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6 Attorney for Petitioner
7 Elmwood Neighborhood Association

**ENDORSED
FILED
ALAMEDA COUNTY**

APR 28 2014

CLERK OF THE SUPERIOR COURT
By Alex Moyle

8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF ALAMEDA**

10 ELMWOOD NEIGHBORHOOD
11 ASSOCIATION, an unincorporated association,

12 Petitioner,

13 vs.

14 CITY OF BERKELEY, a California charter city;
15 BERKELEY CITY COUNCIL; and DOES 1-20,

16 Respondents

17 JOHN PALUSKA; BELT AND SUSPENDERS,
18 LLC; and DOES 21-40,

19 Real Parties in Interest

No. **RG 14722983**

PETITION FOR PEREMPTORY WRIT OF
MANDATE

[C.C.P. §1094.5; Publ. Resources Code
§21168]
Action under the California Environmental
Quality Act (CEQA)

20 As causes of action against Respondents and Defendants CITY OF BERKELEY,
21 BERKELEY CITY COUNCIL; and DOES 1-20, Petitioner ELMWOOD NEIGHBORHOOD
22 ASSOCIATION alleges as follows:

23 **INTRODUCTION**

24 1. This action is brought by Petitioner ELMWOOD NEIGHBORHOOD ASSOCIATION.
25 (hereinafter, "PETITIONER") to challenge approvals by Respondents and Defendants CITY OF
26 BERKELEY, BERKELEY CITY COUNCIL; and DOES 1-20 (hereinafter, "RESPONDENTS")
27 for the 2635 Ashby Avenue Project (hereinafter, "Project").

1 2. PETITIONER contends that RESPONDENTS’ approvals for the Project violate
2 provisions of the California Environmental Quality Act (“CEQA”), as well of provisions of the
3 Berkeley Zoning Ordinance, which violations will be described more fully below.

4 3. PETITIONER asks the Court to find that RESPONDENTS' action in granting approval
5 for the Project and its environmental review was a violation of CEQA and of the Berkeley
6 Zoning Ordinance and an abuse of discretion. PETITIONER seeks a Writ of Mandate under
7 C.C.P. §§1094.5 ordering RESPONDENTS to vacate and rescind their determinations of March
8 25, 2014 approving the Project and its environmental review. PETITIONER also seeks
9 injunctive relief to prevent RESPONDENTS and Real Parties in Interest JOHN PALUSKA, and
10 BELT AND SUSPENDERS, LLC, (hereinafter, collectively, “RPI”) from taking any further
11 actions in support of the Project as approved. Finally, PETITIONER seeks recovery of costs and
12 attorneys' fees necessary for the prosecution of this action in the public interest.

13 **PARTIES**

14 4. Petitioner ELMWOOD NEIGHBORHOOD ASSOCIATION is an unincorporated
15 association made up of residents and merchants of the Elmwood District of Berkeley who share
16 an interest in maintaining the livability of the Elmwood District. PETITIONER exists for the
17 purpose of protecting the livability and economic health of the Elmwood District, including
18 specifically the beneficial environment that currently exists in that district. It and Its members
19 are directly and beneficially interested in preserving the current livable environment of the
20 Elmwood District and its vicinity and protecting them from adverse impacts.

21 5. PETITIONER also has a direct and beneficial interest in seeking RESPONDENTS’
22 compliance with the requirements of CEQA and the CITY OF BERKELEY’s laws.

23 6. Respondent and Defendant CITY OF BERKELEY (“CITY”) is a municipal corporation
24 and charter city within Alameda County. CITY is responsible for regulating and controlling land
25 use and development in all parts of the city, including responsibility for complying with the
26 provisions of CEQA and the CITY’s duly adopted laws, including specifically its zoning
27 ordinance.

1 7. Respondent and Defendant BERKELEY CITY COUNCIL (“COUNCIL”) is the duly
2 elected governing body for the CITY under the state constitution and statutes and the Berkeley
3 Municipal Charter. The COUNCIL was responsible for granting final approvals for the Project
4 and its associated environmental review.

5 8. The true names and capacities of DOES 1-20 and are unknown to PETITIONER at this
6 time; however PETITIONER alleges on information and belief that each party named as DOE is
7 responsible for the acts and omissions of each of the other respondents and defendants, or has
8 some interest in the subject matter of this action. Therefore PETITIONER sues such Parties by
9 such fictitious names, and will ask leave of the Court to amend this Petition and Complaint by
10 inserting the true names and capacities of said Does when ascertained.

11 9. PETITIONER is informed and believes, and on that basis alleges, that Real Party in
12 Interest JOHN PALUSKA is an owner of Real Party in Interest BELT AND SUSPENDERS,
13 LLC, which is a California limited liability company. PETITIONER is further informed and
14 believes and on that basis alleges that JOHN PALUSKA and BELT AND SUSPENDERS, LLC
15 are the applicants for the CITY approvals at issue herein.

16 10. PETITIONER does not know the true names and capacities, whether individual,
17 corporate, associate or otherwise, of real parties in interest DOES 21-40 inclusive, and therefore
18 sues said real parties in interest under fictitious names. PETITIONER will amend the petition
19 and complaint to show their true names and capacities when they have been ascertained. Each of
20 the Doe real parties in interest either is the agent and/or employee of each other real party in
21 interest and performed acts that form the basis for this action that were within the cause and
22 scope of such agency and employment, or has some interest in the subject matter of this action.

23 **PROJECT DESCRIPTION AND HISTORY**

24 11. The 2635 Ashby Avenue Project whose approval is the subject of this action is a proposal
25 for a 5,282 sq. ft. full-service restaurant to be located at 2635 Ashby Avenue in the City of
26 Berkeley.

1 12. The Project site is designated as Neighborhood Commercial in the Berkeley General Plan
2 land use element, and is zoned C-E, Elmwood Commercial.

3 13. The current project application was submitted to the CITY on or about July 17, 2013. On
4 or about August 16, 2013, the project application was deemed complete.

5 14. On or about November 20, 2013, the CITY published a notice of public hearing before
6 the Zoning Adjustment Board (“ZAB”) and intent to adopt a negative declaration (“ND”) for the
7 Project. On or about that same date, the CITY released an initial study and proposed ND for the
8 Project for a thirty day public review and comment period.

9 15. On or about December 12, 2013 the ZAB held a public hearing on the Project and its
10 proposed ND. PETITIONER, through its members, and other members of the public submitted
11 oral and written testimony opposing the ND and the Project and raising issues about the Project’s
12 potentially significant adverse environmental and community impacts. Despite this opposition,
13 on or about that same date, the ZAB voted to approve the Project and its associated ND.

14 16. On or about January 2, 2014 and within the required time limits, Robert Carter and Stuart
15 and Louise Beattie, on behalf of PETITIONER, and joined by numerous other Elmwood
16 residents, filed an appeal of the ZAB’s decisions approving the Project and its ND.

17 17. On or about March 25, 2014 the COUNCIL heard the appeal. Petitioner, through its
18 legal counsel and its members, as well as other members of the public again submitted written
19 evidence and oral testimony in opposition to the proposed approvals, including specifically
20 raising objection to the Project’s violations of CEQA and of the CITY’s zoning ordinance as set
21 forth herein.

22 18. On or about the above same date the COUNCIL voted to deny the appeal and approve the
23 Project, based on CITY staff’s proposed findings.

24 19. Based on information and belief, Petitioner alleges that on or about March 28, 2014 the
25 CITY filed a Notice of Determination for the Project with the Alameda County Clerk’s office.
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27

GENERAL ALLEGATIONS

1 20. PETITIONER has a direct and beneficial interest in seeking the RESPONDENTS'
2 compliance with CEQA and the CITY's zoning ordinance. That interest will be directly and
3 adversely affected by RESPONDENTS' approval of the project in that the project violates
4 provisions of law as set forth in this petition and complaint.

5 21. PETITIONER and its members, as well as other interested groups and individuals
6 submitted both oral testimony and written evidence objecting to the Project. PETITIONER and
7 others raised each of the legal deficiencies asserted in this petition prior to the close of the City
8 Council's hearing of the appeal of Project.

9 22. PETITIONER has complied with Public Resources Code §21167.5 by mailing to
10 RESPONDENTS, prior to the filing of the action, notice of the commencement of this action. A
11 copy of that notice and proof of service therefor are attached hereto as Exhibit A.

12 23. PETITIONER has complied with Public Resources Code §21167.7 by furnishing a copy
13 of this petition and complaint to the Attorney General. A copy of the Notice to the Attorney
14 General and proof of service are attached hereto as Exhibit B.

15 24. PETITIONER has no plain, speedy or adequate remedy in the ordinary course of law
16 unless the court grants the requested writ of mandate to require RESPONDENTS to comply with
17 their duties and set aside the approval of the Project. In the absence of such remedies,
18 RESPONDENTS' approvals will remain in effect in violation of CEQA and of the CITY's
19 zoning ordinance.

20 25. If RESPONDENTS and REAL PARTIES IN INTEREST are not enjoined from
21 implementing the Project, and from undertaking acts in furtherance thereof, PETITIONER, its
22 members, and the public will suffer irreparable harm for which there is no adequate remedy at
23 law in that REAL PARTIES IN INTEREST will begin to develop the project in violation of the
24 CEQA and the CITY's zoning ordinance, with resulting significant and unmitigated impacts as
25 described herein. In addition, the Project's violations of law will have been allowed to stand in
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1 derogation of those laws and in violation of RESPONDENTS' duties to obey and enforce those
2 laws.

3 **CHARGING ALLEGATIONS**

4 First Cause of Action – Approval of a project inconsistent with CITY's zoning ordinance and
5 with findings not supported by substantial evidence.

6 26. PETITIONER hereby realleges and incorporate by reference paragraphs 1 through 25
7 herein as if fully set forth.

8 27. Unless otherwise required and provided for by law, the City of Berkeley Zoning
9 Ordinance governs land use approvals within the City of Berkeley.

10 28. The COUNCIL has a duty to comply with the requirements of the City of Berkeley
11 Zoning Ordinance in approving land use decisions.

12 29. In approving the Project, RESPONDENTS abused their discretion and/or failed to
13 perform an act which the law specially enjoins in the following respects:

14 a. Under the Project site's current CE zoning, RESPONDENTS are required to make
15 findings, based on substantial evidence, that the proposed use will:

16 1) Under the circumstances of the particular case existing at the time at which the
17 application is granted, not be detrimental to the health, safety, peace, morals, comfort or general
18 welfare of persons residing or working in the area or neighborhood of such proposed use or be
19 detrimental or injurious to property and improvements of the adjacent properties, the
20 surrounding area or neighborhood or to the general welfare of the City.

21 2) Be compatible in design and character with the commercial District and the
22 adjacent residential neighborhoods;

23 3) Encourage and maintain the present street frontage and pedestrian orientation of
24 the District;

25 4) Not generate traffic and parking demand beyond the capacity of the commercial
26 District or significantly increase impacts on adjacent residential neighborhoods;

27 5) Not generate objectionable odors nor excessive levels of noise.

1 RESPONDENTS, in approving the Project, purported to make these required findings.

2 However, in violation of the zoning ordinance, the findings were not supported by evidence in
3 the record, which evidence, in fact, indicated that the required findings could not be made.

4 Under those circumstances, it was improper and a violation of the zoning ordinance to approve
5 the Project.

6 b. Under the CE zoning, “On-premises service or consumption of alcoholic beverages shall
7 be permitted only as incidental consumption with meals in food service establishments.” (Ord.
8 7191-NS §7, 2011; Ord. 6478-NS §4 (part), 1999 [emphasis added].) In violation of this
9 provision, the Project, as approved, includes a free-standing bar area and does not restrict the
10 bar’s use by patrons to being incidental to food service with meals, but instead allows bar service
11 to customers who only seek alcoholic beverages. Further, the bar will serve “craft cocktails”
12 which are intended to attract customers for their own sake and not incidental to providing food
13 service as meals to those customers.

14 Second Cause of Action - Inadequate environmental review, Approval of a project based on a
15 negative declaration when an Environmental Impact Report was required; Findings not
16 supported by substantial evidence in the record; Violation of CEQA and CEQA Guidelines.

17 30. PETITIONER hereby realleges and incorporates by reference the allegations contained in
18 paragraphs 1-30 inclusive.

19 31. At all times pertaining to this action, the CITY has been under a duty to comply with the
20 requirements of CEQA and the CEQA Guidelines.

21 32. The Project is a project subject to CEQA within the meaning of Public Resources Code
22 sections 21065 and 21080.

23 33. The CITY was Lead Agency for the consideration of the Project within the meaning of
24 Public Resources Code section 21067.

25 34. The ND for the Project was approved in violation of CEQA and the CEQA Guidelines in
26 that there was substantial evidence in the record before RESPONDENTS that supported a fair
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1 argument that the project, as approved, would have potentially significant environmental
2 impacts, including the following:

3 a) The ND asserted that any increase in traffic in the Project vicinity due to the
4 Project would not result in any significant increase in traffic impacts. However, substantial
5 evidence in the record showed that traffic increases caused by the Project, exacerbated by the
6 existing parking deficiency in the immediate project vicinity and the expected presence of a
7 loading zone on Ashby Avenue in front of the Project would result in significant increases in
8 traffic congestion in the Project vicinity, as well as significant impacts on pedestrian and bicycle
9 safety that should have been analyzed in an Environmental Impact Report (“EIR”);

10 b) The ND asserted that the Project would not result in any parking deficiency in the
11 restaurant vicinity when substantial evidence in the record showed that the increased parking
12 demand caused by the Project would result in a parking deficiency in the restaurant vicinity and
13 more specifically on residential streets in the Project vicinity. Not only would this be an impact
14 in itself, but it would cause secondary impacts, including traffic congestion, the presence of
15 illegally parked vehicles, and pedestrian and bicycle safety impacts;

16 c) The approval of alcoholic beverage consumption, including specifically the
17 presence of a free-standing bar at which consumption of “craft cocktails” would be emphasized,
18 along with approval of late-hour operations means that there will be inebriated patrons heading
19 back to their cars through the neighboring residential streets during the late night and early
20 morning hours. These patrons can be expected to engage in loud conversations, creating excess
21 noise for such late hours. This potentially significant noise impact should have been addressed
22 in an EIR.

23 35. In addition, the Negative Declaration was improper because it “piecemealed” the Project
24 by failing to include in its consideration of potential impacts the impacts of placing a loading
25 zone for the Project on Ashby Avenue, even though said loading zone was required for the
26 Project and its potential impacts could have been identified and analyzed.


1 36. For all the above reasons, the approval of the ND for the Project and the Project's
2 associated environmental findings were improper and in violation of CEQA and the CEQA
3 Guidelines. RESPONDENTS' approval of a ND for the Project and approval of the Project were
4 therefore abuses of discretion in violation of CEQA.

5
6 **PRAAYER FOR RELIEF**

7 **WHEREFORE**, PETITIONER prays for relief as follows:

- 8 1. For this Court's peremptory writ of mandate directing RESPONDENTS to set aside their
9 approvals for the 2635 Ashby Avenue Project and its accompanying negative declaration and
10 remanding the same to the CITY for its reconsideration.
- 11 2. For this Court's peremptory writ of mandate directing RESPONDENTS to comply with
12 the provisions of CEQA and the Berkeley Zoning Ordinance in their reconsideration of the
13 Project and its environmental review.
- 14 3. For this Court's stay, temporary restraining order, preliminary injunction and permanent
15 injunction enjoining RESPONDENTS and RPI, their agents, employees, representatives, and all
16 persons acting in concert or participating with them, from taking any action to enforce, carry out,
17 or implement the 2635 Ashby Ave. Project approvals, or issuing any additional approvals,
18 contracts, or permits based on those approvals.
- 19 4. For an award of attorneys' fees under Code of Civil Procedure section 1021.5 or other
20 applicable basis;
- 21 5. For costs of suit incurred herein; and
- 22 6. For such other relief as the court deems just and proper.

23 Dated: April 26, 2014

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25 Stuart M. Flashman
26 Attorney for Petitioner Elmwood
27 Neighborhood Association

28 **VERIFICATION**

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I, Robert Carter, am a member of the Elmwood Neighborhood Association, which is the petitioner in the above petition and have been authorized by it to verify this petition on its behalf. I have read the foregoing Petition and am familiar with the matters alleged therein. All facts alleged in this Petition are true of my own personal knowledge except as to facts that are alleged on information and belief, and as to them I am informed and believe they are true. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Verification was executed on April 26, 2014 at Oakland, California.

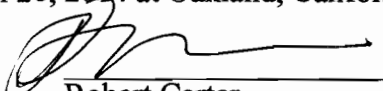

Robert Carter

Exhibit A

Law Offices of
Stuart M. Flashman
5626 Ocean View Drive
Oakland, CA 94618-1533
(510) 652-5373 (voice & FAX)
e-mail: stufash@aol.com

April 23, 2014

Berkeley City Clerk
Berkeley City Hall
2180 Milvia Street
Berkeley, CA 94704

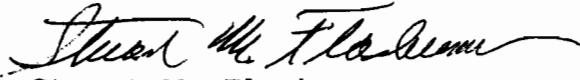
RE: Notice of Intent to Initiate Litigation (2635 Ashby Avenue Project).

To the City Clerk,

Please take notice that the the Elmwood Neighborhood Association intends to file suit against the City of Berkeley ("City") and the Berkeley City Council challenging the City's approval of the above-referenced 2635 Ashby Avenue Project and its associated environmental review. The lawsuit will allege violations of the California Environmental Quality Act and the Berkeley Zoning Ordinance in connection with those approvals.

Please have the City contact me immediately if there are questions or if the City wishes to discuss settlement of the issues involved.

Most sincerely,


Stuart M. Flashman

cc: City Manager
City Attorney

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the within above titled action. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

On April 23, 2014, I served the within NOTICE OF INTENT TO INITIATE LITIGATION on the party listed below by placing a true copy thereof enclosed in a sealed envelope with first class postage thereon fully prepaid, in a United States Postal Service mailbox at Oakland, California, addressed as follows:

Berkeley City Clerk
Berkeley City Hall
2180 Milvia Street
Berkeley, CA 94704

I, Stuart M. Flashman, hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on April 23, 2014.



Stuart M. Flashman

Exhibit B

1 Stuart M. Flashman (State Bar #148396)
2 5626 Ocean View Drive
3 Oakland, CA 94618-1533
4 Telephone (510) 652-5373 (voice & fax)
5 e-mail: stu@stufdash.com

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8 Attorney for Petitioner
9 Elmwood Neighborhood Association

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13 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **IN AND FOR THE COUNTY OF ALAMEDA**

15 ELMWOOD NEIGHBORHOOD
16 ASSOCIATION, an unincorporated association,

17 Petitioner,

18 vs.

19 CITY OF BERKELEY, a California charter city;
20 BERKELEY CITY COUNCIL; and DOES 1-20,

21 Respondents

22 JOHN PALUSKA; BELT AND SUSPENDERS,
23 LLC; JOHN GORDON; and DOES 21-40,

24 Real Parties in Interest

No.

NOTICE OF FILING OF LEGAL ACTION

Code of Civil Procedure §388; Publ.
Resources Code §21167.7]

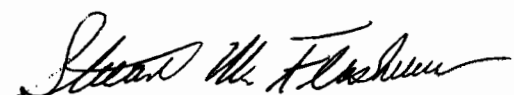
25 TO THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA:

26 PLEASE TAKE NOTICE under Code of Civil Procedure section 388 that, on April 28,
27 2014, Petitioner ELMWOOD NEIGHBORHOOD ASSOCIATION filed a petition for writ of
28 mandate against Respondents and Defendants CITY OF BERKELEY and the BERKELEY
29 CITY COUNCIL in Alameda County Superior Court. The petition alleges that Respondents
30 violated the provisions of the California Environmental Quality Act (CEQA) and provisions of
the City of Berkeley Zoning Ordinance in approving the 26 Project. A copy of the petition is
attached hereto for your reference.

Please provide a letter acknowledging receipt of this notice.

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DATE: April 28, 2014


Stuart M. Flashman
Attorney for Petitioner Elmwood
Neighborhood Association

PROOF OF SERVICE BY MAIL


I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the within above titled action. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

On April 28, 2014, I served the within NOTICE OF FILING OF LEGAL ACTION on the party listed below by placing a true copy thereof enclosed in a sealed envelope with first class postage thereon fully prepaid, in a United States Postal Service mailbox at Oakland, California, addressed as follows:

Office of the Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550

I, Stuart M. Flashman, hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on April 28, 2014.

A handwritten signature in black ink, appearing to read "Stuart M. Flashman", with a long horizontal flourish extending to the right.

Stuart M. Flashman