

# ATTACHMENT 1

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## FINDINGS AND CONDITIONS

DECEMBER 11, 2008

### 1200 Ashby Avenue

#### Use Permit #07-10000133

#### 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 §21084, et seq.) pursuant to Section 15332 of the CEQA Guidelines (Class 32 "In-Fill Development Projects"), as follows:
  - a. The project is consistent with the applicable General Plan designation and policies, and with the applicable zoning designation and regulations, with the exception of waivers/modifications and concessions pursuant to State density bonus law.
  - 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 site is already developed and has 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. Regarding traffic, the project will not exceed significance criteria for any intersections or residential streets, and will actually help reduce congestion at the Ashby/San Pablo intersection by dedicating land along the Ashby frontage of the site, which will allow the installation of a westbound left-turn lane and signal on Ashby.
  - e. The site is already served by required utilities and public services, which will also adequately serve the project.

Furthermore, the project does not trigger any of the exceptions in CEQA Guidelines Section 15300.2. In particular, the project will not have any significant effects due to unusual circumstances, nor any cumulatively significant impacts (such as traffic), nor will it adversely impact any designated historical resources.

#### GENERAL NON-DETRIMENT FINDINGS

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2. Pursuant to BMC Section 23B.32.040, the Zoning Adjustments Board finds that project will not, under the circumstances of the particular case existing at the time at which the application is granted, will not be detrimental to the health, safety, peace, morals,

comfort or general welfare of persons residing or working in the area or 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 for the following reasons:

- A. The project would add vitality, pedestrian activity and neighborhood-serving commercial uses to the neighborhood by providing substantial new ground-floor commercial space and 98 new dwelling units to support those uses and other businesses in the neighborhood.
- B. The project would be compatible with surrounding land uses, which are similar to those of the project, and would promote the economic vitality of the San Pablo Avenue Corridor, the Ashby/San Pablo commercial node, and the West Berkeley Plan. The project would be compatible with adjacent residential uses, particularly those on Carrison Street, because the commercial driveway is located on Ashby Avenue, the building steps down to three stories at the southeast corner, and it provides setbacks of eight to ten feet along the east property line, including a new fence and landscaping along the southeast property line.
- C. The project would improve the pedestrian environment and appearance of a prominent "gateway" location by redeveloping a vacant property with a mixed use building containing ground floor uses that would generate pedestrian activity and visual interest along the street frontage.
- D. The project would provide 15 affordable housing units, 8 for "very low income" households, thereby helping to meet the City's affordable housing goals.
- E. The project meets the City's minimum residential parking requirements, and has a commercial parking shortfall of only 4 spaces; parking analysis indicates that the lack of these four spaces would not substantially reduce the availability of parking in the vicinity, and it would not generate any significant traffic impacts, as stated in Finding 1 above.
- F. The project would not result in significant additional traffic on nearby residential streets, because the commercial driveway would be located on Ashby Avenue, and a left-turn pocket would be provided on San Pablo Avenue to facilitate access to the residential driveway on Carrison Street from San Pablo and minimize the use of Mabel and Carrison Streets. The project also helps minimize the use of Mabel and Carrison Streets by dedicating land along the Ashby frontage of the site that will allow a left-turn signal to be installed on westbound Ashby, thereby reducing congestion at Ashby and San Pablo and encouraging the use of this intersection rather than residential streets. Due to these factors, the project would increase weekday traffic by 5 percent on Mabel Street and 11 percent on Carrison Street. The weekend increase would be 4 percent on Mabel and 7 percent on Carrison. This increase is well below the threshold of 25 percent at which traffic increases become noticeable to most observers.

## DENSITY BONUS / AFFORDABLE HOUSING FINDINGS

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3. Pursuant to Government Code Sections 65915(b) and 65915(n), and BMC Section 23C.12.050.A, the Zoning Adjustments Board (ZAB) makes the following findings for density bonus entitlements:
  - A. The project is entitled to a density increase of 35 percent 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 (g)(1), plus two additional concessions or incentives as set forth in Finding 4 below.
  - B. Under the City's methodology for implementing density bonuses under Section 65915, the "base project" for the proposed 98-unit project consists of commercial space and parking on the ground floor, and 74 residential units on the first, second, third, and fourth floors, with an average unit size of 1,101 square feet.
  - C. The applicants have committed that 15 (20.3 percent) of the units in the 74-unit "base project" will be affordable for lower income households, as more fully set forth in Conditions of Approval 68. This commitment entitles the applicants to a minimum density bonus of 35 percent (26 units after rounding) with a total area of 29,729 square feet. The applicants have requested a density bonus of 32.4 percent (24 market-rate units) with a total area of 22,773 square feet.
  - D. The approval of a density bonus to promote the development of affordable housing at a location well-served by transit is consistent with the policies of the General Plan Housing Element (Policy H-16) and other West Berkeley Plan Policies cited in Finding No. 5, below.
4. In accordance with Government Code Section 65915, the ZAB hereby grants Variances to: a) allow five stories where four are normally allowed; b) allow a building height of 60 feet, 3 inches where 50 feet are normally allowed; and c) allow inclusionary unit sizes and locations that are not "reasonably dispersed throughout the project," as required by BMC Section 23C.12.040.D. The ZAB also grants a Use Permit to waive the required 15-foot setbacks at the northeast and southeast corners of the site (Ashby Avenue and Carrison Street). The basis for these approvals is as follows.
  - A. This project is a "housing development" as defined in Government Code Section 65915(j) and qualifies for a 35 percent density bonus as stated in Finding 3.C above.
  - B. Government Code Section 65915(e) allows the applicant to request waivers or modifications of development standards in order to construct a project proposed under State Density Bonus law. The law requires a local government to waive development standards if these standards would preclude construction of density units in a particular proposed project.

- C. The density bonus units cannot be accommodated within the otherwise maximum allowable residential building envelope of the C-W District, which allows up to four stories and a height of 50 feet, and requires 15-foot setbacks at the northeast and southeast corners of the site (on Ashby Avenue and Carrison Street), and therefore the C-W standards must be modified to accommodate the density bonus units. In this case, consistent with the applicant's request, the ZAB waives and/or modifies these standards for the following reasons:
1. The proposed fifth story is the most appropriate, and least detrimental, way to accommodate the density bonus units because it maintains other amenities and mass reductions in the project, such as an interior courtyard, a community plaza on San Pablo Avenue, and a three-story height at the southeast corner of the building. In addition, the five-story height is consistent with other approved mixed-use projects on commercial corridors in the City and the immediate vicinity (e.g., 2747 San Pablo Ave.).
  2. The fifth story allows for interior courtyards and gardens that provide better natural light and ventilation to the units, thereby reducing energy consumption and greenhouse gases. A four-story building of similar size would not be able to provide courtyards of the same size and quality, since a greater portion of each floor would have to be devoted to residential space instead.
  3. The building height of 60 feet, 3 inches is necessary to provide a 15-foot ceiling in the ground floor commercial space, which enhances the quality and viability of the space and thereby benefits the neighborhood, and 9-foot ceilings on the residential floors, which is considered the minimum ceiling height in residential construction and enhances natural light and quality of life for residents, thereby helping to discourage resident turnover.
  4. The reduced setbacks at the northeast and southeast corners of the building are necessary to accommodate part of the project's density bonus. Without these setbacks, amenities currently proposed in the project, such as an interior courtyard, a community plaza on San Pablo Avenue, and a three-story height at the southeast corner of the building, would have to be reduced or eliminated.
- E. As provided in Government Code Section 65915(d)(2)(B), the applicant has requested a concession to locate all inclusionary units on the second through fourth floors, and none on the fifth floor. This arrangement does not comply with Section 23C.12.040.D, which requires that inclusionary units be "reasonably dispersed throughout the project" because the 5<sup>th</sup> floor contains almost one quarter of the total units in the building, and there is no particular physical reason why such a large portion of the units cannot be on the fifth floor, since it is roughly the same size as the other floors. Furthermore, the fifth floor offers greatly enhanced views, and the City's longstanding approach to "reasonable dispersion" is that inclusionary and market-rate units should be more or less comparable throughout the building,

with respect to floors, views, and other amenities. The Zoning Adjustments Board grants these concessions based on the following:

1. The applicants have demonstrated, and staff has verified, that the concession is necessary to provide for the project's affordable housing costs, because the density bonus units do not fully provide for these costs.
  2. The concession would not have a specific adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon public health and safety or the physical environment or on any real property that is listed in the California Register of Historical Resources.
  3. Based on Findings 4.E(1) and (2) above, and pursuant to Government Code Section 65915(d)(1), there is no basis for the City to deny the requested concession.
5. The project is a "housing development project" as defined in Government Code Section 65589.5(h)(2)(B), because it consists of residential uses and nonresidential uses which are limited to neighborhood commercial uses and to the first floor of a five-story building. The project's nonresidential uses qualify as "neighborhood commercial" uses because the project's largest possible commercial space will be 6,106 square feet, which is too small for a region- or area-serving business. In addition, the applicants have requested flexibility to allow up to 8 commercial tenants, in which case the largest space would be far less than 6,106 square feet.

#### OTHER REQUIRED FINDINGS

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6. **(C-W General Findings)** Pursuant to BMC Section 23E.64.090.B, the Zoning Adjustments Board finds that:
1. The project is consistent with the purposes of the C-W District in that it provides additional commercial spaces that will primarily serve area residents and/or businesses (purpose B), provides mixed income housing that will support local retailers and transit lines (purpose G), and appropriately intensifies development on an underutilized site (purpose H).
  2. The project is compatible with the surrounding uses and buildings in that its height steps down from five to three stories at the southeast corner and steps back 8 to 10 feet along the east property line, in order to minimize impacts on the adjacent residential uses. Furthermore, the proposed residential and commercial land uses are similar to those of surrounding properties.
  3. The project is consistent with the West Berkeley Plan's goals to "encourage infill buildings on vacant and low intensity use sites along [San Pablo Avenue] Corridor" (Urban Design Policy 1.8), and "foster the continued vitality of West Berkeley's neighborhood and regional serving retail trade, in as pedestrian-friendly a manner

as possible” (Land Use Policy 2.E). In addition, the project will “use tools such as increased building setbacks or upper story step backs, landscaping, and other means to reduce the impacts of differences in scale, style, and site plan” (Physical Form Policy 4.2).

4. The project is supportive of an increase in the continuity of retail and service facilities at the ground level to the degree feasible and does not substantially degrade, but rather enhances, the existing urban fabric of the street and area, because it provides new street-fronting commercial space on the vacant site and maximizes the pedestrian orientation of San Pablo Avenue by locating the two driveways on Ashby Avenue (for commercial parking) and Carrison Street (for residential parking), rather than San Pablo.
5. The project provides an intensity of development which does not underutilize the property, because it proposes a floor area ratio (3.3) that is higher than most development located along San Pablo.
6. The project meets applicable performance standards for off-site impacts, including the City’s thresholds of significance for traffic impacts.
7. The project does not exceed the amount and intensity of use that can be served by available traffic capacity and potential parking supply, as stated in Finding 1(d) of the CEQA findings above.

**7. (C-W Node Findings)** Pursuant to BMC Section 23E.64.090.C, the Zoning Adjustments Board finds that the project supports the development of a strong retail commercial, pedestrian oriented environment at the Ashby/San Pablo node, for the following reasons:

- A. The project provides 7,770 square feet of new street-fronting commercial space with generous ceiling heights of 15 feet, relatively large, prominent and continuous doors and windows along San Pablo Avenue, and, for the 6,106-square-foot area at northwest corner of the building depth, a generous depth of at least 50 feet.
- B. The project maximizes the pedestrian orientation of its longest frontage on San Pablo Avenue by placing an 18’ by 25’ community plaza adjacent to the sidewalk, and by locating the two driveways on Ashby Avenue (for commercial parking) and Carrison Street (for residential parking), so as not to interrupt the San Pablo frontage with parking or driveways.
- C. The northwest corner of the building is designed to highlight the Ashby/San Pablo intersection as a prominent gateway into the City, by increasing the height at that corner to create a “tower” feature.
- D. In accordance with Section 23E.64.040.E, the proposed commercial uses would be limited to retail sales, personal/household services, and food and alcohol service, all of which rely on, and generate, pedestrian activity.

8. **(New Floor Area)** Pursuant to BMC Section 23E.64.050, the Zoning Adjustments Board finds that the proposed floor area will not be detrimental because the project's height and bulk scheme minimize impacts on the adjacent residential neighborhoods, and because the project has been reviewed and accepted by the Design Review Committee to ensure an attractive design.
9. **(Full Service Restaurant)** Pursuant to BMC Section 23E.64.030, the Zoning Adjustments Board finds that the full service restaurant would not be detrimental because it provides a basic neighborhood service in a neighborhood currently lacking restaurants, and provides adequate on- and off-site parking to accommodate the restaurant's parking needs.
10. **(Alcohol Service)** Pursuant to BMC Section 23E.16.040, the Zoning Adjustments Board finds that the service of beer, wine and distilled spirits incidental to a full-service restaurant would not be detrimental because such service does not generally create the same potential for detrimental impacts as bars, since alcohol tends to be consumed in smaller quantities and with food, or as retail alcohol stores, since alcohol is consumed on-site and not taken from the premises. In addition, the Police Department has reviewed the application and does not expect any significant crime-related impacts or other public nuisances, and the permit includes a condition of approval requiring that a detailed floor plan of the restaurant be submitted to the Police Department for approval prior to establishment of the restaurant.
11. **(Parking Waiver)** Pursuant to BMC Section 23E.64.080.H, the Zoning Adjustments Board finds that a reduction in required commercial parking from 19 to 15 spaces will not be detrimental because at least 30 percent of the total on-street parking spaces on the five nearest block faces are generally available during the afternoon, and in combination with the on-site parking, these spaces should be adequate to prevent any excessive impact on the neighborhood parking supply. In addition, the provision of a shared vehicle for project residents and employees, the relatively good transit service at the site, and the neighborhood-serving character of the proposed commercial space, will help encourage walking and biking trips to the site, and reduce the project's off-site parking demand.
12. **(Sidewalk Café Seating)** Pursuant to BMC Section 23E.24.020, the Zoning Adjustments Board finds that the café seating would not unduly interfere with pedestrian traffic on the sidewalk or access of public employees and utility workers to meters, fire hydrants or other street hardware objects in the right-of-way and would not obstruct views of traffic devices.
13. **(Operating Hours)** Pursuant to BMC Section 23E.64.060.A, the Zoning Adjustments Board finds that operating hours of 6:00 a.m. to 12:00 a.m. will not be detrimental because such hours will contribute to additional legitimate nighttime activities at the site and immediate vicinity, thereby increasing neighborhood safety, and because the commercial parking and waste/recycling area are enclosed and accessed off of Ashby Avenue rather than the more residential Carrison Street.

14. **(Fence Over 6 Feet)** Pursuant to BMC Section 23E.04.040.A, the Zoning Adjustments Board finds that the eight-foot fence along the southeast portion of the site will not be detrimental because it has been provided at the request of the adjacent neighbor, in order to provide increase privacy.
15. **(Mechanical/Architectural Projections)** Pursuant to BMC Section 23E.04.020.C, the Zoning Adjustments Board finds that proposed rooftop projections, would not be detrimental because they are limited in size and height in relation to the overall building, their design has been reviewed and accepted by the Design Review Committee, and the proposed mechanical room at the northwest corner of the building adds significant architectural character to the building at an important “gateway” intersection to the City.

## STANDARD CONDITIONS

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

The conditions of this Permit shall be printed on the first sheet of each plan set submitted for a building permit pursuant to this Use Permit, under the title ‘Use Permit Conditions.’ The second sheet may also be used if the first 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 exclude 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 for which this Permit is approved is permitted unless the Permit is modified by the Zoning Adjustments Board, in conformance with Section 23B.56.020.A. 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. The Zoning Officer may also approve a maximum two-foot variation to Board approved plans, provided, that such variation does not increase a structure's height, reduce the minimum distance to any property line, and/or does not conflict with any special objective sought by the Board.

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

Except as expressly specified herein, the site plan, floor plans, building elevations and any additional information or representations submitted by the applicant during the Staff review and public hearing process leading to the approval of this Permit, whether oral or written, which indicated the proposed structure or manner of operation are deemed conditions of approval.

**6. Subject to all City and Other Regulations (Section 23B.56.040)**

The approved use and/or construction are subject to, and shall comply with, all applicable City Ordinances and laws and regulations of other governmental agencies.

**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.

## ADDITIONAL CONDITIONS

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

9. **(Dedication of Right-of-Way on Ashby)** Within 180 days of project approval, or prior to issuance of a building permit, whichever is earlier, the applicant shall grant the City and/or State (as necessary) an irrevocable offer of dedication of the northernmost five feet of the project site, adjacent and parallel to Ashby Avenue, to allow installation of a westbound left-turn lane and signal on Ashby.

### **Prior to Issuance of Any Building Permit:**

10. Prior to applying for a building permit, the applicant shall file an "Address Assignment Request Application" with the Permit Service Center (2120 Milvia 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.
11. Prior to issuance of a building permit, the applicant shall secure approval of any parcel merger and/or lot line adjustment associated with this Use Permit.
12. Prior to issuance of a building permit, the applicant shall review the Draft LEED NC Checklist and submit any changes that affect the project's score, along with comments on revised measures, to the project planner. Provided that the project qualifies, the applicant shall also apply for PG&E's "Savings by Design" program for new commercial construction and submit a copy of the application to the project planner.
13. Prior to issuance of a building permit, the applicant shall provide the project planner with the name and telephone number of the individual empowered to manage construction noise from the project. The individual's name, telephone number, and responsibility for noise management shall be posted at the project site for the duration of construction in a location easily visible to the public. The individual shall record all noise complaints received and actions taken in response, and submit this record to the project planner upon request.
- Noise Management Individual \_\_\_\_\_  
Name Phone #
14. Prior to issuance of a building permit, the applicant shall complete a "Construction and Demolition Recycling Plan," submit the plan to the Solid Waste Management Division for approval, and attach the approved plan to the construction drawings. The plan is available at [www.ci.berkeley.ca.us/onlineservice/forms.htm#planning](http://www.ci.berkeley.ca.us/onlineservice/forms.htm#planning) (look under "Land Use Planning") or by contacting Land Use Planning at 510-981-7410. After completing the form contact Solid Waste Management at 981-6357 for approval.

15. Prior to issuance of a building permit, the applicant shall secure the City Traffic Engineer's approval of a "construction traffic management plan". Please contact the Office of Transportation at 981-7010, or 1947 Center Street, 3<sup>rd</sup> floor, 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 City 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.
16. Project is subject to Final Design Review (FDR) approval by the Design Review Committee prior to building permit issuance. All conditions of FDR approval shall be incorporated into the plans submitted for a building permit.
17. Prior to issuance of a building permit, the applicant shall secure an encroachment permit from the California Department of Transportation (Caltrans) for any building features that project into, or any construction activity within, the public right-of-way on Ashby Avenue or San Pablo Avenue. The applicant shall secure an encroachment permit from the City of Berkeley for any building features or construction activity within, the public right-of-way on Carrison Street.
18. Prior to issuance of a building permit, the applicant shall submit any geotechnical plans and recommendations required by the Building and Safety Division.
19. Plans submitted for building permit shall include public improvements in accordance with the Oct 15, 2003 San Pablo Avenue Public Improvements Plan and BMC Chapter 16.06. Said improvements shall include the following, subject to review and approval of the City Public Works Department, City Office of Transportation, City Forester, and California Department of Transportation:
  - Curb, gutter, sidewalk, and curb ramps
  - Pedestrian-scaled pole lighting and fixtures and conduit
  - Trash/recycling receptacles
  - Public benches
  - Bicycle racks
  - News racks
  - Street trees and tree grates
  - Irrigation of street trees and planting areas
20. Prior to issuance of a building permit, construction drawings shall be reviewed and approved by the City's Toxics Management Division (TMD). The applicant shall provide to TMD a plan for detection, analysis, and removal of any contaminated soil and groundwater that may be discovered during construction activities. TMD shall have authority, based on permit review and/or subsequent detection of contaminated materials, to require additional information and/or mitigations as necessary to protect construction workers, the community and the environment. Obvious soil contamination discovered during demolition, grading, or excavation shall be removed, segregated,

profiled, covered, and removed, consistent with the approved plan or as determined by TMD. The applicant shall contract with a qualified professional to collect verification soil samples to ensure complete soil removal, and the City of Berkeley Toxics Management Division shall be notified of all soil contamination requiring removal.

21. Prior to issuance of a building permit, the applicant and/or end user(s) shall enter into a First Source Agreement with the City's WorkSource program, a referral service for Berkeley residents seeking jobs. The agreement requires employers to consult WorkSource before hiring construction workers or permanent employees, but leaves the final hiring decision with the employer. Please call (510) 981-7551 for further information, or visit WorkSource at 1947 Center Street (basement).
22. 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. Prior to issuance of a building permit, the applicant shall deposit \$10,000 with the City, or less with the approval of the Zoning Officer, to pay for the cost of monitoring compliance with the Construction Management Plan (Condition 14), and other applicable conditions and regulations. Should compliance monitoring expenses exceed the initial deposit, the applicant shall deposit additional funds to cover such additional expenses upon the request of the Zoning Officer.
24. Prior to issuance of a building permit, the project shall demonstrate compliance with the requirements of the City's National Pollution Discharge Elimination System (NPDES) permit as described in Berkeley Municipal Code Section 17.20, to the satisfaction of the Public Works Department.
25. Prior to issuance of a building permit for the restaurant, the restaurant floor plan shall be submitted to the Police Department's Community Services Bureau for approval, and any changes required by the Police Department shall be included in the plans submitted for a building permit.

**Prior to Construction:**

26. 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 including (1) project description, (2) description of construction activities, (3) daily construction schedule (i.e., time of day) and expected duration (number of months), (4) the name and phone number of the Noise Management Individual for the project, (5) commitment to notify neighbors at least four days in advance of authorized extended work hours and the reason for extended hours, and (6) that construction work is about to commence. A copy of such notice and methodology for distributing the notice shall be provided in advance to the City for review and approval.

27. Prior to any construction activities, 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:**

28. Prior to any excavation, grading, clearing, or other activities involving soil disturbance during the rainy season (between October 15 and April 15), the applicant shall obtain approval of an erosion prevention plan by the Building and Safety Division and the Public Works Department.
29. Construction activity shall occur only between the hours of 7:00 a.m. and 5:00 p.m. on Monday through Friday, and between 9:00 a.m. and 4:00 p.m. on Saturday. 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 applicant must notify the Zoning Officer and request an exception for a finite period of time. The project shall not be allowed more than 10 extended working days. If the Zoning Officer approves the request, then at least four days prior to the expanded schedule, the applicant 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. No construction-related activity shall occur on Sunday.
30. Where technically and economically feasible, construction activities shall not exceed the maximum sound levels specified in BMC Section 13.40.070.B.7(b). To ensure compliance, the Zoning Officer is authorized to place additional limitations on the hours of operation and/or halt construction until corrective measures are taken.
31. Equipment and trucks used for project construction shall utilize the best available noise control techniques (e.g., improved mufflers, equipment re-design, use of intake silencers, ducts, engine enclosures and acoustically-attenuating shields or shrouds) wherever feasible and necessary. No construction activity that may cause excessive off-site vibration or noise from heavy machinery such as piledrivers, drilling rigs (except as necessary for elevator, shoring, and soil testing), etc. shall be allowed.
32. Impact tools (e.g., jack hammers, pavement breakers and noise drills) used for project construction shall be hydraulically or electrically powered wherever possible to avoid noise associated with compressed air exhaust from pneumatically powered tools. However, where use of pneumatic tools is unavoidable, an exhaust muffler on the compressed air exhaust shall be used; this muffler can lower noise levels from the exhaust by up to 10dB. External jackets on the tools themselves shall be used where

feasible and this could achieve a reduction of 4 dB. Quieter procedures shall be used such as drilling rather than impact equipment whenever feasible.

33. The height and location of the proposed structure, property lines and spot elevations shall be verified by a licensed surveyor or engineer on site after foundation forms are placed, but before pouring concrete or placing construction material in its permanent position. This verification shall be to the satisfaction of the Zoning Officer.
34. 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.
35. Subject to approval of the Public Works Department, the applicant shall repair any damage to public streets and/or sidewalks by construction vehicles traveling to or from the project site.
36. 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.
37. Trucks hauling debris, soil, sand, or other loose materials shall be covered or required to maintain at least two feet of board.
38. Public streets shall be swept (preferably with water sweepers) of all visible soil material carried from the site.

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

39. Except as modified herein, the project shall conform to the approved plans dated November 10, 2008, and to all statements in the Use Permit.
40. Prior to issuance of an occupancy permit or final inspection approval, the applicant shall update, sign, and submit an as-built *LEED NC Checklist* reflecting final as-built conditions, including the total score, to the project planner. If project is eligible for Savings by Design, documentation of the conservation analysis shall be submitted.
41. **(Child Care Fees)** In accordance with a schedule determined by the Office of Economic Development (OED), the applicant shall pay an initial portion of the child care mitigation fees required under BMC Chapter 22.20 prior to occupancy, and shall pay the remainder of the required fees after occupancy. Unless such fees are specifically reduced or waived by the Zoning Adjustments Board pursuant to BMC Section 22.20.090, the required fees shall be \$7,770.

**Restaurant Use:**

42. Hours of operation for a full-service restaurant within the subject building during which customers may be present shall be limited to between 6:00 a.m. and 12:00 midnight. Customer service before or after these hours shall not occur without prior approval by the Zoning Adjustments Board.
43. Cooking odors, noise, exterior lighting and outdoor operation of sidewalk café seating shall be controlled so as to prevent verified complaints from the surrounding neighborhood. This shall include noise created by employees working on the premises before or after patrons arrive.
44. The owner or operator of the establishment shall take reasonable measures to prevent disturbances by patrons in the immediate vicinity. Such measures shall include signs reminding patrons of nearby residences and requests not to congregate or loiter near such residences nor operate vehicles in a noisy manner on residential streets. The operator shall give surveillance to public areas near the establishment, keep such areas free of trash and litter, provide lighting, and otherwise attempt to prevent conduct that might disturb the peace and quiet of residences in the vicinity.
45. Changes to the building's facade, including new doors, windows, signs, or awnings, and venting mechanisms for the full-service restaurant are subject to Design Review approval prior to issuance of a building permit.
46. Containers used for the dispensing of prepared food shall identify the establishment. Polystyrene foam food packing is prohibited by Section 11.60.030 of the Berkeley Municipal Code.
47. 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.
48. The operator of the proposed restaurant shall place a waste receptacle near the entry and shall ensure that the sidewalk in front of the establishment and within 50 feet thereof remains clean.
49. Any establishment selling beverages in cans or bottles that are subject to the State of California Container Deposit Law shall recycle such containers.
50. The operator shall assume reasonable responsibility for ensuring that patrons do not block the entrance or interfere with pedestrian activity on the adjacent public sidewalk.
51. The Zoning Adjustments Board shall have the authority to modify or revoke this Use Permit upon finding that the food service establishment violates any of these conditions or is detrimental to persons residing or working in the neighborhood, to property and improvements in the neighborhood or to the general welfare of the City.

In making this finding, the Board may rely upon neighborhood complaints, Police Department calls for service, and any other indicators of a recurring impact upon the neighborhood or City.

### **Alcohol Service**

52. Pursuant to BMC Section 23F.04.010, alcohol sales “may not generate gross receipts in excess of thirty-three percent (33%) of the gross receipts generated by the primary (food service) use.” In addition, the California Department of Alcohol Beverage Control (ABC) allows this alcohol use only as part of a “bona fide eating place” making “actual and substantial sales of meals,” and stringently enforces this requirement.
53. No sign(s) advertising alcoholic beverages shall be visible from the public right-of-way.
54. Employees shall not serve alcohol to patrons who appear to be inebriated or otherwise unable to behave in an orderly manner upon consuming alcohol.
55. All employees selling and/or serving alcohol, or directly supervising such sales and/or service, shall complete a course in Responsible Beverage Sales and Service (RBSS) through the California Department of Alcoholic Beverage Control within 6 months of employment at the establishment. Employees who have completed the course within the last five (5) years shall be exempt from this requirement.

### **Sidewalk Café Seating:**

56. Prior to placement of seating, the applicant shall obtain all necessary approvals from the California Department of Transportation.
57. Prior to placement of seating, the permittee shall demonstrate possession of liability insurance in the amount of at least one million dollars (\$1,000,000). Said insurance shall name the City of Berkeley as additionally insured and shall be in a form acceptable to the City Attorney.
58. Sidewalk Cafe Seating shall remain in the location and configuration shown on the approved site plan, and the number of tables and chairs shall not be increased without prior approval of the Zoning Officer.
59. At least half of the seats shall be wheelchair accessible. Accessible tables shall have clear floor space with minimum dimensions of 30 inches by 48 inches, maximum height of 34 inches, and minimum knee space of 27 inches high, 30 inches wide and 19 inches deep.
60. All Sidewalk Cafe Seating components shall be stored in a secure location on private property when not in use.

61. The permittee shall regularly inspect and clean the Sidewalk Cafe Seating and that portion of the public sidewalk adjacent to the establishment. A waste receptacle shall be placed immediately inside the entrance of the establishment.
62. The permittee shall monitor and control the use of the Sidewalk Cafe Seating so as to prevent disturbance of the surrounding neighborhood.
63. No alcoholic beverages shall be served to the Sidewalk Cafe Seating at any time.
64. Pursuant to BMC Chapter 12.70, smoking is prohibited in the Sidewalk Cafe Seating, and "No Smoking" signs shall be conspicuously posted in the seating area.
65. Sidewalk Cafe Seating shall not be used before 7 a.m. or after 10 p.m. without prior approval of the Zoning Officer. The Zoning Officer may modify these hours as necessary to avoid detriment or to achieve conformance with revised City standards or policies.
66. If the seating authorized by this Use Permit is found to be in conflict with existing or proposed public facilities or improvements, such seating shall, upon written demand of the City Manager or his/her designee, and at the sole expense of the permittee, be removed or relocated in such a way as to eliminate the conflict. Should the permittee fail to comply with said demand within a reasonable period of time, the City may relocate such seating at the expense of the permittee. Noncompliance shall also be a violation of the Ordinance.
67. Permittee's Liability: By accepting this Permit, the permittee explicitly agrees to hold the City, its officers and employees harmless from any liability, claims, suits or actions for any and all damages alleged by reason of the permittee's installation, operation, maintenance or removal of said Sidewalk Cafe Seating.

**Inclusionary Housing Requirements:**

68. **Inclusionary Requirements.** Prior to the issuance of a certificate of occupancy, the applicant shall enter into an inclusionary housing agreement providing for compliance with the requirements of Berkeley Municipal Code (BMC) Chapter 23C.12 and the State Density Bonus Law (Gov. Code § 65915). The inclusionary housing agreement shall include, but not be limited to, the following conditions:
  - A. **Number of Inclusionary Units.** The project shall include fifteen (15) inclusionary dwelling units out of a total of 98 dwelling units in the project. The Inclusionary Units shall be as shown on the plans dated November 10, 2008, unless the selection of other units is authorized in writing by the City, pursuant to BMC Chapter 23C.12 and the Regulatory Agreement.
  - B. **Sales Prices of Inclusionary Units.** If inclusionary housing units are sold as condominiums, the sales price shall not exceed three (3) times 60 percent (60%) of the Area Median Income (hereinafter referred to as "AMI") as of the date of the sale

the unit, and as adjusted for the appropriate household size pursuant to City of Berkeley Resolution No. 60,328-N.S.

**C. Rents of Inclusionary Units.** If the inclusionary housing units are rented, the following ceilings shall apply:

- 1) Eight (8) units shall be rented at a level that is affordable to households with an income level of not more than fifty percent (50%) of the AMI. In the alternative, this requirement may also be met through rentals pursuant to the Section 8 program at the rent levels authorized by that program.
- 2) Seven (7) units shall be rented at a level that is affordable to households with an income level of not more than eighty-one percent (81%) of the AMI.
- 3) The **gross** rent levels of units that are not rented pursuant to the Section 8 program shall not exceed 30% of the applicable income level ceiling for the unit (either fifty percent (50%) or eighty-one percent (81%) of AMI). Gross rents shall include an allowance for utility costs in accordance with the inclusionary housing ordinance. Gross rent levels of units rented pursuant to the Section 8 program shall be determined by the regulations of that program.

The requirements of this section shall apply to rentals of units that are individually owned as condominiums as well as to units in rental projects.

**D. Calculation of Area Median Income (AMI).** AMI 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. The AMI applicable to each unit shall be determined in accordance with the following table:

Unit Size	Applicable AMI Standard
Under 400 sq. ft.	AMI for a one person household
400-599 sq. ft.	AMI for one person household plus one quarter of the difference between the AMI for a one person household and for a two person household
600-699 sq. ft.	AMI for one person household plus one half of the difference between the AMI for a one person household and for a two person household
700-849 sq. ft.	AMI for a two person household
850-999 sq. ft.	AMI for a three person household
1,000-1,199 sq. ft.	AMI for a four person household
1,200 sq. ft. or more	AMI for a six person household

**E. Contents of Inclusionary Housing Agreement.** The inclusionary housing agreement shall include:

- 1) Designation of the inclusionary units on the project floor plans;
- 2) Requirements governing the selection of tenants;
- 3) Requirements governing the marketing and sale of units;
- 4) City monitoring and reporting requirements;
- 5) Restrictions on the resale prices of condominium units;
- 6) Other terms and conditions necessary to ensure compliance with BMC Chapter 23C.12.
- 7) Any other provisions required for the purpose of qualifying the project for a density bonus under Government Code Section 65915.

**At All Times:**

69. In order to promote a more attractive streetscape, visibility into the ground floor commercial space shall be maintained, and occupants shall not block the windows of such space with shelving, furniture, blinds, curtains, or other window coverings, or any other object that would substantially reduce visibility into the commercial space. Window displays (but not signage) shall be permitted.
70. The applicant shall hold the City of Berkeley and its officers harmless in the event of any legal action related to the granting of this Permit, shall cooperate with the City in defense of such action, and shall indemnify the City for any award of damages or attorneys fees that may result.