SUM-100

SUMMONS
(CITACION JUDICIAL)

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):

City of Berkeley and City of Berkeley Department of Planning & Development

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):

Ruegg & Ellsworth and Frank Spenger Company

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

ENDORSED
FILED
ALAMEDA COUNTY

NOV 28 2018

CLERK OF THE SUPERIOR COURT

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (*www.courtinfo.ca.gov/selfhelp*), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (*www.lawhelpcalifornia.org*), the California Courts Online Self-Help Center (*www.courtinfo.ca.gov/selfhelp*), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of $10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. *¡AVISO! Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.*

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. AVISO: Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de $10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:
(El nombre y dirección de la corte es): Alameda County Superior Court

1225 Fallon Street
Oakland, California 94612

CASE NUMBER
(Número del Caso): RG18930003

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
Jennifer Hernandez, 50 California Street, Suite 2800, San Francisco, CA 94 [illegible] 6900

DATE:
(Fecha) NOV 28 2018

Clerk, by
(Secretario) Chad Finke

, Deputy
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)
(Para prueba de entrega de esta citatión use el formulario Proof of Service of Summons, (POS-010)).

[SEAL]

NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of *(specify)*:
3. ☒ on behalf of *(specify)*: City Department of planning

under:
- ☐ CCP 416.10 (corporation)
- ☐ CCP 416.20 (defunct corporation)
- ☐ CCP 416.40 (association or partnership)
- ☒ other *(specify)*: CCP 416.50 (public entity)
- ☐ CCP 416.60 (minor)
- ☐ CCP 416.70 (conservatee)
- ☐ CCP 416.90 (authorized person)

4. ☒ by personal delivery on *(date)*:

Form Adopted for Mandatory Use
Judicial Council of California
SUM-100 [Rev. July 1, 2009]

SUMMONS

Code of Civil Procedure §§ 412.20, 465
www.courtinfo.ca.gov

CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
Jennifer Hernandez (SBN 11495)
HOLLAND & KNIGHT LLP
50 California Street, Suite 2800
San Francisco, CA 94111
TELEPHONE NO.: (415)743-6976 FAX NO.: (415)743-6910
ATTORNEY FOR (Name): Petitioners and Plaintiffs Ruegg & Ellsworth et al.

FOR COURT USE ONLY

ENDORSED
FILED
ALAMEDA COUNTY

NOV 28 2018

CLERK OF THE SUPERIOR COURT
Anita Dhir

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA
STREET ADDRESS: 1225 Fallon Street
MAILING ADDRESS:
CITY AND ZIP CODE: Oakland, California 94612
BRANCH NAME: Rene C. Davidson Courthouse

CASE NAME:
Ruegg & Ellsworth, et al. v. City of Berkeley, et al.

CIVIL CASE COVER SHEET
☑ **Unlimited** (Amount demanded exceeds $25,000)
☐ **Limited** (Amount demanded is $25,000 or less)

Complex Case Designation
☐ **Counter** ☐ **Joinder**
Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)

CASE NUMBER: RG18930003
JUDGE:
DEPT:

Items 1–6 below must be completed (see instructions on page 2).

1. Check **one** box below for the case type that best describes this case:

Auto Tort
- ☐ Auto (22)
- ☐ Uninsured motorist (46)

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort
- ☐ Asbestos (04)
- ☐ Product liability (24)
- ☐ Medical malpractice (45)
- ☐ Other PI/PD/WD (23)

Non-PI/PD/WD (Other) Tort
- ☐ Business tort/unfair business practice (07)
- ☐ Civil rights (08)
- ☐ Defamation (13)
- ☐ Fraud (16)
- ☐ Intellectual property (19)
- ☐ Professional negligence (25)
- ☐ Other non-PI/PD/WD tort (35)

Employment
- ☐ Wrongful termination (36)
- ☐ Other employment (15)

Contract
- ☐ Breach of contract/warranty (06)
- ☐ Rule 3.740 collections (09)
- ☐ Other collections (09)
- ☐ Insurance coverage (18)
- ☐ Other contract (37)

Real Property
- ☐ Eminent domain/Inverse condemnation (14)
- ☐ Wrongful eviction (33)
- ☐ Other real property (26)

Unlawful Detainer
- ☐ Commercial (31)
- ☐ Residential (32)
- ☐ Drugs (38)

Judicial Review
- ☐ Asset forfeiture (05)
- ☐ Petition re: arbitration award (11)
- ☑ Writ of mandate (02)
- ☐ Other judicial review (39)

Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400–3.403)
- ☐ Antitrust/Trade regulation (03)
- ☐ Construction defect (10)
- ☐ Mass tort (40)
- ☐ Securities litigation (28)
- ☐ Environmental/Toxic tort (30)
- ☐ Insurance coverage claims arising from the above listed provisionally complex case types (41)

Enforcement of Judgment
- ☐ Enforcement of judgment (20)

Miscellaneous Civil Complaint
- ☐ RICO (27)
- ☐ Other complaint *(not specified above)* (42)

Miscellaneous Civil Petition
- ☐ Partnership and corporate governance (21)
- ☐ Other petition *(not specified above)* (43)

2. This case ☐ is ☑ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
   a. ☐ Large number of separately represented parties
   b. ☐ Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve
   c. ☐ Substantial amount of documentary evidence
   d. ☐ Large number of witnesses
   e. ☐ Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
   f. ☐ Substantial postjudgment judicial supervision
3. Remedies sought *(check all that apply)*: a. ☐ monetary b. ☑ nonmonetary; declaratory or injunctive relief c. ☐ punitive
4. Number of causes of action *(specify)*: 5
5. This case ☐ is ☑ is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. *(You may use form CM-015.)*

Date: November 27, 2018
Jennifer L. Hernandez
(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE
- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on **all** other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Form Adopted for Mandatory Use
Judicial Council of California
CM-010 [Rev. July 1 2007]

CIVIL CASE COVER SHEET

Cal. Rules of Court, rules 2.30, 3.220, 3.400–3.403, 3.740;
Cal. Standards of Judicial Administration, std. 3.10
www.courtinfo.ca.gov

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Attorneys for Petitioners and Plaintiffs
RUEGG & ELLSWORTH and
FRANK SPENGER COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

RUEGG & ELLSWORTH, a California general partnership, and FRANK SPENGER COMPANY, a California corporation,

Petitioners and Plaintiffs,

v.

CITY OF BERKELEY and CITY OF BERKELEY DEPARTMENT OF PLANNING AND DEVELOPMENT,

Respondents and Defendants.

Case No. RG18930003

VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Code Civ. Proc. §§ 525, 526, 1060, 1085 & 1094.5; Gov. Code §§ 65589.5 & 65913.4.)

INTRODUCTION

1. At a time when California faces an affordable housing supply crisis of historic proportions, the City of Berkeley has only permitted the construction of *17 units* of low-income housing during a planning period in which it was required to permit 442 low-income units to meet its State-assigned Regional Housing Needs Allocation – a compliance rate of less than 4%.[1] The City will rarely, if ever, receive a better opportunity to reverse this shameful trend than the 1900 Fourth Street Project ("Project"), which will provide 130 units of low-income housing - a commitment, apparently unprecedented for any private developer in the City, to provide *50% of a project's units for affordable housing*. The Project is proposed on a site that is currently used as a parking lot, where

[1] California Department of Housing and Community Development – Annual Progress Report Summary (June 1, 2018), available at http://www.hcd.ca.gov/community-development/housing-element/docs/Annual_Progress_Report_Permit_Summary.xls.

development will not displace any residents or businesses. And most critically, the Project site is within steps of mass transit, in an area which the City's General Plan and zoning explicitly identify for high-density residential development, and which the Association of Bay Area Governments has designated as a "Priority Development Area." But rather than leap at the opportunity to facilitate this Project, the City unlawfully rejected it.

2. The City's decision to reject the Project was unlawful for many reasons, but especially because a State law, SB 35 of 2017 ("SB 35") explicitly requires the City to issue a "streamlined, ministerial approval" for the Project. Gov. Code § 65913.4(a). When rejecting the Project, the City declared that it will simply refuse to obey this State law. The City believes it is beyond the constitutional power of State government to require a local government to issue a streamlined ministerial approval in this situation, even when a project meets all of SB 35's requirements and even when the development is proposed on a site where all of the City's objective zoning criteria call for the development of a project of exactly this type and density. The 130 low-income households who would otherwise occupy new homes in this Project must therefore depend upon the courts to compel the City to comply with State housing law and reverse the City's pattern and practice of applying and enforcing discriminatory and exclusionary housing policies.

PARTIES

3. Petitioner and Plaintiff Ruegg & Ellsworth is a California general partnership which is and was at all times mentioned herein qualified to do business in California.

4. Petitioner and Plaintiff Frank Spenger Company is a California corporation which is and was at all times mentioned herein qualified to do business in California.

5. Petitioners and Plaintiffs Ruegg & Ellsworth and Frank Spenger Company (collectively, "Petitioners") own the 1900 Fourth Street Site, an approximately 2.21-acre site bounded by Fourth Street, Hearst Avenue, University Avenue, and the Union Pacific Railroad corridor, in the City of Berkeley ("Site" or "Property"). Petitioners are the "development proponent[s]" of the 1900 Fourth Street Project pursuant to SB 35, Gov. Code § 65913.4(a), and are also the "applicants" for the 1900 Fourth Street Project pursuant to the Housing Accountability Act ("HAA"), Gov. Code § 65589.5(k)(1)(A).

6. Respondent and Defendant City of Berkeley ("City") is a municipal agency in the County of Alameda.

7. Respondent and Defendant City of Berkeley Department of Planning & Development ("Planning Department") is an agency integral to the City of Berkeley.

JURISDICTION AND VENUE

8. The Court has general subject matter jurisdiction over state law claims, including mandamus claims pursuant to Code Civ. Proc. §§ 1085 & 1094.5 and Gov. Code § 65589.5.

9. The Court has personal jurisdiction over Respondents and Defendants (hereinafter, "Respondents") pursuant to Code Civ. Proc. § 410.10.

10. Venue for this action properly lies with this Court pursuant to Code Civ. Proc. §§ 392, 393(b), 394 and 395.

11. Petitioners have performed any and all conditions precedent to filing this action and have exhausted any and all available administrative remedies to the extent required by law. Petitioners submitted their application for the Project pursuant to SB 35, and therefore the procedures for review of the application are governed by this State law. As described in paragraph 50, *infra*, the City formally rejected the Project in a letter issued by staff on September 4, 2018. As described in paragraphs 40-56 *infra*, Petitioners complied with all opportunities to seek reconsideration of the City's decision provided under the statute, and the statute does not provide any further avenues to seek appeal or reconsideration of a final denial decision. Requiring Petitioners to appeal to the City's discretionary decision-making bodies would defeat the purpose of SB 35, which is to entitle development proponents to a staff-level "streamlined, ministerial approval." Gov. Code § 65913.4(a). The instant petition and complaint does not seek "money or damages," Gov. Code § 905, and therefore it is not governed by the Government Tort Claims Act, Gov. Code §§ 810, *et seq.* However, to avoid any argument to the contrary, Petitioners on October 10, 2018 submitted a Government Tort Claims Act claim to the City Clerk on the City's required form, which the City rejected on November 26, 2018. Finally, to the extent the City's own procedures and regulations are relevant, the City has not formally adopted any ordinances or regulations for appealing the denial of a SB 35 permit application. Regardless, to ensure all avenues for appeal were fully exhausted, as

described in paragraphs 53-55, *infra*, Petitioners' counsel wrote to Planning Department Director Timothy Burroughs and City Attorney Farimah Brown on October 10, 2018 to request that the City advise Petitioners if the City believed there were any remedies or avenues available for Petitioners to appeal or seek reconsideration of the City's September 4, 2018 final denial of Petitioners' application. City Attorney Brown responded on November 21, 2018 to "acknowledge that the City has not identified any administrative appeal provision triggered by the Application Denial Letter."

12. Petitioners have no plain, speedy or adequate remedy in the ordinary course of law. Petitioners seek enforcement of an important right affecting the public interest, and will confer a significant public benefit. As the State Legislature found and declared when enacting SB 35, "ensuring access to affordable housing is a matter of statewide concern." Stats.2017, ch. 366 (S.B.35), § 4. Furthering the development of 260 units of much-needed housing – 130 units of which will be reserved for low-income households – will further the Legislature's often-declared public policy goal to "significantly increase the approval and construction of new housing for all economic segments of California's communities." Gov. Code § 65589.5(a)(2)(K).

STATEMENT OF FACTS

The Site

13. The Project Site is now, and at all times pertinent to the this litigation has been, designated by the City for high-density residential and mixed use development.

14. The Site's General Plan land use designation is Avenue Commercial, which is designated for areas "characterized by pedestrian-oriented commercial development and multi-family residential structures."[2] The City's West Berkeley Plan identifies the intersection of Fourth Street and University Avenue as a "node" where "development should be encouraged."[3]

15. The City's Zoning Ordinance implements these General Plan recommendations by zoning the site C-W (West Berkeley Commercial), which is designed to, *inter alia*, "[i]ncrease the

[2] City of Berkeley General Plan, Land Use Element (2001), available at https://www.cityofberkeley.info/Planning_and_Development/Home/General_Plan_-_Land_Use_Element_Introduction.aspx.

[3] West Berkeley Plan (1993), Physical Form Element, at Policy 1.1, available at https://www.cityofberkeley.info/Planning_and_Development/Home/West_Berkeley_-_Physical_Form.aspx.

opportunities for the development of housing in commercial areas," and by designating the intersection of Fourth Street and University Avenue, immediately abutting the Site, as an area where the City should "[i]ntensify retail, commercial and mixed use activity" and "[e]ncourage intensified development . . .." Berkeley Municipal Code ("BMC") §§ 23E.64.020(A), (G) & 23E.64.040(B) & (C)(6).

16. The Bay Area's official Council of Governments, the Association of Bay Area Governments ("ABAG") - an organization which includes the City of Berkeley – has designated the area including the Site as a "Priority Development Area" in its official Sustainable Communities Strategy, "Plan Bay Area 2040," to reflect the fact that the area has "been identified as appropriate for additional, compact development"[4] where development must be focused to meet the State and the region's greenhouse gas emission reduction goals. See generally Gov. Code § 65080(a)(2).

17. The Project Site is in the middle of a transit-rich environment, located adjacent to the west terminus of AC Transit's 51 line, which is a major connective route in the Central East Bay with 15 minute or less headways. AC Transit's 80 and 81 lines are also located adjacent to the site and the Transbay FS, G, and Z lines, with service to San Francisco, stop 2 blocks from the project site. In addition, Berkeley's Amtrak station and train platform are directly adjacent to the project site. The surrounding neighborhood supports walkable destinations for residential goods and services.

The Site's Landmark Status

18. On February 7, 2000, Berkeley's Landmarks Preservation Commission ("LPC") designated a three-block area bounded by University Avenue, Hearst Avenue, Interstate Highway 880 and Fourth Street as a City landmark, because it was at that time believed that this three-block area may have once been the location of the West Berkeley Shellmound ("Shellmound"), a site of significance to the Ohlone Native American inhabitants of the area and to their descendants. Berkeley Landmarks Preservation Commission, Notice of Decision for Meeting of February 7, 2000. Although the Shellmound was leveled long ago, the LPC believed that it remained important to recognize the location where it once stood and to recognize "that this historical resource has yielded

[4] Metropolitan Transportation Commission and Association of Bay Area Governments, Plan Bay Area 2040 (July 26, 2017), at p. 43.

and is likely to yield information important prehistory or history." *Id.* Accordingly, the LPC "voted to APPROVE the designation of the West Berkeley Shellmound as a City of Berkeley Landmark." *Id.*

19. On October 17, 2000, the Berkeley City Council adopted Resolution No. 60,806-N.S., the operative text of which states that "the Berkeley Shellmound is designated as a City of Berkeley Landmark . . .." Accordingly, this three-block area became City Landmark #221, entitled "West Berkeley Shellmound."

20. On December 22, 2000, the owners of properties on the westernmost of the three initially landmarked blocks ("620 Hearst Plaintiffs") brought suit to challenge the landmark designation as applied to their properties (620 Hearst Avenue, 1916 Second Street, 1920 Second Street, and 1930 Second Street). Verified Petition for Writ of Administrative Mandamus and Complaint for Declaratory and Injunctive Relief, *620 Hearst Group v. City of Berkeley*, No. 834470-2 (Alameda Cty. Super. Ct. Dec. 22, 2000). The 620 Hearst Plaintiffs contended that the evidence before the LPC failed to support the LPC's contention that those properties were the location of the Shellmound. *Id.* at ¶ 16.

21. In litigation, the City stated that when determining the possible location of the West Berkeley Shellmound, "the City was compelled to act on the basis of imperfect information," and that the landmark boundaries the City had chosen were "approximate." Mem. Pts & Auth. in Opposition to Motion for Writ of Mandate ("City Brief"), at pp. 1-2, *620 Hearst Group v. City of Berkeley*, No. 834470-2 (Alameda Cty. Super. Ct. Aug. 20, 2001). The City stated further:

> [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 development or use of the property affected. Rather, it requires additional review of new building or alterations to the exterior of the existing buildings, with an eye towards protecting the resource. That is, it will require that appropriate further investigations be done – and 'certainty' achieved – before further development occurs.

Id. at p. 3. The City's briefing also states explicitly that the City had landmarked an "area," not any specific structure. *Id.* at 5. The City's briefing primarily defended the City's decision by contending

that there was sufficient evidence to conclude that the Shellmound was present within the "approximate" boundaries of the landmarked area (*id.* at pp. 11-17), but the City also made a secondary argument that the landmark decision could be affirmed for other reasons unrelated to the actual location of the Shellmound (*id.* at pp. 7 & 17). The Alameda Superior Court rejected all of the City's contentions. The Alameda Superior Court ruled that because there was no substantial evidence supporting the City's decision to include the 620 Hearst Plaintiffs' properties "as part of the Shellmound," the City's decision to landmark those properties was contrary to law, and therefore the Court entered a writ of mandate directing the City to remove the 620 Hearst Plaintiffs' properties from the landmarked area. Order Directing Issuance of Peremptory Writ of Mandate, *620 Hearst Group v. City of Berkeley*, No. 834470-2 (Alameda Cty. Super. Ct. Oct. 3, 2001); Judgment Directing Issuance of Peremptory Writ of Mandate, *620 Hearst Group v. City of Berkeley*, No. 834470-2 (Alameda Cty. Super. Ct. Oct. 3, 2001). This left the landmark designation in effect as applied to a two-block area bounded by Second Street, Hearst Avenue, Fourth Street and University Avenue (including the Project Site).

The Development Process

22. Effective on December 10, 2013, Petitioners conveyed an interest in the Property to West Berkeley Investors, Inc. ("WBI"), authorizing WBI to seek entitlements and permits from the City to develop the Property. WBI would later quitclaim all interests in the Property, including the rights to all then-pending applications to develop the Property, back to Petitioners on August 21, 2018. As City spokesman Matthai Chakko stated, the change in ownership status "[did] not affect the status of the SB35 application in any way."[5] For purposes of this Petition and Complaint, the term "Applicants" refers to the entity – either WBI or Petitioners – which at the relevant time period had legal authorization to seek entitlements and permits to develop the Site.

23. Before planning any development of the Project site, the Applicants conducted the "further investigations" into the location of the Shellmound that the City previously stated would be a sufficient prerequisite to the development of the Site. City Brief, at p. 3. Specifically, the

[5] See Natalie Orenstein, Developers drop controversial Fourth Street project, hand it over to owners (Sept. 4, 2018), available at https://www.berkeleyside.com/2018/09/04/developers-drop-controversial-fourth-street-project-hand-it-over-to-owners.

Applicants commissioned independent experts to conduct exhaustive archaeological, historical and geological investigations, research, and analysis. The results of this analysis are clear: the Project Site is not now and never was the location of the West Berkeley Shellmound. To the contrary, the Site was largely marshland, primarily underwater, in the period before European contact. The Project Site did not become dry land until it was filled and improved approximately a hundred years ago, and therefore could not have been a site of Native American habitation.

24. Specifically, Dr. Allen Pastron, an expert with impeccable credentials and the lead archeologist for Archeo-Tech, Inc., conducted a thorough investigation of the Site based on archival and historical records review and scientifically rigorous field testing and laboratory analysis, and concluded that there is "no evidence whatever that the West Berkeley Shellmound was ever located on the Spenger's Parking Lot site."[6] This evidence was based on analyzing material found within 43 borings spread throughout the Site in 1999 and 2000, and 22 test trenches dug in 2014. The borings went down at least 18 feet below the surface and the trenches generally below more than 10 feet. This investigation was carried out in consultation with Andrew Galvan, the President of the Board of Directors of Ohlone Indian Tribe, Inc. ("Ohlone Indian Tribe").

25. This analysis was further confirmed by an expert analysis by Geosphere Consultants who conducted further site investigations and analysis of historic era maps.[7] This expert analysis concluded that the majority of the Site is underlain by young marsh deposits, which have since been overlain by artificial fill in the post-contact era, and that historic maps show that the Site was tidal marshland until it was filled approximately a hundred years ago.[8] As for the Shellmound, the expert analysis concluded that historic maps show that the primary Shellmound was located on the site to

[6] A Report on Archaeological Testing Conducted within the Spenger's Parking Lot, Archeo-Tec, Inc., (June 2014), Allen Pastron, Archeo-Tec, Inc., at p. 41; see also Review and Assessment of Newspaper Articles associated with the West Berkeley Shellmound (CA-ALA-307) and the Spatial Relationship of this Prehistoric Site to the Proposed 1900 Fourth Street Project (March 10, 2017), Allen Pastron, Archeo-Tec; see also Review and Assessment of the Boundaries of the Prehistoric Archaeological Site Commonly Known as the West Berkeley Shellmound (CA-ALA-307) and the Spatial Relationship of this Prehistoric Site to the Proposed 1900 Fourth Street Project, Allen Pastron, Archeo-Tec (March 10, 2017), at p. 5 ("there is no evidence that the West Berkeley Shellmound exists within the borders of the proposed 1900 Fourth Street Project").

[7] *Holocene Geology and Land Filling History 1900 4th Street, Berkeley, California 94710,* Eric Swenson and Core Dare, Geosphere Consultants, Inc. (January 31, 2017)

[8] *Id.*

the *west* of the Project site, with a secondary shellmound located to the *northeast* of the Project site.[9] Taken together, the expert analysis, the historic maps, and the archaeological and the geomorphological investigations all demonstrate that the Shellmound (or shellmounds) were located to the west and northeast of the Site, but could not have been located on the Site itself.

26. Having confirmed that the development of the Site would not affect the Shellmound, in April and May 2015 the Applicants submitted initial application materials for the discretionary entitlements – including a Use Permit from the City's Zoning Adjustments Board and a Structural Alteration Permit from the LPC – necessary to build a mixed-used residential and commercial development project on the Site (Zoning Project 2015-0068, "ZP2015-0068 Project"). Supplemental application material was also provided on June 10, 2015 and July 22, 2016. Since the City's Municipal Code requires development applicants to seek discretionary approvals from the City even for projects which conform to all of the City's objective zoning requirements, the City prepared a Draft Environmental Impact Report ("DEIR") pursuant to the California Environmental Quality Act ("CEQA"), Pub. Res. Code §§ 21000 *et seq*.

27. State law imposes rigorous requirements on lead agencies and developers to consult with California Native American tribes, and the City and the Applicants more than fulfilled these requirements. Specifically, Section 21080.3.1 of the Public Resources Code requires a CEQA lead agency to consult with any "California Native American tribe" that is identified by the California Native American Heritage Commission ("NAHC") as "traditionally and culturally affiliated with the geographic area" of a proposed project, if that California Native American tribe both asked to be on the lead agency's notice list for new projects and responded to a lead agency's notice regarding a proposed project. A "California Native American tribe" is one on a contact list maintained by the NAHC. Pub. Res. Code § 21073.

28. Rather than limit consultation to those California Native American tribes who had previously requested to be on a City notice list (as is authorized under the law), the City – with the Applicants' support - proactively contacted the NAHC on January 21, 2016 to obtain NAHC's list of

[9] *Id.*; see also City Brief at p. 17 acknowledging that the "core of the mound" is under the property to the west of the Site, not under the Site itself.

all California Native American tribes "with traditional lands or cultural places" in the area of the Site.[10] The City also requested that NAHC search its Sacred Lands File for the area including the Site.[11] On February 4, 2016, NAHC Staff Services Analyst Sharaya Souza responded that "[a] search of the S[acred] L[ands] F[ile] was completed for the USGS quadrangle information provided with negative results," and provided the City with a list of all California Native American tribes with traditional lands or cultural places in the vicinity of the Site.[12] The City contacted all such California Native American tribes on March 21, 2016 to notify them of their eligibility to consult on the development of the Site and the preparation of the CEQA analysis.[13] The only California Native American tribe to respond to request consultation was Ohlone Indian Tribe.[14] The City and the Applicants consulted with Mr. Galvan, the President of the Board of Directors of Ohlone Indian Tribe, throughout the process of developing the ZP2015-0068 Project and the Draft EIR, including meeting with Mr. Galvan on May 31, August 3, and September 6, 2016.[15] Mr. Galvan reviewed multiple administrative drafts of the DEIR's analysis of tribal cultural resources and provided input which resulted in refined mitigation measures and an improved analysis and disclosure of the Ohlone people's presence in the area.[16]

29. In November 2016, the City released its DEIR for the ZP2015-0068 Project. Staff of Respondent Planning Department, and the City's own consultant, LSA Associates, Inc. ("LSA"), prepared the Draft EIR after independently reviewing and analyzing the analysis the Applicants had commissioned.[17] The City's DEIR concluded that, as long as the project incorporated feasible mitigation measures, such as on-site archaeological and tribal monitoring of all ground-disturbing

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[10] See DEIR, at pp. 80-81, and at Appendix C; see also March 13, 2017 Letter by Miles Imwalle Re: Comments on 1900 Fourth Street Project Draft Environmental Impact Report , at pp. 10-11.

[11] DEIR, at p. 80 and at Appendix C.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] DEIR, at pp. 80-81.

[16] *Id.*

[17] DEIR, at p. 241.

activities, the development of the Site would not have any significant impacts on cultural resources, including on Native American tribal cultural resources.[18]

30. On March 13, 2017, Mr. Galvan wrote to the City on behalf of Ohlone Indian Tribe to comment on the Draft EIR. In his letter, Mr. Galvan said that he had "reviewed and found the Draft Environmental Impact Report to be accurate with respect to the archaeological rigor and methodology . . .." He emphasized that the Site was "primarily underwater" during the pre-contact period, and attached copies of the historic maps which showed the Shellmound (or shellmounds) to be on sites to the west and northeast of the Project Site but not on the Site itself. Mr. Galvan's letter noted that "even though the site was primarily underwater . . . there may be found items of cultural importance to our people," and, recognizing that the development of the Site would occur, stated that "we wish to insure that the mitigations proposed for any project at the site are vigorously enforced" (which the Applicants have consistently affirmed they would do). Mr. Galvan also submitted a second letter on March 13, 2017, which listed the many Ohlone community members with whom he had consulted, and called on the City to continue to recognize the voices of the Ohlone people in the future development of the area and the Site. Neither letter expressed any concern with the DEIR's analysis or any disagreement with the DEIR's conclusion that the development of the Site would not have any significant and unavoidable impact on cultural resources. Neither letter expressed any opposition to the development of the Site. Also on March 13, 2017, the Applicants' counsel submitted a comment letter summarizing the available evidence demonstrating that the West Berkeley Shellmound was not located on the Project Site.

31. Despite this, a group of opponents expressed to the City their firm opposition to any development of the Site. The Applicants made numerous attempts to understand and respond to these opponents' concerns and to reach a compromise over the development of the Site. Specifically, in late 2017, the Applicants made an extraordinary offer that would have, in two steps, given the opponents ownership over the entire Site. The Applicants offered to immediately deed approximately half of an acre of the Site to a non-profit Ohlone trust to build both a 5,000 square foot Ohlone educational and cultural community center and a greenspace park that could be used as a gathering

[18] *Id.*, at pp. 8, 12-13, 20-23 & 96.

place for the Ohlone and other community groups. The Applicants additionally offered to *grant ownership* of the entire balance of the Property to the same non-profit, subject to a lease-back that would allow the development of the Site for housing and mixed-used development. After 99 years, the entire Site and the buildings would revert back to the ownership of the nonprofit. To the Applicants' surprise, the project opponents rejected this and all other reasonable offers of compromise, instead stating they would continue to oppose any effort to develop the Site in any way.[19]

32. With no reasonable prospects of reaching agreement with the project's opponents, the Applicants' counsel wrote to the City on January 22, 2018 to explain why State housing laws strongly supported the development of the Site and why the evidence before the City did not provide any legal ground for the City to preclude the Site's development. The Applicants and their counsel met with City officials on February 1, 2018 to reiterate these concerns and to seek a potential path forward for the development of the Site. Notwithstanding this, City staff continued to take the position that CEQA, and the City's broad discretionary review authority under its Municipal Code, gave the City the legal authority to reject the proposed project entirely.

33. Faced with these obstacles to obtaining approval for a project that conformed in all respects to the City's objective zoning requirements, in 2018 the Applicants turned to an alternative pathway -- invoking laws enacted by the California Legislature to ensure the development of housing that complies with local objective criteria and meets the State's desperate need for affordable housing.

The SB 35 Project

34. The California Legislature found and declared that as long ago as 1990 that "[t]he lack of housing . . . is a critical problem that threatens the economic, environmental, and social quality of life in California," and that "[t]he excessive cost of the state's housing supply is partially caused by activities and policies of many local governments that limit the approval of housing, increase the cost of land for housing, and require that high fees and exactions be paid by producers of housing."

[19] Lauren Seaver & Brad Griggs, "No Ohlone artifacts are under 1900 Fourth St. It's appropriate for affordable housing" (May 25, 2018), available at https://www.berkeleyside.com/2018/05/25/opinion-no-ohlone-artifacts-are-under-1900-fourth-st-in-berkeley-its-perfect-for-affordable-housing; Tom Lochner, "Ohlone activists stand firm in opposing West Berkeley Shellmound development," East Bay Times Dec. 19, 2017.

Stats.1990, ch. 1439 (S.B.2011), § 1 (amending Gov. Code § 65589.5(a)(1)). After watching this problem get steadily worse over the succeeding decades, in 2017 the Legislature found and declared that the "housing supply and affordability crisis" had reached "historic proportions," and that "[t]he 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." Stats.2017, ch. 378 (A.B.1515), § 1.5 (amending Gov. Code § 65589.5(a)(2)). The Legislature recognized in the 2017 legislative session that its past efforts to "curb[] the capability of local governments to deny . . . housing development projects" had failed to achieve their intended effect, *id.*, and therefore the Legislature enacted a package of laws, effective in 2018, that were intended to finally have this effect.

35. It is well recognized by land use scholars that one of the primary ways in which California's "local governments . . . limit the approval of housing," Gov. Code § 65589.5(a)(1)(B), is by requiring a discretionary, subjective review process over housing development projects even when the local governments' own zoning ordinances and general plans explicitly call for housing of the type and density proposed.[20] The Legislature made its first significant effort to limit this local authority by enacting SB 35 of 2017 ("SB 35").

36. Under SB 35, if a city has not issued sufficient building permits to meet its share of its Regional Housing Needs Allocation, the city is required to issue a "streamlined, ministerial approval" to qualifying housing development projects that comply with all of the city's objective zoning and

[20] See, e.g., Moira O'Neill, et al., Getting it Right: Examining the Local Land Use Entitlement Process in California to Inform Policy and Process (Berkeley Law Center for Law, Energy & the Environment; Berkeley Institute of Urban & Regional Development, Columbia Graduate School of Architecture, Planning & Preservation, February 2018), available at https://www.law.berkeley.edu/wp-content/uploads/2018/02/Getting_It_Right.pdf (in major jurisdictions, "even if . . . developments comply with the underlying zoning code, they require additional scrutiny from the local government before obtaining a building permit," which "triggers CEQA review of these projects"; "Our data shows that in many cases, these cities appear to impose redundant or multiple layers of discretionary review on projects"); Elmendorf, Christopher S., Beyond the Double Veto: Land Use Plans As Preemptive Intergovernmental Contracts (November 6, 2018). Available at SSRN: https://ssrn.com/abstract=3256857 or http://dx.doi.org/10.2139/ssrn.3256857, at pp. 36-38 (noting that especially before 2017, local jurisdictions were largely free to ignore their own plans for meeting regional housing goals, and could always use CEQA to kill housing approvals).

design review standards, provide a specified minimum percentage of units as affordable housing, commit to paying prevailing wages to construction workers, and meet a long list of other qualifying criteria. Gov. Code § 65913.4(a). Since the approval is "ministerial," it is exempt from CEQA. See Pub. Res. Code § 21080(b)(1); 14 Cal Code Regs. § 15268(a).

37. SB 35 only allows cities to apply "objective" standards, which it defines narrowly as 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). By restricting local review to confirming compliance with "objective" zoning and design review standards, SB 35 is intended to preclude the discretionary, subjective decision-making typically used by local governments when issuing permits such as use permits or structural alteration permits. 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"). By enacting SB 35, the Legislature "advance[d] an important principle: that local governments' prerogative to use cumbersome, discretionary development procedures is conditional on their producing the amount of new housing . . . that the state expects of them."[21] Since the City of Berkeley has not come close to producing the amount of low-income or very-low-income housing that it is expected to produce under State law, the California Department of Housing & Community Development ("HCD") formally determined in January 2018 that Berkeley was subject to SB 35's streamlined ministerial permitting process for projects that provide at least 50% of their units for affordable housing.[22]

[21] Elmendorf, *supra* at note 20, at p. 48.

[22] California Department of Housing & Community Development, "SB 35 Statewide Determination Summary" (January 31, 2018), at p. 6, available at http://www.hcd.ca.gov/community-development/housing-element/docs/SB35_StatewideDeterminationSummary01312018.pdf.

38. Under SB 35, if a development proposes more than 150 units of housing, a city is required to review the application and to provide the applicant, within 90 days of submittal, an identification and explanation of any objective standards with which the city believes that the application conflicts. Gov. Code § 65913.4(b)(1). The city is also required to complete any design review or public oversight over the proposal, and to issue a streamlined ministerial permit for qualifying projects, within 180 days of submittal. Gov. Code § 65913.4(c). The city's review must 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." *Id.*

39. Also as part of the Legislature's 2017 housing package, the Legislature approved several reforms to strengthen the HAA. 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) (internal quotation omitted). Specifically, if a project complies with all of a local jurisdiction's objective General Plan, zoning and subdivision standards, a city may not reject the project or impose any conditions comparable to reducing the project's density, unless the city makes finding supported by a preponderance of the evidence that the project would have significant and unavoidable adverse effects on public health or safety. Gov. Code § 65589.5(j). Even if a project does *not* comply with the jurisdiction's objective standards, if at least 20% of the project's units are reserved as affordable housing for low-income households, a city may not reject the project unless it makes specific findings supported by a preponderance of the evidence that one of five narrow criteria apply. Gov. Code § 65589.5(d). The 2017 reforms to the HAA significantly increased the burden of proof on local governments to reject projects protected by the HAA, and increased the available penalties and attorney's fees available to prevailing plaintiffs who are forced to sue cities to compel them to comply with the HAA. Stats.2017, ch. 368 (S.B.167); Stats.2017, ch. 373 (A.B.678); Stats.2017, ch. 378 (A.B.1515).

40. On March 8, 2018, the Applicants submitted to the City a SB 35 application for the 1900 Fourth Street Project, which will create 260 units of housing on the Project Site, 50% of which will be reserved for low-income households pursuant to Gov. Code § 65913.4(a)(4)(B)(ii). The application materials provided detailed plans for the Project and information documenting that the Project satisfied all of the applicable criteria for a streamlined ministerial permit pursuant to SB 35, as well as all of the criteria required for approval under the HAA. The application also applied for a density bonus, waivers/modifications, and concessions/incentives pursuant to the State Density Bonus Law, Gov. Code § 65915, as permitted under SB 35. See Gov. Code § 65913.4(a)(5).

41. The day after the application was submitted, Berkeley Mayor Jesse Arreguin stated that although he had policy disagreements with SB 35, "SB 35 is now State law and we must follow it."[23]

42. The Applicants' representatives conducted several phone calls with City staff to discuss the Project and answer City staff's questions about the Project and the Application. On March 30, 2018, to follow up on questions raised during one of these phone calls, the Applicants' counsel e-mailed City staff to explain why SB 35 displaced the City's otherwise applicable discretionary review processes, and why SB 35's exception for projects that would "require the demolition of a historic structure," Gov. Code § 65913.4(a)(7)(C), did not preclude the Project from approval.

43. On April 5, 2018, following up on another question raised in phone calls about the Project, the Applicants' counsel sent an email to City staff to describe several independent reasons why the City could not lawfully require the Project – a 50% affordable housing development – to pay the City's "Affordable Housing Mitigation Fee," BMC § 22.20.065, which is designed to mitigate the impacts of projects providing less than 20% of their units as affordable housing. In this correspondence, the Applicants formally reiterated their request that, to the extent any provisions of BMC § 22.20.065 could lawfully apply to the Project, those provisions must be modified pursuant to the State Density Bonus Law, Gov. Code § 65915. The Applicants also formally documented the reasons that the provisions of BMC § 22.20.065 must also be waived pursuant to the City's own exceptions to the Affordable Housing Mitigation Fee ordinance in BMC §§ 22.20.070-080.

[23] KPIX 5 News at 6:00 P.M., March 9, 2018.

44. Ministerial projects such as an SB 35 application are not subject to the Permit Streamlining Act. Gov. Code § 65928. However, on April 6, 2018, the City provided a letter to the Applicants following the form of an "incompleteness" letter that is typically provided for discretionary applications that *are* subject to the Permit Streamlining Act. See Gov. Code § 65943. The April 6 letter stated that it was only being provided in "an abundance of caution" because "Use Permit applications are generally subject to the Permit Streamlining Act." The April 6 Letter identified certain materials that would ordinarily be required for a discretionary permit application in the absence of SB 35, but the April 6 letter also stated that the requests for additional information in the letter were *not* part of the City's review of whether the Application meets the SB 35 criteria, which review proceeded separately.

45. On April 26, 2018, City Manager Dee Williams-Ridley sent a memorandum to the Mayor and City Council regarding the application, which confirmed that "the City is evaluating the 1900 Fourth St. project in compliance with all relevant laws and regulations" and that "[t]he Planning Department is coordinating with multiple City departments to ensure compliance with all SB 35 deadlines."

46. On May 10, 2018, the Applicants' counsel sent additional correspondence to City staff to respond to criticisms of the application that project opponents had submitted to the City.

47. On June 5, 2018, the City provided its formal "90-day" response to the application pursuant to Gov. Code § 65913.4(b). In this response, in contrast to the earlier statements by the Mayor and City Manager, the City for the first time took the position that it would not comply with SB 35, even if the application met all of the statute's criteria, because the City believed that the law does not apply to the extent it "impinges on legitimate municipal affairs." The response also provided the City's analysis of the Project's compliance with SB 35's criteria. The City's analysis confirmed that the application met most of SB 35's criteria for issuance of a streamlined ministerial permit, but identified some criteria with which the City believed there to be a conflict, or where additional information was required from the Applicants.

48. On June 29, 2018, the Applicants submitted a detailed response to all issues raised in the City's June 5 letter. In this response, the Applicants explained in detail why SB 35 did not

unconstitutionally infringe on municipal affairs, and provided a point-by-point response to every SB 35 criterion which Staff had identified as an area of potential noncompliance. To the extent minor modifications to the application were required to respond to City concerns or questions, the application was modified accordingly. To address concerns about whether the Project would continue to protect tribal cultural resources without CEQA mitigation being imposed, the Applicants confirmed that, despite the fact that CEQA review is not permitted over a SB 35 project, the Applicants intended to provide archaeological and tribal monitoring during all ground-disturbing activities, and that if any human remains are encountered, all obligations under State law would be strictly followed. See, e.g., Health & Safety Code § 7050.5; Pub. Res. Code § 5097.98.

49. Also on June 29, 2018, in order to be as responsive as possible to the City's requests for information, the Applicants' provided a detailed response to the City's April 6 "incompleteness" letter. Despite the fact that the requests in the City's April 6 letter exceeded the scope of the SB 35 application review process, which must be "strictly focused" on SB 35's criteria, Gov. Code § 65913.4(c), the Applicants provided material the City had requested, such as a focused Traffic Impact Assessment, which are ordinarily only required for discretionary projects subject to CEQA.

50. On September 4, 2018, the City's last possible day to complete its 180-day review process pursuant to Gov. Code § 65913.4(c), the City wrote to the Applicants to reject the Project ("Denial Letter'). In the Denial Letter, the City for the first time invoked the California constitution, claiming that "SB 35 cannot be applied to this City-designated historical landmark without violating California's constitution." Accordingly, the City stated that it would not comply with SB 35 even if the Project satisfied all of the criteria for issuance of a streamlined ministerial permit.[24]

51. As a secondary basis for denial, the Denial Letter claimed that there were three reasons why the Project did not meet SB 35's criteria. The Denial Letter does not dispute that the Project

[24] Far from contending that SB 35 is unconstitutional, other jurisdictions in California have already issued SB 35 permits to applicants, and have even published guidance documents and application forms for SB 35 applications. See, e.g., http://forms.sfplanning.org/AffordableHousingStreamlinedApproval_InfoPacket.pdf ("projects providing on-site affordable housing at 80% AMI are eligible for streamlining in San Francisco provided they meet all of the eligibility criteria"); http://forms.sfplanning.org/AffordableHousingStreamlinedApproval_Application.pdf; http://www.cityofconcord.org/pdf/permits/planning/appscheck/sb35.pdf. None of these materials advise potential applicants that these cities believe the law to be unconstitutional in any respect.

application satisfied all of the applicable criteria for a streamlined ministerial permit in Gov. Code § 65913.4(a)(1), (a)(2), (a)(3), (a)(4), (a)(6), (a)(7)(A), (a)(7)(B), (a)(7)(D), (a)(8), (a)(9) and (a)(10). Of all of the numerous City "objective zoning standards and objective design review standards" that apply to the Project, and which the Applicants demonstrated that the Project would meet, Gov. Code § 65913.4(a)(5), the Denial Letter identified only two purportedly objective standards which the City believed the Project would violate. Namely, the Denial Letter claimed that the Project conflicted with BMC § 22.20.065, which requires projects that provide less than 20% of their units for affordable housing to pay an Affordable Housing Mitigation Fee. The Denial Letter also claimed that the Project would conflict with BMC § 23E.64.090(E) - criteria used by the City's Zoning Adjustments Board when issuing discretionary use permits - because the Denial Letter claimed that "it is not clear" that the Project would meet "applicable performance standards for off-site impacts" and avoid "exceed[ing] the amount and intensity of use that can be served by available traffic capacity." As its final reason for denial, the Denial Letter claimed that the Project conflicts with a statutory limitation which excludes SB 35 from applying on sites where a project 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).

52. The City did not make any of the findings required by Gov. Code § 65589.5(d) and Gov. Code § 65589.5(j) when denying the Application and rejecting the Project.

53. After receiving the Denial Letter, Applicants' counsel wrote to Planning Director Burroughs and City Attorney Brown on October 10, 2018, to again explain why the City's permit denial was unlawful, to ask the City to advise the Applicants of any available avenues for seeking appeal or reconsideration of the Denial Letter, and to express the Applicants' willingness to meet to explore avoiding litigation.

54. After receiving no response from the City, Applicants' counsel wrote to Planning Director Burroughs and City Attorney Brown again on November 20, 2018 to reiterate the reasons why the City's denial was unlawful, to express the Applicants' disappointment that the City had shown no interest in meeting to avoid litigation, and to provide a final opportunity for the City to do so. In particular, Applicants' counsel noted that, even if the Project *were* subject to the City's

Affordable Housing Mitigation Fee, this would not be a valid basis to reject the Project, since the fee is payable "at the issuance of a Certificate of Occupancy," BMC § 22.20.065(C)(1), and nothing in SB 35 or any other law entitles the City to reject a project because the City disagrees with an applicant over the amount of a later-due fee. To the contrary, pursuant to the Mitigation Fee Act, the City was required to either approve the project subject to the fee being paid when due, or to provide "notice in writing" advising the Applicants of the precise fee amount it would be imposing so that the Applicants could "pay under protest" while seeking judicial review of the legality of the fee. Gov. Code § 66020.

55. Attorney Brown responded on November 21, 2018 to "acknowledge that the City has not identified any administrative appeal provision triggered by the Application Denial Letter." City Attorney Brown's November 21 letter did not respond to Petitioners' invitation to discuss avoiding litigation over this matter. City Attorney Brown's letter, without citing any applicable authority, claimed that if the Applicants sought to rely upon the Mitigation Fee Act, they "would need to formally inform the City that they seek to file an amendment to their application (or amended application) which would supersede the Application Denial Letter."

56. On November 27, 2018, the Applicants' counsel responded to explain why State law did not require the Applicants to re-submit their application for the application to be treated in a manner consistent with State law. This litigation followed.

FIRST CAUSE OF ACTION

(Petition for Writ of Mandate – Violation of SB 35

Failure to Issue Mandatory Streamlined Ministerial Permit)

(Code Civ. Proc. §§ 1085, 1094.5; Gov. Code § 65913.4)

57. Petitioners re-allege and re-incorporate by reference all preceding allegations in their entirety, as if fully set forth herein.

58. Mandamus relief is available to compel a local agency to take a ministerial act that is prescribed by law. See, e.g., *Ochoa v Anaheim City Sch. Dist.*, 11 Cal. App. 5th 209, 223-24 (2017) (citing numerous authorities). Petitioners, as the owners of the Site, have a "clear, present and beneficial right" to the issuance of the permit that State law requires the City to provide to allow the

Site's development. *Id.* (citing *Santa Clara County Counsel Attys. Assn. v. Woodside*, 7 Cal. 4th 525, 539-540 (1994)).

59. The City's primary reason for rejecting the Project is the City's unsupported contention that SB 35 – the centerpiece of the State's recent efforts to deal with the serious statewide problem of local governments imposing excessive discretionary control over local housing approvals – is unconstitutional. This argument is meritless.

60. The City's Denial Letter states that SB 35 is unconstitutional insofar as it "impinges on the City of Berkeley's legitimate municipal affairs to regulate the development and preservation of a City-designated historical landmark." Even if this were true, as set forth *supra*, the landmark designation does not "prevent any development or use of the property affected"; it merely "require[s] that appropriate further investigations" be taken with an eye towards protecting the Shellmound. City Brief, at p. 3. This investigation has now been conducted, and it confirms that the Shellmound is not in fact present on the Project Site. Therefore, there is no conflict between the approval of the Project and the City's asserted local interest in regulating the development of a locally designated landmark.

61. Even putting this aside, courts have consistently held that, even 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," and "[t]*his is so even where the local measure involves a traditionally municipal affair.*" *City of Watsonville v. State Dept. of Health Services*, 133 Cal.App.4th 875, 883 (2005) (citing *Johnson v Bradley*, 4 Cal.4th 389, 404 (1992)) (emphasis added). When enacting SB 35, "[t]he Legislature f[ound] and declare[d] that ensuring access to affordable housing is a matter of statewide concern," and that "[t]herefore, the changes made by this act are applicable to a charter city." Stats.2017, ch. 366 (S.B.35), § 4. 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*, 1 Cal.3d 56, 63 (1969). It is well-established that housing is a statewide issue and that state legislation in this area can validly preempt inconsistent local laws. See, e.g., *Coalition Advocating Legal Housing Options*

v. City of Santa Monica, 88 Cal.App.4th 451, 458 (2001); *Buena Vista Gardens Apartments Assn. v. City of San Diego Planning Dept.*, 175 Cal.App.3d 289, 306-07 (1985). SB 35 is narrowly tailored, since it does not force any jurisdiction to do anything that it has not already planned for in its objective zoning standards. The law completely reserves cities' authority to adopt objective standards governing where housing should be built and where it should be prohibited.

62. To have any effect at all, SB 35 necessarily displaces local governments' traditional discretionary municipal authority over land use, zoning, and housing. The City contends only that SB 35 is unconstitutional insofar as it infringes on the City's control over local landmarks. Since the City concedes that SB 35 is *otherwise* constitutional, even insofar as it precludes the ability of local jurisdictions to apply their discretionary review processes over housing approvals, the City bears the burden to demonstrate that preserving landmarks is *more* of a uniquely municipal affair than zoning, planning, and housing regulations generally. It is not.

63. Since SB 35 is constitutional, the City was required by law to issue a streamlined ministerial permit to the Project as long as it meets all of SB 35's criteria. It is undisputed that the Project satisfies nearly all such standards – including all standards in Gov. Code § 65913.4(a)(1), (a)(2), (a)(3), (a)(4), (a)(6), (a)(7)(A), (a)(7)(B), (a)(7)(D), (a)(8), (a)(9) and (a)(10).

64. It is further undisputed that the Project complies with countless objective standards in the City's Municipal Code. In the Denial Letter, the City identifies only two standards with which the Project conflicts. The City is incorrect in both cases.

65. The City claims that the Project conflicts with provisions in the City's Affordable Housing Mitigation Fee ("AHMF") Ordinance. As the Applicants noted in their June 29, 2018 letter to the City, "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." As the Applicants also previously explained, the AHMF Ordinance's requirements cannot legally apply to this Project, both because the AHMF Ordinance is unconstitutional to the extent it would impose "mitigation" requirements on a 50% affordable project, as well as because the AHMF Ordinance is

inconsistent with SB 35, which specifically entitles the Project to a streamlined ministerial approval as long as it provides at least 50% of its units for low-income households. The Applicants also demonstrated that the Applicants are entitled to a waiver of the AHMF Ordinance's requirements pursuant to the State Density Bonus Law, Gov. Code § 65915, as well as under the waiver provisions of the AHMF Ordinance itself, BMC §§ 22.20.070-080.

66. But even putting all of this aside, the City's Affordable Housing Mitigation Fee is not an "objective zoning standard[]," Gov. Code § 65953.4(a)(5), it is a *fee* requirement, and the fee is payable "at the issuance of a Certificate of Occupancy." BMC § 22.20.065(C)(1). To the extent the City remained insistent on imposing some or all of the City's Affordable Housing Mitigation Fee on the Project, the Mitigation Fee Act required the City either to approve the Project subject to the fee being paid at the time of issuance of a Certificate of Occupancy, or else to provide to the Applicants "notice in writing" of the precise "amount of the fees" it was imposing on the project, and to provide formal "notification that the 90-day approval period in which the applicant may protest has begun." Gov. Code§ 66020(d). This would give the Applicants the option under the Mitigation Fee Act to "pay under protest" by confirming that the Applicants would tender payment when due but would in the meantime be seeking judicial review of the legality of the fee. Gov. Code§ 66020(a). But the City did not take this step. Nothing in SB 35 or any other law gives the City the authority to deny a permit on the grounds that it disagrees with the Applicants over the amount of a later-due impact fee.

67. The second "objective standard" identified by the City – BMC § 23E.64.090(B)(6)-(7) also does not pass muster, and the City's attempt to cite it only demonstrates that the City remains committed to avoiding the ministerial approval process mandated by State law. The Denial Letter states that because Staff believe that the Project may have traffic impacts if studied pursuant to CEQA, "it is not clear" that the Project satisfies purportedly "objective zoning standards" in BMC § 23E.64.090(B)(6)-(7) regarding performance standards for off-site impacts, and traffic/parking capacity. BMC § 23E.64.090(B) does not describe "objective zoning standards"; this code section lists findings that the Zoning Officer or Zoning Adjustments Board make when making the *subjective* decision about whether to grant a *discretionary* use permit. SB 35 displaces any requirement to seek any type of discretionary permit, *see* Gov. Code§ 65913.4(a), and so none of these criteria apply.

CEQA considerations, of course, are irrelevant to a ministerial approval, because CEQA does not apply to ministerial projects such as an SB 35 permit. Pub. Res. Code§ 21080(b)(l). But even putting all of this aside, it is simply not the case that the City treats BMC § 23E.64.090(B)(6)-(7) as "objective" standards that are determined by whether a project would or would not have CEQA impacts. To the contrary, the City treats these standards as subjective standards which it exercises discretion about how to apply, irrespective of the conclusions made in any accompanying CEQA analysis. To take just one recent example, the ZAB issued Use Permit #ZP2016-0134 in July 2017, and Use Permit # ZP2018-0008 in April 2018, for the 3100 San Pablo Avenue project, including making the findings in BMC § 23E.64.090(B)(6)-(7), *despite concluding in the accompanying EIR that the project would have significant and unavoidable traffic impacts.*[25] This forecloses any argument that BMC § 23E.64.090(B)(6)-(7) function as "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).

68. Finally, there is no merit whatsoever in the City's final attempt to avoid SB 35 by citing Gov. Code § 65913.4(a)(7)(C), which creates a narrow exception to SB 35 for projects that "would require the demolition of a historic structure that was placed on a national, state, or local historic register." To begin with, as discussed *supra*, the Shellmound is not located on the site and so the Project will not result in its "demolition." But regardless, the Denial Letter *explicitly concedes that "SB 35 does not expressly identify landmarked or archaeological sites as exceptions to its ministerial approval process."* What the Denial Letter contends is listed on a City and State register is an "area" or a "site," and SB 35 provides no exception for historic "areas" or "sites." To the contrary, SB 35 expressly recognizes that SB 35 projects are expected to occur in historic districts. See Gov. Code § 65913.4(d)(1)(B). If the Legislature had intended to provide an exemption to SB 35 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

[25] See, e.g., Attachment 2.A, "Finings & Conditions," to ZAB Staff Report on 3100 San Pablo Avenue – Use Permit #ZP2016-0134 (July 13, 2017); Attachment 1, "Findings & Conditions" to ZAB Staff Report on 3100 San Pablo Avenue – Use Permit #ZP2018-0008 (April 26, 2018).

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). No feature occurring on the site has ever been listed as a historic structure on any federal, state or local register. Even if it had, there is no sense in which the Project could be said to result in that feature's "demolition."

69. Since the City's reasons for denying the Project do not withstand scrutiny, Petitioners are entitled to a writ of mandate setting aside the City's denial and directing the City to issue Petitioners the streamlined ministerial permit that SB 35 requires.

SECOND CAUSE OF ACTION

(Petition for Writ of Mandate – Violation of the Housing Accountability Act

Improper Denial of Housing Development Project for

Very Low, Low- or Moderate-Income Households)

(Code Civ. Proc. §§ 1085, 1094.5; Gov. Code § 65589.5(d).)

70. Petitioners re-allege and re-incorporate by reference all preceding allegations in their entirety, as if fully set forth herein.

71. Under subdivision d of the HAA, "[a] local agency shall not disapprove a housing development project . . . for very low, low-, or moderate-income households . . . or condition approval in a manner that renders the housing development project infeasible for development for the use of very low, low-, or moderate-income households," unless the agency makes written findings, based upon a preponderance of the evidence in the record," that one of five specific criteria in the statute are satisfied. Gov. Code § 65589.5(d).

72. The Project qualifies as a "housing development . . . for very low, low-, or moderate-income households" because at least two-thirds of its square footage is devoted to residential uses and "at least 20 percent of the total units shall be sold or rented to lower income households, as defined in Section 50079.5 of the Health and Safety Code." Gov. Code § 65589.5(h)(2)(B) & (h)(3). 50% of the Project's units will be rented to low-income households.

73. By rejecting the Project, and conditioning its approval in a manner that renders it infeasible for the use of low-income households, without making the findings required by Gov. Code § 65589.6(d), Respondents have "not proceeded in the manner required by law." *Honchariw*, 200

Cal.App.4th at 1081 (quoting Code Civ. Proc. § 1094.5(b).) Nor could Respondents validly make such findings:

a. The City has not met its share of the Regional Housing Need Allocation pursuant to Gov. Code § 65588 for low-income housing. Gov. Code § 65589.5(d)(1).

b. The Project would not have any "significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions . . .." Gov. Code 65589.5(d)(2).

c. Denial of the Project is not "required in order to comply with specific state or federal law." Gov. Code § 65589.5(d)(3).

d. The Project is not "proposed on land zoned for agriculture or resource preservation that is surrounded on at least two sides by land being used for agricultural or resource preservation purposes, or which does not have adequate water or wastewater facilities to serve the project." Gov. Code § 65589.5(d)(4).

e. The Project is consistent with "the jurisdiction's zoning ordinance and general plan land use designation." Gov. Code § 65589.5(d)(5).

74. "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." Gov. Code § 65589.5(a)(2)(L). Petitioner is entitled to an order or judgment compelling compliance with the HAA, including but not limited to an order that the City take action to approve the Project. Gov. Code § 65589.5(k)(1)(A).

THIRD CAUSE OF ACTION

(Petition for Writ of Mandate – Violation of the Housing Accountability Act

Improper Denial of Housing Development Project

That Complies with Applicable Objective Criteria)

(Code Civ. Proc. §§ 1085, 1094.5; Gov. Code § 65589.5(j).)

75. Petitioners re-allege and re-incorporate by reference all preceding allegations in their entirety, as if fully set forth herein.

76. Under subdivision j of the HAA, "[w]hen a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards," the local agency may not "disapprove the project or . . . impose a condition that the project be developed at a lower density" unless it makes "written findings supported by a preponderance of the evidence on the record that" two specific criteria defined in the statute are both met. Gov. Code § 65589.5(j). "For purposes of . . . [the HAA], 'lower density' includes any conditions that have the same effect or impact on the ability of the project to provide housing." Gov. Code § 65589.5(j)(2)(4). The HAA's emphasis on *objective* standards and criteria is intended to "tak[e] away an agency's ability to use what might be called a 'subjective' development 'policy' (for example, 'suitability')" as a legitimate ground to reject an otherwise HAA-compliant housing development project. *Honchariw*, 200 Cal. App. 4th at 1076-77. The Project qualifies as a "housing development" because at least two-thirds of its square footage is devoted to residential uses. Gov. Code § 65589.5(h)(2)(B).

77. The City only identified two purportedly "*objective* general plan, zoning, and subdivision standards and criteria," Gov. Code § 65589.5(j) (emphasis added) that the Project supposedly violated. Compare *Honchariw*, 200 Cal. App. 4th at 1076 ("suitability" is a "subjective" criteria that may not be used as a basis to deny an HAA-compliant project). As set forth *supra*, the Project in fact complies with all such standards. This is the case under any standard of review, but is indisputably the case under the HAA, which provides that "a housing development project . . . 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." Gov. Code § 65589.5(f)(4).

78. By rejecting the Project and imposing conditions that impact the ability of the Project to provide housing without making the findings required by Gov. Code § 65589.5(j), Respondents have "not proceeded in the manner required by law." *Honchariw*, 200 Cal.App.4th at 1081 (quoting Code Civ. Proc. § 1094.5(b).) Nor could Respondents validly make such findings. As alleged *supra*, the Project will not have a "significant, quantifiable, direct, and unavoidable impact, 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). Even if the Project would have any such impact, there is no evidence that "[t]here is no feasible method to satisfactorily mitigate or avoid the adverse impact . . . other than the disapproval of the housing development project." Gov. Code § 65589.5(j)(1)(B). At no point has the City ever claimed that the Project would have public health or safety impacts.

79. "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." Gov. Code § 65589.5(a)(2)(L). Petitioner is entitled to an order or judgment compelling compliance with the HAA, including but not limited to an order that the City take action to approve the Project. Gov. Code § 65589.5(k)(1)(A).

FOURTH CAUSE OF ACTION

(Injunctive Relief)

(Code Civ. Proc. §§ 525 & 526)

80. Petitioners re-allege and re-incorporate by reference all preceding allegations in their entirety, as if fully set forth herein.

81. Respondents' refusal to comply with California law has caused and threatens to cause Petitioners irreparable and substantial harm. No amount of monetary damages or other legal remedy can adequately compensate Petitioners for the irreparable harm that they have suffered and will continue to suffer from the violations of law described herein. Petitioners have no plain, speedy, and adequate remedy at law, in that unless Respondents are enjoined by this Court from denying Petitioners the streamlined ministerial permit to which Petitioners are entitled, and further enjoined from taking any further unlawful action to preclude the development of the Site, Petitioners will continue to be denied their statutory rights.

FIFTH CAUSE OF ACTION

(Declaratory Relief)

(Code Civ. Proc. § 1060)

82. Petitioners re-allege and re-incorporate by reference all preceding allegations in their entirety, as if fully set forth herein.

83. An actual controversy has arisen and now exists between Petitioners and Respondents concerning the obligations and duties of Respondents under the California constitution and California statutory law. As set forth *infra*, Petitioners contend that SB 35 is constitutional as applied to the Project, and that both SB 35 and the HAA require Respondents to issue to Petitioners the streamlined ministerial permit for which Petitioners applied. Petitioners are informed and believed, and on that basis allege, that Respondents contend in all respects to the contrary. A judicial determination and declaration as to the constitutionality and applicability of SB 35 and the HAA, and of the resulting legal obligations of Respondents, is therefore necessary and appropriate in order to determine the duties of Respondents and the rights of Petitioners.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray for relief as follows:

1. For alternative and peremptory writs of mandate compelling the City to comply with SB 35 and the Housing Accountability Act, including but not limited to an order or judgment that the City issue to Petitioners the streamlined ministerial permit for which Petitioners applied.

2. For a declaratory judgment pursuant to Code Civ. Proc. § 1010, declaring that SB 35 is constitutional as applied to the Project, and that SB 35, the HAA, or both, require the City to issue the streamlined ministerial permit for which Petitioners applied.

3. For injunctive relief restraining Respondents, their agents, and their employees, from taking any action to preclude the issuance of the streamlined ministerial permit for which Petitioners applied, and from taking any further unlawful actions to preclude the development of the Project.

4. For costs of suit as allowed by law, including attorney's fees pursuant to Gov. Code §65589.5(k)(1)(A) and Code Civ. Proc. § 1021.5.

5. For fines to be assessed as warranted pursuant to Gov. Code § 65589.5(k)(1)(B).

6. For such other and further relief as may be just and proper.

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Dated: Nov. 27, 2018

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: Jennifer L. Hernandez
Attorneys for Petitioners and Plaintiffs
RUEGG & ELLSWORTH and
FRANK SPENGER COMPANY

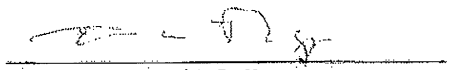
VERIFICATION

I, David C. Ruegg, certify and declare as follows:

I have read the foregoing VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF and know its contents. I am a partner in Ruegg & Ellsworth and in that capacity, I am duly authorized to execute this Verification on behalf of Ruegg & Ellsworth.

Based on information and belief, I declare under penalty of perjury under the laws of the State of California and the United States that the matters stated in the foregoing Verified Petition for Writ of Mandate and Declaratory and Injunctive Relief are true and correct.

Executed this 27th day of November, 2018 in Berkeley, California



David C. Ruegg