

NO FEE FOR RECORDING PURSUANT
TO GOVERNMENT CODE SECTION 27383

RECORDING REQUESTED BY:

Director of Planning
City of Berkeley Planning and Development Department
2120 Milvia Street, 3rd Floor
Berkeley, CA 94704

WHEN RECORDED MAIL TO:

Director of Planning
City of Berkeley Planning and Development Department
2120 Milvia Street, 3rd Floor
Berkeley, CA 94704

NOTICE OF LIMITATION ON USE OF PROPERTY

Subject Property: 2211 Harold Way
Berkeley, California 94704

NOTICE OF LIMITATION ON USE OF PROPERTY

Notice is hereby given that City of Berkeley Use Permit No. 13-10000010 (“Use Permit”), was duly issued by the City of Berkeley on [date] to the owners of the property located at: 2211 Harold Way, Berkeley, California described in Exhibit A below, authorizing the construction of a mixed-use development, up to 18 stories in height, containing 302 dwelling units, approximately 10,877 square feet of ground-floor commercial space, a ten-theater cinema complex (approximately 641 seats) and 177 underground parking spaces (the “Project”). Berkeley Municipal Code section 23E.68.090.E and the Use Permit require that the Project provide certain “significant community benefits”, and that these benefits be included in a written agreement that is binding on all successors in interest. The written agreement required by the Use Permit and Section 23E.68.090.E is set forth in Exhibit B hereto.

HSR Berkeley Investments, LLC

By: _____
Joseph Penner
Managing Member

Dated: _____

CITY OF BERKELEY

By: _____
Dee Williams-Ridley
Interim City Manager
City of Berkeley

Dated: _____

ACKNOWLEDGMENTS

STATE OF CALIFORNIA

COUNTY OF _____

On _____ 20__, before me, _____
Notary Public, personally appeared _____, who
proved to me on the basis of satisfactory evidence to be the person(s) whose name(s)
is/are subscribed to the within instrument and acknowledged to me that he/she/they
executed the same in his/her/their authorized capacity(ies), and that by his/her/their
signature(s) on the instrument the person(s), or the entity upon behalf of which the
person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the
foregoing paragraph is true and correct.

WITNESS my hand and official seal.

_____ (Seal)
Signature of Notary

ACKNOWLEDGMENTS

STATE OF CALIFORNIA

COUNTY OF _____

On _____ 20__, before me, _____
Notary Public, personally appeared _____, who
proved to me on the basis of satisfactory evidence to be the person(s) whose name(s)
is/are subscribed to the within instrument and acknowledged to me that he/she/they
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WITNESS my hand and official seal.

_____ (Seal)
Signature of Notary

Exhibit A
to
Notice of Limitation on Use of Property

LEGAL DESCRIPTION

PARCEL ONE:

FEE SIMPLE TITLE TO UNITS A AND BAS SHOWN ON THE CONDOMINIUM PLAN ("PLAN") ATTACHED AS EXHIBIT "B" TO THE DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF BERKELEY CENTER ("DECLARATION") RECORDED ON JUNE 14, 1996, AS SERIES NO. 96144849, IN THE OFFICIAL RECORDS OF THE COUNTY OF ALAMEDA, STATE OF CALIFORNIA.

EXCEPTING AND RESERVING THEREFROM EASEMENTS AS DEFINED IN THE DECLARATION.

PARCEL TWO:

AN UNDIVIDED 54 PERCENT (54%) TENANCY-IN-COMMON INTEREST IN LOT 1 AS SHOWN ON THE PARCEL MAP ENTITLED PARCEL MAP 6889 FILED FOR RECORD ON JUNE 13, 1996, IN BOOK 223 OF MAPS, AT PAGES 69 THROUGH 70, INCLUSIVE, IN THE OFFICIAL RECORDS OF THE COUNTY OF ALAMEDA, STATE OF CALIFORNIA.

EXCEPTING THEREFROM THE CONDOMINIUM COMMON AREA AND UNITS A, B AND C AS SHOWN ON THE PLAN AND AS DEFINED IN THE DECLARATION, ALL OF WHICH BUILDINGS LAND IMPROVEMENTS ARE AND SHALL REMAIN REAL PROPERTY.

FURTHER EXCEPTING AND RESERVING THEREFROM EASEMENTS AS DEFINED IN THE DECLARATION.

RESERVING THEREFROM, AN EASEMENT OVER, UPON AND THROUGH LOT 1, AS SERVIENT TENEMENT, IN FAVOR OF THE UNITS AND CONDOMINIUM COMMON AREA SITUATED ON LOT 1, AS THE DOMINANT TENEMENT, FOR THE PURPOSES OF INGRESS AND EGRESS, USE AND ENJOYMENT AND FOR SUPPORT OF THE CONDOMINIUM BUILDINGS (CONDOMINIUM COMMON AREA AND UNITS) SITUATED ON THE SERVIENT TENEMENT.

PARCEL THREE:

AN UNDIVIDED 54 PERCENT (54%) TENANCY-IN-COMMON INTEREST IN THE CONDOMINIUM COMMON AREA AS SHOWN ON THE PLAN AND AS DEFINED IN THE DECLARATION. EXCEPTING THEREFROM UNITS A, B AND C AS SHOWN ON THE PLAN.

FURTHER EXCEPTING AND RESERVING THEREFROM: A NON-EXCLUSIVE EASEMENT FOR INGRESS, EGRESS, SUPPORT, USE AND ENJOYMENT OVER, UPON.

Exhibit B
to
Notice of Limitation on Use of Property

**AGREEMENT FOR PROVISION OF SIGNIFICANT COMMUNITY BENEFITS
PURSUANT TO BMC SECTION 23E.68.090.E AT 2211 HAROLD DAY BERKELEY,
CALIFORNIA**

This Agreement and Declaration of Restrictions is entered into as of, by and between the City of Berkeley ("City") and HSR Berkeley Investments, LLC ("Owner").

WHEREAS, the City of Berkeley has approved Use Permit No. 13-10000010 ("Use Permit"), on [date] to the Owners for the property located at: 2211 Harold Way, Berkeley, California described in Exhibit A above, authorizing the construction of of a mixed-use development, up to 18 stories in height, containing 302 dwelling units, approximately 10,877 square feet of ground-floor commercial space, a ten-theater cinema complex (approximately 641 seats) and 177 underground parking spaces (the "Project"); and

WHEREAS, under Berkeley Municipal Code Section 23E.68.090.E, in order to approve a Use Permit for buildings over 75 feet in height, the City is required to 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, and further requires that provision of these benefits be included as conditions of approval in any use permit, and that the City and the owner enter into a written agreement for the provision of the benefits that is binding on all successors in interest; and

WHEREAS, the Owner, applied for a Project of 180 feet in height, and has voluntarily offered various community benefits as a basis for the finding required by Section 23E.68.090.E; and

WHEREAS, the City has determined that the benefits offered by the Owner are significant community benefits within the meaning of section 23E.68.090, and on that basis has approved the Use Permit for the Project.

NOW, THEREFORE, to assure the provision of those significant community benefits to the public, the Owner and the City agree as set forth below.

ARTICLE I
PROVISION OF SIGNIFICANT COMMUNITY BENEFITS

1. Significant Community Benefits. The Owner will provide the following significant community benefits:

- A. Consistent with Resolution NO. 67,172- N.S., for projects that have been in the permitting process for more than two years prior to June 25, 2015, significant community benefits shall consist of the following: payment of \$100 per square foot for all rentable residential square footage between 75 and 120 feet, and payment of \$150 per square foot for all rentable residential square footage between 121 and 180 feet. The 2211 Harold Way Mixed-Use Project shall pay \$13,524,500 in significant community benefits. Payments or credits shall be made as follows: \$_____ credit for Project Labor Agreement; \$_____ credit for Movie Theater Complex; \$_____ cash payment to Habitot Children’s Museum; and \$_____ cash payment to the City of Berkeley Housing Trust Fund.
- B. Project Labor Agreement — Prior to issuance of any permit for demolition, excavation, grading or construction for the Project, the Owner shall provide to the City a fully executed Project Labor Agreement. Project Labor Agreement (PLA). The applicant shall sign a PLA to require 100% of the project’s construction workers to be union labor, with no trade or work exclusions. The PLA shall include provisions for apprentice programs and local hires. A copy of the PLA shall be provide to the City Attorney with the application for building permits. Elements of the PLA shall be in alignment with Building and Construction Trades Council of Alameda County materials submitted to the City on September 23, 2015, which includes: About Apprenticeships/Craft Information; Wage Information; Alameda County Pre-Apprenticeships; Resident Count by Craft; and Local Hire.
- C. Movie Theater Complex —
1. The Project shall include an approximately 28,249 square foot, 641 seat cinema theater complex. The complex shall include 10 cinemas (movie screening rooms), as well as lobbies, concession areas, restrooms, and associated office and storage space. The physical improvements necessary for the theater shall be shown in all building permit applications for the space where the theater will be located. Excavation and grading plans shall specifically note any excavation or grading in the area where the theater will be constructed.
 2. Prior to issuance of a building permit for any portion of the Project, the applicant shall submit building permit plans that include all tenant improvements necessary for occupancy of the 28,250 square foot, 10 screen movie theater complex, including, but not limited to: complete floor plans with all rooms and areas labeled, interior elevations and details, interior finish schedule, door/window schedule, complete restroom build-outs, complete mechanical, plumbing & electrical drawings including lighting plans and light fixture schedule, commercial energy compliance documentation, etc.

3. The applicant shall submit verification of a tenant for the movie theater complex in the form of an executed lease agreement between the property owner and the movie theater operator and an occupancy permit for the movie theater shall be issued for the movie theater complex prior to issuance of any other occupancy permit for the Project.
4. To ensure continued occupancy of the approximately 28,250 square foot, 10 screen movie theater complex with a community benefit use, the applicant shall:
 - a) Notify the City in writing within 30-calendar days of any pending vacancy of the movie theater complex. Said notice to the City shall provide the following:
 - The date of vacancy;
 - A marketing plan to include the list of agencies/organizations to be contacted, rental amount and all promotional materials; and
 - Expected re-occupancy date.
 - b) In the event of vacancy, offer the movie theater complex to any theater use on a month-to-month basis pending finalization of a long-term lease. Such month-to-month tenancy shall be at a rate that is less than the amount paid by the theater operator, per the following schedule:
 - 6 months after vacancy, rent shall be reduced to 50% of the last monthly amount paid prior to vacancy; and
 - 12 to 18 months after vacancy, rent shall be reduced to 25% of the last monthly amount paid prior to vacancy.

In no event shall short-term rentals take precedence over a long-term lease agreement.

Any replacement use is subject to review by the Zoning Officer.

- c) Pay for needed improvements, if necessary, for subsequent tenants that cannot utilize the theater tenant improvements.
- d) In the event that the owner cannot find a tenant for the theater space for over 18 consecutive months within 55 years of project construction (measured from final certificate of occupancy), the property owner shall reimburse the City of Berkeley for the value of the lost community benefit. The payment shall be calculated using the following formula:

$$(55 \text{ years} - \text{numbers of years vacant}) \times \frac{\text{\$value assigned to benefit}}{55 \text{ years}}$$

D. Cash Payment. The applicant shall make the following cash payments:

1. Prior to issuance of a building permit, \$ _____ shall be paid to Habitot Children's Museum. The applicant shall ensure that a letter from Habitot verifying the payment is submitted to the Zoning Officer for the project file.
2. Prior to issuance of the Certificate of Occupancy, \$ _____ shall be paid into the City of Berkeley Housing Trust Fund.

ARTICLE II GENERAL PROVISIONS

Acknowledgements and Waivers

The Owner acknowledges that the Significant Community Benefits set forth herein were arrived at through a public process to ascertain community interests and the various measures that the Berkeley community believes would consider significant community benefits, and have been offered voluntarily by the Owner.

The Owner acknowledges that this offer was entirely voluntary and that the City had no ability to require the provision of such benefits absent Owner's voluntary agreement to provide them.

Owner is also aware that Berkeley Municipal Code Section 23B.56.030 provides:

Unless otherwise specified or required by the Zoning Officer, Board or Council, 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 submitted during the approval process shall be deemed conditions of approval." Owner is further aware that in approving the Use Permit the City relied in part on Owner's offer of affordable units as set forth herein.

Owner is also aware that Government Code section 66020(d)(1) provides, in part:

Each local agency shall provide to the project applicant a notice in writing at the time of the approval of the project or at the time of the imposition of the fees, dedications, reservations, or other exactions, a statement of the

amount of the fees or a description of the dedications, reservations, or other exactions, and notification that the 90-day approval period in which the applicant may protest has begun.

Owner acknowledges that it has received such notice.

Owner has knowingly and voluntarily waived any and all objections it may assert to the provision of the Significant Community Benefits set forth herein under the Mitigation Fee Act (Gov. Code section 66000 *et seq.*), or any other law.

Term of Agreement

This Agreement shall be in effect for the life of the Project.

Binding on Successors

This Agreement shall constitute a covenant running with the land and shall be binding on the Owner and the Owner's successors and assigns for the entire Term, and the benefit hereof shall inure to the benefit of the City and its successors and assigns. For purposes of this Agreement, the term "Owner" includes such successors and assigns.

Superiority of Declaration

The Owner warrants that (s)he has not executed, and agrees that (s)he will not execute, any other agreement with provisions contradictory to, or in opposition to, the provisions of this Agreement, and that, in any event, the requirements of this Agreement are paramount and controlling as to the rights and obligations between and among the Owner, the City, and their respective successors.

Damages and Remedies

In the event of a breach by the Owner, the City shall have the right to proceed with any and all remedies, either successively or concurrently, set forth in this Agreement as well as any remedy accruing to the City by law including but not limited to the following:

a) Specific Performance. The City shall have the right to mandamus or other suit, action or proceeding at law or in equity to require Owner to perform its obligations and covenants under the Agreement or to enjoin acts on things which may be unlawful or in violation of the provisions of the Agreement.

b) Monetary Relief. If the Owner fails to provide the significant community benefits as set forth herein, the City shall have the right to require Owner to pay to the City an amount equal to the current market value of the Project (as determined by appraisal) less the value of the Project not attributable to the City's grant of height increase over 75 feet.

Remedies Cumulative

No right, power, or remedy given to the City by the terms of this Agreement is intended to be exclusive of any other right, power, or remedy; and each and every such right, power, or remedy shall be cumulative and in addition to every other right, power, or remedy given to the City by the terms of any such instrument, or by any statute or otherwise against Owner and any other person. Neither the failure nor any delay on the part of the City to exercise any such rights and remedies shall operate as a waiver thereof, nor shall any single or partial exercise by the City of any such right or remedy preclude any other or further exercise of such right or remedy, or any other right or remedy.

Indemnification

The Owner shall indemnify, defend, and hold harmless the City, its officers, agents, and employees, against and from any and all claims or suits by any third party arising from any breach or any performance of any obligation by the Owner hereunder, and against and from all costs, attorneys' fees, expenses, and liabilities related to any claim or any action or proceeding brought within the scope of this indemnification; provided, however, that such indemnification shall not include any claim or suit arising out of the obligations under this Agreement and imposed by the City which are found to violate any current or future federal, state, or local law or governmental regulation. This indemnification applies only to legal actions that arise from the Owner's breach of this Agreement.

35. Invalid Provisions

If, for any reason, one or more of the provisions contained in this Agreement are held invalid, illegal, or unenforceable in any respect by a court of competent jurisdiction, such provisions shall be deemed severed from the remaining provisions contained in this Agreement, and the remaining provisions shall be construed to continue in full effect.

Amendments

No alteration or variation of the terms of this Agreement shall be valid unless made in writing by the Parties.

Controlling Law

This Agreement shall be interpreted under the laws of the State of California.

IN WITNESS WHEREOF, the parties have executed this Regulatory Agreement the day and year first above written.

HSR Berkeley Investments, LLC

By: Joseph Penner
Managing Member

Date

City of Berkeley, California

By: Dee Williams-Ridley,
Interim City Manager City of Berkeley

Date

Approved as to form:

Zach Cowan
City Attorney

Date

ACKNOWLEDGMENTS

STATE OF CALIFORNIA

COUNTY OF _____

On _____ 20__, before me, _____
Notary Public, personally appeared _____, who
proved to me on the basis of satisfactory evidence to be the person(s) whose name(s)
is/are subscribed to the within instrument and acknowledged to me that he/she/they
executed the same in his/her/their authorized capacity(ies), and that by his/her/their
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I certify under PENALTY OF PERJURY under the laws of the State of California that the
foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of Notary (Seal)

ACKNOWLEDGMENTS

STATE OF CALIFORNIA

COUNTY OF _____

On _____ 20__, before me, _____
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