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September 8, 2016

Via E-Mail

Land Use Planning Division
Attn: ZAB Secretary
2120 Milvia Street
Berkeley, CA 94704
E-Mail: zab@ci.berkeley.ca.us

Re: 2777 Shattuck Avenue/2747 Adeline Street Berkeley Honda, Use Permit #ZP2015-0102

Dear Zoning Adjustments Board Members:

On behalf of 2777 Shattuck Neighbors, we urge you to reject the application for three use permits and an administrative use permit for the proposed auto dealership at 2777 Shattuck Avenue and 2747 Adeline Street (“Project”). As explained in more detail below, the Project will have numerous potentially significant effects on the environment and requires full environmental review pursuant to the California Environmental Quality Act (“CEQA”) (Public Resources Code section 21000 et seq.) and the CEQA Guidelines (California Code of Regulations, title 14 § 15000 et seq.). The Project also conflicts with Berkeley’s General Plan and other land use policies and violates the Berkeley Municipal Code. Accordingly, the Zoning Adjustments Board (“ZAB”) must not grant the requested permits for the Project as proposed.

I. The Project Requires Full CEQA Review.

A. The Project Does Not Qualify for a Categorical Exemption.

The Staff Report for the September 8, 2016 ZAB meeting (“Staff Report”) improperly cites Class 1, 3, and 32 categorical exemptions as allowing the Project to proceed without CEQA review. *See* Staff Report at 1-2. Categorical exemptions are based on the determination of the Resources Agency that, barring unusual circumstances, exempt projects will never have a significant effect on the environment and therefore will never require environmental review or mitigation. *Salmon Protection & Watershed*

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Network v. County of Marin (2004) 125 Cal.App.4th 1098, 1107. A project subject to a categorical exemption is excused from any further compliance with CEQA. Courts therefore “construe the exemptions narrowly in order to afford the fullest possible environmental protection.” *Azusa Land Reclamation Co., Inc. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1193-94. Here, numerous factors, including the proposed change in use to auto sales and service, the Project’s reliance on hazardous materials, conflicts with Berkeley’s land use policies, and the Project’s effects on traffic, noise, and air quality, disqualify the Project from exemption.

1. The Project is not a Class 1 addition to an existing facility.

Class 1 exempts various activities related to existing facilities, provided such activities involve “negligible or no expansion of use beyond that existing at the time of the lead agency’s determination.” CEQA Guidelines § 15301. The Staff Report suggests that the Project would change the existing use from retail to automobile sales and repair. Staff Report at 2. The report claims that the change “would not result in a substantial expansion or intensification of use on-site” (*id.*); however this is not the correct test for this exemption. The CEQA Guidelines explicitly state that the “key consideration” for Class 1 exemptions is “whether the project involves negligible or no expansion of an existing use.” CEQA Guidelines § 15301. The proposed Project site is currently vacant, and the Project would change its use to active auto sales and service. Even if the past use, the outdoor goods retailer Any Mountain, were the baseline for change, the Project does not propose to continue that retail use; it proposes a completely different auto sales and service use that would generate a new set of potential environmental impacts. Therefore, the Project does not meet the requirements for Class 1 exemption.

2. The Project is not a Class 3 small structure.

The Class 3 exemption allows construction or conversion of small structures without environmental review. CEQA Guidelines § 15303. Although, as the Staff Report notes, the Class 3 exemption encompasses some commercial buildings up to 10,000 square feet, Class 3 specifically excludes businesses that handle significant amounts of hazardous substances. CEQA Guidelines § 15303(c). The Staff Report states that “[o]peration of the service center would involve the use of hazardous materials.” Staff Report at 20. The Project will involve handling of exhaust fumes as well as above-ground storage of “a 1,000-gallon tank for used oil, a 200-gallon tank for waste coolant, and a 500-gallon tank for lubricant oil.” *Id.* These are significant volumes of hazardous materials. Thus, the Project falls outside Class 3.

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The Staff Report claims that compliance with regulatory requirements and industry standards would minimize the risks that these hazardous materials pose for nearby residents. *Id.* However, a mitigation measure cannot support a finding that the Project is categorically exempt from CEQA. *Salmon Protection*, 125 Cal.App.4th at 1106-08. The exemption determination is not about whether the Project's significant effects can be mitigated. The question is simply whether the Project meets the exemption criteria set out in the Guidelines. Here, the use of hazardous materials means that the Project objectively does not qualify for the proposed exemption.

Further, the Project as a whole exceeds the intended scope of the "small structures" exemption. CEQA Guidelines § 15303. The Project will consolidate a 15,800 square-foot sales operation and a 24,000 square-foot service operation on a 47,676 square-foot parcel that abuts a residential neighborhood. Staff Report at 11. This is not the type of "limited" and "small" development the Resources Agency determined will never have a significant effect on the environment. CEQA Guidelines § 15303; *Salmon Protection*, 125 Cal.App.4th at 1107.

3. The Project is not a Class 32 exempt in-fill development.

Class 32 in-fill developments are exempt if they meet five requirements. CEQA Guidelines § 15332. These requirements include consistency with "all applicable general plan policies" and zoning designations and regulations. *Id.* § 15332(b). As explained in more detail below, the Project does not meet this requirement. Indeed, the Staff Report itself notes that the Project is inconsistent with three applicable South Shattuck Strategic Plan policies related to urban design, walkability, and transportation. Staff Report at 23.

Further, an in-fill project is not exempt if it may result in significant effects relating to traffic, noise, or air quality. CEQA Guidelines § 15332(d). As the Staff Report acknowledges, the Project will generate numerous potentially significant effects related to transportation and traffic (increased visits, parking issues); noise (auto service, repair, deliveries); and air quality (emissions from test drives, exhaust from auto service and repair). Staff Report at 12-24. For example, the applicant's own traffic analysis notes that the Project would generate 41 new car trips during morning peak hours (10 more than Any Mountain) and a whopping 59 more trips during evening peak hours (more than double the 24 trips Any Mountain generated). Staff Report, Attachment D at 3. And in contrast with Any Mountain's retail operation, the proposed auto dealership and service hours directly conflict with morning commute times. This will impact pedestrians and bikers in addition to drivers, and will conflict with safe routes to nearby schools. The area

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also already suffers significant weekend congestion near neighborhood retailers Berkeley Bowl Marketplace and Walgreens; weekend patrons of the Project would exacerbate this heavy weekend traffic, both by driving to the Project site and by test-driving cars nearby. Full, independent environmental review is necessary to determine the extent to which the Project's many effects are significant and to identify additional issues.

The ZAB proposes to mitigate the Project's traffic and noise impacts by limiting parking hours and days. Staff Report at 20-21 and Attachment A at 11. Again, a project cannot qualify for exemption based on mitigation measures. *Salmon Protection*, 125 Cal.App.4th at 1106-08. Further, an important part of the CEQA process is identifying whether alternatives to the Project would reduce environmental impacts. Pub. Resources Code § 21002. An alternative location, with fewer traffic congestion and noise issues and without known contamination, may more effectively reduce the Project's significant impacts on the environment. A split operation, with service at another site (as is currently in operation), could also alleviate the Project's adverse effects. For example, Albany Ford Subaru operates on three lots: new car sales at 718 San Pablo in Albany, auto repair at 929 San Pablo, and used car sales at 10481 San Pablo in El Cerrito. The repair operation, with longer hours, is located away from residences that might be affected. CEQA does not allow the ZAB to impose mitigation in place of full CEQA review that will require consideration of a wide range of alternatives to this Project. See *Salmon Protection*, 125 Cal.App.4th at 1106-08.

The Project does not qualify for a categorical exemption, and it will have numerous potentially significant effects on the environment, so the Project warrants full CEQA review. The ZAB should direct staff to prepare an Initial Study.

B. Even if the Project Falls within an Exemption, Multiple "Exceptions to the Exemption" Apply.

Because CEQA allows exemptions for "only those activities which do not have a significant effect on the environment," it follows that if there is "any reasonable possibility" that a project "may have a significant effect on the environment, an exemption would be improper." *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 205-06. This idea is codified in CEQA Guidelines section 15300.2, which outlines situations where further environmental review is necessary, even if a proposed project fits an identified exemption. Here, even if the Project falls within the narrow scope of a categorical exemption, four "exceptions to the exemptions" prevent the Project from avoiding CEQA review.

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First, “[a] categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.” CEQA Guidelines § 15300.2(c). This exception applies where “the project has some feature that distinguishes it from others in the exempt class,” or there is evidence that the project will have a significant environmental effect. *Berkeley Hillside Preservation v. City of Berkeley* (2015) 241 Cal.App.4th 943, 952. Here, both are true. Many of the Project site’s characteristics – particularly the known traffic congestion (including a nearby intersection with an “F” level of service rating), the site’s inclusion in the City’s Environmental Management Area for hazardous contamination, and the site’s prominent location (designated as one of nine City gateways in the General Plan) – distinguish it from other similar locations and facilities. *See id.* Further, the unusual impacts of the proposed use distinguish it from other commercial operations. Car dealerships tend to impose “spillover effects” on adjacent neighborhoods (*see, e.g.*, Berkeley Planning Staff Memo to Planning Commission, “Public Workshop and Discussion of Potential Zoning Change Options in West Berkeley for Business Retention of Automobile Sales” at 5 (Jan. 11, 2006), *available at* [https://www.cityofberkeley.info/uploadedFiles/Planning_\(new_site_map_walk-through\)/Level_3_-_General/20070425%20Item%2010%20Auto%20Sales%20Report%20Complete.pdf](https://www.cityofberkeley.info/uploadedFiles/Planning_(new_site_map_walk-through)/Level_3_-_General/20070425%20Item%2010%20Auto%20Sales%20Report%20Complete.pdf)); the proposed Project site, directly abutting neighborhoods and near high traffic intersections, will exacerbate such effects. In addition, as the Staff Report acknowledges, the Project will result in numerous significant environmental effects related to transportation and traffic; noise from auto service, repair, and deliveries; hazards and hazardous materials; air quality; aesthetics, including lighting and outdoor car displays; land use and planning, including circulation and walkability; and the proposed Project site’s historic façade. Staff Report at 12-24. Accordingly, the unusual circumstances exception prohibits the ZAB from relying on categorical exemptions.

Second, exemptions are inapplicable “when the cumulative impact of successive projects of the same type in the same place, over time is significant.” CEQA Guidelines § 15300.2(b). The proposed Project site, with 2777 Shattuck vacant, already suffers an unacceptable level of traffic congestion. Staff Report at 17. Not only would the Project introduce traffic beyond that generated by the retail operation that previously occupied the Project site, it would specifically attract and generate car trips. Potential car buyers would test drive cars near the site throughout operating hours. Patrons of the service portion of the operation would also bring their cars to and from the site for repair. This will add to and exacerbate car dealership-related parking and traffic issues that already plague the neighborhood. *See, e.g.*, 69 South Berkeley Residents, “Use of

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publicly- owned land by car dealerships in the C--SA District: An Open Letter to Berkeley City Officials,” The Berkeley Daily Planet (Sept. 2, 2016), *available at* <http://www.berkeleydailyplanet.com/issue/2016-09-02/article/44835?headline=Use-of-publicly-owned-land-by-car-dealerships-in-the-C--SA-District-br-An-Open-Letter-to-Berkeley-City-Officials---69-South-Berkeley-Residents> (documenting South Berkeley car dealerships’ unpermitted use of parking and interference with walkways). The ZAB must assess the cumulative impacts that will result from adding another auto-centric business to this already impacted neighborhood.

Third, a categorical exemption must not be used for a project that may adversely affect a historical resource. Pub. Resources Code § 21084.1; CEQA Guidelines § 15300.3(f). The Project site is included on the State Historic Resources Inventory. Staff Report at 14. The fact that it is not included in the local register of historic resources does not preclude a determination that the site may be a historical resource requiring protection under CEQA. Pub. Resources Code § 21084.1. The site is a significant historic resource and the Project will significantly impact it. Thus, the extent to which the Project would modify the site’s historic façade must be assessed through CEQA review.

Finally, the Class 3 exemption does not apply where a project may impact a hazardous environment. CEQA Guidelines § 15300.3(a). The Staff Report notes that the Project site is located in the City’s Environmental Management Area for hazardous contamination. Staff Report at 8. It identifies 2747 Adeline Street as the site of an underground storage tank where gasoline previously leaked. *Id.* The proposed expansion of the facility may result in environmental impacts related to this hazard. These circumstances warrant further consideration in the environmental review process.

In sum, the ZAB should take into account evidence that plainly triggers these “exceptions to the exemptions” and require additional environmental review.

II. The Project Conflicts with Berkeley’s Pedestrian-Friendly Land Use Policies.

The Project interferes with overarching land use policies for South Shattuck. The Project would be located on a portion of Shattuck Avenue that the City of Berkeley General Plan designates an “Avenue Commercial Area.” City of Berkeley General Plan: A Guide for Public Decision-Making (2003) (“General Plan”), Policy LU-27. The General Plan directs the City to “[m]aintain and improve Avenue Commercial areas . . . as pedestrian-friendly, visually attractive areas of pedestrian scale and ensure that Avenue areas fully serve neighborhood needs as well as a broader spectrum of needs.” *Id.* In support of this policy, the General Plan includes numerous actions that will

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make South Shattuck more pedestrian-friendly. *Id.* These actions include requiring ground-floor commercial uses to be oriented to the street and sidewalks; ensuring safe, wide walkways; and maintaining and encouraging a wide range of community and commercial services, including basic goods and services. *Id.*

The General Plan also directs the City to implement the South Shattuck Strategic Plan and take action to achieve its objectives. *Id.*, Policy LU-30. These objectives include creating and enhancing the identity of South Shattuck as “a unique and pleasant district that complements adjacent residential neighborhoods,” making traffic improvements that “complement economic development and urban design goals,” encouraging use of “alternatives to the automobile,” and preserving quality of life in residential neighborhoods. *Id.* Like the General Plan, the South Shattuck Strategic Plan emphasizes pedestrian-oriented development and includes several strategies aimed at enhancing the pedestrian-friendly character of the area. South Shattuck Strategic Plan (1997) at 3; Staff Report at 23. As the Staff Report notes, these include reducing automobile impacts and improving relationships between buildings, activities, residents, and shoppers. *Id.*

The Project is incompatible with these City policies. *Napa Citizens for Honest Gov.*, 91 Cal.App.4th at 378. As the Staff Report indicates, the Project is inconsistent with the pedestrian-friendly South Shattuck Strategic Plan strategies. Staff Report at 23. The Project would introduce a curb and cut and driveway on Shattuck that would “interrupt the pedestrian-friendly environment” and “make the streetscape less pedestrian-friendly.” Staff Report at 23. The Staff Report completely omits discussion of the General Plan policy for Avenue Commercial areas and South Shattuck, but staff’s conclusions about the Strategic Plan strategies are also relevant to the General Plan policies. The Project would interfere with safe, wide walkways and reduce space available for businesses that provide basic goods and services. *See* General Plan, Policy LU-27. It would directly conflict with the South Shattuck Strategic Plan objective to encourage “alternatives to the automobile.” *See* General Plan, Policy LU-30. And as the Staff Report acknowledges, auto sales, rental, service, and body work businesses are on an explicit list of “undesirable” businesses for the South Shattuck Corridor. Staff Report at 24. The applicant’s potential sale of electric cars does not overcome these clear policies for the area. The City cannot ignore the South Shattuck Strategic Plan and allow a use that the community has specifically identified as “undesirable.”

The Staff Report’s conclusion that the Project will interfere with pedestrian use of South Shattuck is consistent with other cities’ assessments of auto facilities. For example, Oakland’s Broadway/Valdez District Specific Plan notes that such uses

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“undermine the pedestrian environment with physical distractions such as curb cuts, driveways and roll-up garage doors and uses that provide limited interest to most pedestrians.” Broadway/Valdez District Specific Plan at 34 (June 2014). That Plan further notes that these uses bring people to an area “just on the occasion of purchasing or repairing one’s car,” rather than providing much preferable consistent attractions. *Id.* at 95. Here, the 2747 Adeline triangle, in particular, is one of only three parcels on South Shattuck with frontages on both Shattuck *and* Adeline, maximizing visibility. The Urban Design Element of the General Plan identifies this area as one of nine City Gateways. General Plan, UD-2, Fig. 24. The Project will harm, rather than enhance the pedestrian experience in this area.

Nonetheless, the Staff Report ignores the Project’s inconsistency with policies aimed at developing pedestrian-friendly commercial corridors. Although the Report identifies three inconsistencies with the South Shattuck Strategic Plan in Table 6, the Report’s broader discussion of land use policies does not address these issues. Staff Report at 22. The Report merely highlights policies that support the Project. Staff Report at 21, 24.

However, the fact that the Project is consistent with some General Plan policies does not override its incompatibility with the City’s other clear and fundamental policies and objectives. *See Napa Citizens for Honest Gov. v. Napa County* (2001) 91 Cal.App.4th 342, 378-79. The General Plan is the “constitution” that determines the direction of future development. *Leshner Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 541. Thus, the pedestrian-friendly policies for South Shattuck govern the proposed Project. And despite statements in the Staff Report that imply otherwise, zoning allowing limited auto sales does not trump the General Plan and the Specific Plan adopted pursuant to it. *Compare Leshner Communications*, 52 Cal.3d at 541 (General Plans are not amended to conform to zoning – “[t]he tail does not wag the dog.”) *with* Staff Report at 21. The purpose of the General Plan is to guide land use decisions, including ZAB decisions about projects. General Plan, Introduction. Thus, the ZAB must consider the significant, primary General Plan conflict before it proceeds with the Project approval.

Finally, the Project is likely to conflict with the new Adeline Corridor Plan. *See, e.g.*, Staff Report, Attachment H (letter from Sierra Club noting Project may conflict with affordable housing plans and regional sustainable planning efforts). The Project would occupy a key site in the Corridor and the ZAB’s decision will directly impact the Corridor planning process. To allow this Project to run ahead of that process would eviscerate the existing an ongoing community engagement in the Adeline Corridor Plan.

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III. The Municipal Code Requires the ZAB to Deny the Conditional Use Permits for the Project.

The Berkeley Municipal Code directs the City to hold a public hearing prior to issuing a use permit for auto sales with outdoor sales in the South Area Commercial District. Berkeley Municipal Code (“BMC”) 23E.52.030(A). This use permit requirement is not a formality. It indicates that the ZAB must determine whether outdoor auto sales are appropriate “under the circumstances of the particular case existing at the time at which the application is granted.” BMC 23B.32.040. It also means that under certain circumstances such a proposed use may be detrimental to the health, safety, peace, morals, comfort or general welfare of neighbors, the surrounding area, and the City. *Id.* Here, the proposed Project would exceed the uses allowed in the South Area Commercial District, and it would be detrimental to the neighborhood and the City. Accordingly, the ZAB should deny the application.

A. The Project Would Include Service and Repair as a Primary Use, Not an Ancillary Use, In Violation of the Municipal Code.

The Berkeley Municipal Code prohibits auto service, repairs, and even car washes in the South Area Commercial District. BMC 23E.52.030(A). Such activities may be allowed as an ancillary use for automobile sales operations, but this does not mean that any car dealership is entitled to engage in unlimited auto service activities as of right. BMC 23F.04.010. The applicant argues that the ZAB cannot set criteria or limits on service activities (Staff Report, Attachment C at 3), but the Municipal Code does exactly that. Service activities are only allowed as an “ancillary use.” In reviewing the application for a use permit requirement, the ZAB is required to assess compliance with this limitation and may determine that a project would be compliant only if subject to certain conditions ensuring that a use is ancillary rather than primary.

The proposed service component of the Project does not comply with the Municipal Code’s three-part “ancillary use” definition: an ancillary use is one that is “both dependent on and commonly associated with the principal permitted use of a lot and/or building and that does not result in greater or different impacts than the principal use.” BMC 23F.04.010. The service component of the Project meets none of these criteria. The service use is not dependent on the sales use, the proposed scope of service is not commonly associated with the principal use, and the service use will result in greater and different impacts than the principal use. First, as evidenced by the applicant’s current two-site operation, the service portion of the business is not dependent on the sales portion – they can operate independently. Indeed, the applicant’s materials indicate

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that sales and service have separate staff, different operating hours, and different parking needs. Staff Report, Attachment C at 3, 8 and Attachment D at 2.

Some auto dealers provide service, but this does not mean the proposed service component is similar to service commonly associated with auto sales. There is conflicting information in the record regarding the extent to which service is a dominant component of this proposed Project, and there are many ways to analyze the primary purpose of a business. An extreme case illustrates that primary and ancillary uses operate on a sliding scale: a “car dealership” that sells one car per year but services 2,000 cannot in good faith call service an ancillary use. The ZAB must exercise its discretion on a case-by-case basis to identify an appropriate balance between service “commonly associated” with auto sales and service as a primary use. This Project crosses the line to primary use by dedicating a significant portion of its square footage, staff, and resources to service.

Finally, the service portion of the operation will cause many of the Project’s significant impacts. Most obviously, traffic and noise impacts will be greater as a result of the service operation. There is no question that the proposed Project would generate more traffic than a sales-only facility. Moreover, the hazardous materials impacts of the service component will be different than the impacts from sales alone. Thus, the proposed service component of the Project exceeds the limits on ancillary uses in the South Area Commercial District.

B. The Project Provides Insufficient Off-Site Parking.

The purpose of the City’s off-site parking requirement is to “prevent worsening of the already serious deficiency of parking spaces” in the City and provide parking for traffic-generating uses. BMC 23E.28.010. The applicant plans to count 14 spaces in the service queue and service bays toward the parking requirement. *See* Staff Report at 19 and Attachment D at 2. This refusal to completely dedicate space to off-street parking violates the off-site parking requirements and flies in the face of the City’s parking policy. This problem is compounded by the planned occupation of existing parking spaces at 2747 Adeline and the removal of 13 parking spaces at 2777 Shattuck to accommodate the proposed addition. Neighborhood residents have documented numerous parking conflicts at nearby auto dealerships, and the proposed Project will add to, rather than alleviate, these problems. *See* 69 South Berkeley Residents, “Use of publicly- owned land by car dealerships in the C--SA District: An Open Letter to Berkeley City Officials,” *The Berkeley Daily Planet* (Sept. 2, 2016).

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IV. Conclusion

Based on the issues raised above, the ZAB should deny the application outright or, at a minimum, take no action on the application until full CEQA review and the Adeline Corridor Planning process are complete. We appreciate the ZAB's consideration of these issues. Please provide us with the Notice of Decision when it is complete.

Sincerely,

SHUTE, MIHALY & WEINBERGER LLP

Two handwritten signatures in blue ink. The first signature is stylized and appears to be 'G.M.B. Ross'. The second signature is more legible and appears to be 'Allison Johnson'.

Gabriel M.B. Ross & Allison A. Johnson

Cc:
Ben Bartlett, Friends of Adeline
Matt Williams, Chair Sierra Club

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