



Z O N I N G
A D J U S T M E N T S
B O A R D
S T A F F R E P O R T

FOR BOARD ACTION
JANUARY 12, 2023

2439 Durant Avenue

Use Permit #ZP2021-0192 to demolish a two-story commercial building and construct a 36,529 square-foot 7-story mixed-use building with 22 dwelling units and a roof deck, and establish an entertainment use with the service of distilled spirits.

I. Background

A. Land Use Designations:

- General Plan: AC – Avenue Commercial
- Zoning: C-T – Telegraph Avenue Commercial District

B. Zoning Permits Required:

- Use Permit pursuant to Berkeley Municipal Code (BMC) Section 23.326.070(A) to demolish a non-residential building.
- Use Permit pursuant to BMC Section 23.204.020 to add a mixed-use residential building.
- Use Permit pursuant to BMC Section 23.204.020 to add dwelling units.
- Use Permit pursuant to BMC Section 23.204.110(D)(4) to increase the building height to 75 feet, and increase the FAR to 6.
- Use Permit pursuant to BMC Section 23.310.020(B) to add service of distilled spirits.
- Use Permit pursuant to BMC Section 23.204.020 to add an entertainment establishment.
- Administrative Use Permit pursuant to BMC Section 23.304.050(A) to add mechanical chases and stair and elevator overruns that exceed the 75-foot height limit.
- Administrative Use Permit pursuant to BMC Section 23.302.020(D) to add amplified live entertainment.
- Administrative Use Permit pursuant to BMC Section 23.302.070(E)(2) to add a food service establishment larger than 1,500 square feet.

C. CEQA Recommendation: It is staff's recommendation to ZAB that the project is categorically exempt pursuant to §15332 ("In-Fill Development Projects") of the CEQA Guidelines. The determination is made by ZAB.

The project meets all of the requirements of this exemption, as follows:

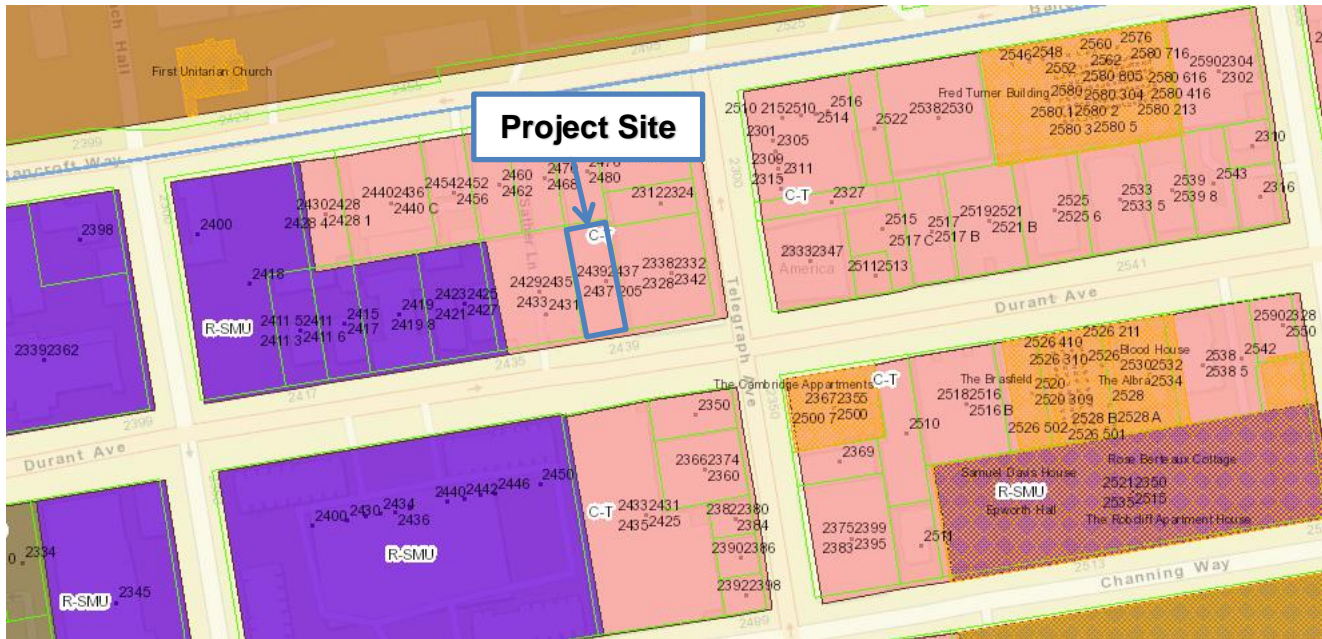
- The project is consistent with the applicable General Plan designation and policies, and with the applicable zoning designation and regulations.
- The project occurs within the Berkeley City limits on a project site of no more than five acres, and is surrounded by urban uses.
- The parcels within the project site have previously been developed and have no value as habitat for endangered, rare or threatened species.
- The project would not result in any significant effects relating to traffic, noise, air quality or water quality. The Traffic Impact Analysis prepared for the project was reviewed by City Transportation Division which concurred with the findings of less than significant impacts. Standard Conditions of Approval would address potential impacts related to traffic, noise, air quality, and water quality.
- The site can be adequately served by all required utilities and public services.

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

D. Parties Involved:

- Applicant Austin Springer, Studio KDA, 1810 Sixth Street, Berkeley, CA
- Property Owner Fortuneworld Inc., c/o Wilson Wong, 200 Creedon Circle, Alameda, CA

Figure 1: Zoning Map



Legend

- C-T: Telegraph Avenue Commercial District
- R-SMU: Residential Southside District

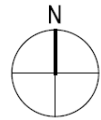


Figure 2: Proposed Site Plan

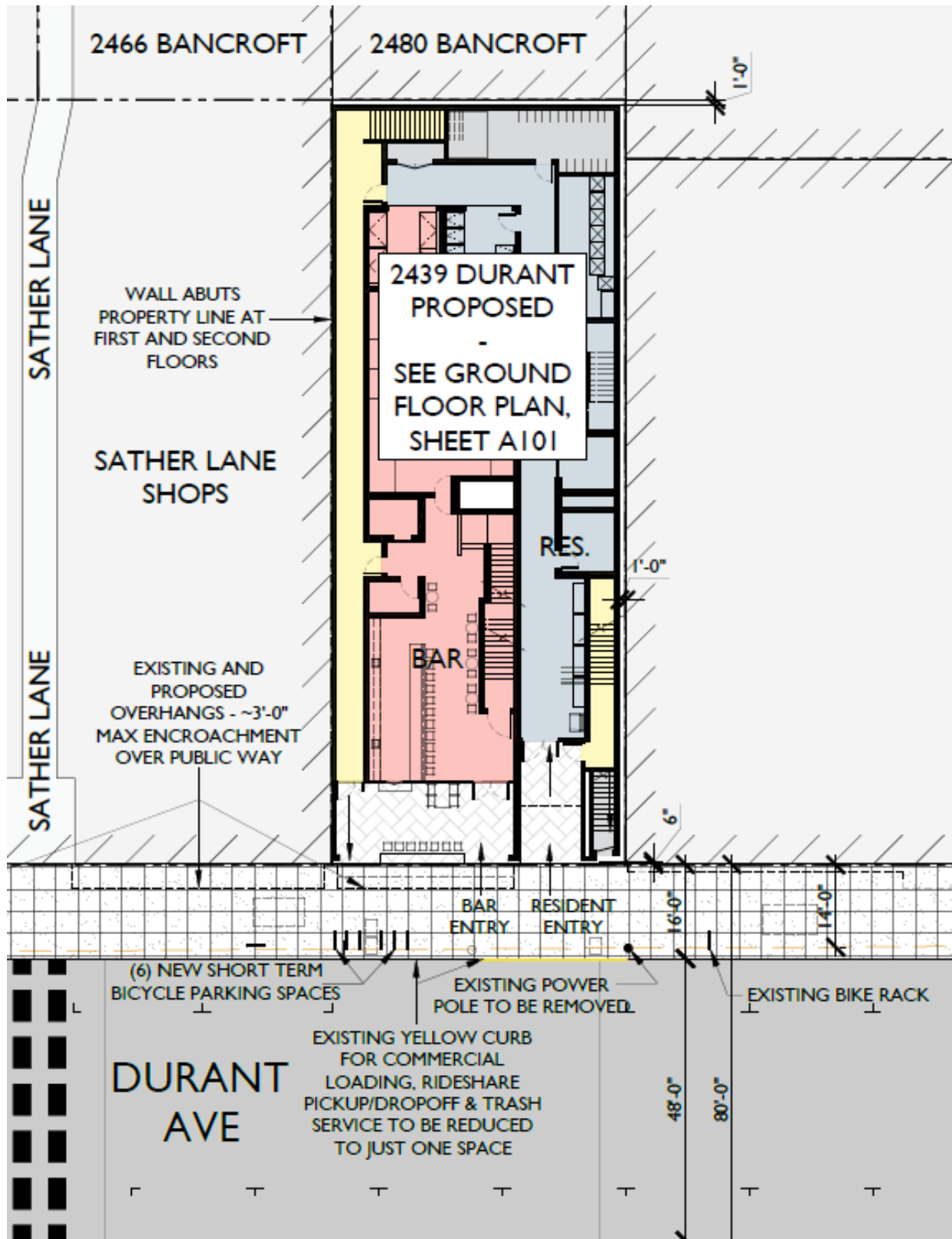


Figure 3: Durant Avenue Elevation (South)

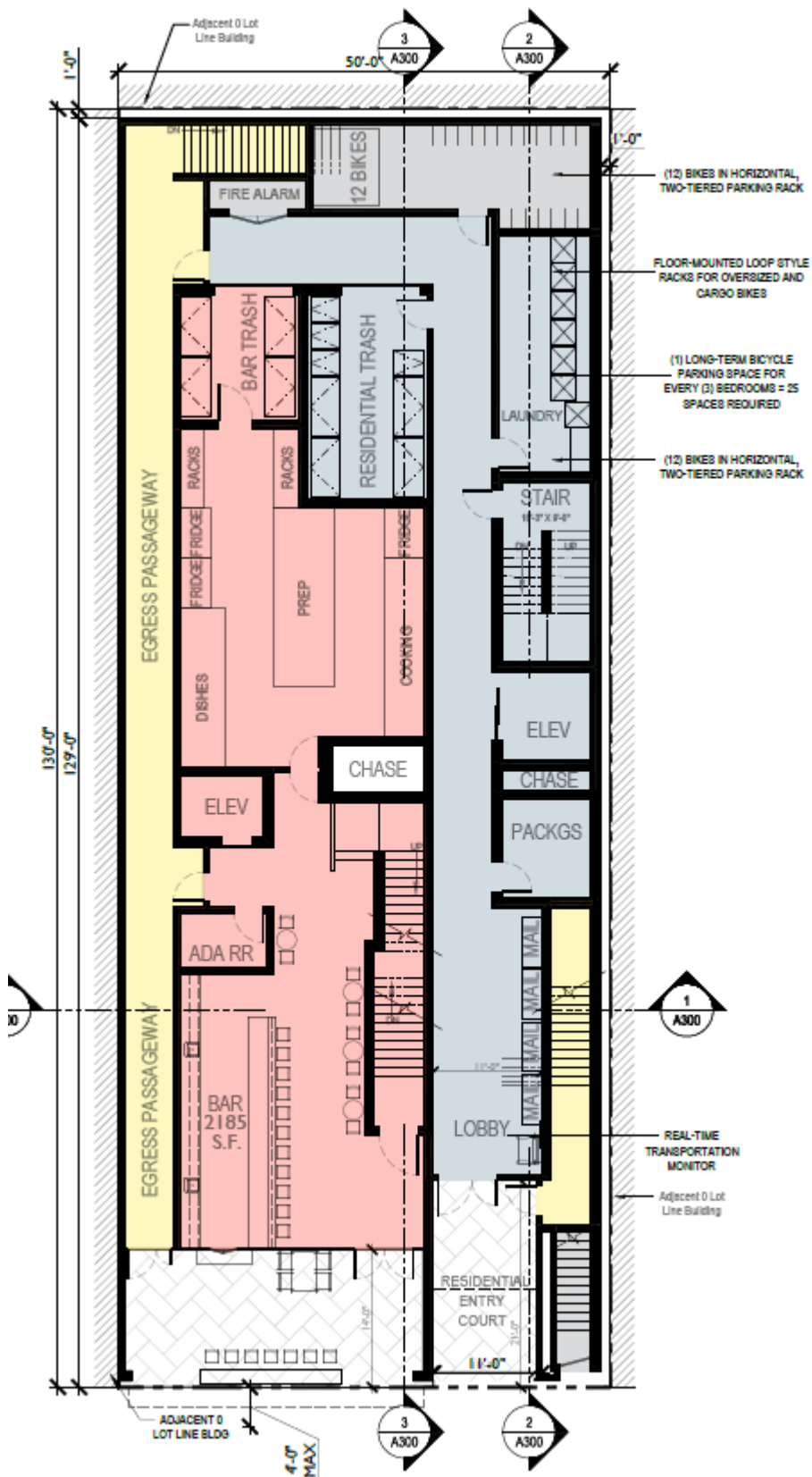


Figure 4: Alcohol Licenses within 1,000 Feet of Project Site



- 20 ■ Off-site beer and wine
- 41 ▲ On-site beer and wine
- 47 ▲ On-site beer, wine, and liquor
- 58/ 66/ 68/ 77 ★ Off-site caterer/ packaged liquor in guest rooms/ on-site portable bar/ events

Figure 5: Commercial Floor Plan, Level 1 (Food Service Establishment)



**Figure 6: Commercial Floor Plan, Basement
(Food Service / Entertainment Establishment)**

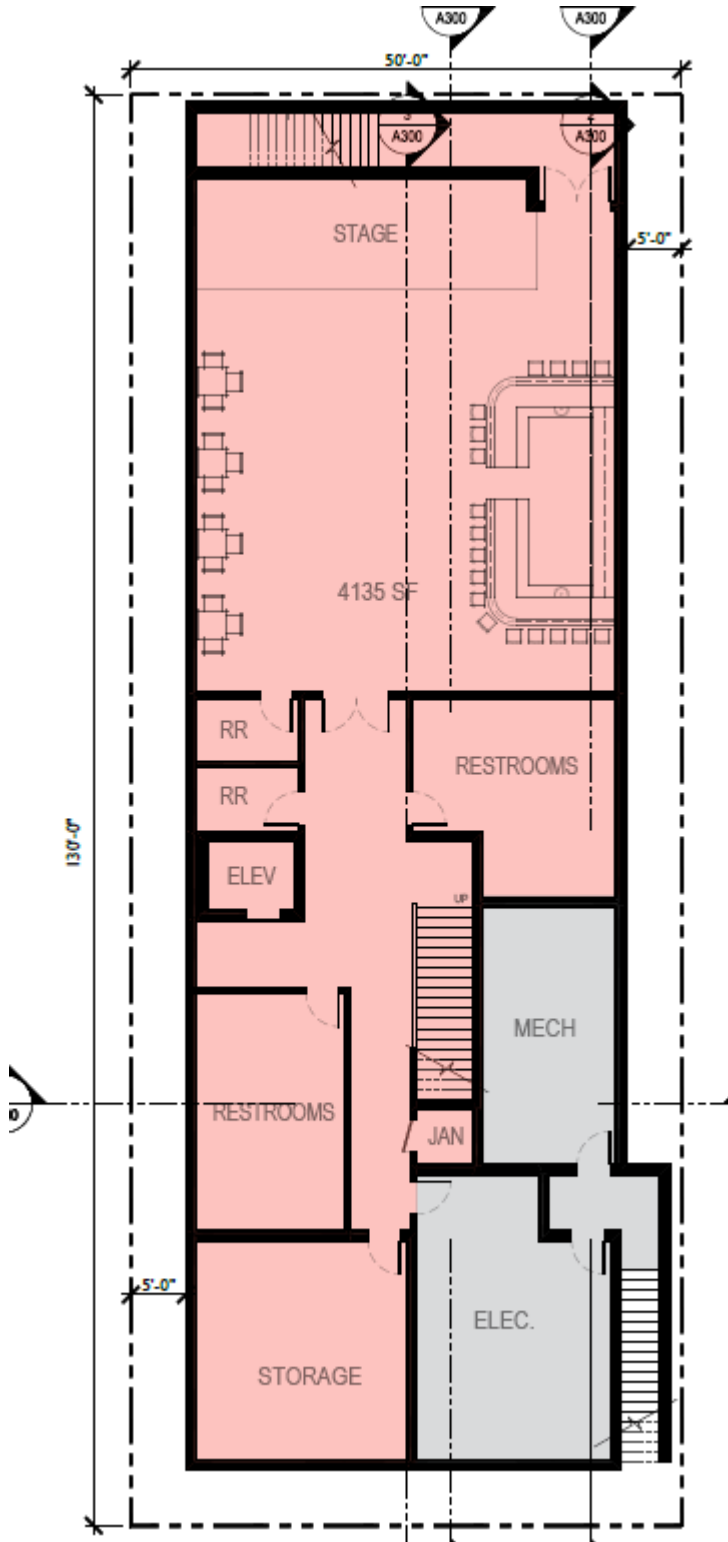


Figure 7: Commercial Floor Plan, Level 2 (Food Service Establishment)

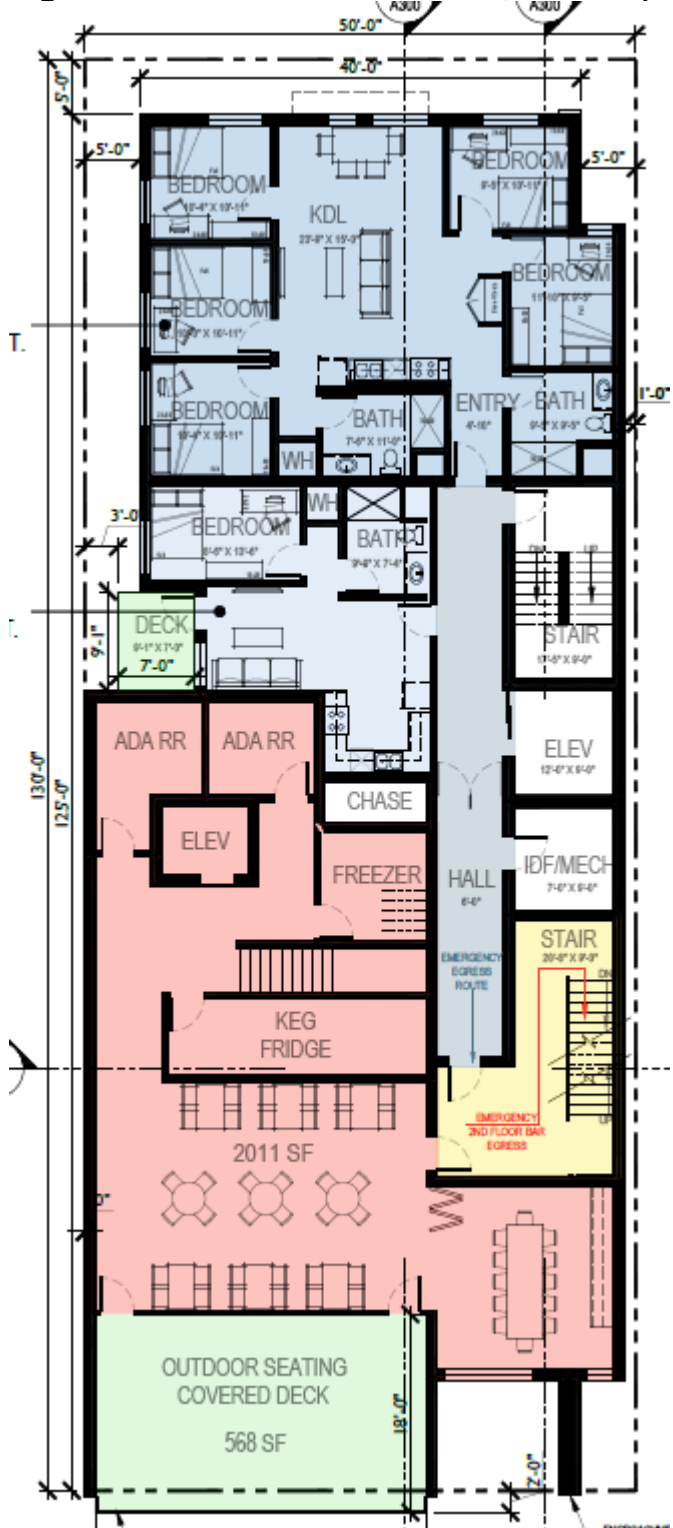


Table 1: Land Use Information

Location		Existing Use	Zoning District	General Plan Designation
Subject Property		Restaurant/Bar/Entertainment Establishment	C-T	AC
Surrounding Adjacent Properties	North	Office		
	East	Mixed-Use		
	South	Parking Garage/Commercial		
	West	Commercial		

Table 2: Special Characteristics

Characteristic	Applies to Project?	Explanation
Affordable Child Care Fee & Affordable Housing Fee for qualifying non-residential projects (Per Resolutions 66,618-N.S. & 66,617-N.S.)	No	These fees apply to projects with more than 7,500 square feet of net new non-residential gross floor area. The project includes demolition of 10,554 square feet of nonresidential gross floor area and construction of 8,332 square feet for a net loss of 2,222 square feet. These fees do not apply.
Affordable Housing Fee for qualifying non-residential projects (Per Resolution 66,617-N.S.)		
Affordable Housing Mitigations for rental housing projects (Per BMC 22.20.065)	Yes	The project would include five or more market rate dwelling units and is therefore subject to the affordable housing provisions of BMC 22.20.065.
Alcohol Sales/Service	Yes	Yes, there is an existing restaurant with a Type 47 license, and the business would be relocated to the new building.
Historic Resources	No	The project would involve demolition of an existing building. A historic resources evaluation (Hibma, July 2021) of the building concluded that the existing building does not meet the criteria for the California Register or a City of Berkeley Landmark. See Section IV.B.

Characteristic	Applies to Project?	Explanation
Housing Accountability Act (Govt. Code 65589.5(j))	Yes	The project is a “housing development project ¹ ” consisting of a mixed-use building that is at least two-thirds residential, and requests no modifications to development standards beyond what is permitted in the BMC. Therefore, the HAA findings apply to this project, and the project cannot be denied at the density proposed unless the findings for denial can be made. See Section V.B for discussion.
Housing Crisis Act of 2019 (SB330)	Yes	The project is a “housing development project ² ” consisting of a mixed-use building that is at least two-thirds residential. See Section V.A of this report for additional discussion on the sections of SB330 that apply to the project.
Natural Gas Prohibition (Per BMC 12.80.020)	Yes	The project complies and is not proposing natural gas use.
Public Art on Private Projects (BMC Chapter 23.316)	Yes	The project is subject to the Percentage for Public Art on Private Projects Ordinance. The applicant is electing to provide on-site publicly accessible artwork valued at less than 1.75% of the total building permit valuation, and paying 80% of the difference in value to the City as an in-lieu fee to comply.
Rent Controlled Units	No	There are no existing dwellings.
Residential Preferred Parking	No	The site is located in RPP zone I. Per Condition of Approval 74 and BMC Section 14.72.080(C), no new permits may be issued to residents in newly-constructed units.
Seismic Hazards (SHMA)	No	The site is not located within an area susceptible to liquefaction, fault rupture, or landslides as shown on the State Seismic Hazard Zones map.
Soil/Groundwater Contamination	No	The project site is not located within the City’s Environmental Management Area. Standard Conditions of Approval related to hazardous materials would apply.
Transit	Yes	The project site is served by multiple bus lines that operate along Bancroft Way and Durant Avenue, and is approximately 0.7 miles from the Downtown Berkeley BART Station.

¹ Government Code Section 65589.5(h)(2) “Housing development project” means a use consisting of any of the following: (A) residential units only, (B) mixed-use developments consisting of residential and nonresidential uses in which at least two-thirds of the square footage is designated for residential use, and (C) transitional or supportive housing.

² See footnote 1

Table 3: Project Chronology

Date	Action
November 8, 2021	Application submitted
December 8, 2021	Application deemed incomplete
March 12, 2022	Revised application materials submitted
April 11, 2022	Application deemed incomplete
May 5, 2022	Landmarks Preservation Commission Meeting
June 13, 2022	Revised application materials submitted
June 16, 2022	Design Review Committee Preliminary Recommendation Meeting
July 13, 2022	Application deemed incomplete
July 25, 2022	Revised application materials submitted
August 24, 2022	Application deemed complete
December 22, 2022	Public hearing notices mailed/posted
January 12, 2023	ZAB hearing

Table 4: Development Standards

BMC Section 23.204.110		Existing	Proposed	Permitted/Required
Lot Area (sq. ft.)		6,500	No change	n/a
Gross Floor Area (sq. ft.)		10,554	36,529	n/a
Commercial Floor Area (sq. ft.)		10,554	8,332	n/a
FAR		1.6	5.81	5, 6 with a Use Permit ³
Dwelling Units		n/a	22	n/a
Building Height	Maximum	25'	75'	65', 75' with a Use Permit ¹
	Stories	2	7	n/a
Building Setbacks	Front	0'	0'-0"	0' min.
	Rear	0'	1'-0"	0' min.
	Left Side	0'	0'-0"	0' min.
	Right Side	0'	1'-0"	0' min.
Lot Coverage (%)		n/a	87	n/a
Usable Open Space (sq. ft.)		n/a	3,419	880 min. (40 s.f./d.u.)
Parking	Automobile	0	0	0
	Loading	0	0	0
Bicycle Parking	Non-Residential	0	5 (1 long-term, 4 short-term)	n/a
	Residential - Long Term	0	29	25 (1 space/3 bedrooms)
	Residential - Short Term	0	2	2 (1 space/40 bedrooms, or 2)
	Total	0	36	32

³ BMC Section 23.304.110(D)(4)

II. Project Setting

- A. Neighborhood/Area Description:** The project site is south of the UC Berkeley campus, on Durant Avenue, with Dana Avenue to the west, and Telegraph Avenue to the east. The neighborhood is campus-oriented, with a mix of commercial uses, apartments, dormitories (Group Living Accommodations), and institutional buildings.
- B. Site Conditions:** The lot is rectangular, 50 feet wide along Durant Avenue, and approximately 130 feet deep. There are zero setbacks at all sides. The site contains an existing two-story commercial building. Kip's Restaurant was established upstairs in the 1950s, and has occupied both floors at different points since the 1980s.

III. Project Description

The proposed project would involve the demolition of a commercial building, and the construction of a new mixed-use building. Commercial space, with a stage at the basement level, a kitchen at the first floor, and a deck off of the second floor, would partially occupy the basement, first, and second floors. Residential access would be at the first floor, with residential units on floors two through seven. A roof deck would provide residential amenity space.

The proposed commercial uses include a restaurant serving beer, wine, and liquor, with a dance club under the same ownership in the basement. The existing business at the subject address, Kips Bar and Grill, is intended to use the 8,332 square-foot commercial space in the new building.

The project would contain 22 dwelling units, with two one-bedroom units, nine two-bedroom units, one three-bedroom unit, and ten five-bedroom units. There would be private balconies for some units on floors two through seven, and nearly 2,000 square-feet of useable open space would be located on a roof deck. There would be six short-term bicycle parking spaces on the sidewalk, and 30 long-term bicycle parking spaces in a secure bike room on the first floor.

IV. Community Discussion

A. Neighbor/Community Concerns: The applicant invited interested neighborhood organizations as well as owners and occupants within 300 feet of the project to a project preview meeting. The meeting was held on March 11, 2022, and attended by one person. A yellow poster was also erected by the applicant on March 11, 2022. On December 22, 2022, the City mailed public hearing notices to property owners and occupants within a 300-foot radius of the project site, and to interested neighborhood organizations, and the City posted notices within the neighborhood in three locations. At the time of writing this report, staff has not received any communications regarding the project.

B. Landmarks Preservation Commission: The project involves demolition of one commercial building over 40 years in age. Pursuant to BMC Section

23.326.070(C)(1), the proposed demolition was brought before the Landmarks Preservation Commission (LPC) for review. A historic resources evaluation of the property (Hibma, July 2021) concluded that the existing building does not meet the criteria for the California/National Register or a City of Berkeley Landmark. At the May 5, 2022, LPC Meeting, the LPC took no action to initiate the property for local register consideration (i.e. Landmark or Structure of Merit designation).

- C. Design Review Committee:** On June 16, 2022, the Design Review Committee (DRC) reviewed the project design for 2439 Durant Avenue, gave a favorable recommendation on the design as presented, and provided conditions and direction for Final Design Review (FDR) (Attachment 4).

V. Issues and Analysis

- A. SB 330 – Housing Crisis Act of 2019:** The Housing Crisis Act, also known as Senate Bill 330, seeks to boost homebuilding throughout the State with a focus on urbanized zones by expediting the approval process for and suspending or eliminating restrictions on housing development projects. A “housing development project” means a use that is: residential units only, mixed use with at least two-thirds of the square footage as residential, or transitional or supportive housing. Sections of SB 330 that apply to the proposed project include the following:

1. Government Code §65905.5(a) states that if a proposed housing development project complies with the applicable, objective general plan and zoning standards in effect at the time an application is deemed complete, then the city shall not conduct more than five hearings in connection with the approval of that housing development project. This includes all public hearings in connection with the approval of the housing development project and any continuances of such public hearings. The city must consider and either approve or disapprove the project at any of the five hearings consistent with applicable timelines under the Permit Streamlining Act [Chapter 4.5 (commencing with §65920)].

The January 12, 2022 ZAB Hearing represents the first public hearing for the proposed project since the project was deemed complete. The City can hold up to four additional public hearings on this project, if needed. One of those hearings must be reserved for any possible appeal to the City Council.

2. Government Code §65913.10(a) requires that the City determine whether the proposed development project site is an historic site at the time the application for the housing development project is deemed complete. The determination as to whether the parcel is an historic site must remain valid during the pendency of the housing development project, unless any archaeological, paleontological, or tribal cultural resources are encountered during any grading, site disturbance, or building alteration activities.

As discussed in an historic resource evaluation prepared for the property in July 2021, the property does not appear to be historically significant, and therefore is not eligible for listing on the California Register of Historical Resources or as a City

of Berkeley Landmark or Structure of Merit. The demolition referral occurred at the May 5, 2022 LPC meeting, and no action was taken. Therefore, it was determined the site is not a historic resource. Further, standard conditions of approval have been included to halt work in case of any unanticipated discovery of archeological, paleontological, or tribal cultural resources.

3. Government Code §65950(a)(5) requires a public agency to approve or disapprove a project within 60 days from the determination that the project is exempt from the California Environmental Quality Act. The project was deemed complete on August 24, 2022. Should ZAB determine the application is categorically exempt from CEQA at the January 12, 2023 public hearing, the application must be approved or disapproved by March 13, 2023.
4. Government Code §66300(d) prohibits the demolition of residential dwelling units unless the project will create at least as many residential units as will be demolished. The project does not propose the demolition of housing units. Therefore, this section does not apply to the project.

B. Housing Accountability Act: The Housing Accountability Act (HAA), California Government Code §65589.5(j), requires that when a proposed housing development complies with the applicable, objective general plan and zoning standards, but a local agency proposes to deny the project or approve it only if the density is reduced, the agency must base its decision on written findings supported by substantial evidence that:

- 1) The development would have a specific adverse impact on public health or safety unless disapproved, or approved at a lower density; and
- 2) There is no feasible method to satisfactorily mitigate or avoid the specific adverse impact, other than the disapproval, or approval at a lower density.

As described in Table 4 above, the project complies with applicable, objective general plan and zoning standards. The ZAB has the discretion to approve, deny or modify the project according to the zoning findings, provided the action does not reduce the project density or effectively deny the project by making it infeasible, unless the ZAB is also able to make the required findings for denial set forth under Section 65589.5(j), above. Staff is not aware of specific adverse impacts that could occur with the construction of the project.

C. Transportation Demand Management

Since the project is located in the Southside Plan Area and contains ten or more dwelling units, the project is required to provide a real-time transportation information monitor in a common area, and off-street bicycle parking spaces, per BMC Section 23.334. Both the off-street bike parking and transportation information monitor would be located on the first floor within the residential portion of the building.

D. Findings for Use Permit to Demolish a Non-Residential Building

The proposed project includes the demolition of the existing commercial building on the site. Pursuant to BMC Section 23.326.070, the demolition of a non-residential building requires ZAB approval of a demolition permit. In addition, pursuant to BMC Section 23.326.070(C), an application for a permit to demolish a non-residential building or structure which is 40 or more years old must be forwarded to the LPC for review prior to the consideration of the use permit.

As noted above in Section IV.B, at a duly noticed hearing, the LPC reviewed the demolition referral for the existing building and took no action to initiate a local historic designation. Pursuant to BMC 23.326.070(D), the demolition of the non-residential building would not be materially detrimental to the commercial and public interest of any affected neighborhood in the city. The new mixed-use building would replace the existing 10,554 square foot commercial building, and would contain 8,332 square-feet of commercial space, which is intended to be occupied by the existing business.

Additionally, the removal of the building would facilitate reuse of the site in a manner that would be economically productive to the city and provide housing units. Therefore, staff believes that ZAB can make the required finding that demolition would be necessary to allow construction of the proposed mixed-use building, subject to the condition of approval allowing demolition of the existing buildings only after complete construction plans are submitted to the City for the replacement building.

F. Use Permit to Increase the Height

The proposed project includes a request to increase the allowable height to 75 feet, and a Floor Area Ratio of 5.81. Pursuant to BMC Section 23.204.110(D)(4), projects with 50 percent or more of the total building floor area for residential use and located north of Dwight Way are allowed a height increase to 75 feet and a FAR increase to 6, provided a Use Permit is obtained and it is found that the project will not result in a significant reduction in sunlight on Telegraph Avenue sidewalks. In the evening on the winter solstice, and in the late afternoon on the summer solstice, the proposed building will cast shadows on to Telegraph Avenue, but those shadows will overlap with shadows cast by the existing buildings on Telegraph Avenue, so there will not be new shadows cast upon Telegraph Avenue.

G. Administrative Use Permit for Architectural Features Above the Height Limit

Projections above the 75-foot height allowance include a mechanical chase for the commercial use, and overruns and a mechanical room for the stairs and elevator serving the residential use. Pursuant to BMC Section 23.304.050(A), building features such as mechanical penthouses that project about the height limit may not exceed 15 percent of the average floor area of all of the building's stories. With a gross floor area of 36,529 square-feet, the average floor area for seven floors is 5,218 square-feet, and 15 percent of the average floor area is 783 square-feet. The proposed features occupy 704 square-feet, which complies with the limit.

H. Use Permit to Add Service of Distilled Spirits

The existing building contains a business with a type 47 license from the California Department of Alcoholic Beverage Control (ABC), which allows the sale of beer, wine, and liquor at a bona fide eating place, with suitable kitchen facilities, and actual and substantial sales of meals for consumption on the premises, and minors are allowed. Since the existing building is being demolished, ABC would require a premise to premise application to transfer the license to the new building, and new Use Permits are required for the existing uses to continue in the new building. Pursuant to BMC Section 23.310.020(B), a Use Permit is required to begin alcoholic beverage sales or service.

Alcoholic beverage sales and service are also regulated by BMC 23.310.020(D) for Special Use Standards. This section requires the City to make all of the "Public Convenience or Necessity" findings if an existing establishment has an ABC license of the same type, other than beer and wine service incidental to food service, within a 1,000-foot radius of the project site. There are three establishments within a 1,000-foot radius with a Type 47 ABC license (Berkeley City Club, Graduate Berkeley/Henry's Bar and Restaurant, and The Tap Haus).

In order to approve the Use Permit, the Board must affirm all of the "Public Convenience or Necessity" findings under BMC Section 23.310.020(D), as follows:

1. *The proposed establishment will promote the City's economic health, contribute to General Plan or area plan policies, or further the district purpose.*

Staff Analysis: The proposed distilled spirits service, combined with beer and wine service would contribute to nightlife in the neighborhood, as well as provide additional tax revenue to the City of Berkeley. A successful establishment at this location would help activate the C-T area in the evenings which could benefit this block of Durant in addition to the establishment's operators. The project would further the Southside Plan's Telegraph Avenue Commercial Subarea goals by establishing a use that would contribute to night-time vitality in the neighborhood (Policy ED-B3).

2. *The economic benefits associated with the establishment could not reasonably be achieved without the proposed alcohol sales or service.*

Staff Analysis: Distilled spirits service would contribute to the profitability of the establishment.

3. *If the applicant has operated a licensed establishment that has been the subject of violations regarding alcohol in the State of California, or violations of public safety or nuisance statutes or regulations in Berkeley as verified by the Police Department, such violations do not indicate a high likelihood of further violations and/or detrimental impacts from the proposed establishment. In making this finding, the ZAB may consider the number, frequency, and*

severity of prior violations, the time elapsed since the last violation, and other relevant factors.

Staff Analysis: The project was referred to the Berkeley Police Department (BPD) for comment (Attachment 5). Kip's Bar and Grill's Type 47 license was issued in June of 2000, and is valid through May 31, 2023. BPD does not support the new Use Permit for alcohol due to the number calls for service over the past several years, past ABC disciplinary actions, and community complaints for nuisance activities including intoxicated people, alcohol violations, narcotics violations, weapons violations, and assaults, including shootings within one block of the premise. In 2022, there were 83 incident reports, and 28 security checks for this business. This finding cannot be made.

4. *If the proposed establishment is within 1,000 feet of any public park or public school, the ZAB has taken into consideration the effect of the proposed establishment upon such sensitive public uses.*

Staff Analysis: People's Park and the UC Berkeley campus are within 1,000 feet of the subject property. Per BMC Section 23.310.030(B), distilled spirit service is allowed only for on-site consumption with seated food service in the C-T District, so patrons would not be able to take alcohol to nearby parks.

5. *The Police Department has reported that the proposed establishment would not be expected to add to crime in the area.*

Staff Analysis: BPD does not support the issuance and approval of the Use Permit, and believes there would be an increase in crime and calls for service with the reopening of the business in a new building, which could cause undue harm and jeopardize the safety of the community. BPD did not provide recommendations to address issues and concerns. This finding cannot be made.

As stated above, per BMC Section 23.310.030(B), distilled spirit service is allowed only for on-site consumption with seated food service in the C-T District, so a bar/cocktail lounge/tavern is not permissible because food would be incidental to alcohol at a bar (based on the definition from the Glossary⁴). The proposed commercial use appears to be a bar. A bar lined with seats, additional tables and chairs, an ADA restroom, kitchen, stairs, and an elevator would be located on the first floor. In the basement there would be a stage, another bar lined with chairs, additional tables and chairs, restrooms, and a storage room. On the second floor there would be tables and chairs, ADA restrooms, a keg fridge, and seating at an outdoor covered deck over Durant Avenue.

⁴ BMC Section 23.502.020: *Bar/Cocktail Lounge/Tavern. A business devoted to serving alcoholic beverages for consumption by guests on the premises and in which the serving of food is only incidental to the consumption of such beverages.*

Since the proposed bar is not in conformance with the requirements of the C-T District, and two of the required five “Public Convenience or Necessity” findings cannot be made, staff recommends denying the Use Permit for service of distilled spirits. The applicant may apply for a Zoning Certificate for beer and wine service incidental to food service, which is similar to the procedure for applying for a business license. Incidental beer and wine is governed by the standards of BMC Section 23.310.030(C).

Since the service of distilled spirits is related to the proposed entertainment establishment and amplified live entertainment, staff recommends denying the Use Permit to add an entertainment establishment, and denying the AUP for amplified live entertainment. Detriment findings are discussed below.

I. General Non-Detriment Finding

1. An analysis of sunlight/shadows, air, and views for the new building follows:

Sunlight/Shadow: Shadow studies submitted by the applicant document the addition’s projected shadow angles and lengths at three times throughout the day during the summer and winter solstice. The studies show that the addition would create an incremental increase in shadows on three neighboring building with dwellings, as follows:

- Two hours after sunrise on the winter solstice, shadows on the south side of the mixed-use building at 2468 Bancroft Way would increase and cover the windows on the south elevation;
- Two hours before sunset on the winter solstice shadows on the west side of the mixed-use building at 2340 Telegraph Avenue would increase and cover the windows on the west elevation;
- Two hours after sunrise on the summer solstice, shadows on the south side of the mixed-use building at 2468 Bancroft Way would increase and cover the majority of windows on the south elevation, and shadows on the south side of the mixed-use building at 2431-2433 Durant Avenue would increase and cover the majority of windows on the upper floor at the south elevation;
- Two hours before sunset on the summer solstice shadows on the west side of the mixed-use building at 2340 Telegraph Avenue would increase and cover the windows on the west elevation.

Because the impacts to neighboring properties would occur on limited areas, and would only partially shade neighboring buildings for a limited time during the year, and only for a few hours of the day, the building would not result in a significant loss of direct sunlight on abutting dwellings, and these shading impacts are not deemed detrimental.

Air: Setbacks are not required. The existing building is not setback, and there would be 1-foot setbacks at the rear and right sides, and a partial setback of 14-feet at the front. Therefore, there would be minimal, if any, air impacts.

Views: The new building would not result in obstruction of significant views in the neighborhood as defined in BMC Section 23.502 (Glossary). This neighborhood is generally flat and developed with multi-story buildings that filter or obscure views that may be available of the Berkeley hills or the Golden Gate Bridge from off-site view angles.

2. BMC Section 23.406.040(E) requires that before the ZAB approves an application for a Use Permit, it must find that the project, under the circumstances of this particular case existing at the time at which the application is granted, would not be detrimental to the health, safety, peace, morals, comfort, and general welfare of the persons residing or visiting in the neighborhood of such proposed use, and would not 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.
 - a) Demolish a non-residential building, add a mixed-use building, add dwelling units, increase the height to 75 feet and FAR to 6, add features that exceed the height limit, and add a food service establishment larger than 1,500 square feet: The proposed demolition and construction of a new mixed-use building with dwelling and a food service establishment subject to the City's standard conditions of approval regarding construction noise and air quality, waste diversion, toxics, and stormwater requirements as well as any other project specific conditions. These standard conditions would ensure that the project would satisfy this finding.
 - b) Add service of distilled spirits, add an entertainment establishment, add amplified live entertainment: The proposed service of distilled spirits across three floors, and the proposed entertainment establishment in the basement with amplified live entertainment are identical to the existing uses. In their letter dated December 20, 2022 (Attachment 5), the Berkeley Police Department (BPD) noted 83 incident reports for this location in 2022, including 10 assaults, some of which involved weapons. There were also three confirmed shootings within a one-block area of the site, one of which was fatal. Information from the previous two years shows a lower number of incidents, however, many customer-serving businesses were not open or had limited services during the COVID-19 shelter-in-place orders. In 2019, there were 129 calls for service, 22 of which were assaults and three involved weapons. There were also two confirmed shootings within a one-block area of the site. BPD concluded that they believe there would be an increase in crime and calls for service at this business, and does not support this portion of the proposal.

The proposed uses would be detrimental to the community because the site has a history of violations from ABC and calls for service from BPD, including assaults and weapons. Based on the history of the site, staff finds detriment in the proposed distilled spirits, entertainment establishment, and amplified live entertainment uses.

J. Findings for Use Permit Approval in the C-T District

To approve an AUP or Use Permit for a project in the C-T district, the ZAB must make the general non-detriment findings in BMC Section 23.406.040(E), and make the findings of BMC Section 23.204.110(E) and find that the use or structure:

1. Is compatible with the purposes of the district;
2. Encourages and maintains the present street frontage of the district;
3. Does not interfere with the continuity of retail or compatible service facilities at the ground level;
4. Does not interrupt a continuous wall of building facades;
5. Is compatible in design and character with the district and the adjacent residential neighborhoods;
6. Does not generate traffic or parking demand significantly beyond the capacity of the district or significantly increase impacts on adjacent residential neighborhoods; and
7. Complies with the Southside Plan's adopted Mitigation Monitoring Program (MMP).

The proposed project will include a commercial use, that will likely serve locals and people from across the region. The commercial use will appeal to the University population and the surrounding residents. The design of the commercial use will support the pedestrian orientation of the district by providing "eyes on the street" in the form of patrons using the second-floor deck for dining. The proposed project will be compatible with the district purposes for the reasons above, and will create a mixed-use building with new dwellings.

The project will also maintain the present street frontage of the district, will continue the existing commercial use at the lower levels, will not interrupt a wall of building facades, and is compatible in design and character with the C-T District and adjacent residential neighborhoods. Parking is not required and will not be provided, and residents will be walking distance to the UC campus, with many nearby transit and biking options.

The project will comply with the Southside Plan's MMP by reducing the size of the existing on-street commercial loading space in front of the property on Durant to

provide one new metered parking space, and the revised loading space will be centered on the residential entry to provide space for rideshare drop-off and pick-up. The standard Conditions of Approval will also help the project comply with the MMP in terms of air quality, and cultural resources.

The proposed project includes space for an entertainment establishment, with a dance club in the basement, and a Use Permit is required to establish an entertainment establishment (BMC Section 23.204.020). An AUP is also requested to add amplified live entertainment (BMC Section 23.302.020(D)), which per the definition in the Glossary (BMC Section 23.502) may include karaoke. An AUP is required to add a food service establishment that exceeds 1,500 square-feet; the proposed food service establishment is approximately 8,300 square-feet, including space for the entertainment establishment. No specific findings are required to approve the entertainment establishment, amplified live entertainment, food service establishment, or the new mixed-use building. Staff finds that the entertainment establishment and amplified live entertainment are connected to the proposed service of distilled spirits because they would be located in the basement bar area, and since the findings cannot be met for the service of distilled spirits, staff recommends denying the Use Permits for service of distilled spirits and the entertainment establishment, and denying the AUP for amplified live entertainment.

Staff recommends approval of the AUP for the food service establishment.

K. General Plan Consistency: The 2002 General Plan contains several policies applicable to the project, including the following:

1. Policy LU-3–Infill Development: Encourage infill development that is architecturally and environmentally sensitive, embodies principles of sustainable planning and construction, and is compatible with neighboring land uses and architectural design and scale.
2. Policy LU-7–Neighborhood Quality of Life, Action A: Require that new development be consistent with zoning standards and compatible with the scale, historic character, and surrounding uses in the area.
3. Policy LU-27–Avenue Commercial Areas: Maintain and improve Avenue Commercial areas, such as University, San Pablo, Telegraph, and South Shattuck, as pedestrian-friendly, visually attractive areas of pedestrian scale and ensure that Avenue areas fully serve neighborhood needs as well as a broader spectrum of needs.
4. Policy LU-23–Transit-Oriented Development: Encourage and maintain zoning that allows greater commercial and residential density and reduced residential parking requirements in areas with above-average transit service such as Downtown Berkeley.
5. Policy UD-16–Context: The design and scale of new or remodeled buildings should respect the built environment in the area, particularly where the character of the built environment is largely defined by an aggregation of historically and architecturally significant buildings.

6. Policy UD-24–Area Character: Regulate new construction and alterations to ensure that they are truly compatible with and, where feasible, reinforce the desirable design characteristics of the particular area they are in.
7. Policy UD-32–Shadows: New buildings should be designed to minimize impacts on solar access and minimize detrimental shadows.

As discussed in section V.A through V.H, the project would improve the utilization of the site with development that is of appropriate intensity, that is compatible with the existing surrounding development, and that would further improve the neighborhood character and quality of life by bringing in new residents and providing an updated location for an existing local business. The project site is served by multiple bus lines, and a nearby BART Station.

8. Policy UD-33–Sustainable Design: Promote environmentally sensitive and sustainable design in new buildings.
9. Policy H-19–Regional Housing Needs: Encourage housing production adequate to meet the housing production goals established by ABAG’s Regional Housing Needs Determination for Berkeley.
10. Policy EM-5–“Green” Buildings: Promote and encourage compliance with “green” building standards. (Also see Policies EM-8, EM-26, EM-35, EM-36, and UD-6.)

The project would help Berkeley meet its regional housing needs by adding 22 new housing units. The project would be subject to standard conditions of approval that promote sustainable building design, including conditions for solar PV systems, water efficient landscaping, and natural gas prohibitions.

L. Area Plan Consistency: The Southside Plan, adopted in 2011, also contains goals and policies applicable to the project, including the following:

1. Policy LU-A1.A: Encourage a variety of housing types to be built in the Southside, including houses, condominiums, townhouses, apartment buildings, group living quarters, and loft-style housing, and encourage owner-occupied housing, rental housing, cooperatives, and co-housing.
2. Policy LU-E1: Support neighborhood services by encouraging development of new housing at suitable locations within walking distance of the UC campus and as part of mixed-use developments in the Telegraph Commercial District and Downtown Berkeley.

Staff Analysis: The project would provide 22 rental dwelling units with a commercial use on the lower levels of the building.

3. Policy LU-F18: Encourage and support transit and other alternatives to automobile use in the Southside

Staff Analysis: Consistent with the policies of the Southside and Climate Action Plans, the project would provide no off-street parking for the residential units, thereby encouraging other modes of transportation, including transit and cycling.

VI. Recommendation

Because of the project's partial consistency with the Zoning Ordinance and General Plan, and minimal impact on surrounding properties, staff recommends that the Zoning Adjustments Board:

APPROVE the Use Permits to: (1) demolish a non-residential building; (2) add a mixed-use residential building; (3) add dwelling units; (4) to increase the building height to 75 feet and increase the FAR to 6; (5) add mechanical chases and stair and elevator overruns that exceed the 75-foot height limit; (6) add a food service establishment larger than 1,500 square feet, pursuant to BMC Section 23.406.040(D) and subject to the attached Findings and Conditions (see Attachment 1A); and

DENY the Use Permits to: (1) add service of distilled spirits; (2) add an entertainment establishment; (3) add amplified live entertainment, pursuant to 23.406.040(E)(5) and the attached Findings (see Attachment 1B).

Attachments:

- 1.A. Findings and Conditions for Approval
- 1.B. Findings for Denial
2. Project Plans, received August 26, 2022
3. Notice of Public Hearing
4. Design Review Committee Summary, June 16, 2022
5. Berkeley Police Department letter, dated December 20, 2022

Staff Planner: Allison Riemer, ariemer@cityofberkeley.info, (510) 981-7433

ATTACHMENT 1

FINDINGS AND CONDITIONS

JANUARY 12, 2023

2439 Durant Avenue

Use Permit #ZP2021-0192 to demolish a two-story commercial building and construct a 36,529 square-foot 7-story mixed-use building with 22 dwelling units and a roof deck, and establish an entertainment use with the service of distilled spirits.

PERMITS APPROVED

- Use Permit pursuant to Berkeley Municipal Code (BMC) Section 23.326.070(A) to demolish a non-residential building.
- Use Permit pursuant to BMC Section 23.204.020 to add a mixed-use residential building.
- Use Permit pursuant to BMC Section 23.204.020 to add dwelling units.
- Use Permit pursuant to BMC Section 23.204.110(D)(4) to increase the building height to 75 feet, and increase the FAR to 6.
- Administrative Use Permit pursuant to BMC Section 23.304.050(A) to add mechanical chases and stair and elevator overruns that exceed the 75-foot height limit.
- Administrative Use Permit pursuant to BMC Section 23.302.070(E)(2) to add a food service establishment larger than 1,500 square feet.

I. CEQA FINDINGS

1. The project is categorically exempt from the provisions of the California Environmental Quality Act (CEQA, Public Resources Code §21000, et seq. and California Code of Regulations, §15000, et seq.) pursuant to Section 15332 of the CEQA Guidelines (“In-Fill Development Projects”).

The project meets all of the requirements of this exemption, as follows:

- A. The project is consistent with the applicable General Plan designation and policies, and with the applicable zoning designation and regulations.
 - B. The project occurs within the Berkeley City limits on a project site of no more than five acres, and is surrounded by urban uses.
 - C. The parcels within the project site have previously been developed and have no value as habitat for endangered, rare or threatened species.
 - D. The project would not result in any significant effects relating to traffic, noise, air quality or water quality. The Traffic Impact Analysis prepared for the project was reviewed by the City Transportation Division which concurred with the findings of less than significant impacts. City Standard Conditions would address potential impacts related to traffic, noise, air quality, and water quality.
 - E. The site can be adequately served by all required utilities and public services.
2. Furthermore, none of the exceptions in CEQA Guidelines Section 15300.2 apply, as follows:
 - (a) the site is not located in an environmentally sensitive area, (b) there are no cumulative impacts, (c) there are no significant effects, (d) the project is not located near a scenic highway,

(e) the project site is not located on a hazardous waste site pursuant to Government Code Section 65962.5, and (f) the project would not affect any historical resource.

II. FINDINGS FOR APPROVAL

1. As required by Section 23.406.040(E)(1) of the BMC, the project, under the circumstances of this particular case existing at the time at which the application is granted, would not be detrimental to the health, safety, peace, morals, comfort, and general welfare of the persons residing or working in the neighborhood of such proposed use or be detrimental or injurious to property and improvements of the adjacent properties, the surrounding area or neighborhood, or to the general welfare of the City because:
 - A. The project is subject to the City's standard conditions of approval regarding construction noise and air quality, waste diversion, toxics, and stormwater requirements as well as any other project specific conditions. These standard conditions will ensure the project will not be detrimental to adjacent properties, the surrounding area or neighborhood or to the general welfare of the City.
 - B. Shadow studies submitted by the applicant document the addition's projected shadow angles and lengths at three times throughout the day during the summer and winter solstice. The studies show that the addition will create an incremental increase in shadows on three neighboring building with dwellings.
 - o Two hours after sunrise on the winter solstice, shadows on the south side of the mixed-use building at 2468 Bancroft Way will increase and cover the windows on the south elevation;
 - o Two hours before sunset on the winter solstice shadows on the west side of the mixed-use building at 2340 Telegraph Avenue will increase and cover the windows on the west elevation;
 - o Two hours after sunrise on the summer solstice, shadows on the south side of the mixed-use building at 2468 Bancroft Way will increase and cover the majority of windows on the south elevation, and shadows on the south side of the mixed-use building at 2431-2433 Durant Avenue will increase and cover the majority of windows on the upper floor at the south elevation;
 - o Two hours before sunset on the summer solstice shadows on the west side of the mixed-use building at 2340 Telegraph Avenue will increase and cover the windows on the west elevation.
 - o Because the impacts to neighboring properties will occur on limited areas, and will only partially shade neighboring buildings for a limited time during the year, and only for a few hours of the day, the project will not result in a significant loss of direct sunlight on abutting dwellings, and these shading impacts are not deemed detrimental.
 - C. Setbacks are not required. The existing building is not setback, and there will be 1-foot setbacks at the rear and right sides, and a partial setback of 14-feet at the front. Therefore, there will be minimal, if any, air impacts.
 - D. The new building will not result in obstruction of significant views in the neighborhood as defined in BMC Section 23.502 (Glossary). This neighborhood is generally flat and developed with multi-story buildings that filter or obscure views that may be available of the Berkeley hills or the Golden Gate Bridge from off-site view angles.

III. OTHER FINDINGS FOR APPROVAL

2. As required by Section 23.326.070 of the BMC, the Zoning Adjustments Board finds that the proposed demolition of the non-residential buildings is permissible because:
 - A. At a duly noticed hearing, the Landmarks Preservation Commission (LPC) reviewed a demolition referral for the existing building and took no action to initiate a local historic designation.
 - B. The demolition of the commercial building is not materially detrimental to the commercial and public interest of any affected neighborhood in the City. The new mixed-use building will replace the existing 10,554 square foot commercial building, and will contain 8,332 square-feet of commercial space.
 - C. Overall, demolition of the building will allow redevelopment of the project site which will complement and be compatible with surrounding uses.
 - D. Demolition is necessary to allow construction of the proposed building given the inclusion of a condition of approval that allows demolition of the existing buildings only after complete construction plans are submitted to the City for the replacement building (COA #23).
3. As required by Section 23.204.110(D)(4) of the BMC, the Zoning Adjustments Board finds that the request to increase the allowable height to 75 feet, and the Floor Area Ratio to 5.81 is permissible because:
 - A. More than 50 percent of the total building floor area will be for residential use.
 - B. The project site is north of Dwight Way.
 - C. In the evening on the winter solstice, and in the late afternoon on the summer solstice, the proposed building will cast shadows on to Telegraph Avenue, but those shadows will overlap with shadows cast by the existing buildings on Telegraph Avenue, so there will not be new shadows cast upon Telegraph Avenue.
4. As required by Section 23.304.050(A) of the BMC, the Zoning Adjustments Board finds that the request to permit building features such as mechanical penthouses that project about the height limit is permissible because:
 - A. With a gross floor area of 36,529 square-feet, the average floor area for seven floors is 5,218 square-feet, and 15 percent of the average floor area is 783 square-feet. The proposed features occupy 704 square-feet, which complies with the 15 percent limit.
5. As required by Section 23.204.110(E) of the BMC, the Zoning Adjustments Board finds that:
 - A. The proposed project will be compatible with the purposes of the C-T District;
 - B. The project will maintain the present street frontage of the district, will continue the existing commercial use at the lower levels, will not interrupt a wall of building facades, and is compatible in design and character with the C-T District and adjacent residential neighborhoods; and
 - C. Parking is not required and will not be provided, and residents will be walking distance to the UC campus, with many nearby transit and biking options.
 - D. The proposed food service establishment will be approximately 8,300 square-feet, across three floors, facing Durant Avenue.

IV. STANDARD CONDITIONS OF APPROVAL FOR ALL PROJECTS

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

1. Conditions Shall be Printed on Plans

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

2. Compliance Required (BMC Section 23.102.050)

All land uses and structures in Berkeley must comply with the Zoning Ordinance and all applicable City ordinances and regulations. Compliance with the Zoning Ordinance does not relieve an applicant from requirements to comply with other federal, state, and City regulations that also apply to the property.

3. Approval Limited to Proposed Project and Replacement of Existing Uses (BMC Sections 23.404.060.B.1 and 2)

- A. This Permit authorizes only the proposed project described in the application. In no way does an approval authorize other uses, structures or activities not included in the project description.
- B. When the City approves a new use that replaces an existing use, any prior approval of the existing use becomes null and void when permits for the new use are exercised (e.g., building permit or business license issued). To reestablish the previously existing use, an applicant must obtain all permits required by the Zoning Ordinance for the use.

4. Conformance to Approved Plans (BMC Section 23.404.060.B.4)

All work performed under an approved permit shall be in compliance with the approved plans and any conditions of approval.

5. Exercise and Expiration of Permits (BMC Section 23.404.060.C)

- A. A permit authorizing a land use is exercised when both a valid City business license is issued (if required) and the land use is established on the property.
- B. A permit authorizing construction is exercised when both a valid City building permit (if required) is issued and construction has lawfully begun.
- C. The Zoning Officer may declare a permit lapsed if it is not exercised within one year of its issuance, except if the applicant has applied for a building permit or has made a substantial good faith effort to obtain a building permit and begin construction. The Zoning Officer may declare a permit lapsed only after 14 days written notice to the applicant. A determination that a permit has lapsed may be appealed to the ZAB in accordance with Chapter 23.410 (Appeals and Certification).
- D. A permit declared lapsed shall be void and of no further force and effect. To establish the use or structure authorized by the lapsed permit, an applicant must apply for and receive City approval of a new permit.

6. Permit Remains Effective for Vacant Property (BMC Section 23.404.060.D)

Once a Permit for a use is exercised and the use is established, the permit authorizing the use remains effective even if the property becomes vacant. The same use as allowed by the original permit may be re-established without obtaining a new permit, except as set forth in Standard Condition #5 above.

7. Permit Modifications (BMC Section 23.404.070)

No change in the use or structure for which this Permit is issued is permitted unless the Permit is modified by the Board. 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.

8. Permit Revocation (BMC Section 23.404.080)

The City may revoke or modify a discretionary permit for completed projects due to: 1) violations of permit requirements; 2) Changes to the approved project; and/or 3) Vacancy for one year or more. However, no lawful residential use can lapse, regardless of the length of time of the vacancy. Proceedings to revoke or modify a permit may be initiated by the Zoning Officer, Zoning Adjustments Board (ZAB), or City Council referral.

9. Pay Transparency Acknowledgement (BMC Section 13.104.030)

Prior to the issuance of a building permit for any Project subject to this Chapter:

- A. A Responsible Representative of the Permittee shall certify under penalty of perjury that: (1) the Permittee has reviewed Chapter 13.104 of the Berkeley Municipal Code; and (2) the Permittee will be responsible for demonstrating compliance with this Chapter.
- B. The Permittee shall provide to the City a Contractor Pay Transparency Acknowledgment on a form approved by the City for this purpose. A Responsible Representative of the Permittee shall certify under penalty of perjury that the Contractor and all Qualifying Subcontractors performing work on the Project will comply with Chapter 13.104 of the Berkeley Municipal Code and with Labor Code sections 226(a) and 2810.5 for each employee who works on the Project.

10. Pay Transparency Attestations Following Project Completion (BMC Section 13.104.040)

Within 10 days of the approved final inspection of any Project subject to this Chapter, each Permittee shall provide to the City for each Contractor and Qualifying Subcontractor a Pay Transparency Attestation on a form approved by the City. On each Pay Transparency Attestation, a Responsible Representative of the Contractor or Qualifying Subcontractor shall attest under penalty of perjury that the Contractor or Qualifying Subcontractor complied with Chapter 13.104 of the Berkeley Municipal Code and Labor Code sections 226(a) and 2810.5 for each employee who performed work on the Project. The City will maintain Pay Transparency Attestation forms for period of at least three years after their date of receipt by the City.

11. Posting of Ordinance (BMC Section 13.104.050)

Each day work is performed on the Project, each Permittee shall post, and keep posted in a conspicuous location where it may be easily read by employees during the hours of the workday, a notice that: (A) contains the text of Chapter 13.104 of the Berkeley Municipal Code; (B) explains that workers can report violations of Labor Code sections 226 and 2810.5 to the Labor Commissioner of the State of California; and (C) provides current contact information, including office address, telephone number, and email address of the Labor Commissioner of the State of California.

12. Conditions of Approval (BMC Section 13.104.060)

The requirements of Sections 13.104.030 through 13.104.050 shall be included as conditions of approval of any Use Permit or Zoning Certificate for any Project that is subject to this Chapter. Failure to comply with the requirements of any provision of this Chapter shall be grounds for issuance of an administrative citation under Chapter 1.28 and/or the revocation or modification of any Use Permit issued for the Project under Chapter 23B.60.

13. Indemnification Agreement

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

V. ADDITIONAL CONDITIONS IMPOSED BY THE ZONING ADJUSTMENTS BOARD

Pursuant to BMC 23.404.050(H), the Zoning Adjustments Board attaches the following additional conditions to this Permit:

Prior to Submittal of Any Building Permit:

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

Project Liaison _____
Name Phone #

15. Final Floor Plan. Update the floor plans to only show the allowed food service establishment in the commercial area, and remove bike parking from the laundry room.

16. Final Design Review. The Project requires approval of a Final Design Review application by the Design Review Committee.

17. Address Assignment. The applicant shall file an "Address Assignment Request Application" with the Permit Service Center (1947 Center Street) for any address change or new address associated with this Use Permit. The new address(es) shall be assigned and entered into the City's database prior to the applicant's submittal of a building permit application.
18. Construction Noise Reduction Program. The applicant shall develop a site-specific noise reduction program prepared by a qualified acoustical consultant to reduce construction noise impacts to the maximum extent feasible, subject to review and approval of the Zoning Officer. The noise reduction program shall include the time limits for construction listed above, as measures needed to ensure that construction complies with BMC Section 13.40.070. The noise reduction program should include, but shall not be limited to, the following available controls to reduce construction noise levels as low as practical:
- A. Construction equipment should be well maintained and used judiciously to be as quiet as practical.
 - B. Equip all internal combustion engine-driven equipment with mufflers, which are in good condition and appropriate for the equipment.
 - C. Utilize "quiet" models of air compressors and other stationary noise sources where technology exists. Select hydraulically or electrically powered equipment and avoid pneumatically powered equipment where feasible.
 - D. Locate stationary noise-generating equipment as far as possible from sensitive receptors when adjoining construction sites. Construct temporary noise barriers or partial enclosures to acoustically shield such equipment where feasible.
 - E. Prohibit unnecessary idling of internal combustion engines.
 - F. If impact pile driving is required, pre-drill foundation pile holes to minimize the number of impacts required to seat the pile.
 - G. Construct solid plywood fences around construction sites adjacent to operational business, residences or other noise-sensitive land uses where the noise control plan analysis determines that a barrier would be effective at reducing noise.
 - H. Erect temporary noise control blanket barriers, if necessary, along building facades facing construction sites. This mitigation would only be necessary if conflicts occurred which were irresolvable by proper scheduling. Noise control blanket barriers can be rented and quickly erected.
 - I. Route construction related traffic along major roadways and away from sensitive receptors where feasible.
19. Damage Due to Construction Vibration. The project applicant shall submit screening level analysis prior to, or concurrent with demolition building permit. If a screening level analysis shows that the project has the potential to result in damage to structures, a structural engineer or other appropriate professional shall be retained to prepare a vibration impact assessment (assessment). The assessment shall take into account project specific information such as the composition of the structures, location of the various types of equipment used during each phase of the project, as well as the soil characteristics in the project area, in order to determine whether project construction may cause damage to any of the structures identified as potentially impacted in the screening level analysis. If the assessment finds that the project may cause damage to nearby structures, the structural engineer or other appropriate professional shall recommend design means and methods of construction that to avoid the potential damage, if feasible. The assessment and its recommendations shall be reviewed and approved by the Building and Safety Division and the Zoning Officer. If there are no feasible design means or methods to

eliminate the potential for damage, the structural engineer or other appropriate professional shall undertake an existing conditions study (study) of any structures (or, in case of large buildings, of the portions of the structures) that may experience damage. This study shall:

- establish the baseline condition of these structures, including, but not limited to, the location and extent of any visible cracks or spalls; and
- include written descriptions and photographs.

The study shall be reviewed and approved by the Building and Safety Division and the Zoning Officer prior to issuance of a grading permit. Upon completion of the project, the structures (or, in case of large buildings, of the portions of the structures) previously inspected will be resurveyed, and any new cracks or other changes shall be compared to pre-construction conditions and a determination shall be made as to whether the proposed project caused the damage. The findings shall be submitted to the Building and Safety Division and the Zoning Officer for review. If it is determined that project construction has resulted in damage to the structure, the damage shall be repaired to the pre-existing condition by the project sponsor, provided that the property owner approves of the repair.

20. Compliance with Conditions. The applicant shall be responsible for demonstrating compliance with all conditions of approval and mitigation measures per the timeline set forth by this use permit. The applicant shall deposit \$10,000 with the City to pay for the cost of monitoring compliance with these Conditions of Approval 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; any unused deposit will be refunded to the applicant.

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

21. Construction Noise Management - Public Notice Required. At least two weeks prior to initiating any construction activities at the site, the applicant shall provide notice to businesses and residents within **500 feet** of the project site. This notice shall at a minimum provide the following: (1) project description, (2) description of construction activities during extended work hours and reason for extended hours, (3) daily construction schedule (i.e., time of day) and expected duration (number of months), (4) the name and phone number of the Project Liaison for the project that is responsible for responding to any local complaints, and (5) that construction work is about to commence. The liaison would determine the cause of all construction-related complaints (e.g., starting too early, bad muffler, worker parking, etc.) and institute reasonable measures to correct the problem. A copy of such notice and methodology for distributing the notice shall be provided in advance to the City for review and approval.
22. Construction Phases. The applicant shall provide the Zoning Officer with a schedule of major construction phases with start dates and expected duration, a description of the activities and anticipated noise levels of each phase, and the name(s) and phone number(s) of the individual(s) directly supervising each phase. The Zoning Officer or his/her designee shall have the authority to require an on-site meeting with these individuals as necessary to ensure compliance with these conditions. The applicant shall notify the Zoning Officer of any changes to this schedule as soon as possible.

23. Demolition. Demolition of the existing building cannot commence until a complete application is submitted for the replacement building. In addition, all plans presented to the City to obtain a permit to allow the demolition are subject to these conditions.
24. Construction and Demolition Diversion. Applicant shall submit a Construction Waste Management Plan that meets the requirements of BMC Chapter 19.37 including 100% diversion of asphalt, concrete, excavated soil and land-clearing debris and a minimum of 65% diversion of other nonhazardous construction and demolition waste.
25. Toxics. The applicant shall contact the Toxics Management Division (TMD) at 1947 Center Street or (510) 981-7470 to determine which of the following documents are required and timing for their submittal:
- A. Environmental Site Assessments:
- 1) Phase I & Phase II Environmental Site Assessments (latest ASTM 1527-13). A recent Phase I ESA (less than 2 years old*) shall be submitted to TMD for developments for:
 - All new commercial, industrial and mixed use developments and all large improvement projects.
 - All new residential buildings with 5 or more dwelling units located in the Environmental Management Area (or EMA).
 - EMA is available online at: http://www.cityofberkeley.info/uploadedFiles/IT/Level_3_-_General/ema.pdf
 - 2) Phase II ESA is required to evaluate Recognized Environmental Conditions (REC) identified in the Phase I or other RECs identified by TMD staff. The TMD may require a third party toxicologist to review human or ecological health risks that may be identified. The applicant may apply to the appropriate state, regional or county cleanup agency to evaluate the risks.
 - 3) If the Phase I is over 2 years old, it will require a new site reconnaissance and interviews. If the facility was subject to regulation under Title 15 of the Berkeley Municipal Code since the last Phase I was conducted, a new records review must be performed.
- B. Soil and Groundwater Management Plan:
- 1) A Soil and Groundwater Management Plan (SGMP) shall be submitted to TMD for all non-residential projects, and residential or mixed-use projects with five or more dwelling units, that: (1) are in the Environmental Management Area (EMA) and (2) propose any excavations deeper than 5 feet below grade. The SGMP shall be site specific and identify procedures for soil and groundwater management including identification of pollutants and disposal methods. The SGMP will identify permits required and comply with all applicable local, state and regional requirements.
 - 2) The SGMP shall require notification to TMD of any hazardous materials found in soils and groundwater during development. The SGMP will provide guidance on managing odors during excavation. The SGMP will provide the name and phone number of the individual responsible for implementing the SGMP and post the name and phone number for the person responding to community questions and complaints.
 - 3) TMD may impose additional conditions as deemed necessary. All requirements of the approved SGMP shall be deemed conditions of approval of this Use Permit.
- C. Building Materials Survey:
- 1) Prior to approving any permit for partial or complete demolition and renovation activities involving the removal of 20 square or lineal feet of interior or exterior walls, a building materials survey shall be conducted by a qualified professional. The survey shall include,

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

D. Hazardous Materials Business Plan:

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

Prior to Issuance of Any Building (Construction) Permit

26. Percent for Public Art: Consistent with BMC §23.316, the applicant shall either pay the required in-lieu fee or provide the equivalent amount in a financial guarantee to be released after installation of the On-Site Publicly Accessible Art.

BELOW MARKET RATE UNITS

27. Affordable Housing Mitigation Fee: Consistent with BMC §22.20.065 and fee resolution No. 68,074-N.S., the applicant shall provide a schedule, consistent with a schedule approved by the City Manager or her designee, outlining the timeframe for payment of the AHMF, or provide an alternative to the fee payment as permitted by the BMC. Payment of the AHMF may be reduced if paid prior to the building permit per resolution No. 68,074-N.S., and shall be paid no later than prior to the issuance of a certificate of occupancy for the project.

As indicated on the development application, the applicant shall not provide any below market rate rental dwelling units ("BMR Units") and will be required to pay the AHMF as calculated in Berkeley Municipal Code (BMC) Section [22.20.065.D](#). The applicant may elect to avoid the AHMF by providing, for the life of the project, a number of units equal to 20% of the total units in the project at rental rates affordable to Low-Income and Very Low-Income Households in accordance with the BMC. The applicant may also elect to provide BMR units below 20% of total units for a reduced AHMF as calculated in BMC Section [22.20.065.D](#). The applicant must contact and coordinate with the Department of Health, Housing and Community Services (HHCS) via email to affordablehousing@cityofberkeley.info for review and approval. The final number of affordable onsite units must be declared prior to issuance of the first building permit for the project.

28. Regulatory Agreement. Prior to the issuance of a building permit, the applicant shall enter into a Regulatory Agreement that implements Government Code Section 65915 and this Use Permit should they elect to provide BMR units to avoid or reduce their AHMF obligation. The Regulatory Agreement shall include any terms and affordability standards determined by the City to be necessary to ensure such compliance. The maximum qualifying household income for very

low income BMR Units shall be 50 percent of Area Median Income (AMI), and their maximum housing payment shall be 30 percent of 50 percent of AMI. The maximum qualifying household income for Low Income BMR units shall be 80 percent of Area Median Income (AMI), and their maximum housing payment shall be 30 percent of 80 percent of AMI for Low-Income households, as set forth in the following paragraphs of this condition. If the BMR units are occupied by Very Low-Income tenants receiving a rental subsidy through the Section 8 or Shelter Plus Care programs, the rent received by the project sponsor may exceed the restricted rent to the payment standards allowed under those programs so long as the rent allowed under the payment standards is not greater than the market rents charged for comparable units in the development. The applicant shall submit the Regulatory Agreement to the Department of Health, Housing and Community Services (HHCS) via email to affordablehousing@cityofberkeley.info for review and approval.

29. In addition, affordable units must adhere to the administrative guidelines for the City’s Below Market Rate program. These guidelines can be found online at <https://berkeleyca.gov/community-recreation/affordable-housing-berkeley/below-market-rate-rental-information-owners-and>. The guidelines are updated annually by HHCS and posted online. Please note the following key provisions from the guidelines:
- A. Maximum rent shall be adjusted for the family size appropriate for the unit pursuant to California Health & Safety Code Section 50052.5 (h).
 - B. Rent shall include a reasonable allowance for utilities, as published and updated by the Berkeley Housing Authority, including garbage collection, sewer, water, electricity, gas, and other heating, cooking and refrigeration fuels. Such allowance shall take into account the cost of an adequate level of service. Utilities do not include telephone service. Rent also includes any separately charged fees or service charges assessed by the lessor which are required of all tenants, other than security deposits.
 - C. BMR units will be provided for the life of the project under Section 22.20.065.
 - D. Determination of Area Median Income (AMI).
 - The 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 applicable AMI for the purpose of determining the allowable rent for each unit (but not for the purpose of determining eligibility for occupancy of an inclusionary unit) shall be determined in accordance with the following table:

Unit Size	AMI Standard
Studio unit	AMI for a one person household
One-bedroom unit	AMI for a two person household
Two-bedroom unit	AMI for a three person household
Three-bedroom unit	AMI for a four person household

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

- 31.** Dwellings that are approved as rental units, but in which a condo map is approved prior to issuance of an occupancy permit, shall be subject to the affordability requirements within BMC 23.328, which applies to the any of the following:
- A. Residential housing projects for the construction of five or more Dwelling Units;
 - B. Residential housing projects for the construction of one to four new Dwelling Units, when such units are added to an existing one to four unit property, which has been developed after August 14, 1986, and the resulting number of units totals five or more. All Units in such a property are subject to the requirements of this chapter;
 - C. Residential housing projects proposed on lots whose size and zoning designation is such to allow construction of five or more dwelling Units.

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

- 32.** HVAC Noise Reduction. Prior to the issuance of building permits, the project applicant shall submit plans that show the location, type, and design of proposed heating, ventilation, and cooling (HVAC) equipment. In addition, the applicant shall provide product specification sheets or a report from a qualified acoustical consultant showing that operation of the proposed HVAC equipment will meet the City's exterior noise requirements in BMC Section 13.40.050. The City's Planning and Development Department shall review the submitted plans, including the selected HVAC equipment, to verify compliance with exterior noise standards.
- 33.** Interior Noise Levels. Prior to issuance of a building permit, the applicant shall submit a report to the Building and Safety Division and the Zoning Officer by a qualified acoustic engineer certifying that the interior residential portions of the project will achieve interior noise levels of no more than 45 Ldn (Average Day-Night Levels). If the adopted Building Code imposes a more restrictive standard for interior noise levels, the report shall certify compliance with this standard.
- 34.** Solar Photovoltaic (Solar PV). A solar PV system, on the solar zone specified in Section 110.10 of the 2019 Energy Code, shall be installed (subject to the exceptions in Section 110.10) as specified by the Berkeley Energy Code (BMC Chapter 19.36). Location of the solar PV system shall be noted on the construction plans.
- 35.** Water Efficient Landscaping. Landscaping, totaling 500 square feet of more of new landscaping or 2,500 square feet or more of renovated irrigated area, shall comply with the State's Model Water Efficient Landscape Ordinance (MWELo). MWELo-compliant landscape documentation including a planting, grading, and irrigation plan shall be included in site plans. Water budget calculations are also required for landscapes of 2,500 square feet or more and shall be included in site plans. The reference evapotranspiration rate (ET_o) for Berkeley is 41.8.
- 36.** Prohibition of Natural Gas Infrastructure in New Buildings. The project shall comply with the City of Berkeley Prohibition of Natural Gas Infrastructure in New Buildings (BMC Chapter 12.80).
- 37.** Recycling and Organics Collection. Applicant shall provide recycling and organics collection areas for occupants, clearly marked on site plans, which comply with the Alameda County Mandatory Recycling Ordinance (ACWMA Ordinance 2012-01).

- 38. Public Works ADA.** Plans submitted for building permit shall include replacement of sidewalk, curb, gutter, and other streetscape improvements, as necessary to comply with current City of Berkeley standards for accessibility.
- 39. Required Parking Spaces for Persons with Disabilities.** Per BMC Section 23.322.040.H of the Zoning Ordinance, "If the number of required off-street parking spaces in a non-residential district is reduced as allowed by this chapter, the number of required parking spaces for persons with disabilities shall be calculated as if there had been no reduction in required spaces."

Prior to Demolition or Start of Construction:

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

During Construction:

- 41. Construction Hours.** Construction activity shall be limited to between the hours of 7:00 AM and 6:00 PM on Monday through Friday, and between 9:00 AM and 4:00 PM on Saturday. No construction-related activity shall occur on Sunday or any Federal Holiday.
- 42. Construction Hours- Exceptions.** It is recognized that certain construction activities, such as the placement of concrete, must be performed in a continuous manner and may require an extension of these work hours. Prior to initiating any activity that might require a longer period, the developer must notify the Zoning Officer and request an exception for a finite period of time. If the Zoning Officer approves the request, then two weeks prior to the expanded schedule, the developer shall notify businesses and residents within 500 feet of the project site describing the expanded construction hours. A copy of such notice and methodology for distributing the notice shall be provided in advance to the City for review and approval. The project shall not be allowed more than 15 extended working days.
- 43. Project Construction Website.** The applicant shall establish a project construction website with the following information clearly accessible and updated monthly or more frequently as changes warrant:
- Contact information (i.e. "hotline" phone number, and email address) for the project construction manager
 - Calendar and schedule of daily/weekly/monthly construction activities
 - The final Conditions of Approval, Mitigation Monitoring and Reporting Program, Transportation Construction Plan, Construction Noise Reduction Program, and any other reports or programs related to construction noise, air quality, and traffic.
- 44. Public Works - Implement BAAQMD-Recommended Measures during Construction.** For all proposed projects, BAAQMD recommends implementing all the Basic Construction Mitigation Measures, listed below to meet the best management practices threshold for fugitive dust:
- A. All exposed surfaces (e.g., parking areas, staging areas, soil piles, graded areas, and unpaved access roads) shall be watered two times per day.
 - B. All haul trucks transporting soil, sand, or other loose material off-site shall be covered.

- C. All visible mud or dirt track-out onto adjacent public roads shall be removed using wet power vacuum street sweepers at least once per day. The use of dry power sweeping is prohibited.
 - D. All vehicle speeds on unpaved roads shall be limited to 15 mph.
 - E. All roadways, driveways, and sidewalks to be paved shall be completed as soon as possible. Building pads shall be laid as soon as possible after grading unless seeding or soil binders are used.
 - F. Idling times shall be minimized either by shutting equipment off when not in use or reducing the maximum idling time to 5 minutes (as required by the California airborne toxics control measure Title 13, Section 2485 of California Code of Regulations [CCR]). Clear signage shall be provided for construction workers at all access points.
 - G. All construction equipment shall be maintained and properly tuned in accordance with manufacturer's specifications. All equipment shall be checked by a certified visible emissions evaluator.
 - H. Post a publicly visible sign with the telephone number and person to contact at the lead agency regarding dust complaints. This person shall respond and take corrective action within 48 hours. The Air District's phone number shall also be visible to ensure compliance with applicable regulations.
- 45. Air Quality - Diesel Particulate Matter Controls during Construction.** All off-road construction equipment used for projects with construction lasting more than 2 months shall comply with **one** of the following measures:
- A. The project applicant shall prepare a health risk assessment that demonstrates the project's on-site emissions of diesel particulate matter during construction will not exceed health risk screening criteria after a screening-level health risk assessment is conducted in accordance with current guidance from BAAQMD and OEHHA. The health risk assessment shall be submitted to the Land Use Planning Division for review and approval prior to the issuance of building permits; or
 - B. All construction equipment shall be equipped with Tier 2 or higher engines and the most effective Verified Diesel Emission Control Strategies (VDECS) available for the engine type (Tier 4 engines automatically meet this requirement) as certified by the California Air Resources Board (CARB). The equipment shall be properly maintained and tuned in accordance with manufacturer specifications.

In addition, a Construction Emissions Minimization Plan (Emissions Plan) shall be prepared that includes the following:

- An equipment inventory summarizing the type of off-road equipment required for each phase of construction, including the equipment manufacturer, equipment identification number, engine model year, engine certification (tier rating), horsepower, and engine serial number. For all VDECS, the equipment inventory shall also include the technology type, serial number, make, model, manufacturer, CARB verification number level, and installation date.
- A Certification Statement that the Contractor agrees to comply fully with the Emissions Plan and acknowledges that a significant violation of the Emissions Plan shall constitute a material breach of contract. The Emissions Plan shall be submitted to the Public Works Department for review and approval prior to the issuance of building permits.

- 46. Public Works - Construction.** Construction must comply with the State-wide general permit requiring owner to (1) notify the State; (2) prepare and implement a Stormwater Pollution Prevention Plan (SWPPP); and (3) monitor the effectiveness of the plan. Additional information

may be found online at <http://www.swrcb.ca.gov>. As part of the permit submittal, the Public Works Department will need a) a copy of the "Notice of Intent" filed with the State Water Resources Control Board (SWRCB)/Division of Water Quality; b) the Waste Discharger Identification (WDID) number issued by the SWRCB for the project; c) a copy of the SWWPP prepared for each phase of the project; and d) the name of the individual who will be responsible for monitoring the site for compliance to the approved SWPPP.

- 47. Construction and Demolition Diversion.** Divert debris according to your plan and collect required documentation. Get construction debris receipts from sorting facilities in order to verify diversion requirements. Upload recycling and disposal receipts if using [Green Halo](#) and submit online for City review and approval prior to final inspection. Alternatively, complete the second page of the original [Construction Waste Management Plan](#) and present it, along with your construction debris receipts, to the Building Inspector by the final inspection to demonstrate diversion rate compliance. The Zoning Officer may request summary reports at more frequent intervals, as necessary to ensure compliance with this requirement.
- 48. Low-Carbon Concrete.** The project shall maintain compliance with the Berkeley Green Code (BMC Chapter 19.37) including use of concrete mix design with a cement reduction of at least 25%. Documentation on concrete mix design shall be available at all times at the construction site for review by City Staff.
- 49. Transportation Construction Plan.** The applicant and all persons associated with the project are hereby notified that a Transportation Construction Plan (TCP) is required for all phases of construction, particularly for the following activities:
- Alterations, closures, or blockages to sidewalks, pedestrian paths or vehicle travel lanes (including bicycle lanes);
 - Storage of building materials, dumpsters, debris anywhere in the public ROW;
 - Provision of exclusive contractor parking on-street; or
 - Significant truck activity.

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

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

- 50. Avoid Disturbance of Nesting Birds.** Initial site disturbance activities, including vegetation and concrete removal, shall be prohibited during the general avian nesting season (February 1 to August 30), if feasible. If nesting season avoidance is not feasible, the applicant shall retain a qualified biologist to conduct a preconstruction nesting bird survey to determine the

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

51. Archaeological Resources (Ongoing throughout demolition, grading, and/or construction).

Pursuant to CEQA Guidelines section 15064.5(f), "provisions for historical or unique archaeological resources accidentally discovered during construction" should be instituted. Therefore:

- A. In the event that any prehistoric or historic subsurface cultural resources are discovered during ground disturbing activities, all work within 50 feet of the resources shall be halted and the project applicant and/or lead agency shall consult with a qualified archaeologist, historian or paleontologist to assess the significance of the find.
- B. If any find is determined to be significant, representatives of the project proponent and/or lead agency and the qualified professional would meet to determine the appropriate avoidance measures or other appropriate measure, with the ultimate determination to be made by the City of Berkeley. All significant cultural materials recovered shall be subject to scientific analysis, professional museum curation, and/or a report prepared by the qualified professional according to current professional standards.
- C. In considering any suggested measure proposed by the qualified professional, the project applicant shall determine whether avoidance is necessary or feasible in light of factors such as the uniqueness of the find, project design, costs, and other considerations.
- D. If avoidance is unnecessary or infeasible, other appropriate measures (e.g., data recovery) shall be instituted. Work may proceed on other parts of the project site while mitigation measures for cultural resources is carried out.
- E. If significant materials are recovered, the qualified professional shall prepare a report on the findings for submittal to the Northwest Information Center.

52. Human Remains (Ongoing throughout demolition, grading, and/or construction).

In the event that human skeletal remains are uncovered at the project site during ground-disturbing activities, all work shall immediately halt and the Alameda County Coroner shall be contacted to evaluate the remains, and following the procedures and protocols pursuant to Section 15064.5 (e)(1) of the CEQA Guidelines. If the County Coroner determines that the remains are Native American, the City shall contact the California Native American Heritage Commission (NAHC), pursuant to subdivision (c) of Section 7050.5 of the Health and Safety Code, and all excavation and site preparation activities shall cease within a 50-foot radius of the find until appropriate arrangements are made. If the agencies determine that avoidance is not feasible, then an alternative plan shall be prepared with specific steps and timeframe required to resume

construction activities. Monitoring, data recovery, determination of significance and avoidance measures (if applicable) shall be completed expeditiously.

53. Paleontological Resources (Ongoing throughout demolition, grading, and/or construction). In the event of an unanticipated discovery of a paleontological resource during construction, excavations within 50 feet of the find shall be temporarily halted or diverted until the discovery is examined by a qualified paleontologist (per Society of Vertebrate Paleontology standards [SVP 1995,1996]). The qualified paleontologist shall document the discovery as needed, evaluate the potential resource, and assess the significance of the find. The paleontologist shall notify the appropriate agencies to determine procedures that would be followed before construction is allowed to resume at the location of the find. If the City determines that avoidance is not feasible, the paleontologist shall prepare an excavation plan for mitigating the effect of the project on the qualities that make the resource important, and such plan shall be implemented. The plan shall be submitted to the City for review and approval.
54. Halt Work/Unanticipated Discovery of Tribal Cultural Resources. In the event that cultural resources of Native American origin are identified during construction, all work within 50 feet of the discovery shall be redirected. The project applicant and project construction contractor shall notify the City Planning Department within 24 hours. The City will again contact any tribes who have requested consultation under AB 52, as well as contact a qualified archaeologist, to evaluate the resources and situation and provide recommendations. If it is determined that the resource is a tribal cultural resource and thus significant under CEQA, a mitigation plan shall be prepared and implemented in accordance with State guidelines and in consultation with Native American groups. If the resource cannot be avoided, additional measures to avoid or reduce impacts to the resource and to address tribal concerns may be required.
55. Stormwater Requirements. The applicant shall demonstrate compliance with the requirements of the City's National Pollution Discharge Elimination System (NPDES) permit as described in BMC Section 17.20. The following conditions apply:
- A. The project plans shall identify and show site-specific Best Management Practices (BMPs) appropriate to activities conducted on-site to limit to the maximum extent practicable the discharge of pollutants to the City's storm drainage system, regardless of season or weather conditions.
 - B. Trash enclosures and/or recycling area(s) shall be covered; no other area shall drain onto this area. Drains in any wash or process area shall not discharge to the storm drain system; these drains should connect to the sanitary sewer. Applicant shall contact the City of Berkeley and EBMUD for specific connection and discharge requirements. Discharges to the sanitary sewer are subject to the review, approval and conditions of the City of Berkeley and EBMUD.
 - C. Landscaping shall be designed with efficient irrigation to reduce runoff, promote surface infiltration and minimize the use of fertilizers and pesticides that contribute to stormwater pollution. Where feasible, landscaping should be designed and operated to treat runoff. When and where possible, xeriscape and drought tolerant plants shall be incorporated into new development plans.
 - D. Design, location and maintenance requirements and schedules for any stormwater quality treatment structural controls shall be submitted to the Department of Public Works for review with respect to reasonable adequacy of the controls. The review does not relieve the property owner of the responsibility for complying with BMC Chapter 17.20 and future

revisions to the City's overall stormwater quality ordinances. This review shall be shall be conducted prior to the issuance of a Building Permit.

- E. All paved outdoor storage areas must be designed to reduce/limit the potential for runoff to contact pollutants.
 - F. All on-site storm drain inlets/catch basins must be cleaned at least once a year immediately prior to the rainy season. The property owner shall be responsible for all costs associated with proper operation and maintenance of all storm drainage facilities (pipelines, inlets, catch basins, outlets, etc.) associated with the project, unless the City accepts such facilities by Council action. Additional cleaning may be required by City of Berkeley Public Works Engineering Dept.
 - G. All on-site storm drain inlets must be labeled "No Dumping – Drains to Bay" or equivalent using methods approved by the City.
 - H. Most washing and/or steam cleaning must be done at an appropriately equipped facility that drains to the sanitary sewer. Any outdoor washing or pressure washing must be managed in such a way that there is no discharge or soaps or other pollutants to the storm drain. Sanitary connections are subject to the review, approval and conditions of the sanitary district with jurisdiction for receiving the discharge.
 - I. All loading areas must be designated to minimize "run-on" or runoff from the area. Accumulated waste water that may contribute to the pollution of stormwater must be drained to the sanitary sewer or intercepted and pretreated prior to discharge to the storm drain system. The property owner shall ensure that BMPs are implemented to prevent potential stormwater pollution. These BMPs shall include, but are not limited to, a regular program of sweeping, litter control and spill cleanup.
 - J. Restaurants, where deemed appropriate, must be designed with a contained area for cleaning mats, equipment and containers. This contained wash area shall be covered or designed to prevent run-on or run-off from the area. The area shall not discharge to the storm drains; wash waters should drain to the sanitary sewer, or collected for ultimate disposal to the sanitary sewer. Employees shall be instructed and signs posted indicating that all washing activities shall be conducted in this area. Sanitary connections are subject to the review, approval and conditions of the waste water treatment plant receiving the discharge.
 - K. Sidewalks and parking lots shall be swept regularly to prevent the accumulation of litter and debris. If pressure washed, debris must be trapped and collected to prevent entry to the storm drain system. If any cleaning agent or degreaser is used, wash water shall not discharge to the storm drains; wash waters should be collected and discharged to the sanitary sewer. Discharges to the sanitary sewer are subject to the review, approval and conditions of the sanitary district with jurisdiction for receiving the discharge.
 - L. The applicant is responsible for ensuring that all contractors and sub-contractors are aware of and implement all stormwater quality control measures. Failure to comply with the approved construction BMPs shall result in the issuance of correction notices, citations, or a project stop work order.
- 56. Public Works.** All piles of debris, soil, sand, or other loose materials shall be covered at night and during rainy weather with plastic at least one-eighth millimeter thick and secured to the ground.

57. Public Works. The applicant shall ensure that all excavation takes into account surface and subsurface waters and underground streams so as not to adversely affect adjacent properties and rights-of-way.
58. Public Works. The project sponsor shall maintain sandbags or other devices around the site perimeter during the rainy season to prevent on-site soils from being washed off-site and into the storm drain system. The project sponsor shall comply with all City ordinances regarding construction and grading.
59. Public Works. Prior to any excavation, grading, clearing, or other activities involving soil disturbance during the rainy season the applicant shall obtain approval of an erosion prevention plan by the Building and Safety Division and the Public Works Department. The applicant shall be responsible for following these and any other measures required by the Building and Safety Division and the Public Works Department.
60. Public Works. The removal or obstruction of any fire hydrant shall require the submission of a plan to the City's Public Works Department for the relocation of the fire hydrant during construction.
61. Public Works. If underground utilities leading to adjacent properties are uncovered and/or broken, the contractor involved shall immediately notify the Public Works Department and the Building & Safety Division, and carry out any necessary corrective action to their satisfaction.

Prior to Final Inspection or Issuance of Occupancy Permit:

62. Number of Below Market Rate Units. Should the Applicant elect to provide BMR units prior to receiving a building permit for the Project, they are entitled to eliminate or receive a proportional reduction in the AHMF consistent with BMC Section 22.20.065. The BMR Units shall be designated in the Regulatory Agreement; comply with the City's BMR administrative guidelines; shall be reasonably dispersed throughout the project; be of the same size and contain, on average, the same number of bedrooms as the non-BMR units in the project; and be comparable with the design or use of non-BMR units in terms of appearance, materials and finish quality. The designation of BMR Units shall conform to the addresses assigned to the building by the City. Any additional BMR units the applicant may choose to provide must also conform with these conditions.
63. Compliance with Conditions. The project shall conform to the plans and statements in the Use Permit. The developer is responsible for providing sufficient evidence to demonstrate compliance with the requirements throughout the implementation of this Use Permit.
64. Compliance with Approved Plan. The project shall conform to the plans and statements in the Use Permit. All landscape, site and architectural improvements shall be completed per the attached approved drawings received August 26, 2022, except as modified by conditions of approval.
65. Transportation Demand Management. Prior to issuance of a Certificate of Occupancy, the property owner shall facilitate a site inspection by Land Use Division staff to confirm that the physical improvements required in Section 23.334.030(C) and 23.322.090 (bike parking) have been installed. A Parking and Transportation Demand Management (PTDM) compliance report

documenting that the programmatic measures required in Sections 23.334.030(C) and 23.322.090 are implemented shall be submitted to the Land Use Division prior to occupancy, and on an annual basis thereafter, which demonstrates that the project is compliant with the applicable requirements in these sections.

A. Consistent with Section 23.334.030(C), publicly-available, real-time transportation information in a common area, such as a lobby or elevator bay, on televisions, computer monitors or other displays readily visible to residents and/or visitors, shall be provided. Transportation information shall include, but is not limited to, transit arrivals and departures for nearby transit routes.

At All Times:

66. Transportation Demand Management Compliance. The property owner shall submit to the Land Use Division annual PTDM Compliance Reports, subject to the review and oversight of Land Use Division staff. Property owners may be required to pay administrative fees associated with compliance with this Condition, pursuant to BMC Section 23.334.040(B).
67. Exterior Lighting. All exterior lighting shall be energy efficient where feasible; and shielded and directed downward and away from property lines to prevent excessive glare beyond the subject property.
68. Noise and exterior lighting 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.
69. Rooftop Projections. No additional rooftop or elevator equipment shall be added to exceed the approved maximum roof height without submission of an application for a Use Permit Modification, subject to Board review and approval.
70. Design Review. Signage and any other exterior modifications, including but not limited to landscaping and lighting, shall be subject to Design Review Committee approval.
71. Drainage Patterns. The applicant shall establish and maintain drainage patterns that do not adversely affect adjacent properties and rights-of-way. Drainage plans shall be submitted for approval of the Building & Safety Division and Public Works Department, if required.
72. Electrical Meter. Only one electrical meter fixture may be installed per dwelling unit.
73. Loading. All loading/unloading activities associated with deliveries to all uses shall be restricted to the hours of 7:00 a.m. to 10:00 p.m. daily.
74. Residential Permit Parking. No Residential Permit Parking (RPP) permits shall be issued to project residents, nor shall commercial placards be issued to non-residential occupants and/or users of the site. The project planner shall notify the Finance Department, Customer Service Center, to add these addresses to the list of addresses ineligible for RPP permits. The property owner shall notify all tenants of rental units, and/or buyers of condominium units, of this restriction in leases and/or contracts, and shall provide sample leases and/or contracts including such notification to the project planner prior to issuance of an occupancy permit or final inspection.

- 75. Tenant Notification.** The developer shall provide tenant notification, via a lease rider or deed covenant, that each dwelling unit is located in a mixed-use area that includes commercial, food service and entertainment uses, and that each occupant shall not seek to impede their lawful operation.
- 76. Transit Subsidy Condition.** The applicant shall reimburse employees the maximum non-taxable cost of commuting to and from work on public transportation (e.g., monthly passes) if they so commute, and a notice informing employees of the availability of such subsidy shall be permanently displayed in the employee area as per BMC Chapter 9.88.
- 77. Periodic Review and Reporting.** The City may require periodic review of this approved project to verify compliance with permit requirements and conditions of approval. The permit holder or property owner is responsible for complying with any periodic reporting, monitoring, or assessments requirement. This permit is subject to the provisions of BMC Section 23.404.080 (Permit Revocation) if violations of the permit requirements are found by the Zoning Officer.
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ATTACHMENT 1B

FINDINGS FOR DENIAL

JANUARY 12, 2023

2439 Durant Avenue

Use Permit #ZP2021-0192 to demolish a two-story commercial building and construct a 36,529 square-foot 7-story mixed-use building with 22 dwelling units and a roof deck, and establish an entertainment use with the service of distilled spirits.

PERMITS DENIED

- Use Permit pursuant to BMC Section 23.310.020(B) to add service of distilled spirits.
- Use Permit pursuant to BMC Section 23.204.020 to add an entertainment establishment.
- Administrative Use Permit pursuant to BMC Section 23.302.020(D) to add amplified live entertainment.

I. CEQA FINDINGS

1. The project is categorically exempt from the provisions of the California Environmental Quality Act (CEQA, Public Resources Code §21000, et seq. and California Code of Regulations, §15000, et seq.) pursuant to Section 15332 of the CEQA Guidelines (“In-Fill Development Projects”).

The project meets all of the requirements of this exemption, as follows:

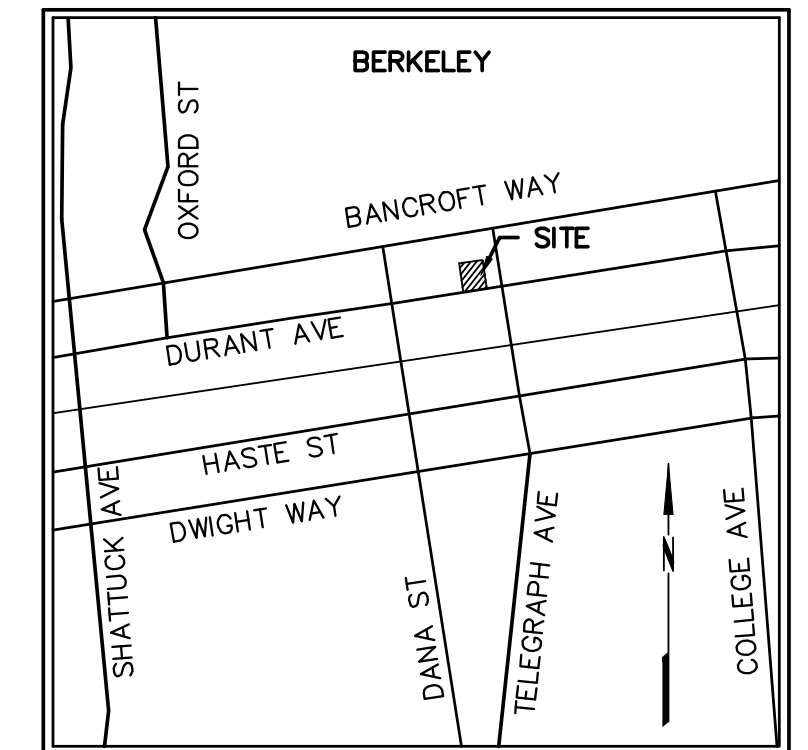
- A. The project is consistent with the applicable General Plan designation and policies, and with the applicable zoning designation and regulations.
 - B. The project occurs within the Berkeley City limits on a project site of no more than five acres, and is surrounded by urban uses.
 - C. The parcels within the project site have previously been developed and have no value as habitat for endangered, rare or threatened species.
 - D. The project would not result in any significant effects relating to traffic, noise, air quality or water quality. The Traffic Impact Analysis prepared for the project was reviewed by the City Transportation Division which concurred with the findings of less than significant impacts. City Standard Conditions would address potential impacts related to traffic, noise, air quality, and water quality.
 - E. The site can be adequately served by all required utilities and public services.
2. Furthermore, none of the exceptions in CEQA Guidelines Section 15300.2 apply, as follows:
(a) the site is not located in an environmentally sensitive area, (b) there are no cumulative impacts, (c) there are no significant effects, (d) the project is not located near a scenic highway, (e) the project site is not located on a hazardous waste site pursuant to Government Code Section 65962.5, and (f) the project would not affect any historical resource.

II. FINDINGS FOR DENIAL

1. As required by Section 23.406.040(E)(5) of the BMC, the project, under the circumstances of this particular case existing at the time at which the application is granted, would be detrimental to the health, safety, peace, morals, comfort, and general welfare of the persons residing or

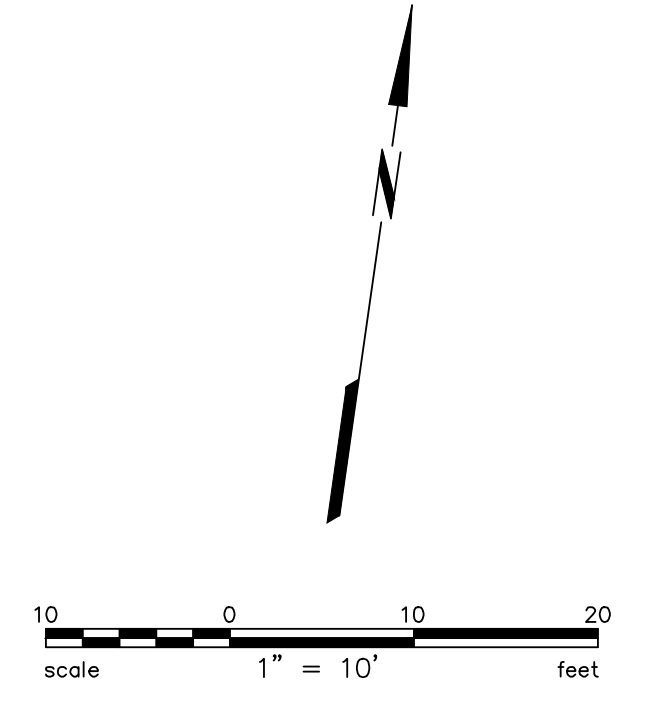
working in the neighborhood of such proposed use or be detrimental or injurious to property and improvements of the adjacent properties, the surrounding area or neighborhood, or to the general welfare of the City because:

- A. Service of distilled spirits across three floors, and an entertainment establishment in the basement with amplified live entertainment are identical to the existing uses. The proposed uses would be detrimental to the community because the site has a history of violations from the California Department of Alcoholic Beverage Control (ABC), and calls for service from the Berkeley Police Department.
2. As required by Section 23.310.020(B) of the BMC, the Zoning Adjustments Board finds that the request to add service of distilled spirits to the new building is not permissible because the following findings of "Public Convenience or Necessity" cannot be met:
 - A. The Berkeley Police Department does not support the new Use Permit for alcohol due to the number calls for service over the past several years, past ABC disciplinary actions, and community complaints for nuisance activities including intoxicated people, alcohol violations, narcotics violations, weapons violations, and assaults, including shootings within one block of the premise.
 - B. The Berkeley Police Department believes there will be an increase in crime and calls for service with the reopening of the business in a new building, which could cause undue harm and jeopardize the safety of the community.
3. As required by Section 23.204.110(E) of the BMC, the Zoning Adjustments Board finds that:
 - A. The entertainment establishment and amplified live entertainment are connected to the proposed service of distilled spirits because they would be located in the basement bar area, and since the findings cannot be met for the service of distilled spirits, findings cannot be met for the entertainment establishment and amplified live entertainment.



VICINITY MAP
NOT TO SCALE

SYMBOLS & LEGEND		ABBREVIATIONS	
EXISTING			
	MONUMENT	±	MORE OR LESS
	GAS VALVE UNLESS OTHERWISE NOTED	AC	ASPHALT CONCRETE
	FIRE DEPARTMENT CONNECTION	APN	ASSESSOR'S PARCEL NUMBER
	POST INDICATOR VALVE	BLDG	BUILDING
	RISER	BLRD	BOLLARD
	STREET LIGHT	CB	CATCH BASIN
	GUY ANCHOR	CONC	CONCRETE
	UTILITY POLE	DWY	DRIVEWAY
	PROPERTY LINE	E	ELECTRIC
	MONUMENT LINE	ELEV	ELEVATION
	CENTER LINE	EX	EXISTING
	STORM DRAIN	GM	GAS METER
	SANITARY SEWER	INV	BOTTOM INSIDE OF PIPE
	OVERHEAD UTILITY LINE	MH	MANHOLE
	CONCRETE	MON	MONUMENT
	DETECTABLE WARNING	OR	OFFICIAL RECORDS
		SD	STORM DRAIN
		SDMH	STORM DRAIN MANHOLE
		SL	STREETLIGHT
		SS	SANITARY SEWER
		SSCO	SANITARY SEWER CLEAN OUT
		SSMH	SANITARY SEWER MANHOLE
		TC	TOP FACE OF CURB
		UB	UTILITY BOX
		W	WATER
		WM	WATER METER
		WV	WATER VALVE



BASIS OF BEARINGS

THE BEARING OF NORTH 81°52'05" EAST BETWEEN FOUND MONUMENTS ON DURANT AVENUE AS SHOWN ON PARCEL MAP NO. 10967, FILED DECEMBER, 2019, IN BOOK 346 OF MAPS AT PAGE 48, ALAMEDA COUNTY RECORDS, WAS TAKEN AS THE BASIS OF BEARINGS FOR THIS SURVEY.

BENCHMARK

THE ELEVATIONS SHOWN HEREON ARE BASED ON A FOUND CITY OF BERKELEY BENCHMARK, DESIGNATION B 0400, BEING A 1/4" DIAMETER BRASS PIN IN A MONUMENT WELL AT THE MONUMENT LINE INTERSECTION OF DURANT AVENUE AND DANA STREET. ELEVATION 235.80 FEET (DATUM = CITY OF BERKELEY)

NOTES

1. TOPOGRAPHY SHOWN HEREON WAS COMPILED FROM FIELD SURVEYS PERFORMED JULY OF 2021.
2. ALL UNITS ARE IN US SURVEY FEET AND DECIMALS THEREOF.
3. ALL TIES ARE PERPENDICULAR UNLESS NOTED OTHERWISE.
4. LINES OF ADJOINING OCCUPATION WERE NOT DISCERNABLE AT THE TIME OF THIS SURVEY. UNTIL SUCH A TIME THAT SAID OCCUPATION CAN BE EXPOSED THROUGH DEMOLITION OR OTHER MEANS, LOCATION CANNOT BE DETERMINED.

UTILITY NOTE

THE UTILITY LINES SHOWN ON THIS PLAN ARE DERIVED FROM SURFACE OBSERVATION. ACTUAL LOCATION AND SIZE, TOGETHER WITH THE PRESENCE OF ANY ADDITIONAL UTILITY LINES NOT SHOWN ON THIS PLAN SHALL BE VERIFIED IN THE FIELD BY THE CONTRACTOR PRIOR TO CONSTRUCTION.

SURVEYOR'S STATEMENT:

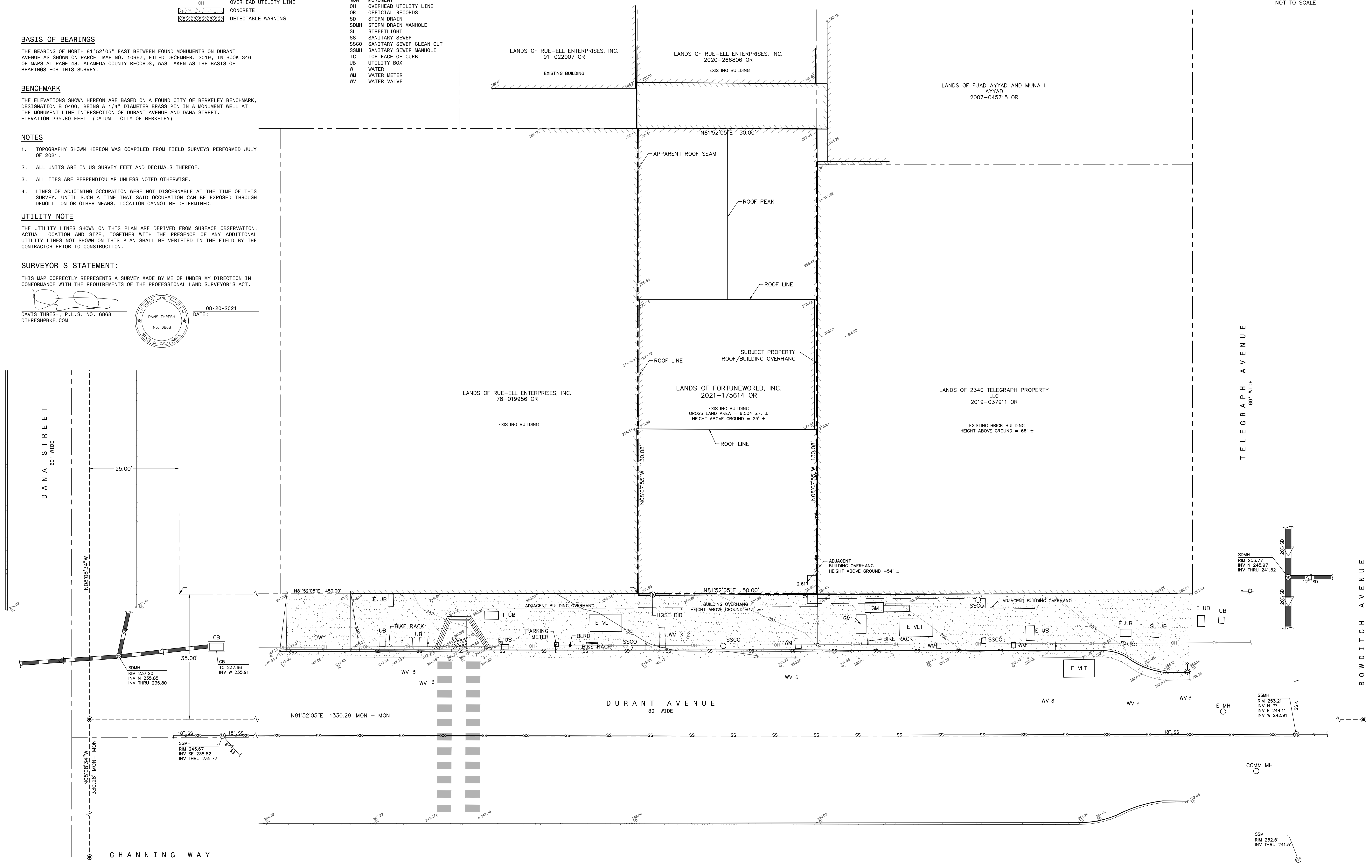
THIS MAP CORRECTLY REPRESENTS A SURVEY MADE BY ME OR UNDER MY DIRECTION IN CONFORMANCE WITH THE REQUIREMENTS OF THE PROFESSIONAL LAND SURVEYOR'S ACT.

DAVIS THRESH, P.L.S. NO. 6868
DTHRESH@BKFCOM

PROFESSIONAL LAND SURVEYOR
DAVIS THRESH
No. 6868
STATE OF CALIFORNIA

DATE: 08-20-2021

DRAWING NAME: K:\2021\211063_2439_Durant_Berkeley\Sur\Maping\Topo\211063_TOPD.dwg
PLOT DATE: 08-20-21 PLOT BY: mcz





www.122westdesign.com
510.992.3122

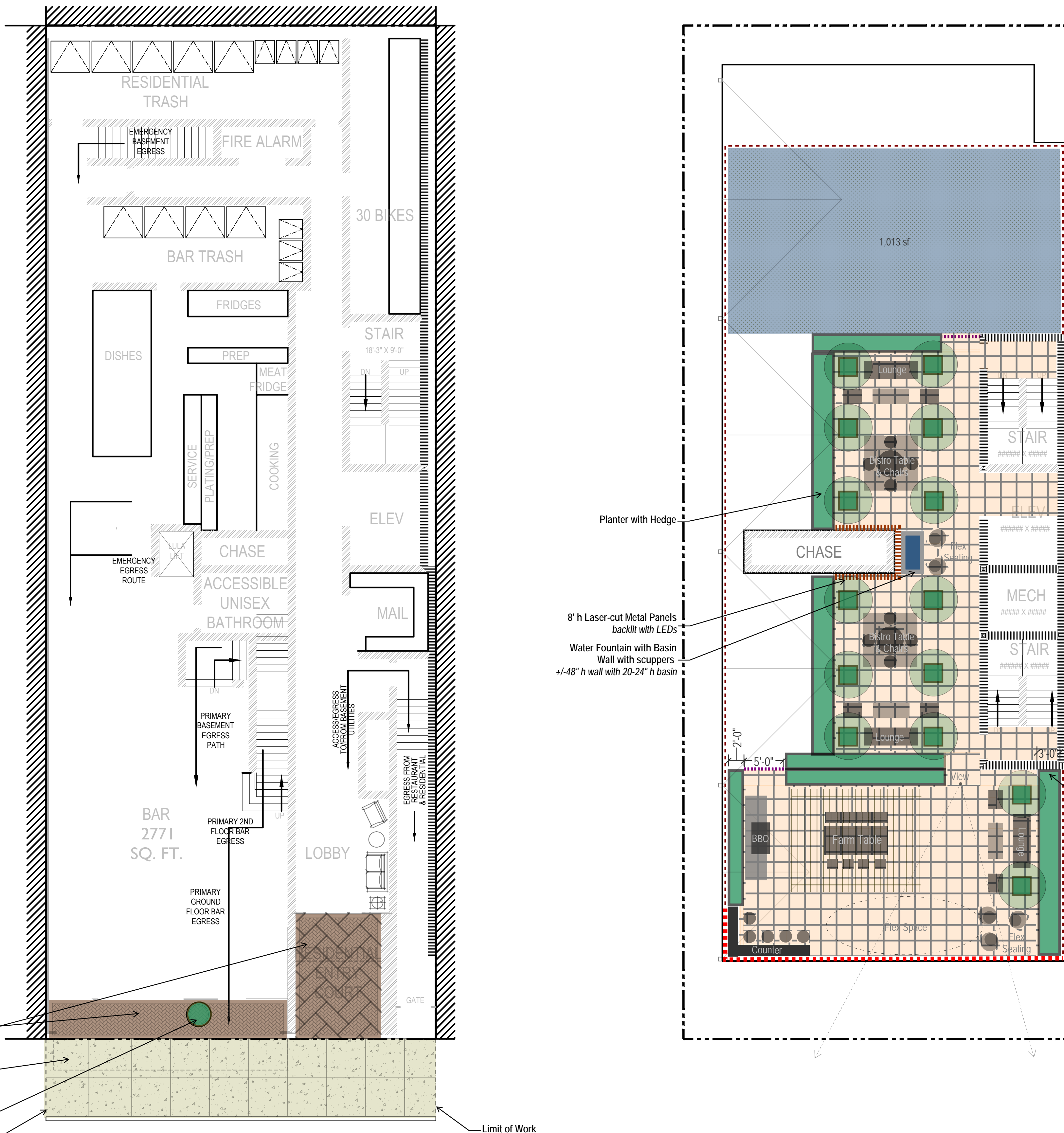
The use of these plans and specifications shall be restricted to the original site and owner for which they were prepared. Alteration, reproduction or publication is expressly limited only to the original use without the express written consent of 122 West Landscape Architecture. Title to said plans remains the sole property of 122 West Landscape Architecture.

2439 DURANT AVENUE
LANDSCAPE PLANS
2439 DURANT AVE, BERKELEY, CA

PHASE OWNER REVIEW
DATE 2/21/2022
REVISIONS

No.	Description	Date

LANDSCAPE
CONCEPT PLANS



Conceptual Plant Species Palette

- Trees**
Citrus vars.
Fern Pine / Privet
Fig
Pomegranate
Bay Laurel
Strawberry Tree

- Shrubs & Perennials**
Autmn Sage
Cleveland Sage
Coffeeberry
California Fuchsia
Lavender
Catmint
Bee Balm
Rosemary
Thyme
African Iris
Hyssop

Percent of total planting area that will contain native and/or wild-life supporting species: 75%

Total Planting Area Provided
404 SF

Enhanced Paving at Entry
Integral Color Concrete Pavers with Band - to extend to interior court

Concrete Sidewalk
Natural Grey with contraction score joints at 5' O.C.E.W. - Typical

Accent Planter
+/- 30" H x W Pre-cast Concrete with specimen accent plant

Limit of Work

Roof Deck Landscape Element Legend

Roof Pavers
Concrete or porcelain unit pavers in a grid pattern over adjustable-height pedestals or gravel as per structural engineer/architect

Mass Planter
FRP/GRFC/Steel planter on adjustable height pedestals or gravel, 24-30" h, set to restrain paver edges and at parapet wall

Accent Planter
FRP/GRFC/Ceramic/Steel planter pavers, plumbed for drainage and irrigation, 32-42" h with specimen accent shrub or tree

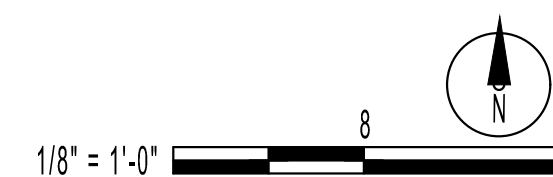
Planter Edge - Architectural Wall
Planter build-up layers over architectural waterproofing roof membrane with parapet wall as support

Planter Edge - Freestanding
Stand-alone planter atop pedestal pavers

Decorative Guardrail
Glass/Steel Cable on parapet wall, 42" h from adjacent walkway (FS). Design concept only - to be coordinated with Architect.

OSHA Guardrail per code requirements.

Access Control Barricade/Gate
Maintenance and staff access only guardrail/fence secured to roof





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

NOTICE OF PUBLIC HEARING

2439 Durant Avenue

Use Permit #ZP2021-0192 to demolish a two-story commercial building and construct a 36,529 square-foot 7-story mixed-use building with 22 dwelling units and a roof deck, and establish an entertainment use with the service of distilled spirits.

The Zoning Adjustments Board of the City of Berkeley will hold a public hearing on the above matter, pursuant to Zoning Ordinance Section 23.406.040.D, on January 12, 2023, **conducted via Zoom**, see the **Agenda for details at: https://berkeleyca.gov/sites/default/files/legislative-body-meeting-agendas/2023-01-12_ZAB_Agenda.pdf**. The meeting starts at 7:00 p.m.

PUBLIC ADVISORY: THIS MEETING WILL BE CONDUCTED EXCLUSIVELY THROUGH VIDEOCONFERENCE AND TELECONFERENCE Pursuant to Government Code Section 54953(e) and the state declared emergency, this meeting of the Zoning Adjustments Board (ZAB) will be conducted exclusively through teleconference and Zoom videoconference. The COVID-19 state of emergency continues to directly impact the ability of the members to meet safely in person and presents imminent risks to the health of attendees. Therefore, no physical meeting location will be available.

A. Land Use Designations:

- General Plan: AC – Avenue Commercial
- Zoning: C-T – Telegraph Avenue Commercial District

B. Zoning Permits Required:

- Use Permit pursuant to Berkeley Municipal Code (BMC) Section 23.326.070(A) to demolish a non-residential building.
- Use Permit pursuant to BMC Section 23.204.020 to add a mixed-use residential building.
- Use Permit pursuant to BMC Section 23.204.020 to add dwelling units.
- Use Permit pursuant to BMC Section 23.204.110(D)(4) to increase the building height to 75 feet, and increase the FAR to 6.
- Use Permit pursuant to BMC Section 23.310.020(B) to add service of distilled spirits.
- Use Permit pursuant to BMC Section 23.204.020 to add an entertainment establishment.
- Administrative Use Permit pursuant to BMC Section 23.304.050(A) to add mechanical chases and stair and elevator overruns that exceed the 75-foot height limit.
- Administrative Use Permit pursuant to BMC Section 23.302.020(D) to add amplified live entertainment.

- Administrative Use Permit pursuant to BMC Section 23.302.070(E)(2) to add a food service establishment larger than 1,500 square feet.

C. CEQA Recommendation: Categorically exempt pursuant to Section 15332 (“In-Fill Development Projects”) of the CEQA Guidelines.

D. Parties Involved:

- Applicant Austin Springer, Studio KDA, 1810 Sixth Street, Berkeley
- Property Owner Fortuneworld Inc., c/o Wilson Wong, 200 Creedon Circle, Alameda

Further Information:

All application materials are available online at:
<https://aca.cityofberkeley.info/CitizenAccess/Welcome.aspx>.

The Zoning Adjustments Board final agenda and staff reports will be available online 6 days prior to this meeting at: <https://berkeleyca.gov/your-government/boards-commissions/zoning-adjustments-board>.

Questions about the project should be directed to the project planner, Allison Riemer, at (510) 981-7433 or ariemer@cityofberkeley.info.

Written comments or a request for a Notice of Decision should be directed to the Zoning Adjustments Board Secretary at zab@cityofberkeley.info.

Communication Disclaimer:

Communications to Berkeley boards, commissions or committees are public record and will become part of the City's electronic records, which are accessible through the City's website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to a City board, commission or committee, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service or in person to the secretary of the relevant board, commission or committee. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the secretary to the relevant board, commission or committee for further information.

Communications and Reports:

Written comments must be directed to the ZAB Secretary at the Land Use Planning Division (Attn: ZAB Secretary), or via e-mail to: zab@cityofberkeley.info. All materials will be made available via the Zoning Adjustments Board Agenda page online at this address: <https://berkeleyca.gov/your-government/boards-commissions/zoning-adjustments-board>

All persons are welcome to attend the virtual hearing and will be given an opportunity to address the Board. Comments may be made verbally at the public hearing and/or in writing before the hearing. The Board may limit the time granted to each speaker.

Correspondence received by 5:00 PM, eight days before this public hearing, will be provided with the agenda materials provided to the Board. Note that if you submit a hard copy document of more than 10 pages, or in color, or with photos, you must provide 15 copies. Correspondence received after this deadline will be conveyed to the Board in the following manner:

- **Correspondence received by 5:00 PM two days before** this public hearing, will be conveyed to the Board in a Supplemental Communications and Reports, which is released around noon one day before the public hearing; or
- **Correspondence received after 5:00 PM two days before** this public hearing will be saved in the project administrative record.

It will not be possible to submit written comments at the meeting.



Accessibility Information / ADA Disclaimer:

To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at 981-6342 (V) or 981-6345 (TDD) at least three business days before the meeting date.

SB 343 Disclaimer:

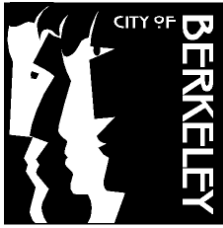
Any writings or documents provided to a majority of the Commission regarding any item on this agenda will be made available to the public. Please contact the Land Use Planning Division (zab@cityofberkeley.info) to request hard-copies or electronic copies.

Notice Concerning Your Legal Rights:

If you object to a decision by the Zoning Adjustments Board regarding a land use permit project, the following requirements and restrictions apply:

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

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



Planning and Development
Department
Land Use Planning Division

**ACTION SUMMARY FOR
DESIGN REVIEW COMMITTEE MEETING
June 16, 2022 7:00 PM**

I. Roll Call:

Committee Members Present:

Charles Kahn, Vice-Chair (*Zoning Adjustments Board*)
Steve Finacom (*Landmarks Preservation Commission*)
Kimberly Gaffney (*Zoning Adjustments Board*)
Diana Pink (*Appointed by Zoning Adjustments Board*)
Janet Tam (*Appointed by Zoning Adjustments Board*)
Cameron Woo (*Civic Arts Commission*)

Committee Members Absent:

Lillian Mitchell, Chair (*Appointed by Zoning Adjustments Board*)

Staff Present: Burns, Dougherty

II. PROJECTS

1. 742 GRAYSON STREET (Between Seventh and Aquatic Park] (DRCP2021-0015): Preliminary Design Review 1) to demolish two existing industrial building and 2) construct a new four story 62' tall manufacturing and research and development facility with 35,352 square feet of ground floor manufacturing space and a seven-story parking garage with 325 parking spaces.

Preliminary Design Review received a favorable recommendation to ZAB with the following conditions and recommendations. MOTION: (Kahn, Woo) VOTE (6-0-0-1) Mitchell - absent.

Conditions

- *Provide more design details on Grayson Street that enrich the pedestrian experience.*
- *Provide options for both fence and mesh design at FDR.*
- *Clearly show how solar equipment is integrated into the building design.*

Recommendations

- *Recommend developing mesh screen to be more integrated with the façade design. Recommendations included pattern and volumetric studies, rather than just a utilitarian screen.*
- *Expand bird safe glass to all floors where the glazing is not covered by the mesh; details should clearly show bird safety, even with the mesh layer.*
- *Recommend that the fence design be better integrated into the landscape.*
- *Recommend 75% native and/or wild-life supporting plants in the plant palette.*

ZAB / Public Works Recommendations

- *Recommend that the end of Grayson be addressed by Public Works and Traffic and included with any drop-off designs.*
- *Recommend working with Public Works to include permeable pavers between the tree wells and adjacent to the curb. Be prepared to discuss at FDR;*
- *Recommend gender neutral bathroom be included on each floor.*

2. 2439 DURANT AVENUE [Between Telegraph and Dana] (DRCP2021-0018):

Preliminary Design Review to demolish an existing two-story commercial building and construct a new seven-story mixed-use building with 7,799 square feet of commercial space, 22 residential units, a roof deck, and indoor bike parking space.

Preliminary Design Review received a favorable recommendation to ZAB with the following direction for Final Design Review (FDR). MOTION: (Tam, Pink) VOTE (5-0-0-2) Mitchell – absent, Kahn – recused himself.

Conditions

- *Provide further study at FDR for:*
 - *final façade details and window types. Simplify façade organization;*
 - *residential entry, including how it meets the ground and is integrated into the residential mass above and the building design as a whole; and*
 - *final fin / frame design, including an alternate, quieter fin profile.*
- *At FDR, show the building with a 7-story mass to the west of the project site so that it is clear what will be visible features on this project in the long-term future.*
- *Provide an alternate color for the Kips feature (alternate to the white material) at FDR.*
- *Details to be provided at FDR, in addition to the standard range of exterior details:*
 - *Control joints;*
 - *Ground floor green screen, including soil depth;*
 - *Paving at the entry court;*
 - *Rooftop trellis;*
 - *Security gate design;*
 - *Back lit metal panels and water feature on the roof deck;*
 - *Information about bird safety; and*
 - *All railings, including on roof.*
- *Study view from the rooftop deck to the 7th floor balconies below.*
- *Provide material samples at FDR.*
- *Use botanical names in plant schedule.*

Recommendations

- *Façade refinement should better highlight the 2-story Kip space, and quiet down the residential structure on top.*
- *Consider art on the Durant street façade, such as a mural or sculptural railing element.*
- *Include commemorative signage at the commercial space outlining the history of Kips.*
- *Recommend more native plants.*
- *Recommend more variation in seating options on the roof deck; and more substantial planting at Durant edge of rooftop deck.*

ZAB / Public Works Recommendations

- *Recommend to Public Works that there be permeable pavers along the curb line with the street trees.*
- *Consider induction cooking in the restaurant.*

III. BUSINESS MATTERS

- Approval of Previous Meeting Minutes
 - A. Minutes from 5/19/22 DRC Meeting with minor clarification
MOTION (Kahn, Finacom) VOTE (5-0-1-1) Pink – abstain, Mitchell - absent.
- Temporary Chair for 2439 Durant
 - B. Steve Finacom
MOTION (Tam, Kahn) VOTE (6-0-0-1) Mitchell - absent.

IV. ADJOURN

- *Meeting adjourned: 10:15 pm*

Members of the Public:

Present: 19

Speakers: 8

APPROVED: _____

Anne Burns

Design Review Committee Secretary





Police Department

December 20th, 2022

TO: **Allison Riemer**
Associate Planner
Land Use Planning Division
City of Berkeley
1947 Center Street, 2nd Floor
Berkeley, CA 94704

Re: **Kip's Bar & Grill- 2439 Durant Avenue, Berkeley**

Dear Ms. Riemer,

This letter is in response to your request to review the existing ABC license for Kip's Bar & Grill in order to issue new use permits.

The project comprises a change in status for an established location, **Kip's Bar & Grill located at 2439 Durant Avenue**. The request is to continue with the existing license (Type 47- On sale general eating place) that was issued in June of 2000 and is valid through May 31st, 2023. The existing license does have documented disciplinary history under numerous Alcohol Beverage number licenses that were considered during this review:

- 25658(a) B&P- Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away any alcoholic beverage to any person under 21 years of age.
- 25658(d) B&P- Any on-sale licensee who knowingly permits a person under 21 years of age to consume any alcoholic beverage in the on-sale premises, whether or not the licensee has knowledge that the person is under 21 years of age.
- 24200(a&b) B&P- Grounds that constitute a basis for the suspension or revocation of licenses:
 - (a) When the continuance of a license would be contrary to public welfare or morals.
 - (b) The violation or the causing or permitting of a violation by a licensee of this division, any rules of the board adopted pursuant to Part 14 (commencing with Section 32001) of Division 2 of the Revenue and Taxation Code, any rules of the department adopted pursuant to the provisions of this division, or any other penal provisions of law of this state prohibiting or regulating the sale, exposing

for sale, use, possession, giving away, adulteration, dilution, misbranding, or mislabeling of alcoholic beverages or intoxicating liquors.

Other important factors that were considered in our determination of this location:

- The business is within 50 feet of residential housing and multi-use businesses.
- In 2022, there were 83 total incident reports generated from this location. Of those reports, there were 10 assaults, some of which involved weapons.
- In the one block area of this premise, we have had 3 confirmed shootings this year, one of which was fatal.
- The premise has been the subject of dozens of community complaints for nuisance activities including, but not limited to: loitering, loud music from vehicles, intoxicated people, alcohol violations, narcotic violations, weapons violations and assaults.

BPD conducted 28 security checks at the business so far this year, some of which resulted in citations being issued. Overall calls for service at the location doubled from the previous year (2021). 2021 only had 42 total incident reports generated, although I'm not sure if the business was open for the full year due to the Covid-19 pandemic.

In 2020, the calls for service at the business reduced dramatically, due in large part to the forced closures of restaurants and bars brought on by Covid-19. Prior to March 2020 and the Covid-19 shutdown, the business had 13 incidents reported and none for the remainder of the year.

In 2019, the calls for service at the business were at the highest, with 129 total incidents being generated at this location. Of those reports, there were 22 assaults, 3 of which involved weapons. In the one block area of this premise, we had 2 confirmed shootings.

Based on the information from the ABC license records listing numerous disciplinary violations and research of our records, Berkeley Police Department does not support the issuance and approval of this application. Based on the redevelopment of the current business, the Berkeley Police Department believes there would be an increase in crime and calls for service at this business, which could cause undue harm and jeopardize the safety of our community.

Sincerely,



Jennifer Louis

Interim Chief
of Police

ARG: jlp