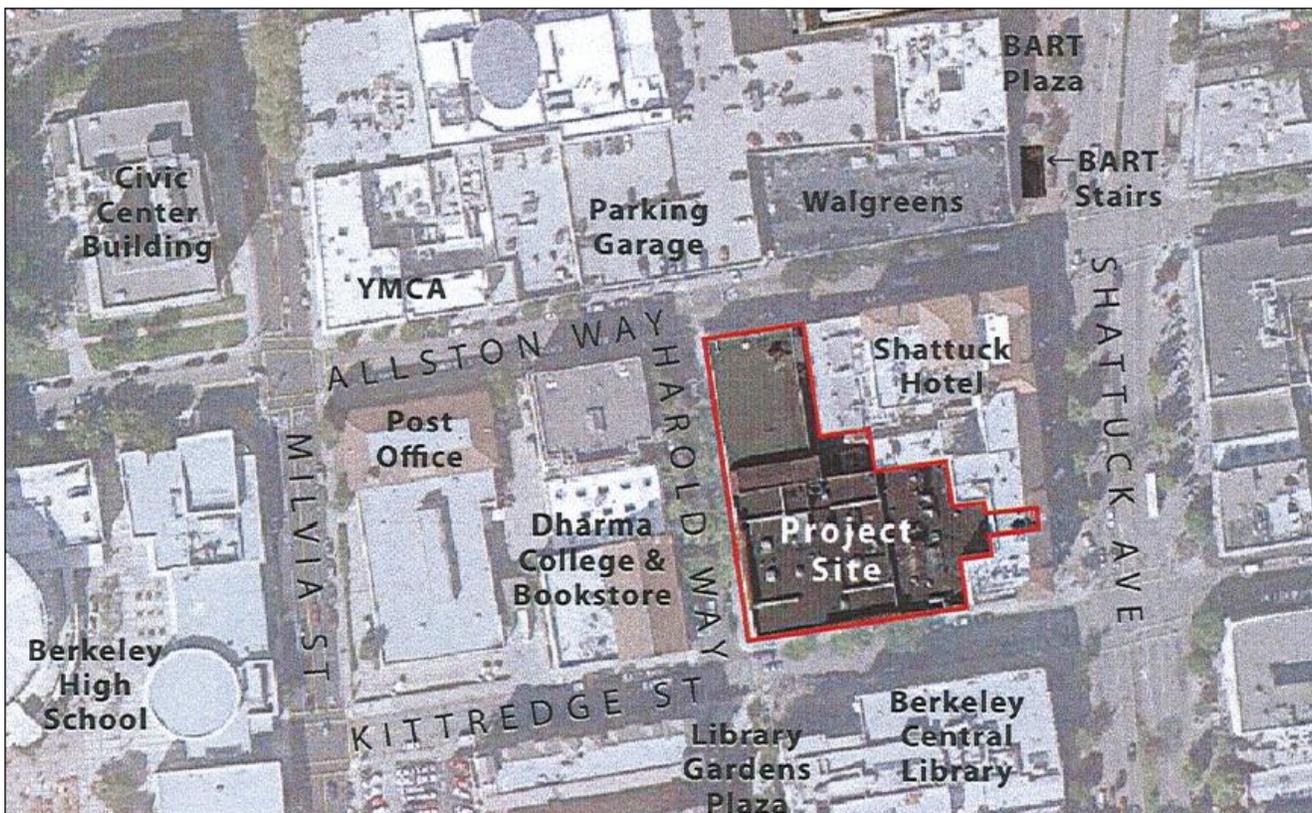




### C. Permits Required:

- Structural Alteration Permit, under BMC Section 3.24.200 (Landmarks Preservation Ordinance)
- Use Permit to demolish a main building used for non-residential purposes, under BMC Section 23C.08.050.A
- Use Permit to construct a Mixed Use Development, under BMC Section 23E.68.030.A
- Administrative Use Permit to allow over 2,000 square feet of Full Service Restaurant space, under BMC Section 23E.68.030.A
- Use Permit to allow service of distilled spirits incidental to food service, under BMC Sections 23E.16.040.A and 23E.68.030.A
- Administrative Use Permit to allow service of beer and wine incidental to food service, under BMC Section 23E.68.030.A
- Administrative Use Permit to allow amplified live entertainment incidental to food service, under BMC Section 23E.68.030.A
- Use Permit to construct over 10,000 square feet of new floor area, under BMC Section 23E.68.050
- Use Permit to allow building height of over 120 feet but not more than 180 feet, under BMC Section 23E.68.070.B.2
- Administrative Use Permit to allow mechanical penthouse to exceed maximum building height, under BMC Section 23E.04.020.C

Figure 1: Vicinity Map



## I. Background

The proposed project, if approved, would be one of five new buildings in the C-DMU District allowed to exceed 75 feet in height under BMC Section 23E.68.070.B. As the ZAB is aware from previous staff reports, the following finding must be made for such projects:

**BMC Section 23E.68.090.E:** In order to approve a Use Permit for buildings over 75 feet in height under Section 23E.68.070.B, the Board must find that the project will provide significant community benefits, either directly or by providing funding for such benefits to the satisfaction of the City, beyond what would otherwise be required by the City. These may include, but are not limited to: affordable housing, supportive social services, green features, open space, transportation demand management features, job training, and/or employment opportunities. The applicable public benefit requirements of this Chapter shall be included as conditions of approval and the owner shall enter into a written agreement that shall be binding on all successors in interest.

This finding is derived from the following policy of the Downtown Area Plan (DAP):

**Policy LU-2.2: Additional Community Benefits for Buildings Exceeding 75 Feet.** Developers of buildings in excess of 75 feet must provide significant community benefits beyond what would otherwise be required. These may include: affordable housing, supportive social services, green features, open space, transportation demand features, job training, and/or employment opportunities. The applicable public benefit requirements shall be included as conditions of approval and the owner shall enter into a written agreement that shall be binding on all successors in interest.

The purpose of this hearing is to begin a discussion with the ZAB regarding the developer's proposed community benefits package, in order to assist the ZAB in later determining whether the package satisfies the above finding and policy.

## II. Description of Proposed Benefits

The applicant's proposed community benefits package is provided in Attachment 1. The package identifies the following four benefits as "significant benefits beyond what would otherwise be required" pursuant to BMC Section 23E.68.090.E:

- A. Full Project Labor Agreement:** As discussed on pages 17-18 of the proposed benefits package, the applicant states that an agreement has been signed with the Alameda County Building Trades Council to construct all aspects of the project using union labor.
- B. Cinema "Retention and Modernization":** The proposed project includes a 6-screen cinema complex to replace the existing 10-screen complex. The project developer would construct both the physical shell and all of the interior tenant

improvements for the cinemas, as well as providing what the applicant describes as a subsidized rent to the future cinema operator. As discussed on pages 19-24 of the proposed benefits package, the applicant considers the proposed cinema complex to be a “significant community benefit” under Section 23E.68.090.E based on the following (as represented by the applicant):

- The current theater operation is not financially viable, as documented in a letter from the CEO and president of Landmark Theatres (see p. 24). The letter notes that the “old style sloped floor theatre...is not a financially sustainable model and eventually the existing theatre will close.” The applicant states that due to these issues, “the movie theater lease would not be renewed and therefore the theater would be closing its doors in 2018.”
- In meetings to discuss the initial project design (which did not include new cinemas), the applicant received substantial community input indicating a strong desire to retain cinemas at this location.

**C. Transportation Demand Management (TDM) Features:** As discussed on pages 25-29 of the proposed benefits package, the package includes the following TDM features which are intended to promote alternative transportation modes and reduced greenhouse gas emissions:

- SmartWalk transit screen – This is a new technology that would project real-time bus and BART arrival times onto the sidewalk adjacent to the project.
- AC Transit passes – The project would provide two unlimited monthly bus passes per unit, where the C-DMU District only requires one (see BMC Section 23E.68.080.H).
- Electric vehicle (EV) charging stations – The project would provide 11 EV charging stations.
- Residential bicycle parking – The project would provide 100 residential bicycle parking spaces.
- BART Bikestation rent subsidy – The project would provide a subsidized rent over a three-year period to the existing BART Bikestation at 2208 Shattuck Avenue (part of the parcel owned by the project developer).
- Cargo bikes – The project would provide three cargo bikes for resident use.
- Pedestrian grocery carts – The project would provide 20 wheeled “shopping caddies” for resident use, to facilitate pedestrian shopping trips in the project vicinity.
- Bike fix-it stations – The project would provide two “fix-it stations” with bicycle repair tools attached, one adjacent to the public plaza at Harold Way and Kittredge Street, and another in the residential bike parking room.
- Bike corral – Subject to City approval, the project would provide a bike parking “corral” on the north side of Kittredge Street, across from the existing corral in front of the Central Library.
- Shared electric bikes – The project would partner with City CarShare to provide shared electric bikes in the project’s parking garage, adjacent to City

CarShare vehicles. The applicant has not specified the number of bikes, but the current proposal is that they could occupy a single auto parking space. The current proposal does not include free membership for project residents or employees.

**D. Harold Way Plaza and Streetscape Improvements:** As discussed on pages 30-34 of the proposed benefits package, the package includes an 1,800 square foot plaza at the northeast corner of Harold Way and Kittredge Street (the southwest corner of the project site), which would be classified as “Privately Owned Public Open Space” (POPOS) pursuant to C-DMU requirements.<sup>1</sup>

In addition, the applicant proposes various improvements to Harold Way, including:

- a speed table/raised crosswalk with decorative paving at Harold/Kittredge;
- curb extensions (bulb-outs) at Harold/Allston;
- new street trees on both sides of Harold Way and on Kittredge and Allston abutting the new building (subject to approval of the City Forester);
- pedestrian-scale lighting on both sides of Harold Way;
- bio-retention basins (for treatment of stormwater runoff from Harold Way);  
and
- full resurfacing of roadway.

The proposed benefits package also discusses the following items which the applicant is not claiming as “significant benefits beyond what would otherwise be required” under BMC Section 23E.68.090.E:

- “Contextual scale reductions” that reduced project massing below C-DMU limits in order to increase compatibility with surrounding historic buildings (see Attachment 1, pp. 35-38). The developer has chosen not to include these elements in the benefits package because an argument could be made that the City would (or could) have required these reductions under the rubric of “general non-detriment” (BMC Section 23B.32.040.A), or to reduce impacts to historic resources pursuant to CEQA.
- Economic benefits such as increased property tax, increased sales tax from spending by project residents, and increased business license tax paid by the property owner.
- Elements required by the Zoning Ordinance, such as the Streets and Open

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<sup>1</sup> Privately Owned Public Open Space is defined in BMC Section 23F.04.010 as “Area on a lot that is designed for active or passive recreational use and that is accessible to the general public without a requirement for payment or purchase of goods. Such areas may include mid-block passageways and other amenities intended to improve pedestrian access. Such areas may be indoor or enclosed, but shall include natural light in the form of windows, skylights, entryways, or other openings. Such areas shall be clearly identified with signage in a publicly conspicuous location at street level indicating the area that is open to the public, the hours the space is open, and the party responsible for maintenance. Such areas shall be separated from the grade of the public sidewalk by a height no greater than three vertical feet unless an Administrative Use Permit is obtained.”

Space Improvement Plan (SOSIP) fee, LEED Gold rating, and affordable housing units (or payment of affordable housing impact fee).

### III. Discussion

The required finding in BMC Section 23E.68.090.E can be broken into the following key questions:

- Are the proposed benefits “significant”<sup>2</sup>?
- Do the proposed benefits benefit “the community”?
- Are the proposed benefits “beyond what would otherwise be required by the City”?

Other than Policy LU-2.2 (cited above), the Downtown Area Plan does not include any language indicating how the community benefits requirement was intended to be implemented. While the DAP includes various goals that may be used in assessing proposed benefits, there is no specific guidance as to how a proposed benefit may qualify as “significant”, what “community” the benefit must serve, and whether the benefit must entail a particular level of investment proportional to the size and/or value of the project. Rather, these provisions were intended to allow the ZAB and City Council a high degree of flexibility in making context-sensitive decisions as to what benefits are appropriate in any given case.

Staff has prepared the following table to address the above questions for each of the applicant’s proposed community benefits.

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<sup>2</sup> This term is not defined in the Zoning Ordinance. Merriam-Webster defines the term as “large enough to be noticed or have an effect, very important, or having a special or hidden meaning.”

**Table 1: Analysis of Proposed Community Benefits**

Benefit	Significance	Community Members Benefited	Otherwise Required?
<b>Project Labor Agreement</b>	Given Berkeley’s long history of supporting collective bargaining rights and living wages for working class persons, and its own adoption of a Community Workforce Agreement, it appears this benefit could be considered significant. “Employment opportunities” is listed in BMC 23E.68.090.E as an example of a significant community benefit.	Unionized workers of various trades, their households, and businesses where they spend money. While hiring of Berkeley residents is not required, the applicant states that the Alameda County Building Trades Council requires at least 50 percent of workers to be Alameda County residents.	No. The City does not have authority to require union labor for private projects.
<b>Cinema “Retention and Modernization”</b>	Given the large amount of testimony expressing concern about the departure of Landmark Theatres, it appears this benefit could be considered significant, provided there are adequate assurances that Landmark (or another operator offering a similar number of independent and non-“first run” films) will occupy the new cinemas after construction is complete.	Local employees who will work in a future theater, current and future theatergoers, other Downtown businesses patronized by theatergoers (e.g. restaurants, ice cream shops, etc.).	No. Other than certain uses in West Berkeley, the Zoning Ordinance does not prohibit the removal of any existing commercial uses.
<b>Transportation Demand Management (TDM) Features</b> (summary; see below for individual items)	Given the City’s numerous policies and programs geared toward promoting alternative modes of transportation and reducing GHGs (see DAP Policy AC-1.3 and General Plan Policy T-10), it appears this benefit could be considered significant. In addition, “transportation demand management features” is listed in BMC 23E.68.090.E as an example of a significant community benefit.	Project residents, patrons and employees, transit users and bicyclists living/working in project vicinity; the general public (through reduced traffic and emissions).	No, except for residential bike parking and grocery carts (see below for further discussion). It should be noted that additional TDM features would need to be provided in order to be consistent with standard practice for such projects (not to qualify as significant benefits). These would likely include having a TDM Plan prepared by a qualified consultant (and approved by the City’s Transportation Division). The Plan could include the features proposed by the applicant, as well as standard features such

Benefit	Significance	Community Members Benefited	Otherwise Required?
			as designating a part-time TDM coordinator, providing a transit packet to new residents, providing a ridesharing/ carpool board, and wiring the building for broadband internet to allow for telecommuting by project residents.
<b>SmartWalk transit screen</b>	While this is a minor benefit on its own, it contributes to the effectiveness and significance of the overall TDM package.	Project residents, patrons and employees; transit users living/working in project vicinity; the general public (through reduced traffic and emissions).	No.
<b>2<sup>nd</sup> AC Transit pass per unit</b>	As this item would promote transit usage by project residents and others in the project vicinity, it could be considered significant as part of the overall TDM package.	Project residents; the general public (through reduced traffic and emissions).	No. Per BMC 23E.68.080.H, the City requires one pass per unit.
<b>EV charging stations</b>	As this item would promote EV usage by project residents and public garage users, it could be considered significant as part of the overall TDM package.	Project residents; public garage users; the general public (through reduced traffic and emissions).	No.
<b>Residential bicycle parking</b>	As this item would promote bicycle usage by project residents, it could be considered significant as part of the overall TDM package. However, as noted to the right, staff does not consider this item to be “beyond what would otherwise be required by the City.”	Project residents; the general public (through reduced traffic and emissions).	Residential bicycle parking is not required by the Zoning Ordinance; however, the Transportation Division has prepared draft requirements that it intends to adopt in the foreseeable future, and the proposed bike parking would comply with, but not substantially exceed, these requirements. In addition, residential bike parking is standard practice for major projects in the Downtown. Therefore, staff does not consider this item to be “beyond what would otherwise be required by the City.”

Benefit	Significance	Community Members Benefited	Otherwise Required?
<b>BART Bikestation rent subsidy</b>	As this item would promote bicycle usage by various persons who live or work in the Downtown, or who commute to the BART station, it could be considered significant as part of the overall TDM package.	Current and future Bikestation users; the general public (through reduced traffic and emissions).	No.
<b>Cargo bikes</b>	While this is a minor benefit on its own, it contributes to the effectiveness and significance of the overall TDM package.	Project residents; the general public (through reduced traffic and emissions).	No.
<b>Pedestrian grocery carts</b>	While this is a minor benefit on its own, it contributes to the effectiveness and significance of the overall TDM package. However, as noted to the right, staff does not consider this item to be “beyond what would otherwise be required by the City.”	Project residents; the general public (through reduced traffic and emissions).	Although grocery carts are not required by the Zoning Ordinance, in staff’s experience they are commonly provided for such projects. Therefore, staff does not consider this item to be “beyond what would otherwise be required by the City.”
<b>Bike fix-it stations</b>	While this is a minor benefit on its own, it contributes to the effectiveness and significance of the overall TDM package.	Project residents; bicyclists living/working/doing business in the project vicinity; the general public (through reduced traffic and emissions).	No.
<b>Bike corral</b>	While this is a minor benefit on its own, it contributes to the effectiveness and significance of the overall TDM package.	Bicyclists in project vicinity, particularly visitors to the site and nearby locations such as the Central Library and Dharma College; the general public (through reduced traffic and emissions).	No. In combination with other bicycle parking in the public right-of-way, the corral would exceed the City’s bike parking requirements for new commercial space.
<b>Shared electric bikes</b>	As this item would provide an additional alternative to vehicle travel by project residents and others in the project vicinity, it could be considered significant as part of the overall TDM package.	Project residents; other persons living/working in the project vicinity; the general public (through reduced traffic and emissions).	No.

Benefit	Significance	Community Members Benefited	Otherwise Required?
<b>Public Plaza</b>	Staff does not consider the proposed plaza a significant benefit given its relatively small size, its dual function as the project entry, and the large portion that is covered by the building.	Project residents, patrons, and employees; other persons living/working in the project vicinity or passing through en route to other destinations.	No. The plaza exceeds the minimum POPOS requirement by approximately 1,200 square feet.
<b>Harold/Kittredge Speed Table</b>	This item may qualify as a significant benefit based on DAP Policy OS-1.2(h), which states: "As a connection between the Library and the YMCA, consider making Harold Way a slow-street". There are also several other DAP and General Plan policies that promote the types of traffic calming features included in this item.	Current and future occupants/users of properties in the vicinity of Harold Way (including the proposed project, the YMCA, the Central Library, and Dharma College), and other persons walking on Harold Way en route to other destinations.	No. This improvement exceeds the scope of a normal pedestrian safety improvement (e.g. bulb-outs) and extends beyond the project's street frontage, and therefore would not typically be required by the City.
<b>Harold/Allston Bulb-Outs</b>	This item may qualify as a significant benefit based on SOSIP policies promoting traffic calming streetscape improvements. However, see discussion of what is otherwise required by the City.	Current and future occupants/users of properties in the vicinity of Harold Way (including the proposed project, the YMCA, the Central Library, and Dharma College), and other persons walking on Harold Way en route to other destinations.	Partially. While the SOSIP calls for bulb-outs, these would typically be required of private projects only on street frontages abutting the project site.
<b>Street Trees</b>	This item may qualify as a significant benefit based on SOSIP policies promoting streetscape improvements (in particular, see SOSIP p. 18). However, see discussion of what is otherwise required by the City.	Current and future occupants/users of properties in the vicinity of Harold Way (including the proposed project, the YMCA, the Central Library, and Dharma College), and other persons walking on Harold Way en route to other destinations.	Partially. Subject to approval of the City Forester, new and/or replacement street trees are required only on street frontages abutting a proposed project. The street trees on the west side of Harold Way would therefore be beyond what is otherwise required.

<b>Benefit</b>	<b>Significance</b>	<b>Community Members Benefited</b>	<b>Otherwise Required?</b>
<b>Pedestrian-Scale Lighting</b>	This item may qualify as a significant benefit based on SOSIP policies promoting such lighting. However, see discussion of what is otherwise required by the City.	Current and future occupants/users of properties in the vicinity of Harold Way (including the proposed project, the YMCA, the Central Library, and Dharma College), and other persons walking on Harold Way en route to other destinations.	Partially. While the SOSIP calls for new pedestrian-scale lighting, this would typically be required of private projects only on street frontages abutting the project site. The new lighting on the west side of Harold Way would therefore be beyond what is otherwise required.
<b>Bio-Retention Basins</b>	This item may qualify as a significant benefit based on SOSIP policies promoting stormwater treatment. However, see discussion of what is otherwise required by the City.	In addition to aesthetic benefits for persons walking on Harold Way, this item would provide an environmental benefit for the Bay Area as a whole, by incrementally improving water quality in the San Francisco Bay.	Partially. While the SOSIP calls for such features, they would typically be required of private projects only on street frontages abutting the project site. (The proposed streetscape project includes bio-retention basins on both sides of Harold Way.)
<b>Full Resurfacing of Harold Way</b>	This item may qualify as a significant benefit based on its improvement to the general safety and functionality of the roadway. However, see discussion of what is otherwise required by the City.	Persons walking, driving and bicycling on Harold Way; others benefiting from City programs that might be supported with funds that would otherwise have been spent on this road work.	To be determined. The City Engineer requires road resurfacing on a case-by-case basis, and has recently required full resurfacing on several major projects.

As noted earlier, the required finding for community benefits allows the ZAB (and City Council) a high degree of flexibility in determining what benefits are appropriate for a particular project. Accordingly, the ZAB may wish to consider other benefits in addition to, or instead of, the applicant's proposed benefits, and the ZAB's consideration should be informed by policies in the City's General Plan, Housing Element, DAP, Streets and Open Space Improvement Plan (SOSIP), Climate Action Plan, or other policy documents.

For discussion purposes, staff has prepared the following list of potential benefits based on the examples provided in DAP Policy LU-2.2 and BMC Section 23E.68.090.E (other applicable policies are also noted):

- **Affordable Housing:** Under current requirements, the project is allowed three options for addressing affordable housing needs: (1) pay an Affordable Housing Mitigation Fee (AHMF) of about \$6 million (\$20,000 per market-rate unit); (2) provide 28 below-market-rate (BMR) units in lieu of the AHMF; or (3) pay a reduced AHMF in combination with a reduced number of BMR units.<sup>3</sup> Consistent with standard practice on new housing projects, the applicant has requested that the Use Permit allow flexibility to pursue any of these options. As an additional benefit, the project could provide additional on-site BMR units or pay a higher AHMF than would otherwise be required. The project sponsor could also agree to waive his right to pay the AHMF, and only provide on-site units. (See General Plan Policies H-1 and H-2, and DAP Policies LU-3.1 and LU-3.2.)
- **Supportive Social Services:** The project could provide services for youth, low-income and/or homeless persons, either through funding to the City or appropriate providers, or at facilities located on the project site. Subject to input from City staff and community members who work with these populations, such services could include a health clinic, child care center, and/or youth counseling center. (See General Plan Policies H-26 and H-30, and DAP Policies HC-5.1 and HC-5.4.)
- **Green Features:** The project could be designed to achieve a LEED<sup>4</sup> Platinum rating rather than the minimum zoning requirement of LEED Gold. The project could also provide funding for green features on public buildings such as solar panels, rainwater harvesting, and clean back-up power (see Climate Action Plan, Ch. 4, Goal 5). The project could also increase the scope of the proposed Harold Way streetscape project to include a district-level rainwater harvesting and recycling system for the surrounding area (see DAP Policy ES-5.1 and SOSIP Policy 4.3).

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<sup>3</sup> Under the City's Affordable Housing Mitigation Fee ordinance (BMC Section 22.20.065), providing one BMR unit waives the AHMF for ten market-rate units. As an example of a project with a combination of AHMF and BMR units, if the proposed project were to provide ten BMR units, the AHMF would be waived for 100 market-rate units and the remaining AHMF would be \$3.84 million [ $\$20,000 \times (302 - 100 \text{ MR units} - 10 \text{ BMR units})$ ].

<sup>4</sup> Leadership in Energy and Environmental Design, a commonly used green building rating system developed by the U.S. Green Building Council.

- **Open Space:** The project could provide funding for implementation of high priority SOSIP projects, beyond the SOSIP fee already required for the project (approximately \$600,000). The highest priority projects in the SOSIP are Phase 1 of the Center Street Plaza, the Shattuck Square and University Gateway project, and the planting of 500 new street trees throughout the Downtown in locations where major SOSIP projects are not anticipated. (See SOSIP p. 18, DAP Figure OS-1 and DAP Policy OS-1.1.)
- **Transportation Demand Management (TDM) Features:** In addition to the proposed TDM features, the project could provide additional TDM features to further promote alternative transportation modes and reduce vehicle traffic and greenhouse gas emissions, such as providing Clipper Cards to other Downtown residents and employees, and providing carsharing and/or bikesharing memberships to project residents. (See DAP Policy AC-1.3 and General Plan Policy T-10.)
- **Job Training:** The project could provide funding to appropriate job training programs in Berkeley and/or the East Bay, such as Building Opportunities for Self Sufficiency (BOSS), Alameda County Workforce Investment Board, or Civicorps. (See DAP Policy HC-5.1 and HC-5.2 and General Plan Policy ED-1.)
- **Employment Opportunities:** The project could provide funding to the City's First Source and/or Youthworks programs, which have experienced funding cuts in recent years. The project is already required to sign a First Source Agreement, but this is a job referral service and does not actually require local hiring. As an additional benefit, the project could agree to hire a minimum number of local residents for jobs on the project site after occupancy. (See DAP Policy HC-5.1 and HC-5.2 and General Plan Policy ED-1.)

In addition, the following benefits could also be considered, based on other City policies (applicable policies are noted):

- **Public Art/Cultural Events:** The project could provide, either directly or through funding to the City, public art pieces within the Downtown, as directed by the Civic Arts Commission (see DAP, p. IN-16, and General Plan Policies ED-11 and UD-34). The project could also provide funding for cultural events in the Downtown, such as music and art festivals and parades (see DAP policy LU-1.2).
- **Seismic Improvements to Public Buildings:** According to the City's Chief Resiliency Officer, there are several critical public buildings in need of funding for seismic improvements, particularly buildings intended to serve as emergency shelters. The project could provide funding for seismic analysis and/or improvements to such buildings, thereby contributing to the safety of the entire Berkeley community. (See the Local Hazard Mitigation Plan, Table 1.1, and General Plan Policy S-20, Actions G and H.)

- **Tenant Relocation/Small Business Assistance:** The project could provide funding for relocation of existing tenants who will be displaced by the project, and/or general assistance for existing and new small businesses in the Downtown. For example, the project could fund micro-loans to appropriate new start-ups desiring to locate in the Downtown. (See General Plan Policy ED-3.)

The above benefits represent just a small portion of the universe of potential options available to the ZAB for consideration.

#### **IV. Recommendation**

Staff recommends that the ZAB hold a public hearing to allow public comment on the proposed community benefits package, provide direction to staff on any further analysis it would like on the benefits package, and provide feedback to the applicant on whether it believes the finding in Section 23E.68.090.E can be made, and if not, what changes might be necessary.

#### **Attachments:**

1. Applicant's "Documentation of Project Significant Community Benefits"
2. Correspondence Received

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