



Office of the City Manager

PUBLIC HEARING

July 27, 2021

To: Honorable Mayor and Members of the City Council
From: Dee Williams-Ridley, City Manager
Submitted by: Jordan Klein, Director, Planning and Development Department
Subject: ZAB Appeal: 770 Page Street, Use Permit #ZP2020-0051

RECOMMENDATION

Conduct a public hearing, and, upon conclusion, adopt a Resolution affirming the Zoning Adjustments Board (ZAB) decision to approve Use Permit #ZP2020-0051 to demolish an existing single-family dwelling unit and construct four detached, three-story approximately 1,500-square-foot dwelling units on a 5,532-square-foot lot in the MU-R District, and dismiss the appeal.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

On May 27, 2021, the Zoning Adjustments Board (ZAB) held a public hearing and approved Use Permit (UP) #ZP2020-0051 by an 8-0-0-0-1 vote on Consent (Yes: Tregub, Duffy, Gaffney, Thompson, Olson, O'Keefe, Kim, Sanderson; No: None; Abstain: None; Absent: None; Recusal: Kahn). On June 1, 2021, staff issued the notice of the ZAB decision, and on June 7, 2021, the City received an appeal of the ZAB decision with the City Clerk filed by Greenfire Law, on behalf of a group of residents from the West Berkeley neighborhood of Oceanview. The Clerk set the matter for review by the Council on July 27, 2021.

BACKGROUND

On May 29, 2020, Matthew Wadlund of 770 Page Street, LLC ("Applicant") submitted an application to demolish the existing dwelling unit on the 5,777-square-foot lot located at 770 Page Street and construct four detached dwelling units. Each building would be three stories, with an average height of 32 feet 6 inches, and would each provide approximately 1,500 square feet of gross floor area. The layout of each unit is essentially identical, with the first floor containing two bedrooms and one bathroom, the second floor containing an open living/dining room with kitchen and bathroom, and the third floor comprised of one bedroom that opens up to a 135-square-foot western facing roof deck. Two of the units would have a dedicated uncovered parking space.

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

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

The proposed project complies with applicable, objective general plan and zoning standards, including maximum height, density, and FAR, and minimum setbacks, useable open space, and number of parking spaces. Thus, section (j) of the Housing Accountability Act applies. Staff is not aware of any basis to make the findings listed above.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

The project approved by the ZAB is in compliance with all applicable State and local environmental requirements.

RATIONALE FOR RECOMMENDATION

The appellants' principal appeal point repeats the argument that appellants advanced in administrative proceedings prior to the approval of the 1444 and 1446 Fifth Street projects. Appellants contend that the approval of the 770 Page Street project is "the next phase of the Fifth and Page Street residential housing project," and is a "continuation of the common development plan at this location . . . that began at the adjacent and contiguous 1444 and 1446 Fifth Street locations." Appellants argue that the project is subject to the inclusionary housing requirements in BMC Chapter 23C.12 on that basis. However, BMC Chapter 23C.12 does not include a provision applying inclusionary housing requirements to neighboring parcels that are otherwise exempt from the inclusionary housing requirements. Staff recommends that Council reject this appeal point on those grounds.

Appellants' remaining appeal points take issue with the demolition of the one residential unit located on the parcel. However, the City Council lacks discretion under the Housing Accountability Act to deny a Use Permit for the demolition of the unit unless the findings in Government Code section 65589.5(j)(1) can be made. The Zoning Adjustments Board made no such findings, and staff is not aware of any basis for Council to make those findings here. Further, any demolition fee required under BMC Section 23C.08.020.A does not apply to the demolition of a single dwelling unit, and in any event, no fee for demolition of a dwelling unit has been established by the City. Finally, the project satisfies Government Code section 66300(d) by providing at least as many replacement units as are being demolished, which also satisfies the operative

requirements of BMC section 23C.08.010 and .020 regarding replacement of demolished units. Staff recommends that Council reject these appeal points, as they urge Council to take an action that is inconsistent with state law and the Demolition Ordinance.

ALTERNATIVE ACTIONS CONSIDERED

Pursuant to BMC Section 23B.32.060.D, the Council may reverse, affirm, or modify the ZAB's decision.

CONTACT PERSON

Jordan Klein, Director, Planning and Development, (510) 981-7534

Attachments:

1: Resolution

 Exhibit A: Findings and Conditions

 Exhibit B: Project Plans dated April 19, 2021

2: Appeal Letter, received June 7, 2021, dated June 3, 2021

3: ZAB Staff Report, dated May 27, 2021

4: Index to Administrative Record

5: Administrative Record

6: Public Hearing Notice

RESOLUTION NO. ##,###-N.S.

UPHOLD THE ZONING ADJUSTMENTS BOARD (ZAB) DECISION TO APPROVE USE PERMIT #ZP2020-0051 TO DEMOLISH AND EXISTING SINGLE-FAMILY DWELLING UNIT AND CONSTRUCT FOUR DETACHED, 3-STORY, APPROXIMATELY 1,500 SQUARE-FOOT, SINGLE-FAMILY DWELLINGS, ON A 5,532 SQUARE-FOOT VACANT LOT IN THE MIXED USE-RESIDENTIAL ZONING DISTRICT, AND DISMISS THE APPEAL

WHEREAS, on May 29, 2020, Matthew Wadlund of 770 Page Street L LC (“applicant”) filed an application for a Use Permit and Staff Level Design Review to demolish a single-family dwelling and construct four detached, 3-story, approximately 1,500 square-foot, single-family dwellings on a 5,532 square-foot parcel at 770 Page Street (“project”); and

WHEREAS, on March 30, 2020, staff deemed this application complete; and

WHEREAS, on May 13, 2021, design review staff posted the approval of the Staff Level Design Review (DRSL) Application in three locations; and

WHEREAS, on May 27, 2021, at a duly noticed public hearing, the Zoning Adjustments Board (ZAB) held a public hearing in accordance with BMC Section 23B.28.030, determined that the project is categorically exempt from the California Environmental Quality Act (“CEQA”) under Sections 15301, 15303, and 15332 of the CEQA Guidelines and approved the Use Permit application with findings and conditions; and

WHEREAS, on May 28, 2021, the posting period for the DRSL approval ended with no appeal, and the DRSL approval became effective; and

WHEREAS, on June 1, 2021, staff issued the notice of the ZAB decision; and

WHEREAS, on June 7, 2021, the City received an appeal of the ZAB decision with the City Clerk filed by Greenfire Law, on behalf of a group of residents from the West Berkeley neighborhood of Oceanview; and

WHEREAS, on July 27, 2021, at a duly noticed public hearing, the Council held a public hearing to consider the ZAB’s decision, and, in the opinion of this Council, the facts stated in, or ascertainable from the public record, including comments made at the public hearing, warrant approving the project.

NOW THEREFORE, BE IT RESOLVED by the City Council of the City of Berkeley that the City Council hereby adopts the findings to approve made by the ZAB in Exhibit A, adopts the conditions of approval in Exhibit A, dismisses the appeal, and approves Use Permit #ZP2020-0051 as shown in Exhibit B.

Exhibits

A: Findings and Conditions

B: Project Plans dated April 19, 2021

FINDINGS AND CONDITIONS

MAY 27, 2021

770 Page Street

Use Permit #ZP2020-0051 to demolish an existing single-family dwelling unit and construct four detached, three-story approximately 1,500-square-foot dwelling units on a 5,532-square-foot lot.

PERMITS REQUIRED

- Use Permit, under BMC 23C.08.010, to demolish of a dwelling unit
- Administrative Use Permit, under BMC Section 23E.84.030, to construct four new dwelling units

I. CEQA FINDINGS

1. The project is categorically exempt from the provisions of the California Environmental Quality Act (CEQA, Public Resources Code §21000, et seq. and California Code of Regulations, §15000, et seq.) pursuant to Sections 15301, 15303, and 15332 of the CEQA Guidelines (“Existing Facilities,” “New Construction or Conversion of Small Structures,” and “In-Fill Development”).

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

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

II. FINDINGS FOR APPROVAL

1. The Housing Accountability Act §65589.5(j) requires that when a proposed housing development complies with applicable, objective general plan and zoning standards, a local

agency may not deny the project or approve it with reduced density unless the agency makes written findings supported by substantial evidence that:

- a. The development would have a specific adverse impact on public health or safety unless disapproved or approved at a lower density¹; and
- b. There is no feasible method to satisfactorily mitigate or avoid the specific adverse impact, other than the disapproval or approval at a lower density.

Because the project would comply with applicable, objective general plan and zoning standards, §65589.5(j) does apply to this project. No significant, quantifiable, direct and unavoidable impacts, based on objective, identified written public health or safety standards, polices, or conditions, have been identified by staff. The project includes construction of one dwelling unit on a lot that allows one dwelling.

2. Pursuant to Government Code §66300(d)(1), a City “shall not approve a housing development application that will require the demolition of residential dwelling units unless the project will create at least as many residential units as will be demolished.” This project proposes replacing the one dwelling proposed for demolition with four new dwellings; therefore, the application complies. Section 66300(d)(2) does not apply because the existing unit is not considered a “protected” unit under SB 330. The findings to approve the demolition of the dwelling unit under BMC Section 23C.08.010.B are therefore satisfied due to compliance with Government Code §66300(d)(3).
3. As required by Section 23B.32.040.A of the Zoning Ordinance, the project, under the circumstances of this particular case existing at the time at which the application is granted, would not be detrimental to the health, safety, peace, morals, comfort, and general welfare of the persons residing or working in the neighborhood of such proposed use or be detrimental or injurious to property and improvements of the adjacent properties, the surrounding area or neighborhood, or to the general welfare of the City because:
 - The proposed development on this parcel is equal to or below the Mixed-Use Residential (MU-R) standards set by BMC 23E.84.070 for maximum residential density, floor area, and height (four dwelling units on the 5,532 square-foot lot, where four dwelling units is the maximum allowed based on the size of this lot; floor area ratio of 1.1, where the maximum allowed is for residential development 1.5; average height of 32.5’, where the maximum allowed is 35’). The proposed project also meets or exceeds the requirements for setbacks and useable open space (1,082 square feet of useable open space, where 600 square feet is required (150 square feet per unit));
 - The proposed project retains the mixed but primarily residential character of the surrounding street and is consistent with the overall scale of the one-, two-, and three-story residences and commercial and manufacturing spaces in the neighborhood. The proposed design references the industrial context of West Berkeley and its mix of uses and aesthetics;
 - No substantial land use conflicts are expected from the project due to the site’s location in a mixed area of commercial and residential development, because the project’s density will be within the range of the surrounding development, and because no substantial privacy or shadow impacts will occur;
 - Sunlight: the project will not result in significant loss of direct sunlight on abutting residences for several reasons. No residences occur to the west and new shadows cast towards the

¹ As used in the Act, a “specific, adverse impact” means a “significant, quantifiable, direct and unavoidable impact, based on objective, identified written public health or safety standards, polices, or conditions as they existed on the date the application was complete.

east will primarily affect the rear façades of the dwelling units located at 776 Page Street and 1442 Fifth Street during the hours before sunset throughout the year. However, because impacts to neighboring residences would be limited to certain hours a day, these shading impacts are not deemed detrimental;

- Air: The Council finds that the proposal is consistent with the existing development and building-to-building separation pattern – or air – in this MU-R neighborhood because the buildings will exceed minimum setback and useable open space requirements; and
- Views: The proposed project will not result in additional obstruction of significant views in the neighborhood because there are limited significant views as defined in BMC Section 23F.04 (Definitions) available to residences in the area. The area is generally flat, developed with one- to three-story buildings, and includes mature vegetation which provides visual screening.

4. Pursuant to Berkeley Municipal Code Section 23E.84.090, the proposed project is consistent with the purposes of the MU-R District for the following reasons:

- The project will strengthen the residential concentration in this neighborhood. The residential use of the project will protect neighboring residents from the unreasonably detrimental effects of nonresidential uses, such as noise, vibration, odors, smoke, fumes, gases, dust, heat and glare;
 - The project is consistent with the West Berkeley Plan because the proposed massing and design is appropriate for the neighborhood and reflects the nature of the MU-R District;
 - The project is not likely, under reasonably foreseeable circumstances, to either induce or contribute to a cumulative change of use in buildings away from residential, live/work, light industrial, or arts and crafts uses because the site location is in an area of West Berkeley known for a diverse mix of land uses and because the project will continue the residential pattern from the west side of Fifth Street to the Page frontage of this city block; and
 - The proposed project is able to meet the applicable performance standards as described in BMC 23E.84.070.H because no additional performance standards are applicable to this project.
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III. STANDARD CONDITIONS OF APPROVAL FOR ALL PROJECTS

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

1. Conditions Shall be Printed on Plans

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

2. Applicant Responsible for Compliance with Conditions

The applicant shall ensure compliance with all of the following conditions, including submittal to the project planner of required approval signatures at the times specified. Failure to comply with any condition may result in construction being stopped, issuance of a citation, and/or modification or revocation of the Use Permit.

3. Uses Approved Deemed to Exclude Other Uses (Section 23B.56.010)

- A. This Permit authorizes only those uses and activities actually proposed in the application, and excludes other uses and activities.
- B. Except as expressly specified herein, this Permit terminates all other uses at the location subject to it.

4. Modification of Permits (Section 23B.56.020)

No change in the use or structure for which this Permit is issued is permitted unless the Permit is modified by the Board, except that the Zoning Officer may approve changes that do not expand, intensify, or substantially change the use or building.

Changes in the plans for the construction of a building or structure, may be modified prior to the completion of construction, in accordance with Section 23B.56.030.D. The Zoning Officer may approve changes to plans approved by the Board, consistent with the Board's policy adopted on May 24, 1978, which reduce the size of the project.

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

Except as specified herein, the site plan, floor plans, building elevations and/or any additional information or representations, whether oral or written, indicating the proposed structure or manner of operation submitted with an application or during the approval process are deemed conditions of approval.

6. Subject to All Applicable Laws and Regulations (Section 23B.56.040)

The approved use and/or construction is subject to, and shall comply with, all applicable City Ordinances and laws and regulations of other governmental agencies. Prior to construction, the applicant shall identify and secure all applicable permits from the Building and Safety Division, Public Works Department and other affected City divisions and departments.

7. Exercised Permit for Use Survives Vacancy of Property (Section 23B.56.080)

Once a Permit for a use is exercised and the use is established, that use is legally recognized, even if the property becomes vacant, except as set forth in Standard Condition #8, below.

12. Revised Driveway Easement. The applicant shall provide the recorded revised driveway easement, as depicted on the Site Plan, to the Zoning Officer.
13. Geotechnical Plan Review. The applicant shall follow all conditions and recommendations outlined in the geotechnical report and response letters prepared by Peters and Ross (March 2020) and the peer reviews prepared by Cotton, Shires and Associates, Inc. (November 12, 2020). In addition, the applicant's geotechnical consultant shall review and approve all geotechnical aspects of the project building and grading plans (i.e., site preparation and grading, site drainage improvements and design parameters for foundations, retaining walls, and driveway) to ensure that their recommendations have been properly incorporated. In addition the consultant shall review project drainage and grading plans and verify that proposed site drainage discharge is acceptable from a geotechnical perspective. The results of the plan review shall be summarized by the geotechnical consultant in a letter and submitted to the City Engineer for review and approval prior to issuance of building permits.

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

14. Demolition. Demolition of the existing building cannot commence until a complete application is submitted for the replacement building. In addition, all plans presented to the City to obtain a permit to allow the demolition are subject to these conditions.
15. Construction and Demolition Diversion. Applicant shall submit a [Construction Waste Management Plan](#) that meets the requirements of BMC Chapter 19.37 including 100% diversion of asphalt, concrete, excavated soil and land-clearing debris and a minimum of 65% diversion of other nonhazardous construction and demolition waste.
16. Toxics. The applicant shall contact the Toxics Management Division (TMD) at 1947 Center Street or (510) 981-7470 to determine which of the following documents are required and timing for their submittal:
- A. Environmental Site Assessments:
- 1) Phase I & Phase II Environmental Site Assessments (latest ASTM 1527-13). A recent Phase I ESA (less than 6 months old*) shall be submitted to TMD for developments for:
 - All new commercial, industrial and mixed use developments and all large improvement projects.
 - All new residential buildings with 5 or more dwelling units located in the Environmental Management Area (or EMA).
 - EMA is available online at: http://www.cityofberkeley.info/uploadedFiles/IT/Level_3_-_General/ema.pdf
 - 2) Phase II ESA is required to evaluate Recognized Environmental Conditions (REC) identified in the Phase I or other RECs identified by TMD staff. The TMD may require a third party toxicologist to review human or ecological health risks that may be identified. The applicant may apply to the appropriate state, regional or county cleanup agency to evaluate the risks.
 - 3) If the Phase I is over 6 months old, it will require a new site reconnaissance and interviews. If the facility was subject to regulation under Title 15 of the Berkeley Municipal Code since the last Phase I was conducted, a new records review must be performed.
- B. Soil and Groundwater Management Plan:
- 1) A Soil and Groundwater Management Plan (SGMP) shall be submitted to TMD for all non-residential projects, and residential or mixed-use projects with five or more dwelling units, that: (1) are in the Environmental Management Area (EMA) and (2) propose any

excavations deeper than 5 feet below grade. The SGMP shall be site specific and identify procedures for soil and groundwater management including identification of pollutants and disposal methods. The SGMP will identify permits required and comply with all applicable local, state and regional requirements.

- 2) The SGMP shall require notification to TMD of any hazardous materials found in soils and groundwater during development. The SGMP will provide guidance on managing odors during excavation. The SGMP will provide the name and phone number of the individual responsible for implementing the SGMP and post the name and phone number for the person responding to community questions and complaints.
- 3) TMD may impose additional conditions as deemed necessary. All requirements of the approved SGMP shall be deemed conditions of approval of this Use Permit.

C. Building Materials Survey:

- 1) Prior to approving any permit for partial or complete demolition and renovation activities involving the removal of 20 square or lineal feet of interior or exterior walls, a building materials survey shall be conducted by a qualified professional. The survey shall include, but not be limited to, identification of any lead-based paint, asbestos, polychlorinated biphenyl (PBC) containing equipment, hydraulic fluids in elevators or lifts, refrigeration systems, treated wood and mercury containing devices (including fluorescent light bulbs and mercury switches). The Survey shall include plans on hazardous waste or hazardous materials removal, reuse or disposal procedures to be implemented that fully comply state hazardous waste generator requirements (22 California Code of Regulations 66260 et seq). The Survey becomes a condition of any building or demolition permit for the project. Documentation evidencing disposal of hazardous waste in compliance with the survey shall be submitted to TMD within 30 days of the completion of the demolition. If asbestos is identified, Bay Area Air Quality Management District Regulation 11-2-401.3 a notification must be made and the J number must be made available to the City of Berkeley Permit Service Center.

D. Hazardous Materials Business Plan:

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

Prior to Issuance of Any Building (Construction) Permit

17. HVAC Noise Reduction. Prior to the issuance of building permits, the project applicant shall submit plans that show the location, type, and design of proposed heating, ventilation, and cooling (HVAC) equipment. In addition, the applicant shall provide product specification sheets or a report from a qualified acoustical consultant showing that operation of the proposed HVAC equipment will meet the City's exterior noise requirements in BMC Section 13.40.050. The City's Planning and Development Department shall review the submitted plans, including the selected HVAC equipment, to verify compliance with exterior noise standards.
18. Natural Gas Prohibition. The project shall comply with the Natural Gas Prohibition pursuant to BMC Chapter 12.80.
19. Electric Vehicle (EV) Charging. Each dwelling unit shall install a listed raceway, wiring, and power to allow for future Level 2 (240 Volt/40 amp) plug-in electric vehicle (EV) charging system installation as specified by the Berkeley Green Code (BMC Section 19.37.040). Readiness for EV charging and EV charging station installations shall be noted on the construction plans.

- 20. Water Efficient Landscaping.** Landscaping, totaling 500 square feet of more of new landscaping or 2,500 square feet or more of renovated irrigated area, shall comply with the State's Model Water Efficient Landscape Ordinance (MWELo). MWELo-compliant landscape documentation including a planting, grading, and irrigation plan shall be included in site plans. Water budget calculations are also required for landscapes of 2,500 square feet or more and shall be included in site plans. The reference evapotranspiration rate (ET_o) for Berkeley is 41.8.
- 21. Recycling and Organics Collection.** Applicant shall provide recycling and organics collection areas for occupants, clearly marked on site plans, which comply with the Alameda County Mandatory Recycling Ordinance (ACWMA Ordinance 2012-01).
- 22. Public Works ADA.** Plans submitted for building permit shall include replacement of sidewalk, curb, gutter, and other streetscape improvements, as necessary to comply with current City of Berkeley standards for accessibility.

During Construction:

- 23. 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 Noon on Saturday. No construction-related activity shall occur on Sunday or any Federal Holiday.
- 24. Public Works - Implement BAAQMD-Recommended Measures during Construction.** For all proposed projects, BAAQMD recommends implementing all the Basic Construction Mitigation Measures, listed below to meet the best management practices threshold for fugitive dust:
- A. All exposed surfaces (e.g., parking areas, staging areas, soil piles, graded areas, and unpaved access roads) shall be watered two times per day.
 - B. All haul trucks transporting soil, sand, or other loose material off-site shall be covered.
 - C. All visible mud or dirt track-out onto adjacent public roads shall be removed using wet power vacuum street sweepers at least once per day. The use of dry power sweeping is prohibited.
 - D. All vehicle speeds on unpaved roads shall be limited to 15 mph.
 - E. All roadways, driveways, and sidewalks to be paved shall be completed as soon as possible. Building pads shall be laid as soon as possible after grading unless seeding or soil binders are used.
 - F. Idling times shall be minimized either by shutting equipment off when not in use or reducing the maximum idling time to 5 minutes (as required by the California airborne toxics control measure Title 13, Section 2485 of California Code of Regulations [CCR]). Clear signage shall be provided for construction workers at all access points.
 - G. All construction equipment shall be maintained and properly tuned in accordance with manufacturer's specifications. All equipment shall be checked by a certified visible emissions evaluator.
 - H. Post a publicly visible sign with the telephone number and person to contact at the lead agency regarding dust complaints. This person shall respond and take corrective action within 48 hours. The Air District's phone number shall also be visible to ensure compliance with applicable regulations.
- 25. Construction and Demolition Diversion.** Divert debris according to your plan and collect required documentation. Get construction debris receipts from sorting facilities in order to verify diversion requirements. Upload recycling and disposal receipts if using [Green Halo](#) and submit online for City review and approval prior to final inspection. Alternatively, complete the second page of the

original [Construction Waste Management Plan](#) and present it, along with your construction debris receipts, to the Building Inspector by the final inspection to demonstrate diversion rate compliance. The Zoning Officer may request summary reports at more frequent intervals, as necessary to ensure compliance with this requirement.

- 26. Low-Carbon Concrete.** The project shall maintain compliance with the Berkeley Green Code (BMC Chapter 19.37) including use of concrete mix design with a cement reduction of at least 25%. Documentation on concrete mix design shall be available at all times at the construction site for review by City Staff.
- 27. Transportation Construction Plan.** The applicant and all persons associated with the project are hereby notified that a Transportation Construction Plan (TCP) is required for all phases of construction, particularly for the following activities:
- Alterations, closures, or blockages to sidewalks, pedestrian paths or vehicle travel lanes (including bicycle lanes);
 - Storage of building materials, dumpsters, debris anywhere in the public ROW;
 - Provision of exclusive contractor parking on-street; or
 - Significant truck activity.

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

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

- 28. Avoid Disturbance of Nesting Birds.** Initial site disturbance activities, including vegetation and concrete removal, shall be prohibited during the general avian nesting season (February 1 to August 30), if feasible. If nesting season avoidance is not feasible, the applicant shall retain a qualified biologist to conduct a preconstruction nesting bird survey to determine the presence/absence, location, and activity status of any active nests on or adjacent to the project site. The extent of the survey buffer area surrounding the site shall be established by the qualified biologist to ensure that direct and indirect effects to nesting birds are avoided. To avoid the destruction of active nests and to protect the reproductive success of birds protected by the MBTA and CFGC, nesting bird surveys shall be performed not more than 14 days prior to scheduled vegetation and concrete removal. In the event that active nests are discovered, a suitable buffer (typically a minimum buffer of 50 feet for passerines and a minimum buffer of 250 feet for raptors) shall be established around such active nests and no construction shall be allowed inside the buffer areas until a qualified biologist has determined that the nest is no longer active (e.g., the nestlings have fledged and are no longer reliant on the nest). No ground-disturbing activities shall occur within this buffer until the qualified biologist has confirmed that

breeding/nesting is completed and the young have fledged the nest. Nesting bird surveys are not required for construction activities occurring between August 31 and January 31.

- 29. Archaeological Resources (Ongoing throughout demolition, grading, and/or construction).** Pursuant to CEQA Guidelines section 15064.5(f), “provisions for historical or unique archaeological resources accidentally discovered during construction” should be instituted. Therefore:
- A. In the event that any prehistoric or historic subsurface cultural resources are discovered during ground disturbing activities, all work within 50 feet of the resources shall be halted and the project applicant and/or lead agency shall consult with a qualified archaeologist, historian or paleontologist to assess the significance of the find.
 - B. If any find is determined to be significant, representatives of the project proponent and/or lead agency and the qualified professional would meet to determine the appropriate avoidance measures or other appropriate measure, with the ultimate determination to be made by the City of Berkeley. All significant cultural materials recovered shall be subject to scientific analysis, professional museum curation, and/or a report prepared by the qualified professional according to current professional standards.
 - C. In considering any suggested measure proposed by the qualified professional, the project applicant shall determine whether avoidance is necessary or feasible in light of factors such as the uniqueness of the find, project design, costs, and other considerations.
 - D. If avoidance is unnecessary or infeasible, other appropriate measures (e.g., data recovery) shall be instituted. Work may proceed on other parts of the project site while mitigation measures for cultural resources is carried out.
 - E. If significant materials are recovered, the qualified professional shall prepare a report on the findings for submittal to the Northwest Information Center.
- 30. Human Remains (Ongoing throughout demolition, grading, and/or construction).** In the event that human skeletal remains are uncovered at the project site during ground-disturbing activities, all work shall immediately halt and the Alameda County Coroner shall be contacted to evaluate the remains, and following the procedures and protocols pursuant to Section 15064.5 (e)(1) of the CEQA Guidelines. If the County Coroner determines that the remains are Native American, the City shall contact the California Native American Heritage Commission (NAHC), pursuant to subdivision (c) of Section 7050.5 of the Health and Safety Code, and all excavation and site preparation activities shall cease within a 50-foot radius of the find until appropriate arrangements are made. If the agencies determine that avoidance is not feasible, then an alternative plan shall be prepared with specific steps and timeframe required to resume construction activities. Monitoring, data recovery, determination of significance and avoidance measures (if applicable) shall be completed expeditiously.
- 31. Paleontological Resources (Ongoing throughout demolition, grading, and/or construction).** In the event of an unanticipated discovery of a paleontological resource during construction, excavations within 50 feet of the find shall be temporarily halted or diverted until the discovery is examined by a qualified paleontologist (per Society of Vertebrate Paleontology standards [SVP 1995,1996]). The qualified paleontologist shall document the discovery as needed, evaluate the potential resource, and assess the significance of the find. The paleontologist shall notify the appropriate agencies to determine procedures that would be followed before construction is allowed to resume at the location of the find. If the City determines that avoidance is not feasible, the paleontologist shall prepare an excavation plan for mitigating the effect of the

project on the qualities that make the resource important, and such plan shall be implemented. The plan shall be submitted to the City for review and approval.

- 32. Halt Work/Unanticipated Discovery of Tribal Cultural Resources.** In the event that cultural resources of Native American origin are identified during construction, all work within 50 feet of the discovery shall be redirected. The project applicant and project construction contractor shall notify the City Planning Department within 24 hours. The City will again contact any tribes who have requested consultation under AB 52, as well as contact a qualified archaeologist, to evaluate the resources and situation and provide recommendations. If it is determined that the resource is a tribal cultural resource and thus significant under CEQA, a mitigation plan shall be prepared and implemented in accordance with State guidelines and in consultation with Native American groups. If the resource cannot be avoided, additional measures to avoid or reduce impacts to the resource and to address tribal concerns may be required.
- 33. Stormwater Requirements.** The applicant shall demonstrate compliance with the requirements of the City's National Pollution Discharge Elimination System (NPDES) permit as described in BMC Section 17.20. The following conditions apply:
- A. The project plans shall identify and show site-specific Best Management Practices (BMPs) appropriate to activities conducted on-site to limit to the maximum extent practicable the discharge of pollutants to the City's storm drainage system, regardless of season or weather conditions.
 - B. Trash enclosures and/or recycling area(s) shall be covered; no other area shall drain onto this area. Drains in any wash or process area shall not discharge to the storm drain system; these drains should connect to the sanitary sewer. Applicant shall contact the City of Berkeley and EBMUD for specific connection and discharge requirements. Discharges to the sanitary sewer are subject to the review, approval and conditions of the City of Berkeley and EBMUD.
 - C. Landscaping shall be designed with efficient irrigation to reduce runoff, promote surface infiltration and minimize the use of fertilizers and pesticides that contribute to stormwater pollution. Where feasible, landscaping should be designed and operated to treat runoff. When and where possible, xeriscape and drought tolerant plants shall be incorporated into new development plans.
 - D. Design, location and maintenance requirements and schedules for any stormwater quality treatment structural controls shall be submitted to the Department of Public Works for review with respect to reasonable adequacy of the controls. The review does not relieve the property owner of the responsibility for complying with BMC Chapter 17.20 and future revisions to the City's overall stormwater quality ordinances. This review shall be conducted prior to the issuance of a Building Permit.
 - E. All paved outdoor storage areas must be designed to reduce/limit the potential for runoff to contact pollutants.
 - F. All on-site storm drain inlets/catch basins must be cleaned at least once a year immediately prior to the rainy season. The property owner shall be responsible for all costs associated with proper operation and maintenance of all storm drainage facilities (pipelines, inlets, catch basins, outlets, etc.) associated with the project, unless the City accepts such facilities by Council action. Additional cleaning may be required by City of Berkeley Public Works Engineering Dept.
 - G. All on-site storm drain inlets must be labeled "No Dumping – Drains to Bay" or equivalent using methods approved by the City.

- H. Most washing and/or steam cleaning must be done at an appropriately equipped facility that drains to the sanitary sewer. Any outdoor washing or pressure washing must be managed in such a way that there is no discharge or soaps or other pollutants to the storm drain. Sanitary connections are subject to the review, approval and conditions of the sanitary district with jurisdiction for receiving the discharge.
- I. Sidewalks and parking lots shall be swept regularly to prevent the accumulation of litter and debris. If pressure washed, debris must be trapped and collected to prevent entry to the storm drain system. If any cleaning agent or degreaser is used, wash water shall not discharge to the storm drains; wash waters should be collected and discharged to the sanitary sewer. Discharges to the sanitary sewer are subject to the review, approval and conditions of the sanitary district with jurisdiction for receiving the discharge.
- J. The applicant is responsible for ensuring that all contractors and sub-contractors are aware of and implement all stormwater quality control measures. Failure to comply with the approved construction BMPs shall result in the issuance of correction notices, citations, or a project stop work order.
34. Public Works. All piles of debris, soil, sand, or other loose materials shall be covered at night and during rainy weather with plastic at least one-eighth millimeter thick and secured to the ground.
35. Public Works. The applicant shall ensure that all excavation takes into account surface and subsurface waters and underground streams so as not to adversely affect adjacent properties and rights-of-way.
36. Public Works. The project sponsor shall maintain sandbags or other devices around the site perimeter during the rainy season to prevent on-site soils from being washed off-site and into the storm drain system. The project sponsor shall comply with all City ordinances regarding construction and grading.
37. Public Works. Prior to any excavation, grading, clearing, or other activities involving soil disturbance during the rainy season the applicant shall obtain approval of an erosion prevention plan by the Building and Safety Division and the Public Works Department. The applicant shall be responsible for following these and any other measures required by the Building and Safety Division and the Public Works Department.
38. Public Works. The removal or obstruction of any fire hydrant shall require the submission of a plan to the City's Public Works Department for the relocation of the fire hydrant during construction.
39. Public Works. If underground utilities leading to adjacent properties are uncovered and/or broken, the contractor involved shall immediately notify the Public Works Department and the Building & Safety Division, and carry out any necessary corrective action to their satisfaction.

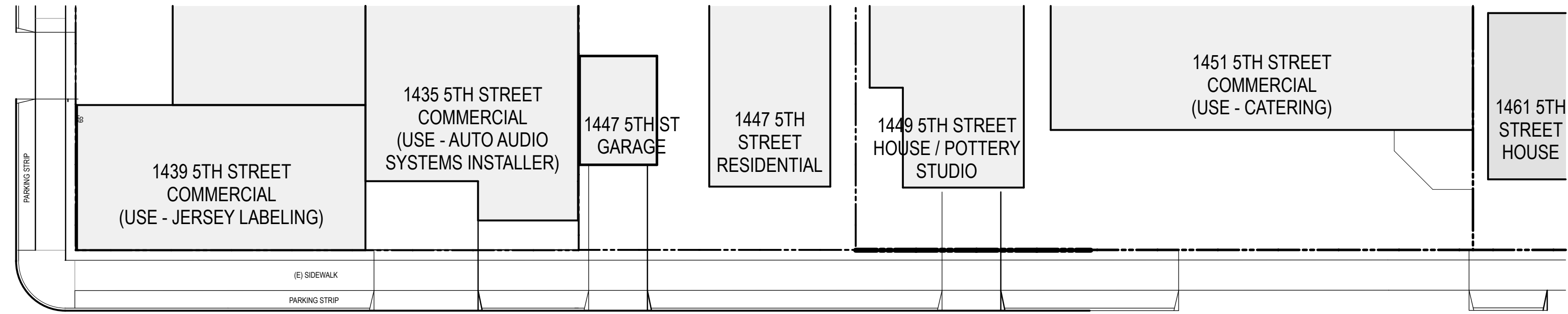
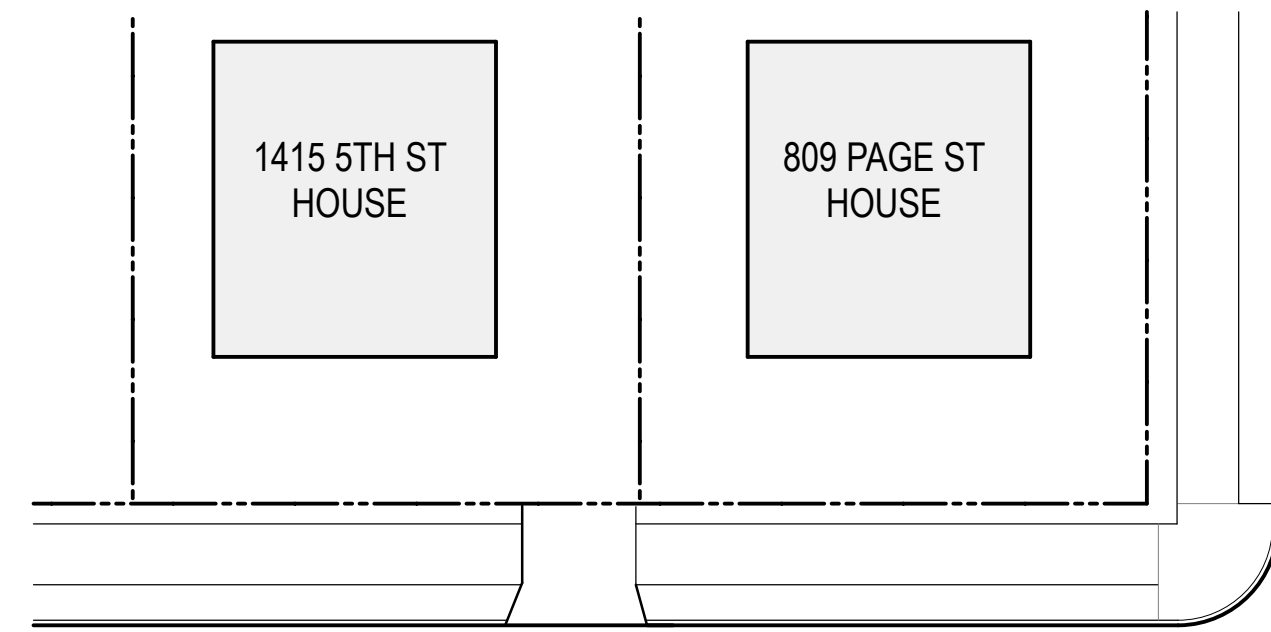
Prior to Final Inspection or Issuance of Occupancy Permit:

40. Compliance with Conditions. The project shall conform to the plans and statements in the Use Permit. The developer is responsible for providing sufficient evidence to demonstrate compliance with the requirements throughout the implementation of this Use Permit.

41. Compliance with Approved Plan. The project shall conform to the plans and statements in the Use Permit. All landscape, site and architectural improvements shall be completed per the attached approved drawings dated April 19, 2021, except as modified by conditions of approval.
42. Housing Trust Fund Contributions. Pursuant to the Settlement Agreement between the City of Berkeley and 1444 Fifth Street, LLC and 1445 Fifth Street, LLC, the applicant shall make a payment of \$15,000 into the City of Berkeley Housing Trust Fund for each of the four dwelling units.

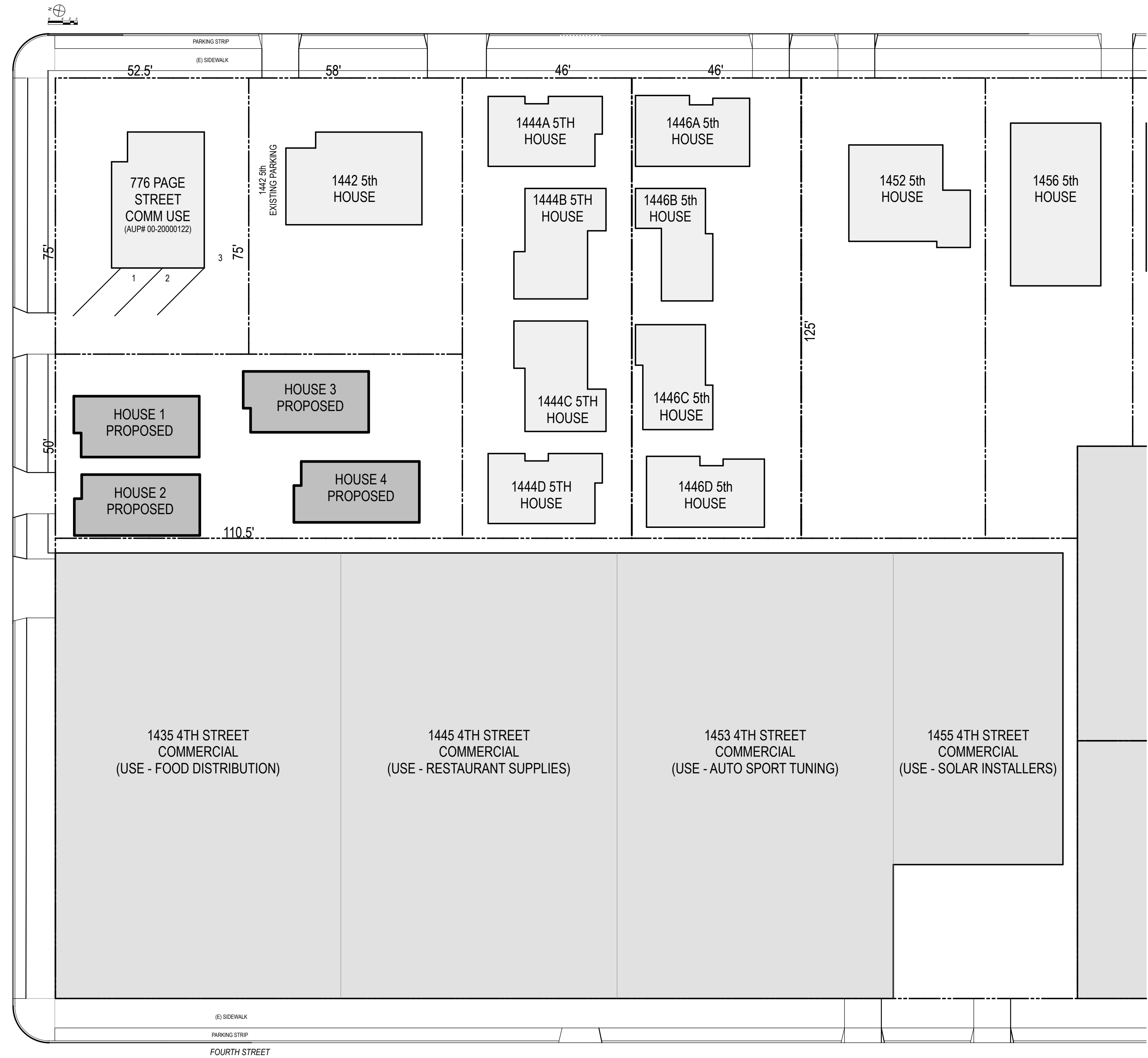
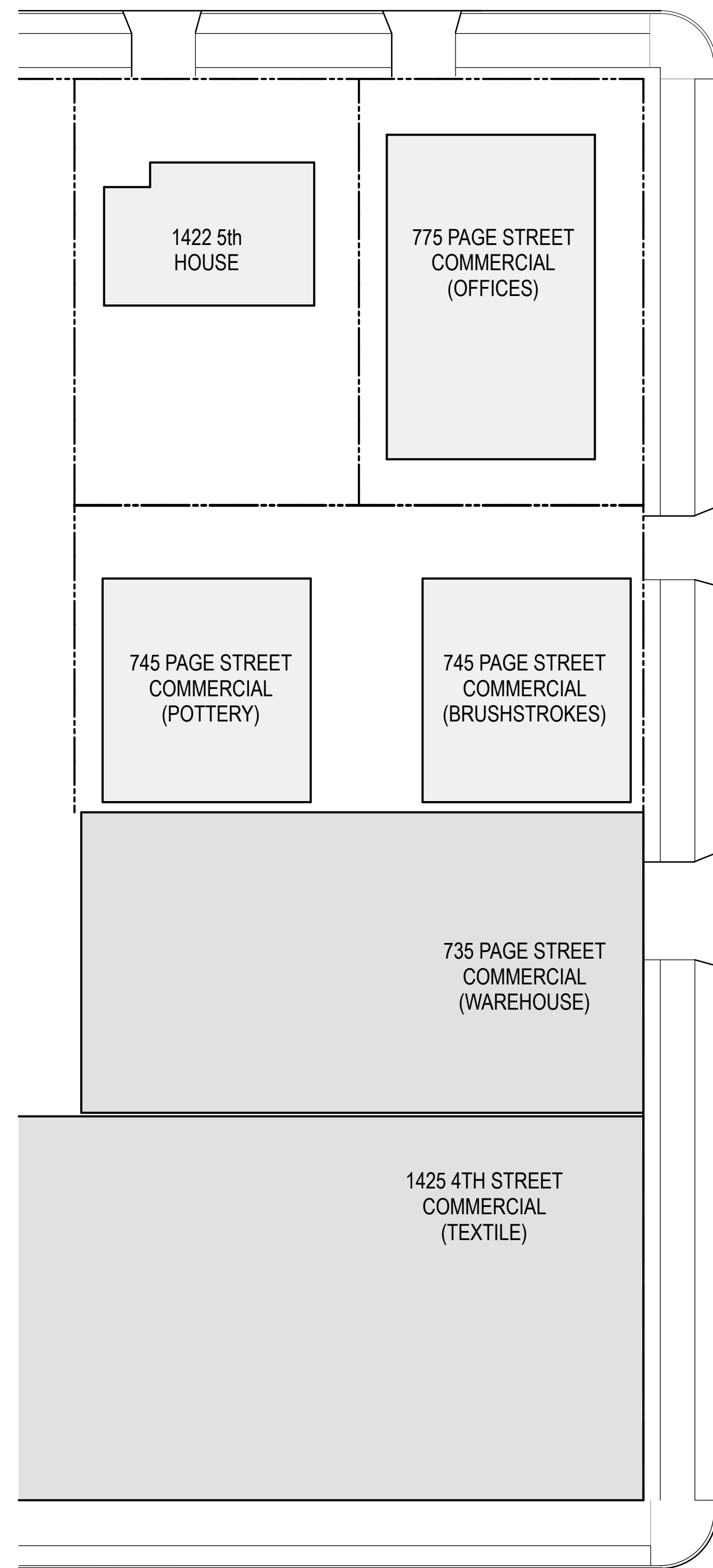
At All Times:

43. Exterior Lighting. All exterior lighting shall be energy efficient where feasible; and shielded and directed downward and away from property lines to prevent excessive glare beyond the subject property.
 44. Rooftop Projections. No additional rooftop or elevator equipment shall be added to exceed the approved maximum roof height without submission of an application for a Use Permit Modification, subject to Board review and approval.
 45. Design Review. Signage and any other exterior modifications, including but not limited to landscaping and lighting, shall be subject to Staff Level Design Review approval.
 46. Drainage Patterns. The applicant shall establish and maintain drainage patterns that do not adversely affect adjacent properties and rights-of-way. Drainage plans shall be submitted for approval of the Building & Safety Division and Public Works Department, if required.
 47. Electrical Meter. Only one electrical meter fixture may be installed per dwelling unit.
-



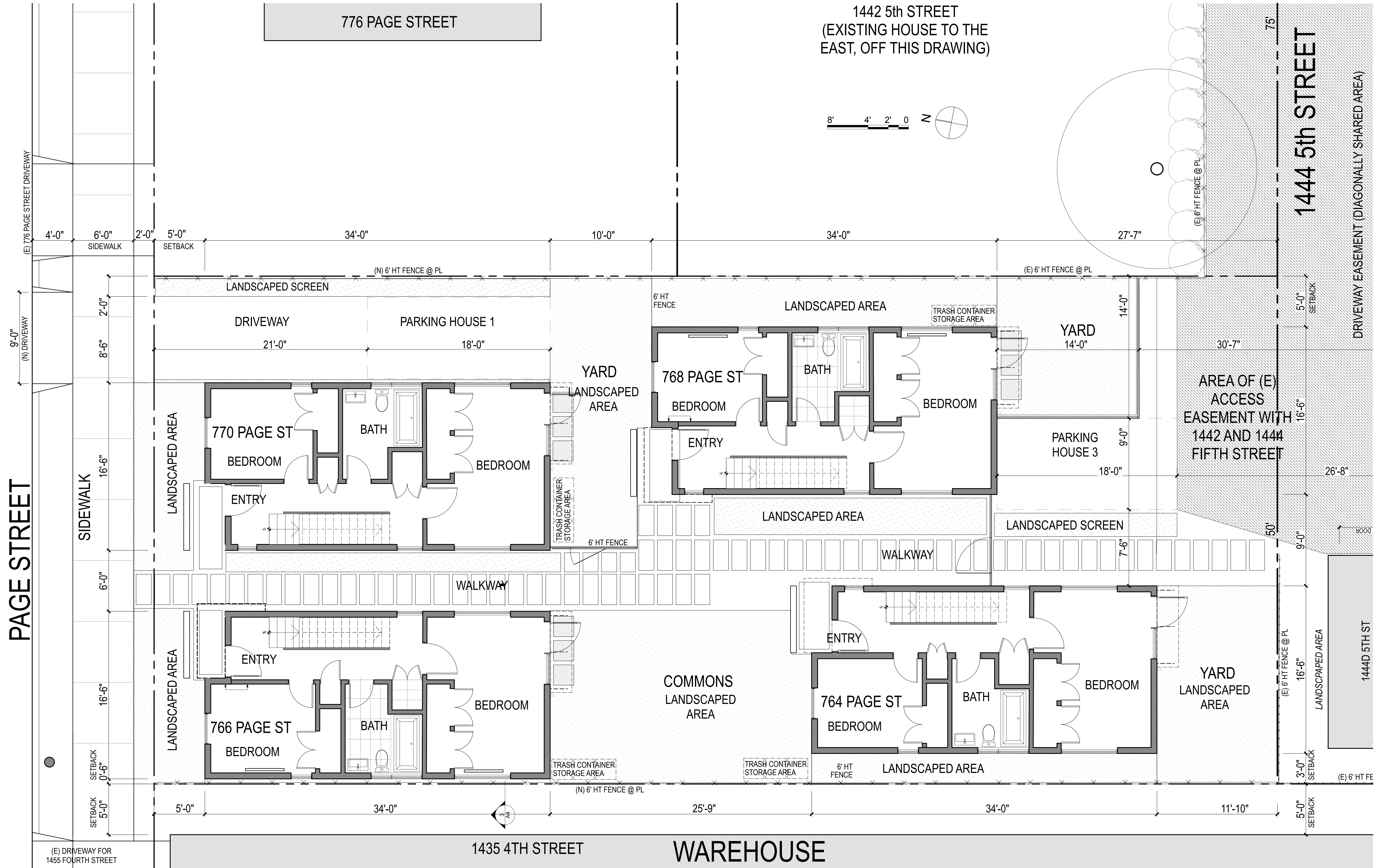
PAGE STREET

FIFTH STREET



VICINITY MAP

770 PAGE STREET USE PERMIT APPLICATION



SITE PLAN WITH 1444 5TH STREET

770 PAGE STREET
USE PERMIT APPLICATION



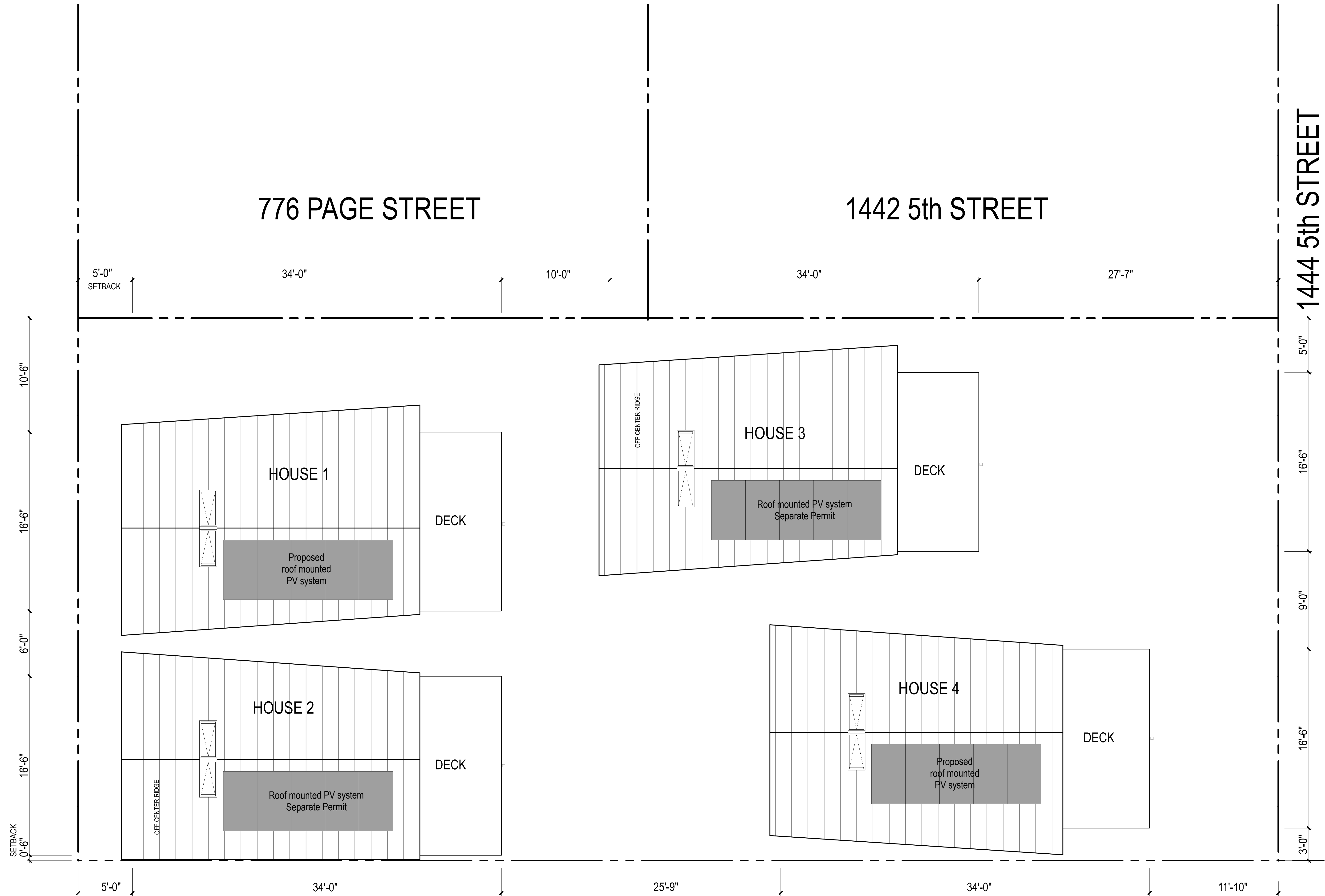
SECOND FLOOR PLAN

770 PAGE STREET
USE PERMIT APPLICATION



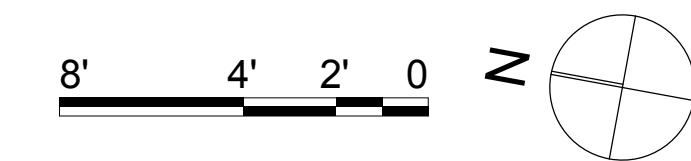
THIRD FLOOR PLAN

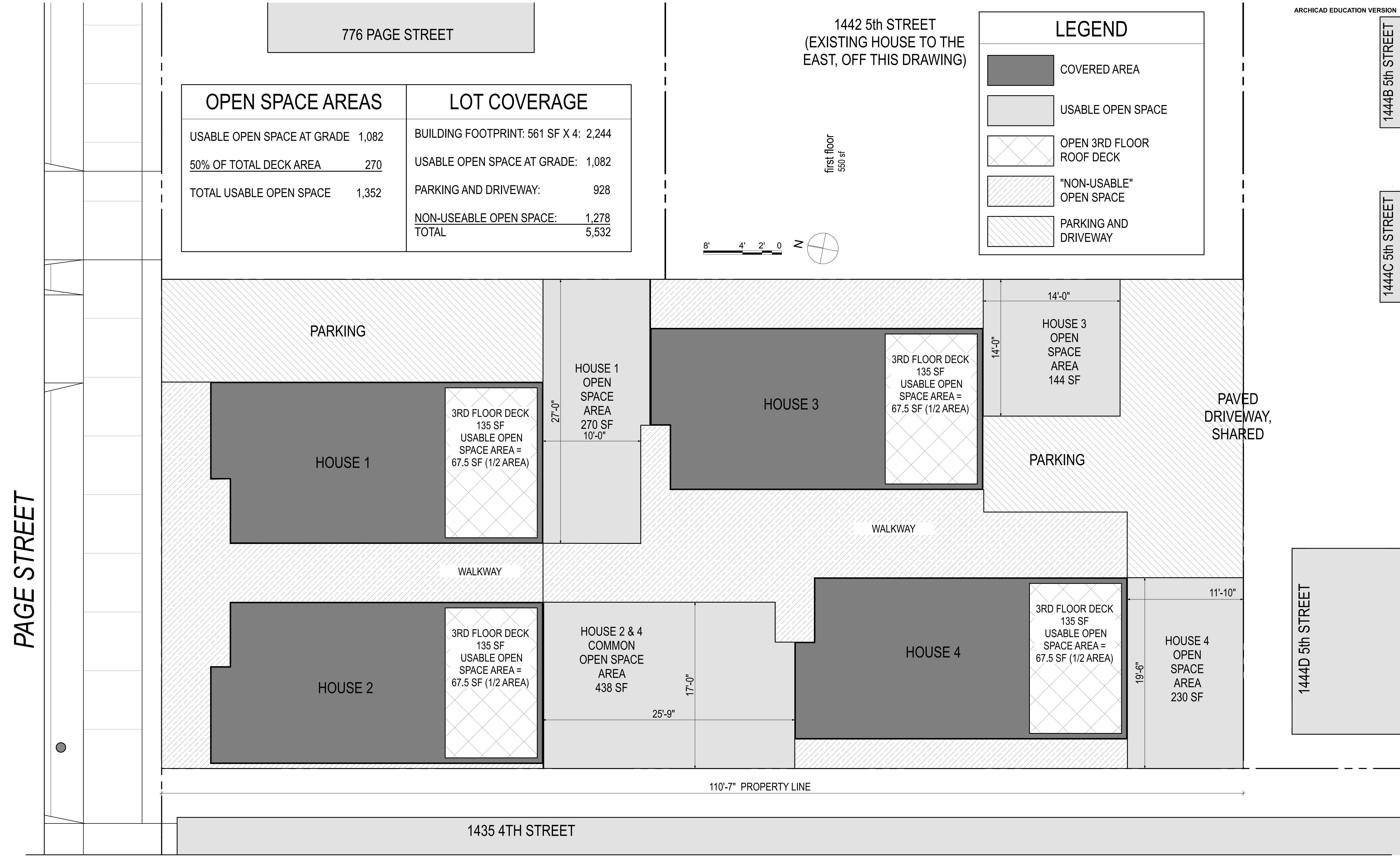
770 PAGE STREET
USE PERMIT APPLICATION



ROOF PLAN

770 PAGE STREET
 USE PERMIT APPLICATION

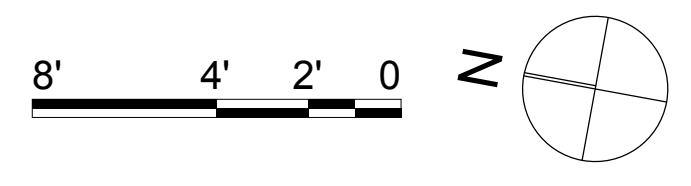




OPEN SPACE AREAS		LOT COVERAGE	
USABLE OPEN SPACE AT GRADE	1,082	BUILDING FOOTPRINT: 561 SF X 4:	2,244
50% OF TOTAL DECK AREA	270	USABLE OPEN SPACE AT GRADE:	1,082
TOTAL USABLE OPEN SPACE	1,352	PARKING AND DRIVEWAY:	928
		NON-USEABLE OPEN SPACE:	1,278
		TOTAL	5,532

LEGEND

- COVERED AREA
- USABLE OPEN SPACE
- OPEN 3RD FLOOR ROOF DECK
- "NON-USABLE" OPEN SPACE
- PARKING AND DRIVEWAY



first floor
550 sf

OPEN SPACE DIAGRAM

770 PAGE STREET
USE PERMIT APPLICATION



WEST ELEVATION - LOT INTERIOR



EAST ELEVATION - LOT INTERIOR

8' 4' 2' 0



1435 4TH STREET
BUILDING

SOUTH ELEVATION LOT INTERIOR



1435 4TH STREET
BUILDING

NORTH ELEVATION PAGE STREET

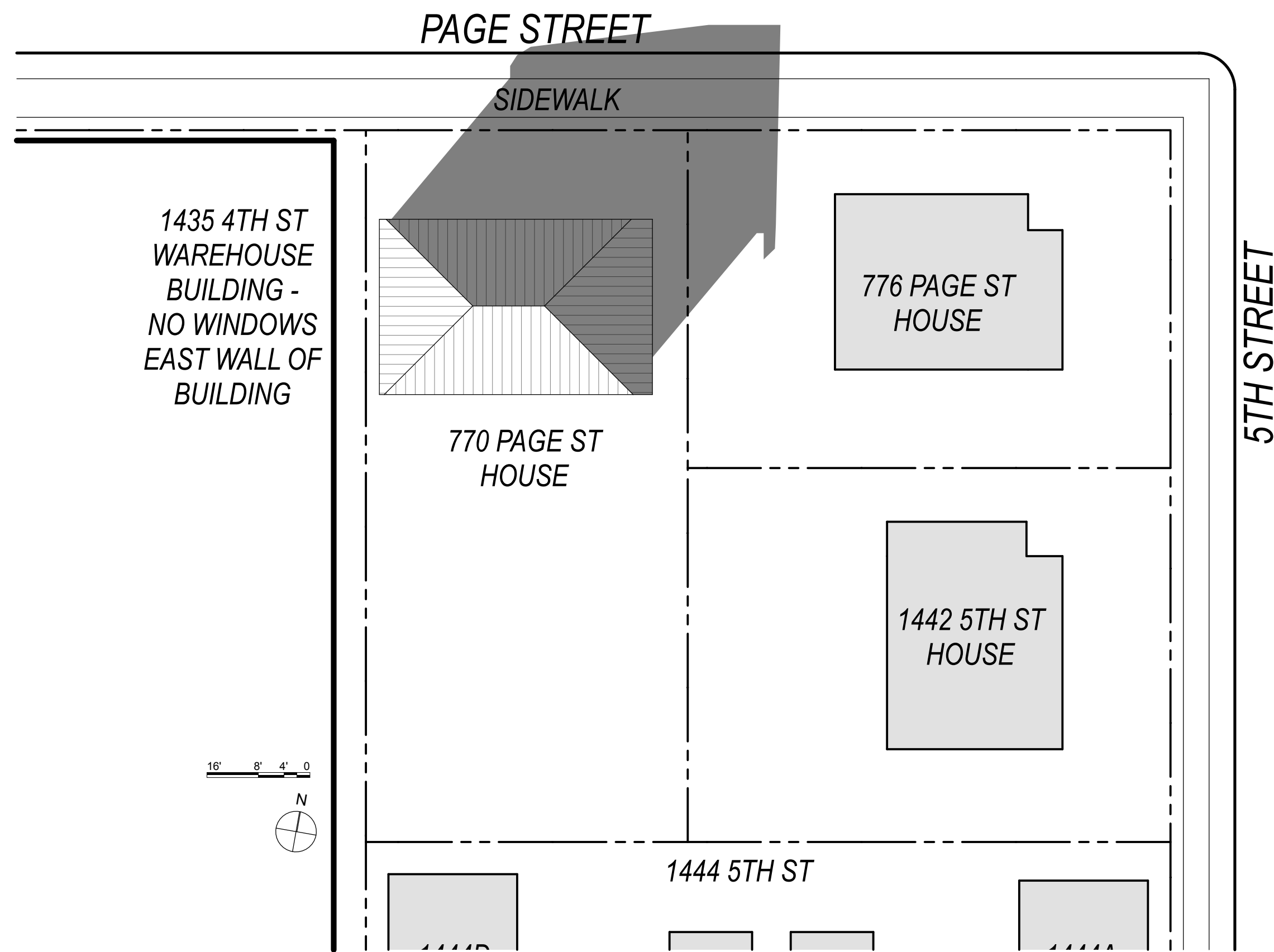
BUILDING ELEVATIONS

770 PAGE STREET
USE PERMIT APPLICATION

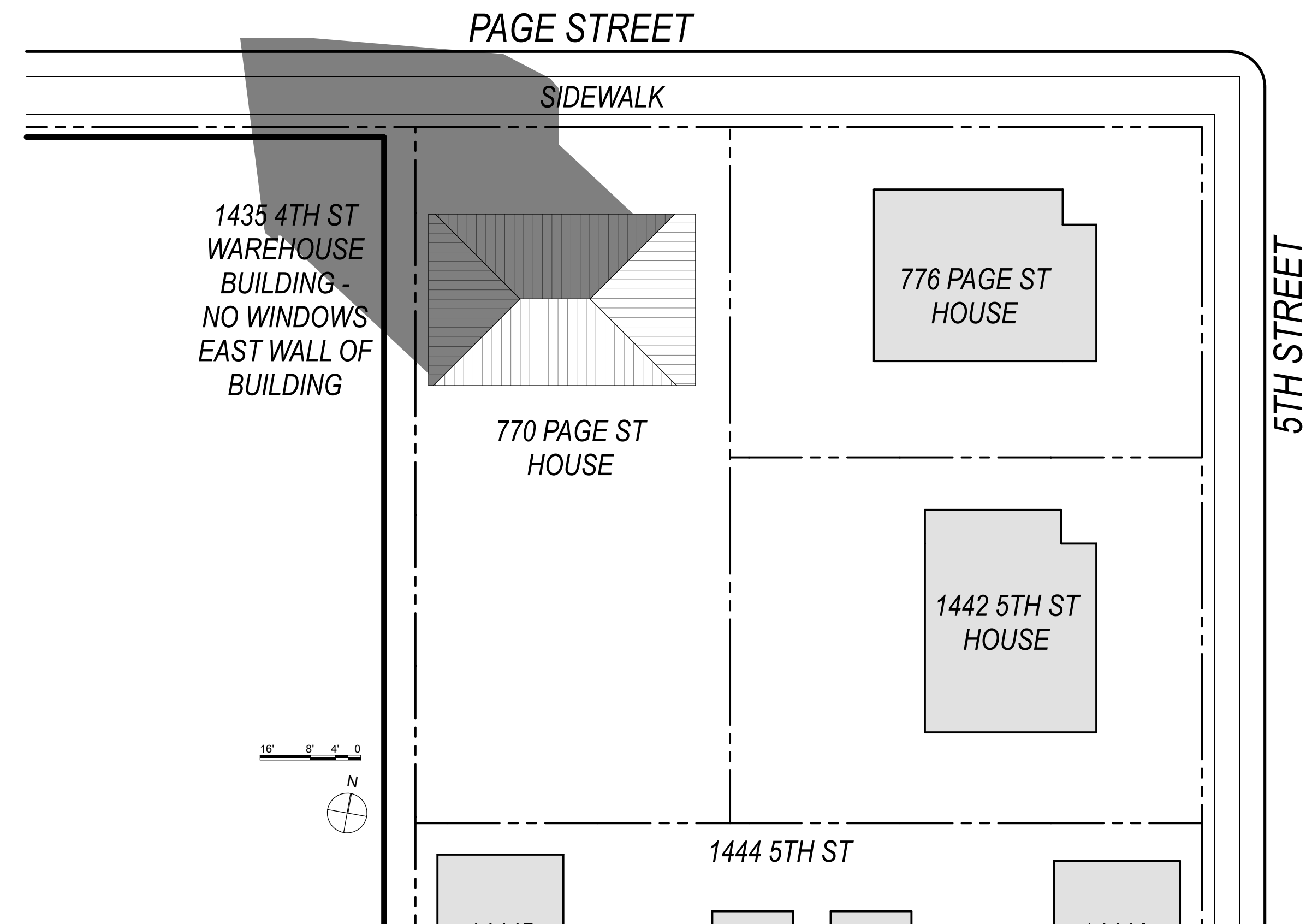


PAGE STREET ELEVATION

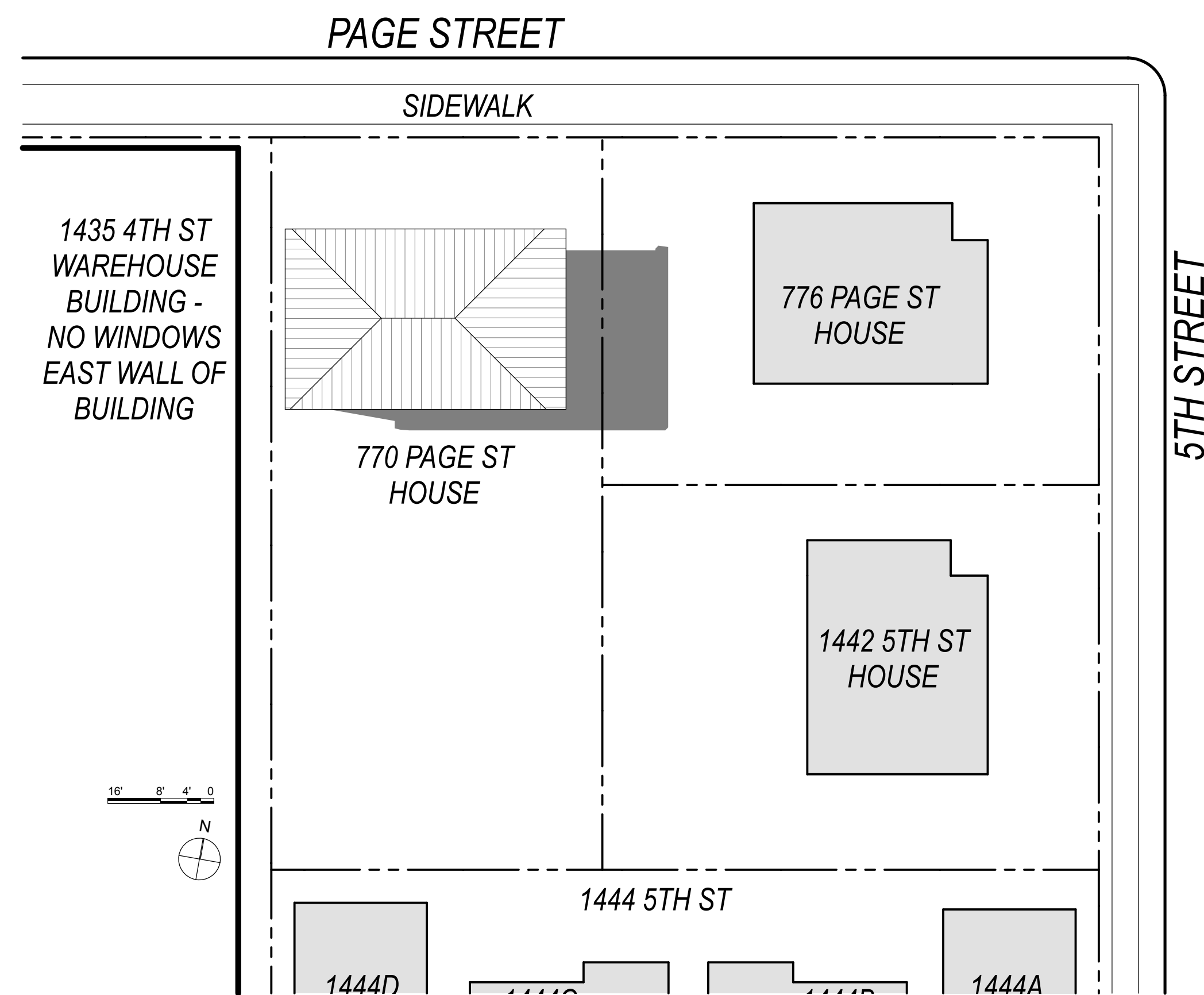
770 PAGE STREET
USE PERMIT APPLICATION



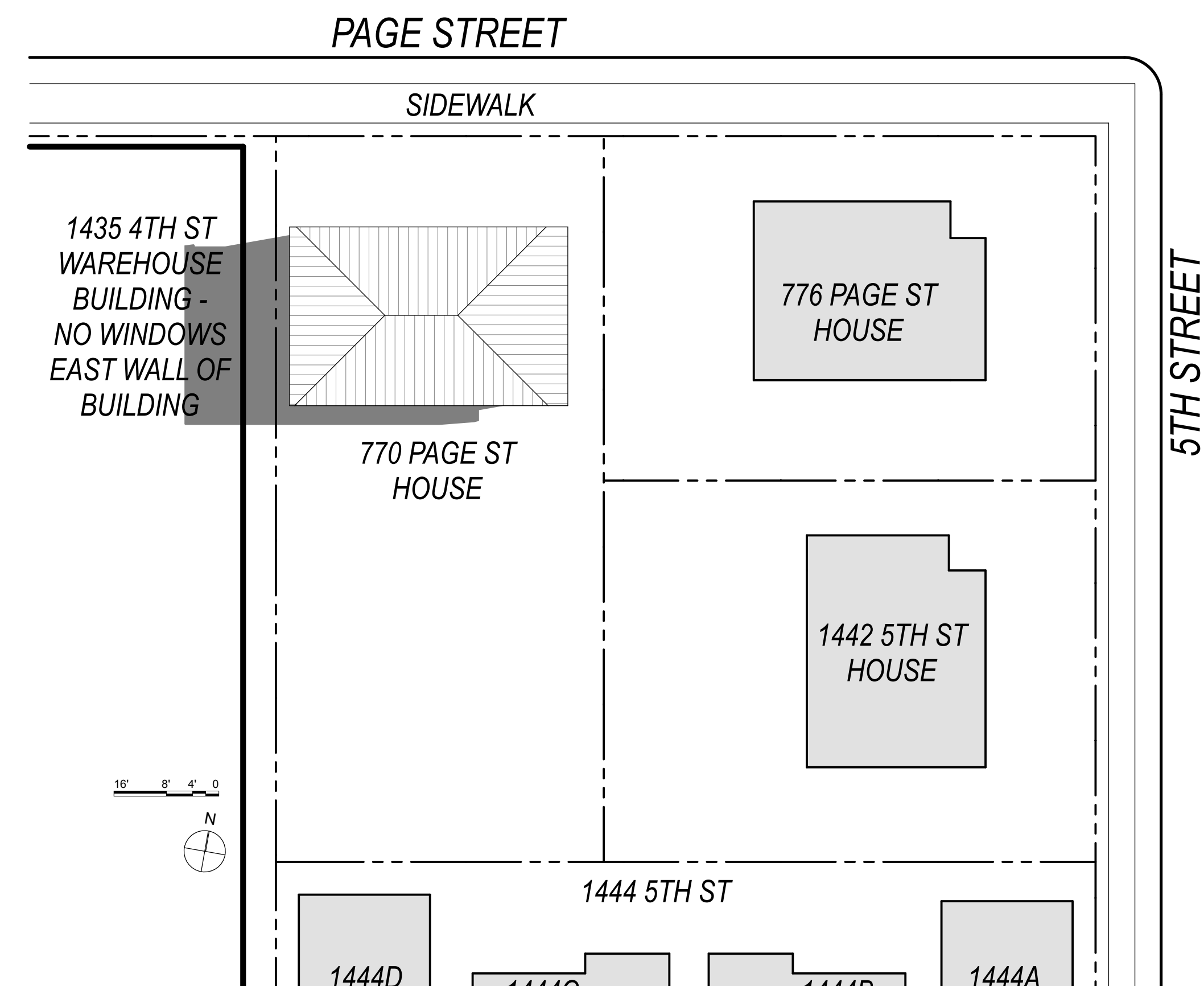
2 EXISTING - DECEMBER 21 - 2 HOURS BEFORE SUNSET
SCALE: 1/16" = 1'-0"



1 EXISTING - DECEMBER 21 - 2 HOURS AFTER SUNRISE
SCALE: 1/16" = 1'-0"



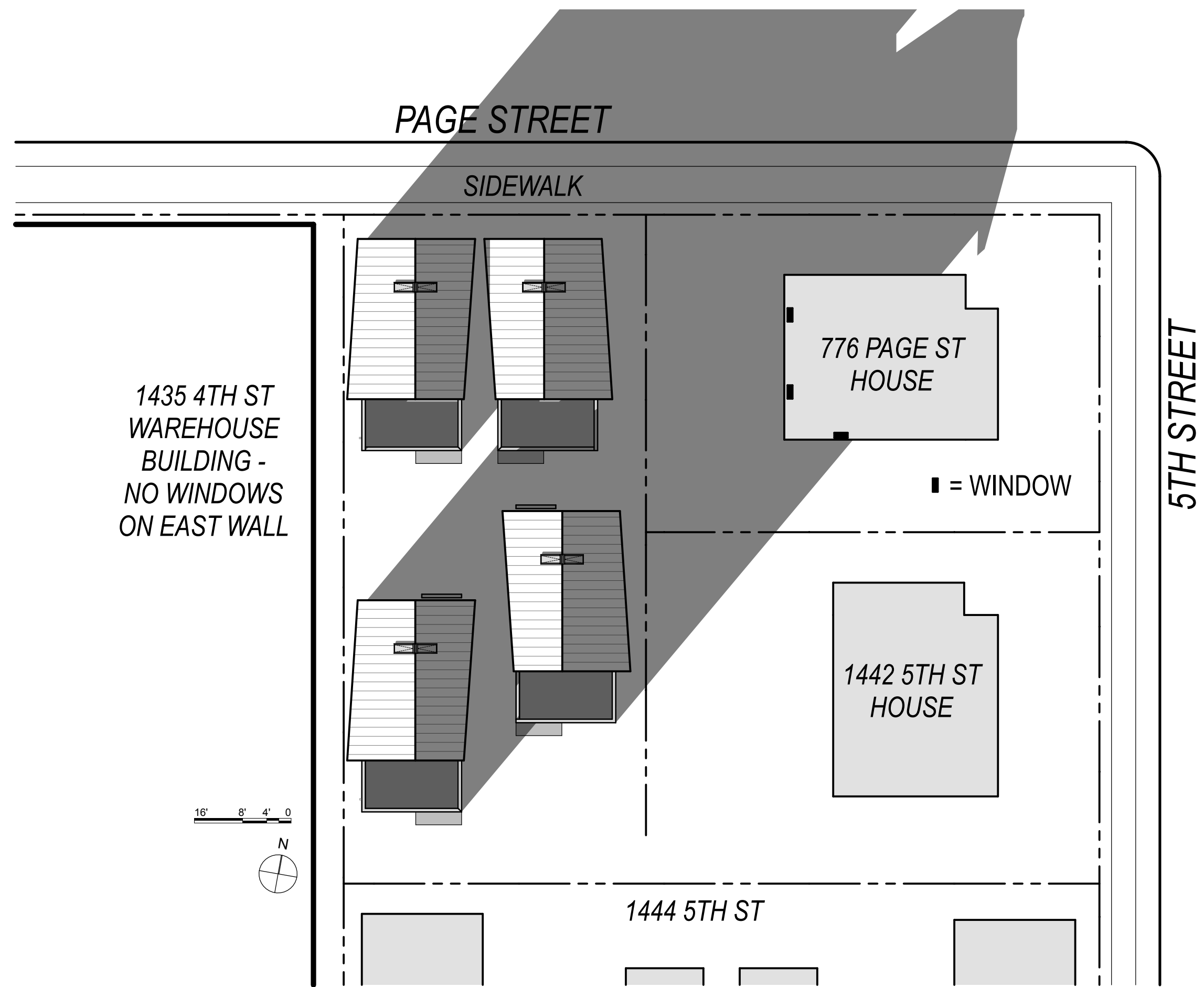
4 EXISTING - JUNE 21 - 2 HOURS BEFORE SUNSET
SCALE: 1/16" = 1'-0"



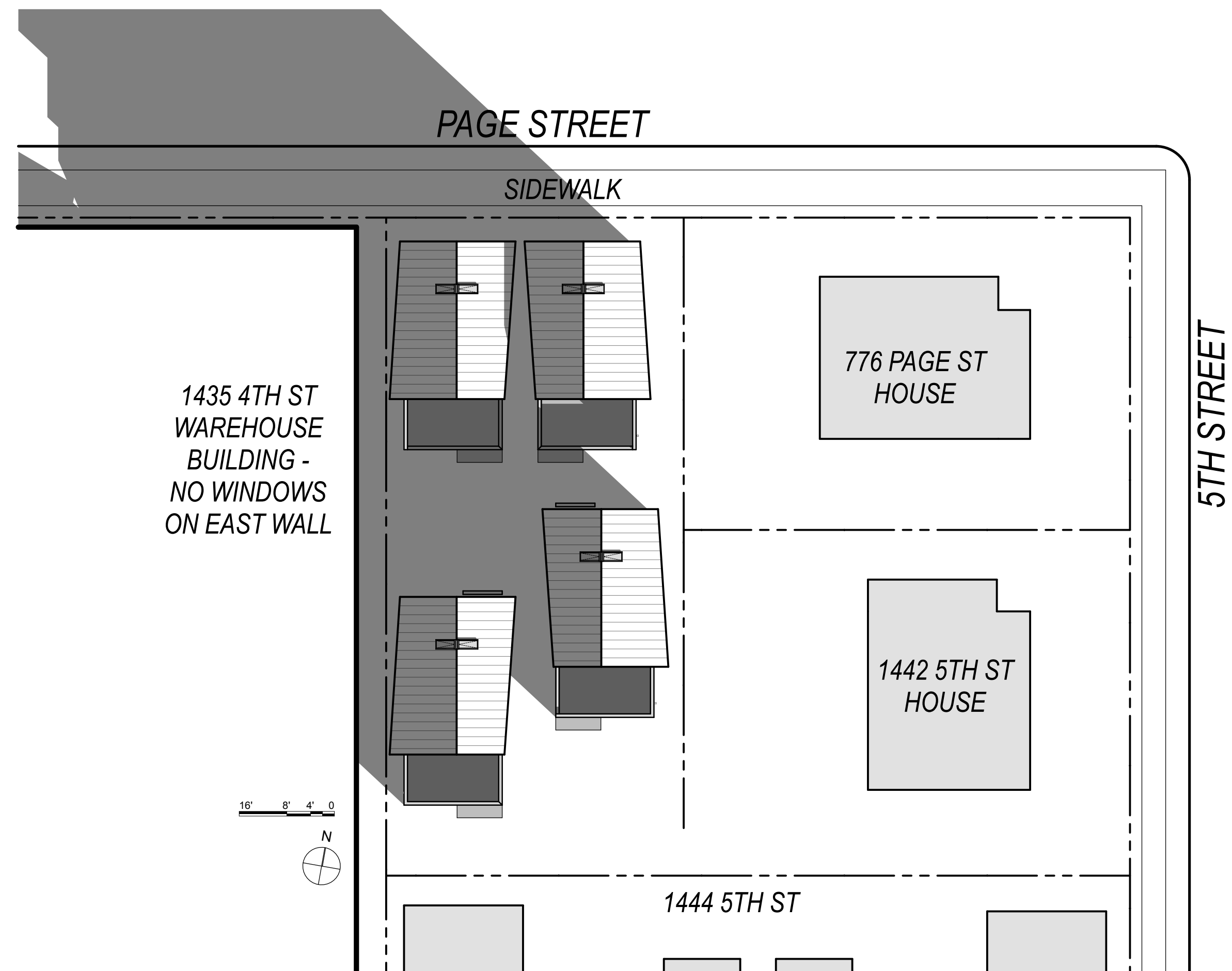
3 EXISTING - JUNE 21 - 2 HOURS AFTER SUNRISE
SCALE: 1/16" = 1'-0"

SHADOW STUDIES - EXISTING

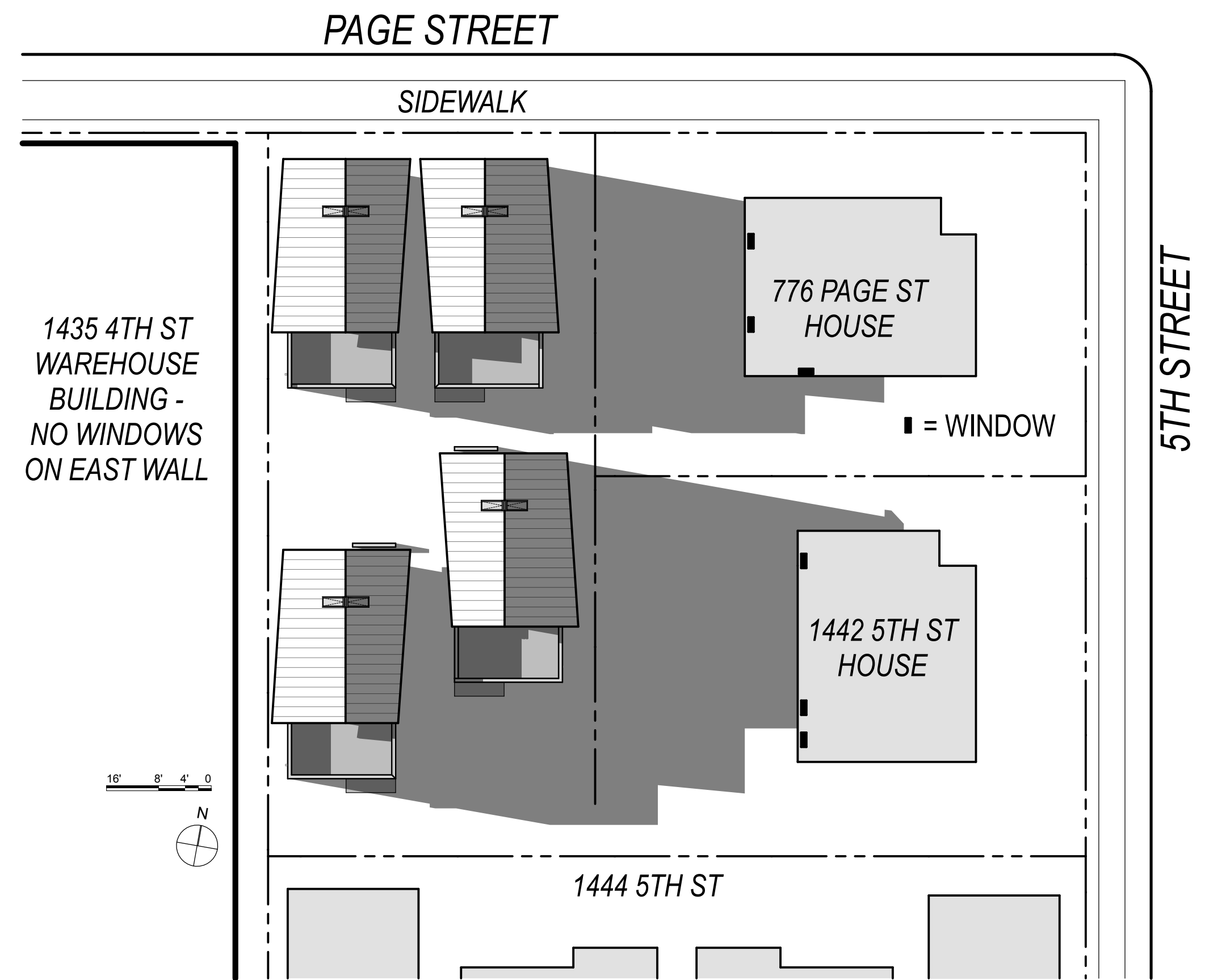
770 PAGE STREET USE PERMIT APPLICATION



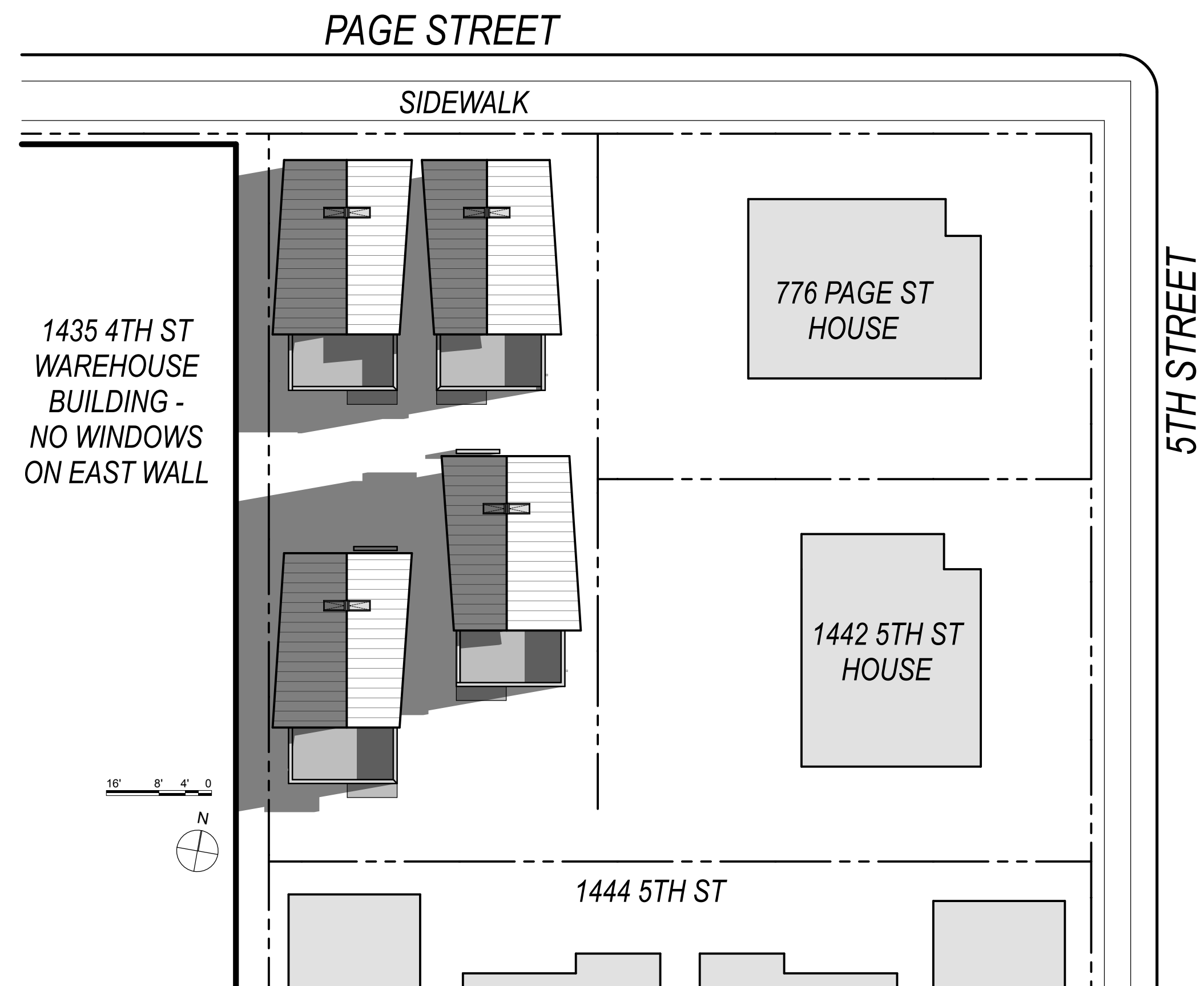
2 PROPOSED - DECEMBER 21 - 2 HOURS BEFORE SUNSET
SCALE: 1/16" = 1'-0"



1 PROPOSED - DECEMBER 21 - 2 HOURS AFTER SUNRISE
SCALE: 1/16" = 1'-0"



4 PROPOSED - JUNE 21 - 2 HOURS BEFORE SUNSET
SCALE: 1/16" = 1'-0"



3 PROPOSED - JUNE 21 - 2 HOURS AFTER SUNRISE
SCALE: 1/16" = 1'-0"

SHADOW STUDIES - PROPOSED

770 PAGE STREET
USE PERMIT APPLICATION



Jessica Taylor
 2001 Addison Street, Suite 300
 Berkeley, CA 94704
 Phone: (510) 900-9502 x 705
 Email: jtaylor@greenfirelaw.com
 www.greenfirelaw.com

June 3, 2021

By USPS

City Clerk Department
 2180 Milvia Street, 1st Floor
 Berkeley, CA 94704

RECEIVED

JUN 07 2021

**CITY OF BERKELEY
 CITY CLERK DEPARTMENT**

RE: 770 Page Street Administrative Use Permit #ZP2020-0051 Appeal

To Whom It May Concern:

Greenfire Law submits this appeal pursuant to Berkeley Municipal Code Section 23B.32.050, on behalf of the Oceanview Neighborhood Council, a group of residents from the West Berkeley neighborhood of Oceanview in Berkeley's Arts District, regarding the May 27, 2021 Zoning Adjustments Board decision to approve the Administrative Use Permit #ZP2020-0051. This letter and the attachments hereto are submitted to appeal the approval of Administrative Use Permit #ZP2020-0051 for the next phase of the Fifth and Page Street residential housing project, which is situated on the real property located at 770 Page Street. The continuation of the common development plan at this location is simply another phase of the same residential housing project that began at the adjacent and contiguous 1444 and 1446 Fifth Street locations. This project represents a multi-unit common development scheme that must comply with the inclusionary housing requirements set forth in Berkeley Municipal Code Sections 23C.12.010, *et seq.* These requirements should be disclosed to the developer immediately, and the developer should be required to either provide inclusionary housing in his project or pay the in-lieu fee as calculated by the formula put forth in Berkeley Municipal Code Section 23C.12.035.

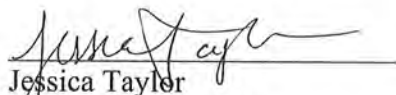
Further, the existing dwelling located at 770 Page Street is currently being rented at a rate significantly below market rate. Practically speaking, the next phase of the Fifth and Page Street residential housing project will eliminate what would otherwise constitute affordable housing available to the people of Berkeley and replace it with housing that lacks any inclusionary units and is not subject to the full in-lieu fee under Berkeley Municipal Code Section 23C.12.035. Preventing the erosion of affordable housing and its replacement with largely unaffordable units fits squarely within the purpose of Berkeley's Inclusionary Housing Requirements. This practical matter further supports our request that the developer in charge of this residential housing project be subject to the full in-lieu fee contemplated by the Berkeley Municipal Code.

Page 2 of 3

Additionally, pursuant to Berkeley Municipal Code Section 23C.08.020, when the Board approves a Use Permit to demolish a building on a property containing two or more dwelling units, the applicant must pay a fee for each unit demolished to mitigate the impact of the loss of affordable housing in the City of Berkeley. Alternatively, the applicant may provide a designated unit in the new project at a below market rate to a qualifying household in perpetuity. The demolition at 770 Page Street may only involve a single dwelling unit, however, it is the first of multiple dwellings that will ultimately be demolished as a part of the Fifth and Page Street residential housing project. The developer's strategy of seeking permits including demolition of only one dwelling at a time does not change the fact that practically, he is demolishing two or more dwellings, and thus has triggered the requirements set forth by Berkeley Municipal Code Section 23C.08.020A. This is yet another iteration of the developer's attempt to evade his responsibilities under the Municipal Code and usurp the financial obligations required to mitigate for a loss of affordable housing. As such, we request that you require the developer to pay either the housing demolition mitigation fee or to provide the requisite below market units in his common development scheme pursuant to Berkeley Municipal Code Section 23C.08.020A.

Attached, you will find documents previously submitted in appeal of the 1444 Fifth Street property along with the pending lawsuit and underlying Settlement Agreement and Resolution related to the development of 1444 Fifth Street, 1446 Fifth Street, 1442 Fifth Street, 770 Page Street, and 776 Page Street. The improper assignment of a \$15,000 Housing Trust Fund contribution for 770 Page Street pursuant to the above-mentioned Settlement Agreement and Resolution and as stated in item #42 in the City's Findings & Conditions is expressly at issue in the attached lawsuit and serves as an improper deviation from the in-lieu fee calculation under the Berkeley Municipal Code. Each of these documents and the arguments contained therein apply to the 770 Page Street project and make clear that this residential housing project is part of a common development scheme subject to inclusionary housing requirements. We request that you consider all of this information in your evaluation approval of Administrative Use Permit #ZP2020-0051 for 770 Page Street and direct the developer to either provide for inclusionary housing or remit the payment of a full in-lieu fee and housing demolition mitigation fee pursuant to Berkeley Municipal Code Sections 23C.12.010, *et seq.* and 23.08.020A, respectively.

Sincerely,



Jessica Taylor
Greenfire Law, P.C.

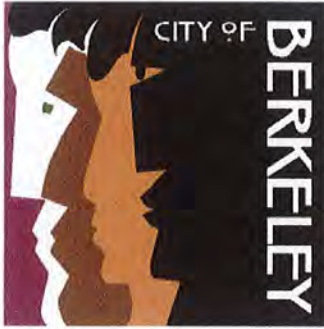
Attorney for Oceanview Neighborhood Council

Enclosures:

2019-04-26 ONC on Inclusionary Housing;
2019-04-29 Strauss Decl. ISO 1444 Appeal, Combined;
2019-04-29 Supp Memo ISO 1444 Appeal;
2019-04-29 Traynor Decl. ISO 1444 Appeal;

Page 3 of 3

2019-04-29 Younger Decl. ISO 1444 Appeal;
2021-09-11 Petition and Complaint, Taxpayer Waste
Appeal Fee



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

DATE OF BOARD DECISION: May 27, 2021

DATE NOTICE MAILED: June 1, 2021

APPEAL PERIOD EXPIRATION: June 15, 2021

EFFECTIVE DATE OF PERMIT (Barring Appeal or Certification)¹: June 16, 2021

770 Page Street

Use Permit #ZP2020-0051 to demolish an existing single-family dwelling unit and construct four detached, three-story approximately 1,500-square-foot dwelling units on a 5,532-square-foot lot.

The Zoning Adjustments Board of the City of Berkeley, **APPROVED** the following permits:

- Use Permit, under BMC 23C.08.010 to demolish of a dwelling unit
- Administrative Use Permit, under BMC Section 23E.84.030, to construct four new dwelling units

ZONING: MU-R – Mixed Use Residential District

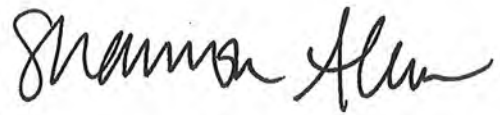
APPLICANT/OWNER: Matthew Wadlund, 770 Page Street, LLC, 805 Jones Street, Berkeley CA 94710

ENVIRONMENTAL REVIEW STATUS: Categorically exempt pursuant to Sections 15301, 15303, and 15332 of the CEQA Guidelines (“Existing Facilities,” “New Construction or Conversion of Small Structures,” and “In-Fill Development”).

FINDINGS, CONDITIONS AND APPROVED PLANS ARE ATTACHED TO THIS NOTICE

¹ Pursuant to BMC Section 23B.32.090, the City Council may certify any ZAB decision for review during the 14-day appeal period after the notice of the ZAB’s decision is issued. Certification has the same effect as an appeal. However, BMC Section 1.04.070 suspends or “tolls” the Council’s deadline to certify when the Council is on recess. Thus, in cases where the 14-day appeal period is scheduled to *end* during a Council recess, the certification deadline is extended past the end of the recess for the remainder of the appeal period. In cases where the appeal period *begins* during a Council recess, the certification deadline is extended until 14 days after the first Council meeting after the recess. *Extension of the certification deadline has no effect on the appeal deadline.*

	Yes	No	Abstain	Absent
DUFFY	X			
KAHN				X
KIM	X			
O'KEEFE	X			
OLSON	X			
SANDERSON	X			
THOMPSON	X			
GAFFNEY	X			
TREGUB	X			
BOARD VOTE:	8	0	0	1



ATTEST:
 Shannon Allen, Zoning Adjustments Board
 Secretary

PUBLICATION OF NOTICE:

Pursuant to BMC Section 23B.32.050, this notice shall be mailed to the applicant at the mailing address stated in the application and to any person who requests such notification by filing a written request with the Zoning Officer on or before the date of the Board action. This notice shall also be filed with the City Clerk. In addition, the notice shall be forwarded to the Zoning Adjustments Board and to the Main Library. The notice shall also be posted at a bulletin board at the Zoning Counter. The City Clerk shall make the notice available to interested members of the Council and the public.

FURTHER INFORMATION:

Questions about the project should be directed to the project planner, Leslie Mendez, at (510) 981-7426 or lmendez@cityofberkeley.info. All project application materials, including full-size plans, may be viewed online at <https://aca.cityofberkeley.info/Community/> or in the Permit Service Center at the Zoning Counter at 1947 Center Street, Third Floor, during normal office hours.

TO APPEAL THIS DECISION (see Section 23B.32.050 of the Berkeley Municipal Code):

Please note that the new method for appeal submittals described below have been put in place to comply with the requirements of the Shelter In Place Order and shall be effective for the duration of Shelter In Place requirements.

Mail your complete appeal to the City Clerk Department, 2180 Milvia Street, Berkeley, CA 94704 with payment of fees by check or money order included. Appeals submitted by mail must be postmarked on or before the deadline date for filing the appeal.

- A. The fee for persons other than the applicant is \$500. This fee may be reduced to \$100 if the appeal is signed by persons who lease or own at least 50 percent of the parcels or dwelling units within 300 feet of the project site, or at least 25 such persons (not including dependent children), whichever is less.
- B. The fee for all appeals by Applicants is \$2,500.

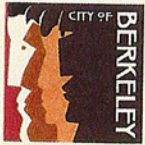
If no appeal is received, the permit will be issued on the first business day following expiration of the appeal period, and the project may proceed at that time.

NOTICE CONCERNING YOUR LEGAL RIGHTS:

If you object to this decision, the following requirements and restrictions apply:

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

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



Planning and Development Department
Land Use Planning Division
1947 Center Street, 2nd Floor
Berkeley, CA 94704

Post and Mail Date:
June 3, 2021

neopost[®]
06/03/2021

FIRST-CLASS MAIL

US POSTAGE

\$000.51⁰



ZIP 94704
041M12250756

NOTICE OF RECEIVE APPLICATION

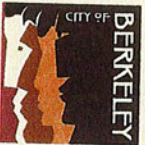
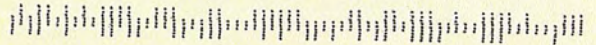
UP #ZP2021-0083 – SUBMITTED on May 25, 2021
1442 Fifth Street
Demolition of an existing single-family dwelling and construction of three new, detached single-family dwellings

Contact information: (see reverse)

All application materials may be viewed online:
www.cityofberkeley.info/zoningapplications, or at
<https://berkeley.buildingeye.com>

Occupant(s)
1416 FIFTH ST
BERKELEY CA 94710

94710\$1324 0023



Planning and Development Department
Land Use Planning Division
1947 Center Street, 2nd Floor
Berkeley, CA 94704

Post and Mail Date:
June 3, 2021

neopost[®]
06/03/2021

FIRST-CLASS MAIL

US POSTAGE

\$000.51⁰



ZIP 94704
041M12250756

NOTICE OF RECEIVE APPLICATION

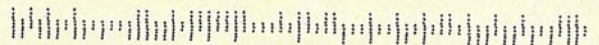
UP #ZP2021-0084 – SUBMITTED on May 25, 2021
776 Page Street
Demolition of an existing single-family dwelling and construction of three new, detached single-family dwellings

Contact information: (see reverse)

All application materials may be viewed online:
www.cityofberkeley.info/zoningapplications, or at
<https://berkeley.buildingeye.com>

Occupant(s)
1416 FIFTH ST
BERKELEY CA 94710

94710\$1324 0023





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April 26, 2019

By Personal Delivery and Electronic Mail

To: Members of the Berkeley City Council
City Clerk
2180 Milvia Street
Berkeley, CA 94704
clerk@cityofberkeley.info

From: Greenfire Law, PC, on behalf of Oceanview Neighborhood Council

Subject: Protecting Berkeley's Affordable Housing Trust Fund

Honorable Members of the Berkeley City Council:

These comments are submitted on behalf of the Oceanview Neighborhood Council (ONC). ONC is comprised of residents of the West Berkeley neighborhood of Oceanview in Berkeley's Arts District, many of whom are artists of modest to moderate means.¹ ONC members have an interest in stemming the erosion of affordability in Berkeley for artists and other current and future residents of similar means, particularly in their neighborhood Arts District neighborhood.

Berkeley taxpayers, including members of ONC, are paying to fund low to middle income housing development.² Yet, ONC's research indicates that hundreds of thousands, if not

¹ First established in 2004, and updated in 2017, the City Arts and Culture Plan reiterates the City's policy goal to increase affordable housing for artists and incentivize development of affordable housing for artists. (City of Berkeley Arts and Culture Plan Update, 2017-2027, Goal 1, available at [https://www.cityofberkeley.info/uploadedFiles/City_Manager/Level_3_-_Civic_Arts/Art%20and%20Cultural%20Plan%202004-09-18%20Draft%20\(2\).pdf](https://www.cityofberkeley.info/uploadedFiles/City_Manager/Level_3_-_Civic_Arts/Art%20and%20Cultural%20Plan%202004-09-18%20Draft%20(2).pdf).) According to the West Berkeley Arts Field Survey, commissioned by the Berkeley Civic Arts Commission in 2008, 827 artists live or work in West Berkeley.

² In 2018, Berkeley voters overwhelmingly approved Measure O, authorizing the City to issue up to \$135 million in bonds to "acquire and improve affordable housing" for "low-, very low-, low-, median-, and



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millions, of dollars and/or inclusionary housing development have been forfeited since the 1986 adoption of the Inclusionary Housing Ordinance because Berkeley has failed to collect fees developers are required to pay or require the inclusion of affordable housing in ownership projects. Therefore, ONC supports the Planning Commission's recommended language to provide more specific direction to City staff to ensure that the intention of the original policy defining the scope of the projects triggering application of the Inclusionary Housing Ordinance, is realized.

The Planning Commission's proposed amendments do not close a loophole or change the existing law. What they do is expressly state what information staff must be provided by applicants and consider in determining whether a proposed project triggers the Inclusionary Housing Ordinance. Berkeley planning staff have repeatedly said that they defer to applicants' definitions of "project." This is problematic because applicants have multiple incentives to downplay the scope of their project—including avoiding paying into the Housing Trust Fund what could instead be retained as profit. Taking developer representations at face value results depleted City resources (where a developer would have opted for payment of the fee), decreased stock of affordable housing in the City (where a developer would have opted to include affordable housing in the project), and increased risk to the City of legal challenge. The Planning Commission-recommended language rectifies this situation by ensuring that staff have the direction and information needed to implement the Inclusionary Housing Ordinance.

ONC provides a number of attachments pertinent to the consideration of the amendments:

1. **ATTACHMENT A:** FAQ Sheet which addresses a number of alleged practical and legal issues with the proposed language have been floated in recent days by a particular developer who has so far circumvented the Inclusionary Housing Ordinance.
2. **ATTACHMENT B:** Examples of recent evasion of the Inclusionary Housing Ordinance.
3. **ATTACHMENT C:** Quick Language Reference.

Sincerely,



Rachel S. Doughty
Greenfire Law, PC
Attorney for Oceanview Neighborhood Council

cc: apearson@cityofberkeley.info

middle-income individuals and working families, including teachers, seniors, veterans, the homeless, students, people with disabilities, and other vulnerable populations.”

Attachment A

FAQ Sheet

Q. What is the history of the Inclusionary Housing Ordinance?

The **Inclusionary Housing Ordinance** was enacted on July 15, 1986 (Ord. No. 5748) and, despite undergoing stylistic and formatting changes when the Zoning Code was re-organized in 1999 (Ord. No. 6478), the provision that is now 23C.12.022 is substantively unchanged since 1986. The objectives of the original Ordinance are furthered by the current proposal.

The initial draft of the ordinance proposed by a subcommittee of the Planning Commission in 1986 only applied to properties on which four or more residential units had been constructed. However, the Planning Commission advised the City Council that the ordinance should apply to lots on which it is feasible to build 5 or more residential units, to “close possible loopholes of building less units or building units incrementally as a means to avoid the requirements of the ordinance.” (Planning Commission Report, *Adoption of Inclusionary Zoning Ordinance* p.4, § IV(A) (June 10, 1986)). The City Council accepted the change suggested by the Planning Commission as what is now 23C.12.020(A)(3).

Among the formal findings of the original Ordinance are that “continued new development which does not include lower cost housing will serve to further aggravate the current housing shortage by reducing the supply of land” and the desirability of “encouragement of usage of density bonus”, which would occur if projects include affordable units. (Ord. No. 5748, § 15.B)

In 1999, the City Council incorporated “Inclusionary Housing Requirements” into the Zoning Ordinance, to “promote achievement of the City Housing Element goals for developing affordable housing for Households with incomes below the median . . . by requiring the inclusion of affordable Dwelling Units in specified proposed developments, hereinafter referred to as *projects*.”³

Q. What currently triggers application of the Inclusionary Housing Ordinance?

The Inclusionary Housing Requirements apply to Dwelling Units that are constructed for sale, rather than rental by the developer, in the following project categories:

1. Residential housing projects for the construction of five or more Dwelling Units;
2. Residential housing projects for the construction of one to four new Dwelling Units, when such Units are added to an existing one to four-unit property, which has been developed after August 14, 1986, and the resulting number of units totals five or

³ BMC, § 23C.12.010 (emphasis added.)

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more. All Units in such a property are subject to the requirements of this chapter;

3. Residential housing projects proposed on lots whose size and zoning designation is such to allow construction of five or more Dwelling Units.⁴

A Dwelling Unit is “a building or portion of a building designed for, or occupied exclusively by, persons living as one (1) household.”⁵ In a Mixed Use- Residential Zone—like West Berkeley—there “shall be no more than one Dwelling Unit or one live/work space per each 1,250 feet of lot area; provided, however, there may be one additional unit for any remaining lot area which may be less than 1,250 square feet but greater than 750 square feet.”⁶ Accordingly, if a West Berkeley lot consists of more than 5,750 square feet, it can accommodate five Dwelling Units, rendering the development subject to Inclusionary Housing Requirements.

Q. Does the revised language substantively change the trigger for application of the Inclusionary Housing Requirement?

No. The obligation to include units or pay into the Housing Trust Fund is still triggered by any of the same three conditions: (1) project of five or more units, (2) project commenced after 1986 on property to which additional units are added for a total of five or more units, and (3) project, regardless of number of units, on lots zoned to allow for construction of five or more units.

Q. What is the obligation of a developer whose project triggers the Inclusionary Housing Requirements?

Developers of residential projects subject to Inclusionary Housing Requirements must either:

(1) sell 20 percent of the total number of Dwelling Units to the City or to Low, Lower or Very Low-Income Households or set aside such units as affordable housing available for rent at below-market rates,⁷ or

(2) pay a fee into the City’s Housing Trust Fund in-lieu of providing such units.⁸

This Inclusionary “in-lieu” fee is calculated after the units are sold using the actual sales price, or the appraised price if it appears that the sale price is below market.⁹ The amount owed is

⁴ BMC, § 23C.12.020, subd. (A)(3).

⁵ BMC, § 23F.04.010.

⁶ BMC, § 23E.84.070, subd. (B).

⁷ BMC, § 23C.12.040, subd. (A).

⁸ BMC, §§ 23C.12.030; 23C.12.035.

⁹BMC at § 23C.12.035.

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calculated by a formula found in BMC, section 23C.12.035, subd. (C)(1). Payment is due “no later than the closing date of the sale of a unit as a condition of said closing.”¹⁰

Q. Under current law, can a developer avoid triggering the Inclusionary Housing Ordinance by reducing its lot below the trigger size through a lot line adjustment?

No. Under the Zoning Ordinance, “No lot shall hereafter be subdivided or reduced in size, nor shall any lot line be adjusted or redrawn, so that any resultant lot conflicts with the provisions of this Ordinance.”¹¹ The “Ordinance” refers to the Zoning Ordinance of the City of Berkeley, which includes the Ordinance, reflected in Sub-Titles 23A through 23F, Appendices A and B, and the “Official Zoning Map,” reflected in Plates 1-9.¹² As discussed above, the Zoning Ordinance expressly denotes promotion of affordable housing as one of its goals.¹³ Municipalities may review individual applications for LLAs to prevent “gamesmanship.”¹⁴

Further, if the adjacent lot is part of the same project and that project includes construction of five or more Dwelling Units, the lot line adjustment will not accomplish the goal of evading the Inclusionary Housing Ordinance’s obligations. Nothing requires that the five Dwelling Units be on the same lot. If it did, the lot size and project size triggers for the Inclusionary Housing Ordinance would be redundant.¹⁵

Q. Is the Inclusionary Housing Ordinance’s Consideration of Ownership of Lots Illegal?

No. The staff report alludes to comments made by a developer’s expediter at the Planning Commission hearing that “proposed amendments treat certain property owners differently than the vast majority of other property owners in the City, potentially limiting their property rights in ways that could create a legal risk for the City.” There is no such risk under the existing or proposed language because there is no such principle in California law, and in fact, California law regularly takes into consideration the ownership patter of nearby lots.¹⁶

¹⁰ Id. at E.

¹¹ BMC, § 23A.12.020, subd. (A).

¹² BMC, § 23A.04.020, subd. (A).

¹³ Id. at (I) and (J).

¹⁴ *Sierra Club v. Napa Cnty. Bd. of Supervisors* (2012) 205 Cal.App.4th 162, 168.

¹⁵ Laws are interpreted to avoid surplusage where at all possible. (Code Civ. Proc., § 1858.)

¹⁶ See *Bright v. Cnty. Bd. of Supervisors* (1977) 66 Cal.App.3d 191, 195-96 (applying Subdivision Map Act to developer of two adjacent parcels where development of either alone would not trigger application of the Act). See also *Pratt v. Adams* (1964) 229 Cal.App. 2d 602 (Court declined to assist landowners in circumventing subdivision law where a group of individuals conspired to separately subdivide multiple lots in order to stay under the Subdivision Map Act’s threshold. This case showcases both the City’s existing authority to address specific instances of subterfuge and to anticipate and proactively prevent such schemes); *Blackmore v. Powell* (2007) 150 Cal.App.4th 1593, 1605 (“courts must be vigilant regarding schemes designed to avoid the regulatory controls”)

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Additionally, as discussed above, the existing language already requires consideration of the entire project regardless of lot line.

Q. Does the proposed language cause the Inclusionary Housing Ordinance to violate the Housing Accountability Act?

No. A primary purpose of the Housing Accountability Act is to “enhance the approval and supply of housing affordable to Californians of all income levels” by limiting municipalities’ authority to deny proposed housing projects. Gov. Code, sec. 65589.5(a)(2)(B). The Act specifically permits a City to obligate a project “to comply with objective, quantifiable, written development standards, conditions, and policies appropriate to, and consistent with, meeting the jurisdiction’s share of the regional housing need pursuant to” its Housing Element. Gov. Code sec. 65589.5(f)(1). The Inclusionary Housing Ordinance (BMC Chap. 23C.12) is precisely such an objective, written standard.

The findings supporting the original Inclusionary Housing Ordinance, which are still applicable, specifically state that it is intended “to make available an adequate supply of housing for persons of all economic segments of the community” “as mandated by the Housing Element of the Master Plan”. Ord. 5748-N.S., sec. 15B.1(g) (July 15, 1986).

The 1999 amendments to the Ordinance reconfirmed that the “purpose of this chapter is to promote achievement of the City Housing Element goals for developing affordable housing for Households with incomes below the median”. BMC, sec. 23C.12.010. The proposed clarification, and the application of the current Ordinance, do not violate the Housing Accountability Act.

Q. Has the Inclusionary Housing Ordinance halted construction of ownership projects in Berkeley?

No. At several public hearings, it has been stated that only one condominium project has been built in Berkeley in recent years. This is simply not true. A quick and by no means comprehensive search of the Multiple Listing Service identified the following:

Condominiums Completed in Berkeley 2007-2018					
Address	Year Built	Dwelling Units	Lot Size	Affordable Units	In-Lieu Fees
2102-2018 6 th St	2007	4	4,760	Undetermined	
2012-2018 6 th St	2007	4	8,900		
1414-1418 Harmon	2007	7	11,200		
1406 San Pablo	2007	8	9,030		
2628 Telegraph	2007	15	6,910		
1912 7 th St	2008	7	10,000		
1532 MLK	2008	3	5,400		
2543 MLK	2008	12	9,000		
1912-1916 7 th St	2008	7	10,000		
1352-1354 Neilson	2009	3	7,500		

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1520-1522 Fairview	2010	4	6,750		
2831-2843 7 th St	2010	4	9,450		
2813 MLK	2011	3	5,350		
1419 Ashby	2012	4	5,618		
1629.5 Harmon St	2015	3	6,750		
2747 San Pablo	2017	39	10,000+	6 Units	\$0
812 Page	2018	5	6,500	0	\$0
3046 Telegraph Ave	2018	3	7,684	Undetermined	
1032 Grayson St	2018	4	5,000	0	\$0
2817 8 th St	2018	4	7,786	0	\$189,570
<i>Total Projects: 20</i>		<i>Total Units: 143</i>		<i>Identified Affordable Units: 6 (4%)</i>	<i>Identified In-Lieu Fees: \$189,570</i>

Q. Has the City’s past reluctance or failure to apply the Inclusionary Housing Ordinance compromised its ability to do so now, whether under existing or amended language?

No. Commencement of a project, even pursuant to a permit, does not create a vested right to proceed in violation of the law.¹⁷ Further, a city does not “contract away the right to exercise its police power in the future” merely because an applicant begins to seek an entitlement, and can in fact be forced to comply with the law.¹⁸

Q. Do the proposed amendments impermissibly reduce project density in violation of the Housing Accountability Act?

No. The Housing Accountability Act restricts the circumstances in which a city may “impose a condition that the project be developed at lower density.”¹⁹ Contending that the Ordinance reduces density is backwards because the amendment is intended precisely to ensure that developers do not evade the application of the Inclusionary Housing Ordinance by making projects or lots smaller. It also does not reflect the reality.

One explicit purpose of the existing Inclusionary Housing Ordinance, in fact, is “encouragement [of] usage of density bonus” as an incentive to include affordable units as part of projects.²⁰ Nothing in the proposed amendments changes this. In fact, one developer’s agent has repeatedly

¹⁷ *Avco Community Developers v. South Coast Regional Commission* (1976) 17 Cal.3d 785, 794 (holding developer that subdivided land and began construction prior to change in permitting law still subject to new law). To the extent the argument is that the Inclusionary Housing Ordinance has not been reliably invoked previously, see, e.g., *Schafer v. City of Los Angeles* (2015) 237 Cal. App. 4th 1250 (court forced city to require parking lot owner to apply for a permit after 50 years of unpermitted use due to city misapplication of zoning ordinance, because city error cannot create a right against the public interest).

¹⁸ *Id.* at 800.

¹⁹ Gov. Code, § 65589.5(j)(1).

²⁰ Ord. 5748-N.S., sec. 15B.1(d) (July 15, 1986).

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argued that one problem with the Inclusionary Housing Ordinance is that it encourages utilizing the density bonus to build more units but higher density “is not this developer’s product type.”²¹

Q. Will amending the Inclusionary Housing Ordinance cause violation of the Permit Streamlining Act?

No. The Permit Streamlining Act requires municipalities to approve or deny permits within given timeframes. The proposed amendments do not change processing timeline or prevent the City from complying with the Act. Only one condominium “project” is currently in the City's permitting pipeline: 1444 Fifth Street. This project has been administratively appealed. The Permit Streamlining Act does not apply to the duration of appeal proceedings.²²

²¹ See 1444 Fifth Street ZAB Appeal, 3hr:47min:23sec (Jan. 24, 2019), *video recording available at* http://berkeley.granicus.com/MediaPlayer.php?publish_id=80c43cb8-20f0-11e9-b021-0050569183fa.

²² Gov. Code, § 65922(b).

Attachment B

Examples of Inclusionary Housing Evasion

Example 1 (Page Street Project): Call One Unit Commercial Regardless of Intended Residential Use to Avoid Triggering Inclusionary Housing Requirements

On September 30, 2015, Developer Matthew Wadlund requested a Use Permit/Variance to demolish a commercial building, construct a new commercial building, and develop four Dwelling Units at 812 Page Street (the “Page Street Project”). In total, 812 Page Street was 6,500 square feet in size, rendering the project subject to Inclusionary Housing Requirements because the lot was zoned to accommodate five or more Dwelling Units.²³ The City approved Wadlund’s Variance Request in June 2016, and on November 6, 2017, the City approved Wadlund’s subdivision map, which divided the lot into five condominiums—four residential and one allegedly commercial—all market rate.²⁴ Thus, the Page Street Project should have triggered the Inclusionary Housing Requirements for two independent reasons: (1) the Page Street Project is “residential” and the lot upon which it was constructed was of sufficient size to allow for construction of five Dwelling Units, and (2) the Page Street Project included construction of five Dwelling Units.²⁵ Nevertheless, the Page Street Project contained no affordable units, and neither Wadlund nor any of the owners of any of the market rate condominiums has ever paid an in-lieu inclusionary housing fee for the Page Street Project.

Example 2 (1446 Fifth Project): Adjust Lot Lines to Shrink Ownership Project Lot Size to Avoid Triggering Inclusionary Housing Requirements

Next, Wadlund purchased five contiguous lots on the very next block at 1442, 1444, and 1446 Fifth Street, and 770 and 776 Page Street. Alone, because of their size, lots 1444 and 1446 each could have been developed with five or more Dwelling Units, so Wadlund applied for a Lot Line Adjustment (LLA) to reduce the total size of each of those lots below 5,750 square feet to 5,744 square feet, reducing the building capacity of 1444 and 1446 each to four units. Wadlund transparently told the Zoning Adjustment Board that he requested the LLA to avoid building inclusionary housing or paying an in-lieu fee for his proposed development of 1446 Fifth Street (1446 Fifth Project). The City responded to Wadlund’s admission by treating the approval of Wadlund’s application for the LLA needed to effect his scheme as a ministerial act which the City had no discretion to deny and then treated 1446 Fifth Project as too small (in size and number of Dwelling Units) to trigger the Inclusionary Housing Requirements. This despite the

²³ Wadlund, Matthew, Zoning Project Application Form, p. 2, Box 10, dated Sept. 30, 2015.

²⁴ Resolution No. 68, 192-N.S. (Oct. 17, 2017.); see also Dee Williams-Ridley, City Manager City of Berkeley Staff Report, *Final Map of Tract 8355- 812 Page Street* (Oct. 17, 2017). Wadlund conveyed the rebuilt commercial building back to its original owner on May 1, 2018. ONC members living nearby report that the commercial building is being used in whole or in part as Dwelling Unit by that original owner, who is believed to have continuously occupied the property

²⁵ BMC, § 23C.12.020, subd. (A).

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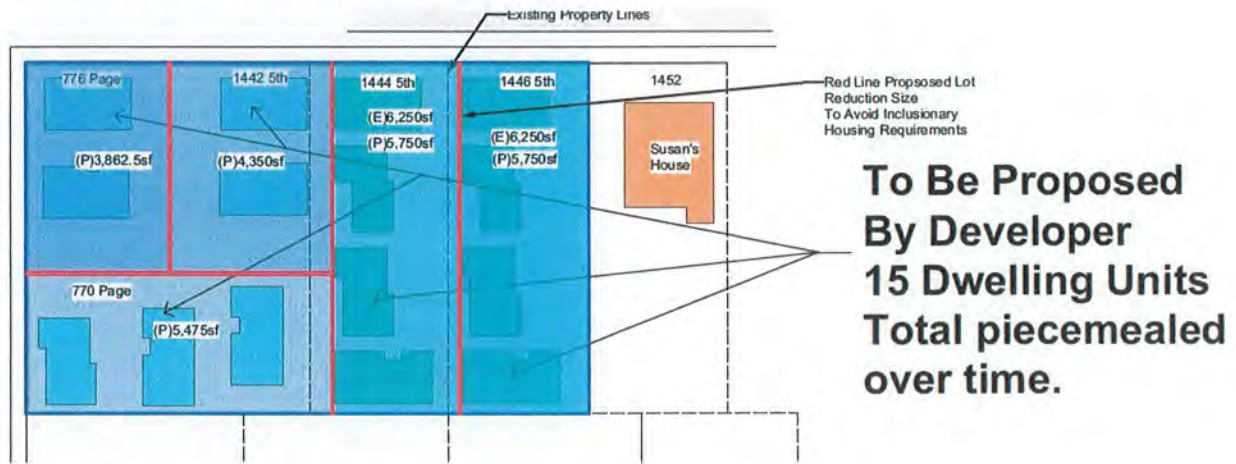
fact that the law expressly requires the City to ensure LLAs do not conflict with other provisions of the Zoning Ordinance.²⁶

The Fifth Street Project has been approved and is under construction.

Example 3 (1444 Fifth Project): Adjust Lot Size and Convey Back Easement to Avoid Payment without Giving Up Access to Land

As was always the intention, Wadlund now seeks to develop 1444 Fifth Street on the very same block. But, as a result of having lost land to his own lots at 1442 Fifth Street and 770 Page Street through his own LLA for the express purpose of avoiding the Inclusionary Housing Requirements, Wadlund now needs an easement to access the very same land he gave up (to himself) in order to effect his plans for development of market-rate housing on 1444. So Wadlund has advised the Planning Department that he will record an easement from 1442 Fifth Street that benefits 1444 Fifth Street in order to meet square footage requirements (the “Easement Swapback”) for the project he has applied to complete at 1444 Fifth Street (1444 Fifth Project). The easement will provide access to multiple lots in the block, all of which Wadlund has stated he plans to develop.

The ZAB approved the 1444 Fifth Project on January 24, 2019. It is now stayed pending resolution of ONC’s administrative appeal.



²⁶ BMC, § 23A.12.020, subd. (A).

Attachment C

Quick Reference Guide: Proposed Update to 23C.12.020 (Action Item #28 August 30, 2019, City Council Meeting)

Application: Section 23C.12.020 applies only to ownership projects. The mitigation fees for rental units is addressed separately in Chapter 22.20.

History of 23C.12.020

The Inclusionary Housing Ordinance was enacted on July 15, 1986 (Ord. No. 5748) and, despite undergoing stylistic and formatting changes when the Zoning Code was re-organized in 1999 (Ord. No. 6478), the provision that is now 23C.12.022 is substantively unchanged since 1986. The objectives of the original Ordinance are furthered by the current proposal.

The initial draft of the ordinance proposed by a subcommittee of the Planning Commission in 1986 only applied to properties on which four or more residential units had been constructed. However, the Planning Commission advised the City Council that the ordinance should apply to lots on which it is feasible to build 5 or more residential units, to “close possible loopholes of building less units or building units incrementally as a means to avoid the requirements of the ordinance.” (Planning Commission Report, *Adoption of Inclusionary Zoning Ordinance* p.4, § IV(A) (June 10, 1986)). The City Council accepted the change suggested by the Planning Commission as what is now 23C.12.020(A)(3).

Among the formal findings of the original Ordinance are that “continued new development which does not include lower cost housing will serve to further aggravate the current housing shortage by reducing the supply of land” and the desirability of “encouragement of usage of density bonus”, which would occur if projects include affordable units. (Ord. No. 5748, § 15.B)

Current Ordinance Language

23C.12.020, Applicability of Regulations

A. The following types of projects must comply with the inclusionary housing requirements of this chapter:

1. Residential housing projects for the construction of five or more Dwelling Units;
2. Residential housing projects for the construction of one to four new Dwelling Units, when such Units are added to an existing one to four unit property, which has been developed after August 14, 1986, and the resulting number of units totals five or more. All Units in such a property are subject to the requirements of this chapter;
3. Residential housing projects proposed on lots whose size and zoning designation is such to allow construction of five or more Dwelling Units.

B. This chapter does not apply to Dormitories, Fraternity and Sorority Houses, Boarding Houses, Residential Hotels or Live/Work Units, which are not considered Dwelling Units. Live/Work Units are subject to low income inclusionary provisions set forth in Section [23E.20.080](#).

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C. This chapter sets forth specific inclusionary housing requirements for the Avenues Plan Area, which prevails over any inconsistent requirements set forth elsewhere in this chapter. (Ord. 6478-NS § 4 (part), 1999)

Language Proposed by Planning Commission

23C.12.020 Applicability of Regulations

A. The following types of projects must comply with the inclusionary housing requirements of this chapter:

1. Residential ~~h~~Housing ~~p~~Projects for the construction of five or more Dwelling Units;
2. Residential ~~h~~Housing ~~p~~Projects for the construction of one to four new Dwelling Units, when such Units are added to an existing one to four unit property, which has been developed after August 14, 1986, and the resulting number of units totals five or more. All Units in such a property are subject to the requirements of this chapter;
3. Residential ~~h~~Housing ~~p~~Projects proposed on lots any part of a single lot or on a grouping of contiguous lots under common ownership and/or control, design, marketing, or financing, whose collective size, including the area of any surface easements, and zoning designation is such to allow construction of five or more Dwelling Units, regardless of whether those units are all built simultaneously. For the purposes of this Section, “common ownership and/or control” shall be interpreted broadly.

B. For purposes of this Section, “Residential Housing Project” means a project involving the construction of at least one Dwelling Unit. This chapter does not apply to Dormitories, Fraternity and Sorority Houses, Boarding Houses, Residential Hotels or Live/Work Units, which are not considered Dwelling Units provided however that Live/Work Units are subject to low income inclusionary provisions set forth in Section 23E.20.080.

C. This chapter sets forth specific inclusionary housing requirements for the Avenues Plan Area, which prevails over any inconsistent requirements set forth elsewhere in this chapter. (Ord. 6478-NS § 4 (part), 1999).



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April 29, 2019

By Electronic Mail

Hon. Mayor Jesse Arreguin
Members of the Berkeley City Council
2180 Milvia Street
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council@cityofberkeley.info
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RE: Supplemental Memorandum in support of the Oceanview Neighborhood Council's appeal of the Zoning Adjustment Board's approval of the 1444 Fifth Street Project, ZAB No. ZP-2018-0172

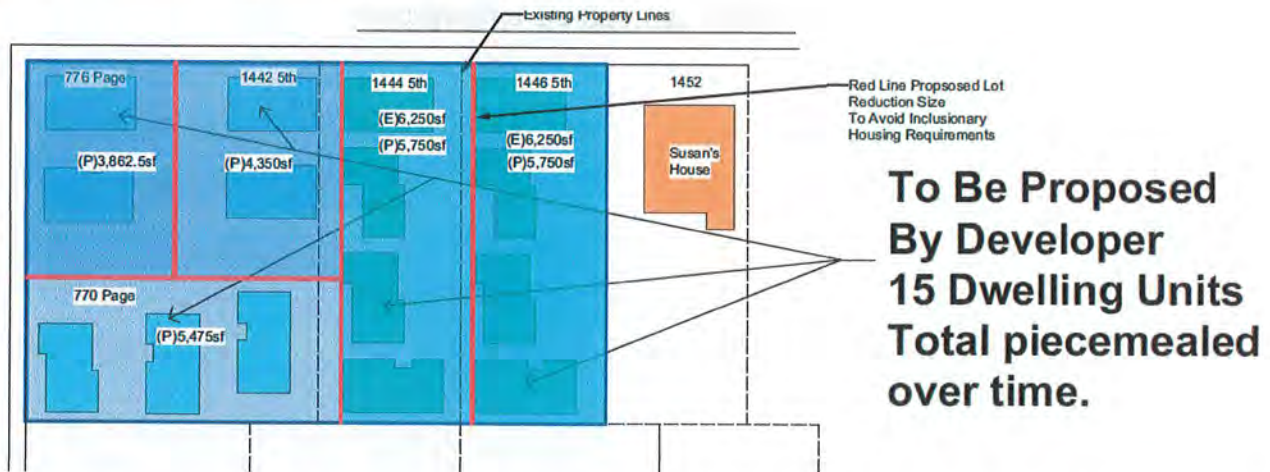
Dear Mayor Arreguin and Councilmembers,

This law firm represents the interests of the Oceanview Neighborhood Council (ONC). ONC is comprised of residents of the West Berkeley neighborhood of Oceanview in the City's Arts & Artisans District, many of whom are artists with moderate incomes. ONC's members are working to stem the erosion of affordability in their neighborhood. ONC firmly believes the City's Zoning Ordinance and Inclusionary Housing Requirements are two of the City's primary tools to develop affordable housing in this area and Berkeley as a whole. According to the West Berkeley Arts Field Survey, commissioned by the Berkeley Civic Arts Commission in 2008, 827 artists live or work in West Berkeley.

Recently, a developer named Matthew Wadlund began constructing four residential Dwelling Units at 1446 Fifth Street, one of five lots he owns in a Mixed-Use Residential District located on the intersection of Fifth and Page Streets in the West Berkeley Arts and Artisans District. This memorandum will refer to these lots collectively as the "Oceanview Neighborhood Block" or "Block." The Zoning Adjustments Board (ZAB) approved Wadlund's proposal to develop a second lot, 1444 Fifth Street, on January 24, 2019, which approval ONC timely appealed on February 6, 2019.



Figure 1: Oceanview Neighborhood Block (the "Block")



With this appeal, the City Council has an opportunity to stop Wadlund from continuing his sequential development of the Oceanview Neighborhood Block, thereby escaping his obligations under the Zoning Ordinance, Inclusionary Housing Requirements, and Subdivision Map Act. Council’s review of ZAB’s approval is *de novo*, and so all materials presently before this Council may be considered, even if they were not considered by ZAB.¹ At the hearing regarding Wadlund’s plans for 1444 Fifth Street, ZAB refused to consider evidence related to Wadlund’s comprehensive development activities in the Oceanview Neighborhood Block. ONC submits this supplemental memorandum, so Council can review that evidence.

I. ZAB failed to consider evidence of Wadlund’s master development plan for the Oceanview Neighborhood Block.

On January 24, 2019, Wadlund appeared before ZAB to win approval of his plan to develop 1444 Fifth Street into four Dwelling Units. During his presentation, Wadlund admitted that he intends to develop all five lots in the Oceanview Neighborhood Block serially. The following publicly available information corroborates his admission that he views the Block as a common development:

- (1) On August 31, 2016, Wadlund registered five separate limited liability companies with the California Secretary of State’s Office, naming himself the sole organizer, member, and office holder. (Declaration of Ariel Strauss, Exh. A (hereinafter “Strauss Decl.”).)
- (2) Just two months after registering his limited liability companies, Wadlund used the companies to purchase the lots that make up the Oceanview Neighborhood Block on the same date. (See Strauss Decl. Exhs. B, C.)
- (3) Wadlund’s consultant evaluated the suitability and environmental health of the soil for 1444 and 1446 Fifth Street in the same report because, as early as October 2016, the consultant understood that these lots would be developed into eight Dwelling Units. (See Strauss Decl.

¹ BMC, §§ 23B.28.060, 23B.32.050, 23B.32.060.

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Exh. D; see also Exh. E (“Our December 16, 2016, report was issued for both 1444 and 1446. We drilled on both lots and were aware that four units would be placed on each of them.”).)

- (4) After the July 20, 2017, Design Review Committee meeting, at which the Committee evaluated the suitability of Wadlund’s design plans for 1446 Fifth Street, Wadlund told ONC members they should be “happy” he is only building four houses because the City would allow him to build five on such a large lot. (See Declaration of Susan Younger, ¶ 2 (hereinafter “Younger Decl.”).)
- (5) During a February 6, 2018, City Council meeting to consider whether to approve Matthew Wadlund’s proposal to develop 1446 Fifth Street, Wadlund’s permit expediter told Council that Matthew Wadlund intended to develop the lots that make up the Oceanview Neighborhood Block sequentially and could consolidate them at will anytime thereafter. (See Strauss Decl. Exh. F.)
- (6) Wadlund requested lot line adjustments (LLA(s)) to reduce the size of 1444 and 1446 Fifth Street after the February 6, 2018, City Council meeting in order to avoid triggering Inclusionary Housing Requirements. (See Strauss Decl. Exhs. F, I; see also Figure 1, *above*.)
- (7) The City Engineer did not consult with the Planning Department regarding the consistency of the 1444 or 1446 Fifth Street with the Zoning Ordinance, including Inclusionary Housing Requirements prior to approving the LLAs.
- (8) Wadlund’s architectural and design plans for 1444 and 1446 Fifth Street are substantially similar to each other, a fact Staff has repeatedly acknowledged and used as justification to expedite review of Wadlund’s plans for 1444 Fifth Street. (See Strauss Decl. Exhs. I, J.)
- (9) Wadlund’s team physically levelled 1444 and 1446 Fifth Street at the same time and with the same equipment. (Younger Decl. ¶ 3.)
- (10) Wadlund is using 1444 to stage construction of 1446, storing construction materials and equipment as well as waste on 1444, and placing the portable toilet and vehicles on 1444. (See Declaration of Niels Traynor ¶ 2, Exh. A (hereinafter “Traynor Decl.”).)
- (11) Wadlund intends for 1444 Fifth Street, 1442 Fifth Street, and 770 Page Street to share an access easement. (Strauss Decl. Exh. I, p. 7, Exh. M.)

During its presentation on January 24, 2019, ZAB Staff omitted any reference to the aforementioned evidence. Instead, according to Staff, because Wadlund has yet to submit a “master development plan” to the City, ZAB must take Wadlund at his word and refrain from considering whether Wadlund’s piecemeal development is part of a common development scheme.² Staff has accepted this strategy, stating publicly at a Planning Commission hearing that Staff accepts a developer’s description of project scope without question. (Traynor Decl. ¶ 3.) Thus—according to Staff—Wadlund is free to develop the Oceanview Neighborhood Block pursuant to his *personal* master plan as long as his applications to the City do not disclose his real intentions. Upon this advice—and without conducting a review of available

² See [ZAB Meeting Video Recording](#), Jan. 24, 2019, Time Stamp 3:33, Staff Comments.

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evidence—ZAB approved Wadlund’s proposal to develop 1444 Fifth Street into four Dwelling Units. The City Council must reverse ZAB’s approval of Wadlund’s 1444 Fifth Street application and order the ZAB to treat Wadlund’s request for development of the remaining four lots as a common development scheme together with 1446 Fifth Street, subject to applicable City and state law, including the City’s Inclusionary Housing Requirements.

II. In approving Wadlund’s piecemeal development of the Oceanview Neighborhood Block, the City has failed to comply with Berkeley’s Inclusionary Housing Requirements.

The City Council adopted Berkeley’s Inclusionary Housing Requirements on July 15, 1986.³ Despite undergoing stylistic and formatting changes when Council reorganized the Zoning Ordinance in 1999⁴, Inclusionary Housing Requirements currently codified at 23C.12.022 are substantively similar to the original 1986 enactment. Among the formal findings in the original ordinance are: (1) “continued new development which does not include lower cost housing will serve to further aggravate the current housing shortage by reducing the supply of land” and (2) “encouragement of usage of density bonus.” (See Declaration of Ariel Strauss, ¶ 25, Exh. K, Berkeley Ordinance No. 5748, § 15.B (hereinafter “Strauss Decl.”))

As initially drafted in 1986, Inclusionary Housing Requirements applied to properties on which four or more residential units had been constructed. However, the Planning Commission advised Council that the Requirements should apply to projects on which it is feasible to build five or more residential units, to “close possible loopholes of building less units or building units incrementally as a means to avoid the requirements of the ordinance.” (See Strauss Decl. Exh. K, p.4, § IV(A).) Council accepted the Planning Commission’s recommendation and adopted the language that is now codified in Berkeley’s Zoning Ordinance at Chapter 23C.12.020(A)(3).

Today, the Inclusionary Housing Requirements compel an applicant for development of a residential housing project to either:

- (1) set aside 20 percent of the total number of Dwelling Units as affordable housing available for sale or rent at below-market rates, or
- (2) pay a fee into the City’s Housing Trust Fund in-lieu of providing units at below-market rates.⁵

This obligation applies to multiple types of projects including:

- (1) Residential housing project for the construction of five or more Dwelling Units;
- (2) [omitted because not relevant to appeal];

³ Berkeley Ordinance No. 5748.

⁴ Berkeley Ordinance No. 6478.

⁵ BMC, §§ 23C.12.030; 23C.12.035.

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- (3) Residential housing projects proposed on lots whose size and zoning designation is such to allow construction of five or more Dwelling Units.⁶

Wadlund has been open about his plan to develop 1444 and 1446 Fifth Street into eight Dwelling Units, which is more than the five required to render this project subject to Inclusionary Housing Requirements. (See Strauss Decl. ¶ 13, Exh. F.) He has also advised Council that he will develop 1442 Fifth Street, 770 Page Street, and 776 Page Street into residential homes in the near future. (Id.) In permitting Wadlund to develop the Block sequentially in piecemeal fashion, the City is violating its obligations under the West Berkeley Plan, Inclusionary Housing Requirements, Housing Accountability Act, California Environmental Quality Act, and Subdivision Map Act. To put it bluntly, nothing in existing state or local law permits the City to ignore Wadlund's piecemeal development plan, as it has to date, and doing so leaves the City vulnerable to legal challenge.

III. ZAB unlawfully relied on Wadlund's self-serving LLAs to reject ONC's call for application of Inclusionary Housing Requirements.

Due to minimum lot square-footage-per-dwelling-unit requirements in Mixed Use-Residential Districts, such as much of the area covered by the West Berkeley Plan, five units can be built on lots **5,750 square feet** or larger in the Oceanview Neighborhood.⁷ Under the Berkeley Municipal Code, the City Engineer must review applications for LLAs⁸ to ensure compliance with the Government Code and for conformity with applicable zoning and building ordinances.⁹ This is not a ministerial task, as the Zoning Ordinance clearly states, "No lot shall hereafter be subdivided or reduced in size, nor shall any lot line be adjusted or redrawn, so that any resultant lot conflicts with the provisions of this Ordinance."¹⁰ The Inclusionary Housing Requirements are part of the Zoning Ordinance. The City Engineer retains ultimate discretion to approve, conditionally approve, or disapprove requested changes, and such review must include consultation with the "departments concerned."¹¹ Upon information and belief, no such consultation occurred prior to approval of Wadlund's requested LLAs.

Berkeley's requirement that Staff scrutinize the consistency of LLAs with the purpose of the Zoning Ordinance is consistent with Government Code section 66412, subdivision (d), which expressly authorizes municipalities to consider the consistency of proposed LLAs with the "local general plan, any applicable specific plan, any applicable coastal plan, and zoning and building ordinances." Under this authority, municipalities may review individual applications for LLAs to prevent "gamesmanship."¹²

In its presentation to ZAB, Staff argued that Wadlund's prior recording of LLAs in connection with his development plan for 1446 Fifth Street obviated Wadlund's obligation to comply with Inclusionary

⁶ BMC, § 23C.12.020(A)(3).

⁷ BMC, § 23E.84.00(B).

⁸ "Lot line adjustments are changes in the boundary between two or more existing adjacent parcels, where the land taken from one parcel is added to an adjacent parcel, and where a greater number of parcels than originally existed is not thereby created." (BMC § 21.32.020.)

⁹ BMC, § 21.040.050

¹⁰ BMC, § 21.32.030.

¹¹ BMC, § 23A.12.020(A).

¹² Id.

¹² *Sierra Club v. Napa Cnty. Bd. of Supervisors* (2012) 205 Cal.App.4th 162, 168.

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Housing Requirements for future projects. But Prior to Wadlund's request for LLAs, recorded square footage indicates that:

- 1446 Fifth Street included 6,254sf;
- 1444 Fifth Street included 6,251sf;
- 1442 Fifth Street included 3,750sf;
- 770 Page Street included 5,126sf; and
- 776 Page Street included 3,900sf.

Combined, Wadlund's contiguous holdings in the Oceanview Neighborhood Block total 25,2789sf, all of which Wadlund intends to develop. (Strauss Decl. ¶ 13, Exh. F; Exh. H.) Staff's advice to ZAB contradicts the Berkeley Municipal Code's requirement to scrutinize LLAs for compliance with the Zoning Ordinance. Council must reverse ZAB's approval of Wadlund's piecemeal project because they plainly constitute "gamesmanship" intended to circumvent the Inclusionary Housing Requirements and order Staff to comply with City law.

IV. The City failed to comply with the Subdivision Map Act.

The Subdivision Map Act vests in cities and counties the authority and responsibility for the review and approval of all proposed subdivision maps; the local agency's review is comprehensive.¹³ Specifically, the local agency must do the following:

- (1) Ensure consistency with local general plans, specific plans, and public health and safety requirements¹⁴;
- (2) Consider the site's suitability for development and the adequacy of local roads, sewer, drainage, and public services¹⁵;
- (3) Provide for the protection of natural resources and mitigation of environmental impacts¹⁶; and
- (4) Take steps to ensure the accuracy and validity of the recorded map¹⁷.

Among the Subdivision Map Act's purposes are "to encourage and facilitate orderly community development [and] coordinate planning with the community pattern established by local authorities."¹⁸

¹³ Gov. Code, § 66411.

¹⁴ See, e.g., Gov. Code, §§ 66473, 66473.5, 66474.

¹⁵ See, e.g., Gov. Code, §§ 66411, 66473.7, 66474, 66474.6.

¹⁶ See, e.g., Gov. Code, § 66474(e).

¹⁷ See, e.g., Gov. Code, §§ 66433–66443.

¹⁸ *Gomes v County of Mendocino* (1995) 37 Cal.4th 977, 985; see also *John Taft Corp. v Advisory Agency* (1984) 161 CA3d 749, 755; *Pratt v Adams* (1964) 229 Ca2d 602, 606.

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“By generally requiring local review and approval of all proposed subdivisions, the Act aims to ‘control the design of subdivisions for the benefit of adjacent landowners, prospective purchasers and the public in general.’”¹⁹ Accordingly, the definition of “subdivision” is broadly drawn:

“Subdivision” means the division, by any subdivider, of any unit **or units** of improved or unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit **or as contiguous units**, for the purpose of sale, lease, or financing, **whether immediate or future**. Property shall be considered as contiguous units, even if it is separated by roads, streets, utility easement, or railroad rights-of-way. “Subdivision” includes a condominium project, as defined in Section 4125 or 6542 of the Civil Code, a community apartment project, as defined in Section 4105 of the Civil Code, or the conversion of five or more existing dwelling units to a stock cooperative, as defined in of Section 4190 or 6566 of the Civil Code.²⁰

To ensure compliance with these goals, the Map Act permits local governments to impose conditions or exactions on subdivisions to conform to the local general plan, any applicable specific plan, and zoning and building ordinances.²¹ A subdivision must be consistent with the City’s General Plan as well as the West Berkeley Plan to win approval in Berkeley.²² Perfect conformity between a proposed subdivision map and the general plan is not required; rather, a proposed map must be in agreement or harmony with the plan and must further the objectives and policies of the plan.²³ Since the power to deny generally includes the power to approve with conditions,²⁴ the local agency may, impose such conditions as may be necessary to ensure consistency with the General Plan and West Berkeley Plan. The Map Act extends a local agency’s authority beyond the physical characteristics of the subdivision, to allow the local agency to address *use* of the property as well, so as to ensure compliance with all general plan elements.²⁵

Wadlund has stated he intends to develop the whole Oceanview Neighborhood Block into single family residences that will be sold as condominiums. In order to assign the parcels to new owners, Wadlund will need to subdivide the lots prior to the sale. Because City staff thus far refused to acknowledge and scrutinize Wadlund’s common development scheme, Wadlund will not only evade Inclusionary Housing Requirements but also potential conditions placed on the development of this subdivision.

¹⁹ *Gardner v County of Sonoma* (2003) 29 Cal.4th 990, 997 (quoting *Hays v Vanek* (1989) 217 Ca3d 271, 289).

²⁰ Gov. Code, § 66424 (emphasis added).

²¹ Gov. Code, § 66412(d).

²² See BMC, § 21.16.047.

²³ *Friends of Lagoon Valley v City of Vacaville* (2007) 154 Ca4th 807, 817.

²⁴ *Nollan v California Coastal Comm'n* (1987) 483 US 825, 836.

²⁵ Gov. Code, § 66473.5; See also *DeVita v County of Napa* (1995) 9 Ca4th 763, 772 (subdivision must be consistent with development policies of general plan); *City of Del Mar v City of San Diego* (1982) 133 Ca3d 401, 414 (subdivision must be consistent with affordable housing policies of the general plan).

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V. Wadlund's request for a driveway easement encumbrance on 1442 5th Street and 770 Page Street is only needed because he reduced the lot size of 1444 Fifth Street to escape Inclusionary Housing Requirements.

Remarkably, Wadlund's proposed construction of four Dwelling Units at 1444 Fifth Street requires an easement encumbering 1442 Fifth Street and 770 Page Street—for the very same square footage that Wadlund relinquished by LLA from 1444 Fifth Street to avoid paying into the City's Housing Trust Fund. (See Strauss Decl. Exh. I, p. 7; see also ¶ 15, Exh. H; see also Exh. M.) Without the easement, 1444 Fifth Street is not large enough to include the necessary driveway to develop the four units planned on that lot. Wadlund advised the Planning Department that he will record the easement once the City Council approves his permit for 1444 Fifth Street. The City must not approve Wadlund's request for the project or the easement unless it rejects Wadlund's invitation to piecemeal develop the Oceanview Neighborhood Block and instead treat it as the common development scheme it is, subject to applicable City law, including Inclusionary Housing Requirements.

VI. Neighborhood Preservation Ordinance

On April 17, 1973, Berkeley voters adopted the Neighborhood Preservation Ordinance (NPO) through the initiative process. A true and correct copy of the NPO is attached to the Strauss Declaration as Exhibit L. Though not codified in the Berkeley Municipal Code, the Ordinance has never been amended or repealed. To amend or repeal the NPO, a majority of voters must approve the repeal or proposed amendment at a general municipal election.²⁶ According to the NPO, notice of public hearings related to a development project subject to the NPO—like Wadlund's—must be sent to all addresses and owners of property within a five hundred feet radius of the boundaries of the site of proposed construction and must include:

- (1) The number of housing units proposed;
- (2) The percentage of low-income units included in the structure;
- (3) A small reproduction of the site plan and perspective rendering of the proposed structure;
- (4) Time and place of public hearing; and
- (5) City departments to contact for further information.

(Strauss Decl. Exh. L § 7(a)(1)—(5).) This provision has not been repealed or amended, so the NPO controls. (Strauss Decl. Exh. L, § 9.) ZAB's published notice for hearings related to 1446 and 1444 Fifth Street violated the NPO because neither notice identified the total number of Dwelling Units proposed for the Oceanview Neighborhood Block. Without such critical information, ONC was forced to argue against Wadlund's *personal* development plan in a vacuum, and ZAB failed to consider critically relevant information. Council now has an opportunity to consider that evidence and comply with the NPO, Inclusionary Housing Requirements, Zoning Ordinance, and Subdivision Map Act.

²⁶ Berkeley City Charter, Art. XIII, Section 92, subd. (9).

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VII. The Design Review Committee failed to comply with public participation requirements in approving the Administrative Use Permit for 1444 Fifth Street after a “desk review.”

Compounding the effects of serially, piecemeal development of the Block, ZAB’s Design Review Committee approved Wadlund’s architectural and design plans for 1444 Fifth Street on a “desk review.” According to Staff, a desk review was appropriate because, “the proposed design of the buildings is similar to that of the recently approved development at the southern abutting lot, 1446 Fifth Street, which is currently under construction.” (Strauss Decl. Exh. I, p. 7, § III.) Indeed, implicit in Staff’s acknowledgement is the fact that these two lots are part of a common development.

Staff’s decision to conduct a desk review, apparently under the guise of the public having already had an opportunity to comment on this project, undermined the public participation process for residential housing developments in Berkeley and eliminated ONC’s opportunity to express its concerns with Wadlund’s design proposal for the 1444 Fifth Street Project. This treatment is also inconsistent with Staff’s accepting Wadlund’s applications for permission to develop 1444 and 1446 Fifth Street as separate projects completely at face value.

We look forward to the opportunity to present public comment at the Council hearing on May 14, 2019. I can be reached at jblome@greenfirelaw.com or (641) 431-0478 if you have any questions in the interim.

Sincerely,



Jessica L. Blome
Senior Associate Attorney

Attachments: Declaration of Ariel Strauss with Exhibits A through M, Declaration of Susan Younger, Declaration of Niels Traynor with Exhibit A

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Attorneys for Plaintiff Oceanview Neighborhood Council

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA**

OCEANVIEW NEIGHBORHOOD COUNCIL,
an unincorporated citizen group,

Plaintiff,

vs.

CITY OF BERKELEY CITY COUNCIL and
CITY OF BERKELEY MANAGER DEE
WILLIAMS-RIDLEY,

Defendants.

MATTHEW WADLUND, an individual; 1442
FIFTH STREET, LLC, a California Limited
Liability Company; 1444 FIFTH STREET,
LLC, a California Limited Liability Company;
1446 FIFTH STREET, LLC, a California
Limited Liability Company; 770 PAGE
STREET LLC, a California Limited Liability
Company; and 776 PAGE STREET, LLC, a
California Limited Liability Company,

Real Parties in Interest.

FILED BY FAX
ALAMEDA COUNTY

March 12, 2021

CLERK OF
THE SUPERIOR COURT
By Joanne Downie, Deputy

CASE NUMBER:
RG21091748

Case No.

**VERIFIED PETITION FOR WRIT OF
MANDAMUS AND COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

Code Civ. Proc. §§ 1060, 526, 526a, 1085

(UNLIMITED JURISDICTION)

1 On December 15, 2020, Respondent CITY OF BERKELEY CITY COUNCIL adopted a
 2 resolution approving the settlement of an action titled *1444 Fifth Street, LLC v. City of Berkeley*,
 3 Case No. RG 1903243. The settlement required the City to pay \$250,000 in attorneys’ fees to Real
 4 Party in Interest 1444 FIFTH STREET, LLC and is anticipated to result in payments into the City
 5 Housing Trust Fund in the amount of \$150,000. This lawsuit seeks declaratory relief that the
 6 settlement agreement constitutes an unlawful amendment by contract of the City of Berkeley’s
 7 Zoning Ordinance because it requires the City to assess something other than the mandatory
 8 inclusionary housing fee set by ordinance for a future residential housing project. This lawsuit also
 9 seeks injunctive relief prohibiting the CITY OF BERKELEY from complying with that illegal
 10 settlement agreement as well as a writ of mandate compelling the City to rescind the resolution
 11 adopting the settlement agreement. In support of their Complaint for Declaratory and Injunctive
 12 Relief, Plaintiff OCEANVIEW NEIGHBORHOOD COUNCIL, an unincorporated citizen group,
 13 alleges as follows:

PARTIES

14
 15 1. Plaintiff OCEANVIEW NEIGHBORHOOD COUNCIL (ONC) is a neighborhood
 16 association comprised of residents of the West Berkeley neighborhood of Oceanview in the City’s
 17 Arts & Artisans District, many of whom are artists with moderate incomes. ONC’s members work
 18 to stem the erosion of affordability in their neighborhood. ONC firmly believes the City of
 19 Berkeley’s Zoning Ordinance and specifically its Inclusionary Housing Requirements are two of
 20 the City’s primary tools to develop affordable housing in their neighborhood and Berkeley as a
 21 whole. All of the members of ONC pay some form of tax to the City of Berkeley, whether through
 22 property taxes, sales taxes, business taxes, or others.

23 2. Plaintiff OCEANVIEW NEIGHBORHOOD COUNCIL has relied upon the City’s
 24 representations, expressed through the Inclusionary Housing Requirements and West Berkeley
 25 Plan, that the Oceanview Neighborhood where the projects are located would remain affordable
 26 and welcoming to artists. REAL PARTIES IN INTEREST have neither provided inclusionary
 27 housing, nor paid the full in-lieu fee to the City’s Housing Trust Fund for any of the developments
 28

1 they have undertaken in the Oceanview Neighborhood, to the detriment of Plaintiff's interest in
2 housing that is affordable and welcoming to artists.

3 **Respondents**

4 3. Respondent CITY OF BERKELEY CITY COUNCIL is the legislative body of the
5 City of Berkeley, the jurisdiction where the proposed Project would be located. The City Council
6 has principal responsibility for determining whether projects within the City of Berkeley are
7 consistent with the City's General Plan, zoning and land use ordinances, and other applicable laws.
8 The City Council also has the power to enforce Berkeley's Inclusionary Housing Requirements.

9 4. Respondent CITY MANAGER DEE WILLIAMS-RIDLEY is the City Manager of
10 the City of Berkeley with authority to direct City staff in implementing and administering the City
11 of Berkeley Municipal Code, including the Zoning Ordinance and Inclusionary Housing
12 Requirements.

13 **Real Parties in Interest**

14 5. Real Party in Interest MATTHEW WADLUND was or is the sole member,
15 manager, officer, and organizer of 1442 FIFTH STREET, LLC; 1444 FIFTH STREET, LLC; 1446
16 FIFTH STREET, LLC; 770 PAGE STREET, LLC; and 776 PAGE STREET, LLC during the life
17 of each company. As the sole member, manager, officer, and organizer of each company, Wadlund
18 is the responsible corporate officer for any decisions made on behalf of each company, including in
19 deciding when and whether to apply for an administrative use permit to develop the property
20 ostensibly owned by each company.

21 6. Real Party in Interest 1442 FIFTH STREET, LLC is a limited liability company,
22 with its principal place of business at 805 Jones Street in Berkeley, Alameda County, California.
23 At all times relevant herein, 1442 FIFTH STREET, LLC owned the real property located at 1442
24 Fifth Street in Berkeley, Alameda County, California. Through Mr. Wadlund, 1442 FIFTH
25 STREET, LLC, plans to apply to the City of Berkeley for the administrative use permit necessary
26 to develop 1442 Fifth Street into four condominiums. 1442 FIFTH STREET, LLC is a beneficiary
27 of the settlement agreement and release entered into between Respondent CITY OF BERKELEY
28 and REAL PARTIES IN INTEREST 1444 FIFTH STREET, LLC and 1446 FIFTH STREET,

1 LLC, on December 15, 2020.

2 7. Real Party in Interest 1444 STREET, LLC is a limited liability company, with its
3 principal place of business at 805 Jones Street in Berkeley, Alameda County, California. At all
4 times relevant herein, 1444 FIFTH STREET, LLC owned the real property located at 1444 Fifth
5 Street in Berkeley, Alameda County, California. Through Mr. Wadlund, 1444 FIFTH STREET,
6 LLC, applied to the City of Berkeley for the administrative use permit necessary to develop 1444
7 Fifth Street into four condominiums. 1444 FIFTH STREET, LLC is a beneficiary of the settlement
8 agreement and release entered into between Respondent CITY OF BERKELEY and REAL
9 PARTIES IN INTEREST 1444 FIFTH STREET, LLC and 1446 FIFTH STREET, LLC, on
10 December 15, 2020.

11 8. Real Party in Interest 1446 STREET, LLC is a limited liability company, with its
12 principal place of business at 805 Jones Street in Berkeley, Alameda County, California. At all
13 times relevant herein, 1446 FIFTH STREET, LLC owned the real property located at 1446 Fifth
14 Street in Berkeley, Alameda County, California. Through Mr. Wadlund, 1446 Fifth Street, LLC,
15 applied to the City of Berkeley for the administrative use permit necessary to develop 1446 Fifth
16 Street into four condominiums. 1446 FIFTH STREET, LLC is a beneficiary of the settlement
17 agreement and release entered into between Respondent CITY OF BERKELEY and REAL
18 PARTIES IN INTEREST 1444 FIFTH STREET, LLC and 1446 FIFTH STREET, LLC, on
19 December 15, 2020.

20 9. Real Party in Interest 770 PAGE STREET, LLC is a limited liability company, with
21 its principal place of business at 805 Jones Street in Berkeley, Alameda County, California. At all
22 times relevant herein, 770 PAGE STREET, LLC owned the real property located at 770 Page
23 Street in Berkeley, Alameda County, California. Through Mr. Wadlund, 770 PAGE STREET,
24 LLC, applied to the City of Berkeley for the administrative use permit necessary to develop 770
25 Page Street into four condominiums. 770 PAGE STREET, LLC is a beneficiary of the settlement
26 agreement and release entered into between Respondent CITY OF BERKELEY and REAL
27 PARTIES IN INTEREST 1444 FIFTH STREET, LLC and 1446 FIFTH STREET, LLC, on
28

1 December 15, 2020.

2 10. Real Party in Interest 776 PAGE STREET, LLC is a limited liability company, with
3 its principal place of business at 805 Jones Street in Berkeley, Alameda County, California. At all
4 times relevant herein, 776 PAGE STREET, LLC owned the real property located at 776 Page
5 Street in Berkeley, Alameda County, California. Through Mr. Wadlund, 776 PAGE STREET,
6 LLC, plans to apply to the City of Berkeley for the administrative use permit necessary to develop
7 776 PAGE Street into four condominiums. 776 PAGE STREET, LLC is a beneficiary of the
8 settlement agreement and release entered into between Respondent CITY OF BERKELEY and
9 REAL PARTIES IN INTEREST 1444 FIFTH STREET, LLC and 1446 FIFTH STREET, LLC, on
10 December 15, 2020.

11 **JURISDICTION AND VENUE**

12 11. This Court has jurisdiction over this action pursuant to Code of Civil Procedure
13 sections 1085 (traditional writ of mandate).

14 12. Code Civil Procedure section 1060 gives this Court jurisdiction to grant declaratory
15 relief; Code of Civil Procedure section 526 gives this Court jurisdiction to issue injunctive relief;
16 and Code Civil Procedure section 526a gives this Court jurisdiction to issue injunctive relief
17 against local agencies for the illegal expenditure of resources in violation of municipal law,
18 including Berkeley’s Inclusionary Housing Ordinance, Berkeley Municipal Code section
19 23C.12.010, et seq.

20 13. Venue is proper in Alameda County pursuant to Code Civil Procedure section 395,
21 subdivision (a) because the City of Berkeley is located there. In addition, the action arose in
22 Alameda County, pursuant to Code Civil Procedure section 393, because Plaintiff’s members
23 reside in Berkeley, Alameda County and paid taxes within the last year while living there.

24 **GENERAL ALLEGATIONS**

25 **Relevant Legal Background**

26 14. The Government Code empowers the City of Berkeley to adopt and administer a
27 zoning ordinance that “regulates the use of buildings” by zones “of the number, shape, and area” it
28

1 deems best suited to carry out the purpose of the Government Code. (See Gov't Code, §§ 65800,
2 65850, 65851, 65852; see also Id. at § 37100.)

3 15. Government Code section 36931, et seq. sets forth the specific provisions a
4 municipality must follow to duly enact an ordinance. (Id. at § 36931, et seq.) For example, each
5 ordinance must be published at least once in a newspaper of general circulation in the City and
6 does not go into effect for thirty days after its second reading and final passage. (Id. at §§ 36933,
7 36937.)

8 16. The City Charter for the City of Berkeley mandates that “no ordinance shall be
9 revised, re-enacted, or amended . . . except in the method provided in this section or the adoption
10 of ordinances.” (City of Berkeley City Charter, Art. VIII, Sec. 44(10).)

11 17. Government Code section 65852 specifically requires uniformity in planning and
12 zoning by local governments.

13 18. No City can amend a duly enacted zoning ordinance by settlement agreement in
14 order to fit the needs of an individual developer. (See *Trancas Property Owners Assn. v. City of*
15 *Malibu* (2006) 138 Cal.App.4th 172, 181–182 (agreement between city and developer providing
16 exemption from zoning restrictions was invalid because it attempted to abrogate city’s zoning
17 authority for future projects.)

18 19. Resolutions adopting settlement agreements without the “formality” required of an
19 ordinance do not morph into an ordinance, as a duly enacted ordinance is a “law of this State”
20 within the meaning of a penal statute proscribing the violation of such law. (*City of Sausalito v.*
21 *County of Marin* (1970) 12 Cal.App.3d 550, 566.) “A resolution is not” a law of this State. (Id.)

22 **Inclusionary Housing Requirements**

23 20. The City of Berkeley’s Zoning Ordinance include a set of Inclusionary Housing
24 Requirements (IHR), which apply when a developer proposes a residential housing project “for the
25 construction of five or more Dwelling Units.” (BMC, § 23C.12.020(A)(1).) The number of lots
26 involved in the development is irrelevant, as the IHR applies when the developer plans to construct
27 five or more units in the “residential housing project.”
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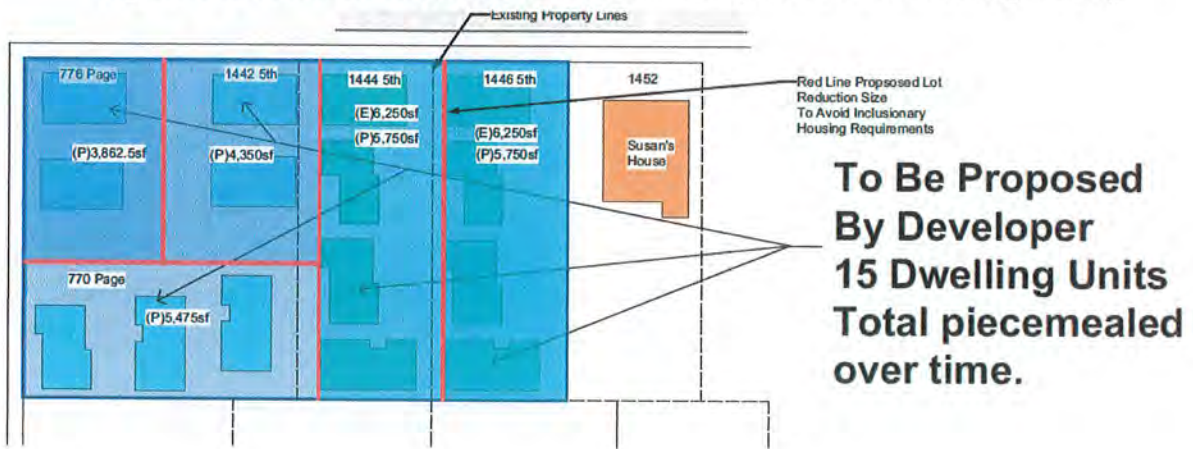
21. In Berkeley, developers subject to the IHR must set aside 20 percent of the total number of homes as affordable housing available for sale at below-market rates or pay a fee into the City’s Housing Trust Fund in-lieu of providing units at below-market rates. (BMC, § 23C.12.030.) This fee is often referred to as the “in-lieu fee.”

22. The IHR is mandatory: “The developer *shall be required* to pay the applicable in-lieu fee no later than the closing date of the sale of a unit as a condition of said closing.” (Id. at § 23C.12.035(E) (emphasis added).) The City does not have discretion to alter the formula set by the IHR for calculation of the in-lieu fee, which is based upon the sales price for the unit.

West Berkeley’s Oceanview Neighborhood & the Corner Development

23. Real Parties in Interest have been working to develop the five lots located at the corner of Fifth and Page Streets in the Oceanview Neighborhood of West Berkeley’s Arts and Artisans District for several years. This Complaint will refer to this corner as the “Corner Development” throughout for ease of reference. Real Party in Interest Mathew Wadlund submitted the following figure in connection with his first application for an Administrative Use Permit to serially develop each of the five lots into two, three, or four Dwelling Units.

Figure 1: Oceanview Neighborhood Corner Site (the “Corner Development”)



24. West Berkeley’s Oceanview Neighborhood is characterized by a diverse mix of uses, including sing-family and multi-family residential homes, art galleries and showrooms, offices, warehouses, and light manufacturing.

1 25. City policy in West Berkeley is guided by the West Berkeley Plan, which seeks, in
2 part, to protect and preserve unconventional housing, such as live-work units for artists and
3 craftspeople. To that end, a guiding principle of the West Berkeley Plan is to maintain housing
4 affordability in West Berkeley by taking all reasonable steps in housing policy “to maintain and
5 foster the social and economic diversity of West Berkeley's residents.” The West Berkeley Plan
6 further notes: “[o]ne of the key strategies for maintaining this diversity is to maintain West
7 Berkeley's stock of affordable rental housing.”

8 26. As early as 1993, when Council adopted the West Berkeley Plan, Berkeley has
9 recognized that “West Berkeley’s reservoir of lower cost housing is likely to become increasingly
10 important over the West Berkeley Plan period, if inflationary forces continue to quickly drive up
11 house prices and rents elsewhere in the city.”

12 27. The City’s Arts and Culture Plan also expresses City policy to increase affordable
13 housing for artists and indicates the City will incentivize development of affordable housing for
14 artists in West Berkeley.

15 **Application of the Inclusionary Housing Requirements to the Corner Development**

16 28. The IHR allows a developer to pay a fee in-lieu or designate 20% of residences
17 constructed as inclusionary or affordable.

18 29. The IHR set forth the methodology for calculating the in-lieu fee as follows:

19 This fee shall be calculated and collected based on the sales prices of all of the
20 units in a project to which the inclusionary requirement applies, such that the
21 fee as charged shall be a percentage of the difference between the actual sales
22 price for each unit, and the sales price that would have been permitted had that
23 unit been an inclusionary unit. The percentage shall be determined using the
24 following formula: the number of units for which an in-lieu fee is substituted
25 for an inclusionary unit divided by the total number of units to which the
26 inclusionary ordinance applies, multiplied by 62.5%.

27 (BMC, § 23C.12.035.C.1.)

28 30. The allowable inclusionary sales price for the purpose of calculating the in-lieu fee
is three-times 80% of the Area Median Income (AMI) last reported as of the closing date of the
sale of the unit. (BMC, § 23C.12.035(D).) The affordable sales price for units of 1,200 square feet

1 or greater is to be calculated based on 80% of the AMI for a six-person household in the Oakland-
2 Fremont metropolitan area.

3 31. On August 31, 2016, Real Party in Interest Matthew Wadlund registered 1442 Fifth
4 Street, LLC; 1444 Fifth Street, LLC; 1446 Fifth Street, LLC; 770 Page Street, LLC; and 776 Page
5 Street, LLC with the California Secretary of State's Office, naming himself the sole organizer,
6 member, and office holder. Wadlund controls each LLC and is the true alter ego of each entity.

7 32. On paper, each LLC owns the lot associated with its name, all of which are located
8 in the Mixed-Use Residential Zone of the Oceanview Neighborhood in West Berkeley.

9 33. On December 14, 2016, Wadlund, on behalf of 1446 Fifth Street, LLC, submitted
10 applications for an Administrative Use Permit (AUP) and Staff Level Design Review to construct
11 four new single-family Dwelling Unites at 1446 Fifth Street. Staff deemed the application
12 complete in May 2017.

13 34. The City specifically declined to require compliance with the IHR for the
14 development of the homes at 1446 Fifth Street because Wadlund adjusted the lot lines for the five
15 contiguous and adjacent parcels that make up the Corner Development expressly to avoid
16 application of the IHR for the first phase of his residential housing project.

17 35. Wadlund has consistently publicly expressed his plan to avoid the IHR by building
18 Dwelling Units on each of the five lots sequentially because he personally believes the IHR to be
19 too expensive. In total, Wadlund has stated he will develop the Corner Development into
20 somewhere between 15 and 18 Dwelling Units.

21 36. According to the Alameda County Assessor/Recorder, Wadlund, through 1446 Fifth
22 Street, LLC, sold four single-family units for more than \$1,000,000 each.

23 37. When applying the IHR's formula to a project where the developer has elected to
24 construct no affordable units, the in-lieu fee is best represented as the difference between the actual
25 sales price and the inclusionary sales price for each unit, multiplied by 12.5%:
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$$\text{In-lieu fee percentage per unit} = (\text{Units required}) / (\text{Units built}) \times 62.5\% = 12.5\%^1$$

38. Wadlund and 1446 Fifth Street, LLC should have paid a total in-lieu fee of more than \$300,000 to the City's Housing Trust Fund.

39. ONC filed a lawsuit to reverse the City's decision to ignore Wadlund's obligation to comply with the IHR at 1446 Fifth Street.

40. The Superior Court of Alameda County dismissed ONC's lawsuit over Wadlund's first phase of development at 1446 Fifth Street as untimely.

41. Wadlund, on behalf of 1444 Fifth Street, LLC, almost immediately submitted his applications for an AUP and Staff Level Design Review to construct the next phase of his residential housing project at 1444 Fifth Street. This phase of the project also consists of four single-family Dwelling Units.

42. In the staff memo recommending approval of this phase of Wadlund's development, Staff advised City officials to streamline its review because the proposal was nearly identical to that of Wadlund's development plan for 1446 Fifth Street.

43. The City's Zoning Adjustments Board approved Wadlund's AUP for 1444 Fifth Street on January 24, 2019, again declining to apply the IHR to phase two of Wadlund's residential housing project.

44. ONC timely appealed the Zoning Adjustments Board's decision to the Berkeley City Council on February 6, 2019.

45. After a hearing on the merits on May 28, 2019, the City Council concluded that Wadlund's development plan for the five lots constituted a single residential housing project subject to the IHR. The City Council would require Wadlund's compliance with the IHR upon the sale of each Dwelling Unit. Per Berkeley Municipal Code section 23C.12.030, Wadlund could, of course, designate the requisite number of Dwelling Units as inclusionary to avoid paying the in-lieu fee.

¹ Since the IHR requires that 20% of units be affordable or the fee to be paid, this number is always 12.5% where the developer elects to construct no affordable units: 0.2×0.625 .

1 46. Wadlund, 1446 Fifth Street, LLC and 1444 Fifth Street, LLC filed a lawsuit in the
2 Superior Court of Alameda County against the City challenging the City Council’s decision to
3 impose the IHR on Wadlund’s phased development of a residential housing project.

4 47. ONC attempted to intervene in Wadlund’s lawsuit but was denied permissive
5 intervention.

6 48. On September 23, 2020, following a hearing on Wadlund’s petition for writ of
7 mandate, the Superior Court of Alameda County entered judgment in favor of Wadlund and his
8 limited liability companies. The Court ruled that the City impermissibly applied the IHR to phases
9 one and two of Wadlund’s development project because it imposed the condition more than 30
10 days after the City deemed the respective applications complete in violation of Government Code
11 section 65589.5, subdivision (j)(2).

12 49. On December 15, 2020, the City Council adopted Resolution No. 69,649-N.S.
13 authorizing the City Attorney to enter into a Settlement Agreement and Release with 1444 Fifth
14 Street, LLC and 1446 Fifth Street, LLC. A true and correct copy of the Settlement Agreement and
15 Release is attached hereto as **Exhibit A**.

16 50. The Settlement Agreement collectively refers to 770 Page Street, 776 Page Street,
17 and 1442 Fifth Street as “Undeveloped Parcels,” for which neither Wadlund nor his limited
18 liability companies had submitted application for development at the time of execution of the
19 Settlement Agreement, but for which Wadlund and his limited liability companies “contemplate
20 submitting application for the construction” of development projects in the future. (Id. at ¶ H.)

21 51. The Settlement Agreement provides, “The City shall not require compliance with
22 the Inclusionary Housing Ordinance for construction of dwelling units on any legal parcel that can
23 accommodate no more than four dwelling units under the development standards of the Berkeley
24 Zoning Ordinance,” which includes “on the construction of new Dwelling Units on any of the
25 Undeveloped Parcels.” (Exh. A, ¶ 3.)

26 52. The Settlement Agreement also requires the City to comply with a number of
27 contractual deadlines when Wadlund applies to develop 1442 Fifth Street, 770 Page Street, and 776
28

1 Page Street at some point in the future.

2 53. The Settlement Agreement requires Wadlund and his limited liability companies to
3 pay a total in-lieu fee of \$15,000 per Dwelling Unit to the City of Berkeley Housing Trust Fund at
4 the time of sale for each of the Dwelling Units constructed on the Undeveloped Parcels in the
5 future. (Id. at ¶ 5.)

6 54. The agreed-upon in-lieu fee of \$15,000 per Dwelling Unit is a significantly and
7 substantially lower in-lieu fee than the expected mandatory fee imposed by the IHR and constitutes
8 an amendment to the IHR as applied to this individual developer.

9 **Taxpayer Waste**

10 55. The City Council is a local agency that authorizes budgets and expends money
11 every year to fund staff, resources, and supplies for the Berkeley Planning and Development
12 Department to administer the City’s AUP program and processes, which includes implementation
13 of Inclusionary Housing Requirements.

14 56. The City created its Housing Trust Fund in 1990. A housing trust fund is a program
15 that pools funds for affordable housing construction from a variety of sources with different
16 requirements and makes them available through one single application process to local developers.
17 Listed among the many sources of revenue for the Housing Trust Fund is “Inclusionary Zoning
18 fees to be paid in-lieu of construction of housing units as allowed by the Inclusionary Housing
19 Ordinance, Berkeley Municipal Code Chapter 23C.12”²

20 57. The City Council has failed to conduct oversight of City staff’s implementation of
21 the Inclusionary Housing Requirements.

22 58. Since its adoption in 2006, the City has failed to compel developers—including
23 Real Parties in Interest—to comply with IHR and therefore has failed to fund the City’s Housing
24 Trust Fund.

25
26
27 ² See City of Berkeley’s Housing Trust Fund Guidelines, Section I(B)(6), available at
28 https://www.cityofberkeley.info/uploadedFiles/Housing/Level_3_-_General/Revised%202016%20HTF%20GUIDELINES.pdf (last visited May 17, 2019).

1 59. According to the Settlement Agreement, in consideration for the City’s commitment
2 to abdicate its legal duty to collect the in-lieu fee, Wadlund promises to pay up to \$150,000 in in-
3 lieu fees connected with the development of 10 Dwelling Units on 1442 Fifth Street, 770 Page
4 Street, and 776 Page Street at some unknown point in the future.

5 60. The City has failed to collect hundreds of thousands of dollars in in-lieu fees from
6 Real Parties In Interest pursuant to the plain language of the IHR.

7 61. Despite this abject failure to ensure funding of the City’s Housing Trust Fund, on
8 November 6, 2018, the City Council asked voters to authorize the City to issue up to \$135 million
9 in bonds at an estimated tax rate of \$23 per \$100,000 in assessed property value for 36 years to
10 fund housing for “very low-, low-, median-, and middle-income individuals and working families,
11 including teachers, seniors, veterans, the homeless, students, people with disabilities, and other
12 vulnerable populations.” (See Voter Guide, Measure O, Nov. 6, 2018.)

13 62. Berkeley residents overwhelmingly passed Measure O.

14 63. Members of ONC pay the property taxes assessed under authority of Measure O.

15 64. The City plans to use Measure O bond proceeds to leverage state and county funds
16 allocated for affordable housing against monies available in the City’s Housing Trust Fund.

17 65. The City’s failure to fully fund the City’s Housing Trust Fund through the
18 collection of in-lieu fees under the IHR has resulted and will continue to result in wasted taxpayer
19 dollars because the City Housing Trust Fund has never been fully realized.

20 66. Without full funding of the City Housing Trust Fund, the City will never meet
21 affordable housing goals set forth in the West Berkeley Plan because it has failed and continues to
22 refuse to collect in-lieu fees owed to the Fund.

23 67. Plaintiff has no adequate remedy at law.

24 68. The City must be restrained from complying with the Settlement Agreement and
25 Release because it impermissibly amends the IHR as applied to Real Parties in Interest and because
26 it abdicates the police powers of future City Council bodies to correctly apply the IHR to
27 Wadlund’s phased residential development project.

28

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

(Impermissible Promise to Abdicate Legislative Zoning Action, CCP § 526)

69. Plaintiff hereby realleges and incorporates all of the above paragraphs as if fully set forth herein.

70. A municipality may not contract away its legislative and governmental functions. (See Morrison Homes Corp. v. City of Pleasanton (1976) 58 Cal. App. 3d 724, 734.) Indeed, a long line of California cases establishes that a government may not bargain away its right to exercise its police power in the future. (See e.g., Avco Community Developers, Inc. v. South Coast Regional Com. (1976) 17 Cal.3d 785, 800; Delucchi v. County of Santa Cruz (1986) 179 Cal. App. 3d 814, 823.) A contract that purports to do so is invalid as contrary to public policy if the contract amounts to a municipality's "surrender" or "abnegation" of its control of a municipal function. (County Mobilehome Positive Action Com., Inc. v. County of San Diego (1998) 62 Cal.App.4th 727.) This is especially true when the government attempts to amend its zoning ordinance, which requires uniformity for each class or kind of building throughout each zone, by settlement agreement. (See Trancas Property Owners Assn. v. City of Malibu (2006) 138 Cal.App.4th 172, 181-182 (agreement between city and developer providing exemption from zoning restrictions was invalid because it attempted to abrogate city's zoning authority); see also Gov't Code, § 65852 (requiring uniformity in planning and zoning by local governments).)

71. Respondent impermissibly abdicated its zoning authority by binding future legislative bodies to the terms of the Settlement Agreement and Release, which amends the Zoning Ordinance's Inclusionary Housing Requirements as applied to Real Parties in Interest only and binds the City to certain contractual deadlines and processing times not clearly required by the Berkeley Municipal Code.

72. Respondent did not have discretion to set the in-lieu fee the City will assess against future developments by contract. Respondent may only assess the fee applicable at the time of that future development.

73. In addition to amending the Inclusionary Housing Requirements as applied to future

1 development, the Settlement Agreement and Release constitutes an impermissible “promise by the
2 government that zoning laws thereafter enacted would not be applicable to” the “Undeveloped
3 Parcels” at 1442 Fifth Street, 770 Page Street, and 776 Page Street. (*Avco Community Developers,*
4 *Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785; see also *Trancas v. City of Malibu* (Cal.
5 Ct. App. 2006) 138 Cal.App.4th 172, 181.)

6 74. Plaintiff’s members will be irreparably injured if Respondent is allowed to proceed
7 with the amendments to the Inclusionary Housing Requirements contained in the Settlement
8 Agreement and Release.

9 75. This Court has authority to enjoin the City from complying with the Settlement
10 Agreement and Release pursuant to Code of Civil Procedure, section 526.

11 **SECOND CAUSE OF ACTION**
12 **(Enjoining Taxpayer Waste, CCP § 526a)**

13 76. Plaintiff hereby realleges and incorporates all of the above paragraphs as if fully set
14 forth herein.

15 77. The Settlement Agreement and Release, which obligates Respondent to collect
16 substantially less than the mandatory in lieu fee imposed by the Inclusionary Housing
17 Requirements, is an illegal expenditure of, waste of, and injury to the property of the City of
18 Berkeley under Code of Civil Procedure section 526a.

19 78. Plaintiff has no plain, speedy, or adequate remedy in the ordinary course of law
20 within the meaning of Code of Civil Procedure section 526a because the City Council’s failure to
21 enforce the Inclusionary Housing Requirements is not otherwise reviewable in a manner that
22 provides an adequate remedy.

23 79. The City Council is able to perform the duties required by the City’s Inclusionary
24 Housing Requirements. Notwithstanding such ability, the City Council has failed to perform its
25 duties. Unless compelled by this Court to perform its duties, Respondent City Council will
26 continue to fail and refuse to do so.

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THIRD CAUSE OF ACTION
(Writ of Mandate, CCP §1085)

80. Plaintiff hereby realleges and incorporates all of the above paragraphs as if fully set forth herein.

81. Respondent City of Berkeley City Council violated Government Gov. Code secs. 65800, 65850, 65851, 65852; and § 37100, et seq. as well as the City of Berkeley City Charter when it adopted Resolution No. 69,649-N.S. authorizing the City Attorney to enter into the Settlement Agreement and Release because the Settlement Agreement amends an ordinance by resolution and contract, rather than by legislative action.

82. Respondent has a nondiscretionary obligation to comply with the City Charter and the Government Code.

83. Plaintiff has no plain, speedy, or adequate remedy in the ordinary course of law within the meaning of Code of Civil Procedure section 1086, because the Respondent’s adoption of Resolution No. 69,649-N.S. is not reviewable in a manner that provides an adequate remedy other than through this lawsuit.

84. Respondents are able to perform the duties required by the City Charter and Government Code. Notwithstanding such ability, Respondent has failed to perform their duties. Unless compelled by this Court to perform their duties, Respondent will continue to fail and refuse to do so.

85. Section 1085 of the Code of Civil Procedure authorizes this Court to issue a writ of mandate when it is required to compel Respondent to comply with the Inclusionary Housing Requirements when approving the design and construction of small cell wireless facilities in the future.

FOURTH CAUSE OF ACTION
(Declaratory Relief, CCP § 1060)

86. Plaintiff hereby realleges and incorporates all of the above paragraphs as if fully set forth herein.

87. Plaintiff seeks declaratory relief the City of Berkeley’s Inclusionary Housing

1 Requirements, located at Berkeley Municipal Code Chapter 23C.12, apply to the development of
2 1446 Fifth Street, 1444 Fifth Street, 1442 Fifth Street, 770 Page Street, and 776 Page Street
3 because the development plan it is a residential housing project “for the construction of five or
4 more Dwelling Units.”

5 88. Plaintiff has no plain, speedy, or adequate remedy in the ordinary course of law
6 within the meaning of Code of Civil Procedure section 1060, because the City’s failure to enforce
7 the Inclusionary Housing Requirements against Real Parties in Interest is not reviewable in a
8 manner that provides an adequate remedy other than through this lawsuit.

9 89. Respondent City of Berkeley is able to perform the duties required by the
10 Inclusionary Housing Requirements. Notwithstanding such ability, Respondent has failed to
11 perform their duties. Unless compelled by this Court to perform their duties, Respondent will
12 continue to fail and refuse to do so.

13 90. Declaratory relief under Code of Civil Procedure section 1060 is required to direct
14 the City to comply with the Inclusionary Housing Requirements as enacted.

15
16 **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiff pray for the following relief:

- 18 A. An ORDER DECLARING that the City of Berkeley’s Inclusionary Housing
19 Requirements apply to residential housing projects of five or more residential
20 housing units regardless of whether the units are located on the same parcel under
21 Berkeley Municipal Code section 23C.12.020(A)(1);
22 B. An ORDER ENJOINING the City of Berkeley from complying with the terms of the
23 Settlement Agreement and Release;
24 C. An ORDER ENJOINING the City of Berkeley to collect the in-lieu fee mandated by
25 the Inclusionary Housing Requirements in effect at the time of applicability.
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D. An ORDER MANDATING that the City of Berkeley rescind Resolution No. 69,649-N.S. as an impermissible amendment of a zoning ordinance by resolution and contract;

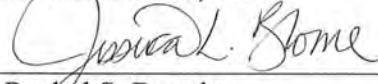
E. For the costs of suit.

F. For an award of attorneys' fees pursuant to Code of Civil Procedure section 1021.5 and any other applicable provisions of law.

G. For any other legal and equitable relief as this Court deems just and proper.

DATED: March 12, 2021

GREENFIRE LAW, PC

By: 

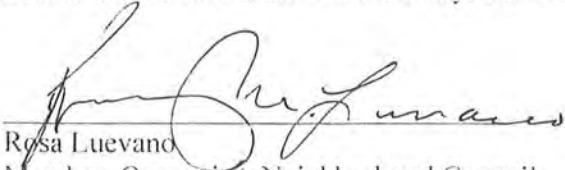
Rachel S. Doughty
Jessica L. Blome
Attorneys for Plaintiff
Oceanview Neighborhood Council

VERIFICATION

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I, Rosa Luevano, am a member of the Oceanview Neighborhood Council, which is the plaintiff in this action. I have read the foregoing Verified Petition for Writ of Mandamus and Complaint of Declaratory and Injunctive Relief and know its contents. The facts alleged in the above Petition are within my own knowledge and I know these facts to be true, except as to matters alleged therein on information and belief.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration is executed on March 12, 2021 at Berkeley, California.



Rosa Luevano
Member, Oceanview Neighborhood Council

I, Niels Traynor, am a member of the Oceanview Neighborhood Council, which is the plaintiff in this action. I have read the foregoing Verified Petition for Writ of Mandamus and Complaint of Declaratory and Injunctive Relief and know its contents. The facts alleged in the above Petition are within my own knowledge and I know these facts to be true, except as to matters alleged therein on information and belief.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration is executed on March 12, 2021 at Berkeley, California.



Niels Traynor
Member, Oceanview Neighborhood Council

Exhibit A

RESOLUTION NO. 69,649-N.S.

AUTHORIZING THE CITY ATTORNEY TO SETTLE 1444 FIFTH STREET, LLC V. CITY OF BERKELEY (ALAMEDA COUNTY CASE NO. RG19032434)

WHEREAS, on August 23, 2019, Petitioners 1444 Fifth Street, LLC and 1446 Fifth Street, LLC ("Petitioners") filed an action in Alameda County Superior Court entitled 1444 Fifth Street, LLC et al. v. City of Berkeley et al., Civil Case No. RG19032434 ("Action"), alleging causes of action for writ of mandate, declaratory judgment, and injunctive relief, and seeking an order or judgment that the City must rescind the inclusionary housing fee applied to petitioners' housing development project; and

WHEREAS, on September 23, 2020, the court granted a petition for writ of mandate and found that the City violated the Housing Accountability Act by imposing an additional condition on the housing development project requiring compliance with the City's Inclusionary Housing Ordinance, Berkeley Municipal Code Chapter 23C.12; and

WHEREAS, Petitioners and the City wish to resolve the dispute giving rise to the action.

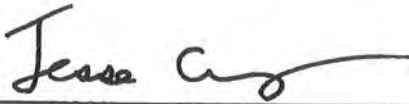
NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that the Council of the City of Berkeley authorizes the City Attorney to enter into the settlement agreement with the 1444 Fifth Street, LLC and 1446 Fifth Street, LLC enclosed herewith as Exhibit A.

The foregoing Resolution was adopted by the Berkeley City Council on December 15, 2020 by the following vote:

Ayes: Bartlett, Droste, Hahn, Harrison, Kesarwani, Robinson, Taplin, Wengraf, and Arreguin.

Noes: None.

Absent: None.



Jesse Arreguin, Mayor

Attest: 

Mark Numainville, City Clerk

SETTLEMENT AGREEMENT AND RELEASE

This SETTLEMENT AGREEMENT AND RELEASE (“Settlement Agreement”) is made this 24th day of November, 2020, by and between Respondents and Defendants CITY OF BERKELEY and CITY OF BERKELEY CITY COUNCIL (collectively, “City”) and Petitioners and Plaintiffs 1444 FIFTH STREET, LLC and 1446 FIFTH STREET, LCC (“Petitioners”). The City and Petitioners are collectively referred to herein as the “Parties,” and are each individually referred to as a “Party.”

RECITALS

A. On January 10, 2019, the City of Berkeley Zoning Adjustments Board approved Administrative Use Permit #ZP2018-0172, which authorized the construction of a four-unit residential housing development at 1444 Fifth Street, Berkeley, California (the “Project”). The Zoning Adjustments Board’s decision was appealed to the Berkeley City Council.

B. On May 28, 2019, the Berkeley City Council held a public hearing, and following the hearing, affirmed the Zoning Adjustments Board’s approval of Administrative Use Permit #ZP2018-0172. In addition, the City Council imposed a new condition of approval requiring the Project to pay an inclusionary housing fee under Berkeley Municipal Code Chapter 23C.12 (the “Inclusionary Housing Ordinance”). The City Council imposed the condition of approval after determining that the Project and a previously approved, separately owned project on the adjacent property at 1446 Fifth Street constituted a single “residential housing project” under the Inclusionary Housing Ordinance. The condition required the Project to comply with the Inclusionary Housing Ordinance on behalf of both the Project and the previously approved project on the adjacent 1446 Fifth Street parcel.

C. On August 23, 2019, Petitioners filed an action in Alameda County Superior Court entitled *1444 Fifth Street et al. v. City of Berkeley et al.*, Civil Case No. RG19032434 (“Action”) alleging causes of action for writ of mandate, declaratory judgment, and injunctive relief, and seeking an order or judgment that the City must rescind the inclusionary housing fee applied to the construction of the Project.

D. On September 23, 2020, following a hearing on the petition for writ of mandate, the Court entered judgment in favor of Petitioners (“Judgment”), attached hereto as Exhibit 1. The Court ruled that (1) the Inclusionary Housing Ordinance applies to residential housing projects proposed on the same legal parcel, but cannot be lawfully applied to separate legal parcels where each individual parcel can accommodate no more than four dwelling units; and (2) the application of the Inclusionary Housing Ordinance to the Project violated Government Code section 65589.5(j)(2), which obligated the City to inform Petitioners within 30 days of the completeness of their respective applications of any “applicable plan, program, policy, ordinance, standard, requirement, or other similar provision” with which the Project was “inconsistent, not in compliance, or not in conformity.”

E. Further, the Court enjoined the City from applying the Inclusionary Housing Ordinance in a manner contrary to the Court's order, from taking any action inconsistent with the Order to preclude the issuance of revised conditions of approval for Administrative Use Permit #ZP2018-0172, and from taking any further unlawful actions to preclude the development of the Project.

F. Petitioners and/or their principals, agents, and/or affiliates, have submitted or contemplate submitting applications for the construction of separate housing development projects on three separate legal parcels located adjacent to the Project site, located at 770 Page Street, 776 Page Street, and 1442 Fifth Street (collectively, "Undeveloped Parcels").

G. The Parties wish to resolve their dispute regarding the subject matter of the Action, and regarding the application of the Inclusionary Housing Ordinance to development of the Undeveloped Parcels.

NOW, THEREFORE, in consideration of the mutual covenants, conditions and terms contained in this Agreement, and good and valuable consideration, and in full and final settlement of the Action and to compromise on the disputed claims contained therein, the Parties agree as follows:

AGREEMENT

1. Incorporation of Recitals. The above recitals are incorporated herein by reference.

2. Payment by the City. Within 15 days of the date of execution of this Settlement Agreement, the City shall pay to Petitioners attorneys' fees and costs of suit incurred in the amount of \$250,000. Payment shall be made to 1444 Fifth Street, LLC.

3. Compliance with Judgment. The City shall not require compliance with the Inclusionary Housing Ordinance for construction of dwelling units on any legal parcel that can accommodate no more than four dwelling units under development standards in the Berkeley Zoning Ordinance. The City agrees that under the Judgment, the condition of approval applying the Inclusionary Housing Ordinance in Administrative Use Permit #ZP2018-0172 has been held to be unlawful and unenforceable, but that otherwise Administrative Use Permit #ZP2018-0172 remains valid and in full force and effect for the approved housing project now under construction on 1444 Fifth Street. The City further agrees that as currently configured and under the City's Zoning Ordinance and current development standards, the City may not apply the Inclusionary Housing Ordinance or impose an inclusionary housing fee under that Ordinance on the construction of new dwelling units on any of the Undeveloped Parcels.

4. Review of Applications for Development of Undeveloped Parcels. The City will comply with applicable provisions of the Berkeley Zoning Ordinance and state law in reviewing any application to construct a housing development project on the Undeveloped Parcels. The City shall consider and process a housing development application on each separate legal lot independently of a housing development application on any other legal

lot under currently applicable provisions of the Berkeley Zoning Ordinance and state law. The City shall not apply the Berkeley Zoning Ordinance to consolidate an application for a housing development on an Undeveloped Legal Parcel with one or more applications on another Undeveloped Parcel, including but not limited to compliance with the Inclusionary Housing Ordinance or California Environmental Quality Act. The City will accordingly process each application for a housing development project on an Undeveloped Parcel as follows:

a. The City shall schedule a public hearing before the Zoning Adjustments Board and shall approve or disapprove each application to construct a housing development project on in a separate legal lot within 60 days of the date the application is determined to be complete, or within 60 days of the completion of any environmental review process required under the California Environmental Quality Act, whichever is later.

b. The City Council shall schedule a public hearing on any appeal of a determination made by the Zoning Adjustments Board under Paragraph 4.a within 60 days of the date of mailing of the Notice of Decision, and shall decide any appeal within 30 days of the date of the public hearing.

c. If a proposed housing development project on one or more of the Undeveloped Parcels complies with the applicable, objective general plan and zoning standards in effect at the time an application is deemed complete, the City shall not conduct more than five public hearings in connection with the approval of the project.

d. Any deadline set forth in this Paragraph 4 may be extended by mutual agreement of the project applicant and the City.

5. Housing Trust Fund Contributions by Petitioners. Notwithstanding the Judgment or any other provision of this Agreement, Petitioners agree to make a payment into the City of Berkeley Housing Trust Fund for each unit of housing constructed on any of the Undeveloped Parcels. Petitioners agree to pay \$15,000 per unit of housing, payable within thirty (30) days of the issuance of Certificate of Occupancy.

6. Waiver of Right to Appeal. Each Party hereby waives its right to appeal any order or judgment entered in the Action.

7. Mutual Release. Except as otherwise expressly set forth in this Settlement Agreement, Petitioners and the City hereby release and forever discharge each other, together with their agents, representatives, trustees, employees, officers, directors, partners, stockholders, attorneys, successors, assigns, heirs, personal representatives and executors, and all persons, firms, associations, co-partners, co-venturers, insurers, contractors, engineers, subcontractors, subsidiaries, parents, affiliates, or corporations connected therewith, and each of them from any and all claims, debts, liabilities, demands, obligations, costs, expenses, and attorneys' fees relating to the Action or the claims or causes of action set forth therein.

It is understood and agreed that this is a full and final mutual release of the Action. The Parties agree, as further consideration and inducement for this Agreement, to waive the provisions of California Civil Code §1542 which provides as follows:

“A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.”

This Release and Waiver only releases and waives claims arising from actions, failures to act, events and occurrences taking place on or before August 23, 2019, and does not release or waive any claims arising out of actions, failures to act, events or occurrences taking place after that date.

Notwithstanding any potentially inconsistent provisions in this Section, if the City does not comply fully with Sections 2 through 4 of this Agreement, Petitioners reserve the right to take any and all appropriate legal action to enforce the requirements of the Housing Accountability Act, Gov. Code § 65589.5, including but not limited to proceeding to litigate the claims brought in the Action and seeking an award of any and all attorney’s fees, costs of suits, and fines authorized under the Housing Accountability Act.

8. Cooperation on Additional Documents. Each of the Parties agrees to execute and deliver to each of the other Parties all additional documents, instruments, and agreements required to take such additional actions as are required to implement the terms and conditions of this Agreement.

9. Authorization to Execute. Each Party represents that the individual signing this Settlement Agreement is authorized to bind the Party on whose behalf he or she signs.

10. Entire Agreement. As to the matters set forth herein, this Settlement Agreement is the entire, integrated agreement and understanding of the Parties.

11. Waiver, Modification, and Amendment. No breach of this Settlement Agreement or of any provision herein can be waived except by an express written waiver executed by the Party waiving such breach. Waiver of any one breach shall not be deemed a waiver of any other breach of the same or other provisions of this Agreement. This Agreement may be amended, altered, modified, or otherwise changed in any respect or particular only by a writing duly executed by the Parties or their authorized representatives.

12. Notice. Any notice, demand, request, or other communication required or permitted to be given under this Agreement, (a) shall be made in writing; (b) shall be delivered by one of the following methods: (i) by personal delivery (with notice deemed given when delivered personally); (ii) by overnight courier (with notice deemed given upon written verification of receipt); or (iii) by certified or registered mail, return receipt requested (with notice deemed given upon verification of receipt); and (c) shall be addressed as provided in this Section or such other address as such Party may request by notice in accordance with the terms of this Section.

Notice to Petitioners shall be provided as follows:

1444 5th Street, LLC and 1446 5th Street, LLC
c/o WADLUND+ Design Studio
805 Jones Street
Berkeley, CA 94710

With copy to: Jennifer Hernandez
Holland & Knight LLP
50 California Street, Suite 2800
San Francisco, CA 94111
jennifer.hernandez@hklaw.com

Notice to the City shall be provided as follows:

City Attorney
City of Berkeley
2180 Milvia Street
Berkeley, CA 94704
attorney@cityofberkeley.info

13. Attorneys' Fees. In any proceeding at law or in equity to enforce any of the provisions or rights under this Settlement Agreement, the prevailing Party shall be entitled to recover from the unsuccessful Party all costs, expenses and reasonable attorneys' fees incurred in the enforcement proceeding by the prevailing Party (including, without limitation, such costs, expenses, and fees on any appeals) and if such prevailing Party shall recover judgment in any such action or proceeding, such costs, expenses, including those of expert witnesses, and attorneys' fees shall be included in and as part of the judgment.

14. Severability. If any part of this Settlement Agreement is found to be void, invalid or unenforceable, the remainder shall remain in full force and effect and shall be interpreted to carry out the Parties' intent with respect to their obligations and rights.

15. Drafting of Agreement. The Parties and/or their respective counsel have participated in the drafting and negotiation of this Settlement Agreement and, for all purposes, this Settlement Agreement shall be deemed to have been drafted jointly by all Parties.

16. Successors and Representatives. This Settlement Agreement shall be binding on and shall inure to the benefit of the successors and assigns of each Party.

17. Informed Consent. Each Party declares that prior to the execution of this Settlement Agreement, it and/or its duly authorized representatives have apprised themselves of sufficient relevant data, either through attorneys, experts or other sources of their own selection, in order to intelligently exercise their judgment in deciding whether to execute, and in deciding the contents of, this Settlement Agreement. Each Party states that

this Settlement Agreement is entered into freely and voluntarily, upon the advice and with the approval of its counsel.

18. Applicable Law. This Settlement Agreement shall be interpreted in accordance with California law, without reference to its choice of law provisions.

19. Execution in Counterparts. This Agreement may be executed in any number of counterparts, each of which may be deemed an original, and all of which together shall constitute a single instrument, notwithstanding that all the Parties are not signatories to the original or same counterpart. Photocopies or facsimiles shall constitute good evidence of such execution.

Dated: _____, 2020

1444 FIFTH STREET,LLC

By: _____
Name: Matthew Wadlund
Title: _____

Dated: _____, 2020

1446 FIFTH STREET, LLC

By: _____
Name: Sean Kenmore
Title: _____

Dated: _____, 2020

CITY OF BERKELEY

By: _____
Name: Farimah Brown
Title: City Attorney

APPROVED AS TO FORM:

Christopher D. Jensen
Assistant City Attorney

1 GREENFIRE LAW, PC
2 2550 Ninth Street, Suite 204B
3 Berkeley, CA 94710
4 Phone: (510) 900-9502
5 Fax: (510) 900-9502
6 rdoughty@greenfirelaw.com
7 jblome@greenfirelaw.com

8 *Attorneys for Petitioner Oceanview Neighborhood Council*

9 **Declaration of Susan Younger**

10 *in support of the Oceanview Neighborhood Council's Appeal*
11 *of the Zoning Adjustment Board's approval of the 1444 Fifth Street Project*
12 **ZAB No. ZP-2018-0172**

I, Susan Younger, declare as follows:

1. I am a resident of Berkeley and a member of the Oceanview Neighborhood Council. I have personal knowledge of the facts declared herein, and will competently testify to them if called upon to do so.

2. I talked to Matthew Wadlund shortly after the Design Review Committee hearing on July 20, 2017, meeting where the Committee considered whether to approve Wadlund's design plans for 1446 Fifth Street. Several of the neighbors, including myself, had made statements against the design of this project. Matthew Wadlund told me that he could build five units on 1446 Fifth Street because it was large enough. Wadlund said we should be happy he's only building four houses. We did not know about the Inclusionary Housing Requirements at that point, but it bothered me that Wadlund acted as though he was doing me a favor for only putting in four houses when the law allowed five.

3. I live at 1452 Fifth Street which is adjacent to Fifth Street. Sometime in late summer or early fall of 2018, from the upstairs level of my home, I personally observed that construction workers had demolished a garden and play structure previously located on those lots and levelled the ground. The construction crew worked on the two lots at the same time.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 24th day of April 2019 at Berkeley, California.

/S/ Susan Younger
By: _____
SUSAN YOUNGER

I hereby attest that the law offices of Greenfire Law, PC have on file all holographic signatures corresponding to any signatures indicated by a conformed signature (/S/) within this e-filed document. Executed on this 29th day of April 2019 at Berkeley, California.

By: *Jessica L. Blome*

Jessica L. Blome
Senior Associate Attorney
Greenfire Law, PC

1 GREENFIRE LAW, PC
2 2550 Ninth Street, Suite 204B
3 Berkeley, CA 94710
4 Phone: (510) 900-9502
5 Fax: (510) 900-9502
6 rdoughty@greenfirelaw.com
7 jblome@greenfirelaw.com

8 *Attorneys for Petitioner Oceanview Neighborhood Council*

9 **Declaration of Niels Traynor**

10 *in support of the Oceanview Neighborhood Council's Appeal*
11 *of the Zoning Adjustment Board's approval of the 1444 Fifth Street Project*
12 **ZAB No. ZP-2018-0172**

I, Niels Traynor, declare as follows:

1. I am a resident of Berkeley and a member of the Oceanview Neighborhood Council. I have personal knowledge of the facts declared herein, and will competently testify to them if called upon to do so.

2. I live at 1419 Fifth Street, which is one block away from 1442, 1444, and 1446 Fifth Street. On Friday, April 26, 2019, I walked past the construction staging area for Matthew Wadlund's development of 1446 Fifth Street. Wadlund is using 1444 Fifth Street to stage construction of 1446 Fifth Street, storing construction materials and equipment as well as waste on 1444 Fifth Street, and placing the portable toilet and vehicles on 1444 Fifth Street. A true and accurate copy of a photograph depicting the activities happening on 1444 Fifth Street and 1446 Fifth Street as I personally observed on April 26, 2019, is attached hereto as Exhibit A. 1446 Fifth Street is on the left, and the empty lot on the right is 1444 Fifth Street.

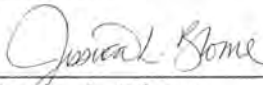
3. At a Planning Commission hearing during which the Commission considered the merits of the Oceanview Neighborhood Council's appeal of the Zoning Adjustment Board's approval of Matthew Wadlund's development of 1446 Fifth Street, I heard Staff tell the Commission that it accepts a developer's description of project scope without question or further analysis.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 29th day of April, 2019 at Berkeley, California.

/S/ Niels Traynor
By: _____
NIELS TRAYNOR

I hereby attest that the law offices of Greenfire Law, PC have on file all holographic signatures corresponding to any signatures indicated by a conformed signature (/S/) within this e-filed document. Executed on this 29th day of April 2019 at Berkeley, California.

By: 

Jessica L. Blome
Senior Associate Attorney
Greenfire Law, PC

EXHIBIT A



1 GREENFIRE LAW, PC
2 2550 Ninth Street, Suite 204B
3 Berkeley, CA 94710
4 Phone: (510) 900-9502
5 Fax: (510) 900-9502
6 rdoughty@greenfirelaw.com
7 jblome@greenfirelaw.com

8 *Attorneys for Petitioner Oceanview Neighborhood Council*

9 **Declaration of Ariel Strauss**

10 *in support of the Oceanview Neighborhood Council's Appeal*
11 *of the Zoning Adjustment Board's approval of the 1444 Fifth Street Project*
12 *ZAB No. ZP-2018-0172*

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I, Ariel Strauss, declare as follows:

1. I am an attorney licensed to practice in California. I have personal knowledge of the facts declared herein, and will competently testify to them if called upon to do so.

2. In April 2019, I conducted research through the websites for the Clerk-Recorder of Alameda County, California Secretary of State’s Office, and City of Berkeley Planning and Zoning Department. The results of my research are reflected herein.

Matthew Wadlund Formed, Manages, and Controls the LLCs

3. On August 31, 2016, Matthew Wadlund registered the following limited liability companies with the California Secretary of State’s Office:

770 Page Street, LLC
776 Page Street, LLC
1442 Fifth Street, LLC
1444 Fifth Street, LLC
1446 Fifth Street, LLC

These limited liability companies will be referred to collectively as the “LLCs” throughout this declaration.

4. True and correct copies of the formal “Articles of Organization,” “Statements of Information,” and “Statements of No Change” filed for the LLCs are attached hereto as **Exhibit A** and will be identified collectively as the “LLC Filings” throughout this Declaration.

5. According to the LLC Filings, Matthew Wadlund is the sole organizer, manager, agent for service of process, chief executive officer, and Managing Member for each LLC, and each LLC is located at 805 Jones Street, Berkeley, California 94701.

6. Aside from Matthew Wadlund, the only individual identified in the LLC Filings is Sean Kenmore, who filed “Statements of No Change” for each LLC in May 2018.

///

///

Matthew Wadlund’s LLCs Simultaneously Acquired Five Lots

7. On October 31, 2016, just two months after Mathew Wadlund registered the LLCs, Denise Arriaza, Raul Ariaza, the Linda Lee Olson Trust, the Carl Edward Olson Trust, the Olson Family Trust, and the Linda Olson Trust transferred title of the following parcels to the identified LLC. A true and correct copy of the search results from the Clerk-Recorder of Alameda County’s Grantor-Index is attached hereto as **Exhibit B**.

Table 1: Grantee Identification	
Accessor Parcel Number (APN)	New Property Owner/Grantee
APN 59-2325-3, 770 Page Street, Berkeley	770 Page Street, LLC
APN 59-2325-4, 776 Page Street, Berkeley	776 Page Street, LLC
APN 59-2325-5, 1442 Fifth Street, Berkeley	1442 Fifth Street, LLC
APN 59-2325-6, 1444 Fifth Street, Berkeley	1444 Fifth Street, LLC
APN 59-2325-7, 1446 Fifth Street Berkeley	1446 Fifth Street, LLC

Matthew Wadlund Investigated 1444 and 1446 Fifth Street as a Single Unit

8. A true and correct copy of the Parcel Map from the Alameda County Accessor's Office “Parcel Viewer” webpage depicting the intersection of Page and Fifth Streets in Berkeley, California is attached hereto as **Exhibit C**. The Parcel Map reflects that all five properties are adjacent to one another.

9. In December 2016, just two months after the LLCs’ acquisitions identified in Table 1, Matthew Wadlund applied for approval from the City to develop 1446 Fifth Street into four Dwelling Units.

10. The application to develop 1446 Fifth Street submitted to the City by Matthew Wadlund included a “Geotechnical Investigation for 1444 & 1446 5th Street Development” dated December 16, 2016, authored by Peters & Ross, Geotechnical & GeoEnvironmental Consultants. A true and correct copy of the investigation is attached hereto as **Exhibit D**.

11. Matthew Wadlund's consultants, Peters & Ross treated 1444 and 1446 Fifth Street as a single "project site" with the two approximately 6,250 square foot lots described as one "relatively level rectangular lot with total maximum plan dimensions of about 100 feet by 125 feet [12,500 square feet]." (Exh. D, p. 1.)

12. At the time of the initial application for 1446 Fifth Street, Mathew Wadlund had planned to construct a total of eight Dwelling Units on 1444 and 1446 Fifth Street as reflected in a letter from Peters & Ross to Matthew Wadlund, dated October 11, 2018, in which Peters & Ross states "Our December 16, 2016, report was issued for both 1444 and 1446. We drilled on both lots and were aware that four units would be placed on each of them." A true and correct copy of the letter is Attached as **Exhibit E**.

Matthew Wadlund Considered All Lots as One Combined, Sequential Development

13. During a February 6, 2018, City Council meeting at which the Council considered whether to approve Matthew Wadlund's proposal to develop 1446 Fifth Street, Matthew Wadlund's agent repeatedly told the Council that all lots identified in Table 1 were owned by the same owner, this owner intends to develop the lots sequentially and this owner could consolidate all lots at will. An approximate transcript of applicable portions of the recording from the February 6, 2018, Council meeting is attached hereto as **Exhibit F**.

14. During the January 24, 2019, ZAB hearing to consider whether to approve Matthew Wadlund's plan to develop four Dwelling Units on 1444 Fifth Street, his representative confirmed that "the same owner owns that property [1444 Fifth Street] as well as 770 Page." An approximate transcript of applicable portions of the audio recording of the January 24, 2019, ZAB hearing for 1444 Fifth Street is attached hereto as **Exhibit G**.

Dimensions of the Four Lots Were Adjusted to Avoid Affordable Housing In-Lieu Fees

15. At the request of Matthew Wadlund, the City of Berkeley Approved a Lot Line Adjustment (LLA), which was recorded by Chicago Title Company in the Official Records of Alameda County on July 23, 2018 and identified as Instrument 2019144173. A true and correct copy of the LLA is attached hereto as **Exhibit H**.

16. The LLA altered the dimensions of the lots located at 770 Page Street, 1442 Fifth Street, 1444 Fifth Street and 1446 Fifth Street, as follows:

<i>Owner Entity Name</i>	<i>Address</i>	<i>Original Lot Size</i>	<i>Adjusted Lot Size</i>
770 Page Street, LLC	770 Page Street	5,126	5,532
1442 Fifth Street, LLC	1442 Fifth Street	3,750	4,358
1444 Fifth Street, LLC	1444 Fifth Street	6,251	5,744
1446 Fifth Street, LLC	1446 Fifth Street	6,251	5,744

17. Matthew Wadlund signed the authorization for the requested LLA as the “Managing Member” of the LLCs for each of the affected lots. As a result of the LLA, the dimensions of the 1444 Fifth Street and 1446 Fifth Street lots were each seven square feet smaller than 5,751 square feet. (See Exh. H.)

18. On January 24, 2019, Matthew Wadlund’s representative admitted that the purpose of the lot line adjustment is to reduce the size of the 1444 and 1446 Fifth Street lots specifically so that they would no longer be large enough to accommodate five units under the Zoning Code and thereby avoiding incurring the City’s Inclusionary Housing in-lieu fee. (See Exh. G.)

**Matthew Wadlund Proposed that Parking Amenities Cross Lot Lines
and be Shared Among the Lots**

19. On August 31, 2018, approximately one month after recording the LLA, Matthew Wadlund applied to the City for a permit to develop 1444 Fifth Street into four Dwelling Units. In his application, he proposed that the driveway for 1444 Fifth Street lot would straddle the north property line with the 1442 lot and also serve as a “shared access easement that would also provide access to the northern abutting parcels at 1442 Fifth Street and 770 Page Street”. A true and correct copy of the Staff Report to the Zoning Adjustments Board dated January 24, 2019, discussing the proposed easement is attached hereto as **Exhibit I** (see p.7). A true and correct copy of a drawing depicting the proposed easement provided by Matthew Wadlund in his October 16, 2018 supplemental application to the City for development of 1444 Fifth Street is attached as **Exhibit M**.

20. The LLA moved the north lot line of 1444 Fifth Street south by 8.11 feet (see Exh. A) and the shared access easement is proposed to be located almost entirely within land seceded by 1444 Fifth Street to 1442 Fifth Street. (see Ex. I, Fig. 2, p.3)

The Design and Layout of 1444 and 1446 Fifth Street Are Substantially Similar and Appear as a Combined Project

21. During the January 24, 2019, ZAB hearing, City staff declared that “this project [1444 Fifth Street] is very similar to an adjoining project to the south [1446 Fifth Street] . . . it's similar in pretty much every way.” (See Exh. G.)

22. The Staff Report of January 24, 2019, describes the 1444 and 1446 projects as being “similar” and “proposed by the same applicant”. (see Exh. I, p.6.)

23. I compared Matthew Wadlund’s proposed architectural and design plans for the four Dwelling Units he intends to construct at 1446 Fifth Street to the architectural and design plans for four Dwelling Units proposed at 1444 Fifth Street. The four structures proposed on each of the two adjacent lots are substantially similar in layout and exterior design. Excerpts from Matthew Wadlund’s application for Administrative Use Permit ZP2016-0247 (1446 Fifth Street) and Administrative Use Permit ZP2018-0172 (1444 Fifth Street) are attached as **Exhibit J**.


Additional Materials Reviewed

24. A true and correct copy of the Planning Commission’s Report regarding its recommendations for “Adoption of Inclusionary Zoning Ordinance,” dated June 10, 1986, is attached hereto as **Exhibit K**.

25. A true and correct copy of the Neighborhood Preservation Ordinance No. 4641-N.S., adopted on April 17, 1973, is attached hereto as **Exhibit L**.

Executed on this 29th day of April, 2019 at Berkeley, California.

By: _____


Ariel Strauss
Attorney for Oceanview
Neighborhood Council

201625210081

To form a limited liability company in California, you can fill out this form, and submit for filing along with:

- A \$70 filing fee.
- A separate, non-refundable \$15 service fee also must be included, if you **drop off** the completed form.

Important! LLCs in California may have to pay a minimum \$800 yearly tax to the California Franchise Tax Board. For more information, go to <https://www.ftb.ca.gov>.

LLCs may not provide "professional services," as defined by California Corporations Code sections 13401(a) and 13401.3.

Note: Before submitting the completed form, you should consult with a private attorney for advice about your specific business needs.

FILED
Secretary of State
State of California

AUG 31 2016

lcc
This Space For Office Use Only

For questions about this form, go to www.sos.ca.gov/business/be/filing-tips.htm.

LLC Name (List the proposed LLC name exactly as it is to appear on the records of the California Secretary of State.)

① 770 Page Street, LLC

Proposed LLC Name

The name must include: LLC, L.L.C., Limited Liability Company, Limited Liability Co., Ltd. Liability Co. or Ltd. Liability Company; and may not include: bank, trust, trustee, incorporated, inc., corporation, or corp., insurer, or Insurance company. For general entity name requirements and restrictions, go to www.sos.ca.gov/business/be/name-availability.htm.

Purpose

- ② The purpose of the limited liability company is to engage in any lawful act or activity for which a limited liability company may be organized under the California Revised Uniform Limited Liability Company Act.

LLC Addresses

③ a. 805 Jones Street, Berkeley CA 94710
Initial Street Address of Designated Office in CA - Do not list a P.O. Box *City (no abbreviations)* *State* *Zip*

b. _____
Initial Mailing Address of LLC, if different from 3a *City (no abbreviations)* *State* *Zip*

Service of Process (List a California resident or a California registered corporate agent that agrees to be your initial agent to accept service of process in case your LLC is sued. You may list any adult who lives in California. You may not list an LLC as the agent. Do not list an address if the agent is a California registered corporate agent as the address for service of process is already on file.)

④ a. Matthew Wadlund

Agent's Name

b. 805 Jones Street, Berkeley CA 94710
Agent's Street Address (if agent is not a corporation) - Do not list a P.O. Box *City (no abbreviations)* *State* *Zip*

Management (Check only one.)

- ⑤ The LLC will be managed by:

One Manager More Than One Manager All Limited Liability Company Member(s)

This form must be signed by each organizer. If you need more space, attach extra pages that are 1-sided and on standard letter-sized paper (8 1/2" x 11"). All attachments are made part of these articles of organization.

Organizer - Sign here

Matthew Wadlund

Print your name here

Make check/money order payable to: **Secretary of State**

Upon filing, we will return one (1) uncertified copy of your filed document for free, and will certify the copy upon request and payment of a \$5 certification fee.

By Mail

Secretary of State
Business Entities, P.O. Box 944228
Sacramento, CA 94244-2280

Drop-Off

Secretary of State
1500 11th Street., 3rd Floor
Sacramento, CA 95814



Secretary of State
Statement of Information
(Limited Liability Company)

20

LLC-12

FILED
Secretary of State
State of California
DEC 12 2016

IMPORTANT — Read instructions before completing this form.

Filing Fee - \$20.00

Copy Fees — Face Page \$1.00 & .50 for each attachment page;
Certification Fee - \$5.00

See Secretary of State's
records for exact entity name.

This Space For Office Use Only

1. Limited Liability Company Name 770 PAGE STREET	
2. 12-Digit Secretary of State File Number 201625210081	3. State or Place of Organization (only if formed outside of California)

4. Business Addresses			
a. Street Address of Principal Office - Do not list a P.O. Box 805 JONES STREET	City (no abbreviations) BERKELEY	State CA	Zip Code 94710
b. Mailing Address of LLC, if different than item 4a	City (no abbreviations)	State	Zip Code
c. Street Address of California Office, if Item 4a is not in California - Do not list a P.O. Box	City (no abbreviations)	State CA	Zip Code

5. Manager(s) or Member(s) If no managers have been appointed or elected, provide the name and address of each member. At least one name and address must be listed. If the manager/member is an individual, complete Items 5a and 5c (leave Item 5b blank). If the manager/member is an entity, complete Items 5b and 5c (leave Item 5a blank). Note: The LLC cannot serve as its own manager or member. If the LLC has additional managers/members, enter the name(s) and addresses on Form LLC-12A (see Instructions).

a. First Name, if an individual - Do not complete Item 5b MATTHEW	Middle Name	Last Name WADLUND	Suffix
b. Entity Name - Do not complete Item 5a			
c. Address 805 JONES STREET	City (no abbreviations) BERKELEY	State CA	Zip Code 94710

6. Agent for Service of Process Item 6a and 6b: If the agent is an individual, the agent must reside in California and Item 6a and 6b must be completed with the agent's name and California address. Item 6c: If the agent is a California Registered Corporate Agent, a current agent registration certificate must be on file with the California Secretary of State and Item 6c must be completed (leave Item 6a-6b blank).

a. California Agent's First Name (if agent is not a corporation) MATTHEW	Middle Name	Last Name WADLUND	Suffix
b. Street Address (if agent is not a corporation) - Do not list a P.O. Box 805 JONES STREET	City (no abbreviations) BERKELEY	State CA	Zip Code 94710
c. California Registered Corporate Agent's Name (if agent is a corporation) - Do not complete item 6a or 6b			

7. Type of Business

a. Describe the type of business or services of the Limited Liability Company
REAL ESTATE

8. Chief Executive Officer, if elected or appointed

a. First Name MATTHEW	Middle Name	Last Name WADLUND	Suffix
b. Address 805 JONES STREET	City (no abbreviations) BERKELEY	State CA	Zip Code 94710

9. The information contained herein, including any attachments, is true and correct.

12/5/16 MATTHEW WADLUND MANAGING MEMBER

Date Type or Print Name of Person Completing the Form Title Signature

Return Address (Optional) (For communication from the Secretary of State related to this document, or if purchasing a copy of the filed document enter the name of a person or company and the mailing address. This information will become public when filed. SEE INSTRUCTIONS BEFORE COMPLETING.)

Name: []

Company: []

Address: []

City/State/Zip: []



Secretary of State
Statement of No Change
(Limited Liability Company)

LLC-12NC

18-B91351

FILED

In the office of the Secretary of State
of the State of California

MAY 31, 2018

This Space For Office Use Only

IMPORTANT — **Read instructions** before completing this form. This form may be used only if a complete Statement of Information has been filed previously and there has been no change.

Filing Fee – \$20.00

Copy Fee – \$1.00;
Certification Fee - \$5.00 plus copy fee

1. Limited Liability Company Name (Enter the **exact** name of the LLC as it is recorded with the California Secretary of State. Note: If you registered in California using an alternate name, see instructions.)

770 PAGE STREET, LLC

2. 12-Digit Secretary of State File Number

201625210081

3. State, Foreign Country or Place of Organization (only if formed outside of California)

CALIFORNIA

4. No Change Statement (Do not alter the No Change Statement. If there has been any change, please complete a Statement of Information (Form LLC-12).)

There has been no change in any of the information contained in the previous complete Statement of Information filed with the California Secretary of State.

5. The information contained herein is true and correct.

05/31/2018

Date

Sean Kenmore

Type or Print Name of Person Completing the Form

Member

Title

Signature

Return Address (Optional) (For communication from the Secretary of State related to this document, or if purchasing a copy of the filed document, enter the name of a person or company and the mailing address. This information will become public when filed. (SEE INSTRUCTIONS BEFORE COMPLETING.)

Name: []

Company:

Address:

City/State/Zip: []

To form a limited liability company in California, you can fill out this form, and submit for filing along with:

- A \$70 filing fee.
- A separate, non-refundable \$15 service fee also must be included, if you drop off the completed form.

Important! LLCs in California may have to pay a minimum \$800 yearly tax to the California Franchise Tax Board. For more information, go to <https://www.ftb.ca.gov>.

LLCs may not provide "professional services," as defined by California Corporations Code sections 13401(a) and 13401.3.

Note: Before submitting the completed form, you should consult with a private attorney for advice about your specific business needs.

FILED
Secretary of State
State of California

AUG 31 2016

lcc

This Space For Office Use Only

For questions about this form, go to www.sos.ca.gov/business/be/filing-tips.htm.

LLC Name (List the proposed LLC name exactly as it is to appear on the records of the California Secretary of State.)

① 776 Page Street, LLC

Proposed LLC Name

The name **must** include: LLC, L.L.C., Limited Liability Company, Limited Liability Co., Ltd. Liability Co. or Ltd. Liability Company; and **may not** include: bank, trust, trustee, incorporated, inc., corporation, or corp., insurer, or insurance company. For general entity name requirements and restrictions, go to www.sos.ca.gov/business/be/name-availability.htm.

Purpose

② The purpose of the limited liability company is to engage in any lawful act or activity for which a limited liability company may be organized under the California Revised Uniform Limited Liability Company Act.

LLC Addresses

③ a. 805 Jones Street, Berkeley CA 94710

Initial Street Address of Designated Office in CA - Do not list a P.O. Box *City (no abbreviations)* *State* *Zip*

b. _____
Initial Mailing Address of LLC, if different from 3a *City (no abbreviations)* *State* *Zip*

Service of Process (List a California resident or a California registered corporate agent that agrees to be your initial agent to accept service of process in case your LLC is sued. You may list any adult who lives in California. You may **not** list an LLC as the agent. Do not list an address if the agent is a California registered corporate agent as the address for service of process is already on file.)

④ a. Matthew Wadlund

Agent's Name

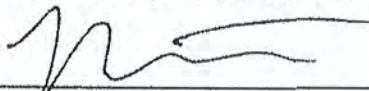
b. 805 Jones Street, Berkeley CA 94710

Agent's Street Address (if agent is not a corporation) - Do not list a P.O. Box *City (no abbreviations)* *State* *Zip*

Management (Check only one.)

- ⑤ The LLC will be managed by:
- One Manager More Than One Manager All Limited Liability Company Member(s)

This form must be signed by each organizer. If you need more space, attach extra pages that are 1-sided and on standard letter-sized paper (8 1/2" x 11"). All attachments are made part of these articles of organization.


Organizer - Sign here

Matthew Wadlund
Print your name here

Make check/money order payable to: **Secretary of State**
Upon filing, we will return one (1) uncertified copy of your filed document for free, and will certify the copy upon request and payment of a \$5 certification fee.

By Mail
Secretary of State
Business Entities, P.O. Box 944228
Sacramento, CA 94244-2280

Drop-Off
Secretary of State
1500 11th Street., 3rd Floor
Sacramento, CA 95814



Secretary of State
Statement of Information
(Limited Liability Company)

20

LLC-12

FILED
Secretary of State
State of California
DEC 12 2016

IMPORTANT — Read instructions before completing this form.

Filing Fee - \$20.00

Copy Fees – Face Page \$1.00 & .50 for each attachment page;
Certification Fee - \$5.00

See Secretary of State's records for exact entity name.
This Space For Office Use Only

1. Limited Liability Company Name **776 PAGE STREET**

2. 12-Digit Secretary of State File Number **201625210087**

3. State or Place of Organization (only if formed outside of California)

4. Business Addresses

a. Street Address of Principal Office - Do not list a P.O. Box 805 JONES STREET	City (no abbreviations) BERKELEY	State CA	Zip Code 94710
b. Mailing Address of LLC, if different than item 4a	City (no abbreviations)	State	Zip Code
c. Street Address of California Office, if Item 4a is not in California - Do not list a P.O. Box	City (no abbreviations)	State CA	Zip Code

5. Manager(s) or Member(s)

If no *managers* have been appointed or elected, provide the name and address of each *member*. At least one name **and** address must be listed. If the manager/member is an individual, complete Items 5a and 5c (leave Item 5b blank). If the manager/member is an entity, complete Items 5b and 5c (leave Item 5a blank). Note: The LLC cannot serve as its own manager or member. If the LLC has additional managers/members, enter the name(s) and addresses on Form LLC-12A (see instructions).

a. First Name, if an individual - Do not complete Item 5b MATTHEW	Middle Name	Last Name WADLUND	Suffix
-----------------------------------------------------------------------------	-------------	-----------------------------	--------

b. Entity Name - Do not complete Item 5a

c. Address 805 JONES STREET	City (no abbreviations) BERKELEY	State CA	Zip Code 94710
---------------------------------------	--------------------------------------------	--------------------	--------------------------

6. Agent for Service of Process

Item 6a and 6b: If the agent is an individual, the agent must reside in California and Item 6a and 6b must be completed with the agent's name and California address. Item 6c: If the agent is a California Registered Corporate Agent, a current agent registration certificate must be on file with the California Secretary of State and Item 6c must be completed (leave Item 6a-6b blank).

a. California Agent's First Name (if agent is not a corporation) MATTHEW	Middle Name	Last Name WADLUND	Suffix
------------------------------------------------------------------------------------	-------------	-----------------------------	--------

b. Street Address (if agent is not a corporation) - Do not list a P.O. Box 805 JONES STREET	City (no abbreviations) BERKELEY	State CA	Zip Code 94710
-------------------------------------------------------------------------------------------------------	--------------------------------------------	--------------------	--------------------------

c. California Registered Corporate Agent's Name (if agent is a corporation) – Do not complete item 6a or 6b

7. Type of Business

a. Describe the type of business or services of the Limited Liability Company
REAL ESTATE

8. Chief Executive Officer, if elected or appointed

a. First Name MATTHEW	Middle Name	Last Name WADLUND	Suffix
---------------------------------	-------------	-----------------------------	--------

b. Address 805 JONES STREET	City (no abbreviations) BERKELEY	State CA	Zip Code 94710
---------------------------------------	--------------------------------------------	--------------------	--------------------------

9. The information contained herein, including any attachments, is true and correct.

12/5/16
Date

MATTHEW WADLUND
Type or Print Name of Person Completing the Form

MANAGING MEMBER
Title

[Signature]
Signature

Return Address (Optional) (For communication from the Secretary of State related to this document, or if purchasing a copy of the filed document enter the name of a person or company and the mailing address. This information will become public when filed. SEE INSTRUCTIONS BEFORE COMPLETING.)

Name: []
Company: []
Address: []
City/State/Zip: []



Secretary of State
Statement of No Change
(Limited Liability Company)

LLC-12NC

18-B91413

FILED

In the office of the Secretary of State
of the State of California

MAY 31, 2018

This Space For Office Use Only

IMPORTANT — [Read instructions](#) before completing this form. This form may be used only if a complete Statement of Information has been filed previously and there has been no change.

Filing Fee – \$20.00

Copy Fee – \$1.00;
Certification Fee - \$5.00 plus copy fee

1. Limited Liability Company Name (Enter the **exact** name of the LLC as it is recorded with the California Secretary of State. Note: If you registered in California using an alternate name, [see instructions](#).)

776 PAGE STREET, LLC

2. 12-Digit Secretary of State File Number

201625210087

3. State, Foreign Country or Place of Organization (only if formed outside of California)

CALIFORNIA

No Change Statement (Do not alter the No Change Statement. If there has been any change, please complete a Statement of Information (Form LLC-12).)

There has been no change in any of the information contained in the previous complete Statement of Information filed with the California Secretary of State.

5. The information contained herein is true and correct.

05/31/2018

Sean Kenmore

Member

Date

Type or Print Name of Person Completing the Form

Title

Signature

Return Address (Optional) (For communication from the Secretary of State related to this document, or if purchasing a copy of the filed document, enter the name of a person or company and the mailing address. This information will become public when filed. [\(SEE INSTRUCTIONS BEFORE COMPLETING.\)](#))

Name: []

Company:

Address:

City/State/Zip: []

To form a limited liability company in California, you can fill out this form, and submit for filing along with:

- A \$70 filing fee.
- A separate, non-refundable \$15 service fee also must be included, if you drop off the completed form.

Important! LLCs in California may have to pay a minimum \$800 yearly tax to the California Franchise Tax Board. For more information, go to <https://www.ftb.ca.gov>.

LLCs may not provide "professional services," as defined by California Corporations Code sections 13401(a) and 13401.3.

Note: Before submitting the completed form, you should consult with a private attorney for advice about your specific business needs.

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Secretary of State
State of California

AUG 31 2016

loc

This Space For Office Use Only

For questions about this form, go to www.sos.ca.gov/business/be/filing-tips.htm.

LLC Name (List the proposed LLC name exactly as it is to appear on the records of the California Secretary of State.)

① 1442 Fifth Street, LLC

Proposed LLC Name

The name must include: LLC, L.L.C., Limited Liability Company, Limited Liability Co., Ltd, Liability Co. or Ltd. Liability Company; and may not include: bank, trust, trustee, incorporated, Inc., corporation, or corp., insurer, or insurance company. For general entity name requirements and restrictions, go to www.sos.ca.gov/business/be/name-availability.htm.

Purpose

- ② The purpose of the limited liability company is to engage in any lawful act or activity for which a limited liability company may be organized under the California Revised Uniform Limited Liability Company Act.

LLC Addresses

③ a. 805 Jones Street, Berkeley

CA 94710

Initial Street Address of Designated Office in CA - Do not list a P.O. Box

City (no abbreviations)

State Zip

b.

Initial Mailing Address of LLC, if different from 3a

City (no abbreviations)

State Zip

Service of Process (List a California resident or a California registered corporate agent that agrees to be your initial agent to accept service of process in case your LLC is sued. You may list any adult who lives in California. You may not list an LLC as the agent. Do not list an address if the agent is a California registered corporate agent as the address for service of process is already on file.)

④ a. Matthew Wadlund

Agent's Name

b. 805 Jones Street, Berkeley

CA 94710

Agent's Street Address (if agent is not a corporation) - Do not list a P.O. Box

City (no abbreviations)

State Zip

Management (Check only one.)

- ⑤ The LLC will be managed by:



One Manager

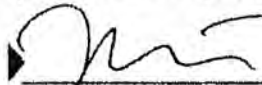


More Than One Manager



All Limited Liability Company Member(s)

This form must be signed by each organizer. If you need more space, attach extra pages that are 1-sided and on standard letter-sized paper (8 1/2" x 11"). All attachments are made part of these articles of organization.



Organizer - Sign here

Matthew Wadlund

Print your name here

Make check/money order payable to: **Secretary of State**

Upon filing, we will return one (1) uncertified copy of your filed document for free, and will certify the copy upon request and payment of a \$5 certification fee.

By Mail

Secretary of State
Business Entities, P.O. Box 944228
Sacramento, CA 94244-2280

Drop-Off

Secretary of State
1500 11th Street., 3rd Floor
Sacramento, CA 95814



Secretary of State
Statement of Information
(Limited Liability Company)

20

LLC-12

FILED
Secretary of State
State of California
DEC 12 2016

IMPORTANT — Read instructions before completing this form.

Filing Fee - \$20.00

Copy Fees – Face Page \$1.00 & .50 for each attachment page;
Certification Fee - \$5.00

See Secretary of State's
records for exact entity name.

This Space For Office Use Only

1. Limited Liability Company Name 1442 FIFTH STREET

2. 12-Digit Secretary of State File Number 2016 25210057

3. State or Place of Organization (only if formed outside of California)

4. Business Addresses

a. Street Address of Principal Office - Do not list a P.O. Box 805 JONES STREET	City (no abbreviations) BERKELEY	State CA	Zip Code 94710
b. Mailing Address of LLC, if different than Item 4a	City (no abbreviations)	State	Zip Code
c. Street Address of California Office, if Item 4a is not in California - Do not list a P.O. Box	City (no abbreviations)	State CA	Zip Code

5. Manager(s) or Member(s)

If no **managers** have been appointed or elected, provide the name and address of each **member**. At least one name and address must be listed. If the manager/member is an individual, complete Items 5a and 5c (leave Item 5b blank). If the manager/member is an entity, complete Items 5b and 5c (leave Item 5a blank). Note: The LLC cannot serve as its own manager or member. If the LLC has additional managers/members, enter the name(s) and addresses on Form LLC-12A (see instructions).

a. First Name, if an individual - Do not complete Item 5b
MATTHEW

Middle Name

Last Name
WADLUND

Suffix

b. Entity Name - Do not complete Item 5a

c. Address
805 JONES STREET

City (no abbreviations)
BERKELEY

State
CA

Zip Code
94710

6. Agent for Service of Process

Item 6a and 6b: If the agent is an individual, the agent must reside in California and Item 6a and 6b must be completed with the agent's name and California address. Item 6c: If the agent is a California Registered Corporate Agent, a current agent registration certificate must be on file with the California Secretary of State and Item 6c must be completed (leave Item 6a-6b blank).

a. California Agent's First Name (if agent is not a corporation)
MATTHEW

Middle Name

Last Name
WADLUND

Suffix

b. Street Address (if agent is not a corporation) - Do not list a P.O. Box
805 JONES STREET

City (no abbreviations)
BERKELEY

State
CA

Zip Code
94710

c. California Registered Corporate Agent's Name (if agent is a corporation) - Do not complete item 6a or 6b

7. Type of Business

a. Describe the type of business or services of the Limited Liability Company
REAL ESTATE

8. Chief Executive Officer, if elected or appointed

a. First Name
MATTHEW

Middle Name

Last Name
WADLUND

Suffix

b. Address
805 JONES STREET

City (no abbreviations)
BERKELEY

State
CA

Zip Code
94710

9. The information contained herein, including any attachments, is true and correct.

12/5/16

MATTHEW WADLUND

MANAGING MEMBER

Date

Type or Print Name of Person Completing the Form

Title

Signature

Return Address (Optional) (For communication from the Secretary of State related to this document, or if purchasing a copy of the filed document enter the name of a person or company and the mailing address. This information will become public when filed. SEE INSTRUCTIONS BEFORE COMPLETING.)

Name: []

Company: []

Address: []

City/State/Zip: []



Secretary of State
Statement of No Change
(Limited Liability Company)

LLC-12NC

18-B91406

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In the office of the Secretary of State
of the State of California

MAY 31, 2018

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IMPORTANT — **Read instructions** before completing this form. This form may be used only if a complete Statement of Information has been filed previously and there has been no change.

Filing Fee – \$20.00

Copy Fee – \$1.00;
Certification Fee - \$5.00 plus copy fee

1. Limited Liability Company Name (Enter the exact name of the LLC as it is recorded with the California Secretary of State. Note: If you registered in California using an alternate name, see instructions.)

1442 FIFTH STREET, LLC

2. 12-Digit Secretary of State File Number

201625210057

3. State, Foreign Country or Place of Organization (only if formed outside of California)

CALIFORNIA

4. No Change Statement (Do not alter the No Change Statement. If there has been any change, please complete a Statement of Information (Form LLC-12).)

There has been no change in any of the information contained in the previous complete Statement of Information filed with the California Secretary of State.

5. The information contained herein is true and correct.

05/31/2018

Date

Sean Kenmore

Type or Print Name of Person Completing the Form

Member

Title

Signature

Return Address (Optional) (For communication from the Secretary of State related to this document, or if purchasing a copy of the filed document, enter the name of a person or company and the mailing address. This information will become public when filed. (SEE INSTRUCTIONS BEFORE COMPLETING.)

Name:

Company:

Address:

City/State/Zip:

To form a limited liability company in California, you can fill out this form, and submit for filing along with:

- A \$70 filing fee.
- A separate, non-refundable \$15 service fee also must be included, if you drop off the completed form.

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Note: Before submitting the completed form, you should consult with a private attorney for advice about your specific business needs.

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Secretary of State
State of California

AUG 31 2016



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LLC Name (List the proposed LLC name exactly as it is to appear on the records of the California Secretary of State.)

① 1444 Fifth Street, LLC

Proposed LLC Name

The name must include: LLC, L.L.C., Limited Liability Company, Limited Liability Co., Ltd. Liability Co. or Ltd. Liability Company; and may not include: bank, trust, trustee, incorporated, inc., corporation, or corp., insurer, or insurance company. For general entity name requirements and restrictions, go to www.sos.ca.gov/business/be/name-availability.htm.

Purpose

② The purpose of the limited liability company is to engage in any lawful act or activity for which a limited liability company may be organized under the California Revised Uniform Limited Liability Company Act.

LLC Addresses

③ a. 805 Jones Street, Berkeley

Initial Street Address of Designated Office in CA - Do not list a P.O. Box

City (no abbreviations)

CA 94710

State Zip

b.

Initial Mailing Address of LLC, if different from 3a

City (no abbreviations)

State Zip

Service of Process (List a California resident or a California registered corporate agent that agrees to be your initial agent to accept service of process in case your LLC is sued. You may list any adult who lives in California. You may not list an LLC as the agent. Do not list an address if the agent is a California registered corporate agent as the address for service of process is already on file.)

④ a. Matthew Wadlund

Agent's Name

b. 805 Jones Street, Berkeley

Agent's Street Address (if agent is not a corporation) - Do not list a P.O. Box

City (no abbreviations)

CA 94710

State Zip

Management (Check only one.)

⑤ The LLC will be managed by:



One Manager



More Than One Manager



All Limited Liability Company Member(s)

This form must be signed by each organizer. If you need more space, attach extra pages that are 1-sided and on standard letter-sized paper (8 1/2" x 11"). All attachments are made part of these articles of organization.



Organizer - Sign here

Matthew Wadlund

Print your name here

Make check/money order payable to: Secretary of State

Upon filing, we will return one (1) uncertified copy of your filed document for free, and will certify the copy upon request and payment of a \$5 certification fee.

By Mail

Secretary of State
Business Entities, P.O. Box 944228
Sacramento, CA 94244-2280

Drop-Off

Secretary of State
1500 11th Street., 3rd Floor
Sacramento, CA 95814



Secretary of State
Statement of Information
(Limited Liability Company)

20

LLC-12

FILED
Secretary of State
State of California
DEC 12 2016

IMPORTANT — Read instructions before completing this form.

Filing Fee - \$20.00

Copy Fees – Face Page \$1.00 & .50 for each attachment page;
Certification Fee - \$5.00

See Secretary of State's
records for exact entity name.
This Space For Office Use Only

1. Limited Liability Company Name 1444 FIFTH STREET	
2. 12-Digit Secretary of State File Number 201625210418	3. State or Place of Organization (only if formed outside of California)

4. Business Addresses

a. Street Address of Principal Office - Do not list a P.O. Box 805 JONES STREET	City (no abbreviations) BERKELEY	State CA	Zip Code 94710
b. Mailing Address of LLC, if different than item 4a	City (no abbreviations)	State	Zip Code
c. Street Address of California Office, if Item 4a is not in California - Do not list a P.O. Box	City (no abbreviations)	State CA	Zip Code

5. Manager(s) or Member(s)

If no **managers** have been appointed or elected, provide the name and address of each **member**. At least one name and address must be listed. If the manager/member is an individual, complete Items 5a and 5c (leave Item 5b blank). If the manager/member is an entity, complete Items 5b and 5c (leave Item 5a blank). Note: The LLC cannot serve as its own manager or member. If the LLC has additional managers/members, enter the name(s) and addresses on Form LLC-12A (see instructions).

a. First Name, if an individual - Do not complete Item 5b MATTHEW	Middle Name	Last Name WADLUND	Suffix
b. Entity Name - Do not complete Item 5a			
c. Address 805 JONES STREET	City (no abbreviations) BERKELEY	State CA	Zip Code 94710

6. Agent for Service of Process

Item 6a and 6b: If the agent is an individual, the agent must reside in California and Item 6a and 6b must be completed with the agent's name and California address. **Item 6c:** If the agent is a California Registered Corporate Agent, a current agent registration certificate must be on file with the California Secretary of State and Item 6c must be completed (leave Item 6a-6b blank).

a. California Agent's First Name (if agent is not a corporation) MATTHEW	Middle Name	Last Name WADLUND	Suffix
b. Street Address (if agent is not a corporation) - Do not list a P.O. Box 805 JONES STREET	City (no abbreviations) BERKELEY	State CA	Zip Code 94710
c. California Registered Corporate Agent's Name (if agent is a corporation) - Do not complete Item 6a or 6b			

7. Type of Business

a. Describe the type of business or services of the Limited Liability Company REAL ESTATE

8. Chief Executive Officer, if elected or appointed

a. First Name MATTHEW	Middle Name	Last Name WADLUND	Suffix
b. Address 805 JONES STREET	City (no abbreviations) BERKELEY	State CA	Zip Code 94710

9. The information contained herein, including any attachments, is true and correct.

12/5/16
Date

MATTHEW WADLUND
Type or Print Name of Person Completing the Form

MANAGING MEMBER
Title

Signature

Return Address (Optional) (For communication from the Secretary of State related to this document, or if purchasing a copy of the filed document enter the name of a person or company and the mailing address. This information will become public when filed. SEE INSTRUCTIONS BEFORE COMPLETING.)

Name: []
Company: []
Address: []
City/State/Zip: []



Secretary of State
Statement of No Change
(Limited Liability Company)

LLC-12NC

18-B91396

FILED

In the office of the Secretary of State
of the State of California

MAY 31, 2018

This Space For Office Use Only

IMPORTANT — [Read instructions](#) before completing this form. This form may be used only if a complete Statement of Information has been filed previously and there has been no change.

Filing Fee – \$20.00

Copy Fee – \$1.00;
Certification Fee - \$5.00 plus copy fee

1. Limited Liability Company Name (Enter the **exact** name of the LLC as it is recorded with the California Secretary of State. Note: If you registered in California using an alternate name, [see instructions](#).)

1444 FIFTH STREET, LLC

2. 12-Digit Secretary of State File Number

201625210418

3. State, Foreign Country or Place of Organization (only if formed outside of California)

CALIFORNIA

No Change Statement (Do not alter the No Change Statement. If there has been any change, please complete a Statement of Information (Form LLC-12).)

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5. The information contained herein is true and correct.

05/31/2018

Date

Sean Kenmore

Type or Print Name of Person Completing the Form

Member

Title

Signature

Return Address (Optional) (For communication from the Secretary of State related to this document, or if purchasing a copy of the filed document, enter the name of a person or company and the mailing address. This information will become public when filed. [\(SEE INSTRUCTIONS BEFORE COMPLETING.\)](#))

Name: []

Company:

Address:

City/State/Zip: []

LLC-1

Articles of Organization of a Limited Liability Company (LLC)

201625210414

To form a limited liability company in California, you can fill out this form, and submit for filing along with:

- A \$70 filing fee.
- A separate, non-refundable \$15 service fee also must be included, if you drop off the completed form.

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LLCs may not provide "professional services," as defined by California Corporations Code sections 13401(a) and 13401.3.

Note: Before submitting the completed form, you should consult with a private attorney for advice about your specific business needs.

FILED Secretary of State State of California

AUG 31 2016

lcc

This Space For Office Use Only

For questions about this form, go to www.sos.ca.gov/business/be/filing-tips.htm.

LLC Name (List the proposed LLC name exactly as it is to appear on the records of the California Secretary of State.)

1 1446 Fifth Street, LLC

Proposed LLC Name

The name must include: LLC, L.L.C., Limited Liability Company, Limited Liability Co., Ltd. Liability Co. or Ltd. Liability Company; and may not include: bank, trust, trustee, incorporated, inc., corporation, or corp., insurer, or insurance company. For general entity name requirements and restrictions, go to www.sos.ca.gov/business/be/name-availability.htm.

Purpose

2 The purpose of the limited liability company is to engage in any lawful act or activity for which a limited liability company may be organized under the California Revised Uniform Limited Liability Company Act.

LLC Addresses

3 a. 805 Jones Street, Berkeley

CA 94710

Initial Street Address of Designated Office in CA - Do not list a P.O. Box

City (no abbreviations)

State Zip

b.

Initial Mailing Address of LLC, if different from 3a

City (no abbreviations)

State Zip

Service of Process (List a California resident or a California registered corporate agent that agrees to be your initial agent to accept service of process in case your LLC is sued. You may list any adult who lives in California. You may not list an LLC as the agent. Do not list an address if the agent is a California registered corporate agent as the address for service of process is already on file.)

4 a. Matthew Wadlund

Agent's Name

b. 805 Jones Street, Berkeley

CA 94710

Agent's Street Address (if agent is not a corporation) - Do not list a P.O. Box

City (no abbreviations)

State Zip

Management (Check only one.)

5 The LLC will be managed by:



One Manager



More Than One Manager



All Limited Liability Company Member(s)

This form must be signed by each organizer. If you need more space, attach extra pages that are 1-sided and on standard letter-sized paper (8 1/2" x 11"). All attachments are made part of these articles of organization.

Handwritten signature of Matthew Wadlund

Organizer - Sign here

Matthew Wadlund

Print your name here

Make check/money order payable to: Secretary of State. Upon filing, we will return one (1) uncertified copy of your filed document for free, and will certify the copy upon request and payment of a \$5 certification fee.

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Secretary of State
Statement of Information
(Limited Liability Company)

20

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1. Limited Liability Company Name 1446 FIFTH STREET	
2. 12-Digit Secretary of State File Number 201625210414	3. State or Place of Organization (only if formed outside of California)

4. Business Addresses			
a. Street Address of Principal Office - Do not list a P.O. Box 805 JONES STREET	City (no abbreviations) BERKELEY	State CA	Zip Code 94710
b. Mailing Address of LLC, if different than item 4a	City (no abbreviations)	State	Zip Code
c. Street Address of California Office, if Item 4a is not in California - Do not list a P.O. Box	City (no abbreviations)	State CA	Zip Code

5. Manager(s) or Member(s) If no **managers** have been appointed or elected, provide the name and address of each **member**. At least one name and address must be listed. If the manager/member is an individual, complete Items 5a and 5c (leave Item 5b blank). If the manager/member is an entity, complete Items 5b and 5c (leave Item 5a blank). Note: The LLC cannot serve as its own manager or member. If the LLC has additional managers/members, enter the name(s) and addresses on Form LLC-12A (see instructions).

a. First Name, if an individual - Do not complete Item 5b MATTHEW	Middle Name	Last Name WADLUND	Suffix
b. Entity Name - Do not complete Item 5a			
c. Address 805 JONES STREET	City (no abbreviations) BERKELEY	State CA	Zip Code 94710

6. Agent for Service of Process Item 6a and 6b: If the agent is an individual, the agent must reside in California and Item 6a and 6b must be completed with the agent's name and California address. Item 6c: If the agent is a California Registered Corporate Agent, a current agent registration certificate must be on file with the California Secretary of State and Item 6c must be completed (leave Item 6a-6b blank).

a. California Agent's First Name (if agent is not a corporation) MATTHEW	Middle Name	Last Name WADLUND	Suffix
b. Street Address (if agent is not a corporation) - Do not list a P.O. Box 805 JONES STREET	City (no abbreviations) BERKELEY	State CA	Zip Code 94710
c. California Registered Corporate Agent's Name (if agent is a corporation) – Do not complete item 6a or 6b			

7. Type of Business

a. Describe the type of business or services of the Limited Liability Company
REAL ESTATE

8. Chief Executive Officer, if elected or appointed

a. First Name MATTHEW	Middle Name	Last Name WADLUND	Suffix
b. Address 805 JONES STREET	City (no abbreviations) BERKELEY	State CA	Zip Code 94710

9. The information contained herein, including any attachments, is true and correct.

12/5/16 **MATTHEW WADLUND** **MANAGING MEMBER**

Date Type or Print Name of Person Completing the Form Title Signature

Return Address (Optional) (For communication from the Secretary of State related to this document, or if purchasing a copy of the filed document enter the name of a person or company and the mailing address. This information will become public when filed. SEE INSTRUCTIONS BEFORE COMPLETING.)

Name: []

Company: []

Address: []

City/State/Zip: []



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Statement of No Change
(Limited Liability Company)

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In the office of the Secretary of State
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MAY 31, 2018

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1. Limited Liability Company Name (Enter the exact name of the LLC as it is recorded with the California Secretary of State. Note: If you registered in California using an alternate name, see instructions.)

1446 FIFTH STREET, LLC

2. 12-Digit Secretary of State File Number

201625210414

3. State, Foreign Country or Place of Organization (only if formed outside of California)

CALIFORNIA

4. No Change Statement (Do not alter the No Change Statement. If there has been any change, please complete a Statement of Information (Form LLC-12).)

There has been no change in any of the information contained in the previous complete Statement of Information filed with the California Secretary of State.

5. The information contained herein is true and correct.

05/31/2018

Date

Sean Kenmore

Type or Print Name of Person Completing the Form

Member

Title

Signature

Return Address (Optional) (For communication from the Secretary of State related to this document, or if purchasing a copy of the filed document, enter the name of a person or company and the mailing address. This information will become public when filed. (SEE INSTRUCTIONS BEFORE COMPLETING.)

Name: []

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Exhibit C

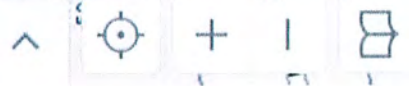


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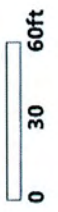


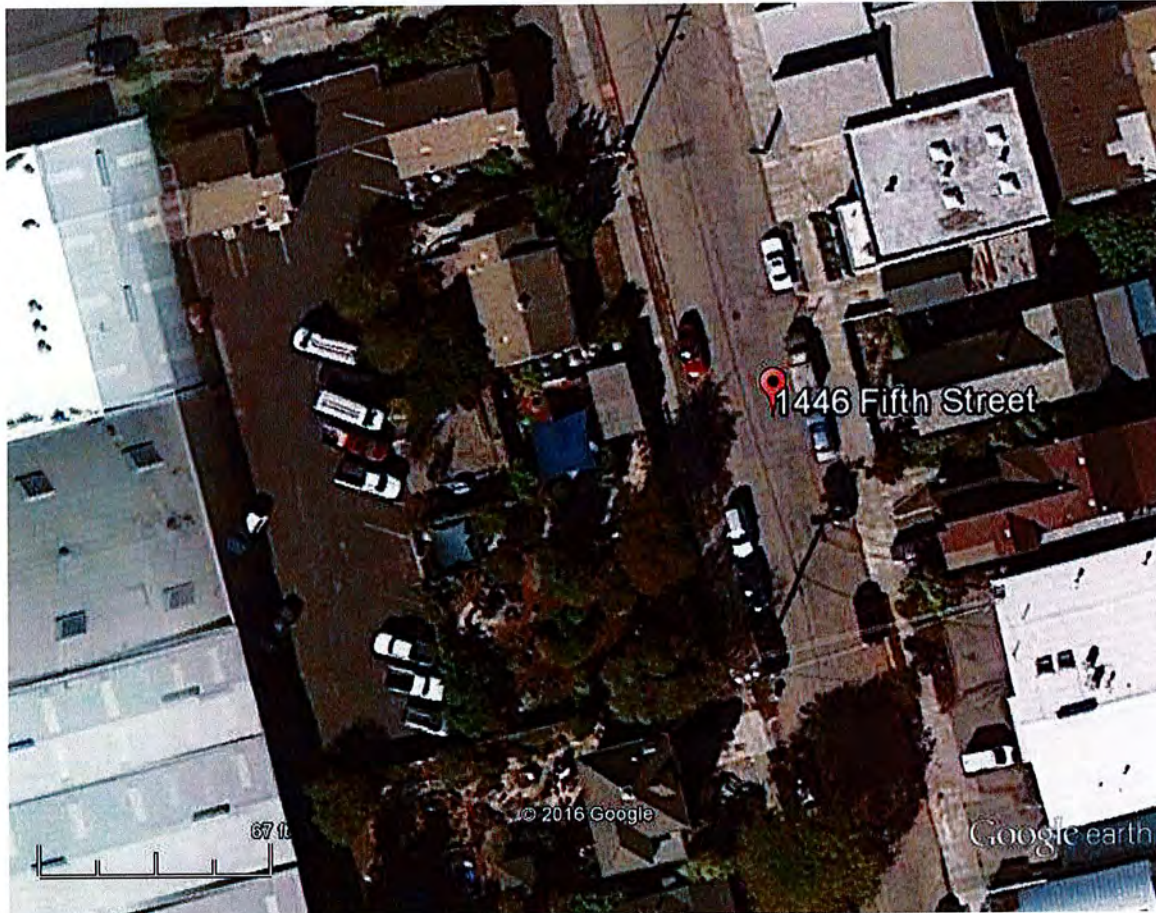


Exhibit D

Peters & Ross

Geotechnical & Geoenvironmental Consultants

Geotechnical Investigation for 1444 & 1446 5th Street Development



1444 & 1446 5th Street, Berkeley, California

Peters & Ross
Geotechnical & Geoenvironmental
Consultants

December 16, 2016
Project No. 16183.001

Mr. Matthew Wadlund
Wadlund + Design Studio
805 Jones Street
Berkeley, CA 94710

Geotechnical Investigation
1444 and 1446 5th Street, Berkeley, California

Dear Mr. Wadlund:

In accordance with your authorization, Peters & Ross has completed a geotechnical investigation for the above referenced project. The accompanying report presents the results of our field investigation, laboratory testing, and engineering analyses. Based on this information, it is Peters & Ross' opinion that the site is suitable for the proposed improvements.

Peters & Ross should also be retained:

- to review geotechnical aspects of project plans and specifications,
- to provide supplemental recommendations should significant changes in the planned improvements be made, and
- to provide geotechnical engineering observation and testing services during construction, in order to check that the recommendations presented in this report are properly implemented into the completed project.

We appreciate the opportunity to provide geotechnical engineering services to you. If you have any questions, please call.

Sincerely,

Peter K. Mundy, P.E., G.E.
Geotechnical Engineer 2217



INTRODUCTION

This report presents the results of a geotechnical investigation performed by Peters & Ross for the planned mixed use development to be constructed at 1444 and 1446 5th Street in Berkeley, California. The location of the project is shown on the Site Vicinity Map, Figure 1. The ground surface topography near the site is shown on Figure 2.

Project Description

The project site is a relatively level rectangular lot with total maximum plan dimensions of about 100 feet by 125 feet, located on the west side of 5th Street. The site is currently occupied by a parking lot and a garden area. Plans are to demolish the existing parking lot and garden and to develop new single-family homes and a mixed use facility.

Scope of Services

Peters & Ross services on the project were limited to the following:

- Drilling three exploratory test borings, extending one boring to 50 feet
- Logging the test borings and obtaining samples of the materials encountered
- Performing laboratory tests on selected samples
- Performing engineering analyses sufficient to develop conclusions and recommendations regarding:
 1. Site geology and seismicity including liquefaction susceptibility;
 2. Soil and groundwater conditions;
 3. The most appropriate foundation type for the new buildings;
 4. Geotechnical design parameters for the recommended foundation type;
 5. Geotechnical aspects of site drainage; and
 6. Construction considerations.
- Preparing this report.

FIELD EXPLORATION AND LABORATORY TESTING

Subsurface conditions were explored by drilling three test borings to a maximum depth of 50 feet using a truck mounted CME-75 drill rig. The location of the borings are shown on the Site Plan, Figure 3. Samples of the materials encountered in the borings were obtained at frequent depth intervals, for field classification and laboratory testing. A description of the drilling and sampling equipment used and other details of the subsurface exploration, as well as the logs of the test borings, are presented in Appendix A. The laboratory tests performed are discussed in Appendix B.

SITE CONDITIONS

Geology and Seismicity

The site is located in the Coast Ranges geomorphic province of California. The Coast Ranges show strong northwest-southeast geologic trends induced by folds and faults. The site geology has been mapped by Radbruch (1957) and updated by Seismic Hazard Zone for the Richmond Quadrangle (California Geological Survey, 2003). The geologic unit mapped at the site by Radbruch is described as the Quaternary Temescal formation, which is comprised of alluvial-fan deposits with interfingering lenses of clayey gravel, sandy silty clay, and sand-clay-silt mixtures. The CGS (2003) maps the site as having surficial soils of the Quaternary Holocene alluvial fan deposits and deeper soils of the older Quaternary Pleistocene alluvial fan deposits.

The site is located in a seismically active area of California. Several major fault systems capable of generating strong earthquake ground shaking have been identified near the site. The site is about 3.5 kilometers southwest of the active trace of the Hayward Fault. This and other regional faults are capable of generating large magnitude earthquakes that could cause strong groundshaking at the site. The site is located within an area susceptible to liquefaction as shown on the State Seismic Hazard Zones map.

Subsurface Conditions

Generally, 4.5 to 8.0 feet of sandy fat clays blanket the site. Atterberg limits tests of the fat clay materials taken at a depth of 4.5 feet in Boring 1 indicate a liquid limit of 58 percent and a plasticity index of 40 percent with 60 percent passing the No. 200 sieve. These results indicate that the sandy fat clay materials have a very high expansion potential (expansive soils shrink and swell in response to changes in moisture). The fat clay materials were underlain by layers of sandy lean clays and sandy lean clays with gravel materials which extended to the depths explored.

Groundwater

Groundwater was encountered at a depth of 25 feet in Boring 1, and 15 feet in Borings 2 and 3, during drilling, and rose to 4.5 feet. Upon completion of the drilling the boreholes were backfilled with grout in accordance with the City of Berkeley permit. It should be noted that groundwater levels typically fluctuate a few feet seasonally.

CONCLUSIONS AND RECOMMENDATIONS

From a soil and foundation engineering standpoint, it is our opinion that the site is suitable for the proposed development. The primary geotechnical concern is the presence of highly expansive clay soils. However, all of the conclusions and recommendations

presented in this report should be incorporated in the design and construction of the project to avoid possible soil and foundation problems.

1.0 Expansive Soils

The clayey soils that blanket the site have a very high expansion potential. When expansive soils are subjected to increases in moisture content, such as during the rainy season, they swell if unconfined. If concrete slabs or shallow foundations confine the expansive soils, they can exert significant pressures when subjected to moisture increases. These pressures can cause slabs and shallow foundations to heave and crack. When the soils dry, they shrink, causing slabs and shallow foundations to settle.

Expansive clays are common in the San Francisco Bay Area. Over the past several decades, expansive soil movements have caused extensive damage to residential and commercial structures, slabs, and pavements throughout the Bay Area. The local climate, with its pronounced wet and dry seasons, is a main cause of significant seasonal moisture changes that cause the expansive soils to shrink and swell.

There are a number of methods available for reducing the adverse effects of expansive soils. These include removing the expansive soils, replacing expansive soils with non-expansive engineered fill, deepening foundations to develop support below the zone of significant seasonal moisture change (about 32 to 48 inches), designing foundation/slab systems to resist uplift pressures generated by swelling soils, and/or providing drainage and landscaping to minimize seasonal moisture fluctuations in the near-surface soils. Drainage and landscaping improvements adjacent to slabs and foundations should be designed to promote efficient runoff during the rainy season, and provide occasional sprinkling during the summer.

In order to minimize the adverse effects of expansive soils, the proposed improvements should be supported on a deepened footing or a stiffened reinforced thin mat foundation system.

2.0 Seismic Hazards

Potential seismic hazards resulting from a nearby moderate to major earthquake can generally be classified as primary and secondary. The primary effect is ground rupture, also called surface faulting. The common secondary seismic hazards include ground shaking, and liquefaction. The following sections present a discussion of these hazards as they apply to the site. Based on topographic and lithologic data, the risk of soil liquefaction, lateral spreading, landslides, tsunamis, flooding or seiches is considered low to negligible at this site.

2.1 Ground Rupture

There are no known active faults crossing the site and the property is not located within an Earthquake Fault Special Study Zone. Therefore the risk of fault rupture is considered low at the site.

2.2 Ground Shaking

An earthquake of moderate to high magnitude could cause considerable ground shaking at the site. To mitigate the shaking effects, all structures should be designed using sound engineering judgment and the 2013 California Building Code (CBC) requirements. According to USGS 2013 Design Maps website, the MCE peak ground acceleration for a CBC Site Class D (Stiff Soils) is 0.770g with a long period transition-period of 8 seconds.

2.3 Liquefaction

Soil liquefaction results from loss of strength during cyclic loading, such as imposed by earthquakes. Soils most susceptible to liquefaction are clean, loose, saturated, uniformly graded, fine-grained sands. The materials encountered in the three exploratory test borings consisted of stiff sandy lean clays. We judge that the potential for liquefaction during seismic shaking at the site is low.

2.4 Lateral Spreading

Lateral spread is the finite, lateral displacement of sloping ground (0.1 to <6 percent) as a result of pore pressure buildup or liquefaction in a shallow, underlying soil deposit during an earthquake. Lateral spreading, as a result of liquefaction, occurs when a soil mass slides laterally on a liquefied layer, and gravitational and inertial forces cause the layer, and the overlying non-liquefied material, to move in a downslope direction. The magnitude of lateral spreading movements depends on earthquake magnitude, distance between the site and the seismic event, thickness of the liquefied layer, ground slope or ratio of free-face height to distance between the free face and structure, fines content, average particle size of the materials comprising the liquefied layer, and the standard penetration rates of the materials. As stated in the previous section the liquefaction potential was deemed to be low, therefore lateral spread potential at the building site is also considered low.

2.5 California Building Code (CBC) Seismic Design Parameters

In accordance with Section 1613 of the 2013 CBC, Peters & Ross classifies the site as Site Class D with a latitude of 37.8763 degrees and a longitude of -122.3010 degrees. The CBC parameters presented in the following table should be used for seismic design.

PERIOD (sec)	0.2	1.0
SPECTRAL RESPONSE S _s , S _I	2.002	0.815
SITE COEFFICIENT F _a , F _v (SITE CLASS D)	1.0	1.5
MAXIMUM SPECTRAL RESPONSE S _{ms} , S _{ml}	2.002	1.223
DESIGN SPECTRAL RESPONSE S _{Ds} , S _{DI}	1.335	0.815

3.0 Corrosive Soils

Based on sulfate testing done at nearby sites, the native soils are classified within the negligible sulfate exposure levels. The materials placed at the finished pad grade may be different from the on-site soils. Therefore, additional samples should be collected after site grading for future corrosivity testing.

4.0 Earthwork

4.1 Clearing and Site Preparation

The site should be cleared of any foundations, flatwork, retaining walls, trees, abandoned utilities, and buried structures identified for demolition on the construction plans and removed from the site. Holes resulting from the removal of any obstructions that extend below the proposed finished grade should be cleared and backfilled with suitable material compacted to the requirements given below under Compaction. We recommend that the backfilling operations for any excavations to remove deleterious material be carried out under the observation of the soil engineer, so that these excavations will be properly backfilled.

After clearing, the portions of the site containing surface vegetation or organic laden topsoil should be stripped to an appropriate depth to remove these materials. The amount of actual stripping should be determined in the field by the soil engineer at the time of construction. The cleared and stripped layer should be removed from the site or stockpiled for later use in landscaping, if desired.

4.2 Subgrade Preparation

After the site has been properly cleared and stripped and any necessary excavations made, the exposed soils to receive structural fill, slabs-on-grade or pavements should be scarified to a depth of 6 inches, moisture conditioned to slightly above optimum water content and compacted to the requirements for structural fill.

4.3 Material for Fill

All on-site soils below the stripped layer and having an organic content of less than 3% by volume can be used as fill except where non-expansive import is required beneath the slabs. However, all fill placed at the site, including on-site soils, should not contain rocks or lumps larger than 6 inches in greatest dimension with not more than 15% larger than

2.5 inches. In addition, the required import fill should be predominantly granular with a plasticity index of 12 or less.

4.4 Compaction

All structural fill less than 5 feet thick should be compacted to at least 90% relative compaction as determined by ASTM Test Designation D 1557, except for the upper 6 inches of subgrade soils under pavements which should be compacted to at least 95% relative compaction. Structural fill or wall backfill greater than 5 feet high should be compacted to at least 95% relative compaction. Fill material should be spread and compacted in lifts not exceeding 8 inches in uncompacted thickness. We should note that if construction proceeds during or immediately after the wet winter months, it may require time to dry the on-site soils to be used as fill since their moisture content will probably be appreciably above optimum.

4.5 Trench Backfill

Pipeline trenches should be backfilled with fill placed in lifts not exceeding 8 inches in uncompacted thickness. The following table presents our recommendations for compaction requirements.

Condition	Trench Depth	Compaction Requirements*	
		Native Soils	Granular Import
Non-Improved Area	Any Depth	85%	90%
Improved Area	Less than 5 feet	Upper 3 feet 90% Lower 2 feet 85%	Entire backfill 90%
	5 feet or greater but less than 8 feet	Entire backfill 90%	Entire backfill 95%
	8 feet or greater	Entire backfill 95%	Entire backfill 95%

* Assumes a reasonable "cushion" layer around the pipe.

If imported granular soil is used, sufficient water should be added during the trench backfilling operations to prevent the soil from "bulking" during compaction. In all of the cases outlined above, we recommend that the upper 6 inches of subgrade under pavement and baserock be compacted to at least 95% relative compaction. All compaction operations should be performed by mechanical means only. We recommend against jetting unless the backfill material is granular (sand or gravel) and the water used in jetting is able to rapidly flow out of the trench.

If granular backfill is used for utility trenches, we recommend that an impermeable plug or mastic sealant be used where utilities enter the building to minimize the potential for free water or moisture to enter below the building. Finally, because of the potential for catastrophic collapse of trench walls we recommend that the contractor carefully evaluate the stability of all trenches and use temporary shoring where appropriate. The design and installation of the temporary shoring should be wholly the responsibility of the contractor. In addition, all state and local regulations governing safety around such excavations should be carefully followed.

4.6 Drainage

Positive surface gradients of at least 3% for a minimum distance of 5 feet should be provided adjacent to the building so as to direct surface water away from foundations and slabs toward suitable discharge facilities. Ponding of surface water should not be allowed adjacent to the structure or on pavements. We also recommend that rainwater collected on the roof of the building be transported through gutters, downspouts and closed pipes to a suitable discharge facility. The best discharge location for the collected water is probably the storm drain line. We recommend that the landscape architect, general contractor, and landscaping contractor on this project be advised of this recommendation to minimize the potential for its omission during construction. Some nominal maintenance should be expected after the construction has been completed. Should ownership of this property change hands, the new owner should be informed of the existence of this report, the importance of maintaining proper surface drainage, and not adversely change the grading or drainage facilities.

5.0 Foundations

5.1 Footing Foundations

Peters & Ross recommends that the buildings be supported on conventional continuous and isolated spread footings bearing on undisturbed native soils. Any soft zones encountered in the footing trenches should be overexcavated and recompacted under the observation of the geotechnical engineer. All footings should be founded at least 24 inches below the lowest adjacent finished grade. Footings located adjacent to other footings or utility trenches should have their bearing surfaces situated below an imaginary 1.5 horizontal to 1 vertical plane projected upward from the bottom of the adjacent footing or utility trench.

At the above depth, the footings should be designed to impose net allowable bearing pressures not exceeding 2000 pounds per square foot (psf) due to dead loads, 3000 psf due to dead plus live loads, and 4000 psf for all loads including wind or seismic. Resistance to lateral loads will be provided by a combination of friction along the bottoms of the footings, and passive pressures developed along the sides of the footings. Frictional resistance should be calculated by multiplying the vertical dead load times a

friction coefficient of 0.35. Passive resistance should be calculated using an equivalent fluid weight of 350 pounds per cubic foot (pcf).

All continuous footings should be designed with adequate top and bottom reinforcement to provide structural continuity and to permit spanning of local irregularities. Any visible cracks in the bottoms of the footing excavations should be closed by wetting prior to construction of the foundations. To assure that footings are founded on appropriate material, we recommend that we observe the footing excavations prior to placing steel or concrete.

5.2 Stiffened Reinforced Thin Mat Foundation

Alternatively the planned structures can be supported on a stiffened reinforced thin mat foundation system. The mat foundation should have a minimum thickness of 5 inches and should be designed in accordance with the 2013 California Building Code Section 1808.6.2. The mat should be reinforced with steel reinforcing bars rather than welded wire mesh. At a minimum, slab reinforcement should consist of No. 4 bars on 12-inch centers in both directions, placed at the center of the slab thickness. Spacers should be placed beneath the mesh of reinforcing bars, to maintain their positioning near the center of the slab during the concrete pour.

The mat should be provided with exterior and interior stiffening beams with maximum spacing of 15 feet. The beams should have a minimum width of 12-inches and should extend a minimum of 30-inches below top of slab. In addition, the stiffening beams should be designed to cantilever 5 feet.

The subgrade material under the mat foundation should be uniform. The upper 12 inches of the pad subgrade should be scarified and moisture conditioned to a moisture content at least 5 percentage points above optimum (ASTM D-1557). The subgrade should be kept moist until the slab is poured. At least 6 inches of clean, crushed rock should be placed over the prepared subgrade, to provide a capillary moisture break. If the migration of moisture vapor through the slab is undesirable, a vapor barrier blanketed with 2 inches of clean sand should be placed over the gravel. We also recommend that the specifications for the mat require that moisture emission tests be performed on the mat prior to the installation of the flooring. No flooring should be installed until safe moisture emission levels are recorded for the type of flooring to be used.

7.0 Exterior Slabs –on-Grade

We recommend that any slabs-on-grade be supported on a minimum of 9 inches of imported, compacted, non-expansive fill. The subgrade should be recompact to at least 90 percent relative compaction at a moisture content of 5 percent above optimum. The subgrade should be kept moist until the slab is poured. In any slab area where minor floor wetness would be undesirable, at least 4 inches of $\frac{3}{4}$ inch gravel should be placed

over the prepared subgrade, to provide a capillary moisture break. A 10-mil thick vapor barrier blanketed with 2 inches of clean sand should be placed over the gravel. This can be used in lieu of the upper 6 inches of the non-expansive fill.

The slab should have a minimum thickness of 4-inches and should be reinforced with steel reinforcing bars rather than welded wire mesh. At a minimum, slab reinforcement should consist of No. 4 bars on 18-inch centers in both directions, placed at the center of the slab thickness. Spacers should be placed beneath the mesh of reinforcing bars, to maintain their positioning near the center of the slab during the concrete pour. Exterior slabs should be structurally independent from the perimeter grade beams and be free floating. Score joints should be provided at a maximum spacing of 10 feet in both directions. The slabs should be appropriately reinforced according to structural requirements; concentrated loads may require additional reinforcing.

The use of free floating slabs for interior floors may result in damage to the proposed architectural finishes. Peters & Ross should be contacted if interior slabs are proposed. Interior floors should be designed to resist an uplift pressure of 1000 pounds per square foot.

8.0 Plan Review and Geotechnical Engineering Services during Construction

Peters & Ross should review project plans, to check that the geotechnical engineering recommendations contained in this report are properly incorporated.

Peters & Ross should provide geotechnical observation and testing services on an as-needed basis during construction, to check that geotechnical aspects of the work are completed in accordance with the plans. These services should include observing site grading, observing foundation excavations, testing the compaction of fill, and checking surface drains. In addition, Peters & Ross should provide consultation regarding geotechnical concerns that arise during construction. Peters & Ross cannot accept responsibility for geotechnical aspects of construction that are not observed by its staff.

We will make every reasonable effort to accommodate the contractor's work schedule during construction, so that necessary observations and tests can be performed in a timely manner to avoid construction delays. However, since our field services are often required on several projects concurrently, we request that 48 hours advance notice be given for site visits, in order to minimize scheduling conflicts.

LIMITATIONS

Peters & Ross services consist of professional opinions and recommendations that are made in accordance with generally accepted geotechnical engineering principles and practices. The opinions and recommendations presented in this report are based on a site reconnaissance, three exploratory test borings, laboratory testing, and engineering analyses. This warranty is in lieu of all other warranties either expressed or implied.

Subsurface conditions commonly vary significantly from those encountered at the test boring location. Unanticipated, adverse soil conditions encountered during construction often require additional expenditures to achieve a properly constructed project. It is advised that a contingency fund be established to accommodate possible consulting and construction cost increases due to unanticipated conditions.

LIST OF FIGURES

Figure 1 Site Vicinity Map
Figure 2 Site Topography
Figure 3 Site Plan

APPENDICES

Appendix A Field Investigation
Appendix B Laboratory Testing

DISTRIBUTION

5 copies: Mr. Matthew Wadlund
 Wadlund Design Studio
 805 Jones Street
 Berkeley, CA 94710



Figure 1 - Site Vicinity Map

1444 & 1446 5th Street
 1444 & 1446 5th Street
 Berkeley, California

PROJECT No.	16183.001
DATE	December 2016

114 Hopeco Road
 Pleasant Hill, CA 94523
 tel. (925) 942-3629
 fax. (925) 665-1700
 PetersRoss@aol.com

Peters & Ross

Geotechnical and
 Geoenvironmental Consultants

TOPO! map printed on 12/16/16 from "California.tpo" and "Untitled.tpg"
 NAD27 122.30000° W

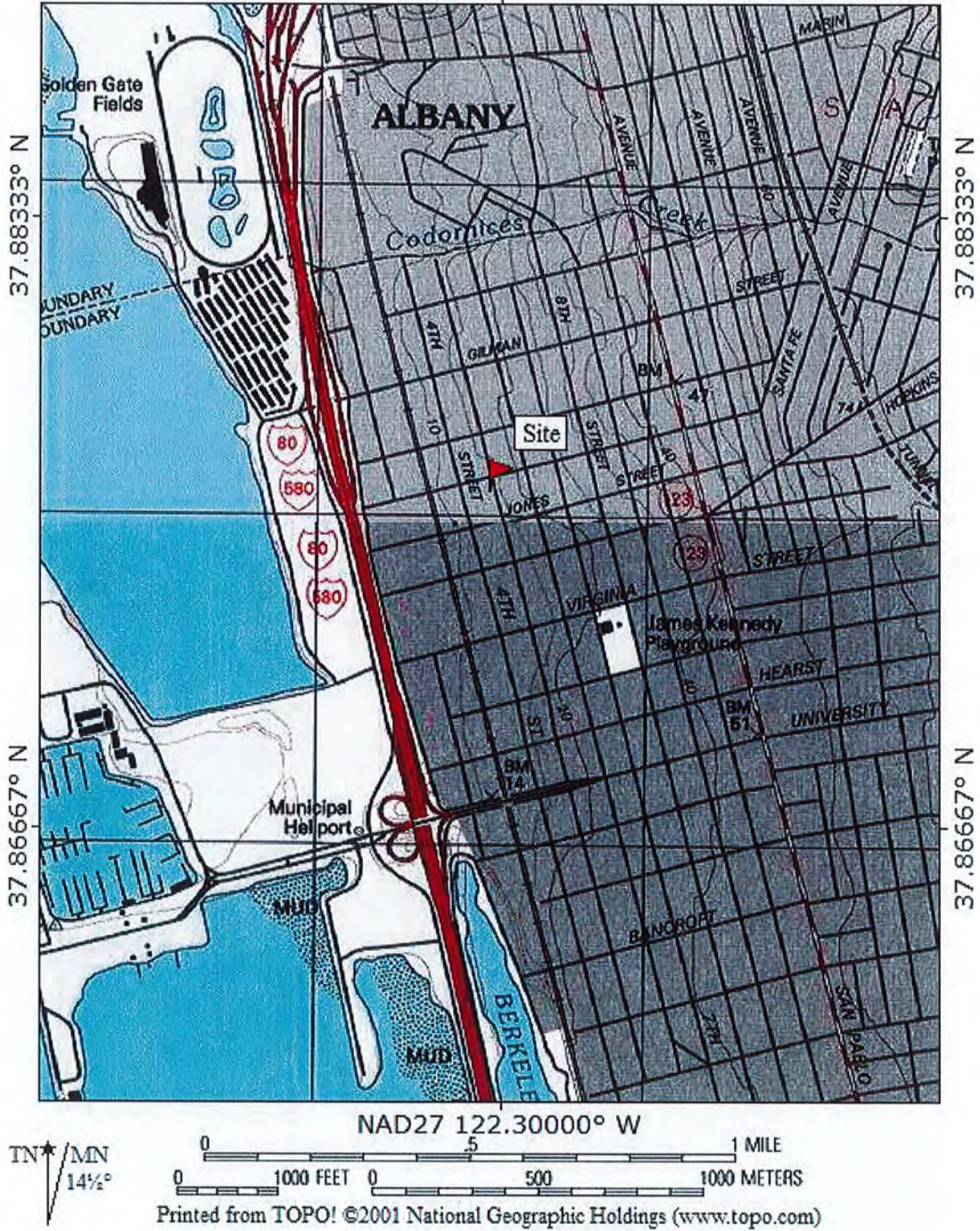


Figure 2 - Site Topography

Peters & Ross

Geotechnical and
 Geoenvironmental Consultants

114 Hopeco Road
 Pleasant Hill, CA 94523
 tel. (925) 942-3629
 fax. (925) 665-1700
 PetersRoss@aol.com

PROJECT No.

16183.001

DATE

Dec. 2016

1444 & 1446 5th Street
 1444 & 1446 5th Street
 Berkeley, California

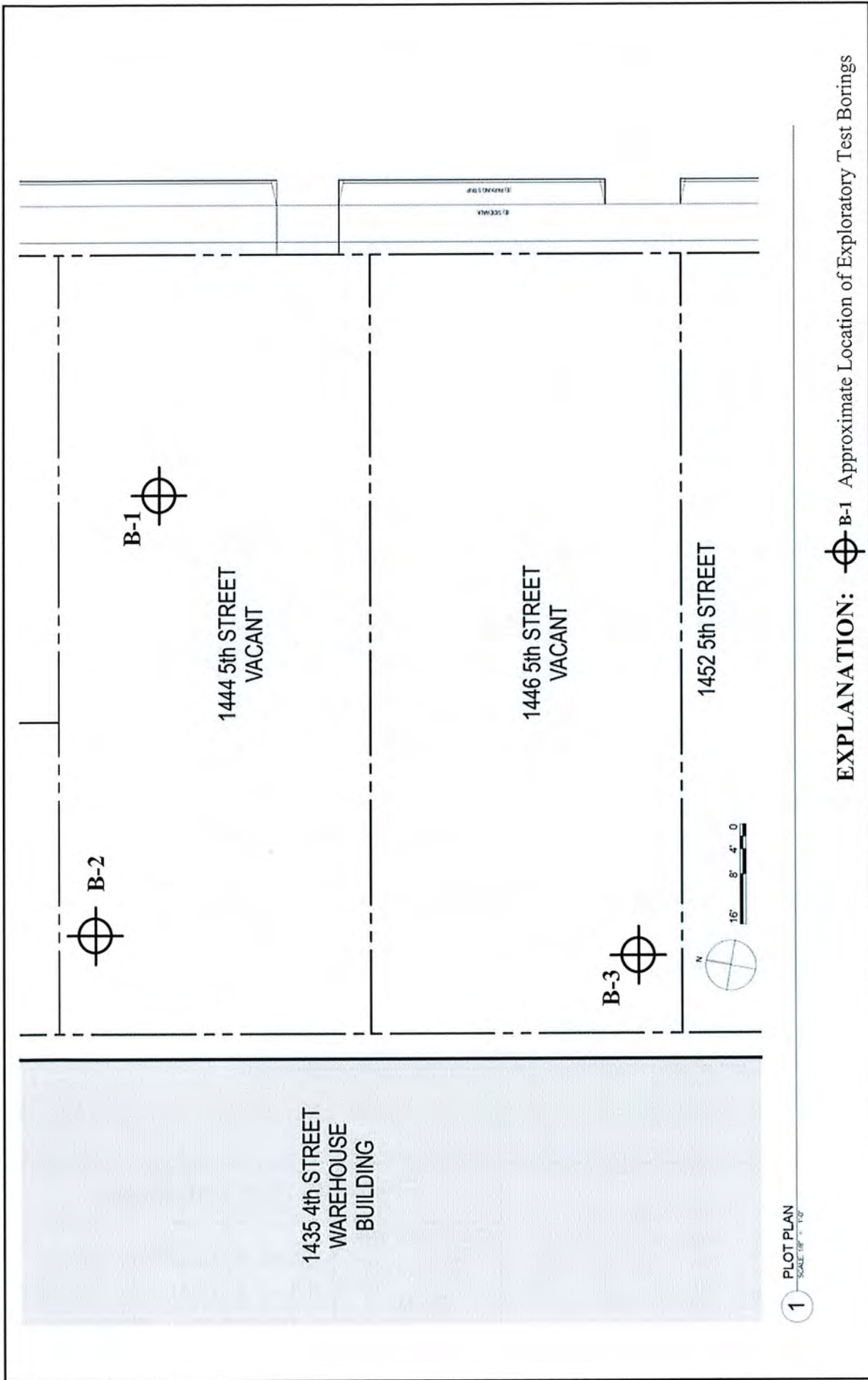


Figure 3 - Site Plan

114 Hopeco Road
Pleasant Hill, CA 94523
tel. (925) 942-3629
fax. (925) 665-1700
PetersRoss@aol.com

Peters & Ross
Geotechnical and
Geoenvironmental Consultants

PROJECT No.	1444 & 1446 5th Street 1444 & 1446 5th Street Berkeley, California
	16183.001
DATE	
	Dec. 2016

APPENDIX A – FIELD INVESTIGATION

Peters & Ross explored subsurface conditions at the site by drilling three exploratory test borings to a maximum depth of 50 feet. The location of the test borings are shown on the Site Plan.

The borings were drilled using a truck mounted CME 75 drill rig with 8.0 inch diameter hollow stem auger and 6.0 inch diameter solid flight auger. The drill rig is operated by HEW Drilling of Palo Alto, California. Our field engineer continuously logged the materials encountered. The boring logs that show the materials encountered are included in this Appendix. Soils are classified in accordance with the Unified Soil Classification System.

The boring logs indicate Peters & Ross interpretations of subsurface conditions encountered at the locations and times the borings were drilled, and may not be representative of subsurface conditions at other locations and times. Stratification lines represent the approximate boundaries between soil and rock types. The transitions between soil and rock layers are often gradual.

Samples of the materials encountered were obtained at frequent depth intervals, for visual classification and laboratory testing. Samples were obtained using a Modified California sampler (outer diameter of 3.0 inches, inner diameter of 2.5 inches) with thin-wall brass sampler liners, and a Standard Penetration Test sampler (outer diameter of 2.0 inches, inner diameter of 1.375 inches). The samplers were driven with an automatic 140 pound safety hammer lifted and dropped 30 inches.

Project Name: 1444 and 1446 5th Street

Project No.: 16183.001

Location: 1444 & 1446 5th St., Berkeley, CA

Client: Wadlund + Design Studio




Drilling Method: Truck Mounted CMe 75 w/ 8" HSA

Date Drilled: 11/17/16

Elevation: N/A

Water Level: See Note 3

Remarks: Samplers driven with 140 lb. automatic hammer using a 30 inch drop

DESCRIPTION	SYMBOL	DEPTH FT.	SAMPLE TYPE	BLOWS/FT.	MOISTURE %	DRY DENSITY PCF	UNCONFINED STRENGTH KSF	REMARKS
Ground Surface		0						
Sandy Fat CLAY (CH) black, wet, stiff, roots			SS	24	20			
			SS	19	20			LL=58%, PI=40% -200 = 60 percent
Sandy Lean CLAY (CL) olive brown, wet, stiff, roots, some black specks with depth			SS	22	22			
			SS	34	20			
			SS	31	19			-200 = 68 percent
Sandy Lean CLAY with Gravel (CL) yellow brown, wet, stiff, rock fragments and black specks			SS	29	23			

Project Name: 1444 and 1446 5th Street
 Location: 1444 & 1446 5th St., Berkeley, CA
 Drilling Method: Truck Mounted CMe 75 w/ 8" HSA
 Elevation: N/A

Project No.: 16183.001
 Client: Wadlund + Design Studio
 Date Drilled: 11/17/16
 Water Level: See Note 3

Remarks: Samplers driven with 140 lb. automatic hammer using a 30 inch drop

DESCRIPTION	SYMBOL	DEPTH FT.	SAMPLE TYPE	BLOWS/FT.	MOISTURE %	DRY DENSITY PCF	UNCONFINED STRENGTH KSF	REMARKS
Sandy Lean CLAY with Gravel (CL) yellow brown, wet, stiff, rock fragments and black specks		25	SS	42	17			
		30	SS	22	23			-200 = 67 percent
Sandy Lean CLAY (CL) yellow brown, wet, stiff, black specks		35	SS	45	18			
		40	SS	23	26			

Peters & Ross Geotechnical Services
 114 Hopeco Road
 Pleasant Hill, CA 94523
 925-942-3629

Project Name: 1444 and 1446 5th Street

Project No.: 16183.001

Location: 1444 & 1446 5th St., Berkeley, CA

Client: Wadlund + Design Studio

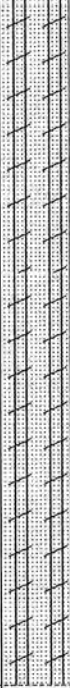
Drilling Method: Truck Mounted CMe 75 w/ 8" HSA

Date Drilled: 11/17/16

Elevation: N/A

Water Level: See Note 3

Remarks: Samplers driven with 140 lb. automatic hammer using a 30 inch drop

DESCRIPTION	SYMBOL	DEPTH FT.	SAMPLE TYPE	BLOWS/FT.	MOISTURE %	DRY DENSITY PCF	UNCONFINED STRENGTH KSF	REMARKS
Sandy Lean CLAY (CL) olive brown, wet, stiff		45	SS	19	24			-200 = 60 percent
		50	SS	23	25			
Bottom of Borehole = 50 feet		55						
<p>NOTES:</p> <ol style="list-style-type: none"> 1. Penetration resistance values are not standard N values, they are the values measured in the field. 2. Stratification lines represent the approximate boundaries between material types, and the transitions may be gradual. 3. Groundwater was encountered at 25 feet during drilling. It rose to 4.5 feet prior to backfilling the hole with grout. 								
		60						

Project Name: 1444 and 1446 5th Street
 Location: 1444 & 1446 5th St., Berkeley, CA
 Drilling Method: Truck Mounted CMe 75 w/ 6" SFA
 Elevation: N/A

Project No.: 16183.001
 Client: Wadlund + Design Studio
 Date Drilled: 11/17/16
 Water Level: See Note 3

Remarks: Samplers driven with 140 lb. automatic hammer using a 30 inch drop

DESCRIPTION	SYMBOL	DEPTH FT.	SAMPLE TYPE	BLOWS/FT.	MOISTURE %	DRY DENSITY PCF	UNCONFINED STRENGTH KSF	REMARKS
Ground Surface		0						
Sandy Fat CLAY (CH) black to dark olive brown, wet, stiff, roots			MC	25	22	103	(2.5)	
			MC	18	25	104	(1.5)	
		5	MC	42	20	111	(>4.5)	
Sandy Lean CLAY with Gravel (CL) yellow brown, wet, stiff, rock fragments and black specks		10	MC	50	20	111	(2.5)	
			MC	33	26	98	(3.5)	
Sandy Lean CLAY (CL) olive brown, wet, stiff		15						
Bottom of Borehole = 18.5 feet								
		20						
		25						

- NOTES:
1. Penetration resistance values are not standard N values, they are the values measured in the field.
 2. Stratification lines represent the approximate boundaries between material types, and the transitions may be gradual.
 3. Groundwater was encountered at 15 feet during drilling. It rose to 4.5 feet prior to backfilling the hole with grout.
 4. Shear strength values in Parentheses are in tons per square foot and were obtained using a pocket penetrometer.

Project Name: 1444 and 1446 5th Street

Project No.: 16183.001

Location: 1444 & 1446 5th St., Berkeley, CA

Client: Wadlund + Design Studio

Drilling Method: Truck Mounted CMe 75 w/ 6" SFA

Date Drilled: 11/17/16

Elevation: N/A

Water Level: See Note 3

Remarks: Samplers driven with 140 lb. automatic hammer using a 30 inch drop

DESCRIPTION	SYMBOL	DEPTH FT.	SAMPLE TYPE	BLOWS/FT.	MOISTURE %	DRY DENSITY PCF	UNCONFINED STRENGTH KSF	REMARKS
Ground Surface		0						
Sandy Fat CLAY (CH) black to dark olive brown, wet, stiff, roots			MC	18	23	99	(1.25)	
			MC	40	18	110	(4.0)	
Sandy Lean CLAY with Gravel (CL) yellow brown, wet, stiff, rock fragments and black specks		5						
			MC	35	22	105	(4.0)	-200 = 80 percent
		10	MC	53	18	114	(>4.5)	
Sandy Lean CLAY (CL) olive brown, wet, stiff								
			MC	22	25	102	(1.5)	-200 = 57 percent
		15						
			MC	47	22	109	(1.5)	
Bottom of Borehole = 20 feet		20						
<p>NOTES:</p> <ol style="list-style-type: none"> 1. Penetration resistance values are not standard N values, they are the values measured in the field. 2. Stratification lines represent the approximate boundaries between material types, and the transitions may be gradual. 3. Groundwater was encountered at 15 feet during drilling. It rose to 4.5 feet prior to backfilling the hole with grout. 4. Shear strength values in Parentheses are in tons per square foot and were obtained using a pocket penetrometer. 								
		-25						

APPENDIX B - LABORATORY TESTING

Laboratory tests were performed on representative samples of the materials encountered in the test borings, to achieve a quantitative and qualitative evaluation of the physical and mechanical properties of the materials that underlie the site. The tests included moisture content/dry density determinations, #200 washed sieve tests, and Atterberg limits tests. The test results are presented on the boring logs in Appendix A. Test reports provided by the testing laboratory are included in this Appendix. Brief descriptions of the tests performed follow.

Moisture Content/Dry Density (ASTM 2937): Performed on undisturbed samples to determine the moisture content (the ratio of the weight of water to the weight of solids in the field sample, expressed as a percentage) and dry density (the ratio of the weight of solids in the field sample to its volume, expressed in pounds per cubic foot).

#200 Washed Sieve Test (ASTM D-1140): Performed on undisturbed or disturbed samples to determine the fine-grained (silt and clay) fraction of the materials. The fine-grained fraction is used to classify the soils according to the Unified Soils Classification System.

Atterberg Limits Test (ASTM D-4318): Performed on undisturbed or disturbed samples to determine the liquid limit (LL) and plastic limit (PL) of the samples. These limits are used to classify fine-grained soils and to evaluate the plasticity index (PI), the moisture content range over which the material exhibits plasticity. Atterberg limits correlations also provide an indication of the compressibility and expansion potential of the sample.

B. HILLEBRANDT SOILS TESTING, INC.

29 Sugarloaf Terrace, Alamo, CA 94507 - Tel: (510) 409-2916 - Fax: (925) 891-9267 - Email: soiltesting@aol.com

MOISTURE CONTENT/DRY DENSITY

Job #: 16183.001
 Job Name: Fifth Street Development
 Date: 11/29/16
 Tested by: Brad Hillebrandt

Additional Tests:						
Boring #:	B-2	B-2	B-2	B-2	B-2	B-3
Depth:	2.5	5.0	7.5	10.0	15.0	2.5
Sample Description:	Dark gray CLAY	Olive brown CLAY with some gravel	Dark yellowish brown CLAY with sand	Dark yellowish brown sandy, gravelly CLAY	Olive brown sandy CLAY	Dark gray CLAY
Can #:	420	338	305	312	318	327
Wet Sample + can	278.2	346.9	307.8	314.3	296.5	297.0
Dry Sample + can	234.7	285.6	263.7	268.8	243.1	247.1
Weight can	32.9	37.5	38.0	38.0	38.5	38.3
Weight water	43.5	61.3	44.1	45.5	53.4	49.9
Weight Dry Sample	201.8	248.1	225.7	230.8	204.6	208.8
WATER CONTENT (%)	21.6%	24.7%	19.5%	19.7%	26.1%	23.9%
Weight Sample + Liner	1147.6	1175.2	1190.1	1134.0	1118.4	1047.4
Weight Liner	261.7	262.6	246.1	275.1	270.5	257.9
Sample Length	6.0	6.0	6.0	5.5	5.8	5.4
Sample Diameter	2.39	2.39	2.40	2.39	2.39	2.40
DRY DENSITY (pcf)	103.1	103.6	110.8	110.8	98.4	99.4

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29 Sugarloaf Terrace, Alamo, CA 94507 - Tel: (510) 409-2916 - Fax: (925) 891-9267 - Email: soiltesting@aol.com

MOISTURE CONTENT/DRY DENSITY

Job #: 16183.001
 Job Name: Fifth Street Development
 Date: 11/29/16
 Tested by: Brad Hillebrandt

Additional Tests:		-200		-200		
Boring #:	B-3	B-3	B-3	B-3	B-3	
Depth:	5.0	7.5	10.0	15.0	20.0	
Sample Description:	Olivebrown clayey, gravelly SAND	Dark yellowish brown CLAY with sand	Dark yellowish brown sandy CLAY	Olive brown sandy CLAY	Olive brown CLAY with sand	
Can #:	501	370	349	339	362	
Wet Sample + can	356.1	264.1	266.9	348.7	321.6	
Dry Sample + can	306.4	223.6	230.5	286.7	270.7	
Weight can	34.0	37.8	32.5	37.7	33.8	
Weight water	49.7	40.5	36.4	62	50.9	
Weight Dry Sample	272.4	185.8	198	249	236.9	
WATER CONTENT (%)	18.2%	21.8%	18.4%	24.9%	21.5%	
Weight Sample + Liner	1184.1	1067.8	1208.0	1050.3	1115.3	
Weight Liner	269.0	256.4	256.3	249.3	256.4	
Sample Length	6.0	5.3	6.0	5.3	5.5	
Sample Diameter	2.39	2.41	2.39	2.40	2.39	
DRY DENSITY (pcf)	109.5	105.0	113.8	101.9	109.2	

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29 Sugarloaf Terrace, Alamo, CA 94507 - Tel: (510) 409-2916 - Fax: (925) 891-9267 - Email: soiltesting@aol.com

MOISTURE CONTENT WORKSHEET

Job #: 16183.001
 Job Name: Fifth Street Development
 Date: 11/29/16
 Tested by: B. Hillebrandt

Additional Tests:	PI, -200											
Boring #:	B-1	B-1	B-1	B-1	B-1	B-1	B-1	B-1	B-1	B-1	B-1	B-1
Depth:	2.5	5.0	7.5	10.5	15.0	20.0	25.0	30.0	35.0			
Sample Description:	Dark brown CLAY	Dark brown sandy fat CLAY	Olive brown CLAY with sand	Brown CLAY with some sand and gravel	Olive brown sandy CLAY	Brown CLAY with some sand and gravel	Yellowish brown sandy CLAY with gravel	Yellowish brown sandy CLAY	Olive brown sandy CLAY with gravel			
Can #:	307	341	342	331	345	306	346	414	353			
Wet Sample + can	250.8	240.4	283.9	301.5	245.6	269.8	282.3	262.5	274.5			
Dry Sample + can	215.6	206.5	240.3	257.9	212.1	234.0	247.8	220.4	238.5			
Weight can	38.2	37.8	40.1	37.4	37.8	38.0	38.1	34.1	32.5			
Weight water	35.2	33.9	43.6	43.6	33.5	35.8	34.5	42.1	36			
Weight Dry Sample	177.4	168.7	200.2	220.5	174.3	196	209.7	186.3	206			
WATER CONTENT (%)	19.8%	20.1%	21.8%	19.8%	19.2%	18.3%	16.5%	22.6%	17.5%			

B. HILLEBRANDT SOILS TESTING, INC.

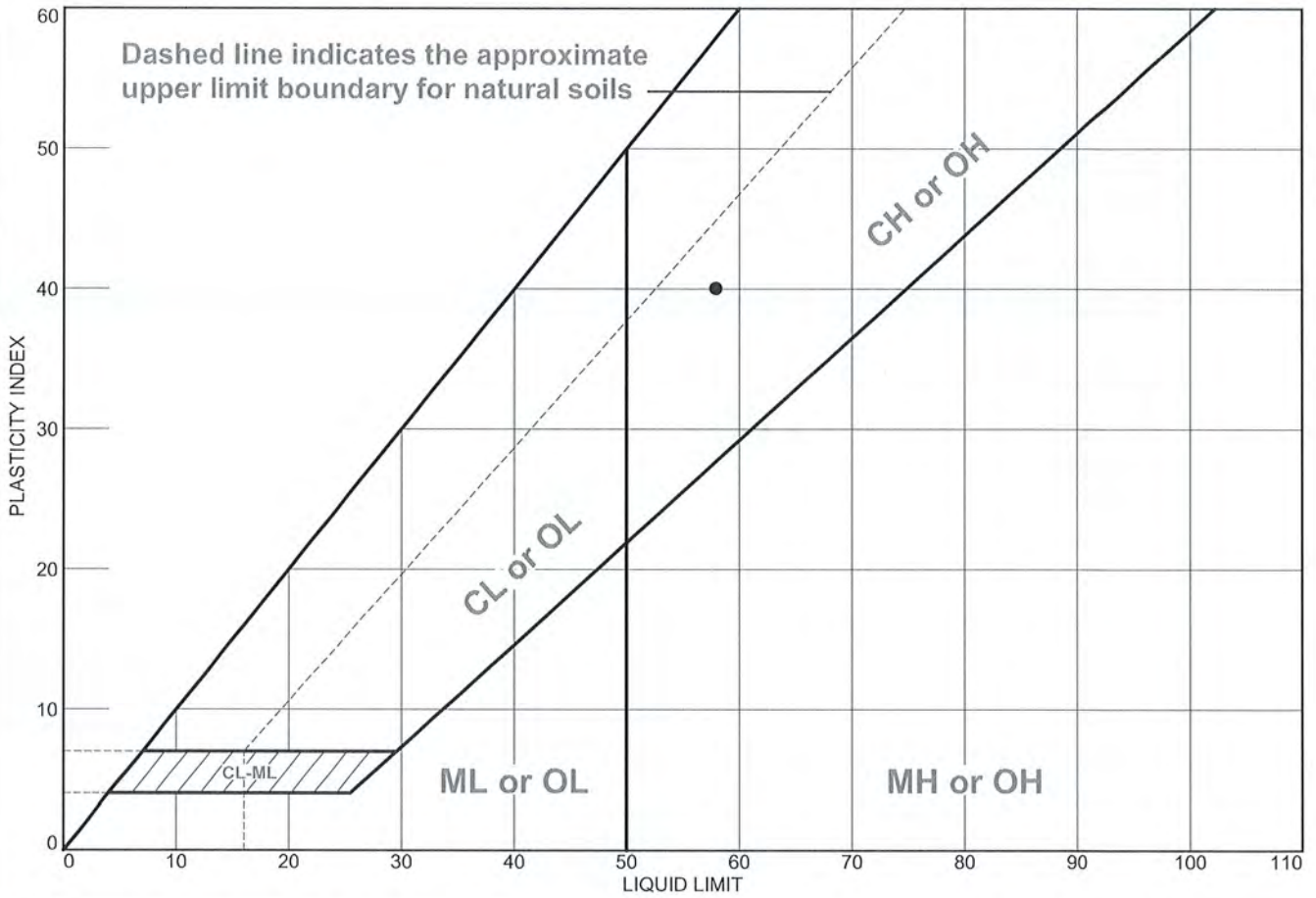
29 Sugarloaf Terrace, Alamo, CA 94507 - Tel: (510) 409-2916 - Fax: (925) 891-9267 - Email: soiltesting@aol.com

MOISTURE CONTENT WORKSHEET

Job #: 16183.001
 Job Name: Fifth Street Development
 Date: 11/29/16
 Tested by: B. Hillebrandt

Additional Tests:									
Boring #:	B-1	-200	B-1	B-1	B-1				
Depth:	40.0	45.0	45.0	50.0					
Sample Description:	Olive brown sandy CLAY	Olive brown sandy CLAY	Olive brown sandy CLAY	Olive brown sandy CLAY					
Can #:	393	347	314						
Wet Sample + can	226.1	269.1	252.6						
Dry Sample + can	186.6	225.0	210.1						
Weight can	32.7	38.1	38.1						
Weight water	39.5	44.1	42.5						
Weight Dry Sample	153.9	186.9	172						
WATER CONTENT (%)	25.7%	23.6%	24.7%						

LIQUID AND PLASTIC LIMITS TEST REPORT



	MATERIAL DESCRIPTION	LL	PL	PI	%<#40	%<#200	USCS
●	Dark brown sandy fat CLAY	58	18	40	84.6	60.4	CH

Project No. 16183.001 **Client:** Peters & Ross
Project: Fifth Street Development
Source of Sample: B-1 **Depth:** 5.0'

B. HILLEBRANDT SOILS TESTING, INC.
 +1 510-409-2816
 SoilTesting@aol.com

Remarks:

Figure

Tested By: BH _____

LIQUID AND PLASTIC LIMIT TEST DATA

12/9/20

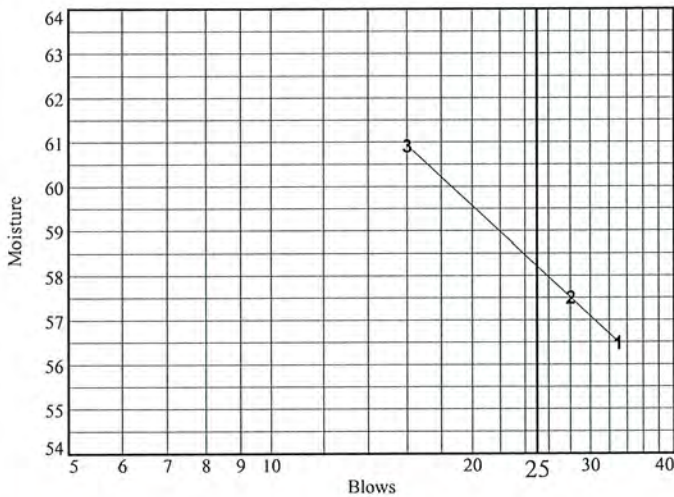
Client: Peters & Ross
 Project: Fifth Street Development
 Project Number: 16183.001
 Location: B-1
 Depth: 5.0'
 Material Description: Dark brown sandy fat CLAY
 %<#40: 84.6 %<#200: 60.4
 Tested by: BH

USCS: CH

AASHTO: A-7-6(21)

Liquid Limit Data

Run No.	1	2	3	4	5	6
Wet+Tare	23.01	25.51	24.63			
Dry+Tare	18.79	20.27	19.50			
Tare	11.32	11.16	11.08			
# Blows	33	28	16			
Moisture	56.5	57.5	60.9			



Liquid Limit= 58
 Plastic Limit= 18
 Plasticity Index= 40
 Natural Moisture= 20.1
 Liquidity Index= 0.1

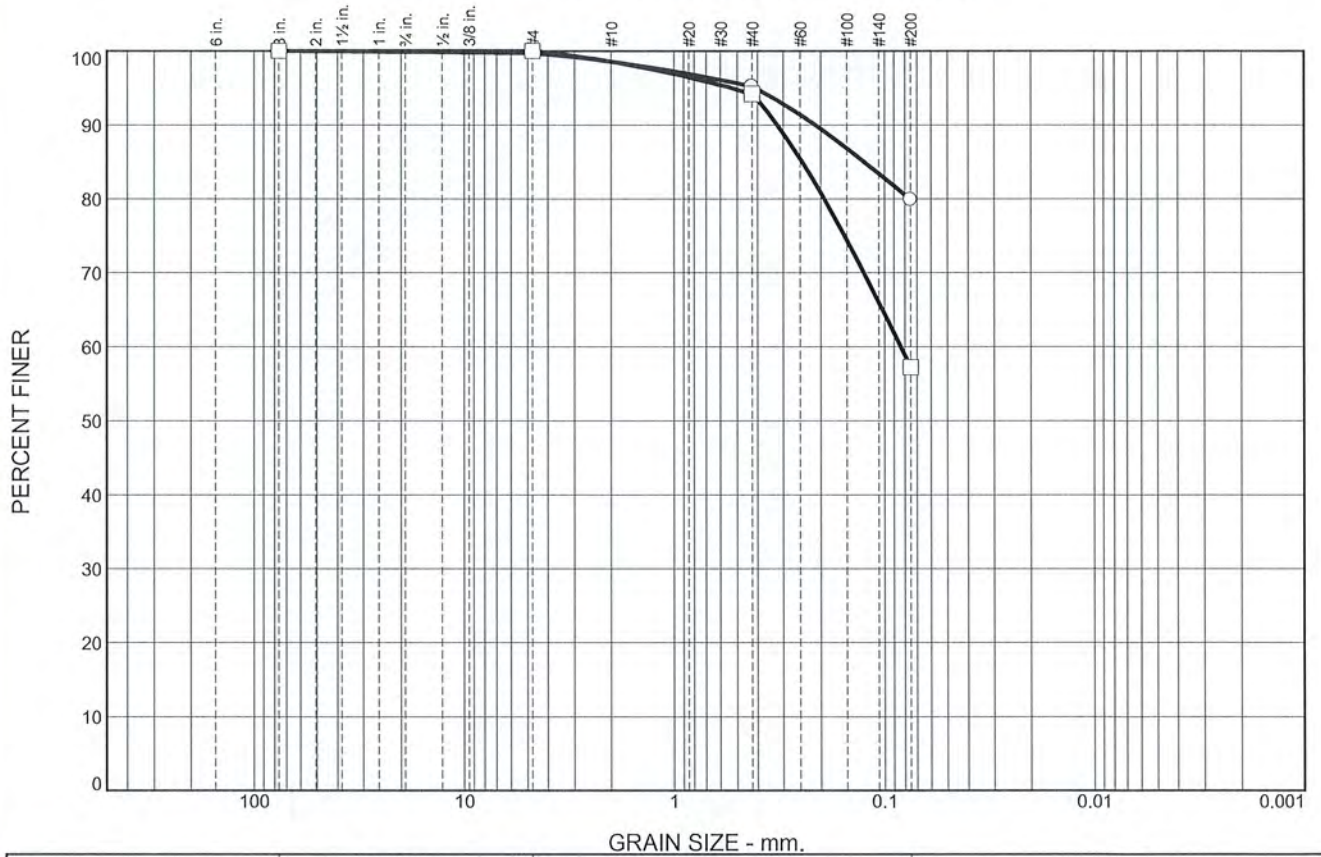
Plastic Limit Data

Run No.	1	2	3	4
Wet+Tare	17.27	17.05		
Dry+Tare	16.34	16.16		
Tare	11.13	11.33		
Moisture	17.9	18.4		

Natural Moisture Data

Wet+Tare	Dry+Tare	Tare	Moisture
240.4	206.5	37.8	20.1

Particle Size Distribution Report



% +3"	% Gravel		% Sand			% Fines	
	Coarse	Fine	Coarse	Medium	Fine	Silt	Clay

MATERIAL DATA					
SYMBOL	SOURCE	SAMPLE NO.	DEPTH (ft.)	Material Description	USCS
○	B-3		7.5'	Dark yellowish brown CLAY with sand	
□	B-3		15.0'	Olive brown sandy CLAY	

B. HILLEBRANDT SOILS TESTING, INC. +1 510-409-2816 SoilTesting@aol.com	Client: Peters & Ross Project: Fifth Street Development
	Project No.: 16183.001
	Figure

Tested By: BH _____

GRAIN SIZE DISTRIBUTION TEST DATA

12/9/2016

Client: Peters & Ross
 Project: Fifth Street Development
 Project Number: 16183.001
 Location: B-1
 Depth: 5.0'
 Material Description: Dark brown sandy fat CLAY
 USCS: CH
 Tested by: BH

Sieve Test Data

Dry Sample and Tare (grams)	Tare (grams)	Sieve Opening Size	Weight Retained (grams)	Sieve Weight (grams)	Percent Finer
206.50	37.80	3"	0.00	0.00	100.0
		#4	3.88	0.00	97.7
		#40	22.03	0.00	84.6
		#200	40.97	0.00	60.4

Fractional Components

Cobbles	Gravel			Sand				Fines		
	Coarse	Fine	Total	Coarse	Medium	Fine	Total	Silt	Clay	Total
0.0	0.5	1.8	2.3	2.4	10.7	24.2	37.3			60.4

D ₅	D ₁₀	D ₁₅	D ₂₀	D ₃₀	D ₄₀	D ₅₀	D ₆₀	D ₈₀	D ₈₅	D ₉₀	D ₉₅
								0.2858	0.4397	0.7709	1.8705

Fineness Modulus
0.76

GRAIN SIZE DISTRIBUTION TEST DATA

12/9/20

Client: Peters & Ross
 Project: Fifth Street Development
 Project Number: 16183.001
 Location: B-1
 Depth: 15.0'
 Material Description: Olive brown sandy CLAY
 Tested by: BH

Sieve Test Data

Dry Sample and Tare (grams)	Tare (grams)	Sieve Opening Size	Weight Retained (grams)	Sieve Weight (grams)	Percent Finer
212.10	37.80	3"	0.00	0.00	100.0
		#4	6.99	0.00	96.0
		#40	3.21	0.00	94.1
		#200	45.83	0.00	67.9

Fractional Components

Cobbles	Gravel			Sand				Fines		
	Coarse	Fine	Total	Coarse	Medium	Fine	Total	Silt	Clay	Total
0.0	2.3	1.7	4.0	0.8	1.1	26.2	28.1			67.9

D5	D10	D15	D20	D30	D40	D50	D60	D80	D85	D90	D95
								0.1477	0.2013	0.2880	1.6615

Fineness Modulus
0.56

GRAIN SIZE DISTRIBUTION TEST DATA

12/9/2016

Client: Peters & Ross
 Project: Fifth Street Development
 Project Number: 16183.001
 Location: B-1
 Depth: 30.0'
 Material Description: Yellowish brown sandy CLAY
 Tested by: BH

Sieve Test Data

Dry Sample and Tare (grams)	Tare (grams)	Sieve Opening Size	Weight Retained (grams)	Sieve Weight (grams)	Percent Finer
220.40	34.10	3"	0.00	0.00	100.0
		#4	3.05	0.00	98.4
		#40	13.27	0.00	91.2
		#200	44.41	0.00	67.4

Fractional Components

Cobbles	Gravel			Sand				Fines		
	Coarse	Fine	Total	Coarse	Medium	Fine	Total	Silt	Clay	Total
0.0	1.1	0.5	1.6	0.4	6.8	23.8	31.0			67.4

D ₅	D ₁₀	D ₁₅	D ₂₀	D ₃₀	D ₄₀	D ₅₀	D ₆₀	D ₈₀	D ₈₅	D ₉₀	D ₉₅
								0.1687	0.2427	0.3737	0.7142

Fineness Modulus
0.50

GRAIN SIZE DISTRIBUTION TEST DATA

12/9/20

Client: Peters & Ross
 Project: Fifth Street Development
 Project Number: 16183.001
 Location: B-1
 Depth: 45.0'
 Material Description: Olive brown sandy CLAY
 Tested by: BH

Sieve Test Data

Dry Sample and Tare (grams)	Tare (grams)	Sieve Opening Size	Weight Retained (grams)	Sieve Weight (grams)	Percent Finer
225.00	38.10	3"	0.00	0.00	100.0
		#4	13.11	0.00	93.0
		#40	21.25	0.00	81.6
		#200	40.37	0.00	60.0

Fractional Components

Cobbles	Gravel			Sand				Fines		
	Coarse	Fine	Total	Coarse	Medium	Fine	Total	Silt	Clay	Total
0.0	3.5	3.5	7.0	2.4	9.0	21.6	33.0			60.0

D5	D10	D15	D20	D30	D40	D50	D60	D80	D85	D90	D95
								0.3595	0.6453	1.6868	10.6214

Fineness Modulus
1.06

GRAIN SIZE DISTRIBUTION TEST DATA

12/9/2016

Client: Peters & Ross

Project: Fifth Street Development

Project Number: 16183.001

Location: B-3

Depth: 7.5'

Material Description: Dark yellowish brown CLAY with sand

Tested by: BH

Sieve Test Data

Dry Sample and Tare (grams)	Tare (grams)	Sieve Opening Size	Weight Retained (grams)	Sieve Weight (grams)	Percent Finer
223.60	37.80	3"	0.00	0.00	100.0
		#4	0.54	0.00	99.7
		#40	8.42	0.00	95.2
		#200	28.41	0.00	79.9

Fractional Components

Cobbles	Gravel			Sand				Fines		
	Coarse	Fine	Total	Coarse	Medium	Fine	Total	Silt	Clay	Total
0.0	0.1	0.2	0.3	1.2	3.3	15.3	19.8			79.9

D ₅	D ₁₀	D ₁₅	D ₂₀	D ₃₀	D ₄₀	D ₅₀	D ₆₀	D ₈₀	D ₈₅	D ₉₀	D ₉₅
								0.0758	0.1241	0.2115	0.4125

Fineness Modulus
0.29

GRAIN SIZE DISTRIBUTION TEST DATA

12/9/20

Client: Peters & Ross
 Project: Fifth Street Development
 Project Number: 16183.001
 Location: B-3
 Depth: 15.0'
 Material Description: Olive brown sandy CLAY
 Tested by: BH

Sieve Test Data

Dry Sample and Tare (grams)	Tare (grams)	Sieve Opening Size	Weight Retained (grams)	Sieve Weight (grams)	Percent Finer
286.70	37.70	3"	0.00	0.00	100.0
		#4	0.00	0.00	100.0
		#40	14.41	0.00	94.2
		#200	92.09	0.00	57.2

Fractional Components

Cobbles	Gravel			Sand				Fines		
	Coarse	Fine	Total	Coarse	Medium	Fine	Total	Silt	Clay	Total
0.0	0.0	0.0	0.0	1.5	4.3	37.0	42.8			57.2

D5	D10	D15	D20	D30	D40	D50	D60	D80	D85	D90	D95
							0.0836	0.1920	0.2441	0.3208	0.5355

Fineness Modulus
0.45

Peters & Ross
Geotechnical & Geoenvironmental
 Consultants

October 11, 2018
 Project No. 16183.001

Mr. Matthew Wadlund
 Wadlund Design Studio
 805 Jones Street
 Berkeley, CA 94710

Response to Geotechnical Peer Review Email dated September 17, 2018
1444 5th Street, Berkeley, California
Permit Application ZP2018-0172

Dear Mr. Wadlund:

In accordance with your authorization, Peters & Ross has reviewed the September 17, 2018, email from Mr. Ted Sayre of Cotton, Shires and Associates, Inc. (CSA), the City of Berkeley's peer reviewer. The primary issues raised by CSA are 1) The seismic design values presented in our December 16, 2016 report. 2) Will these new seismic design values have any impact on our conclusions and recommendations regarding liquefaction, and 3) Is Peters & Ross aware of the new 4-unit development proposed for 1444 Fifth Street.

1) Seismic Design Values

In accordance with Section 1613 of the 2016 CBC, Peters & Ross classifies the site as Site Class D with a latitude of 37.876 degrees and a longitude of -122.301 degrees. The CBC parameters presented in the following table should be used for seismic design.

PERIOD (sec)	0.2	1.0
SPECTRAL RESPONSE S _s , S _i	2.002	0.815
SITE COEFFICIENT F _a , F _v (SITE CLASS D)	1.0	1.5
MAXIMUM SPECTRAL RESPONSE S _{ms} , S _{m1}	2.002	1.223
DESIGN SPECTRAL RESPONSE S _{Ds} , S _{DI}	1.335	0.815

2) Liquefaction

The above values and the the MCE peak ground acceleration of 0.770g are the same values we computed for the 2013 CBC. Therefore our conclusions and recommendations regarding liquefaction are unchanged.

1444 5th Street
Project No. 16183.001

October 11, 2018
Page 2 of 2

3) Development of 1444 Fifth Street

Our December 16, 2016 report was issued for both 1444 and 1446. We drilled borings on both lots and were aware that four units would be placed on each of them.

Peters & Ross services consist of professional opinions and recommendations that are made in accordance with generally accepted geotechnical engineering principles and practices.

We appreciate the opportunity to provide geotechnical engineering services to you. If you have any questions, please call.

Sincerely,



Peter K. Mundy, P.E., G.E.
Geotechnical Engineer 2217



City Council Hearing for 1446 Fifth Street Zoning Appeal

February 6, 2018¹

In response to being informed that the project would be subject to the Inclusionary Housing in-lieu fee due the site being capable of accommodating five units, Elisa Mikiten, project representative for the developer Matthew Wadlund, declared that the fee forces the developer to transform the project into one in which they will have “consolidated all their lots” (namely, 770 Page Street and 1442, 1444 and 1446 Fifth Street) to build a 27-unit apartment building (25:28-25:43). Ms. Mikiten then displayed the following slides depicting the building envelope of a 7-unit complex as compared with a 27-unit building straddling multiple lots:


YouTube Search



Zoning appeal - 1446 5th Street (February 2018 Berkeley City Council)

13 views 0 likes 0 dislikes SHARE SAVE ...

YouTube Search



Zoning appeal - 1446 5th Street (February 2018 Berkeley City Council)

13 views 0 likes 0 dislikes SHARE SAVE ...

¹ Available at https://www.youtube.com/watch?v=Fkvw_Do4KQ

Later in the proceeding, Vice Mayor Sophie Hahn and Ms. Mikiten engaged in the following exchange (30:30-31:57).

Vice Mayor Sohie Hahn: You're showing a bunch of parcels merged. Does your applicant own those parcels?

Elisa Mikiten: They do . . . Yes. They do.

SH: Is it the intent to develop them in the future with this kind of [indistinct] condos similar to what is proposed?

EM: That is their product. This is a test case. They just applied for one. . . .

SH: . . . I just didn't know that they own those other parcels.

EM: They do. Yes, yes.

SH: That's new information and I wanted to confirm that and it sounds like these parcels are easy to merge, and you're asserting that they can do that by right.

EM: I think so.

SH: And it seems like they have the intent to potentially develop them and that's all the information that I was looking for. Is that all correct?

EM: Yes. Especially with the vacant lot next door.

SH: Thank you very much. That is very helpful.

Zoning Adjustment Board Appeal for 1444 Fifth Street

January 24, 2019¹

Planning Staff: This project [1444 Fifth Street] is very similar to an adjoining project to the south [1446 Fifth Street] . . . it's similar in pretty much every way . . . (3:19:20)

...

Board Member Teresa Clarke: The same owner owns that property as well as 770 Page?

Elisa Mikiten, project representative (EM): Correct. As well as 776. (3:33:26)

...

TC: Could someone please explain the City's rules as it relates to unit production versus fees and why a four-unit project would not be obligated to pay any fees even if it is not obligated to provide on-site affordable?

EM: So it goes by lot size. If a lot is large enough to accommodate five units then you have to pay the fee regardless of the number of proposed units. So typically what a development team does is adjust the lot line before making an application. We didn't see it coming. It came up as an appeal point. (3:45:50- 3:46:40)

¹ Available at http://berkeley.granicus.com/MediaPlayer.php?publish_id=80c43cb8-20f0-11e9-b021-0050569183fa.

This map conforms to the requirements of the Subdivision Map Act and local ordinance. It has been examined by me, or under my direction by City of Berkeley staff, and I find that it conforms to the requirements of the Subdivision Map Act and local ordinance.

By: *Patrick M. Rei*

DATE:

Patrick Rei
City Consultant Surveyor
P.L.S. 8178



APPROVED:
City of Berkeley

By: *Nisha Patel*

Nisha Patel
City Engineer
R.C.E. 72491

California All-Purpose Acknowledgement

A notary or other officer completing this certificate verifies only the identity of the individual who signs the document to which this certificate is attached and not the truthfulness, accuracy, or content of the document.

State of California}
County of Alameda}

On *July 3, 2018*, before me *Mark Numanville*
(Date) (Name of Notary)

ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

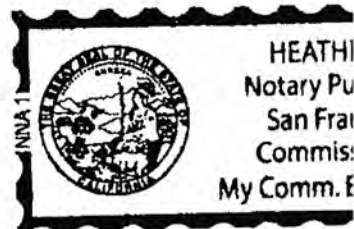
State of California
County of ALAMEDA

On JUNE 27 2018 before me, HEATHER MOORE
(insert name and

personally appeared MATTHEW WADLUND
who proved to me on the basis of satisfactory evidence to be the pers
subscribed to the within instrument and acknowledged to me that he/s
his/her/their authorized capacity(ies), and that by his/her/their signatur
person(s), or the entity upon behalf of which the person(s) acted, exer

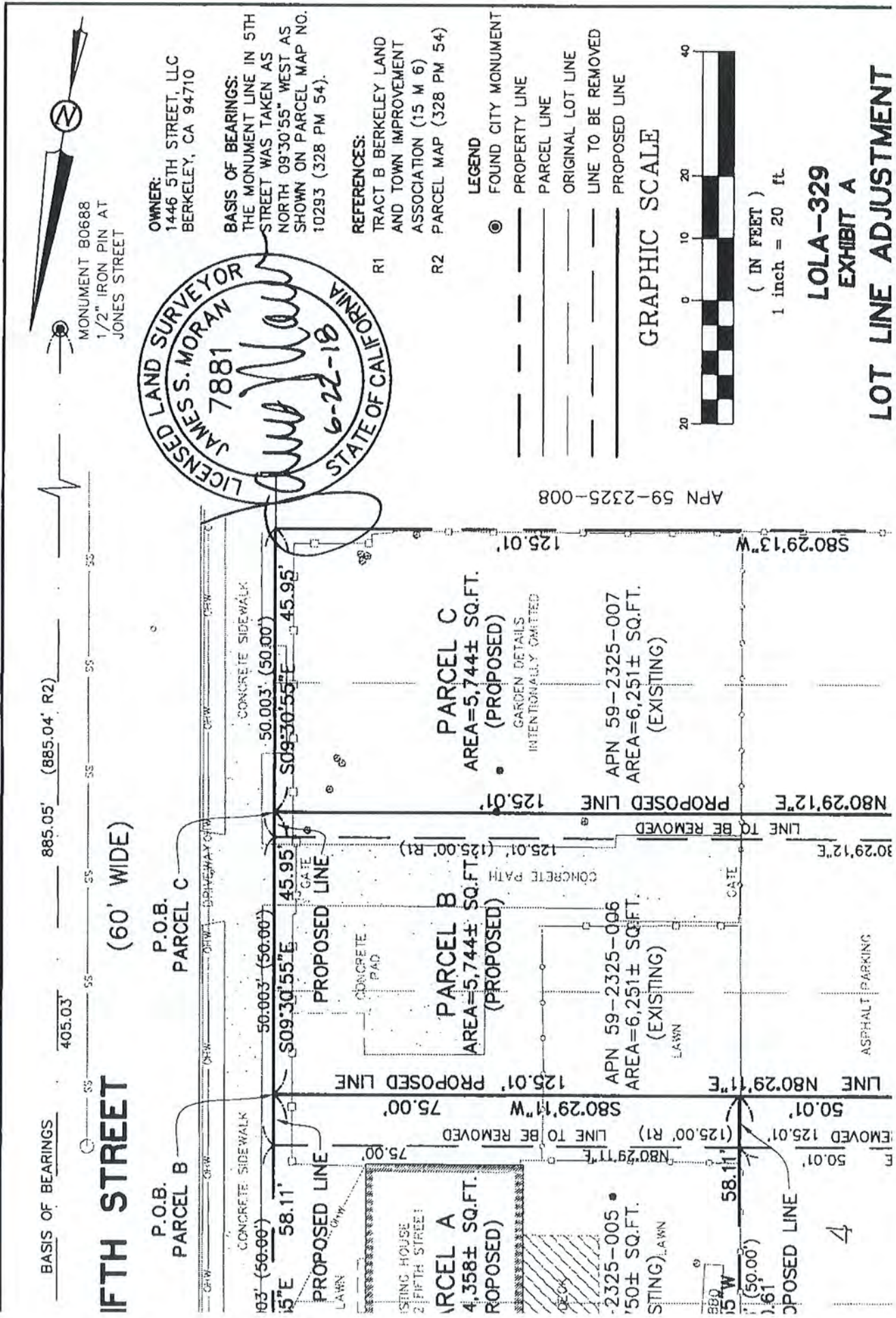
I certify under PENALTY OF PERJURY under the laws of the State of
paragraph is true and correct.

WITNESS my hand and official seal.



Signature [Handwritten Signature]

(Seal)



MONUMENT B0688
 1/2" IRON PIN AT
 JONES STREET

LICENSED LAND SURVEYOR
JAMES S. MORAN
 7881
 6-22-18
 STATE OF CALIFORNIA

OWNER:
 1446 5TH STREET, LLC
 BERKELEY, CA 94710

BASIS OF BEARINGS:
 THE MONUMENT LINE IN 5TH STREET WAS TAKEN AS NORTH 09°30'55" WEST AS SHOWN ON PARCEL MAP NO. 10293 (328 PM 54).

REFERENCES:
 R1 TRACT B BERKELEY LAND AND TOWN IMPROVEMENT ASSOCIATION (15 M 6)
 R2 PARCEL MAP (328 PM 54)

GRAPHIC SCALE



(IN FEET)
 1 inch = 20 ft.

LOLA-329
EXHIBIT A

LOT LINE ADJUSTMENT

EXHIBIT B

LOLA - 329

Adjusted Parcel A

REAL PROPERTY in the City of Berkeley, County of Alameda, State of follows:

Being a portion of Lots 3, 4 and 5, Block 47, Tract 'B', Berkeley I Association, filed November 8, 1894, in Book 15 at Page 6, in the offi Alameda County, more precisely described as follows:

Beginning at the point of intersection of the western line of Fifth Street as said street and lot line are shown on said map; thence, along sa 09°30'55" East 58.11 feet to a point distant South 09°30'55" East 110.61 Page Street as shown on said map; thence, leaving said western line, Sou thence, northerly, parallel with the line of Fifth Street North 09°30'55" \ line of Lot 3; thence, easterly along said northern line, North 80°29'11" Beginning.

Containing 4,358 square feet, more or less.

EXHIBIT B

LOLA - 329

Adjusted Parcel B

REAL PROPERTY in the City of Berkeley, County of Alameda, State of California, more particularly described as follows:

Being a portion of Lots 5, 6 and 7, Block 47, Tract 'B', Berkeley Improvement Association, filed November 8, 1894, in Book 15 at Page 6, in the official records of Alameda County, more precisely described as follows:

Beginning at the point on the western line of Fifth Street, distant South from the southern line of Page Street, as said streets are shown on said record, Fifth Street South 09°30'55" East 45.95 feet; thence, leaving said western line, South 125.01 feet to the western line of said Lot 7; thence, northerly, along said western lines of Lot 6 and Lot 5, North 09°30'58" East 45.95 feet; thence, North 125.01 feet to the Point of Beginning.

Containing 5,744 square feet, more or less.

EXHIBIT B

LOLA - 329

Adjusted Parcel C

REAL PROPERTY in the City of Berkeley, County of Alameda, State of California, as shown on the map of the City of Berkeley, California, known as the City of Berkeley, California, Association, filed November 8, 1894, in Book 15 at Page 6, in the office of the County Recorder of Alameda County, more precisely described as follows:

Being Lot 8 and a portion of Lot 7, Block 47, Tract 'B', Berkeley, California, as shown on the map of the City of Berkeley, California, known as the City of Berkeley, California, Association, filed November 8, 1894, in Book 15 at Page 6, in the office of the County Recorder of Alameda County, more precisely described as follows:

Beginning at the point on the western line of Fifth Street, distant South 80°29'13" West 125.01 feet to the western line of said Lot 8; from the southern line of Page Street, as said streets are shown on said map, South 09°30'55" East 45.95 feet to the southern line of said Lot 8; from the southern line of said Lot 8, South 80°29'13" West 125.01 feet to the western line of said Lot 8; from the western line of Lot 8 and the western line of Lot 7, North 09°30'58" West 45.95 feet to the western line of Lot 7; from the western line of Lot 7, North 80°29'12" East 125.01 feet to the Point of Beginning.

Containing 5,744 square feet, more or less.

EXHIBIT B

LOLA - 329

Adjusted Parcel D

REAL PROPERTY in the City of Berkeley, County of Alameda, State of follows:

Being Lot 34 and a portion of Lots 1, 2, 3, 4 and 5, Block 47, Tract 'Improvement Association, filed November 8, 1894, in Book 15 at Page Recorder of Alameda County, more precisely described as follows:

Beginning at the point of intersection of the southern line of Page Street ; as said street and lot are shown on said map; thence, along said line of East 50.01 feet to a point distant South 80°29'11" West 75.00 feet from as shown on said map; thence, leaving said southerly line, South 09°30' South 80°29'11" West 50.01 feet to the western line of Lot 5; thence, al and the western line of Lot 34, North 09°30'58" West 110.61 feet to the I

Containing 5,532 square feet, more or less.



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

S T A F F R E P O R T
FOR BOARD ACTION
JANUARY 24, 2019

1444 Fifth Street

Administrative Use Permit #ZP2018-0172 to construct four detached, three-story, approximately 1,900 square-foot single-family dwellings, each with an average height of 33 feet, on a 5,744 square-foot vacant lot.

I. Background

A. Land Use Designations:

- General Plan: MU – Manufacturing Mixed Use
- West Berkeley Plan Area
- Zoning: MU-R – Mixed Use Residential District

B. Zoning Permits Required:

- Administrative Use Permit, under BMC Section 23E.84.030, to construct four new dwelling units.

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

D. Parties Involved:

- Applicant/Owner: 1444 5th Street, LLC, 805 Jones Street, Berkeley

Figure 1: Vicinity Map



Figure 2: Site Plan

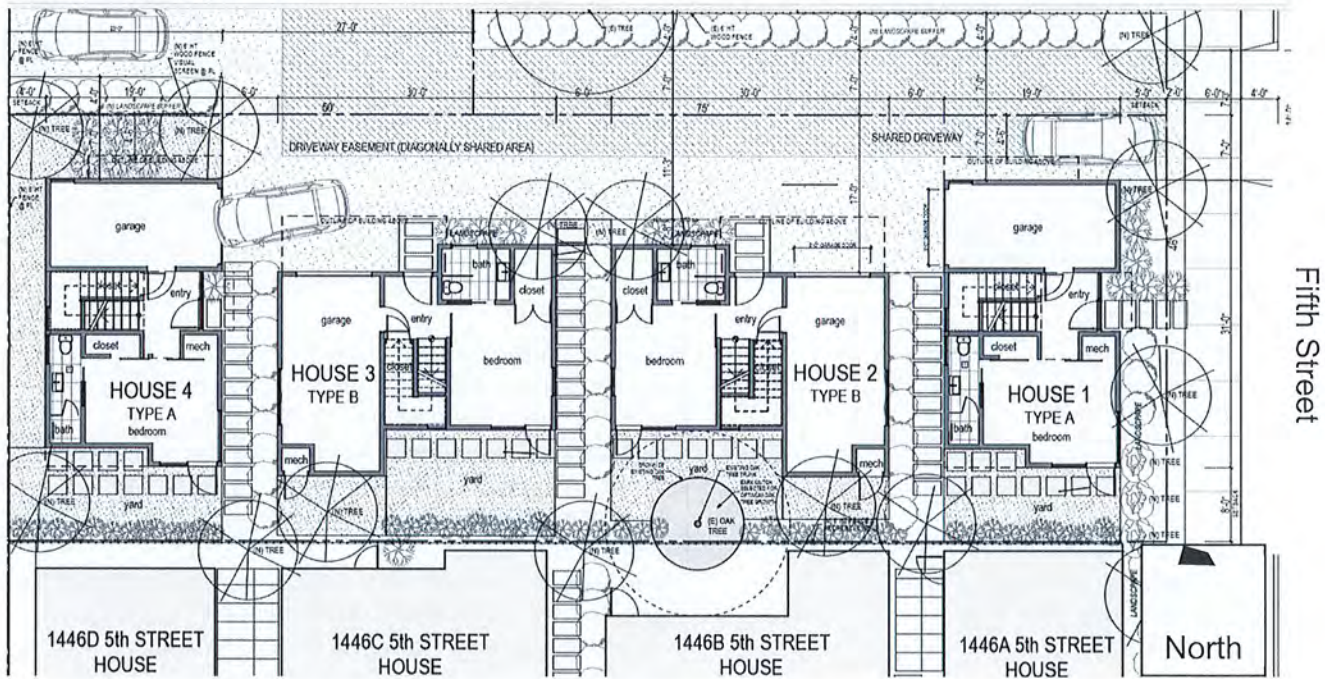


Table 1: Land Use Information

Location	Existing Use	Zoning District	General Plan Designation
Subject Property	Vacant		
Surrounding Properties	North	Single-family residential	MU – Mixed Use
	South	Four new detached dwelling units (developed by same applicant) currently under construction	
	East	Residential, commercial	
	West	Industrial, Warehouse	
		MU-R – Mixed Use Residential	
		MU-LI – Mixed Use-Light Industrial	

Table 2: Special Characteristics

Characteristic	Applies to Project?	Explanation
Affordable Child Care Fee for qualifying non-residential projects (Per Resolution 66,618-N.S.)	No	This fee applies to projects with net new 7,500 sq. ft. of non-residential floor area. The project involves only new residential floor area, and thus this requirement does not apply.
Affordable Housing Fee for qualifying non-residential projects (Per Resolution 66,617-N.S.)	No	This fee applies to projects with net new 7,500 sq. ft. of non-residential floor area. The project involves only new residential floor area, and thus this requirement does not apply.
Affordable Housing Mitigations for rental housing projects (Per BMC 22.20.065)	No	This fee applies to projects that propose 5 or more rental dwelling units. This project involves 4 new units, and thus this requirement does not apply.
Inclusionary Housing Requirements (Per BMC Chapter 23C.12)	No	This requirement applies to dwellings that are offered for sale as condominiums; at the time of this writing, the applicant has not applied for a condominium map at the project site. Moreover, the requirement applies to construction of less than 5 condominium units only on lots whose zoning designation allows for the construction of 5 or more units. Given the density standards in the MUR District, the existing lot can accommodate only 4 units. Thus, if the applicant did apply for a condominium parcel map, this fee would not apply.
Coast Live Oak Trees (BMC Section 6.52.010)	Yes	One Coast Live Oak tree that is subject to the moratorium on the removal of such trees is located near the south property line of the subject property. Two Conditions of Approval were added by the ZAB to an entitlement on the adjacent parcel at 1446 Fifth Street to ensure appropriate protection measures are taken during and after construction. Those Conditions of Approval are also included in the conditions for this project.
Creeks	No	The project site is not within a creek buffer zone.
Density Bonus	No	The applicant has not applied for a State Density Bonus.
Green Building Score		This project exceeds the minimum requirements of the GreenPoint Rated Checklist and must comply with the City's Building Code regarding project planning and design; energy, water, resources and material efficiency and conservation; and environmental quality. These requirements represent the minimum standards for green building in Berkeley, and the applicant may pursue further measures upon actual construction of this project is approved.
Historic Resources	No	The project does not involve the demolition of any building, nor is there any evidence to suggest that the site qualifies as a historic resource.
Rent Controlled Units	No	No rent-controlled units are at this site.
Residential Preferred Parking (RPP)	No	The neighborhood surrounding the subject site does not participate in the City's Residential Preferred Parking program.

Characteristic	Applies to Project?	Explanation
Seismic Hazards (SHMA)	Yes	The project site is located within an area susceptible to liquefaction as shown on the State Seismic Hazard Zones map. The applicant submitted a geotechnical investigation for the project (Peters & Ross, December 2016, May 2017, and October 2018), which concluded that the project is feasible from a geotechnical engineering standpoint provided the recommendations in the reports are followed. The City's geotechnical consultant peer reviewed the geotechnical investigations in memoranda of February 2017, May 2017, and October 2018 and concluded that the Peters & Ross report satisfactorily addresses the site geotechnical issues.
Soil/Groundwater Contamination	No	The project site is not listed on the Cortese List (an annually updated list of hazardous materials sites), however it is located within the City's Environmental Management Area. Standard Toxics Conditions of Approval apply.

Table 3: Project Chronology

Date	Action
August 31, 2018	Application submitted
November 19, 2018	Application deemed complete
January 10, 2019	Public hearing notices mailed/posted Staff Level Design Review approval posted on site
January 24, 2019	ZAB hearing

Table 4: Development Standards

Standard		Existing	Proposed Total	Permitted/ Required
BMC Sections 23E.84.070-080				
Lot Area (sq. ft.)		5,744	No Change	N/A
Gross Floor Area (sq. ft.)		0	Approximately 7,672 (1,900 per unit) ¹	N/A
Floor Area Ratio		0	1.3	1.5 max
Dwelling Units	Total	0	4	4 max (1 per 1,250 sq. ft. lot area, + 1 if remainder is 750 + sq. ft.)
Building Height	Average	N/A	33'	35' max
	Stories	N/A	3	3 max
Building Setbacks	Front	N/A	5'	5' min
	Rear	N/A	4'	0' min
	Left Side	N/A	4'6"	4'7" min ²
	Right Side	N/A	8'	4'7" min ²
Lot Coverage (%)		0	42%	N/A
Usable Open Space (sq. ft.)		N/A	816	600 min (150 per unit)
Parking	Automobile	N/A	4	4 min (1 per unit)
	Bicycle	0	0	None Required
¹ The originally submitted application included a proposal for 7,672 square feet of gross floor area. However, the applicant provided revised plans on December 24, 2018 to accommodate the required open space for each unit. The revised plans propose a reduction of approximately 30 square feet.				
² Per BMC Section 23E.84.070.E, if a side of a lot abuts a property with one or more dwelling units, the side yard shall be either 10', or 10% of the lot width, whichever is less.				

II. Project Setting

A. Neighborhood/Area Description: The project is in West Berkeley on the west side of Fifth Street between Page Street to the north and Jones Street to the south. A similar development project, which was proposed by the same applicant and also includes four detached, three-story dwelling units, is currently under construction at the southern abutting lot. One- and two-story residential buildings are located further south of the property for the length of the block to Jones Street and directly across Fifth Street.

This portion of the MU-R District provides a transition between the more exclusively residential areas to the east and the industrial areas to the west. The west side of the subject block, along Fourth Street, where the MU-LI District begins, includes industrial and warehouse uses. The east side of the block, along Fifth Street, where the project site is located, includes a residential concentration of one- and two-story buildings. The neighborhood further eastward features a mix of uses, including one- to three-story residential and commercial buildings. The concentration of residential uses increases further eastward.

B. Site Conditions: The project site is generally level, rectangular in shape and currently vacant, with no buildings or structures onsite. The western portion of the site is used

as part of a private parking area for the industrial and warehouse buildings on the west side of the block, including 1435, 1445, and 1453 Fifth Street.¹ The site contains one small Coast Live Oak tree located roughly 45 feet from the street near the southern property line. Several small trees are located along Fifth Street, in the public right-of-way in front of the project site.²

III. Project Description

The applicant proposes to construct four detached dwelling units. Each building would be three stories, with an average height of 33 feet, and would each provide approximately 1,900 square feet of gross floor area. The buildings would be located towards the south side of the property. A driveway serving each of the four proposed attached one-car garages would be aligned along the north side of the property and would be part of a proposed shared access easement that would also provide access to the northern abutting parcels at 1442 Fifth Street and 770 Page Street (see above, Figure 2).

The applicant has designed all four buildings according to the same general floor plan scheme. The ground floors would each include a garage, one bedroom, and one bathroom. The second floors would each include two bedrooms and a bathroom. The third floors would feature open floor plans, with connected living areas, dining areas, and kitchens. The front and rear buildings would have third floor decks with views of the street and rear yard, respectively. The two middle buildings would have rooftop decks with views in all directions. The proposed design of the buildings is similar to that of the recently approved development at the southern abutting lot, 1446 Fifth Street, which is currently under construction. Their design is intended to reference modern architecture and the industrial context of West Berkeley and would include wood and metal siding.

IV. Community Discussion

A. Neighbor/Community Concerns: As noted above, the same developer received an entitlement last year to develop the adjacent parcel at 1446 Fifth Street. That project also involved the construction of four new, detached, three-story dwellings on a vacant lot. Approvals by staff and the ZAB were appealed four times (once to the DRC, once to ZAB, and twice to City Council), and the application was ultimately approved at the City Council in July 2018. The appeal issues included concerns that the applicant was not meeting several City requirements, including the in-lieu fee required by the Inclusionary Housing Requirements, adequate review by Design Review staff, code-compliant parking spaces, protection of the Oak tree onsite, and notification of neighborhood residents.

¹ According to zoning records for these buildings, the off-street parking spaces for the existing businesses were provided on the same property as the businesses. While the parking does not occur entirely on the same property as these buildings (it occurs at portions of the eastern abutting properties), it appears that the City did not confirm the location of the parking spaces when zoning certificates were approved. However, per BMC Section 23B.20.020, because the approved zoning certificates do not contain evidence that required parking would be provided on different property, they do not validate approval of parking at the subject parcel.

² The attached Findings and Conditions include Conditions of Approval that apply to protection of the Coast Live Oak tree (#15) and proposed removal of any of the existing street trees (#16).

During the appeal process, in June 2018, the applicant obtained a Lot Line Adjustment of the property line between the subject parcel to 1446 Fifth Street, which shifted south by approximately 4 feet. The size of 1446 Fifth Street decreased to 5,744 square feet, and the size of the subject parcel increased to 5,744 square feet. Given the density standards in the MU-R District, each newly created lot can accommodate a maximum of four units. As noted in Table 2, the result of this change is that the Inclusionary Housing Requirements in BMC 23C.12 would not apply if the applicant chooses to submit a condominium parcel map for either parcel.

As allowed by BMC Section 23B.28.030 (Referral of Applications for AUPs to Board), because of the similarity between the proposed project and the neighboring approved project, and given the level of recent neighborhood interest, the Zoning Officer has scheduled the AUP application for a public hearing before the ZAB, instead of issuing a notice of decision administratively. In this case, the Board must review and act upon the application in the same manner as it acts upon other Use Permit Applications.

Prior to submitting this application to the city, a pre-application poster was erected by the applicant, and the applicant held a community meeting on August 23, 2018, which was attended by six people (meeting minutes are included as Attachment 4). On January 9, 2019, the City mailed public hearing notices to property owners and occupants within 300 feet of the subject site, and to interested neighborhood organizations, and the City posted notices within the neighborhood in three locations. At the time of this writing, staff has not received any communications regarding the project.

- B. Committee Review:** Since the project site is in a nonresidential zoning district, Staff Level Design Review is required. The applicant submitted a Staff Level Design Review application in conjunction with the Administrative Use Permit application on August 31, 2018. Design Review Staff concluded that the project is compatible with City-wide Design Guidelines and posted notices on-site on January 9, 2019. The Staff Level Design Review Approval included standard design review conditions for further review of building details and the landscape plan during the building permit process. The appeal and comment period for this approval is currently underway and will end on January 23, 2019, at 4:00 PM.

V. Issues and Analysis

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

1. The development would have a specific adverse impact on public health or safety unless disapproved, or approved at a lower density;³ and

³ As used in the Act, a "specific, adverse impact" means a "significant, quantifiable, direct and unavoidable impact, based on objective, identified written public health or safety standards, polices, or conditions as they existed on the date the application was complete.

2. There is no feasible method to satisfactorily mitigate or avoid the specific adverse impact, other than the disapproval, or approval at a lower density.

Staff Analysis: The proposed project complies with applicable, objective general plan and zoning standards, including maximum height, density, and FAR, and minimum setbacks, useable open space, and number of parking spaces. Thus, the Housing Accountability Act applies. Staff is not aware of any basis to make the findings listed above.

- B. New Dwelling Units in the MU-R District and Neighborhood Compatibility:** Pursuant to BMC Section 23E.84.090, the proposed project is consistent with the purposes of the MU-R District and the West Berkeley Plan because it would strengthen the residential concentration in this neighborhood. The project would protect neighboring residents from unreasonably detrimental effects of nonresidential uses, such as noise, vibration, odors, smoke, fumes, gases, dust, heat and glare because the proposal would add residences (not industrial uses) to the existing cluster of residential buildings at this block. Given the existing residential concentration on this block face, the project is also not likely to contribute to a cumulative change of use in buildings away from the mix of uses that surround this area of West Berkeley. Moreover, the proposed use and its industrial aesthetic would help contribute to a neighborhood that acts as a transition between the residential districts to the east and the industrial districts to the west.

The proposed project complies with all applicable MU-R District development standards (see Table 4). The applicant proposes to construct four units on a lot that can accommodate four units; a floor area ratio of 1.3 where the maximum allowed is 1.5; average height of 33 feet at all four buildings where the maximum average height allowed is 35 feet; and 816 square feet of useable open space where the minimum required is 600 square feet (150 per unit). The project would provide the required number of parking spaces, one per unit, and the City's Traffic Engineer has confirmed that the proposed parking and driveways would operate acceptably. (To ensure compliance with Traffic Engineering standards, Condition of Approval #12 requires that the applicant provide the recorded easements prior to issuance of a building permit.) The project would meet the required front yard setback and would exceed all side and rear yard setbacks.

Staff believes the proposal is consistent with the overall scale and development pattern of the one-, two-, and three-story residences and commercial and manufacturing spaces in the neighborhood, including the approved development on the southern abutting parcel. In addition, Design Review Staff found that the application is consistent with applicable design review guidelines and with the surrounding aesthetic context.

Sunlight: Staff believes the project would not result in significant loss of direct sunlight on abutting residences for several reasons. No residences occur to the west and new shadows cast towards the east would occur primarily along Fifth Street, and not any dwellings. The project would cast shadows on the northern abutting dwelling at 1442 Fifth Street during the winter solstice and on the southern abutting dwellings (currently

under construction) at 1446 Fifth Street during the summer solstice. However, in both cases, shadows would only affect some windows and occur during some morning hours. Because impacts to neighboring residences would be limited to certain hours a day and certain months of the year, staff believes these shading impacts would not be detrimental.

Air: Staff believes the proposal would be consistent with the existing development and building-to-building separation pattern – or air – in this MU-R neighborhood because the buildings would exceed minimum setback and useable open space requirements and would be three stories where the maximum allowed is three.

Views: Staff expects that the proposed project would not result in additional obstruction of significant views in the neighborhood because there are no significant views as defined in BMC Section 23F.04 (Definitions) available to residences in the area. The area is generally flat, developed with one- to three-story buildings, and includes mature vegetation which provides visual screening.

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

1. Policy LU-3–Infill Development: Encourage infill development that is architecturally and environmentally sensitive, embodies principles of sustainable planning and construction, and is compatible with neighboring land uses and architectural design and scale.
2. Policy LU-7–Neighborhood Quality of Life, Action A: Require that new development be consistent with zoning standards and compatible with the scale, historic character, and surrounding uses in the area.
3. Policy UD-16–Context: The design and scale of new or remodeled buildings should respect the built environment in the area, particularly where the character of the built environment is largely defined by an aggregation of historically and architecturally significant buildings.
4. Policy UD-24–Area Character: Regulate new construction and alterations to ensure that they are truly compatible with and, where feasible, reinforce the desirable design characteristics of the particular area they are in.

Staff Analysis: The proposed project is an infill development that would add four new dwellings on a vacant lot in a primarily residential neighborhood. The massing, proportions, design, and use of the buildings would be compatible with the surrounding neighborhood. As noted above, the project meets or exceeds all development standards in the MU-R district.

5. Policy H-33–Regional Housing Needs: Encourage adequate housing production to meet City needs and the City's share of regional housing needs.

Staff Analysis: The applicant proposes to add four new dwelling units to the City of Berkeley housing stock.

6. Policy EM-5–“Green” Buildings: Promote and encourage compliance with “green” building standards. (Also see Policies EM-8, EM-26, EM-35, EM-36, and UD-6.)
7. Policy UD-33–Sustainable Design: Promote environmentally sensitive and sustainable design in new buildings.

Staff Analysis: The project would be constructed to comply with current green building standards that are required by the Building Code.

D. West Berkeley Plan Consistency: The 1993 West Berkeley Area Plan contains several policies applicable to the project, including the following:

1. Land Use Goal 1, Policy A: Retaining, through planning, zoning and land use policies which shield manufactures from economic and physical incompatibilities with other uses, sufficient land and buildings to maintain the current level of manufacturing employment at a minimum.
2. Land Use Goal 2, Policy D: Create a Mixed Residential district as a special mixed use district which will recognize and support the continued evolution of a unique mix of residential, light industrial, and arts and crafts uses, with a particular effort to strengthen residential concentrations existing there.

Staff Analysis: Since the proposed residential units would be located on a block that already contains a concentration of residential uses, the project would shield manufacturers elsewhere in the MU-R district from incompatibilities with residences that are too proximate. Given this compatibility of the proposed use, the project would support the mixed nature of the existing neighborhood.

3. Land Use Goal 4: Assure that new development in any sector is of a scale and design that is appropriate to its surroundings, while respecting the genuine economic and physical needs of the development.

Staff Analysis: As discussed above in Sections V.B and V.C, the proposed massing and scale would be compatible with the surrounding neighborhood context and would reflect the industrial nature of West Berkeley. The project would also provide four new dwelling units that meet all applicable zoning requirements for new residential uses.

VI. Recommendation

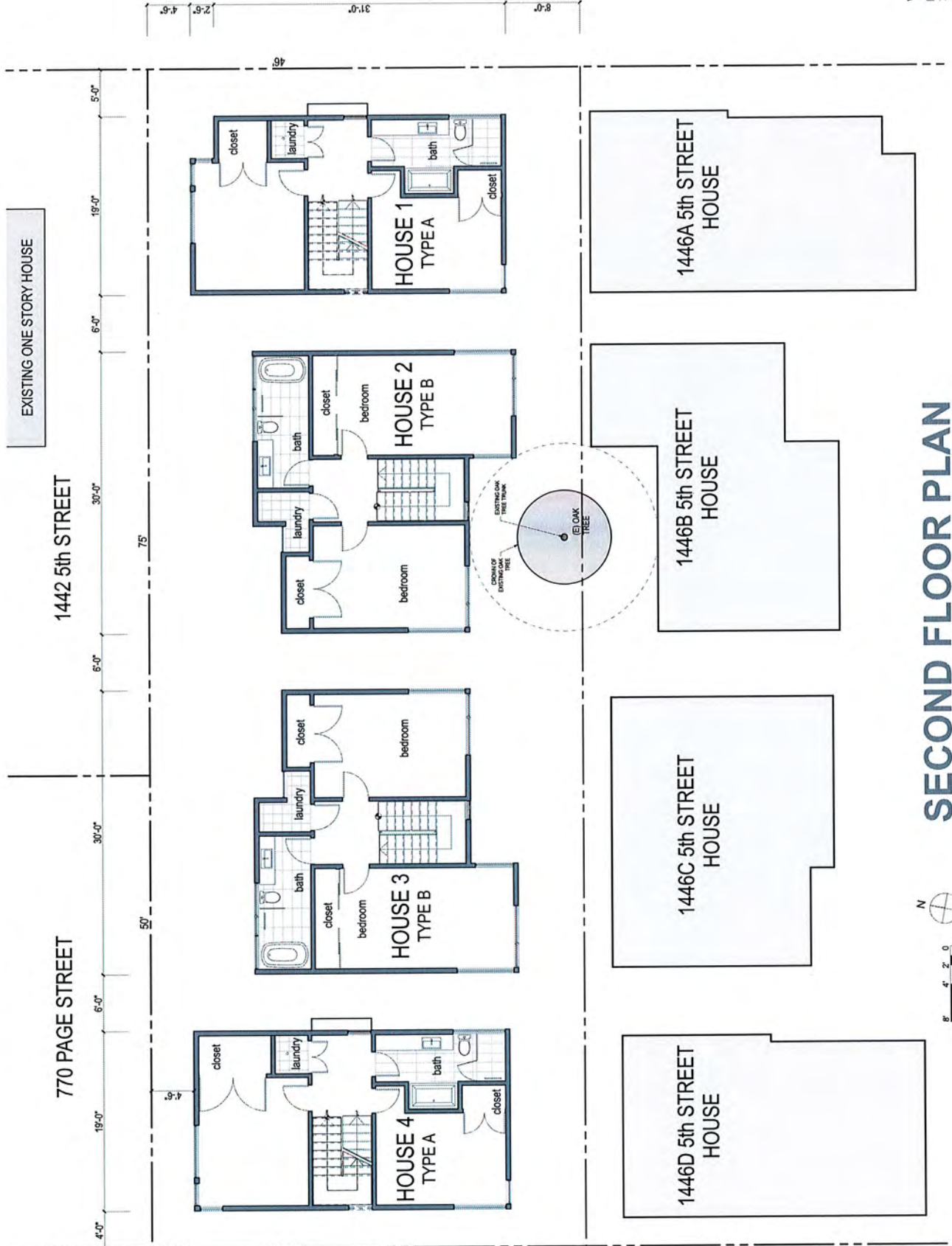
Because of the project’s consistency with the Zoning Ordinance and General Plan, and minimal impact on surrounding properties, staff recommends that the Zoning Adjustments Board **APPROVE** #ZP2018-0172 pursuant to Section 23B.28.060.C.1 and subject to the attached Findings and Conditions (see Attachment 1).

Attachments:

1. Findings and Conditions
2. Project Plans, received January 8, 2019
3. Notice of Public Hearing
4. Neighborhood Meeting Notes and Attendance

5. Correspondence Received

Staff Planner: Abe Leider, Contract Planner, aleider@rinconconsultants.com, (510) 671-0175 and Leslie Mendez, LMendez@cityofberkeley.info, (510) 981-7426



EXISTING ONE STORY HOUSE

1442 5th STREET

770 PAGE STREET

HOUSE 1
TYPE A

HOUSE 2
TYPE B

HOUSE 3
TYPE B

HOUSE 4
TYPE A

1446A 5th STREET
HOUSE

1446B 5th STREET
HOUSE

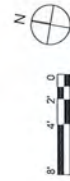
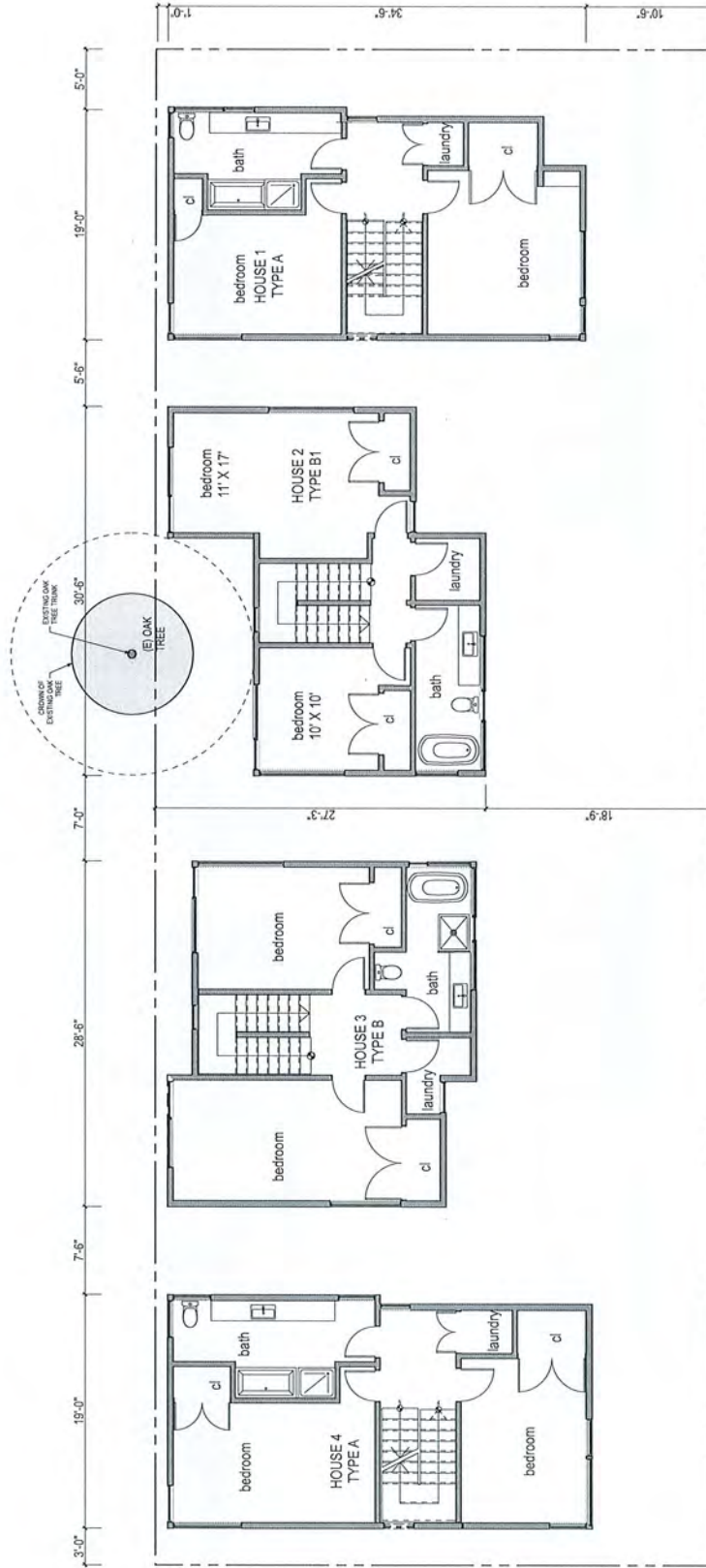
1446C 5th STREET
HOUSE

1446D 5th STREET
HOUSE

SECOND FLOOR PLAN

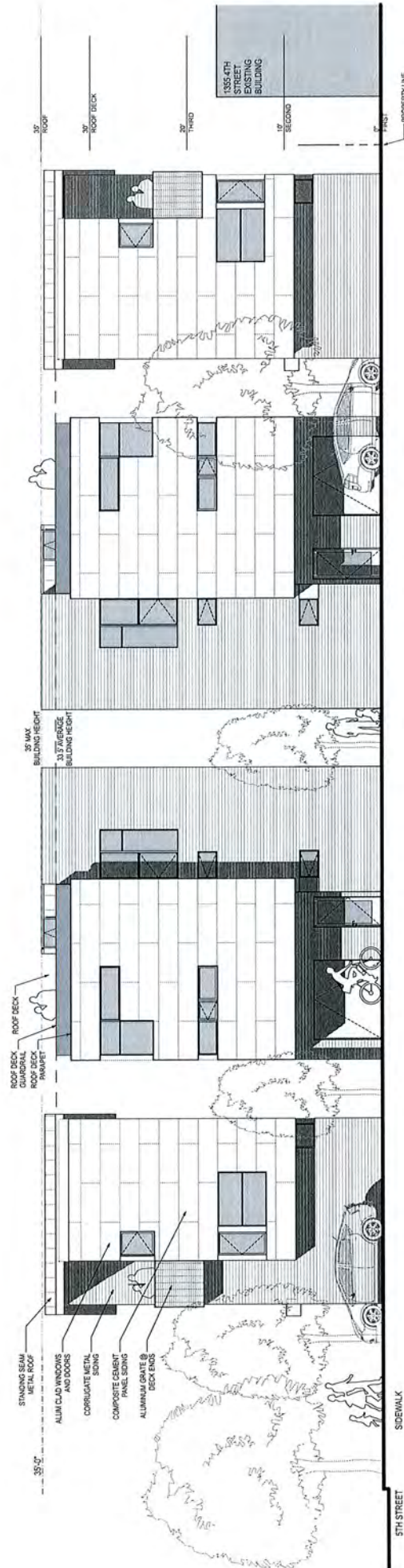
EXISTING WAREHOUSE FACING 4TH STREET

ARCHITECT: EDUCATION VERSION

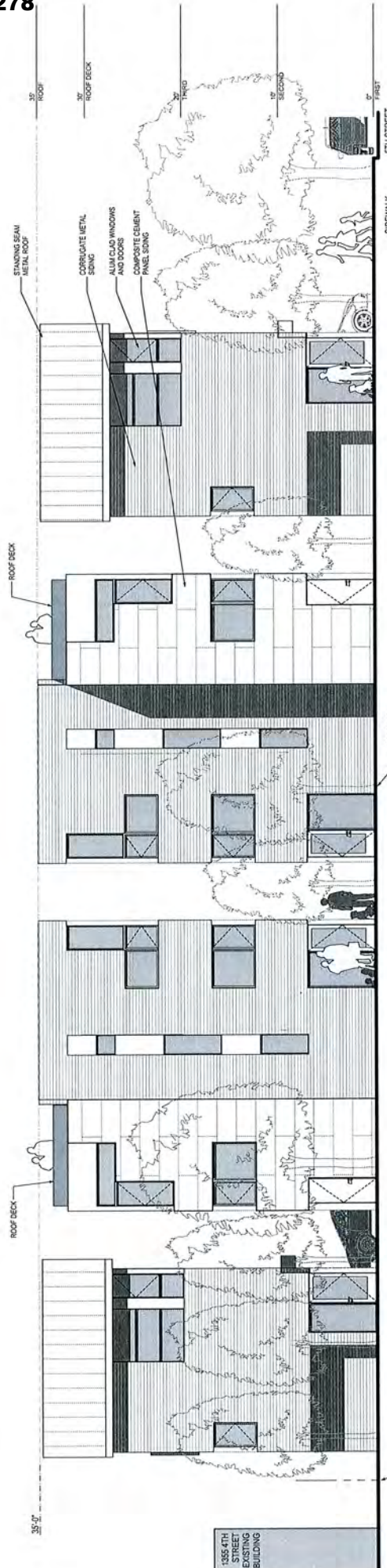


WADLUND +
Design Studio
3485 5TH STREET, S.W.
SEASIDE, WA 98138
TEL: 206.465.2001 FAX: 206.465.2002
WWW.WADLUND.COM

SECOND FLOOR PLAN



NORTH ELEVATION - LOT INTERIOR



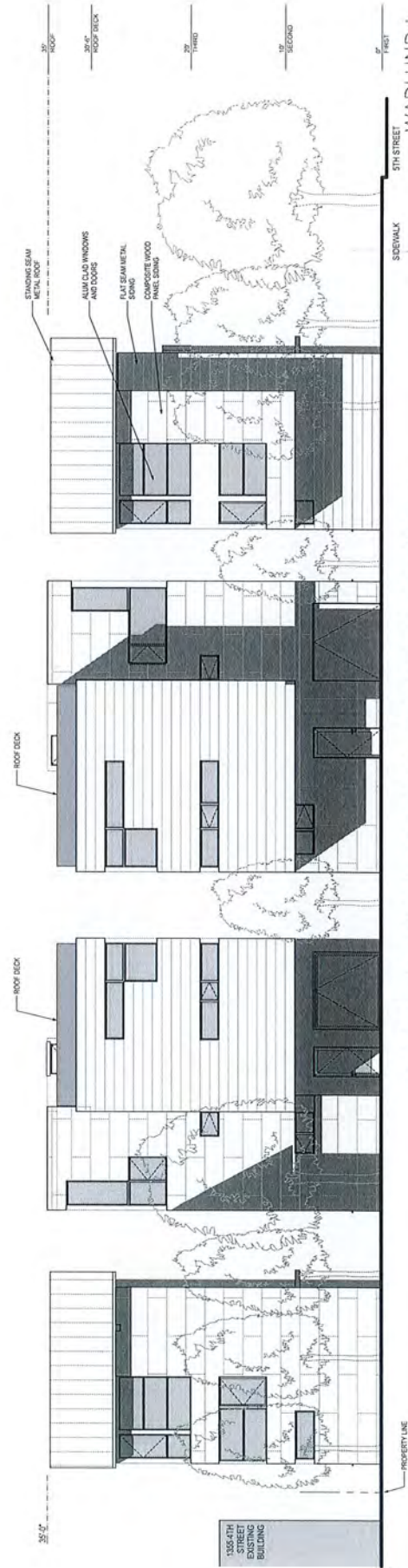
SOUTH ELEVATION - LOT INTERIOR

ARCHICAD EDUCATION VERSION



NORTH ELEVATION - LOT INTERIOR

5TH STREET
 SIDEWALK
 0' 2' 4' 8'
 SCALE



SOUTH ELEVATION - LOT INTERIOR

5TH STREET
 SIDEWALK
 0' 2' 4' 8'
 SCALE

1355 5TH STREET
 EXISTING BUILDING
 WADLUND+
 Design Studio
 1445 5TH STREET, A-100
 REVEREND, OR 97077 FOR CONTACT
 APPLICATING



City of Berkeley



Manager's Office
Martin Luther King, Jr.
Civic Center Building
2180 Milvia Street
Berkeley, California 94704

(415) 644-6580
TTY (415) 644-6915

FOR COUNCIL ACTION
June 10, 1986

Deadline For Council
Action: August 18, 1986

To: Honorable Mayor and
Members of the City Council
From: Hal Cronkite, Acting City Manager
Subject: ADOPTION OF INCLUSIONARY ZONING ORDINANCE

PRESENTED TO COUNCIL
CITY OF BERKELEY
JUN 10 1986
OFFICE OF
CITY CLERK

Introduction

The purpose of this report is to present for Council consideration a draft Ordinance which revises the Inclusionary Zoning Ordinance initiated by the Planning Commission.

RECOMMENDATION

1. That Council adopt a Negative Declaration and adopt the attached Ordinance which adds Chapter 15B to the City's Zoning Ordinance No. 2,018-N.S. to require inclusion of low income housing in certain residential housing projects.
2. That Council direct the City Manager to examine the Planning and Community Development Work Program to identify which activities must be deleted so that implementation of the Inclusionary Zoning Ordinance can be added.

Background

The attached draft Inclusionary Zoning Ordinance prepared by staff and recommended for adoption by Council is very similar in principle and content as that approved by the Planning Commission. This draft was developed as a result of Legal review of the Planning Commission's Ordinance and staff discussion of certain issues which arose subsequent to approval of the Commission's Ordinance. Many of the changes are minor and technical in nature, some involve clarifications and elucidations, a few are substantive. A summary of the more salient changes and the rationale for those changes is provided below. Attachment B is the proposed Ordinance, while Attachment C is the proposed Ordinance with differences between it and the Planning Commission's version.

I SUMMARY OF CHANGES

Applicability

The draft clarifies the Planning Commission's intention that the Ordinance applies to both proposed projects of five units or more and residential projects proposed on parcels suitable for development of five units or more.

Eliminated from this section is the requirement that no building or occupancy permit be issued unless the requirements of the Ordinance are met. That language was superfluous since in the section on General Inclusionary Requirements the Ordinance specifies that no Use Permit shall be issued without appropriate inclusionary provisions.

The text exempting live/work projects has also been removed from this section since the exclusion of that category in the staff's draft is contained in the definition of "residential unit."

Purpose

This section better defines the purpose of the Ordinance.

Definitions

The location of the section has been changed and some of the definitions deemed not necessary eliminated. The major change in this section is in the definition of "residential unit." The definition clarifies that fraternities, sororities, residential hotels, and other group living quarters for purposes of this Ordinance are not considered "residential units" and, therefore, exempt from the Ordinance. Those exclusions were not discussed during the drafting of the Ordinance by the Planning Commission Committee. Nonetheless, they appear logical given the structure of the Ordinance. It would be extremely difficult to apply the Ordinance without substantive additions to accommodate those categories. Staff did not think it appropriate to recommend such changes. Furthermore, it did not appear likely that there would be any significant number of new projects in those categories.

Designated Implementing Authority

Unlike the Planning Commission's Ordinance which requires prior approval by that body of regulations and procedures, the proposed Ordinance allows the City Manager to develop and implement regulations. This change is necessary to avoid delay between passage of the Ordinance and processing of Use Permits. The Planning Commission would still have input but rather than being at the beginning of the process, review and input will occur within one year of passage of the Ordinance.

General Inclusionary Requirements

Regulations pertaining to density bonuses have been eliminated as a separate section and incorporated into this section and other parts of the Ordinance for low income inclusionary units where a density bonus/incentives are provided is the same as that required when no density bonus/incentives are granted.

Use Permit Conditions

A section on Use Permit conditions present in the Planning Commission's Ordinance has been eliminated because it is too restrictive (for example, it requires information that may not be available at the time of the Use Permit application). The section is also superfluous since the previous section already states that applicable residential developments shall have conditions attached which will assure compliance with the provision of the Ordinance and require a written agreement between the City and developer as to specific requirements.

Inclusionary Requirements for Rental Projects

An addition has been made to this section to specify that when a density bonus/incentives are given to allow development of "lower income" units, those units shall be affordable to households with income that is 60% of median for this area. This addition is necessary to clarify what the actual price of the inclusionary units will be.

Inclusionary Unit Requirements for Ownership Projects

Language has been added to this section to exclude limited equity housing cooperatives from giving the City the right-of-first refusal to purchase units. Given the goals of limited equity cooperatives, it would be unlikely that the City would be interested in purchasing inclusionary units in such projects.

This section also has an addition that specifies that when a density bonus is granted in exchange for development of "low income" units those units shall be affordable to households at 70% of median income.

Another change in this section pertains to the time limit by which the City must either act on its right-of-first refusal or provide a purchaser list. This draft allows the City 60 days from completion of the project to take either of the above actions. The Planning Commission's Ordinance requires the City to take those actions within 60 days from completion of the development's foundation. Staff felt that the timeline contained in the Planning Commission's Ordinance was insufficient to give any indication as to the appearance of the inclusionary unit. Therefore, it would be difficult to find a buyer for the inclusionary unit. The time limit in the proposed draft would

reduce that difficulty. It will give the developer sufficient time to sell the inclusionary unit at approximately the same time as other units in the project.

Control of Resale

This section has also been revised to exclude limited equity housing cooperatives (LEHC) from the resale controls contained in the Ordinance. Such exclusion appeared justified since LHEC's contain restrictions similar to those found in the Ordinance. The City still maintains the right to monitor the inclusionary units to ensure that affordability requirements are being met.

The staff's draft also proposes that only half of the cost of improvements may be recovered by the owner once the inclusionary unit is sold as opposed to the whole amount allowed in the Planning Commission's Ordinance. This change provides a balance between retaining an incentive for owners to improve their home but yet maintaining affordability for future households who are at the same income level as the original buyer.

In Lieu Fees

This section has been changed by adding language to cover in-lieu fees for residential rental projects. Since those units are not offered for sale, it is recommended that the in-lieu fee be the same as for the ownership units. However, rather than "actual sales price" the City would use "comparable sales price" to determine the amount to be paid by the developer.

Density Bonus/Other Incentives

This section has been incorporated into the section on General Inclusionary Requirements.

II ADOPTION OF A NEGATIVE DECLARATION

Since the proposed draft is very similar to that initiated by the Planning Commission, the Initial Environmental Study which justifies the issuance of a Negative Declaration for that Ordinance is equally valid for this draft. The Initial Environmental Study is contained in Attachment C of the Planning Commission's report being presented for Council action on this matter.

III IMPLEMENTATION

It is difficult to say precisely how much staff time will be involved in implementing the Ordinance since much depends on the level of applicable new residential projects developed. However, at least for the first year, approximately 0.5 FTE staffing will be required to: develop regulations, schedules, and procedures, prepare a referral list and certify eligibility, provide information to potential developers and other interested parties and prepare agreements. The level of staffing could be reduced by simplifying the

ADOPTION OF INCLUSIONARY ZONING ORDINANCE

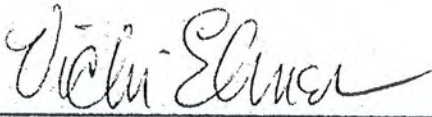
FOR COUNCIL ACTION
June 10, 1986

Ordinance to decrease staff involvement. But if the City wishes to retain control on occupancy and future affordability of the inclusionary units, staff involvement is crucial. In any case, initial implementation of the Ordinance will require intensive and considerable staff time. It is extremely important to identify funding and staff not only to achieve the goals of the Ordinance but also to avoid major bottlenecks in the operation of the Zoning Division.

Financial Implications and Contact Person

Negligible
Vicki Elmer, 644-6073

Approved by:



Vicki Elmer, Assistant City Manager
Planning and Community Development

- Attachments:
- A. Negative Declaration
 - B. Proposed Ordinance
 - C. Annotated Staff-Proposed Ordinance

08-03



Planning and Community
Development Department
Zoning Division
Martin Luther King, Jr.
Civic Center Building
2180 Milvia Street
Berkeley, California 94704

(415) 644-6570
TTY (415) 644-6915

P R O P O S E D
N E G A T I V E D E C L A R A T I O N

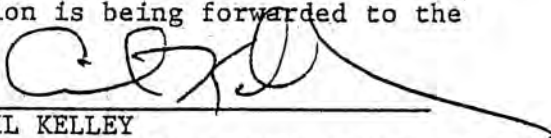
It is hereby declared that the project described below will not have a significant effect on the environment based on the Initial Study prepared according to CEQA guidelines:

INCLUSIONARY ZONING ORDINANCE

The purpose of an inclusionary zoning ordinance is to ensure that some units in multi-family housing projects be made affordable to low income households. The Ordinance will require that 20% of all new residential development projects be affordable. The Ordinance will be applicable to projects containing five or more residential units. Potential beneficiaries are households with income below the median income for this area. Other elements of the Ordinance include a City's right-of-first refusal to acquire inclusionary units, resale restrictions on inclusionary units to maintain long-term affordability, payment of an "in-lieu" fee instead of provision of fractional unit, provision of a density bonus or other incentives when State requirements are applicable. The Planning and Community Development Department is the designated implementing agency.

Anyone concerned with this project may review the application and other material composing the Initial Study on file in the Zoning Division, Martin Luther King, Jr. Civic Center Building, 2180 Milvia Street, Berkeley, CA 94704 (Phone 644-6570.)

The Planning Commission reviewed and recommended adoption of this Negative Declaration on May 21, 1986. The recommendation is being forwarded to the City Council for adoption.


GIL KELLEY
ENVIRONMENTAL REVIEW, ZONING DIVISION

ORDINANCE NO. -N.S.

Amending Zoning Ordinance No. 3018-N.S. by adding Chapter 15B to require the inclusion of low income housing in certain residential housing projects.

BE IT ORDAINED by the Council of the City of Berkeley that the Zoning Ordinance be amended as follows:

CHAPTER 15B

INCLUSIONARY UNITS

Section 15B.0 APPLICABILITY OF REGULATIONS

(a) The following regulations shall apply to Use Permit and variance applications for development of:

- (1) projects containing five or more residential units.
- (2) residential housing projects proposed on parcels whose size and zoning designation is such to allow construction of five or more dwelling units.
- (3) projects of one to four residential units when such units are added to an existing one to four unit property which has been developed after passage of this Section and the resulting number of units totals five or more. All units in said property are subject to the requirements of this Chapter.

(b) no building permit shall be issued for a project subject to this Chapter unless the developer has agreed to meet the requirements of this Chapter except projects for which building permits were granted prior to February 19, 1986, shall not be required to comply with this Chapter's requirements.

Section 15B.1 FINDINGS

The City of Berkeley finds that:

(a) There is a shortage of housing affordable to low income residents.

(b) Persons with low incomes who live and/or work in the City have serious difficulties locating housing at prices they

can afford.

(c) The high cost of newly constructed housing does not, to any appreciable extent, provide housing affordable by low income households, and that continued new development which does not include lower cost housing will serve to further aggravate the current housing shortage by reducing the supply of land.

(d) The encouragement of usage of density bonus rather than other incentives in applicable cases will help increase the housing supply.

(e) Federal and State housing subsidy programs are not sufficient by themselves to satisfy the housing needs of low income households.

(f) The housing shortage for persons of low income is detrimental to the public health, safety and welfare of the City.

(g) The public purpose of the City and the public policy of the State of California as mandated by the Housing Element of the Master Plan is to make available an adequate supply of housing for persons of all economic segments of the community.

Section 15B.2 PURPOSE

The purpose of this Chapter is to promote achievement of goals number one, two, three, four, and six of the Housing Element by requiring development of affordable housing for households with income below this area's median.

Section 15B.3 DEFINITIONS

(a) Developer means any person, firm, partnership, joint venture, corporation, or any entity or combination of entities which City permits and approvals and/or develop a project pursuant to this Chapter.

(b) Household for purposes of inclusionary requirements shall be the same as the definition used for "family" in the federal Section 8 Existing Housing Program or its future equivalent.

(c) Residential unit or unit means a dwelling containing its own bathroom and kitchen facilities and used primarily for residential accommodations. For purposes of this Chapter dormitories, fraternity and sorority houses, boarding houses, residential hotels, and joint living and work quarters shall not be considered residential units and shall not be subject to this Chapter.

(d) Low income household means a household whose gross income is greater than 80% and less than 100% of the PMSA median income for this area.

(e) Lower income household means a household whose income is no greater than 80% and above 50% of the PMSA median income for this area.

(f) Very low income household means a household whose gross income is 50% or below of the PMSA median income for this area.

(g) Gross household income means the household income of all adult members of the household as determined according to the guidelines used by the Berkeley Housing Authority for its Section 8 rental subsidy program.

(h) Inclusionary unit means a residential unit which as required by this Chapter is to be affordable by households with income below the PMSA median income for this area.

(i) In-lieu fee means a fee paid to the City by a developer in place of construction of a required fraction of an inclusionary unit.

(j) Density bonus means an increase in the number of units authorized for a particular parcel of land beyond the maximum allowed by the Master Plan as provided for by the California Government Code Section 65915.

(k) Incentive means a benefit offered by the City instead of a density bonus to facilitate the construction of housing projects which include low income inclusionary units. Among others, benefits may include fee deferments and waivers, granting of variances, relaxation of otherwise applicable permit conditions, and provision of government benefits.

(l) Resale controls means a resale restriction placed on inclusionary units by which the price of such units and income of purchaser will be restricted in order to insure the affordability and occupancy by low, lower, or very low income households.

(m) Project means a project subject to any of the requirements of this Chapter as set forth in Section 15B.0.

Section 15B.4 DESIGNATED IMPLEMENTING AUTHORITY

(a) The City Manager or his or her designee shall be the designated authority to develop and implement rules and regulations pertaining to this Chapter, to require guarantees; to enter into recorded agreements with developers, and to take other appropriate steps necessary to assure that the required low income

and very low income dwelling units are provided and are occupied by low income households.

(b) Within one year from passage of this Chapter, administrative rules and regulations pertaining to this Chapter shall be brought before the Planning Commission for assessment and revisions as deemed necessary.

Section 15B.5 GENERAL INCLUSIONARY REQUIREMENTS

(a) Any new residential construction involving five or more dwelling units shall be required to include at least 20% of the total number of dwelling units within the project as inclusionary units. The 20% requirement shall also be applicable to residential projects proposed on parcels suited for the development of five residential units or more. In applying these percentages, any decimal fraction shall be paid as an in-lieu fee in conformity with Section 15B.12.

(b) If a developer agrees to construct at least 25% of low income units or 10% of lower income units as set forth in this Chapter, the City shall provide a 25% density bonus or incentives of equivalent financial value.

(1) The use of density bonus is to be preferred over other types of incentives.

(2) If the density bonus or equivalent incentive granted is above 25%, the developer shall agree to a cost certification process.

(c) Any use permit for new residential construction project of five or more units, or for residential construction on parcels that allow for the development of five or more units shall have conditions attached which will assure compliance with the provisions of this Chapter.

(c) All inclusionary units shall be sold to the City or its designee or to households whose gross income is below the Oakland Primary Metropolitan Standard Area (PMSA) median income figures, or rented to households of similar incomes.

Section 15B.6 PROVISION OF WRITTEN AGREEMENT

A written agreement shall be made between the developer and the City which indicates the number, type, location, approximate size and construction scheduling of all dwelling units and such information as shall be required by the City for the purpose of determining the developer's compliance with this Chapter.

Section 15B.7 GENERAL CONSTRUCTION REQUIREMENTS

10.

(a) All inclusionary units in a project and phases of a project shall be constructed concurrently with or prior to the construction of non-inclusionary units.

(b) All inclusionary units shall be reasonably dispersed throughout the project, shall contain on an average the same number of bedrooms and be of the same size as the non-inclusionary units in the project, and shall be comparable with the design or use of remaining units in terms of appearance, materials, and finished quality.

(c) In situations where the developer substantiates and staff concurs that the direct construction and financing costs of the inclusionary units, excluding marketing cost and profit (and also excluding land costs if a density bonus or equivalent incentives are provided), exceed the selling prices allowed for inclusionary units by this Chapter, the Board of Adjustment may approve one or more of the following measures to reduce costs or increase profitability:

(1) reduction of interior amenities of the inclusionary units provided that such units conform to the requirements of the City building and housing codes;

(2) reduction of the square footage of the inclusionary units provided all units conform to the requirements of the City's building and housing codes.

(3) allowance of an increase in the number of bedrooms in the inclusionary unit.

(d) In a homeownership project, the Board of Adjustment shall have the option of allowing the developer to construct rental units in a number sufficient to meet the inclusionary requirements of this Chapter. These rental units shall be subject to the "Inclusionary Unit Requirements for Rental Housing Projects" contained in Section 15B.8.

Section 15B.8 INCLUSIONARY UNIT REQUIREMENTS FOR RENTAL HOUSING PROJECTS

(a) All inclusionary units shall be occupied by low, lower, or very low income households. The Oakland PMSA income figures shall be used in determining income eligibility.

(b) The maximum rental price for inclusionary units shall be rent affordable to an appropriate-sized household whose income is 81% of the PMSA median for this area.

(c) In projects requiring more than one inclusionary unit,

//.

at least 50% of those units shall be rented at a price that is affordable to an appropriate-sized household whose income is at 50% of the PMSA median income provided that the City can make available rental subsidies through the Section 8 Existing Housing Program or an equivalent program. When there is an uneven number of inclusionary units, the uneven number shall be also be priced to be affordable to a household at 50% of median income if subsidies are available. If no rental subsidies are available, all inclusionary unit prices shall be affordable to households at 81% of the PMSA median income.

(d) If a developer agrees to provide 10% lower income inclusionary units, rental price for such units shall be affordable to a household with income that is 60% of the PMSA area median.

(e) A unit shall be considered affordable if the rent (including utilities) does not exceed 30% of a household's gross income. Gross household income and utility allowance shall be calculated according to the guidelines used by the Housing Authority for the Section 8 Existing Housing Program. For purposes of calculating rent, appropriate household size shall be determined by using the schedule contained in the administrative regulations for this Chapter.

(f) At least 20% of the units shall be inclusionary for a period of 59 years. In applying that percentage, any decimal fraction shall be paid as an in-lieu fee in conformity with Section 15B.12.

(g) The City or its designee shall screen applicants for the inclusionary units and refer eligible households of the appropriate household size for the unit. For purposes of occupancy, the appropriate household size standards used by the Housing Authority for the Section 8 Program or any future equivalent program shall be used. The developer or owner shall retain final discretion in the selection of the eligible households referred by the City.

(h) The owner shall provide the City with data on vacancies and other information required to insure the long-term affordability of the inclusionary unit by eligible households.

Section 15B.9 INCLUSIONARY UNIT REQUIREMENTS FOR
OWNERSHIP PROJECTS

(a) The first inclusionary unit shall be sold at a price that is affordable to an appropriate sized household whose income

is no more than 90% of the PMSA median. Thereafter, inclusionary units shall be sold at prices affordable to low income households of the appropriate size for the unit at a price that will result in the average cost being no more than 2.5 times the annual gross income of an appropriate-sized household whose income is no more than 81% of the PMSA for this area. "Lower income" inclusionary units shall be sold at a price that is affordable to an appropriate sized household whose income is 70% of median income. For determining sales price, appropriate size of household shall be calculated by using the schedule contained in the administrative regulations .

(b) The developer of a project other than a limited equity housing cooperative shall be required to give right-of-first refusal to purchase any or all inclusionary units to the City or a City designated agency or organization for a period of not less than 60 days from completion of construction.

(c) Should the City choose not to exercise its right-of-first refusal, it shall provide the developer or owner with a purchaser or with a list of eligible purchasers within that same time period. If the list is not provided, the developer may select a low income purchaser of his/her choice as long as the City verifies income eligibility and the unit is sold at an affordable price as described in this Ordinance.

(d) The City shall maintain a list of eligible low income households and review the assets and income of prospective purchasers of the inclusionary units on a project by project basis and refer potential purchasers to the developer or owner.

Section 15B.10 PURCHASER RESTRICTIONS

(a) All purchasers of inclusionary units shall be first time home buyers with Low, Lower, or Very Low Income. Purchasers shall also be required to occupy the unit except that such requirement may be waived with the approval of the City. In such cases, the unit shall be rented to a Low, Lower, or Very Low Income household at a rent affordable by such households..

(b) Eligible Berkeley residents will have first preference for inclusionary units; second preference will be given to eligible persons employed in the City of Berkeley. Other preferences and priorities may also be established administratively, with Planning Commission review, to help meet the City's Housing Element goals.

(c) The City shall advise all prospective purchasers on the City's eligibility list of the resale restrictions applicable to ownership of inclusionary units as specified in this Chapter and shall provide purchasers with a declaration of restrictions

applicable to ownership of inclusionary units as specified in this Chapter.

Section 15B.11 CONTROL OF RESALE

(a) Except for inclusionary units in limited equity cooperatives, in order to maintain the availability of affordable housing units, the City shall impose the following resale conditions :

(1) Homeownership inclusionary units offered for sale, or sold under the requirements of this Chapter shall be offered to the City or its designee for a period of at least 60 days by the first purchaser or subsequent purchaser(s) from the date of the owner's notification to the City of intent to sell. The resale price of the unit shall not exceed the original price and customary closing costs except to allow for any increase of the Consumer Price Index (CPI) for all urban consumers applicable to the Oakland PMSA for the downpayment amount. Fifty percent (50%) of the cost of improvements, except for debt financing costs, may also be added to the original price as long as the unit remains affordable to a household at the same income level as the original purchaser at the time of acquisition of the inclusionary unit.

(2) If the City does not act on its right-of-first refusal, the same procedure as contained in Section 15B.9(c) shall be used for selection of a purchaser.

(3) The seller shall not levy or change any additional fees nor shall any "finders fee" or other monetary consideration be allowed other than customary real estate commissions if the use of an agent becomes necessary.

(b) The City or its designee may monitor resale of inclusionary units by limited equity cooperatives. The City or its designee shall monitor the resale of ownership inclusionary units. The owners of any inclusionary units shall attach and legally reference in the Grant Deed conveying title of any such inclusionary ownership unit and record with the county recorder a Declaration of Restrictions provided by the City, stating the restrictions imposed pursuant to this Chapter. Violation of any of the terms thereof may be prosecuted by the City.

Section 15B.12 IN LIEU PARTICIPATION FEES

(a) In projects where the inclusionary requirement will result in a fraction of a unit, such a fraction shall be paid to the City as an in-lieu participation fee. The in-lieu fee shall be used by the City, or its designee such as a non-profit housing

development corporation, to provide, construct, or promote the creation or retention of low income housing in the City. The use of in-lieu fees for specific housing programs shall be brought before the Housing Advisory and Appeals Board for approval.

(b) The in-lieu fee shall be as follows:

(1) the difference between development cost (excluding marketing costs and profit) and actual sales price for the fraction of the unit in projects where Government Code 69515 does not apply.

(2) the difference between affordable cost for an appropriately-sized household and actual sales price for the fraction of the unit in projects where Government Code 69515 requiring a density bonus or equivalent incentives is applicable.

ANNOTATED STAFF-PROPOSED INCLUSIONARY ORDINANCE WITH CHANGES FROM THE PLANNING COMMISSION'S INITIATED ORDINANCE UNDERLINED AND MAJOR CHANGES EXPLAINED

ORDINANCE NO. -N.S.

Amending Zoning Ordinance No. 3018-N.S. by adding Chapter 15B to require the inclusion of low income housing in certain residential housing projects.

BE IT ORDAINED by the Council of the City of Berkeley that the Zoning Ordinance be amended as follows:

CHAPTER 15B

INCLUSIONARY UNITS

Section 15B.0 APPLICABILITY OF REGULATIONS

(a) The following regulations shall apply to Use Permit and variance applications for development of:

(1) projects containing five or more residential units.

(2) residential housing projects proposed on parcels whose size and zoning designation is such to allow construction of five or more dwelling units.

CHANGED LANGUAGE TO SIMPLIFY

(3) projects of one to four residential units when such units are added to an existing one to four unit property which has been developed after passage of this Section and the resulting number of units totals five or more. All units in said property are subject to the requirements of this Chapter.

(b) no building permit shall be issued for a project subject to this Chapter unless the developer has agreed to meet the requirement of this Chapter except for which building permits were granted prior to February 19, 1986, shall not be required to comply with this Chapter's requirements.

Section 15B.1 FINDINGS

The City of Berkeley finds that:

(a) There is a shortage of housing affordable to low income residents.

(b) Persons with low incomes who live and/or work in the City have serious difficulties locating housing at prices they can afford.

(c) The high cost of newly constructed housing does not, to any appreciable extent, provide housing affordable by low income households, and that continued new development which does not include lower cost housing will serve to further aggravate the current housing shortage by reducing the supply of land.

(d) The encouragement of usage of density bonus rather than other incentives in applicable cases will help increase the housing supply.

(e) Federal and State housing subsidy programs are not sufficient by themselves to satisfy the housing needs of low income households.

(f) The housing shortage for persons of low income is detrimental to the public health, safety and welfare of the City.

(g) The public purpose of the City and the public policy of the State of California as mandated by the Housing Element of the Master Plan is to make available an adequate supply of housing for persons of all economic segments of the community.

Section 15B.2 PURPOSE

The purpose of this Chapter is to promote achievement of goals number one, two, three, four, and six of the Housing Element by requiring development of affordable housing for households with income below this area's median.

CONCEPT THE SAME, CHANGED LANGUAGE TO MAKE CLEARER

Section 15B.3 DEFINITIONS

THIS SECTION MOVED FROM END OF ORDINANCE TO THIS SECTION FOR STRUCTURAL PURPOSES, CERTAIN DEFINITIONS LEFT OUT FROM THE DEFINITION SECTION BUT ARE INCLUDED IN THE BODY OF THE ORDINANCE

(a) Developer means any person, firm, partnership, joint venture, corporation, or any entity or combination of entities which City permits and approvals and/or develop a project pursuant to this Chapter.

(b) Household for purposes of inclusionary requirements shall be the same as the definition used for "family" in the federal Section 8 Existing Housing Program or its future equivalent.

(c) Residential unit or unit means a dwelling containing its own bathroom and kitchen facilities and used primarily for residential accommodations. For purposes of this Chapter dormitories, fraternity and sorority houses, boarding houses, residential hotels, and joint living and work quarters shall not be considered residential units and shall not be subject to this Chapter.

THIS DEFINITION CHANGED TO EXCLUDE CERTAIN CATEGORIES.
CHANGES SUBSTANTIAL BUT NOT EXPECTED TO BE OPPOSED BY PLANNING
COMMISSION - JUST NOT DISCUSSED

(d) Low income household means a household whose gross income is greater than 80% and less than 100% of the PMSA median income for this area.

(e) Lower income household means a household whose income is no greater than 80% and above 50% of the PMSA median income for this area.

(f) Very low income household means a household whose gross income is 50% or below of the PMSA median income for this area.

(g) Gross household income means the household income of all adult members of the household as determined according to the guidelines used by the Berkeley Housing Authority for its Section 8 rental subsidy program.

(h) Inclusionary unit means a residential dwelling which as required by Chapter 15B of the Zoning Ordinance is affordable by households with income below the PMSA median income for this area.

(i) In-lieu fee means a fee paid to the City by a developer in place of construction of a required fraction of an inclusionary unit.

(j) Density bonus means an increase in the number of units authorized for a particular parcel of land beyond the maximum allowed by the Master Plan as provided for by the California Government Code Section 65915.

(k) Incentive means a benefit offered by the City instead of a density bonus to facilitate the construction of housing projects which include low income inclusionary units. Among others, benefits may include fee deferments and waivers, granting of

variances, relaxation of otherwise applicable permit conditions, and provision of government benefits.

(l) Resale controls means a resale restriction placed on inclusionary units by which the price of such units and income of purchaser will be restricted in order to insure the affordability and occupancy by low, lower, or very low income households.

(m) Project means a project subject any of the requirements of this Chapter as set forth in Section 15B.0.

Section 15B.4 DESIGNATED IMPLEMENTING AUTHORITY

(a) The City Manager or his or her designee shall be the designated authority to develop and implement rules and regulations pertaining to this Chapter, to require guarantees, to enter into recorded agreements with developers, and to take other appropriate steps necessary to assure that the required low income and very low income dwelling units are provided and are occupied by low income households.

(b) Within one year from passage of this Chapter, administrative rules and regulations pertaining to this Chapter shall be brought before the Planning Commission for assessment and revisions as deemed necessary.

SUBSTANTIVE CHANGE HERE BECAUSE NO PRIOR PLANNING COMMISSION APPROVAL BUT NECESSARY IF THE ORDINANCE IS TO BE IMPLEMENTED IN A TIMELY MANNER.

Section 15B.5 GENERAL INCLUSIONARY REQUIREMENTS

(a) Any new residential construction involving five or more dwelling units shall be required to include at least 20% of the total number of dwelling units within the project as inclusionary units. The 20% requirement shall also be applicable to residential projects proposed on parcels suited for the development of five residential units or more. In applying these percentages, any decimal fraction shall be paid as an in-lieu fee in conformity with Section 15B.12.

(b) If a developer agrees to construct at least 25% of low income units or 10% of lower income units as set forth in this Chapter, the City shall provide a 25% density bonus or incentives of equivalent financial value.

(1) The use of density bonus is to be preferred over other types of incentives.

(2) If the density bonus or equivalent incentive granted is above 25%, the developer shall agree to a cost

certification process.

THIS PORTION ON DENSITY BONUSES MOVED FOR STRUCTURAL REASONS, CONCEPT THE SAME EXCEPT THAT ONE PART LEFT OUT SPECIFYING THAT CITY MANAGER WOULD DETERMINE INCENTIVE AND BOARD OF ADJUSTMENT APPROVE. THIS IS USUALLY THE PROCESS AND CAN BE MORE CLEARLY DETAILED IN THE IMPLEMENTING REG'S

(c) Any use permit for new residential construction project of five or more units, or for residential construction on parcels that allow for the development of five or more units shall have conditions attached which will assure compliance with the provisions of this Chapter.

(c) All inclusionary units shall be sold to the City or its designee or to households whose gross income is below the Oakland Primary Metropolitan Standard Area (PMSA) median income figures, or rented to households of similar incomes.

SECTION 15B.6 USE PERMIT CONDITIONS

THIS PART ELIMINATED - SUPERFLUOUS, OTHER SECTION IN THE ORDINANCE SPECIFIES THAT USE PERMITS SHALL HAVE CONDITIONS ATTACHED

Section 15B.6 PROVISION OF WRITTEN AGREEMENT

A written agreement shall be made between the developer and the City which indicates the number, type, location, approximate size and construction scheduling of all dwelling units and such information as shall be required by the City for the purpose of determining the developer's compliance with this Chapter.

Section 15B.7 GENERAL CONSTRUCTION REQUIREMENTS

(a) All inclusionary units in a project and phases of a project shall be constructed concurrently with or prior to the construction of non-inclusionary units.

(b) All inclusionary units shall be reasonably dispersed throughout the project, shall contain on an average the same number of bedrooms and be of the same size as the non-inclusionary units in the project, and shall be comparable with the design or use of remaining units in terms of appearance, materials, and finished quality.

(c) In situations where the developer substantiates and staff concurs that the direct construction and financing costs of the inclusionary units, excluding marketing cost and profit (and also excluding land costs if a density bonus or equivalent incentives are provided), exceed the selling prices allowed for inclusionary units by this Chapter, the Board of Adjustment may

approve one or more of the following measures to reduce costs or increase profitability:

(1) reduction of interior amenities of the inclusionary units provided that such units conform to the requirements of the City building and housing codes;

(2) reduction of the square footage of the inclusionary units provided all units conform to the requirements of the City's building and housing codes.

(3) allowance of an increase in the number of bedrooms in the inclusionary unit.

(d) In a homeownership project, the Board of Adjustment shall have the option of allowing the developer to construct rental units in a number sufficient to meet the inclusionary requirements of this Chapter . These rental units shall be subject to the "Inclusionary Unit Requirements for Rental Housing Projects" contained in Section 15B.8.

THIS SECTION, FOR ALL INTENT AND PURPOSE, IS THE SAME

Section 15B.8 INCLUSIONARY UNIT REQUIREMENTS FOR RENTAL HOUSING PROJECTS

(a) All inclusionary units shall be occupied by low, lower, or very low income households. The Oakland PMSA income figures shall be used in determining income eligibility.

(b) The maximum rental price for inclusionary units shall be rent affordable to an appropriate-sized household whose income is 81% of the PMSA median for this area.

(c) In projects requiring more than one inclusionary unit, at least 50% of those units shall be rented at a price that is affordable to an appropriate-sized household whose income is at 50% of the PMSA median income provided that the City can make available rental subsidies through the Section 8 Existing Housing Program or an equivalent program. When there is an uneven number of inclusionary units, the uneven number shall be also be priced to be affordable to a household at 50% of median income if subsidies are available. If no rental subsidies are available, all inclusionary unit prices shall be affordable to households at 81% of the PMSA median income.

(d) If a developer agrees to provide 10% lower income inclusionary units, rental price for such units shall be affordable to a household with income that is 65% of the PMSA area median.

7

PART (d) ADDED TO GIVEN GREATER CLARIFICATION AS TO LEVEL OF LOWER INCOME INCLUSIONARY UNITS TO BE PROVIDED - NOT SPECIFIED IN THE PLANNING COMMISSION'S ORDINANCE

(e) A unit shall be considered affordable if the rent (including utilities) does not exceed 30% of a household's gross income. Gross household income and utility allowance shall be calculated according to the guidelines used by the Housing Authority for the Section 8 Existing Housing Program. For purposes of calculating rent, appropriate household size shall be determined by using the schedule contained in the administrative regulations for this Chapter.

(f) At least 20% of the units shall be inclusionary for a period of 59 years. In applying that percentage, any decimal fraction shall be paid as an in-lieu fee in conformity with Section 15B.12.

59 YEARS HAS BEEN SELECTED INSTEAD OF "LIFE OF THE INCLUSIONARY UNIT" BECAUSE OF CERTAIN IMPLICATIONS FOR THE KINDS OF REQUIREMENTS THAT CAN BE MADE

(g) The City or its designee shall screen applicants for the inclusionary units and refer eligible households of the appropriate household size for the unit. For purposes of occupancy, the appropriate household size standards used by the Housing Authority for the Section 8 Program or any future equivalent program shall be used. The developer or owner shall retain final discretion in the selection of the eligible households referred by the City.

(h) The owner shall provide the City with data on vacancies and other information required to insure the long-term affordability of the inclusionary unit by eligible households.

Section 15B.9 INCLUSIONARY UNIT REQUIREMENTS FOR OWNERSHIP PROJECTS

(a) The first inclusionary unit shall be sold at a price that is affordable to an appropriate sized household whose income is no more than 90% of the PMSA median. Thereafter, inclusionary units shall be sold at prices affordable to low income households of the appropriate size for the unit at a price that will result in the average cost being no more than 2.5 times the annual gross income of an appropriate-sized household whose income is no more than 81% of the PMSA for this area. "Lower income" inclusionary units shall be sold at a price that is affordable to an appropriate sized household whose income is 70% of median income. For determining sales price, appropriate size of household shall be calculated by using the schedule contained in the

administrative regulations .

THIS SECTION SPECIFIES THE PRICE LEVEL WHEN LOWER INCOME INCLUSIONARY UNITS ARE PROVIDED AND A DENSITY BONUS IS GIVEN.

(b) The developer of a project other than a limited equity housing cooperative, shall be required to give right-of-first refusal to purchase any or all inclusionary units to the City or a City designated agency or organization for a period of not less than 60 days from completion of construction.

SUBSTANTIVE CHANGE IN TIME PERIOD TO ALLOW PURCHASER KNOW WHAT HE/SHE IS BUYING; IT WILL BE VERY DIFFICULT FOR CITY TO FIND PURCHASERS IF NOTIFICATION OR REFERRAL LIST MUST BE GIVEN SOONER BY CITY. SHOULD NOT CAUSE MAJOR DIFFICULTY WITH DEVELOPER, ALTHOUGH THIS TOPIC WAS DISCUSSED AND PLANNING COMMISSION SPECIFIED A DIFFERENT TIME PERIOD.

THIS PART ADDED, NOT DISCUSSED WITH PLANNING COMMISSION, AFFECT LIKELY TO BE MINISCULE - NO CITY W/ INCLUSIONARY ZONING HAS ACTED ON ITS RIGHT OF FIRST REFUSAL. THERE REALLY WOULD BE NO NEED FOR THE CITY TO HAVE SUCH RIGHTS IN LEHC PROJECTS.

(c) Should the City choose not to exercise its right-of-first refusal, it shall provide the developer or owner with a purchaser or with a list of eligible purchasers within that same time period. If the list is not provided, the developer may select a low income purchaser of his/her choice as long as the City verifies income eligibility and the unit is sold at an affordable price as described in this Ordinance.

(d) The City shall maintain a list of eligible low income households and review the assets and income of prospective purchasers of the inclusionary units on a project by project basis and refer potential purchasers to the developer or owner.

Section 15B.10 PURCHASER RESTRICTIONS

(a) All purchasers of inclusionary units shall be first time home buyers with Low, Lower, or Very Low Income. Purchasers shall also be required to occupy the unit except that such requirement may be waived with the approval of the City. In such cases, the unit shall be rented to a Low, Lower, or Very Low Income household at a rent affordable by such households..

(b) Eligible Berkeley residents will have first preference for inclusionary units; second preference will be given to eligible persons employed in the City of Berkeley. Other preferences and priorities may also be established administratively, with Planning Commission review, to help meet the City's Housing Element goals.

(c) The City shall advise all prospective purchasers on the City's eligibility list of the resale restrictions applicable to ownership of inclusionary units as specified in this Chapter and shall provide purchasers with a declaration of restrictions applicable to ownership of inclusionary units as specified in this Chapter.

Section 15B.11 CONTROL OF RESALE

(a) Except for inclusionary units in limited equity cooperatives, in order to maintain the availability of affordable housing units, the City shall impose the following resale conditions :

LIMITED EQUITY COOPS HAVE LONG-TERM AFFORDABILITY REQUIREMENTS, LESS ADMINISTRATIVE COSTS IF THEY ARE EXCLUDED FROM MANY OF THE REQUIREMENTS OF THIS SECTION - MONITORING TO ASSURE COMPLIANCE WITH ORDINANCE STILL LEFT IN

(1) Homeownership inclusionary units offered for sale, or sold under the requirements of this Chapter shall be offered to the City or its designee for a period of at least 60 days by the first purchaser or subsequent purchaser(s) from the date of the owner's notification to the City of intent to sell. The resale price of the unit shall not exceed the original price and customary closing costs except to allow for any increase of the Consumer Price Index (CPI) for all urban consumers applicable to the Oakland PMSA for the downpayment amount. Fifty percent (50%) of the cost of improvements, except for debt financing costs, may also be added to the original price as long as the unit remains affordable to a household at the same income level as the original purchaser at the time of acquisition of the inclusionary unit.

THE QUESTION OF COST OF IMPROVEMENTS WAS DISCUSSED BY THE PLANNING COMMISSION -THIS DRAFT DOES NOT ALLOW FULL COST BECAUSE AFTER MORE THOUGHT AND DISCUSSION ON THE MATTER, IT DID NOT SEEM APPROPRIATE THAT THE OWNER SHOULD BE RETURNED FULL COST OF IMPROVEMENTS SINCE SHE/HE HAD BENEFITTED FROM THEM AS WELL AND WHAT ARE IMPROVEMENTS TO SOME MAY NOT REALLY APPEAR AS SUCH TO THE NEXT BUYER.

(2) If the City does not act on its right-of-first refusal, the same procedure as contained in Section 15B.9(c) shall be used for selection of a purchaser.

(3) The seller shall not levy or change any additional fees nor shall any "finders fee" or other monetary

consideration be allowed other than customary real estate commissions if the use of an agent becomes necessary.

(b) The City or its designee may monitor resale of inclusionary units by limited equity cooperatives. The City or its designee shall monitor the resale of ownership inclusionary units. The owners of any inclusionary units shall attach and legally reference in the Grant Deed conveying title of any such inclusionary ownership unit and record with the county recorder a Declaration of Restrictions provided by the City, stating the restrictions imposed pursuant to this Chapter. Violation of any of the terms thereof may be prosecuted by the City.

Section 15B.12 IN LIEU PARTICIPATION FEES

(a) In projects where the inclusionary requirement will result in a fraction of a unit, such a fraction shall be paid to the City as an in-lieu participation fee. The in-lieu fee shall be used by the City, or its designee such as a non-profit housing development corporation, to provide, construct, or promote the creation or retention of low income housing in the City. The use of in-lieu fees for specific housing programs shall be brought before the Housing Advisory and Appeals Board for approval.

(b) The in-lieu fee shall be as follows:

(1) the difference between development cost (excluding marketing costs and profit) and actual sales price for the fraction of the unit in projects where Government Code 69515 does not apply.

(2) the difference between affordable cost for an appropriately-sized household and actual sales price for the fraction of the unit in projects where Government Code 69515 requiring a density bonus or equivalent incentives is applicable.

SECTION ON DENSITY BONUS/OTHER INCENTIVES INCORPORATED INTO GENERAL INCLUSIONARY REQUIREMENTS SECTION

DEFINITION SECTION ALSO MOVED CHANGES IN THAT SECTION INCLUDED: MORE THOROUGH DEFINITION OF RESIDENTIAL UNIT, CLARIFICATION OF HOUSEHOLD AND LOW, LOWER, AND VERY LOW INCOME CATEGORIES, ELIMINATION OF CERTAIN DEFINITIONS BECAUSE INCORPORATED INTO THE BODY OF THE ORDINANCE (E.G., HOUSING COSTS, AFFORDABLE RENT).



Planning Commission
 Martin Luther King, Jr.
 Civic Center Building
 2180 Milvia Street
 Berkeley, California 94704

City of Berkeley

B.4a



PRESENTED TO COUNCIL
 CITY OF BERKELEY

JUN 10 1986

OFFICE OF
 CITY CLERK

FOR COUNCIL ACTION

June 10, 1986

Deadline for Council
 Action August 18, 1986

(415) 644-6534
 TTY (415) 644-6915

TO: Honorable Mayor and
 Members of the Council

FROM: Planning Commission

SUBJECT: ADOPTION OF INCLUSIONARY ZONING ORDINANCE

Introduction

The purpose of this report is to provide background information and to present for Council consideration an inclusionary zoning ordinance initiated by the Planning Commission on February 19, 1986 which adds a new Chapter to the present Zoning Ordinance requiring low income units in certain new residential development projects. The ordinance is in effect on an interim basis until August 18 or until Council deliberation.

RECOMMENDATION

That Council approve the attached Inclusionary Zoning Ordinance adding Chapter 15B to the Zoning Ordinance No. 3018-N.S. and that Council adopt the attached Proposed Negative Declaration for that Ordinance.

Background

I. Process

The Planning Commission considered the use of inclusionary zoning as a mechanism to help deal with the housing crisis that exists in Berkeley for low income households some time ago. In June 1985 it established a subcommittee to work with staff and Housing Advisory and Appeals Board (HAAB) members to review a draft inclusionary ordinance prepared by Planning Commission members and revise that draft as appropriate. Many meetings and discussions regarding that ordinance and later versions of it were held with developers and staff.

A draft ordinance similar to that adopted by the Planning Commission was presented to the Board of Adjustments and to the HAAB for comment. On January 9, 1986, the HAAB unanimously approved (present: Tiedemann, Rios, Collins, Lambert) the ordinance presented with the following changes: Firstly, that the

INCLUSIONARY ZONING ORDINANCE

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ordinance apply to all projects of four or more units; secondly, that the price of all inclusionary units be set at a price affordable to households with income at 81% of the median for this area.

An Initial Environmental Study (Attachment C) was prepared by staff on a draft ordinance which considered both a 20% and a 25% inclusionary requirement. That study indicated that no substantial negative environmental impact would result from the ordinance. The Planning Commission held a public hearing on the ordinance on February 5, 1986. Some changes to the ordinance were made as a result of that hearing before its approval by the Planning Commission on February 19 (in favor: Barragan, Gleason, Goldfarb, Gordon, Illgen, Peterson, Pinkston; against: Chong, abstaining: none). A minor change to the ordinance was made by the Commission on May 21 to clarify that exempted from the ordinance were projects involving new development of live/work quarters as well as projects receiving their building permit prior to its adoption.

II. Summary of the Problem and Assumptions

It is increasingly difficult for low income households to find affordable housing in Berkeley. There is little developable land and construction and financing costs are high. The challenge for the creation of an inclusionary zoning ordinance was to find a way to assure that a portion of new housing developments benefited low income households without placing an unbearable burden on the developer. Example of inclusionary zoning ordinances in effect or proposed elsewhere were of some utility but no one by itself could be used to deal effectively with Berkeley's situation. A summary of other inclusionary zoning regulations are contained in Attachment D.

The following assumptions were used in developing the ordinance:

- Given the dire need for affordable housing and given that most projects were likely to be small, the ordinance should be as inclusive as possible.
- The ordinance was not to serve as a mechanism to deter development, but development "at any cost" and under "all conditions" was not an overriding goal.
- The number of inclusionary units obtained through the inclusionary ordinance was not expected to be high because of the built-up nature of the City. However, some units would be obtained making the creation of an inclusionary ordinance a worthwhile endeavor.
- The principal objective of inclusionary zoning should be to assure that a portion of new residential developments be

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made available to low income households, therefore, inclusionary units should be on-site; and in-lieu fee would be allowed only where the inclusionary requirement resulted in a fraction of a unit.

• Given high development costs, the program could only benefit those whose income is within 81% to 99% of the median for this area unless further subsidies could be made available. Moderate income households should not be included in the targeted group because although they too have difficulty in finding affordable housing, their situation is not as dire as the low income.

• The costs of developing inclusionary units could be borne and/or shared by various entities:

The City - When the developer agreed to build 25% of "low" income units or 10% of "lower" income units the City would provide a 25% density bonus above the normal density allowed in an area, or provide other incentives of equivalent financial value.

The landowner - Developers might not be willing to pay the price being asked for land and owners really willing to sell their land might lower their land sale price.

Other purchasers or renters - Some increase to other purchasers or renters of the non-inclusionary units might result, but only if the private market was such that others would be willing to pay a higher price.

The developer - The developer's profit might be lowered.

• In order to ensure that targeted groups are the beneficiaries both initially and with subsequent purchasers and renters of inclusionary units, the City must maintain a high level of control even if it will involve additional administrative staff.

III. Ordinance Summary

The ordinance applies to new residential development projects of five units or more as well as residential units created on parcels which allow the development of five units or more. The ordinance applies to both ownership and rental projects with the inclusionary requirement set at 20%. The City will provide a 25% density bonus if the developer agrees to develop at least 25% of a project as low income housing, or

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10% as lower income units.

In ownership projects, the price of the first inclusionary unit is set at a level that is affordable to an appropriate-sized household with income that is at 90% of the median for the Berkeley area, other inclusionary units are to be affordable to households at 81% of median. A developer can also construct 10% of a project as inclusionary units if they are made affordable to a household with income 80% or below of the area median. An inclusionary unit is considered affordable if it is sold at two and one half times the households gross annual income. Attachment B contains a chart of income and affordable sales and rental prices for the inclusionary units. As an example, a sales price of \$72,000 would be affordable to a household with income at 90% of median.

In rental projects, all units are to be affordable to those at 81% of median income. However, if the City can make available Section 8 or other rental subsidies, 50% of the inclusionary units must be rented to households with income no higher than 50% of median. Affordability is calculated at 30% of the household's grossly monthly income.

Other major elements of the ordinance are: the right-of-first refusal to the City or its designee to purchase inclusionary units, selection controls for purchasers and renters of inclusionary units, resale restrictions to maintain long-term affordability, and in-lieu fees when the requirement results in a fraction of an inclusionary units.

IV. Content, Issues, and Explanations

A. Applicability of Regulations

Most residential projects likely to be built in Berkeley are expected to be comparatively small and this was the basis for making the ordinance applicable primarily to projects involving five or more units. The applicability section also contains language to close possible loopholes of building less units or building units incrementally as a means to avoid the requirements of the ordinance.

The HAAB's suggestion that the ordinance be applicable to projects containing four units or more was rejected. The Commission felt that because of the economies of scale, five unit projects were the lowest threshold to which an inclusionary requirement could apply without increasing the possibility of making a development prohibitive. Other proposals that the ordinance be applicable to projects containing 8-10 units or above were also rejected. Those

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proponents argued that it would be very difficult for small projects (i.e., five units), especially those involving creation of modest units, to absorb the inclusionary costs. They made the argument that a low threshold was combined with a high inclusionary requirement making it extremely difficult, if not impossible, to develop such projects. Even if projects were developed, occupants were likely to be a mix of either low income (occupants of inclusionary units) or very high income (occupants of luxury units).

In response to the above arguments and recognizing that smaller projects are likely to have higher costs (and recognizing the high cost of development in general) the ordinance allows the first inclusionary unit to be made affordable to households at 90% of the median income. Additionally, when development costs are higher than the sales price of the inclusionary unit, the Board of Adjustment has flexibility (such as allowing a smaller size for inclusionary units) to reduce development costs. The City can also offer density bonuses or provide other incentives to help make the project feasible.

B. General Inclusionary and Construction Requirements

A 20% requirement was selected by the Planning Commission because, given the little developable land, were the requirement to be lower, few inclusionary units would result from the ordinance. This requirement (except in the case of development of rental projects when rental subsidies are available) does not trigger a density bonus. The Commission recognized that it was advantageous for most developers to accept a 25% requirement and receive a density bonus and allowed for that. However, there may be a situation where a density bonus or other incentives would not be needed and in those cases a 20% requirement would reduce administrative involvement.

There was much discussion on the question of density bonus and what other incentives could be offered. It was clear that the City, to be in compliance with state law, had to provide either one or the other. If incentives were given, they had to be of an equivalent financial value to the developer as the density bonus. Incentives can include fee waivers or deferments, granting of variances, provision of government grants or loans, land donations, use of bonds monies for financing. The Commission was of the opinion that density bonuses should be preferred over other incentives. The issue of what type of incentives should be provided if density bonuses were not offered was also discussed. For consistency sake, it would be best to specify what incentives the City was willing to allow. In reality, it would be difficult to do so because each individual project would have different needs. Additionally, the City should not tie itself to specific incentives since the type of resources it has available at any one

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time also varies.

In terms of construction requirements, the ordinance requires that inclusionary units be built at the same time as the other units, that they be comparable to other units, and reasonably dispersed throughout the project. The issue in this area concerns situations where development costs for the inclusionary units would be higher than the inclusionary sales price, therefore, developers could be asked to build the inclusionary unit at below cost. In those cases, to bring sales costs for inclusionary costs more in line with actual development costs, the ordinance gives the Board of Adjustment the possibility of reducing the unit size and amenity level of the unit or other measures to facilitate construction of the inclusionary unit without undue hardship on the developer.

The issue of cost of developing inclusionary units was a major one discussed with developers. Staff research indicated that prototypical development costs were approximately \$73.40 a square foot without land cost, with the caveat that there is considerable variation in cost depending on quality and size of the development, financing rates available, and experience of the developer. In some cases, it would appear that development costs could be higher than inclusionary sales prices. However, given the measures contained in the ordinance to facilitate development in those cases, in general, the inclusionary requirement should not be prohibitive. Attachment B contains a Chart of inclusionary sales prices and prototype development costs for various size units.

C. Inclusionary Units: Prices and Occupancy

The inclusionary requirement varies depending on whether inclusionary units are in "for ownership" or rental projects. The difference in requirement is based on the economic feasibility for the different types of projects. For rental projects there are factors that permit providing housing to households at a somewhat lower income level. For example, there are certain tax advantages for rental properties; inclusionary units may also receive government rent subsidies.

For ownership units the ordinance requires that the first inclusionary unit be affordable to a purchaser with income that is 90% of the median for this area. Any other inclusionary unit has to be affordable to households at 81% of median income. For example, if a project contained three inclusionary units of a size appropriate for a family of four, the first unit would have to be sold for \$72,000, the others for \$64,800. Inclusionary units in rental projects must have rents that are affordable to households at 81% of the median for this area. However, if the City can make

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available Section 8 subsidies, 50% of the inclusionary units must be affordable to households with income that is 50% of median. This requirement would encourage placing inclusionary units on Section 8 without causing financial duress for the owner.

Some developers argued that the requirement was too prohibitive and that the inclusionary units should be priced to be affordable for households with incomes ranging from 80% to 120% of median. A group of developers of limited equity housing projects also suggested that if 75% of a limited equity housing project (or project with similar resale controls) were made available to households with income at 110% of the median, there should be no requirement to develop low income housing. This exception would encourage the development of limited equity cooperatives. While those proposals had merit, the overriding concern of the Commission was to use the Inclusionary Zoning Ordinance to provide housing for low income households.

The ordinance requires that the inclusionary units be made affordable to low income households. The definition of affordable is two and one-half times the gross household income for ownership units and 30% of a household's monthly income for rental units. The affordable definition for ownership units have been used in other locations with inclusionary zoning requirement; the definition of affordability of rental units is the standard used for the federal Section 8 program.

The definition of "low", "lower", and "very low" income is based on family size. Therefore, family size is used in the ordinance for calculating the sales/rental prices of inclusionary units. The appropriate family size for a unit is to be determined by the City and contained in a schedule in the administrative regulations. That schedule will take into consideration the number of bedrooms, the size of the unit, and occupancy standards to avoid overcrowding.

Since, the sales or rental price of inclusionary units is tied to household size, it is important for a developer to know what is an appropriate household size. A schedule is to be prepared that sets those sizes. That schedule will take into consideration number of bedrooms, size of the unit, and typical household size. For example, a project with two inclusionary units containing two bedrooms would make one unit affordable to a household of four and one unit affordable to a household of three.

In terms of actual occupancy, a unit may be occupied by a household that is either low or lower income. The ordinance allows for flexibility in selecting tenants who may be above the 81% or 90% of median if qualifying tenants at that level are not found (as long as they are still low income). Conversely, the inclusionary units may be made available to households with lower

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income if the City can find ways to subsidize the difference.

D. Selection of Purchasers and Renters

The ordinance specifies that the City or its designee shall have the right-of-first refusal to purchase inclusionary units. Although, at the present it is highly unlikely that the City would act on this right (as to date, no other city with inclusionary ordinances has), nonetheless, in the future the City may want, and have the possibility, to do so. Discussion on the topic of selection centered around who should have that right. After consideration of this issue, the Planning Commission committee recommended that the City should have the responsibility to prepare the eligibility list in order to better ensure that the targeted households were the actual beneficiaries. In regard to rental projects, if an owner is willing to place inclusionary units under the Section 8 or equivalent rental subsidy program, the owner will have the right of tenant selection as long as the tenant is participating in that program and the unit is of the correct size for the household.

Another issue regarding the topic of selection concerned the question of when in the process the developer would be provided with a list of eligible purchasers. Developers argued that a list should be provided as soon as possible (e.g., after subdivision tract approval, or issuance of a building permit). Others thought that the list should be given at the completion of the project. As a compromise solution, the ordinance requires the City to provide a list 60 days from completion of the project's foundation.

E. In-Lieu Participation Fees

The ordinance allows for an in-lieu fee only when the inclusionary requirement results in a fraction of a unit. The fee is set at the difference between development cost (or affordable cost, if a density bonus is given) and market sales price of the unit.

There was much discussion on the advisability of allowing in-lieu fees for other than fraction of units. One argument in favor of more general in-lieu fees was that if the fee was equivalent to actual construction of an inclusionary unit, the fee monies obtained could be better leveraged to provide housing for more low income households, either in existing housing or in new projects in a different location. Some argued that the inclusionary fee should be allowed but should be less than the cost of providing an actual unit since such a fee would make the development unfeasible. However, the Planning Commission was decidedly in favor of the creation of actual units on site, not only for achieving the overall goal of having a portion of new developments benefitting the low income, but also to avoid segregation on the

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basis of income. Another argument made by developers was that all new residential developments (including single family homes) should have an inclusionary requirement which would be paid as a fee in order that the cost of providing low income housing could be shared more equitably. This possibility was considered but rejected because more thought was necessary as to the structure and legal implications of such a general requirement.

F. Purchasers' Restrictions and Resale Controls

The ordinance restricts purchase of inclusionary units to first time homeowners and households that live or work in Berkeley. It allows the establishment of other preference and priorities to help meet the Housing Element goals. Owner-occupancy is also required unless City approval is obtained to rent the unit to a low income household.

A major element of any inclusionary ordinance is a mechanism for maintaining long-term affordability. One issue discussed in this area was how to allow some build up in the purchaser's equity and still maintain the unit affordable. The criterion adopted was similar to that used by limited equity housing cooperatives. Another concern was what policy should be followed when the household was no longer low income. Although, it was acknowledged that allowing the purchaser to occupy the unit even when no longer low income would result in a deviation from the targeting inclusionary units for low income households, in reality it would be difficult to device and administer a workable mechanism. The implications of this deviation, however, were not expected to be serious, since not all low income households (unfortunately) are upwardly mobile. Moreover, the patterns of physical moves are high so that in many cases, households who were no longer low income would be selling or renting their unit to a low income household.

G. Designated Implementing Authority

The City Manager or his/her designee has been designated as the implementing authority. This gives the City flexibility as to which City Department or Division, at any one time, is best equipped to implement the ordinance. The ordinance places many functions and responsibilities on the City Administration. Apart from developing regulations and implementing procedures, staff assignments include: providing information to both developers and tenants, negotiating with developers and preparing agreements on the inclusionary requirements, preparing and maintaining a referral list, verifying eligibility, and monitoring resale controls. Arguments were made that the ordinance should be more self-enforcing to avoid bureaucratic "red-tape". For example, the developer could select an eligible purchaser. However, the

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agreed.

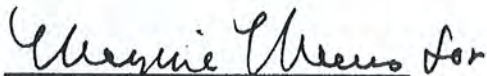
V. Conclusion

While recognizing that to administer an inclusionary zoning program is complex and time-consuming and places a burden on certain segments of the community, this recognition has to be counter-balanced with the effects on the community in absence of such a program. In balancing the two, the Planning Commission has seen the need for an inclusionary zoning ordinance. However, the many discussions on this topic have pointed out that although such a program is necessary, the impact on increasing the number of affordable units will be relatively small. The inclusionary zoning ordinance can only be one in a number of measures that should be instituted or enlarged to help maintain affordable housing for low income households residing in Berkeley.

Financial Implication and Contact Person

Approximately 0.5 to 1.0 FTE to administer the program depending on number of actual number of applicable residential projects constructed.

Rich Illgen, 525-0996



Rich Illgen
Chairperson

THE CITY MANAGER CONCURS IN PRINCIPLE WITH THE RECOMMENDATIONS FROM THE PLANNING COMMISSION. HOWEVER, HE IS RECOMMENDING ADOPTION OF A SLIGHTLY DIFFERENT ORDINANCE THAT CLARIFIES CERTAIN SECTIONS AND MAKES SOME TECHNICAL CHANGES.

Attachments

- A. Inclusionary Zoning Ordinance
- B. Eligible Income Guidelines, Affordability Prices, and Development Costs of Inclusionary Units
- C. Initial Environmental Study
- D. Summary of Other Inclusionary Zoning Regulations

08-02

ORDINANCE NO. -N.S.

AMENDING ZONING ORDINANCE NO. 3,018-N.S. BY ADDING CHAPTER 15B AND ADDING SECTIONS 22.55 THROUGH SECTIONS 22.55.11 TO REQUIRE THE INCLUSION OF LOW INCOME HOUSING IN RESIDENTIAL HOUSING PROJECTS.

BE IT ORDAINED by the Council of the City of Berkeley that the Zoning Ordinance be amended as follows:

CHAPTER 15B

INCLUSIONARY UNITS

Section 15B.0 APPLICABILITY OF REGULATIONS

(a) The following regulations shall apply to all developers, agents, successors, and assignees of a developer who apply for development of:

(1) Residential housing projects proposed on parcels that are zoned for five units or more.

(2) Projects of one to four residential units when such units are added to an existing one to four unit property developed consequent to passage of this Section and the resulting number of units total five or more. All units in said property are subject to the requirements of this Chapter.

(b) No building permit or occupancy permit shall be issued, nor any subdivision or development approval granted, which do not meet the requirements of this Chapter.

(c) The regulations of this Chapter shall not apply in the following cases:

(1) Development of joint live/work quarters as defined in Section 22.28-1 of Zoning Ordinance.

(2) Residential Development Projects which had building permits issued prior to February 19, 1986.

Section 15B.1 FINDINGS

The City of Berkeley finds that:

(a) There is a shortage of housing affordable to low income residents.

(b) Persons with low incomes who live and/or work in the City have serious difficulties locating housing at prices they can afford.

(c) The high cost of newly constructed housing does not, to any appreciable extent, provide housing affordable by low income household, and that continued new development which does not

include lower cost housing will serve to further aggravate the current housing shortage by reducing the supply of land.

(d) The encouragement of usage of density bonus rather than other incentives in applicable cases will help increase the housing supply.

(e) Federal and State housing subsidy programs are not sufficient by themselves to satisfy the housing needs of low income households.

(f) The housing shortage for persons of low income is detrimental to the public health, safety and welfare of the City.

(g) The public purpose of the City and the public policy of the State of California as mandated by the Housing Element of the Master Plan is to make available an adequate supply of housing for persons of all economic segments of the community.

Section 15B.2 PURPOSE

The purpose of this ordinance is to enhance the public welfare by providing affordable housing for certain portion of the population and to assure compatability between future housing development and the Housing Element of the Master Plan as it pertains to the use of the City's land for residential use.

Section 15B.3 DESIGNATED IMPLEMENTING AUTHORITY

(a) The City Manager or his or her assignee shall be the designated authority to develop rules and regulations pertaining to this Chapter, to require guarantees, to enter into recorded agreements with developers, and to take other appropriate steps necessary to assure that the required low income and very low income dwelling units are provided and are occupied by low income households.

(b) Administrative rules and regulations pertaining to this Chapter shall be brought before the Planning Commission for approval.

Section 15B.4 GENERAL INCLUSIONARY REQUIREMENTS

(a) Any new residential construction project involving five or more dwelling units shall be required to include at least 20% of the total number of dwelling units within the project as inclusionary units. In applying these percentages, any decimal fraction shall be paid as an in-lieu fee in conformity with Section 15B.12.

(b) Any use permit for new residential construction projects

on parcels that allow for the development of five or more units shall have conditions attached which will assure compliance with the provisions of this Chapter.

(c) All inclusionary units shall be sold to the City or its designee or to a low income household or rented to low income or very low income households as certified by the City or its designee.

Section 15B.5 USE PERMIT CONDITIONS

Use Permit conditions shall specify: the number of inclusionary units at appropriate price levels, provision for income certification and screening of potential purchasers and/or renters of inclusionary units, a resale control mechanism, and, density bonus or other incentives offered by the City.

Section 15B.6 PROVISION OF WRITTEN AGREEMENT

A written agreement shall be made between the developer and the City which indicates the number, type, location, approximate size and construction scheduling of all dwelling units and such information as shall be required by the City for the purpose of determining the developer's compliance with this Chapter.

Section 15B.7 GENERAL CONSTRUCTION REQUIREMENTS

(a) All inclusionary units in a project and phases of a project shall be constructed concurrently with or prior to the construction of non-inclusionary units.

(b) All inclusionary units shall be reasonably dispersed throughout the project, shall contain on an average the same number of bedrooms as the non-inclusionary units in the project, and shall be comparable with the design or use of remaining units in terms of appearance, materials, and finished quality.

(c) In situations where the developer substantiates and staff concurs that the direct construction and financing costs of the inclusionary units (excluding land cost, marketing cost, off-site improvements and profit) exceed the selling prices allowed for inclusionary units by this Chapter, staff shall have the option of recommending for Board of Adjustment approval one or more of the following measures to reduce costs or increase profitability:

(1) reduction of the interior amenity level of the inclusionary units provided that such units conform to the requirements of the City building and housing codes;

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(2) reduction of the square footage of the inclusionary units provided all units conform to the requirements of the City's building and housing codes.

(3) allowance of an increase in the number of bedrooms in the unit.

(d) In a homeownership project, the Board of Adjustment shall have the option of allowing the developer to construct rental units in a number sufficient to meet the inclusionary requirements of this Chapter. These rental units shall be subject to the "Inclusionary Unit Requirements for Rental Housing Projects" contained in Section 15B.8.

Section 15B.8 INCLUSIONARY UNIT REQUIREMENTS FOR RENTAL HOUSING PROJECTS

(a) The Oakland Primary Metropolitan Standard Area (PMSA) income standards shall be used in determining income eligibility.

(1) Inclusionary units shall only be occupied by low income households at a price which will allow their housing costs to be no more than 30 percent of the gross income of an appropriate-sized household whose income is at 81% of the PMSA median income.

(2) Gross household income shall be calculated according to the guidelines used by the Housing Authority for rental subsidies programs. For purposes of calculating rent, the schedule contained in the administrative regulations for this Chapter shall be used.

(2) In projects requiring more than one inclusionary unit, at least 50% of the inclusionary units shall be made available to Very Low Income households at affordable rent provided that the owner is given the opportunity to place the unit on the Section 8 Existing Housing Program or similar rental subsidy programs. When there is an uneven number of inclusionary units, the uneven inclusionary unit shall be made available to very low income households if rental subsidies are available. When the City cannot make available rental subsidies, all rental prices of inclusionary units shall be the same as set forth in Section 15B.7(1) above.

(3) For the life of the project, at least 20% of the units shall be inclusionary. In applying that percentage, any decimal fraction shall be paid as an in-lieu fee in conformity with Section 15B.12.

(4) The City or its designee shall screen applicants for the inclusionary units and refer eligible households of the appropriate household size for the unit. For purposes of occupancy, the appropriate household size standards used by the Housing Authority for the Section 8 Program or any future equivalent program shall be used. The developer or owner shall retain final discretion in the selection of the eligible households referred by the City.

(5) The owner shall provide the City with data on vacancies and other information required to insure the long-term affordability to eligible households.

Section 15B.9 INCLUSIONARY UNIT REQUIREMENTS FOR OWNERSHIP PROJECTS

(1) The first inclusionary unit shall be sold at a price that is affordable to an appropriate sized household whose income is no more than 90% of the PMSA median. Thereafter, inclusionary units shall be sold at prices affordable to low income households of the appropriate size for the unit at a price that will result in the average cost being no more than 2.5 times the annual gross income of an appropriate-sized household at 81% of the PMSA for this area. In determining appropriate size for sale price calculation purposes, the schedule contained in the administrative regulations shall be used.

(2) The developer shall be required to give right-of-first refusal to the City or a City designated agency or organization for a period of not less than 60 days from completion of foundation construction for the project and City approval of the same.

(3) Should the City choose not to exercise its right-of-first refusal, it shall provide the developer or owner with a purchaser or with a list of eligible purchasers within that same time period. If the list is not provided, the developer may select a low income purchaser of his/her choice as long as the City verifies income eligibility and the unit is sold at an affordable price as described in this Ordinance.

(3) The City shall maintain a list of eligible low income households and review the assets and income of prospective purchasers of the inclusionary units on a project by project basis and refer potential purchasers to the developer or owner.

Section 15B.10 PURCHASER RESTRICTIONS

(1). All purchasers of inclusionary units shall be first time home buyers with Low or Very Low Income.. Purchasers shall also be required to occupy the unit except with the approval of the City. In such cases, the unit shall be rented to a low or Very Low Income household.

(2). Berkeley residents will have first preference for inclusionary units which shall be made available to eligible purchasers; second preference will be given to persons employed in the City of Berkeley. Other preferences and priorities may also be established administratively, with Planning Commission, approval to help meet the City's Housing Element goals.

(3). The City shall advise all prospective purchasers on the City's eligibility list of the resale restrictions applicable to ownership of inclusionary units as specified in this Chapter and shall provide purchasers with a declaration of restrictions applicable to ownership of inclusionary units as specified in this Chapter.

Section 15B.11 CONTROL OF RESALE

(1) In order to maintain the availability of affordable housing units, the City shall impose the following resale conditions:

(a) Homeownership inclusionary units offered for sale, or sold under the requirements of this Chapter shall be offered to the City or its assignee for a period of at least 60 days by the first purchaser or subsequent purchaser(s) from the date of the owner's notification to the City of intent to sell. The sales price of the unit shall not exceed the original price and customary closing costs except to allow for any increase of the cost of living price (CPI) for the downpayment amount. The cost of improvements to the property may also be added to the original price as long as the unit remains affordable to low income households.

(b) If the City does not act on its right-of-first refusal, the same procedure as contained in Section 15B.9(3) shall be used for selection of a purchaser.

(c) The seller shall not levy or change any additional fees nor shall any "finders fee" or other monetary consideration be allowed other than customary real estate commissions if the use of an agent becomes necessary.

(2) The City or its designee shall monitor the resale of ownership inclusionary units. The owners of any inclusionary units shall attach and legally reference in the Grant Deed conveying title of any such inclusionary ownership unit a Declaration of Restrictions provided by the City, stating the restrictions imposed pursuant to this Chapter. Violation of any of the terms thereof may be prosecuted by the City.

Section 15B.12 IN LIEU PARTICIPATION FEES

(1) In projects where the inclusionary requirement will result in a fraction of a unit, such a fraction shall be paid to the City as an in-lieu participation fee. The in-lieu fee shall be used by the City, or its designee such as a non-profit housing development corporation, to provide, construct, or promote the creation or retention of low income housing in the City. The use of in-lieu fees for specific housing programs shall be brought before the Housing Advisory and Appeals Board for approval.

(2) The in-lieu fee shall be as follows:

(a) the difference between development cost (excluding marketing costs, off-site improvements, and profit) and actual sales price for the fraction of the unit in projects where Government Code 69515 does not apply.

(b) the difference between affordable cost for an appropriately-sized household and actual sales price for the fraction of the unit in projects where Government Code 69515 requiring a density bonus or equivalent incentives is applicable.

Section 15B.13 DENSITY BONUS/OTHER INCENTIVES

(a) If the owner agrees that the proposed project shall contain 25% or more of low income units or 10% of lower income units, the Board of Adjustments shall grant density bonuses or provide other incentives of equivalent financial value to all projects which are affected by this Chapter as provided by Government Code Section 69515. Density bonuses or incentives shall apply to fractional units as well.

(1) If incentives are over and above those required by Government code Section 69515, the developer shall agree to a cost certification process.

(2) The determination of what incentive to be provided in lieu of or in combination with a density bonus shall be determined by the City staff and referred to the Board of

Adjustments for approval, modification or denial. Use of density bonuses rather than other incentives shall be preferred.

Section 15B.14 DEFINITIONS

Definitions pertaining to this Chapter are contained in Section 22.55 through 22.55-11 of the Zoning Ordinance.

Section 22.55 DEVELOPER

Any person, firm, partnership, joint venture, corporation, or any entity or combination of entities which seek City permits and approvals and/or develop a project pursuant to Chapter 15B.

Section 22.55-1 AFFORDABLE HOUSING

Rental housing in which the yearly housing costs do not exceed 30 percent of a household's gross yearly income as defined by the Oakland Primary Metropolitan Standard Area (PMSA) for a household of the same size; or ownership housing where the total sales cost does not exceed 2.5 times annual gross income of a household of an appropriate size for the inclusionary unit.

Section 22.55-2 HOUSEHOLD

For purposes of inclusionary requirements, the definition of household shall be the same as that used for the federal Section 8 Existing Housing Program or its equivalent.

Section 22.55-3 LOW INCOME HOUSEHOLD

A household whose gross income is 81%-99% of the PMSA median income for this area.

Section 22.55-4 LOWER INCOME HOUSEHOLD

A household whose gross income is 51%-80% of the PMSA median income for this area.

Section 22.55-5 VERY LOW INCOME HOUSEHOLD

A household whose gross income is 50% or below of the PMSA median income for this area.

Section 22.55-6 ELIGIBLE INCOME

For purposes of Chapter 15B, the gross annual household income determined according to the guidelines used by the Berkeley

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Section 22.55-7 HOUSING COSTS

The monthly mortgage (principal and interest), property taxes, homeowners insurance, and condominium fees, where applicable, or the monthly rent plus utilities (utilities as defined in the Section 8 Existing Housing Program, Utility Schedule) for rental units.

Section 22.55-8 ACQUISITION COST

For purposes of acquisition of inclusionary units as provided in Chapter 15B, acquisition cost includes sales price plus closing costs.

Section 22.55-9 UNIT

All units referred to in Chapter 15B refer to residential and not commercial units.

Section 22.55-10 INCLUSIONARY UNIT

An ownership or rental housing unit as required by Chapter 15B which is affordable by households of low or very low income.

Section 2.55-11 IN-LIEU FEE

A fee paid to the City by a developer subject to the provisions of Chapter 15B in place of construction of a required fraction of an inclusionary unit.

Section 2.55-12 DENSITY BONUS

An increase in the number of units authorized for a particular parcel beyond that which would have otherwise been authorized under the applicable zoning ordinance and land use element of the Master Plan as provided for by the California Government Code Section 65915.

Section 2.55-13 INCENTIVES

Benefits offered by the City in-lieu of a density bonus to facilitate the construction of housing projects which include low income inclusionary units. Among others, benefits may include fee deferments and waivers, granting of variances, relaxation of otherwise applicable permit conditions, and provision of government benefits.

Section 2.55-14 RESALE CONTROLS

Legal restriction placed on inclusionary units by which the price of such units will be restricted in order to insure the affordability and occupancy by low or very low income households.

City of Berkeley



Planning and Community
Development Department
Zoning Division
Martin Luther King, Jr.
Civic Center Building
2180 Milvia Street
Berkeley, California 94704

(415) 644-6570
TTY (415) 644-6915

P R O P O S E D
N E G A T I V E D E C L A R A T I O N

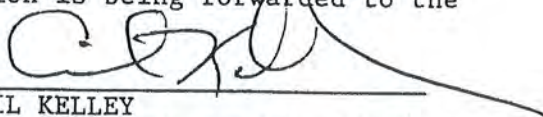
It is hereby declared that the project described below will not have a significant effect on the environment based on the Initial Study prepared according to CEQA guidelines:

INCLUSIONARY ZONING ORDINANCE

The purpose of an inclusionary zoning ordinance is to ensure that some units in multi-family housing projects be made affordable to low income households. The Ordinance will require that 20% of all new residential development projects be affordable. The Ordinance will be applicable to projects containing five or more residential units. Potential beneficiaries are households with income below the median income for this area. Other elements of the Ordinance include a City's right-of-first refusal to acquire inclusionary units, resale restrictions on inclusionary units to maintain long-term affordability, payment of an "in-lieu" fee instead of provision of fractional unit, provision of a density bonus or other incentives when State requirements are applicable. The Planning and Community Development Department is the designated implementing agency.

Anyone concerned with this project may review the application and other material composing the Initial Study on file in the Zoning Division, Martin Luther King, Jr. Civic Center Building, 2180 Milvia Street, Berkeley, CA 94704 (Phone 644-6570.)

The Planning Commission reviewed and recommended adoption of this Negative Declaration on May 21, 1986. The recommendation is being forwarded to the City Council for adoption.



GIL KELLEY
ENVIRONMENTAL REVIEW, ZONING DIVISION

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INCOME AND AFFORDABILITY GUIDELINES

Household Size	<u>PMSA INCOME</u>					
	1	2	3	4	5	6
100% of Median Income	\$22,375	\$25,625.	\$28,812	\$32,000	\$34,000	\$36,000
70% of Median Income	\$15,662.5	\$17,937.5	\$20,168.4	\$22,400.	\$23,800.	\$25,200
81% of Median Income	\$18,123.75	\$20,756.25	\$23,337.72	\$25,920.	\$27,540.	\$29,160
90% of Median Income	\$20,137.5	\$23,062.5	\$25,930.8	\$28,800.	\$30,600.	\$32,400.
<u>AFFORDABLE SALES PRICES*</u>						
Very Low 70%	\$39,156.25	\$44,843.75	\$56,000	\$56,000	\$59,500	\$63,000
Low Income 81%	\$45,309.38	\$51,890.63	\$58,344.30	\$64,800	\$68,850	\$72,900
Median Income 90%	\$50,343.75	\$75,656.25	\$64,827	\$72,000	\$76,500	\$81,000
<u>AFFORDABLE RENTS</u>						
Affordable rents for households at 81% of median**	\$ 453	\$ 519	\$ 583	\$ 648	\$ 688	\$ 729

* CALCULATED AT 2.5 TIMES ANNUAL HOUSEHOLD INCOME

** CALCULATED AS 30% OF MONTHLY HOUSEHOLD INCOME

ELIGIBLE INCOME, PROTOTYPE DEVELOPMENT COSTS* AND SUBSIDIES**
NEEDED TO MAKE INCLUSIONARY UNIT AFFORDABLE

Income Category	STUDIO (600 Sq. Ft. - Development Costs \$44,040)			
	1 Person	Subsidy	2 Persons	Subsidy
81% Median	\$45,309	---	\$51,891	---
90% Median	50,344	---	57,656	---
	ONE BEDROOM (750 Sq. Ft. - Development Costs \$55,050)			
	2 Persons	Subsidy	3 Persons	Subsidy
81% Median	\$51,891	\$ 3,159	\$58,344	---
90% Median	57,656	---	64,827	---
	TWO BEDROOMS (850 Sq. Ft. - Development Costs \$62,390)			
	3 Persons	Subsidy	4 Persons	Subsidy
81% Median	\$58,344	\$ 4,046	\$64,800	---
90% Median	64,827	---	72,000	---
	TWO BEDROOMS (1000 Sq. Ft. - Development Costs \$73,400)			
	3 Persons	Subsidy	4 Persons	Subsidy
81% Median	\$58,344	\$15,056	\$64,800	\$ 8,600
90% Median	64,827	8,573	72,000	1,400
	THREE BEDROOMS (1000 Sq. Ft. - Development Costs \$73,400)			
	5 Persons	Subsidy	6 Persons	Subsidy
81% Median	\$68,850	\$ 4,550	\$72,900	\$ 500
90% Median	76,500	---	81,000	---
	THREE BEDROOMS (1200 Sq. Ft. - Development Costs \$88,080)			
	5 Persons	Subsidy	6 Persons	Subsidy
81% Median	\$68,850	\$19,230	\$72,900	\$15,180
90% Median	76,500	11,580	81,000	7,080

AVERAGE MULTI-FAMILY DEVELOPMENT COSTS

Construction Costs	\$60.0 Sq. Ft.
Soft Costs	6.0 Sq. Ft.
Financing	7.4 Sq. Ft.
TOTAL	\$73.4 Sq. Ft.

* Development costs do not include land. If density bonus given would be equivalent to land costs.

** Subsidy equal to the difference between development costs and affordability. Subsidy would be greater if no density bonus provided.



Planning and Community Development Department
Zoning Division
Martin Luther King, Jr.
Civic Center Building
2180 Milvia Street
Berkeley, California 94704

(415) 644-6570
TTY (415) 644-6915

E N V I R O N M E N T A L I N I T I A L S T U D Y *

I. General Information

Project title (if any) and address or Assessor's block and parcel number(s):

INCLUSIONARY ZONING ORDINANCE

Use permit application number and date submitted (if any):

Date environmental information form submitted: 1/24 /86

Applicant's name, address and telephone number:

Planning and Community Development Department
Teri Piccolo
2180 Milvia Street, Berkeley, CA 94704

II. Description of Attachments

Environmental checklist and discussion (Lead Agency)

Environmental information form (Applicant)

Use permit or other application (Applicant)

Correspondence or memoranda: _____

Mitigation measures

Other: _____

III. Determination

On the basis of the attached initial evaluation, I find:

That the proposed project COULD NOT have a significant effect on the environment, and a NEGATIVE DECLARATION will be prepared.

That although the proposed project could have a significant effect on the environment, there will not be a significant effect in this case because the mitigation measures described on the attached sheet have been added to the project. A NEGATIVE DECLARATION will be prepared.

That the proposed project MAY have a significant effect on the environment, and an ENVIRONMENTAL IMPACT REPORT is required.

Jan. 27, 1986
Date



Gil Kelley, Environmental Review

*(To be completed by Lead Agency.)

Impact Rating

- 1 - No significant impact
- *2 - Potential impact, but not substantial

- *3 - Potential significant impact
- *4 - Significant impact

*Impact described on the attached sheet

Earth - Will the proposal result in:

- a. Unstable earth conditions or changes in geologic substructures? 1
- b. Disruptions, displacements, compaction or overcovering of the soil? 1
- c. Change in topography or ground surface relief features? 1
- d. The destruction, covering or modification of any unique geologic or physical features? 1
- e. Any increase in wind or water erosion of soils, either on or off the site? 1
- f. Changes in deposition or erosion of beach sands, or changes in siltation, deposition or erosion which may modify the channel of a river or stream or the bed of the ocean or any bay, inlet or lake? 1
- g. Exposure of people or property to geologic hazards such as earthquakes, landslides, mudslides, ground failure or similar hazards? 1

Air - Will the proposal result in:

- a. Substantial air emissions or deterioration of ambient air quality? 1
- b. The creation of objectionable odors? 1
- c. Alteration of air movement, moisture or temperature, or any change in climate, either locally or regionally? 1

Water - Will the proposal result in:

- a. Changes in currents, or the course or direction of water movements, in either marine or fresh waters? 1
- b. Changes in absorption rates, drainage patterns, or the rate and amount of surface water runoff? 1
- c. Alterations to the course or flow of flood waters? 1
- d. Change in the amount of surface water in any water body? 1
- e. Discharge into surface waters, or in any alteration of surface water quality, including but not limited to temperature, dissolved oxygen or turbidity? 1
- f. Alteration of the direction or rate of flow of ground waters? 1
- g. Change in the quantity of ground waters, either through direct additions or withdrawals, or through interception of an aquifer by cuts or excavations? 1
- h. Substantial reduction in the amount of water otherwise available for public water supplies? 1
- i. Exposure of people or property to water related hazards such as flooding or tidal waves? 1

Plant Life - Will the proposal result in:

- a. Change in the diversity of species, or number of any species of plant? 1

- b. Reduction of the numbers of any unique, rare or endangered species of plants? 1
- c. Introduction of new species of plants into an area, or in a barrier to the normal replenishment of existing species? 1
- d. Reduction in acreage of any agricultural crop? 1

Animal Life - Will the proposal result in:

- a. Change in the diversity of species, or numbers of any species of animals? 1
- b. Reduction of the numbers of any unique, rare or endangered species of animals? 1
- c. Introduction of new species of animals into an area, or result in a barrier to the migration or movement of animals? 1
- d. Deterioration to existing fish or wildlife habitat? 1

Noise - Will the proposal result in:

- a. Increases in existing noise levels? 1
- b. Exposure of people to severe noise levels? 1

Light and Glare - Will the proposal produce new light or glare? 1

- Land Use - Will the proposal result in a substantial alteration of the present or planned land use of an area? 2

Natural Resources - Will the proposal result in:

- a. Increase in the rate of use of any natural resources? 1
- b. Substantial depletion of any non-renewable natural resource? 1

- Risk of Upset - Does the proposal involve a risk of an explosion or the release of hazardous substances (including oil, pesticides, chemicals or radiation) in the event of an accident or upset conditions? 1

- Population - Will the proposal alter the location, distribution, density, or growth rate of the human population of an area? 2

- Housing - Will the proposal affect existing housing or housing demand? 2

Transportation/Circulation - Will the proposal result in:

- a. Generation of substantial additional vehicular movement? 2
- b. Effects on existing parking facilities, or demand for new parking? 2
- c. Substantial impact upon existing transportation systems? 1
- d. Alterations to present patterns of circulation or movement of people and/or goods? 1
- e. Alterations to waterborne, rail or air traffic? 1

f. Increase in traffic hazards to motor vehicles, bicyclists or pedestrians?

1

14. Public Services. Will the proposal have an effect upon, or result in a need for new or altered governmental services in any of the following areas:

a. Fire protection?

2

b. Police protection?

2

c. Schools?

1

d. Parks or other recreational facilities?

1

e. Maintenance of public facilities, including roads?

1

f. Other governmental services?

1

15. Energy. Will the proposal result in:

a. Use of substantial amounts of fuel or energy?

1

b. Substantial increase in demand upon existing sources of energy, or require the development of new sources of energy?

1

16. Utilities. Will the proposal result in a need for new systems, or substantial alterations to the following utilities:

a. Power or natural gas?

1

b. Communications systems?

1

c. Water?

1

d. Sewer or septic tanks?

2

e. Storm water drainage?

1

f. Solid waste and disposal?

2

17. Human Health. Will the proposal result in:

a. Creation of any health hazard or potential health hazard (excluding mental health)?

1

b. Exposure of people to potential health hazards?

1

18. Aesthetics. Will the proposal result in the obstruction of any scenic vista or view open to the public, or will the proposal result in the creation of an aesthetically offensive site open to public view? 1

19. Recreation. Will the proposal result in an impact upon the quality or quantity of existing recreational opportunities? 1

20. Archeological/Historical. Will the proposal result in an alteration of a significant archeological or historical site, structure, object or building? 1

21. Mandatory Findings of Significance.

(a) Does the project have the potential to degrade the quality of the environment, substantially reduce the habitat of a fish or wildlife species, cause a fish or wildlife population to drop below self sustaining levels, threaten to eliminate a plant or animal community, reduce the number or restrict the range of a rare or endangered plant or animal or eliminate important examples of the major periods of California history or prehistory? 1

b. Does the project have the potential to achieve short-term, to the disadvantage of long-term, environmental goals? (A short-term impact on the environment is one which occurs in a relatively brief, definitive period of time while long-term impacts will endure well into the future.) 1

c. Does the project have impacts which are individually limited, but cumulatively considerable? (A project may impact on two or more separate resources where the impact on each resource is relatively small, but where the effect of the total of those impacts on the environment is significant.) 1

d. Does the project have environmental effects which will cause substantial adverse effects on human beings, either directly or indirectly? 1

24.

III. DISCUSSION OF ENVIRONMENTAL EVALUATION

See Attached

ENVIRONMENTAL INITIAL STUDY: INCLUSIONARY ZONING PROGRAM

INTRODUCTION

In June 1985 the Planning Commission proposed that an inclusionary zoning ordinance be developed to ensure that a portion of new housing projects be made available for low income housing. This Environmental Initial Study has been undertaken by the Planning and Community Development Department to analyze potential environmental impacts of an inclusionary zoning requirement. Identified areas are land use, housing, transportation/circulation, public services, and utilities.

The Environmental Initial Study considers two possible inclusionary alternatives: the first containing a 25% inclusionary requirement for all new residential construction projects resulting in four units or more; the second requiring that in projects containing five or more units, 20% of the units be inclusionary. This study concludes that both alternatives would have negligible environmental impacts and that of the two, the second alternative would have least impact. At present, it appears that the second alternative is the one most likely to be considered for adoption.

PROJECT DESCRIPTION

Alternative One

The proposed inclusionary zoning program would become part of the City's Zoning Ordinance and would require that 25% of the dwelling units in new residential projects of four or more units be reserved for low income households. That requirement would apply to both rental and ownership projects.

The Oakland Primary Metropolitan Standard Area's (which includes Berkeley) income figures are used as a basis for calculating eligibility and sales or rental prices for inclusionary units. For purposes of this program income definitions are as follows:

- o Low income - household income that is 81% to 99% of median for this area,
- o lower income - household income that is 51% to 80% of median for this area,
- o very low income - household income that is 50% or below of median for this area.

Other salient features of the ordinance are:

- o All units are to be sold to households in the low income category except in rental units for which the City can provide rental subsidies through the Section 8 Program or some equivalent. Where the City can provide rental subsidies, 50% of the inclusionary units in rental projects shall be made available to the very low income.
- o The City or its designee has the right-of-first refusal to buy inclusionary units. This would allow control in assuring that the targeted group is benefitted as well as allow the City to make inclusionary units available to lower income or very low income households if further subsidies are available.
- o Resale restrictions on inclusionary units to ensure long-term affordability.
- o Allowance of an in-lieu fee for fractional units. (e.g., when the inclusionary requirement is 2.5 units, a fee could be paid for the 0.5 unit). The in-lieu fee would be equal to the difference between sales price and the price that would make the unit affordable to low income households.
- o Allow the City, in certain situations, to reduce amenities, unit size, or change configuration to keep the inclusionary requirement from being prohibitive while still providing housing that meets housing and building standards.
- o Provide a density bonus or other incentives of equivalent financial value. State law requires that a density bonus of 25% or equivalent incentives be given to the developer when 25% or more of a project is reserved for low/moderate income households at affordable costs, or when 10% a project is made available to lower income households. Whether a bonus or incentives would actually be given would be decided on a case-by-case basis. Incentives could include (but are not limited to) fee deferments or waivers, variances, land donations, or other assistance such as loans or grants to facilitate construction of the project.

Alternative Two

All features of this alternative are virtually the same as Alternative One except that there would be a 20% inclusionary requirement and only new residential construction projects resulting in five (instead of four) units would be covered. Under Alternative Two, less density bonuses/incentives would be required since the only case where the State law would be triggered would

ENVIRONMENTAL INITIAL STUDY page 3

be in rental projects for which the City could provide rental subsidies. In those cases, 10% of the inclusionary units would be made available to lower income households and a density bonus/incentives would be given by the City. Lastly, if no density bonus/incentives would be given, the in-lieu fee would be calculated as the difference between development cost of the fractional unit and sales price (rather than the difference between between low income affordability and sales price).

METHODOLOGY

In order to assess the potential of the proposed inclusionary zoning program to increase density substantially, staff examined the following:

- o data of actual residential construction involving four or more units for a ten year period (1975-1985),
- o use permit applications and approvals for the period 1984-85,
- o existing vacant land in Berkeley, and city-wide zoning patterns.

Information about other localities with inclusionary zoning in effect was also gathered but was not be used since it appeared to be of little comparative value for assessing the proposed ordinance. This is because few of the localities face the same developable land constraints as Berkeley, and also because there is no one locality with the same requirements as those being proposed in Berkeley.

HOUSING TRENDS

Past Construction

Data on residential construction of projects of four units or more during the period 1975-85 shows a total of 321 units completed in 35 structures containing four units or more. The data further shows that:

- o of the 35 structures, 32 contained less than 10 units;
- o structures containing more than 10 units were all publicly-assisted;
- o the 35 structures contained a total of 321 units; of these 248 were publicly-assisted, low income housing, leaving only 73 units built in the private, for-profit field;
- o the 32 structures were scattered throughout nine different census tracts.

For purposes of the inclusionary zoning program, only private for-profit projects can be validly used for projection purposes.

30.

ENVIRONMENTAL INITIAL STUDY page 4

Future Construction

Use Permit data for the period January 1984 through December 1985 (includes both applications and use permits granted) indicate that a total of 12 projects were proposed during that period. Two of the proposed projects are to be publicly-assisted (The Dwight-Derby Site Project and the Low Income Public Housing Project) and were excluded from this study. The ten proposed privately-developed, for profit projects, if constructed, would contain a total of 103 units and be located in nine different census tracts.

Vacant and Developable Land

A study done by the Planning and Community Development Department on existing vacant land indicates that there is very little vacant land in Berkeley. As of October 1984 there were 216 conforming residential vacant lots and 19 vacant lots in non-residential areas. Of the vacant residentially zoned lots, the overwhelming majority were in areas zoned as R-1. Census tracts 11, 12, 15, 16 which are virtually zoned as R-1 accounted for 209 of the vacant lots, possibly leaving 17 lots subject to the inclusionary requirement if used for development of residential projects of four or more units. The one major vacant land area in the City is the Waterfront, however, plans for that area do not envision housing of any kind.

One factor to consider in terms of future development of multi-unit residential projects is that of re-use of existing underutilized areas. However, although initial consideration is being given to facilitate such reutilization through rezoning and expansion of the redevelopment area, no studies or plans are actually in place. It is, therefore, not possible to predict how reutilization of existing developed areas may affect the number of new residential projects that is likely to be constructed in the future. However, local controls on demolition contained in the Neighborhood Preservation Ordinance (NPO) and the Neighborhood Commercial Preservation Ordinance (NCPO) should have a deterring effect on reutilization of land as indicated by the low level of demolitions since passage of those ordinances. At any rate, reutilization of existing developed areas will not be ministerial and will require environmental review at the time that proposals are made.

ANALYSIS OF IMPACT

Alternative One

Assuming that past construction trends continue and that a density bonus would be given in every situation, it can be projected that approximately two additional units would result from the inclusionary zoning ordinance (73 units were built in a ten year period, averaging 7.3 units per year. A 25% density bonus requirement would result in less than two units above the allowed maximums). This increase in itself would have negligible environmental impact, but would be further reduced for several reasons. Firstly, projects, would be likely to be under 10 units and scattered in various census tracts. Secondly, it is very unlikely that density bonuses would be given in every situation since the City has the option of providing different types of incentives. The recent trend in the City has been toward down-zoning and there has been a high concern among Berkeley residents with density. It can be expected, therefore, that other types of incentives which would not be likely to affect density would be given preference.

If one were to project from the use permit data, approximately twelve units per year could be expected if all units applied for would actually be constructed and if a density bonus would be given in every case (103 total units proposed for a two year period = 51.5 units per yr., divided by .25% = 12.67). While that number would not have a negative impact in any one year, cumulatively, some negative impact might result. However, it is highly unlikely that twelve additional units would result for the following reasons:

- o not all applications receive approval, nor all proposed units actually get constructed,
- o incentives with little environmental impact are likely to be used rather than density bonuses,
- o as projects are constructed on vacant land, vacant land becomes scarcer and project sites harder to find,
- o historically, new housing market demands are cyclical. The current housing market in the Bay Area is at the high end of the upswing with a downswing likely to follow and thus the average yearly figure can be expected to be lower.

Impacted Areas

Due to variation in zoning throughout the City some areas will be affected more than others by the inclusionary zoning program. The program will have little if any direct effect on areas zoned R-1, R-2, or R2-A because construction of projects with four or more units is not allowed in those areas (The map in Appendix A outlines the affected areas). However, even in affected areas past examples indicate that any impact should be mitigated because projects are likely to be small (i.e., under ten units) and scattered throughout census tracts.

Impact on Housing

The proposed inclusionary zoning program is expected to have a positive effect on housing by helping the City meet its housing goals as expressed in the Housing Element of the City's Master Plan. Among specific Housing Element policies that the program would address are:

- o Policy 3.10 - Encourage the development of housing for low and moderate income households.
- o Policy 3.11 - Whenever feasible, employ state/federal programs and pursue innovative ways to stimulate the development of new housing for rent or sale to low and moderate income households.

The beneficial effect on housing will result from the creation of new additional low income units as well as from any in-lieu fees received by the City which are specifically to be used for housing programs benefitting low income households.

However, a potentially negative impact on housing must also be considered. Were an inclusionary zoning program to make residential projects of four or more units prohibitive, then the overall housing goals for Berkeley of adding 1,611 housing units by 1990 would be more difficult to meet. The proposed programs offers several ways to avoid such an occurrence. Firstly, inclusionary units are to be made available to those at the upper end of the low income spectrum (i.e., those above 80% of median income) unless the government can make rental subsidies available. Secondly, density bonuses or incentives of equivalent financial value must be provided to the developer. Finally, to reduce developer subsidy costs for inclusionary units, the City may allow the lessening of amenities and square footage of the inclusionary units. Increasing the number of bedrooms while maintaining the same square footage may also be allowed, resulting in a higher price for the unit (by having more bedrooms the unit could be made available to a larger sized household. Since income is based on household size, a household with greater income but more household members would still be eligible for the inclusionary unit). The developer may also be given the option of maintaining the inclusionary units as rental units in a "for sale" project which may be financially advantageous to the developer.

Alternative Two

The environmental impact of the second alternative should be considerably less than Alternative One because in most cases there would be no density bonus requirement and fewer projects would be subject to the program (e.g., four-unit projects would not be

33

~~33~~

ENVIRONMENTAL INITIAL STUDY page 7

covered). Rental projects of 10 units or more would require a density bonus/incentives but few rental projects can be expected (there has been no private, for profit, multi-unit rental project constructed in the last ten years). Moreover, whenever density bonuses would be applicable, the same mitigating factors cited for Alternative one would also be operative.

CONCLUSION

It can be expected that any negative environmental impact in the areas cited should be negligible. As has been discussed, for Alternative One the probable increase in residential units above the allowed maximums range from a low of less than two per year to a high of 12 per year. All factors considered, a realistic estimate of actual increase is approximately five units or 11 additional persons (2.2 per unit). In terms of impact on density, it is difficult to state clearly what that impact is other than to say that it is negligible. Normally "unit per lot/parcel" or "people per acre" are used as density measures. In this case, because additional units are expected to be few and projects are likely to be small and scattered any increased density is virtually unquantifiable. In any case, any density increase will still be subject to discretionary decision and to appropriate environmental review on a case-by-case basis.

Alternative Two is expected to have even less negative environmental impact since in the majority of cases no density bonus or other incentives are required. Both alternatives contain mechanisms to keep the program from being prohibitive to developers.

2148

TO: Secretary for Resources
1416 Ninth Street, Room 1311
Sacramento, California 95814
or
~~xxx~~ County Clerk
County of Alameda

FROM: (Public Agency) City of Berkeley
2180 Milvia Street
Berkeley, CA 94704

SUBJECT: Filing of Notice of Determination in compliance with Section 21108 or 21152 of the Public Resources Code.

INCLUSIONARY ZONING PROGRAM
Project Title

State Clearinghouse Number Contact Person Telephone Number
(If submitted to Clearinghouse)

CITY OF BERKELEY
Project Location

Section 15B has been added to the Zoning Ordinance to require the inclusion
Project Description

of low income housing (20% of the project) in certain residential developments.

This is to advise that the Planning and Community Development Dept.
(Lead Agency or Responsible Agency)
has approved the above described project and has made the following determinations regarding the above described project:

1. The project will, ~~xxx~~ will not, have a significant effect on the environment.
2. An Environmental Impact Report was prepared for this project pursuant to the provisions of CEQA.

~~xxx~~ A Negative Declaration was prepared for this project pursuant to the provisions of CEQA.

The EIR or Negative Declaration and record of project approval may be examined at: _____

3. Mitigation measures were, ~~xxx~~ were not, made a condition of the approval of the project.
4. A statement of Overriding Considerations was, ~~xxx~~ was not, adopted for this project.

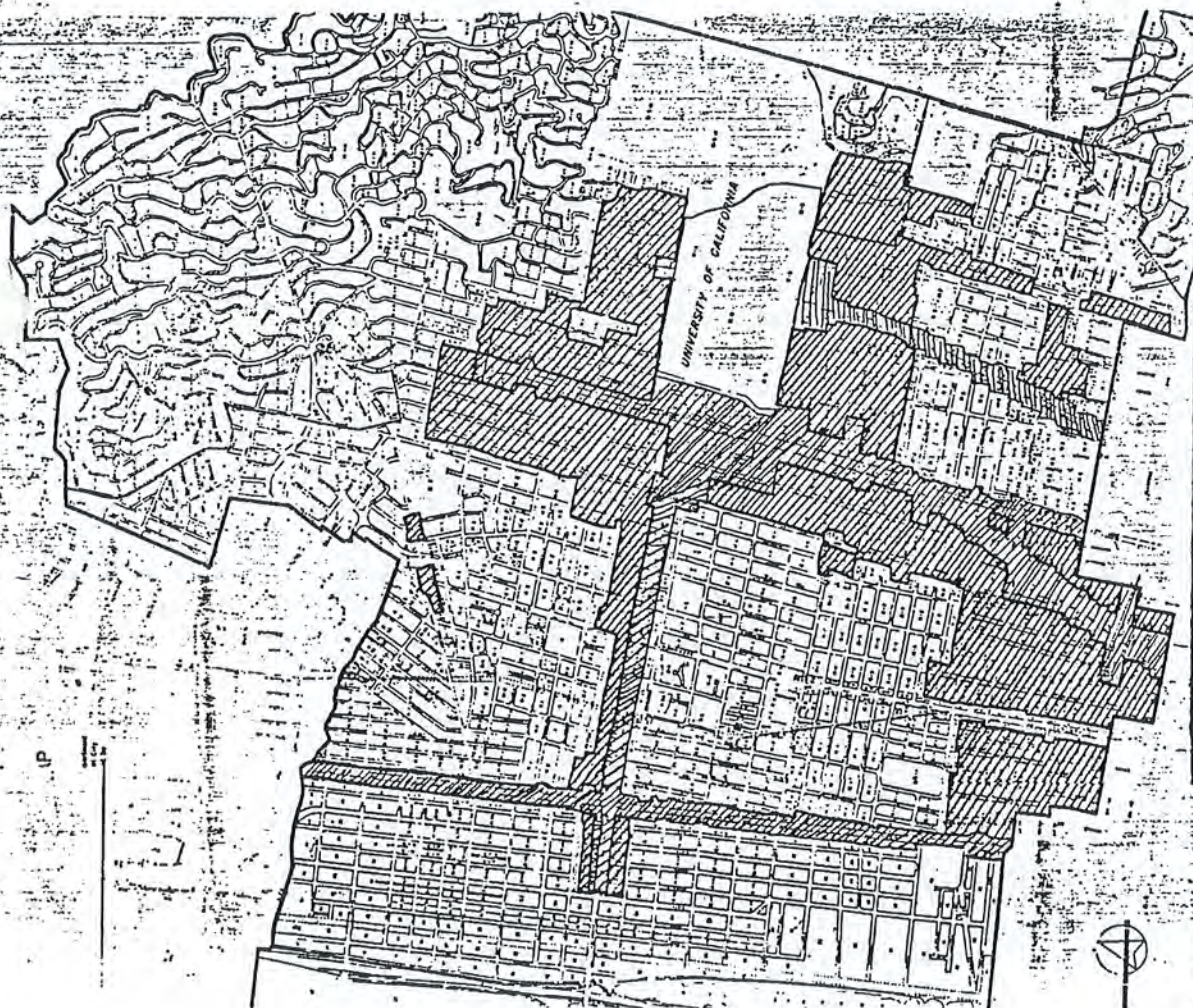
Date Received for Filing
FILED AND POSTED BY
Governor's Office of
Planning and Research

SEP 17 1986


Mary Reynolds Sur
Signature

Planning Administrative
Title

APPENDIX A



- F. DISTRICTS**
- R ENVIRONMENTAL SUFFICIENCY RESIDENTIAL
 - 1 SINGLE FAMILY RESIDENTIAL
 - 1A LIMITED TWO-FAMILY RESIDENTIAL
 - 2 RESTRICTED TWO-FAMILY RESIDENTIAL
 - 2A RESTRICTED MULTIPLE-FAMILY RESIDENTIAL
 - 3 MULTIPLE-FAMILY RESIDENTIAL
 - 4 MULTIPLE-FAMILY RESIDENTIAL
 - C-3 COMMERCIAL
 - SI SPECIAL INDUSTRIAL
 - M

 AREA AFFECTED BY PROPOSED INCLUSIONARY ZONING ORDINANCE

SUMMARY OF EXAMPLES OF OTHER INCLUSIONARY ZONING REGULATIONS

1. PALO ALTO - Contained in housing element of the general Plan. Inclusionary requirement for 10 units or more, 10% requirement. Affordability to persons ranging from 80% to 100% of median income. Price of inclusionary units=actual cost of construction (except land, marketing costs and profit). Scaling down of inclusionary unit possible. In-lieu payment allowed = 3% of sales price of total project (no density bonus given). Deed restriction, City has right of first refusal, handled through non-profit (Palo Alto Hsg. Corp.). Fraction of required below market percentage handled by in-lieu payments.
2. MARIN COUNTY - Projects of 15 units or more, rental or ownership units, made affordable to those within 80%-120% of area median income (actual average between 100 -110% of median); 15% inclusionary requirement; amenities can be reduced, off-site development allowed, rental units allowed in "for sale" developments, 90 day resale controls, fractional percentages adjusted downward. In-lieu fee average construction cost for a unit less the affordable cost for the unit.
3. COASTAL COMMISSION - 16 units or more, for sale units only. 25% of units made available to low and moderate income households. Offsite units O.K. but twice the number for on-site. projects of 5 to 15 units must make payment of fee equal to 6% of total sales price of the project. Density bonuses and reduced other requirements must be consistent with environmental policy of the Commission.
4. SANTA MONICA - (soon to change) Projects with 3 units or more, 25% inclusionary requirement. First unit affordable to moderate income (120% of median), others within 80 -100% of median income. No in-lieu fee. Developer finds buyer.
5. STATE MODEL - sales and rentals, 75% of inclusionary units at moderate income, 25% lower income. Applicable to 5 units or more, 25% inclusionary requirement. Off-site o.k. Rental units rents same as Section 8 Fair Market Rents. In-lieu fees allowed for 20 units or less based on estimated sales price for 1200 square feet minus what is affordable to a moderate income household. Density bonus equal to one additional unit for every two inclusionary ones.
6. ORANGE COUNTY - 25% of all new developments and condo conversions (10% lower income -80%; 10% at 100% of median income; 5% moderate income 100-120% of median). Density bonus or relaxation of parking requirements, CDBG assistance and other incentives used. Alternatives, off-site development or land dedication. No resale restrictions unless government subsidy has been received.

36.

7. CUPERTINO - 10 units or more in areas with density of 6 units to an acre. 10% of units, affordability range 80 -120% of median income. Density bonus of up to 20% ; can scale down and reduce size but exterior of unit must be the same. City eliminates inspection fees, park dedication fees and other fees, uses CDBG to offset land, site improvement costs. City has right of first refusal.

8. LOS ANGELES - 5 units or more new developments or condos, 15% inclusionary requirement (6% low income, 9% moderate income). City has right of first refusal to buy at market price.

9. NAPA - "bonus points" given for low/moderate units. Exemption from rating system used to reduce development.e

10. SAN DIEGO - (yet to be implemented), 15% low income units, 20% density bonus given.

11. CONCORD (proposed) 25% of units affordable at 120% of median; or 10% of units affordable at 80% of median, or sell 50% of units to elderly. Inclusionary units for rental housing as well, 25% at 120% of median; 10% of units at 20% of 80% of median. Negotiations often on a case-by-case basis. Additional incentives given for going above the 25% requirement.

ORDINANCE NO. 4641 -N.S.

PROVIDING FOR THE ESTABLISHMENT OF A NEW PLANNING PROCESS TO ACHIEVE THE PRESERVATION AND ENHANCEMENT OF THE NEIGHBORHOODS OF THE CITY OF BERKELEY INCLUDING INTERIM REGULATIONS ON RESIDENTIAL CONSTRUCTION AND DEMOLITION.

The people of the City of Berkeley do ordain as follows:

Section 1. TITLE.

This ordinance shall be called the Neighborhood Preservation Ordinance.

Section 2. PURPOSE.

The purpose of this ordinance is to deal with an emergency situation arising from current development trends in the City of Berkeley.

(a) IMPACT OF CURRENT DEVELOPMENT TRENDS. An increasing number of neighborhoods in Berkeley are threatened by over-construction of dwellings which do not meet the needs of the community. It is essential that the residents of the city determine the processes which regulate the uses of available land. Housing which has not met the needs of underserved people in the community must become a prime priority in any consideration of such land use and must also rectify the problems presented by the concentration of dwellings in certain areas of the city. At all times the environmental impact of housing construction must be a major concern.

New construction in a city as built-up as Berkeley requires demolition, often of attractive low rent older homes, thus actually reducing the stock of decent housing available to those most in need of it -- families, low income and underserved, racial minorities and students. Although charging high rents, most new dwellings have

been of uniformly low quality. In addition, the design of new buildings often has disregarded the special needs of the aged and the handicapped.

Residents of Berkeley suffer from the effects of high-density construction which increases traffic, competes for limited recreational space, and experience drastically reduced views, light and air. The city as a whole also suffers. The tax rate has soared as the need for costly public services, such as recreation space, transportation services, police and fire protection, child care, health care, and waste disposal, increase in the affected neighborhoods. Higher taxes are necessitated because such developments fail to pay for the additional services; these increased taxes, therefore, represent an indirect subsidy to developers from the pockets of taxpayers.

(b) DEFICIENCIES IN MASTER PLAN AND ZONING ORDINANCE. These current development trends in Berkeley constitute a serious public emergency which deficiencies in the City's Master Plan and Zoning Ordinance have not been able to control. There has been no substantial reconsideration and revision of the Master Plan since its adoption in 1955, and this plan fails to reflect the current priorities and needs of Berkeley residents.

The Master Plan does not contain a housing element, as required for the City's continuing eligibility to participate in various Federal programs, such as rent and housing subsidy and loan programs. Neither the City's Master Plan or the Zoning Ordinance contain provisions insuring the development of low-income housing to meet the needs of low-income groups residing in the City of Berkeley, or establish procedures to insure the preservation of land space on which low-income housing may be constructed at such time as public or private funds for such housing are made available. The Master Plan also lacks protective provisions for Charter Cities, as required by a recent act of the State Legislature, including conservation, open space, noise abatement, and geological elements.

Major policies included in the Master Plan have not been followed. The Zoning Ordinance does not conform with the population guidelines of the Master Plan. The Zoning Ordinance allows vastly higher densities than recommended as a maximum by the Master Plan. The Ordinance also fails to provide for a public report concerning the environmental impact of proposed developments, as required by a recent decision of the California Supreme Court. Although a new development has its greatest impact on the surrounding neighborhood, the Zoning Ordinance makes little provision for neighborhood consideration of this impact.

Until the above-mentioned deficiencies are corrected, the critical conflict between current development trends and the public welfare will continue.

Section 3. PROCEDURES FOR THE CORRECTION OF DEFICIENCIES ENUMERATED IN SECTION 2.

(a) COMPREHENSIVE REVISION OF BERKELEY MASTER PLAN AND ZONING ORDINANCE. The City Planning Commission shall prepare and submit to the City Council for its consideration a comprehensive revision of the Master Plan and Zoning Ordinance. The Planning Commission shall submit the revised Master Plan and Zoning Ordinance no later than March 31, 1975 or by such later date as the City Council may direct for good cause shown.

(b) RESIDENT PARTICIPATION. A Committee of interested residents shall be formed by the City Council to assist the Planning Commission during the revision of the Master Plan and Zoning Ordinance. Each council-member shall appoint an equal number of committee members. The City Council shall allocate sufficient funds to meet minor expenses incurred by low-income, handicapped or aged persons who may be serving on this advisory committee (ie: child care, transportation).

(c) CORRECTION OF DEFICIENCIES AND RESIDENT REVIEW. The Planning Commission shall include in the revised Master Plan and Zoning Ordinance correction of the deficiencies specified in Section 2 and provision for resident review at the neighborhood level of all proposed developments and changes in land use.

(d) PUBLIC HEARINGS. In order to insure that the City Planning Commission is adequately informed regarding the priorities and concerns of Berkeley residents and to insure that those residents are appraised from time to time of the status of the Commission's revisory work, the Planning Commission shall hold no fewer than five (5) public hearings throughout the City.

Section 4. INTERIM BUILDING REGULATIONS.

In order to regulate the issuance of building permits during the period between the enactment of the "Neighborhood Preservation Ordinance" and the final acceptance by the Berkeley City Council of the revised Master Plan and Zoning Ordinance, no residential building permits shall be issued except in conformity with the following requirements:

(a) USE PERMITS. Use Permits issued by the Board of Adjustments shall be required for the construction of all new residential construction of one or more units, excepting legal conversions and/or the addition of a single legal unit to an existing structure. The use permit shall be obtained before the issuance of a building permit. Decisions of the Board of Adjustments may be appealed to the City Council by any interested party.

(b) GRANTING OF USE PERMITS. A use permit may be granted if from the facts presented at a duly called public hearing at the Board of Adjustments, or the City Council on appeal finds the following:

(1) That the requirements of the Zoning Ordinance have been met, including those for use permits and variances as

specified therein.

(2) That the establishment, maintenance, or operation of the building applied for will not, under the circumstances of the particular case, be detrimental to the health, safety, peace, comfort and general welfare of persons residing or working in the neighborhood of such proposed use or to the general welfare of the city.

(3) That in the case of construction of new buildings with one or more units, the affected neighborhood has received notification as required by Section 7.

(4) That the developer and/or contractor has submitted and will comply with an affirmative action program conforming with Berkeley's affirmative action guidelines.

(5) That the proposed construction of four or more units shall have at least twenty-five percent (25%) low-income housing units as defined in Section 4(c) of this ordinance.

(6) That the environmental impact requirements have been met according to Section 6 of this ordinance.

In addition, for any proposed construction with less than 50% low income units, the Board of Adjustments shall make a finding of whether the proposed construction meets with the general approval of residents of the neighborhood where it is to be located. Neighborhood disapproval may not be based upon discrimination against the characteristics of potential residents. The Board shall consider this finding in determining whether requirements of Section 4(b)(2) has been met. "Neighborhood" shall be defined as provided for in Section 7(a) below.

(c) LOW-INCOME HOUSING. Low income housing is housing whose dwelling unit rents and income standards are defined in HUD guidelines for Section 236 housing. For buildings of eight units or larger, at least half of the minimum specified in Section 4(b)(5) must meet rent and income guidelines for Section 23 (Leased Housing).

Section 5. INTERIM BUILDING DEMOLITION REGULATIONS.

In order to protect the stock of older housing during the period between the enactment of the "Neighborhood Preservation Ordinance" and the final acceptance by the Berkeley City Council of the revised Master Plan and Zoning Ordinance, no residential demolition permits shall be issued except in conformity with the following requirements:

(a) DEMOLITION PERMITS. Demolition permits shall be required for the demolition of structures containing one or more residential units. These permits shall be issued by the Board of Adjustments. Decisions of the Board of Adjustments may be appealed to the City Council by any interested party.

(b) GRANTING OF DEMOLITION PERMITS. A demolition permit may be granted if, from all facts presented at a duly called public hearing at the Board of Adjustments, or the City Council upon appeal, finds:

(1) That the demolition would not be materially detrimental to the housing needs and public interest of the affected neighborhood and the City of Berkeley; and

(2) That the developer and/or owner of the proposed construction has provided alternative housing for the residents of the structure to be demolished, and further that this relocation housing is consistent with HUD relocation guidelines, including standards for a choice of housing of comparable quality and costs within the same community if the relocatee(s) so desire, and either

(3) That the demolition will remove a hazardous, unusable or unrepairable structure, or

(4) That the demolition is necessary to permit construction approved pursuant to Section 6(c)(5), and with the additional requirement that such construction contain at least the same number of housing units as the demolished structure, and, further, that provisions have been made for persons displaced by the proposed construction to have first choice in the new housing.

Section 6. ENVIRONMENTAL IMPACT REPORT AND FINDING.

(a) ESTABLISHMENT OF INTERIM ENVIRONMENTAL IMPACT GUIDELINES. The Planning Commission, as soon as possible after public hearings in which all interested parties are asked to participate, shall prepare for adoption by the City Council a set of interim guidelines to determine which construction and demolition projects may have a significant effect on the environment, and when permits should be issued for such projects.

(b) PREPARATION AND CONSIDERATION OF ENVIRONMENTAL IMPACT REPORT. No permit for construction or demolition which may have a significant effect on the environment shall be granted until:

(1) An Environmental Impact Report has been prepared by the Planning Department at the expense of the applicant. This cost to the applicant may be waived if the Board of Adjustments finds it to be a financial hardship.

(2) The Board of Adjustments has considered such Environmental Impact Report at the duly called public hearing on the granting of a use or demolition permit, and

(5) The Board of Adjustments has made a finding that the project will not have a significantly adverse environmental effect. (Decisions of the Board of Adjustments may be appealed to the City Council by any interested party.)

(b) PRESUMPTION OF ENVIRONMENTAL EFFECT. Until interim guidelines have been prepared by the Planning Commission after public hearings and have been adopted by the City Council, all projects involving construction or demolition of buildings which require approval by the Board of Adjustments shall be deemed to have a significant effect on the environment.

Section 7. REQUIRED PUBLIC NOTICE.

(a) NOTICE TO THE NEIGHBORHOOD. Notice of public hearings provided for in this Ordinance shall be sent at least 21 days before the public hearing date, to all addresses and owners of property within a radius of five hundred (500) feet from the boundaries of the site of the proposed construction or demolition. The Board of Adjustments may decrease this radius to not less than three hundred (300) feet in appropriate cases of small-scale development. The following information shall be included in the notice of public hearing:

- (1) The number of housing units proposed.
- (2) The percentage of low-income units included in the structure.
- (3) A small reproduction of the site plan and perspective rendering of the proposed structure.
- (4) Time and place of public hearing.
- (5) City departments to contact for further information.

(b) NOTICE TO THE REGISTRY. The Board of Adjustments shall maintain a registry of all persons and groups requesting notice, to whom notice of all public hearings shall be sent as specified in Section 7(a)(1) through (5) above, and shall be sent at least 21 days before the public hearing date.

(c) NOTICE BY POSTING. A notice of public hearing shall be posted on the site of the proposed construction at least 21 days before the public hearing date. This posted notice shall be in lettering sufficiently large to be seen clearly and read easily by passersby, and the posted notice shall contain information as specified in Section 7(a)(1) through (5).

(d) COSTS OF NOTICE. All costs of giving notice shall be

paid by the applicant. This cost to the applicant may be waived if the Board of Adjustments finds it to be a financial hardship.

Section 8. DETERMINATION OF RULES AND PROCEDURES.

The Planning Commission shall determine rules and procedures necessary to make operative the Interim Building and Demolition regulations established by this ordinance.

Section 9. RELATIONSHIP TO OTHER ORDINANCES.

It is not the purpose of this Ordinance to repeal the existing Zoning Ordinance, except insofar as its provisions are in conflict with this Ordinance. Where there is no conflict, the Zoning Ordinance shall continue to apply. Wherever the existing Zoning Ordinance or other ordinances are in conflict with this Ordinance, this Ordinance shall apply.

Section 10. SEVERABILITY.

If any provision of this Ordinance or application thereof to any person or circumstance is held invalid, this invalidity shall not affect other provisions of this Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable.

In effect: April 17, 1973

ORDINANCE NO. 4641 —N.S.

Passed to Print:.....

Finally Adopted:.....

In Effect:..... April 17, 1973.....

Passed by the electors April 17, 1973 at the General Municipal Election.

At a regular meeting of the Council of the City of Berkeley, held on the.....day of
....., this Bill was passed to print and ordered published by posting by the
following vote:

Ayes:.....

Noes:.....

Absent:.....

Attest:

.....
City Clerk and ex-officio Clerk of the Council

At a regular meeting of the Council of the City of Berkeley, held on the.....day of
....., this Ordinance was finally adopted by the following vote:

Ayes:.....

Noes:.....

Absent:.....

Attest:

.....
City Clerk and ex-officio Clerk of the Council
of the City of Berkeley, California

Approved this.....day of.....

.....
Mayor and President of the Council
of the City of Berkeley, California

770 PAGE STREET (E) ASPHALT PARKING AREA.

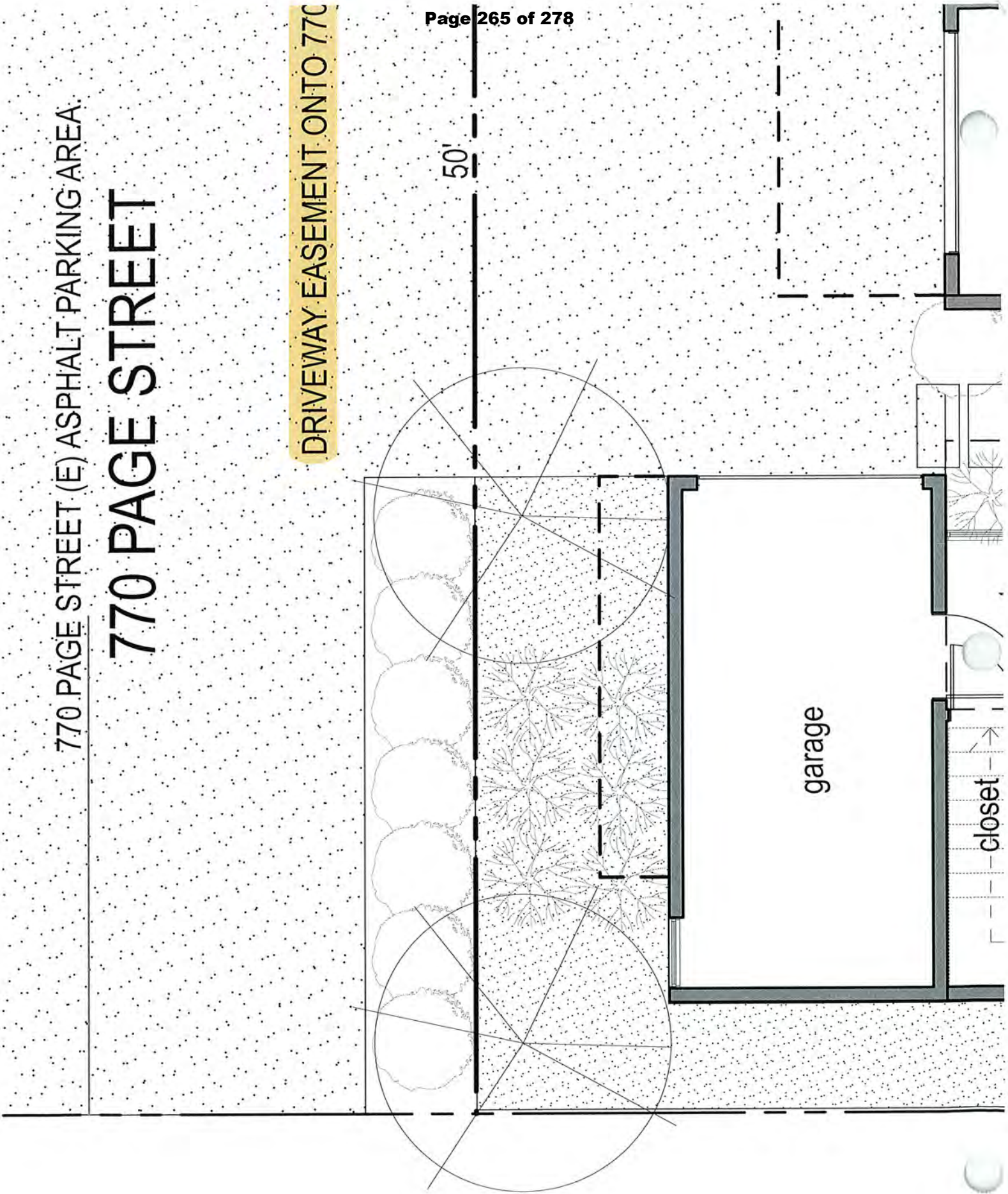
770 PAGE STREET

DRIVEWAY EASEMENT ONTO 770

50'

garage

closet





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

FOR BOARD ACTION
MAY 27, 2021

770 Page Street

Use Permit #ZP2020-0051 to demolish an existing single-family dwelling unit and construct four detached, three-story approximately 1,500-square-foot dwelling units on a 5,532-square-foot lot.

I. Background

A. Land Use Designations:

- General Plan: MU – Manufacturing Mixed Use
- West Berkeley Plan Area
- Zoning: MU-R – Mixed Use Residential District

B. Zoning Permits Required:

- Use Permit, under BMC 23C.08.010 to demolish of a dwelling unit
- Administrative Use Permit, under BMC Section 23E.84.030, to construct four new dwelling units

C. CEQA Recommendation: It is staff's recommendation that the project is **categorically** exempt pursuant to Sections 15301, 15303, and 15332 of the CEQA Guidelines ("Existing Facilities," "New Construction or Conversion of Small Structures," and "In-Fill Development"). The determination is made by ZAB.

D. Parties Involved:

- Applicant/Owner: 1444 5th Street, LLC, 805 Jones Street, Berkeley

Figure 2: Proposed Site Plan

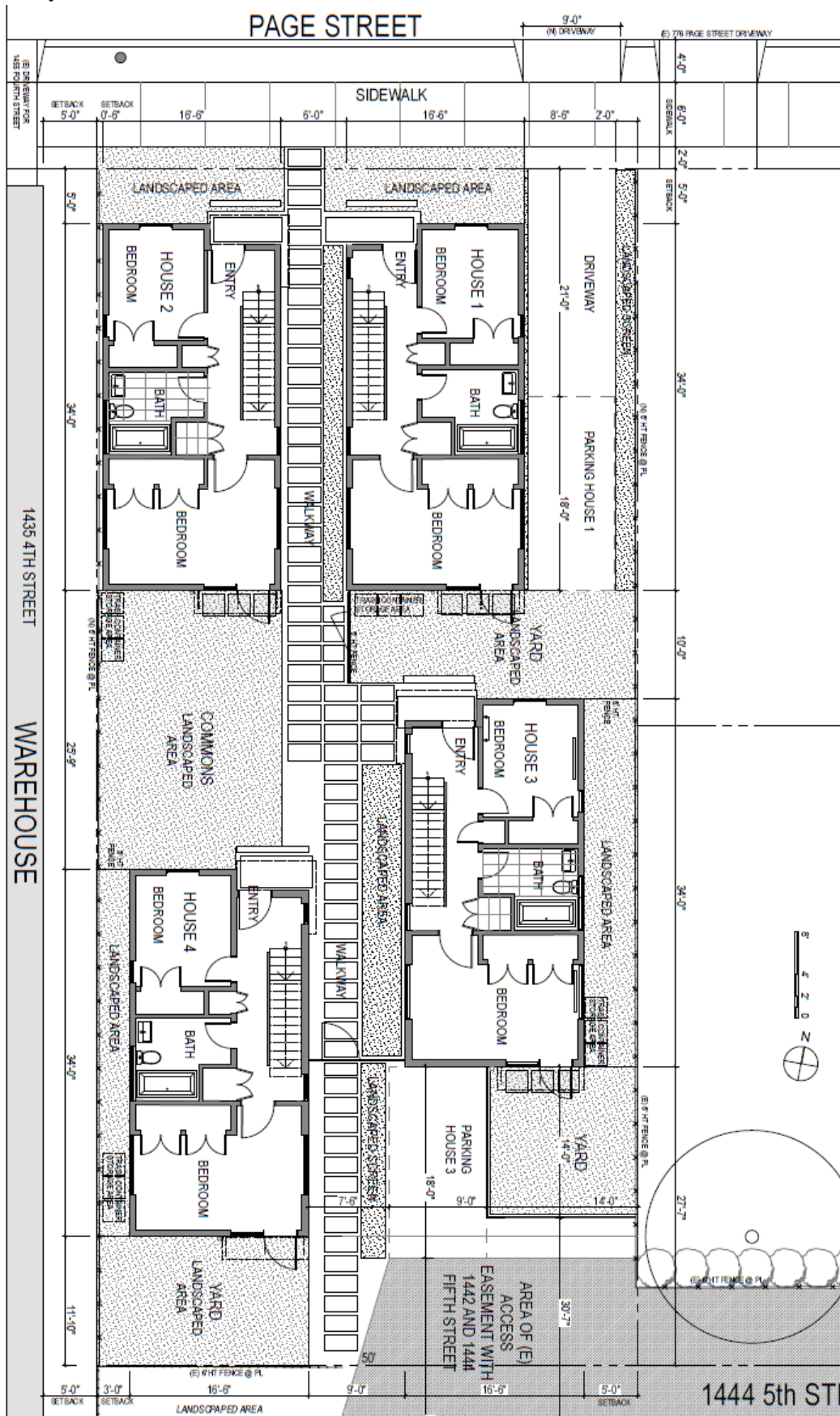


Table 1: Land Use Information

Location		Existing Use	Zoning District	General Plan Designation
Subject Property		Single-Family Residential	MUR	Manufacturing Mixed Use
Surrounding Properties	North	Residential, Commercial	MUR	Manufacturing Mixed Use
	South	Four new detached dwelling units (developed by same applicant) currently under construction	MUR	Manufacturing Mixed Use
	East	Residential, Commercial	MUR	Manufacturing Mixed Use
	West	Warehouse	MULI	Manufacturing

Table 2: Special Characteristics

Characteristic	Applies to Project?	Explanation
Affordable Child Care Fee for qualifying non-residential projects (Resolution 66,618-N.S.)	No	This fee applies to projects with net new 7,500 sq. ft. of non-residential floor area. The project involves only new residential floor area, and thus this requirement does not apply.
Affordable Housing Fee for qualifying non-residential projects (Resolution 66,617-N.S.)	No	This fee applies to projects with net new 7,500 sq. ft. of non-residential floor area. The project involves only new residential floor area, and thus this requirement does not apply.
Affordable Housing Mitigations for rental housing projects (BMC 22.20.065)	No	This fee applies to projects that propose 5 or more rental dwelling units. This project does not propose rental units.
Coast Live Oak Trees (BMC 6.52.010)	No	There are no coast live oak trees on or abutting the project site.
Creeks	No	The project site is not within a creek buffer zone.
Density Bonus	No	The applicant has not applied for a State Density Bonus.
Inclusionary Housing Ordinance (BMC 23C.12)	No	This fee applies to project that propose 5 or more ownership dwelling units or to projects on parcels that can accommodate 5 or more dwelling units. The project is proposing the maximum number of dwelling units supportable on a lot of this size: 4.
Natural Gas Prohibition (BMC 12.80.020)	Yes	The project is subject to the natural gas prohibition.
Historic Resources	No	The applicant submitted an HRE (Preservation Architecture, December 17, 2020) that concluded the property and building on-site do not have potential historical significance under the criteria of Berkeley's LPO.
Housing Accountability Act (Gov't Code Section 65589.5(j))	Yes	The project complies with applicable, objective general plan and zoning standards, and thus section (j) of the Housing Accountability Act applies. See Section V.B of this report for additional discussion on compliance with the Housing Accountability Act.
Housing Crisis Act of 2019 (SB330)	Yes	The project is a project that is: all residential; a mixed-use project with at least two-thirds of the square-footage residential; or for transitional or supportive housing. See Section V.A of this report

		for additional discussion on the sections of SB330 that apply to the project.
Rent Controlled Units	No	There are no rent controlled units on the subject site.
Residential Preferred Parking (RPP)	No	The neighborhood surrounding the subject site is not located in an RPP Zone.
Seismic Hazards (SHMA)	Yes	The project site is located within an area susceptible to liquefaction as shown on the State Seismic Hazard Zones map. The applicant submitted a geotechnical investigation for the project (Peters & Ross, March 2020), which concluded that the project is feasible from a geotechnical engineering standpoint provided the recommendations in the report are incorporated into project plans and specifications. The geotechnical report was peer reviewed by the City's peer reviewer who concluded the report satisfactorily addresses the site's geotechnical issues.
Soil/Groundwater Contamination	no	The project site is not listed on the Cortese List (an annually updated list of hazardous materials sites), however it is located within the City's Environmental Management Area. Standard Toxics Conditions of Approval apply.

Table 3: Project Chronology

Date	Action
May 29, 2020	Application submitted
March 30, 2021	Application deemed complete
May 13, 2021	DRC Staff Level Design Review NOD Posted
May 11, 2021	Public hearing notices mailed/posted
May 27, 2021	ZAB hearing

Table 4: Development Standards

Standard		Existing	Proposed Total	Permitted/ Required
BMC Sections 23E.84.070-080				
Lot Area (sq. ft.)		5,532	No change	n/a
Gross Floor Area (sq. ft.)		900	6,000 (1,500 per unit)	8,298 max
Floor Area Ratio		0.2	1.1	1.5 max
Dwelling Units		1	4	4 max (1 per 1,250 sq. ft. lot area, + 1 if 750+ sq. ft. remainder)
Building Height	Average (ft.)	14	32.5	35 max
	Stories	1	3	3 max
Building Setbacks (ft.)	Front	14	5	5 min
	Rear	62	11.8	10 min

	Left Side	9.7	5	5 min
	Right Side	3	0.5	0 min
Lot Coverage (%)		16	41	n/a
Usable Open Space (sq. ft.)		140	1,082	600 min (150 per unit)
Automobile Parking		1	2	0 min

II. Project Setting

A. Neighborhood/Area Description: The project is in West Berkeley on the south side of Page Street between Fourth Street to the west and Fifth Street to the east. The neighborhood consists predominantly of one- and two-story residential buildings, warehouse, and other commercial buildings, with some three-story residential and mixed residential buildings as well. Similar developments of four detached three-story dwelling units by the same developer are in the area including those newly constructed at 1446 Fifth Street and those currently under construction at 1444 Fifth Street.

This portion of the MU-R District provides a transition between the more exclusively residential areas to the east and the industrial areas to the west. The west side and northwest sides of the subject block, along Fourth Street, where the MU-LI District begins, includes industrial and warehouse uses. The east side of the block, along Fifth Street, includes residential buildings. The neighborhood further eastward features a mix of uses, including one- to three-story residential and commercial buildings. The concentration of residential uses increases further eastward.

B. Site Conditions: The project site is generally level, rectangular in shape and currently developed with a single-story dwelling unit constructed in 1944. A curb cut and driveway are located on the east (left) side of the lot. Currently, the rear yard area is undeveloped and completely paved.

III. Project Description

The project proposes to demolish the existing single-family dwelling and construct four detached dwelling units. Each building would be three stories, with an average height of 32 feet 6 inches, and would each provide approximately 1,500 square feet of gross floor area. The layout of each unit is essentially identical, with the first floor containing two bedrooms and one bathroom, the second floor containing an open living/dining room with kitchen and bathroom, and the third floor comprised of one bedroom that opens up to a 135-square-foot western facing roof deck. Two of the units would have a dedicated uncovered parking space. Unit 1 would have an uncovered parking to the east (left) of the dwelling, accessed from a curb cut and driveway off of Page Street. Unit 3 would have an uncovered parking space located at the rear (south) of the dwelling, accessed from the shared access easement that also provide access to the eastern parcels at 1442 and 1444 Fifth Street. The existing easement would be re-recorded to meet the design standards required by the Traffic Engineer.

IV. Community Discussion

- A. Neighbor/Community Concerns:** The applicant installed a yellow project notification on the project site on March 12, 2021. On April 20, 2021, staff sent an email to interested parties who had provided emails in correspondence regarding other project by the applicant in the immediate vicinity. On May 13, 2021, the City mailed public hearing notices to property owners and occupants, and to interested neighborhood organizations. The City also posted notices within the neighborhood in three locations. At the time of this writing, staff has received no correspondence regarding this project.
- B. Committee Review:** As the construction of the dwelling units in the MU-R requires an AUP and not a UP, Committee Review of the project is not required; it is subject to Staff Level Design Review (SLDR). The applicant submitted a SLDR application on June 5, 2020. Design Review Staff concluded that the project is compatible with City-wide Design Guidelines and posted notices of approval on-site on May 13, 2021. The SLDR approval included standard design review conditions for further review of building details and the landscape plan during the building permit process. The appeal and comment period for this approval is currently underway and will end on May 27, 2021, at 4:00 PM.

V. Issues and Analysis

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

1. Government Code §65905.5(a) states that if a proposed housing development project complies with the applicable, objective general plan and zoning standards in affect at the time an application is deemed complete, then the city shall not conduct more than five (5) hearings in connection with the approval of that housing development project. This includes all public hearings in connection with the approval of the housing development project and any continuances of such public hearings. The city must consider and either approve or disapprove the project at any of the five hearings consistent with applicable timelines under the Permit Streamlining Act (Chapter 4.5 (commencing with §65920)).

The May 27, 2021 ZAB hearing represents the first public hearing for the proposed project since the project was deemed complete. The City can hold up to four additional public hearings on this project, if needed. One of those hearings must be reserved for any possible appeal to the City Council.

2. Government Code §65913.10(a) requires that the City determine whether the proposed development project site is a historic site at the time the application for the housing development project is deemed complete. The determination as to

whether the parcel is a historic site must remain valid during the pendency of the housing development project, unless any archaeological, paleontological, or tribal cultural resources are encountered during any grading, site disturbance, or building alteration activities.

As noted in Table 2: Special Characteristics, The applicant submitted a Historic Resource Evaluation (Preservation Architecture, December 17, 2020) that concluded the property and building on-site do not have potential historical significance under the criteria of Berkeley's LPO. The Landmarks Preservation Commission Secretary reviewed the report and concurred with the conclusion. Therefore, it was determined the site is not a historic resource. Further, standard conditions of approval have been included to halt work in case of any unanticipated discovery of archeological, paleontological, or tribal cultural resources.

3. Government Code §65950(a)(5) requires a public agency to approve or disapprove a project within 60 days from the determination that the project is exempt from the California Environmental Quality Act. The project was deemed complete on March 30, 2021. Should ZAB determine the application is categorically exempt from CEQA at the May 27, 2021 public hearing, the application must be approved or disapproved by July 26, 2021.

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

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

The proposed project complies with applicable, objective general plan and zoning standards, including maximum height, density, and FAR, and minimum setbacks, useable open space, and number of parking spaces. Thus, section (j) of the Housing Accountability Act applies. Staff is not aware of any basis to make the findings listed above.

C. Demolition of a Dwelling Unit: Pursuant to Government Code §66300(d)(1), a City "shall not approve a housing development application that will require the demolition of residential dwelling units unless the project will create at least as many residential units as will be demolished." This project proposes replacing the one dwelling proposed for demolition with four new dwellings; therefore, the application complies. Section 66300(d)(2) does not apply because the existing unit is not considered a "protected" unit under SB 330. The findings to approve the demolition of the dwelling unit under BMC Section 23C.08.010.B are therefore satisfied due to compliance with Government Code §66300(d)(3).

D. New Dwelling Units in the MU-R District and Neighborhood Compatibility:

Pursuant to BMC Section 23E.84.090.B, the proposed project is consistent with the purposes of the MU-R District and the West Berkeley Plan because it would strengthen the residential concentration in this neighborhood (see Section IV.B below). The project would protect neighboring residents from unreasonably detrimental effects of nonresidential uses, such as noise, vibration, odors, smoke, fumes, gases, dust, heat and glare because the proposal would add residences (not industrial uses) to the existing cluster of residential buildings at this block. Given the existing residential concentration on the eastern half of this block and as the residential use would be maintained on the subject property, the project would not contribute to a cumulative change of use in buildings away from the mix of uses that surround this area of West Berkeley. Moreover, the proposed use and its proposed design elements including gable roof, selectively placed windows and metal siding, responds to local residential and commercial buildings and would thereby contribute to a neighborhood that acts as a transition between the residential districts to the east and the industrial districts to the west.

The proposed project complies with all applicable MU-R District development standards (see Table 4). The applicant proposes to construct four units on a lot that can accommodate four units; a floor area ratio of 1.1 where the maximum allowed is 1.5; average height of 32 feet 6 inches at all four buildings where the maximum average height allowed is 35 feet; and 1,082 square feet of useable open space where the minimum required is 600 square feet (150 per unit). The project would provide two parking spaces, where none are required and the City's Traffic Engineer has confirmed that the proposed parking, driveway, and easement would operate acceptably. (To ensure compliance with Traffic Engineering standards, Condition of Approval #12 requires that the applicant provide the recorded easements with the revised design prior to issuance of a building permit.) The project would meet the required front yard setback and would exceed all side and rear yard setbacks.

Staff believes the proposal is consistent with the overall scale and development pattern of the one-, two-, and three-story residences and commercial and manufacturing spaces in the neighborhood, including the nearby developments by the same applicant. In addition, Design Review Staff found that the application is consistent with applicable design review guidelines and with the surrounding aesthetic context.

E. General Non-Detriment: Pursuant to BMC Section 23E.84.090.A, the Board may approve an application for a Use Permit if the proposed project meets the findings of non-detriment. A discussion of the project's potential impact to sunlight, air or views follows:

Sunlight: Staff believes the project would not result in significant loss of direct sunlight on abutting residences for several reasons. No residences occur to the west. New shadows cast towards the east would affect the rear façades of the dwelling units located at 776 Page Street and 1442 Fifth Street during the hours before sunset throughout the year. However, because impacts to neighboring residences would be limited to certain hours a day, staff believes these shading impacts would not be detrimental. (Shadow studies are provided on pages 11 and 12 of the plan set.)

Air: Staff believes the proposal would be consistent with the existing development and building-to-building separation pattern – or air – in this MU-R neighborhood because the buildings would exceed minimum setback and useable open space requirements..

Views: Staff expects that the proposed project would not result in additional obstruction of significant views in the neighborhood because there are limited significant views as defined in BMC Section 23F.04 (Definitions) available to residences in the area. The area is generally flat, developed with one- to three-story buildings, and includes mature vegetation which provides visual screening.

VI. Other Considerations

The following list of 2002 General Plan goals and polices and Specific Plan policies are provided for information purposes only, to provide context; they do not require findings of conformance because the proposed project is HAA-compliant.

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

1. Policy LU-3–Infill Development: Encourage infill development that is architecturally and environmentally sensitive, embodies principles of sustainable planning and construction, and is compatible with neighboring land uses and architectural design and scale.
2. Policy LU-7–Neighborhood Quality of Life, Action A: Require that new development be consistent with zoning standards and compatible with the scale, historic character, and surrounding uses in the area.
3. Policy UD-16–Context: The design and scale of new or remodeled buildings should respect the built environment in the area, particularly where the character of the built environment is largely defined by an aggregation of historically and architecturally significant buildings.
4. Policy UD-24–Area Character: Regulate new construction and alterations to ensure that they are truly compatible with and, where feasible, reinforce the desirable design characteristics of the particular area they are in.

Staff Analysis: The proposed project is an infill development that would add a net gain of three new dwellings units in a primarily residential neighborhood. The massing, proportions, design, and use of the buildings would be compatible with the surrounding neighborhood. As noted above, the project meets or exceeds all development standards in the MU-R district.

5. Policy H-33–Regional Housing Needs: Encourage adequate housing production to meet City needs and the City’s share of regional housing needs.

Staff Analysis: The project would add three additional dwelling units to the City’s housing stock.

6. Policy EM-5–“Green” Buildings: Promote and encourage compliance with “green” building standards. (Also see Policies EM-8, EM-26, EM-35, EM-36, and UD-6.)

7. Policy UD-33–Sustainable Design: Promote environmentally sensitive and sustainable design in new buildings.

Staff Analysis: The project would be constructed to comply with current green building standards that are required by the Building Code.

F. West Berkeley Plan Consistency: The 1993 West Berkeley Area Plan contains several policies applicable to the project, including the following:

1. Land Use Goal 1, Policy A: Retaining, through planning, zoning and land use policies which shield manufactures from economic and physical incompatibilities with other uses, sufficient land and buildings to maintain the current level of manufacturing employment at a minimum.
2. Land Use Goal 2, Policy D: Create a Mixed Residential district as a special mixed use district which will recognize and support the continued evolution of a unique mix of residential, light industrial, and arts and crafts uses, with a particular effort to strengthen residential concentrations existing there.

Staff Analysis: Since the proposed residential units would be located on a block that already contains a concentration of residential uses, the project would shield manufacturers elsewhere in the MU-R district from incompatibilities with residences that are too proximate. Given this compatibility of the proposed use, the project would support the mixed nature of the existing neighborhood.

3. Land Use Goal 4: Assure that new development in any sector is of a scale and design that is appropriate to its surroundings, while respecting the genuine economic and physical needs of the development.

Staff Analysis: As discussed above in Sections V.D-F the proposed massing and scale would be compatible with the surrounding neighborhood context and would reflect the industrial nature of West Berkeley. The project would also provide four new dwelling units that meet all applicable zoning requirements for new residential uses.

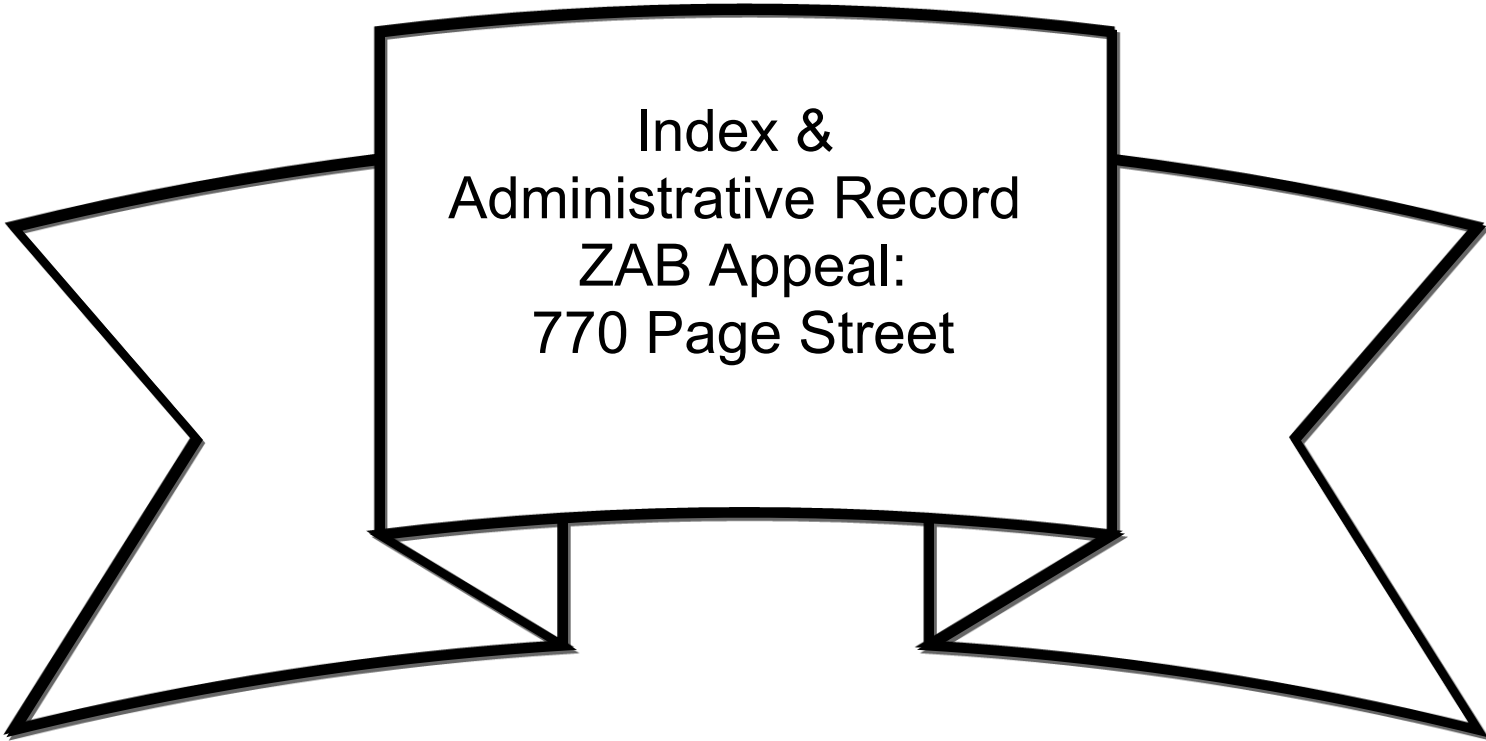
VI. Recommendation

Because of the project's consistency with the Zoning Ordinance and General Plan, and minimal impact on surrounding properties, staff recommends that the Zoning Adjustments Board **APPROVE** Use Permit #ZP2020-0051 pursuant to Section 23B.32.030 and subject to the attached Findings and Conditions (see Attachment 1).

Attachments:

1. Findings and Conditions
2. Project Plans, dated April 19, 2021
3. Notice of Public Hearing
4. Correspondence Received

Staff Planner: Leslie Mendez, LMendez@cityofberkeley.info, (510) 981-7426



Index &
Administrative Record
ZAB Appeal:
770 Page Street

These attachments are on file and available for review upon request from the City Clerk Department, or can be accessed from the City Council Website.

City Clerk Department
2180 Milvia Street
Berkeley, CA 94704
(510) 981-6900

or from:

The City of Berkeley, City Council's Web site
<http://www.cityofberkeley.info/citycouncil/>

NOTICE OF PUBLIC HEARING – BERKELEY CITY COUNCIL
ZAB APPEAL: 770 PAGE STREET, USE PERMIT #ZP2020-0051

Notice is hereby given by the City Council of the City of Berkeley that on **TUESDAY, JULY 27, 2021 at 4:00 P.M.** a public hearing will be conducted to consider an appeal of a decision by the Zoning Adjustments Board (ZAB) to approve Use Permit #2020-0051, to demolish an existing single-family dwelling unit and construct four detached, three-story, approximately 1,500-square-foot single-family dwelling units on a 5,532-square-foot lot in the Mixed Use-Residential Zoning District (MU-R).

A copy of the agenda material for this hearing will be available on the City's website at www.CityofBerkeley.info as of **July 22, 2021**. **Once posted, the agenda for this meeting will include a link for public participation using Zoom video technology.**

For further information, please contact Jordan Klein, Director, Planning and Development at (510) 981-7453 or planning@cityofberkeley.info. Written comments should be mailed or delivered directly to the City Clerk, 2180 Milvia Street, Berkeley, CA 94704, in order to ensure delivery to all Councilmembers and inclusion in the agenda packet.

Communications to the Berkeley City Council are public record and will become part of the City's electronic records, which are accessible through the City's website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to the City Council, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service or in person to the City Clerk. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the City Clerk at 981-6900 or clerk@cityofberkeley.info for further information.

Mark Numainville, City Clerk

Mailed: July 13, 2021

NOTICE CONCERNING YOUR LEGAL RIGHTS: *If you object to a decision by the City Council to approve or deny (Code Civ. Proc. §1094.6(b)) or approve (Gov. Code 65009(c)(5)) an appeal, the following requirements and restrictions apply: 1) Pursuant to Code of Civil Procedure Section 1094.6, no lawsuit challenging a City decision to deny or approve a Zoning Adjustments Board decision may be filed more than 90 days after the date the Notice of Decision of the action of the City Council is mailed. Any lawsuit not filed within that 90-day period will be barred. 2) In any lawsuit that may be filed against a City Council decision to approve or deny a Zoning Adjustments Board decision, the issues and evidence will be limited to those raised by you or someone else, orally or in writing, at a public hearing or prior to the close of the last public hearing on the project.*

If you challenge the above in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the City of Berkeley at, or prior to, the public hearing. Background information concerning this proposal will be available by request from the City Clerk Department and posted on the City of Berkeley webpage prior to the public hearing.