

1 Petitioner Pro Per
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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF ALAMEDA

11 RUTH ANN KELLY HAMMARGREN

CASENO:

12 Petitioner

13 v.

PETITION FOR WRIT OF MANDATE

14 CITY OF BERKELEY, a Charter City
15 Respondent

(California Environmental Quality Act)

16
17 Hill Street Realty, LLC.
18 Joseph Penner
19 HSR Berkeley Investments, LLC.
20 Rhoades Planning Group, Inc
and DOES I to X;
21 Real Parties of Interest
22 Respondents
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INTRODUCTION

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3 1. Over tremendous public opposition and in violation of the California
4 Environmental Quality Act ("CEQA"), and in violation of other legal requirements set
5 forth below, the City of Berkeley ("City") approved the 2211 Harold Way Mixed-Use
6 Project ("Project") on December 8, 2015. The Notice of Determination was issued on
7 December 15, 2015. Contrary to the procedural requirements of CEQA, Berkeley City
8 Council, without addressing any findings voted to approve the Project. The Project as
9 proposed would demolish parts of a historic, landmarked downtown block known as the
10 "Shattuck Hotel," and would rise over 18 stories high, the tallest building in Berkeley's
11 history. It would contain 302 luxury "market rate," and zero affordable "Below Market
12 Rate" inclusionary housing apartments. The Project also impacts three nearby schools,
13 Berkeley High School, Washington Elementary School and Berkeley City College.

14 2. The City, the lead agency, violated CEQA requirements by its failure to properly
15 describe and evaluate the Project's significant impacts upon water, sewage, seismic
16 safety, shadows, wind velocity, transportation, traffic, air quality and noise, affordable
17 housing at all income levels, nearby elementary and high school students, and diversity.
18 The adequacy of the EIR's description is closely related to the adequacy of the EIR's
19 analysis of environmental impacts. See, County of Inyo v. City of LA, 71 Cal.App. 3d
20 185, 192-193. The Project exacerbates existing environmental hazards, and Respondents
21 fail to minimize the risks of said dangers.

22 3. City Respondent failed to make necessary findings and violated procedural
23 requirements under CEQA. The approval of this Project constitutes an abuse of
24 discretion, because the City relied upon speculative assessments, rather than required
25 studies and was based upon incomplete, incorrect, deceptive and misleading information.
26 It is by definition an inadequate ["infill"] environmental impact report ("EIR"). See,
27 Berkeley Keep Jets Over the Bay Comm. v. Board of Port Commrs., 91 Cal.App. 4Th
28 1344(2001).

4. The proposed Project envisions that a significant portion of the flagship

1 Shattuck Hotel site (“Site”) would become an 18-story residential building, with three
2 floors of underground parking facilities with 177 parking slots for the 302 unit building,
3 and a possible grouping of small underground module theaters to replace the above
4 ground Shattuck Cinemas theater complex. The Shattuck Hotel complex was landmarked
5 November 9, 1987, and the Shattuck Cinemas theaters were under construction at that
6 time. The current Shattuck Cinemas theaters were structurally reinforced during the
7 adaptive reuse construction per the architect, and currently thrive as a regional cultural
8 resource, beautifully designed to integrate within the landmarked building.

9 5. The proposed Project is vastly out-of-scale in contrast to surrounding historic
10 buildings (historic brick storefronts, historic library and post office, Veterans building,
11 City Hall, and YMCA). It stands sorely out of place in the center of Berkeley’s historic
12 Downtown, blocking its viewscales, from the hills to the San Francisco Bay, and from all
13 vista points to and from the statuesque and emblematic Campanile on the University of
14 California campus. Strong public testimony in opposition to the Project included
15 comments from the President of the ASUC (Associated Students of the University of
16 California), the President of the Berkeley Architectural Heritage Association, teachers,
17 downtown neighbors, and numerous experts including engineers, economists and real
18 estate developers.

19 6. The proposed project also sits within two Berkeley Unified School District
20 (BUSD) school zones, a fact that the BUSD acknowledges, but Respondent City does
21 not. The City failed to provide to BUSD the required CEQA notice for schools within
22 one quarter mile of a project- a notice designed to troubleshoot impacts on neighboring
23 schools. Moreover, both the Downtown Plan EIR, and the Project EIR, completely omit
24 specific study of impacts on nearby sensitive receptors Berkeley High School (BHS), 400
25 feet from the Project, and upon Washington Elementary School (WES), where a
26 combined 3,500 students attend class each day. Berkeley City College (BCC), the central
27 Berkeley Library and YMCA are even closer sensitive receptors and are also omitted.
28 Thus, there are no baseline measurements, or site-specific studies in either the Downtown
Area Plan (DAP) EIR or the Project EIR of the Project with respect to (a) healthy noise

1 levels above those set for classrooms both during and after construction; (b) air quality
2 within healthy levels for students; (c) lack of available teacher parking given the Project's
3 dependence on street parking for residents; (d) sewage overflow on BHS grounds
4 stemming from the 302-unit's lateral pipeline apparently slated to share a main line with
5 BHS, where sewage overflow is already a problem; (e) traffic congestion on all streets
6 within the school safety zone (1,500 feet from school); (f) the hazards that traffic
7 congestion will cause to over 3,500 students who must get to and from school safely and
8 on time both during construction and after the Project is complete, given the Project
9 garage's proximity to the BHS main entrance. Whatever "infill" or other similar
10 exemptions may apply to the commercial downtown area, these exemptions do not apply
11 to the school zones also impacted by the project, and omitted from both the Downtown
12 Area Plan EIR and the Project EIR.

13 7. Petitioner, interested groups and individuals made oral and written comments on
14 the Draft and Final EIR, and raised each of the legal deficiencies asserted in this petition.

15 8. Petitioner exhausted all administrative remedies as required by law.

16 9. The Respondent City's Notice of Determination to allow this Project must be
17 rejected because it failed to meet the legal requirements of CEQA, and is contrary to the
18 vision for Berkeley embraced in its Downtown Area Plan ("DAP"), adopted General
19 Plan, and citizen approved "Measure R" as set forth below. It also violates state and
20 federal law.

21 10. The DAP recognizes that among the Downtown Berkeley's many assets, its
22 rich historic character is an important building block toward furthering a sustainable
23 environment and a vibrant center for arts and culture, as well as for creating an attractive
24 setting in which to develop new housing.

25 11. In general, due to being considered consistent with the growth inducing goals
26 of DAP, the Project was deemed eligible for CEQA "infill streamlining" environmental
27 review.

28 12. However, the City elected to consider only three of eighteen environmental
factors listed in the form EIR Infill Checklist: Transportation/Traffic, Cultural Resources

1 and Mandatory Findings of Significance.

2 13. Therefore, the EIR dismissed and ignored Aesthetics, Land Use/Planning,
3 Utilities/Service Systems, Geology/Soils, and Noise which are all potential
4 environmental effects. An objective and legally adequate review of these environmental
5 concerns is absent in the faulty EIR.

6 14. Further, the EIR is deficient because the City improperly and negligently
7 excused required consideration of the environmentally superior preservation alternative
8 on the basis of Respondent Hill Street Realty, LLC. HSR Berkeley Investments, LLC
9 and Joseph Penner's "pro forma" that used \$40 million as land cost, when the tax records
10 show that the actual cost was \$19.6 million. Based upon incorrect information, the
11 environmentally superior preservation alternative was erroneously deemed financially
12 infeasible.

13 15. The City admittedly failed to perform any analysis of the pro forma documents
14 submitted by the Project applicant.

15 **History of a Vibrant Downtown Berkeley**

16 16. The primary focus of the Cultural Resource analysis is the Project Site,
17 distinguished today by the six story California Mission Revival façade of the Shattuck
18 Hotel located on Berkeley's "main street," Shattuck Avenue. Originally the Site was
19 where the Villa home stood of Francis K. Shattuck, a "49'er," an early mayor of the City
20 of Oakland, and the prime investor who promoted the Central Pacific Berkeley Branch
21 Railroad line in 1876 to run along "Shattuck's road" to serve the new town and the new
22 University of California.

23 17. Mr. Shattuck's large Victorian Shattuck house stood at the corner of what is
24 today Shattuck Avenue and Allston Way, a location where Strawberry Creek once
25 crossed through the open landscape, flowing from the hills toward the Bay. The creek
26 was culverted in the late 1890s. In 1909-1910, after the Victorian home was removed, the
27 signature Shattuck Hotel building was built upon the watershed lands, today identified to
28 be within a liquefaction zone. No adequate report or impact analysis was conducted in
the EIR.

1 18. The 1910 hotel building with additions contains 199 hotel rooms and is
2 interconnected with four additions (1912, 1913, 1927, 1957), which at one time
3 incorporated a department store, "Hink's Department Store." When the Berkeley
4 Landmark Preservation Commission ("LPC") voted in 1987 "... to designate the
5 Shattuck Hotel/Hink's Building Complex (including the 1926 and 1957 additions) a City
6 of Berkeley Landmark," the Commission formally recognized the significance of all the
7 building segments, so as to be regarded as a whole. The designation was fully considered,
8 regardless of the stylistic variations.

9 19. The landmark designation stands, and was not eliminated when the parcel
10 converted into condominium ownership in 1996. The Site is listed on the California State
11 Historic Resources Inventory. The landmarked Shattuck Hotel Site is surrounded by a
12 multitude of other early 20th century landmarked buildings. Directly surrounding the Site
13 is the landmarked Armstrong College building, the U.S. Post Office, an early Elks Club,
14 the YMCA, and a distinguished group of buildings that make up the Civic Center
15 Historic District.

16 **History of Project's Permit: Faulty from the Outset**

17 20. The Cultural Resource impacts of the Project were not fully and accurately
18 evaluated because the Respondents Rhoades Planning Group, Inc. Hill Street Realty,
19 LLC., HSR Berkeley Investments, LLC. and Joseph Penner filed two permits that were
20 incorrect and misleading. These permit applications, Permit #13-10000010 and Permit
21 #13-40000002, divided the Project, thus blurring and confusing all subsequent Project
22 description and analysis. Permit #13-10000010, directed to the Zoning Adjustments
23 Board, requested a permit for demolition of the landmarked 1957 addition as a separate,
24 independent building ("23C.08.050 Use Permit to demolish 'Postal Annex' bldg"). Permit
25 #13-40000002, directed to the Landmarks Preservation Commission, was understood to
26 be an alteration permit, without specifying building particulars. The City accepted these
27 two permits on February 27, 2013. These inaccurate permit applications are the
28 documents upon which the City proceeded to conduct a faulty review.

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JURISDICTION

21. This Court has jurisdiction over the writ action under section 1094.5 of the Code of Civil Procedure, and sections 21168 and 21168.5 of the Public Resources Code.

22. This Court also has jurisdiction over the writ action under section 1085 of the Code of Civil Procedure and sections 21168 and 21168.5 of the Public Resources Code.

PARTIES

23. Petitioner Ruth Ann Kelly Hammargren (“Petitioner”) is a Berkeley resident of 25 years who is concerned with sustainable economic development, environmental protection, historic cultural asset preservation, affordable housing and racial, cultural and economic diversity in Berkeley. Petitioner is a homeowner who resides near downtown Berkeley. Petitioner is a Registered Nurse and mixed media artist. She supports reasonable development, but challenges the adequacy of the environmental analysis prepared by the City of Berkeley on the 2211 Harold Way “Project.” Petitioner is a member of the Downtown YMCA and patron of the main library and the Shattuck Cinemas. Petitioner also has a deep concern about the traffic and sewage that would be generated by the Project and the Project’s construction between 18 and 36 months according to Respondent HSR's varying estimates, and traffic and adverse impacts once completed on the adjacent Central Berkeley Library, YMCA and three schools. Berkeley City College, Berkeley High School (only 400 feet away) and Washington Elementary School (approximately 1,000 feet away). Noise and air quality impacts associated with that traffic adversely affects the schools. Respondents have not addressed impacts on City infrastructure, including but not limited to wastewater capacity, and the failure to analyze the impact of the Project on climate change, affordable housing, seismic safety, wind velocity, shadows, and blocked views of the hills and the Bay. Petitioner is also concerned about the safety of the “staging area” for construction for two to three years, large trucks and equipment in front of the city’s main library, posing risks and an adverse impact on library patrons, and also nearby schools. Petitioner finds that the “side letter”

1 agreement between Berkeley Unified School District and Respondents the day before the
2 City Council's vote on the final EIR and Project fails to provide specific analysis and
3 study required under CEQA, and lacks enforceability in the event of breach by
4 Respondents, or sale to a subsequent buyer. Additionally, the BUSD failed to provide
5 appropriate notice of the special meeting for the side-letter agreement so the public could
6 attend.

7 24. Respondent City of Berkeley, a Real Party in Interest, is one of the State's
8 oldest Charter cities and a political subdivision of the State of California, and is the
9 entity which approved the EIR and Respondent's 2211 Harold Way high rise complex.
10 The City of Berkeley is the lead agency responsible under the California Environmental
11 Quality Act (CEQA) for evaluating the environmental impacts of the project.

12 25. Respondent Hill Street Realty, LLC. a Real Party in Interest, a California
13 corporation is a privately held real estate investment, management and development firm
14 based in Los Angeles, California, founded in 2001. It was named on City agendas as a
15 party having an interest by agreement or otherwise to a portion of the 2211 Harold Way
16 "Project."

17 26. HSR Berkeley Investments, LLC, a Real Party in Interest, a is Delaware
18 corporation for the Harold Way Project.

19 27. Respondent Joseph Penner, a Real Party in Interest, is the founder of HSR, and
20 has been involved in the real estate industry in various capacities since 1990 including
21 acquisitions, management, leasing, and financing in the United States and Europe. Mr.
22 Penner has been referenced by the Project as the owner or primary investor of 2211
23 Harold Way.

24 28. Rhoades Planning Group, Inc., a Real Party in Interest, is an urban planning
25 and development consulting business based in Oakland, California and incorporated in
26 the State of California. Owner Mark Anton Rhoades is a Real Party in Interest as the
27 "applicant" who submitted the Project application on February 27, 2013 and represented
28

1 his client's "HSR" et.al. and Mr. Penner throughout the process. Mr. Rhoades worked in
2 the Planning Department as Director for Respondent City of Berkeley prior to starting
3 his development consulting firm.

4 29. Real parties named as Does I to X are given fictitious names because their
5 names and capacities are presently unknown to Petitioner.

6 **STATEMENT OF FACTS**

7 **Berkeley's Population**

8 30. Berkeley is a mid-size city of 118,853 residents in the East Bay, according to
9 the 2014 Census.

10 31. Berkeley is the most densely populated city in the East Bay of the San
11 Francisco Bay Area. Census figures from 2010 reveal that Berkeley has a population of
12 10,752.6 persons per square mile, Oakland 7,004.0/sq mi, Emeryville 8, 089.9, El Cerrito
13 6,385.3, Kensington 5,361.1, Richmond 3,448.9 and is second to San Francisco with
14 17,179.1/square mile.

15 **Berkeley's History**

16 32. Berkeley was incorporated in 1878 and continued to grow thereafter, with
17 charming neighborhoods and commercial districts. By 1910, Berkeley's population
18 reached 40,434. In that year, the Shattuck Hotel was built at the corner of Shattuck
19 Avenue and Allston Way, directly over the former creek bed of Strawberry Creek.
20 Approximately 15 years earlier, the Creek had been culverted under Allston Way and the
21 creek bed was filled in with soil.

22 33. Additions to the successful Shattuck Hotel were constructed in the years 1912,
23 1913, 1926 and 1957. With the final addition, the building covered almost the entire city
24 block between Shattuck Avenue and Harold Way and Kittredge Street and Allston Way.

25 34. By 1930, most of the central parts of Berkeley were fully developed in the
26 various architectural styles of the preceding 50 years. Berkeley's downtown is still
27 largely comprised of historic buildings completed before 1930.
28

1 35. In 1974, the City of Berkeley adopted a Landmarks Preservation Ordinance,
2 whereby sites of historic interest or beauty could be designated as Landmarks, with the
3 intention of preserving their integrity and context.

4 36. The entire Shattuck Hotel complex with all the additions, 1912, 1913, 1926,
5 1957 to the 1910 Shattuck Hotel was landmarked November 9, 1987.

6 37. The entire complex is currently in very good condition and fully utilized.

7 **The Theaters and the Shattuck Hotel, a Cultural Resource, not properly**
8 **protected by EIR**

9 38. The Project demolishes portions of the most significant historic Cultural
10 Resource in the City of Berkeley, the landmarked Shattuck Hotel complex and places the
11 remaining structure at risk by removing the existing basement under the 1913 addition,
12 excavating deeper under this Cultural Resource to construct three new movie theaters.

13 39. The Shattuck Cinemas were under construction as adaptive reuse when the
14 Shattuck Hotel complex was landmarked in 1987 and officially opened in May 1988.

15 40. The four largest theaters were spectacularly finished with murals by local
16 artists and fiber reinforced plaster cast sculptures. All the theaters including two Moorish
17 and two Egyptian themed theaters open into a lush lobby with coffered ceilings and
18 mahogany wainscoting. All the Shattuck Cinema theaters have high ceilings of 21 feet or
19 greater.

20 41. Two of the original eight theaters were later divided into the present total of 10
21 theaters. All ten theaters are wheelchair accessible from a gradual ramp in the lobby to
22 gently sloping floors in the theaters.

23 42. The current total number of seats in the Shattuck Cinemas is 862. The Project
24 proposes to reduce total seats to approximately 641 seats and possibly four fewer theaters
25 (6 to 10 referenced in City approved Project).

26 43. Landmark Theatres operates the movie theaters Shattuck Cinemas inside the
27 Shattuck Hotel site, and reports a growing film audience with 275,00 to 300,000 annual
28 ticket sales at the Shattuck Cinemas location.

1 44. The theaters as they presently exist have enormous support with 60% of the
2 Shattuck Cinemas patrons traveling from across the greater Bay Area and inland areas for
3 the curated independent and domestic films.

4 45. Over 4,200 petition signatures to Save the Shattuck Cinemas were submitted to
5 the City Council, the Zoning Adjustment Board, Landmark Preservation Commission and
6 Design Review Committee.

7 46. The Shattuck Cinemas with regular sold out weekend crowds are cited as the
8 economic engine to many downtown businesses including bars, restaurants and retail
9 stores.

10 47. The December 8, 2015 final City approved Project theater replacement is six
11 (6) to ten (10) theaters with approximately 641 seats with one full size theater and nine
12 screening rooms, including three small screening room theaters with a floor to ceiling
13 height of only 13 feet.

14 **Respondents Failed to Conduct the CEQA Required Analysis of**
15 **Utilities/Water, Sewage, Seismic, Transportation or Traffic Impacts**

16 48. The geotechnical report relied upon by Respondent “City” is for an earlier
17 proposal of a free standing separate building, not the final, approved design of the Project
18 which includes three movie theaters constructed under the existing Cultural Resource.
19 The final design of the theaters will require excavating six additional feet below the
20 basement. This design of underground theaters was approved without any study of
21 impacts, stating that such study will occur after excavation begins.

22 49. Structural assessment of the structural integrity of the remaining portions of
23 this Cultural Resource must be done before, not after demolition has started.

24 50. The Project demolishes the 1926 and 1957/58 (“Hinks”) additions and part of
25 the 1913 addition. The interconnected landmarked “1957/58” addition was treated and
26 described as a separate unlandmarked building in the application, and subsequent
27 documents and staff reports continue to reference this inaccuracy.

28 51. From the beginning, the process was flawed with misrepresentations in the
applications and dismissal of public comment. Public hearings were held in a manner

1 that showed the bias of decision-makers who disregarded or ignored objective studies,
2 professional testimony of experts, and reasonable concerns that CEQA requires decision-
3 makers to fully examine.

4 **Transportation and Traffic**

5 52. Respondents' Project also fails to meet CEQA required review of traffic and
6 transportation impacts. The Project objective is to allegedly provide transit oriented
7 market rate housing development for prospective tenants that would otherwise live in San
8 Francisco, but fails to account for the fact that all BART trains feed into a single transbay
9 tube which is at capacity with standing room only packed trains at peak commute. This
10 Project will exacerbate existing environmental hazards of overloaded transit systems.
11 Respondent City failed to conduct a study of the current capacity of our mass transit
12 system (BART and Metro buses) to accommodate 500 – 600 (estimate per Respondent)
13 more residents expected to reside in the Project.

14 53. The EIR transportation studies conducted one day, December 3, 2013, are
15 outdated and flawed without a rational basis for the estimated number of car trips
16 Respondent concludes irrationally that only ninety (90) additional cars trips will be
17 generated in the pm peak hours per day. If the City Respondent concluded 100 cars per
18 pm peak hour or greater, a full transportation study is required. Respondent City also
19 relied upon a transportation study that concluded arbitrarily without any reasonable basis
20 that only seven (7) people would be taking BART in the am peak hour and six (6) in the
21 pm peak hour out of the hundreds that are expected to be commuting to jobs in the San
22 Francisco Bay Area and "Silicon Valley."

23 **Alternatives Rejected Erroneously**

24 54. Respondents' financial analysis from the Project listed the cost of the property
25 as \$40 million, an incorrect number which continued in the financial analysis of the
26 preservation alternative. This erroneous figure continued to be used even after the public
27 uncovered the actual cost as \$19.6 million.

28 55. The preservation alternative was identified as the superior environmental
alternative; however, it was not considered as a viable alternative because the

1 unexamined financial analysis by the Respondents declared the preservation alternative
2 financially infeasible (using the land cost as \$40 million when as stated, the actual cost
3 was \$19.6 million).

4 56. A second analysis, either independent or by staff, of the financials submitted by
5 the Project was never performed even after an admission by the Project applicant that the
6 \$40 million was not the actual land cost.

7 57. Further, Respondents did not include any alternative within the zoning limit of
8 a 75 foot tall building.

9 **Utilities/Service Systems**

10 58. A letter from East Bay Municipal Utility District (EBMUD) dated October 13,
11 2014, notes EBMUD was cited by the federal EPA in 2009 for excessive discharge. Wet
12 Weather flows exceed the treatment and disinfection capacity and prohibit further
13 discharge from EBMUD's Wet Weather Facilities (WWF).

14 59. EBMUD must demonstrate reduction in discharge. Respondents' project at
15 Harold Way is expected to result in an increase, not reduction in discharges of water and
16 waste, yet this is not addressed by the EIR. A pre-existing dangerous condition will be
17 exacerbated without mitigation.

18 60. Berkeley High School (BHS) has over 3,000 students, and sits downstream
19 from the proposed Project. Evidence was submitted in the record that BHS has sewage
20 back-up in buildings and the athletic field. In a "side letter" between the Project and
21 BUSD, the City Council without examination or review accepted this twelfth hour
22 alleged agreement to meet and confer that no sewer line for the Project will utilize any
23 sewer lines used by BHS. The 'side letter agreement' also claims the parties will
24 "discuss" sewer service line plans and capacity during the construction phase of the
25 project. CEQA requires more than future 'meet and confer' sessions on vital
26 environmental concerns.

27 61. Meet and confer in no way ensures that the sewage from 500 to 600
28 (Respondent estimate) or more residents will not flow into the same lines that are already
backing up.

1 62. Further, the 2009 DAP EIR used to allow this streamlined “Infill” EIR requires
2 individual site specific analysis by the City of Berkeley to determine whether the
3 development would exceed the capacity of the sanitary sewer conveyance system. This
4 was never done.

5 **The Administrative Decision-Making Process was Arbitrary and Capricious:**
6 **The Project Impacts the Entire Landmarked Block, and was Not Properly**
7 **Analyzed**

8 63. In 1996, the land in question was divided into three commercial
9 condominiums, parcels: one parcel is owned by the Patel family (the historic hotel on
10 Allston Way), and two parcels now owned by Respondents “HSR,” Penner.

11 64. Respondents HSR and Penner own 2060 Allston A (57-2027-6) which includes
12 the 1926 addition, the retail store fronts along Shattuck Avenue (currently leased to
13 Starbucks, a yogurt place, a diner, a fast food pizza place, a bicycle storage and shop, and
14 a video game shop) in the 1910 Shattuck Hotel block and 1913 addition, and the
15 basement in the 1913 and 1926 additions. The Shattuck Hotel rooms are above the
16 storefront and basement where the proposed constructed apartment towers would be built.
17 Respondents also own 2070 Allston B (57-2027-7) which includes the 1957 addition.

18 65. 2060 Allston C (57-2027-8), which includes the 1910 Shattuck Hotel and
19 floors two and above in the 1913 addition, is owned by Patel.

20 66. On November 28, 2012, it was reported in the San Francisco Business Times
21 that Hill Street Realty LLC (Respondent HSR) investor paid \$20 million or about \$217
22 per square foot for a 92,000 square foot office and retail complex, 2211 Harold Way
23 (“The Project”).

24 67. The property is on a 1.75 acre block.

25 68. On December 20, 2012 the Conceptual Project Application for an 18 story,
26 mixed use 355 unit building “Residences at Berkeley Plaza,” 2211 Harold Way was
27 submitted to the City of Berkeley.

28 69. The initial proposal was for a permit for “Alteration to Remove,” i.e. a
euphemism for demolish the Shattuck Hotel landmarked additions 1957, 1926 and a

1 portion of the 1913 addition. If the 1957 addition were a separate building and not
2 landmarked, it could be demolished without LPC approval. However, it was landmarked
3 as a complete, total structure. Thus, Respondent labeled the permit as an “alteration”
4 when instead it was an application to demolish part of the landmarked site.

5 70. No cinema theaters were included in the initial Project proposal.

6 71. The Project was presented for preview to the Design Review Committee
7 (DRC) February 21, 2013, the LPC March 7, 2013 and ZAB March 14, 2013.

8 72. Fourteen months passed between the March 14, 2013 ZAB meeting and the
9 next public meeting which was a joint LPC-DRC subcommittee meeting on May 15,
10 2014 to review the drawings of 4-10-14 and 5-15-14.

11 73. After the LPC-DRC subcommittee meeting on May 15, 2014, the Project plans
12 were revised dated May 31, 2014 to include six cinema theaters.

13 74. There are no meeting minutes posted for the public from the subcommittee
14 meeting of the LPC and DRC which resulted in reissued Project plans.

15 75. An EIR Public Scoping Hearing was held June 5, 2014.

16 **The Project**

17 76. When the Project returned to the Zoning Adjustment Board (ZAB) on June 12,
18 2014 for EIR scoping, it was described as an eighteen story mixed-use development with
19 302 dwelling units, a six theater cinema complex, 10,500 square feet of ground-floor
20 commercial space and a 171 space underground parking garage.

21 77. The additional space referenced to be constructed under the remaining portion
22 of the 1913 Shattuck Hotel was the 93-seat 1736 square feet, and 57-seat 1346 square feet
23 theaters with projection rooms, concourse, concessions, bar and restrooms.

24 78. On January 9, 2013, Respondents submitted Pre-application Materials
25 checking the box “No” when asked whether Liquefaction regulations apply (per the
26 Seismic Hazards Mapping Act). Respondents continued to deny the potential existence
27 of this risk of a liquefaction zone despite the January 25, 2013 ENGEO geotechnical
28 report that concluded that such a problem may exist. A liquefaction zone runs through
the middle of the Shattuck Hotel landmarked site as mapped by “The State of California

1 Seismic Hazard Zones” map. Further, factual findings by an expert were reached that
2 indicate the likelihood of a liquefaction zone. The professional geotechnical report,
3 submitted by Respondent on February 27, 2013 confirmed on page 4, “The presence of
4 potentially liquefiable sands below the proposed excavation.”

5 79. Documentation including state approved maps were presented multiple times
6 showing the danger of liquefaction, yet LPC and other City entities failed to conduct any
7 further engineering studies prior to issuing final approval.

8 80. On August 13, 2015 the LPC approved the Structural Alteration Permit
9 LMSAP #13-40000002 (the entire construction/demolition to build the 2211 Harold Way
10 Project) without further study.

11 81. Follow up studies were never completed. Instead, the City deferred the conduct
12 of any studies until after approval of the Project. Mitigation Measure CR-4(b) provides
13 that after permits have been obtained, and prior to demolition, an initial survey will be
14 done to serve as a baseline to determine if any damage would occur during demolition or
15 construction of the new building. Respondent City wrongfully deferred an essential study.

16 82. The revised May 31, 2014 Project plans included two of the six theaters under
17 the 1913 Shattuck Hotel addition.

18 83. The depth of the existing basement as measured in the open stairwell from the
19 basement floor to the floor above (street level entrance) is ten (10) feet ten (10) ³/₄ inches.

20 84. The EIR states two theaters would be entirely within the basement underneath
21 the ground floor retail strip.

22 85. The basement floor would be lowered by six feet to accommodate the theaters
23 requiring removal of the basement slab, soil excavation and construction of new footings,
24 retaining walls and floor. The largest of the two underground theaters has seven rows of
25 stadium seating with a thirteen (13) foot ceiling. Planned seismic work would not
26 strengthen the entire building, only the area of new construction.

27 86. In a midnight hour, last minute “side letter agreement” reached between the
28 Respondents HSR and Penner and Berkeley Unified School District, signed on December
7, 2015 and approved by the City Council December 8, 2015, all the construction staging

1 has been placed in the 2000 block of Kittredge Street, the doorstep to the entrance of the
2 Berkeley Main Public Library. This location on Kittredge is one short block from the
3 high school's loading zone area on Milvia.

4 87. The public was not provided any time or information to evaluate the impact of
5 daily trips of construction material and trucks pulling into the area where children and
6 elderly are dropped off for the library.

7 88. There is no analysis on mitigation or measures taken to ensure safe passage for
8 persons with visual, hearing or physical disabilities (the court should take judicial notice
9 that we have a large population of other-abled persons with disabilities including
10 residents who live and work near downtown including the office of a national law firm,
11 Disability Rights Advocates on Milvia and Center). Impact on street parking on
12 Kittredge and Harold Way were not analyzed. Traffic flow being diverted and backed up
13 to the high school one block away west or into main thoroughfare Shattuck Avenue and
14 downtown were not analyzed.

15 89. All aspects of a proper EIR analysis were ignored. Vague promises to safely
16 stage a construction zone between a high school and main public library are inadequate
17 for CEQA scrutiny.

18 **EXHAUSTION OF ADMINISTRATIVE REMEDIES**
19 **AND INADEQUATE REMEDIES AT LAW**

20
21 90. Petitioner objected to the Project in the administrative process, and fully
22 exhausted its administrative remedies. Petitioner submitted letters during the comment
23 period raising the issues set forth herein.

24 91. Petitioner has no plain, speedy or adequate remedy in the course of ordinary
25 law unless this Court grants the requested writs of mandate and injunctive relief. In the
26 absence of such remedies, Respondent City's approval of the 2211 Harold Way Project
27 would form the basis for a development project that would proceed in violation of state
28 law.

1 92. Petitioner has complied with Public Resources Code section 21167.7 by
2 filing a copy of this petition with the California Attorney General. A copy of that
3 notice is attached as Exhibit A.

4 93. Petitioner has complied with Public Resources Code section 21167.5 by
5 providing the City of Berkeley with notice of its intention to commence the action.
6 Said notice is attached as Exhibit "B."

7 94. Petitioner elects to prepare the administrative record. A copy of that election
8 is attached as Exhibit C.

9 **FIRST CAUSE OF ACTION**

10 **(PROCEDURAL VIOLATION OF CEQA:**

11 **RESPONDENT CITY FAILED TO MAKE, ENTER OR ADOPT FINDINGS)**

12
13 95. Petitioner incorporates all previous and subsequent paragraphs as if fully
14 set forth.

15 96. CEQA requires the City to conduct adequate environmental review prior to
16 making any formal decision regarding projects subject to the Act. (CEQA Guidelines, 14
17 Cal. Code Regs. § 15004). A proper CEQA review requires objective findings to support
18 approval. Respondent City did not address or make any findings, nor did they formally
19 enter findings as required by CEQA in the December 8, 2015 final hearing.

20 97. CEQA imposes upon the City a clear, present and mandatory duty to certify an
21 EIR only if the EIR fully discloses to the public the significant environmental effects that
22 may occur. The Draft EIR lacked the necessary analysis, and the Final EIR is equally
23 deficient as set forth throughout this Petition.

24 98. The EIR inappropriately defers key infrastructure assessment and decisions
25 until after Project approval.

26 99. Further, the City did not adequately respond to many of the public comments
27 regarding these impacts, and thus the FEIR also failed to provide an adequate analysis of
28 impacts. Respondent City failed to make findings on key impact areas. These impacts
include, but are not limited to, the following:

1 **Historic Cultural Resource Impact Analysis was Non-Existent**

2 100. The entire Shattuck Hotel Complex with all additions 1912, 1913, 1926 and
3 1957 was landmarked November 9, 1987 yet not analyzed for its historic, cultural
4 significance.

5 101. The 1957 addition to the Shattuck Hotel was described in both City and
6 Project developer documents as a separate building when in fact the 1957 addition is
7 interconnected to the 1926 addition.

8 102. The faulty Project application Permits 13-10000010 and 13-40000002
9 designating the 1957 landmarked addition as a separate building confused and deflected
10 the required impact analysis.

11 103. The Project is described as adjacent when in fact it is integrated into and
12 connected to the Shattuck Hotel Complex, a Cultural Resource.

13 104. Assessment of the Shattuck Hotel’s ability to withstand demolition of the
14 1957, 1926, portions of the 1913 addition and major excavation under the 1913 addition
15 is deferred until after approval of the project. CEQA requires such an analysis BEFORE
16 approval.

17 105. The inaccurate account of the intended action (i.e. minimizing a
18 demolition of a historic resource and calling it a mere 'alteration') also
19 reduced LPC & ZAB's full understanding of environmental consequences. An EIR that
20 was to focus on impacts to a historic resource but failed to do so, did not provide
21 accurate, adequate, true discussion of impacts per the historic resource(s).

22 106. As a result of this flawed process, the Respondent City’s decisions
23 constituted an "abuse of discretion." A demolition permit has been issued for a
24 separate building that is not separate. Further, a use permit for demolition of the
25 theater addition was improper when cultural and economic impacts were not fully
26 disclosed and analyzed in the EIR itself.

27 **Respondents Concluded “Insignificance” Based on an Arbitrary and**
28 **Capricious Foundation, and Wrongfully Determined Mitigation not Required**

1 107. Respondent City failed to analyze the scope and degree of environmental
2 impacts, and deferred critical studies until later, which contributed to the arbitrary and
3 capricious conclusion that such unstudied and unanalyzed impacts were “insignificant.”
4 “Mitigation Measures. As impacts would be less than significant, no mitigation is
5 required.” See, Impact CR-4. Respondent City's shortsighted and CEQA deficient
6 analysis resulted in reducing mitigation requirements by the Project.

7 108. Respondent City concedes that the construction “could produce ground
8 vibration or soil movement under the existing foundation of nearby historic resources,
9 compromising the historic building’s structural stability. Construction activities,
10 including demolition and excavation onsite, may result in substantial ground vibration
11 and/or soil movement under or adjacent to the existing foundation of nearby historic
12 resources, including the Shattuck Hotel. Onsite vibration could cause a substantial
13 adverse change in the significance of the historical resources in the immediate vicinity of
14 a given project area. In some cases, resources may be physically damaged by inadvertent
15 contact with materials or machinery associated with demolition.” The record shows the
16 historic structures within 200 feet of the project’s construction area that could be affected
17 by construction of the project. A portion of the demolition abuts the 1913 addition to the
18 Shattuck Hotel.

19 109. The Respondent City’s “insignificance” analysis conflicts with conclusions
20 from the retained geotechnical engineer that “substantial ground vibration” “could affect
21 historic structures in the vicinity.”

22 **Aesthetic Impacts Were Not Sufficiently Analyzed: Historic Bay and Hill**
23 **Views Blocked**
24

25 110. Both the public and the City of Berkeley’s Design Review Committee (DRC)
26 requested the placement of Storey Poles/balloons/crane to determine the view impact of
27 the proposed Project.
28

1 111. The Urban Design and Preservation Element of the City’s General Plan,
2 Policy UD-31: *Construction should avoid blocking significant views, especially toward*
3 *the Bay, the hills, and significant landmarks such as the Campanile, Golden Gate Bridge*
4 *and Alcatraz Island. Whenever possible, new buildings should enhance a vista or*
5 *punctuate or clarify the urban pattern.*

6 112. Absent the placement of Storey Poles/balloons/cranes the impact is unknown
7 depriving the public and decision-makers of needed information.

8 113. Simulations prepared by the Project Respondents were never independently
9 analyzed despite the public and a Landmarks Preservation Commissioner, Carrie Olson
10 pointing out that the Project Respondents had improperly misidentified buildings for
11 placement of the Project in the simulation. The LPC majority rejected the DRC’s
12 recommendation for Storey Poles.

13 114. Additionally, elevation drawings showing context of the proposed Project to
14 the Cultural Resource, the Landmarked Shattuck Hotel Complex, were inconsistent with
15 written description of Shattuck Hotel’s actual height. In other words, the Project drawings
16 create misleading illusion that there is less contrast in mass, and height conflicts with the
17 historic hotel.

18 115. The absence of Storey Poles/balloons/crane as requested deprives the public
19 and decision-makers of the true, accurate and verifiable impact of the Project on the
20 Cultural Resource.

21 **Utilities and Service System Impacts were not sufficiently analyzed**

22 116. The Project Infill EIR references the 2012 DAP EIR by checking XVII
23 Utilities and Service Systems “Less than significant and Analyzed in prior EIR.”

24 117. As required in the certified 2009 DAP FEIR (DAP EIR prepared 2009
25 certified 2012), each individual Project proposed in the Downtown Area must be subject
26 to a site-specific analysis by the City of Berkeley to determine whether the proposed
27 development would exceed the capacity of the sanitary sewer conveyance system.

28 118. The Project DEIR references “a personal communication” as its evidence to
support the finding of insignificance for sewage impacts. “Personal communications”

1 with “Aikenhead” dated May 2, 2014, is cited by Respondent City as its evidence or basis
2 to meet its obligation. See, pp. 178- 179 of DEIR. The record does not contain any
3 verifiable report of this ‘personal communication’ with the City of Berkeley Department
4 of Public Works employee. A “personal communication” clearly does not constitute a
5 “site-specific study” on the impact on sanitary sewer lines. CEQA requires written
6 documentation of any methods used, factual findings and objective data to determine the
7 condition of the sanitary sewer system and the capacity to convey wastewater from the
8 Project.

9 119. The EIR fails to provide the public and decision-makers with
10 sewer/wastewater map and capacity study results.

11 120. The conclusion that an 8” lateral into a 12” sewer main under Allston Way
12 based merely on a conceptual utilities plan without study is inadequate and fails to
13 provide the public and decision-makers with necessary information.

14 121. The Project’s proposed 8” lateral into the 12” main under Allston Way is
15 upstream from BHS which is identified as an “Active Hotspot” with sewage overflow
16 problems in buildings and the athletic field.

17 122. BUSD requested that no sewer line for the Project utilize any sewer lines used
18 by BHS.

19 123. The Respondents HSR and Penner agreed to meet with BUSD and
20 appropriate City representatives to discuss service line plans and capacity during the
21 construction phase of the Project. Agreement to confer and discuss carries no
22 enforcement, however.

23 124. Deferring assessment of capacity until construction is flawed and inadequate.
24 Respondent’s Project Violates Berkeley’s DAP EIR requirements: A sewer Capacity study
25 was never conducted.

26 *Potential Impact UTIL-1: Sanitary Sewer Conveyance Capacity Constraints.*
27 *Individual development projects proposed under the Project could exceed the*
28 *capacity of the existing sanitary local sewer conveyance system serving the*

1 *specific project. This would represent a potentially significant environmental*
2 *impact.*

3 *Mitigation UTIL-1: Site-Specific Analysis of Project-Related Effects on the*
4 *Sanitary Sewer Conveyance System/Project-Related Contribution to Necessary*
5 *Capacity Expansion. As individual development projects are proposed in the*
6 *Downtown Area, each project will be subject to site-specific analysis by the City of*
7 *Berkeley to determine whether the development proposed would exceed the*
8 *capacity of the sanitary sewer conveyance system that directly serves the project.*
9 *In the event that existing sanitary sewer modeling demonstrates that sanitary*
10 *sewer conveyance system capacity would be exceeded by the proposed project,*
11 *then the project proponents and the City shall enter into negotiations to determine*
12 *the financial contribution required from the project.*

13
14 125. A sewer capacity study was never conducted.

15
16 126. Many of the questions regarding population and water supply apply equally to
17 the issue of the adequacy of the methods used to handle wastewater.

18
19 127. City documents, including the DAP EIR, reveal there are 254 miles of sewers
20 that vary in age from 1 to 100 years, and in size from 6 to 46 inches. Further, that while
21 collector lines on the University of California at Berkeley and Lawrence Berkeley
22 National Laboratory are built and maintained by these entities, their lines flow into city of
23 Berkeley lines. All Berkeley sewer mains connect into the EBMUD regional interceptor
24 lines which convey the sewage to the EBMUD treatment plant. During storms, the
25 sewage flow can increase up to 20 times the amount of dry weather flow due to
26 infiltration and inflow (I/I) of storm water. East Bay cities, including Berkeley, are under
27 a current legal order to reduce their current I/I amount, as these amounts currently allow
28 sewage to enter San Francisco Bay. Berkeley's I/I correction program allows for a 20%
increase in the base wastewater flow for each of the City's 89 sub-basins, but no more
than that amount.

1 128. EBMUD warns that "wet weather flows are a concern" due to regulations
2 prohibiting further discharges from EBMUD's Wet Weather Facilities, and Berkeley as
3 one of the seven collection system agencies, is prohibited from "causing or contributing"
4 to these Wet Weather Facilities. A consent decree has been put in place that requires
5 Berkeley (and the other agencies in the system) "to perform I/I reduction work sewer
6 main rehabilitation and elimination of inflow sources." The letter warns that if reductions
7 are not achieved, it could result in "significant financial implications" for East Bay
8 residents.

9 129. The EIR response to this warning is that the project will include a new sewer
10 lateral eight inches in diameter connecting to an existing 12-inch sewer main under
11 Allston Way. No study was conducted to determine whether this will suffice.

12 130. CEQA requires more. A proper EIR requires a discussion of the effects of
13 cumulative projects on the environment. There is no discussion in the EIR of how it was
14 determined that the 12-inch Allston Way sewer main is adequate in light of the likely
15 population increase in the Downtown area due to the many other projects that have been
16 constructed, are waiting for approvals, or will be seeking approval that are serviced by
17 this line as it contributes to the appropriate Wet Weather Facility. Nor, is there any
18 mention of the particular "sub-basin" in which this project is located and the percentage
19 of base wastewater flow.

20 131. The DAP EIR, pp 2-17, states that "population would be expected to
21 increase," but describes that this change "would not be regarded as inducing population
22 growth, but would rather be considered as accommodating population growth already
23 anticipated by the City of Berkeley in the General Plan." The EIR goes on to arrive at the
24 surprising conclusion that since current City policies require that the development of new
25 housing in the Downtown replace existing units that would be lost as a result of
26 development, there would be no net loss of housing and, therefore, no "adverse,
27 cumulative effect on the Downtown Area housing supply." The EIR fails to account for
28 the reality of a net "increase" of human beings living downtown and thus an increase in
waste generated and conveyed into the sewer.

1 132. Time and experience has shown this to be a specious conclusion. Population
2 as derived from the number of housing units in new development in Berkeley,
3 particularly in the Downtown and near the UC Berkeley campus, is significantly more
4 than what might be expected given UC Berkeley enrollment increases, and high rental
5 rates which force students to live in groups that are increasingly dense. Moreover, the
6 increasing "doubling or tripling up" of apartment occupants, while prevalent with
7 students, is not confined to just that group. Because of the high rents, those with
8 moderate or low incomes are doing this as well. California now faces a serious drought
9 that can reasonably be expected to continue in the future with new warnings regarding an
10 El Nino year bringing heavy rain fall. Population increases, growth, aging infrastructure
11 and climate changes must be anticipated and properly evaluated. Neither the DAP nor
12 any of the EIRs that form the background for the evaluation of the Project, take any of
13 these factors into consideration.

14 133. Another letter from EBMUD dated June 17, 2014, states it would be prudent
15 for the lead agency (City of Berkeley) to require the project to incorporate the following
16 measures into the proposed project:

- 17 (1) replace or rehabilitate any existing sanitary sewer collection systems, including
18 sewer lateral lines, to reduce infiltration/inflow and
- 19 (2) ensure any new wastewater collection systems, including sewer lateral lines,
20 for the project are constructed to prevent infiltration/inflow to the maximum extent
21 feasible.

22 134. The above measures do not state replace just the lateral line - as the EIR
23 would require the applicant to do - it says "including" the lateral line - which the EIR
24 ignores. Such a requirement is not listed in the ZAB approved Conditions, dated
25 September 30, 2015.

26 **Aging Downtown Sewer System Not Evaluated**

27 135. The capacity of the sewers in the Downtown is based on a figure of "3,100
28 new residential units and up to 1,000,000 square feet of new non-residential floor space
in the Downtown Area." (DAP DEIR, pp 2-14). Page 14 of the August 13, 2015 CEQA

1 Findings document states that the anticipated population in the project is "less than 10
2 percent of the Downtown Area's projected 2015 population." However, it refers to the
3 whole Downtown Area, not just the Core, and it does not take into consideration other
4 projects already approved or in the pipeline for approval.

5 136. Section 3.3 Cumulative Projects Setting, pages 308-309, presents a chart of
6 ten projects by address that indicate "Cumulative Projects in Berkeley's Downtown Area
7 Plan Study Area," 2014. This chart indicates there will be 1,057 dwelling units (293 of
8 which will be hotel rooms) and 21,395 Net Square Feet of Commercial Floor Area.

9 Ignoring that the figures given for the Commercial Floor Area (Net Square Feet) projects
10 do not add up in the table, the numbers do not delineate projects by Core or Outer Core,
11 or by wastewater sub-basin, and they are not updated as to their cumulative number.

12 Without a map of the sewer system as it serves the Downtown, and absent the knowledge
13 of the boundaries of the City's 89 sub-basins and their respective populations, the
14 information provided gives no information to the public or decision-makers regarding the
15 amount of population which can be served by existing wastewater systems which by law
16 must be updated on a regular basis.

17 137. Berkeley High School campus is on the list of "Active Hot Spots," i.e. areas
18 that have been identified as having experienced sewage overflow problems.

19 138. This list appears in the City of Berkeley's Sewer System Management Plan,
20 March 2014, Revision 1-August 2014.

21 139. The Project completely ignores DAP Goal ES 4.3 (f) Encourage water
22 recycling through use of grey water systems.

23 **Water Supply**

24 140. Berkeley residents, including Petitioner, testified to the danger of approving
25 new downtown developments without consideration of the drought crisis. A Power Point
26 presentation by Mr. Leider, author of the EIR for 2211 Harold Way, dismissed these
27 concerns with statements that the water supply analysis is based on East Bay Municipal
28 Utilities District's (EBMUD's) adopted Urban Water Management Plan that includes a
multiple dry year scenario. Further that EBMUD's letter to the City regarding this

1 proposed project, dated October 13, 2014, pg 31-33, 2211 Harold Way FEIR, reflects the
2 District's "standard development project requirement and did not identify any significant
3 project impact." In June 2015 EBMUD, stated: *impacts of the proposed project in*
4 *relation to hydrology and water quality would be less than significant with compliance*
5 *with existing regulations and normal standards of use.* (Emphasis added.)

6 141. Since the EBMUD letter was written, however, the Governor has declared an
7 emergency and EBMUD has declared its first ever Stage 4 Critical Water Crisis, imposed
8 a mandatory 20% reduction from 2013 usage and enacted rate hikes and penalties.
9 Residents have been advised that the City is considering purchase of non-potable water to
10 use for our parks. The City has made a strong effort to conserve water, but municipal use
11 still accounts for only about 2% of the total used in the City with about 80% of that
12 amount being for use in our parks and landscaped areas. The major use, about 57%, is by
13 residents.

14 142. Petitioner maintains that the population increase from the proposed project
15 has been significantly underestimated. The list of CEQA Findings and Statement of
16 Overriding Considerations, July 2015 attached to the Staff Report for the August 13,
17 2015 LPC meeting, pg 13-14, Section 3.13 Population, Employment and Housing is
18 unsupported by reliable study or data.

19 143. The proposed Project according to Respondent City could increase the local
20 population by up to only 516 persons. This population growth would not be considered
21 substantial in the context of existing population in Berkeley, and according to Respondent
22 City would be within the population projections in the DAP EIR. The anticipated
23 population growth associated with the Project represents approximately 15 percent of the
24 potential population growth that would result from the DAP, and less than 10 percent of
25 the Downtown Area's projected 2015 population.

26 144. Given the applicant's statement regarding the mix of units in the proposed
27 project, there will be 394 bedrooms (77 studios, 139 one-bedroom, 80 two-bedroom and
28 6 three-bedroom units). If there are two people in each bedroom, except in the studio
units, there will be 711 people in the Project not 516. Moreover, the figure that is usually

1 used to project occupancy in Berkeley, is based upon 2.1 residents per bedroom, for a
2 total population in the project of 827.4 residents, about a 38% increase over the Staff
3 Report's projection. This higher number may well require a re-calculation of the open
4 space requirements for this project.

5 145. Census reports and actual experience indicate that a substantial amount of the
6 potential population growth in the Downtown will come from UC students. In 2007, one
7 half of the existing Downtown population was between the ages of 21 and 29. Building
8 after building constructed, particularly near the Campus, then and since 2007 show this
9 pattern. The project while advertising itself as a building offering "luxury" units (with
10 rents to match), the units do NOT have in-unit laundry facilities. The submitted plans
11 dated July 22, 2015 for all residential levels indicate a separate laundry unit that serves all
12 the units on each floor. The high rents, size of units and their layout indicate that their
13 likely occupants, even in the studios, will be primarily students grouping together with
14 the result that not only is the 2.1 residents per bedroom the more likely outcome, but that
15 the total number of occupants per unit might well exceed that number.

16 146. The EIR ignores discussion of the drought, and how this changed
17 environmental reality affects projected population increases which are in part being
18 driven by University of California's increased student enrollment.

19 147. No mitigation measures are required of the project with the exception of
20 installation of low water use appliances, planting drought-tolerant landscaping, and using
21 a 20,000 gallon recycled water cistern in the basement to water landscaping. Petitioner
22 maintains these requirements are insufficient. No consideration has been given to
23 requiring a recycled water system to flush toilets or to the installation of individual
24 meters within the project so that each unit knows its water consumption and can
25 effectively participate in water conservation measures and restrictions, now and in the
26 future.

27 148. Further, the EIR certification does not consider a diminished water supply in
28 the mitigation measures regarding construction. The June Addition Report provides the
information that under the proposed Mitigation Measures there will be watering two

1 times daily during the site preparation and grading period which they state will be about
2 30 days, to a depth of one inch, using 4.4 acre feet of water for dust control. (Note: An
3 acre foot = one foot of water on an area 66 feet wide and 660 feet long, or approximately
4 893 gallons of water. 4.4 acre feet would equal almost 4,000 gallons of water or more if
5 watering took more than 30 days) EBMUD has established a new restrictive policy: they
6 are going to prohibit the use of potable water in construction projects and that "all water
7 use for construction, soil compaction and dust control will require a permit issued by
8 EBMUD." This is one more correction that will have to be made to the EIR and other
9 requirements. Since the City does not have access to non-potable water at this time, this
10 new requirement will involve considering construction impacts on sensitive receptors
11 such as BHS, WES, BCC, Library, the YMCA, etc. regarding damage to and congestion
12 of streets from additional construction-related trucking.

13 149. If all of the new residents in this project conserve water, using it at the current
14 standard of 35 gallons per person, that equals over 10.5 million gallons per year, plus
15 about 4 million gallons used during its construction. None of this was discussed and
16 when members of the public mentioned water concerns, they were brushed off as not
17 important. This flies in the face of expert warnings that even if rains occur in December
18 or January, the drought will not be over. The latest prediction is that our area will receive
19 an average or maybe an above average amount of rain but that it will take years to
20 recover from current drought conditions. Add to this, the explicit statements from experts
21 that extended droughts will recur in our future, and that we must plan now. Recent
22 studies show that the depth of the snowpack, not rain, is the most important indicator and
23 that tree-ring studies indicate that the 2015 snowpack is the lowest it has been in 500-
24 years. As a City that is planning a sustainable future, Berkeley simply cannot ignore
25 these facts, particularly with a potential 5,000 to 10,000 new residents in our Downtown.

26 150. Further, in a case involving Stanislaus National Heritage, Sierra Club v.
27 County of Stanislaus, the court reversed a certified EIR for the lack of consideration of
28 future water needs. An Alameda County Superior Court would apply the substantial

1 evidence test and conclude that this particular EIR clearly fails on many levels, including
2 the lack of consideration of future water needs and the current impact on limited water.

3 **Wind**

4 151. Wind is a concern at pedestrian level and on rooftop terraces and balconies.
5 Rooftop terraces and balconies are used to meet open space requirements. When rooftops
6 are unusable because of high wind, the Project must provide open space elsewhere on the
7 site or pay the open space fee which should pay for more or improved parks.
8 Additionally, since balconies count as open space and furniture, etc. in the high winds
9 needs to be anchored, then balconies become unsafe and unusable for pedestrians on the
10 ground.

11 152. Appendix F admits that wind turbulence on the roofs will create hazards for
12 pedestrians walking on public space below the project by stating: "All rooftop decks
13 would be windy for some wind directions and would need to be carefully landscaped to
14 reduce wind and improve usability..." but describes the project's configuration
15 incorrectly as: "An L-shaped base of 5 stories would extend along all of the Harold Way
16 and Kittredge Street frontage. This base structure would be largely sheltered from
17 westerly or southerly winds by existing structures, such that only the top floor would
18 extend above the surrounding buildings. Because of the limited exposure of this lower
19 base of the building, any pedestrian wind accelerations generated by the base structure
20 building faces would be minor."

21 153. In the plans dated July 9, 2015, Sheet A-O.10, "Project Info", the L-shaped
22 base of five stories does not "extend along all of the Harold Way and Kittredge Street
23 frontage." The low-rise base portions of the project stop short of the southwest corner,
24 and the 180-foot tower comes directly to the ground.

25 154. There is no intervening "base structure" at the corner.

26 155. The potential risks of wind turbulence at ground level are increased when a
27 tall building is downwind from a low-rise structure. This is precisely the situation
28 created by the proposed project as approved by ZAB, which positions the 180 foot tower
downwind from the Central Library to the south where storm winds come from and

1 downwind for Dharma College (formerly Armstrong College) to the west where
2 prevailing winds come from. Because this tower is proposed across from a small existing
3 plaza at the entrance to Berkeley's Central Library and, as currently proposed, would also
4 be directly above a plaza-like enhancement of the intersection of Kittredge and Harold
5 Way, the safety, comfort and livability of these spaces may be seriously and adversely
6 affected by wind turbulence.

7 156. The Final certified EIR for this proposed Project does not address any of
8 these important environmental issues; ZAB did not discuss these issues; the City Council
9 did not discuss these issues and there are no conditions or findings that address these
10 issues.

11 **SECOND CAUSE OF ACTION**

12 **(VIOLATIONS OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT**
13 **REQUIREMENT OF RELIABLE AND OBJECTIVE DOCUMENTS)**

14
15 157. Petitioner incorporates all previous and subsequent paragraphs as if fully
16 set forth.

17 158. Every EIR must contain a project description that gives a "general
18 description of the project's technical, economic, and environmental characteristics."
19 (CEQA Guidelines Section 15124(c)).

20 159. Respondent HSR and Penner's plans, however, are flawed from the
21 application to the final drawings and designs, adding underground theaters without proper
22 study of the ground that they intend to excavate.

23 160. The financial claims regarding the cost of the building are inflated twice the
24 actual cost incurred by Respondents, preordaining the rejection of a more
25 environmentally "green" alternative project. Also doomed to failure was any
26 consideration of affordable, inclusionary units. Such alternatives were deemed 'not
27 feasible' based upon the Respondents unexamined pro forma documents.

28 161. Respondent City also concluded that seismic studies were not required prior
to approval and excavation despite evidence that a liquefaction stream runs through the

1 site as mapped by the State of California Seismic Hazard Zones map. Respondent City
2 decided that any seismic study will only be conducted after excavation commences. In
3 places where studies were conducted, they were disregarded (geotechnical engineer
4 concludes possibility of a liquefaction zone under the building) or out of date and
5 irrelevant for an accurate analysis of the environmental impacts of this project (i.e. old
6 transportation and water studies). CEQA requirements for tangible data, studies and
7 analysis have been ignored.

8 **THIRD CAUSE OF ACTION**
9 **(CEQA ALTERNATIVES CANNOT BE REJECTED DUE TO MISSING**
10 **AND INCOMPLETE INFORMATION)**
11

12 162. Petitioner incorporates all previous and subsequent paragraphs as if fully
13 set forth.

14 163. The DEIR, Section 5.0 identifies and compares the original project to three
15 alternatives: No Project; a "Preservation Project; and a "Contextual Design Project." In
16 June 2015, a "DRC Recommended Project" emerged as "the Project" which with an
17 additional design change becomes the Project which was approved by ZAB, LPC and
18 later the City Council.

19 164. All of the alternatives, except the "No Project" involve a "maximum height of
20 18 stories/180 feet." All, again with the exception of the "No Project," involve different
21 amounts of market rate housing: Preservation 220-244 units, Contextual 269-297 units
22 and DRC Recommended 302 units. They differ in the extent of demolition and the
23 amount of space which would be allocated to the Shattuck Cinemas.

24 165. A major function of an EIR is to ensure that all reasonable alternatives to
25 proposed projects are thoroughly assessed by the responsible official. (San Joaquin
26 Raptor/Wildlife Rescue Center v. County of Stanislaus (1994) 27 Cal.App.4th 713 732
27 [Cal.Rptr.2d 704]; see Public Resources Code, § 21002.1, subd. (a) [purpose of EIR
28 includes identifying alternatives to the project].) Guidelines require that the EIR "shall
describe a range of reasonable alternatives to the project, or to the location of the project,

1 which would feasibly attain most of the basic objectives of the project but would avoid or
2 substantially lessen any of the significant effects of the project, and evaluate the
3 comparative merits of the alternatives. "A potential alternative should not be excluded
4 from consideration merely because it 'would impede to some degree the attainment.' "
5 (Save Round Valley Alliance v. County of Inyo (2007) 157 Cal.App.4th 1437, 1456
6 [appellate court held that discussion of alternatives was inadequate where it did not
7 consider reasonable and feasible alternatives].)

8 166. Alternatives, however, are affected by the adequacy of the EIR. The
9 adequacy of the information that is a part of the EIR will shape what can be considered a
10 "reasonable" alternative. Alternatives must address impacts in order to achieve a balance
11 between the proposal that is offered and the impacts that can be mitigation to some sort of
12 degree. Alternatives cannot be fashioned until the missing information is "on the table."
13 This is particularly true when assessing a project like this one that involves the very
14 special circumstances of destroying a designated landmark and a cultural and financial
15 resource, determining impacts on the cluster of historical resources that surrounds it, and
16 seeking to provide desperately needed affordable housing, contributing to a sustainable
17 future community. This is a tall order, but it is not met in proposals where all alternatives
18 simply repeat the 18-story height of the proposed building.

19 167. Respondent failed to present a 75 foot alternative which would be within the
20 current Zoning height limit.

21 **FOURTH CAUSE OF ACTION**
22 **(CEQA VIOLATION: FAILURE TO EVALUATE AND/OR MITIGATE**
23 **TRAFFIC AND NOISE IMPACTS IN DOWNTOWN BERKELEY)**

24 168. Petitioner incorporates all previous and subsequent paragraphs as if fully
25 set forth.

26 169. Traffic congestion and the impacts from that increased traffic on Milvia
27 related to the Project will impact: (a) Safety of students entering and exiting school from
28 Kittredge, Allston or Durant; (b) 16 classrooms in the M building, 12 of which have

1 windows that open over Milvia for climate control; (c) Classes and other school activities
2 in the school's D building which houses Administration offices on the first floor along
3 Milvia and the library, media center/computer rooms and three classrooms on the second
4 floor along Milvia; (d) Classrooms and other school activities in the D building which
5 also fronts Allston to Kittredge; (e) The E building which houses the gym, dance studio
6 and the pool.

7 170. Furthermore, the EIR does not study and mitigate traffic congestion on all
8 streets within the school's safety zone (1,500 feet from school) and the hazards that traffic
9 congestion will cause to over 3,000 students who must get to and from school safely and
10 on time on a daily basis during construction and after the project is complete, given the
11 project's underground parking proximity to the BHS main entrance on Milvia.

12 171. Traffic noise: Noise is a particularly important factor for school uses. Students
13 have an inalienable right to attend a safe, secure, and peaceful environment in order to
14 promote learning. See, Cal. Const. Art I, Sec. 28(c). See also, Cal. Health and Safety
15 Code Sec 46000(e), and Cal. Govt. Code Sec. 65302, and Berkeley Municipal Code
16 Chap. 13.40.010. For its final conclusion regarding noise impact, the study purports to
17 rely upon a valid peak hour traffic volumes study for streets other than Milvia
18 surrounding Berkeley High (Allston between Milvia and MLK and Kittredge between the
19 project driveway and Milvia) apparently to calculate street noise from added traffic. Not
20 only does the study incorrectly assume that peak traffic hours on Allston and Kittredge
21 are spread over inapplicable time periods, instead of at morning drop off time for school,
22 it concludes that the entire 18-story project with a parking garage on Kittredge for 171
23 cars, **will net exactly 1 new trip on Allston, and 13 new trips per day on Kittredge.**
24 **(DEIR, Append. A, p. 153.)** The BHS Committee has studied traffic impacts on BHS
25 for the last two years. Based upon its study, the EIR assertion seems implausible and
26 unreliable, particularly because the likely path for most vehicles exiting the 2211 Harold
27 Way Project garage on Kittredge is right on Kittredge to Milvia, rather than the only
28 alternative: left on Kittredge to Shattuck. Erroneous roadway traffic studies undermine

1 the plausibility of all traffic and noise related conclusions based upon those same traffic
2 studies.

3 172. Based upon the above, the Respondent City's conclusion that potential noise
4 impacts do not require further study in an EIR (DEIR, App.A, p. 157) is not supported by
5 substantial credible evidence. Thus, the ZAB abused its discretion in rubber-stamping
6 implausible comments in the face of compelling, contrary and specific evidence with
7 respect to the nearby schools supplied by BHS Safety Committee members who have
8 studied traffic patterns around the school for years. Proper studies must be conducted on
9 all noise-related impacts, and their cumulative effects reliably assessed and mitigated.

10 173. The EIR and permit approvals are inadequate because they fail to assess the
11 project's significant traffic congestion impact on BHS during the School's peak traffic
12 period.

13 174. The EIR does not study traffic impacts along Milvia, the school's one
14 designated major drop off zone, or the traffic impacts of the project specifically on BHS.
15 (DEIR, App. A, p. 266.) Given the flow of school-related pedestrian, bicycle, and
16 vehicle traffic around the school on Milvia, Allston, and Kittredge and other streets
17 impacted by this project, these are material omissions. Moreover, the responses are
18 ambiguous, implausible, inadequate, and insufficient.

19 175. The Response to Comments (p. 104) states that "construction activities... are
20 not anticipated to impact student drop-off facilities on Milvia . . . [or] . . . block streets
21 adjacent to Berkeley High School." This response is ambiguous and legally insufficient
22 for EIR purposes. The Conditions of Approval (COA) are likewise ambiguous and are
23 inadequate to prevent significant traffic impacts on BHS.

24 176. It is simply implausible to assume that the traffic and noise from construction
25 and later from the Project's planned garage on Kittredge near Milvia will not impact the
26 school's traffic on Milvia, or the school's main entrances on Milvia, or the classrooms
27 that face Milvia. Milvia is one of two access points to Harold Way and is less than 400
28 feet from the project. There is no substantial evidence to credibly support an assumption

1 that all of the heavy equipment necessary for the project will be situated in a way to block
2 businesses and bus lines on Shattuck instead of amassing on Milvia, particularly because
3 the Permit conditions do not expressly prohibit it.

4 177. Project planners claim that they will provide detours for cars during
5 construction or that the school has three other entrances for students other than on Milvia
6 does not comport with reality. The school’s major drop off zone for cars and the bike
7 lane is on Milvia, close to the planned construction. The school has no other significant
8 drop off zones or cross walks across from school entrances. Respondent City failed to
9 establish safety measures for BHS students who also walk, bike, and scooter to school.
10 They are unable to navigate “traditional” detours. Additional traffic congestion and
11 detours can only make it more difficult for students to get to school safely and on-time,
12 unless these are mitigated.

13 178. The Project EIR relies on traffic studies on streets other than Milvia that are
14 close to BHS. Moreover, these traffic studies are implausible on their face in terms of net
15 auto trips and net new trips generated by the project and net new trips. (See e.g, prior
16 discussion regarding the alleged “1” new trip generated by the 18-story, multi-use, 171-
17 parking space structure.)

18 179. The BHS Safety Committee has been studying the traffic around BHS for two
19 years and is well familiar with the traffic patterns and congestion around BHS,
20 particularly from 8 to 8:30 a.m.

21 180. The EIR’s traffic data is nearly inscrutable in its entirety, including vague
22 discounts for mitigation impacts irrelevant to Berkeley High, and is not consistent with
23 Safety Committee observations. The conclusion that the large project would not generate
24 more than 100 new auto trips during the pm peak hour is unsupportable with respect to
25 traffic congestion impacts on Berkeley High for two reasons: (1) The peak hour traffic
26 around Berkeley High occurs in the morning, not the afternoon, during drop off to school.
27 Milvia street, the school’s main drop off zone, is highly accessed by car travel to and
28

1 from the school via Allston, Kittredge, and Durant; (2) It is implausible that the Project
2 will generate less than the 100 net auto trips. The Project has 302 units and about 171
3 parking spaces and over 10,000 square feet of new retail space. The Project has about
4 131 fewer parking spaces than apartment units. Traffic in terms of commuters leaving
5 for work in the morning or cars circling the block in search of parking will add to traffic
6 congestion around Berkeley High. Likewise, the additional traffic from vehicles during
7 construction and delivery vehicles afterwards servicing the Project will be part of the real
8 BHS traffic equation.

9 181. An up-to-date, appropriate and complete parking and traffic analysis is an
10 essential part of the consideration of this project, at this location. CEQA requires such
11 studies before any permits are granted and would by necessity involve the School
12 District, the Central Library, the YMCA, Berkeley City College, institutional uses on the
13 west side of Harold Way and all affected businesses.

14 **Incomplete Response with respect to traffic circulation**

15 182. The EIR also absolves itself from conducting a Congestion Management
16 study of any type because it relies on an implausible and immaterial forecast that
17 excludes the high school and assumes the project will not “generate more than 100 net
18 new automobile trips during the pm peak hour.” (Appendix C, p. 2.) While Milvia and
19 Allston may not technically qualify as regionally significant roadways, these roadways
20 are highly significant to the families of about 3,500 students who must get to BHS and
21 WES every day. The city of Berkeley, as the lead agency, may still, and should require
22 the City to evaluate circulation, safety, and other transportation impacts on a more
23 extensive roadway network that includes facilities such as large public schools and its
24 roadways that are locally, but not regionally significant.

25 183. The EIR is inadequate because it has not been prepared with a sufficient
26 degree of analysis or clarity to provide decision-makers with the information needed to
27

1 make an intelligent judgment concerning all of the project’s environmental impacts and
2 alternatives. (See 14 Cal. Code Regs 15151).

3 184. The purpose of an EIR is to provide the public with detailed information
4 about the effect that a proposed project is likely to have on the environment, to list the
5 ways in which the significant effects of a project might be minimized, and to identify
6 alternatives to the project. (Pub. Res. Code 21002, 21002.1(a), 21061, 21100, 21150; 14
7 Cal. Code Regs 15362.) It is designed to be an informational document for public use,
8 and should give the public and public agencies the information they need to make
9 informed decision. (See In re Bay-Delta Programmatic Env’t Impact Report
10 Coordination Proceedings (2008) 43 Cal.4th 1143, 1162.) An EIR should be written in a
11 way that readers are not forced “to sift through obscure minutiae or appendices” to find
12 important components of the analysis. (San Joaquin Raptor Rescue Ctr. v. County of
13 Merced (2007) 149 Ca. App.4th 645, 659.) In addition to being vague, the Harold Way
14 Project’s EIR has not described a reasonable range of alternatives to the project, or to its
15 location, that could feasibly attain the project’s basic objectives while reducing or
16 avoiding any of its significant impacts. (Pub. Res. Code 21100 (b)(4) 14 Cal Code Regs
17 15126.6.)

18 185. BUSD, BHS and WES should be consulted in the preparation of a new EIR
19 which considers, studies and mitigates environmental impacts upon the schools.

20 186. The Zoning Adjustment Board’s (ZAB) and the City’s acts and omissions in
21 certifying the EIR and granting the permits constituted a prejudicial abuse of discretion
22 with respect to the project’s direct and indirect impacts on BHS and the other nearby
23 sensitive receptors. The ZAB has not proceeded in the manner required by law and their
24 decisions are not supported by substantive law or substantial evidence. The EIR for the
25 project should be rescinded and a new EIR should require the City to meaningfully
26 consult with the BUSD as part of a thorough assessment of the Project impacts and
27 mitigation measures on issues such as noise in classrooms and school facilities, air
28 quality in classrooms and on playing fields, teacher parking, sewage overflow, and any
lighting and cooling impacts of the Project on the schools.

1 187. In contrast, the strong concerns expressed by many BHS parents is that the
2 foreseeable result of the Project going forward, without school sensitive and enforceable
3 mitigation measures in place for noise, traffic congestion, air quality, teacher parking and
4 sewage capacity will be this: The families with the means to bypass BHS, the one public
5 high school for all of Berkeley, will do so in order to avoid the extreme difficulty and
6 hazards of getting to school safely and on time; the noise in classrooms that disrupts
7 learning; the poor air quality in classrooms from diesel trucks and other equipment
8 associated with the nearby project; the sewage overflows in BHS facilities; and the
9 schools' inability to retain or attract quality teachers because parking is so difficult or too
10 costly on a teacher's salary. The less fortunate families, however, will be left to contend
11 with the project's impacts on their learning environment both during and after
12 construction. Many families have moved to Berkeley for its schools, and those families
13 have generously voted for local tax increases to support the schools. It is foreseeable that
14 the 2211 Harold Way Project could reverse this support of public education in Berkeley.
15 A decline in the school environment will change the dynamic of Berkeley as a desired
16 location for families with school age children. If City officials look the other way about
17 this project's impacts, the harm to students in the BUSD will be incalculable. Again, the
18 tragedy of the situation is that these concerns are entirely avoidable if the project impacts
19 in the School Zone are acknowledged, properly studied, and clearly mitigated.

20 **There are Unresolved Differences Regarding Impacts on Bicycle Traffic**

21 188. A July 7, 2014 traffic study prepared by the IBI Group, identified Milvia
22 Street as Alameda County Bicycle Route 35. South and north of Allston Way, Milvia
23 Street is a designated Bicycle Boulevard in each direction, sometimes with metered
24 parking, or sometimes with limited parking through a pay station, except along its west
25 side between Allston Way and Bancroft Way where there is a loading zone area adjacent
26 to Berkeley High School.

27 189. Section 8.4, pg 68, Table 8-3 BEQI (Bicycle Environment Quality Index
28 Analyses) Scores - With Project, Appendix C concludes that there are "no significant
impacts to bicycle facilities or bicyclist mobility" due to the project. This statement is

1 based on the project's inclusion of "bicycle parking, street trees, storefront retail and
2 pedestrian scale lighting."

3 190. Petitioner agrees that "bicycle parking, street trees, storefront retail and
4 pedestrian scale lighting" are important amenities for both pedestrians and bicyclists.
5 However, Petitioner fails to see how this statement relates to or comes to the conclusion
6 of "no significant impacts" given the reality of cars dropping off BHS students, increased
7 traffic on Milvia Street, project-related construction traffic, Bicycle Boulevard traffic,
8 and BHS students who are biking to school. One need only go to this area where street
9 work is currently being done to observe the amount of congestion and conflict between
10 streams of students crossing Milvia from the east or the west weaving through the cars,
11 and bicycles using Milvia in the north-south direction.

12 191. Petitioner maintains that the EIR is deficient in that it does not adequately
13 address this issue, particularly as one of the goals of the City is to increase bicycle usage.

14 **FIFTH CAUSE OF ACTION**
15 **(INSUBSTANTIAL EVIDENCE TO SUPPORT OVERRIDING**
16 **CONSIDERATIONS)**

17
18 192. Petitioner incorporates all previous and subsequent paragraphs as if fully set
19 forth.

20 193. CEQA permits a project with significant adverse environmental impacts to be
21 approved if the lead agency makes findings, supported by substantial evidence, that the
22 project's benefits will outweigh its adverse impacts and that there are not feasible
23 mitigation measures or less damaging alternatives available.

24 194. As discussed above, the findings that there are no feasible less
25 environmentally damaging alternatives to the Project and that all feasible mitigation
26 measures were required for the Project are not supported by substantial evidence. Thus,
27 the Statement of Overriding Considerations lacks substantial evidence in violation of
28 CEQA.

1 195. CEQA requires the decision-making agency to balance the benefits of a
2 project against its significant unavoidable impacts when determining whether to approve
3 a project. If the unavoidable adverse environmental impacts are not outweighed by
4 overriding considerations, the Project should be denied.

5 196. Respondent claims: *The Project will transform an important urban block in*
6 *Downtown Berkeley to a vital, walkable, retail-centered, transit-friendly, residential*
7 *block with pedestrian amenities consistent with the Downtown Area Plan and the Streets*
8 *and Open Space improvement Plan, while maintaining and enhancing the key historic*
9 *resource on the block.* Petitioner and substantial evidence reveals, however, the Project
10 demolishes the 1957, 1926 and a portion of the 1913 historic additions. The glass curtain
11 wall facing east behind the Cultural Resource received much criticism from the
12 community. This Project includes a sixteen story glass curtain wall tower that will be lit
13 at night causing visual blight, and contains more dwelling units than parking spaces and
14 more residents than mass transit capacity.

15 197. Respondent claims: *The Project advances DAP Environmental Sustainability*
16 *Goal ES-3 and Land Use Goal LU-1, which encourage high intensity development near*
17 *transit, by introducing high-quality, transit-oriented, and sustainable market rate housing*
18 *and contributing substantial affordable housing (and/or fees to support: development of*
19 *such housing) as required by Section 22.20.065 of the Berkeley Municipal Code.*

20 Petitioner urges instead, the greatest need is affordable housing not market rate units. The
21 Project results in further segregated housing by not including very low income to
22 moderate income residents. Such a disparate impact upon persons of color has been ruled
23 by the Supreme Court a violation of the 1968 Fair Housing Act, See, Texas Dept of
24 Housing v. Inclusive Communities Project, Inc. (June 25, 2015). As covered in the causes
25 of action, the Project is not providing the greatest housing need, affordable housing. The
26 delayed payment schedule to the HTF pushes such projects far into the future. A smaller
27 complex that preserves the Shattuck Cinemas, the Cultural Resource and viewsapes was
28 conceptualized around 2006 by a previous owner. Such a project that included affordable
housing and/or disability housing was suggested by the public for this site during the

1 review process. This Project pays \$1 million to the Housing Trust Fund (HTF) with the
2 building permits. The remaining HTF payments are on a schedule that continues up to
3 two years after occupancy of the Project. Such future payments contribute to Berkeley's
4 housing crisis of inadequate supply of affordable housing for low income and working
5 families such as retail employees, teachers, etc.

6 198. Respondent erroneously claims: *The Project advances DAP Environmental*
7 *Sustainability Goal ES-4, which promotes sustainable building practices, by constructing*
8 *a green building and establishing an attractive and environmentally sustainable*
9 *residential neighborhood that maximizes transit-oriented density and contribute to a*
10 *vibrant urban character.* Petitioner reveals the project actually attains most of the LEED
11 points through location. The Respondent requested modification which was approved by
12 the City to reduce GreenTRIP Certification from Platinum to simply Certification.
13 Additional measures for conservation such as unit metering, gray-water reuse, enlarging
14 rain water capture were dismissed. The renewable energy for the building is projected by
15 the applicant to be only 5-10%. The embedded energy of the existing building is being
16 ignored along with the environmental impact to demolish the 1957, 1926 and a portion of
17 the 1913 additions. High rises with steel construction require significant energy for
18 construction and consume high energy to operate after construction. The Project as
19 planned would be constructed to the minimum required sustainable threshold, not
20 exceeding it.

21 199. Respondent claims, *The Project activates the pedestrian environment along*
22 *Kittredge Street and Harold Way by replacing the existing structure, which has limited*
23 *openings and visual permeability/activity, with walkable retail and pedestrian amenities;*
24 *this advances DAP Goal ES-3, Historic Preservation and Urban Design Goal HD-4,*
25 *which emphasizes pedestrian environments that are active, safe, a visually engaging, and*
26 *Policy HD-4.1, which emphasizes improving the pedestrian experience.* The reality is:
27 The Central Berkeley Library is on Kittredge facing the south side of the building and the
28 Meditation Center is on Harold Way facing the west side of the Project. These services in
the neighboring buildings thrive with quiet surroundings and normal traffic. Parking is

1 already at a premium for these services, and the Project will put this safe pedestrian
2 environment at risk.

3 200. Respondent claims: *In furtherance of DAP Economic Development Policy*
4 *ED-1.3, which supports existing cultural uses, such as theaters, the Project maintains*
5 *Downtown as a major cinema destination by replacing the existing theater boxes with*
6 *state-of-the-art cinemas.* The reality: The fully utilized 862 seat ten theater complex with
7 four large theaters, high ceilings throughout, full wheelchair accessibility, murals in the
8 large theaters is being replaced with a “six to ten” theater complex with only one full size
9 theater, nine screening rooms with low ceilings that will severely limit screen size and
10 approximately 641 seats. The planned stadium style seating significantly limits seating
11 selection for mobility impaired individuals. The three theaters (1,6, and 7) to be
12 constructed underneath the 1913 Shattuck Hotel addition according to the plans
13 distributed by the City with the Notice of Determination show stadium seating. Theater 1
14 in this grouping shows seven (7) rows of stadium seating in a room with an approximate
15 floor to ceiling height of thirteen (13) feet. Additionally, the conditions approved by ZAB
16 during the September 30, 2015 hearing to ensure the final theater complex is fully
17 developed, completely built out, with all tenant improvements necessary for occupancy,
18 and usable so as to prevent the condition of an empty unusable shell, were removed by
19 the City at the Project applicant’s request during the December 8, 2015 Project approval
20 hearing.

21 201. Respondent mistakenly claims: *The Project will help preserve the historic*
22 *Shattuck Hotel with certain seismic improvements to the underlying retail and basement*
23 *made possible by the Project as part of reuse of the basement.* The truth is: Only the
24 section under construction will be reinforced per Project description leaving portions of
25 the same 1913 addition as is. Additionally, the term “reuse” of the basement is
26 misleading. The current basement is being removed through major excavation to build
27 movie theaters. It is this excavation that the public has cited as potential structural hazard
28 to the Cultural Resource that requires study before approval of the project.

1
2 **The EIR does not Consider the Environmental Impacts of the Removal and**
3 **Disposal of the Large Amount of Excavation Debris Required by the Project**

4 205. Petitioner incorporates all previous and subsequent paragraphs as if fully
5 set forth.

6 206. The June 25, 2015 ZAB Staff Report added more information regarding the
7 demolition debris associated with the project when it stated: "Some alteration/excavation
8 of the area beneath the retail stores along Shattuck Avenue would also occur in order to
9 create additional space for new cinemas."

10 207. However, the issue of excavation has never been discussed by any of the
11 review bodies. The total amount of excavation materials was not disclosed until the
12 September 30, 2015 ZAB Staff Report which states the amount will be 36,000 cubic
13 yards. The Geotechnical Feasibility Report of January 25, 2013 gives a hint as to size of
14 the excavation materials as it describes the site as approximately 1.50 acres. New plans
15 as of September 30, 2015 Staff Report, state that the amount of excavation is to
16 accommodate three levels of parking. These new plans include a "Demo Section" sheet
17 dated July 22, 2015 that plainly indicates that the planned demolition area is large and
18 extends substantially under the Shattuck Hotel.

19 208. The EIR completely ignores the environmental issue regarding excavation
20 waste and how these materials will be disposed of, by what means and where. There is
21 no acknowledgement that there are no nearby landfills and that the excavated materials
22 will have to be trucked to the Altamont Landfill (some 90 miles roundtrip from 2211
23 Harold Way).

24 209. This is an important issue for Berkeley as the City has struggled for years
25 with the question of how to manage the monumental problem not only of disposal of
26 waste but also of repair and maintenance of its streets. The City has recognized that
27 trucks loaded with construction materials and debris damage street pavement. The
28 combined impact of cumulative construction in the Downtown and along commercial
corridors, as anticipated in the DAP and Plan Bay Area, and on the University of

1 California Berkeley (UCB) campus, indicate that street damage will be substantial. UCB
2 has made it clear in the past that it will cooperate with City actions regarding a street
3 damage-related fee, but only if such fee is applicable to all development. The
4 construction of major buildings in the Downtown is the time to consider this issue, and
5 the City has failed to do so. This situation must be corrected.

6 **SEVENTH CAUSE OF ACTION**

7 **(CEQA VIOLATION: FAILURE TO DISCLOSE AND/OR ANALYZE**
8 **ECONOMIC IMPACTS IN DETERMINING THE SIGNIFICANCE OF**
9 **PHYSICAL CHANGES)**

10
11 210. Petitioner incorporates all previous and subsequent paragraphs as if fully
12 set forth.

13 211. The Shattuck Cinemas combined with the neighboring Arts and Theater
14 District function as the economic engine for the Downtown. Because the maintenance of
15 this revenue is a function of the size of the project, the economic impacts of the loss of
16 this revenue during construction and possible decline after construction, must be
17 disclosed either in the EIR or some other document as required by CEQA, and they must
18 be considered in determining the physical changes brought by the project. Neither of
19 these two requirements have been met.

20 212. A common branding sentiment for Berkeley's Downtown is "Come for the
21 Culture, Stay for the Food." The Shattuck Cinemas are a strong contributor to both sides
22 of that sentiment. They are a unique cultural resource. Eight of the Theaters opened in
23 1988. Two more Cinemas were added in early 2000 to make a total of 10 screens in 10
24 theaters with 862 seats. For the past 27 years, they have successfully offered foreign,
25 domestic documentary and art films that are limited in release and that are not available
26 to see elsewhere in the East Bay.

27 213. Only 20% of the films shown at the Shattuck Cinemas fall into what might be
28 called commercial film. The Shattuck Cinemas attract to the Downtown some 300,000
people in a mix of ages, ethnicities and incomes that sustain many Downtown restaurants.

1 214. The Shattuck Cinemas are a successful, unionized business. However, at the
2 beginning of the review process, the applicant asserted that the owner of the Shattuck
3 Cinemas, Landmark Theatres wanted to close up and leave because of financial
4 problems. The President of Landmark Theatres Ted Mundorff has refuted that statement
5 through an email exchange interview by Berkeleyside (turned in by the public for the
6 record) and letter to Joseph Penner on June 17, 2015. However, throughout the entire
7 review process, various members of the Council, ZAB and LPC consistently dismissed
8 the economic importance of the theaters by stating that the movie business was "dead" or
9 "dying." Kimberlee West, Shattuck Cinemas General Manager, negated that scenario in
10 her testimony to the Berkeley Planning Commission on May 6, 2015 that: *"...Despite the
11 fact that the movie exhibition industry was down nationally, Shattuck Cinemas grew 2%
12 last year (2014 over 2013 calendar). Since 2008 we have increased box office
13 admissions at the Shattuck, 25%. Our theatre is thriving and is a mainstay of a
14 prosperous and growing cultural community.....This has an irrefutable impact on
15 Berkeley merchants."*

16 215. Shattuck Cinemas customers paying ticket prices that range from \$8.50 (for
17 seniors, students) to \$11.00, plus concession stand income, generate some \$3 million
18 inside the theaters alone. Further, these movie-goers spend another estimated \$2 million
19 having a drink or a meal in Downtown restaurants before or after the movie or on
20 purchases they make as they become aware of what our local businesses have to offer.
21 Very few Downtown businesses can make such claims. Moreover, Downtown merchants
22 have testified before ZAB or written them of their concerns that even closing the
23 Cinemas temporarily during construction would have a negative impact on their
24 businesses.

25 216. While contributing significantly to City revenues, the Cinemas also
26 substantially contribute to the vibrancy of the Downtown by extending the range of
27 cultural resource opportunities available to a wider number of people and income levels
28 than served by the offerings available in the Arts and Theater District. The Arts and
Theater District combined with the Shattuck Cinemas are key to the revitalization of the

1 Downtown. Should the City make a more concerted effort to market the Theater and Arts
2 District together with the Shattuck Cinemas, they will make even more of a contribution
3 to the financial health of the City.

4 217. However, the EIR for this project ignored, both City policy and CEQA. City
5 policy Downtown Area Plan Economic Development, Policy ED-1.7 (a) Strengthen
6 Downtown as a prime regional destination for alternative and mainstream cinemas, and
7 live theater and music. Evaluate and enhance the theater and cinema going experience
8 in subareas where they are concentrated, a) Work to retain and expand cinemas, live
9 theaters, and music venues. (Underline emphasis added).

10 218. CEQA Guidelines were also violated; see, Section 15131 that provide while
11 economic effects shall not be treated as an effect on the environment:

12 (a) *An EIR may trace a chain of cause and effect from a proposed decision on a*
13 *project through anticipated economic or social changes resulting from the project*
14 *to physical changes caused in turn by the economic or social changes.*

15 (b) *Economic or social effects of a project may be used to determine the*
16 *significance of physical changes caused by the project.*

17 (c) *Economic, social, and particularly housing factors shall be considered by*
18 *public agencies together with technological and environmental factors in deciding*
19 *whether changes in a project are feasible to reduce or avoid the significant effects*
20 *on the environment identified in the EIR. If information on these factors is not*
21 *contained in the EIR, the information must be added to the record in some other*
22 *manner to allow the agency to consider the factors in reaching a decision on the*
23 *project.* (Emphasis added.)

24 219. Additionally, economic impacts due to the size and scope of the project
25 should include those of the closure of the retail stores and services along Shattuck Avenue
26 as construction is carried out underneath them. As listed on the applicant's drawings
27 dated July 22, 2015, these include Mel's, Yogurt Land, Starbucks, Papa John's, and Sprint.
28 Also not included is the disruption and probable closure at times of the destination
restaurant, "Five," the Hotel meeting room, and possibly extending to all or some rooms

1 within the Shattuck Hotel itself. Other retail outlets on Shattuck Avenue in the Hotel
2 Shattuck Building that might at times be affected are the Game Stop, Tea Fever, Ice
3 Cream, a bike storage area and the Bike Station.

4 220. No questions were ever asked, discussions ever held, or economic impacts
5 included either in the EIR or in any other document associated with the project as part of
6 considering an alternative that might reduce the size of the project at this location and be
7 more "environmentally friendly" in respecting its surrounding historical resources, and
8 providing housing, while leaving the Cinemas intact.

9 221. It should be noted that the "temporary" impacts of a two-year or more
10 construction period, plus recovery time after construction have never been considered
11 either for the Cinemas or for the other businesses in the area.

12 222. As required by CEQA guidelines, this information must be included in the
13 EIR.

14 **EIGHTH CAUSE OF ACTION**
15 **(CEQA FAILURE TO ASSESS AND MITIGATE IMPACTS ON**
16 **“SENSITIVE RECEPTORS” INCLUDING SCHOOLS, LIBRARY AND**
17 **YMCA)**

18 223. Petitioner incorporates all previous and subsequent paragraphs as if fully
19 set forth.

20 224. ZAB's Certification of the EIR and Approval of Permits for the Project
21 Should be Rescinded Because Both Fail to Comport with the Procedural and Substantive
22 Legal Requirements for Assessing and Mitigating Significant Impacts on Berkeley High
23 School (BHS), and Other Nearby Sensitive Receptors, and Because the ZAB's Acts and
24 Omissions Constitute a Prejudicial Abuse of Discretion Unsupported by Substantial
25 Evidence: ZAB erred in certifying and approving an incomplete and legally deficient EIR
26 and set of Findings and Conditions for the project. Minutes for the June 25, 2015 ZAB
27 meeting approved on July 9, 2015 simply state that ZAB "CERTIFIED the Final EIR."
28 A review of the video and captioner's transcript of that meeting confirms that no findings

1 were made regarding compliance with CEQA, or even that certification was based on the
2 independent judgment and analysis of the City.

3 225. Further, absent from the approved action minutes of the ZAB June 25, 2015
4 meeting is the action that a majority of ZAB members also approved on that date a
5 request for a separate report regarding impacts and mitigations of the project on Berkeley
6 High School (BHS). ZAB member Denise Pinkston characterized this request with the
7 following statement: That she would support certifying the Final EIR if ZAB added *a*
8 *mitigation that says a construction period impact plan shall be provided and adopted as*
9 *a condition of project approval - that will address the following issue raised by the*
10 *Berkeley School Board in their correspondence and be reviewed by the School Board*
11 *prior to project approval. And that would contain air quality, noise, construction, traffic,*
12 *hours of construction, pedestrian safety and sensitive hours for Berkeley High School.*
13 *This is an additional mitigation that specifies generalized items from the Downtown Area*
14 *Plan EIR and asks it to come back in the form of essentially a separate report or a series*
15 *of detailed conditions that pertain specifically to Berkeley High. We should probably*
16 *throw in the construction coordinator issue as well.*

17 226. Ms. Pinkston, as noted above, went on to provide the necessary vote to
18 approve certification of the EIR.

19 227. The video and transcript confirm that ZAB members were greatly concerned
20 about the lack of information regarding impacts on the over 3,000 students at BHS and
21 Washington Elementary School (WES) and associated mitigation measures that might be
22 imposed in the future. Without question, ZAB members knew from verbal testimony by
23 members of the public and several letters which had been delivered to them in prior
24 meetings that addressed the information that consultation with the School District was
25 missing in the EIR. ZAB members specifically and publicly had asked that meetings
26 between the City and School District be held PRIOR to June 25th and expressed
27 frustration and disappointment on June 25th that such meetings had not be held.

28 228. It is neither logical, nor in compliance with CEQA (Article 9. Contents of
Environmental Impact Reports (Sections 15120-15132), to certify an EIR while at the

1 very same time acknowledging it is incomplete by requesting further information
2 regarding environmental impacts that are missing.

3 229. The basic issue raised by the Berkeley Unified School District (BUSD) is that
4 consultation with the District regarding this project had not occurred at any point in the
5 review process. The 2211 Harold Way EIR was tiered off of the EIR for the Downtown
6 Area Plan (DAP) which does not mention the presence of nearby "sensitive receptor"
7 school zones. This omission is carried forward into the 2211 Harold Way EIR in which
8 responses to school impact issues were described as if BHS and WES were in an urban,
9 commercial, non-school zone, rather than as responses to the lower impact thresholds that
10 CEQA requires for sensitive receptors. The School Board maintained on June 25th, that
11 school-related impacts are significant, discrete and distinguishable from other impacts
12 that must be addressed prior to EIR certification and not pushed off into the future
13 because they require District feasibility considerations as well as specific identification
14 studies and analysis.

15 230. Groups that Project applicants met with are listed on the City's website
16 regarding the Project, Conceptual Application, December 20, 2012, pg 20, and Re-
17 submittals, October 20, 2014, Benefits, pg 10. The School District is not listed among
18 these groups.

19 231. BHS is located approximately 400 feet from the Project. It is not even a 2-
20 minute walk from the Project. Monday through Friday, over 3,000 students travel to
21 school each morning by bike, car, bus, or on foot on Milvia, Allston, and Kittredge --the
22 streets that surround the Project-- and on Harold Way, itself. There is no EIR mitigation
23 or condition which prohibits staging or project massing or vehicle traffic virtually right
24 outside of classroom windows; project conditions appear to waive compliance with state
25 standards for interior noise in classrooms; and the school HVAC systems to maintain air
26 quality are not equipped to filter for construction or diesel vehicle related output.

27 232. On June 25, 2015, the Berkeley School Board as well as parent and student
28 members of the BHS Safety Committee strongly urged ZAB to substantially revise and
reconsider the project's EIR. The BUSD letter to ZAB stated: *...until the Project's impacts*

1 -- both during and after construction -- on Berkeley High School and Washington
2 Elementary are specifically studied and feasible and school-sensitive mitigation
3 measures set, recognizing that construction impacts in a school zone differ from impacts
4 to a commercial downtown; and that The EIR be reconsidered, substantially revised and
5 recirculated with coordinated input from the school community, including the BUSD
6 Executive Director of Facilities, the BHS Facility and Operations Manager, and the BHS
7 Safety Committee. (Emphasis added)

8 233. ZAB approved the sufficiency of an EIR that considered impacts for a
9 commercial area, but which completely ignored nearby school zone impacts. ZAB's
10 actions in certifying the EIR and approving the permits constituted a prejudicial abuse of
11 discretion, and ZAB failed to proceed in the manner required by law, or consistent with
12 legal requirements: a) the City failed to provide the BUSD or any BUSD school with the
13 requisite CEQA- required notice for projects within one-fourth mile of a school prior to
14 preparation of an EIR; b) the EIR Project description is incomplete and misleading in its
15 omission of the Project's location in two BUSD school zones; c) the EIR is inadequate
16 because it improperly relies upon the DAP for exemptions and an infill analysis with
17 respect to BHS and WES, even though the DAP does not mention significant impacts on
18 nearby schools and therefore cannot excuse a full CEQA study and review with respect to
19 the schools; d) the EIR fails to adequately study and mitigate the Project's significant
20 direct and indirect impacts both before and after construction with respect to basic issues
21 such as noise levels and air quality in classrooms, availability of teacher parking, sewage
22 overflow on school grounds, and traffic congestion around Berkeley High and
23 Washington Elementary School, among other omission; e) the EIR relies on traffic
24 studies that are obsolete and unreliable and there is no substantial evidence that would
25 support the EIR's conclusion that the 2013 traffic studies done on a single day, December
26 3, 2013, for a commercial area has any relevance to existing (2015-2016) traffic patterns
27 on Milvia next to Berkeley High School, which opened a new major part of its campus on
28 Milvia in 2014 after the traffic study was done; f) the EIR fails to include a reasonable
range of alternatives that could eliminate or substantially lessen significant environmental

1 impacts. Moreover, because Project impacts on BUSD schools were not studied as part of
2 the EIR as legally required, the City does not have the baseline measurements relevant to
3 such things as classroom noise and air quality at BHS (e.g. the limits of the BHS HVAC
4 system to handle construction-related air particulate and diesel fumes) that would
5 otherwise be available to support narrowly-tailored mitigations.

6 234. The ZAB abused its discretion not only in failing to require necessary,
7 enforceable mitigations as part of the EIR, but also by improperly relegating
8 consideration of Project mitigations to a less rigorous permit process, thereby bypassing
9 CEQA rules and certifying conditions that protect the developer instead of the schools
10 and its students.

11 235. The ZAB failed to appropriately question the EIR's blanket representation that
12 the BUSD and Safety Committee concerns had been addressed in the EIR and the
13 findings and conditions, even though the BUSD and the Safety Committee each stated
14 that its concerns had not been met in either the EIR or in the permit.

15 236. The ZAB failed to adopt legally adequate findings with respect to all school-
16 related impacts and mitigations, or a legally adequate statement of overriding
17 considerations for significant impacts such as for noise as required by law.

18 237. The EIR improperly has not required the Developer to pay standard State-
19 authorized Developer fees which elsewhere are routinely paid to schools from
20 construction projects in school districts, and even though the Project is situated in two
21 school zones.

22 238. These issues were raised in the June 25, 2015 BUSD letter regarding
23 certification and in an additional letter from BUSD regarding permit approval on
24 September 30, 2015, and by members of the public in letters, e-mails and testimony. This
25 included that the DEIR Checklist of "Environmental Factors Affected" was improperly
26 determined. The Project EIR dismisses the issues raised by BUSD, the School Safety
27 Committee, and the public as "insignificant." On September 30, 2015, ZAB members
28 acknowledged receiving the BUSD letter, but did not discuss it, except that Vice Chair
Pinkston verbally indicated that the teacher parking issue was of no concern, ignoring

1 that the City itself finds it important to provide convenient parking for its own employees
2 within this same area.

3 239. Further, there is no evidence of consultation with other nearby "sensitive
4 receptors" which are located even closer to the project than the schools. These include
5 the Berkeley City College (BCC), Central Berkeley Public Library, and the Downtown
6 YMCA, facilities well-used by many children, the elderly, and the disabled on a daily
7 basis.

8 240. The June 2015 Addition to the Final Environmental Impact Report and
9 Response to Comments Document: DRC Recommended Alternative, states, "Noise
10 sensitive receptors include land uses where quiet is an essential element in their intended
11 purpose (i.e. concert halls), residences, buildings where people sleep, and institutional
12 land uses with primarily daytime and evening uses, such as schools, places of worship
13 and libraries (Federal Transit Administration, 2006)."

14 241. This document further states on page 5.50 that: "As shown in Table 17 of the
15 Infill Environmental Checklist, construction noise levels could be up to 94 dBA at 25 feet
16 from the project site boundary. These potential construction noise levels are within those
17 anticipated by the DAP EIR, which determined that sensitive receptors throughout the
18 Downtown Area would be intermittently exposed to elevated noise levels throughout the
19 planning horizon of the DAP."

20 242. In addition to the BHS and WES school sites, sensitive receptors are the
21 Library Gardens apartments (about 60 feet southwest of the project), Berkeley City
22 College (about 200 feet northwest of the project), Central Branch of the Berkeley Public
23 Library (across Kittredge Street from the project) and the Downtown Berkeley YMCA
24 (about 150 feet west of the project). Not mentioned is the further impact on Berkeley
25 City College, attended by thousands of students, faculty and staff and which faces the
26 loss of current classroom space in the Postal Annex (1957 addition) at 2211 Harold Way.
27 In addition, Berkeley has a large number of blind and other disabled persons who work
28 and/or live in the Downtown area who will be adversely impacted by the approximately
two to three years of construction, another ignored group of sensitive receptors. All of

1 these facilities and groups of other sensitive receptor have the same concerns as the
2 BUSD, and should be treated in a similar manner.

3 243. On June 25, 2015, EIR author Mr. Abe Leider of Rincon Consultants gave a
4 Power Point presentation to the ZAB regarding responses to issues the public raised at the
5 meeting of May 14, 2015. This presentation reflected his opinion that CEQA issues had
6 been addressed in the DEIR and that construction issues as they affected BHS, City
7 College, the YMCA and the Library could be mitigated to the "extent feasible."
8 Moreover, Respondent City and developer fail to outline mitigation measures to reduce
9 damage to "sensitive receptors" (children, elderly, disabled). Feasibility, is not defined or
10 mitigated to protect against discomfort, safety or health problems being suffered by
11 surrounding sensitive receptors. The "side letter" between Respondent HSR and BUSD
12 does not negate or excuse Respondent City's duties under CEQA and other laws.

13 244. The City violates its duties under CEQA if it does not substantially revise the
14 EIR with direction that Staff meet with the BUSD and all other sensitive receptors near
15 the Project regarding the commission of site-specific studies and Project mitigations that
16 meaningfully address the health, safety, and welfare of students and residents. A revised
17 EIR must be re-circulated to ensure that it is directly responsive to the concerns of the
18 BUSD and BHS Safety Committee and other sensitive receptors and that it includes
19 enforceable mitigations that protect students and residents.

20 245. ZAB's certification of the EIR and its approval of permits for the 2211 Harold
21 Way project should be rescinded for all of the reasons set forth in the record.

22 246. The City and its agencies failed to meet CEQA requirements for a specific
23 and timely notice to schools within one-fourth mile of the project.

24 247. CEQA and the California Code of Regulations, Title 14, Division 6, Chapter
25 3, Section 15186 require that "Before certifying an EIR or adopting a negative
26 declaration for a project located within one-fourth mile of a school," the lead agency
27 "must consult with the affected school district or districts regarding the potential impact
28 of the project on the school." This regulation is meant to provide an opportunity for

1 schools and cities to meet so that they can discuss needed studies and mitigations with
2 respect to schools before the EIR process commences for a project, and certainly before
3 an EIR certified.

4 248. The specific CEQA notice is different from the “community notice” sent out
5 to public members to inform them that a completed EIR is available for comment. BHS
6 and WES are within a one-fourth mile of the Project and the City plainly erred by failing
7 to provide the required specific CEQA notice to these schools, as well as to Berkeley City
8 College. That BHS was incidentally included in the general mailing list for a completed
9 EIR, does not meet the CEQA notice requirement.

10 249. Further, in listing “other public agencies whose approval is required,” the EIR
11 states “None,” but goes on to say, “Although the University of California at Berkeley has
12 no permitting authority over the project, the Draft EIR will be provided to the University
13 for comment.” (DEIR Appendix A, p. 43.) No effort was taken to similarly inform
14 Berkeley High, although it is far closer than UC Berkeley, and despite the fact that the
15 City was required by law to meet with the BUSD prior to EIR certification.

16 250. The BUSD September 29, 2015 letter of record from BUSD attorneys to ZAB
17 highlights the discrepancy between the procedure in this case which excluded BUSD at a
18 critical stage in the project planning process, from the procedure that takes place
19 throughout California in the ordinary course of business: *Our firm represents school*
20 *districts throughout California, and we can state unequivocally that it is standard*
21 *practice for local public agencies with planning authority (i.e., cities/towns, counties and*
22 *school districts) to collaborate on the location of proposed projects, as well as the*
23 *impacts of these projects on the surrounding community.*

24 251. The City’s error in failing to provide the required CEQA notice resulted in a
25 profound distortion of the necessary CEQA process designed to ensure that project
26 impacts on nearby schools are specifically studied and properly mitigated.

27 252. The project description in the EIR is misleading, inadequate, and incomplete
28 in that it fails to properly describe the project as being located in the designated school
zones for BHS and WES.

1 253. The failure to properly describe the project as sitting within at least two
2 school zones is a material omission and misled the public with respect to the scope and
3 impact of the Project on the health, safety, and welfare of students, and the operation of
4 the schools. (See Penal Code section 626 (C)(2) (B) [defining safe school zone]; see also
5 Cal. Code of Regulations, Title 14, § 15186 [requiring notice to schools within one-fourth
6 mile of a project])

7 254. Schools are sensitive environments with noise, pollution, and traffic planning
8 thresholds that are different from and lower than what is tolerated in commercial use
9 areas. While the EIR admits that certain population groups like children are more
10 sensitive to air pollution (DEIR App. A, p. 94), nowhere does the EIR mention possible
11 air pollution effects on the children who attend nearby BHS High.

12 255. After-the-fact attempts by the City to shoehorn BHS within studies already
13 done for the surrounding urban (non-school zone) area are plainly insufficient and
14 unreliable for school zone purposes. For example, the EIR is deficient in assessing noise
15 that impacts classrooms facing Milvia/Allston from both construction and construction-
16 related traffic, as well as noise impacts after construction from both standard vehicle
17 traffic and truck deliveries. Studies done for the surrounding commercial zone do not
18 adequately measure the noise impact in the school zone or on the specific school facilities
19 in the impacted area, or set forth mitigation measures appropriate for schools. The EIR
20 describes decibel noise from the site as 71 dBA at 500 feet from site (DEIR, Appendix A,
21 pp. 155-156). The EIR and the project's supplementary documents, including the May 14,
22 2015, Power Point for ZAB, and the Conditions of Approval (COAs) for the permit
23 regarding mitigation for noise in the area is that construction will be done during the
24 workday (7 a.m. to 6 or 7 p.m.) These are the hours students are in class every day and
25 should not be distracted by decibel levels that far exceed the 45 dBA state threshold for
26 interior noise and what CEQA considers acceptable for schools. (BHS is about 400 feet
27 from the Project.)
28

1 256. The failure to correctly describe the project resulted in the omission of
2 school-site specific studies which are the necessary predicate foundation for school-
3 specific Project mitigations, and a proper assessment of the Project.

4 257. The EIR is inadequate because the Project relies upon a Downtown plan that
5 does not specifically assess the significant impact on BHS or WES.

6 258. Throughout the review process, ZAB Commissioners failed to apply the
7 correct legal standards and abused their discretion by erroneously relying on the DAP to
8 declare that CEQA requirements were met with respect to nearby schools in the area.

9 259. However, as the DAP EIR does not mention BHS, it cannot govern or apply
10 to the CEQA process with respect to BHS and the other schools that it omits. It is also
11 fundamental to the CEQA process that the “significance of an impact may vary with the
12 setting.” (14 Cal.Code Regs 15064.(b).) In other words, whatever “infill” or other
13 similar exemptions may apply to the commercial downtown area, these exemptions do
14 not apply to the school zones that also are impacted by the project, particularly with
15 respect to traffic congestion, student safety to and from school, classroom noise, air
16 quality, teacher parking, and sewage impacts. (See Section 17(E) and Footnote #47
17 regarding sewage overflow at BHS.) As previously stated, the requirements of a school
18 differ markedly from the requirements for commercial areas both during and after
19 construction, and the DAP which does not mention significant impacts on nearby schools
20 cannot excuse a full CEQA study and review with respect to the schools.

21 260. At ZAB hearings, the City steadfastly maintained that it had no obligation to
22 notify BHS because BHS is situated more than 300 feet from the project. Even if this
23 was correct, the City should have been well aware that the staging and vehicular traffic
24 associated with the project would occur within 300 feet of BHS and other sensitive
25 receptors. In contrast to the City's disregard for nearby schools in the EIR process, the
26 EIR's environmental checklist properly acknowledges that "all answers must take account
27 of the whole action involved, including off-site as well as on-site, cumulative as well as
28 project level, indirect as well as direct, and construction as well as operational impacts."
(See DEIR Appendix A, pg 55). This plainly did not occur in this case and ZAB abused

1 its discretion by rubber-stamping the project despite significant and unmitigated impacts
2 on the schools and other sensitive receptors as brought to their attention during project
3 review hearings.

4 261. The EIR and project approvals should be rescinded because they do not
5 adequately study and mitigate the project's impact both before and after construction with
6 respect to traffic, noise levels from that increased traffic and congestion around BHS and
7 WES that makes entering and exiting school unsafe and difficult.

8 262. The assessment which was done regarding traffic and noise-related traffic was
9 conducted on December 3, 2013. The study is obsolete and unreliable. Even if there
10 could be a valid infill project within a designated school site, State law does not sanction
11 approval of such a project when there is substantial new information which shows the
12 effects will be more significant than described in the prior environmental impact report
13 (Pub. Resources Code 21094.5)

14 **The EIR and Project approvals fail to adequately take into account the**
15 **Project's significant impacts of cumulative noise on a sensitive school**
16 **environment during and after construction.**

17 263. The ZAB acted unlawfully and abused its discretion in failing to account for
18 noise impacts on BHS in the EIR and also in voting to defer mitigation of noise impacts
19 to the COAs, without ever having the City conduct the necessary site-specific noise
20 studies that CEQA requires. Moreover, neither the EIR nor the COAs adequately analyze
21 or mitigate the Project's impacts on noise, including noise from traffic, at BHS.

22 264. The courts have found EIRs inadequate when they fail to adequately analyze
23 a project's impacts on noise and traffic because they improperly deferred mitigation
24 measures. (See e.g. Gray v. County of Madera (2008) 167 Cal. App.4th 1099 [noise and
25 traffic impacts must be analyzed and mitigated if significant].) Noise is considered a
26 direct environment impact of a project requiring assessment by the EIR. (See Pub. Res.
27 Code 21060.5, 14 Cal.Code Regs 15064(d)(1), 15360; Los Angeles Unified School Dist.
28 v. City of Los Angeles (1997) 58 Cal.App.4th 1019 [finding inadequate EIR's assessment
of impact of traffic noise on existing school]; Cf. 5 Cal. Code Regs., 14001 [in planning

1 new educational facilities “the district shall consider environmental factors of light, wind,
2 noise, aesthetics, and air pollution in its site selection process”].)

3 265. Noise is a particularly important factor for school uses. Students have an
4 inalienable right to attend safe, secure and peaceful campuses in order to promote
5 learning. (Cal. Const., art. I, § 28, subd. (c).) In addition to CEQA, many California
6 statutes, including those related to health and safety and general plans, recognize the
7 seriousness of noise impact and the government’s duty to mitigate noise impacts. (See
8 e.g. Cal. Health & Safety Code 46000 (e) [“The State of California has a responsibility to
9 protect the health and welfare of its citizens by the control, prevention, and abatement of
10 noise”]; Cal. Health & Safety Code 46000 (f) [“All Californians are entitled to a peaceful
11 and quiet environment without the intrusion of noise which may be hazardous to their
12 health or welfare.”]; see also Government Code 65302 [relating to general plans and
13 requirement for a “noise element that shall identify and appraise noise problems in the
14 community” and shall analyze current and projected noise levels for “major local
15 streets.”]; Berkeley Code, 13.40.010 [finding “Every person is entitled to an
16 environment in which the noise is not detrimental to his or her life, quality of life, health,
17 or enjoyment of property"].)

18 266. The Response Comment dismissing any noise impact on BHS, because BHS
19 is about 400 away from the Project site is inconsistent with the data in the Draft EIR
20 which lists the construction noise at 500 feet from the cite as 71 dBA---well over the 45
21 dBa interior noise threshold for schools. (DEIR, Appen A, pp. 155-156)

22 267. The ZAB’s Permit COAs likewise ignore compliance with the 45 dBA
23 threshold for interior noise at schools, and instead sets the noise threshold at 65 dBA, but
24 only on specific school-wide test days, and only for exterior noise.

25 268. Therefore, ZAB and Respondent City Council both improperly certified the
26 EIR and abused its discretion by allowing the project to exceed state standards for daily
27 interior classroom noise levels. There is no exemption that can excuse Respondent
28 City’s actions which appear to waive the Project’s compliance with established noise
thresholds for schools. Further, Respondent City improperly certified the EIR although it

1 did not consider feasible and enforceable mitigations such as: (A) a daily monitoring
2 system for interior noise at or below 45 dBA to help ensure that students can hear their
3 teachers and one another every day in classrooms; and (B) The use of sound barriers,
4 acoustic tiles, sound-rated windows, acoustical calking and the like for noise reduction in
5 BHS classrooms and facilities facing Allston and Milvia -- even in the face of the DEIR
6 note that such “special building construction techniques” may be required to “reduce
7 interior noise levels to the 45 dBA Ldn or lower” for nearby residences. (See EIR,
8 Appendix. A, p. 149).

9 **Construction Noise**

10 269. The City’s DEIR Response Comment (p. 104) that noise impacts are
11 mitigated because BHS "is almost entirely occluded by intervening buildings” between
12 the project and BHS is not supported by substantial evidence. Even if a minor portion of
13 the noise impact might possibly be absorbed by buildings across from BHS, there are no
14 buildings between the bulk of the 18-story project and BHS to absorb any noise.

15 270. To the extent the Draft EIR makes general comments about noise impact, it is
16 clear that any mitigations of these impacts are unsuitable for BHS as a school/sensitive
17 noise receptor. The Draft EIR notes: “NOI-5: Construction Noise: Businesses and
18 residences throughout the Downtown Area would be intermittently exposed to high level
19 of noise throughout the planning horizon (elevating noise levels “by 15 to 20 dBA or
20 more, a significant impact” to adjacent businesses and residences). As a mitigation
21 measure the Report states that “the applicant shall develop a site specific noise reduction
22 program which shall include appropriate time limits for construction (7:00 AM to
23 7:00 PM on weekdays...”). (See Appen. A, p. 149) Although, the 7 a.m.-7 p.m. period
24 for construction may be acceptable for working residents, it creates a maximum impact
25 on the school during normal school hours. Report concludes this “impact would remain
26 significant and unavoidable,” Respondent City deemed that there were no necessary
27 mitigations for the school.

28 **Post-Construction Noise**

1 271. Post-construction noise estimates are also problematic particularly with
2 respect to noise on the high school's Milvia facing classrooms. Post-construction noise
3 estimates conclude the “project would introduce new residential land uses adjacent to
4 local roadways, potentially exposing sensitive receptors to noise levels that would exceed
5 those considered compatible with exterior residential land uses.” (DEIR, Appen. A, p.
6 152) Again, no specific study is done for BHS, much less Milvia street, a main
7 thoroughfare for the project, and no mitigations are put in place for BHS classrooms. In
8 fact, BHS is not mentioned in the list of noise-sensitive uses. Noise increases generated
9 by traffic, service vehicles or building uses that are cumulative to existing street noise
10 should have been specifically studied and mitigated before the EIR was approved. The
11 fact that the ZAB and Respondent City approved the EIR without these studies and
12 school-specific mitigations was an abuse of discretion, and just cause for the EIR
13 certification to be rescinded.

14 272. Neither the EIR nor the Permit considered permanent mitigations such as
15 well-placed and clearly designated midblock/flashing beacon cross walks and new drop
16 off zones, as suggested by the BHS Safety Committee members in their Comment to the
17 DEIR, and throughout the EIR certification process. Instead, in violation of its CEQA
18 responsibilities, the City leaves its traffic congestion and traffic safety planning to a later
19 date at the sole discretion of the City—which steadfastly fails to acknowledge even the
20 present traffic safety issues in the area.

21 273. The ZAB erred in certifying an EIR and approving findings and conditions
22 that never adequately studied or mitigated the traffic issues around the school or
23 considered traffic safety mitigations necessary to ensure that students from BHS and
24 WES, including students with disabilities, can get to school safely and on time. This was
25 a material omission. The location of the garage and additional traffic on Milvia,
26 combined with noise, and more large delivery trucks, also may indeed dissuade biking
27 and walking to school—an outcome at odds with the goals of the DAP to make the area
28 more pedestrian-friendly.

Failure to evaluate the impact on BHS Teacher Parking/Teacher Recruitment

1 274. Although CEQA does not require parking impacts be done for infill projects
2 located in transit priority areas, it is highly debatable whether the concept of infill for a
3 commercial downtown area can or should be applicable to a school zone within a
4 downtown —particularly when significant impacts to the school are also not considered
5 in the downtown plan prepared for the area. This is the case with respect to Berkeley
6 High and the DAP. Accordingly, the City should rescind the EIR, and instruct that a new
7 EIR analyze the foreseeable significant indirect impact of the project on the parking
8 available for BHS school faculty and staff, and the school’s ability to keep and hire
9 quality teachers in the severe absence of parking that will be caused by the project. BHS
10 currently has 160 parking places for approximately 280 teachers and staff. By design,
11 2211 Harold Way has 302 units and about 171 parking spaces; In other words, the project
12 has 131 fewer spaces than apartment units. Given this parking shortfall, it is foreseeable
13 that BHS faculty and staff will be unable to find suitable nearby parking as 2211 Harold
14 Way residents and their visitors compete for scarce street parking near the school.
15 (Although the data points are unclear, the parking impact study also supports a parking
16 impact on teachers and staff. It concludes the “forecast peak period parking demand” is
17 414 from the apartment uses alone, and that “forecast peak period parking demand
18 expected to exceed proposed parking supply.”) (Appendix C, at p. 72)

19 275. It is one thing for the City to discourage car use by residents in the
20 commercial Downtown area by limiting parking. It is another matter entirely to assume
21 that teachers who cannot afford to live near Berkeley High on current salaries can also
22 reasonably take alternate transportation to get to and from school on a daily basis. It is
23 therefore foreseeable that lack of parking could significantly impact the ability of BHS to
24 keep and attract quality teachers to the school. This foreseeable outcome would be flatly
25 inconsistent with the goals of Berkeley residents who have prioritized an interest in
26 quality education and educational facilities. The residents of Berkeley have passed
27 funding to enable Berkeley schools to maintain favorable teacher/student ratios and to
28 upgrade school facilities so that students have a school environment highly conducive to
learning.

1 276. The EIR also failed to examine the changes to existing (environmental)
2 parking conditions that would occur in the affected area when the proposed Project is
3 built. (See generally, 14 Cal. Code Regs 15126.2(a); see also 14 Cal. Regs 14126.2(d)
4 Regardless of whether parking is considered an indirect impact as set forth above, the
5 lack of parking also will have a cognizable and significant effect on: (1) air quality --
6 which is impacted as teachers will need to search for longer periods of time for parking
7 around the school; and (2) foreseeable school facility construction in the form of
8 necessary parking structures for faculty and staff cars. (See El Dorado Union High
9 School Dist. v. City of Placerville (1983) 144 Cal. App. 3d 123.) Just as development
10 which leads to population growth and potential school overcrowding can require the
11 project EIR to assess project impact in terms of new classroom facilities required, project
12 development which results in the need for construction of new school facilities in terms
13 of teacher parking is likewise subject to EIR requirements. In fact, the Berkeley
14 Development Plan recognizes as a possible impact, the need for new school facilities as a
15 result of Downtown development. To this end, it provides that in Mitigation Measure
16 SVC-5: "The City and the BUSD will continue to work in concert to evaluate the impacts
17 of new development on BUSD facilities." Had the City consulted BHS about the impact
18 of the Project on BHS facilities some mitigation efforts for parking impacts could have
19 been discussed.

20 277. Finally, nothing in the Permit's Conditions adequately and specifically study
21 the impact of the midnight hour signing of the side letter setting the staging area in the
22 2000 block of Kittredge 400 feet from BHS. Condition 38, related to use of a "Flag
23 person" as the tangible "fix" to the traffic congestion problem is inadequate, and ignores
24 the fact that any road closures from Harold Way can exacerbate an already dangerous
25 traffic situation around the school. Obviously, new traffic impediments on Allston and
26 Kittredge will form extremely hazardous traffic bottlenecks for the more than 3000
27 students trying to get to or from the school. Having a flag person on the street to wave
28 through a few cars at a time does not diminish the problem, or the hazard for pedestrians,
bicyclers, or scooters trying to use the same roadway en route to school.

1 discounted payment which makes it easier to convert its rental units into condominiums
2 after the short time needed for the construction liability period to expire and which brings
3 even more increased profit to the developer without any further sharing of profits with the
4 community.

5 282. Based on the information presented at the June 14, 2015 Special Council
6 meeting, the new Nexus Study, completed by Bay Area Economics (BAE), recommended
7 a \$34,000 per unit mitigation fee for a building that did not include affordable units
8 within the building, however, Respondent City gave special exemption to the Project to
9 maintain a discounted “in lieu” mitigation fee of only \$20,000 per unit.

10 283. The State of California required Housing Elements Unit Production Report
11 for years 2007 - 2014 shows Berkeley has done well in providing housing for richer
12 people, but has failed miserably for poor and middle income: The city reached 89% of
13 target for market rate housing production while only 23% of the target for very low
14 income up to 50% of area median income (AMI), 21% for Low income (51% - 80% of
15 AMI) and only 4% for moderate income (81% - 120% AMI).

16 284. Banners advertising vacant new multi-unit buildings abound in Berkeley
17 including Downtown seeking tenants for market rate, non-rent controlled units, while
18 residents clammer for a very limited number of affordable housing units.

19 285. Public testimony called for inclusionary affordable housing to be included in
20 the Harold Way project, citing homelessness and excessively long waiting lists for
21 “Below Market Rate” units, and lack of Section 8 low-income housing providers. Senior
22 citizens on limited income are also languishing on waiting lists for years.

23 286. The 2010 Measure R and the DAP specifically calls for housing for “all
24 income levels and family sizes.”

25 287. The 302 Unit Project which sits within two BUSD school zones, Berkeley
26 High School and Washington Elementary School, 400 feet from the main entrance to the
27 City’s only public high school, has only six (6) three bedroom units for larger families.

1 288. The Project fails to meet land use planning of housing for families of all sizes.
2 Over 70% of the dwelling units are set aside for studio and 1 bedroom apartments.

3 289. Buildings of over 75 feet must provide “significant community benefits.”
4 See, BMC 23E.68. This building provides insignificant community benefits, and
5 wrongfully receives 'credit' from Respondent City for things they are already required to
6 do, i.e. mitigate negative impacts of a massive development taking up air, space, water,
7 etc.

8 **TENTH CAUSE OF ACTION**
9 **(VIOLATION OF THE SEISMIC HAZARD MAPPING ACT)**

10
11 **City failed to require preparation of a site-specific geotechnical report to**
12 **analyze seismic hazards prior to Project approval**

13 290. Petitioner incorporates all previous and subsequent paragraphs as if fully
14 set forth.

15 291. Pursuant to the Seismic Hazard Mapping Act (Public Resources Code § 2690
16 et seq.), cities must submit a Seismic Hazard Investigation, a site-specific geotechnical
17 report defining and delineating any seismic hazard, prior to the approval of a project in a
18 seismic hazard zone.

19 292. Historically, Strawberry Creek, the principal watercourse running through
20 Berkeley, flowed east to west through the Project site. Strawberry Creek was backfilled
21 with uncontrolled fill in the late 19th Century. Therefore the site is in a liquefaction zone
22 due to the presence of uncontrolled fill.

23 293. The Project is within approximately 2 miles of the Hayward Fault line, an
24 earthquake zone expected to have “a big one anytime.”

25 294. The oldest portions of the Shattuck Hotel were built over an area of
26 uncontrolled fill, yet no study of the soil conditions under the Hotel has been performed,
27 despite the Infill Environmental Checklist's statement that activities to build the new
28 Project, such as demolition and structural work, "would affect below-grade portions of

1 the Shattuck Plaza Hotel ..." The Checklist further states, "These are potentially
2 significant impacts and will be studied in an Infill EIR."

3 295. Respondents HSR and Penner claimed on their application that no
4 liquefaction zone existed. City employees, Commission members and Council members
5 supported this misrepresentation by failing to independently investigate, despite repeated
6 oral and written testimony to inform them of the liquefaction zone, including visual
7 representations of the City's Environmental Constraints Map which clearly shows the
8 liquefaction zone. The site is clearly in a liquefaction zone as mapped by the State of
9 California Seismic Hazard Zones map.

10 296. The purpose of the Seismic Hazard Mapping Act is to minimize loss of life
11 and property through the mitigation of seismic hazards.

12 297. The Shattuck Hotel is in continual use for human occupancy, 24 hours per
13 day. The Infill Environmental Checklist admits that vibration caused by Project
14 construction could result in structural damage to the Hotel – yet no mitigations have been
15 proposed for construction activities, which could create a hazardous situation for human
16 occupants of the Hotel, because the requirements of the Seismic Hazard Mapping Act
17 have been violated.

18 298. Pursuant to the Seismic Hazards Mapping Act (Public Resources Code 2690
19 et seq.) cities must require developers to submit a site and project specific geotechnical
20 report defining and delineating any seismic hazard, prior to the approval of a project
21 located in a seismic hazard zone.

22 299. State Special Publication 117, Guidelines for Evaluation and Mitigating
23 Seismic Hazards in California clearly indicate that "(c) Prior to approving the project, the
24 lead agency shall independently review the geotechnical report to determine the adequacy
25 of the hazard evaluation and proposed mitigation measures".... No such independent
26 review was performed. Respondent City also concluded that seismic studies were not
27 required prior to approval and excavation despite evidence that a liquefaction stream runs
28 through the parcel.

1 300. Respondent City decided that any seismic study will only be conducted after
2 excavation commences.

3 301. In places where studies were conducted, they were disregarded (geotechnical
4 engineer concludes possibility of a liquefaction zone under the building) or out of date
5 and irrelevant for an accurate analysis of the environmental impacts of this project (i.e.
6 old transportation and water studies).

7 **Creeks**

8 302. Whether the distance of the culverted creek should be 25 or 30 feet is not the
9 issue. The issue is that there is no documentation as to what the actual distance is. The
10 map as submitted in the ENGEO Report seems to indicate the culvert is within that
11 distance, but this has not been measured. Further, the September 16, 2015 letter from
12 Structural Engineer Steven Tipping states that he had reviewed the original 1910 Shattuck
13 Hotel drawings and the foundations of that building "some of which are located over the
14 original creek bed." (Emphasis added.) It is clear there is some question regarding the
15 location of not only the Strawberry Creek culvert but also any possible tributary of
16 Strawberry Creek in this location.

17 303. Incorrect and missing information in the EIR and Staff Reports were given to
18 ZAB and LPC commissioners. Both ZAB and LPC decisions were based upon faulty and
19 incomplete studies. Every property in Berkeley must abide by Section 17.08. The City
20 needs to explain either why 2211 Harold is exempt, or what must be done by the
21 applicant to meet this requirement. Not to do so, raises serious legal issues as a result of
22 unequal treatment of property owners.

23 304. If the project is found to be exempt, the Respondent City must still assess the
24 condition of the Allston Way Strawberry Creek culvert and include that in the baseline
25 report. This assessment should include the insertion of language in Mitigation Measure
26 CR-4(a) and (b) that it occur prior to the approval of any zoning and building permits.
27
28

1 the complex according to projected and actual public demand. The number of films
2 shown on any day of the week is between 9 and 11 with over 40 daily screenings and
3 movie times. The 10 theaters and large number of daily viewings provides many options
4 for the public. Additionally, all ten theaters are fully wheelchair accessible with easy
5 navigation ramps from the lobby to the theaters. A reduced number of screens, changes
6 in seat types, or changes in the size of theaters, including ceiling heights, and decor
7 would destroy their continued operation as the premier destination of art and independent
8 films in the entire East Bay. The Cinemas have attained "destination" status in the
9 Downtown with an estimated 60% of patrons coming from surrounding Bay Area
10 communities and foreign countries.

11 309. In addition, the EIR, Staff Reports, ZAB and LPC commissioners failed to
12 consider the Secretary of the Interior's Standards for Rehabilitation. The Shattuck Hotel
13 Building was landmarked by the City in 1987, and it is eligible for the National Register
14 which automatically results in it being listed on the California Register of Historical
15 Resources. The movie theaters became a part of the Shattuck Hotel Building in 1988
16 and have operated in that location ever since. The Secretary of the Interior has issued
17 guidelines for the *rehabilitation* of historic buildings. The Secretary's website states:

18 *The Standards apply to historic buildings of all periods, styles, types, materials,*
19 *and sizes. They apply to both the exterior and the interior of historic buildings.*
20 *The Standards also encompass related landscape features and the building's*
21 *site and environment as well as attached, adjacent, or related new*
22 *construction."*

23 *Some of the guidelines for rehabilitation of an historic building include:*

24 *·A property shall be used for its historic purpose or be placed in a new use that*
25 *requires minimal change to the defining characteristics of the building and its site*
26 *and environment.*

27 *·The historic character of a property shall be retained and preserved. The removal of*
28 *historic materials or alteration of features and spaces that characterize a property*
shall be avoided.

1 ·Most properties change over time; those changes that have acquired historic
2 significance in their own right shall be retained and preserved.

3 ·Distinctive features, finishes, and construction techniques or examples of
4 craftsmanship that characterize a historic property shall be preserved.

5 ·Deteriorated historic features shall be repaired rather than replaced.

6 310. The Secretary of the Interior's Rehabilitation Standards have never even been
7 mentioned during the review process. New plans for the theaters have simply been
8 presented, not because the applicant wanted to change the plans, but because of pressure
9 from the public. These new plans were just accepted, but never discussed, analyzed or
10 questioned until September 30, 2015 when ZAB members decided they wouldn't question
11 the Project but would instead consider what form of agreement between developer, the
12 Shattuck Cinemas and the City would ensure that the Shattuck Cinemas remain in the
13 project. However, ZAB missed the point on two levels: (a) The size and mass of the
14 project should be considered on the basis of leaving the Shattuck Cinemas intact as they
15 currently exist, and (b) Any relationship agreement between the developer and the
16 Shattuck Cinemas must ensure not only the continued operation of the Cinemas but also
17 that they exist in the same number, size including ceiling height, retention of features
18 such as the lobby ceiling, murals, decor, etc. and, be fully wheelchair accessible.

19 311. Petitioner maintains that these details regarding retention of the theaters must
20 be in the EIR, and an integral part of the discussion by the LPC and ZAB. Further, that
21 discussion must be reflected in the mitigation measures and conditions attached to their
22 decisions regarding the SAP, Design Review Committee Summary and Use Permits
23 recommended by the ZAB.

24 312. Consideration of an alternative that would involve development and retention
25 of the Shattuck Cinemas as is and/or involving the Secretary of the Interiors Standards for
26 Rehabilitation with its consequent tax credit, never occurred.
27
28

1 **TWELFTH CAUSE OF ACTION**
2 **(CEQA VIOLATION: ABUSE OF DISCRETION, FAILURE TO ADHERE TO**
3 **BMC CHAPTER 23E.68 2010 MEASURE “R”)**
4

5 **Project proposed roof height Violates Measure “R”**

6 313. Petitioner incorporates all previous and subsequent paragraphs as if fully
7 set forth.

8 314. Berkeley Measure R and the DAP both reference 180 feet for the height of
9 Berkeley’s existing tallest downtown building. The Voter Handbook stated for the voters
10 that under the 2010 Measure R no building would be taller than existing buildings. The
11 tallest building in downtown Berkeley is the 14-story Great Western building, the
12 maximum height allowed. However, the tallest existing building, the Great Western, is
13 169.5 feet to the main roofline and 185.6 feet to the highest visible point of the utility
14 structure. Since the tallest downtown building is 169.3 feet to the roofline, the 2211
15 Harold Way plan is more than 10 feet taller than allowed under Measure R.

16 315. The Project is 180 feet to main roof with total height of 194 feet. The 194 foot
17 height does not include “large” trees planned for the rooftop terrace.

18 **THIRTEENTH CAUSE OF ACTION**
19 **(VIOLATION OF THE 1968 FAIR HOUSING ACT:**
20 **42 U. S. C. §3601 et seq.)**

21 316. Petitioner incorporates all previous and subsequent paragraphs as if fully
22 set forth.

23 317. The Project results in further segregated housing in Berkeley by not including
24 very low income to moderate income residents in the 302 unit building. On information
25 and belief, the monthly rent for units in this Project are believed to cost in the range of
26 \$3,200- \$7,000 per month. According to federal HUD guidelines, a tenant should pay no
27 more than 30% of his or her household income on rent. Therefore, the anticipated
28 eligibility to rent these units will require \$120,000 and higher in annual income. By

1 electing to pay a small, discounted ‘in lieu’ fee to build affordable housing elsewhere
2 long into the future, Respondent City is enabling the furtherance of disparity in housing
3 availability for persons of all economic and racial backgrounds. This policy, pattern and
4 practice has contributed to the reduction of persons of color residing in Berkeley, i.e. a
5 racially disparate impact. Such a disparate impact upon persons of color has been ruled
6 by the Supreme Court a violation of the 1968 Fair Housing Act, See, Texas Dept of
7 Housing v. Inclusive Communities Project, Inc. (June 25, 2015). The minimal
8 contributions to the “Affordable Housing Mitigation” are less than what is required to
9 provide housing for residents of all income backgrounds and family sizes.

10 318. In contrast to a disparate-treatment case, where a “plaintiff must establish that
11 the defendant had a discriminatory intent or motive,” a plaintiff bringing a disparate-
12 impact claim challenges practices that have a “disproportionately adverse effect on
13 minorities” and are otherwise unjustified by a legitimate rationale. Ricci v. DeStefano,
14 557 U. S. 557, 577 (2009) (internal quotation marks omitted). The Supreme Court has
15 determined that disparate-impact claims are cognizable.

16 **PRAYER FOR RELIEF**

17
18
19 In each of the respects enumerated above, Respondents have violated its duties
20 under law, abused its discretion, failed to proceed in the manner required by law, and
21 decided the matters complained of without the support of substantial evidence.
22 Accordingly, the certification of the EIR and the approval of the Project must be set
23 aside.

24 WHEREFORE, Petitioner prays for relief as follows:

- 25 1. For an alternative and peremptory writ of mandate, commanding Respondent:
 - 26 A. To set aside and vacate its certification of the EIR, Findings and Statement
27 of Overriding Considerations supporting the Project;
 - 28 B. To set aside and vacate any approvals for the Project based upon the EIR

1 and Findings and Statement of Overriding Considerations supporting the Project,
2 including, but not limited to, the BUSD side letter, applicant modifications Development
3 Agreement, Specific Plan, and General Plan Amendments; and

4 C. To prepare and certify a legally adequate EIR for the Project so that
5 Respondent will have a complete disclosure document before it, identify for the decision-
6 makers and public the potential significant impacts of the Project, and enable it to
7 formulate realistic and feasible alternatives and mitigation measures to avoid those
8 impacts;

9 2. For an order enjoining Respondent and Real Parties in Interest from taking any
10 action to construct any portion of the Project or to develop or alter the Project site in any
11 way that could result in a significant adverse impact on the environment unless and until
12 a lawful approval is obtained from Respondent after the preparation and consideration of
13 an adequate EIR;

14 3. For costs of the suit;

15 4. For reasonable attorneys' fees; and

16 5. For such other and further relief as the Court deems just and proper.

17 DATE: January 13, 2016

17 Respectfully Submitted,

18 Ruth Ann Kelly Hammargren

19 Petitioner Pro Per

20 By:

21
22
23
24 Verification of Petition for Writ of Mandate

25 Dated this 13th day of January, 2016.

26
27
28 _____
Ruth Ann Kelly Hammargren

Petitioner Pro Per

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VERIFICATION

I, Ruth Ann Kelly Hammargren, the Petitioner in this action. I have read the foregoing Petition for Writ of Mandate and know the contents thereof, and the same is true of my own knowledge.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 13th day of January 2016, in Berkeley, California.

Ruth Ann Kelly Hammargren