



Office of the City Manager

ACTION CALENDAR

December 12, 2006

To: Honorable Mayor and
Members of the City Council

From: *PK* 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 compatible with the cultural uses, provided that cultural performances have priority in scheduling. Panoramic Interests submitted a proposal in June 2006 that established a minimum number of dates, including weekends, that the theater space will be reserved for performances. A resolution was subsequently drafted to specifically memorialize the performance standard, to describe uses that would not need additional approval, and to guide staff in determining whether a use should be included as cultural for the purpose of meeting the performance standard. The proposed resolution has been expanded to provide a more specific standard for ensuring that cultural uses receive priority in scheduling.

The Council briefly discussed the issues on November 14, 2006 and continued the item for further discussion. Specific issues raised at the meeting are discussed below. A Closed Session has been scheduled for December 11, 2006 to address threatened litigation on the subject.

FISCAL IMPACTS OF RECOMMENDATION

None

CURRENT SITUATION AND ITS EFFECTS

Questions have been raised during previous Council discussions about whether the entire non-residential area of the Gaia Building should be used exclusively for cultural uses. As described below, none of the Use Permits approved by the Zoning Adjustments Board (ZAB) were for exclusive cultural uses.

Are cultural uses the only allowed use?

1. The Gaia Bookstore, approved by Use Permit in 1997, received credit as a cultural use because of the performances which were to occur in a small part of the premises. A bookstore does not by itself qualify as a cultural use.
2. The 2002 Use Permit Modification, approved by ZAB, likewise did not require that the entire property be devoted to cultural uses 100% of the time. It allowed offices on the mezzanine and a condition stated, “no less than 50% of the mezzanine shall be used by non-profit organizations whose purpose is to directly support arts and/or education in the City of Berkeley”. Necessarily, this modified permit allowed up to 50% of the mezzanine to be used by groups that did not “support arts and/or education”.
3. The 2003 Use Permit Modification for Anna’s Jazz Island did not limit the hours of operation to those hours during which music was being performed. Necessarily, at all other times the use was “incidental” to cultural uses.
4. The “Barrett Letters”, approved by staff in 2003, allowed a change of use in the mezzanine from office to a “wide variety of arts-related activity, music concerts, lectures, films, receptions, and cultural and incidental uses appropriate for the space”. Staff authorized this change as consistent with cultural uses approved by ZAB in the 2002 Use Permit Modification and with a condition of the 2002 Use Permit which authorized staff to approve groups leasing all, or part of the cultural space. Staff believed that active cultural uses were more consistent with the original intent than were offices.

As indicated above, the 2002 Use Permit only required 50% of the offices to be cultural. The “Barrett letters” basically accepted the same numerical criteria for use of the mezzanine. On April 25, 2006 the City Council accepted the “Barrett letters” as establishing use of the theater and mezzanine for cultural and incidental purposes subject to the defined performance standard, and directed staff to return with proposals for implementation that would ensure that cultural performances have priority in scheduling.

What does “incidental use” mean?

There has been some question as to whether the original Use Permit or subsequent modifications of it ever contemplated or allowed “incidental” uses of the cultural space. As noted above, the original Use Permit clearly anticipated that most of the space, most of the time, would not be used for cultural purposes, such as performances. Furthermore, as also indicated above, only half of the mezzanine space approved as part of the first Use Permit Modification was required for cultural office users.

There is a longstanding administrative interpretation of the Zoning Ordinance that incidental uses that do not themselves require additional permits and are consistent with the primary permitted use are generally allowed.

An issue was raised that the mixture of uses violates the Zoning Ordinance because the uses do not qualify as “incidental” as defined by the Zoning Ordinance. Staff does not believe that the definition applies to the situation at hand. First, the term has been repeatedly used in an every day sense, and there is no reference to the Zoning Ordinance definition. Second, the Zoning Ordinance definition was clearly drafted for a different, more conventional type of situation, where the “incidental” use is concurrent with the primary use (thus the limitation on the amount of floor space) and involves a different “line of products or services”. An example would be the sale of beverages in a gift store. The use of these terms is incommensurable with the situation at hand, where the same space is being used for different purposes at different times, and neither products nor services are being offered.

In sum, it is apparent that the cultural space was not planned for exclusive cultural use, and that “incidental”, non-cultural uses, were permissible. Thus, the “Barrett letters” merely quantified for the first time the extent to which those various uses would be permitted.

The performance standard and priority for cultural uses

There is a different proposed performance standard for the theater (performances - 30%) than for the mezzanine (cultural use - 50% of each month on average). Concerns have been expressed about non-cultural uses, which are generally held in the mezzanine. Given that the mezzanine is partially open to the first floor theater and it would be difficult for both areas to be used concurrently, it is important that use of the two areas be coordinated.

As has been reported in previous staff reports, the performance standard proposed by the owner is 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.

As part of the continued discussion of implementation of the performance standard for the Gaia Arts Center, Councilmember Maio presented a resolution at the October 24, 2006 meeting that

listed specific uses that would not need additional approval as cultural uses and that 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 was proposed as further implementation of Condition No.10.

An expanded resolution is attached which provides more detail regarding priority in scheduling for cultural users. The proposal by Mr. Kennedy, to allow cultural users to book events one month earlier than other users, does not appear adequate, especially given that there is not a fixed time for bookings and that private events such as weddings commonly make reservations earlier than cultural events.

Finally, it should be noted that the situation with the Gaia Building is unique. This project was the first cultural density bonus granted by the City and the cultural aspect of the project has changed several times since the original approval. Subsequent to project approval, the new General Plan provided more detail on the cultural facility density bonus and the Cultural Arts Commission has developed a Cultural Facilities Application. The Gaia Use Permit Modifications, the "Barrett letters", and the resolution drafted to implement direction from the City Council are incremental approaches to addressing the lack of detail provided with the original application and Use Permit. They are consistent with the detailed standards now required. Conditions of approval for future projects will be written to more clearly define City requirements.

The Seagate project, 2041 - 2067 Center Street, which was approved in 2004, is the only other cultural density bonus project and sets a much better example for future applications. For Seagate, Berkeley Repertory Theater (BRT) was proposed as the primary tenant of the cultural space. Minimum usage was defined as the number of public performances. The total minimum number of regularly scheduled event days open to the public is at least 100 days per year, with BRT required to present at least 48 performances per year in the proposed building and to make the space available at below market rent to other non-profit community organizations for at least 52 days per year. The report and conditions do not address allowable uses for the remaining days. It is interesting to note that the 100-day minimum is approximately 30% of the days annually, similar to the administratively-approved performance standard for the Gaia Arts Center, although the Seagate performance standard explicitly regulates the number of performances.

BACKGROUND

Previous City Council staff reports have provided detailed information about project history and uses, as described below.

City Council Report: April 25, 2006 (10 pages, without attachments)
<http://www.ci.berkeley.ca.us/citycouncil/2006citycouncil/packet/042506/2006-04-25%20Item%2031%20GAIA%20Building%20Use%20Permit.pdf>

- Summary of each Use Permit and relevant conditions
- Information regarding 2003 "Barrett" letters

- Overview of use of facility and performance standard
- Summary of ZAB actions
- Discussion of incidental uses, including examples of such uses of other cultural facilities
- Information about Seagate conditions (the only other cultural density bonus project)

City Council Report: June 27, 2006 (6 pages, without attachments)

<http://www.ci.berkeley.ca.us/citycouncil/2006citycouncil/packet/062706/2006-06-27%20Item%2032%20GAIA.pdf>

- Summary of Council action, April 25, 2006
- Further background on “Barrett” letters and performance standard
- Panoramic Interests’ proposal to implement Council direction
- Table with information about weekend use of facility, 6/2005 – 6/2006

Off-agenda Council Report: July 7, 2006 (2 pages, without attachments)

- Information about Marsh lease
- Comparison of theater rental rates
- Calendar of arts programming: 6/2006 – 6/2007

City Council Report: October 10, 2006 (7 pages, without attachments)

<http://www.ci.berkeley.ca.us/citycouncil/2006citycouncil/packet/101006/2006-10-10%20Item%2019%202116%20Allston%20Way%20Gaia.pdf>

- Summary of information from previous reports
- Schedule/compliance with performance standard
- Summary of Gaia Schedule, 8/2006 – 3/2007 (Attachment 4)

City Council Report: November 14, 2006 (5 pages, without attachments)

<http://www.ci.berkeley.ca.us/citycouncil/2006citycouncil/packet/111406/2006-11-14%20Item%2026%20Gaia%20Building.pdf>

- Response to issues raised at October 24, 2006 Council meeting:
 - What is a cultural use?
 - Food and alcohol service
- Draft resolution establishing performance standards

RATIONALE FOR RECOMMENDATION

Gaia Arts Center received its Final Certificate of Occupancy for tenant improvements in September; renewed the lease with The Marsh Theater, which has performances planned for all November, January and February weekends; 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 project to ZAB for a determination of the allowable cultural uses was discussed at the October 24, 2006 Council meeting. 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

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 Use Permit modification allowing performance spaces on the main floor and office uses on the mezzanine, of which one-half were required to be for non-profit organizations supporting arts and/or education; and

WHEREAS, a second Use Permit Modification was approved by the Zoning Adjustments Board in January 2003 that allowed one of the previously approved performance spaces on the first floor to be used as a café with live entertainment, food service, and incidental sale of alcoholic beverages; and

WHEREAS, as a result of this second Use Permit Modification, the café and the remainder of the Cultural Space are under different management and control (the area other than the café is referred to herein as the Gaia Arts Center); and

WHEREAS, despite the first Use Permit Modification, the owner was not able to reach agreement with an arts organization to occupy the performance space because they were unwilling to make the investment necessary to improve the former bookstore space so that it could be used as performance space, and thus it remained unoccupied; and

WHEREAS, the owner decided not to move forward with the office uses as approved by the first Use Permit Modification; and

WHEREAS, the owner brought potential partners for the cultural venue to City staff to explore what could be done for the project to move forward; and

WHEREAS, the owner offered to make the investment in the performance space himself if he could recoup this investment by being permitted to change the mezzanine from office to “all kinds of cultural uses and events” that would include “wide variety of arts-related activity, music concerts, lectures, films, receptions, and cultural and incidental uses appropriate for the space”; and

WHEREAS, letters were exchanged about this proposal 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, in these letters the owner and his representative proposed that the performance space on the first floor would be used a minimum of 30% of the days of the year time for cultural performances or events; and

WHEREAS, the change of use of the mezzanine from offices to actual cultural uses with arts-related activities programmed 50% of the time would expand the space occupied by cultural uses and thus was consistent with and an expansion of cultural uses; and

WHEREAS, City staff approved the final proposal made by the owner and his representative as consistent with the cultural uses approved in the 2002 Use Permit Modification and with a condition thereof that authorized staff to approve groups leasing all or part of the Cultural Space, because in staff's opinion active cultural uses were more consistent with the intent of the original Use Permit and the underlying General Plan policy than were offices; 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 performance (theater) area 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 on the first floor 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, the June 13, 2006 letter also states:

“The Gaia Arts Center will be mindful of the limited budget of many cultural users, and make special efforts to accommodate them throughout the year. (E.g. The Marsh Theater just had a three week run of Stephanie Weisman’s “Aphrodisia” at no charge.)”; 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.
 - a. The Council accepts the June 13, 2006, letter of Patrick Kennedy, as clarified by the July 6, 2006, letter from Wendy Cosin and as further modified herein, as a partially workable implementation strategy consistent with its action of April 25, 2006. Collectively, the commitments set forth in these letters constitute some of the minimum Performance Standard that is and will be applicable to the Gaia Art Center under the applicable Use Permits.
 - b. As the Council determined on April 25, 2006, the Use Permits also require that Cultural Uses have priority over other uses. Given the existing unsatisfied demand for cultural space in Berkeley, the minimum Performance Standard does not fully reflect the priority requirement. However the Council also recognizes that circumstances change, and that is impracticable to adopt an inflexible definition of “priority” in this context. Instead, the Council determines that the “priority” requirement will be met if the performance space on the main floor of the Cultural Space is used for Cultural Use performances 3 out of every 4 weekends. If the performance space is not used for Cultural Performances with this frequency, the person or entity responsible for programming the Cultural Space shall demonstrate as part of the regular

reporting required by paragraph 6 why this level of performances was infeasible.

- c. In addition, while it is helpful for Cultural Uses to have the opportunity to reserve the Cultural Space before other uses, it is not clear that this accurately reflects market demands. In many cases persons looking for venues for non-cultural uses like weddings book spaces well before persons looking to book venues for Cultural Uses would even begin looking. Thus, the operator of the Gaia Arts Center shall draft and submit for City review a booking protocol that insures that Cultural Uses are not preempted by excessive earlier bookings of non-cultural uses. If during any reporting period as set forth in section 6 the Performance Standards are not met, this protocol shall be modified to ensure that the Performance Standards are met in future reporting periods.
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 (including rehearsals and workshops), live theatrical productions, literature readings, spoken performances, 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, as well as lectures and workshops about film or photography.
 - 3) Display of sculpture, painting, mixed-media 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. “Sandwich signs” or other freestanding signs placed on the sidewalk are prohibited.
 - c. Use of the Cultural Space should not materially or unreasonably interfere with Cultural Use of any part of the Cultural Space.
 1. Any person who presents amplified music in any part of the Cultural Space shall maintain at all such times an appropriate type of decibel meter or other sound monitoring device as specified by the City, that records decibel levels in a manner that allows appropriate analysis by the City.
 2. Any event in the Cultural Space that is attended by more than 100 persons shall provide unarmed security in an attendee/security ratio determined by the Chief of Police. The Chief of Police, in consultation with the Fire Marshal, shall base his or her determination as to the appropriate number of security personnel solely on the following factors:
 - a. the number of persons that can reasonably be anticipated to attend;
 - b. whether alcohol will be served or is likely to be consumed; and
 - c. the number and character of other events at which incidents requiring police intervention have occurred, with which the sponsor or any person responsible for the promotion of the event has been associated.

In no event may the Chief establish an attendee/security ratio in excess of one security person per 25 attendees.

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, and in particular has also considered the representation in the June 13, 2006 letter that is quoted above. 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 by the first day of June and December of 2007, and the first day of 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. 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 concerning the use of the Cultural Uses, as well as any marketing plans for the Cultural Space, 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.