

Office of the City Manager

September 4, 2018

To: Honorable Mayor and City Councilmembers

From:  Dee Williams-Ridley, City Manager

Subject: The 1900 Fourth Street Development Application and Senate Bill 35

On April 26, 2018, I provided you with a memo<sup>1</sup> with information about a development application that the City received for 1900 Fourth Street, the current site of a surface parking lot and a vacant 1,600 square foot commercial building. The site and all subsurface portions are part of a multi-block area designated as a Berkeley City Landmark - the West Berkeley Shellmound. The site and subsurface area are also included on the California Register of Historical Resources.

The applicant requested streamlining pursuant to SB 35, which is a state law that went into effect in 2018 that requires a ministerial approval process for development projects that provide 50% of the proposed residential units at rents affordable to households making 80% of Area Median Income, and that meet several other criteria.

Staff reviewed the project in a thorough manner based on all applicable laws. Pursuant to SB 35, the City had 90 days from the date of project application submittal (i.e., until June 5, 2018) to determine if the project is eligible for ministerial approval. On June 5, 2018, I informed you that the City sent a letter to the applicant notifying them that their project does not qualify for ministerial approval under SB 35. The June 5 letter is available in the “City Communications” section of the [project page for 1900 4<sup>th</sup> St](#), which is footnoted below.<sup>2</sup> On June 29, 2018, the applicant sent a letter to the City in response and again asserted that the project is in compliance with all applicable SB 35 criteria and is entitled to approval. This letter is also available on the project website under “SB 35 Submittal – June 29<sup>th</sup> Response.” Today, staff sent a letter to the applicant affirming that their application does not qualify for ministerial approval under SB 35. The September 4, 2018, letter is also available on the project website under “City Communications.”

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<sup>1</sup> The April 26, 2018 memo regarding the 1900 Fourth St. development application and SB 35 is available here: [https://www.cityofberkeley.info/uploadedFiles/Clerk/Level\\_3\\_-\\_General/Council%20Memo\\_SB%2035%201900%20Fourth%20St.\\_April%2026%20with%20attachments.pdf](https://www.cityofberkeley.info/uploadedFiles/Clerk/Level_3_-_General/Council%20Memo_SB%2035%201900%20Fourth%20St._April%2026%20with%20attachments.pdf)

<sup>2</sup> 1900 4<sup>th</sup> St. project website: [https://www.cityofberkeley.info/Planning\\_and\\_Development/Zoning\\_Adjustment\\_Board/1900\\_Fourth\\_Street\\_Part\\_2.a.spx](https://www.cityofberkeley.info/Planning_and_Development/Zoning_Adjustment_Board/1900_Fourth_Street_Part_2.a.spx)

September 4, 2018

Re: The 1900 Fourth Street Development Application and Senate Bill 35

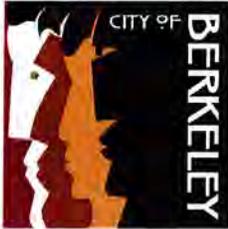
As a preliminary matter, SB 35 cannot be applied to this site without violating California's constitution. To be specific, SB 35 does not apply to the project because it impinges on the City of Berkeley's legitimate municipal affairs to regulate the development and preservation of a City-designated historical landmark. As noted above, the project is within an area designated as City Landmark #227, also known as the West Berkeley Shellmound. Furthermore, even if SB 35 were found to be constitutional in its application to local landmarks, the project would not qualify for approval under SB 35 because multiple components of the application conflict with SB 35 streamlining criteria.

As is noted in the City's September 4, 2018 letter, the applicant is welcome to reactivate the April 2015 application for the site (ZP2015-0068), which is currently on hold, or to reapply under a standard Use Permit process for this revised larger project or other alternative projects.

I want to thank staff for their professionalism in conducting the required analysis.

Attachment: Letter to Ruegg & Ellsworth, September 4, 2018

cc: Paul Buddenhagen, Interim Deputy City Manager  
Timothy Burroughs, Director, Planning Department  
Farimah Brown, City Attorney  
Ann-Marie Hogan, City Auditor  
Mark Numainville, City Clerk  
Matthai Chakko, Assistant to the City Manager



Planning and Development Department

**SENT VIA US MAIL AND E-MAIL**

September 4, 2018

Dana Ellsworth  
Ruegg & Ellsworth  
2437 Durant Avenue  
Berkeley, CA 94704

[dana.ellsworth@clire.com](mailto:dana.ellsworth@clire.com)

RE: 1900 Fourth Street, Application ZP2018-0052  
Denial of Application for Ministerial Approval, Pursuant to SB 35, of Application for Use Permit and Structural Alteration Permit/SB35 (Government Code 65913.4) for a Mixed Use Development (260 apartments, 27,500 square feet commercial, 290 auto parking spaces, 140 bike parking spaces)

Dear Ms. Ellsworth,

You have applied for approval of a development project (the "Project") pursuant to Government Code Section 65913.4 (enacted by Senate Bill [SB] 35 of 2017). SB 35 requires ministerial approval of development projects that meet certain criteria. For multiple reasons explained below, staff has determined that your application as submitted does not qualify for ministerial approval pursuant to SB 35.

As a preliminary matter, SB 35 cannot be applied to this City-designated historical landmark site without violating California's constitution. To be specific, SB 35 does not apply to the Project because it impinges on the City of Berkeley's legitimate municipal affairs to regulate the development and preservation of a City-designated historical landmark. As a charter city, Berkeley has a constitutional right to govern itself as to municipal affairs. Historic landmark preservation is a core municipal affair because designated landmarks often represent irreplaceable parts of the City's unique history. Under the City's usual development review process, designated City landmarks may be developed (and many have been). But in the ordinary case, controls exist to ensure that the landmark is not destroyed. SB 35 does not expressly identify landmarked or archeological sites as exceptions to its ministerial approval process. Therefore, to the extent SB 35 can be interpreted as removing Berkeley's ability to protect its local landmarks—including the West Berkeley Shellmound—it is not narrowly tailored to avoid unnecessary interference with the City's municipal affairs. SB 35 thus is preempted by the California Constitution, Article XI, Section 5(a), to the extent that it impinges on legitimate municipal affairs by interfering with the City's authority to preserve a designated City landmark.

In this case, the site of the proposed project is within an area designated as City Landmark #227, also known as the West Berkeley Shellmound. Berkeley's Landmarks Preservation Commission has determined that the earliest humans in the area occupied this site and its surroundings. A Native American burial ground and one of the oldest and largest shellmounds around the Bay was located within the landmarked site. Indeed, part of the West Berkeley Shellmound may still exist beneath the

ground today. For these and other reasons, the Landmarks Preservation Commission said the site is important to preserve. The City recognized this fact by designating the site as a landmark. The State also recognized the significance of the site. It is within an area that is a State of California archeological site (P-01-000084/CA-ALA-307).

Even if SB 35 were found to be constitutional in its application to local landmarks such as the Project site, then the Project application would not qualify for approval under SB 35 and is hereby rejected for the following additional reasons:

1. The application does not satisfy Government Code Section 65913.4(a)(5) because, as was stated in the City's letter dated June 5, 2018, the Project conflicts with the City's Affordable Housing Mitigation Fee (AHMF) requirements, which, among other things, require the provision of very low income units. Specifically, Municipal Code Section 22.20.065 requires that applicants for rental housing projects either pay the specified AHMF or designate a percentage of the proposed housing units as affordable to low income ("LI") and very low income ("VLI") households. The Project application asserts that "the Project is exempt from the City's affordable housing mitigation fee at this time ... by providing 50% of its units for low-income households."<sup>1</sup> (Applicant Statement, March 8, 2018, page 3.) However, the application does not provide the requisite number of VLI units that are required by Municipal Code Section 22.20.065.C.4, nor have you undertaken any formal process to request an exemption from the AHMF. Thus, you have not established that the Project is exempt from the AHMF, and the City cannot accept an application that summarily declares that the AHMF will not be paid. The development application thus fails to comply with the objective requirements of Municipal Code Section 22.20.065, rendering SB 35 inapplicable to the Project.
2. The application does not satisfy Government Code Section 65913.4(a)(5) because it appears to conflict with the City's requirement that projects in West Berkeley Commercial zoning districts be capable of meeting "any applicable performance standards for off-site impacts" and "[must not] exceed the amount and intensity of use that can be served by available traffic capacity." (See Berkeley Municipal Code § 23E.64.090.) Indeed, even the originally-proposed project (ZP2015-0068), which included far fewer housing units, was found to contribute to exceedances of street capacity in cumulative scenarios, in conflict of the City's Guidelines.<sup>2</sup> (See discussion of Impacts TRA-1, TRA-2, TRA-3, and TRA-4 on pages 139-141 of the Draft EIR for the originally-proposed project.) When analyzed pursuant to the City's Guidelines for Development of Traffic Impact Reports (i.e., an "external and uniform benchmark or criterion"), it is not clear that the Project would meet these performance standards under cumulative traffic conditions. As such, the Project application does not demonstrate that it satisfies an objective standard of the City's Zoning Ordinance, rendering SB 35 inapplicable to the Project.

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<sup>1</sup> The applicant has made subsequent statements that continue to unilaterally assert a right of exemption. (See, e.g., the April 5, 2018, email from Jennifer Hernandez to City Attorney Farimah Brown.)

<sup>2</sup> The impacts of the originally-proposed project were identified as conflicting with "an applicable plan, ordinance or policy establishing measures of effectiveness for the performance of the circulation system." Draft EIR, p. 125. We note that the cumulative analysis in that Draft EIR was "based on City of Berkeley criteria, which state that an impact would occur only if the intersection meets peak hour signal warrants, operates at LOS F, and adds more than 10 vehicles to the critical approach/movement." Draft EIR, p. 139. Despite the fact that the applicant failed to include any cumulative analysis in its "Focused Transportation Impact Analysis" for the far denser Project (see the draft Fehr & Peers Memorandum dated June 22, 2018, which was provided to the City as part of the applicant's June 29, 2018, Informational Response to the City's "Incomplete Letter"), there is no question that the Project similarly would violate those objective benchmarks.

3. The application does not satisfy Government Code Section 65913.4(a)(7)(C) because implementation of the Project may require the demolition of a historic structure that has been placed on a state and local historic register. As was stated, the Project site is within the area designated as City Landmark #227 and State archeological site P-01-000084/CA-ALA-307. Accordingly, the site has been placed on the City's local historic register and the California Register of Historical Resources. City Landmark #227, excludes only above-ground buildings and structures. State archeological site P-01-000084/CA-ALA-307 describes "[a] large mound feature, historically reported to be 18 feet in height, [that] has been leveled to modern grade (but extends below grade," and references "cultural features (hearths, pits, and structures)." The Project involves extensive excavation of the historic, landmarked site, which may demolish subsurface structures.

For the reasons stated above, City staff has determined that SB 35 does not apply to the Project. The Project impinges on legitimate municipal affairs (preservation of a designated City landmark), and even if SB 35 were applicable, then the application as submitted does not qualify for ministerial approval because it is inconsistent with SB 35 criteria.

As you previously requested, we have placed the original application for the site on hold; while the Project does not qualify for approval under SB 35, you are welcome to reactivate that project, or to reapply under a standard Use Permit process for this revised larger project or other alternative projects.

Please note that Berkeley does have a track record of approving housing development throughout the city. Our housing pipeline list includes 1,459 units under review, 1,070 are approved but have not yet pulled building permits, 525 units are currently under construction, and 910 units have been recently constructed and occupied since 2014. This includes the projects at 2001 Fourth Street (152 units), as well as 800 and 824 University Avenue (106 units).

Berkeley also has approved development of designated City landmark properties where they were modified, expanded, or otherwise further developed subject to Structural Alteration Permit approval. Recent examples include Acheson Commons at 1979-1987 Shattuck/2101-2109 University/1922-1930 Walnut Street; the Regent Terrace project at 2597 Telegraph Avenue; and the Stuart House residential expansion at 2524 Dwight Way.

If you have any questions, please contact me at (510) 981-7400 or via email at [tburroughs@cityofberkeley.info](mailto:tburroughs@cityofberkeley.info).

Sincerely,



Timothy Burroughs  
Director, Department of Planning & Development