



Office of the City Manager

ACTION CALENDAR

November 14, 2006

To: Honorable Mayor and  
Members of the City Council

From:  Phil Kamlarz, City Manager

Submitted by: Dan Marks, Director, Planning and Development

Subject: 2116 Allston Way, Gaia Building: Implementation of Cultural Use Requirements

RECOMMENDATION

Adopt a Resolution establishing performance standards for use of cultural space at the Gaia Building, terminate ZAB revocation proceedings, and establish a reporting schedule.

SUMMARY

The City Council discussed cultural uses of the Gaia Arts Center in April 2006 and directed staff to return with a proposal to allow non-cultural uses that are incidental to and compatible with the cultural uses, provided that cultural performances have priority in scheduling. Panoramic Interests submitted a proposal in June 2006 that establishes a minimum number of dates, including weekends, that the theater space will be reserved for performances. A schedule was submitted, which demonstrates compliance with the expanded performance standard.

The theater received has not been fully scheduled for several months. Staff recommends that the Council pass a resolution which clearly sets forth the City's expectations for minimum cultural use of the theater and mezzanine and that staff report to Council in December 2006, in June and December 2007, and every December thereafter with detailed information about the uses of the cultural space. If the cultural facility is not programmed as required, the permits can be referred to the Zoning Adjustments Board for revocation.

FISCAL IMPACTS OF RECOMMENDATION

None

CURRENT SITUATION AND ITS EFFECTS

Previous City Council staff reports have provided detailed information about project history and uses (see reports dated April 25, June 27, and October 10, 2006). On April 25, 2006, the City Council passed the following motions:

Moved, seconded, carried (Maio/Capitelli; Noes Worthington; Abstain Spring; Absent Anderson) that:

- 1) Carol Barrett had the authority to agree in her June 6, 2003 letter that the required cultural use had to have a minimum of 30% of the time devoted to performances; and,

- 2) this requirement must be construed to also require additional preparation time such as set-up and rehearsal time for such performances.

Carried (Noes Spring, Worthington; Absent Anderson) a severed motion affirming that:

- 1) non-cultural uses which are incidental to and compatible with the cultural uses are permissible as long as the cultural performances have priority in scheduling;
- 2) the staff is directed to return with specific proposals for implementation; and,
- 3) the pending Zoning Adjustments Board revocation proceedings shall be suspended until further Council action.

The performance standard that was approved by staff and accepted by City Council was as follows:

- Theater: in use 30% of the days of each month on average
- Remainder of ground floor & mezzanine: in use 15 days each month on average

Information about use of the cultural space has been provided several times. The project has consistently conformed with the performance standard, with the exception of use of the mezzanine area. As was reported in the February 23, 2006 staff report to ZAB, the Marsh Theater operated on 48% of the days (118 out of 244) between August 2005 and March 2006. Uses were limited for several months until a Final Certificate of Occupancy was approved in September. An attachment to the a July 7, 2006 Off-Agenda Council Report included a tentative schedule and the October 10, 2006 Council staff report included the following:

- Calendar of scheduled activities between August 2006 and March 2007
- Table summarizing monthly cultural and noncultural events (attachment 4)
- Table summarizing conformance with the 30% performance schedule (page 5 of the staff report).

In accordance with the Marsh's lease, which staff reviewed, the Marsh has reserved 11 full weekends in November, January, February, and March. They also have the option to reserve additional weekends at the market rate for arts organizations.

Staff will continue to work with Gaia Arts Management regarding conformance with the requirement for cultural use of the mezzanine for 15 days per month. An art exhibit is currently open to the public for the minimum number of days. Now that construction of two rooms is complete on the mezzanine, the applicant will schedule other cultural uses as well.

This report addresses the following issues that were raised at the October 24, 2006 City Council meeting.

- What is a cultural use?
- Food and alcohol service

### ***What is a cultural use?***

Concerns were expressed at the City Council meeting regarding the importance of defining "cultural use", especially given that the facilities manager also caters non-cultural events in the

Gaia Building. Given City Council acceptance of the performance standard as described above, it is important that there be agreement about what types of uses are counted as “cultural” for the purpose of meeting the performance standard. If the performance standard is met, other uses consistent with the zoning and that will not adversely affect residents or other businesses are allowed.

A brief overview of the Gaia Building’s approved cultural uses is attached. Of current relevance, UP 02-70000067, which authorized performance spaces and offices, modified the original use permit and, in Condition No. 10<sup>1</sup>, indicated that a cultural use must show qualifications as an art, cultural or education group that directly supports arts and/or education in the City of Berkeley. Neither the Use Permit nor the condition had an explicit performance standard, although the Use Permit only required half of the mezzanine office uses to be non-profit organizations whose purpose was to directly support arts and/or education. Letters exchanged in 2003 indicated that the cultural space would be used for a “wide variety of arts-related activity, music concerts, lectures, films, receptions, and cultural and incidental uses appropriate for the space.” This approval was a refinement of and consistent with Use Permit 02-70000014, and as implementation of Condition No. 10, it approved certain types of uses and established a performance standard.

Councilmember Maio presented a resolution at the October 24, 2006 meeting that listed specific uses that would not need additional approval as cultural uses, including live performances, films, art galleries, and educational uses related to arts. The resolution also provides guidance to staff to use in determining whether a use should be included as cultural for the purpose of meeting the performance standard. The resolution is proposed as further implementation of Condition No. 10. An expanded resolution is attached, which incorporates the implementation plan provided in the June 13, 2006 letter from Patrick Kennedy; makes it clear that religious uses are not cultural uses and that cultural uses may not interfere with other uses in the building; and includes language about use of the marquee.

If the staff recommendation is approved, a report will be provided to Council every January that describes conformance with the performance standard. Church services and private parties would not be considered cultural uses.

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<sup>1</sup> Condition of Approval No. 10 stated: The following groups are approved for use of the cultural space - GAIA Arts and Cultural Center, Central Works Theater Ensemble, Shotgun Players, Berkeley Community Fund. All other groups leasing all or part of the cultural space, other than that those listed below, shall be subject to review and approval of staff as uses that are consistent with those required for cultural uses in which the overall building received a development bonus. All such groups shall submit information on a form, to be developed by Staff, as necessary to ascertain their qualifications as an art, cultural or education group that directly supports arts and/or education in the City of Berkeley. Staff shall conduct research in order to certify that the groups are consistent with the Zoning Adjustments Board's intent, and staff may forward such information for review by the Zoning Adjustments Board or the Civic Arts Commission in making its determination.

***Food and Alcohol Service***—Clarification was requested by the City Council regarding the Use Permit requirements for food and alcohol service. The March 20, 2003 memo prepared by Anna de Leon and signed by the Zoning Officer states:

I am writing to confirm our understanding that the above referenced Use Permit allows us to serve all permitted food and beverages to all entities in the cultural center at 2116-2120 Allston Way, both on the main floor and on the mezzanine. These spaces will not be used for cooking or be part of the cooking or bar facility in any formal sense, but food and alcoholic beverages may be brought to and consumed in the theater and mezzanine spaces.

The Zoning Officer confirmed this understanding, and added a note:“Food may be served but spaces must be used as required by all use permits.” At the time, Ms. de Leon was planning to assist with programming for the Gaia Cultural Center. As with use permits, such approvals run with the property or use, not with an individual; therefore, the current programming manager may“serve food and beverages”that are brought to the facility, however, cooking is not allowed pursuant to specific Use Permit conditions.

When food is served in the theater or on the mezzanine, it is delivered by a catering company, kept warm or cold in the food-preparation room, and served. The food-preparation room is not a full kitchen—it has a large appliance that keeps food warm, a refrigerator, and sink. The facility is not a“food service establishment”as defined by the Zoning Ordinance. Similarly, the facility does not provide“Alcohol Beverage Service”, which is defined in the Zoning Ordinance as follows:

The retail sale of beverages for on-site consumption subject to regulation by the ABC as an on-sale establishment.

Staff understanding is that the catering company or their client obtains one-time licenses when alcohol is served with a catered dinner. Staff does not consider this a retail alcohol sale use, for which a Use Permit would be required.

#### BACKGROUND

Please refer to previous staff reports for background.

#### RATIONALE FOR RECOMMENDATION

Gaia Arts Center recently received its Final Certificate of Occupancy for tenant improvements, renewed the lease with The Marsh Theater, has opened a gallery, and is discussing bookings other cultural users. Although there has been concern about private events, very few have been scheduled. There will be regular staff review of the schedule with a report to the City Council in one year. If a problem develops, enforcement would take the usual course of staff investigation, followed by further ZAB or City Council enforcement action.

ALTERNATIVE ACTIONS CONSIDERED

The possibility of referring the cultural use issue was discussed at the October 24, 2006 Council meeting. It was suggested that the ZAB should determine the allowable cultural uses. Staff does not see a basis for such a referral.

On March 23, 2006, the ZAB determined that staff did not have the authority to allow non-cultural uses and requested that Staff set a hearing to consider revocation or additional conditions for the project. This determination that staff should not have approved a performance standard was not supported by the City Council, therefore, no Use Permit Modification or additional conditions are necessary for uses that were not specifically permitted by the previous use permit, and no revocation hearing should be set unless the performance standard is not met.

CONTACT PERSON

Wendy Cosin, Deputy Planning Director, Planning and Development Department, 981-7402

Attachments:

1. Resolution
2. Overview of Gaia Building's approved cultural uses

RESOLUTION NO.            -N.S.

ESTABLISHING PERFORMANCE STANDARDS FOR USE OF CULTURAL SPACE AT  
GAIA BUILDING, 2120 ALLSTON WAY

WHEREAS, when the City approved a Use Permit for the Gaia Building, at 2120 Allston Way, in 1998, the applicant, received two additional residential stories in exchange for provision of a 10,000 square foot cultural facility, consisting of space on the ground floor and a mezzanine (the“Cultural Space”); and

WHEREAS, at the time the building was approved the intended use of the Cultural Space was for the Gaia Bookstore; and

WHEREAS, the Gaia Bookstore went bankrupt and ceased to operate before the building was finished; and

WHEREAS, In April 2002, the Zoning Adjustments Board approved a plan that included a café and performance spaces on the main floor and arts-related office uses on the mezzanine, of which one-half were required to be for non-profit organizations supporting arts and/or education; and

WHEREAS the café and the remainder of the Cultural Space are under different management and control, and the area other than the café is known as the Gaia Arts Center; and

WHEREAS, letters were exchanged between City staff and a representative of the owner in April, May, and June 2003, which clarified and refined the requirements for cultural uses; and

WHEREAS, on April 25, 2006, the City Council approved a motion that Carol Barrett had the authority to agree in her June 6, 2003 letter that the required cultural use had to have a minimum of 30% of the time devoted to performances and that this requirement must be construed to also require additional preparation time such as set-up and rehearsal time for such performances; and a motion affirming that non-cultural uses which are incidental to and compatible with the cultural uses are permissible as long as the cultural performances have priority in scheduling, thereby accepting the 2003 letters as describing uses permissible under the applicable Use Permits and the required frequency of such uses; and directed staff to return with specific proposals for implementation for Council consideration; and

WHEREAS, staff has met with the applicant and the operator of the Gaia Arts Center and conducted additional research, and has now returned with specific proposals for implementation; and

WHEREAS, on June 13, 2006, Patrick Kennedy, on behalf of Panoramic Interests, wrote the City proposing that the Council's April 25, 2006, action be implemented as follows:

- A. The theater space will be reserved for actual performances or events 30% of the days of the year (equivalent to 109 days per year), of which at least 70% (77 days) will be on weekends (Fridays, Saturday and Sundays). This 30% will *not* include rehearsal or set up time.
- B. Other weekend dates will also be reserved for cultural uses such that a minimum of 51% of all weekend dates will be reserved for cultural uses. This is equivalent to at least 80 weekend dates.
- C. On all other days, cultural users will be able to book one month earlier than other potential users.
- D. In the remainder of the ground floor and mezzanine, cultural related events will be programmed 15 days per month, on average; and

WHEREAS, on July 6, 2006, Wendy Cosin replied to this letter, clarifying that any non-cultural use of the Gaia Arts Center would be allowable provided that the performance standards set forth in the June 13, 2006, letter were met and that cultural performances have priority in scheduling; and

WHEREAS, the City Council has considered these specific proposals and believes they are workable.

NOW THEREFORE, BE IT RESOLVED by the City Council of the City of Berkeley as follows:

- 1. The Council accepts the June 13, 2006, letter of Patrick Kennedy, as clarified by the July 6, 2006, letter from Wendy Cosin, as a workable implementation strategy consistent with its action of April 25, 2006. Collectively, the commitments set forth in these letters constitute the Performance Standard that is and will be applicable to the Gaia Art Center under the applicable Use Permits.
- 2. a. In general, the following shall be considered a "Cultural Use" for purposes of Condition No. 10 of Use Permit Modification #02-7000004 and in connection with this Resolution, and uses within these categories that are open to the public need not be individually approved as cultural by staff:
  - 1) Live performances of music or dance, live theatrical productions, literature readings, or similar types of live performance.
  - 2) Film showings, other than regular use of the Gaia Arts Center as a movie theater for first-run films that are commercial in nature.
  - 3) Display of sculpture, painting, or other graphic arts when the space is open to the public.
  - 4) Educational uses related to any of the above.

- b. In addition, other uses specified in the 2003 letters, such as a wide variety of art-related activities, lectures, benefits and receptions for culture-related nonprofit organizations, and other similar uses as may be determined by the City, will be considered Cultural Uses if so determined by City staff.
  - c. In general, the following shall not be considered Cultural Uses:
    - 1) Religious services and related religious events.
    - 2) Private parties and receptions and similar functions that are not open to the general public, even for a fee.
    - 3) Uses that would otherwise be considered Cultural Uses that are presented at inappropriate times or for unreasonably brief periods.
  
- 3. In addition, there may be marginal situations that require the exercise of some judgment by the operator and staff as to whether a particular proposed use is a Cultural Use. Accordingly, the Council provides the following guidance for the operator and staff in making such determinations.
  - a. The fact that a use may not be open to the public (for instance, an invitation only master class for musicians) does not necessarily prevent it from being a Cultural Use. However, the purpose behind the General Plan policy that grants a development bonus for providing cultural space, as well as the Council's intention in approving the Gaia Building with such a bonus, was to provide opportunities for Berkeley residents to enjoy cultural opportunities. Therefore, the fact that an event is not open to the public shall mitigate against its being considered a cultural event.
  - b. The fact that there is a charge to attend an event or that food is served is irrelevant.
  
- 4. Uses other than Cultural Uses are allowed in the Cultural Space as long as they are incidental to its primary use for Cultural Uses and do not interfere with Cultural Uses. Consistent with, and subject to, the requirement that Cultural Uses be given priority, other permissible uses shall be subject to the following limitations.
  - a. The use of the marquee shall be limited to advertising Cultural Uses.
  - b. Use of the Gaia Arts Center may not materially or unreasonably interfere with Cultural Use of any part of the Cultural Space.
  
- 5. It is not the Council's intention to regulate the price that is charged for cultural use of the Gaia Arts Center. However, the operator of the Gaia Arts Center not only leases out the Cultural Space for Cultural Uses, but also rents it out for other uses that generate greater income, resulting in a perceived conflict of interest. Therefore, it is incumbent upon the City to ensure that Cultural Uses have the priority that is intended. The Council has considered the information presented to it concerning the discounted price charged to the existing lessee (the Marsh Theater), market rates for comparable cultural uses in the area, as well as non-cultural uses of the sort that use or might use the Gaia Arts Center. Based on its review of these rates, it is the Council's expectation, as well as its interpretation of the applicable Use Permits, that the prices charged for cultural uses of the Gaia Arts Center will be adjusted as necessary to comply with the Performance Standard

6. The operator of the Gaia Arts Center shall report in December 2006, June and December of 2007, and every December thereafter, on a form provided by City staff, as to compliance with the Performance Standard. Staff shall report the operator's compliance to the Council annually in January, beginning in 2007. The first report shall be limited to compliance for the period of September 19<sup>th</sup> (the date on which a final certificate of occupancy was issued) through December 31<sup>st</sup>. For subsequent years, compliance shall be judged based on the calendar year. Occasions on which a cultural user has reserved the space but not provided a cultural event through no fault of the operator shall be counted as a cultural event for purposes of compliance analysis.
7. In addition, upon three days notice, the operator of the Gaia Arts Center shall allow City staff to review (but not retain copies of) any future leases for Cultural Uses, to ensure continuing compliance with the Performance Standards.
8. The City Council supports and encourages the use of the Gaia Arts Center for the full range of permitted Cultural Uses, consistent with, and as a way to implement, Policy LU-19 of the General Plan.

## Attachment 2

November 14, 2006 Council Staff Report

### Overview of the Gaia Building's approved cultural uses

1. *Original approval:* The original cultural use of the property was planned to be Gaia Bookstore, which was considered a cultural use because it was locally owned, gave priority to cultural events involving local talent; and brought community members together for cultural purposes (including, but not limited to, music, art, multi-cultural presentations and literature).
2. *First UP Modification:* The Zoning Adjustments Board (ZAB) approved a modification on May 2, 2002 to substitute two performance spaces, galleries, and a café/concession on first floor and offices on mezzanine for the previously approved bookstore. Condition of approval no. 10<sup>1</sup> listed specific groups as approved uses, with all other groups requiring staff approval, with possible referral to ZAB or CAC.
3. *Second UP Modification:* The ZAB approved Anna's Jazz Island on April 25, 2003 (food service, live entertainment, and the incidental sale of beer, wine and distilled spirits).
4. *2003 Letters:* The applicant received staff approval to change the mezzanine office space to space for a "wide variety of arts-related activity, music concerts, lectures, films, receptions, and cultural and incidental uses appropriate for the space." Staff requested a performance standard<sup>2</sup>, which was approved. Approval was a refinement of and consistent with Use Permit 02-70000014, which authorized performance spaces and offices, and as implementation of Condition No. 10.
5. *ZAB Action* – On March 23, 2006, the ZAB determined that approval of a performance standard was not appropriately within staff authority and that a Use Permit Modification would be necessary for any use that was not permitted under the previously referenced Condition No. 10.
6. *Council Action*–On April 25, 2006, the City Council determined that establishment of a performance standard by the Planning Director in 2003 was appropriate implementation of the Gaia Use Permits and conditions approved by ZAB, and within the Planning Director's realm of discretion.

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<sup>2</sup> Theater: in use 30% of the days of each month on average; Remainder of ground floor & mezzanine: in use 15 days each month on average