

WEST BERKELEY ARTISANS & INDUSTRIAL COMPANIES WEBAIC

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**To: Berkeley Board of Adjustments members,
Re: appeal of Administrative Use Permit #ZP2019-0090 for 2600 Tenth St:**

The West Berkeley Artisans & Industrial Companies Association (WEBAIC) **supports the appeal** of the City of Berkeley Zoning Officer's decision to approve Administrative Use Permit #ZP2019-0090 to change the use of four existing tenant spaces on the first and second floors at 2600 Tenth St. totaling 20,367 square feet, from media production to a research and development use.

WEBAIC contends that Wareham Corporation was erroneously given change of use permits from media to research and development on these spaces because:

1.) These spaces are, and have been, "Protected Non-Industrial" arts studios as defined in the Zoning Ordinance Table 23.206-8, Section 23.206.050 C that can not legally be converted to non-protected uses without creation of equivalent replacement space as required by BMC section 23.206.050 C. 4 (a). **See 1. for details below.**

(a) In response to 2008 Wareham Use Permit requests at 2600 Tenth St. two separate 2008 ZAB Planning Staff reports staff and Wareham Corporation statements in 3 separate places definitively define the spaces now at issue as "existing protected uses", i.e. "To support the operation's long term success, over the years the owner's have invested in very specialized tenant improvements, including screening rooms and award-winning recording and mixing studios, which are "protected uses" in the MULI district." – from FEBRUARY 14, 2008 Staff Report - 2600 Tenth Street Variance #07-10000132 to operate a child care center for children of Pixar employees. See 1.(a) below.

Present staff **can not** remove a determination that previous staff has made that these spaces are "protected uses" when nothing has changed in the BMC that would support such a re-determination.

2. Evidence that the spaces at issue were in use as protected arts uses prior to the determinate date of July 6, 1989. See 2. (a) below.

3. Use Permit #ZP2019-0090 Inconsistent with West Berkeley Plan Goals and Policies:

Allowing the conversion of these spaces from protected Arts Uses to research and development violates Goals and Policies of the West Berkeley Plan specifically intended to protect and encourage Arts uses, arts employment, and the cultural enrichment that arts activities bring to the City and its citizens. The Plan specifically seeks to "protect arts and crafts uses from displacement" while strongly identifying Research and Development as a use that - unlike the Arts - is "strongly supported by the market" and can easily displace arts and industrial uses if they're not protected or protections are not enforced. See 3.(a) below.

4. The West Berkeley Plan's identifies R&D uses as "supported by the market", as opposed to industrial and arts uses, thus clarifying why the "protected uses" provisions were installed into the West Berkeley Plan and the zoning. See 4. (a) below.

5. Creation of the Arts Protections in the West Berkeley Plan and the BMC. See 5 (a) below.

Corroborating information for the above contentions are found in the West Berkeley Plan, the Berkeley Municipal Code, the spaces' historical use records, public and Planning staff documents:

1. Berkeley Municipal Code evidence that the spaces are "Protected Non-Industrial Uses."

Staff contention that spaces at issue are not "protected uses.":

In the ZAB Staff Report for Board Action January 13, 2022, under IV. Community Discussion - A. Neighbor/Community Concerns, staff writes: "Staff determined that the existing media production use does not meet the definition of any protected use listed in Section 23E.80.040 of the Zoning Ordinance. Under V. - Appeal Issues and Analysis, staff writes that "Media production and office uses (are) allowed in the zone but are not included in the list of 'protected' uses, therefore the special provisions related to changes of use from a protected use to any other use do not apply to this project."

WEBAIC rebuttal to staff contention. The spaces at issue are absolutely "protected uses.":

Section 23.206.050 C. addresses and defines **Protected Non-Industrial Uses** in the MULI. In support of their contention staff posts **Table 23.206-8** from **Section 23.206.050 C.** showing "Art/Craft Studio" as a protected use:

- Category 1 - **Art/Craft Studio**, and
Category 2 – 4). Fine arts performance, instruction and rehearsal studios (dance, music, theater)
5). Theaters, stage performance, but excluding motion picture theaters

While referring to this table to prove that the existing uses (or any arts/crafts occupations) are not listed as protected, staff failed to refer to BMC Chapter 23.502 GLOSSARY, 23.502.020, Defined terms, to determine what ARE the activities taking place in an Art/Craft Studio that define it as "protected" under the Zoning's Arts Protections.

In the BMC Glossary, under "Defined terms" is found: 22. *Art/Craft Studio*: "An establishment engaged in the creation of art or crafts that requires artistic skill. Examples of individuals typically engaged in this work include ...photographers/**filmmakers**,..**video artists**...and other makers of art and crafts that the Zoning Officer determines to be consistent with this definition."

It is WEBAIC's contention that staff did not refer to the Glossary of Defined Terms in their Use Permit determination, and therefore did not understand that the consistent historical uses of these spaces absolutely deems them as "protected uses."

Clearly, "filmmakers" and "video artists" occupying an Arts Studio qualify it as what the BMC defines as "Protected Non-Industrial Space" which **can not** be converted, except without complying with the C.4 (a) Findings provision of **23.206.050 C. 2. Permit Required for Change of Use**: "To approve a permit required by Table 23.206-9, the review authority must find that space occupied by the existing non-industrial protected use will be replaced with a comparable space in the West Berkeley Plan area, which is reserved for use by any protected use in the same category."

An additional requirement for a studio to be deemed a “protected use” is found here:

23.206.050 - Protected Uses.,1. Protected Non-Industrial Uses Defined further clarifies that "A use in the MU-LI...district listed in **Table 23.206-8** is classified as a protected non-industrial use, provided the use: (a) Was legally established as of July 6, 1989;

It is clear in the public and COB records (see below) that these protected uses were established as early as 1971, clearly well before the cut-off date of July 6,1989. Therefore, the spaces at issue ARE “Non-Industrial protected use” space.

WEBAIC Conclusion: Since the studios under discussion were "legally established as of July 6, 1989" and were significantly being used by "filmmakers" and "video artists" (including sound artists working on film and video projects), WEBAIC believes these studios unquestionably fall under BMC Section 23.206.050 C. - **Protected Non-Industrial Uses in the MULI**, and therefore **can not be converted to a non-protected use** without triggering the replacement requirement found in the C.4 (a) Findings provision of **23.206.050 C. 2. Permit Required for Change of Use:**

1.(a) Planning Staff’s 2008 definitive determination that the spaces at issue are “protected uses.”

In 2008 Wareham Corporation applied for a variance to operate a child care center at 2600 Tenth St. The following is from two staff reports on this variance request that define the existing spaces at issue as “protected uses.”:

Zoning Adjustments Board 2600 Tenth Street Variance Request #07-10000132 to operate a child care center for children of Pixar employees: Attachment 1 - Findings and Conditions - VARIANCE FINDINGS:

“D. The facility houses over 40 different businesses and organizations that contribute to an interactive arts community. To support the operation’s long term success, over the years the owner’s have invested in very specialized tenant improvements, including screening rooms and award-winning recording and mixing studios, **which are “protected uses” in the MULI district.**”

GENERAL NON-DETRIMENT FINDING

G. The MULI district identifies child care centers as “protected uses” and the West Berkeley Plan and General Plan promote a mix of uses.

F. The applicant could theoretically choose to convert existing recording studios or screening rooms to a child care center with an administrative use permit because the MULI District **allows the conversion of one protected use to another** by the granting of an administrative use permit.

Z O N I N G A D J U S T M E N T S B O A R D Staff Report - FOR BOARD ACTION
FEBRUARY 14, 2008 2600 Tenth Street Variance #07-10000132

“Finally, the MULI District allows the conversion of one protected use to another by the granting of an administrative use permit. In other words, if the applicant chooses to convert studios or screening rooms to a child care center, he could hypothetically do it with an administrative use permit. However, the conversion of such space would be contrary to the applicant’s goal of retaining the **existing protected uses**, and therefore, the applicant requests a Variance to convert space that has been used as offices and storage to the proposed child care center.”

2. (a) Evidence that the spaces at issue were established as uses deemed “protected” previous to the July 6, 1989 date of determination:

From COB 2008 Staff Report to ZAB: Applicant’s (Wareham) statements: - “Note that the 1985 Academy award winning sound productions work for Amadeus was all performed at the building.”

- “The Fantasy recording studios were first opened in 1971...”

A. The buildings have been used as a multi-media center since they were constructed over 30 years ago
VARIANCE FINDINGS: “A. The two buildings on the project site were built in 1974 (2-story annex) and 1981 (five story tower constructed on top of a 2-story building, resulting in a 7-story tower) to house recording studios, screening rooms, and related media uses. They have been used as a multi-media center since they were constructed.”

From July 28, 2019 Berkeleyside article by Frances Dinkelspiel:

“Fantasy Studios, internationally renowned film and music studio, to close its doors”: “The financial success of *One Flew Over the Cuckoo’s Nest* enabled Zaentz to add a new seven-story building in 1980 that became one of the defining features of West Berkeley’s skyline. The new structure contained a fully equipped dubbing stage and picture and sound editing suites.” “We offer services such as ISDN to link to studios worldwide, comprehensive media transfer work, editing and on-site mastering. We are available for film, video, photo shoots, live streaming, conferences, and special events.”

City of Berkeley’s West Berkeley Arts Survey: The City of Berkeley’s Arts Commission under the Office of Economic Development commissioned a West Berkeley Arts Survey between 2007 and 2010. This survey documented 33 protected arts uses at 2600 Tenth St, most of which were deemed to be established before 1989. This document is available through the City of Berkeley or through WEBAIC.

3. (a) WEBAIC rebuttal to staff’s contention that AUP #ZP2019-0090 is consistent with the West Berkeley Plan. AUP #ZP2019-0090 Inconsistency with West Berkeley Plan Goals and Policies:

In the staff report “the Zoning Officer finds that the project is: (1) consistent with the purposes of the District; (2) (and)...; (3) consistent with the adopted West Berkeley Plan;

The West Berkeley Plan clearly seeks to support arts and crafts enterprises, employment, and culture. The various Goals, Policies, and statements supporting the arts that are found in the Plan are cited below. WEBAIC believe that Use Permit #ZP2019-0090 not only does not abide by Plan Goals and Policies on protected arts uses, but violates and actively works in contradiction to these Goals and Policies:

The Economic Development Chapter (2) of the West Berkeley Plan provides direct guidance on the issue of Arts and Crafts and their protections. The most critical and applicable provision of the West Berkeley Plan as it relates to this issue is found in:

Economic Development - Goals and Policies - Goal 7: “Protect small businesses, particularly arts and crafts businesses, so they can continue to flourish in West Berkeley.”

"Rationale: Small businesses, especially arts and crafts businesses, are key in creating the unique character of West Berkeley. The City has developed Arts and Crafts zoning to protect these businesses. However, the zoning has not always worked as intended. **It is vital to assure that arts and crafts enterprises are genuinely protected from displacement."**

5.

Policy: A. Use available mechanisms, including **zoning**, property purchase assistance, and direct City assistance to artists, **to assure that artists and craftspeople remain a vital part of the West Berkeley community.**

WEBAIC Comment: Administrative Use Permit #ZP2019-0090 violates Goal 7's commitment to "protect arts and crafts...businesses...from displacement." It additionally violates Goal 7's Policy to "use zoning... to assure that artists and craftspeople remain a vital part of the West Berkeley community." In contradiction to the above WB Plan Goals and Policies, **AUP #ZP2019-0090 as constituted is a mechanism to displace arts and crafts enterprises and assures that artists (particularly endangered film and sound artists) do not "remain a vital part of the West Berkeley community"**.

Economic Development (Chapter 2), A. Strategies for Business Retention VII. Implementation Measures, states:

2. Arts and Crafts--Review the functioning of the arts and crafts Ordinance, and develop recommendations about how it can best be implemented.

Other West Berkeley Plan policies supporting Arts & Crafts Uses:

Economic Development III. The Economic Future of West Berkeley - Economic Prospects by Sector: "One of Berkeley's economic roles as a city--with a strong contribution from West Berkeley firms--is as a reservoir of ... artistic talent for the East Bay, the Bay Area, and... an even larger area."

Under The West Berkeley Plan's Economic Development section, **VII. Implementation Measures - Priority Implementation Activities, A. Ordinances, Regulation and Policy Development**, is

2. Arts and Crafts--Review the functioning of the arts and crafts Ordinance, and develop recommendations about how it can best be implemented.

Goals and Policies Implemented: Goal 7, Policy 7A - Responsibility: City Planning Department, in consultation with affected parties. Funding: Regular staff funding

West Berkeley Plan Appendices - Appendix B - Cultural Resources of West Berkeley

"West Berkeley is an important locale for artists and craftspeople..." The strong community of artists and craftspeople which exists in West Berkeley is clearly such a resource." "In addition to being a locale where culture is enjoyed, it is also one where cultural products are created and produced."

The West Berkeley Plan specifically called out R&D as a use that is "supported by the market" that could displace uses such as Arts & Crafts uses that are NOT "supported by the market", and therefore require special zoning support (Arts/Crafts protections) to "remain part of the mix

The West Berkeley Plan's overriding goal is to retain the area's dynamic "economic mix" of uses. To accomplish this it recognizes some sectors are "supported by the market" and thus do not require special zoning support, while other sectors that bring important economic, social, and cultural value to our City are not supported by the market and require special zoning to assure they "remain part of the mix." The West Berkeley Plan clearly recognizes R&D as economically "supported by the market" while recognizing Arts & Crafts and Industrial uses as not being supported by the market. To assure these uses "remain part of the mix" the the WB Plan installed Arts & Crafts and Industrial protection zoning provisions into the zoning:

4.) (a) West Berkeley Plan Policies & statements regarding R&D being “supported by the market:

I. Economic Rationale of the Plan: The City's economic policy must ...strike a balance between working within market... realities on the one hand, and guiding and regulating economic actors to achieve City goals on the other. ...a policy which passively followed dominant market forces would not necessarily achieve City economic goals (and would not require a Plan). Market forces...strongly support the development of advanced services (e.g. research laboratories).”

“While support for advanced services (research laboratories) ...is also important, these sectors are generally supported, rather than threatened, by market developments. Thus, the policy structure for these sectors should be different.” “Perhaps the strongest benefit from advanced services (e.g. software preparation, research laboratories, architecture & engineering) come from the high salaries paid to the professional element of its workforce.”

Goal 4: Rationale:...research activities generally provide jobs solely for the highly trained...

5. (a) Creation of the Arts Protections in the West Berkeley Plan and the BMC.

As representative of Southwest Berkeley Merchants, Artists, Artisans, and Residents (MAARS), Rick Auerbach sat on the West Berkeley Plan subcommittee of the Planning Commission for 8 years where the original Arts Protections were conceived of. It was during this period that the list of protected arts uses was created with extensive staff and community input.

In the subsequent creation of the zoning language to reflect the intentions of the WB Plan, Planning staff consulted with Mr. Auerbach and SW Berkeley MAARS on the language and content of the Arts Protections. From the inception of the Arts protections, “filmmakers” was always included as one of the protected uses in this section of the BMC. Around 2008 the Arts Commission was charged with updating this definition to reflect modern changes to arts occupations and processes. As a working artist, WEBAIC representative, and consultant on the West Berkeley Arts Survey, Mr. Auerbach was invited by the Arts Commission to participate in the discussion and creation of the updated definition of Arts and Crafts. It is with this direct experience of the original creation and further delineation of the BMC’s definition of “protected” arts uses that WEBAIC believes the existing definition of “protected” Arts and Crafts Studio uses definitively includes the “filmmakers” (including sound artists) and video artists historically, and presently occupying and working in the studios at issue at 2600 Tenth St.

