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Received
OCT 10 2018
City Attorney

October 10, 2018

Timothy Burroughs
Director, Department of Planning &
Development
City of Berkeley
1947 Center Street
Berkeley, CA 94704

Farimah Brown
City Attorney
City of Berkeley
2180 Milvia Street, Fourth Floor
Berkeley, CA 94704

Re: ZP2018-0052 Unlawful Permit Denial

Dear Mr. Burroughs and Ms. Brown:

We have been retained to represent Ruegg & Ellsworth and the Frank Spenger Company (collectively the "Applicants"), the Applicants for ZP2018-0052 (the "Application"), an application for a streamlined ministerial permit for the 1900 Fourth Street property, to which the Applicants are entitled as a matter of law pursuant to Gov. Code § 65913.4 (also known as "SB 35"). As you know, in a letter dated September 4, 2018 ("Denial Letter", attached as Exhibit A hereto), City Planning & Development Director Timothy Burroughs denied the Application on behalf of the City of Berkeley ("City"). For the reasons set forth in the March 8, 2018 original application, March 30, 2018 correspondence, April 5, 2018 correspondence, May 10, 2018 correspondence, and June 29, 2018 submission (all of which are on file with the City and the cover letters of which are attached as exhibits B-F hereto), the City's denial was unlawful.

We have submitted a Government Claims Act form to the City Clerk in compliance with the City's form to the extent there is any arguable requirement that Applicants exhaust that avenue for relief before availing themselves of their legal remedies. The Denial Letter, in notable

contrast to other permit determinations issued by the City, did not provide the Applicants with any opportunity to appeal or seek reconsideration of the City's final decision on this application, and City Manager Dee Williams-Ridley's April 26, 2018 memorandum to the Mayor and City Council regarding this project expressly states that there is no "right of appeal" for an SB 35 project and that any challenge "would need to be resolved in litigation rather than through an appeal to City Council." If, notwithstanding this, the City believes that it has adopted any procedures to seek appeal or reconsideration of the City's final decision to deny an SB 35 permit, please advise us of those avenues immediately so that the Applicants can consider them.

We further urge the City to evaluate the extent to which its taxpayers, residents, and those needing the 130 low-income and 130 market-rate units this project would provide are served by litigating this matter – which would result in delayed construction of urgently-needed housing, as well as cause the City to spend taxpayer dollars on litigation defense costs as well as the fines and attorneys' fees that would be due to our client based on the City's unlawful denial of this application. Should you wish to meet to attempt to avoid the need for litigation, please do not hesitate to contact me or my colleague Dan Golub. We expect to initiate legal action on or before November 22.

Sincerely yours,

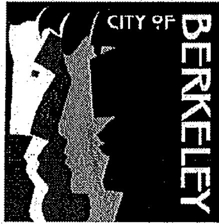
HOLLAND & KNIGHT LLP

Jennifer Lynn Hernandez

JLH:mlm

EXHIBIT

A



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

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."[1] (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.[2] (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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[1] 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.)

[2] 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.

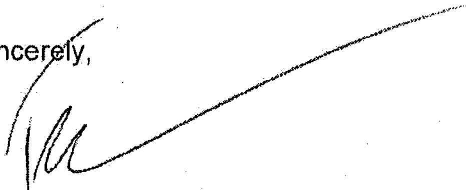
As you previously requested, we have placed the original application for the site on hold; while the Project does not qualify for approval under SB 35, you are welcome to reactivate that project, or to reapply under a standard Use Permit process for this revised larger project or other alternative projects.

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.

Sincerely,



Timothy Burroughs
Director, Department of Planning & Development

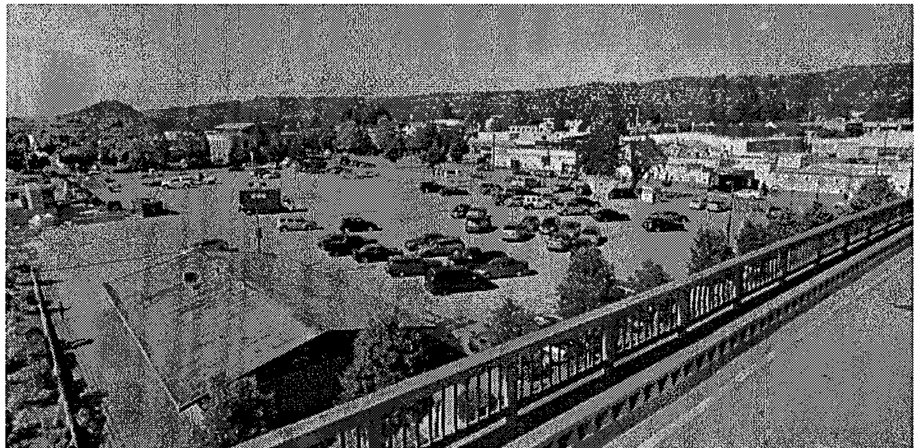
EXHIBIT

B

1900 Fourth Street, Berkeley, California
Government Code Section 65913.4 Project Submittal
Applicant Statement
March 8, 2018

INTRODUCTION AND OVERVIEW

This Applicant Statement is submitted on behalf of West Berkeley Investors, LLC, for a proposed residential mixed-use development project to be located on an existing parking lot located at 1900 Fourth Street. This is an application for a development permit pursuant to Government Code 65913.4, otherwise known as Senate Bill 35. The project proposes to include 260 residential units, **fifty percent** (50%) of which will be affordable to low income households (less than 80% area median income [AMI]).



As has been recently determined by the Department of Housing and Community Development ("HCD"), Berkeley has only permitted 17 low income units in the current Regional Housing Needs Assessment (RHNA) cycle, which is approximately 4% of the City's low income allocation, so this single project will dramatically increase the City's production of affordable housing. Further, the project site is ideally situated for mixed-use development: it is transit rich, is adjacent to one of the City's most vibrant retail areas and has easy access to the I-80 corridor.

The City has long recognized the development potential for the site, long ago identifying it in the West Berkeley Plan as a "node" where "development should be encouraged." Further, because this application is submitted pursuant to newly enacted Government Code Section 65913.4 ("SB 35"), 100% of the construction workers will be paid prevailing wage and the work will be undertaken by a "skilled and trained workforce."

The project also includes a density bonus pursuant to Government Code Section 65915, with waivers/modifications and concessions/incentives, as allowed per the statute. The proposed project is subject to Government Code Section 65589.5, also known as the Housing Accountability Act. The project's consistency with each of these provisions of State law is discussed in detail below. All three of these Government Code sections are state legislative efforts that recognize the severity of California's housing crisis and the difficulties associated with developing new housing at appropriately zoned, transit-oriented locations. They all also apply to Charter Cities, of which Berkeley is one. The following legislative findings (from Government Code section 65589.5(a)(2)) are instructive of how the City must interpret and implement these laws:

> California has a housing supply and affordability crisis of historic proportions. The consequences of failing to effectively and aggressively confront this crisis are hurting millions of Californians,

> robbing future generations of the chance to call California home, stifling economic opportunities for workers and businesses, worsening poverty and homelessness, and undermining the state's environmental and climate objectives...
>
> The Legislature's intent in enacting this section in 1982 and in expanding its provisions since then was to significantly increase the approval and construction of new housing for all economic segments of California's communities by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects and emergency shelters. That intent has not been fulfilled...
>
> It is the policy of the state that this section 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.

With those laws and policies in mind, the following sets forth the Applicant Statement. This Statement also includes the following attachments:

1. 1900 Fourth Street Compliance with Objective Planning Standards
2. Site Archeological, Geological and Historical Studies
3. Letter from Citi Community Capital Regarding Affordable Housing Financing
4. Letter Certifying Compliance with Prevailing Wage/Skilled Labor Requirements

SB 35/Government Code Section 65913.4

The legislature enacted SB 35 in 2017 as a response to California's housing crisis and, specifically, the negative impact that the lack of housing production is having on the state's economic vitality, environmental goals and social diversity.

Under SB 35, cities that are not on track to meet their RHNA housing production obligations will be required to follow a streamlined, ministerial approval process for qualified housing projects. On January 31, 2018, HCD confirmed that Berkeley has produced insufficient below moderate income housing, and is subject to SB 35. The SB 35 approval process requires cities to approve projects within 180 days of submittal of an application and such approval must be based only on whether the project complies with "objective planning standards." To qualify, the project must meet a number of criteria, including providing certain percentages of the units affordable to households with incomes below 80% area median income; paying prevailing wage for construction labor; and meeting all objective zoning and design review standards. The terms "objective zoning standards" and "objective design review standards" are narrowly defined to mean "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." A comprehensive checklist of SB 35 requirements is found below. Because the statute mandates that the process is ministerial and that projects are judged purely on objective standards that do not involve the exercise of discretion, CEQA does not apply to the SB 35 process. *See* 14 Cal. Code Regs. 15268(a) ("Ministerial projects are exempt from the requirements of CEQA"); *see also* Pub. Res. Code 21080(b)(1).

For purposes of SB 35, "additional density or any other concessions, incentives, or waivers of development standards granted pursuant to the Density Bonus Law in Section 65915" are not taken into account when

assessing the project's compliance with the City's objective standards. Gov. Code § (a)(5). The project qualifies for the State Density Bonus Law, because the Project will provide 50% of its units with rents affordable to households earning less than 80% of AMI. The benefits afforded under the State Density Bonus Law include waivers/modifications of development standards that would otherwise "physically preclude" the density bonus project, three concessions/incentives, and reduced parking requirements, all as discussed further below.

PROJECT DESCRIPTION

Project Uses

The proposed project includes 260 dwelling units (130 of which will be available at less than 80% AMI), a 7,333-square foot ground level community open space, 27,891 square feet of commercial uses, resident lobbies with different pedestrian access points, service areas for residential and commercial uses, and direct vehicular access to parking. The project site currently consists of two parcels, which will be merged for the purpose of this development proposal, consistent with Berkeley Municipal Code Section 21.52. The ground floor also includes a community room that will be privately managed, but can be used by the public for meetings or other purposes. The proposed parking is located within the structure, with commercial parking at existing grade level behind the retail spaces and residential parking in a secured basement-level garage. Above the ground floor are residential apartments and residential open space and amenities.

Half of the apartments will be affordable to households with incomes below 80% AMI and the other half will be market rate. The apartments contain a mix of studio, one bedroom, and two bedroom units. For financing purposes, the residential units above the podium are located within either Building 1 or Building 2. Building 1 is the area reserved for the below market rate units and Building 2 will house market rate units. Building 1 may be financed using a variety of options.

All residents of 1900 Fourth Street will have access to interior amenities, including resident lounges and fitness centers, bicycle storage and repair area, and a community room. Each of these common spaces open onto large courtyards and, in addition, residents will have access to a roof deck lounges with San Francisco Bay and other views.

Project Residential Affordability

The proposed project is subject to three different affordable unit criteria. SB 35 requires 50% of units to be dedicated affordable units, *see* Gov. Code § 65913.4(a)(4)(B)(ii), and the project's compliance with that criterion insures that it meets the requirements of both the City of Berkeley Affordable Housing Mitigation Fee and State Density Bonus Law Thresholds, both of which require 20% of units to be affordable. *See* Gov. Code § 65915(d)(2)(B); BMC § 22.20.065.C.2. By providing 50% of its units for low-income households, the Project is exempt from the City's affordable housing mitigation fee at this time. BMC § 22.20.065.D.

The table below calculates the proportional fee per BMC § 22.20.065.D which specifies the following formula:
[(A-B-C) x Fee] – [(B+C)/((A-B-C) x 20%)) x ((A-B-C) x Fee)], with A, B, and C defined below. This calculation results in a negative fee/number since the project exceeds the 20% requirement.

Calculation	*Project*
A = Total number of units in the project	260
B = Number of Very-Low Income Units provided in the project.	0
C = Number of Low-Income Units provided in the project.	130
Per Unit in-lieu Fee	$37,000
Proportional Fee Required for Remaining In-Lieu Units	**- $19,240,000**

Location

The proposed project at 1900 Fourth Street is located at the northwest corner of Hearst Avenue and Fourth Street in the City of Berkeley.

Fourth Street, in the vicinity of the project site, supports a pedestrian-oriented shopping district, which includes a variety of retail and restaurant facilities, as well as offices and other commercial uses, both to the north of the site and directly east of the site across Fourth Street. South of the project site across University Avenue is a mixed-use building with residential units above ground-floor retail. Directly west of the project site is the Truitt and White building material company's main yard, separated from the project site by the Union Pacific Railroad tracks.

The Berkeley Amtrak Station is located directly south of the project site, at the westernmost end of University Avenue. Adjacent parcels are all zoned C-W, West Berkeley Commercial, within the Designated Node, aside from the Truitt and White site to the west of the project, which is zoned MULI Mixed-Use Light Industrial.

Surrounding Uses and Zoning		
Direction	**Use**	**Zoning**
North	Commercial Retail/Office	C-W
East	Commercial Food Service	C-W
South	Mixed-Use Commercial/Residential	C-W
West	Light Industrial	MULI

Project Design

The ground plane is varied both vertically and horizontally and includes a community open space element stretching from Fourth Street to the railroad tracks along Hearst Avenue. The pedestrian environment is designed in accordance with the Berkeley Aquatic Park Public Improvement Plan and also contains a variety of commercial storefront design and articulation. The project's architectural character enhances pedestrian interest and acknowledges architectural efforts and forms already approved north and south on Fourth Street and in West Berkeley generally. The relatively large development site includes a mix of

building forms and materials that reflect West Berkeley's mixed use and industrial past while creating an architectural ensemble that feels more like it was developed over time as multiple projects.

Community Open Space

The 1900 Fourth Street project will provide 7,333 square feet of land at the north end of the project site for public use as a well-appointed landscaped open space running along the length of Hearst Avenue. This linear open space feature is historically symbolic and designed to reflect the general location where an embankment once existed along Hearst Avenue and adjacent to the wet marshland that once occupied approximately 80% of the site during the Quaternary Period (2.5 million years ago) to its later epoch, the Holocene Period (11.7 thousand years ago) to the early 1900's, when the site was artificially filled for development. (This is described in more detail in the Structural Alteration Permit Findings discussion below). The project also includes a 1,332 square foot community room that will be available for public use and managed by the property owners.

Transit-Orientation and Neighborhood Mixed Use Development

1900 Fourth Street is in a transit rich environment and will expand the range of uses in this walkable mixed-use neighborhood. It is 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. A key purpose of the project is to make a substantial contribution to Berkeley's below market rental housing supply and enhance an adjacent retail environment. The proposed project will specifically address the existing small-scale pedestrian-oriented environment of Fourth Street and provide needed residential goods and services for the new housing that has been and will be developed in the area.

Project Statistics

The project includes the following major elements:

- Lot Size: 96,266 square feet
- Lot Coverage: 87% where 100% is allowed.
- Gross Project Floor Area (parking areas excluded per BMC Section 23F): 286,809 square feet
- Floor Area Ratio: 2.98 where 3.0 is allowed.
- Commercial Gross Floor Area: 27,891 square feet of retail and food service space. As defined in Zoning Ordinance table 23E64.030.A, the West Berkeley node use requirements of 23E.64.040.E, and the definitions found in Zoning Ordinance Section 23F., the non-residential components of the proposed mixed use project will only be used for retail sales, personal/household services, banks, food and alcohol service, lodging, entertainment and assembly uses, and required access to and lobbies serving upper-story uses. Consistent with Berkeley's past practice for initial project occupancy, the commercial tenant space components of the ground floor uses will not be defined

until building permitting. Pursuant to SB 35 none of those particular uses are subject to any additional discretionary approval.

- Residential Gross Floor Area/Units: The residential area includes 254,888 gross square feet (197,937 square feet of net unit area) with 260 dwelling units that have an average size of 761 square feet, with a mix of studio, one and two bedroom units.
- Residential Open Space: A total of 19,079 square feet of resident open space is provided along with 5,676 square feet of resident amenity space.
- Parking: The project provides 190 residential and 100 commercial parking spaces where 170 residential spaces are allowed per State Density Bonus Law and 100 commercial spaces are required per the City of Berkeley parking requirements (0 parking spaces are required per SB 35 because the project is within ½ mile of a major transit facility – Amtrak Station + AC Transit bus stop with <15 minute headways), for a surplus of 45 parking spaces. The project will provide residential parking spaces in the basement parking level. Commercial parking will be located within the ground-floor level of the garage and will be available to the public.

PROJECT COMPLIANCE AND APPLICABILITY OF STANDARDS

Compliance with City of Berkeley Zoning and Design Review Standards

A comprehensive table analyzing the project's consistency with all applicable zoning and design review standards is included in Attachment 1 of this Applicant Statement.

Compliance with City of Berkeley General Plan and West Berkeley Plan

The project site is located within the West Berkeley Plan Area. The project's General Plan land use designation is Avenue Commercial. Both the West Berkeley Plan and the General Plan land use designation support intensive mixed use development at this location. The operative zoning for the site is C-W (West Berkeley Commercial), which grew out of the West Berkeley Plan policy process and is also consistent with the general plan land use category Avenue Commercial.

Environmental Review

SB 35 specifies that the approval process is "ministerial" and approval will be granted if the project complies with "objective standards," meaning standards for which no subjective judgment is exercised. Because CEQA does not apply to ministerial approvals such as this, environmental review is not required for the project.

However, extensive environmental review for the site was recently completed in the form of a Draft Environmental Impact Report for a project very similar in nature and intensity. While that analysis has no bearing on the City's review of this project, we recognize that such information in the Draft EIR may be of interest, and we incorporate such review by reference in the appendices provided on CD.

It should be noted that although the project was designated a City landmark due to the belief that the West Berkeley Shellmound is located on the site, extensive testing and undisputed expert analysis have shown that the shellmound does not actually exist on the project site and never did. (Reference materials

are included in Attachment 2.) The site was substantially a wet marshland until it was filled and paved over the last 100+ years. However, its landmark status requires that design review be conducted pursuant to the Berkeley's Landmarks Preservation Ordinance, Berkeley Municipal Code Chapter 3.24. The project's compliance with BMC 3.24 is included in the analysis below and Attachment 1.

Parcel Map

Pursuant to Berkeley Municipal Code Title 21, Subdivisions, the project is submitting a parcel map for condominium purposes. A draft map application is being submitted pursuant to the requirements of BMC Section 21.24.

PROJECT COMPLIANCE WITH ALL APPLICABLE LAWS

1. SB 35: Government Code Section 65913.4 (SB 35) Review and Approval Criteria

As shown in the table below, the proposed submittal complies with the SB 35 eligibility requirements. The following table lists the criteria for a project's consideration per the Government Code, as demonstrated below and confirms that the project complies.

	Government Code Section 65913.4 Eligibility Requirement	Requirement satisfied?
1.	**Is the project a multifamily housing development with 2 or more units? Subd. (a)(1).** As stated in the project description the project is a multifamily housing development that will provide 260 new dwelling units, 130 (or 50%) of which will be affordable to households with incoming less than 80% AMI.	Yes
2.	**Is the project located in an area designated by the U.S. Census Bureau as an urbanized area? Subd. (a)(2)(A).** The project is located in the City of Berkeley, which is entirely within a U.S. Census urbanized area boundary. *See also:* https://www2.census.gov/geo/maps/dc10map/UAUC_RefMap/ua/ua78904_san_francisco--oakland_ca/DC10UA78904.pdf	Yes
3.	**Is more than 75% of the project site's perimeter developed with urban uses? Subds. (a)(2)(B), (h)(8).** SB 35 defines "urban uses" as "any current or former residential, commercial, public institutional, transit or transportation passenger facility, or retail use, or any combination of those uses." Based on these standards, the entirety of the Project site's perimeter is developed with urban uses.	Yes
4.	**Does the site have either a zoning or a general plan designation that allows for residential use or residential mixed-use development, with at least two-thirds of the square footage designated for residential use? Subd. (a)(2)(C).**	Yes

	Government Code Section 65913.4 Eligibility Requirement	Requirement satisfied?
	The Project site is zoned C-W (West Berkeley Commercial), which allows for commercial, residential, and mixed-use development. The General Plan designates the Property "Avenue Commercial" which is for areas "characterized by pedestrian-oriented commercial development and multi-family residential structures." The total square footage of the Project is approximately 286,809 square feet (excluding the parking garage per Zoning Ordinance Section 23F). Of that amount, approximately 254,888 square feet are dedicated to residential uses. Residential uses comprise 88.8% of the total, in excess of the two-thirds requirement.	
5.	**Has the Department of Housing and Community Development (HCD) determined that the local jurisdiction is subject to SB 35? Gov't Code Sec. 65913.4(a)(4)(A).** On February 2, 2018, HCD made its determination which jurisdictions throughout the state are subject to streamlined housing development under SB 35. The City of Berkeley is subject to SB 35 because although it is on course to meet its pro rata share of above moderate housing for this RHNA reporting period, it has not done so for below market rate housing. See also: http://www.hcd.ca.gov/community-development/housing-element/docs/bay-area-with-insets.pdf	**Yes**
6.	**Will the project include the required percentage of below market rate housing units? Subd. (a)(3) and (a)(4)(B)** The required percentage of below market rate housing under SB35 is 50% for Berkeley. The Project will include at least 50% of housing units dedicated to households with incomes below 80% of AMI; affordability will be assured through the recordation of a regulatory agreement.	**Yes**
7.	**Is the project consistent with "objective zoning standards" and "objective design review standards." Subd. (a)(5)** The Project will comply with all applicable objective standards, except where waivers and concessions are requested pursuant to State Density Bonus Law requirements and consistent with SB 35. SB 35 defines "objective planning standards" narrowly: "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."	**Yes**

	Government Code Section 65913.4 Eligibility Requirement	Requirement satisfied?
	See Attachment 1 of this Applicant Statement for a complete list of objective zoning and design review standards associated with this project.	
8.	**Is the project located outside of all types of areas exempted from SB 35? Subd. (a)(6-7), (10).** The project site is not located within any of the below exempt areas. <u>Subd.(a)(6) exempt areas</u>: - Coastal zone - Prime farmland or farmland of statewide importance - Wetlands - High or very high fire hazard severity zones - Hazardous waste sites - Earthquake fault zone (unless the development complies with applicable seismic protection building code standards) - Floodplain or floodway designated by FEMA - Lands identified for conservation in an adopted natural community conservation plan or habitat conservation plan - Habitat for a state or federally protected species - Land under a conservation easement The Project site is not located on any of the above areas. <u>Subd. (a)(7) exempt areas</u>: - A development that would require the demolition of housing that: - Is subject to recorded rent restrictions - Is subject to rent or price control - Was occupied by tenants within the last 10 years - A site that previously contained housing occupied by tenants within past 10 years - A development that would require the demolition of a historic structure on a national, state, or local register - The property contains housing units that are occupied by tenants, and units at the property are/were offered for sale to the general public by the subdivider or subsequent owner of the property. There have been no dwelling units on the property at any point during the last ten years, and the project would not require the demolition of any residential or historic structures. <u>Subd. (a)(10) exempt areas</u>:	**Yes**

	Government Code Section 65913.4 Eligibility Requirement	**Requirement satisfied?**
	- Land governed under the Mobilehome Residency Law - Land governed by the Recreational Vehicle Park Occupancy Law - Land governed by the Mobilehome Parks Act - Land governed by the Special Occupancy Parks Act The project site is not located on land governed by any of the above laws.	
9.	**Will all construction workers employed in the development project be paid at least the general prevailing wage as required by state law? Subd. (a)(8)(A).** As detailed in the attached letter, the applicant certifies that all construction workers employed in the execution of the development will be paid at least the general prevailing rate of per diem wages. *See Attachment 4.*	Yes
10.	**Will all construction workers employed in the development project be certified as a "skilled and trained workforce." Subd. (a)(8)(B).** As detailed in the attached letter, the applicant certifies that a skilled and trained workforce shall be used to complete the development. *See Attachment 4.*	Yes
11.	**Will the project developer pay prevailing wages and use a "skilled and trained" workforce if the project involves a subdivision, subject to the Subdivision Map Act? Subd. (a)(9)** The Project will pay prevailing wages and use a "skilled and trained" workforce. See items 9 and 10 above for more information on the applicant's commitments to prevailing wages and a skilled and trained workforce. The Project application includes a parcel map for condominium purposes, which will create separate condominiums for each residential building and the retail portion.	Yes

2. Density Bonus: Government Code Section 65915, Affordable Housing Compliance and Density Bonus Entitlement

The proposed project will provide 260 new apartments, half of which (130), will be affordable to families earning less than 80% AMI.

Pursuant to Government Code section 65915, because more than 20% of the "base" density units will be affordable to low income households, the project is entitled to a 35% density bonus over the otherwise allowable maximum residential density ("base project"). The City must also waive development standards

that if applied would "physically preclude" the density bonus project. Finally, the project is entitled to up to three (3) concessions or incentives that provide actual and identifiable cost reductions.

Density Standard and Bonus

The C-W zoning district does not establish an otherwise allowable maximum residential density so the General Plan standard is applicable pursuant to Government Code section 65915. The Berkeley General Plan states that commercial area densities are measured over broad areas and that Avenue Commercial Areas will generally have 44 to 88 persons per acre. These broad areas include corridors such as San Pablo Avenue, Shattuck Avenue, Telegraph Avenue, and University Avenue, to which the project site is adjacent.

In order to create a proxy for residential density, given Berkeley's lack of density standards, the City of Berkeley has created a density bonus methodology (City of Berkeley Procedures for Implementation of State Density Bonus Law, September 15, 2014) that measures the residential floor area of a given project site based on the objective zoning standards (i.e., height and setbacks and other standards that limit allowable floor area), divides the floor area by the applicant's proposed unit count, and derives a unit density based on those factors. A 35% bonus is then applied to that density and the floor area that supports it. This methodology has been adjudicated and the courts have upheld this methodology in prior cases, including the decisions in *Wollmer I* and *Wollmer II*.

In the case of 1900 Fourth Street, the base project provides 180,000 square feet of residential floor and 237 dwelling units, as shown on page A8.1 of the plan set because the average unit size is 761 square feet. As a result, the project is entitled to a bonus of 63,000 square feet of building program to accommodate an additional 83 dwelling units. In addition, the proposed project includes community accessible open space area and other building articulation at the north end of the property. That removes 44,080 square feet of base project floor area on the 2nd, 3rd, and 4th floors. In order to provide for that public amenity that massing is moved to the fifth and sixth floors along with the density bonus massing.

Therefore, the density bonus area of 83 units plus the additional floor area of 44,080 square feet derived from the public amenity space, are added to the fifth and sixth floors pursuant to the project's waivers and modifications. The density bonus base project, proposed density bonus floor area, and additional calculations are provided in the project plans.

Waivers and Modifications

The City must waive any development standards that would have the effect of "physically precluding" the density bonus project, including the concessions discussed below. The following standards, if applied, would physically preclude the project and thus must be waived. Further, if there are other development standards that would physically preclude the project with the density bonus units and incentives/concessions, those must also be waived.

1900 Fourth Street requires the following waivers and modifications of the C-W zoning development standards that would otherwise "physically preclude" the density bonus project:

- **Waiver:** Increase in height and stories beyond the 50' maximum height standard and four allowed stories for the density bonus floor area, including for the rooftop mechanical equipment, as otherwise required pursuant to Zoning Ordinance Section 23E.64.070. In order to accommodate

the additional massing and floor area for the density bonus units, the project must increase in height to 70'-8" and six stories where the application of the 50' height and four story limits would otherwise physically preclude the density bonus project.

Concessions and Incentives

In addition to granting the density bonus, the City must also grant the Project up to three incentives or concessions pursuant to GC Sec. 65915(d)(1) because more than 30% of the "base density" units will be affordable to low income households. The City is required to grant the concessions/incentives in so far as the request results in identifiable and actual cost reductions to provide for affordable housing costs and do not result in any adverse public health or safety impacts. Although the Project qualifies for three incentives or concessions, the project only requires one as described below.

Concession #1: Waiver of the City's requirement (BMC Sections 22.20.065.C.2 and 23C.12.040.D) with respect to affordable v. market rate unit size and design. This allows Inclusionary Units to be separated into a separate building on the podium deck for financing purposes and be of different design to non-inclusionary units in terms of appearance, materials and finish quality.

BMC Sections 23C.12.040.D and 22.20.065.C.2 state the following:
All Inclusionary Units shall be reasonably dispersed throughout the project, be of the same size and contain, on average, the same number of bedrooms as the non-Inclusionary Units in the project; and be comparable with the design or use of non-inclusionary units in terms of appearance, materials and finish quality.

Separating the Inclusionary Units into a separate building on the podium deck is required in order to obtain lower cost financing as discussed in the attached letter (See Attachment 3). Cost of capital is a significant component of project cost, so a reduction in the cost of this item represents a clear and identifiable cost savings to the project. In addition, building the inclusionary/BMR units of a different design in terms of appearance, materials and finish quality is intended to reduce costs of construction of the units to a specification consistent with other affordable housing projects. Purpose-built affordable housing projects typically include more cost-effective finishes including but not limited to appliances, cabinetry, lighting, counter tops, fixtures, windows and other items. To the extent such finishes are different from those used on non-inclusionary units, the cost will be reduced for the inclusionary/BMR units.

Although it is the City's burden to make findings in order to deny a project's proposed concessions/incentives, we do not believe it can do so. The concession yields direct savings to the Project and the development standard does not impact public health and safety nor is it required by State or federal law.

3. Housing Accountability Act

As set forth in this Applicant Statement, the project is entitled to streamlined ministerial approval under SB 35. In addition, the Housing Accountability Act (Gov. Code § 65589.5) also requires the City of Berkeley (City) to approve the project.

The project is protected under the Housing Accountability Act for two independent reasons:

1. The project complies with the City's objective standards and criteria, as demonstrated in Attachment 1 of this application statement; and,

2. As described above, the project is providing 50% of its units affordable to families earning less than 80% AMI, which is much more than the minimum 10% of units for lower-income households than is required by the State Density Bonus Law. Gov. Code § 65589.5(d), (h)(3), (j).

The City is only permitted to reject a project under these circumstances if there is a preponderance of evidence that the project would have a significant, unavoidable, and quantifiable impact on "objective, identified written public health or safety standards, policies, or conditions." Gov. Code §65589.5(j). There is no evidence, let alone a preponderance of evidence, that the project would have any impact on public health and safety that cannot be feasibly mitigated.

A broad range of plaintiffs can sue to enforce the Housing Accountability Act, and the City would bear the burden of proof in any challenge. Gov. Code § 65589.5(k). As recently reformed in the 2017 legislative session, the act makes attorney's fees and costs of suit presumptively available to prevailing plaintiffs, requires a minimum fine of $10,000 per housing unit for jurisdictions that fail to comply with the act within 60 days, and authorizes fines to be multiplied by five times if a court concludes that a local jurisdiction acted in bad faith when rejecting a housing development. *Id.*

3. Other State Laws Protecting the Project

Numerous other State laws also prohibit the City from precluding housing development on this site. These laws include, but are not limited to, California's Housing Element Law (*see* Gov. Code § 65585(i), 65587(b), 65863 & 65913.1(a)), California's Planning & Zoning Law (Gov. Code § 65000, *et seq.*), California's "No Net Loss" housing law (*see* Gov. Code § 65863(b)), and fundamental legal principles that prohibit local governments from regulating land use in a manner that is arbitrary and capricious, discriminatory, or effecting an uncompensated regulatory taking of private property.

EXHIBIT

C

From: Hernandez, Jennifer (SFO - X56927)
Sent: Friday, March 30, 2018 9:40 AM
To: Brown, Farimah F.; Iyengar, Savith
Cc: Lauren Seaver (lseaver@blakegriggs.com); mark@rhoadesplanninggroup.com; Imwalle, Miles H.; Golub, Daniel R (SFO - X56976)
Subject: 1900 Fourth Street

Hi Farimah, thank you for the time you and Savith spent with us on last week's call – we appreciate it, and would like to schedule another check-in call later next week. Would Friday at 11 or 1 be convenient? If not, we'll work to find a different time.

You raised a question during our call regarding the City's Landmark Preservation Ordinance ("LPO"). As we discussed, we believe that the LPO does not apply under SB 35, and even if it did apply we have complied with the LPO's requirements and demonstrated that the project is not a shellmound nor does the project include demolition of a historic structure.

The LPO does not apply because it is not an "objective standard"
SB 35 requires that the City process applications through a streamlined, ministerial process to be completed by staff. The LPO's procedural requirements, such as the role of the Landmarks Preservation Commission, do not apply to SB 35 applications. The LPO's substantive requirements apply only to the extent they are "objective" standards, which SB 35 defines 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." Section 3.24.260 of the LPO sets out the standards for issuance of a Structural Alteration Permit which are not "objective standards" under this SB 35 definition. In particular, in order to issue a Structural Alteration Permit, the LPO requires a finding that the project would not "adversely affect the special character or special historical, architectural or aesthetic interest or value of the landmark and its site, as viewed both in themselves and in their setting." Other LPO provisions require that "the proposed work shall be as appropriate for and as consistent with the purposes of this chapter as is possible within the peculiar circumstances of the owner of the property and preservation or enhancement of the characteristics and particular features specified in the designation." These LPO provisions require the exercise of subjective judgment (e.g., "special" and "value" are subjective terms, and "as appropriate" is likewise subjective). Under SB 35, the LPO's subjective standards are not applicable.

Project site is not a shellmound, and thus does comply with the LPO's subjective standards.
In our SB 35 application submittal, we did include for informational purposes a compliance assessment with subjective standards. With respect to the LPO, we do have ample evidence in the documentation the city already has that the project site is not in fact a shellmound. As you know, the intent of the landmark designation was not to prohibit development, but rather to require a careful analysis first to confirm whether the shellmound is actually present. The City has expressly confirmed that this is the intent, and appropriate application, of the LBO in a brief filed in response to a lawsuit challeng the LPO by an owner of property west of Second Street, which the LBO landmarked. The City explained in its briefing:

> [I]t is important to emphasize (as Petitioners concede) 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 buildings or alterations to the exterior of 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. No doubt Petitioners would rather not go to the expense of these proceedings and investigations. But that is not a reason to endanger a resource that, once lost, cannot be recreated.

Memorandum of Points and Authorities in Opposition to Motion for Writ of Mandate, Alameda Superior Court, Case No. 834470-2 (Aug 20, 2001), at 3. During the original application and CEQA process for this project, we fully followed this LPO process by conducting extensive archaeological investigations, which found "no evidence whatever that the West

Berkeley Shellmound was ever located on the Spenger's Parking Lot site." This conclusion is supported by historic maps and geologic testing. There is no evidence in the record controverting this expert opinion. Thus, even under the subjective criteria set forth in the LPO (which do not apply under SB 35), the project can proceed.

The SB 35 exception for demolition of historic structures is inapplicable.
You asked whether the exception to SB 35 for projects requiring the "demolition of a historic structure" could apply here given the project site's landmark status. This provision is inapplicable for several reasons:

- Other than the small non-historic building on the site, there are no "structures." As defined by the BMC, a "structure" is "[a]nything constructed or erected, the use of which requires location on the ground or attachment to something having location on the ground." Even if the shellmound were present, which it is not, it is not a "structure."

- There is no "demolition" and no demolition permit is needed to dig up the parking lot. Demolition permits are only needed to remove "structures."

- As demonstrated by the archaeological investigations, there is no shellmound present. Even if impacting the shellmound could be considered "demolition of a historic structure," the project does not impact any shellmound.

We hope this is helpful information – and as always, please don't hesitate to call or email if you have any followup questions. We will also be separately responding in a subsequent email to the affordable housing questions that arose during the Departmental meeting and our call. Thanks very much, and please let us know if we can do a followup call next week. Have a great weekend!

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EXHIBIT

D

From: Hernandez, Jennifer (SFO - X56927)
Sent: Thursday, April 05, 2018 10:26 AM
To: Brown, Farimah F.; Iyengar, Savith
Cc: Lauren Seaver (lseaver@blakegriggs.com); mark@rhoadesplanninggroup.com; Imwalle, Miles H.; Golub, Daniel R (SFO - X56976)
Subject: 1900 Fourth Street

Hi Farimah and Savith, another topic that you briefly raised during our call last week (and that was also discussed at the Departmental meeting the week before), was the 1900 Fourth Street project's compliance with the Affordable Housing Mitigation Fee ordinance, BMC 22.20.065 (AH Ordinance). This email addresses this topic.

As background, and in compliance with SB 35, 50% of the project's units are below-market-rate, affordable to 130 low-income households earning less than 80% of the Area Median Income. This is an unprecedented affordable housing commitment for a market rate housing project in Berkeley, and we believe is an unprecedented commitment statewide by any market rate project developer.

Under the AH Ordinance, projects that provide 20% of their units at below-market-rate rents are exempt from the requirement to pay a fee to the City to help subsidize offsite affordable housing development efforts. For projects that do not pay this fee, the AH Ordinance specifies that the 20% of required onsite affordable units be divided evenly between low and very low (VL) income households, and also imposes restrictions on the distribution and design of the below-market-rate (BMR) units. BMC 22.20.065(C)(2) & (4). As explained below, the AH Ordinance requirements do not apply to this project for three reasons:

1. SB 35 requires that the project provide 50% rather than 20% of the project's units to be affordable, and thus is more stringent than and displaces the City's AH ordinance.

2. The project also uses the State's density bonus laws (Gov't Code §§ 65915-18), pursuant to which the project is entitled to use exceptions ("concessions") to otherwise applicable city ordinances; even if the AH does apply, the applicant is entitled to use concessions from the AH Ordinance to support this unprecedented 50% affordable unit project.

3. The AH Ordinance establishes mitigation requirements for market rate projects providing less than 20% of onsite affordable units, and is based on a nexus study of the demand that market based housing creates for affordable units. The project's 130 affordable units more than fully offset the demand for affordable units created by 130 market rate units, and qualifies for the exceptions included in the AH Ordinance itself.

Each of these three reasons provides an independent legal basis for concluding that the AH Ordinance's VL and BMR design/distribution requirements do not apply to this project.

1. The Project Meets SB 35's 50% Affordability Requirements, Which Is More Stringent than and Displaces the City's 20% Affordable Housing Mitigation Fee Ordinance.

Government Code section 65913.4(a)(4)(B) sets forth the affordability requirements for SB 35 projects. The level of affordability required depends on whether the jurisdiction has failed to meet its RHNA target for below moderate housing, above moderate housing, or both. Here, as determined by HCD, Berkeley has failed to meet its below moderate housing RHNA target, and as a result a project qualifies for SB 35 streamlining if it "dedicates 50 percent of the total number of units to housing affordable to households making below 80 percent of the area median income . . .." Gov't.

Code § 65913.4(a)(4)(B)(ii). Under the law, this is the exclusive affordability requirement for an SB 35 project. The only exception is if the local jurisdiction "has adopted a local ordinance that requires that greater than 50 percent of the units be dedicated to housing affordable to households making below 80 percent of the area median income, in which case that ordinance applies." *Id.* Here, the City has not adopted a local ordinance that requires greater than 50% of a project's units to be affordable. The City's local ordinance requires only 20% of onsite units to be affordable, and so it is displaced by SB 35.

2. In Compliance with State Density Bonus Law, the Project Is Independently Entitled to a Concession Waiving the VL and BMR Design/Distribution Requirements.

Even if the AH Ordinance does apply, the project is entitled to concessions under the State Density Bonus Law that would waive both the VL and BMR design/distribution requirements.

Under the Density Bonus Law, any project providing more than 30 percent of its units for lower income households is entitled to three "incentives" or "concessions," which would include the modification of the provisions of the AM Ordinance that include distribution and design requirements, and the VL increment (10% of the 20% required AH units) requirement. Gov't Code § 65915(d)(2)(C), (k).

Also under the Density Bonus Law, the only lawful basis for the City's denial of these requested concessions is that the concessions do not result in identifiable and actual cost reductions for the affordable units. Gov't Code §65915(d)(1). Here, there is no question that the concessions will result in identifiable and actual cost reductions. As described in the application documentation, the project's unprecedented commitment to 130 - 50% - low income units creates an extraordinary cost burden. The costs would be even higher without the concessions, since VL units, as well as units meeting the BMR distribution/design requirements, add to project costs.

To the extent this was insufficiently clear in the application documentation, please accept this email as our supplemental applicant confirmation of the Applicant's request, pursuant to Gov't Code § 65915(d)(1), for incentives/concessions that would waive the VL and BMR distribution/design requirements, in BMC 22.20.065(C)(2) and 22.20.065(C)(4).

3. Even on its Own Terms, the City's AH Ordinance Does Not Apply to a 50% Affordable Housing Project

Even if the AH Ordinance were not displaced by SB 35, and even if the State Density Bonus Law did not apply, the AH Ordinance itself explicitly acknowledges that its requirements do not apply to developments that will not generate any additional need for affordable housing.

The AH Ordinance imposes affordable housing fee payment mitigation requirements on projects based on the city's determination that projects which include less than 20% affordable units create a need for affordable housing that requires a mitigation fee payment. This project, which will provide 50% affordable units, will not create any such impact. Therefore, as explained in greater detail below, even if SB 35 did not displace the AH Ordinance, the AH Ordinance does not apply to the Project pursuant to BMC sections 22.20.070 and 22.20.080.

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

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

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

> The AH formula is [A x Fee] – [(B+C)/(A x 20%) x (A x Fee)], where A is the total number of units (260 for the Project), B is the number of VL units (0 for the Project), and C is the number of low income units (130 for the Project). The current fee is $37,000 per unit.
>
> As applied to the Project, this formula results in the project owing a "negative" fee – i.e., no fee at all – of over $14 million dollars:
>
> [260 x $37,000] – [130/(260 x 20%) x (260 x $37,000)] = -$14,430,000

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

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

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

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

Also as described above, the AH Ordinance fee formula demonstrates that the project creates a net affordable housing benefit in excess of $13 million to the city; imposition of any "mitigation fee" given these facts would vastly exceed the project's mitigation obligations.

Finally, constitutional prohibitions on fees and exactions that are not based on nexus and rough proportionality also apply, since the project is providing a far greater affordable housing benefit – and is not causing an affordable housing impact.

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

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

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

As always, please do not hesitate to call or email if you would like further information on these or any other project issues. Thanks very much for your continued attention to this matter.

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From: Hernandez, Jennifer (SFO - X56927)
Sent: Friday, March 30, 2018 9:39 AM
To: 'Brown, Farimah F.' ; Iyengar, Savith
Cc: Lauren Seaver (lseaver@blakegriggs.com) ; mark@rhoadesplanninggroup.com; 'Imwalle, Miles H.' ; Golub, Daniel R (SFO - X56976)
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> [I]t is important to emphasize (as Petitioners concede) 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 buildings or alterations to the exterior of 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. No doubt Petitioners would rather not go to the expense of these proceedings and investigations. But that is not a reason to endanger a resource that, once lost, cannot be recreated.

Memorandum of Points and Authorities in Opposition to Motion for Writ of Mandate, Alameda Superior Court, Case No. 834470-2 (Aug 20, 2001), at 3. During the original application and CEQA process for this project, we fully followed this LPO process by conducting extensive archaeological investigations, which found "no evidence whatever that the West Berkeley Shellmound was ever located on the Spenger's Parking Lot site." This conclusion is supported by historic maps and geologic testing. There is no evidence in the record controverting this expert opinion. Thus, even under the subjective criteria set forth in the LPO (which do not apply under SB 35), the project can proceed.

The SB 35 exception for demolition of historic structures is inapplicable.
You asked whether the exception to SB 35 for projects requiring the "demolition of a historic structure" could apply here given the project site's landmark status. This provision is inapplicable for several reasons:

- Other than the small non-historic building on the site, there are no "structures." As defined by the BMC, a "structure" is "[a]nything constructed or erected, the use of which requires location on the ground or attachment to something having location on the ground." Even if the shellmound were present, which it is not, it is not a "structure."

- There is no "demolition" and no demolition permit is needed to dig up the parking lot. Demolition permits are only needed to remove "structures."

- As demonstrated by the archaeological investigations, there is no shellmound present. Even if impacting the shellmound could be considered "demolition of a historic structure," the project does not impact any shellmound.

We hope this is helpful information – and as always, please don't hesitate to call or email if you have any followup questions. We will also be separately responding in a subsequent email to the affordable housing questions that arose during the Departmental meeting and our call. Thanks very much, and please let us know if we can do a followup call next week. Have a great weekend!

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EXHIBIT

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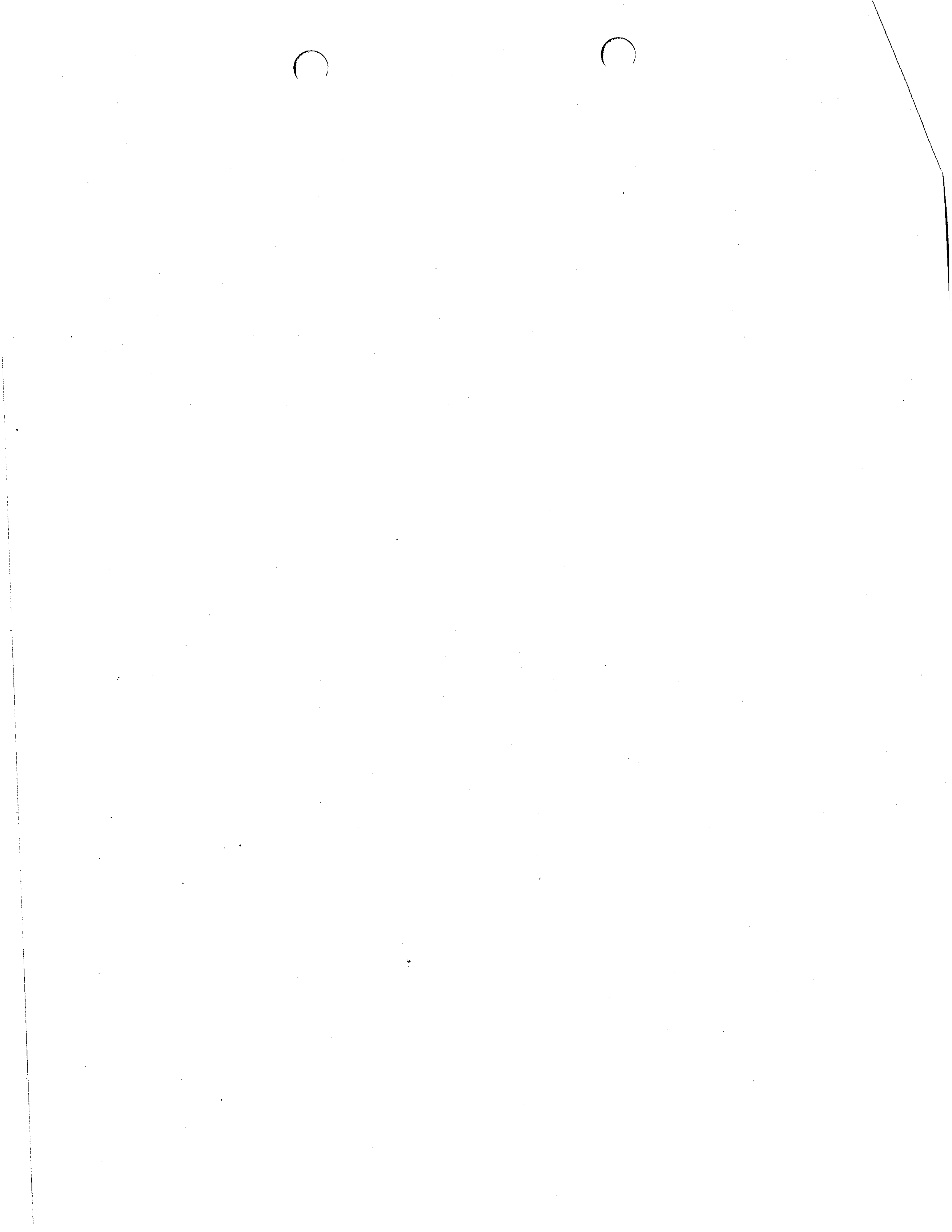

From: Hernandez, Jennifer (SFO - X56927)
Sent: Thursday, May 10, 2018 3:55 PM
To: fbrown@cityofberkeley.info; siyengar@cityofberkeley.info
Subject: 1900 Fourth Street – Historic Structures

Dear Farimah and Savith:

Thank you for your continuing review of the SB 35 application submitted for the 1900 Fourth Street Project ("Project").

We note that you received an April 9, 2018 letter ("Letter") by Project opponent Corinna Gould. For the most part, the Letter raises issues that are irrelevant to the currently submitted SB 35 application, and most, if not all, of the issues and questions in the Letter have been previously addressed by the applicant team and/or the City. Therefore, we do not intend to respond to these portions of the Letter, but as always, please let us know if you or other City staff have any further questions on any of those issues.

We would like to take the opportunity to briefly respond to a number of statements in the Letter that are relevant to the submitted SB 35 application.

First, the Letter claims that "[t]he developer's own plans state and affirm . . . that the property at 1900 4th Street is designated a 'structure of merit.'" That is not true. Under the required heading for "Historic Preservation," the plans state only that the Project site falls within one of the historic designation categories recognized by the City: "landmark/structure of merit" – meaning, in this case, a landmark. *See* Sheet G1.0. The plans do not state, as the Letter contends, that the Project site is a "structure."

Second, the letter claims that "SB 35 exempts landmarked sites, referring to them as 'historic structures.'" In fact, SB 35 contains no exception for "landmarked sites"; it only creates an exception for projects that "would require the demolition of a historic structure that was placed on a national, state, or local historic register." Gov. Code § 65913.4(a)(7)(C). It is obvious that SB 35 is intended to apply even in areas subject to landmark designations, since the statute specifies that SB 35 streamlined projects are exempt from parking requirements if they are "located within an architecturally and historically significant historic district." Gov. Code § 65913.4(d)(1)(B). As explained in our March 30, 2018 e-mail, the SB 35 exception for the demolition of historic structures is inapplicable because there are no historic structures on the site, because the Project would not require "demolition" of any historic structures, and because the West Berkeley Shellmound is not located on the Project site. The only structure on the Project site is a vacant 1955 commercial building which the City has acknowledged is not historic, and is not on any national, state or local historic register. *See* 1900 Fourth Street Project Draft Environmental Impact Report ("DEIR") (November 2016), at p. 220, and at Appendix B, p. 40; see also Michael Hibma, Memorandum to Shannon Allen re Historical Resources Evaluation of 701 University Avenue, Berkeley, Alameda County, California (April 21, 2016). Although the City has designated the "West Berkeley Shellmound" as a landmark site due to the originally assumed subterranean presence of the West Berkeley Shellmound, according to the official Notice of Decision on the landmark, this "designation does not include any current above ground buildings." City of Berkeley Landmark Preservation Commission Notice of Decision (2/7/00 LPC NOD), at p. 1; see also DEIR, at pp. 1, 5, 7 & 37.

On this point, we note that you have also been provided with a March 21, 2018 letter from Ms. Gould to Senators Nancy Skinner and Scott Wiener, which argues that the words "historic structure" in SB 35 should be understood to encompass the entire "property, associated sites and cultural elements." "[C]ourts ordinarily give the words of a statute . . . [their] usual, everyday meaning," or, "when a word used in a statute has a well-established legal meaning, it will be given that meaning." Arnett v. Dal Cielo (1996) 14 Cal. 4th 4, 19. The everyday meaning of

"structure," as well as its well-established legal meaning, refers to something that is constructed, such as a building - not a property, a site, or a set of cultural elements. *See, e.g.*, Berkeley Municipal Code § 23F.04.010 ("structure" defined as "[a]nything constructed or erected, the use of which requires location on the ground or attachment to something having location on the ground,"); California Building Code § 202 ("structure" is "that which is built or constructed"); Black's Law Dictionary (10th ed. 2014) ("structure" is "[a]ny construction, production, or piece of work artificially built up or composed of parts purposefully joined together, "). It is clear from the context of the surrounding words that SB 35 uses the word "structure" in this everyday sense. SB 35 only exempts a project if it would result in the "demolition of a historic structure." Gov. Code § 65913.4(a)(7)(C). Sites, properties and cultural elements cannot be "demolished." *See, e.g.*, Berkeley Municipal Code § 23F.04.010 (definition of "demolition" recognizes that only a "[a] building or enclosed structure" can be considered demolished). And SB 35 plainly recognizes that a site or location is not exempt from streamlining merely because it is an area subject to a landmark designation. *See* Gov. Code § 65913.4(d)(1)(B). To the extent there is any question about whether "structure" should be interpreted according to its ordinary meaning, this context resolves the question. *See* Gutierrez v. Carmax Auto Superstores California (2018) 19 Cal. App. 5th 1234, 1250 ("Ambiguous statutory language is construed in context—that is, it must be read in conjunction with the other words of the section and in light of the statutory scheme as a whole").

The March 21 letter notes that, in a different California code, the term "qualified historical building or structure" is defined to include officially listed "places, locations or sites." Health & Safety Code § 18955. This specialized definition applies only "[f]or the purposes of [the Historic Building Code]." *Id.* The Legislature added this language deliberately and specifically to the Historic Building Code alone, and declined to make any generalized amendment to other code provisions re-defining "structures" to include "places." *See* Stats.2003, ch. 504 (A.B.1731), § 5. The fact that the Legislature thought it necessary to redefine the term "structure" in the Historic Building Code to encompass the terms "places, locations and sites" only emphasizes the fact that the word "structure" is not normally susceptible to that interpretation. *See* People v. Trevino (2001) 26 Cal.4th 237, 242 ("When the Legislature uses materially different language in statutory provisions addressing the same subject or related subjects, the normal inference is that the Legislature intended a difference in meaning"). There is no indication whatsoever that SB 35 imported a specialized definition of "structure" from an entirely different code of California law. SB 35 is an amendment to the Planning & Zoning Law, not the Historic Building Code, and the word "structure" is used in the Planning & Zoning Law in a manner consistent with the everyday use of the word "structure." *See, e.g.*, Gov. Code §§ 65589.4, 65590, 65620, 65852.3.

Moreover, even assuming *arguendo* that the entire site were a "structure" (which it is not), SB 35's exception does not apply to projects that merely affect or alter the "structure." It applies only when a project would result in the "demolition" of the "structure." There is no reasonable argument that the development of the Project site would result in the "demolition" of any listed "structure" – regardless of how "structure" is defined.

Third, as you know, the Project application included a letter from the applicant confirming its commitment to SB 35's prevailing wage and "skilled and trained workforce" requirements, and also included all of the other attachments referred to in the Applicant Statement. There is no merit to the Letter's contention that the application is incomplete.

Thank you again for your continuing review of this Project. Please let us know if you have any remaining questions regarding the application.

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EXHIBIT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The AH formula is [A x Fee] – [(B+C)/(A x 20%) x (A x Fee)], where A is the total number of units (260 for the Project), B is the number of VL units (0 for the Project), and C is the number of low income units (130 for the Project). The current fee is $37,000 per unit.
>
> As applied to the Project, this formula results in the project owing a "negative" fee – i.e., no fee at all – of over $14 million dollars:
>
> [260 x $37,000] – [130/(260 x 20%) x (260 x $37,000)] = -$14,430,000

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. SB 35 Does Not Unlawfully Infringe on Municipal Affairs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TO:	Shannon Allen, Principal Planner Planning and Development Department, City of Berkeley
FROM:	West Berkeley Investors, LLC
Date:	June 29, 2018
SUBJECT:	Informational Response to City of Berkeley "Incomplete Letter" Dated April 6, 2018 for 1900 Fourth Street

The following is a response to your letter dated April 6, 2018 ("April 6 Letter"), regarding the affordable housing project application ("Application") submitted pursuant to Government Code § 65913.4 ("SB 35") at 1900 Fourth Street in the City of Berkeley ("Project"). The April 6 Letter indicates that it is intended only to "review[] the application under the City's existing Zoning Project Submittal requirements," and is only being provided in "an abundance of caution" because "Use Permit applications are generally subject to the Permit Streamlining Act." The April 6 Letter also indicates that its requests are *not* part of the City's review of whether the Application meets the applicable SB 35 criteria, which review has proceeded separately. Accompanying this response letter is a separate letter responding to the City's analysis of the Project's compliance with SB 35's criteria.

The City has not published any formal application forms for SB 35 project applications, and so the Application used the forms and permit thresholds for a Zoning Project Submittal, since that format appeared to be the closest match for an application of this nature available using the formats that would apply in the absence of SB 35. The Application also submitted information relevant to Structural Alteration Permits and Parcel Maps, since the Project would ordinarily require these permits if SB 35 did not apply. This information was provided out of an abundance of caution and to demonstrate that the Project meets all of the City's objective zoning and design standard criteria.

But SB 35's requirements are clear: the City's review of this project must be "ministerial," and must be "strictly focused on assessing compliance with" SB 35's criteria. Gov. Code § 65913.4(a), (c). In a ministerial approval process, "the agency is not permitted to shape the process to address environmental concerns." *Sierra Club v. City. of Sonoma* (2017) 11 Cal. App. 5th 11, 20 (internal quotation omitted). With that said, and without in any way waiving the applicant's statutory entitlement to the ministerial review process required by SB 35, there are items requested in your letter that the project team is able and willing to provide, in order to provide clarification and information regarding the Project and the Application that may be of assistance to the City. Since these materials are not directly relevant to the SB 35 process, providing this supplemental information does not impact any of the timelines or process under SB 35, and none of the material is relevant to whether the application complies with SB 35's criteria and whether the Project is entitled to a streamlined ministerial SB 35 permit. In order to provide application information most relevant to the streamlined ministerial process required by SB 35, this response includes an application form for a Zoning Certificate, which is the City's ministerial project application form and process.

This memo and attached table provide item-by-item responses to each incomplete comment referenced in the City's April 6th letter. There are seven general areas of information that you have requested:

1. Applicability of the City of Berkeley's Structural Alteration Permit requirements, as they are defined in Berkeley Municipal Code Sec. 3.24.
2. Neighborhood Contact Requirements Relevant to Discretionary Project Applications
3. Parking Standards and Studies/Traffic Impact Analysis
4. Parcel Map Submittal
5. Proposed Affordable Housing and State Density Bonus Components
6. Location of Strawberry Creek
7. Forms and Materials

The project team's responses to each are as follow (also see attached table).

1. *Applicability of the City of Berkeley's Structural Alteration Permit requirements, as they are defined in Berkeley Municipal Code Sec. 3.24.*

Section 1, item C. of the City's April 6 letter requests the project team clarify its position with respect to the City's requirements for a Structural Alteration Permit ("SAP"). As explained in the accompanying response cover letter, the Application, and in a March 30, 2018 e-mail to City Attorney Farimah Brown, the criteria for issuance of a Structural Alteration Permit are clearly discretionary and hence inapplicable under SB 35 (See Applicant Statement Attachment 3.A, "Compliance with Objective Zoning Standards," at pages 57-65 in March 8, 2018 submittal; see also March 30, 2018 E-Mail from Jennifer Hernandez to City Attorney Farimah Brown which is included as Attachment #4 in this response packet.) The applicant team submitted information regarding the Landmark Preservation Ordinance out of the project team's own abundance of caution in ensuring that any potential objective/ministerial permit requirements were fulfilled, and because a SAP would ordinarily be required at this location if SB 35 did not apply. Since the requirement to seek a discretionary SAP does not apply to this Project, the City's review is "strictly limited" to assessing compliance with the SB 35 criteria, including zoning standards and design review standards published and adopted by resolution or ordinance. Gov. Code § 65913.4(c). The Application demonstrates the Project's compliance with all such standards.

Since the Project *would* require a SAP, Use Permit and a Parcel Map in the absence of SB 35, the initial Application paid the fees for those three applications which were made at project submittal. Of course, if the City believes that as a ministerial project the submittal fee should be that required for a Zoning Permit, the Applicant would be willing to adjust the appropriate fees to reflect that. That fee, consistent with the City of Berkeley fee schedule that is available online at: (*https://www.cityofberkeley.info/uploadedFiles/Online_Service_Center/Planning/Fee%20Schedule%202011-06-16(1).pdf*), is $200/hour for staff time (although your comment letter suggests that the fee may now be $230/hour). To cover staff time for review of the project application as a ministerial action, the SAP and Use Permit fees should be applied to staff time before any new invoice is generated. Please confirm your understanding of the fee requirement.

Although the requirement to seek an SAP does not apply to this SB 35 application, and despite the fact that a ministerial process does not authorize the City to apply conditions of approval, or CEQA mitigation requirement to the project, we nonetheless want to reiterate our longstanding commitment to avoiding impacts to the shellmound or any tribal cultural resources. To that end, we want to clarify that we intend to provide both archaeological and tribal monitoring during all ground-disturbing activities, and have amended the Applicant Statement to confirm this. Also, it should go without saying, but if any human remains are encountered, all obligations under State law (specifically, Health and Safety Code 7050.5: Human Remains, and Public Resources Code 5097.98: Notification of Most Likely Descendent) for handling such remains would be strictly followed.

2. *Neighborhood Contact Requirements Relevant to Discretionary Project Applications*

Section 1, items G., H., and I., of the City's April 6th letter relate to neighborhood pre-application signage, contact, and meetings, which are required pursuant to the City's Zoning Project Application Form (ZPAF). The ZPAF is a required form for *discretionary* project applications. Per GC Sec 65913.4, this SB35 application is a ministerial project application, and the ZPAF form does not apply. These measures are not required by any "zoning" or "design review standards . . . published and adopted by ordinance or resolution," nor are they relevant to any other SB 35 criteria. Gov. Code §65913.4(a)(5), (c). Since the City's review of this application is "strictly limited to assessing compliance" with the SB 35 criteria, these materials are not relevant to the Application. (See Zoning Certificate in Attachment #5.) Therefore, the neighborhood pre-application signage, contact, and meeting provisions cited in these sections of the letter do not apply to the 1900 Fourth Street SB 35 application.

3. *Parking Standards and Studies/Traffic Impact Analysis*

Section 2.1, B. Parking Survey of the letter requests a parking study, stating that such a study is "required for projects requesting a waiver of any off-street parking required under the Zoning Ordinance, or as determined necessary by the project planner." However, the Project is not seeking a waiver of applicable off-street parking requirements. Since the Project is a qualifying project under the State's Density Bonus law, the applicable residential parking requirement is 170 spaces, and the Project will provide 190 spaces. See Gov. Code § 65915(p)(2). Moreover, the City's parking standard is not applicable to the project under SB 35, since the project utilizes parking standards permitted by State Density Bonus Law. "Notwithstanding any other law, a local government, whether or not it has adopted an ordinance governing parking requirements in multifamily developments, shall not impose parking standards" where, as here, the project is within one half mile of public transit. Gov. Code § 65913.4(d)(1). As shown on the project site plan, the site is directly adjacent to Berkeley's Capitol Corridor Amtrak station. In addition, a parking study is not required by any "zoning standards" or "objective design review standards . . . published and adopted by ordinance or resolution." Gov. Code § 65913.4(a)(5), (c). As per Section 23E.28.140 of the BMC, parking surveys are only required in the C-districts for projects requesting reductions in off-street parking.

Finally, parking studies are not required for ministerial project applications; they are only used to inform the City's consideration of whether a project might create "detriment," which is a discretionary standard. The City's form for "Zoning Certificate" does not include any requirements for a parking or

traffic study. As stated above, the Application for 1900 Fourth Street is a ministerial application that is not subject to any discretionary analysis or consideration. As above, since the City's review must be "strictly focused on assessing compliance with" SB 35's qualifying criteria, Gov. Code § 65913.4(a), a parking survey is not relevant to the Application.

Section 3, Traffic Impact Analysis, the City requests the submittal of a Traffic Impact Analysis ("TIA"). The project team is not aware of any "objective zoning standards and objective design review standards . . . published and adopted by ordinance or resolution," Gov. Code § 65913.4(a)(5), (c), that require a TIA for a ministerial project approval. TIAs are required by the City of Berkeley Zoning Project Application Form (ZPAF), which is a required form for discretionary project applications in order to enable environmental review pursuant to the California Environmental Quality Act and in order to consider discretionary approvals, mitigation requirements and conditions of approval. Since SB 35 requires the City to process the Application under a "streamlined, ministerial approval process," Gov. Code § 65913.4(a), pursuant to which "the agency is not permitted to shape the process to address environmental concerns." *Sierra Club*, 11 Cal. App. 5th at 20, a TIA is not relevant to the City's review of the Project.

Despite this, in the interest of being responsive to the City's concerns, and to assist the City with its planning process, a revised project TIA, prepared by Fehr and Peers, is attached to this response packet. The results of the analysis are that the project will have no significant environmental effects. (See Attachment #6).

This Focused TIA includes the following key findings:

- The project would generate about 73 AM peak hour, 168 PM peak hour, and 252 Saturday midday peak hour trips.
- The project trips would not cause any significant impacts at the intersections evaluated in the 2016 DEIR under Existing Plus Project conditions.
- The project would not cause a significant impact on safety or emergency access.

4. *Parcel Map Submittal*

Section 1, item "Other. 'Parcel Map' binder with Application for Condominium," indicates the application for the Parcel Map, submitted on March 8th, 2018, should be submitted directly to Vincent Chen of the City's Public Works Department. A member of the project team will collect that binder and submit a copy of it to Vincent Chen of the City's Public Works Department. Please note that, as your April 6th letter recognizes, the parcel map application was submitted on March 8, 2018. It is subject to the 180-day review requirement (from March 8, 2018) that SB 35 imposes on qualifying projects.

5. *Proposed Affordable Housing and State Density Bonus Components*

Section 4, item A., requests additional discussion of the project Housing Affordability Statement. That discussion was provided to the City Attorney's Office on April 5, 2018 and is attached to this document for your additional review (See Attachment #2). Further discussion of affordable housing is contained in the accompanying response cover letter.

Section 4, item C., requests additional information in support of the project's request for a concession pursuant to Government Code Section 65915, State Density Bonus Law. Further discussion of request for additional information is addressed in in section C of the accompanying response cover letter.

6. Location of Strawberry Creek

Section 3, item A. requests that the project team provide location information relevant to the City's culvert, which conveys the western extent of Strawberry Creek until it outflows to San Francisco Bay. Attached to this letter response is a copy of the City of Berkeley's Public Works/Engineering map for the portion of University Avenue between the Union Pacific Railroad's tracks and Fourth Street (See Attachment #3). The City's map shows that the City's culvert is approximately 70' from the southern boundary of the project site.

7. Forms and Materials

There are several items in the April 6th letter that identify information that needs to be revised with respect to application forms, fees, and the plan set. These corrections are in the following sections of the City's April 6th letter:

Section 1, item A. and item L.
Section 2, items A., B., C., D., E., and G.
Section 4, Other, Base Project Diagrams
Section 5, A.

Additionally, a Revised Zoning Use Questionnaire responds to these items (see Attachment #7).

Thank you very much for your continued review of this important affordable housing application. Should you have any questions or require clarification of any of the information presented herein, please do not hesitate to contact me by email at mark@rhoadesplanninggroup.com, or by phone at 510.545.4341.