

CITY OF BERKELEY  
CITY CLERK DEPT

October 23, 2015

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Mark Numainville, City Clerk  
City of Berkeley  
2180 Milvia Street  
Berkeley, CA 94704

Subject: Appeal of Zoning Adjustments Board Approval of 2211 Harold Way, Use Permit #13-10000010

Dear Mr. Numainville,

This letter and the accompanying appeal fee is an appeal of the Zoning Adjustments Board (ZAB) decision of September 30, 2015, relevant to 2211 Harold Way, Use Permit #13-10000010. This appeal is submitted pursuant to section 23B.32.050.C of the Zoning Ordinance, and all applicable law. This appeal is submitted on behalf of the property owner and project proponent, HSR Berkeley Investments, LLC. As required by section 23B.32.050.C, this letter clearly and concisely sets forth the basis for appeal, including clearly stating and providing reference to all evidence supporting the appeal of the ZAB-mandated community benefits package. We expressly reserve the right to provide additional documentation and argument to the decision-makers once a date is scheduled for a hearing on this appeal and once we have had an opportunity to review and consider the appeal materials and oral argument, if any, made/submitted by other parties.

The project team appreciates the strong community support for the project after nearly three years and more than 35 public hearings. The design of the project and its unprecedented community benefits proposal are a testament to the Berkeley community's high expectations and aspirations as reflected in the Downtown Area Plan and implementing zoning.

We believe that the ZAB decision to disregard the guidance from the City Council on community benefits has caused a significant imbalance in the project's financial profile, jeopardizing the project and compromising the legal foundation of the City's approval. The mandated additional cash payment of \$5.5 million is more than the guidance provided by the City Council, and lacks a reasonable or proportional relationship to the impacts of the project. The ZAB's reduction of the community benefit credit from the project PLA and the new theater was arbitrary, and not based on the actual conditions and facts related to the project. The corresponding conditions placed on the theater also do not mirror the reduced value of the community benefit assigned to the theater complex.

In addition to those stated above, the bases for the appeal are as follows:

### **1. The ZAB Relied on Flawed Economic Data and Analysis, and Disregarded Relevant Substantial Evidence in the Record**

The ZAB failed to ascribe appropriate value to the actual costs of providing the full project construction labor agreement, and for the costs of constructing and operating a new movie theater complex. The data provided in the City's economic analysis (EPS, September, 2015) is neither an appropriate analysis of the project's financial requirements, nor is it an objective sensitivity analysis with respect to the project's costs and returns. In addition to the ZAB's disregard of the actual project costs and financial requirements, the ZAB failed entirely to establish any connection between the requirements it imposed and the anticipated impacts of the project.

The project team requests that the City Council eliminate the ZAB's additional requirements of September 30, 2015, and instead approve the unprecedented significant additional community benefits package proposed. The project's community benefits proposal is consistent with the City Council's guidance and is supported by the data previously provided to the City.<sup>1</sup>

### **2. The Proposed Theater Complex Requirements are Unreasonable**

The conditions of approval with respect to the valuation of the theater complex, its construction, operation, and Notice of Limitations requirements are not feasible, are unfair, and set the stage for project failure. We need to have a set of conditions that is fair and creates an environment for the new theaters to thrive and operate in order to help revitalize the downtown area.

### **3. The Conditions of Approval Should Be Modified To Ensure The Project's Success**

During its meeting of September 30, we believe the ZAB overlooked certain specific requests by the applicant for modification of certain project conditions of approval. Accordingly, as part of the appeal, the applicant reiterates its request for modification of the following specific conditions of approval.

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

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<sup>1</sup> The applicant and project team have provided the City and its board/commissions with substantial evidence related to the proposed community benefits package and project financials. This appeal incorporates by reference all previous submissions, which can be accessed on the publicly available City website at the following address: [http://www.ci.berkeley.ca.us/Planning\\_and\\_Development/Zoning\\_Adjustment\\_Board/2211\\_Harold.aspx](http://www.ci.berkeley.ca.us/Planning_and_Development/Zoning_Adjustment_Board/2211_Harold.aspx).

**APPLICANT REQUEST: Allow a minimum of two years before the use permit will lapse due to the scale and complexity of the project.**

Condition 17. Street Frontage Improvements

**APPLIANT REQUEST: Eliminate the requirement to perform improvements to Shattuck Avenue or provide additional community benefit credit by reducing the cash payment balance commensurate with the cost.** The proposed project does not touch Shattuck Avenue, nor will the construction have any impacts on Shattuck Avenue street frontage. The requirement as it is stated, "to construct and install the curb, gutter, sidewalk, dividers, street trees, benches, and planters along the project's street frontage," should not include Shattuck Avenue, and to do so is overreaching.

Conditions 21 and 53. GreenTRIP Platinum Certification

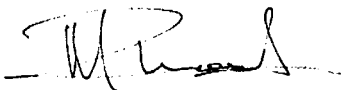
**APPLICANT REQUEST: Eliminate these conditions or provide additional community benefit credit by reducing the cash payment balance commensurate with the cost.** We object to the placement of this condition. GreenTRIP Platinum certification was proposed as a part of the community benefits package that was rejected by the ZAB in December, 2014. We have provided evidence that the project has been conditionally granted GreenTRIP certification and that, according to TransForm, the project provides EXCEPTIONAL transportation options and location. The proposed level of certification is above and beyond the project's otherwise required public benefits.

Condition 57. Design Review and Landmarks Preservation Review for Exterior Alterations and Signage

**APPLICANT REQUEST: Modify the condition to require review only by the LPC.** The approval for any exterior design features and signage is subject only to LPC approval because the property is still a part of a landmark site. The requirement for signage and exterior alterations to be approved by both the DRC and the LPC is not a process contemplated by either the Zoning Ordinance or the Landmarks Preservation Ordinance.

Thank you for expeditious consideration of these points of appeal. We may provide additional information to supplement the points identified above. We are anxious to move the project forward into the construction phase. Should you have any questions please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to be "M. Reed", written over a horizontal line.

Mark A. Rhoades  
President/CEO  
Rhoades Planning Group

C: Joseph Penner, HSR Berkeley Investments, LLC

Kristina Lawson, Project Counsel