TO:	**Shannon Allen, Principal Planner**
	Planning and Development Department, City of Berkeley
FROM:	West Berkeley Investors, LLC
DATE:	June 29, 2018
SUBJECT:	Re: 1900 Fourth Street, Application ZP 2018-0052
	Use Permit and Structural Alternation Permit/SB35 (Government Code 65913.4)
	Application for a Mixed Use Development

I. Berkeley Should Approve Affordable Housing at 1900 Fourth- Summary

We have received your June 5, 2018 letter ("City Letter") responding to our March 8, 2018 application ("Initial Application") for a streamlined ministerial permit pursuant to Government Code § 65913.4 ("SB 35") for the 1900 Fourth Street Project ("Project"). As you know, the Project will provide 50% of its units – 130 homes - as affordable housing for low-income households, an unprecedented commitment in the City of Berkeley for any private developer, on a site designated as a Priority Development Area and designated for high-density housing in the City's General Plan. It offers a major step toward improving Berkeley's poor track record in creating affordable housing for low-income households; the City has met less than 4% of its Regional Housing Needs Assessment target for low-income housing in the current planning period. (*See* California Department of Housing & Community Development, SB 35 Determination Methodology and Background Data (June 2018).) The Project will also pay prevailing wages to construction workers, among many other community benefits. The City Letter acknowledges that the Project satisfies most of the applicable SB 35 criteria, but states that more information is needed from the Applicant to demonstrate compliance with certain SB 35 criteria.

This submission addresses all issues raised in the City Letter and establishes the Project's compliance with all applicable SB 35 criteria. Pursuant to State law, the Project is entitled to approval within 180 days of submission of the Initial Application. Therefore, the City must grant the Project a ministerial permit pursuant to SB 35 by September 4, 2018.

The City Letter primarily focuses on two issues, the first of which relates to historic structures and the second of which relates to the City's Affordable Housing Mitigation Fee ("AHMF") Ordinance. With respect to historic structures, the City Letter contends that the Project is precluded by SB 35's exception for projects that "would require the demolition of a historic structure," Gov. Code § 65913.4(a)(7)(C), despite the fact the Project does not propose to demolish any historic structure that is listed on any federal, state or local register. We further note that it has been definitively demonstrated that the West Berkeley shellmound *is not* located on the Project site, and will not be affected by the Project.

With respect to affordable housing, the City Letter states that the City is inclined to reject this *50% affordable project* because it does not meet various technical aspects of the City's AHMF ordinance, which are normally only applicable to projects which provide 20% or less of their units for affordable housing. As set forth below, this contention also does not permit the City to reject the Project.

The City Letter also re-iterates requests for information first made in the City's April 6, 2018 letter. As the April 6 letter acknowledges, the April 6 letter is not part of the City's assessment of the Project's compliance with SB 35's criteria, and as a matter of state law the City's review of the Project's eligibility

for a streamlined ministerial permit must be "strictly focused on assessing compliance with" SB 35's criteria. Gov. Code § 65913(c). Despite this, although the April 6 letter is not relevant to the SB 35 application process, in the interest of being as responsive as possible to the City's requests, we have provided a response to the April 6 letter, purely for informational purposes, which is provided separately.

Finally, we respond below to the City Letter's unfortunate suggestion that the City may be considering refusing to follow SB 35 even if the Project does comply with the statute's requirements. We know that some sources within the City expressed policy disagreements with SB 35, but we greatly respected and appreciated Mayor Jesse Arreguin's statement on the date of the Initial Application acknowledging that "SB35 is now state law and we must follow it." We hope the City will reconsider the City Letter's apparent retreat from the Mayor's admirable statement. As set forth below, the City has no ground on which it could legally refuse to meet its obligations under State law to do its part to meet California's affordable housing crisis.

II. Revision Does Not Restart the 90-Day Clock; The Applicant Is Entitled to a Decision Within 180 Days of Submitting its Application.

There is nothing in SB 35 that suggests the 90-day initial review period restarts upon resubmittal of a revised application; rather, subsection (b) sets a deadline for the City's initial review of the application and subsection (c) provides a total of 180 days for the City to ensure that any revised submittals comply with objective criteria. In relevant part, subsection (b) provides that

> If a local government determines that a development submitted pursuant to this section is in conflict with any of the objective planning standards specified in subdivision (a), it shall provide the development proponent written documentation of which standard or standards the development conflicts with, and an explanation for the reason or reasons the development conflicts with that standard or standards . . . Within 90 days of submittal . . . if the development contains more than 150 housing units.

The above language simply requires that the local government provide written documentation of which standards the development conflicts with. Nowhere does SB 35 provide a "new" 90 day period to review any revisions. In fact, the Legislature pointedly *declined* to adopt or incorporate procedures providing for "completeness" review and providing for new timelines to review re-submitted applications. *Compare* Gov. Code § 65943(a) (in Permit Streamlining Act, agencies required to notify an applicant within 30 days whether the application is complete, and specifies that "upon receipt of any resubmittal of the application, a new 30-day period shall begin"). As the City has noted, SB 35 "effectively replac[es] the standard procedures and timelines for completeness review with . . . [the] timeframes [in the SB 35 statute]." (April 26, 2018 Memorandum from City Manager Dee Williams-Ridley Re: The 1900 Fourth Street Development Application and Senate Bill 35, at p. 3.)

Instead, SB 35 provides local governments and applicants with 180 days to complete the typical back-and-forth process of ensuring compliance with development standards. To that end, subsection (c) provides that

> Any design review or public oversight of the development may be conducted by the local government's planning commission or any equivalent board or commission responsible for review and approval of development projects, or the city council or

> board of supervisors, as appropriate. That design review or public oversight shall be objective and be strictly focused on assessing *compliance with criteria required for streamlined projects*, as well as any reasonable objective design standards published and adopted by ordinance or resolution by a local jurisdiction before submission of a development application, and shall be broadly applicable to development within the jurisdiction. That design review or public oversight shall be completed . . . [w]ithin 180 days of submittal . . . if the development contains more than 150 housing units.

(Emphasis added.) Oversight of "compliance with criteria for streamlined projects" during the 180 days includes ensuring a revised application's compliance with conflicting standards raised by local governments at the end of the initial 90-day period. By allowing a total of 180 days for public oversight regarding compliance with criteria required for streamlined projects, SB 35 contemplates an ongoing period beyond the initial 90 days to allow applicants to revise their application as needed. Thus, an applicant is entitled to a decision on the application at the end of the 180-day period, during which the applicant may address any non-compliance issues that the local government documented and explained in writing before completion of the initial 90-day period.

The 180-day oversight period reflects SB 35's intent to streamline applications. SB 35 would not have included the 180-day review period if the 90-day clock restarted in response to any application revisions addressing compliance issues that a local government documented at the end of the initial 90-day period. If applicants were required to resubmit revised applications due to any non-compliance, the result would be absurd for a statute designed to "streamline" applications: cities would be given another 90 days to review even minor revisions, and could then reject an application for minor compliance issues once again, thus restarting the 90-day period over and over again to keep an application in limbo. Instead, the 180-day review period allows for cities to identify compliance issues and for applicants to address them through revisions in a time-limited process. If the non-compliance issues cannot be addressed within the 180-day period, then the City can deny the application, but at this point it would be is premature and unlawful for the City to do so.

III. The Fact That the Project Site is Located within a Historically Designated Area Does Not Authorize the City to Reject the Project.

A. The Requirement to Obtain a Discretionary Structural Alteration Permit Does Not Apply Pursuant to SB 35.

Under SB 35, if a project satisfies the statute's prerequisites, the applicant is entitled to a "ministerial approval process," and the local jurisdiction cannot require an applicant to obtain a discretionary permit. Gov. Code § 65913.4(a). SB 35 further states that the only standards a local agency may impose on a SB 35 application are "objective" standards that "involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official prior to submittal." Gov. Code § 65913.4(a)(5). As set forth in the Initial Application and in

this submission, the Project complies with all such applicable objective standards. The only remaining standards that would ordinarily apply are subjective, and therefore inapplicable pursuant to SB 35.

In spite of this, Attachment A to the City Letter, citing BMC § 3.24.260(C)(1)(a), states that the City will reject the Project because staff has concluded that the project "could adversely affect the special historical value of the landmark and its site." (Attachment A to City Letter, at Page 9.) To put it bluntly, it is impossible to understand how the City could contend that this is an "objective" standard. The question of whether a proposed development "could adversely affect" a landmark is not "objective" under any reasonable definition of that word – and is certainly not objective under SB 35's very specific, and very narrow, definition of the term. The City cannot reasonably contend that determining whether a project complies with BMC § 3.24.260(C)(1)(a) "involve[s] no personal or subjective judgment by a public official," Gov. Code § 65913.4(a)(5), because the standard calls for the public officials on the Landmarks Preservation Commission ("LPC") to make a personal and subjective judgment about whether or not a particular project would or would not adversely affect the landmark. Similarly, the question of whether a project could "adversely affect" a landmark is not "uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official prior to submittal." Gov. Code § 65913.4(a)(5). If the City has published any official uniform benchmarks or criteria defining precisely what types of development do and do not "adversely affect" this landmark, the City would have been required to identify those in the City Letter. *See* Gov. Code § 65913.4(b)(1). The Applicant would have designed the Project to comply with all such uniformly verifiable benchmarks, if any existed. But there are no such uniformly verifiable benchmarks. Indeed, the process to date demonstrates that there is no objective standard defining the answer to this question: the City's Draft EIR for the Project concludes that the project would not significantly impact the landmark with appropriate mitigation, while others apparently believe that it would. Under the City's code, the question of whether a project "adversely affects" a landmark is not an objective determination but is rather left to the subjective discretion of the LPC, and it is precisely this subjective decision-making that SB 35 was designed to preclude. Controlling case law confirms this explicitly. *See* Honchariw v. County of Stanislaus, 200 Cal. App. 4th 1066, 1076 (2011) (standards such as "suitability" are subjective, and are not applicable where state law only permits reliance on "objective standards").

Since the criteria for issuance of a Structural Alteration Permit ("SAP") are plainly subjective, the requirement to obtain an SAP does not apply to an otherwise SB 35-compliant project. Notwithstanding this, the City Letter states that the Project is not eligible for SB 35 streamlining because the Project conflicts with what the City Letter calls an "objective" requirement in BMC § 3.24.200 that requires project applicants to obtain a SAP. (City Letter at Page 7 and at Attachment A, Page 9.) The City Letter seems to suggest that the City can deny project applicants access to the ministerial approval process mandated by State law simply because the *requirement to seek a discretionary permit* is phrased in objective terms in a city's ordinance. If it is, in fact, the City's position that SB 35 can be effortlessly evaded in this manner, this position is inconsistent with the text, structure and intent of the law.

First, nearly all – if not all – local agencies in California have requirements similar to those imposed in BMC § 3.24.200, which ordinarily require a particular type of discretionary permit for certain uses or developments in certain districts. If these requirements were considered an "objective" requirement that precluded application of SB 35, then SB 35 would not have any effect. A "statute cannot be construed in a way that would make its provisions void or ineffective, especially if that would frustrate the underlying legislative purpose," Singletary v. Local 18 of the Int'l Bhd. of Elec. Workers, 212 Cal. App. 4th 34, 45

(2012), and any court reviewing the City's interpretation would be bound "to give effect to the Legislature's intended purpose in enacting the law." People v. Hubbard, 63 Cal.4th 378, 386 (2016). It is for this reason that the guidance documents of other jurisdictions acknowledge explicitly what the City of Berkeley appears to deny: that SB 35 displaces any requirement to seek any type of discretionary permit. See, e.g., San Francisco Planning Department, SB 35 Implementation in San Francisco, May 11, 2018 (SB 35 "[r]emoves requirement for Conditional Use Authorizations or other discretionary entitlements"); City of Concord Planning Division, Streamlined Housing Development: Applications Under Senate Bill 35 ("Under SB 35, the City is required to review qualifying projects using a ministerial review process, which means that no discretionary approvals can be required").

Second, the City's apparent position is also internally inconsistent and arbitrary. The City Letter does not claim that the Project conflicts with the similarly "objective" standard in the BMC that would ordinarily require a discretionary Use Permit for this Project. This is, of course, the proper application of SB 35: because the criteria for issuance of a Use Permit are subjective, the requirement to seek a Use Permit cannot be asserted as an "objective" standard with which the Project conflicts. Having conceded that the Project need not seek a discretionary Use Permit to qualify for SB 35's ministerial approval process, there is no legal reason why the requirement to seek a Structural Alteration Permit should be treated any differently.

Third, although SB 35 is too recently enacted to have generated any case law, the California Court of Appeal and the Alameda County Superior Court have already definitively resolved this question in cases involving practically identical language in the Housing Accountability Act ("HAA"), Gov. Code § 65589.5. Under the HAA, as under SB 35, a local agency's discretion to reject a project is substantially limited if the project "complies with applicable, objective . . . standards." Gov. Code § 65589.5(j)(1). According to the Court of Appeal, the HAA's emphasis on "objective" standards is intended to "take[e] away an agency's ability to use what might be called a 'subjective' development 'policy' (for example, 'suitability')." *Honchariw*, 200 Cal. App. 4th at 1076. *Honchariw* involved a provision of the Stanislaus County Code - phrased in terms just as objective as BMC § 3.24.200 – that requires applicants to obtain a discretionary tentative map approval in defined circumstances. *See* Stanislaus County Code § 20.12.010. Notwithstanding this requirement, the Court of Appeal held that the county could not deny approval to a project based on the subjective tentative map approval criteria in the county code that ordinarily empowered the county's Board of Supervisors to decide whether a development is "physically suitable" for the site. *Honchariw*, 200 Cal. App. 4th at 1078-79 (quoting Stanislaus County Code § 20.12.140). There is no reason why SB 35 should be interpreted in a manner that is inconsistent with the California Court of Appeal's precedential interpretation of essentially identical language in the HAA.

The same result occurred in recent litigation before the Alameda Superior Court, which was prompted by the City of Berkeley's attempt to require a discretionary demolition permit for a project that complied with all objective standards and otherwise qualified for protection under the HAA. *See* Order on Motion to Enforce Settlement Agreement/Stipulated Order Granted, San Francisco Bay Area Renters Alliance v. Berkeley City Council, No. RG16834448 (Alameda Cty. Sup. Ct. July 21, 2017); Stipulated Order Granting Petitioners' Motion to Enforce Settlement Agreement/Stipulated Order, No. RG16834448, San Francisco Bay Area Renters Alliance v. Berkeley City Council (Alameda Cty. Sup. Ct. Sep. 20, 2017). As a result of the City's improper attempt to require a discretionary permit for this HAA-compliant project that complied with all objective standards, Berkeley taxpayers ended up paying the attorney's fees of the developer who was forced to sue to compel the City to comply with State housing law.

Under SB 35 (as well as under the HAA, discussed further at Part, *infra*), the fact that a project would ordinarily require a discretionary permit cannot be a valid reason for denying a project access to the ministerial approval process mandated by SB 35. For the foregoing reasons, we respectfully request that the City reconsider and retract the City Letter's contention that the Project's asserted noncompliance with BMC §§ 3.24.200 and 3.24.260 renders the Project inconsistent with "objective" standards.

B. The Applicant Has Demonstrated that the Shellmound and Associated Cultural Features Are Not Present on the Project Site, and so the Project Will Not Require Their Demolition.

Even assuming the shellmound could be considered a "structure" and excavation of the shellmound as "demolition," evidence submitted by the Applicant, and confirmed by the City's independent consultant, demonstrates that the shellmound is not present on the Project Site. With no shellmound, there can be no "demolition." Indeed, the City's letter confirms that if there is no shellmound there can be no demolition, noting that "**If** the West Berkeley Shellmound or another historic structure is underneath the project site, the project's extensive excavation of the site **could** require the demolition of a historic structure." City Letter, at 6 (emphasis added). The City Letter goes on to conclude that the application is SB 35 eligible if it "establishes that there are no such subsurface historic structures at the site or that the project will not require the demolition of those historic structures." *Id*.[1] What the City Letter fails to recognize, however, is that the Applicant has already demonstrated that there are no subsurface historic structures at the site so no demolition will occur.

Over a period of several years, the applicant team conducted exhaustive archaeological, historical and geological investigations, research, and analysis, all of which concludes that the Project Site is not now and never was the location of the West Berkeley Shellmound, but rather was largely marshland and at least partially under water. This analysis was peer reviewed by the City's independent consultant in the Draft EIR and the same conclusion was reached. While the West Berkeley Shellmound – or rather shellmounds – exist in the immediate vicinity, neither of the two shellmounds is on the Project Site. All of this has been extensively documented in the administrative record. Rather than repeat those conclusions, we direct the City to the letter submitted by counsel to the Applicant on March 13, 2017, which is included as Attachment #1 in this submittal. We also incorporate by reference the archaeological report prepared by Dr. Pastron, *A Report on Archaeological Testing Conducted within the Spenger's Parking Lot*, Archeo-Tec, Inc., June 2014 ("Archaeological Report"), and the discussion of these issues contained in the Draft EIR. The following are the key takeaways from this thorough investigation:

- Dr. Pastron concluded that there is "no evidence whatever that the West Berkeley Shellmound was ever located on the Spenger's Parking Lot site."

[1] This statement that construction can occur on this landmarked site is consistent with the City's earlier position that the purpose of the landmark is not to prohibit development, but rather to require prior investigation. In litigation relating to the original extent of the landmark designation, the City wrote:

> "[I]t is important to emphasize…that the City's decision to designate the West Berkeley Shellmound as a City "landmark" does not in itself prevent any developer or use of the property effected. Rather, it requires additional review of new buildings or alterations to the exterior of existing buildings, with an eye towards protecting the resource. That is, it will require that appropriate further investigation be done – and "certainty" achieved – before further development occurs.

620 Hearst Group v. City of Berkeley, Alameda Superior Court, Case No. 834470-2, Memorandum of Points and Authorities in Opposition to Writ of Mandate, at 3.

- This conclusion was reached after analyzing material found within 43 borings spread throughout the site and 22 trenches; the borings went down at least 18 feet and the trenches generally more than 10 feet, all well below the approximately top 4 feet that contains post-contact fill materials.
- The City's independent consultant, LSA, reviewed the Archaeological Report and concluded that its "methods are consistent with standard archaeological practice, and the study represents a reasonable and good faith effort to identify archaeological deposits." Draft EIR at 74.
- Historic maps place the primary shellmound on the neighboring Truitt & White property, a secondary shellmound to the east and north of the Project Site, and depict the Project Site as consisting of marshland at the mouth of Strawberry Creek.
- Geological testing confirms the marshland depiction on the maps, as investigations found that a "majority of the site is underlain by young marsh deposits."

In sum, extensive subsurface archaeological investigations throughout the entirety of the Project Site found no evidence of the shellmound, historic maps depict the shellmounds on adjacent properties and show the Project Site as primarily marshland, and geological testing confirms that most of the Project Site is underlain by marsh deposits.

C. The Fact That the Project Is Within the Boundaries of a Landmarked Site Does Not Authorize the City to Reject The Project.

For the foregoing reasons, since the Project will not affect or alter the shellmound or any of its associated cultural features, the City must find, without further inquiry, that the Project is not exempt from SB 35 streamlining. However, for the purposes of completeness, this response further responds to the contention that SB 35's exception for projects that "would require the demolition of a historic structure that was placed on a national, state, or local historic register" applies to this Project. Gov. Code § 65913.4(a)(7)(C). There is no merit to this contention.

As the City Letter correctly acknowledges, what is listed on the state and local register in this case is an "area" or a "site": namely the two-block area bounded by Second Street, Fourth Street, Hearst Avenue and University Avenue, which defines the boundaries of City Landmark # 227 and State archaeological site P-01-00084/CA-ALA-307. (City Letter, at Page 9 (the "project site is within the ***area*** designated . . ."; "the ***site*** has been placed [on a local and state register]" (emphases added)). SB 35 contains no exception for developments located within a listed "site" or "area." If the Legislature had intended to provide an exemption that covered all sites or areas subject to a historic designation, it would have been easy enough to write language saying so. Instead, SB 35 *only* creates an exception for projects that "would require the demolition of a ***historic structure*** that was placed on a national, state, or local historic register." Gov. Code § 65913.4(a)(7)(C) (emphasis added).

"[C]ourts ordinarily give the words of a statute . . . [their] usual, everyday meaning," or, "when a word used in a statute has a well-established legal meaning, it will be given that meaning." Arnett v. Dal Cielo, 14 Cal. 4th 4, 19 (1996). The everyday meaning of "structure," as well as its well-established legal meaning, refers to something that is constructed, such as a building - not a property, a site, or a set of cultural elements. *See, e.g.*, Berkeley Municipal Code § 23F.04.010 ("structure" defined as "[a]nything constructed or erected, the use of which requires location on the ground or attachment to something having location on the ground,"); California Building Code § 202 ("structure" is "that which is built or constructed"); Black's Law Dictionary (10th ed. 2014) ("structure" is "[a]ny construction, production, or piece of work artificially built up or composed of parts purposefully joined together, <a building is a

structure>"). By using the phrase "demolition" immediately before the word "structure," the Legislature removed any reasonable doubt about whether it was using the word "structure" consistent with its everyday meaning. After all, it is not possible for a residential development project to result in the "demolition" of an "area." Moreover, it is clear from the context that SB 35 is intended to apply even in areas subject to landmark designations, since the statute specifies that SB 35 streamlined projects are exempt from parking requirements if they are "located within an architecturally and historically significant historic district." Gov. Code § 65913.4(d)(1)(B).

Obviously, the Project will not result in the "demolition" of the two-block "area," and so there should be no dispute that the project will not result in the "demolition" of the only feature that is listed on the state or local register. However, the City Letter claims that the Project is exempt from SB 35 because it is believed that, somewhere within the two-block area, there may be a subterranean "large mound structure" (the actual shellmound) and "cultural features (hearths, pits and structures)." Assuming *arguendo* that any of these features qualify as "structures" under SB 35, and again even assuming *arguendo* that either of these features are present on the Project site (which they are not), these features are *not what is listed* in the State and local register. Only the site or area is listed, and so Gov. Code § 65913.4(a)(7)(C)'s exception does not apply.

Either the State or the City could have listed the actual shellmound or those specific cultural features as historic "structures," but neither the State nor the City has ever done so. Of course, listing the actual shellmound as a historic "structure" would have required the City or the State to *know the location* of the shellmound, which is an understandable prerequisite for listing a structure. It was not possible to list the shellmound as a historic structure because the City did not know at the time of landmarking where the shellmound was actually located (and subsequent investigation has now demonstrated that it is not located on the Project site). The State or the City could also, at any time, have adopted objective development standards governing the listed area that would have prohibited or restricted development from proceeding within this area. But neither the State nor the City have taken that action either. Instead, the City has maintained a landmark designation on the two-block area that the City has acknowledged was intended only to encompass the "approximate" location of the shellmound, which designation has the effect of requiring a discretionary review process on development within the two-block area. After enactment of SB 35, an otherwise SB 35-compliant project cannot be denied approval through this discretionary process.

We know that opponents of the Project have argued that this question is an extremely complex legal issue that requires the City to delve deeply into numerous extraneous provisions of law in order to come to the conclusion that the word "structure" really means "site."[2] In reality, the issue is

[2] We are aware of the fact that the Project opponents' lawyer has submitted an extensive brief arguing that "structure" really means "site." (The 1900 Fourth Street Project and Senate Bill 35 – Brief of the Confederated Villages of Lisjan, May 21, 2018 ["Brief"]). Having discovered nothing in the text of SB 35 that supports this interpretation, the Brief contends that the City should not apply the plain text of SB 35 in accord with its ordinary meaning, but should instead draw from a wide-ranging list of other sources in order to come to the conclusion that the drafters of SB 35 meant "site" when they wrote the word "structure." Since it is not clear to us that the City has accepted any of these arguments, we will refrain from responding in detail to the Brief. However, we feel compelled to note that this argument is riddled with inconsistencies and implausible claims. To take one example, the Brief claims that the City should apply a definition of "structure" used in a federal guidance document which states that the term "structure" is "used to distinguish from buildings those functional constructions made usually for purposes other than creating human shelter." (Brief at 26 [quoting National Register Bulletin 16A].) But under this definition, "structure" would

straightforward. A "site" is not a "structure," and nothing in the text of SB 35 suggests that it is. Nothing in SB 35 states or implies that it is intended to incorporate any specialized definition of "structure" from any other provision of law that would cause the word to have anything other than its usual, everyday meaning. However, to the extent other provisions of State law are pertinent, it should be noted that in the statute governing the California Register of Historical Resources, the term "structure" is used in contradistinction to the terms "site" and "place." *See, e,g.*, Pub. Res. Code §§ 5020.4(a)(9)-(10), 5021 & 5024(h). The corresponding regulations refer to "buildings," "site[s]" and "structure[s]" as entirely distinct types of resources. 14 Cal. Code Regs. § 4852(a)(1)-(3). Moreover, although it is unlikely that the State Legislature intended to incorporate any specialized definitions used in the Berkeley Municipal Code into SB 35's understanding of the word "structure," numerous provisions of the BMC also plainly distinguish between "structures" and "sites" as different types of landmarks (*see, e.g.,* BMC § 3.24.110 [establishing two distinct categories: "landmarks and historic districts," as distinct from "structures of merit"]), and the official "City of Berkeley Designated Landmarks" list refers to City Landmark #227 as a "landmark" rather than a "structure of merit," and the list does not identify any "structure of merit" on the Project site.[3]

It is not possible to place a specific structure on a historic register by listing a much broader two-block area where the actual structure is thought to be possibly located. The word "structure" means "structure," and the Project would not require the demolition of any structure that is listed in any state or local register. The Project is not exempt from SB 35 under Gov. Code § 65913.4(a)(7)(C).

D. Even if the "Mound" and "Cultural Elements" Were Listed "Structures," the Project Does Not Require Their "Demolition."

Even if the subterranean "mound" and "cultural elements" referred to in the City Letter were actually listed in a local or state register (which they are not), it is far from clear that these features qualify as "structures" as that term is used in SB 35. The statute is much more reasonably understood to encompass above-ground buildings and similar objects, rather than archaeological locations.[4] But regardless, even if these features *were* listed historic structures, there is no exception in SB 35 for projects that merely affect or alter a listed structure. Gov. Code § 65913.4(a)(7)(C)'s exception applies only when a project would "require" the "demolition" of the listed "structure." There is no reasonable argument that the development of the Project site would result in the "demolition" of any listed "structure" – regardless of how "structure" is defined.

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exclude residential buildings, and the City would be required to approve an SB 35 application for a project that would demolish a landmarked residential building. As another example, the Brief argues that other laws consider a "structure" to qualify as a type of "historic resource," which is a complete *non sequitur*, since SB 35 declined to use the term "historic resource" in Gov. Code § 65913.4(a)(7)(C). (Brief at 30.) Finally, the Brief's author contended at length that the question of whether the site is a "structure" is a "discretionary" determination for the City to make (Brief at 39-42) – only to submit a "Supplemental Brief" eight days later taking the completely contradictory position that the question actually has only one legally correct answer, which makes the determination, by definition, *not* discretionary. (Supplemental Brief of the Confederated Villages of Lisjan, May 29, 2018, at 2-4.) Suffice to say, these types of haphazard arguments are unlikely to be of any effective assistance to the City if the City were defending this interpretation of SB 35 to a reviewing court.

[3] https://www.cityofberkeley.info/uploadedFiles/Planning_and_Development/Level_3_-_LPC/COB_Landmarks_updated%20April%202015.pdf

[4] For example, Berkeley Municipal Code § 23F.04.010 defines "structure" as "[a]nything constructed or erected, the use of which requires location *on the ground* or attachment to something having location *on the ground*,") (emphases added).

To "demolish" means to "tear down" or "raze." Merriam-Webster Dictionary (2018). This is yet more of an indication that the type of "structure" protected by Gov. Code § 65913.4(a)(7)(C) is a building or something like a building that is capable of being torn down. Excavating the parking lot and preparing the site for the development of the Project would not require the *demolition* of anything, except the commercial building on the site that the City Letter properly acknowledges is not historic. It might be said that excavation and site preparation could affect or alter the subterranean shellmound and cultural features (if they were present, which they are not) – but there is no meaningful sense in which the development of the Project would result in these features being "torn down" or "razed."

Finally, it must be noted, again, that even in the most recent map created by Project opponents, the opponents contend only that a small sliver of the Project site is the location of the shellmound. Even if this map were accepted as accurate (and it should not be), and even if the development of this small corner of the site were understood to require the "demolition" of the shellmound, the overwhelming majority of the Project site is acknowledged even by project opponents not to be the location of the shellmound. Even accepting the opponents' strongest, best case for the location of the shellmound would only require a small portion of the site to be avoided (unnecessarily costing the City several much-needed housing units), but it would not preclude development of the Project site.

E. Other Applicable Provisions of State Law, and the Applicant's Commitments, Will Ensure the Protection and Appropriate Treatment of Cultural Resources in the Event Any Are Encountered on the Site.

We know that some City officials have expressed concern that, without CEQA mitigation imposed, there would be inadequate protection for tribal or other cultural resources, to the extent may be found on that site. To that end, despite the fact that CEQA review is not permitted over this SB 35 application, the Applicant reiterates its longstanding commitment to avoiding impacts to the shellmound or any tribal cultural resources. To that end, we want to clarify that we intend to provide both archaeological and tribal monitoring during all ground-disturbing activities, and have amended the Applicant Statement to confirm this. Also, it should go without saying, but if any human remains are encountered, all obligations under State law (specifically, Health and Safety Code § 7050.5: Human Remains, and Public Resources Code § 5097.98: Notification of Most Likely Descendent) for handling such remains would be strictly followed.

IV. The Project's Purported Inconsistency with the City's Affordable Housing Mitigation Fee Ordinance Does Not Authorize the City to Reject the Project.

The City Letter states that the City will reject the Initial Application on the grounds that the Project does not comply with various provisions in the City's Affordable Housing Mitigation Fee Ordinance. Again, it must be noted that it is extraordinary that the City would consider rejecting a 50% affordable housing project, and denying 130 low-income households of any affordable housing opportunities, on the grounds that the Project does not precisely comply with various technical requirements of a local affordable housing ordinance that only aims to meet a 20% affordable housing target. Moreover, as set forth below, the City may not reject the Project on these grounds as a matter of state law.

A. SB 35 Displaces the AHMF Ordinance's Requirements, since the Project Will Provide Far More Affordable Housing Than Would Otherwise Be Required under the AHMF Ordinance.

Government Code section 65913.4(a)(4)(B) sets forth the affordability requirements for SB 35 projects. The level of affordability required depends on whether the jurisdiction has failed to meet its RHNA target for above moderate-income housing, lower-income housing, or both. If a jurisdiction has not met its RHNA targets for lower-income housing, a project is entitled to SB 35 streamlining if it provides 10% of its units as affordable to households earning 80% or less of the area median income. Gov. Code § 65913.4(a)(4)(B)(i). The only exception is if the local jurisdiction has in place an ordinance requiring more than 10% of its units to be affordable to 80% AMI households in which case that local ordinance applies. *Id.* If a jurisdiction has met its RHNA targets for lower-income housing, but has failed to meet its target for above-moderate income housing, the applicable affordable housing requirement is 50% of the units for households earning less than 80% of the AMI. Gov. Code § 65913.4(a)(4)(B)(ii). Similarly, this requirement applies unless the juridiction has adopted an ordinance requiring greater than 50% of units to be reserved for households earning less than 80% of the AMI, in which case that local ordinance applies.

Here, as determined by HCD, and as acknowledged in the City Letter, Berkeley has failed to meet its lower-income RHNA target, and as a result a project qualifies for SB 35 streamlining if the project "dedicates 50 percent of the total number of units to housing affordable to households making below 80 percent of the area median income . . .." Gov. Code § 65913.4(a)(4)(B)(ii). Under the law, this is the exclusive affordability requirement for an SB 35 project. The only exception in which the local ordinance applies is if the local jurisdiction "has adopted a local ordinance that requires that greater than 50 percent of the units be dedicated to housing affordable to households making below 80 percent of the area median income, in which case that ordinance applies." *Id.* Here, the City has not adopted a local ordinance that requires greater than 50% of a project's units to be affordable. The City's local ordinance requires only 20% of onsite units to be affordable, and so it is displaced by SB 35. SB 35's requirement only requires units to be reserved for < 80% AMI households and does not require units to be targeted for any other income category. Since the Project fully complies with the requirements exclusively imposed by SB 35, and since the City does not have in place any ordinance exceeding SB 35's 50% affordable housing threshold, the requirements in the City's AHMF Ordinance do not apply.

B. Even if the AHMF Ordinance Were Not Displaced by SB 35, the Applicant Has Demonstrated That It Is Entitled to an Exception Under Sections 22.20.070 and 22.20.080 of the Berkeley Municipal Code.

Even putting aside the foregoing, the requirements of the City's AHMF Ordinance plainly do not apply, under its own terms, to a development like the Project, which will provide 50% of its units as affordable housing and obviously will have no negative impact on affordable housing in the City of Berkeley, whose local ordinance aims only at achieving a 20% affordable housing target. BMC sections 22.20.070 and 22.20.080 acknowledge this, and provide that the ordinarily applicable requirements of the AHMF Ordinance do not apply where, as here, the project "will not generate any additional need for affordable housing," where the requirements of the ordinance would "exceed the reasonable cost of . . . satisfying the additional demand for affordable housing," where application of the AHMF Ordinance would "result[] in a deprivation of the applicant's constitutional rights, and where the requirements would make "the particular project infeasible" and "[t]he benefits to the City from the particular development

project outweigh its burdens in terms of increased demand for affordable housing." BMC §§ 22.20.070(A) & 22.20.080(A).

On April 5, 2018, the Applicant demonstrated in correspondence with the City that BMC §§ 22.20.070(A)(1), (A)(2) and A(3), as well as 22.20.080(A), all apply here and that, accordingly, the otherwise applicable requirements of the AHMF Ordinance do not apply. [*See* Attachment #2.] The Applicant's representatives spoke to City staff about this submission both before and after it was made. However, for some reason, the City Letter reads as though this submission was never made, stating: "[f]inally, if the applicant seeks an exception from the Affordable Housing Mitigation Fee under Sections 22.20.070 or 22.20.080, the applicant must establish by satisfactory factual proof the applicability of subsections 22.20.070.A.1, 2, and 3 or subsections 22.20.080.A.1 and 2, respectively, subject to review and approval as set forth in Section 22.20.090." (Attachment A to Letter, at Page 4.) If there is anything about the Applicant's submission that was not "satisfactory" to the City, the City Letter gives the Applicant no hint about what would be required to satisfy the City on this point. As set forth here, it should not to be difficult for the City to reach the conclusion that a project providing a level of affordability that is unprecedented for any privately financed project in the City of Berkeley should not, and indeed cannot, be required to meet even greater "affordable housing mitigation" requirements contained in an ordinance that only attempts to meet a 20% affordability target.

1. The Requirements of the AH Ordinance Do Not Apply to a 50% Affordable Project.

Berkeley's AHMF is based the City's conclusion that mitigation fees to help subsidize affordable unit development are necessary to offset the impacts of building market rate housing projects that include fewer than 20% affordable units. See, e.g., BMC §§ 22.20.065(A)(8); see also BAE Urban Economics, City of Berkeley Affordable Housing Nexus Study (2015) ("Nexus Study"), at 10-13 (assessing the impact that market-rate units have on the City's need for lower-income households). While there have been serious criticisms of the Nexus Study methodology, assuming that this analysis is correct, the AHMF Ordinance concludes that projects consisting of 80% or fewer market-rate units will not create an adverse impact on the need for affordable units in Berkeley. The AHMF Ordinance, and the underlying Nexus Study, did not provide any legal basis for extending requirements imposed on projects providing 20% or fewer affordable housing units to this 50% affordable project.

This can be further illustrated with reference to the AHMF Ordinance's formula for determining the amount of fee owed for projects that do not provide 20% affordable units. BMC 22.20.065.D. Under that formula, as shown below, no fee would be owed for the Project because there is no "impact." In fact, using that formula, the Project is more than offsetting any impact and in theory has a "credit" – or net affordable housing "benefit" to the City - of $14,430,000.

> The AH formula is [A x Fee] – [(B+C)/(A x 20%) x (A x Fee)], where A is the total number of units (260 for the Project), B is the number of VL units (0 for the Project), and C is the number of low income units (130 for the Project). The current fee is $37,000 per unit.

As applied to the Project, this formula results in the project owing a "negative" fee – i.e., no fee at all – of over $14 million dollars:

> [260 x $37,000] – [130/(260 x 20%) x (260 x $37,000)] = -$14,430,000

Thus, based on the City's own formula, because of the Project's 130 affordable units, there is a net benefit to the City equivalent to over $14 million. There is no nexus, and no Mitigation Fee Act basis, for imposing any additional increment of AHMF Ordinance obligations to this project.

2. The Project Also Independently Qualifies for the BMC 22.20.070 Exceptions

Under BMC § 22.20.070(A), a project is not required to provide mitigation in excess of the project's impacts. Under that section, the AHMF Ordinance's requirements "shall not" apply if (1) "the proposed development project will not generate any additional need for affordable housing;" (2) the mitigation "exceed[s] the reasonable cost of either satisfying the additional demand for affordable housing…or of eliminating and/or reducing to an acceptable level any other impact which reasonably may be anticipated to be generated by or attributed to any individual development project;" or (3) the mitigation would "result in a deprivation of the applicant's constitutional rights." Any one of these criteria would be sufficient to render the AHMF Ordinance inapplicable to the project, and here all three of the criteria apply.

As described above, the AHMF Ordinance concludes that projects that provide 20% onsite affordable housing do not create an impact warranting payment of a mitigation fee. This project includes 50% affordable housing, and thus does not create an impact triggering the AHMF Ordinance.

Also as described above, the AHMF Ordinance fee formula demonstrates that the project creates a net affordable housing benefit in excess of more than $14 million to the city; imposition of any "mitigation fee" given these facts would vastly exceed the project's mitigation obligations.

As for BMC 22.20.070(A)(3), since the project is providing a far greater affordable housing benefit than would be provided by a project that merely complied with the requirements of the AHMF Ordinance, it would be unconstitutional to require greater mitigation in excess of the Project's impacts. (See Part IV-D, *infra*.)

3. The Project Also Independently Qualifies for the Exception Under BMC § 22.20.080

BMC 22.20.080 provides a separate exception if the AHMF Ordinance will (1) make the project infeasible, and (2) the "benefits to the City from the particular development project outweigh its burdens in terms of increased demand for affordable housing." BMC § 22.20.080(A). Here, the Project is providing a very high level of affordable housing, producing 130 low income units. Providing these units comes at an enormous financial cost; ratcheting these costs up even further to require that half of those units be reserved only for VL units would render the entire project infeasible. An average 1 bedroom low income unit can be rented for $1,670 per month, whereas the same very low income unit can only be rented for $1044 per month. If 65 of the 130 affordable units were rented at very low income levels instead of low income, this would be a rent differential of $40,690 per month, placing a significant additional cost on the project and rendering it infeasible.

As for the benefit to the city, the number of affordable units the Project will include greatly exceeds the total number of low income units that have been produced in the city during the entire current RHNA cycle, and will in fact bring Berkeley into compliance with its Low Income RHNA target for the current period. To date, Berkeley has only permitted 17 of 442 (3.8%) of its Low Income RHNA allocation. This project will put Berkeley at 33% of its total Low Income allocation for the planning cycle.

Like the entire region, Berkeley faces a housing affordability crisis, so providing this number of low income units creates an exceptional benefit.

C. Moreover, pursuant to the State Density Bonus Law, the Applicant Is Entitled to Concessions That Exempt the Project from the Provisions at Issue.

Under the State Density Bonus Law, eligible projects not only receive additional density but also up to three concessions, depending on the amount of affordable housing provided. Gov. Code § 65915(d)(2). Here, as a Project providing 50% of the units at the low income category, the project qualifies for three concessions. Although the Project qualifies for three concessions, the application only requests a single concession, meaning that it is still eligible for two concessions.

A concession is defined to include "reduction in site development standards or a modification of zoning code requirements or architectural design requirements," approval of mixed-use zoning, and "[o]ther regulatory incentives or concessions proposed by the developer or the city, county, or city and county that result in identifiable and actual cost reductions to provide for affordable housing costs." Gov. Code § 65915(k). The final "other regulatory incentives or concessions" prong clarifies that the concept is expansive and is governed primarily by whether the concession results and "identifiable and actual cost reductions." Further, the City has limited discretion to deny a concession: to do so it must find that the concession will not achieve identifiable and actual cost reductions, will result in health or safety impacts, or will violate state or federal law. Gov. Code § 65915(d)(1). If a concession is denied, an applicant can seek a writ of mandate and in any such proceeding the City bears the burden of proof. Gov. Code § 65915(d)(4).

With this framework in mind, it is clear that waiving the requirement to provide half of the affordable units at the very low income level qualifies for a concession. Constructing a large housing project, but then limiting rent to a fraction of the market rate that could be charged comes at a considerable cost. Affordable units in otherwise market rate projects, or in affordable housing projects, do not pay for themselves through the rents that are collected. They require subsidies to be built. In market rate projects the subsidies come from the market rate rents. In all affordable projects they come from a variety of sources but they are not paid for through rents. The lower the level to which rent is limited, the higher the associated subsidies. Thus, assuming the AHMF would otherwise apply, waiving the requirement to provide half of the units at very low income and allowing all of them to be at the low income would achieve a significant cost reduction in the affordable units. Having the ability to collect slightly higher rents (see above) for low income rather than the rents for very low income units means that the costs for financing and constructing the low income units are required to have less subsidy from other project income sources, or from other public sources.

The City Letter claims that under Government Code section 65915(l) it cannot be required to waive fees, "including the requirements a developer must satisfy to be exempt from a fee." The City misconstrues Section 65915(l). That section says that the definition of concession "does not limit or require the provision of direct financial incentives" and then lists as examples the provision of publicly owned land, or the waiver of fee or dedication requirements. The point of this language is to clarify that local jurisdictions are not obligated through "concessions" to provide "direct financial incentives." That is, local jurisdictions cannot be required (although they have the option) through concessions to make a direct financial contribution. That is not what is being proposed here. The Applicant is bearing all of the

financial burden of providing an unprecedented 50% of the units at the low income level, and the supposed concession would be to allow relief from what the City claims is an otherwise applicable requirement to include half of the units at the very low income. By waiving this requirement, the City is by no means making a direct financial contribution. None of the examples cited are relevant. The City is not being asked to provide public land or waive any fee or dedication requirement. The fact that the very low income requirement is part of the in-lieu program does not mean that a "fee" is being waived or that the City is somehow making a direct financial contribution.

In response to the City's contention that the Applicant must submit a pro forma or cost certification to demonstrate entitlement to the concessions and incentives mandated by State law, we remind the City that under the Density Bonus Law, "[a] local government shall not condition the submission, review, or approval of an application pursuant to this chapter on the preparation of an additional report or study that is not otherwise required by state law," Gov. Code § 65915(a)(2), and that the *City* "shall bear the burden of proof for the denial of a requested concession or incentive," Gov. Code § 65915(d)(4). Effective in 2017, the Legislature amended the Density Bonus Law specifically to eliminate the authority of cities to reject a requested concession or incentive on the grounds that "[t]he concession or incentive is not required in order to provide for affordable housing costs," Stats.2016, ch. 758 (A.B.2501), § 1. The currently operative text of the law only authorizes the City to reject the requested concession if the *City* demonstrates that "[t]he concession or incentive does not result in identifiable and actual cost reductions." whereas the prior language required that concessions are also "financially sufficient." *Id.* The purpose of this amendment was to foreclose the exact documentation demands made in the City Letter. *See* Assem. Com. on Housing & Community Development, Floor Analysis of Assembly Bill No. 2501 (2015-2016 Reg. Sess.), August 30, 2016, at p. 4 (legislative amendments were intended to respond to "local governments [which] interpret . . . [the previously operative] language to require developers to submit pro formas"); *see also* "Policy White Paper: City of Santa Rosa, Density Bonus Ordinance Update", *available at* https://srcity.org/DocumentCenter/View/18475/Density-Bonus-Policy-White-Paper , at p. 45 ("amendments adopted through AB 2501 are intended to presume that incentives and concessions provide cost reductions, and therefore contribute to affordable housing development"). The Initial Application included a letter from an affordable housing investor demonstrating that modifying the requirement to integrate the affordable units throughout the development would result in cost reductions [see attachment # 14], and the City has identified no reasonable basis for disputing or contesting the straightforward proposition that modifying the otherwise applicable requirement to provide half of the affordable units to very-low-income households would similarly result in cost reductions. The Applicant's Initial Application in March 8, 2018, as supplemented by the Applicant's April 5 submission [*see* Attachment #2.], more than satisfies any burden that State law would allow the City to impose on the Applicant in demonstrating entitlement to the requested concessions.

Finally, portions of the City Letter appear to suggest that the City may believe that the Project's use of Density Bonus Law modifications renders the Project inconsistent with objective standards. (Attachment A to City Letter, at Pages 3-5.) SB 35 actually says exactly the opposite – the determination about whether the Project complies with objective standards must be made after "excluding any additional density or any other concessions, incentives, or waivers of development standards granted pursuant to the Density Bonus Law in Section 65915..." Gov. Code § 65913.4(a)(5). The Project is obviously entitled to the bonus, concessions and waivers provided as a matter of state law, but the use of the Density Bonus law does not count against the Project's compliance with the City's objective

standards. The SB 35 application materials published by the City's fellow local jurisdictions acknowledge this explicitly. *See* San Francisco Planning Department, Planning Director Bulletin No. 5 (December 2017), *available at* http://default.sfplanning.org/publications_reports/DB_05_Senate_Bill_35_December_2017.pdf ("Any waivers, concessions, or incentives, conferred through the State Density Bonus Law are considered code-complying, and therefore are consistent with the objective standards of the Planning Code"); City of Concord Planning Division, Streamlined Housing Development: Applications Under Senate Bill 35, *available at* http://www.cityofconcord.org/pdf/permits/planning/appscheck/sb35.pdf ("Modifications to otherwise-applicable standards under density bonus law do not affect a project's ability to qualify for SB 35").

D. Irrespective of the Foregoing, It Would Be Unconstitutional and Unlawful for the City to Apply the Requirements of the AHMF to This 50% Affordable Project

The City's AHMF Ordinance, which includes the option of providing housing on-site and the requirement that half of such housing is at the very low income level, was developed based on the notion that market rate housing has an impact of "inducing demand" for additional affordable housing, and this "induced demand" impact must be mitigated. That is, the constitutional "nexus" the City has identified to justify these requirements is the increased demand for affordable housing caused by market rate housing. However, requiring the Project to meet the requirements of a mitigation ordinance that lacks the required nexus and proportionality to the Project's impacts would violate the applicant's constitutional rights under the California and U.S. Constitutions' takings clauses. *See California Bldg. Indus. Assn. v. City of San Jose*, 61 Cal. 4th 435, 474 (2015) (holding that regulations imposed for the purpose of advancing broad public purposes do not need to meet "nexus" and "proportionality" requirements, but distinguishing such fees from regulations like the AHMF ordinance, which explicitly acknowledge that their purpose is to "mitigat[e] the impacts or effects that are attributable to a particular development or project"); *see also Koontz v. St. Johns River Water Mgmt. Dist*., 570 U.S. 595, 606 (2013) (government "may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts").

As described above in Section IV.D, this SB 35 project with 50% low income units will not cause the demand for BMR units that underlies the assumption for the AHMF ordinance, and thus the essential nexus is lacking. This fact is further supported by a detailed look at the City of Berkeley Affordable Housing Nexus Study (2015) prepared by BAE Urban Economics, ("Nexus Study"). The Nexus Study is instructive because it is the evidence the City used to demonstrate the constitutionality of the AHMF. While the Nexus Study has its own flaws causing it to grossly overstate the impact, this analysis assumes the accuracy of the Nexus Study.

According to the Nexus Study, the maximum impact fee that the City could charge is $84,391 per rental unit, which would mean that for a 260 unit market rate project, the City could in theory charge $21,941,660, while not infringing on constitutional rights or the Mitigation Fee Act (again, assuming arguendo that the Nexus Study is accurate). See Nexus Study, at Table 11. The Nexus Study reaches that figure by looking at the number of affordable units "demanded" by a given market rate unit and the "financing gap" per affordable unit, and the maximum fee is the amount required to bridge this financing gap for the number of "units demanded." For low income units, the Nexus Study identifies the "financing gap" as $315,688 per unit. Applying this to the Project, 130 low income units would have a "financing

gap" of $41,039,440. But instead of paying a fee to the City so the City could use this fee to bridge the "financing gap" and construct the affordable units supposedly "induced" by the Project, the Project is providing units itself and subsidizing this "financing gap" directly. Because the Project is providing the equivalent of a $41 million "financing gap" and this far exceeds the maximum fee the City's Nexus Study justifies for a 260 unit project ($21,941,660), under the City's own analysis, the Project is already more than offsetting its impact. Therefore, charging a greater amount would violate constitutional principles.

V. The Housing Accountability Act – Among Other Laws - Also Apply to the Project.

We note that, in addition to being subject to SB 35, the Project is also subject to the Housing Accountability Act ("HAA"), because the Project is a mixed-use development with at least two-thirds of its square footage designated for residential use. Gov. Code § 65589.5(g)(2). Pursuant to the Housing Accountability Act, "[w]hen a proposed housing development project complies with applicable, objective general plan, zoning and subdivision standards and criteria," the City *may not* disapprove the project or reduce its density unless the City makes findings, supported by a preponderance of the evidence, that the project would have an unavoidable impact on public health or safety that cannot be mitigated in any way other than rejecting the project or reducing its size. Gov. Code § 65589.5(j). Under recent reforms to the HAA, the question of whether a project is consistent with objective standards is resolved under a standard of review that is extremely deferential to the applicant. *See* Gov. Code § 65589.5 (f)(4) ("a housing development project or emergency shelter shall be deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision if there is substantial evidence that would *allow a reasonable person to conclude* that the housing development project or emergency shelter is consistent, compliant, or in conformity") (emphasis added); *see also* Gov. Code § 65589.5(a)(2)(L) ("It is the policy of the state that. . . [the HAA] should be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing").

As set forth in the Initial Application and this submission, the Project complies with all applicable objective standards under any standard of review. But at the very least, it is clear that it is possible for a "reasonable person to conclude" that the project complies with the City's objective standards. Gov. Code § 65589.5 (f)(4). Accordingly, the HAA "imposes 'a substantial limitation' on the government's discretion to deny a permit." *N. Pacifica, LLC. v. City of Pacifica* 234 F. Supp. 2d 1053, 1059 (N.D. Cal. 2002), aff'd sub nom. *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478 (9th Cir. 2008) (quoting *Wedges/Ledges of Calif., Inc. v. City of Phoenix, Ariz*. 24 F.3d 56, 63 (1994)). Before the City could legally reject the Project or reduce its density, the City would be required to demonstrate, based on a preponderance of the evidence, that the project would cause "a significant, quantifiable, direct, and unavoidable impact" on public health or safety, "based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." Gov. Code § 65589.5(j)(1)(A). The City would be required to further affirmatively prove that there are no feasible means of addressing such "public health" and "safety" impacts other than rejecting or reducing the size of the Project. Gov. Code § 65589.5(j)(1)(B). There is no evidence – to say nothing of the required *preponderance* of the evidence – that the Project would have any impact at all on public health or safety. Even if there were, there is no evidence that any such impacts are incapable of mitigation. Therefore, any improper denial of the Project would violate the HAA.

A broad range of plaintiffs can sue to enforce the Housing Accountability Act, and the City would bear the burden of proof in any challenge. Gov. Code § 65589.5 (j), (k). Under the revised Act effective January 1, 2018, any local government that disapproves a housing development project must now meet the more demanding "preponderance of the evidence" standard – rather than the more deferential "substantial evidence" standard – in proving that it had a permissible basis under the Act to reject the project. Gov. Code § 65589.5 (j)(1). The reformed HAA makes attorney's fees presumptively available to prevailing plaintiffs regardless of whether the project contains 20% affordable housing. Gov. Code § 65589.5(k)(1)(A). The Act previously limited the circumstances under which a court could issue fines or directly order a local government to approve a project, but under the revised Act, if the City fails to prove that it had a valid basis to reject the project, the court *must* issue an order compelling compliance with the Act, and any local government that fails to comply with such order within 60 days *must* be fined a minimum of $10,000 per housing unit and may also may be ordered directly to approve the project. Gov. Code § 65589.5(k). Perhaps most importantly for a jurisdiction that was so recently held liable for violating the HAA, the reformed HAA further provides that if a local jurisdiction acts in bad faith when rejecting a housing development, the applicable fines must be multiplied by five. *Id.* For this 260-unit project, the applicable fines would be $2.6-13 million – all before considering the City's obligation to pay the attorney's fees of a prevailing plaintiff.

We note as well that improperly rejecting this 50% low-income project would have a disparate impact on housing availability, a potential violation of the Federal Fair Housing Act, 42 U.S.C. §§ 3604(a) & 3613(c), the California Fair Housing and Employment Act, Gov. Code §§ 12955 & 12955.8(b), the California Planning & Zoning Law's antidiscrimination law, Gov. Code § 65008, and the equal protection clauses of the federal and California constitution, among other laws. Improperly rejecting housing on this site, which is designated for housing in the City's General Plan and within an officially designated Priority Development Area would also violate provisions of Housing Element Law, including but not limited to Gov. Code § 65584, 65585(i)-(j), 65863, 65913 & 65913.1(a).

VI. SB 35 Does Not Unlawfully Infringe on Municipal Affairs

A. Since the Shellmound Is Not Present, Approving this Application Does Not Interfere with the City's Ability to Preserve any Existing Landmark.

As described in Section III.B, substantial evidence in the administrative record concludes that the shellmound is not actually present on the Project Site. Further, the City's position in legal briefings is that development may proceed on the Landmark if "appropriate further investigation" concludes the shellmound is not actually present. *620 Hearst Group v. City of Berkeley*, Alameda Superior Court, Case No. 834470-2, Memorandum of Points and Authorities in Opposition to Writ of Mandate, at 3. Therefore, because there is no shellmound, this SB 35 application does not infringe on any legitimate municipal affair.

B. Regardless, SB 35 Is Lawful and Constitutional in All Respects.

The City Letter states that "SB 35 does not apply to the project to the extent it impinges on legitimate municipal affairs (preservation of a designated City landmark)." Although the City Letter provides no explanation to support this claim, we believe that this conclusory statement refers to arguments included in the "Brief" by Tom Lippe, counsel to the Confederated Villages of the Lisjan, on May 21, 2018, that state laws cannot interfere with the "municipal affairs" of charter cities. Mr. Lippe's letter provides incomplete

and misleading analysis of this issue. SB 35 is properly applied to all cities in California, including charter cities such as Berkeley.

The "home rule" provision of the California Constitution grants charter cities supremacy over "municipal affairs." (Cal. Const., art. XI, § 5, subd. (a).) This supremacy is limited only by conflicting provisions in the state or federal constitutions and by preemptive state law on matters of statewide concern. Courts have consistently held that, as applied to charter cities,

> a state law regulating a matter of statewide concern preempts a conflicting local ordinance or regulation if the state law is reasonably related to the resolution of the statewide concern and is narrowly tailored to limit incursion into legitimate municipal interests. [Citation omitted]. *This is so even where the local measure involves a traditionally municipal affair.*

(City of Watsonville v. State Dept. of Health Services (2005) 133 Cal.App.4th 875, 883, *citing Johnson v. Bradley* (1992) 4 Cal.4th 389, 404, 14 Cal.Rptr.2d 470 (emphasis added).)

Mr. Lippe's letter cites to a number of cases supporting the notion that land use regulation, including regulation of local landmarks, is a municipal affair. That may be true, but it is beside the point. The only relevant questions are whether SB 35 addresses an issue of statewide concern and is narrowly tailored. And on those questions, SB 35 clearly passes the test.

As the legislature made clear, the purpose of SB 35—housing creation—is an issue of statewide concern. Section 4 of SB 35's enacting legislation states that "[t]he Legislature finds and declares that ensuring access to affordable housing is a matter of statewide concern, and not a municipal affair. *Therefore, the changes made by this act are applicable to a charter city*, a charter county, and a charter city and county" (emphasis added). This plain statement is critical because courts "give great weight to the purpose of the Legislature in enacting general laws which disclose an intent to preempt the field to the exclusion of local regulation." *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 62.

A brief look at the housing crisis and statements made by the Legislature makes it clear that this is a statewide issue, not merely a municipal one. In 2017, as part of amendments to the Housing Accountability Act, the Legislature codified the following declarations, among others:

> (A) California has a housing supply and affordability crisis of historic proportions. The consequences of failing to effectively and aggressively confront this crisis are hurting millions of Californians, robbing future generations of the chance to call California home, stifling economic opportunities for workers and businesses, worsening poverty and homelessness, and undermining the state's environmental and climate objectives.
>
> (B) While the causes of this crisis are multiple and complex, the absence of meaningful and effective policy reforms to significantly enhance the approval and supply of housing affordable to Californians of all income levels is a key factor.
>
> (C) The crisis has grown so acute in California that supply, demand, and affordability fundamentals are characterized in the negative: underserved demands, constrained supply, and protracted unaffordability.

(D) According to reports and data, California has accumulated an unmet housing backlog of nearly 2,000,000 units and must provide for at least 180,000 new units annually to keep pace with growth through 2025.

(E) California's overall homeownership rate is at its lowest level since the 1940s. The state ranks 49th out of the 50 states in homeownership rates as well as in the supply of housing per capita. Only one-half of California's households are able to afford the cost of housing in their local regions.

(F) Lack of supply and rising costs are compounding inequality and limiting advancement opportunities for many Californians.

(G) The majority of California renters, more than 3,000,000 households, pay more than 30 percent of their income toward rent and nearly one-third, more than 1,500,000 households, pay more than 50 percent of their income toward rent.

(H) When Californians have access to safe and affordable housing, they have more money for food and health care; they are less likely to become homeless and in need of government-subsidized services; their children do better in school; and businesses have an easier time recruiting and retaining employees.

(I) An additional consequence of the state's cumulative housing shortage is a significant increase in greenhouse gas emissions caused by the displacement and redirection of populations to states with greater housing opportunities, particularly working- and middle-class households. California's cumulative housing shortfall therefore has not only national but international environmental consequences.

(J) California's housing picture has reached a crisis of historic proportions despite the fact that, for decades, the Legislature has enacted numerous statutes intended to significantly increase the approval, development, and affordability of housing for all income levels, including this section.

(K) The Legislature's intent in enacting this section in 1982 and in expanding its provisions since then was to significantly increase the approval and construction of new housing for all economic segments of California's communities by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects and emergency shelters. That intent has not been fulfilled.

Gov. Code § 65589.5(a)(2). These codified findings highlight that resolving the housing shortage crisis is a statewide issue, not an affair that should be left to local jurisdictions. In fact, finding (K) above finds that excessive municipal control is actually one of the *causes* of this statewide issue. *See also* Gov. Code § 65589.5(a)(1)(D) (similar conclusion in findings adopted by Legislature in 1990 that "local governments do not give adequate attention to the economic, environmental, and social costs of decisions that result in disapproval of housing development projects, reduction in density of housing projects, and excessive standards for housing development projects"). Obviously if local control over certain decision-making is actually causing the statewide problem, the claim that local control is needed cannot be a basis for precluding preemption.

Recent headlines further confirm that housing is a statewide issue. Addressing the housing crisis has become the top issue in the recent gubernatorial primary election, with all six of the leading candidates' platforms making dramatic promises about housing production increases.[5] The Bay Area Council's 2017 annual poll of Bay Area residents showed that 40 percent of respondents are considering leaving the region in the next few years, with high cost of living and housing as two of the primary reasons.[6] No fewer than 15 housing related bills emerged from the 2017 legislative session. The list can go on, but what is clear is that the economic, social, and environmental implications of the housing crisis make it an issue of statewide, not municipal, concern. In fact, it is telling that the letter from Mr. Lippe does not even attempt to claim that the housing crisis is not a statewide issue.

Case law further confirms that housing is a statewide concern and that state law may properly preempt local regulation by charter cities on this issue. In *Coalition Advocating Legal Housing Options v. City of Santa Monica*, the Court of Appeal held that state law preempted a charter city's ordinance limiting accessory dwelling units. ((2001) 88 Cal.App.4th 451, 458, *as modified on denial of reh'g* (Apr. 11, 2001).) The court noted that "the Legislature has expressly declared housing to be a matter of statewide concern" and cited the Housing Element Law's declaration that "the availability of housing is of vital statewide importance." (*Id.*, citing Gov. Code, § 65580.) In another case, the Court of Appeal held that state law requiring local governments to adopt a Housing Element program addressed a statewide concern and was thus applicable to charter cities despite potential intrusion into "matters traditionally reserved to municipalities." (*Buena Vista Gardens Apartments Assn. v. City of San Diego Planning Dept*. (1985) 175 Cal.App.3d 289, 306-07). In addition to citing multiple legislative declarations of intent, the *Buena Vista* court noted that "the judiciary has likewise found the need to provide adequate housing to be a matter of statewide concern," and cited three supporting cases. *Id.*[7] The *Buena Vista* court concluded that "These high pronouncements [of statewide need for adequate housing] do no more than iterate what is the common knowledge of all." (*Id.* at 307 [brackets in original].)

Additionally, SB 35 is narrowly tailored to limit intrusions on municipal interests. Mr. Lippe's characterization that SB 35 "radically shift[s] the relationship between state and local governments" is a gross misrepresentation of the law. SB 35 does not force any jurisdiction to do anything that it has not already planned for. In particular, an eligible project must be consistent with all "objective zoning standards and objective design review standards." That is, the jurisdiction must have already identified the project site for residential uses, as is the case with 1900 Fourth Street, and all adopted objective standards continue to apply. To this extent, the state law does not say where or how housing must be built, but rather only holds local governments accountable to follow through on zoning decisions already made. SB 35 is further narrowed by containing a long list of exceptions, including for projects that would result in the demolition of locally listed structures. Indeed, many commenters have said that the narrowness of SB 35 may result in very few projects coming forward because few qualify, which may be

[5] Melody Gutierrez, *Fixing California's housing crisis: What candidates for governor would do*, San Francisco Chronicle, April 16, 2018, *available at* https://www.sfchronicle.com/politics/article/Fixing-California-s-housing-crisis-What-12839339.php.

[6] Rufus Jeffris, *40% Considering Leaving in the Next Few Years as Bay Area's Housing, Traffic & Cost of Living Woes Go Unaddressed*, Bay Area Council Press Release, March 30, 2017, *available at* http://documents.bayareacouncil.org/bacp17exodus1.pdf.

[7] The supporting cases the *Buena Vista* court cited for the holding that housing is a matter of statewide concern are: *Marina Point, Ltd. v. Wolfson* (1992) 30 Cal.3d 721, 743; *Green v. Superior Court* (1974) 10 Cal.3d 616, 625 and *Bruce v. City of Alameda*, (1987) 166 Cal.App.3d 18, 21–22.

true. To date, six months after SB 35 became effective, we are aware of only three applications having been submitted. While surely the goal of the legislation is to have greater participation, this fact highlights that SB 35 is narrowly tailored.

For the reasons stated, SB 35 addresses an issue of statewide concern—a critical housing crisis that is threatening the state's economy and equality—and is narrowly tailored and thus can be constitutionally applied to charter cities, like the City of Berkeley, even where it interferes with traditionally municipal affairs.

VII. Table Responding to Attachments A, A.1 & A.2

Accompanying this response is a 90-day letter of compliance table responding to Attachments A, A.1 and A.2 of the City Letter.