	94707 Berkeley	Retired	Retired	Check	03/18/2020	06/05/2020	6.5.2020	50.00
23.	Shamban	Cindy	94703 Berkeley	Retired	San Francisco Municipal Transportation Agency	Check	03/15/2020	04/20/2020	4/4/20	50.00
24.	Zelaya	Mary	94709 Berkeley	Retired Teacher	Antioch Unified School District	Check	03/12/2020	04/04/2020	4/4/20	50.00
25.	Zelaya	Mario	94709 Berkeley	Retired	Retired	Check	03/12/2020	05/17/2020	5.30.2020 6.1.2020	50.00
26.	McFall	Chadidjah	94702 Berkeley	Student	Student	Cash	03/08/2020	04/04/2020	4/4/20	50.00
27.	Duggan	Sharon	94703 Berkeley	Retired	Retired	Check	03/02/2020	04/04/2020	4/4/20	50.00
28.	Allen	Phil	94702 Berkeley	Retired	Retired	Check	02/20/2020	03/27/2020	4/4/20	50.00
29.	Fouda	Tarek	94707 Berkeley	Sound Engineer	KALW Radio Station	Check	02/02/2020	04/04/2020	4/4/20	50.00
30.	Erickson	John	94703 Berkeley	Retired Attorney	Erickson, Beaseley & Hewitt	Check	01/13/2020	01/13/2020	4/4/20	50.00
31.	Erickson	Barbara	94703 Berkeley	Retired journalist	Catholic Voice, Diocese of Oakland	Check	01/13/2020	01/13/2020	4/4/20	50.00
									Subtotals	800.00
									Grand Totals	1,550.00



Fair Campaign Practices Commission

Date: July 8, 2020

To: Fair Campaign Practices Commission

From: Sam Harvey, Secretary

Subject: Regulations defining a “minor violation” for staff approval of public financing program applications

At its April 23, 2020 meeting, the Commission approved amendments to the Berkeley Election Reform Act (“BERA”) to allow staff to certify public financing applications without Commission action, with subsequent reporting to the Commission.

The Commission amended BMC § 2.12.500.A.10 as follows:

The ~~Commission~~City has the authority to approve a candidate's application for public financing, despite a violation by the candidate related to participation and qualification in the public financing program, if the violation is minor in scope and the candidate demonstrates a timely, good-faith effort to remedy the violation. The Commission ~~may~~shall adopt regulations setting forth guidelines for what constitutes a minor violation under this provision.

The BERA amendments must be approved by the City Council before they become effective. The amendments were approved by Council at its June 30, 2020 meeting. The amendments will appear on the Consent Calendar for final passage at the Council’s July 14, 2020 meeting. If passed, the amendments will go into effect August 13, 2020.

At its June 18, 2020 meeting, the Commission discussed potential regulation language to define “minor violation” and directed staff to gather proposed language from commissioners and present that language at a subsequent meeting so that the Commission may develop and adopt a regulation defining “minor violation.”

Staff recommends that the Commission discuss, develop and adopt language defining a “minor violation.”

To aid this discussion, staff has attached a copy of BMC § 2.12.555 and FCPC Regulation R2.12.555. Under the City's public financing laws, a person who commits a "substantial violation" of BERA is ineligible to receive public funds for a period of four years. (BMC § 2.12.555.) Regulation R2.12.555 was adopted by the Commission to define a "substantial violation."

Also attached are two sets of proposed regulation language provided by Commissioners Metzger and O'Donnell. The Commission may adopt either of these proposed regulations or a combination of these proposals, or draft and approve its own language.

Attachments:

1. BMC § 2.12.555 and FCPC Regulation R2.12.555
2. Proposed "minor violation" language, Commissioner Metzger
3. Proposed "minor violation" language, Commissioner O'Donnell



**Berkeley Municipal Code**

**2.12.555 Violation--Persons ineligible for public funds--Time limit.**

No person who commits a substantial violation of this chapter shall be eligible to receive public funds for a period of four years from and after the date that the Commission determines, upon a two-thirds vote, that such a violation has occurred, following a hearing held pursuant to Section [2.12.230](#). The Commission shall by regulation state the criteria to be satisfied in order to make a finding of a substantial violation. (Ord. 7524-NS § 3.6 (part), 2016)

**FCPC Regulations**

**R2.12.555 Substantial Violation**

A violation is deemed to be substantial if the seriousness of the offense is severe and public harm is significant. Severity and significance will be determined by assessing the following factors:

- (1.) the dollar amount of the unreported or misreported violations;
- (2.) the presence or lack of intent to deceive the voting public;
- (3.) whether the violation appears deliberate, negligent, or inadvertent;
- (4.) whether the Respondent demonstrated good faith in consulting with Commission staff during any investigation or made good faith efforts to correct any deficiencies, violations, or errors;
- (5.) whether the violation was isolated or was part of a pattern of violations of this chapter by the candidate, either within the same election cycle or in past election cycles;
- (6.) the effect of the violation upon the election or upon the administration of the Fair Elections Act.

## Revisions to BERA to define “Minor Violations” for Approval of Public Funds

### R3.12.555 Minor Violation

A violation is deemed to be minor if the offense is insufficient and is of no public harm. A minor violation will be determined by assessing the following factors:

- (1.) A checking account for the candidate’s committee is open with the candidate’s own funds amounting to \$100 or less.
- (2.) A contributor’s name is misspelled but corrected when the misspelling is discovered.
- (3.) A contributor’s address is incorrect but corrected when discovered and is a Berkeley resident.
- (4.) If a contribution is greater than \$50 and is returned to the contributor.
- (5.) If the candidate unknowingly makes a false statement to the FCPC and corrects it when it is discovered.
- (6.) Any perceived violation that does not meet the definition of a substantial violation and can be interpreted in more than one way.

All minor violations are to be presented to the commission for a final determination of their status.

July 16, 2020

Draft Amendments to Regulation R2.12.555  
of the Berkeley Election Reform Act

R2.12.555 would be amended to read as follows:

**R2.12.555 Substantial and Minor Violations**

(a) A violation is deemed to be substantial if the seriousness of the offense is severe and public harm is significant. Severity and significance will be determined by assessing the following factors:

- (1) the dollar amount of the unreported or misreported violations;
- (2) the presence or lack of intent to deceive the voting public;
- (3) whether the violation appears deliberate, negligent, or inadvertent;
- (4) whether the Respondent demonstrated good faith in consulting with Commission staff during any investigation or made good faith efforts to correct any deficiencies, violations, or errors;
- (5) whether the violation was isolated or was part of a pattern of violations of this chapter by the candidate, either within the same election cycle or in past election cycles;
- (6) the effect of the violation upon the election or upon the administration of the Fair Elections Act.

(b) A violation is deemed to be minor if it is not substantial as provided above, and if the offense is minimal and has resulted in no significant public harm. The minimal scope of the offense and lack of public harm will be determined by assessing the following factors:

- (1) the violation has not had any significantly impact on the election process, on the fairness of the election, or on other candidates' ability to conduct their campaigns;
- (2) the violation is merely technical;
- (3) the dollar amount of the violation is small;
- (4) the violation is capable of being promptly corrected;
- (5) any improperly received funds have been promptly returned;

(6) the individual seeking or receiving public financing has demonstrated good faith in consulting with Commission staff regarding the violation and has made good faith efforts to correct any deficiencies, violations, or errors;

(7) the individual seeking or receiving public financing has not been found to have repeatedly violated the Berkeley Elections Reforms Act in the past or to have recently violated the Act; and

(8) the violation does not significantly affect, or undermine, the purposes of the Fair Elections Act or its effective administration.

In the event that City staff is unable to make a determination whether a violation is minor, the issue of the scope of the violation shall promptly be presented to the Commission for its determination.



Fair Campaign Practices Commission

Date: July 8, 2020

To: Fair Campaign Practices Commission

From: Commissioner Patrick O'Donnell

Subject: Regulation of officeholder accounts and potential direction to Ad Hoc Subcommittee on Officeholder Accounts

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This item has been agendaized to facilitate discussion in light of the City Council's ongoing consideration of the Commission's proposal to prohibit officeholder accounts.

In 2019, the FCPC approved an amendment to the Berkeley Election Reform Act ("BERA") prohibiting officeholder accounts. That proposal was submitted to Council. However, some councilmembers have expressed opposition to an outright ban on officeholder accounts and a preference for developing regulations for those accounts. This report contains a new alternative proposal to regulate – rather than prohibit – officeholder accounts.

## **Background**

During 2019, the Commission discussed whether there is a need to amend the law relating to the use of officeholder accounts. These accounts are not expressly regulated by BERA. But under current law, if funds for officeholder accounts are used for campaign purposes, this may implicate campaign financing law and may trigger various local and state legal requirements. A 1999 legal opinion from the City Attorney stated: "[t]he mere fact that an account may be designated an officeholder account does not insulate it from scrutiny under BERA or other applicable local law if the officeholder account is not used strictly for officeholder purposes or if some action taken with respect to the officeholder account implicates campaign contributions and expenditures or other applicable laws." (Report, page 14.)

In the course of its review of the issue of officeholder accounts, the Commission considered three options: (1) leaving the law on officeholder accounts unchanged; (2) prohibiting officeholder accounts entirely (an approach used by the City of San Jose), or

(3) authorizing officeholder accounts but limiting their use and imposing various restrictions and requirements on them (an approach used by the City of Oakland).

The Commission referred the issue of officeholder accounts to a subcommittee, which met in the fall of 2019 and considered the options. The subcommittee unanimously recommended prohibiting officeholder accounts entirely. At its regular meeting on November 21, 2019 the Commission voted without opposition to recommend amendments to the BERA that would prohibit officeholder accounts.

The Commission's proposal was presented to the City Council at a February 4, 2020 special meeting. (Report to the Council, with Attachments, is attached.) The FCPC report summarized its proposal: "Contributions to and expenditures from Officeholder Accounts provide an unfair advantage to incumbents. They also increase the reliance on private campaign contributions and risk increasing the perception of corruption. Amending the Berkeley Election Reform Act to prohibit Officeholder Accounts will help to level the playing field in municipal elections, which was also the goal of the Fair Elections Act of 2016." (Report, page 1.) At the February 4 meeting, the Council had a lengthy discussion about their D13 accounts and the lack of discretionary funds that members have to spend. They also decided not to approve the FCPC recommendation to prohibit officeholder Accounts. (See Memorandum to FCPC dated February 12, 2020, a copy of which is attached.)

The City Council, however, referred both the issues relating to D13 accounts and those relating to officeholder accounts to its Agenda and Rules Committee for further consideration. At a special meeting on March 9, 2020, that Committee had an initial discussion of these topics. At that meeting, it was agreed that the Council Committee would work collaboratively with the FCPC on matters relating to D13 accounts and officeholder accounts. This collaborative work with the Council was included in the FCPC and OGC 2020-2021 workplans, which were approved on May 21, 2020.

### **Alternative Proposal for Legislation on Officeholder Accounts**

Given the Council's opposition to accepting an outright prohibition of officeholder accounts, the FCPC should at least explore some alternatives, including the option of amending the BERA to allow for officeholder accounts that would be subject to limitations, as the City of Oakland has done. The subcommittee which examined officeholder accounts briefly discussed this option but, given that there was unanimous support for prohibiting officeholder accounts entirely, it never developed a detailed proposal for this kind of alternative. However, now that the FCPC/OGC will be in conversation with the council about the options going forward, it seems to make good sense to examine in more detail what the alternative might look like.

For discussion purposes, a draft proposal to amend the BERA is attached (Attachment 1). It is based generally on the Oakland ordinance but differs in important ways from that statute. The basic concept behind this alternative is to allow officeholders to have *true* officeholder accounts, but to insure that the funds in these accounts are

used *strictly* for officeholder purposes and may not be used for political campaigns or other non-officeholder purposes. The proposal would also include limitations on the amount each donor may contribute and the total amount of donations to each officeholder account permitted annually. The amendments would require disclosures of the sources and amounts of all donations and expenditures. And they would specify how officeholder accounts are to be terminated.

Although not as fully effective as the complete prohibition of officeholder accounts previously recommended by the FCPC, this approach would allow officeholders to create regulated accounts for proper officeholder purposes. At the same time, these true officeholder accounts would be subject to public scrutiny and express limitations that would prevent serious abuses. Finally, the strict prohibitions in the proposed legislation against using any funds from officeholder accounts for campaign purposes would greatly simplify the management and oversight of these accounts. Current state law, which permits certain officeholder funds to be redesignated for campaign purposes under certain circumstances and subject to various disclosure and notice requirements, creates a nightmare of administrative and reporting requirements. It has made it difficult for officeholders to comply with the law and has established traps for the unwary. Thus, it is hardly surprising that most candidates elected to public office do not even attempt to set up officeholder accounts.

In the end, it may well be that the alternative presented here—or any other—may be unable to carry the day. Because of the double-green light requirements of BERA, no proposal may be able to garner the 2/3 votes of both the Council and Commission required to change the law. But for the purposes of collaborating with the Council on ways of improving the officeholder account process, the Commission should review the attached proposal which offers at least one possible scenario for addressing the problems and pitfalls involved with officeholder accounts.

#### Attachments:

1. New draft proposed amendments to BERA to allow for officeholder accounts, to limit such accounts to being used strictly for officeholder purposes, and to subject these accounts to various other limitations and disclosure requirements (“Proposal”)
2. Report to the City Council from the Fair Campaign Practices Commission entitled “Amendments to the Berkeley Election Reform Act to prohibit Officeholder Accounts: Amending BMC Chapter 2.12” (for Public Hearing on February 4, 2020) (with Attachments) (“Report”)
3. Memorandum from Dean Metzger, Chair, to FCPC dated February 12, 2020 (with Attachments) (“Memorandum”)

July 16, 2020

Proposed Amendments to Berkeley Municipal Code  
(Regulation of Officeholder Accounts)

The following legislative proposal for amendments to the Berkeley Election Reform Act (BERA) is based on the City of Oakland Campaign Reform Act, with changes shown as strikeouts (for deletions) and underlinings (for additions) to the Oakland ordinance.

The Berkeley Election Reform Act would be amended, effective \_\_\_, to read as follows:

**Berkeley Election Reform Act, Chapter 2.12**

**Article 2. Definitions**

**Section 2.12.157 Officeholder account**

“Officeholder account” means any bank account maintained by an elected officer or by any person or committee on behalf of an elected officer, and whose funds are used for expenses associated with holding office and not for direct campaign purposes.

~~**Oakland, California, Code of Ordinances**~~

~~**Title 3 – MUNICIPAL ELECTIONS**~~

~~**Chapter 3.12 – THE CITY OF OAKLAND CAMPAIGN REFORM ACT**~~

~~**Article VIII – Miscellaneous Provisions**~~

**Article 9. Officeholder Accounts**

~~**3.12.150 – Officeholder fund.**~~ **Section 2.12.600 Regulation of officeholder accounts**

A. ~~Every elected city officeholder~~ The mayor and council members (the “officeholder” or “office holders”) shall each be permitted to establish one officeholder ~~expense fund~~ account, as defined in section 2.12.157.

B. ~~All contributions~~ donations deposited into ~~the an~~ officeholder ~~expense fund~~ account shall be deemed to be held in trust solely for expenses associated with holding the office currently held by the elected city officer. For the purpose of this section, “donation” means a gift, subscription, loan, advance, deposit, pledge, forgiveness of indebtedness, payment of a debt by a third party, contract, agreement, or promise of money or anything of value or other obligation, whether



or not legally enforceable, in support of the office currently held by an elected official.

C. Only a natural person who is a resident of the City may make a donation to an officeholder account.

D. ~~Contributions~~ Donations to the an officeholder fund account must be made by a separate check or other separate written instrument. Single ~~contributions~~ donations may not be divided between the officeholder fund account and any other candidate committee or other entity.

E. No donor shall make, and no elected officer shall receive from a donor, a donation or donations under this section totaling more than fifty [or two-hundred and fifty] dollars (\$50.00 [or \$250.00]) per person for the calendar year. "Donor" means a natural person who is a resident of the City who makes a donation as defined in paragraph B.

F. For District Councilmembers, City Auditor and School Board Directors total contributions to an officeholder fund shall not exceed twenty-five thousand dollars (\$25,000.00) per year in office. For Councilmember-At-Large and City Attorney, total contributions to an officeholder fund shall not exceed thirty thousand dollars (\$30,000.00) per year in office. For the office of the Mayor, total contributions to an officeholder fund shall not exceed fifty thousand dollars (\$50,000.00) per year in office. For the office of mayor, total donations to an officeholder account from all donors shall not exceed ten thousand dollars (\$10,000.00) in the aggregate per calendar year. For each member of the city council, total donations to an officeholder account from all donors shall not exceed five thousand dollars (\$5,000.00) in the aggregate per calendar year.<sup>1</sup>

G. All donations received for, and expenditures made from, an officeholder account during a calendar year shall be reported at least annually on the date or dates prescribed by the commission and the report shall be made available to the public promptly thereafter. The commission shall adopt or designate a form or forms for the purpose of reporting the information about each elected officer's officeholder account. The forms shall be filed electronically. The information on the form or forms shall be verified by the officeholder. The information that shall be included in the officeholder account report shall include the following:

1. The name of the officeholder and the office held;

2. The reporting period covered by the report;

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<sup>1</sup> The specific amounts of the donations permitted under this paragraph will obviously be a subject of discussion for the Commission. The figures inserted are for illustrative purposes.

3. A description of all receipts and expenditures.

4. The full name of each donor from whom a donation or donations has been received together with his or her street address, occupation, and the name of his or her employer, if any, or the principal place of business if he or she is self-employed; the amount which he or she donated; the date on which the each donation was received during the period covered by the report; and the cumulative amount that the donor donated. Loans received shall be set forth in a separate schedule and the foregoing information shall be stated with regard to each lender, together with the date and amount of the loan, and if the loan has been repaid, the date of the payment and by whom paid;

5. The full name and street address of each person to whom an expenditure or expenditures have been made, together with the amount of each separate expenditure to each person during the period covered by the report; a description of the purpose for which the expenditure was made; and the full name and street address of the person receiving the expenditure.

6. Under the heading "receipts," the total amount of donations received, and under the heading "expenditures," the total amount of expenditures made during the reporting period and cumulative amount of such totals;

7. The balance of cash and cash equivalents, including the amounts in the officeholder bank account, at the beginning and end of each period covered by the report.

~~B. H. Expenditures from an officeholder fund account may be made only for any political, governmental or other lawful officeholder purposes, but and may not be used for any of the purposes prohibited in subsections (C)(1) through (5) J. and K. of this section.~~

~~I. Such Allowable expenditures from an officeholder account shall include, but are not limited to the following categories:~~

- ~~1. Expenditures for fundraising (including solicitations by mail) for the officeholder expense fund account;~~
- ~~2. Expenditures for office equipment, furnishings and office supplies;~~
- ~~3. Expenditures for office rent;~~
- ~~4. Expenditures for salaries of part-time or full-time staff employed by the officeholder for officeholder activities;~~

5. Expenditures for consulting, research, polling, photographic or similar services except for campaign expenditures for any city, county, regional, state or federal elective office;

6. Expenditures for conferences, meetings, receptions, and events attended in the performance of government duties by (1) the officeholder (2) a member of the officeholder's staff; or (3) such other person designated by the officeholder who is authorized to perform such government duties;

7. Expenditures for travel, including lodging, meals and other related disbursements, incurred in the performance of governmental duties by (1) the officeholder, (2) a member of the officeholder's staff, (3) or such other person designated by the officeholder who is authorized to perform such government duties, ~~or a member of such person's household accompanying the person on such travel;~~

~~8. Expenditures for meals and entertainment directly preceding, during or following a governmental or legislative activity;~~

~~9. Expenditures for donations to tax-exempt educational institutions or tax-exempt charitable, civic or service organizations, including the purchase of tickets to charitable or civic events, where no substantial part of the proceeds will have a material financial effect on the elected officer, any member of his or her immediate family, or his or her committee treasurer;~~

~~8. 10.~~ Expenditures for memberships to civic, service or professional organizations, if such membership bears a reasonable relationship to a governmental, legislative or political purpose;

~~9. 11.~~ Expenditures for an educational course or educational seminar if the course or seminar maintains or improves skills which are employed by the officeholder or a member of the officeholder's staff in the performance of his or her governmental responsibilities;

~~12. Expenditures for advertisements in programs, books, testimonials, souvenir books, or other publications if the advertisement does not support or oppose the nominations or election of a candidate for city, county, regional, state or federal elective office;~~

~~10. 13.~~ Expenditures for mailing to persons within the city which provide information related to city-sponsored events, ~~school district-sponsored events~~, an official's governmental duties or an official's position on a particular matter pending before the Council, or Mayor, ~~or School Board;~~

~~11.~~ 14. Expenditures for expressions of congratulations, appreciation or condolences sent to constituents, employees, governmental officials, or other persons with whom the officeholder communicates in his or her official capacity;

~~12.~~ 15. Expenditures for payment of tax liabilities incurred as a result of authorized officeholder expense fund transactions; and

~~13.~~ 16. Expenditures for accounting, professional and administrative services provided to the officeholder ~~fund~~ account;

~~17.~~ Expenditures for ballot measures.

~~C.~~ J. Officeholder expense funds shall not be used for any of the following:

1. Expenditures in connection with a future election for any city, county, regional, state or federal elective office or in connection with a ballot measure;

2. Expenditures for campaign consulting, research, polling, photographic or similar services for election to city, county, regional, state or federal elective office;

3. Membership in any athletic, social, fraternal, veteran or religious organization;

4. Supplemental compensation for employees for performance of an act which would be required or expected of the person in the regular course or hours of his or her duties as a city official or employee;

5. Any expenditure that would violate the provisions the California State Political Reform Act, including Government Code Sections 89506 and 89512 through 89519, and any provisions of the BERA.

~~D.~~ K. Prohibitions:

1. No funds may be contributed or transferred from the an officeholder fund account of an elected city officeholder to any other candidate's candidate or committee, as defined in sections 2.12.085 and 2.12.095 of this chapter, including to any committee in which the officeholder is a candidate. An officeholder may not redesignate his or her officeholder account as a committee for a future term of the same office or redesignate his or her officeholder funds to be used as campaign funds by his or her committee for a future term of the same office.

2. No funds may be used from an officeholder account to pay any campaign expenses.

3. An officeholder may not transfer or contribute funds from any other committee he or she controls to the officeholder account.

~~E. Annual contributions received by or made to the officeholder fund shall be subject to the contribution limitations of Article III of this Act.<sup>2</sup>~~

~~F. Expenditures made from the officeholder fund shall not be subject to the voluntary expenditure ceilings of Article IV of this Act.~~

L. Once an officeholder's term of office ends or she or he leaves that office, whichever is earlier, the former officeholder may use his or her officeholder funds only for the following purposes:

1. Paying for legitimate, outstanding officeholder expenses.
2. Repaying contributions to contributors to the officeholder accounts.
3. Making a donation to a bona fide charitable, educational, civic, religious or similar tax-exempt, non-profit organization if no substantial part of the proceeds will have a material financial effect on the officeholder, a member of his or her immediate family, or his or her committee treasurer.

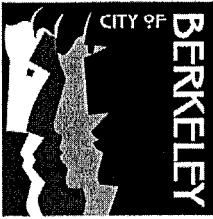
M. The officeholder shall terminate the officeholder account within 90 days of the date that the officeholder's term of office ends or he or she leaves that office, whichever is earlier. The Commission may for good cause extend the termination date. The disposition of all funds from the closed officeholder account, including the identification of all persons and entities that have received funds from the account and the amounts distributed, shall be described on a form prescribed by the Commission. The officeholder must verify and file the form electronically no later the date prescribed for the termination of the officeholder account or an approved extension thereof.

All funds from a closed officeholder account not properly disposed of within the 90 day period prescribed above, or an approved extension thereof, shall be deposited in the City's general fund.

O. Violations of this article involving the unlawful use of officeholder accounts are subject to the procedures of, and the penalties in, Article 7 of this chapter.

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<sup>2</sup> An annual limitation on the amount of any contribution to officeholder accounts similar to the limitation in the Oakland ordinance based on that city's campaign contribution limits is contained in these draft amendments to Berkeley municipal code. (See subsection E., above.)



Fair Campaign Practices Commission

PUBLIC HEARING

February 4, 2020

To: Honorable Mayor and Members of the City Council

From: Fair Campaign Practices Commission

Submitted by: Dean Metzger, Chairperson, Fair Campaign Practices Commission

Subject: Amendments to the Berkeley Election Reform Act to prohibit Officeholder Accounts; Amending BMC Chapter 2.12

RECOMMENDATION

Conduct a public hearing and upon conclusion, adopt first reading of an ordinance amending the Berkeley Election Reform Act, Berkeley Municipal Code Chapter 2.12, to prohibit Officeholder Accounts (See Section 18531.62. Elected State Officeholder Bank Accounts, Regulations of the Fair Political Practices Commission).

SUMMARY

Contributions to and expenditures from Officeholder Accounts provide an unfair advantage to incumbents. They also increase the reliance on private campaign contributions and risk increasing the perception of corruption. Amending the Berkeley Election Reform Act to prohibit Officeholder Accounts will help to level the playing field in municipal elections, which was also a goal of the Fair Elections Act of 2016.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

The proposed amendments to the Berkeley Election Reform Act (BERA) were adopted by the Fair Campaign Practices Commission (FCPC) at its regular meeting of November 21, 2019.

**Action:** M/S/C (Smith/Saver) to adopt the proposed amendments to BERA related to Officeholder Accounts.

**Vote:** Ayes: Metzger, Ching, Saver, Blome, McLean, Tsang, Smith; Noes: none; Abstain: none; Absent: O'Donnell (excused).

Pursuant to Berkeley Municipal Code Section 2.12.051, BERA may be amended by the "double green light" process. This process requires that the FCPC adopt the amendments by a two-thirds vote, and the City Council hold a public hearing and adopt the amendments by a two-thirds vote.

**BACKGROUND**

The Fair Campaign Practices Commission has supported creating the circumstances in which the incumbent and challengers during an election play on as level a playing field as possible and reducing the influence of private campaign contributions. For instance, the Berkeley Fair Elections Act of 2016, which was passed by voters and recommended to Council by the Commission, included the following express purposes:

- Eliminate the danger of actual corruption of Berkeley officials caused by the private financing of campaigns.
- Help reduce the influence of private campaign contributions on Berkeley government.
- Reduce the impact of wealth as a determinant of whether a person becomes a candidate.

(Section 2.12.490(B)-(D).)

A recent inquiry to the Commission Secretary regarding the regulation of Officeholder Accounts resulted in a request from a Commissioner to have discussion of these accounts placed on the May 16, 2019 agenda for possible action. The following motion was made and passed at that meeting:

Motion to request staff work with Commissioner Smith to bring to a future meeting background information and a proposal to eliminate officeholder accounts (M/S/C: O'Donnell/Blome; Ayes: Blome, Ching, McLean, Metzger, O'Donnell, Saver, Smith, Tsui; Noes: None; Abstain: None; Absent: Harper (excused)).

**Definition of an Officeholder Account**

Under state law, an "officeholder account" refers to the funds held in a single bank account at a financial institution in the State of California separate from any other bank account held by the officeholder and that are used for "paying expenses associated with holding public office." Officeholder Account funds cannot be used to pay "campaign expenses." This definition is drawn from state law applicable to statewide elected officials: Government Code section 85316 (Attachment 2), and the accompanying regulation by the Fair Political Practices Commission (FPPC) codified at Title 2, Division 6, of the California Code of Regulations, Section 18531.62 (Attachment 3).

Contributions to or expenditures from an Officeholder Account are not subject to BERA's reporting requirements. (The FPPC still requires the reporting of activity relating to Officeholder Accounts, which is available to view on Berkeley's Public Access Portal.) If, however, a complaint is filed that an Officeholder Account is used for

campaign contributions or to pay "campaign expenses," BERA can be used to respond to the complaint. The legal arguments for these statements are contained in a memorandum signed by City Attorney Manuela Albuquerque to Aide to Mayor Shirley Dean, Barbara Gilbert, dated December 28, 1999 and a December 9, 1991 memorandum by Secretary and Staff Counsel to the FCPC, Sarah Reynoso, that is attached to the December 28, 1999 memo. (Attachment 4.) Because the BERA provisions relied on in these memoranda have not been amended, and because no other BERA provisions have been added to regulate officeholder accounts, the memoranda's conclusions remain valid and are still controlling guidance.

### **Contributions to Officeholder Accounts**

Funds raised for Officeholder Accounts in Berkeley are not subject to any limitations, either from the FPPC or BERA. Neither is there a limit on the total amount the Officeholder Account fund may receive in contributions per year. Contributions to an elected official's Officeholder Account may put that contributor in a more favorable light with the elected official than might otherwise be the case.

### **Expenditures from Officeholder Accounts**

Except for the restriction that Officeholder Account funds cannot be used for "campaign expenses," BERA does not restrict how funds from Officeholder Accounts can be used.

There are a number of permissible expenditures from Officeholder Accounts that could put an elected official in a favorable light with voters that are not available to a challenger for that office. A donation to a nonprofit organization, although technically not a "campaign expense," would be seen favorably by those receiving the funds as well as individuals favorably disposed to the nonprofit organization receiving the funds. An individual running against this incumbent would have to draw on their own resources to make contributions to nonprofit organizations.

As long as political campaigns are not included, newsletters mailed to constituents related to events, information, or an officeholder's position on matters before the Council are a permissible Officeholder Account expenditure. This keeps the incumbent's name in front of the voter in a way unavailable to a challenger unless they pay for a newsletter and its distribution from their own resources.

Expenditures from Officeholder Account funds for flowers and other expressions of condolences, congratulations, or appreciation, while technically not "campaign expenses," also increase the probability that the recipient will be favorably predisposed toward the elected official as a candidate for reelection or election to another office. Again, a challenger would have to draw on their own resources to express condolences, congratulations, or appreciation to their potential supporters.



Further, officeholder accounts can be used to pay for a broad range of office expenses, such as meals, travel, parking tickets, or contributions to other candidates or political parties.<sup>1</sup> Eliminating officeholder accounts would reduce reliance on and the influence of private contributions for these expenditures.

### Recommendation

To make elections more equitable between challengers and incumbent and for the reasons given above, the Fair Campaign Practices Commission recommends prohibiting Officeholder Accounts.

Berkeley will not be the first to prohibit Officeholder Accounts. The San Jose Municipal Code was amended to prohibit officeholder accounts in January 2008. (Chapter 12.06 – ELECTIONS, San Jose, CA Code of Ordinances, p. 10)

#### Part 8 - OFFICEHOLDER ACCOUNTS

##### 12.06.810 - Officeholder account prohibited.

No city officeholder, or any person or committee on behalf of a city officeholder may establish an officeholder account or an account established under the Political Reform Act, California Government Code Section 8100 et seq. as amended, for the solicitation or expenditure of officeholder funds. Nothing in this section shall prohibit an officeholder from spending personal funds on official or related business activities.

The following additions to BERA are proposed:

#### 2.12.157 Officeholder Account

“Officeholder Account” means any bank account maintained by an elected officer or by any person or committee on behalf of an elected officer, and whose funds are used for expenses associated with holding office and not for direct campaign purposes.

#### 2.12.441 Officeholder account prohibited

- A. No elected officer, or any person or committee on behalf of an elected officer, may establish an officeholder account.
- B. No elected officer, or any person or committee on behalf of an elected officer, may use contributions, as defined in 2.12.100, for expenses associated with holding office.

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<sup>1</sup> Under state law applicable to state elected officials, officeholders may use campaign contributions for “expenses that are associated with holding office.” (Govt. Code, § 89510.) To qualify, expenditures must be “reasonably related to a legislative or governmental purpose.” (*Id.*, § 89512.) “Expenditures which confer a substantial personal benefit shall be directly related to a political, legislative, or governmental purpose.” (*Ibid.*)

## ITEM 8 - Attachment 2

Page 5 of 16

Amendments to the Berkeley Election Reform Act  
to prohibit Officeholder Accounts

PUBLIC HEARING  
January 21, 2020

- C. Anyone holding an active Officeholder Account on the date this change to BERA is adopted on a second reading by the City Council has one year from that date to terminate their Officeholder Account, in accordance with FPPC guidelines.

### ENVIRONMENTAL SUSTAINABILITY

There are no identified environmental effects related to the recommendation in this report.

### RATIONALE FOR RECOMMENDATION

This proposed change to BERA will help to level the playing field between challengers and the incumbent running for elective office.

### ALTERNATIVE ACTIONS CONSIDERED

A Subcommittee was formed to consider the options of (1) amending the Berkeley Elections Reform Act, BMC Chapter 2.12, to prohibit Officeholder Accounts, (2) amending BERA to mitigate possible advantages incumbents with an Officeholder Accounts have over challengers, or (3) doing nothing with regard to Officeholder Accounts. The four members of the Subcommittee recommended unanimously to the full Commission to amend the Berkeley Elections Reform Act, BMC Chapter 2.12, to prohibit Officeholder Accounts.

### CITY MANAGER

The City Manager takes no position on the content and recommendations of this report.

### CONTACT PERSON

Dean Metzger, Chair, Fair Campaign Practices Commission. 981-6998

### Attachments:

- 1: Proposed Ordinance
- 2: Government Code section 85316
- 3: Section 18531.62 (Elected State Officeholder Bank Accounts), Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations
- 4: Memorandum signed by City Attorney Manuela Albuquerque to Aide to Mayor Shirley Dean, Barbara Gilbert (including attached memorandum signed by Secretary and Staff Counsel to the FCPC, Sarah Reynoso, to the FCPC)

ORDINANCE NO. ##,###-N.S.

OFFICEHOLDER ACCOUNT PROHIBITED; AMENDING BERKELEY MUNICIPAL CODE  
CHAPTER 2.12

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code section 2.12.157 is added to read as follows:

**BMC 2.12.157 Officeholder account**

“Officeholder Account” means any bank account maintained by an elected officer or by any person or committee on behalf of an elected officer, and whose funds are used for expenses associated with holding office and not for direct campaign purposes.

Section 2. That Berkeley Municipal Code section 2.12.441 is added to read as follows:

**BMC 2.12.441 Officeholder account prohibited**

- A. No elected officer, or any person or committee on behalf of an elected officer, may establish an officeholder account.
- B. No elected officer, or any person or committee on behalf of an elected officer, may use contributions, as defined in 2.12.100, for expenses associated with holding office.
- C. This provision does not affect a candidate’s ability to establish a legal defense fund or the requirements for such a fund, as set forth in the Political Reform Act or by regulation.
- D. Any active Officeholder Account on the date this change to BERA is adopted on a second reading by the City Council has one year from that date to terminate their Officeholder Account.

Section 3. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation


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**GOVERNMENT CODE - GOV**
**TITLE 9. POLITICAL REFORM [81000 - 91014]** ( Title 9 added June 4, 1974, by initiative Proposition 9. )

**CHAPTER 5. Limitations on Contributions [85100 - 85802]** ( Chapter 5 added June 7, 1988, by initiative Proposition 73. )

**ARTICLE 3. Contribution Limitations [85300 - 85321]** ( Article 3 added June 7, 1988, by initiative Proposition 73. )

**85316.** (a) Except as provided in subdivision (b), a contribution for an election may be accepted by a candidate for elective state office after the date of the election only to the extent that the contribution does not exceed net debts outstanding from the election, and the contribution does not otherwise exceed the applicable contribution limit for that election.

(b) Notwithstanding subdivision (a), an elected state officer may accept contributions after the date of the election for the purpose of paying expenses associated with holding the office provided that the contributions are not expended for any contribution to any state or local committee. Contributions received pursuant to this subdivision shall be deposited into a bank account established solely for the purposes specified in this subdivision.

(1) No person shall make, and no elected state officer shall receive from a person, a contribution pursuant to this subdivision totaling more than the following amounts per calendar year:

(A) Three thousand dollars (\$3,000) in the case of an elected state officer of the Assembly or Senate.

(B) Five thousand dollars (\$5,000) in the case of a statewide elected state officer other than the Governor.

(C) Twenty thousand dollars (\$20,000) in the case of the Governor.

(2) No elected state officer shall receive contributions pursuant to paragraph (1) that, in the aggregate, total more than the following amounts per calendar year:

(A) Fifty thousand dollars (\$50,000) in the case of an elected state officer of the Assembly or Senate.

(B) One hundred thousand dollars (\$100,000) in the case of a statewide elected state officer other than the Governor.

(C) Two hundred thousand dollars (\$200,000) in the case of the Governor.

(3) Any contribution received pursuant to this subdivision shall be deemed to be a contribution to that candidate for election to any state office that he or she may seek during the term of office to which he or she is currently elected, including, but not limited to, reelection to the office he or she currently holds, and shall be subject to any applicable contribution limit provided in this title. If a contribution received pursuant to this subdivision exceeds the allowable contribution limit for the office sought, the candidate shall return the amount exceeding the limit to the contributor on a basis to be determined by the Commission. None of the expenditures made by elected state officers pursuant to this subdivision shall be subject to the voluntary expenditure limitations in Section 85400.

(4) The commission shall adjust the calendar year contribution limitations and aggregate contribution limitations set forth in this subdivision in January of every odd-numbered year to reflect any increase or decrease in the Consumer Price Index. Those adjustments shall be rounded to the nearest one hundred dollars (\$100).

(Amended by Stats. 2007, Ch. 130, Sec. 149. Effective January 1, 2008. Note: This section was added by Stats. 2000, Ch. 102, and approved in Prop. 34 on Nov. 7, 2000.)

(Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations.)

**§ 18531.62. Elected State Officeholder Bank Accounts.**

(a) Application and Definitions. For purposes of Section 85316(b) and this regulation, the following definitions apply:

- (1) "Officeholder" means an elected state officer.
- (2) "Officeholder controlled committee" means a committee formed pursuant to subdivision (c) of this regulation.
- (3) "Officeholder account" means the bank account established at a financial institution located in the State of California pursuant to Section 85316(b).
- (4) "Officeholder funds" means money in the officeholder account.

(b) Establishing the Officeholder Account: For purposes of Section 85316(b), an officeholder shall maintain officeholder funds in a single bank account separate from any other bank account held by the officeholder.

(c) Establishing the Officeholder Controlled Committee, Reporting and Recordkeeping:

(1) Formation: The officeholder shall establish a controlled committee by filing a statement of organization pursuant to Section 84101 if the officeholder receives \$2,000 or more in officeholder contributions in a calendar year.

(2) Committee Name: The controlled committee name shall include the officeholder's last name, the office held, the year the officeholder was elected to the current term of office, and the words "Officeholder Account." The statement of organization shall include the name, account number, and address of the financial institution where the committee established the officeholder account.

(3) Filing Requirements: The controlled committee shall file campaign statements and reports pursuant to Chapters 4 and 5, except Sections 85200 and 85201, of Title 9 of the Government Code at the same times and in the same places as it otherwise would be required to do for any other controlled committee formed by the officeholder for election to state office.

(4) Required Recordkeeping and Audits. The officeholder and treasurer shall be subject to recordkeeping requirements under Section 84104. The officeholder account and officeholder controlled committee shall be subject to audits under Chapter 10 of Title 9 of the Government Code. Any audit of the officeholder, or any of his or her controlled committees, under Section 90001 shall include all officeholder accounts and officeholder controlled committees maintained by the officeholder during the audit period as described in Regulation 18996(a)(1).

(d) Prohibitions:

(1) Officeholder funds may not be contributed or transferred to another state or local committee, including any other controlled committee of the officeholder, except as permitted in subdivisions (g) (2) and (g)(3).

(2) Officeholders may not use officeholder funds to pay "campaign expenses" as defined in Regulation 18525(a).

(3) The officeholder may not transfer or contribute funds from any other committee he or she controls to the officeholder account, except as permitted in subdivision (g)(2) and (g)(3).

(e) Contributions to the Officeholder Account:

(1)(A) Required Notices: In addition to the requirements of Regulation 18523.1, a written solicitation for contributions to the officeholder account shall include the following: "For purposes of the Political Reform Act's contribution limits, a contribution to an officeholder

account is also considered to be a contribution to all campaign committees for future elective state office the officeholder seeks during his or her current term of office."

(B) In addition to the requirements of subparagraph (A) above, an officeholder who files a statement of intention to be a candidate for any elective state office during the officeholder's term of office shall provide notice of this filing to every person that has made a contribution to his or her officeholder account. The notice shall contain the language in subparagraph (A) and be transmitted or mailed within 10 days of filing the statement of intention to be a candidate.

(2) Cumulation: A contribution to the officeholder account shall also be deemed a contribution to the officeholder's controlled committee for election to elective state office for the purposes of Section 85316(b)(3) only under all of the following circumstances:

(A) The contributor makes the contribution between the day the election was held for the term of office for which the officeholder account was established and the end of that term of office;

(B) The officeholder maintains the controlled committee, established for a future term of elective state office, at any time during the period covered in subparagraph (A).

(3) Cumulation and Primary and General Elections: A person's contributions to the officeholder account, when combined with contributions from the same person for a primary and general election to the elective state office may not exceed the contribution limits applicable to the primary and general election.

(4) Multiple Officeholder Accounts: When an officeholder maintains more than one officeholder account in the same calendar year, he or she may not receive the following contributions to any of those accounts during that calendar year:

(A) Contributions from a single contributor that, when cumulated for all the accounts, exceed the maximum amount the contributor could give to the officeholder account having the highest per person contribution limit under Section 85316(b)(1).

(B) Contributions from all contributors that, when cumulated for all the accounts, exceed the maximum amount in total contributions the officeholder could receive in the officeholder account having the highest aggregate contribution limit under Section 85316(b)(2).

(f) Contributions Over the Limits.

(1) An officeholder shall return to the contributor the portion of any contribution to his or her officeholder account that exceeds the limits of Section 85301, 85302 (after cumulation) or 85316 (either alone or after cumulation) by the earlier of 14 days of receipt or 14 days of the date the officeholder files a statement of intention to be a candidate for elective state office pursuant to Section 85200.

(2) A contributor to the officeholder account does not violate the contribution limits applying to the officeholder's election to a future elective state office as otherwise provided under Section 85316(b)(3) if, when he or she makes the contribution, the officeholder has not filed a statement of organization to establish a controlled committee for election to a future elective state office.

(g) Terminating Officeholder Accounts and Committees.

(1) The officeholder may not accept contributions after the officeholder's term of office ends or the date he or she leaves that office, whichever is earlier.

(2) The officeholder may redesignate the officeholder account as an officeholder controlled committee for a future term of the same office by amending the statement of



organization for the committee to reflect the redesignation for the future term of office prior to the date the officer's term of office ends.

(3) An officeholder may redesignate officeholder funds in the redesignated officeholder account as officeholder funds for the new term of office, subject to the limitations in subdivision

(e)(4).

(4) Once the officeholder's term of office ends or he or she leaves that office, whichever is earlier, the officeholder may only use his or her officeholder funds for the following purposes:

(A) Paying outstanding officeholder expenses.

(B) Repaying contributions to contributors to the officeholder account.

(C) Making a donation to a bona fide charitable, educational, civic, religious, or similar tax-exempt, nonprofit organization, if no substantial part of the proceeds will have a material financial effect on the officeholder, a member of his or her immediate family, or his or her committee treasurer.

(D) Paying for professional services reasonably required by the officeholder controlled committee to assist in the performance of its administrative functions.

(5) The officeholder shall terminate the officeholder controlled committee within 90 days of the date the officer's term of office ends or he or she leaves that office, whichever is earlier. The Executive Director may for good cause extend the termination date or permit the candidate to reopen the account.

Note: Authority cited: Section 83112, Government Code. Reference: Sections 84104, 85316 and 90000-90007, Government Code.

**HISTORY**

1. New section filed 7-3-2007; operative 8-2-2007. Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements and not subject to procedural or substantive review by OAL) (Register 2007, No. 27). For prior history, see Register 2007, No. 26.
2. Change without regulatory effect amending section filed 3-22-2016; operative 4-21-2016 pursuant to 2 CCR 18312(e). Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements and not subject to procedural or substantive review by OAL) (Register 2016, No. 13).



Office of the  
City Attorney

**DATE:** December 28, 1999

**TO:** BARBARA GILBERT,  
Aide to Mayor Shirley Dean

**FROM:** MANUELA ALBUQUERQUE, City Attorney *MA*  
By: CAMILLE COUREY, Deputy City Attorney

**SUBJECT:** APPLICATION OF BERKELEY ELECTION REFORM ACT TO  
OFFICEHOLDER ACCOUNTS

ISSUE:

Does the Berkeley Election Reform Act (BERA) govern officeholder accounts?

CONCLUSION:

No. The BERA does not govern true officeholder accounts per se. However, the mere fact that an account may be designated an officeholder account does not insulate it from scrutiny under the BERA or other applicable local law if the officeholder account is not used strictly for officeholder purposes or if some action taken with respect to the officeholder account implicates campaign contributions and expenditures or other applicable local laws.

ANALYSIS:

Sarah Reynoso, former secretary and staff counsel to the Fair Campaign Practices Commission (FCPC), issued an opinion to the FCPC dated December 2, 1991, a copy of which is attached, stating that the BERA's contribution limit does not apply to contributions made to an officeholder account. The opinion reasons that the BERA's contribution limit applies only to "contributions" as defined in the BERA, i.e., which are made directly or indirectly in support of or in opposition to the nomination or election of one or more candidates to elective office. (See Berkeley Municipal Code (BMC) § 2.12.100.) Contributions to a true officeholder account are not made for the purpose of nominating or electing a candidate to office, but rather for the use of an officeholder in carrying out the duties of his or her office. Therefore, the contribution limit of the BERA is inapplicable to officeholder accounts.<sup>1</sup> For similar reasons, the BERA does not

<sup>1</sup> However, the opinion also provided that contributions to officeholder accounts still had to be reported on campaign statements because the State Fair Political Practices Commission (FPPC) Regulations broadly defined contributions as any contribution for "political purposes." Since officeholder expenses are for political purposes, they must be reported to the State.

Barbara Gilbert

Re: Application of Berkeley Election Reform Act To Officeholder Accounts

December 28, 1999

Page 2

apply to true officeholder accounts.

The BERA requires the filing of statements to report the amounts received and expended in municipal elections. (See BMC §§ 2.12.015, 2.12.030 through 2.12.050) Specifically, a "campaign statement" required to be filed under the BERA is an itemized report which provides the information required by Sections 2.12.245 through 2.12.325 of the BERA. (BMC § 2.12.080.) Sections 2.12.245 through 2.12.325 govern the reporting of contributions and expenditures. "Contributions" and "expenditures" are defined by the BERA as any amounts received or expended, respectively, in aid of or in opposition to the nomination or election of one or more candidates to elective office. (See BMC §§ 2.12.100 and 2.12.130.) Contributions to or expenditures from a true officeholder account are not subject to the BERA's reporting requirements because they are made for the purpose of carrying out the duties of elective office, and not for the purpose of aiding or opposing the nomination or election of one or more candidates to elective office.<sup>2</sup> Therefore, the BERA does not apply to true officeholder accounts.

However, the fact that an account may be designated as an officeholder account will not shield it from scrutiny under the BERA if the officeholder account is, in fact, being used for the receipt of contributions or the making of expenditures in aid of the nomination or election of a candidate for local elective office. Nor will BERA requirements, such as the \$250 contribution limit or the prohibition against contributions from businesses to candidates, be held inapplicable if contributions made initially to an officeholder account are transferred subsequently to a campaign account. Where the actions taken with respect to an officeholder account implicate campaign contributions and expenditures in municipal elections, the officeholder account will be scrutinized under the BERA and other applicable local law.

Attachment

cc: Fair Campaign Practices Commission  
Sherry Kelly, City Clerk

City Attorney Opinion Index: H.E.I. and H.G.

CC-M

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<sup>2</sup> Again, however, the State FPPC still requires the reporting of activity relating to an officeholder account. (See footnote 1.)

ITEM 8 - Attachment 2

CITY OF BERKELEY

DATE: December 9, 1991

Memorandum

TO: FCPC COMMISSIONERS

FROM: Sarah Reynoso,  Secretary & Staff Counsel

SUBJECT: APPLICABILITY OF BERA'S CONTRIBUTION LIMIT TO FUNDS RAISED FOR OFFICEHOLDER EXPENSES

BACKGROUND AND ISSUE

I received the attached letter from Richard N. Lerner, treasurer of Friends of Ioni Hancock Committee ("Committee"), regarding the applicability of BERA's (Berkeley Election Reform Act) \$250 contribution limit to funds raised to cover officeholder expenses. The Committee would like to raise money to cover activities by the Mayor for which the City has not allocated funds, for example, distribution of a newsletter and international travel to visit Berkeley Sister Cities.

Thus, the issue presented to the Commission is as follows: Is BERA's \$250 contribution limit applicable to funds raised for officeholder expenses?

CONCLUSION

No. The BERA's contribution limitation is only applicable to money raised "in aid of or in opposition to the nomination or election" of a candidate. Since the Committee intends to raise these funds for activities unrelated to the nomination or election of the Mayor, they are not subject to the BERA's \$250 contribution limitation. However, such funds must be reported as contributions under the State Political Reform Act and their expenditure itemized on the disclosure forms.

ANALYSIS

The BERA prohibits candidates for elective office from soliciting or accepting a contribution of more than \$250 from any one contributor. (BERA section 2.12.415.) Thus, funds which fall within BERA's definition of a contribution, are subject to the \$250 limit. In order to determine whether funds raised for officeholder expenses are subject to the contribution limitation, BERA's definition of contribution must be reviewed.

The BERA defines contribution, in part, as follows:

"Contribution" means a gift, subscription, loan, advance, deposit, pledge, forgiveness of indebtedness, payment of a debt by a third party, contract, agreement, or promise of money or anything of value or other obligation, whether or not legally enforceable, made directly or indirectly in aid of or

FCPC COMMISSIONERS  
December 9, 1991  
Page 2

in opposition to the nomination or election of one or more candidates . . . . (Emphasis added.)

Thus, the plain language of the BERA requires that a contribution be solicited for purposes related to the nomination or election of a candidate for office to be subject to its contribution limitation. Since the Committee intends to raise funds for purposes unrelated to the Mayor's nomination or election for elective office, such funds do not fall within the BERA's definition and are therefore not subject to its \$250 limitation.

However, because the state Political Reform Act defines contribution to include any funds raised for political purposes, funds raised for officeholder expenses are considered contributions and must be reported on campaign disclosure forms.<sup>1/</sup> (Government Code section 82015.) Additionally, since the court's ruling in SEIU v. FPCC invalidated the state's \$1,000 contribution limit, funds raised for officeholder expenses are not subject to any limitation.

As a final precaution, the Committee should be advised that the FPCC has issued regulations concerning officeholder expenses and it should review them with respect to their interaction with the BERA.

Attachment

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<sup>1/</sup>I spoke with the FPCC's legal staff and confirmed that funds raised for officeholder expenses must be reported as contributions on the campaign disclosure forms.

**NOTICE OF PUBLIC HEARING  
BERKELEY CITY COUNCIL**

**AMENDMENTS TO THE BERKELEY ELECTION REFORM ACT**

The Fair Campaign Practices Commission is proposing amendments to the Berkeley Election Reform Act related to the prohibition of officeholder accounts.

The hearing will be held on, February 4, 2020, at 4:00 p.m. in the School District Board Room, 1231 Addison Street.

A copy of the agenda material for this hearing will be available on the City's website at [www.CityofBerkeley.info](http://www.CityofBerkeley.info) as of **January 30, 2020**.

For further information, please contact Samuel Harvey, Commission Secretary at 981-6998.

Written comments should be mailed or delivered directly to the City Clerk, 2180 Milvia Street, Berkeley, CA 94704, in order to ensure delivery to all Councilmembers and inclusion in the agenda packet.

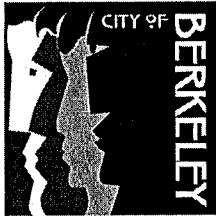
Communications to the Berkeley City Council are public record and will become part of the City's electronic records, which are accessible through the City's website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to the City Council, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service or in person to the City Clerk. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the City Clerk at 981-6900 or [clerk@cityofberkeley.info](mailto:clerk@cityofberkeley.info) for further information.

**Published:** January 24, 2020 – The Berkeley Voice  
Pursuant to Berkeley Municipal Code Section 2.12.051

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I hereby certify that the Notice for this Public Hearing of the Berkeley City Council was posted at the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way, as well as on the City's website, on January 30, 2020.

\_\_\_\_\_  
Mark Numainville, City Clerk

## ITEM 8 - Attachment 2



[First Last name]  
Councilmember District [District No.]

# SUPPLEMENTAL REVISED AGENDA MATERIAL for Supplemental Packet 2

**Meeting Date:** February 4, 2020

**Item Number:** 2

**Item Description:** Statement on Item 2 - Amendments to the Berkeley Election Reform Act to prohibit Officeholder Accounts; Amending BMC Chapter 2.12

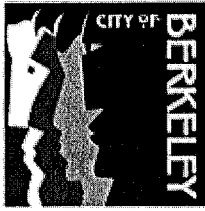
**Submitted by:** Councilmember Hahn

This item seeks to outlaw Officeholder Accounts in Berkeley. I would like to offer an alternative: to allow Officeholder Accounts but establish regulations to limit them in ways that reflect Berkeley's limitations on campaign donations and consider narrowing the uses for which Officeholder Account funds can be used.

The action I advocate for Council to take is to refer a discussion of Officeholder accounts to the Agenda and Rules Committee, to consider a reasonable set of limitations and rules for such accounts and bring back recommendations to the full Council, for the Council to consider referring to the Fair Campaign Practices Committee.



## ITEM 8 - Attachment 2



### SOPHIE HAHN

Berkeley City Council, District 5  
2180 Milvia Street, 5th Floor  
Berkeley, CA 94704  
(510) 981-7150  
shahn@cityofberkeley.info

### ACTION CALENDAR

February 4, 2020

To: Honorable Mayor and Members of the City Council  
From: Vice Mayor Sophie Hahn  
Subject: Statement on Item 2 - Amendments to the Berkeley Election Reform Act to prohibit Officeholder Accounts; Amending BMC Chapter 2.12

### RECOMMENDATION

This item seeks to outlaw Officeholder Accounts in Berkeley. I would like to offer an alternative: to allow Officeholder Accounts but establish regulations to limit them in ways that reflect Berkeley's limitations on campaign donations and consider narrowing the uses for which Officeholder Account funds can be used.

The action I advocate for Council to take is to refer a discussion of Officeholder accounts to the Agenda and Rules Committee, to consider a reasonable set of limitations and rules for such accounts and bring back recommendations to the full Council, for the Council to consider referring to the Fair Campaign Practices Committee.

Officeholder accounts are accounts an elected official can open, and raise funds for, to pay for expenses related to the office they hold.<sup>1</sup> They are not campaign accounts, and cannot be used for campaign purposes. The types of expenses Officeholder Accounts can be used for include research, conferences, events attended in the performance of government duties, printed newsletters, office supplies, travel related to official duties, etc. Cities can place limits on Officeholder Accounts, as Oakland has done.<sup>2</sup> Officeholder Accounts must be registered as official "Committees" and adhere to strict public reporting requirements, like campaign accounts. They provide full transparency to the public about sources and uses of funds.

The FCPC bases its recommendation to prohibit Officeholder Accounts on arguments about "equity" and potential "corruption" in elections. The report refers repeatedly to "challengers" and "incumbents," suggesting that Officeholder Accounts are vehicles for unfairness in the election context.

I believe that the FCPC's recommendations reflect a misunderstanding of the purpose and uses of Officeholder Accounts, equating them with campaign accounts and suggesting that they create an imbalance between community members who apparently have already decided to run against an incumbent (so-called "challengers") and elected officials who are presumed to be

<sup>1</sup> <http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/LegalDiv/Regulations/Index/Chapter5/18531.62.pdf>

<sup>2</sup> <http://www2.oaklandnet.com/w/OAK052051>

## ITEM 8 - Attachment 2

always running for office. The recommendations do not take into account some important framing: the question of what funds are otherwise available to pay for Officeholder-type expenses for Officeholders or members of the public. Contrary to the conclusions of the FCPC, I believe Officeholder accounts are an important vehicle to redress a significant disadvantage for elected officials, whose ability to exercise free speech in the community and participate in conferences and events related to their profession is constrained by virtue of holding public office, as compared to community members, whose speech rights are unrestricted in any manner whatsoever, and who can raise money to use for whatever purposes they desire.

Outlawing Officeholder Accounts is also posited as a means to create equity between more and less wealthy Officeholders, on the theory that less affluent Officeholders will have less access to fundraising for Officeholder Accounts than more affluent Officeholders. Because there are no prohibition on using personal funds for many of the purposes for which Officeholder Account funds can be used, prohibiting Officeholder Accounts I believe has the opposite effect; it leaves more affluent Officeholders with the ability to pay for Officeholder expenses from personal funds, without providing an avenue for less affluent Officeholders, who may not have available personal funds, to raise money from their supporters to pay for such Officeholder expenses.

The question of whether Officeholder Accounts should be allowed in Berkeley plays out in the context of a number of rules and realities that are important to framing any analysis.

First, by State Law, elected officials are prohibited from using public funds for a variety of communications that many constituents nevertheless expect. For example, an elected official may not use public funds to send a mailing announcing municipal information to constituents, "such as a newsletter or brochure, [ ] delivered, by any means [ ] to a person's residence, place of employment or business, or post office box."<sup>3</sup> Nor may an elected official mail an item using public funds that features a reference to the elected official affiliated with their public position.<sup>4</sup> Note that Electronic newsletters are not covered by these rules, and can and do include all of these features, even if the newsletter service is paid for by the public entity. That said, while technically not required, many elected officials prefer to use email newsletter distribution services (Constant Contact, MailChimp, Nationbuilder, etc.) paid for with personal (or "Officeholder") funds, to operate in the spirit of the original rules against using public funds for communications that include a photo of, or references to, the elected official.

Without the ability to raise funds for an Officeholder Account, for an elected official to send a paper newsletter to constituents or to use an email newsletter service that is not paid for with public funds, they must use personal funds. A printed newsletter mailed to 5-6,000 households (a typical number of households in a Berkeley City Council District) can easily cost \$5,000+, and an electronic mail service subscription typically costs \$10 (for the most basic service) to \$45 per month, a cost of \$120.00 to over \$500 per year - in personal funds.

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<sup>3</sup> <http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/communications-sent-using-public-funds/campaign-related-communications.html>

<sup>4</sup> <http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/communications-sent-using-public-funds/campaign-related-communications.html>

## ITEM 8 - Attachment 2

Second, Berkeley City Councilmembers and the Mayor of Berkeley are not paid enough for there to be any reasonable expectation that personal funds should be used for these types of expenses.<sup>5</sup> For many Councilmembers and/or the Mayor, work hours are full time - or more - and there is no other source of income.

Finally, and most importantly, local elected officials are restricted from accepting money or gifts. An elected official cannot under any circumstances raise money to pay for Officeholder expenses such as printed communications, email newsletter services, travel and admission to industry conferences for which the elected official is not an official delegate (e.g., conferences on City Planning, Green Cities, Municipal Finance, etc.), and other expenses related to holding office that are not covered by public funds. Again, without the possibility of an Officeholder Account, an elected official generally must use personal funds for these expenses, allowing more affluent elected officials to participate while placing a hardship or in some cases a prohibition on the ability of less affluent elected officials to undertake these Officeholder-type activities - which support expected communications with constituents and participation in industry activities that improve the elected official's effectiveness.

The elected official's inability to raise funds from others must be contrasted with the ability of a community member - a potential "challenger" who has not yet declared themselves to be an actual candidate - or perhaps a neighborhood association, business or corporation (Chevron, for example) - to engage in similar activities. Nothing restricts any community member or organization from using their own funds - or funds obtained from anyone - a wealthy friend, a corporation, a local business, a community organization or their neighbors - for any purpose whatsoever.

Someone who doesn't like the job an elected official is doing could raise money from family or connections anywhere in the community - or the world - and mail a letter to every person in the District or City criticizing the elected official, or buy up every billboard or banner ad on Facebook or Berkeleyside to broadcast their point of view. By contrast, the elected official, without access to an Officeholder Account, could only use personal funds to "speak" with their own printed letter, billboard or advertisement. Community members (including future "challengers") can also attend any and all conferences they want, engage in travel to visit interesting cities and projects that might inform their thoughts on how a city should be run, and pay for those things with money raised from friends, colleagues, businesses, corporations, foreign governments - *anyone*. They are private citizens with full first amendment rights and have no limitations, no reporting requirements, no requirements of transparency or accountability whatsoever.

The imbalance is significant. Outside of the campaign setting, where all declared candidates can raise funds and must abide by the same rules of spending and communications, *elected officials cannot raise money for any expenses whatsoever, from any source, while community*

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<sup>5</sup> Councilmembers receive annual compensation of approximately \$36,000, while the Mayor receives annual compensation of approximately \$55,000.<sup>5</sup>

## ITEM 8 - Attachment 2

*members, including organizations and private companies, can raise as much money as they want from any sources, and use that money for anything they choose.*

Without the ability to establish and fund an Officeholder Account, the only option an elected official has is to use personal funds, which exacerbates the potential imbalance between elected officials with more and less personal funds to spend. Elected officials work within a highly regulated system, which can limit their ability to "speak" and engage in other activities members of the public are able to undertake without restriction. Officeholder Accounts restore some flexibility by allowing elected officials to raise money for expenses related to holding office, so long as the sources and uses of those funds is made transparent.

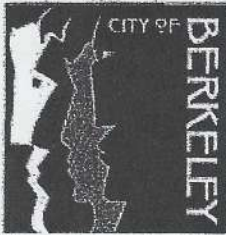
By allowing Officeholder Accounts and regulating them, Berkeley can place limits on amounts that can be raised, and on the individuals/entities from whom funds can be accepted, similar (or identical) to the limits Berkeley places on sources of campaign funds. Similarly, Berkeley can restrict uses of funds beyond the State's restrictions, to ensure funds are not used for things like family members' travel, as is currently allowed by the State. Oakland has taken this approach, and has a set of Officeholder Account regulations that provide a good starting point for Berkeley to consider.<sup>6</sup>

I respectfully ask for a vote to send the question of potential allowance for, and regulation of, Officeholder Accounts to the Agenda and Rules Committee for further consideration.

CONTACT: Sophie Hahn, District 5: (510) 981-7150

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<sup>6</sup> <http://www2.oaklandnet.com/w/OAK052051>



Fair Campaign Practices Commission

**Date:** February 12, 2020  
**To:** FAIR CAMPAIGN PRACTICES COMMISSION  
**From:** Dean Metzger, Commission Chair  
**Subject:** Council discussion and action with regards to the Officeholder Accounts FCPC proposal.

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At the Special City Council meeting of Tuesday February 4, 2020, the City Council had a lengthy discussion about their D13 accounts, and the lack of discretionary funds Council Members have to spend. They then decided not to approve the FCPC recommendation to prohibit Officeholder Accounts.

To remedy this concern the FCPC should request from the City Manager the amount each Council Member receives in their D13 accounts and after some discussion make a recommendation to Council. If the D13 account is large enough to allow Council members to make the expenditures they feel will keep their constituents informed of their activities, travel to local meetings, provide transportation expenses and meals - there would be no need for Officeholders Accounts.

A search of the City's Budget documents did not reveal the amounts allocated to the Council D13 accounts. Once the information is available the FCPC can make its recommendations to City Council.

**Attachments:**

1. Mayor and City Council Financial Summary
2. Draft request to City Manager for budget details of the Mayor and each individual Council Member

**MAYOR AND CITY COUNCIL FINANCIAL SUMMARY**

|                        | FY 2015<br>Actual | FY 2016<br>Actual | FY 2017<br>Adopted | FY 2018<br>Proposed | FY 2019<br>Proposed |
|------------------------|-------------------|-------------------|--------------------|---------------------|---------------------|
| <b>EXPENDITURES</b>    |                   |                   |                    |                     |                     |
| <b>By Type:</b>        |                   |                   |                    |                     |                     |
| Salaries and Benefits  | 1,660,661         | 1,760,619         | 1,723,617          | 1,833,734           | 1,880,031           |
| Services and Materials | 36,942            | 43,407            | 113,526            | 113,526             | 113,526             |
| Capital Outlay         | 1,953             | 7,674             |                    |                     |                     |
| Internal Services      | 89,100            | 81,181            | 81,181             | 81,181              | 81,181              |
| Indirect Cost Transfer |                   |                   |                    |                     |                     |
|                        | <b>1,788,656</b>  | <b>1,892,881</b>  | <b>1,918,324</b>   | <b>2,028,441</b>    | <b>2,074,738</b>    |
| <b>By Division:</b>    |                   |                   |                    |                     |                     |
| Mayor's Office         | 515,095           | 558,137           | 584,877            | 554,389             | 566,917             |
| Council Offices        | 1,273,561         | 1,334,744         | 1,333,447          | 1,474,052           | 1,507,821           |
| Exiting Officials      |                   |                   |                    |                     |                     |
|                        | <b>1,788,656</b>  | <b>1,892,881</b>  | <b>1,918,324</b>   | <b>2,028,441</b>    | <b>2,074,738</b>    |
| <b>By Fund:</b>        |                   |                   |                    |                     |                     |
| General Fund           | 1,788,656         | 1,892,881         | 1,918,324          | 2,028,441           | 2,074,738           |
|                        | <b>1,788,656</b>  | <b>1,892,881</b>  | <b>1,918,324</b>   | <b>2,028,441</b>    | <b>2,074,738</b>    |

|                         |       |       |       |       |       |
|-------------------------|-------|-------|-------|-------|-------|
| <b>General Fund FTE</b> | 12.00 | 12.00 | 12.00 | 12.00 | 12.00 |
| <b>Total FTE</b>        | 12.00 | 12.00 | 12.00 | 12.00 | 12.00 |

**DRAFT**

**DRAFT**

**DRAFT**

**Date:** February 20, 2020  
**To:** Dee Williams-Riley  
City Manager  
**From:** Fair Campaign Practices Commission  
**Subject:** Request for budget details of the Mayor and each individual Council Member.

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At the Special Council meeting of Tuesday, February 4, 2020 the Council heard and took action on the FCPC recommendation to amend the Berkeley Municipal Code to prohibit Officeholder Accounts. The Council discussion went to great lengths about why they needed the Officeholder Account before declining to approve the FCPC recommendation.

The FCPC needs to understand why the Council took the action it did.

To help the Commission determine if any further action on its part would be helpful, the Commission requests that your office provide the FCPC with the detailed budgets of the Mayor and each Council Member. The Commission has the budget summaries of the Mayor and City Council but it is of little use for the discussion.

Please provide the requested information in time for the FCPC meeting on March 19, 2020.

Thank you,

**Fair Campaign Practices Commission**



Open Government Commission

INFORMATION CALENDAR  
July 28, 2020

To: Honorable Mayor and Members of the City Council

From: Open Government Commission

Submitted by: Brad Smith, Chairperson, Open Government Commission

Subject: Open Government Commission FY2020-2021 Work Plan

INTRODUCTION

The Open Government Commission (OGC) has updated its work plan, which outlines Commission objectives for the upcoming fiscal year. This work plan includes the ongoing review of complaints concerning alleged non-compliance with the Open Government Ordinance, the Brown Act, the Public Records Act, or the Lobbyist Registration Act; proposing legislation or procedures to further ensure the City of Berkeley's compliance with the Open Government Ordinance, the Brown Act, the Public Records Act, and the Lobbyist Registration Act; advising the City Council of any action or policy that would enhance open and effective government in the City of Berkeley; reviewing, approving, and forwarding to City Council the report submitted to the Open Government Commission by the City Manager regarding compliance with the Open Government Ordinance, the Public Records Act, the Brown Act, the Lobbyist Registration Act, and any other information the City Manager deems appropriate for open and effective government in the City of Berkeley; working collaboratively with the City Council to develop policy related to Council District (D-13) accounts; and reviewing lobbying registration and reporting practices for individuals and organizations.

CURRENT SITUATION AND ITS EFFECTS

At the regular meeting on May 21, 2020, the Open Government Commission unanimously approved the FY2020-2021 Work Plan, which will be used to guide the Commission's work throughout the year.

**Action:** M/S/C (O'Donnell/Blome) to approve work plan and to prepare and submit an Information Report to City Council.

**Vote:** Ayes: Mezger, O'Donnell, Ching, Sheahan, Blome, McLean, Tsang, Smith; Noes: none; Abstain: none; Absent: none.

BACKGROUND

See attached Work Plan.





Open Government Commission

ENVIRONMENTAL SUSTAINABILITY

No environmental impacts or opportunities were identified as a result of this recommendation.

POSSIBLE FUTURE ACTION

Based on Commission research and public hearings, new initiatives and recommendations to City Council may be submitted to City Council at such time deemed necessary.

FISCAL IMPACTS OF POSSIBLE FUTURE ACTION

Unknown, but none expected.

CONTACT PERSON

Samuel Harvey, Commission Secretary, City Attorney's Office (510) 981-6998  
Brad Smith, Chairperson, (510) 926-2047

Attachment: 1: Open Government Commission FY2020-2021 Work Plan



Open Government Commission

**Open Government Commission FY2020-2021 Work Plan  
Approved May 21, 2020**

- Ongoing review of complaints concerning alleged non-compliance with the Open Government Ordinance, the Brown Act, the Public Records Act, or the Lobbyist Registration Act.
- Propose legislation or procedures to further ensure the City of Berkeley's compliance with the Open Government Ordinance, the Brown Act, the Public Records Act, and the Lobbyist Registration Act.
- Advise the City Council of any action or policy that would enhance open and effective government in the City of Berkeley.
- Review, approve, and forward to the City Council the report submitted to the Open Government Commission by the City Manager regarding compliance with the Open Government Ordinance, the Public Records Act, the Brown Act, the Lobbyist Registration Act, and any other information the City Manager deems appropriate for open and effective government in the City of Berkeley.
- Work collaboratively with the City Council to develop policy related to Council District (D-13) accounts.
- Review lobbying registration and reporting processes for individuals and organizations and recommend changes if appropriate.



**Open Government Commission**

Date: July 8, 2020

To: Open Government Commission

From: Sam Harvey, Secretary / Deputy City Attorney

Subject: Complaint filed by Martin and Olga Schwartz alleging violations of the Open Government Ordinance relating to Zoning Adjustments Board proceedings

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**INTRODUCTION**

This report is presented to the Commission as part of its process for considering complaints pursuant to the Open Government Ordinance (“OGO”), BMC Section 2.06.190.A.1, which provides in relevant part:

The Open Government Commission shall:

- a) hear complaints by any person concerning alleged non-compliance with this Ordinance, the Brown Act, the Public Records Act, or the Lobbyist Registration Act, by the City or any of its legislative bodies, elected or appointed officials, officers or employees;
- b) consider ways to informally resolve those complaints and make recommendations to the Council regarding such complaints;
- c) seek advice from the City Attorney concerning those complaints;
- d) advise the City Council of its opinion, conclusion or recommendation as to any complaint . . .

Separate from its process for considering complaints, the Commission may “propose additional legislation or procedures that it deems advisable to ensure the City’s compliance with this Ordinance, the Brown Act, the Public Records Act, and the Lobbyist Registration Act, and advise the City Council as to any other action or policy that it deems advisable to enhance open and effective government in Berkeley.” (BMC § 2.06.190.A.2.)

July 8, 2020

Page 2 Re: Schwartz Complaint

## BACKGROUND

On June 16, 2020, Complainants Martin and Olga Schwartz (“Complainants”) submitted a Complaint of Noncompliance (“Complaint”) under the OGO to the Commission Secretary. The Complaint and accompanying appendices are attached to this report as Attachment 1.

The Complaint alleges “procedural violations and/or unfair practices” during the ZAB’s proceedings regarding a project at 2650 Telegraph Avenue (the “Project”). While the Complaint does not identify specific provisions of the OGO which it alleges have been violated, the Complaint alleges the following:

1. Omission from the ZAB packet and supplemental materials of correspondence submitted to the ZAB by members of the public.

The Complaint alleges that Complainants submitted a letter to ZAB on December 14, 2019 which was not included on the City’s webpage for the Project. The Complaint also alleges that numerous members of the public submitted correspondence to the ZAB prior to the hearing on March 12, 2020 requesting that the hearing be conducted via videoconference or postponed in light of the coronavirus pandemic, and that these letters were omitted from published ZAB materials. The Complaint alleges that the ZAB has systematically refrained from posting correspondence submitted in opposition to the Project.

2. Failure by the ZAB to include in the Notice of Decision (“NOD”) items previously approved by the ZAB.

The Complaint alleges that two items related to the Project which were approved by the ZAB at its March 12, 2020 hearing were omitted or insufficiently included in the NOD. Specifically, the Complaint alleges that an item recommending consultation with an engineer regarding a soundless gate system was not included in the NOD, and that a recommendation to replace a community garden/dog walk with trees is insufficiently discussed in the NOD.

3. Exclusion from the NOD of items agreed upon by the applicant, developer and neighbors of the Project.

The Complaint alleges that neighbors of the project and the applicant and developer reached agreement regarding an on-site manager and regulations for the use of open space. The Complaint alleges the applicant “attempted to back out” of this agreement at the March 12, 2020 meeting and “feels not obligated to implement these items.”

The Complaint also requests that “potential conflicts of interest” be reviewed and that “persons having such conflicts of interest be excluded from serving on ZAB or as planners.” The Complaint does not identify any specific “potential conflicts of interest.”

July 8, 2020  
Page 3 Re: Schwartz Complaint

### RECOMMENDATION

As noted above, the Complaint does not identify a specific provision of the OGO, the Brown Act, the Public Records Act, or the Lobbyist Registration Act which the Complainants believe has been violated. The Commission Secretary has reviewed the Complaint and performed an initial review of the records related to the ZAB's consideration of the 2650 Telegraph project. The Secretary believes that additional investigation into the facts alleged by the Complaint as well as review of applicable provisions of City and state law over which the Commission has jurisdiction is necessary to determine whether the actions alleged in the Complaint constitute a violation.

This report therefore recommends that the Commission direct the Secretary to continue to investigate the Complaint and, as soon as practicable, provide the Commission with a determination as to whether the actions identified in the Complaint constitute a violation of any provision of law over which the Commission has enforcement authority.

OGC \_ Schwartz complaint 6.5.2020

To: Open Government Commission

Re: Procedural violations/unfair practices in creating the Notice of Approval for the construction project at 2650 Telegraph Ave.

From: Martin and Olga Schwartz , 2405 Derby Street, Berkeley, CA 94705 (neighbor immediately west of 2650 Telegraph)

We would like to attract your attention to procedural violations and/or unfair practices in the creation of a Notice of Approval for the construction project 2650 Telegraph.

**A. The omission of significant letters from the neighbors into the ZAB packet or supplemental materials.**

On December 14, Martin Schwartz and myself wrote a letter to ZAB, sent to planner Ashley James. None of the materials on the project website have this letter included, but the letters from Berkeley citizens who live far away from the project who wrote in support of it are posted. The email communication and our letter is in **Appendix A**.

([https://www.cityofberkeley.info/Planning\\_and\\_Development/Zoning\\_Adjustment\\_Board/2650\\_Telegraph.aspx](https://www.cityofberkeley.info/Planning_and_Development/Zoning_Adjustment_Board/2650_Telegraph.aspx))

Second, in advance of the in-person ZAB public hearing on March 12, in the midst of pandemics several neighbors wrote letters asking for the meeting to be conducted by ZOOM or postponed. These letters are also omitted in the project materials, while the letters urging ZAB to hold the meeting are posted.

It seems that there is systematically selective postings of materials favorable to the project.

**B. Omission to include two ZAB-approved items: replacement of the “community garden”= dog run by mature trees, and soundless garage gates, in the NOD from April 14 (Appendix G)**

Both replacement of a community garden with trees and soundless gates are of major importance in mitigation of the impact of the project on the neighbors. They were discussed in detail during ZAB meeting on March 12; ZAB recommended replacement of community garden/dogwalk with trees, and consultation with DRC about what type of trees will be used. ZAB also recommended consulting an engineer for a soundless garage gate system. However, in the NOD, the formulation of first item is changed to “planting the trees on western border”, while the dog walk is still in the plans; garage gates are omitted altogether. Please see **Appendix B** for details.

**C. Other Items excluded from ZAB discussion and NOD**

These include omission of agreed-upon on-site manager and regulations for the use of open space. The applicant and developer agreed to implement these items in discussions with the neighbors, but attempted to back out of this agreement during the ZAB hearing on March 12. Attempts of the neighbors to attract attention to these two items were dodged. Thereby, the applicant feels not obligated to implement these items. Please see **Appendix C** for details.

OGC \_ Schwartz complaint 6.5.2020

These omissions are a detriment to the neighbors but benefit the applicant/ developer.

In order for the City's decisions to be impartial, we are requesting the Open Government Commission to look into the procedural violations/ unfair practices issue. We are also asking that potential conflicts of interests be vented and persons having such conflicts of interest be excluded from serving on ZAB or as planners .

Enclosed:

1. Cover Letter and OGC complaint form
2. Appendix A. Schwartz letter to ZAB from Dec 14.
3. Appendix B. ZAB-approved items omitted to be included in the NOD (replacement of community garden with mature trees; soundless garage gates).
4. Appendix C. Items excluded from ZAB discussion (manager and open space management; temporary construction fence)
5. Appendix D. DRC comments to ZAB (manager and open space management)
6. Appendix E. Supplemental Items Round 2 (manager and open space management)
7. Appendix F. Architect's response to manager and open space concerns
8. Appendix G. Notice of Decision on 2650 Telegraph.



Open Government Commission

## Complaint of Noncompliance

### Open Government Ordinance (“OGO”), the Brown Act, the Public Records Act, and the Lobbyist Registration Act

Name: Olga Louchakova-Schwartz and Martin Schwartz

Date: June 5, 2020

Mailing Address/

Contact Info: 2405 Derby Street, Berkeley, CA 94705

Identify the area of noncompliance (check all that apply):

OGO     Brown Act     Public Records Act     Lobbyist Registration Act

Describe the act(s) of noncompliance. (Attach additional page if more space is needed.)

ZAB NOD for 2650 Telegraph avenue project, user permit #ZP2019-0070 has been issued with several areas of diversion from ZAB decision, as documented in ZAB meeting minutes from March 12. In addition, the ZAB limited the input omitted from discussion several items which were already agreed upon by the applicant and the neighbors. The manner of hearings, process of decision issuance, and accuracy of documentation are of concern . See attachments.

List the date(s) on which the noncompliance occurred.

March 12 2020 (date of ZAB hearing), April 14 2020 (Date of NOD issuance)

Describe any steps taken to address the noncompliance directly with City of Berkeley staff and/or elected official, including the name of any staff person involved, if known.

Olga Louchakova-Schwartz made an attempt to address the omitted or misstated items in the NOD with the planner, Ashley James. Ms. James responses missed to address the issues. Please see the copies of emails in the attached. Then, Schwartz submitted an appeal to the City Council. The date of the appeal hearing is scheduled for June 16, 2020.

Documents:

Attach any written requests or complaints submitted to the City and any responses received. You should also attach any additional information that you believe will assist the Commission and staff in reviewing your complaint.

Use this “Complaint of Noncompliance” form if you would like the Open Government Commission to review your complaint and possibly forward their recommendation(s) to the City Council. Filing a Complaint with the Open Government Commission does not constitute a demand to cure or correct under California Government Code § 54960.1.





Olga Louchakova-Schwartz &lt;olouchakova@gmail.com&gt;

**RE: 2650 Telegraph avenue project: a letter from Olga and Martin Schwartz, 2405 Derby**

1 message

**James, Ashley** <AJames@cityofberkeley.info>  
To: Olga Louchakova-Schwartz <olouchakova@gmail.com>

Tue, Dec 17, 2019 at 4:36 PM

Thank you, Olga this has been received.

**From:** Olga Louchakova-Schwartz [mailto:[olouchakova@gmail.com](mailto:olouchakova@gmail.com)]  
**Sent:** Saturday, December 14, 2019 5:22 PM  
**To:** James, Ashley <[AJames@cityofberkeley.info](mailto:AJames@cityofberkeley.info)>  
**Subject:** 2650 Telegraph avenue project: a letter from Olga and Martin Schwartz, 2405 Derby

Dear Ms. James,

My husband and I live at 2405 Derby Street, immediately west of the proposed construction on 2650 Telegraph. I am writing to inform you about the specific ways in which our lives will be degraded by this project. We are very scared of this, and hope you can help us to avoid it.

We are two retired professors, and we are not "sitting on a pile of money", as one of the members of ZAB referred to our age group. I am an immigrant who came to this country midlife with \$50, and did not have a chance to earn retirement. My husband is a researcher in the humanities who was focused on producing intellectual and not monetary values, and we live solely off his fairly modest UC retirement money. Both of us need to stay within walking distance of the University libraries in order to continue research we are committed to doing. My husband is disabled with advanced arthritis, and doesn't have permission to drive. So, we need to remain in our present home. Even if we had to go through what for us would be a horribly upsetting event of having to find a home elsewhere, at the moment, due to the planned construction at 2650 Telegraph, our property has lost its sales value by \$390,000 (see attached evaluation), thus effectively depriving us of the possibility to move somewhere else. Over the next ten years, our loss of sales and appreciation will be \$ 1,017,512.

At hand is a construction of a monolithic mountain-like commercial-residential building 12 feet (size of regulation?) from the eastern wall of our home, and adding 100+ people squeezed into the space between us and the already busy Telegraph Avenue. We do not think that the density bonus request is applicable to the lots like this one, because the commercial buildings and the student apartments between Telegraph and Carlton already provide enough of such density: we have to make frequent calls to police to remove vehicles blocking our driveway; we constantly have delivery trucks and uber vehicles parked near our house, we have noise after midnight, etc. In the proposed form, the project will not just deteriorate the quality of our lives, but the stress of it may as well turn fatal for us. This is not an exaggeration, but a realistic and quite a somber assessment of the situation.

Palliative solutions, such as landscaping etc., will not prevent this. We are requesting a solution which makes the situation livable for us. Specifically, we are requesting to reduce the scale of the project to a three story building, which will be one floor above the highest houses in our block and down the street. This, of course, will reduce the income the applicant plans to obtain from his luxury project, and will change the character of the project. However, this will need many needs of the city, including low income housing, animating downtown Berkeley, sustaining the historical character of the neighborhood, keeping down the traffic, etc. This will also address the concerns of neighborhood businesses regarding solar panels, shade etc. We earnestly look to ZAB to consider our request favorably.

Sincerely, and with much hope

Olga Louchakova-Schwartz (and Martin Schwartz)

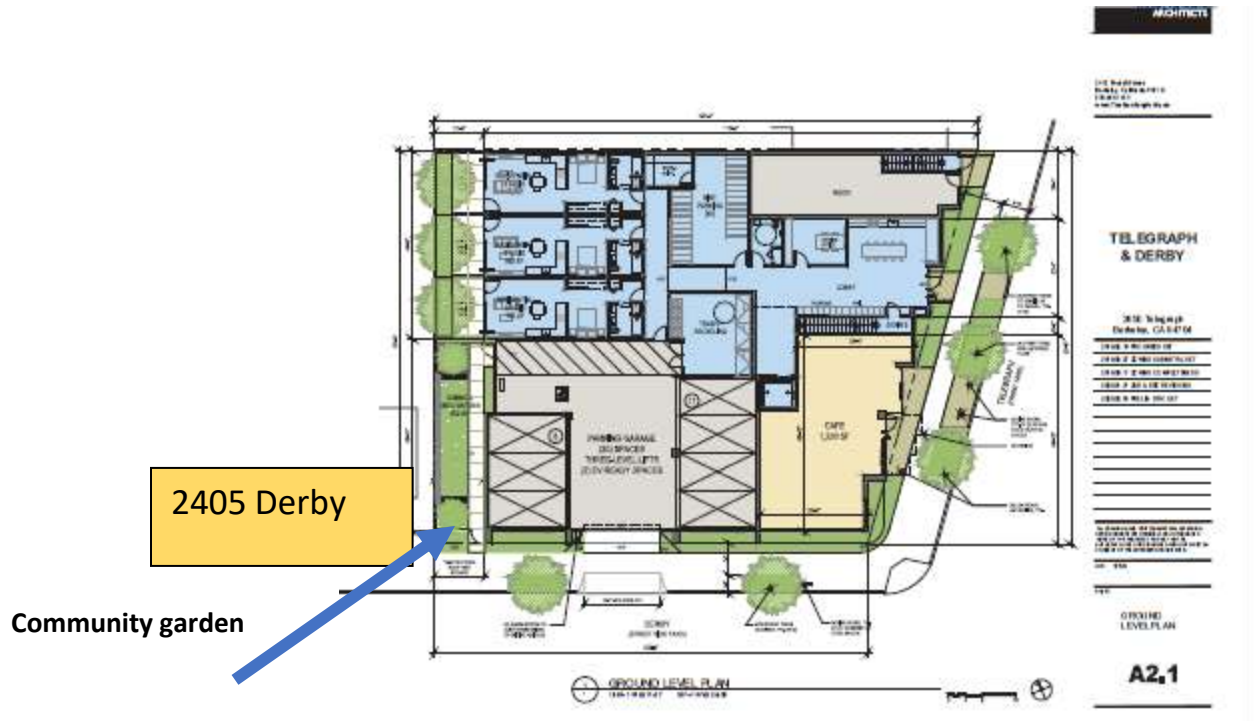
P.S.

The 18 months of construction (the time estimated by the architect, Mr. Trachtenberg, in conversation with my husband) would bring intolerable noise, cutting into our sleep and making work and just being at home difficult for us. We were particularly alarmed by ZAB member Patrick Sheehan's report that on Mr. Trachtenberg's other project, construction workers would turn up at 5:30 AM and talk loudly, etc. before they get to work, in theory at 8:30.AM. The construction would also fill the air with particles, some toxic (my husband has a respiratory problem as it is) for that long time. Scaling down the project will help these concerns as well.

--



The windows of the study and bedroom walls of Schwartz residence at 2405 Derby are right next to the construction site. The adjacent area of construction next to the 2405 Derby would have "Common Area Garden" (a.k.a. Dog Walk on L1.1, below).





Both Teresa Clark and Denise Pinkston of ZAB very specifically requested replacement of “community garden”/ dog walk with mature trees. See transcription below .

### Transcription 2:19:00

**Teresa Clark, ZAB member**

- What are you replacing the dog run area with?

**David Trachtenberg, the applicant**

- Just landscape

**Teresa Clark**

- And that’s where the trees are going... Mature trees. Did you revise the design after the design committee review? Have you already revised it?

**Trachtenberg**

Yes, it is already revised, in the set that you have.

### Transcription 2:21:27

**Denise Pinkston , ZAB member**

- I just wanted to clarify what is the status of other things the neighbors outlined as being a part of the agreement. So the landscape plan shows the mature tress at the western edge now?

**Trachtenberg**

- Correct, Yes.

**Denise**

- The landscape plans show mature trees at the western side of the lot? Is that agreement on the landscape plan, or do we have to add it to the condition?

**Trachtenberg**

- Is that a question?. Let me check. It all happened very quickly. We do not have any problem with it

**Denise :**

- OK, there is no right or wrong with it. I am going to say, if it is not on the plan, put it on the plan.

Transcription 2:41:42, 2: 43:34

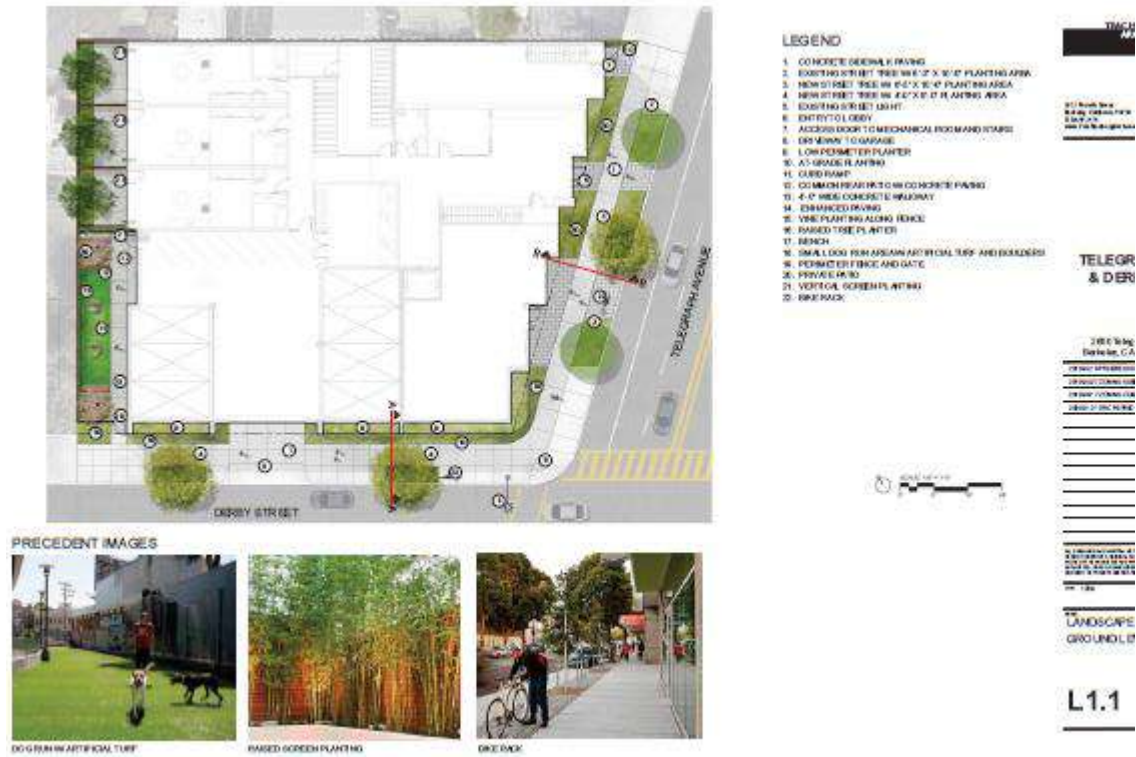
**Teresa Clark**

- but I think with some mature trees, trees which will grow larger, it's gonna reduce the impact on Martin's house. Well this is the house which is.. if you look at A0.7A, you can see it really well in a perspective view, if you look at the back section going back to the inner part of the lot, ...

**Teresa Clark**

- I would like us to consider the fence either separately. I would like us to see if you are friendly to amending it slightly... I think what I would like to see us to recommend the design review to select the trees which would be against Martin Schwartz's property, which is kind of adjacent to Martin Schwartz, where the Dog Run was, and now you have trees, you know, where the dog run used to be. I would like us to have the design review look at that. Because you know with some mature trees there, trees where the dog run used to be, you know trees which will grow larger, this is going to reduce the impact on Martin Schwartz' house. If you look at A0.7A, you can see it really well in a perspective view. And I think, if you look at the section going from the street back to the inner part of the lot...

Despite this, the "Conditions and Findings" of the NOD does not include the requirement of replacing the community garden/dogwalk by mature trees, it states only "mature trees along the western property line". As result, the dog walk/community garden remains in the plans (see below). When we attempted to resolve the issue with the planner, she denied these facts. See below email exchange with the planner Ashley James.



Emails with the planner Ashley James

Fri, May 1,  
9:26 AM

James, Ashley  
to me

Olga -

Shannon followed up with Igor yesterday regarding this appeal, and communicated that a thorough response to your appeal letter will be provided in the staff report for the City Council.

Please note that a building manager was not requested as a COA by the ZAB. The dogwalk is not part of the project; it was an error included in an earlier plan set. Neither staff nor the ZAB committed to a noiseless system at the garage entrance/exit, that safety issue is a matter for the traffic engineer.

I'm happy to answer any other questions regarding this project.

**From:** Olga Louchakova-Schwartz <[olouchakova@gmail.com](mailto:olouchakova@gmail.com)>

**Sent:** Friday, May 1, 2020 9:17 AM

**To:** James, Ashley <[AJames@cityofberkeley.info](mailto:AJames@cityofberkeley.info)>

**Subject:** Re: APPEAL LETTER RECEIVED - 2650 Telegraph ZP 2019-0070

I included in the appeal several items which were approved in the ZAB meeting but are missing in the NOD.

Shall we leave this for the hearing, or can corrections be made prior to hearing? See another email thread regarding this, from Igor to Shannon.

Olga

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## B.02. Soundless Garage Gates

Soundless garage gates were recommended for the ZAB discussion by the DRC. The following slide shows the proximity between 2405 Derby and the garage gates – the distance equals approx. length of one car spot, therefore, the soundless system is very important to mitigate the impact of the project on 2405 Derby.



Transcript, 22:22:38

**Denise Pinkston**

- ... the garage door condition regarding noise, I already saw, in the staff report conditions. No? ...

**Shannon (Staff)**



- This will be reviewed by the city engineer, not to have any noise or light at the exit of the garage
- Denise**
- That's what I meant. Thank you.

This condition is omitted in the "Conditions and Findings" section of the NOD, and the request for sound engineer consultation is nowhere else in the records. But, if this is an issue which has to be addressed by the traffic engineer, it has to be made a condition of approval; otherwise, it will be simply omitted to from being addressed.

## Appendix C.

### Omitted in ZAB Discussion: On-site 24/7 manager and the Open Space Management

The open space of 2650 Telegraph consists of an elevated 2nd floor patio and 7 private patios which will be right above the residences to the west (see below). Two neighbor groups independently requested that there be a 24/7 on-site manager who can be reached in case of excessive noise or other problems.

In communications with the neighbors, the applicant agreed on this condition. DRC directly recommended that the matters of management will be discussed at ZAB hearing (See **Appendix D**). However, during ZAB meeting, the developer attempted to back out of these agreements. Despite the neighbor's attempts to bring the management question back into discussion, the question was dodged at the ZAB March 12 meeting. The item (24/7 on-site manager, signs with the rules of use of the open space, limitations on the number of people, etc.) needed to be included in the conditions of approval of NOD because without it, the agreement doesn't have binding power.

Please see below the transcript from ZAB meeting of March 12, email exchange showing that the manager appointment was agreed upon; and the letter exchange between applicant and the neighbors, in which the applicant complies with the condition – attached **Appendix D**.



Transcript, 2:15:59

#### Jeff Kazowitz, neighbor

- In terms of noise, we are pleased to see that there will be on-site building manager whom we can contact if there is an excessive noise; we also proposed that there will be signage limiting the number of people on terraces [also advised by DRC], so that if there are neighbor complaints about noise, those kinds of gatherings will be stopped and prohibited.

Email

10:54 AM (10  
hours ago)

jeff kasowitz  
to me, Martin

Hi Olga - Sorry didn't see this second email earlier. I'm not sure where it is written, but **the architect and developer proactively stated that there would be a 24/7 dedicated on-site manager.**

On Tue, Jun 2, 2020 at 2:12 PM olgalouchakova <[olouchakova@gmail.com](mailto:olouchakova@gmail.com)> wrote:

Sorry, one more question: do you know was there anything on the manager in the materials submitted? On the video, you mentioned it was discussed with Trachtenberg, and he agreed on having the manager.

Olga

**Quote from Appendix F.**

Architects response, page 3 of 4.

“Regarding noise, the project’s lease agreements and community policies will include quiet hours, time restrictions for roof deck use, and contact information will be posted for an on-site building manager who can address noise complaints.”

**DRC SUMMARY – February 20, 2020**

**2650 TELEGRAPH AVENUE [at Derby] (DRCP2019-0004): Preliminary Design Review** to 1) demolish one existing commercial building; and 2) construct one, five-story, 34,249 square foot mixed-use building with 45 units (including 4 Very Low-Income units), 1,290 square feet of commercial space, 4,051 square feet of usable open space, as well as 50 long-term bicycle parking spaces and 20 vehicular parking spaces at the ground level.

***Preliminary Design Review received a favorable recommendation to ZAB with the following direction for Final Design Review (FDR): MOTION (Clarke, Kahn) VOTE (6-0-0-0)***

**Conditions:**

- *Show sections through the podium open space at ZAB and continue to review at FDR. Section shall include adjacent houses, including window locations. Railing design may need modified at FDR.*
- *Review steel eave detail at FDR to make sure that it is the best proportions for the building design.*

**Design Recommendations:**

- *Lowered height in combination with open space location is appropriate.*
- *Consider zinc panels in other locations around the whole building, such as the south elevation.*
- *Recommend grouping operable windows in the bays and over planters. Stack vertically if possible.*
- *Recommend that mature trees be planted on west property line.*
- *Recommend window boxes with reservoirs.*
- *Recommend no plastic plants in window boxes.*

**Recommendations for ZAB Discussion:**

- *Recommend discussing potential solar equipment relocation and skylights with neighbors to the north.*
- *ZAB should discuss conditions for the common open space areas, including quiet hours and management requirements.*
- *Recommend that ZAB discuss whether the garage should be restricted there is no buzzer.*
- *ZAB should discuss conditions appropriate for the dog run.*
- *Recommend that the applicant discuss the fence height with nearby and adjacent neighbors.*

**James, Ashley**

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**From:** jeff kasowitz <jkasowitz@gmail.com>  
**Sent:** Tuesday, March 10, 2020 1:54 PM  
**To:** David Trachtenberg  
**Cc:** James, Ashley; Kathy Curran; adina; Philip Miller; David Miller  
**Subject:** Re: Summary of last night's conversation points (2650 Telegraph project)

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

David,

Thanks for the follow up clarifying questions regarding the patios. Here is our response:

We are asking for glass walls around all common areas that are not private patios. We are not asking for glass walls surrounding the two private patios on the fourth floor. If the developer prefers to also add glass walls to the private patios for consistency reasons, however, we would welcome that approach.

Yes, we are asking that glass walls be installed above the opaque wall surrounding the fifth floor common terrace to dampen noise from group gatherings. We request that the glass extend to eight feet above the common-area ground level.

Please also note that at our recent meeting, during the discussion of trees along the back of the building, Phil Miller forgot to mention his request that there also be a tree planted along the north boundary of the lot, near the west boundary, to provide some privacy to the homes on Dana Street northwest of the building. The type of tree can be the same as the trees along the west boundary.

Thank you

On Wed, Mar 4, 2020 at 4:04 PM David Trachtenberg <[david@trachtenbergarch.com](mailto:david@trachtenbergarch.com)> wrote:  
Jeff et al,

Thank you for taking the time to meet with me last night and for the excellent summary notes. our landscape architect is now assembling a menu of possible trees for your consideration which I expect to be able to get to you by tomorrow.

You wrote:

**Walls surrounding patios:** For any of the building's public gathering spaces, we request installation of glass screens surrounding the patios, in addition to a 42" opaque wall and 12" planters around all patios of the building. These measures are needed in order to provide privacy and mitigate against unwanted noise.

I am not clear about what exactly it is that you are requesting. If I understand correctly, you are requesting the addition of glass walls around the fifth floor "public gather spaces" or common area terrace only. You are not requesting that the private patios off of the two fourth floor units have glass surrounds. Is that correct?

Also, our plans already show 42" tall opaque guardrails at all terraces and 36" wide by 42" tall planters at the entire perimeter of both the fourth and the fifth-floor terraces which serves to keep people from getting close to the railing and thus makes it impossible for a person to look directly down into the adjacent rear yards. (We'll be providing you with a drawing showing that relationship by tomorrow). My question is - are you requesting that we install glass above the opaque 42" railing on the fifth floor common terrace and if so to what height?

Thank you,

**David Trachtenberg** | Principal  
TRACHTENBERG ARCHITECTS  
2421 Fourth Street Berkeley, CA 94710  
510 649 1414 x112  
[TrachtenbergArch.com](http://TrachtenbergArch.com)

On Wed, Mar 4, 2020 at 9:20 AM jeff kasowitz <[jkasowitz@gmail.com](mailto:jkasowitz@gmail.com)> wrote:  
Dear David, Ashley and Zoning Adjustment Board Members,

We (a group of residents living adjacent to 2650 Telegraph Ave) had a constructive meeting with David Trachtenberg yesterday and talked through the following items related to the 2650 Telegraph project. We request that these items inform the decision making process for next week's ZAB meeting and be adopted. In one case, we ask for some follow up information from DRC.

- **Landscape Plan:** Regarding the trees to be planted along the West side of the property, please have the landscape architect send us examples of several potential species (both deciduous and evergreen) that can help us achieve screening for privacy as well as property beautification.
- **Dog Run:** We ask that there not be a dog run included in this project. It will be disruptive for us as neighbors, creating additional unwanted noise and odors. This does not seem an essential element of this project. Instead, we would like to see additional mature trees (see landscape plan above) planted where this space is.
- **Fencing:** On the West side of property, we would like an 8' fence constructed to provide additional privacy for the adjacent neighbors. We are comfortable with a corrugated steel material that David Trachtenberg recommended last night.
- **Walls surrounding patios:** For any of the building's public gathering spaces, we request installation of glass screens surrounding the patios, in addition to a 42" opaque wall and 12" planters around all patios of the building. These measures are needed in order to provide privacy and mitigate against unwanted noise.
- **Noise:** In addition to having an onsite building manager who can be contacted in cases of excessive noise, we propose that signage be placed on all terraces that limits the maximum number of people allowed on a terrace at one time to 15. In addition, we propose signage stating that if complaints of excessive noise be made by neighbors, that future gatherings will be prohibited.
- **Lighting:** On outdoor terraces, lighting should be shielded and facing down. We propose that the only lighting included be step lighting (walkway only) installed above finished floors. Lighting should face eastward away from neighbors to the West. Exterior lighting along Western exit path to be set at 7' max (below 8' fencing). Ground level lighting for three apartments should be pointed down and be installed below 7'.
- **Garage Door:** We propose that the garage door not include any light or sound signal when opening and closing.

We request that approved changes to the current plan based on these items discussed last night be formally incorporated into the plans before the plans are approved.

Thank you,  
Jeff Kasowitz and Rabbi Adina Allen (2643 Dana St.)  
David and Tayanah Miller / Philip and Marianne Miller (2639 Dana St.)  
Kathy Curran (2410 Carleton St.)



**James, Ashley**

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**From:** Hussein Saffouri <Hussein@ramseylawgroup.com>  
**Sent:** Tuesday, March 10, 2020 6:10 PM  
**To:** James, Ashley  
**Subject:** 2650 Telegraph ZP2019-0070

Hi Ashley, in the interest of time, I am sending you my clients' current concerns and requests in the form of the bullet points below:

#### **Parking concerns**

- The applicant's traffic study's conclusion that the reduced number of parking spots available will not have a detrimental impact on the neighborhood is based on the untested and circular assumption that the mere fact the building offers fewer parking spaces will result in a reduced vehicle ownership rate for the project trips. The traffic study cites no concrete data to support this assumption. It is merely wishful (not to say and self-serving) thinking. If the assumption is false (which, given the lack of data to support it suggests that it is at least as equally possibly true as it is false) then the actual vehicle ownership data cited in the study supports the notion that the reduced number of parking spots will be detrimental to the neighborhood. The City should require the applicant to explore a way to add more parking spaces. Furthermore, to minimize the parking burden on the neighborhood in the future, and (assuming the parking study is correct) continue to disincentivize ownership of vehicles by residents of the building the City should impose as a condition that the exclusion from RPP will extend to purchasers or residents of units in the building even after they are re-sold by the original owners (i.e. not only to the original purchasers of the new units).
- The addition of the Café, and the likely number of residents without in-building parking spots, will result in more difficult parking for the patients of Aloha Dentistry and Berkeley Pediatrics, next door at 2640 Telegraph, harming their business and detrimentally impacting the wellbeing of the special needs patients those practices serve. We request that the City designate two parking spots on Telegraph, in front of 2640 Telegraph as short term paid parking spots (20 to 30 minutes max.) and designate one spot for patient drop-off only during business hours.

#### **Aloha Dentistry/Berkeley Pediatrics Solar Panels**

- Notwithstanding that the California Solar Shade Act does not regulate the development rights of neighboring property, the City has the power under BMC sec. 23B.32.040 to conditions requiring the developer to take steps to avoid the significant detriment to Aloha Dentistry and Berkeley Pediatrics which will result from the loss of use of their solar panels due to the anticipated shading of those panels by the proposed building. The loss of use of those panels will be detrimental, and economically injurious, to these businesses. The City can impose a condition requiring the applicant to relocate the solar panels to the new building to ensure that they remain viable to avoid such detriment under BMC sec. 23B.32.040. This is also the City's policy to promote the use of solar panels and other green energy production.

#### **Aloha Dentistry/Berkeley Pediatrics Signage**

The north wall of the new building will obscure these businesses' signage along Telegraph. The businesses request approval of new signage along Telegraph that can extend perpendicular to the building façade along Telegraph Avenue.

#### **Privacy Concerns**



- The type and size of plantings along the patios should be specified to ensure privacy. The thickness of the plantings along the railings of the patios should be clearly specified to keep users at least three feet back from the edge to eliminate line of sight visibility into the single family homes directly to the West. Furthermore, the glass rails should be raised so that the top of the rails is at six feet from the ground level of the patios to provide sound proofing to the residences below (alternatively the plantings along the railings should consist of six foot tall hedges to provide some degree of sound proofing).
- The garage door should not have an audible buzzer.

#### Building Height

- The ground floor height should be reduced by an additional two feet to further lower the building and minimize its shading and bulk impacts. The proposed 12 ft. ceilings for the commercial space do not match any other neighboring buildings and are unnecessary. Although the shadow study shows that shadowing will not occur all of the time, the shadow impacts are significant and should be minimized.

#### Building Rules and Manager

- The conditions of approval should specify the rules which the building must adopt with respect to limiting the hours when the patios may be used, the number of users of the patios, and the permitted uses of the patios, to ensure the privacy of the single family homes below and directly to the West by preventing the patios from turning into outdoor party pads. Additionally, the conditions of approval should require that the building must have a full time on site manager able to enforce these rules.

#### Construction

- In addition to the notices already required in the proposed conditions, the developer should be required to give Aloha Dentistry and Berkeley Orthodontics at least 48 hours advance notice prior to any construction activity anticipated to result in loud noises so that they can appropriately schedule their special needs patients who are sensitive to noise.
- The construction site should be surrounded by fence a minimum of 8 ft. tall.

I look forward to discussing these matters with you tomorrow.

Regards, Hussein.

---

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The foregoing applies even if this notice is embedded in a message that is forwarded or attached.





**Telegraph Business Improvement District**

2437 Durant Avenue #206, Berkeley, CA 94704

510-486-2366

[alex@telegraphberkeley.org](mailto:alex@telegraphberkeley.org)

March 11, 2020

City of Berkeley  
Zoning Adjustments Board  
Land Use Planning Division  
2120 Milvia Street, 2nd Floor  
Berkeley, CA 94704

**Re: Item #4 - proposed development at 2650 Telegraph Avenue**

Dear Zoning Adjustment Board members:

On behalf of the Telegraph Business Improvement District, I write to urge your support for moving the proposed development at 2650 Telegraph Avenue forward. The project will bring productive use to an underutilized site, significantly advancing our community and economic development goals.

Our many stakeholders strongly support the addition of new residential units and retail space which will help activate the southern portion of our district. On March 3, 2020 the development team presented a project overview to our board of directors including their most recent designs. We appreciate their honest efforts to engage with us on our priority issues and honor our feedback.

The TBID is excited to see this move forward and we will continue to partner with the City, community and the development team throughout the process to ensure the project's successful completion. We ask that you approve this item and thank you for your commitment to promoting greater equity, inclusion, and sustainability in Berkeley and the Telegraph district.

Sincerely,

Alex Knox  
Executive Director



## MINUTES

### Meeting of the Board of Directors

Telegraph Business Improvement District

Tuesday, March 3<sup>rd</sup>, 2019, 8:00 AM- 9:30 AM

California Room, Graduate Hotel 2600 Durant Ave. Berkeley, CA 94704

**Attendance:** Kevin Gordon, Craig Becker, Steve Ruegg, Bonnie Gold, Ali Eslami, Eleanor Hollander, Jen Loy, Ito Ripstein, Doris Moskowitz, Christine McDermott, Swami Prasannatmananda

**Absent:** Heidi Scribner

**Staff:** Jeff Gilbert, Emily Szczech

**Guest:** David Trachtenberg, John Caner, Eric Tam, Rachel Vranizan

1. **Call to order**
2. **Public Comment**
  - a. John Caner: Excited to learn more about the new TBID ED candidate, Alex Knox.
3. **Approve Minutes**
  - a. Bonnie firsts, Swami seconds
4. **Event and Program Manager Report (Emily)**
  - a. Sunday Streets
    - i. In process of writing the permit
    - ii. DBA and NSA are not doing the event again this year
    - iii. Working on securing attractions, 510 skateboarding is doing it this year!
  - b. Marketing
    - i. Postcards! For targeting visitors and students
    - ii. Website updates, adding in a resident's page
  - c. Preparing for the new ED
    - i. Reviewing projects and adding in updates, compiling notes from meetings, preparing for suggested meet and greets
  - d. Portland Loo
    - i. Planning site visit to begin the project plan to submit to Portland Loo
    - ii. Progress report for the Chancellors grant is almost done
5. **Ambassador Report (Jeff)**
  - a. Alejandro is getting housing at YMCA!
  - b. We've met with the new area coordinator for BPD, Jessica Perry
    - i. She's been working in Berkeley for about a year and is very excited about the opportunity
    - ii. Her background is in community policing
  - c. Weekly meetings with Steve Ruegg to stay up to date about the district
  - d. Met with Sargent for DTF
    - i. Bike force is a potential
  - e. It's getting warmer so we're beginning to water plants and work on more water washing efforts
6. **Development Presentation for 2650 Telegraph Ave. (David)**
  - a. This development is happening at the old Bacheesos site
  - b. Market rate units with roughly 45 units that are studios and one bedrooms
  - c. Development team has made their rounds with neighbors, appropriate associations, and businesses
  - d. There aren't any available parking spaces in the unit, but residents in these units aren't allowed to get parking permits through the city. Units will attract people without cars

- e. Trash is a major problem in the area, discussion on if they will have a trash room in the downstairs café
  - i. It is up to the tenants to figure out the trash and not yet decided
  - ii. Very important to the board that this is addressed and to avoid more trashcans sitting on the sidewalk 24/7

7. **Introduction (Alex Knox)**

- a. **Alex is the Executive Director candidate that the TBID Executive committee has decided to move forward with**
- b. Alex: Very excited to be here!
  - i. Passionate public servant with a background in public service, even growing up his family members were all public servants
  - ii. Last position was Chief of Staff at the City of Richmond for the Mayor
  - iii. His realm is in on the ground problem solving everyday
  - iv. Very excited to work for this district in particular
    - 1. Thrives with high pressure situations and used to responding to issues with a high sense of urgency
  - v. Involved in many initiatives on marketing, transportation, clean and safe

8. **Questions for Alex Knox**

- a. What do you think will be the most crucial challenge for you?
  - i. Learning curve will be the knowledge of what the heart and soul of the area is. Currently know a fair amount about the area, being a Bay Area resident, but not the same sense as a Telegraph community member
- b. How would you handle someone that is distressed because of how a situation is unfolding?
  - i. I'm diplomatic and spend a fair amount of time weighing options and thinking a lot about all potential pitfalls and how to avoid any issues.
  - ii. Would make sure the individual is happy and put a lot of work and effort ahead of time in hope that everyone is well represented and content with the outcome.
- c. What in particular drew you to this position, to this district?
  - i. There's an exciting amount of activity and growth in the area. The area is also going in the right direction and has changed for the better in the past years, since my college days when I was frequenting the area on a much more regular basis.
    - 1. With that being said, the area is still one of the many epicenters for the homelessness crisis. I anticipate this to be something that I focus on and spend a lot of time on.
- d. What are you most excited about?
  - i. Honing in on the identity and iconic image of the district, and presenting the district in an exciting, new way.
- e. **Kevin Gordon makes the motion to make an offer to Alex Knox to be the Executive Director of the TBID position with a total compensation of \$90,000 per year, without the option to increase in July 2020.**
  - i. Ito made a motion to approve Kevin Gordon, Doris seconded the motion. Kevin Gordon called for a vote; the vote was unanimous.
- f. **Ito made a motion to continue Emily's compensation by \$1,000 per month commencing May 1, 2020 (following the temporary \$1,000 per month approved thru April 2020) and to allow an annual increase in line with the board approved assessment increase for the 2020-2021 fiscal year.**
  - i. Craig seconded the motion. Kevin Gordon called for a vote; the vote was unanimous.

9. **Adjourn**



**Telegraph Business Improvement District**

2437 Durant Avenue #206, Berkeley, CA 94704

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[alex@telegraphberkeley.org](mailto:alex@telegraphberkeley.org)

March 11, 2020

City of Berkeley  
Zoning Adjustments Board  
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2120 Milvia Street, 2nd Floor  
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Sincerely,

Alex Knox  
Executive Director

TRACHTENBERG ARCHITECTS  
2421 Fourth Street Berkeley, CA 94710  
phone: 510.649.1414  
www.TrachtenbergArch.com

Hussein Saffouri, Attorney  
Ramsey Law Group  
3736 Mt. Diablo Blvd., Suite 300  
Lafayette, CA 94549

February 27, 2020

RE: Design Review #DRCP 2019-0004; 2650 Telegraph Avenue

Dear Mr Saffouri,

Thank you for forwarding the letter dated February 20, 2020, written on behalf of Martin and Olga Schwartz in response to our proposed project at 2650 Telegraph. Please see below for our responses (in blue) to each of the concerns raised in the aforementioned letter.

**1. Height Reduction:** The building is excessively tall causing unnecessary shading of neighboring properties, blocking their access to light, rendering useless their installed solar panels. The proposed five story building is also entirely out of character for the neighborhood. The preferred solution is to require a redesign of the building limiting it to four floors. The dramatic shading that the current design will cause is sufficiently detrimental to the health, comfort and general welfare of the neighborhood as to justify denying the project even though it qualifies under the Density Bonus Ordinance. The total number of units should be reduced to limit the Project to four stories.

We do not agree that the building is excessive in height. The project meets the both Berkeley's and the State of California's housing goals and codes and is similar in height to all other recently built and approved new multi-family projects along Telegraph Avenue and other higher density corridors around the City. Via the California State Density Bonus, the project is granted a by-right approval to provide the 45 units of housing in Berkeley which is proposed.

The building has been designed to minimize shade impacts as much as reasonably possible without sacrificing project viability. Building volume was removed from the north and west ends of the projects to reduce the depth of shadows cast on neighboring properties. The massing also creates a visual transition from the high-density nature of the Telegraph corridor to the lower-density character of residential neighborhoods to the west. Furthermore, following feedback which we received from neighbors, we have voluntarily agreed to reduce the building height from 59'-6" as originally proposed down to 55'-6" as presented at last week's Design Review Committee hearing. A building height of 60' is permitted by code so our proposed building is 4'-6" lower than what is allowable.

At a minimum, and in the alternative, the Project should be designed to reduce its height by limiting ceiling heights to the required minimums. The Project is currently designed to feature an excessively tall commercial retail first floor, and residential units that are also slightly taller than necessary.

We have voluntarily reduced the ground floor ceiling from 16'-0" down to 12'-0". We have achieved this by placing the parking machines in below grade pits (at considerable extra cost to the owner). Code minimum ceiling heights in dwelling units is 8'-0". In consideration of the mechanical, plumbing, fire safety and electrical systems, that will be in the floor/ceiling assemblies, the finish ceiling heights will range inside the units. The finish ceiling heights of the four residential floors will range from code minimum 8'-0" ceilings to 8'-6".

The project seeks a Density Bonus waiver to achieve a height of 55'6", close the maximum height permitted pursuant to such a waiver. (See BMC § 23C.14.060.) The height serves to accommodate a proposed commercial retail-use first floor with ceiling heights of 15'6". This height is unnecessary and far exceeds the minimum required for commercial premises. It is not necessary to build the proposed number of total units or the proposed low income units. The first color should be redesigned to the standard minimum permitted. Additionally, ceiling heights throughout the building exceed the required minimums, though more modestly. Those heights should also be reduced to the required minimums for residential units.

See comments above regarding building heights and ceiling heights.

With respect to the total number of units, the zoning of this site allows for and encourages precisely the kind of density which we have proposed. The project's developer is required by law to provide the number of low-income units which we have proposed in this project. That number is not negotiable.

In addition to the shading impact on all adjacent neighbors, the Project will have an additional detrimental impact on the dental practices directly to the North. As designed, the Project will block ambient light into their building, which is necessary to their practices and to the wellbeing of their patients. It will also block the light from reaching the solar panels installed on their building, making them useless, and increasing their electrical expenses. Even with a height reduction, an impact will remain. The best solution is to reduce the scope of the Project to eliminate this negative impact. Alternatively, the Applicant should pay to relocate the panels to retain their functionality and compensate the dental practices for their increased utility bills resulting from the construction of the Project.

We reached out to Senior Planner, Greg Powell, about the solar panel issue and his response is quoted below:

*Local agencies are largely precluded from regulating new solar facilities. The applicable state law is the California's Solar Shade Act (AB 2331, 1978), which provides protection to solar energy system owners from shading caused by landscaping on adjacent properties. The law seeks to prevent a property owner from allowing trees or shrubs to shade an existing solar energy system installed on a neighboring property, provided the shading trees or shrubs were planted after the solar collecting device was installed. The law does not eliminate or limit the development rights of a neighboring property.*

**2. Noise Mitigation and Privacy:** As currently designed, the Project includes open patios which look down into neighboring properties to the West, such as the Schwartz's home. These will cause a loss of privacy, and noise and light pollution generated by persons socializing in the elevated open spaces.

To mitigate the noise pollution, light pollution and loss of privacy that will result from the elevated patios looking down into neighboring properties, the project should be redesigned so that the patios face east toward Telegraph Avenue.

Alternatively, and at a minimum all patios and other open spaces should be enclosed by glass enclosures at least 8 ft. tall (but may remain open to the sky). Additionally, the Project's CC&Rs should: 1) incorporate decibel limits consistent with or stricter than the applicable noise ordinance; 2) limit the hours during which patios may be used; and 3) limit the total number of persons allowed on patios at any one time. Signs must be posted prominently stating the noise limits, hours of use, maximum limit of persons, and the penalties for violations.

Measures have been integrated into the design to mitigate privacy impacts on the neighbors: roof top open spaces have tall landscaping at their perimeters to create a visual buffer, trees are planted



at the ground floor unit patios as a screen, and units will be constructed with shades installed. We will install uniform blinds and shades in all units). Regarding noise, the project's lease agreements and community policies will include quiet hours, time restrictions for roof deck use, and contact information will be posted for an on-site building manager who can address noise complaints.

**3. Parking:** The requested reduction in minimum parking spaces provided should be denied as detrimental to the wellbeing of the neighborhood.

Parking is already inadequate and difficult on the permitted residential streets to the West of the Project. The lack of parking in the building will lead to excessive street parking unsupported by the current parking availability.

As a result, at a minimum, the Project must be subject to a condition that residents of the Project, in perpetuity, may not obtain parking permits (in either the "J" zone street or the "B" zone). Moreover, while such a condition might mitigate the impacts on the permitted streets, it will do little if anything to mitigate the impact of the additional cars on the metered parking on Telegraph. That will deprive the businesses along Telegraph of vital, but limited, parking spaces for their clients, customers and patients. The preferred solution, therefore, is to deny the request for a reduction in the number of off street parking spaces because it will be detrimental to the comfort and general welfare of the neighborhood.

Indeed, the neighboring dental practices obtained approval from the City of Berkeley a few years ago, based on a determination by the City that there was adequate parking and appropriate traffic flow for their businesses. The proposed Project will upend those determinations. It will leave them with inadequate parking and excessive traffic, which will negatively impact their businesses. The City, however, is doing nothing to address the inadequacy of the infrastructure to support the proposed building, which is out of scale for the location where it is being proposed. The Project must be scaled back to reduce its negative impacts.

As a matter of policy the City of Berkeley does not issue residential parking permits to occupants of newly constructed apartment buildings. The building will provide 20 garaged parking space for the 45 apartment units. Parking spaces are "unbundled", meaning that a parking space is charged separately from rent. Prospective tenants are smart shoppers. If ownership of a car is essential for a given tenant then that tenant will necessarily select an apartment building where they can park their car. We anticipate some residents will be employees, undergraduate and graduate students of UC Berkeley, who will likely not own cars. Furthermore, given the proximity to UCB, BART and the Rapid Bus line it is our belief that this is an ideal car free location for the ± 25 apartments which will not have an on-site parking space.

Moreover, analysis by our traffic consultant determined that "the project residents are likely to have a lower automobile ownership than the surrounding areas due to the limited on-site parking supply and the on-street parking restrictions in the surrounding areas (meters along Telegraph Avenue and RPP along residential streets) which make long-term daytime parking infeasible for most project residents."

Finally, any difficulty Aloha Dental patients have in parking may be due to the developer of the Aloha Dental building requesting a parking reduction for their new building that resulted in no off-street parking being provided for the their patients. That decision should not preclude the current project from making similar design choices.

**4. Parking Garage Door:** The proposed garage door is located approximately 3 yards from the Schwartz's driveway and just 4 yards from the windows of their living room and study. This will result in unacceptable noise at all hours from entering and exiting vehicles and the operation of the door itself.

My clients request that the Project be redesigned to move the gate either onto Telegraph, or, instead towards Telegraph to the corner of Derby, and further away from where it will impact their quiet and privacy. The door must also operate noise free, with no audible alarms or the like.

The garage door is located 35'-9" from the adjacent property line and approximately 40' away from the Schwartz' home. While it is impossible to have a garage door that produces no noise, the garage doors that we specify are quiet. In terms of decibels, they are approximately as loud as an audible conversation.

**5. Construction Hours, Safety, Noise and Dust:** Aloha Pediatric Dentistry and Berkeley Orthodontics are among few pediatric dental practices which treat children with special needs. These children are sensitive to loud noises and vibrations. The practices accommodate their special needs patients by blocking their schedules to allow them to be at the practice when there are no other sounds/vibrations/etc. to allow them to feel safe during dental treatment.

It is critical that the hours of construction be limited to allow these dental practices reasonable hours to continue to provide for their special needs patients without being exposed to noise and vibrations from construction activities. Strict decibel limits should be imposed including during business hours, and a protocol for dust and particulate mitigation imposed. Additionally, for the benefit of children and parents walking to Willard School, as well as the patients of the dental practices, requirements must be imposed to ensure the sidewalks remain useable and safe, and access to the dental practices remains safe and unimpeded.

Berkeley's standard Use Permit Conditions say that construction activity shall be limited to between the hours of 7:00 AM and 6:00 PM on Monday through Friday, and between 9:00 AM and 4:00 PM on Saturday. No construction-related activity shall occur on Sunday or any Federal Holiday.

**6. General:** Lighting on the Project should be designed so as to minimize light pollution and ensure they do not shine onto neighboring properties. Landscaping should include solid fencing and mature trees to the West and North to provide privacy, noise and light screening.

Lights specified throughout the project will comply with Title 24 requirements to reduce lighting impacts on neighbors and the environment at night.

If you have any questions or comments, please feel free to contact me using the information below.

Sincerely,



David Trachtenberg, Principal  
TRACHTENBERG ARCHITECTS

Cc: Michael Orwitz, Developer/Owner  
Ashley James, Planner, City of Berkeley



Z O N I N G  
A D J U S T M E N T S  
B O A R D  
NOTICE OF DECISION

**DATE OF BOARD DECISION:** March 12, 2020

**DATE NOTICE MAILED:** April 14, 2020

**APPEAL PERIOD EXPIRATION:** April 28, 2020

**EFFECTIVE DATE OF PERMIT (Barring Appeal or Certification)<sup>1</sup>:** April 29, 2020

## 2650 Telegraph Avenue

Use Permit #ZP2019-0070 to 1) demolish one existing commercial building; and 2) construct one, five-story, mixed-use building with 45 units (including 4 Very Low-Income units), 1,290 square feet of commercial space, 4,051 square feet of usable open space, as well as 50 long-term bicycle parking spaces and 20 vehicular parking spaces at the ground level.

The Zoning Adjustments Board of the City of Berkeley, after conducting a public hearing, **APPROVED** the following permits:

### PERMITS REQUIRED

- Use Permit to demolish a commercial building, pursuant to BMC Section 23C.08.050.A;
- Use Permit to construct a new mixed-use development, pursuant to BMC Section 23E.36.030;
- Use Permit to construct new floor area of 5,000 square feet or more, pursuant to BMC Section 23E.36.050; and
- Administrative Use Permit to allow architectural elements to exceed the height limit in a commercial district, pursuant to BMC Section 23E.04.020.C.
- Administrative Use Permit to construct a fence over six feet in height, pursuant to BMC Section 23D.08.060.

### WAIVERS PURSUANT TO GOVERNMENT CODE SECTIONS 65915-65918

- Waiver of BMC Section to exceed height, to be 55'-6", where 40' is the limit;
- Waiver of BMC Section to reduce the parking requirement, to provide 20 parking spaces, where 35 are required; and
- Waiver of BMC Section to exceed the maximum floor area ratio (FAR), to be 3.15, where 3.0 is the limit.

<sup>1</sup> Pursuant to BMC Section 23B.32.090, the City Council may certify any ZAB decision for review during the 14-day appeal period after the notice of the ZAB's decision is issued. Certification has the same effect as an appeal. However, BMC Section 1.04.070 suspends or "tolls" the Council's deadline to certify when the Council is on recess. Thus, in cases where the 14-day appeal period is scheduled to *end* during a Council recess, the certification deadline is extended past the end of the recess for the remainder of the appeal period. In cases where the appeal period *begins* during a Council recess, the certification deadline is extended until 14 days after the first Council meeting after the recess. *Extension of the certification deadline has no effect on the appeal deadline.*

**CONCESSION UNDER GOVERNMENT CODE SECTIONS 65915-65918**

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- Concession to decrease the usable open space requirement in the Proposed Project by eliminating the roof deck where a roof deck is provided in the Base Project, providing 4,051 square feet of usable open space where 9,000 is the minimum.

**APPLICANT:** David Trachtenberg, 2421 Fourth Street, Berkeley CA 94710

**PROPERTY OWNER:** 2650 Telegraph, LP, 1516 South Bundy Drive, Suite 300, Los Angeles, CA 90025

**ZONING DISTRICT:** C-1 – General Commercial District

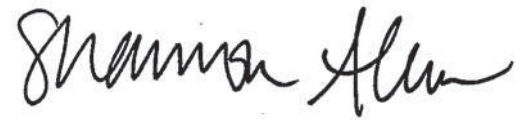
**ENVIRONMENTAL REVIEW STATUS:** Categorical Exemption under Section 15332 of the California Environmental Quality Act (CEQA) Guidelines (“In-Fill Development Projects”).

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**FINDINGS, CONDITIONS AND APPROVED PLANS ARE ATTACHED TO THIS NOTICE**

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|                    | Yes      | No       | Abstain  | Absent   |
|--------------------|----------|----------|----------|----------|
| CLARK              | X        |          |          |          |
| KAHN               | X        |          |          |          |
| KIM                | X        |          |          |          |
| O'KEEFE            | X        |          |          |          |
| LEWIS              |          |          | X        |          |
| PINKSTON           | X        |          |          |          |
| SHEAHAN            | X        |          |          |          |
| TREGUB             | X        |          |          |          |
| <b>BOARD VOTE:</b> | <b>7</b> | <b>0</b> | <b>1</b> | <b>0</b> |



ATTEST:

Shannon Allen, Zoning Adjustments Board  
Secretary**PUBLICATION OF NOTICE:**

Pursuant to BMC Section 23B.32.050, this notice shall be mailed to the applicant at the mailing address stated in the application and to any person who requests such notification by filing a written request with the Zoning Officer on or before the date of the Board action. This notice shall also be filed with the City Clerk. In addition, the notice shall be forwarded to the Zoning Adjustments Board and to the Main Library. The notice shall also be posted at a bulletin board at the Zoning Counter. The City Clerk shall make the notice available to interested members of the Council and the public.

**FURTHER INFORMATION:**

Questions about the project should be directed to the project planner, Ashley James, at (510) 981-7458 or [ajames@cityofberkeley.info](mailto:ajames@cityofberkeley.info). All project application materials, including full-size plans, may be viewed online at <https://aca.cityofberkeley.info/Community/> or in the Permit Service Center at the Zoning Counter at 1947 Center Street, Third Floor, during normal office hours.

**TO APPEAL THIS DECISION (see Section 23B.32.050 of the Berkeley Municipal Code):**

Please note that the new methods for appeal submittals described below are put in place to comply with the requirements of the Shelter In Place Order and shall be effective for the duration of Shelter In Place requirements.

1. Mail your complete appeal to the City Clerk Department, 2180 Milvia Street, Berkeley, CA 94704 with payment of fees by check or money order included. Appeals submitted by mail must be postmarked on or before the deadline date for filing the appeal.

OR

2. E-mail your complete appeal to the Planning Department, [planning@cityofberkeley.info](mailto:planning@cityofberkeley.info) and include a telephone number where you can be reached during the day. Planning Department

staff will call you within three business days to obtain credit card information over the phone for payment of required fees.

- A. The fee for persons other than the applicant is \$500. This fee may be reduced to \$100 if the appeal is signed by persons who lease or own at least 50 percent of the parcels or dwelling units within 300 feet of the project site, or at least 25 such persons (not including dependent children), whichever is less.
- B. The fee for all appeals by Applicants is \$2,500.

If no appeal is received, the permit will be issued on the first business day following expiration of the appeal period, and the project may proceed at that time.

### **NOTICE CONCERNING YOUR LEGAL RIGHTS:**

If you object to this decision, the following requirements and restrictions apply:

1. If you challenge this decision in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the Zoning Adjustments Board at, or prior to, the public hearing.
2. You must appeal to the City Council within fourteen (14) days after the Notice of Decision of the action of the Zoning Adjustments Board is mailed. It is your obligation to notify the Land Use Planning Division in writing of your desire to receive a Notice of Decision when it is completed.
3. Pursuant to Code of Civil Procedure Section 1094.6(b) and Government Code Section 65009(c)(1), no lawsuit challenging a City Council decision, as defined by Code of Civil Procedure Section 1094.6(e), regarding a use permit, variance or other permit may be filed more than ninety (90) days after the date the decision becomes final, as defined in Code of Civil Procedure Section 1094.6(b). Any lawsuit not filed within that ninety (90) day period will be barred.
4. Pursuant to Government Code Section 66020(d)(1), notice is hereby given to the applicant that the 90-day protest period for any fees, dedications, reservations, or other exactions included in any permit approval begins upon final action by the City, and that any challenge must be filed within this 90-day period.
5. If you believe that this decision or any condition attached to it denies you any reasonable economic use of the subject property, was not sufficiently related to a legitimate public purpose, was not sufficiently proportional to any impact of the project, or for any other reason constitutes a "taking" of property for public use without just compensation under the California or United States Constitutions, your appeal of this decision must including the following information:
  - A. That this belief is a basis of your appeal.
  - B. Why you believe that the decision or condition constitutes a "taking" of property as set forth above.
  - C. All evidence and argument in support of your belief that the decision or condition constitutes a "taking" as set forth above.

If you do not do so, you will waive any legal right to claim that your property has been taken, both before the City Council and in court.

# ATTACHMENT 1

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## FINDINGS AND CONDITIONS

MARCH 12, 2020

### 2650 Telegraph Avenue

**Use Permit #ZP2019-0070 to 1) demolish one existing commercial building; and 2) construct one, five-story, mixed-use building with 45 units (including 4 Very Low-Income units), 1,290 square feet of commercial space, 4,051 square feet of usable open space, as well as 50 long-term bicycle parking spaces and 20 vehicular parking spaces at the ground level.**

#### PERMITS REQUIRED

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- Use Permit to demolish a commercial building, pursuant to BMC Section 23C.08.050.A;
- Use Permit to construct a new mixed-use development, pursuant to BMC Section 23E.36.030;
- Use Permit to construct new floor area of 5,000 square feet or more, pursuant to BMC Section 23E.36.050; and
- Administrative Use Permit to allow architectural elements to exceed the height limit in a commercial district, pursuant to BMC Section 23E.04.020.C.
- Administrative Use Permit to construct a fence over six feet in height, pursuant to BMC Section 23D.08.060.

#### WAIVERS PURSUANT TO GOVERNMENT CODE SECTIONS 65915-65918

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- Waiver of BMC Section to exceed height, to be 55'-6", where 40' is the limit;
- Waiver of BMC Section to reduce the parking requirement, to provide 20 parking spaces, where 35 are required; and
- Waiver of BMC Section to exceed the maximum floor area ratio (FAR), to be 3.15, where 3.0 is the limit.

#### CONCESSION UNDER GOVERNMENT CODE SECTIONS 65915-65918

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- Concession to decrease the usable open space requirement in the Proposed Project by eliminating the roof deck where a roof deck is provided in the Base Project, providing 4,051 square feet of usable open space where 9,000 is the minimum.

#### I. CEQA FINDINGS

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1. The project is categorically exempt from the provisions of the California Environmental Quality Act (CEQA, Public Resources Code §21000, et seq. and California Code of Regulations, §15000, et seq.) pursuant to Section 15332 of the CEQA Guidelines ("In-Fill Development Projects"). The project meets all of the requirements of this exemption, as follows:
  - A. The project is consistent with the applicable General Plan designation and policies, and with the applicable zoning designation and regulations.
  - B. The project occurs within the Berkeley City limits on a project site of no more than five acres, and is surrounded by urban uses.
  - C. The parcels within the project site have previously been developed and have no value as habitat for endangered, rare or threatened species.
  - D. The project would not result in any significant effects relating to traffic, noise, air quality or water quality. The Traffic Impact Analysis prepared for the project was reviewed by the City

Transportation Division which concurred with the findings of less than significant impacts. City Standard Conditions would address potential impacts related to traffic, noise, air quality, and water quality.

E. The site can be adequately served by all required utilities and public services.

2. Furthermore, none of the exceptions in CEQA Guidelines Section 15300.2 apply, as follows: (a) the site is not located in an environmentally sensitive area, (b) there are no cumulative impacts, (c) there are no significant effects, (d) the project is not located near a scenic highway, (e) the project site is not located on a hazardous waste site pursuant to Government Code Section 65962.5, and (f) the project would not affect any historical resource.

## II. DENSITY BONUS FINDINGS

1. Pursuant to Government Code Section 65915, the Zoning Adjustments Board finds that:
  - A. Under the City's methodology for implementing density bonuses, the "base project" consists of 34 units;
  - B. The project will provide at least four Very Low Income qualifying units in the 34-unit "base project", as more fully set forth in Conditions of Approval #52-57;
  - C. The project is entitled to a density increase of 35% over the otherwise maximum allowable residential density under the Zoning Ordinance and General Plan Land Use Element, under the requirements of Government Code Section 65915(b) and (f), plus two concessions or incentives. This equates to a density bonus of 12 units above the Base Project, for a total of 46 units.
2. In accordance with Government Code Section 65915(d) and (k), the Zoning Adjustments Board hereby grants the following concession in order to provide for affordable housing costs:
  - A. Concession to decrease the required usable open space from 9,000 sq. ft. to 4,051 sq. ft.
3. In accordance with Government Code Section 65915(d), in order to allow construction of the proposed project with the density permitted under State law, the Zoning Adjustments Board finds that the approval of the concession is required to provide for affordable rents, as provided in Government Code Section 65915(d)(1)(A) because 1) approval of the concession would result in identifiable and actual cost reduction; 2) approval of the concession would not 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 3) would not be contrary to State or Federal law.
4. In accordance with Government Code Section 65915(e) the Zoning Adjustments Board hereby grants the following waivers:
  - A. Waiver of BMC Section 23E.36.070.B.1 to exceed height, to be 55'-6", where 40' is the limit;
  - B. Waiver of BMC Section 23E.36.080.B to reduce the parking requirement, to provide 20 parking spaces, where 35 are required; and
  - C. Waiver of BMC Section 23E.36.070.A to exceed the maximum floor area ratio (FAR), to be 3.15, where 3.0 is the limit.

These waivers are required because state law requires the City to modify development standards as necessary to accommodate these density bonus units, and because the Zoning Adjustments Board hereby finds that the density bonus units can best be accommodated by granting these waivers.



5. In accordance with Government Code Section 65915(e), in order to allow construction of the proposed project with the density permitted under State law, the Zoning Adjustments Board finds approval of waivers is required 1) construct the proposed project at the density permitted under State law; 2) approval of requested waivers would not 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 3) approval of the requested waivers would not be contrary to State or Federal law.

### III. FINDINGS FOR APPROVAL

1. As required by Section 23B.32.040.A of the BMC, the project, under the circumstances of this particular case existing at the time at which the application is granted, would not be detrimental to the health, safety, peace, morals, comfort, and general welfare of the persons residing or working in the neighborhood of such proposed use or 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 because:
- A. Height/Massing/Neighborhood Compatibility: While the proposed five-story building will be greater in height and massing than existing adjacent development, more recent development in the surrounding area along Telegraph Avenue has been constructed at a similar height and massing as the subject building. While the project will be at a higher density and create housing on an underutilized parcel along a commercial and transit corridor, the proposed building mass is concentrated at the Derby Street and Telegraph Avenue frontages, and the building exceeds the minimum setback from the north and west property lines (from 0' to 36'-8" starting on second floor and continuing to the roof level at the north property line, and 22'-6" at the fifth floor and from 45' to 62'-10" at the roof level the west property line) in order minimize impacts to the residences located to the north and west of the property.
- B. Shadows: Shadow studies submitted by the applicant document the new building's projected shadow angles and lengths at three times of the day during the summer and winter solstice. The proposed five-story building will be taller than existing buildings surrounding it and the project will cast new shadows on the abutting residences to the west and north. New shadows will occur during morning hours and at noon on the winter solstice and during morning hours on the summer solstice, as described below:

During morning hours on the winter solstice, new shadows would be cast on two residential dwellings to the east; 2410 and 2414 Carleton Street, and would affect the south and east façades of these buildings as described below:

- 2410 Carleton Street: fully shade a west facing living room window and partially shade all south facing living room windows on the dwelling in the rear of the property; and
- 2414 Carleton Street: fully shade all south and east facing windows on the cottage in the rear of the property.

At Noon on the winter solstice, new shadows would be cast on the south and east facing windows on the cottage in the rear of the property.

During morning hours on the summer solstice, new shadows would be cast on two residential dwellings to the west; 2643 Dana Street and 2405 Derby Street; and would affect their east façades as described below:

- 2643 Dana Street: fully shade three east facing windows; and
- 2405 Derby Street: fully shade two east-facing windows.

Given the existing structure at the project site is a single-story commercial building in a zoning district that permits greater heights and density, as well as the site's proximity to a low density residential neighborhood, any new construction will increase shadow impacts on the dwelling units to the west. While the project will cast new shadows on residential buildings, these shading impacts will occur for a limited time during the year, and only for a few hours of the day, and therefore the Board finds these shading impacts would not be detrimental.

- C. Parking: The parking impacts created as a result of the project will not be detrimental because, while the applicant has requested a waiver pursuant to State Density Bonus Law to reduce the number of vehicular parking spaces provided for dwelling units from 35 to 20 spaces, the traffic study found that the available on-street parking supply within two blocks of the project site can accommodate the project's expected peak parking demand.
- D. Traffic: The traffic study found that the project would generate approximately 220 daily net new trips, 20 of which are generated during the a.m. peak hour and 13 of which are generated during the p.m. peak hour. Under this scenario, the net peak trips generated by the project will not be noticeable no change traffic operations.
- E. Fence over six feet in height: The proposed fence will be located at the west property line only, and will be constructed in an architectural style with colors and materials the complement the surrounding buildings and fences. Due to its location, solar orientation, limited scale, and the presence of mature trees that will be installed along the western property line, the proposed fence is not expected to create significant changes to the existing sunlight or privacy conditions in the immediate vicinity of this project. No new sight lines will be created to or from neighboring buildings, and as the fence is located on a relatively flat parcel, there are no existing sightlines to the San Francisco Bay from the subject property at the ground floor, and will thus not block views.

#### IV. REQUIRED C-1 FINDINGS

1. As required by BMC Section 23E.36.090.B, the Zoning Adjustments Board makes the following required findings of this section, to the extent applicable, as described below:
  - A. Pursuant to BMC Section 23E.36.090.B, the proposed building is consistent with the following applicable purposes of the District:
    - Purpose A – “Implement the General Plan’s designations for Avenue Commercial area.” The project furthers this purpose because it would replace a vacant commercial building with a mixed-use building that would provide 45 dwelling units and a ground-floor café along a transit corridor, bringing more activity to the street in a transitional area of Telegraph Avenue, being located at the southern boundary of the Telegraph Business Improvement District and four blocks north of six-story medical and mixed-use buildings.
    - Purpose C - “Encourage development in underutilized neighborhood and community shopping areas.” The project is consistent with this purpose in that it would intensify an underutilized site consisting of a small commercial building and surface parking lot with a mixed-use building that would maximize the site’s development potential.
    - Purpose D - “Promote development compatible with adjacent commercial and residential areas.” The project is consistent with this purpose because the building would meet the minimum setback at the rear of the property, which is adjacent to one-story residences, on the ground through fourth levels, and the then step back an additional 10’-6” at the fifth level and an additional 33’ to 50’-10” at the roof level. Also, the majority of the proposed usable open space is located on the second level adjacent to the two-story commercial

building to the north, providing a 36'-8" setback at the second the fifth levels. Further, the proposed café at the ground level is compatible with surrounding commercial uses to the north, east and south along Telegraph Avenue, and the proposed residential use is compatible with surrounding residences to the west, northwest and south.

- B. Pursuant to BMC Section 23E.36.090.B.2, the Board finds that the project is compatible with the surrounding uses and buildings because the project would be consistent with the recent development pattern of 4- to 5-story mixed use and medical officer buildings within the vicinity along Telegraph Avenue. In addition, the project has been designed to minimize potential impacts to the lower-density residences to the west and north.
- C. Pursuant to BMC Section 23E.36.090.B.3, the Board finds that the project is supportive of an increase in the continuity of retail and service facilities at the ground level because the project will replace an approximately 2,862 sq. ft. commercial building last in use as a restaurant and provide 1,290 sq. ft. of café space on the ground level accessible from Telegraph Avenue, thus providing a continuity of service facilities in the C-1 District.
- D. Pursuant to BMC Section 23E.36.090.B.4, and based on the Traffic Impact Analysis submitted as part of this application, the Board finds that the project would not exceed the amount and intensity of use that can be served by available traffic capacity and potential parking supply. There will be no significant transportation impacts according to established traffic engineering standards and no off-site traffic or transportation mitigations are required.

#### **V. REQUIRED DEMOLITION OF AN EXISTING NON-RESIDENTIAL BUILDING FINDINGS**

- 1. As required by Section 23C.08.050.D of the BMC, the Zoning Adjustments Board finds that the proposed demolition of the existing building will not be materially detrimental to the commercial needs and public interest of any affected neighborhood or the City because:
  - A. The non-residential structure is not eligible for the California Register or a City of Berkeley Landmark designation, and the Landmarks Preservation Commission voted to take no action on the demolition;
  - B. The proposed project includes a mixed-use building which will provide dwellings and commercial space in this District, and thus will be compatible with adjacent and nearby residential uses; and
  - C. The demolition of the non-residential structure is required in order to authorize construction of the proposed new building and new use.

#### **VI. REQUIRED ROOFTOP PROJECTION FINDINGS**

- 1. As required by Section 23E.04.020.C of the BMC, the Zoning Officer finds that the rooftop projections will not be habitable and that the combined floor area of the projections represents less than 15% of the average floor area of the building because:
  - A. The elevator over-run and stair hatch will extend no more than 10'-3" above the roof and the mechanical equipment surround will extend no more than 3'-3" above the roof and will only provide access to the roof and will not provide habitable space; and
  - B. The average floor area of all of the building's floors is 6,850 sq. ft., and 15 percent of this total is 1,027 sq. ft. The total area of all rooftop architectural elements is approximately 236 sq. ft., or 3.4%, which is less than the 15% maximum allowed (or 1,027 sq. ft.).

## **VII. STANDARD CONDITIONS OF APPROVAL FOR ALL PROJECTS**

The following conditions, as well as all other applicable provisions of the Zoning Ordinance, apply to this Permit:

### **1. Conditions Shall be Printed on Plans**

The conditions of this Permit shall be printed on the *second* sheet of each plan set submitted for a building permit pursuant to this Use Permit, under the title 'Use Permit Conditions.' *Additional sheets* may also be used if the *second* sheet is not of sufficient size to list all of the conditions. The sheet(s) containing the conditions shall be of the same size as those sheets containing the construction drawings; 8-1/2" by 11" sheets are not acceptable.

### **2. Applicant Responsible for Compliance with Conditions**

The applicant shall ensure compliance with all of the following conditions, including submittal to the project planner of required approval signatures at the times specified. Failure to comply with any condition may result in construction being stopped, issuance of a citation, and/or modification or revocation of the Use Permit.

### **3. Uses Approved Deemed to Exclude Other Uses (Section 23B.56.010)**

- A. This Permit authorizes only those uses and activities actually proposed in the application, and excludes other uses and activities.
- B. Except as expressly specified herein, this Permit terminates all other uses at the location subject to it.

### **4. Modification of Permits (Section 23B.56.020)**

No change in the use or structure for which this Permit is issued is permitted unless the Permit is modified by the Board, except that the Zoning Officer may approve changes that do not expand, intensify, or substantially change the use or building.

Changes in the plans for the construction of a building or structure, may be modified prior to the completion of construction, in accordance with Section 23B.56.030.D. The Zoning Officer may approve changes to plans approved by the Board, consistent with the Board's policy adopted on May 24, 1978, which reduce the size of the project.

### **5. Plans and Representations Become Conditions (Section 23B.56.030)**

Except as specified herein, the site plan, floor plans, building elevations and/or any additional information or representations, whether oral or written, indicating the proposed structure or manner of operation submitted with an application or during the approval process are deemed conditions of approval.

### **6. Subject to All Applicable Laws and Regulations (Section 23B.56.040)**

The approved use and/or construction is subject to, and shall comply with, all applicable City Ordinances and laws and regulations of other governmental agencies. Prior to construction, the applicant shall identify and secure all applicable permits from the Building and Safety Division, Public Works Department and other affected City divisions and departments.

### **7. Exercised Permit for Use Survives Vacancy of Property (Section 23B.56.080)**

Once a Permit for a use is exercised and the use is established, that use is legally recognized, even if the property becomes vacant, except as set forth in Standard Condition #8, below.

**8. Exercise and Lapse of Permits (Section 23B.56.100)**

- A. A permit for the use of a building or a property is exercised when, if required, a valid City business license has been issued, and the permitted use has commenced on the property.
- B. A permit for the construction of a building or structure is deemed exercised when a valid City building permit, if required, is issued, and construction has lawfully commenced.
- C. A permit may be declared lapsed and of no further force and effect if it is not exercised within one year of its issuance, except that permits for construction or alteration of structures or buildings may not be declared lapsed if the permittee has: (1) applied for a building permit; or, (2) made substantial good faith efforts to obtain a building permit and begin construction, even if a building permit has not been issued and/or construction has not begun.

**9. Indemnification Agreement**

The applicant shall hold harmless, defend, and indemnify the City of Berkeley and its officers, agents, and employees against any and all liability, damages, claims, demands, judgments or other losses (including without limitation, attorney's fees, expert witness and consultant fees and other litigation expenses), referendum or initiative relating to, resulting from or caused by, or alleged to have resulted from, or caused by, any action or approval associated with the project. The indemnity includes without limitation, any legal or administrative challenge, referendum or initiative filed or prosecuted to overturn, set aside, stay or otherwise rescind any or all approvals granted in connection with the Project, any environmental determination made for the project and granting any permit issued in accordance with the project. This indemnity includes, without limitation, payment of all direct and indirect costs associated with any action specified herein. Direct and indirect costs shall include, without limitation, any attorney's fees, expert witness and consultant fees, court costs, and other litigation fees. City shall have the right to select counsel to represent the City at Applicant's expense in the defense of any action specified in this condition of approval. City shall take reasonable steps to promptly notify the Applicant of any claim, demand, or legal actions that may create a claim for indemnification under these conditions of approval.

**VIII. ADDITIONAL CONDITIONS IMPOSED BY THE ZONING ADJUSTMENTS BOARD**

Pursuant to BMC 23B.32.040.D, the Zoning Adjustments Board attaches the following additional conditions to this Permit:

**Prior to Submittal of Any Building Permit:**

- 10. Project Liaison.** The applicant shall include in all building permit plans and post onsite the name and telephone number of an individual empowered to manage construction-related complaints generated from the project. The individual's name, telephone number, and responsibility for the project shall be posted at the project site for the duration of the project in a location easily visible to the public. The individual shall record all complaints received and actions taken in response, and submit written reports of such complaints and actions to the project planner on a weekly basis.

**Please designate the name of this individual below:**

**Project Liaison** \_\_\_\_\_  
Name Phone #

- 11. Final Design Review.** The Project requires approval of a Final Design Review application by the Design Review Committee. At Final Design Review, the applicant shall present plans indicating the following:
- Installation of walls surrounding each private patio on the fourth floor and the commonly-accessible usable open space on the fifth floor up to 54” in height. The top 12” may consist of translucent glass or stucco at the discretion of the applicant.
  - Installation of a fence along the western property line only that extends up to 8’ in height.
  - Mature trees planned for installation at the western property line, the species of which are to be mutually agreeable with the applicant and immediate neighbors to the west.
- 12. Address Assignment.** The applicant shall file an “Address Assignment Request Application” with the Permit Service Center (1947 Center Street) for any address change or new address associated with this Use Permit. The new address(es) shall be assigned and entered into the City’s database prior to the applicant’s submittal of a building permit application.
- 13. Construction Noise Reduction Program.** The applicant shall develop a site specific noise reduction program prepared by a qualified acoustical consultant to reduce construction noise impacts to the maximum extent feasible, subject to review and approval of the Zoning Officer. The noise reduction program shall include the time limits for construction listed above, as measures needed to ensure that construction complies with BMC Section 13.40.070. The noise reduction program should include, but shall not be limited to, the following available controls to reduce construction noise levels as low as practical:
- A. Construction equipment should be well maintained and used judiciously to be as quiet as practical.
  - B. Equip all internal combustion engine-driven equipment with mufflers, which are in good condition and appropriate for the equipment.
  - C. Utilize “quiet” models of air compressors and other stationary noise sources where technology exists. Select hydraulically or electrically powered equipment and avoid pneumatically powered equipment where feasible.
  - D. Locate stationary noise-generating equipment as far as possible from sensitive receptors when adjoining construction sites. Construct temporary noise barriers or partial enclosures to acoustically shield such equipment where feasible.
  - E. Prohibit unnecessary idling of internal combustion engines.
  - F. If impact pile driving is required, pre-drill foundation pile holes to minimize the number of impacts required to seat the pile.
  - G. Construct solid plywood fences around construction sites adjacent to operational business, residences or other noise-sensitive land uses where the noise control plan analysis determines that a barrier would be effective at reducing noise.
  - H. Erect temporary noise control blanket barriers, if necessary, along building facades facing construction sites. This mitigation would only be necessary if conflicts occurred which were irresolvable by proper scheduling. Noise control blanket barriers can be rented and quickly erected.
  - I. Route construction related traffic along major roadways and away from sensitive receptors where feasible.

### **Prior to Issuance of Any Building & Safety Permit (Demolition or Construction)**

- 14. Construction Noise Management - Public Notice Required.** At least two weeks prior to initiating any construction activities at the site, the applicant shall provide notice to businesses and residents within **500 feet** of the project site. This notice shall at a minimum provide the following: (1) project

description, (2) description of construction activities during extended work hours and reason for extended hours, (3) daily construction schedule (i.e., time of day) and expected duration (number of months), (4) the name and phone number of the Project Liaison for the project that is responsible for responding to any local complaints, and (5) that construction work is about to commence. The liaison would determine the cause of all construction-related complaints (e.g., starting too early, bad muffler, worker parking, etc.) and institute reasonable measures to correct the problem. A copy of such notice and methodology for distributing the notice shall be provided in advance to the City for review and approval.

15. Construction Phases. The applicant shall provide the Zoning Officer with a schedule of major construction phases with start dates and expected duration, a description of the activities and anticipated noise levels of each phase, and the name(s) and phone number(s) of the individual(s) directly supervising each phase. The Zoning Officer or his/her designee shall have the authority to require an on-site meeting with these individuals as necessary to ensure compliance with these conditions. The applicant shall notify the Zoning Officer of any changes to this schedule as soon as possible.
16. Demolition. Demolition of the existing building cannot commence until a complete application is submitted for the replacement building. In addition, all plans presented to the City to obtain a permit to allow the demolition are subject to these conditions.
17. Construction and Demolition. Applicant shall submit a Waste Diversion Form and Waste Diversion Plan that meet the diversion requirements of BMC Chapters 19.24 and 19.37.
18. First Source Agreement. The applicant and/or end user(s) shall enter into a First Source Agreement with the City of Berkeley. First Source promotes the hiring of local residents on local projects. The agreement requires contractors/employers to engage in good faith efforts to hire locally, including utilizing graduates of local job training programs. Please call (510) 981-4970 for further information, or visit the City's Employment Programs office at 2180 Milvia, 1<sup>st</sup> Floor.
19. Toxics. The applicant shall contact the Toxics Management Division (TMD) at 1947 Center Street or (510) 981-7470 to determine which of the following documents are required and timing for their submittal:
  - A. Environmental Site Assessments:
    - 1) Phase I & Phase II Environmental Site Assessments (latest ASTM 1527-13). A recent Phase I ESA (less than 6 months old\*) shall be submitted to TMD for developments for:
      - All new commercial, industrial and mixed use developments and all large improvement projects.
      - All new residential buildings with 5 or more dwelling units located in the Environmental Management Area (or EMA).
      - EMA is available online at:
      - [http://www.cityofberkeley.info/uploadedFiles/IT/Level\\_3\\_-\\_General/ema.pdf](http://www.cityofberkeley.info/uploadedFiles/IT/Level_3_-_General/ema.pdf)
    - 2) Phase II ESA is required to evaluate Recognized Environmental Conditions (REC) identified in the Phase I or other RECs identified by TMD staff. The TMD may require a third party toxicologist to review human or ecological health risks that may be identified. The applicant may apply to the appropriate state, regional or county cleanup agency to evaluate the risks.
    - 3) If the Phase I is over 6 months old, it will require a new site reconnaissance and interviews. If the facility was subject to regulation under Title 15 of the Berkeley Municipal Code since the last Phase I was conducted, a new records review must be performed.

**B. Soil and Groundwater Management Plan:**

- 1) A Soil and Groundwater Management Plan (SGMP) shall be submitted to TMD for all non-residential projects, and residential or mixed-use projects with five or more dwelling units, that: (1) are in the Environmental Management Area (EMA) and (2) propose any excavations deeper than 5 feet below grade. The SGMP shall be site specific and identify procedures for soil and groundwater management including identification of pollutants and disposal methods. The SGMP will identify permits required and comply with all applicable local, state and regional requirements.
- 2) The SGMP shall require notification to TMD of any hazardous materials found in soils and groundwater during development. The SGMP will provide guidance on managing odors during excavation. The SGMP will provide the name and phone number of the individual responsible for implementing the SGMP and post the name and phone number for the person responding to community questions and complaints.
- 3) TMD may impose additional conditions as deemed necessary. All requirements of the approved SGMP shall be deemed conditions of approval of this Use Permit.

**C. Building Materials Survey:**

- 1) Prior to approving any permit for partial or complete demolition and renovation activities involving the removal of 20 square or lineal feet of interior or exterior walls, a building materials survey shall be conducted by a qualified professional. The survey shall include, but not be limited to, identification of any lead-based paint, asbestos, polychlorinated biphenyl (PBC) containing equipment, hydraulic fluids in elevators or lifts, refrigeration systems, treated wood and mercury containing devices (including fluorescent light bulbs and mercury switches). The Survey shall include plans on hazardous waste or hazardous materials removal, reuse or disposal procedures to be implemented that fully comply state hazardous waste generator requirements (22 California Code of Regulations 66260 et seq). The Survey becomes a condition of any building or demolition permit for the project. Documentation evidencing disposal of hazardous waste in compliance with the survey shall be submitted to TMD within 30 days of the completion of the demolition. If asbestos is identified, Bay Area Air Quality Management District Regulation 11-2-401.3 a notification must be made and the J number must be made available to the City of Berkeley Permit Service Center.

**D. Hazardous Materials Business Plan:**

- 1) A Hazardous Materials Business Plan (HMBP) in compliance with BMC Section 15.12.040 shall be submitted electronically at <http://cers.calepa.ca.gov/> within 30 days if on-site hazardous materials exceed BMC 15.20.040. HMBP requirement can be found at <http://ci.berkeley.ca.us/hmr/>

**Prior to Issuance of Any Building (Construction) Permit**

- 20. Percent for Public Art:** Consistent with BMC §23C.23, the applicant shall either pay the required in-lieu fee or provide the equivalent amount in a financial guarantee to be released after installation of the On-Site Publicly Accessible Art.
- 21. Affordable Housing Mitigation Fee:** Consistent with BMC §22.20.065, and fee resolution applicable to this project, the applicant shall provide a schedule, consistent with a schedule approved by the City Manager or her designee, outlining the timeframe for payment of the AHMF, and they shall pay this fee.
- 22. Interior Noise Levels.** Prior to issuance of a building permit, the applicant shall submit a report to the Building and Safety Division and the Zoning Officer by a qualified acoustic engineer certifying



that the interior residential portions of the project will achieve interior noise levels of no more than 45 Ldn (Average Day-Night Levels). If the adopted Building Code imposes a more restrictive standard for interior noise levels, the report shall certify compliance with this standard.

23. Solar Photovoltaic (Solar PV). A solar PV system, on the solar zone specified in Section 110.10 of the 2019 Energy Code, shall be installed (subject to the exceptions in Section 110.10) as specified by the Berkeley Energy Code (BMC Chapter 19.36). Location of the solar PV system shall be noted on the construction plans.
24. Electric Vehicle (EV) Charging. At least 20% of the project parking spaces for residential parking shall be "EV Charger Ready": equipped with raceway, wiring, and power to allow for future Level 2 (240 Volt/40 amp) plug-in electric vehicle (EV) charging system installation, and at least 80% of the project parking spaces for residential parking shall be "EV Spaces Raceway Equipped": equipped with a raceway between an enclosed, inaccessible, or concealed area and an electrical service panel/subpanel as specified by the Berkeley Green Code (BMC Section 19.37.040). Any Level 2 EV charging systems installed at parking spaces will be counted toward the applicable readiness requirement. Readiness for EV charging and EV charging station installations shall be noted on the construction plans.
25. Recycling and Organics Collection. Applicant shall provide recycling and organics collection areas for occupants, clearly marked on site plans, which comply with the Alameda County Mandatory Recycling Ordinance (ACWMA Ordinance 2012-01).
26. Water Efficient Landscaping. Landscaping, totaling 500 square feet of more of new landscaping or 2,500 square feet or more of renovated irrigated area, shall comply with the State's Model Water Efficient Landscape Ordinance (MWELo). MWELo-compliant landscape documentation including a planting, grading, and irrigation plan shall be included in site plans. Water budget calculations are also required for landscapes of 2,500 square feet or more and shall be included in site plans. The reference evapotranspiration rate (ET<sub>o</sub>) for Berkeley is 41.8.
27. Public Works ADA. Plans submitted for building permit shall include replacement of sidewalk, curb, gutter, and other streetscape improvements, as necessary to comply with current City of Berkeley standards for accessibility.
28. Parking for Disabled Persons. Per BMC Section 23E.28.040.D of the Zoning Ordinance, "Notwithstanding any reduction in off-street parking spaces that may be granted for mixed-use projects in non-residential districts listed in Sub-title 23E, the requirement for off-street parking spaces for disabled persons in the project shall be calculated as if there had been no reduction in total parking spaces."

#### **Prior to Demolition or Start of Construction:**

29. Construction Meeting. The applicant shall request of the Zoning Officer an on-site meeting with City staff and key parties involved in the early phases of construction (e.g., applicant, general contractor, foundation subcontractors) to review these conditions and the construction schedule. The general contractor or applicant shall ensure that all subcontractors involved in subsequent phases of construction aware of the conditions of approval.

#### **During Construction:**

- 30. Construction Hours.** Construction activity shall be limited to between the hours of 8:00 AM and 6:00 PM on Monday through Friday, and between 9:00 AM and 4:00 PM on Saturday. No construction-related activity shall occur on Sunday or any Federal Holiday.
- 31. Construction Hours- Exceptions.** It is recognized that certain construction activities, such as the placement of concrete, must be performed in a continuous manner and may require an extension of these work hours. Prior to initiating any activity that might require a longer period, the developer must notify the Zoning Officer and request an exception for a finite period of time. If the Zoning Officer approves the request, then two weeks prior to the expanded schedule, the developer shall notify businesses and residents within 500 feet of the project site describing the expanded construction hours. A copy of such notice and methodology for distributing the notice shall be provided in advance to the City for review and approval. The project shall not be allowed more than 15 extended working days.
- 32. Transportation Construction Plan.** The applicant and all persons associated with the project are hereby notified that a Transportation Construction Plan (TCP) is required for all phases of construction, particularly for the following activities:
- Alterations, closures, or blockages to sidewalks, pedestrian paths or vehicle travel lanes (including bicycle lanes);
  - Storage of building materials, dumpsters, debris anywhere in the public ROW;
  - Provision of exclusive contractor parking on-street; or
  - Significant truck activity.

The applicant shall secure the City Traffic Engineer's approval of a TCP. Please contact the Office of Transportation at 981-7010, or 1947 Center Street, and ask to speak to a traffic engineer. In addition to other requirements of the Traffic Engineer, this plan shall include the locations of material and equipment storage, trailers, worker parking, a schedule of site operations that may block traffic, and provisions for traffic control. The TCP shall be consistent with any other requirements of the construction phase.

Contact the Permit Service Center (PSC) at 1947 Center Street or 981-7500 for details on obtaining Construction/No Parking Permits (and associated signs and accompanying dashboard permits). Please note that the Zoning Officer and/or Traffic Engineer may limit off-site parking of construction-related vehicles if necessary to protect the health, safety or convenience of the surrounding neighborhood. A current copy of this Plan shall be available at all times at the construction site for review by City Staff.

- 33. Project Construction Website.** The applicant shall establish a project construction website with the following information clearly accessible and updated monthly or more frequently as changes warrant:
- Contact information (i.e. "hotline" phone number, and email address) for the project construction manager
  - Calendar and schedule of daily/weekly/monthly construction activities
  - The final Conditions of Approval, Mitigation Monitoring and Reporting Program, Transportation Construction Plan, Construction Noise Reduction Program, and any other reports or programs related to construction noise, air quality, and traffic.

- 34. Avoid Disturbance of Nesting Birds.** Initial site disturbance activities, including vegetation and concrete removal, shall be prohibited during the general avian nesting season (February 1 to

August 30), if feasible. If nesting season avoidance is not feasible, the applicant shall retain a qualified biologist to conduct a preconstruction nesting bird survey to determine the presence/absence, location, and activity status of any active nests on or adjacent to the project site. The extent of the survey buffer area surrounding the site shall be established by the qualified biologist to ensure that direct and indirect effects to nesting birds are avoided. To avoid the destruction of active nests and to protect the reproductive success of birds protected by the MBTA and CFGC, nesting bird surveys shall be performed not more than 14 days prior to scheduled vegetation and concrete removal. In the event that active nests are discovered, a suitable buffer (typically a minimum buffer of 50 feet for passerines and a minimum buffer of 250 feet for raptors) shall be established around such active nests and no construction shall be allowed inside the buffer areas until a qualified biologist has determined that the nest is no longer active (e.g., the nestlings have fledged and are no longer reliant on the nest). No ground-disturbing activities shall occur within this buffer until the qualified biologist has confirmed that breeding/nesting is completed and the young have fledged the nest. Nesting bird surveys are not required for construction activities occurring between August 31 and January 31.

- 35. 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. All construction equipment shall be equipped with Tier 2 or higher engines and the most effective Verified Diesel Emission Control Strategies (VDECS) available for the engine type (Tier 4 engines automatically meet this requirement) 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, 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.

- 36. Halt Work/Unanticipated Discovery of Tribal Cultural Resources.** In the event that cultural resources of Native American origin are identified during construction, all work within 50 feet of the discovery shall be redirected. The project applicant and project construction contractor shall notify the City Planning Department within 24 hours. The City will again contact any tribes who have requested consultation under AB 52, as well as contact a qualified archaeologist, to evaluate the

resources and situation and provide recommendations. If it is determined that the resource is a tribal cultural resource and thus significant under CEQA, a mitigation plan shall be prepared and implemented in accordance with State guidelines and in consultation with Native American groups. If the resource cannot be avoided, additional measures to avoid or reduce impacts to the resource and to address tribal concerns may be required.

- 37. Archaeological Resources (Ongoing throughout demolition, grading, and/or construction).** Pursuant to CEQA Guidelines section 15064.5(f), "provisions for historical or unique archaeological resources accidentally discovered during construction" should be instituted. Therefore:
- A. In the event that any prehistoric or historic subsurface cultural resources are discovered during ground disturbing activities, all work within 50 feet of the resources shall be halted and the project applicant and/or lead agency shall consult with a qualified archaeologist, historian or paleontologist to assess the significance of the find.
  - B. If any find is determined to be significant, representatives of the project proponent and/or lead agency and the qualified professional would meet to determine the appropriate avoidance measures or other appropriate measure, with the ultimate determination to be made by the City of Berkeley. All significant cultural materials recovered shall be subject to scientific analysis, professional museum curation, and/or a report prepared by the qualified professional according to current professional standards.
  - C. In considering any suggested measure proposed by the qualified professional, the project applicant shall determine whether avoidance is necessary or feasible in light of factors such as the uniqueness of the find, project design, costs, and other considerations.
  - D. If avoidance is unnecessary or infeasible, other appropriate measures (e.g., data recovery) shall be instituted. Work may proceed on other parts of the project site while mitigation measures for cultural resources is carried out.
  - E. If significant materials are recovered, the qualified professional shall prepare a report on the findings for submittal to the Northwest Information Center.
- 38. Human Remains (Ongoing throughout demolition, grading, and/or construction).** In the event that human skeletal remains are uncovered at the project site during ground-disturbing activities, all work shall immediately halt and the Alameda County Coroner shall be contacted to evaluate the remains, and following the procedures and protocols pursuant to Section 15064.5 (e)(1) of the CEQA Guidelines. If the County Coroner determines that the remains are Native American, the City shall contact the California Native American Heritage Commission (NAHC), pursuant to subdivision (c) of Section 7050.5 of the Health and Safety Code, and all excavation and site preparation activities shall cease within a 50-foot radius of the find until appropriate arrangements are made. If the agencies determine that avoidance is not feasible, then an alternative plan shall be prepared with specific steps and timeframe required to resume construction activities. Monitoring, data recovery, determination of significance and avoidance measures (if applicable) shall be completed expeditiously.
- 39. Paleontological Resources (Ongoing throughout demolition, grading, and/or construction).** In the event of an unanticipated discovery of a paleontological resource during construction, excavations within 50 feet of the find shall be temporarily halted or diverted until the discovery is examined by a qualified paleontologist (per Society of Vertebrate Paleontology standards [SVP 1995,1996]). The qualified paleontologist shall document the discovery as needed, evaluate the potential resource, and assess the significance of the find. The paleontologist shall notify the appropriate agencies to determine procedures that would be followed before construction is allowed to resume at the location of the find. If the City determines that avoidance is not feasible, the paleontologist

shall prepare an excavation plan for mitigating the effect of the project on the qualities that make the resource important, and such plan shall be implemented. The plan shall be submitted to the City for review and approval.

40. Stormwater Requirements. The applicant shall demonstrate compliance with the requirements of the City's National Pollution Discharge Elimination System (NPDES) permit as described in BMC Section 17.20. The following conditions apply:
- A. The project plans shall identify and show site-specific Best Management Practices (BMPs) appropriate to activities conducted on-site to limit to the maximum extent practicable the discharge of pollutants to the City's storm drainage system, regardless of season or weather conditions.
  - B. Trash enclosures and/or recycling area(s) shall be covered; no other area shall drain onto this area. Drains in any wash or process area shall not discharge to the storm drain system; these drains should connect to the sanitary sewer. Applicant shall contact the City of Berkeley and EBMUD for specific connection and discharge requirements. Discharges to the sanitary sewer are subject to the review, approval and conditions of the City of Berkeley and EBMUD.
  - C. Landscaping shall be designed with efficient irrigation to reduce runoff, promote surface infiltration and minimize the use of fertilizers and pesticides that contribute to stormwater pollution. Where feasible, landscaping should be designed and operated to treat runoff. When and where possible, xeriscape and drought tolerant plants shall be incorporated into new development plans.
  - D. Design, location and maintenance requirements and schedules for any stormwater quality treatment structural controls shall be submitted to the Department of Public Works for review with respect to reasonable adequacy of the controls. The review does not relieve the property owner of the responsibility for complying with BMC Chapter 17.20 and future revisions to the City's overall stormwater quality ordinances. This review shall be conducted prior to the issuance of a Building Permit.
  - E. All paved outdoor storage areas must be designed to reduce/limit the potential for runoff to contact pollutants.
  - F. All on-site storm drain inlets/catch basins must be cleaned at least once a year immediately prior to the rainy season. The property owner shall be responsible for all costs associated with proper operation and maintenance of all storm drainage facilities (pipelines, inlets, catch basins, outlets, etc.) associated with the project, unless the City accepts such facilities by Council action. Additional cleaning may be required by City of Berkeley Public Works Engineering Dept.
  - G. All on-site storm drain inlets must be labeled "No Dumping – Drains to Bay" or equivalent using methods approved by the City.
  - H. Most washing and/or steam cleaning must be done at an appropriately equipped facility that drains to the sanitary sewer. Any outdoor washing or pressure washing must be managed in such a way that there is no discharge or soaps or other pollutants to the storm drain. Sanitary connections are subject to the review, approval and conditions of the sanitary district with jurisdiction for receiving the discharge.
  - I. Restaurants, where deemed appropriate, must be designed with a contained area for cleaning mats, equipment and containers. This contained wash area shall be covered or designed to prevent run-on or run-off from the area. The area shall not discharge to the storm drains; wash waters should drain to the sanitary sewer, or collected for ultimate disposal to the sanitary sewer. Employees shall be instructed and signs posted indicating that all washing activities shall be conducted in this area. Sanitary connections are subject to the review, approval and conditions of the waste water treatment plant receiving the discharge.

- J. Sidewalks and parking lots shall be swept regularly to prevent the accumulation of litter and debris. If pressure washed, debris must be trapped and collected to prevent entry to the storm drain system. If any cleaning agent or degreaser is used, wash water shall not discharge to the storm drains; wash waters should be collected and discharged to the sanitary sewer. Discharges to the sanitary sewer are subject to the review, approval and conditions of the sanitary district with jurisdiction for receiving the discharge.
- K. The applicant is responsible for ensuring that all contractors and sub-contractors are aware of and implement all stormwater quality control measures. Failure to comply with the approved construction BMPs shall result in the issuance of correction notices, citations, or a project stop work order.
- 41. Public Works - Implement BAAQMD-Recommended Measures during Construction.** For all proposed projects, BAAQMD recommends implementing all the Basic Construction Mitigation Measures, listed below to meet the best management practices threshold for fugitive dust:
- A. All exposed surfaces (e.g., parking areas, staging areas, soil piles, graded areas, and unpaved access roads) shall be watered two times per day.
  - B. All haul trucks transporting soil, sand, or other loose material off-site shall be covered.
  - C. All visible mud or dirt track-out onto adjacent public roads shall be removed using wet power vacuum street sweepers at least once per day. The use of dry power sweeping is prohibited.
  - D. All vehicle speeds on unpaved roads shall be limited to 15 mph.
  - E. All roadways, driveways, and sidewalks to be paved shall be completed as soon as possible. Building pads shall be laid as soon as possible after grading unless seeding or soil binders are used.
  - F. Idling times shall be minimized either by shutting equipment off when not in use or reducing the maximum idling time to 5 minutes (as required by the California airborne toxics control measure Title 13, Section 2485 of California Code of Regulations [CCR]). Clear signage shall be provided for construction workers at all access points.
  - G. All construction equipment shall be maintained and properly tuned in accordance with manufacturer's specifications. All equipment shall be checked by a certified visible emissions evaluator.
  - H. Post a publicly visible sign with the telephone number and person to contact at the lead agency regarding dust complaints. This person shall respond and take corrective action within 48 hours. The Air District's phone number shall also be visible to ensure compliance with applicable regulations.
- 42. Public Works.** All piles of debris, soil, sand, or other loose materials shall be covered at night and during rainy weather with plastic at least one-eighth millimeter thick and secured to the ground.
- 43. Public Works.** The applicant shall ensure that all excavation takes into account surface and subsurface waters and underground streams so as not to adversely affect adjacent properties and rights-of-way.
- 44. Public Works.** The project sponsor shall maintain sandbags or other devices around the site perimeter during the rainy season to prevent on-site soils from being washed off-site and into the storm drain system. The project sponsor shall comply with all City ordinances regarding construction and grading.
- 45. Public Works.** Prior to any excavation, grading, clearing, or other activities involving soil disturbance during the rainy season the applicant shall obtain approval of an erosion prevention

plan by the Building and Safety Division and the Public Works Department. The applicant shall be responsible for following these and any other measures required by the Building and Safety Division and the Public Works Department.

46. Public Works. The removal or obstruction of any fire hydrant shall require the submission of a plan to the City's Public Works Department for the relocation of the fire hydrant during construction.
47. Public Works. If underground utilities leading to adjacent properties are uncovered and/or broken, the contractor involved shall immediately notify the Public Works Department and the Building & Safety Division, and carry out any necessary corrective action to their satisfaction.

#### **Prior to Final Inspection or Issuance of Occupancy Permit:**

48. Voluntary Solar Access Agreement. The applicant is strongly encouraged to consult with the property owners at 2640 Telegraph Avenue in an effort to find a mutually agreeable solution that mitigates the impact of the subject building on the productivity of the existing solar panels located at 2640 Telegraph Avenue.
49. Compliance with Conditions. The project shall conform to the plans and statements in the Use Permit. The developer is responsible for providing sufficient evidence to demonstrate compliance with the requirements throughout the implementation of this Use Permit.
50. Compliance with Approved Plan. The project shall conform to the plans and statements in the Use Permit. All landscape, site and architectural improvements shall be completed per the attached approved drawings dated **February 04, 2020**, except as modified by conditions of approval.
51. Construction and Demolition Diversion. A Waste Diversion Report, with receipts or weigh slips documenting debris disposal or recycling during all phases of the project, must be completed and submitted for approval to the City's Building and Safety Division. The Zoning Officer may request summary reports at more frequent intervals, as necessary to ensure compliance with this requirement. A copy of the Waste Diversion Plan shall be available at all times at the construction site for review by City Staff.

#### **BELOW MARKET RATE UNITS**

52. Number of Below Market Rate Units. The project shall provide 4 below market rate rental dwelling units ("BMR Units"), which are required to comply with the State Density Bonus Law (Government Code Section 65915). The BMR Units shall be designated in the Regulatory Agreement and shall be reasonably dispersed throughout the project; be of the same size and contain, on average, the same number of bedrooms as the non-BMR units in the project; and be comparable with the design or use of non-BMR units in terms of appearance, materials and finish quality. The designation of BMR Units shall conform to the addresses assigned to the building by the City.
53. Regulatory Agreement. Prior to the issuance of a building permit, the applicant shall enter into a Regulatory Agreement that implements Government Code Section 65915 and this Use Permit. The Regulatory Agreement may include any terms and affordability standards determined by the City to be necessary to ensure such compliance. The maximum qualifying household income for the BMR Units shall be 50 percent of area median income (AMI), and the maximum housing payment shall be 30 percent of 50 percent of AMI, as set forth in the following paragraphs of this condition. If the BMR units are occupied by very low income tenants receiving a rental subsidy through the Section 8 or Shelter Plus Care programs, the rent received by the project sponsor may

exceed the restricted rent to the payment standards allowed under those programs so long as the rent allowed under the payment standards is not greater than the market rents charged for comparable units in the development.

**54.** In addition, the following provisions shall apply:

- A. Maximum rent shall be adjusted for the family size appropriate for the unit pursuant to California Health & Safety Code Section 50052.5 (h).
- B. Rent shall include a reasonable allowance for utilities, as published and updated by the Berkeley Housing Authority, including garbage collection, sewer, water, electricity, gas, and other heating, cooking and refrigeration fuels. Such allowance shall take into account the cost of an adequate level of service. Utilities do not include telephone service. Rent also includes any separately charged fees or service charges assessed by the lessor which are required of all tenants, other than security deposits.
- C. BMR units will be provided for the life of the project under Section 22.20.065.

**55.** Determination of Area Median Income (AMI).

- A. The "AMI" (Area Median Income) shall be based on the income standards for the Oakland Primary Metropolitan Statistical Area reported by the United States Department of Housing and Urban Development (HUD). In the event HUD discontinues establishing such income standards, AMI shall be based on income standards determined by the California State Department of Housing and Community Development (HCD). If such income standards are no longer in existence, the City will designate another appropriate source or method for determining the median household income.
- B. The applicable AMI for the purpose of determining the allowable rent for each unit (but not for the purpose of determining eligibility for occupancy of an inclusionary unit) shall be determined in accordance with the following table:

| <b>Unit Size</b>   | <b>AMI Standard</b>              |
|--------------------|----------------------------------|
| Studio unit        | AMI for a one person household   |
| One-bedroom unit   | AMI for a two person household   |
| Two-bedroom unit   | AMI for a three person household |
| Three-bedroom unit | AMI for a four person household  |

**56.** Nothing in these conditions shall be interpreted to prohibit, or to require modification of the Use Permit or Regulatory Agreement to allow, the provision of additional BMR units, or additional affordability, than are required in the foregoing provisions.

**57.** Dwellings that are approved as rental units, but in which a condo map is approved prior to issuance of an occupancy permit, shall be subject to the affordability requirements within BMC Section 23C.12, which applies to the any of the following:

- A. Residential housing projects for the construction of five or more Dwelling Units;
- B. Residential housing projects for the construction of one to four new Dwelling Units, when such Units are added to an existing one to four unit property, which has been developed after August 14, 1986, and the resulting number of units totals five or more. All Units in such a property are subject to the requirements of this chapter;
- C. Residential housing projects proposed on lots whose size and zoning designation is such to allow construction of five or more Dwelling Units.



If a density bonus was granted for the project, the regulatory agreement shall reflect the number of qualifying units set forth in Section 65915(f)(4) that are needed to support the bonus that was granted.

**At All Times:**

58. Exterior Lighting. All exterior lighting shall be energy efficient where feasible; and shielded and directed downward and away from property lines to prevent excessive glare beyond the subject property.
59. Rooftop Projections. No additional rooftop, elevator equipment, or roof screens, shall be added without submission of an application for a Use Permit Modification, subject to Board review and approval.
60. Design Review. Signage and any other exterior modifications, including but not limited to landscaping and lighting, shall be subject to Design Review approval.
61. Drainage Patterns. The applicant shall establish and maintain drainage patterns that do not adversely affect adjacent properties and rights-of-way. Drainage plans shall be submitted for approval of the Building & Safety Division and Public Works Department, if required.
62. Electrical Meter. Only one electrical meter fixture may be installed per dwelling unit.
63. Loading. All loading/unloading activities associated with deliveries to all uses shall be restricted to the hours of 7:00 a.m. to 10:00 p.m. daily.
64. Residential Permit Parking. No Residential Permit Parking (RPP) permits shall be issued to project residents, nor shall commercial placards be issued to non-residential occupants and/or users of the site. The project planner shall notify the Finance Department, Customer Service Center, to add these addresses to the list of addresses ineligible for RPP permits. The property owner shall notify all tenants of rental units, and/or buyers of condominium units, of this restriction in leases and/or contracts, and shall provide sample leases and/or contracts including such notification to the project planner prior to issuance of an occupancy permit or final inspection.
65. Bike Parking. Secure and on-site bike parking for at least 50 bicycles shall be provided for the life of the building.
66. Tenant Notification. The developer shall provide tenant notification, via a lease rider or deed covenant, that each dwelling unit is located in a mixed-use area that includes commercial, food service and entertainment uses, and that each occupant shall not seek to impede their lawful operation.
67. Transportation Demand Management. A Transportation Demand Management compliance report shall be submitted to the Transportation Division Manager, on a form acceptable to the City, prior to occupancy, and on an annual basis thereafter, which demonstrates that the project is in compliance with the applicable requirements and the following:
  - A. Subject to the review and oversight of the Transportation Division Manager and the Zoning Officer, the cost equivalent to an unlimited local bus pass shall be provided on a Clipper Card, or equivalent card that can be used by major Bay Area transit systems, shall be provided, at no cost, to every employee.

- B. Subject to the review and oversight of the Transportation Division Manager and the Zoning Officer, the cost equivalent to an unlimited local bus pass shall be provided on a Clipper Card, or equivalent card that can be used by major Bay Area transit systems, shall be provided, at no cost, one per residential unit.
  - C. Transit information shall be provided in the residential lobby, updated at a minimum once a year. The information panels shall be shown in the construction drawings and shall be installed **prior to occupancy**.
  - D. An information package describing these transportation benefits shall be provided to all residents/employees on arrival plus once a year. Information may pertain to the City, regional transit agencies, car sharing, Spare the Air, 511 and other relevant programs. This information package shall be provided to all residents/employees on arrival plus once a year.
  - E. A notice describing these transportation benefits shall be posted in a location or locations visible to all employees and residents.
  - F. The food service operation, if qualifying for participation in the Alameda County Guaranteed Ride Home program (or successor program), shall participate in the "Guarantee Ride Home" program to reduce employee single occupant vehicle trips by providing alternate means of leaving work in an emergency. Enrollment shall be encouraged by providing Guarantee Ride Home information to all employees. An affidavit/statement indicating number of participating employees shall be provided annually to the Transportation Division Manager.
- 68. Transit Subsidy Condition.** The applicant shall reimburse employees the maximum non-taxable cost of commuting to and from work on public transportation (e.g., monthly passes) if they so commute, and a notice informing employees of the availability of such subsidy shall be permanently displayed in the employee area as per BMC Chapter 9.88.
- 69. Subject to Review.** This permit is subject to review, imposition of additional conditions, or revocation if factual complaint is received by the Zoning Officer that the maintenance or operation of this establishment is violating any of these or other required conditions or is detrimental to the health, safety, peace, morals, comfort or general welfare of persons residing or working in the neighborhood or is detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the City.
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TELEGRAPH  
& DERBY

2650 Telegraph  
Berkeley, CA 94704

- 2019.02.19 PROGRESS SET
- 2019.03.27 ZONING SUBMITTAL SET
- 2019.06.17 ZONING COMPLETENESS
- 2020.01.21 ZAB & DRG REVISIONS
- 2020.02.04 PRELIM. DRG SET

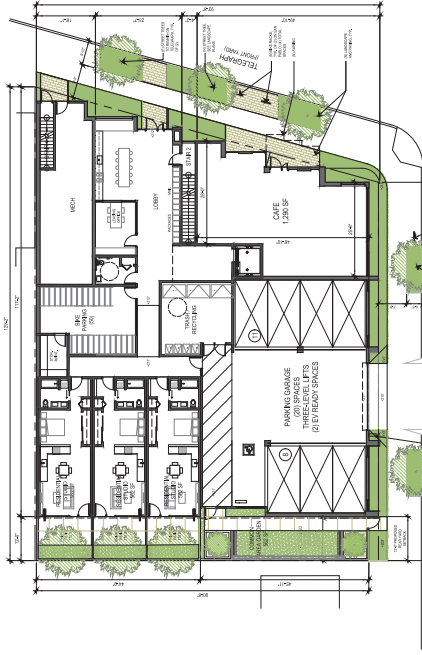
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SHEET:

DESIGN  
REVISION  
COMPARISONS

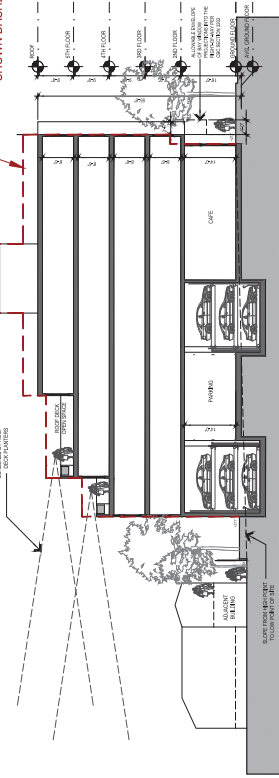
A0.1



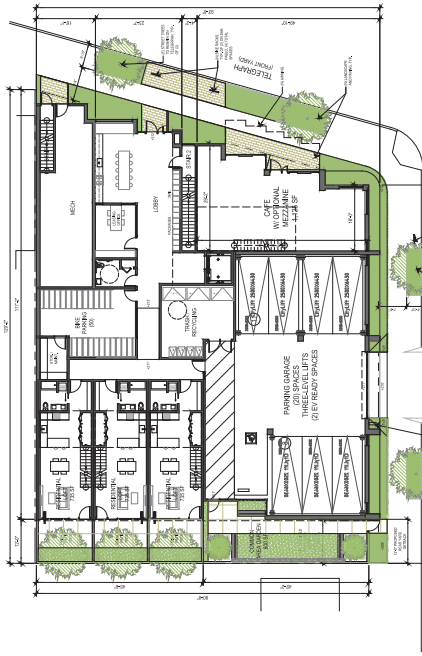
PREVIOUS HEIGHT,  
SHOWN DASHED

THIS IS A 4' MAX  
INCREASE IN HEIGHT  
FOR THE GARAGE

THIS IS A 4' MAX  
INCREASE IN HEIGHT  
FOR THE GARAGE

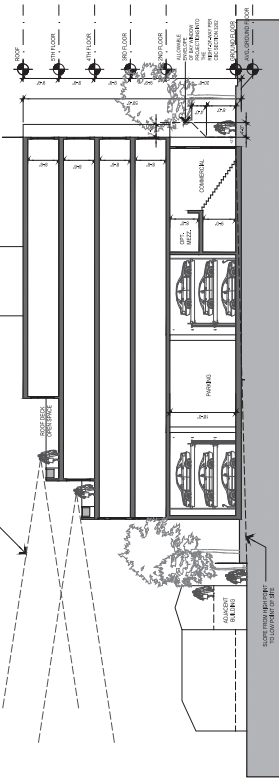


REVISED DESIGN FOLLOWING NEIGHBORHOOD & ZAB INPUT  
HEIGHT LOWERED BY 4'-0"



THIS IS A 4' MAX  
INCREASE IN HEIGHT  
FOR THE GARAGE

THIS IS A 4' MAX  
INCREASE IN HEIGHT  
FOR THE GARAGE



DESIGN AS SHOWN AT PREVIEWS

















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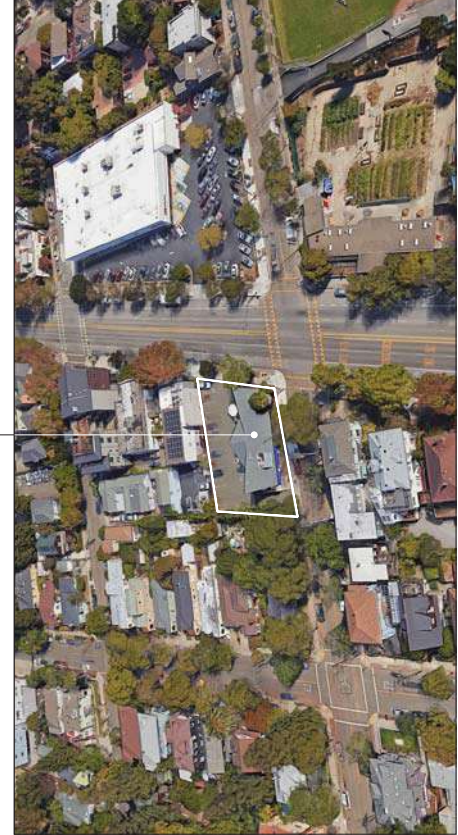
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ZONING SITE  
PHOTOS

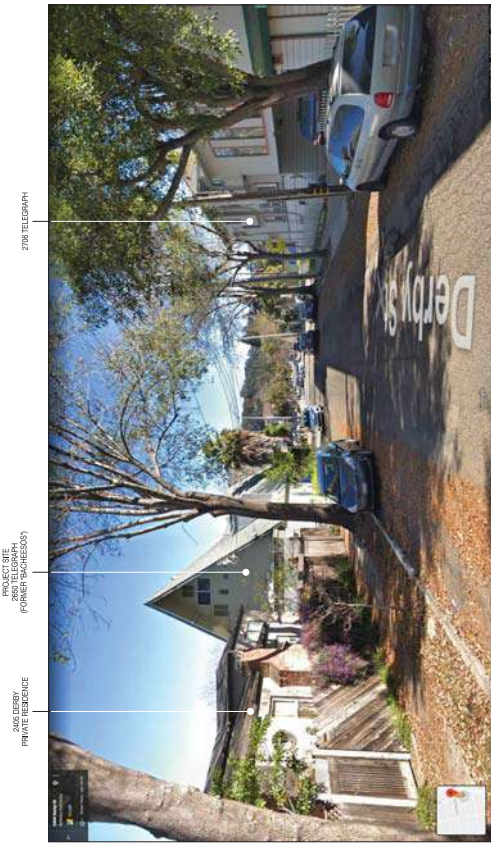
**A0.5**



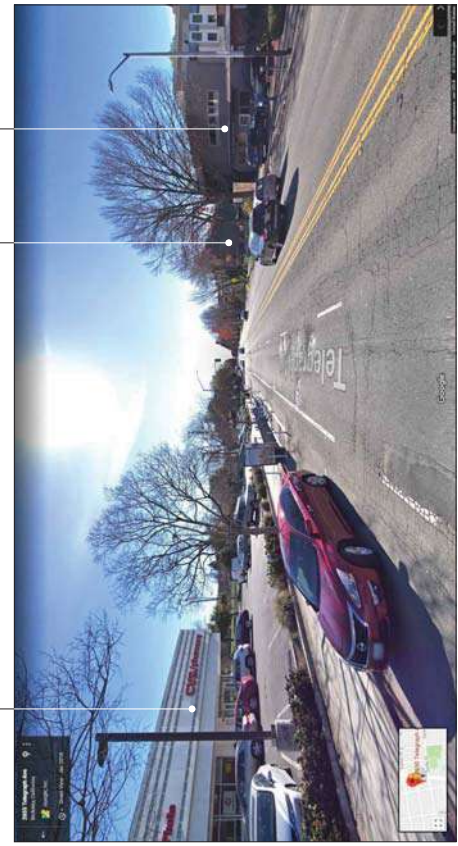
2 VIEW FROM TELEGRAPH LOOKING NORTH



1 GOOGLE EARTH BIRD'S EYE CONTEXT VIEW



4 VIEW FROM DERBY LOOKING EAST



3 VIEW FROM TELEGRAPH LOOKING SOUTH



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SHEET:

PERSPECTIVE VIEWS

## A0.7A



1 AERIAL VIEW

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PERSPECTIVE VIEWS

**A0.7B**



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PERSPECTIVE VIEWS

## A0.7C



1 TELEGRAPH LOOKING NORTHEAST



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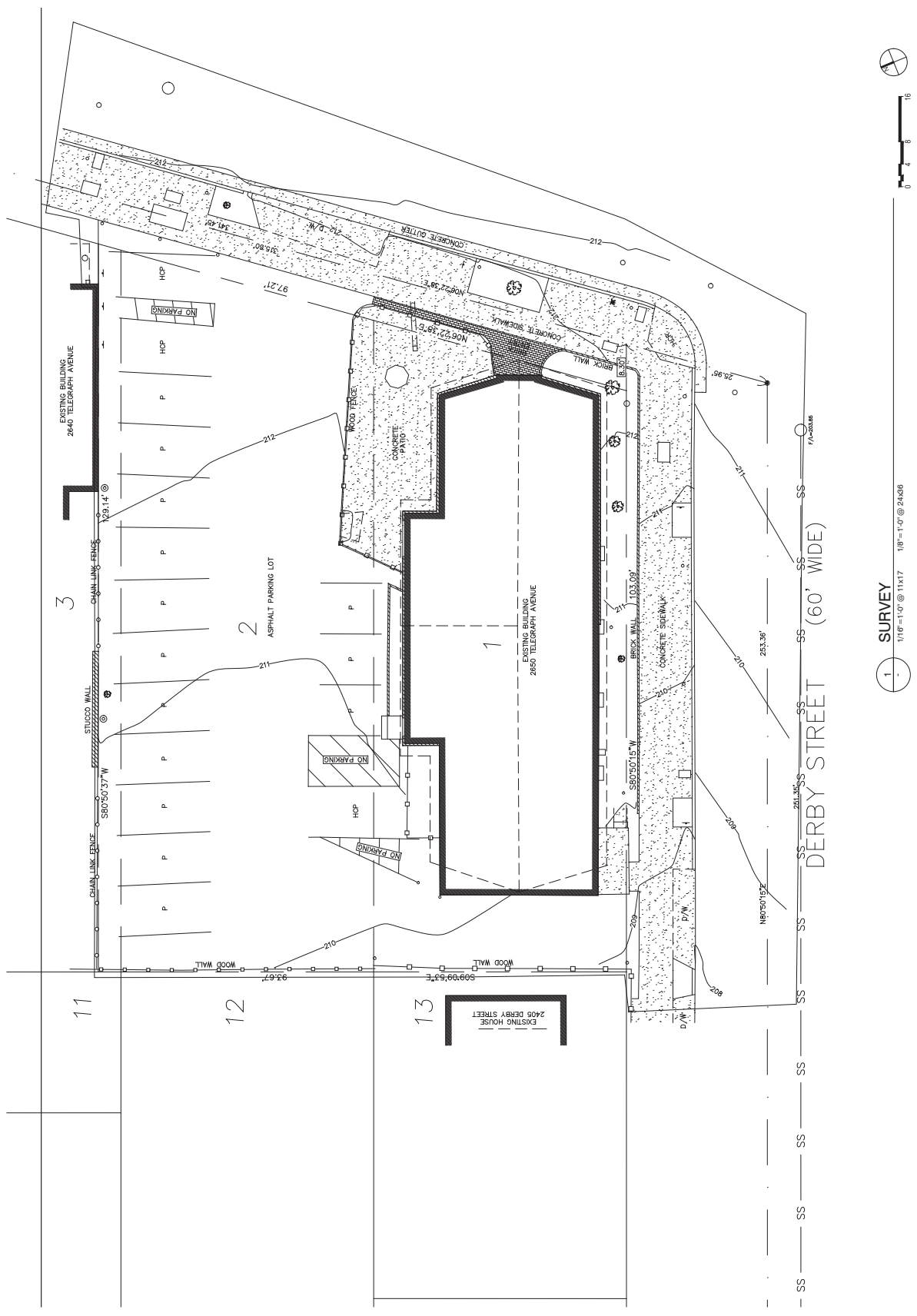
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SHEET:

SURVEY

A1.0



1 SURVEY  
1/16"=1'-0" @ 11x17 1/8"=1'-0" @ 24x36







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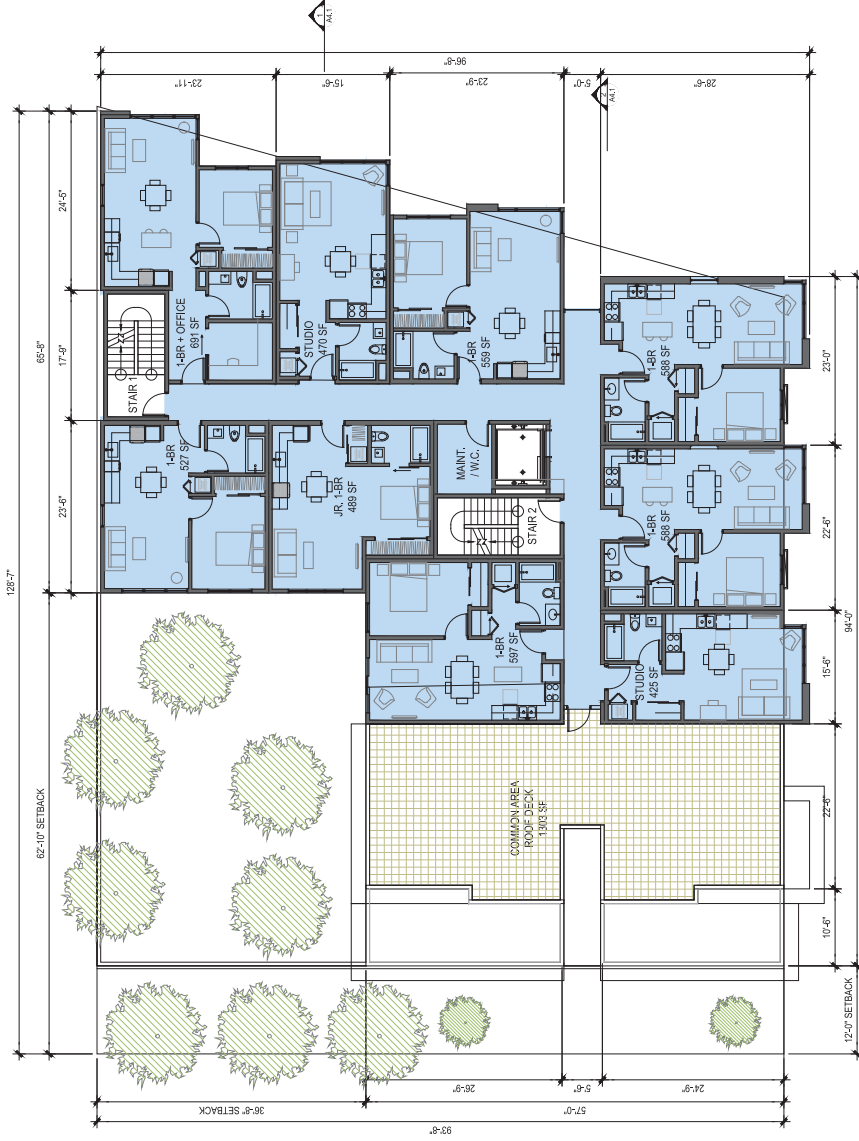
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SHEET:

PLAN AT LEVEL 5

**A2.4**



1 PLAN AT LEVEL 5  
1/16" = 1'-0" @ 11x17 1/8" = 1'-0" @ 24x36





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SHEET:

RENDERING

## A3.1



1 VIEW ALONG TELEGRAPH LOOKING NORTH

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SHEET:

RENDERING

## A3.2



1 PEDESTRIAN EXPERIENCE AT CORNER





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SHEET:

BUILDING  
ELEVATIONS

**A3.4**



1 SOUTH ELEVATION  
1/16" = 1'-0" @ 11X17 1/8" = 1'-0" @ 24X36







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SHEET

STREET STRIP  
ELEVATIONS

**A3.7**



2 STREET STRIP ELEVATION @ DERBY  
1/32" = 1'-0" @ 11X17 1/16" = 1'-0" @ 24X36



1 STREET STRIP ELEVATION @ TELEGRAPH  
1/32" = 1'-0" @ 11X17 1/16" = 1'-0" @ 24X36



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PERSPECTIVE VIEWS

## A3-8



1 AERIAL VIEW

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PERSPECTIVE VIEWS

**A3-9**



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SHEET:

PERSPECTIVE VIEWS

**A3-10**



DERBY - STREETFRONT





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SHEET:

PERSPECTIVE VIEWS

**A3.11**



1 DERBY - STREETFRONT

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SHEET:

PERSPECTIVE VIEWS

## A3-12



1 TELEGRAPH LOOKING SOUTHWEST

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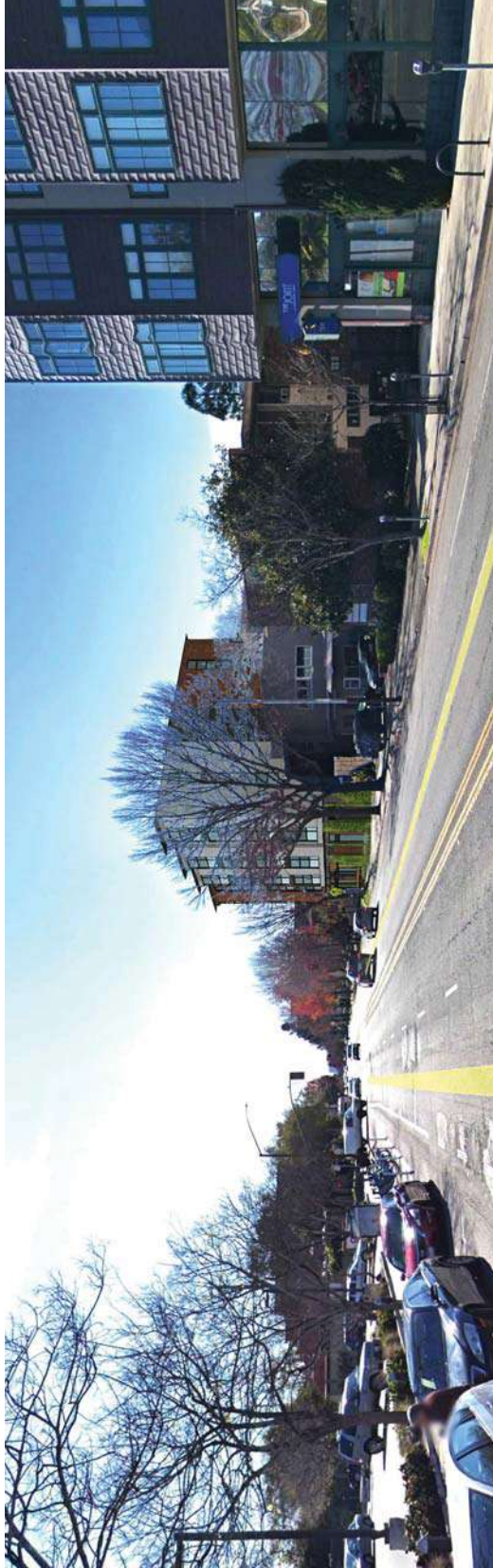
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PHOTO CONTEXT  
VIEWS

## A3-13



2 TELEGRAPH LOOKING SOUTH - AFTER



1 TELEGRAPH LOOKING SOUTH - BEFORE





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PHOTO CONTEXT  
VIEWS

A3-16



2 DERBY LOOKING EAST - AFTER



1 DERBY LOOKING EAST - BEFORE

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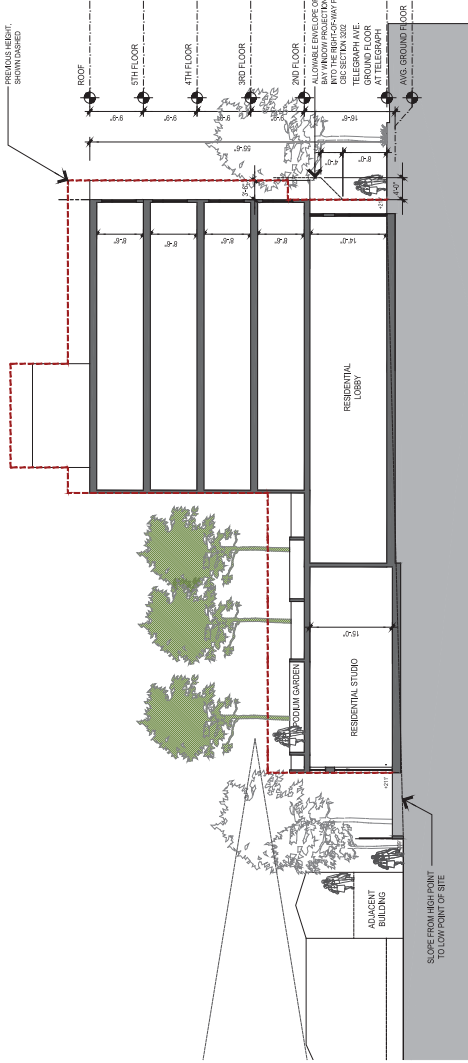
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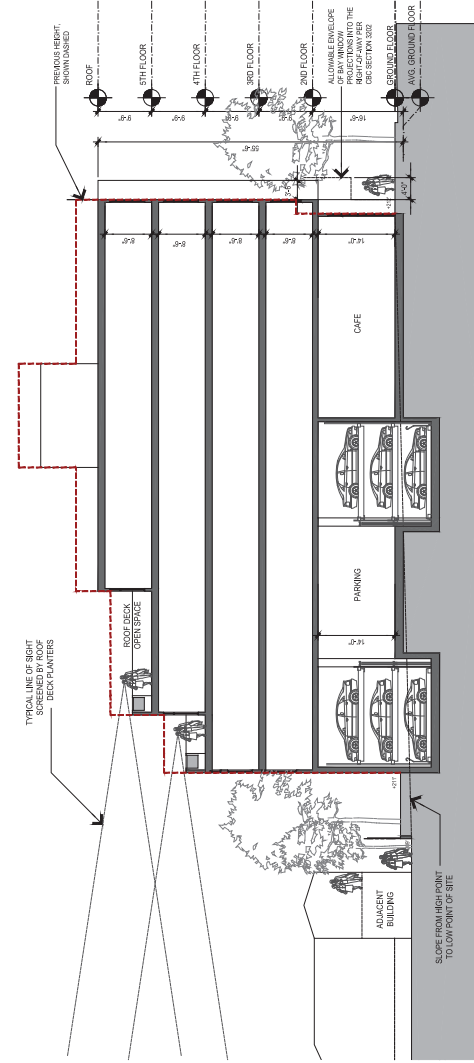
BUILDING  
SECTION

**A4.1**

SHEET



2 E-W SECTION THROUGH PODIUM GARDEN  
3/8" = 1'-0" @ 11x17 3/32" = 1'-0" @ 21x36



1 E-W SECTION  
3/8" = 1'-0" @ 11x17 3/32" = 1'-0" @ 21x36

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Attachment 1

WALL SECTIONS &  
DETAILS

A4.2

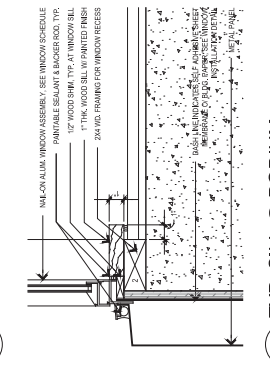
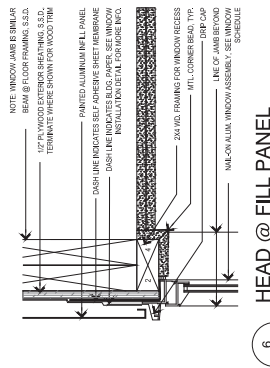
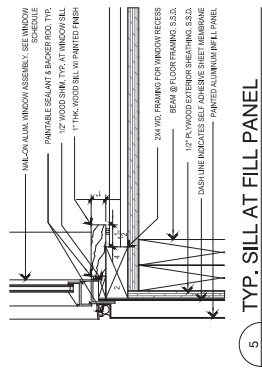
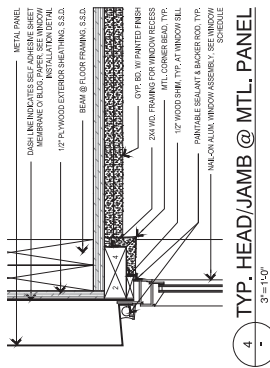
SHEET



3 ELEVATION DETAIL 1/8"=1'-0" @ 24X36

2 SECTION 1/8"=1'-0" @ 11X17 1/4"=1'-0" @ 24X36

1 SECTION @ BAY 1/8"=1'-0" @ 11X17 1/4"=1'-0" @ 24X36



- METAL PANEL
- DASH LINE INDICATES SELF-ADHESIVE SHEET
- MEMBRANE OF BLDG PANELS - SEE WINDOW
- 1/2" PW WOOD EXTERIOR SHEATHING, S.S.D.
- BEAM @ FLOOR JOISTING, S.S.D.
- 2x4 W/O FRAMING FOR WINDOW RECESS
- OPT. EC. W/ PAINTED FINISH
- MTL. CORNER BEAD, TYP.
- 1/2" WOOD SILL, TYP. AT WINDOW SILL
- PANORAMIC SOLARANT & SMOKE-ROD, TYP.
- MIL-KON ALUM. WINDOW ASSEMBLY - SEE WINDOW
- SCHEDULE

- MIL-KON ALUM. WINDOW ASSEMBLY - SEE WINDOW
- SCHEDULE
- PANORAMIC SOLARANT & SMOKE-ROD, TYP.
- 1/2" WOOD SILL, TYP. AT WINDOW SILL
- 1" TYP. WOOD SILL, W/ PAINTED FINISH
- 2x4 W/O FRAMING FOR WINDOW RECESS
- BEAM @ FLOOR JOISTING, S.S.D.
- 1/2" PW WOOD EXTERIOR SHEATHING, S.S.D.
- DASH LINE INDICATES SELF-ADHESIVE SHEET MEMBRANE
- PAINTED ALUMINUM INFILL PANEL

- NOTE: WINDOW JAMB IS SIMILAR
- BEAM @ FLOOR FRAMING, S.S.D.
- 1/2" PW WOOD EXTERIOR SHEATHING, S.S.D.
- TERMINATE WHERE SHOWN FOR WOOD TRIM
- PAINTED ALUMINUM INFILL PANEL
- DASH LINE INDICATES SELF-ADHESIVE SHEET
- MEMBRANE OF BLDG PANELS - SEE WINDOW
- INSTALLATION DETAIL FOR FURURE INFO.
- 2x4 W/O FRAMING FOR WINDOW RECESS
- MTL. CORNER BEAD, TYP.
- DRP CAP
- LINE OF JAMB BEYOND
- MIL-KON ALUM. WINDOW ASSEMBLY - SEE WINDOW
- SCHEDULE

- MIL-KON ALUM. WINDOW ASSEMBLY - SEE WINDOW
- SCHEDULE
- PANORAMIC SOLARANT & SMOKE-ROD, TYP.
- 1/2" WOOD SILL, TYP. AT WINDOW SILL
- 1" TYP. WOOD SILL, W/ PAINTED FINISH
- 2x4 W/O FRAMING FOR WINDOW RECESS
- MEMBRANE OF BLDG PANELS - SEE WINDOW
- INSTALLATION DETAIL FOR FURURE INFO.



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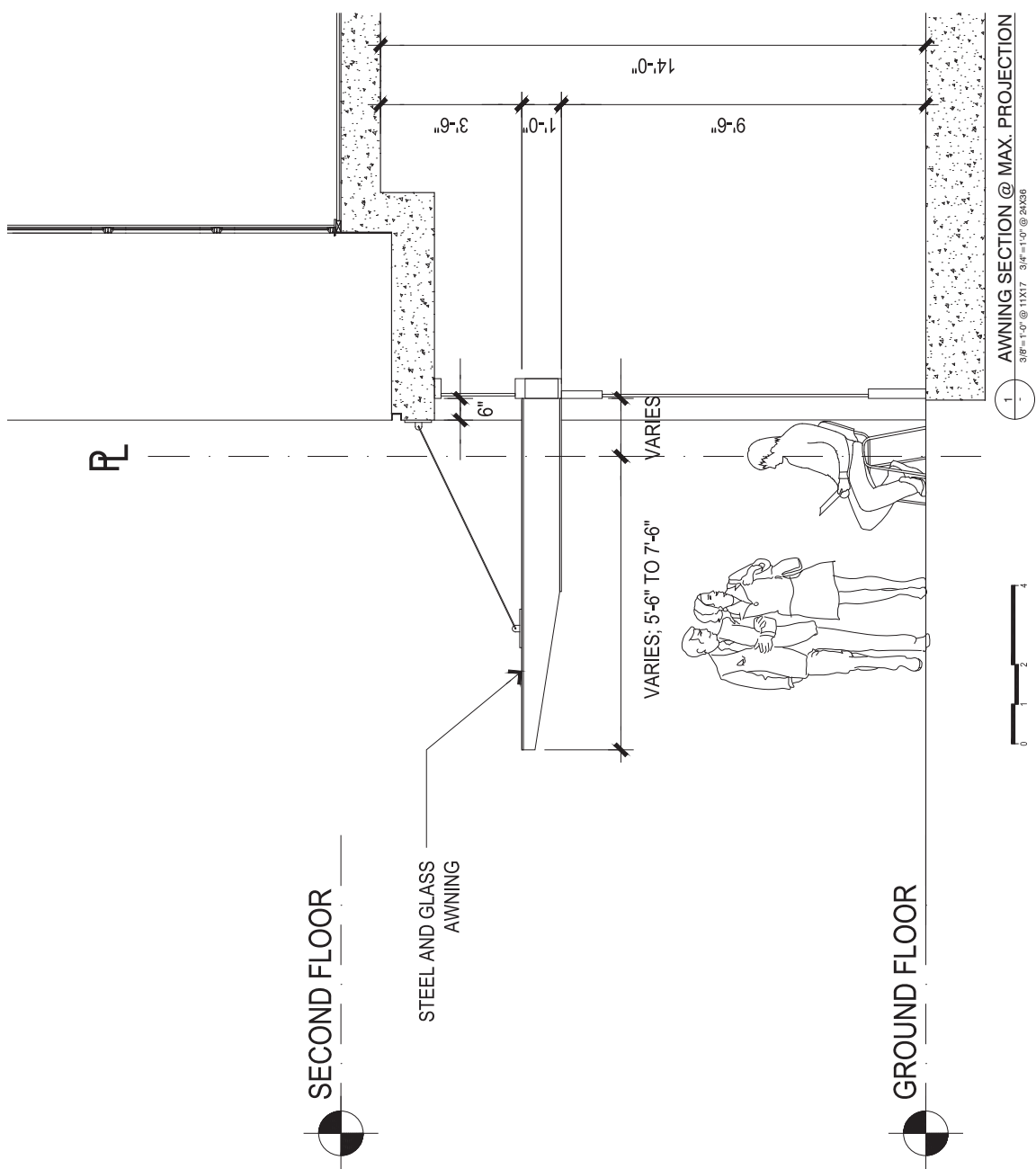
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JOB: 1758

SHEET:

WALL SECTIONS &  
DETAILS

A4.3









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DATE: 1/7/20

LEGEND

1. ENTRY DOOR TO COMMON COURTYARD
2. UNIT PAVERS ON PEDESTALS
3. RAISED CONCRETE PLANTERS
4. BUILT IN BENCH FOR QUIET SPACE
5. SPECIMEN TREES W/ LIGHTING
6. FLOWERING TREES
7. PRIVATE PATIO



PRECEDENT IMAGES



QUIET SPACE WITH RAISED PLANTER AND SEATING



UNIT PAVERS

TELEGRAPH & DERBY

2650 Telegraph  
Berkeley, CA 94704

|            |                      |
|------------|----------------------|
| 2019.02.19 | PROGRESS SET         |
| 2019.03.27 | ZONING SUBMITTAL SET |
| 2019.09.17 | ZONING COMPLETENESS  |
| 2020.01.21 | DPIC REVISIONS       |

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JCB: 17/88

ITEM 10  
Attachment 1  
LANDSCAPE PLAN  
LEVEL 4 AND 5  
L1.3

LEGEND

1. 4TH FLOOR PRIVATE PATIO W/ UNIT PAVERS
2. RAISED PLANTERS
3. ROOF DECK W/ UNIT PAVERS ON PEDESTALS
4. OUTDOOR KITCHEN COUNTER
5. CANTILEVERED TRELLIS
6. DINING TABLES AND CHAIRS
7. LOUNGE CHAIRS AND TABLES
8. FIRE PIT



PRECEDENT IMAGES



LOUNGE CHAIRS AND TABLES



DINING TABLES AND CHAIRS



OUTDOOR FIRE PIT

TELEGRAPH & DERBY

2650 Telegraph  
Berkeley, CA 94704

|            |                      |
|------------|----------------------|
| 2019.02.19 | PROGRESS SET         |
| 2019.03.27 | ZONING SUBMITTAL SET |
| 2019.09.17 | ZONING COMPLETENESS  |
| 2020.01.21 | DPC REVISIONS        |

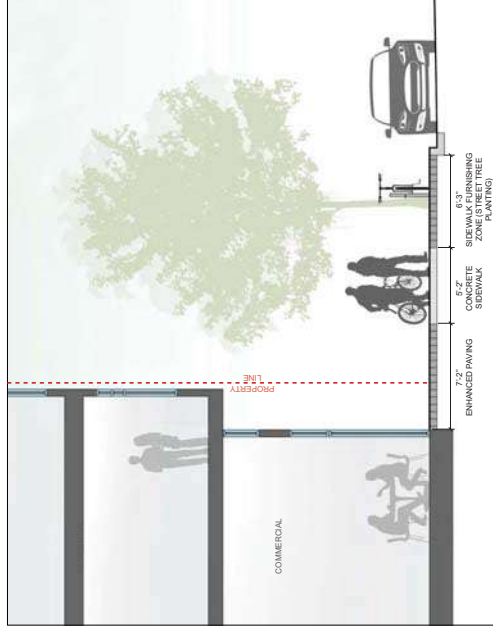
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DATE: 1/7/20

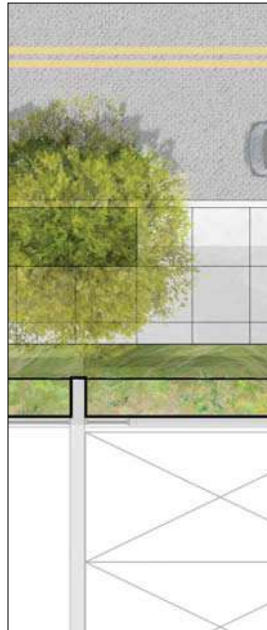
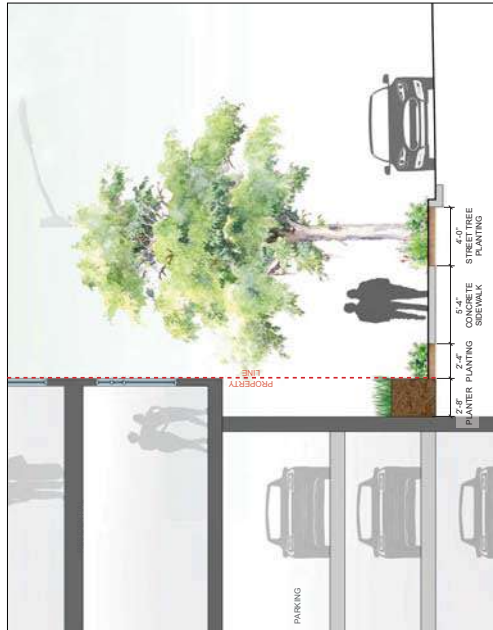
SHEET:

LANDSCAPE SECTIONS

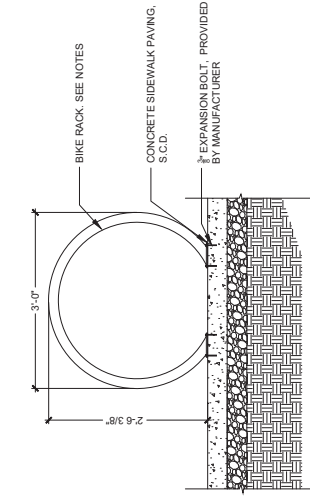
L1.4



SECTION B-B: TELEGRAPH STREET



SECTION A-A: DERBY STREET



- BIKE RACK DETAIL
- NOTES:
- CONTACT SPMTA AT [bikeparking@spmta.com](mailto:bikeparking@spmta.com) FOR THE LOCATION AND INSTALLATION OF BIKE RACKS.
  - BIKE RACK: WELLE, CIRCULAR, SQUARE TUBE, HOT-DIPPED GALVANIZED FINISH SURFACE MOUNT, MODEL: WCR02-SQ-SF-GS, AVAILABLE FROM: [www.bikeparking.com](http://www.bikeparking.com)



BIKE RACK

TELEGRAPH  
& DERBY

2650 Telegraph  
Berkeley, CA 94704

2019.09.19 PROGRESS SET

2019.09.27 ZONING SUBMITTAL SET

2019.09.17 ZONING COMPLETENESS

2020.01.21 DPC REVISIONS

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LANDSCAPE  
AND PLANTING  
PALETTE

L1.5

SHEET

1758

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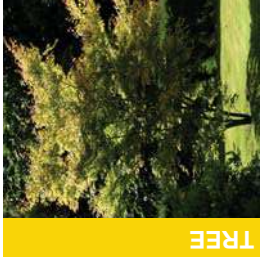
MEXICAN ELDERBERRY  
SAMBUCUS MEXICANA



WESTERN REDBUD  
CERCIS OCCIDENTALIS



RIVER BIRCH  
BETULA NIGRA 'HERITAGE'



MAPLE TREE  
ACER SPP.



LONDON PLANE TREE  
PLATANUS ACERIFOLIA 'COLUMBIA'



MARINA STRAWBERRY TREE  
ARBUTUS 'MARINA'



CALIFORNIA BUCKWHEAT  
ERIGONIUM SPP.



CALIFORNIA FUCHSIA  
EPILOBIUM CANUM



WILD LILAC  
CEANOETHUS SPP.



BAMBOO  
BAMBUSA 'CLUMPING TYPE'



MANZANITA  
ARCTOSTAPHYLOS SPP.



YARROW  
ACHILLEA MILLERFOLIUM



ROSEMARY  
ROSMARINUS SPP.



KOHUHU  
PITTIOSPORUM TENUIFOLIUM



OREGANO  
ORIGANUM VULGARE



PARROT'S BEAK  
LOTUS BERTHELOTII



ORANGE LIBERTIA  
LIBERTIA PEREGRINANS



CANYON PRINCE WILD RYE  
LEYMUS CONDENSATUS  
CANYON PRINCE



RHAMNUS CALIFORNICA  
'SAN BRUNO'  
MAIDENHAIR TREE



WESTERN SWORD FERN  
POLYSTICHUM MUNITUM



DOUGLASIANA IRIS  
IRIS DOUGLASIANA



ISANTI REDOSIER DOGWOOD  
CORNUS SERICEA 'ISANTI'



SMALL CAPE RUSH  
CHONDROPETALUM TECTORIUM



SALVIA  
SALVIA SPP.