

City Council, City of Berkeley
2180 Milvia Street
Berkeley, CA 94704
council@berkeleyca.gov

[date]
Hand-delivered to City Clerk's Office
Emailed to

Dear City Council Members:

This is an appeal of the May 11, 2023 decision of the Zoning Adjustments Board ("ZAB") to issue a Use Permit for 3000 Shattuck, ZP#2022-00046 ("Project"), on all the grounds stated in the May 9, 2023 Objections ("Objections", copied below) provided to ZAB by several of us who are neighbors to the Project. The grounds are summarized here with further arguments following the ZAB meeting:

There can be no dispute that the City has failed to perform the required *cumulative impact* analysis. City Council must deny the Use Permit and direct the City to perform a proper CEQA analysis as required by law, including, but not limited to, the following.

1. Applicable Law

- State law SB330 expressly requires the City to comply with CEQA per Govt. Code Section 65589.5(e).
- CEQA requires an "Initial Study" per CEQA Guidelines ("Guidelines"), Title 14, California Code of Regulations, Sections 15063-15365.
- The purpose of the Initial Study is to determine whether there may be a significant environmental impact. Id. "Careful judgment [...] based on scientific and factual data" is required. Guidelines Section 15064(b)(1). Under Section 15064(b)(2), "[t]hresholds of significance, as defined in Section 15064(a), may assist lead agencies in determining whether a project may cause a significant impact. When using a threshold, the lead agency should briefly explain how compliance with the threshold means that the project's impacts are less than significant. *Compliance with the threshold does not relieve a lead agency of the obligation to consider substantial evidence indicating that the project's environmental effects may still be significant.*" (emphasis added)
- Under Guidelines Section 15065(a), the City is required to find that a project may have a significant effect on the environment and thereby require an Environmental Impact Report (EIR) to be prepared for the project "where there is substantial evidence, in light of the whole record, that any of the following conditions may occur: [...] (3) The project has possible environmental effects that are individually limited but cumulatively considerable. 'Cumulatively considerable' means that the *incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.*" (emphasis added)

- Under Guidelines Section 15064(c), the lead agency must notify and get input from the public as part of its determination whether to conduct an EIR. “In determining whether an effect will be adverse or beneficial, the lead agency shall consider the views held by members of the public in all areas affected as expressed in the whole record before the lead agency.”

2. Neither the 2018 Initial Study - Negative Declaration nor the January 2023 Addendum to Initial Study - Negative Declaration contains any analysis per above, i.e., there is *no analysis* of the Project in connection with other projects, past, current or future. Same for the City Consultant’s May 5, 2023 Supplemental Analysis (identifying “minor project revisions” without mention of cumulative impacts). And there is *no evidence* of consideration of views of the affected public.

3. The Objections by neighbors below identify fifteen (15) projects in the vicinity of the Project that are under development or in the pipeline in the City's planning department. See attached excel spreadsheet submitted with the Objections. The Objections include concerns about construction and traffic impacts in the dangerous Russell-Shattuck-Ashby corridors (including evidence of high crash rates), where there are five (5) projects, including the three (3) tallest at 9-10 stories, with by far the most units, within only one-two blocks.

4. The City Planner, the City's Consultant and ZAB members ignored the Objections below at the May 11, 2023 meeting, especially the fact of 15 projects in the vicinity. Collectively, the representatives wrongly stated that:

- a) it was the Objectors’ responsibility - and failure - to identify cumulative impacts regarding the projects;
- b) the Objectors asserted that an automatic finding of significant impact must be made; and,
- c) nothing further needed to be done to meet the requirements of CEQA with regard to other projects.

See transcript of meeting, timestamps:

- a) 21:32:41 to 21:35:29 (ZAB discussion with City Planner and CEQA Consultant referring to Objections below and failure of Objectors to identify specific impacts, suggesting for that reason that Objections may be ignored and there are no significant impacts anyway; the fact of 15 projects was ignored);
- b) 21:35:06 to 21:35:27 (Consultant confirms to ZAB that “threshold” to analyze cumulative impact was not met) -

"K. Green: YEAH, DOES REQUIRE COMMUTATIVE [SIC] IMPACT TO GET DISCUSSION BUT NOT IN THIS ONE."

c) 22:03:52 to 22:05:51 (Objectors' ignored effort to alert ZAB to requirements of law in light of foregoing misleading discussion);

d) 22:29:14 to 22:31:05 (Consultant falsely states that other projects have been acknowledged; no further analysis is necessary especially as no automatic finding of significant cumulative impact can be made);

e) 22:46:05 to 22:46:13 (ZAB member makes motion that passed under misinformed belief that the Project must be approved per state law):

"I AM MAKING A MOTION BECAUSE WE ARE REQUIRED TO APPROVE THIS PROJECT TONIGHT, OR AT LEAST THAT IS MY BELIEF BASED ON MY UNDERSTANDING OF STATE LAW AS IT CURRENTLY STANDS."

5. ZAB is misguided and has overlooked the law at risk to public health and safety by failing to conduct the required careful judgment analysis; this decision must be reversed.

6. The City Council has no recourse under the law but to deny Use Permit and remand to the City to conduct a legally compliant Initial Study under CEQA and direct the City to comply with public notice requirements under Guideline Section 15072, in the event it decides to make a Negative Declaration or a Mitigated Negative Declaration following the Initial Study.

A copy of this email has been provided to the City Clerk's Office.

Sincerely yours,
Larisa Cummings, 2913 Newbury St.
[other signatories]

----- Forwarded message -----

From: **Larisa Cummings** <pidicummings@gmail.com>

Date: Tue, May 9, 2023 at 4:08 PM

Subject: SUPPLEMENTAL OBJECTIONS TO 3000 SHATTUCK PROJECT PLANS, #ZP2022-00046, 5/11/23 ZAB MEETING

To: <zab@cityofberkeley.info>

Cc: Gong, Sharon <SGong@cityofberkeley.info>, Burns, Anne M
<ABurns@cityofberkeley.info>, <council@cityofberkeley.info>, Berkeley Mayor's Office
<mayor@cityofberkeley.info>

Dear ZAB members:

As neighbors to the proposed plans to develop 3000 Shattuck Avenue, we strenuously object to the project on numerous health and safety grounds, per applicable state law. Far from being merely obstructionist, we bring to your attention that the City is overlooking state laws that exist to protect public health and safety. Further, we are concerned about the obvious inequities at hand; clearly, this part of Berkeley is bearing the brunt of intensive multi-family housing development, whereas this kind of housing should be spread equitably throughout the city and its transit hubs.

We are asking the ZAB to deny issuance of Use Permit #ZP2022-0046 at the upcoming May 11, 2023 meeting until the concerns below are appropriately addressed:

1. The City's recommendation – that ZAB adopt the Addendum to the Initial Study/Negative Declaration and approve Use Permit #ZP2022-0046 pursuant to BMC Section 23.406.040 – is not in compliance with the California Environmental Quality Act (CEQA). To protect public health and safety, a subsequent Environmental Impact Review pursuant to CEQA is clearly required.

A. State law SB330 expressly requires the City to comply with CEQA per Govt. Code Section 65589.5(e).

The City's January 2023 Addendum to the 3000 Shattuck Avenue Project Initial Study - Negative Declaration largely fails to comply with its obligations under CEQA.

i. No Cumulative Impact Study Has Been Performed

Section 15355 of the State CEQA Guidelines defines a cumulative impact as the condition under which “two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts. (a) The individual effects may be changes resulting from a single project or a number of separate projects. (b) The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.” Title 14, California Code of Regulations, Section 15355. Further, Section 15130 explicitly requires a factual analysis. Section 15332 addresses in-fill development projects and requires a finding that “(d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.” Section 15065 lists mandatory findings of significant effect, which must be evaluated. In other words, the City is required to evaluate these potential impacts, including analysis of cumulative impacts of all closely related projects. Note that there are quite a number of closely related current projects.

In its January 2023 Addendum (pp. 11-12) to the 3000 Shattuck Avenue Project Initial Study - Negative Declaration, the City listed only four projects in the vicinity of 3000 Shattuck: 2650 Telegraph, 2801 Adeline, 2440 Shattuck, and Ashby BART. In its January Addendum, the City made no analysis of those sites or impacts, but rather simply listed them in its determination that “The existing environmental conditions on and around the project site are substantially the same under present conditions as those described in the 2018 Final IS-ND, with the exception of two relevant changes described below in Section 4.1.”

Addendum p. 11. Section 4.1 similarly makes no analysis of the sites or impacts, but simply lists the same four projects. However, a careful recent search of several sources has identified fifteen projects in the vicinity. No comprehensive listing by the City could be located, which makes it very difficult for the public to follow these developments. Note the following developments:

- Five (5) projects are very intensively situated in a one to two block radius. 3000 Shattuck and two more projects are *the tallest (9-10 stories) with the most units* of the 15 projects, in the vulnerable and dangerous Russell-Shattuck-Ashby corridor, and where the Russell Bike Boulevard traverses Shattuck. **None of them provide for onsite loading zones, or any planning for right-of-way improvements or features to facilitate safe loading in an age of intensive loading activity, e.g., ride-hailing, food and commercial deliveries, service vehicles, etc., which often double park.** For an example of the long-standing traffic hazards, note that the Shattuck/Ashby intersection is second only to San Pablo/Ashby intersection in the City's crash rate for the period from 2011 through 2022 - <https://tims.berkeley.edu/tools/gismap/>

- Four (4) projects surround these projects within another one to three block

radius (including where the Russell Bike Boulevard traverses Adeline),
- the remaining six (6) projects fall within the area covered by the January 2023 Addendum's original listing of four projects. See this appendix:

[2023 COB Multi-family Housing Projects - in/nr S. Berk.xlsx](#)

In summary, the City must fully comply with CEQA; the January 2023 Addendum has no analysis of cumulative impacts at all, nor does the 2018 Final Initial Study - Negative Declaration, regarding a much smaller design for 3000 Shattuck.

ii. Erroneous or Misleading Conclusions

In the January 2023 Addendum, Section 2, Project Description, two statements are inaccurate and misleading, overlooking adverse impacts on the surrounding community, including but not limited to, extra traffic congestion, noise, odors, etc. Although they pertain to the construction phase only, they need to be reconsidered or rewritten.

--Duration of construction, estimated to be 18 months to construct the five-story structure in the previously proposed project (see 2018 Final Initial Study - Negative Declaration cited in January 2023 Addendum), is estimated to be the *same length of time to build* out the revised building of ten-stories. This is highly unrealistic. Construction duration can be foreshortened somewhat, by accelerating the work, but not without incurring large amounts of additional costs, raising the overall project budget far beyond levels of competitive pricing. Addendum p. 2 and p. 3, Table 1.

--Foundation work for the ten-story building is similarly projected to be comparable to the foundation's scope for the five-story building. It might be similar in terms of foundation type (spread footings, most likely) but with a

doubling of the size of the structure, a stronger type of foundation might be necessitated (drilled pier-and-grade beam) at considerable additional cost. Addendum p. 2. This increases the construction costs and duration, and is dependent on soil-types, and access at the site.

While statements of this type may not devalue the January 2023 Addendum as a whole, they reflect a very casual attitude about construction realities, and as such, raise questions about the accuracy of other assertions in the study.

We ask the ZAB either to deny the issuance of a Use Permit, or to delay issuance of such Use Permit until these and all other related concerns are appropriately addressed by the City, as required by applicable state law. Thank you for your due consideration.

Sincerely yours,

Larisa Cummings (2913 Newbury Street),
Les Shipnuck, retired architect, construction manager (2071 Emerson Street),
Janis Ching (1937 Oregon Street),
Reed Dillingham (2903 Newbury Street),
Paul Dillingham (2927 Newbury Street)