



MICHAEL K. BROWN
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December 8, 2017

Via Email

Chancellor@berkeley.edu

Carol T. Christ
Office of the Chancellor
University of California, Berkeley
200 California Hall #1500
Berkeley, CA 94720-1500

**RE: Berkeley Way West – Non-Educational Building Use
1919 Shattuck, Berkeley, California (the “Property”)**

Dear Ms. Christ:

We represent Berkeley Way LLC (our “Client”), the owner of the commercial building located at 2120 Berkeley Way, Berkeley (“2120”), which is adjacent to the University’s new office building under construction at 1919 Shattuck Avenue, Berkeley (“Berkeley Way West”). As outlined in my letter dated December 4, 2017, which I copied to you (for convenience, attached here), my client objects to the University’s efforts to lease Berkeley Way West to private businesses, without a City Use Permit, without compliance with City land use and building requirements, and in contravention of the University’s constitutional exemption from local land use regulation.

The University constructed Berkeley Way West without obtaining approvals from the City of Berkeley, on the basis that the University is conditionally exempted from the City’s land use regulations. Berkeley Way West’s use was represented by the University to be limited to University educational purposes, which would allow the university to stay within its constitutional prerogatives as described by the Court of Appeal in Regents of University of California v. Aubry, 42 Cal.App.4th 579 (1996). The University’s educational purpose is understood to be limited to its efforts to ensure “access to qualified students who otherwise could not attend, and securing the services of outstanding faculty and staff who otherwise might decline to accept or continue employment....” *Id.* at 590.

By offering and leasing space to private businesses with no connection to the University's educational purpose, the University is or will be in violation of its Article 9 responsibilities and such private use of Berkeley Way West would be in violation of California law. See, for example, Bame v. City of Del Mar (2001) 86 Cal.App.4th 1346, where the Court of Appeal found that a "District's leasing of its property to private entities for consumer events is solely a revenue-producing or proprietary activity not within its governmental functions." (*Id.* at 1357)

The leasing of Berkeley Way West for private businesses, simply as a revenue-producing or proprietary activity for the University unrelated to its educational charter, is not exempt from compliance with the City of Berkeley Zoning requirements and ordinances, including requirements for Use Permits and similar approvals. Without those land use approvals, the University cannot use Berkeley Way West for non-educational purposes.

If it persists in leasing Berkeley Way West to private businesses, without City land use approvals in place, the University will cause damage to our Client, as the University will be competing for tenants. Our client was surprised recently by a potential tenant that broke off lease negotiations upon learning that the University was offering office space at Berkeley Way West.

Under California law, if University persists in its wrongful conduct which interferes with our Client's prospective business opportunities, the University will be legally responsible for our Client's damages pursuant to the tort of interference.

We ask that the University confirm it will not use or lease space at Berkeley Way West for anything outside of the University's educational purposes for which it receives special protections under the California Constitution. Please advise your real estate leasing agents accordingly.

Very truly yours,

BROWN, GEE & WENGER



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MKB/dj

cc: Sam Swam (sam.swan@am.jll.com)
Kristi Childers (kristi.childers@am.jll.com)



MICHAEL K. BROWN
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December 4, 2017

Via Email

manager@cityofberkeley.info

Dee Williams-Ridley
City Manager, City of Berkeley
2180 Milvia Street
Berkeley, CA 94704

RE: Berkeley Way West – Non-Educational Building Use
1919 Shattuck, Berkeley, California (“Property”)

Dear Ms. Williams-Ridley:

We represent Berkeley Way LLC (our “Client”), the owner of the commercial building located at 2120 Berkeley Way, Berkeley (“2120”). Currently, the University of California (“University”) is constructing what the University had described as an educational office building located at 1919 Shattuck Avenue, Berkeley and bounded by University, Oxford and Berkeley Way (“Berkeley Way West”). However, we have learned that the University seeks to expand the use of Berkeley Way West without regard to its educational charter and has offered both retail and office spaces for lease to private businesses.¹

The University’s current efforts to lease its office and retail space to private businesses is inconsistent with the University’s exemption from local regulation provided by Article 9, Section 9, of the California Constitution. Our Client objects to any private business use of Berkeley Way West given the constitutional limits that require University property built using its own discretion to exclusively serve educational purposes.

To this end, we request confirmation that the City of Berkeley (“City”) will either (1) limit the use of Berkeley Way West solely for the University’s educational purposes or (2) alternatively, deny a certificate of occupancy and other required legal permissions until the University processes an application and appropriate permits so that Berkeley Way West meets all of the same planning and building requirements that have been imposed on all privately used commercial buildings within the City’s land use control.

In Regents of University of California v. Aubry, 42 Cal.App.4th 579 (1996), the California Court of Appeal described the University’s educational purpose as “ensuring access to

¹ The University has retained private real estate brokerage firms to advertise office and retail space in Berkeley Way West, and listings are found on LoopNet and other online sites. The University itself, on the webpage of the Office of the Vice Chancellor of Finance, is advertising the building for leasing to private tenants.

qualified students who otherwise could not attend, and securing the services of outstanding faculty and staff who otherwise might decline to accept or continue employment....” It is for this reason, and this reason only, that the California Constitution exempted the University from certain local land use controls. Though “the City’s power to restrict the University’s use of its property in Berkeley is limited,” as “the University of California is not subject to local regulations with regard to its use or management of the property held by Regents in public trust,” such privilege does not apply where the property owned or leased does not serve an educational purpose. Friberg v. Bates, No. A118041, 2008 WL 4643102 (Oct. 21, 2008) (citing Regents of University of California v. City of Santa Monica, 77 Cal.App.3d 130, 136-37 (1978)).

The court in Regents of University of California v. City of Santa Monica held that “in view of the virtually plenary power of the regents of the University of California in the regulation of affairs relating to the university and the use of property owned or leased by it for educational purposes, the regents, in constructing improvements solely for educational purposes, are exempt from local building codes and zoning regulations and are also exempt from payment of local permit and inspection fees.” To the contrary, if the use of Berkeley Way West is not going to be limited solely for educational purposes, the building may not be used or occupied without confirmation that it is in full compliance with the City’s planning, zoning and building codes and regulations.

Very truly yours,

BROWN, GEE & WENGER



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