



Fair Campaign Practices Commission

Date: January 21, 2021

To: Fair Campaign Practices Commission

From: Samuel Harvey, Secretary

Subject: Complaint alleging violation of BERA by Wayne Hsiung for Mayor 2020 and Compassionate Bay

On October 15, 2020, Commission staff received the attached complaint alleging that the campaign committee Wayne Hsiung for Mayor 2020 and an organization called Compassionate Bay have violated the Berkeley Election Reform Act (“BERA”) (BMC Ch. 2.12). (Attachment 1.) The complaint alleges that two campaign advertisements have failed to include the disclaimer required by Berkeley Municipal Code (“BMC”) section 2.12.335. Additionally the complaint indicates that Compassionate Bay may have failed to register as a campaign committee and file applicable disclosures. At its November meeting, the Commission directed staff to initiate an investigation into this matter. Staff recommends that the Commission bifurcate this matter, addressing the alleged violations by each of the campaigns separately.

A. Wayne Hsiung for Mayor 2020

The complaint includes an image of an advertisement supporting the candidacy of Wayne Hsiung. (Attachment 1.) In the image an advertisement titled Wayne Hsiung for Mayor is stapled to a utility pole. The advertisement includes an image of the candidate, lists a number of policy objectives and provides the candidate’s campaign website address.

BMC section 2.12.335.A requires that:

Campaign communications supporting or opposing any candidate or measure shall include the name of the committee and the phrase “Major Funding Provided By” immediately followed by the name of the contributor, the city of domicile, and the total cumulative sum of contributions by each of the top four contributors over \$250 to the committee funding the expenditure made within six months of the expenditure.

Wayne Hsiung for Mayor 2020 has not received any contributions over \$250. As a result, the committee’s campaign communications are not required to include a “Major Funding Provided By” line. However, under section 2.12.335, the committee’s campaign communications must still “include the name of the committee.”

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Here, the advertisement states “Wayne Hsiung for Mayor” and includes a link to the committee’s website “wayneformayor.com.”¹ A strict reading of section 2.12.335 would require that the communication contain the words “Wayne Hsiung for Mayor 2020.” However, one could assert that the communication nearly complies with the requirements of section 2.12.335 by providing a partial name of the committee and a link to the committee’s website. Staff recommends that the Commission determine whether the omission of the committee’s full name constitutes a potential violation of section 2.12.335 and, based upon that determination, what action the Commission wishes to take next.

Additionally, there is some ambiguity as to the applicability of the communication disclaimer requirements to this type of advertisement. Section 2.12.335 defines the type of “campaign communication” that must include the committee name as any of the following:

1. One thousand or more substantially similar pieces of campaign literature, including but not limited to mailers, flyers, pamphlets, and door hangers;
2. Paid advertisements, including but not limited to advertisements in newspapers, magazines, and on the Internet;
3. One thousand or more substantially similar e-mails or pre-recorded telephone calls made within a calendar month.

Expressly exempted from the definition of “campaign communications” are “posters, yard or street signs, billboards, supergraphic signs, skywriting, and similar items.” (BMC § 2.12.335.C.) Arguably, the communication in this case is a “sign” in that it is affixed to a utility pole. However, it is also a document that could easily function as a flyer and therefore could be described as a piece of “campaign literature.” Staff recommends the Commission consider how this communication should be treated in light of the distinction section 2.12.335 draws between flyers and other literature, which require the committee name, and signs, which do not.

Staff believes that this communication potentially represents a minor violation of BERA if the Commission determines that the communication is a flyer and not a sign and therefore is required to contain the disclosure under section 2.12.335. However, even if this is the case, staff believes that the communication nearly complies with the disclosure requirement as it contains nearly the entire name of the committee.

Additionally, the advertisement does not create a serious risk of confusion about the source of the communication and provides the web address of the committee in two forms, thereby enabling an interested party to easily determine the source of the advertisement. Staff therefore believes that if any harm is done by this potential violation, it is minor.

¹ The advertisement also includes “QR Code” – a square barcode which a person can scan using a smart phone – which will direct the viewer to the committee’s website.

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At this stage the Commission may take either of the following actions:

1. The Commission may dismiss the matter (by majority vote) and proceed no further if evidence of any violation is insufficient or unreliable or if the possible violation has only a slight impact on the administration of BERA and/or the outcome of any election that further proceeding would be an inefficient use of resources.
2. The Commission may determine that probable cause exists to believe that the BERA has been violated. Probable cause exists when based on the circumstances presented there is a reasonable basis on which to believe that a violation of the BERA has occurred.

(Procedures for the FCPC VI.B.)

Staff believes that, if there is a possible violation, it is a minor one which poses only a slight impact on the administration of BERA or the outcome of any election and, as a result, the Commission should dismiss this complaint with regards to the committee Wayne Hsiung for Mayor 2020.

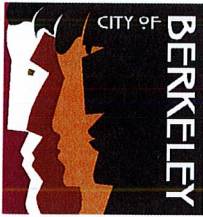
B. Compassionate Bay

The complaint also alleges violations of BERA by a group called Compassionate Bay (CB). The complaint includes an image of a door hangar allegedly circulated by CB which does not contain any disclaimer required by section 2.12.335. At the time the complaint was filed, CB had not registered or filed any campaign reports with the City Clerk. Following initiation of this matter by the Commission, CB filed a number of reports with the Clerk. The complaint asserts that CB has qualified as either an independent committee or a slate mailer organization under BERA. CB has registered as an independent committee.

At this time, staff is recommending that the Commission take no action on this complaint with regards to Compassionate Bay. Staff continues to investigate the potential violations of BERA posed by the door hangar and potential failure to timely file. Following completion of this investigation, staff will return to the Commission with a report making a recommendation of whether the Commission should make a finding of probable cause in this matter.

Attachments:

1. Complaint of Jacquelyn McCormick and attachments



Fair Campaign Practices Commission

Date: November 13, 2020
To: Fair Campaign Practices Commission
From: Samuel Harvey, Secretary
Subject: Complaint alleging violation of BERA by Wayne Hsiung for Mayor 2020 and Compassionate Bay

On October 15, 2020, Commission staff received the attached complaint alleging that the campaign committee Wayne Hsiung for Mayor 2020 and an organization called Compassionate Bay have violated the Berkeley Election Reform Act ("BERA") (BMC Ch. 2.12). The complaint alleges that two campaign advertisements have failed to include the disclaimer required by Berkeley Municipal Code ("BMC") section 2.12.335. Additionally the complaint indicates that Compassionate Bay may have failed to register as a campaign committee and file applicable disclosures.

The complaint includes an image of a flyer supporting the candidacy of Wayne Hsiung and a door hanger titled "Compassionate Bay Voter Guide." The flyer appears to be an advertisement distributed by Wayne Hsiung for Mayor 2020. The door hanger appears to be distributed by the organization Compassionate Bay and does not appear to be affiliated with Wayne Hsiung for Mayor 2020.

Section 2.12.335 of BERA provides that:

- A. Campaign communications supporting or opposing any candidate or measure shall include the name of the committee and the phrase "Major Funding Provided By" immediately followed by the name of the contributor, the city of domicile, and the total cumulative sum of contributions by each of the top four contributors over \$250 to the committee funding the expenditure made within six months of the expenditure. . . .
- B. The disclosures required by this section shall list contributors in descending order by the cumulative total amount of their contributions and shall be presented in a clear and conspicuous manner to give the reader, observer, or listener adequate notice. For all communications, the complete name of the contributor must be listed. No acronyms may be used. For purposes of this section, "campaign communication" means any of the following items:
 1. One thousand or more substantially similar pieces of campaign literature, including but not limited to mailers, flyers, pamphlets, and door hangers;
 2. Paid advertisements, including but not limited to advertisements in

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Page 2 Re: Wayne Hsiung for Mayor 2020 – Compassionate Bay

newspapers, magazines, and on the Internet;

3. One thousand or more substantially similar e-mails or pre-recorded telephone calls made within a calendar month.

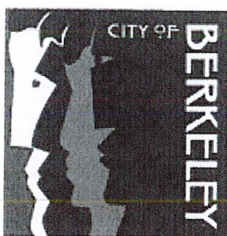
One or more of the advertisements which are the subject of this complaint may have failed to include a disclaimer required by section 2.12.335. However, staff will need to investigate to determine the source of the subject advertisements and to verify the required disclaimers, if any.

As the complaint notes, the entity Compassionate Bay may have qualified as an independent committee (see BMC § 2.12.140) or as a slate mailer organization (see BMC § 2.12.272). Staff will need to review Compassionate Bay's activity and any campaign reports to determine whether the entity has properly registered and reported its campaign activities.

Under the Commission's Procedures, at this stage, the Commission may (1) direct the Secretary to investigate the complaint, to the extent the Secretary has not already done so; (2) dismiss the complaint; or (c) find probable cause to believe BERA has been violated. (FCPC Procedures Section V.B.2.) Staff recommends the Commission direct the Secretary to investigate the complaint further and return at a future meeting with a subsequent report. Staff believes, based upon initial review, that the evidence provided in the complaint is sufficient such that the complaint should not be dismissed, but is insufficient to support a finding of probable cause of a violation at this stage.

Attachments:

1. Complaint of Jacquelyn McCormick and attachments



Fair Campaign Practices Commission

Complaint of Noncompliance Berkeley Election Reform Act ("BERA")*

Full Name: Jacquelyn McCormick
Date: October 15, 2020
Address: [REDACTED]
E-mail (optional but suggested): robleroad@gmail.com
Phone (optional but suggested): _____

Party or parties alleged to have committed or are about to commit a violation of BERA:
Wayne Hsuing for Mayor 2020
Compassionate Bay Voter Guide 2020

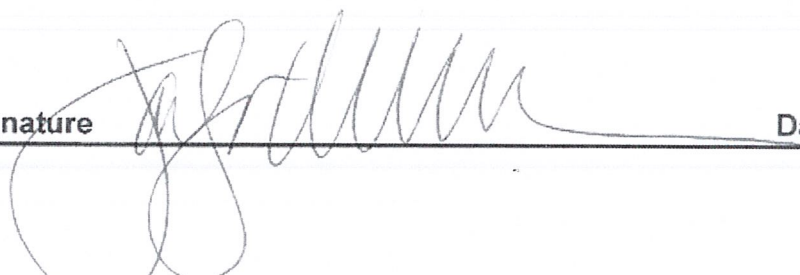
Clear, concise and accurate statement of the facts that constitute the violation of BERA.
If additional space is needed, you may attach additional pages:

I wish to bring to the attention of the FCPC several apparent violations of BERA. The first concerns use of campaign literature and doorhangers disseminated by or on behalf of Wayne Hsuing, a candidate for Berkeley Mayor in the November 2020 election. As the attached documentation demonstrates, none of these contain the kind of disclosure required under BMC 2.12.335.A. Further the propagation of these door hangers and other campaign literature makes it highly likely that the threshold enumerated in BMC 2.12.335.B(1) ("One thousand or more substantially similar pieces of campaign literature, including, but not limited to, flyers, pamphlets, and door hangers") is exceeded. The second concerns several apparent violations associated with the "Compassionate Bay Voter Guide 2020". The same lack of disclosure enumerated above applies here, and there are other violations. On the face, this appears to be either a SMO or IE. However, neither Netfile nor state filing reports show any evidence of either type of committee being formed, and no campaign reports required under BMC 2.12.272 are evident. Further, if an SMO, no disclosure of payments by candidates of their likeness on the state mailer is evident, nor is there a required asterisk denoting that endorsed candidates were not asked to pay for the doorhanger. If an IE, no BERA or FPPC-required disclaimer exists on the card as to the name of the committee or who/what are the major funders.

Documents: Attach any documentation supporting the facts alleged.

Statements that are not based upon personal knowledge should identify the source of information that gives rise to the complainant's belief in the truth of such statements.

I declare under penalty of perjury under the laws of the State of California that all information submitted hereon and in the attachments is true and correct.

Signature  Date 10-15-2020

*Use this "Complaint of Noncompliance" form to allege a violation of BERA pursuant to Berkeley Municipal Code Section 2.12.225 and the *Procedures of the Fair Campaign Practices Commission*.

COMPASSIONATEBAY.ORG

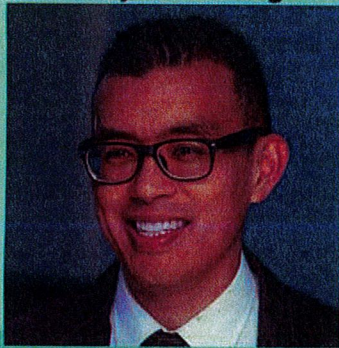
COMPASSIONATE

BAY

VOTER GUIDE 2020

Please vote via mail (see the back of this guide),
or in person on November 3, 2020.

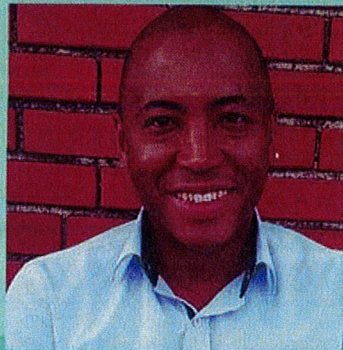
Mayor of Berkeley
Wayne Hsiung



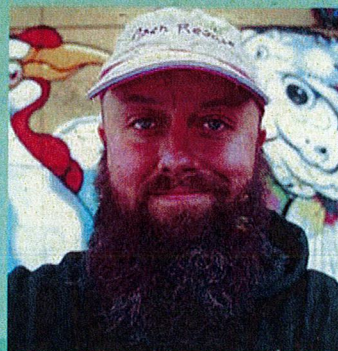
Berkeley
City Council District 2
Cheryl Davila


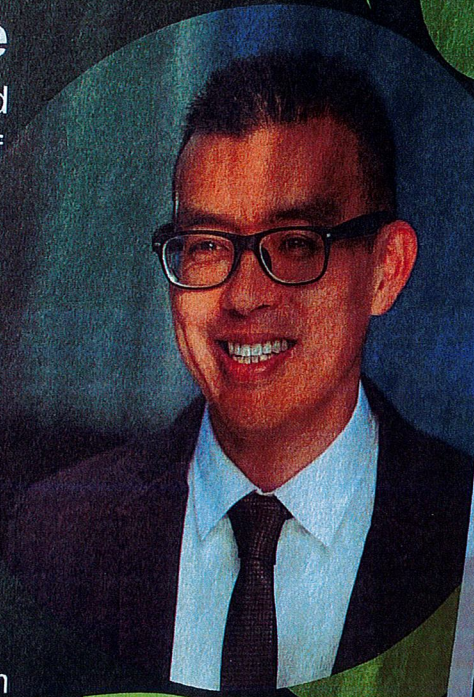




Berkeley
City Council District 3
Ben Bartlett



Berkeley
City Council District 5
Paul Darwin Picklesimer





WAYNE HSIUNG
for mayor

Housing For Everyone
We'll fight to transform under-utilized corporate property into thousands of units of affordable housing.

Green New Deal
We'll divest city funds from climate-destroying industries and build a carbon neutral Green District -- then expand it to the rest of the city

Police Reform
We'll end police militarization and transform Berkeley Police Department into a Public Safety Force to strengthen our community.

Funded By Small Donors
We've rejected corporate PAC money and only accepts contributions from individuals up to \$50.

wayneformayor.com



Fair Campaign Practices Commission

Date: January 21, 2021
To: Fair Campaign Practices Commission
From: Samuel Harvey, Secretary
Subject: Enforcement referrals from the City Clerk

The office of the City Clerk has referred the following items to the Commission for review and potential enforcement action:

Case No. 1: Andrew for Berkeley Council 2020 (ID # 1426039)

Case No. 2: Wayne Hsiung for Mayor 2020 (ID # 1425923)

As the attached report from the City Clerk indicates, both campaigns have participated in the City's Public Financing Program and received matching funds for eligible contributions. However, both campaigns returned one or more eligible contributions to their contributors. The City Clerk asserted, and Commission staff agreed, that the matching funds given to these committees for the returned contributions must be remitted to the City's Fair Elections Fund. At its November 2020 meeting, the Commission voted to continue this item to the Commission's January 2021 meeting, at which point the Commission can make a determination on next steps based on whether the committees have returned any outstanding public funds

The deadline for a publicly financed campaigns to return any unspent public funds is sixty days after the election. BERA section 2.12.505.H provides:

Unspent funds of any Participating Candidate who does not remain a candidate until the election for which they were distributed, or such funds that remain unspent by a Participating Candidate following the date of the election for which they were distributed shall be deposited into the Fair Elections Fund. A Participating Candidate shall deposit all unspent funds into the Fair Elections Fund, up to the total amount of funds that the Participating Candidate received as Fair Elections Fund distributions in that election cycle, within sixty (60) days after the date of the election.

This election cycle, unspent funds were therefore due to the City by January 4, 2021.

However, the Berkeley Election Reform Act (BERA) is silent on the treatment of public funds which were provided as matching funds for a contribution that has been returned to the contributor. City Clerk staff and the Commission Secretary agree that it would be improper for a committee to spend matching funds for a returned contribution. The

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Page 2 City Clerk enforcement referrals

unspent matching funds would then be returned to the City on the 60-day deadline along with any other unspent funds.

As the attached report indicates, the City Clerk Department has confirmed receipt of the matching funds from Andrew for Berkeley Council 2020 and recommends the Commission take no further action regarding that committee. In the initial report circulated to the Commission on January 15, 2021, the City Clerk Department indicated it was still awaiting confirmation of repayment of funds from Wayne Hsiung for Mayor 2020. However, following circulation of that report, the City Clerk Department confirmed that all required repayments of funds by Wayne Hsiung for Mayor 2020 have been received. Staff therefore recommends that the Commission vote to dismiss this matter as it pertains to both committees.

Staff recommends that the Commission also consider whether, for future elections, matching funds for returned contributions should be returned at the ordinary 60-day deadline, or whether campaign committees should be required to return funds on a different deadline. The Commission has discretion to promulgate regulations under BERA and to alter deadlines for the public financing program. (See BMC § 2.12.535.) The Commission therefore may adopt clarifying regulations on this question.

Attachments:

1. City Clerk Staff Referral Report (Jan. 13, 2021)
2. City Clerk Staff Referral Report (Nov. 12, 2021)



Open Government Commission

Date: January 21, 2020

To: Open Government Commission

From: Sam Harvey, Secretary

Subject: Complaint filed by Martin and Olga Schwartz alleging violations of the Open Government Ordinance relating to Zoning Adjustments Board proceedings

INTRODUCTION

This report is presented to the Commission as part of its process for considering complaints pursuant to the Open Government Ordinance (“OGO”) and to “propose additional legislation or procedures that it deems advisable to ensure the City’s compliance with this Ordinance, the Brown Act, the Public Records Act, and the Lobbyist Registration Act, and advise the City Council as to any other action or policy that it deems advisable to enhance open and effective government in Berkeley.” (BMC § 2.06.190.A.)

BACKGROUND

In June 2020, Complainants Martin and Olga Schwartz (“Complainants”) submitted a Complaint of Noncompliance (“Complaint”) under the OGO to the Commission Secretary. (Attachment 1.) The Complaint alleged “procedural violations and/or unfair practices” during the Zoning Adjustments Board (“ZAB”) proceedings regarding a project at 2650 Telegraph Avenue (the “Project”). While the Complaint does not identify specific provisions of the OGO which it alleges have been violated, the Complaint alleges the following:

1. Omission from the ZAB online record of correspondence submitted to the ZAB by members of the public.
2. Failure by the ZAB to include in the Notice of Decision (“NOD”) items previously approved by the ZAB.

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Page 2 Re: Land Use Public Communications

3. Exclusion from the NOD of items agreed upon by the applicant, developer and neighbors of the Project.

The Complaint also requested that “potential conflicts of interest” be reviewed and that “persons having such conflicts of interest be excluded from serving on ZAB or as planners.” However, as the Complaint did not identify any specific “potential conflicts of interest” or ZAB members who may have participated in a decision in which they had a conflict, staff was unable to investigate any potential conflicts of interest.

Staff determined that the allegations contained in the Complaint did not amount to violations of the Open Government Ordinance, the Brown Act, the Public Records Act, or the Lobbyist Registration. (See Attachment 1.) At its September 17, 2020 meeting, the Commission directed staff to perform a factual evaluation of the claims and return with a report to enable OGC to determine whether a proposal should be submitted to the City Council regarding possible changes to board/commission procedures or other City policies to address the concerns expressed in the Complaint.

At the Commission’s November meeting, staff provided a report recommending that, of the three enumerated allegations, the omission of communications from the public from the Project website (Item 1 above) is an area where the OGC could consider recommending proposed City policy changes to City Council. The Commission directed staff to return with a proposal to change City policy regarding inclusion of public communications with online project records.

City Resolution No. 62,571-N.S. (Establishing Fair Procedures in Land Use Quasi-Judicial Public Hearings) sets forth a series of procedural requirements aimed at creating fairness in land use proceedings before the following City bodies:

- City Council
- Planning Commission
- Landmarks Preservation Commission
- Zoning Adjustments Board
- Housing Authority

The Commission Secretary has drafted an amendment to Resolution 62,571 to reflect the discussion of the commissioners regarding inclusion of public communications with online records for land use projects. The proposed amendment to Resolution 62,571 would require that where a land-use decision making body maintains an online collection of records for a project, such as a project-specific webpage containing relevant actions and documents, which includes copies of written communications submitted by members of the public, that online collection must include copies of all written public communications submitted to the decision making body regarding the project so that the complete record of written public input is available in a single place.

Attachments:

1. Staff report to Commission (Nov. 19, 2020) and attachments

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Page 3 Re: Land Use Public Communications

2. Resolution No. 62,571-N.S.
3. Proposed recommendation to Council



Open Government Commission

Date: November 17, 2020
To: Open Government Commission
From: Sam Harvey, Secretary
Subject: Complaint filed by Martin and Olga Schwartz alleging violations of the Open Government Ordinance relating to Zoning Adjustments Board proceedings

INTRODUCTION

This report is presented to the Commission as part of its process for considering complaints pursuant to the Open Government Ordinance (“OGO”), BMC Section 2.06.190.A.1, which provides in relevant part:

The Open Government Commission shall:

- a) hear complaints by any person concerning alleged non-compliance with this Ordinance, the Brown Act, the Public Records Act, or the Lobbyist Registration Act, by the City or any of its legislative bodies, elected or appointed officials, officers or employees;
- b) consider ways to informally resolve those complaints and make recommendations to the Council regarding such complaints;
- c) seek advice from the City Attorney concerning those complaints;
- d) advise the City Council of its opinion, conclusion or recommendation as to any complaint . . .

Separate from its process for considering complaints, the Commission may “propose additional legislation or procedures that it deems advisable to ensure the City’s compliance with this Ordinance, the Brown Act, the Public Records Act, and the Lobbyist Registration Act, and advise the City Council as to any other action or policy that it deems advisable to enhance open and effective government in Berkeley.” (BMC § 2.06.190.A.2.)

BACKGROUND

On June 16, 2020, Complainants Martin and Olga Schwartz (“Complainants”) submitted a Complaint of Noncompliance (“Complaint”) under the OGO to the Commission Secretary. The Complaint and accompanying appendices are attached to this report as Attachment 1.

The Complaint alleges “procedural violations and/or unfair practices” during the Zoning Adjustments Board (“ZAB”) proceedings regarding a project at 2650 Telegraph Avenue (the “Project”). While the Complaint does not identify specific provisions of the OGO which it alleges have been violated, the Complaint alleges the following:

1. Omission from the ZAB packet and supplemental materials of correspondence submitted to the ZAB by members of the public.

The Complaint alleges that Complainants submitted a letter to ZAB on December 14, 2019 which was not included on the City’s webpage for the Project. The Complaint also alleges that numerous members of the public submitted correspondence to the ZAB prior to the hearing on March 12, 2020 requesting that the hearing be conducted via videoconference or postponed in light of the coronavirus pandemic, and that these letters were omitted from published ZAB materials. The Complaint alleges that the ZAB has systematically refrained from posting correspondence submitted in opposition to the Project.

2. Failure by the ZAB to include in the Notice of Decision (“NOD”) items previously approved by the ZAB.

The Complaint alleges that two items related to the Project which were approved by the ZAB at its March 12, 2020 hearing were omitted or insufficiently included in the NOD. Specifically, the Complaint alleges that an item recommending consultation with an engineer regarding a soundless gate system was not included in the NOD, and that a recommendation to replace a community garden/dog walk with trees is insufficiently discussed in the NOD.

3. Exclusion from the NOD of items agreed upon by the applicant, developer and neighbors of the Project.

The Complaint alleges that neighbors of the project and the applicant/developer reached agreement regarding an on-site manager and regulations for the use of open space. The Complaint alleges the applicant “attempted to back out” of this agreement at the March 12, 2020 meeting and “feels not obligated to implement these items.”

The Complaint also requests that “potential conflicts of interest” be reviewed and that “persons having such conflicts of interest be excluded from serving on ZAB or as planners.” The Complaint does not identify any specific “potential conflicts of interest.”

In the absence of any allegations of specific conflicts or identification of ZAB members who may have participated in a decision in which they had a conflict, staff have not been able to investigate any potential conflicts of interest.

Staff have determined that the allegations contained in the Complaint do not amount to violations of the Open Government Ordinance, the Brown Act, the Public Records Act, or the Lobbyist Registration. (See Attachment 2.) At its September 17, 2020 meeting, the Commission directed staff to perform a factual evaluation of the claims and return with a report to enable OGC to determine whether a proposal should be submitted to the City Council regarding possible changes to board/commission procedures or other City policies to address the concerns expressed in the Complaint.

EVALUATION OF ALLEGATIONS

1. Omission of communications from the public

The Complaint asserts that certain communications from the public were omitted from ZAB materials related to the project. Specifically, the complaint asserts that a letter complainants submitted to ZAB on December 14, 2019 was omitted from the ZAB webpage for the project as were multiple additional letters sent to ZAB requesting that a hearing be conducted via videoconference in light of concerns about the spread of COVID-19. Staff has confirmed that the December 14, 2019 letter has not been posted onto the ZAB webpage for the project.¹ In practice, it appears that many or most communications to ZAB regarding a project are published to the project's webpage. However, as staff's report of September 17, 2020 notes, failure to include the complainant's communication on the project webpage does not constitute a violation of any provision of law over which the Commission has jurisdiction. The Commission may wish to review and consider amendments to City policies if it believes that communications submitted to ZAB regarding a project should be required to be published as part of the online record for that project.

2. Failure to include previously agreed upon items in the NOD

The complaint alleges that the following two items were agreed to by the ZAB but omitted from the NOD:

- a. Replacing a community garden/dogwalk on the west side of the project with mature trees
- b. Consulting an engineer regarding a soundless gate system.

These two concerns were raised by Complainants in an appeal of the ZAB approval which was considered by the City Council. As the City Manager's report regarding that

¹ See Planning and Development webpage for 2650 Telegraph Ave project:
https://www.cityofberkeley.info/Planning_and_Development/Zoning_Adjustment_Board/2650_Telegraph.aspx

appeal (see attachment 3) notes, ZAB included the following condition for approval to the Use Permit:

Mature trees planned for installation at the western property line, the species of which are to be mutually agreeable with the applicant and immediate neighbors to the west.

The soundless gate concern appears to be focused on whether the building will include an alarm at the garage gate to warn pedestrians of cars moving out of the garage. The City Manager's report indicates that ZAB consulted with the City's Traffic Engineer regarding the need for an alarm associated with the building's garage gate. The engineer determined that, given the design of the project, such an alarm is required by law. (See Attachment 3.)

Based upon review of the administrative record of the Project and the City Manager's report, staff believes there is insufficient evidence to conclude that ZAB's decision to approve the Project omitted previously agreed upon items. Moreover, absent a showing of procedural misconduct, staff believes that concerns about the substantive determinations of a City body such as ZAB may lie outside of the Open Government Commission's purview.

3. Exclusion from the NOD of items agreed upon by the applicant/developer and neighbors of the Project.

The complaint asserts that the applicant/developer agreed to certain items in discussions with neighbors of the project but "attempted to back out of this agreement during the ZAB hearing." These items include:

- a. On-site manager
- b. "regulations for the use of open space"

The Complaint includes a letter from the project applicant/developer which asserts that "the project's lease agreement and community policies will include quiet hours, time restriction for roof deck use, and contact information will be posted for an on-site building manager who can address noise complaints." Staff's review of the record confirms that these items were not included in the final determination by the ZAB. This conclusion is supported by the City Manager's report as well. That report notes that public comment regarding these items was heard by the Design Review Committee ("DRC") and ZAB, but that neither the DRC nor ZAB discussed or adopted these provisions. Staff believes that both the DRC and ZAB acted within their discretion in deciding whether to consider or adopt these provisions and that failure to do so does not reflect a violation of any applicable rule or law.

RECOMMENDATION

Staff believes that the first prong of the complaint (Omission of communications from the public from the Project website) is an area the Commission may wish to discuss and direct the Commission secretary to return with proposed changes to City policy regarding the inclusion of public comment with the ZAB administrative record available on a project's ZAB webpage. Regarding the second and third prongs of the Complaint, staff does not see a clear avenue for the Commission to recommend changes to City policy. Rather, staff believes these two prongs are best characterized as disagreements over the merit of ZAB's substantive determinations.

Attachments:

1. Complaint
2. Staff Report (Sep. 17, 2020)
3. Excerpt from City Manager's report to Council regarding ZAB decision appeal (June 16, 2020)

OGC _ Schwartz complaint 6.5.2020

To: Open Government Commission

Re: Procedural violations/unfair practices in creating the Notice of Approval for the construction project at 2650 Telegraph Ave.

From: Martin and Olga Schwartz , 2405 Derby Street, Berkeley, CA 94705 (neighbor immediately west of 2650 Telegraph)

We would like to attract your attention to procedural violations and/or unfair practices in the creation of a Notice of Approval for the construction project 2650 Telegraph.

A. The omission of significant letters from the neighbors into the ZAB packet or supplemental materials.

On December 14, Martin Schwartz and myself wrote a letter to ZAB, sent to planner Ashley James. None of the materials on the project website have this letter included, but the letters from Berkeley citizens who live far away from the project who wrote in support of it are posted. The email communication and our letter is in **Appendix A**.

(https://www.cityofberkeley.info/Planning_and_Development/Zoning_Adjustment_Board/2650_Telegraph.aspx)

Second, in advance of the in-person ZAB public hearing on March 12, in the midst of pandemics several neighbors wrote letters asking for the meeting to be conducted by ZOOM or postponed. These letters are also omitted in the project materials, while the letters urging ZAB to hold the meeting are posted.

It seems that there is systematically selective postings of materials favorable to the project.

B. Omission to include two ZAB-approved items: replacement of the “community garden”= dog run by mature trees, and soundless garage gates, in the NOD from April 14 (Appendix G)

Both replacement of a community garden with trees and soundless gates are of major importance in mitigation of the impact of the project on the neighbors. They were discussed in detail during ZAB meeting on March 12; ZAB recommended replacement of community garden/dogwalk with trees, and consultation with DRC about what type of trees will be used. ZAB also recommended consulting an engineer for a soundless garage gate system. However, in the NOD, the formulation of first item is changed to “planting the trees on western border”, while the dog walk is still in the plans; garage gates are omitted altogether. Please see **Appendix B** for details.

C. Other Items excluded from ZAB discussion and NOD

These include omission of agreed-upon on-site manager and regulations for the use of open space. The applicant and developer agreed to implement these items in discussions with the neighbors, but attempted to back out of this agreement during the ZAB hearing on March 12. Attempts of the neighbors to attract attention to these two items were dodged. Thereby, the applicant feels not obligated to implement these items. Please see **Appendix C** for details.

OGC _ Schwartz complaint 6.5.2020

These omissions are a detriment to the neighbors but benefit the applicant/ developer.

In order for the City's decisions to be impartial, we are requesting the Open Government Commission to look into the procedural violations/ unfair practices issue. We are also asking that potential conflicts of interests be vented and persons having such conflicts of interest be excluded from serving on ZAB or as planners .

Enclosed:

1. Cover Letter and OGC complaint form
2. Appendix A. Schwartz letter to ZAB from Dec 14.
3. Appendix B. ZAB-approved items omitted to be included in the NOD (replacement of community garden with mature trees; soundless garage gates).
4. Appendix C. Items excluded from ZAB discussion (manager and open space management; temporary construction fence)
5. Appendix D. DRC comments to ZAB (manager and open space management)
6. Appendix E. Supplemental Items Round 2 (manager and open space management)
7. Appendix F. Architect's response to manager and open space concerns
8. Appendix G. Notice of Decision on 2650 Telegraph.



Open Government Commission

Complaint of Noncompliance

Open Government Ordinance (“OGO”), the Brown Act, the Public Records Act, and the Lobbyist Registration Act

Name: Olga Louchakova-Schwartz and Martin Schwartz

Date: June 5, 2020

Mailing Address/

Contact Info: 2405 Derby Street, Berkeley, CA 94705

Identify the area of noncompliance (check all that apply):

OGO Brown Act Public Records Act Lobbyist Registration Act

Describe the act(s) of noncompliance. (Attach additional page if more space is needed.)

ZAB NOD for 2650 Telegraph avenue project, user permit #ZP2019-0070 has been issued with several areas of diversion from ZAB decision, as documented in ZAB meeting minutes from March 12. In addition, the ZAB limited the input omitted from discussion several items which were already agreed upon by the applicant and the neighbors. The manner of hearings, process of decision issuance, and accuracy of documentation are of concern . See attachments.

List the date(s) on which the noncompliance occurred.

March 12 2020 (date of ZAB hearing), April 14 2020 (Date of NOD issuance)

Describe any steps taken to address the noncompliance directly with City of Berkeley staff and/or elected official, including the name of any staff person involved, if known.

Olga Louchakova-Schwartz made an attempt to address the omitted or misstated items in the NOD with the planner, Ashley James. Ms. James responses missed to address the issues. Please see the copies of emails in the attached. Then, Schwartz submitted an appeal to the City Council. The date of the appeal hearing is scheduled for June 16, 2020.

Documents:

Attach any written requests or complaints submitted to the City and any responses received. You should also attach any additional information that you believe will assist the Commission and staff in reviewing your complaint.

Use this “Complaint of Noncompliance” form if you would like the Open Government Commission to review your complaint and possibly forward their recommendation(s) to the City Council. Filing a Complaint with the Open Government Commission does not constitute a demand to cure or correct under California Government Code § 54960.1.



Olga Louchakova-Schwartz <olouchakova@gmail.com>

RE: 2650 Telegraph avenue project: a letter from Olga and Martin Schwartz, 2405 Derby

1 message

James, Ashley <AJames@cityofberkeley.info>
To: Olga Louchakova-Schwartz <olouchakova@gmail.com>

Tue, Dec 17, 2019 at 4:36 PM

Thank you, Olga this has been received.

From: Olga Louchakova-Schwartz [mailto:olouchakova@gmail.com]
Sent: Saturday, December 14, 2019 5:22 PM
To: James, Ashley <AJames@cityofberkeley.info>
Subject: 2650 Telegraph avenue project: a letter from Olga and Martin Schwartz, 2405 Derby

Dear Ms. James,

My husband and I live at 2405 Derby Street, immediately west of the proposed construction on 2650 Telegraph. I am writing to inform you about the specific ways in which our lives will be degraded by this project. We are very scared of this, and hope you can help us to avoid it.

We are two retired professors, and we are not "sitting on a pile of money", as one of the members of ZAB referred to our age group. I am an immigrant who came to this country midlife with \$50, and did not have a chance to earn retirement. My husband is a researcher in the humanities who was focused on producing intellectual and not monetary values, and we live solely off his fairly modest UC retirement money. Both of us need to stay within walking distance of the University libraries in order to continue research we are committed to doing. My husband is a disabled with advanced arthritis, and doesn't have permission to drive. So, we need to remain in our present home. Even if we had to go through what for us would be a horribly upsetting event of having to find a home elsewhere, at the moment, due to the planned construction at 2650 Telegraph, our property has lost its sales value by \$390,000 (see attached evaluation), thus effectively depriving us of the possibility to move somewhere else. Over the next ten years, our loss of sales and appreciation will be \$ 1,017,512.

At hand is a construction of a monolithic mountain-like commercial-residential building 12 feet (size of regulation?) from the eastern wall of our home, and adding 100+ people squeezed into the space between us and the already busy Telegraph Avenue. We do not think that the density bonus request is applicable to the lots like this one, because the commercial buildings and the student apartments between Telegraph and Carlton already provide enough of such density: we have to make frequent calls to police to remove vehicles blocking our driveway; we constantly have delivery trucks and uber vehicles parked near our house, we have noise after midnight, etc. In the proposed form, the project will not just deteriorate the quality of our lives, but the stress of it may as well turn fatal for us. This is not an exaggeration, but a realistic and quite a somber assessment of the situation.

Palliative solutions, such as landscaping etc., will not prevent this. We are requesting a solution which makes the situation livable for us. Specifically, we are requesting to reduce the scale of the project to a three story building, which will be one floor above the highest houses in our block and down the street. This, of course, will reduce the income the applicant plans to obtain from his luxury project, and will change the character of the project. However, this will need many needs of the city, including low income housing, animating downtown Berkeley, sustaining the historical character of the neighborhood, keeping down the traffic, etc. This will also address the concerns of neighborhood businesses regarding solar panels, shade etc. We earnestly look to ZAB to consider our request favorably.

Sincerely, and with much hope

Olga Louchakova-Schwartz (and Martin Schwartz)

P.S.

The 18 months of construction (the time estimated by the architect, Mr. Trachtenberg, in conversation with my husband) would bring intolerable noise, cutting into our sleep and making work and just being at home difficult for us. We were particularly alarmed by ZAB member Patrick Sheehan's report that on Mr. Trachtenberg's other project, construction workers would turn up at 5:30 AM and talk loudly, etc. before they get to work, in theory at 8:30.AM. The construction would also fill the air with particles, some toxic (my husband has a respiratory problem as it is) for that long time. Scaling down the project will help these concerns as well.

--



Open Government Commission

Date: September 17, 2020

To: Open Government Commission

From: Sam Harvey, Secretary / Deputy City Attorney

Subject: Complaint filed by Martin and Olga Schwartz alleging violations of the Open Government Ordinance relating to Zoning Adjustments Board proceedings

INTRODUCTION

This report is presented to the Open Government Commission as part of its process for considering complaints pursuant to the Open Government Ordinance (“OGO”), BMC Section 2.06.190.A.1, which provides in relevant part:

The Open Government Commission shall:

- a) hear complaints by any person concerning alleged non-compliance with this Ordinance, the Brown Act, the Public Records Act, or the Lobbyist Registration Act, by the City or any of its legislative bodies, elected or appointed officials, officers or employees;
- b) consider ways to informally resolve those complaints and make recommendations to the Council regarding such complaints;
- c) seek advice from the City Attorney concerning those complaints;
- d) advise the City Council of its opinion, conclusion or recommendation as to any complaint . . .

BACKGROUND

On June 16, 2020, Complainants Martin and Olga Schwartz (“Complainants”) submitted a Complaint of Noncompliance (“Complaint”) under the OGO to the Commission Secretary. The Complaint and accompanying appendices are attached to this report as Attachment 1.

The Complaint alleges “procedural violations and/or unfair practices” during the ZAB’s proceedings regarding a project at 2650 Telegraph Avenue (the “Project”). While the

Complaint does not identify specific provisions of the OGO which it alleges have been violated, the Complaint alleges the following:

1. Omission from the ZAB packet and supplemental materials of correspondence submitted to the ZAB by members of the public.

The Complaint alleges that Complainants submitted a letter to ZAB on December 14, 2019 which was not included on the City's webpage for the Project. The Complaint also alleges that numerous members of the public submitted correspondence to the ZAB prior to the hearing on March 12, 2020 requesting that the hearing be conducted via videoconference or postponed in light of the coronavirus pandemic, and that these letters were omitted from published ZAB materials. The Complaint alleges that the ZAB has systematically refrained from posting correspondence submitted in opposition to the Project.

2. Failure by the ZAB to include in the Notice of Decision ("NOD") items previously approved by the ZAB.

The Complaint alleges that two items related to the Project which were approved by the ZAB at its March 12, 2020 hearing were omitted or insufficiently included in the NOD. Specifically, the Complaint alleges that an item recommending consultation with an engineer regarding a soundless gate system was not included in the NOD, and that a recommendation to replace a community garden/dog walk with trees is insufficiently discussed in the NOD.

3. Exclusion from the NOD of items agreed upon by the applicant, developer and neighbors of the Project.

The Complaint alleges that neighbors of the project and the applicant and developer reached agreement regarding an on-site manager and regulations for the use of open space. The Complaint alleges the applicant "attempted to back out" of this agreement at the March 12, 2020 meeting and "feels not obligated to implement these items."

The Complaint also requests that "potential conflicts of interest" be reviewed and that "persons having such conflicts of interest be excluded from serving on ZAB or as planners." The Complaint does not identify any specific "potential conflicts of interest." In the absence of any allegations of specific conflicts or identification of ZAB members who may have participated in a decision in which they had a conflict, staff has not been able to investigate any potential conflicts of interest.

ANALYSIS

The Commission Secretary has analyzed these allegations against the provisions of the Open Government Ordinance, the Brown Act, the Public Records Act, and the Lobbyist Registration Act.¹

Open Government Ordinance

Staff has determined that none of the actions or omissions alleged in the Complaint violate any provision of the Open Government Ordinance (“OGO”). The OGO does not contain any provisions which govern the inclusion of supplemental materials or correspondence in the ZAB agenda packet or materials posted on the ZAB webpage. While the OGO contains a provision requiring that communications sent to the City Council must be made available on the City’s website, no similar provision exists that would apply to ZAB.² Additionally, the OGO does not contain provisions governing alleged failure to include agreed-upon elements of the Project in the Notice of Decision.

The Brown Act

The Brown Act provides that, upon request, agendas and other documents distributed to members of a legislative body in connection with any matter subject to discussion at a meeting must be made available to the public pursuant to the Public Records Act (Cal. Gov. Code § 6250 et seq.). (Cal. Gov. Code § 54957.5(b).)

Additionally, any document related to an agenda item that is distributed to a legislative body less than 72 hours before a meeting must be made available for public inspection at a designated public office or other location. (Cal. Gov. Code § 54957.5(b).) The address of this location must be indicated on the meeting agenda. (Cal. Gov. Code § 54957.5(b)(2).) The document may be posted online, though this is not required. (Cal. Gov. Code § 54957.5(b)(2).)

ZAB agendas contain the following notification:

Any writings or documents provided to a majority of the Commission regarding any item on this agenda will be made available for public inspection at the Permit Service Center, Planning and Development Department located at 1947 Center Street, Berkeley, during regular business hours.

¹ The Complaint does not allege any activity which implicates that Lobbyist Registration Act. As a result, no discussion of the Lobbying Registration Act is included in this report.

² BMC § 2.06.180: “All documents submitted to the City Council, including but not limited to, the Agenda and Agenda Packet, communications, and any documents submitted at a meeting of that body, shall be available through the City’s website no later than the close of business the following business day after the meeting for which the documents were submitted.”

The Complaint alleges that communications were submitted to the ZAB on December 14, 2019 and prior to the March 12, 2020 hearing which were omitted from the online record for the Project. The communications submitted on December 14, 2020 are public records and must be made available upon request. Additionally, the March 12, 2020 communications also must be made available upon request and, because they were submitted within 72 hours of the relevant meeting, must be made available for inspection at a City office or other location pursuant to Cal. Gov. Code § 54957.5(b). The ZAB agenda notification indicates that these records should be made available at 1947 Center Street in Berkeley. The Brown Act does not require that these communications be posted online on the webpage for the Project. The Complaint therefore does not allege facts which would amount to a Brown Act violation.

Additionally, the Complaint's allegations that the NOD does not accurately reflect prior decisions and agreements made by the ZAB do not implicate the provisions of the Brown Act.

Public Records Act

As noted above, any communications submitted to the ZAB in connection with an item on a Commission meeting agenda are disclosable records under the California Public Records Act (Cal. Gov. Code § 6250.) Moreover, any communication submitted to ZAB by the public, regardless of its relevance to a ZAB meeting, would be a disclosable public record, assuming that record does not fall into a number of exceptions under the Public Records Act. (Cal. Gov. Code § 6253(b).)³ However, the Public Records Act does not contain any provision which would require these communications to be posted on the ZAB webpage. Additionally, the Public Records Act does not contain any provision that would govern the final determinations reached in the NOD or whether the NOD is an accurate reflection of the conclusions reached by the ZAB.

RECOMMENDATION

Staff recommends that the Commission take no further action on this Complaint based upon a finding that the Complaint does not allege actions that would constitute a violation of a provision of law over which the Commission has jurisdiction.

Attachments:

1. Complaint and appendices

³ Cal. Gov. Code § 6253(b): "Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so."



Office of the City Manager

PUBLIC HEARING
June 16, 2020

To: Honorable Mayor and Members of the City Council

From: Dee Williams-Ridley, City Manager

Submitted by: Timothy Burroughs, Director, Planning & Development Department

Subject: ZAB Appeal: 2650 Telegraph Avenue, Use Permit #ZP2019-0070

RECOMMENDATION

Conduct a public hearing and, upon conclusion, adopt a Resolution affirming the Zoning Adjustments Board (ZAB) decision to approve Use Permit #ZP2019-0070 to demolish an existing commercial building and construct a five-story, 34,249 square foot mixed-use building with 45 residential units (including four Very Low-Income units), 1,290 square feet of commercial space, 4,051 square feet of usable open space, 50 bicycle parking spaces and 20 vehicular parking spaces, and dismiss the appeal.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

On April 18, 2019, David Trachtenberg Architects submitted an application for Use Permit #ZP2019-0070, to demolish an existing commercial building and construct a five-story, 34,249 square-foot mixed-use building with 45 residential units (including four Very Low-Income units), including 1,290 square feet of commercial space, 4,051 square feet of usable open space, 50 bicycle parking spaces, and 20 vehicular parking spaces at the ground level, including a request for a density bonus and waivers and concessions under the State Density Bonus Law (DBL).¹

On September 20, 2019, after two rounds of comments from staff, the application was deemed complete.

On November 7, 2019, the Landmarks Preservation Commission (LPC) held a public hearing for the demolition of the existing commercial building located on the project site and continued the item to December 5, 2019. At the December 5, 2019 hearing, the LPC took no action to initiate a Landmark or Structure-of-Merit designation, and chose not to provide ZAB comments on the application.

¹ Government Code section 65915 *et seq.*

On December 12, 2019 the ZAB held a Preview for the project and provided general comments to the applicant.

On December 19, 2019, the Design Review Committee (DRC) held a Preview for the project and provided comments to the applicant. In response to DRC comments, the applicant revised the building design and presented the revisions to the DRC at its Preliminary Design Review (PDR) meeting on February 20, 2020. At that meeting, the DRC completed the PDR and forwarded a favorable recommendation for the project to the ZAB, with conditions and recommendations for Final Design Review (FDR) related to screening for adjacent neighbors at balconies and yards. The DRC, responding to zoning-related comments heard during the public comments portion of the agenda, also forwarded recommendations for discussion to the ZAB.

On March 12, 2020, the ZAB conducted a public hearing for the Use Permit application. After considering the staff report and administrative record, and hearing public comments and holding discussion, the ZAB added Condition #48 related to solar access at the neighboring commercial property to the north and approved the Use Permit by a vote of 7-0-1-0 (Yes: Clark, Kahn, Kim, O'Keefe, Pinkston, Sheahan, Tregub; No: None; Abstain: Lewis; Absent: None).

On April 14, 2020, staff issued the ZAB Notice of Decision. On April 28, 2020, Olga Louchakova-Schwartz, a neighbor residing at 2405 Derby Street immediately west of the project site, filed an appeal of the ZAB decision with the City Clerk. The appeal was signed by an additional 11 neighbors, two of whom are located within 300 feet of the project site. On June 4, 2020, staff posted the public hearing notice at the site and two nearby locations, and mailed notices to property owners and occupants within 300 feet of the project site, and to all registered neighborhood groups that cover this area. The Council must conduct a public hearing to resolve the appeal.

BACKGROUND

The site is located in the General Commercial (C-1) zoning district at the southern portion of the Telegraph Avenue commercial corridor, two blocks south of the 'core' Telegraph commercial area (C-T Zoning District: Bancroft Way to Parker Street). The site is located one block south of Carleton Street, where two four-story mixed-use buildings have been recently developed on the west side of Telegraph Avenue. The site is located three blocks north of Oregon Street, where two six-story medical office buildings are located on both sides of Telegraph Avenue. To the north, east and south of the project site along Telegraph Avenue are one- to four-story commercial and mixed-uses, including medical offices, retail shops, quick service restaurants, personal and household services, and auto repair, as well as Willard Park. To the west of the project site are low-rise residential uses consisting mainly of one-to two-story buildings with a mix of single- and multi-family dwellings.

The applicant is seeking approval pursuant to State DBL. According to the base density calculation (34 units with an average size of 703 sq. ft.) and the amount of and type of affordable units included in the project (four units at the Very Low Income level), the developer is entitled to a bonus of 12 units, as well as waivers for height, floor area ratio (FAR), and parking to accommodate the inclusion of the bonus units. A concession necessary for financial feasibility of the project to provide the affordable units was also granted under the DBL, allowing the project to provide less than the minimum amount of usable open space (see Attachment 3, ZAB Hearing Staff Report and Project Plans for details). The project is also subject to the State Housing Accountability Act (HAA). Pursuant to the HAA, the ZAB could not deny the project or approve it at a reduced density unless findings for “specific, adverse impact” could be made.²

At the December 12, 2019 ZAB preview and the December 19, 2019 DRC preview, neighbors voiced concerns about impacts to adjacent properties. Concerns regarding the proposed project’s impact to the adjacent commercial building to the north at 2640 Telegraph included reduced efficacy of existing rooftop solar panels, increased shading of south-facing windows, and reduced visibility of signage on the south-facing façade. Concerns regarding the proposed project’s impact to the adjacent residences to the west included increased shading of east-facing windows during the morning hours, noise and privacy concerns related to the garage entrance on Derby Street, and the private patios and usable open space located on the west façade of the building. Concerns regarding the proposed project’s impacts to the surrounding neighborhood included spillover parking demand related to the State DBL-allowed waiver to the minimum parking requirement, light pollution, and construction-related health and safety impacts.

In response to concerns raised, the DRC recommended lowering the height of the building and planting mature trees at the west property line. The DRC forwarded recommendations for ZAB discussion that included working with the property owner at 2640 Telegraph to potentially relocate existing solar panels and add skylights to the building, possible conditions for usable open space areas (quiet hours and management), possible conditions on noise generated by the garage door and the dog run, and reconsideration of the fence height at the west property line.

The applicant then revised the plans to: 1) reduce the building height by 4’-0”, from 59’-6” to 55’-6” by lowering the height of the ground floor by 4’-0”, from 20’-6” to 16’-6”, and by excavating below existing grade within portions of the garage; and 2) correctly

² Housing Accountability Act, California Government Code Section 65589.5(j). The HAA requires that findings for “specific, adverse impact” must be made to deny or approve with reduced density a project that is compliant with applicable, objective general plan and zoning standards. As used in Section 65589.5(j), a “specific, adverse impact” means “a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.” An award of a density bonus does not remove a project for the scope of the HAA.

labelling green space located at the ground floor near the west property line as a common area/garden rather than a dog run (see Attachment 3, Project Plans, Sheet A2.1).

At its March 12, 2020 hearing, the ZAB addressed neighbor concerns related to noise, privacy, and access to sunlight, by negotiating adjustments to the allowed construction hours and the building design to the portions of the building closest to the western neighboring properties. Specifically, the ZAB modified Condition of Approval #30 (construction to begin at 8:00 AM rather than 7:00 AM), and added Condition of Approval #11 to the Use Permit. They read as follows:

30. *Construction Hours.* *Construction activity shall be limited to between the hours of 8:00 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.*

11. *Final Design Review.* *The Project requires approval of a Final Design Review application by the Design Review Committee. At Final Design Review, the applicant shall present plans indicating the following:*

- Installation of walls surrounding each private patio on the fourth floor and the commonly-accessible usable open space on the fifth floor up to 54" in height. The top 12" may consist of translucent glass or stucco at the discretion of the applicant.*
- Installation of a fence along the western property line only that extends up to 8' in height.*
- Mature trees planned for installation at the western property line, the species of which are to be mutually agreeable with the applicant and immediate neighbors to the west.*

Another concern expressed during both the project preview hearing on December 12, 2019, and the public hearing on March 12, 2020 related to potential shadow impacts to the rooftop solar panels on the adjacent commercial structure to the north of the project site (2640 Telegraph). The applicable state law regarding this issue is the California Solar Shade Act (AB 2331, 1978), which provides protection to solar energy system owners from shading caused by landscaping on adjacent properties. The law seeks to prevent a property owner from allowing trees or shrubs to shade an existing solar energy system installed on a neighboring property, provided the shading trees or shrubs were planted after the solar collecting device was installed. The law does not eliminate or limit the development rights of a neighboring property. Therefore, under the HAA and the Density Bonus Law, the City may not limit the development of the subject property to protect the existing solar facility on the adjacent commercial building to the north. ZAB members, aware of the fact that local agencies such as the City of Berkeley are largely precluded from regulating new solar facilities, added Condition of Approval #48. This Condition of Approval recommends that the applicant work with the commercial property owner at 2640 Telegraph as follows:

48. Voluntary Solar Access Agreement. *The applicant is strongly encouraged to consult with the property owners at 2640 Telegraph Avenue in an effort to find a mutually agreeable solution that mitigates the impact of the subject building on the productivity of the existing solar panels located at 2640 Telegraph Avenue.*

The ZAB found that the project satisfied the findings for approval of a Use Permit and approved the demolition of the existing commercial building and construction of the new five-story mixed-use building.

Staff did not receive any further communications or concerns about the ZAB's March 12, 2020 approval of the Use Permit. The Notice of Decision of the ZAB's action was delayed when the City's Health Officer ordered residents to shelter in place and City offices were closed. The Planning Department issued pending permit decisions in mid-April when safe and adequate remote noticing and appeal procedures were in place. The neighbor to the immediate west, Olga Louchakova-Schwartz, filed a timely appeal.

ENVIRONMENTAL SUSTAINABILITY

The project approved by the ZAB is in compliance with all state and local environmental requirements, would be located in a transit-rich area, and would be built and operated according to current codes for energy conservation, waste reduction, low toxicity, and other factors.

RATIONALE FOR RECOMMENDATION

The issues raised in the appellant's letter, and staff's responses, are as follows. For the sake of brevity, the appeal issues are not re-stated in their entirety. Please refer to the attached appeal letter (Attachment #2: Appeal Letter) for the full text.

Issue #1: Items recommended by the DRC on February 20, 2020 and approved by ZAB on March 12, 2020: The appellant contends that four conditions of approval were recommended by the DRC and approved by the ZAB, but are not included in the NOD. They are:

1. Prohibiting fire pits on any private or shared patio
2. Requiring an on-site building manager
3. Removing the proposed dog walk located on the ground level at the west portion of the site
4. Prohibiting a buzzer on the building's parking garage

Regarding items #1 and 2, the appellant contends that staff omitted these conditions of approval from the NOD. Regarding item #3, the appellant cited the ZAB Preview staff report. Regarding item #4, the appellant cited the traffic impact analysis, which states that the project would generate 220 auto trips per day, and indicated that the project's garage door would be located approximately 30 feet from the bedroom at 2405 Derby Street, and

100 feet from the residential buildings across Derby Street. For these reasons, a garage door buzzer would be disruptive to the wellbeing of nearby residents.

Response: Regarding items #1-2, the captioner's record shows that the DRC and the ZAB heard public comment requesting such Conditions of Approval and did not discuss or decide to impose such conditions of approval. Regarding item #3, the dog walk was included on an earlier set of plans but is not proposed in the project approved by the ZAB on March 12, 2020 (see Attachment 3, Project Plans, Sheet A2.1).

Regarding item #4, the ZAB deferred to the expertise of the City's Traffic Engineer, who reviewed the Site Plan and determined at the Interdepartmental Roundtable meeting held on October 9, 2019 that the project's clearance area from the right-of-way on Derby to the garage door does not meet the minimum City standard for pedestrian sight lines (5' by 5'), and therefore requires a garage alarm (or audible walk indication) to ensure pedestrian safety. An alarm is one of several safety measures required by the California Manual on Uniform Traffic Control Devices (CA MUTCD) and the provisions of the Americans with Disabilities Act (ADA). The CA MUTCD establishes the minimum noise level of the audible walk indication for pedestrian signals at 5 dBA above the ambient noise level. This is the noise level threshold that would be set for the pedestrian signal within the 10-foot audible range approaching the driveway. The City's Traffic Engineer estimates that the signal per vehicle is less than a minute and the peak hour exiting vehicle trips based on the Transportation Assessment is 12. Therefore, the maximum hourly sounding would be 12 minutes in the peak (morning) hour.

Issue #2: The project exceeds the allowable density pursuant to the subject parcel's land use designation, inclusive of the Density Bonus, which would negatively impact public health: The appellant contends that based on the number of dwellings and unit types, 81 people would reside at the subject property, while the Avenue Commercial land use designation recommends a maximum of 43 people, inclusive of the 35% density bonus. In addition, the appellant asserts that population density is a leading factor in the spread of COVID-19, and as such, the project would be detrimental to public health.

Response: Under the City's density bonus procedures, the project's "base project" is 34 units. The "base project" is the project that could be built on the site allowed pursuant to the density and development standards of the General Commercial (C-1) Zoning District, without any Use Permits to expand the building envelope or waive development standards. The project qualifies

RESOLUTION NO. 62,571–N.S.

ESTABLISHING FAIR PROCEDURES IN LAND USE QUASI-JUDICIAL PUBLIC HEARINGS BEFORE THE CITY COUNCIL, PLANNING COMMISSION, LANDMARKS PRESERVATION COMMISSION, ZONING ADJUSTMENTS BOARD AND HOUSING ADVISORY COMMISSION AND REPEALING SECTION I F OF THE COUNCIL RULES BY AMENDING RESOLUTION 62,420

WHEREAS, the City of Berkeley has adopted a range of regulations to regulate land uses in Berkeley; and

WHEREAS, these include the City’s Zoning ordinance, Landmarks Preservation ordinance and Subdivision ordinance; and

WHEREAS, these regulatory schemes adopt procedures to guide the application of the standards contained in these regulatory schemes to particular land uses, structures and divisions of property; and

WHEREAS, these procedures generally provide for boards and commissions to implement these regulatory schemes in the first instance, with ultimate oversight and review by the City Council; and

WHEREAS, the purpose of Council review is to ensure adherence to the Council’s legislative intent in enacting the regulatory scheme and because the Council is the elected body ultimately responsible to the voters for appropriate regulation of land uses; and

WHEREAS, the Council does not intend, by the procedural hearings and review established in the City’s regulatory procedures, to adopt or utilize in any way the adversary criminal or civil justice system used in the courts, and indeed finds that such a system is completely unsuitable to making land use decisions at the local administrative level; and

WHEREAS, the City Council and its subordinate agencies and staff are not partisans on any side of any land use dispute but are charged with making land use decisions in the best interests of the entire City after weighing all input, and this process is in fact a form of mediation between divergent community interests; and

WHEREAS, the City staff and City Attorney are charged with assisting the City Council and subordinate City boards and commissions to adjust competing interests affecting land use decisions and are not advocates of any side, but play the role of providing technical assistance and advice to the decision making bodies; and

WHEREAS, the United States Supreme Court has noted that due process “unlike some technical rules, is not a technical conception with a fixed content unrelated to time, place and circumstances [citations omitted].” Mathews v. Eldridge, *supra*, 424 U.S. 319, 334 (1976). It is “flexible and calls for such procedural protections as the situation demands [citations omitted].” Id.; and

WHEREAS, the provisions of the California Administrative Act (“APA”) regarding state adjudicatory proceedings properly have no application to local agencies in light of the very substantial difference in state agencies and local administrative procedures; and

WHEREAS, even the APA recognizes that its prohibition on combining prosecutorial and adjudicatory functions applies only to prosecutors and other advocates who are committed to specific result and have a will to win and not merely to staff providing professional recommendations who are accustomed to serving decision making bodies with views on matters that differ from one another and from recommendations of staff; and

WHEREAS, a unique aspect of land use decision-making and the administrative procedures of cities with subordinate citizen boards and an elected City Council is that City staff regularly provide technical assistance to boards and commissions that may disagree with one another, with the City staff and with the City Council; and

WHEREAS, the City planning and legal staff are not advocates for any party or body’s position but merely provide expert technical advice and recommendations to each decision making body including the City Council; and

WHEREAS, when the differing perspectives of the different decision-making bodies and differing input at each stage of a decision-making process result in an approach which differs from that originally recommended by staff, City staff nonetheless regularly assist in implementing and guiding such changed approaches at successive stages of a decision-making process within the City; and

WHEREAS, in addition, the differing perspectives of the different decision-making bodies, as well as the differing input at each stage of a decision-making process, often results in City staff gaining an improved understanding of the nature and implications of development proposals, thus improving staff’s ability to analyze such proposals under the applicable land use regulations, and make useful recommendations to decision-makers; and

WHEREAS, it is not uncommon for applicants or opponents of projects, or both, who come before the City Council to claim that the City staff and City Attorney are biased towards them; and

WHEREAS, because the City is largely built-out and its limited number of remaining developable sites are surrounded by existing uses, its land use regulations are detailed and complex, in order to allow flexibility to address the difficult issues sometimes raised by infill development, and as a result, consultations among planning, legal and other staff concerning the proper interpretation and application of the City’s land use regulations is particularly vital; and

WHEREAS, consistency of technical and legal advice is critical to a coherent and consistent implementation of a local government’s laws and regulations and this result cannot be achieved if different staff members who act wholly independently of one another provide conflicting technical and legal advice concerning a land use matter pending before the City; and

WHEREAS, resolving land use issues requires a unique appreciation of the context of the development, community values and similar considerations have historically been resolved through local government decision making procedures that are uniquely accessible to ordinary citizens and into which they expect and demand broad input; and

WHEREAS, the time which can be set aside by an elected or appointed body to conduct a hearing is inherently limited; and

WHEREAS, citizens expect to be able to contact their elected and appointed representatives on pending land use matters and find restrictions on their ability to do so artificial, confining and undemocratic and an impairment of their reasonable expectation to be able to communicate with their elected and appointed representatives; and

WHEREAS Council members can play a constructive role in facilitating public discussion and resolution of land use disputes through mediating seemingly irreconcilable positions; and

WHEREAS, most information gathered in these contacts usually results only in elaboration of issues already delineated in staff reports and other parts of the written and oral record; and

WHEREAS, even the state APA, in Government Code section 11430.30(c)(2) recognizes, as a policy matter, that land use determinations by members of state land use commissions such as the San Francisco Bay Conservation and Development Commission should not be subject to a prohibition on such contacts; and

WHEREAS while commissioners and Councilmembers often express tentative opinions on various projects pending before them, the expression of such opinions assists interested persons and the public to address the concerns expressed and makes for a robust and far-ranging exploration of the issues raised by a project, final decisions are nonetheless based upon the entire record, after all evidence and testimony has been considered, and such tentative opinions, even if expressed in strong language, are a necessary part of the review process and do not constitute prejudgment of the project.

NOW THEREFORE, BE IT BE RESOLVED by the Council of the City of Berkeley that the Council hereby establishes the following procedure for conduct of land use hearings in the City of Berkeley, in addition to any other procedure required by applicable federal state or local standards as follows:

1. Bodies such as the Planning Commission, Zoning Adjustments Board, Landmarks Commission and Housing Advisory Commission that make adjudicatory decisions shall withhold final judgment on such matters until the close of the hearing relating to the pending land use matter. Nothing in this section shall preclude a decision maker from articulating areas of concern for the staff or public to react to in the decision making process or to express tentative opinions on the matter.
2. City planning and legal staff are to provide their technical and legal advice and professional judgment to each decision making body and the Council and are not advocates of any party or position in a dispute, notwithstanding the fact that their

technical judgment may lead them to make recommendations concerning the matter. In the absence of clear evidence in the record that a staff member has lost his or her impartiality as a technical adviser, the City's need for consistent, coherent and experienced advisers outweighs any claimed bias from the adviser involvement at any earlier stage of the administrative proceeding.

3. Council members and Commissioners may receive information relevant to the land use decision by contacts with the parties, the public or staff and are not confined to reading the record or hearing presentations at public hearings.
4. Where information of a specific nature is gathered by a member of the City Council or a board or commission, through contacts outside the record, and the information is not already in the record, the member shall, to the extent feasible, keep contemporaneous notes of the substance of the contact and shall disclose the contact and its substance on the record prior to the commencement of the hearing to which such contact relates. Where the information is received during the pendency of a hearing the matter shall be disclosed prior to completion of the hearing and the parties and public shall have an opportunity to respond if the matter is substantially new information.
5. Where such contacts were made and information gathered prior to a pending decision by the Council or any decision making body whether or not to grant a hearing, the substance of the information shall be reported to the secretary of the relevant body as soon as it is made. The secretary shall maintain a file on such disclosed contacts for review by members of the public.
6. All written communications to the decision making body shall be submitted to the secretary of that body, or the City Clerk, in the case of a matter pending before the City Council.
7. Nothing in these procedures shall be construed as limiting any procedural protections that a party or the public may be entitled to by law over and above the protections of this resolution, based upon the facts of any particular proceeding.

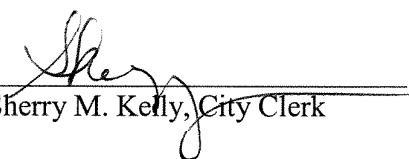
BE IT FURTHER RESOLVED, that Section I F of the Council Rules of Procedure, Resolution number 62,420–N.S., is hereby repealed and Resolution 62,420–N.S. is so amended.

The foregoing Resolution was adopted by the Berkeley City Council on July 13, 2004 by the following vote:

Ayes: Councilmembers Breland, Hawley, Maio, Olds, Shirek, Spring, Worthington, Wozniak and Mayor Bates.

Noes: None.

Absent: None.

Attest: 
Sherry M. Kelly, City Clerk


Tom Bates, Mayor



Open Government Commission

ACTION CALENDAR
XXXXX XX, 2021

To: Honorable Mayor and Members of the City Council

From: Brad Smith, Chair, Open Government Commission

Submitted by: Samuel Harvey, Secretary, Open Government Commission

Subject: Amendments to Resolution No. 62,571 to ensure consistent practices in posting public communications submitted to land use decision making bodies

RECOMMENDATION

Adopt a resolution amending Resolution No. 62,571 Establishing Fair Procedures in Land Use Quasi-Judicial Public Hearing Before the City Council, Planning Commission, Landmarks Preservation Commission, Zoning Adjustments Board and Housing Advisory Commission and Repealing Section I F of the Council Rules by Amending Resolution 62,571 to ensure consistent practices in posting of public communications submitted to land use decision making bodies.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

This recommendation was approved by the Open Government Commission at its regular meeting of XXXXX XX, XXXX.

Action:

Vote:

This recommendation is provided by the OGC pursuant to its authority under BMC § 2.06.190.A.2 to “propose additional legislation or procedures that it deems advisable to ensure the City’s compliance with [the Open Government Ordinance], the Brown Act, the Public Records Act, and the Lobbyist Registration Act, and

advise the City Council as to any other action or policy that it deems advisable to enhance open and effective government in Berkeley.”

BACKGROUND

In June 2020, the Open Government Commission received a complaint from neighbors of a proposed project alleging “procedural violations and/or unfair practices” during the Zoning Adjustments Board (ZAB) proceedings regarding the project. The OGC determined that the allegations contained in the complaint did not amount to violations of the Open Government Ordinance, Brown Act, Public Records Act or any other provision over which the OGC may have authority.

Included in the complaint was an allegation that certain written public communications to ZAB regarding the project were not included on the project-specific webpage in which other public communications and relevant documents were posted. While the OGC determined that the apparently inadvertent omission of some public communications from the online record for the project did not amount to a violation of City law or policy, some commissioners expressed concern that only a partial record of public communications could be posted on online collections of records for a project maintained by a land use decision making body, thereby giving the public an incomplete picture of the public input regarding a proposed project. Some commissioners expressed an interest in developing a City policy which would require comprehensive posting of public communications when a decision making body maintains an online collection of communications related to a project.

At its January 21, 2021 meeting the OGC adopted a proposed amendment to Resolution 62,571 which would require that where a land-use decision making body maintains an online collection of records for a project, such as a project-specific webpage containing relevant actions and documents, which includes copies of written communications submitted by members of the public, that online collection must include copies of all written public communications submitted to the decision making body regarding the project so that the complete record of written public input is available in a single place.

ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects related to the recommendation in this report.

RATIONALE FOR RECOMMENDATION

The proposed resolution would ensure greater transparency and enhance the ability of the public to participate in land use decision making processes.

ALTERNATIVE ACTIONS CONSIDERED

None.

CITY MANAGER

CONTACT PERSON

Brad Smith, Chair, Open Government Commission, (510) 981-6998

Samuel Harvey, Commission Secretary, Open Government Commission (510) 981-6998

Attachments:

1. Resolution

RESOLUTION NO. XX,XXX

ESTABLISHING FAIR PROCEDURES IN LAND USE QUASI-JUDICIAL PUBLIC HEARINGS BEFORE THE CITY COUNCIL, PLANNING COMMISSION, LANDMARKS PRESERVATION COMMISSION, ZONING ADJUSTMENTS BOARD AND HOUSING ADVISORY COMMISSION AND REPEALING SECTION I F OF THE COUNCIL RULES BY AMENDING RESOLUTION 62,~~571420~~

WHEREAS, the City of Berkeley has adopted a range of regulations to regulate land uses in Berkeley; and

WHEREAS, these include the City's Zoning ordinance, Landmarks Preservation ordinance and Subdivision ordinance; and

WHEREAS, these regulatory schemes adopt procedures to guide the application of the standards contained in these regulatory schemes to particular land uses, structures and divisions of property; and

WHEREAS, these procedures generally provide for boards and commissions to implement these regulatory schemes in the first instance, with ultimate oversight and review by the City Council; and

WHEREAS, the purpose of Council review is to ensure adherence to the Council's legislative intent in enacting the regulatory scheme and because the Council is the elected body ultimately responsible to the voters for appropriate regulation of land uses; and

WHEREAS, the Council does not intend, by the procedural hearings and review established in the City's regulatory procedures, to adopt or utilize in any way the adversary criminal or civil justice system used in the courts, and indeed finds that such a system is completely unsuitable to making land use decisions at the local administrative level; and

WHEREAS, the City Council and its subordinate agencies and staff are not partisans on any side of any land use dispute but are charged with making land use decisions in the best interests of the entire City after weighing all input, and this process is in fact a form of mediation between divergent community interests; and

WHEREAS, the City staff and City Attorney are charged with assisting the City Council and subordinate City boards and commissions to adjust competing interests affecting land use decisions and are not advocates of any side, but play the role of providing technical assistance and advice to the decision making bodies; and

WHEREAS, the United States Supreme Court has noted that due process "unlike some technical rules, is not a technical conception with a fixed content unrelated to time, place and circumstances [citations omitted]." Mathews v. Eldridge, *supra*, 424 U.S. 319, 334 (1976). It is "flexible and calls for such procedural protections as the situation demands [citations omitted]." Id.; and

WHEREAS, the provisions of the California Administrative Act ("APA") regarding state adjudicatory proceedings properly have no application to local agencies in light of the very substantial difference in state agencies and local administrative procedures; and

WHEREAS, even the APA recognizes that its prohibition on combining prosecutorial and adjudicatory functions applies only to prosecutors and other advocates who are committed to specific result and have a will to win and not merely to staff providing professional recommendations who are accustomed to serving decision making bodies with views on matters that differ from one another and from recommendations of staff; and

WHEREAS, a unique aspect of land use decision-making and the administrative procedures of cities with subordinate citizen boards and an elected City Council is that City staff regularly provide technical assistance to boards and commissions that may disagree with one another, with the City staff and with the City Council; and

WHEREAS, the City planning and legal staff are not advocates for any party or body's position but merely provide expert technical advice and recommendations to each decision making body including the City Council; and

WHEREAS, when the differing perspectives of the different decision-making bodies and differing input at each stage of a decision-making process result in an approach which differs from that originally recommended by staff, City staff nonetheless regularly assist in implementing and guiding such changed approaches at successive stages of a decision-making process within the City; and

WHEREAS, in addition, the differing perspectives of the different decision-making bodies, as well as the differing input at each stage of a decision-making process, often results in City staff gaining an improved understanding of the nature and implications of development proposals, thus improving staff's ability to analyze such proposals under the applicable land use regulations, and make useful recommendations to decision-makers; and

WHEREAS, it is not uncommon for applicants or opponents of projects, or both, who come before the City Council to claim that the City staff and City Attorney are biased towards them; and

WHEREAS, because the City is largely built-out and its limited number of remaining developable sites are surrounded by existing uses, its land use regulations are detailed and complex, in order to allow flexibility to address the difficult issues sometimes raised by infill development, and as a result, consultations among planning, legal and other staff concerning the proper interpretation and application of the City's land use regulations is particularly vital; and

WHEREAS, consistency of technical and legal advice is critical to a coherent and consistent implementation of a local government's laws and regulations and this result cannot be achieved if different staff members who act wholly independently of one another provide conflicting technical and legal advice concerning a land use matter pending before the City; and

WHEREAS, resolving land use issues requires a unique appreciation of the context of the development, community values and similar considerations have historically been resolved through local government decision making procedures that are uniquely accessible to ordinary citizens and into which they expect and demand broad input; and

WHEREAS, the time which can be set aside by an elected or appointed body to conduct a hearing is inherently limited; and

WHEREAS, citizens expect to be able to contact their elected and appointed representatives on pending land use matters and find restrictions on their ability to do so artificial, confining and undemocratic and an impairment of their reasonable expectation to be able to communicate with their elected and appointed representatives; and

WHEREAS, Council members can play a constructive role in facilitating public discussion and resolution of land use disputes through mediating seemingly irreconcilable positions; and

WHEREAS, most information gathered in these contacts usually results only in elaboration of issues already delineated in staff reports and other parts of the written and oral record; and

WHEREAS, even the state APA, in Government Code section 11430.30(c)(2) recognizes, as a policy matter, that land use determinations by members of state land use commissions such as the San Francisco Bay Conservation and Development Commission should not be subject to a prohibition on such contacts; and

WHEREAS, while commissioners and Councilmembers often express tentative opinions on various projects pending before them, the expression of such opinions assists interested persons and the public to address the concerns expressed and makes for a robust and far-ranging exploration of the issues raised by a project, final decisions are nonetheless based upon the entire record, after all evidence and testimony has been considered, and such tentative opinions, even if expressed in strong language, are a necessary part of the review process and do not constitute prejudgment of the project; and

WHEREAS, ensuring that publicly available collections of written communications submitted to a decision making body regarding a project accurately reflect the entirety of public communications is essential to enabling informed public participation in the land-use decision making process.

NOW THEREFORE, BE IT BE RESOLVED by the Council of the City of Berkeley that the Council hereby establishes the following procedure for conduct of land use hearings in the City of Berkeley, in addition to any other procedure required by applicable federal state or local standards as follows:

1. Bodies such as the Planning Commission, Zoning Adjustments Board, Landmarks Commission and Housing Advisory Commission that make adjudicatory decisions shall withhold final judgment on such matters until the close of the hearing relating to the pending land use matter. Nothing in this section shall preclude a decision maker from articulating areas of concern for the staff or public to react to in the decision making process or to express tentative opinions on the matter.
2. City planning and legal staff are to provide their technical and legal advice and professional judgment to each decision making body and the Council and are not advocates of any party or position in a dispute, notwithstanding the fact that their technical judgment may lead them to make recommendations concerning the matter. In the absence of clear evidence in the record that a staff member has lost his or her impartiality as a technical adviser, the City's need for consistent, coherent and experienced advisers outweighs any claimed bias from the advisor involvement at any earlier stage of the administrative proceeding.
3. Council members and Commissioners may receive information relevant to the land use decision

by contacts with the parties, the public or staff and are not confined to reading the record or hearing presentations at public hearings.

4. Where information of a specific nature is gathered by a member of the City Council or a board or commission, through contacts outside the record, and the information is not already in the record, the member shall, to the extent feasible, keep contemporaneous notes of the substance of the contact and shall disclose the contact and its substance on the record prior to the commencement of the hearing to which such contact relates. Where the information is received during the pendency of a hearing the matter shall be disclosed prior to completion of the hearing and the parties and public shall have an opportunity to respond if the matter is substantially new information.
5. Where such contacts were made and information gathered prior to a pending decision by the Council or any decision making body whether or not to grant a hearing, the substance of the information shall be reported to the secretary of the relevant body as soon as it is made. The secretary shall maintain a file on such disclosed contacts for review by members of the public.
6. All written communications to the decision making body shall be submitted to the secretary of that body, or the City Clerk, in the case of a matter pending before the City Council. Where the decision making body maintains an online collection of records for a project, such as a project-specific webpage containing relevant actions and documents, and that online collection includes copies of written communications submitted by members of the public, that online collection shall include copies of all written public communications submitted to the decision making body regarding the project such that the complete record of written public input is available in a single place.
7. Nothing in these procedures shall be construed as limiting any procedural protections that a party or the public may be entitled to by law over and above the protections of this resolution, based upon the facts of any particular proceeding.

BE IT FURTHER RESOLVED, that Section IF of the Council Rules of Procedure, Resolution number 62,~~571420~~-N.S., is hereby repealed and Resolution 62,~~571420~~-N.S. is so amended.

The foregoing Resolution was adopted by the Berkeley City Council on XXXX XX, 2021 by the following vote:

Ayes:

Noes:

Absent: