USE PERMIT

CITY OF BERKELEY ZONING ORDINANCE
Berkeley Municipal Code Title 23

USE PERMIT #04-10000014

Property Address: 2701 SHATTUCK AVENUE
Permittee Name: 2701 SHATTUCK LLC

Use and/or Construction Permitted:

- Use Permit under §23C.08.010 of the Zoning Ordinance to demolish the existing buildings;
- Use Permit under §23E.52.030 and §23E.52.050 of the Zoning Ordinance to construct a mixed-use building with greater than 3,000 square feet gross floor area;
- Use Permit under §23E.52.030 to establish a quick-service food use;
- Use Permit under §23E.52.030 to establish sidewalk seating, incidental to the quick-service food use;
- Use Permit under §23E.52.070.D.7 of the Zoning Ordinance to modify height, number of stories, setback, lot coverage and residential parking;
- Use Permit under §23E.52.080.E of the Zoning Ordinance to modify the number of off-street parking spaces required for the commercial portion of a mixed-use project.

RESOLUTION, FINDINGS, CONDITIONS AND APPROVED PLANS ATTACHED

The Use Permit herein described has been duly granted by the City Council and is in effect on July 18, 2007.
RESOLUTION NO. 63,782-N.S.

AFFIRMING THE DECISION OF THE ZONING ADJUSTMENTS BOARD TO APPROVE USE PERMIT NO. 04-10000014 TO CONSTRUCT A 24-UNIT, MIXED-USE PROJECT, AND DISMISSING THE APPEAL

WHEREAS, on February 11, 2004, the City received an application for a 29-unit, five-story, 41,765 square foot mixed-use project; and

WHEREAS, on June 17 and November 2004, the applicant presented the project to the Design Review Committee; and

WHEREAS, on April 7, 2005, the applicant submitted a revised project that reduced the floor area to 34,788; and

WHEREAS, on June 23, 2005, the Zoning Adjustments Board held a public hearing to preview and comment on the proposed design and received testimony from nine speakers; and

WHEREAS, on July 6, 2005, the City deemed the application complete; and

WHEREAS, on August 18, 2005, the applicant presented a 26-unit, five-story 38,051-square foot, mixed-use building to the Design Review Committee; and

WHEREAS, on October 23, 2005, the applicant submitted a revised project to reduce the floor area to 37,793 square feet and the number of dwelling units to 24; and

WHEREAS, on December 15, 2005 and March 16, 2006 the applicant presented the revised project to the Design Review Committee; and

WHEREAS, on March 16, 2006, after several redesigns of the project, the Design Review Committee forwarded a positive recommendation (5-Y, 0-N, 0-abstain) to the Zoning Adjustments Board; and

WHEREAS, on August 11, 2006, the applicant submitted a revised project that required review by the Design Review Committee; and

WHEREAS, on August 17, September 21 and October 19, 2006 the applicant presented the revised project to the Design Review Committee; and

WHEREAS, on November 13, 2006, the City released a public hearing notice; and

WHEREAS, on November 27, 2006, the Zoning Adjustments Board held a public hearing, took testimony from the public, and directed that the applicant provide a better rationale for the concessions related to the distribution and characteristics of the affordable units; and
WHEREAS, on December 8, 2006, the applicant revised the project description in regards to the inclusionary units and withdrew the request for concessions; and

WHEREAS, on December 14, 2006, the Zoning Adjustments Board considered the revised project description, and approved Use Permit No. 04-10000014; and

WHEREAS, on December 19, 2006, notice of the Zoning Adjustments Board decision was issued; and

WHEREAS, on January 2, 2007, Rolf Bell filed an appeal with the City Clerk; and

WHEREAS, on March 20, 2007, the City Council reviewed the appeal and continued the matter to March 27, 2007; and

WHEREAS, on March 27, 2007, the City Council set the matter for a public hearing; and

WHEREAS, on May 8, 2007, the City Council held a hearing, and continued consideration of the appeal to allow the applicant to work with the neighbors to review alternatives to the project; and

WHEREAS, on July 6, 2007, the applicant submitted revised plans that increased the horizontal separation between the project and the residences to the east, and reduced the gross floor area from 34,894 to 33,598 square-feet; and

WHEREAS, on July 17, 2007, the City Council considered the record of the proceedings before the City Council, staff reports and correspondence presented to the City Council, and, in the opinion of this Council, the facts stated in, or ascertainable from this information, warrant approving the subject Use Permit, based on the revised plan submitted on July 6, 2007 and dismissing the appeal; and

WHEREAS, attached hereto are the findings and conditions of approval applicable to this permit (Exhibit A) that are included by reference as though fully incorporated herein; and

WHEREAS, attached hereto is a reduced copy of the approved plan (dated July 6, 2007 and marked as Exhibit B) that is included by reference as though fully incorporated herein; and

NOW THEREFORE, BE IT RESOLVED the Council of the City of Berkeley hereby approves Use Permit No. 04-10000014 as reflected in the July 6, 2007 design, based on the findings, and subject to the conditions of approval contained in Exhibit A, and dismisses the appeal.
The foregoing Resolution was adopted by the Berkeley City Council on July 17, 2007 by the following vote:

Ayes: Capitelli, Maio, Moore, Olds, Wozniak and Bates.

Noes: None.

Absent: None.

Abstain: Anderson, Spring, and Worthington.

Betty Olds, Vice Mayor

Attest: Pamyla Means, MMC, City Clerk
EXHIBIT A
FINDINGS AND CONDITIONS

2701 Shattuck Avenue/ 2100 Derby Street
Use Permit #04-10000014

JULY 17, 2007

CEQA FINDINGS

1. The project is categorically exempt from the provisions of the California Environmental Quality Act (CEQA, Public Resources Code §21000, et seq.) pursuant to §15332 of the CEQA Guidelines ("In-Fill Development"), because:
   A. The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations;
   B. The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses;
   C. The project site has no value as habitat for endangered, rare or threatened species;
   D. Approval of the project would not result in any significant effects relating to air quality, or water quality;
   E. The project will be designed to prevent noise impacts to the residents of the building;
   F. The project will not cause a significant increase in the amount of traffic; and
   G. The site can be adequately served by all required utilities and public services.

GENERAL NON-DETRIMENT FINDING

2. Pursuant to Berkeley Municipal Code §23B.32.040, the Zoning Adjustments Board finds that the proposed construction of a 33,598 square foot, five-story, mixed-use building containing 24 residential units (4 Inclusionary), 3,198 square feet of commercial floor area within up to 4 ground floor tenant spaces (to include a 2,000 square foot, quick-service food use and sidewalk seating) and 24 parking spaces, under the circumstances of the particular case existing at the time at which the application is granted, will not be detrimental to the health, safety, peace, morals, comfort, or general welfare of persons residing or working in the area or neighborhood of such proposed use or be detrimental or injurious to property and improvements of the adjacent properties, the surrounding area or neighborhood, or to the general welfare of the City, for the following reasons:
   A. The project is consistent with the purposes of the C-SA District and the goals and policies of the General Plan, including its density standard for "Avenue Commercial" areas;
   B. The provision of 24 dwellings will support local retailing and transit use;
   C. Based on the information contained in the Traffic and Parking study, the project would not significantly impact any intersection and there is adequate on-street parking supply to accommodate parking demand that cannot be met on the site; and
   D. That this housing project contributes at least four affordable dwelling units needed to meet the ABAG Fair Share Housing Goals.
OTHER REQUIRED FINDINGS

3. Pursuant to Berkeley Municipal Code §23C.08.050.D.1, the Zoning Adjustments
   Board finds that the proposed demolition:
   A. Is required to allow the proposed building; and
   B. Would remove the automotive sales use that is not compatible with the purposes
      of the District.

4. Pursuant to Berkeley Municipal Code §23E.52.090.B.1, the Zoning Adjustments
   Board finds that the proposed project:
   A. Is consistent with the purposes of the C-SA District because it represents
      concentrated, medium density development that supports pedestrian-oriented
      retail that helps to prevent commercial sprawl; enhances the existing commercial
      uses in the area by intensifying an underutilized site; provides residential units
      that provide a market for area businesses thereby promoting a concentrated,
      walkable commercial area; and improves the existing urban fabric of the street
      and area by providing ground-floor retail uses;
   B. Is supportive of an increase in the continuity of retail and service facilities at the
      ground level by including 1,198 of retail floor area and a 2,000 square foot, quick-
      service food use along Shattuck Avenue and by removing a long-underutilized
      parcel that substantially degraded the existing urban fabric of the street and area;
   C. Provides an appropriate intensity of development that does not underutilize the
      property by providing 33,598 square feet of residential and commercial floor area
      on a 11,737 square foot site;
   D. The design of the project, including the prominent display windows along
      Shattuck Avenue and the location of the parking garage away from the primary
      street frontage on Derby Street, enhances the pedestrian environment by
      providing visual interest along the Shattuck Avenue sidewalk;
   E. Provides amenities (landscaping, paving and benches) within the public right-of-
      way to support pedestrian-oriented uses; and
   F. The proposed dwelling units and ground-floor commercial uses are consistent
      with the purposes of the District because they provide medium-density for-sale
      units and ground-floor commercial space in an area intended for such
      development.

5. Pursuant to Berkeley Municipal Code §23E.52.090.B.2, the Zoning Adjustments
   Board finds that the proposed project is compatible with the surrounding uses and
   buildings because it would remove the existing non-conforming auto sales use and
   would improve the existing urban fabric of the street and area by providing ground-
   floor retail and food service uses in a building that has received Design Review
   Committee approval;

6. Pursuant to Berkeley Municipal Code §23E.52.090.B.3, the Zoning Adjustments
   Board finds that the proposed project would not result in the domination of one type
   of commercial/retail use in any one area of the District;

7. Pursuant to Berkeley Municipal Code §23E.52.090.C, the Zoning Adjustments Board
   finds that the proposed project:
A. Encourages utilization of public transit by providing more commercial floor area and more dwellings than otherwise allowed if maximum lot coverage and story limits were strictly followed;
B. Is consistent with the building setbacks existing in the immediate area where a residential building setback would not serve a useful purpose;
C. Facilitates the construction of affordable housing as defined by the U.S. Department of Housing and Urban Development (HUD) Guidelines by providing four Inclusionary Units; and
D. Provides consistency with the purposes of the District as stated above.

8. Pursuant to Berkeley Municipal Code §23E.52.090.D, the Zoning Adjustments Board finds that the proposed project is consistent with 23E.28.140 (3, 4 & 5) as follows:
A. The parking survey found 14 parking spaces free along commercial block faces from 5-5:30 on weeknights and 19 parking spaces free along commercial block faces from 7-7:30 on weeknights- twice the number required by the Zoning Ordinance (two times the number of spaces requested for reduction, which in this case is seven spaces) for at least two of the four hours of the new use's peak parking demand;
B. The project includes two neighborhood-serving uses: Retail Products Store(s) and a Food Service Establishment; and
C. The applicant has committed to provide additional bicycle parking spaces within the project (5 extra spaces) and within the public right-of-way along each street frontage (6 spaces), whose location and design is subject to the review and approval of the City's Bicycle Planner, and will provide economic incentives to encourage the use of public transit.

9. Pursuant to Berkeley Municipal Code §23E.24.020.A, the Zoning Adjustments Board finds that the provision of sidewalk seating would:
A. Provide at least six (6) feet of clear space for pedestrian movement along Shattuck Avenue, thereby not unduly interfering with pedestrian traffic on the sidewalk;
B. Allow pedestrian view and/or access to commercial window displays and entry/exit;
C. Allow needed access by public employees and utility workers to meters, fire hydrants or other objects (street hardware) in the right of way;
D. Maintain visibility of necessary authorized traffic devices; and
E. Comply with established operational standards for sidewalk seating as noted in Conditions 72-89.
STANDARD CONDITIONS

1. Conditions Shall be Printed on Plans
The conditions of this Permit shall be printed on the second sheet of each plan set submitted for a building permit pursuant to this Use Permit, under the title 'Use Permit Conditions'. Other sheets may also be used if the second sheet is not of sufficient size to list all of the conditions. The sheet(s) containing the conditions shall be of the same size as those sheets containing the construction drawings; 8-1/2" by 11" sheets are not acceptable.

2. Applicant Responsible for Compliance with Conditions
The applicant shall ensure compliance with all of the following conditions, including submittal to the project planner of required approval signatures at the times specified. Failure to comply with any condition may result in construction being stopped, issuance of a citation, and/or modification or revocation of the Use Permit.

3. Uses Approved Deemed to Exclude Other Uses (§23B.56.010)
   A. This Permit authorizes only those uses and activities actually proposed in the application and exclude other uses and activities.
   B. Except as expressly specified herein, this Permit terminates all other uses at the location subject to it.

4. Modification of Permits (§23B.56.020)
   No change in the use for which this Permit is approved is permitted unless the Permit is modified by the Zoning Adjustments Board, in conformance with §23B.56.020.A.

   Changes in the plans for the construction of a building or structure, may be modified prior to the completion of construction, in accordance with § 23B.56.030.D. The Zoning Officer may approve changes to plans approved by the Board, consistent with the Board's policy adopted on May 24, 1978, which reduce the size of the project. The Zoning Officer may also approve a maximum two-foot variation to Board approved plans, provided, that such variation does not increase a structure's height, reduce the minimum distance to any property line, and/or does not conflict with any special objective sought by the Board.

5. Plans and Representations Become Conditions (§23B.56.030)
   Except as expressly specified herein, the site plan, floor plans, building elevations and any additional information or representations submitted by the applicant during the Staff review and public hearing process leading to the approval of this Permit, whether oral or written, which indicated the proposed structure or manner of operation are deemed conditions of approval.

6. Subject to all City and Other Regulations (§23B.56.040)
   The approved use and/or construction are subject to, and shall comply with, all applicable City Ordinances and laws and regulations of other governmental agencies.

7. Exercised Permit for Use Survives Vacancy of Property (§23B.56.080)
Once a Permit for a use is exercised and the use is established, that use is legally recognized, even if the property becomes vacant, except as set forth in Standard Condition #8.

8. Exercise and Lapse of Permits (§23B.56.100)
   A. A permit for the use of a building or a property is exercised when, if required, a valid City business license has been issued, and the permitted use has commenced on the property.
   B. A permit for the construction of a building or structure is deemed exercised when a valid City building permit, if required, is issued, and construction has lawfully commenced.
   C. A permit may be declared lapsed and of no further force and effect if it is not exercised within one year of its issuance, except that permits for construction or alteration of structures or buildings may not be declared lapsed if the permittee has (1) applied for a building permit or (2) made substantial good faith efforts to obtain a building permit and begin construction, even if a building permit has not been issued and/or construction has not begun.

ADDITIONAL CONDITIONS
Pursuant to BMC §23B.32.040.D, the Zoning Adjustments Board attaches the following conditions to this Permit:

Prior to Issuance of Any Building Permit
9. Prior to issuance of a building permit, the applicant shall provide the project planner with the name and telephone number of the individual empowered to manage construction noise from the project. The individual’s name, telephone number and responsibility for noise management shall be posted at the project site for the duration of construction in a location easily visible to the public. The individual shall record all noise complaints received and actions taken in response, and submit this record to the project planner upon request.
   □ Noise Management Individual

   Name
   Phone #

10. Prior to issuance of a building permit, the applicant shall complete a “Construction and Demolition Recycling Plan”, submit the plan to the Solid Waste Management Division for approval and attach the approved plan to the construction drawings. The plan is available at www.ci.berkeley.ca.us/onlineservice/forms.htm#planning (look under “Land Use Planning”) or by contacting Land Use Planning at 510-981-7410. After completing the form contact Solid Waste Management at 981-6368 for approval.
   □ City Monitor: Solid Waste Mgmt. Staff

   Signature
   Date

11. Prior to issuance of a building permit, the applicant shall secure the City Traffic Engineer’s approval of a construction traffic management plan. Please contact the Office of Transportation at 981-7010, or 1947 Center Street, 3rd floor, and ask to speak to a traffic engineer. In addition to other requirements of the Traffic Engineer, this plan shall include the locations of material and equipment storage, trailers, worker parking, a schedule of site operations that may block traffic, and provisions for traffic control. The
City Zoning Officer and/or Traffic Engineer may limit off-site parking of construction-related vehicles if necessary to protect the health, safety or convenience of the surrounding neighborhood.

☐ City Monitor: Traffic Engineer ____________________________

Signature ____________________ Date __________

12. Prior to issuance of any building permits, the applicant shall receive Final Design Review approval.

13. Prior to issuance of a building permit, the applicant shall provide the project planner with a schedule of major construction phases, a description of the activities and anticipated noise levels of each phase, and the name(s) and phone number(s) of the individual(s) directly supervising each phase. The Zoning Officer or his designee shall have the authority to require an on-site meeting with these individuals as necessary to ensure compliance with these conditions. The applicant shall notify the project planner of any changes to this schedule as soon as possible.

14. The applicant/end user shall enter into a First Source Agreement with the City's WorkSource Department. The First Source Agreement requires the applicant/end user/tenant to use the City's employment and training system as their first source in recruiting and employing construction and permanent employees. The First Source program provides free employment services and gives priority to Berkeley residents and other specified groups as potential employees.

15. Prior to applying for a building permit, the applicant shall file an "Address Assignment Request Application" with the Permit Service Center (2120 Milvia Street) for any address change or new address associated with this Use Permit. The new address(es) shall be assigned and entered into the City's database prior to the applicant's submittal of a building permit application.

16. The developer shall provide tenant notification, via a lease rider or deed covenant, that each dwelling unit is located in a mixed use area that includes commercial, food service and entertainment uses, and that each occupant shall not seek to impede their lawful operation.

17. All exterior windows must meet a Sound Transmission Class (STC) rating of at least 32,

18. Building ventilation shall be designed to ensure adequate ventilation to the dwelling units to meet UBC requirements, such that interior sound levels do not exceed 45 dB CNEL or Ldn interior noise limit.

19. Plans submitted for building permit shall include replacement of sidewalk, curb and gutter as necessary to comply with current City of Berkeley standards for accessibility.

20. Plans submitted for building permit shall include new street trees and grates in accordance with current City of Berkeley standards.
21. All building permit plans shall be subject to the review and approval by the City of Berkeley Toxics Management Division. The applicant shall pay all review fees associated with the City’s Toxics Division.

22. Prior to disturbing any soil on site, the applicant shall present a plan to the City’s Toxics Management Division to identify and remediate any soil or groundwater contaminants present that might pose an unreasonable risk to human, health and safety. The site shall be remediated to the satisfaction of the Toxics Management Division prior to initiation of construction activities on site.

23. The applicant shall provide test results for any onsite groundwater monitoring wells to confirm groundwater quality conditions. The wells are required to be properly destroyed before the site is released for development. Contact the Toxics Management Division for sampling and well destruction requirements.

24. To protect the public and/or construction personnel, a hazardous materials survey will be conducted by a TMD Certified Environmental Inspector, and the survey, along with any hazardous materials abatement procedures, will be included in the final demolition specifications, prior to any demolition activities.

25. A dewatering and collection and disposal plan shall be identified prior to commencing grading activities. Water generated during dewatering shall be discharged or collected and disposed of off-site in accordance with all applicable local and state regulations which may include obtaining appropriate permits to discharge through the sanitary sewer to the local treatment plant. Water may not be discharged directly to nearby surface water drainages unless appropriate permits and approvals are obtained and conditions of those permits and approvals are applied. Temporary dewatering plans shall be forwarded to public works for review.

Prior to the Start of Construction:

26. Two weeks prior to undertaking demolition of the existing buildings, the applicant shall ensure that notice is provided to businesses and residents within 1,000 feet of the project site explaining the nature of the project and that construction work is about to commence. A copy of such notice and methodology for distributing the notice shall be provided in advance to the City for review and approval.

27. Prior to any construction-related activities, an on-site meeting shall be held with City staff and key parties involved in the early phases of construction (e.g., applicant, general contractor, foundation subcontractors) to review these conditions and the construction schedule.

28. An on-site pre-construction meeting shall be held with the General Contractor and the manager of all subcontractors to review the Conditions of Approval and construction schedule.

29. A plywood construction barrier shall be erected around the perimeter of the project site as a noise barrier to shield pedestrians and neighboring land uses. The exterior of the barrier shall be painted a neutral color and shall be kept free of graffiti and non-project related notices. The barrier shall remain in place through construction of the project, or as deemed necessary by the Zoning Officer.
30. **Inclusionary Requirements:** The applicant shall enter into an Inclusionary housing agreement providing for compliance with the requirements of Berkeley Municipal Code (BMC) Chapter 23C.12 and this Condition. The Inclusionary Agreement may include any terms determined by the City to be necessary to ensure such compliance.

A. **Regulatory Agreement Required.** Prior to the issuance of a certificate of occupancy, the applicant shall enter into a Regulatory Agreement that implements Berkeley Municipal Code (BMC) Chapter 23C.12 and this Condition.

B. **Number of Inclusionary Units and Designation of Units.** The project shall include **four** Inclusionary Units. The Inclusionary Units shall be units **120, 204, 307 and 401** as shown on the plans dated July 6, 2007, unless the selection of other units is authorized in writing by the City.

C. **In-lieu Fee.** The applicant shall pay the City an in-lieu fee for **0.8 Inclusionary units.** The fee shall be calculated by the Housing Department, and shall be equal to the fractional value (eighty percent) of the difference between development cost (excluding market costs and profit) and the estimated average market value of the units in the project.

D. **Affordability-Condominium Units.** If the Inclusionary Units are sold as condominiums, the sales price shall not exceed 3 times 80% of the Area Median Income ("AMI") as of the date of the sale the unit. Allowable sale prices shall be determined in accordance with Zoning Adjustments Board Resolution No. 61,497-N.S.

1) The foregoing price ceiling may be exceeded if production costs of the unit exceed 3 times 80% of the AMI as of the date of sale. In such cases, the applicant may be permitted to sell the units for actual production costs, subject to a ceiling of 3 times 120% of the AMI as of the date that a certificate of occupancy is granted for the project. Actual production costs shall be determined in accordance with the “City Manager’s Proposed Regulations Governing Implementation of Inclusionary Ownership Unit Sales Price Calculations for the City of Berkeley’s Inclusionary Housing Ordinance”.

E. **Affordability-Rental Units.** If the Inclusionary Units are rented, the following rent ceilings shall apply:

1) Two (2) units shall be rented at a level that is affordable to households with an income level of not more than 50% of the AMI. This requirement may also be met through rentals pursuant to the Section 8 program or its equivalent at the rent levels authorized by that program.

2) Two (2) units shall be rented at a level that is affordable to households with an income level of not more than 81% of the AMI.

3) The gross rent levels of units that are not rented pursuant to the Section 8 program shall not exceed 30% of the applicable income level ceiling for the unit (either 50% or 81% of AMI). Gross rents shall include an allowance for utility costs in accordance with the Inclusionary housing ordinance. Gross rent levels of units rented pursuant to the Section 8 program or its equivalent shall be determined by the regulations of that program.

4) The foregoing requirements shall apply to rentals of Inclusionary Units that are individually owned as condominiums.

F. **AMI shall be based on the income standards for the Oakland Primary Metropolitan Statistical Area reported by the United States Department of Housing and Urban Development (HUD).** In the event HUD discontinues establishing such income standards, AMI shall be based on income standards determined by the California
State Department of Housing and Community Development (HCD). If such income standards are no longer in existence, the City will designate another appropriate source or method for determining the median household income.

The applicable AMI for each unit shall be determined in accordance with the following table:

<table>
<thead>
<tr>
<th>Unit Size</th>
<th>Applicable AMI Standard</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under 400 sq. ft</td>
<td>AMI for a one person household</td>
</tr>
<tr>
<td>400-599 sq. ft.</td>
<td>AMI for one person household plus one quarter of the difference between the AMI for a one person household and for a two person household</td>
</tr>
<tr>
<td>600-699 sq. ft.</td>
<td>AMI for one person household plus one half of the difference between the AMI for a one person household and for a two person household</td>
</tr>
<tr>
<td>700-849 sq. ft.</td>
<td>AMI for a two person household</td>
</tr>
<tr>
<td>850-999 sq. ft.</td>
<td>AMI for a three person household</td>
</tr>
<tr>
<td>1,000-1,199 sq. ft.</td>
<td>AMI for a four person household</td>
</tr>
<tr>
<td>1,200 sq. ft or more</td>
<td>AMI for a six person household</td>
</tr>
</tbody>
</table>

G. Payment of In-Lieu Fees as an Alternative to Providing Inclusionary Units:

1) Amount of Fee:
   a) The in-lieu fee shall be sixty two and a half percent (62.5%) of the difference between the permitted sale price for Inclusionary units and the amounts for which those units are actually sold by the applicant.
   b) This fee shall be calculated and collected based on the sales prices of all of the units in a project to which the Inclusionary requirement applies, such that the fee as charged shall be a percentage of the difference between the actual sales price for each unit, and the sales price that would have been permitted had that unit been an Inclusionary unit. The percentage shall be determined using the following formula: the number of units for which an in-lieu fee is substituted (4 units) for an Inclusionary unit divided by the total number of units to which the Inclusionary ordinance applies (24 units), multiplied by 62.5%.
   c) This fee shall only be applicable to units in a project that are counted in determining the required number of Inclusionary units in a project and shall not be applicable to any units provided as a density bonus. In this case, at least four (4) units.
   d) In the event that the City Manager makes a determination that an actual sales price does not reflect the fair market value of a unit, the City Manager shall propose an alternate price based on the fair market value of the unit. In the event that the developer and the City Manager cannot agree on a fair market value the City Manager shall select an appraiser to carry out an appraisal of the unit and the appraised value shall be used as the market value.

2) Calculation of Inclusionary Sales Price:
   a) The allowable Inclusionary sales price for the purpose of calculating the in-lieu fee pursuant to this section shall be three (3) times eighty percent (80%)
of the Area Median Income (AMI) last reported as of the closing date of the sale of the unit.

b) Area median income (AMI) shall be calculated in accordance with the affordability regulations established by the City Manager pursuant to §23C.12.090.

3) Time of Payment of Fee: The developer shall be required to pay the applicable in-lieu fee no later than the closing date of the sale of a unit as a condition of said closing.

H. The foregoing Inclusionary Housing requirements shall apply for the life of the project.

31. The applicant shall submit for, and obtain an Administrative Use Permit to install streetscape benches, planters and plant materials within the public right-of-way (sidewalk) along Shattuck Avenue. The design of said improvements shall be subject to review and approval by the Public Works Department, and shall be in full compliance with BMC Chapter 23E.26.

During Construction:

32. Construction activity shall be limited to between the hours of 8:00 a.m. and 6:00 p.m. on Monday through Friday, and between 9:00 a.m. and noon on Saturday. No construction-related activity shall occur on Sunday.

33. Stationary noise sources shall be located as far from sensitive receptors as possible. If they must be located near existing receptors, they shall be muffled to the extent feasible and enclosed with temporary sheds.

34. Equipment and trucks used for project construction shall utilize the best available noise control techniques (e.g., improved mufflers, equipment re-design, use of intake silencers, ducts, engine enclosures and acoustically-attenuating shields or shrouds, wherever feasible and necessary).

35. No construction activity that may cause vibrations or excessive noise involving the use of heavy machinery such as piledrivers, drilling rigs, etc. shall be allowed.

36. Impact tools (e.g., jack hammers, pavement breakers and noise drills) used for project construction shall be hydraulically or electrically powered wherever possible to avoid noise associated with compressed air exhaust from pneumatically powered tools. However, where use of pneumatic tools is unavoidable, an exhaust muffler on the compressed air exhaust shall be used; this muffler can lower noise levels from the exhaust by up to 10dB. External jackets on the tools themselves shall be used where feasible and this could achieve a reduction of 4 dB. Quieter procedures shall be used such as drilling rather than impact equipment whenever feasible.

37. To ensure compliance with BMC Section 13.40.070.B.7 (a-b) Prohibited acts, the operation of any tools or equipment used in construction, drilling, repair, alteration, or demolition work is subject to the following standards measured at the property line of the subject site:
A. Maximum sound levels for nonscheduled, intermittent, short-term operation (less than ten days) of mobile equipment shall not exceed 85 dBA Monday -Friday from 7:00 a.m. to 7:00 p.m. or 70 dBA weekends and legal holidays 9:00 a.m. to 8:00 p.m.

B. Maximum sound levels for repetitively scheduled and relatively long term operation (period of ten days or more) of stationary equipment shall not exceed 70 dBA Monday -Friday from 7:00 a.m. to 7:00 p.m. or 60 dBA weekends and legal holidays 9:00 a.m. to 8:00 p.m.

38. To ensure compliance with the City of Berkeley’s Noise Ordinance, the Zoning Officer is authorized to place additional limitations on the hours of operation and/or halt construction until corrective measures are taken.

39. The removal or obstruction of any fire hydrant shall require the submission of a plan to the City’s Public Works Department for the relocation of the fire hydrant during construction.

40. If underground utilities leading to adjacent properties are uncovered and/or broken, the contractor involved shall immediately notify the Public Works Department and the Building & Safety Division, and carry out any necessary corrective action to their satisfaction.

41. Subject to approval of the Public Works Department, the applicant shall repair any damage to public streets and/or sidewalks by construction vehicles traveling to or from the project site.

42. After construction is complete, all drainage culverts shall be inspected for accumulated sediment. If sediment accumulation has occurred, these drainage structures shall be cleared of debris and sediment.

43. All piles of debris, soil, sand, or other loose materials shall be covered at night and during rainy weather with plastic at least one-eighth millimeter thick and secured to the ground.

44. All active construction areas shall be watered at least twice daily, and all piles of debris, soil, sand or other loose materials shall be watered or covered.

45. Trucks hauling debris, soil, sand, or other loose materials shall be covered or required to maintain at least two feet of board.

46. Public streets shall be swept (preferably with water sweepers) of all visible soil material carried from the site.
47. The applicant shall require implementation of a Drainage and Erosion Control Plan to minimize any impacts from erosion and sedimentation during grading. The grading plan may include, but is not limited to, the following methods. The best control method, as recommended by the San Francisco Bay Area Regional Quality Board, shall be used, including, but not limited to:
   A. restricting grading to the dry season, if necessary and practical;
   B. protecting all finished graded slopes from erosion using such techniques as erosion control matting and hydro-seeding;
   C. protecting downstream storm drainage inlets from sedimentation;
   D. using appropriate methods to retain sediment on the project site;
   E. use of temporary water conveyance and water diversion structure to eliminate surface runoff;
   F. any other suitable measures outlined in the Association of Bay Area Governments’ (ABAG) Manual of Standards for Erosion and Sediment Control Measures or the San Francisco Bay Regional Water Quality Control Board’s Erosion and Sediment Control Field Manual; in case of a conflict between the two Manuals, the latter shall prevail.

48. Prior to any excavation, grading, clearing, or other activities involving soil disturbance during the rainy season (between October 15 and April 15), the applicant shall obtain approval of an erosion prevention plan by the Building and Safety Division and the Public Works Department.

Prior to Issuance of Occupancy Permit or Final Inspection:
49. The project shall conform to the plans and statements in the Use Permit.

50. All landscape, site and architectural improvements shall be completed per the attached approved drawings dated July 6, 2007, except as modified by conditions of approval herein.

51. The parking spaces designated for the residential portion of the project shall be made available to commercial tenants when not required by the residential occupants (e.g., weekdays).

52. The applicant shall apply for and obtain a condominium map.

At All Times:
53. All exterior lighting shall be shielded and directed downward and away from property lines to prevent excessive glare beyond the subject property.

54. The applicant shall establish and maintain drainage patterns that do not adversely affect adjacent properties and rights-of-way. Drainage plans shall be submitted for approval of the Building & Safety Division and Public Works Department, if required.

55. The applicant shall ensure that all excavation takes into account surface and subsurface waters and underground streams so as not to adversely affect adjacent properties and rights-of-way.
56. No additional rooftop or elevator equipment shall be added to exceed the approved maximum roof height without submission of an applicant for a Use Permit modification, subject to Board review and approval.

57. The each business shall be responsible for promoting the use of non-automobile transportation. Each business shall reimburse all on site employees the maximum non-taxable costs of commuting to and from work on public transportation (e.g. monthly passes) if they so commute, and a notice informing employees of the availability of such subsidy shall be permanently displayed in the employee area. In addition, this notice shall inform all employees of the alternative means of transportation available.

58. The ‘keyhole’ entries were not counted as gross floor area, conversion to enclosed floor area would require modification to this permit and provision of any required parking.

Standard Food Service Conditions
(These requirements are in addition to any other requirements under the City's Building, Health or Fire Codes or by agencies such as the Alcoholic Beverage Control Department of the State of California. The applicant is responsible for contacting these and other departments and agencies to identify and secure all applicable permits and licenses).

59. This permit is subject to review, imposition of additional conditions, or revocation if factual complaint is received by the Zoning Officer that the maintenance or operation of this establishment is violating any of these or other required conditions or is detrimental to the health, safety, peace, morals, comfort or general welfare of persons residing or working in the neighborhood or is detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the City.

60. Changes in the nature of the operation including, but not limited to, the addition of seating, changes in hours, and the addition of live entertainment, shall require modification of this permit subject to approval by the Zoning Officer or the Zoning Adjustments Board.

61. The approved floor plan, including the number of seats, shall be followed and the operation shall be conducted as presented to the Board. The maximum occupancy shall be as specified in the application unless otherwise required by applicable regulations.

62. Changes to the building's facade, including doors or windows, site plans, landscaping, signage, and awnings are subject to Design Review and approval prior to issuance of a building permit.

63. The hours of operation of the restaurant portion of the business shall be limited to 7:00 a.m. to 12:00 midnight Sunday through Thursday and 7:00 a.m. to 2:00 a.m. weekends (Friday and Saturday). Hours of operation refer to arrival of the first patron and departure of the last patron. Any change in the hours of operation shall be approved by the Zoning Adjustments Board or designee. Hours of operation are subject to review and amendment by the Zoning Adjustments Board as necessary to avoid detriment to the neighborhood or to achieve conformance with revised City standards or policies.
64. Cooking odors, noise, exterior lighting and operation of any parking area shall be controlled so as to prevent verified complaints from the surrounding neighborhood. This shall include noise created by employees working on the premises before or after patrons arrive.

65. Smoke and odor control equipment approved by the City Environmental Health Division and providing adequate protection to residential uses above and to the east of the restaurant shall be installed prior to issuance of an Occupancy Permit.

66. Garbage and trash containers that are suitably enclosed and screened from view shall be provided subject to approval of the Zoning Officer, the Health Department and, where applicable, the Design Review Planner. Any establishment selling beverages in cans or bottles that are subject to the State of California Container Deposit Law shall provide separate bins or cans for the placement of such cans or bottles to ensure recycling of such containers.

67. Containers used for the dispensing of prepared food shall identify the establishment. Polystyrene foam food packing is prohibited by Section 11.60.030 of the Berkeley Municipal Code.

68. Any establishment selling beverages in cans or bottles that are subject to the State of California Container Deposit Law shall recycle such containers.

69. The operator of the restaurant shall place a waste receptacle near the entry way and shall ensure that garbage on the sidewalk in front of the establishment and within 50 feet thereof will be picked up periodically during each day, so that the sidewalk remains clean.

70. The owner or operator of the establishment shall take reasonable measures to prevent disturbances by patrons in the immediate vicinity. Such measures shall include signs reminding patrons of nearby residences and requests not to congregate or loiter near such residences nor operate vehicles in a noisy manner on residential streets. The operator shall give surveillance to public areas near the establishment, keep such areas free of trash and litter, provide lighting, and otherwise attempt to prevent conduct that might disturb the peace and quiet of residences in the vicinity.

71. The operator shall assume reasonable responsibility for ensuring that patrons do not block the entrance or interfere with pedestrian activity on the adjacent public sidewalk

**Standard Conditions For Sidewalk Café Seating**

72. That this Use Permit for Sidewalk Cafe Seating, or a copy thereof, shall be posted in plain view at the site of the Food Service Establishment where the permit has been issued.

73. Any authorized Sidewalk Cafe Seating shall be subject to additional taxes, permits or fees as required by law.

74. The permittee shall carry liability insurance in the amount of at least one million dollars ($1,000,000). The City of Berkeley shall be named as additionally insured. Said
insurance shall be in a form acceptable to the City Attorney. Prior to commencement of said operation, the permittee shall demonstrate proof that they have said insurance.

75. Permittee’s Liability: By accepting a permit for Sidewalk Cafe Seating, the permittee explicitly agrees to hold the city, its officers, and employees harmless from any liability, claims, suits or actions for any and all damages alleged to have been suffered by any person or property by reason of the permittee’s installation, operation, maintenance or removal of said Sidewalk Cafe Seating.

76. That the hours of operation of the sidewalk cafe seating shall be limited to those set forth in the District. Hours of operation refer to arrival of the first patron and departure of the last patron. The hours of operation are subject to review and amendment by the Zoning Adjustments Board as necessary to avoid detriment to the neighborhood or to achieve conformance with revised City standards or policies.

77. When any Sidewalk Cafe Seating authorized hereunder is found to be in conflict with the existing or proposed facilities or improvements owned, maintained, or operated by the city, or any existing or proposed city design plans, such placement shall, upon written demand of the City Manager or his designee, be removed or relocated in such a way as to eliminate the conflict; and said removal or relocations shall be at the sole expense of the permittee. Should the permittee fail to comply with said written demand within a reasonable period of time, the city may cause such relocation of the placement at the expense of the permittee. Any noncompliance shall also be a violation of the Ordinance.

78. Pursuant to Section 12.07.030 of the Berkeley Municipal Code, smoking shall not be permitted in any sidewalk seating area. Pursuant to BMC Section 12.70.060, conspicuous “No Smoking” signs shall be posted in the outdoor seating area and/or on tables.

79. The permittee is responsible for identifying and securing all applicable permits from the Engineering Division, Fire Department, Health Department, and any other affected City Departments.

80. No beer, wine or other alcoholic beverages shall be served for patrons seated in the Sidewalk Cafe Seating at any time.

81. The permittee shall be responsible for, and exercise reasonable care in the inspection, maintenance and cleanliness of the area affected by the Sidewalk Cafe Seating including any design requirements hereafter enacted, from the building frontage to the curb.

82. The permittee shall continuously bus the tables, and ensure that garbage, litter, and waste food left on the sidewalk and curb area adjacent to the restaurant and within 50 linear feet thereof shall be picked up periodically during each day, and maintain such areas in a clean condition.

83. A waste receptacle shall be placed inside the entryway of the restaurant, subject to the review and approval of the Zoning Officer.
84. Any and all chairs, tables and umbrellas used for the Sidewalk Cafe Seating use shall be stored in a secured place off of the public sidewalk when not in use and when the establishment is closed.

85. The permittee shall restrict the Sidewalk Cafe Seating to the approved location against the building face and not adjacent to the curb and shall ensure compliance with all applicable laws including laws against blocking the public right-of-way (Berkeley Municipal Code Chapter 13.52), health and safety laws, public cleanliness laws, and laws regulating sale and public consumption of alcohol.

86. No fixed-base umbrellas are allowed. The permittee shall restrict the location of the chairs and tables to the location described herein, and as shown on the approved site plan. No tables or chairs are permitted within six (6) feet clear space as specified.

87. That use of the chairs and tables shall be controlled so as to prevent complaints from the neighborhood. The permittee shall assume reasonable responsibility to ensure that the patrons do not cause a disturbance outside the premises. The permittee shall give surveillance to public areas near their premises and otherwise attempt to inhibit conduct which might disturb the peace and quiet of residential uses in the vicinity.

88. Any and all chairs, tables and umbrellas used for the Sidewalk Cafe Seating use shall be stored in a secured place off of the public sidewalk when not in use and when the establishment is closed.

89. At least 50% of the Sidewalk Cafe Seating spaces shall be accessible to persons using wheelchairs. Tables shall have seating located along an accessible route and with a minimum 30"x48" clear floor space; height of table tops shall be 34" maximum from floor or ground; and tables shall have knee space at least 27" high, 30" wide and 19" deep.