Thomas N. Lippe, SBN 104640
LAW OFFICES OF THOMAS N. LIPPE, APC
201 Mission Street, 12th Floor
San Francisco, California 94105
Tel: (415) 777-5604
Fax: (415) 777-5606

Attorney for Intervenors: Confederated Villages of Lisjan and Confederated Villages of Lisjan, Inc.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

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

Petitioners and Plaintiffs,

vs.

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

Respondents and Defendants,

and

CONFEDERATED VILLAGES OF LISJAN; CONFEDERATED VILLAGES OF LISJAN, INC., and DOES 1 through 50,

Intervenors.

Case No. RG18930003

OPPOSITION BRIEF ON THE MERITS AND RESPONSE TO AMICUS CURIAE BRIEF OF INTERVENOR CONFEDERATED VILLAGES OF LISJANS AND CONFEDERATED VILLAGES OF LISJANS, INC.

Action Filed: November 28, 2018
ASSIGNED FOR ALL PURPOSES TO:
Hon. Frank Roesch, Dept. 17

Date: September 13, 2019
Time: 2:00 p.m.
Dept: 17
Judge: Hon. Frank Roesch

TABLE OF CONTENTS Page

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

TABLE OF CONTENTS (con't) Page

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

TABLE OF AUTHORITIES Page

Cases:

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

TABLE OF AUTHORITIES (con't) Page

Cases (con't):

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

TABLE OF AUTHORITIES (con't) Page

Statutes and Regulations:

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

TABLE OF AUTHORITIES (con't) Page

Statutes and Regulations (con't):

Miscellaneous:

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

TABLE OF AUTHORITIES (con't) Page

Miscellaneous (con't):

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

I. INTRODUCTION

Plaintiffs seek the City's approval to build a mixed commercial/residential building with 27,891 square feet of commercial uses and 260 dwelling units on the block bounded by Fourth Street, Hearst Avenue, Third Street, and University Avenue. (AR 13; 3818; 6439 .) The project is located in a historic property known as the West Berkeley Shellmound that is listed on the national and California historic place registers, and is designated a City landmark. (AR 3820-21; 4523; 6893; 6930-35; Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief (Petition) 5:19-6:1; 6:4-7; 7:12-14.)[1]

Intervenors Confederated Villages of Lisjan and Confederated Villages of Lisjan, Inc. (CVL) join with Respondents/Defendants City of Berkeley and Berkeley Department of Planning & Development (City or Berkeley) in opposing Plaintiffs' and Amicus' opening briefs. CVL's members are Native Americans with a deep interest in preserving the West Berkeley Shellmound (Shellmound), including the 1900 Fourth Street site where Plaintiffs propose to build, and in preventing development from damaging its historic, ancestral, and spiritual meaning to the Ohlone people.

Plaintiffs argue the City was required to grant ministerial review and approval of the project pursuant to Government Code section 65913.4, also known as "SB 35." On September 4, 2018, the City denied this request on numerous grounds. (AR 4521.) CVL briefs two issues: (1) SB 35 does not preempt the City's discretionary zoning authority to protect its own designated landmarks (see AR 4521); and (2) the City's determination that the application does not qualify for ministerial review and approval under SB 35 because it may demolish a historic structure placed on a state and local historic register is supported by evidence in the record (see AR 4523).

II. STATEMENT OF FACTS

CVL adopts the statement of facts in Respondents' Brief and Response to Amicus Curiae Brief.

The Shellmound is a sacred place for Native American people, whose ancestors lived, loved, and died here for thousands of years before European and American colonization. The Berkeley City Council designating the Shellmound a landmark finds the "Shellmound is most highly significant to Native descendants as a sacred burial ground and, ... the Shellmound's cultural resource lies in its age, the fact that it is the oldest and one of the largest mounds established around the bay, that it represents ancient culture, that it was built by the earliest humans in the area and, ... it is recognized that this historical resource has

[1]The West Berkeley Shellmound is denoted on the national and state registers as "CA-ALA-307" and Berkeley City Landmark #227. Its historical resource status code is 2S2. (AR 3820-21; 4523.)

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

yielded and is likely to yield information important in prehistory or history." (AR 6937.) The Shellmound represents the oldest example of mound building in the Bay Area. (AR 2196.) Starting about 4900 years ago, native people occupied the site for at least 3700 years. (AR 6477-80.) Thus, the Shellmound is a rich reservoir of information about the pre-contact life of Native American people in the Bay Area, including burial practices, hunting and fishing techniques, and cooking and food preparation. (AR 6896-6907; 6930-37; AR 6901 ["Even to this day, native descendants value these mounds as sacred resting sites of their early ancestors"], 6901-07; 6930-35.)

The once great Shellmound has been leveled, leaving its only trace below ground. (AR 6896; 6930 ["the [landmark] designation does not include any current above ground buildings, railroad tracks, ties, gravel, signal gates, barriers or structures. Designation does include the site itself and all items found subsurface including artifacts from the earliest native habitation"]; 4309.) The project will complete the century long process of demolishing the shellmound, by excavating to a depth of at least eight feet throughout the site and much deeper where piles are installed, thereby removing the soil and its archaeological record of Native American people and culture. (AR 2179; 3113; 6398.)

CVL submitted extensive comments on the Draft EIR for the first project. (AR 2413; 8788; 11107; 11241; 11401.) In 2017, CVL requested formal "tribal consultation" with the City pursuant to Pub. Res. Code section 21080.3.2 (AB 52). (AR 8773; 8776; 8777.) The City denied that formal consultation was required under AB 52, but nevertheless engaged in consultation with CVL. (AR 8801; 8436-38; 8803-04; 8938.) With respect to Plaintiffs' request for ministerial approval of their second project pursuant to SB 35, CVL's counsel submitted three "briefs" to the City arguing that (1) SB 35 does not preempt the City's obligation to exercise its discretionary legal authority conferred by Berkeley Municipal Code (BMC) protections for City designated landmarks; and (2) the project does not qualify for SB 35 review because it requires the demolition of a historic structure placed on a national, state, or local historic register as provided in Gov. Code section 65913.4(a)(7)(C) (Subparagraph C). (AR 6395; 7433; 7442.)

Plaintiffs misstate many facts. For example, Plaintiffs state "the Draft EIR relied on an expert archeological subsurface site investigation as well as historical studies that demonstrate the property was not and never had been the location of the West Berkeley Shellmound (Shellmound) created by Native Americans, but was instead historically a tidal marsh" (Plaintiffs' Opening Brief (POB) 8:18, citing AR 2189-200) and "City completed the EIR process in full compliance with all legal requirements to consult with recognized Native American Tribes" (POB 8:22, citing AR 2726-58). In fact, the City never issued

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

or certified a Final EIR; therefore, the City did not "complete the EIR process." (AR 3819; CEQA Guidelines, 15090-15093.) Also, as discussed in section V.B below, the "expert archeological subsurface site investigation" conducted by Petitioners' own expert found "remnants" of the shellmound on the project site and other historical sources indicate the West Berkeley Shellmound is present on the project site.

Plaintiffs suggest that CVL is a competitor for control of the land. (POB 9:13.) This is rather extravagant. CVL advocates for an alternative use of the land, i.e., an Ohlone heritage memorial park (e.g. AR 14405), but with full understanding that the landowners would need to willingly sell the parcel at fair market value to realize this vision. Plaintiffs also imply that the concerns of the Ohlone people were addressed by agreement between Plaintiffs and Andrew Galvan, President of the Board of Ohlone Indian Tribe, Inc. (POB 8:23.) Plaintiffs fail to mention that many in the community expressed their concern that Mr. Galvan has a conflict of interest because he requested, as mitigation, payment in the amount of $75,000 to Ohlone Indian Tribe, Inc. (See e.g., AR 10677.)

III. SCOPE OF REVIEW AND STANDARD OF REVIEW

CVL agrees with the City that the Court must uphold the City's September 4, 2018, denial of Plaintiffs' request for ministerial review and approval pursuant to SB 35 if it is legally correct for any reason, even if the City did not state that reason in its September 4, 2018, letter to Plaintiffs.

CVL agrees with the City's description of the applicable standard of review.

IV. ARGUMENT

A. SB 35 Does not Preempt the City's Discretionary Zoning Controls Protecting its Landmarks.

Berkeley zoning prohibits any person from engaging in any construction, alteration, or demolition "on a designated landmark" without approval by the Berkeley Landmarks Preservation Commission (LPC). (BMC § 3.24.200.) The LPC cannot approve work that would "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." (BMC § 3.24.260.C.1(a).) Plaintiffs argue the City's legal obligation to exercise its discretionary authority under this ordinance is preempted by SB 35.

Under general preemption law applicable to all municipalities "The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption." (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149 (*Big Creek Lumber*).) In addition to the zoning authority it shares with all other cities, Berkeley is a charter city. Therefore, it enjoys additional independence from state preemption of its zoning authority under the state constitution (Article XI, § 5,

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

subd. (a)) and the Home Rule Doctrine. (*City and County of San Francisco v. Regents of University of California* (Cal., June 20, 2019, No. S242835) 2019 WL 2529253, at *3 (*CCSF v. Regents*).) [charter cities may " 'make and enforce all ordinances and regulations in respect to municipal affairs;' with respect to such matters, the cities' charters 'supersede all laws inconsistent therewith.'"].)

California courts are "particularly reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another." (*Big Creek Lumber, supra*.) Even in cities and counties that are not organized by charter, zoning is historically a matter of local control. (*Village of Euclid, Ohio v. Ambler Realty Co.* (1926) 272 U.S. 365, 395; *Miller v. Board of Public Works of City of Los Angeles* (1925) 195 Cal. 477, 495; *Big Creek Lumber, supra,* 38 Cal.4th at 1151–52 ["Land use regulation in California historically has been a function of local government under the grant of police power contained in article XI, section 7 of the California Constitution"].) "A city's or county's power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state." (*Id*., quoting *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 782.) Further, "the Legislature, when enacting state zoning laws, has declared its "'intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters.'" (*Id*, quoting Gov.Code, § 65800.) "The power of cities and counties to zone land use in accordance with local conditions is well entrenched." (*IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 89.)

"The common thread of the cases is that if there is a significant local interest to be served which may differ from one locality to another then the presumption favors the validity of the local ordinance against an attack of state preemption." (*Big Creek Lumber, supra,* 38 Cal.4th at 1149.) Here, the City's interest in protecting the Shellmound is a "significant local interest" that "differs from one locality to another." Therefore, the presumption favors the validity of Berkeley's landmark protection ordinance. Moreover, in order to preempt a charter city law, the state law must address a matter of statewide concern, the state law must be reasonably related to the resolution of the statewide concern, and the state law must be "narrowly tailored to limit incursion into legitimate municipal interests." (*City of Watsonville v. State Dept. of Health Services* (2005) 133 Cal.App.4th 875, 883 (*Watsonville*); *Johnson v. Bradley* (1992) 4 Cal.4th 389, 404.)

Applying these principles to the instant case demonstrates that SB cannot and does not preempt Berkeley's landmark protection ordinance. Berkeley's protection of its landmarks is a uniquely local 'municipal affair," not a matter of statewide concern. Also, to the extent SB 35 could be read to preempt

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

the City's authority to protect its landmarks, it would not be "narrowly tailored." "If the state statute does not qualify as a matter of statewide concern, the conflicting charter city measure (or practice) is a 'municipal affair' and 'beyond the reach of legislative enactment.'" (*Johnson v. Bradley, supra,* 4 Cal.4th at p. 404.) "In articulating the test for preemption the Supreme Court was concerned with ensuring that a state law does not infringe legitimate municipal interests other than that which the state law purports to regulate as a statewide interest." (*Watsonville*, *supra*, 133 Cal.App.4th at 889.) Also, the Legislature did not clearly express an intent to occupy the entire field of law, thereby preempting contrary local law. (*Big Creek Lumber, supra,* 38 Cal.4th at 1149–1150.) In addition, there is no "true conflict" between BMC Chapter 3.24 and SB 35. (*Watsonville, supra* ["If there is no true conflict, 'a choice between the conclusions 'municipal affair' and 'statewide concern' is not required'"].)

1. SB 35 does not express legislative intent to preempt Berkeley's landmark protection ordinance and there is no "true conflict" between SB 35 and BMC Chapter 3.24.

The primary indicia of Legislative intent to preempt local law is state occupation of the entire field, either expressly or by necessary implication. (*Big Creek Lumber, supra*, 38 Cal.4th at 1149–1150 ["it is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication"] *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 17.)

SB 35 does not occupy the entire field of land use control and zoning, as it applies only to housing projects. Further, SB 35 does not even occupy the entire field of zoning control over new housing developments, because it only applies to housing projects that meet SB 35's numerous qualifying criteria. Indeed, SB 35 expressly excludes from its purview a host of housing projects that meet any of the disqualifying criteria set forth in Government Code section 65913.4, subdivision (a), paragraphs (6) and (7). Moreover, even in this narrow area of local zoning authority, SB 35 does not preempt the "objective criteria" established by local legislative regulations governing housing projects that meet SB 35's qualifying criteria. Instead, SB 35 only purports to preempt local government from exercising their discretionary authority to make quasi-adjudicative decisions on a case-by-case basis.

The "field" that SB 35 occupies is even narrower than that, because it is limited by SB 35's express delegation and reservation of authority to municipalities to determine on their own—*without state involvement or guidance*—whether a housing project otherwise qualified for SB 35 processing is nevertheless disqualified because it will demolish a historic structure. This determination requires

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

interpreting and applying terms such as "demolition" and "structure," which the Legislature elected not to define. Therefore, the Legislature intended for the City to exercise its discretion—necessarily according to the City's own laws—to interpret and apply these terms. Subparagraph C thus negates any possibility of finding a "clear indication of preemptive intent" regarding the City's discretionary zoning authority when reviewing housing projects that affect City landmarks.

As the Court noted in *CCSF v. Regents,* "this is not a preemption case like *California Federal*; we are not asking whether an ordinance that would otherwise represent a lawful exercise of the charter city's powers is invalid, either on its face or as applied, because the Legislature has claimed the relevant regulatory area exclusively for the state." (*Id*. at 10.) The same is true here. In contrast to *California Federal*, the extremely narrow area of zoning law that SB 35 purports to preempt clearly does not claim the relevant regulatory area exclusively for the state, nor does it clearly express an intent to preempt a charter city's legal obligation or authority to enforce its own laws requiring discretionary decision-making regarding landmark protection. Thus, there is no "true conflict" between SB 35 and Berkeley's landmark protection ordinance because SB 35 necessarily contemplates that the City will make a discretionary decision pursuant to Subparagraph C as to whether the project may demolish a historic structure.

2. The City's interest in protecting its landmarks is not a matter of statewide concern.

Assuming, *arguendo*, that the Legislature can preempt the City's discretionary zoning authority in general, it cannot preempt the City's discretionary authority to protect its own landmarks, because the protection of Berkeley's landmarks is not a matter of statewide concern. "If the state statute does not qualify as a matter of statewide concern, the conflicting charter city measure (or practice) is a 'municipal affair' and 'beyond the reach of legislative enactment.'" (*Johnson v. Bradley, supra,* 4 Cal.4th at 404.)

The Court in *City of Watsonville v. State Dept. of Health Services* observed that "in articulating the test for preemption the Supreme Court was concerned with ensuring that a state law does not infringe legitimate municipal interests other than that which the state law purports to regulate as a statewide interest." (133 Cal.App.4th at 889, quoting *Johnson v. Bradley*, *supra*, 4 Cal.4th at 404.) Here, SB 35 does not purport to regulate the City's protection of its own landmark sites; therefore, it cannot preempt the City's discretionary authority to protect its own landmark sites. Consequently, the applicant's contention that BMC sections 3.24.200 and 3.24.260 are preempted by SB 35 fails.

Here, the City was actively engaged in the process of ensuring that Petitioners' development proposal complied with the City's ordinance protecting its landmarks when Plaintiffs pulled the plug on the first

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

project, as shown by a number of Landmark Preservation Commission (LPC) staff reports prepared by City planning staff for LPC and comment letters submitted to the LPC by members of the public in connection with several hearings the Commission held to enforce the City's municipal code provisions that protect City designated landmarks. (See e.g., AR 2478; 3777; 8778; 13156; 13171; 13204; 13402; 13426; 13739; 13748; 14370; 14405-13; 14414-16; 14427; 14441.) These materials show the City was actively engaged in the "municipal affair" of enforcing its landmark protection laws.

Thus, regardless of whether SB 35 preempts other discretionary City zoning controls, the project remains subject to the City's zoning control in BMC section 3.24.260.C.1(a).

3. SB 35 is not reasonably related to the resolution of a statewide concern because it is not narrowly tailored to limit incursion into legitimate municipal interests.

SB 35 strikes at the heart of the City's land use regulatory authority, i.e., its discretion to decide whether a particular land use is detrimental to the public's health, safety and welfare. (See BMC § 23B.32.040.A.) Plaintiffs argue that for qualifying projects SB 35 preempts the City's discretion over the entirety of the vast array of interests that local zoning authority is intended to protect, including protection of municipal landmarks. So construed, SB 35 is neither reasonably related to the resolution of the state's concern for housing, nor narrowly tailored to limit incursion into legitimate municipal interests.

Plaintiffs' reliance on *City of Watsonville v. State Dept. of Health Services* is misplaced. The issue there was a state law requiring fluoridation of public water systems having at least 10,000 service connections. Therefore, it has nothing to do with local control of zoning. The applicant's reliance on *Coalition Advocating Legal Housing Options v. City of Santa Monica* (2001) 88 Cal.App.4th 451 is also misplaced. In that case, the court noted that the city did not raise the municipal affairs doctrine as a defense in its briefs to the trial court, so it was "not appropriate to raise it for the first time on appeal." (Id at 457–458.) In dicta, the court observed that the "matter" (i.e., encouraging secondary dwelling units) was of statewide concern. But the court did not apply the remainder of the test articulated by the California Supreme Court in *Johnson v. Bradley,* that a state statute cannot preempt home rule unless the state law is "both (i) reasonably related to the resolution of that [statewide] concern, and (ii) 'narrowly tailored' to limit incursion into legitimate municipal interests." Therefore, the decision provides no guidance for this case.

4. The SB 35 "Guidelines" are not persuasive authority on preemption.

Plaintiffs argue the Court should give weight to the Department of Housing and Community Development's (HCD) view that SB 35 is "constitutional in all respects." (POB 17:4, citing the HCD's SB

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

35 "Guidelines" at Supplemental Petition, Ex 1, second title page.) This is incorrect. The HCD did not adopt the Guidelines pursuant to a rule-making proceeding authorized by the Administrative Procedures Act (Gov. Code § 11340 et seq.). Also, its view of SB 35's constitutionality is not within its lawmaking authority delegated by Gov. Code section 65913.4, subd. (i), which provides: "The department may review, adopt, amend, and repeal guidelines to implement uniform standards or criteria that supplement or clarify the terms, references, or standards set forth in this section;" nor is it reasonably necessary to implement the purpose of the statute. Therefore, it is not entitled to deference as a quasi-legislative rule. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10–11 (*Yamaha*).)

Also, none of the factual predicates described in *Yamaha* for giving weight to an agency "interpretation" of a statute are present: it is not a long-standing interpretation, it is not "entwined with issues of fact, policy, and discretion," and it does not involve technical matters within the agency's expertise. (*Yamaha*, supra, at 4, 10-12.) In fact, the HCD's view of SB 35's constitutionality is a bald legal conclusion without any supporting legal analysis whatsoever.

Thus, Plaintiffs have failed to overcome the presumption against state preemption of local control over zoning, particularly Berkeley's obligation to exercise its discretionary authority to enforce its landmark protection ordinance.

B. The City's Determination That the Project May Require the Demolition of a Historic Structure That Has Been Placed on a State and Local Historic Register Is Supported by Evidence and by "Substantial Evidence" in the Record.

1. Subparagraph C must be liberally construed against preempting local zoning authority.

As discussed above, SB 35 represents a sharp break with the history of local control of land use regulation, especially for a charter city. Therefore, assuming arguendo that the Legislature could lawfully preempt Berkeley's discretion to protect its landmarks, SB 35 must be strictly construed to ensure that it preempts local zoning authority only where it is absolutely clear the Legislature intended this result. (*Big Creek Lumber, supra,* 38 Cal.4th 1139, 1149-50, 1155.) Thus, the provisions in SB 35 that preclude it from preempting local discretion, including Subparagraph C, must be liberally interpreted.

2. Standard of review.

With respect to the City's "Subparagraph C determination (at AR 4523), Plaintiffs contend there is no historic "structure" on the site; therefore, the project cannot demolish one. This contention misconceives the issue before the Court. The City correctly points out that this is a traditional mandamus action under

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

Code Civ. Proc. section 1085, not an administrative mandamus action under Code Civ. Proc. section 1094.5. Therefore, the issue is not whether there is a historic "structure" on the site. The issue is whether the City's Subparagraph C determination that the Project may demolish a historic structure is arbitrary, capricious, or devoid of evidentiary support. (*Golden Drugs Co., Inc. v. Maxwell-Jolly* (2009) 179 Cal.App.4th 1455, 1466-67, 1470-71; *O.W.L. Foundation v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 586 [substantial evidence test inapplicable in section 1085 cases]; *McGill v. Regents of Univ. of Calif.* (1996) 44 Cal.App.4th 1776, 1786-1789.) With respect to the City's factual determination under Subparagraph C, there is ample evidence supporting it. Also, even if the alternative, but still deferential, "substantial evidence" standard of review provided in subdivision (c) of section 1094.5 applies, the record contains ample substantial evidence supporting the City's factual finding. "In determining whether substantial evidence supports a finding, the court may not reconsider or reevaluate the evidence presented to the administrative agency. All conflicts in the evidence and any reasonable doubts must be resolved in favor of the agency's findings and decision. In applying that standard, rather than the less deferential independent judgment test, the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision." (*Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 881-882.)

Further, Petitioners failed to summarize all of the evidence in the record—both favorable and unfavorable—that is relevant to the City's Subparagraph C determination, which is an independent ground to deny the Petition. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 [failure to set forth all material evidence, and not merely supporting evidence, entitles opponent to presumption that findings are supported by substantial evidence]; *Roy v. Sup.Ct. (Med. Bd. of Calif.*) (2011) 198 Cal.App4th 1337, 1347 [failure to set forth all the material evidence, rather than just petitioner's own evidence, waives contention that findings are not supported by substantial evidence]; *Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218; *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409-410.)

Also, the City's Subparagraph C determination necessarily requires interpreting and applying the term "structure" as used in Subparagraph C. Here, the City concluded that Native American shellmounds are "structures" or that the entire landmarked and historically registered "site" or "property" is a "structure" as that term in used in Subparagraph C. (AR 4523.) The Court should give weight to the City's construction of the term "structure" because this construction is "entwined with issues of fact, policy, and discretion." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 4 (*Yamaha*).) Here, SB 35 delegates to municipalities the task of determining—under Subparagraph C—whether a project will

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

demolish a historic structure listed in a historic register. SB 35 does not define "structure;" therefore, the Legislature intended for the City to exercise its discretion—necessarily according to the City's own laws—in interpreting and applying this term.[2]

3. The City correctly determined that the West Berkeley Shellmound and Native American shellmounds are "structures" for purposes of Subparagraph C.

In their initial submission of the second project and request for SB 35 review in March 2018, Plaintiffs did not contend that a Native American shellmound is not a "structure" under Subparagraph C. (See AR 11-19; 57; 62-63; 77-89.) Instead, Plaintiffs argued that no shellmound is present on the site. (AR 82-88; 327-481.) In its May 21, 2018, brief to the City, CVL argued that Plaintiffs' contention is unsupported (AR 6403-6420) and that shellmounds are "structures" under Subparagraph C (AR 6420-6421). CVL amplified the latter argument in its May 29, 2018, brief to the City. (AR 7435-36.) The City's June 5, 2018, letter response to Plaintiffs initial SB 35 request found that Native American shellmounds are "structures" for purposes of Subparagraph C. (AR 4309.) In their June 29, 2018, response letter to the City (at AR 3105-3126), Plaintiffs reiterated their position that no shellmound is present (AR 3110-11) and also argued that shellmounds are not "structures" for purposes of Subparagraph C. (AR 3111-13.) CVL then countered these positions in its August 3, 2018, letter to the City. (AR 7447-50.)

Plaintiffs correctly observe that "when a word used in a statute has a well-established legal meaning, it will be given that meaning." (POB 22:25, citing *Arnett v. Dal Cielo* (1996) 14 Cal. 4th 4, 19.) "Structure" is defined in the online Merriam-Webster Dictionary as "something (such as a building) that is constructed."[3] The shellmound was "constructed" by Native American people over nearly 4,000 years. (AR 6895.) Therefore, the shellmound is within the plain meaning of the term "structure."

Plaintiffs also rely on a number of building and planning code definitions of "structure," including Berkeley Municipal Code § 23F.04.010, which 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"; California Building Code § 202, which defines "structure" is "that which is built or constructed"; and the Planning & Zoning Law at Gov. Code §§ 65589.4, 65590, 65620, 65852.3. Native American shellmounds,

---

[2]Discretion "is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action." (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355.)

[3]https://www.merriam-webster.com/

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

including the Shellmound, satisfy these definitions of "structure" because they were built by humans.

Also, the purpose of these planning and building codes is to build *new* structures, not to preserve *historic* structures. Plaintiffs ignore a host of other laws specifically intended to preserve historic resources that also use the word "structure." SB 35 must be read in the context of "the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1099–1100 (*Berkeley Hillside I*). "One should seek to consider the statutes not as antagonistic laws but as parts of the whole system which must be harmonized and effect given to every section [citations]. Accordingly, statutes which are *in pari materia* should be read together and harmonized if possible." (*Picayune Rancheria of Chukchansi Indians v. Brown* (2014) 229 Cal.App.4th 1416, 1428; quoting *Natural Resources Defense Council, Inc. v. Arcata Nat. Corp.* (1976) 59 Cal.App.3d 959, 965.) Since the purpose of Subparagraph C is to enhance preservation of historic structures by preserving local discretion to do so, the laws intended to preserve historic resources provide a more authoritative guide to the legal meaning of the word "structure" in Subparagraph C.

Thus, Subparagraph C must be read *in pari materia* with and harmonized with many other laws intended to preserve and protect historic resources that also use the word "structure." These laws include several California state statutes, including the State Historical Building Code (at Health & Safety Code § 18950 et seq.); CEQA (at Pub. Res Code § 21000 et seq.) and AB 52, as well as the National Historic Preservation Act (NHPA) (at 54 U.S.C, § 300101 *et seq*.), its implementing regulations adopted by the National Park Service (at 36 CFR § 800.1 et seq.), and National Register Bulletin 16A published by the National Park Service. The applicant's position is deeply inconsistent with all of these laws, all of which require defining, recognizing, and protecting historic resources in their entirety.

- The purpose of the State Historical Building Code is to "provide alternative regulations and standards for the rehabilitation, preservation, restoration (including related reconstruction), or relocation of qualified historical buildings or *structures*, as defined in Section 18955." (Health & Safety Code § 18951.) Section 18955 defines "a qualified historical building or structure" as:

> any structure *or property*, collection of structures, *and their related sites* deemed of importance to the history, architecture, or culture of an area by an appropriate local or state governmental jurisdiction. This shall include historical *buildings or structures* on existing or future national, state or local historical registers ... and city or county registers or inventories of historical or architecturally s*ignificant sites, places, historic districts, or landmarks*. This shall also include *places, locations, or sites identified on these historical registers* or official inventories....

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

(Health & Safety Code § 18955 [italics added].) In short, the term "structure" includes places, locations, and sites identified on historical registers and, contrary to Petitioners' argument, the term "structure" is not synonymous with the term "building."

- Public Resources Code § 5020.1, subd. (h), defines "structure" to mean "an immovable work constructed by man having interrelated parts in a definite pattern of organization and used to shelter or promote a form of human activity and which constitutes an historical resource." The Shellmound meets this definition. It is "immovable." It was "constructed by man." It has "interrelated parts," as it was originally built from millions of individual shells of marine animals placed over thousands of years. It also contains hundreds of human burials as well as hearths, home floors, at least one large building thought to be a ceremonial round house, and the ritual burial of a California condor. These parts were built in a "definite pattern of organization" known and legally recognized as a "mound." It was used to "promote a form of human activity," namely, living, fishing, and burial. (AR 2196; 6901-03.)
- Public Resources Code § 5020.1, subd. (j) defines "historical resource" as including "but is not limited to, any object, building, structure, site, area, place, record, or manuscript which is historically or archaeologically significant, or is significant in the architectural, engineering, scientific, economic, agricultural, educational, social, political, military, or cultural annals of California."
- CEQA Guidelines § 15064.5, subd. (a), paragraph (3) provides that "Any object, building, structure, site, area, place, record, or manuscript which a lead agency determines to be historically significant or significant in the architectural, engineering, scientific, economic, agricultural, educational, social, political, military, or cultural annals of California may be considered to be an historical resource ...."
- The NHPA defines the term "historic property" to mean "any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object." (54 U.S.C, § 300308.) Subdivision (l)(1) of 36 CFR § 800.16 defines the term "historic property" to mean "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places" and provides that "The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria."
- National Register Bulletin 16A ("How to Complete the National Register Registration Form") defines "structure" as a term "used to distinguish from buildings those functional constructions made usually

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

for purposes other than creating human shelter." The Bulletin's list of examples of "structures" includes "mounds" and "earthworks." (AR 6503.) The shellmound is a mound or earthwork.[4]

- In 2014 the Legislature adopted AB 52 to enhance protections for Native American archaeological and cultural sites such as the Shellmound, stating its intent to: "Recognize that California Native American prehistoric, historic, archaeological, cultural, and sacred *places* are essential elements in tribal cultural traditions, heritages, and identities." (Request for Judicial Notice of CVL, Ex 1 [AB 52, § 1(b)] (italics added).) AB 52 defines "Tribal cultural resources" as, inter alia, "*Sites, features, places, cultural landscapes, sacred places*, and objects with cultural value to a California Native American tribe that are either of the following: (A) Included or determined to be eligible for inclusion in the California Register of Historical Resources. (B) Included in a local register of historical resources as defined in subdivision (k) of Section 5020.1." (Pub Res. Code §§ 21074, subd. (a); 5020.1(k).) Thus, the Shellmound property is a tribal cultural resource.

AB 52 also added new sections 21080.3.1, 21080.3.2, 21082.3, 21083.09, 21084.2 and 21084.3 to CEQA to require that CEQA lead agencies consult with Native American tribes regarding projects that may impact tribal cultural resources. The Assembly Committee on Natural Resources report explains that AB 52 was the Legislature's response to the failure of the existing CEQA process to consider Native American sacred places in the planning process. (AR 6638.) The report describes two cases where a project threatened to destroy the landscape of Native American sacred places, places without buildings or structures, and two proposed bills to save those places that did not becomes law. The report explains that AB 52 is intended to establish a comprehensive, long-term planning process to avoid similar train wrecks in the future, quoting Governor Brown's veto message for one of the site-specific bills: "This dispute pains me given the unspeakable injustices the native peoples have endured and the profound importance of their spirituality and connection to the land. ... the current planning process needs reform to provide stronger protections for Native American cultural resources." (AR 6643-44.)

When Plaintiffs suspended its first project application, it terminated the consultation process established by AB 52. Plaintiffs' withdrawal from that process and its current lawsuit would return to the broken system that AB 52 was designed to fix. There is no basis to infer that the Legislature intended to

---

[4]The photograph at AR 2188 shows the shellmound in partially demolished form. The photograph at AR 6623 depicts the Emeryville Shellmound in partially demolished form. These photographs visually document that shellmounds are "mound" or "earthwork" type structures.

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

sweep away this historic reform by using the word "structure" rather than "resource" or "property" in Subparagraph C. In all the laws discussed in this section, historic resource value is not dependent on the specific location of a charismatic structure such as a shellmound. Reading Subparagraph C *in pari materia* with these laws precludes applying SB 35 to a project that would demolish any historic property placed on a national, state, or local historic register, especially one—such as the Shellmound—that qualifies as a "tribal cultural resource" under AB 52.

Indeed, many Native American archaeological sites do not have buildings. As recognized by AB 52, places of historic, cultural, and spiritual importance to Native American people are often "sites, features, places, or cultural landscapes." In contrast, there are many historic *buildings* constructed by Europeans and their descendants that are recognized historic resources. Plaintiffs interpret SB 35 and Subparagraph C to allow discretionary local decision-making and CEQA review of housing developments that would demolish *buildings* placed on historic registers, but to disallow such treatment for Native American cultural and archaeological sites that do not have *buildings*. Plaintiffs reach this startling result based solely on the word "structure" in Subparagraph C. This interpretation requires attributing further neglect of Native American sites, which is deeply inconsistent with the thrust of AB 52.

- BMC Chapter 3.24 is a key source of guidance for the City's Subparagraph C determination. The requirements of this chapter conclusively refute the applicant's attempt to isolate "structures" from their surrounding "sites" or "properties." Section 3.24.060, subd. B, defines "structure of merit" to include "structures, sites and areas." BMC section 3.24.110, subd. A.5 protects the entire property where a designated structure or site is located because a criteria for designating landmarks and historic districts based on "structures, sites and areas" is "Any *property* which is listed on the National Register...." ([italics added].)
- Similarly, when the LPC designates a landmark, historic district or structure of merit, "the *property* included in any such designation shall upon designation be subject to the controls and standards set forth in this chapter." (BMC § 3.24.100, subd. B [italics added].)
- These "controls and standards" prohibit any person from engaging in any construction, alteration, or demolition "on a designated landmark" without approval by the LPC. (BMC § 3.24.200.) These "controls and standards" also prohibit the LPC from approving work that would "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." (BMC § 3.24.260, subd. C.1.(a) [italics added].)
- For demolition, these "controls and standards" require that the LPC find the landmark "is in such

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

condition that it is not feasible to preserve or restore it, taking into consideration the economic feasibility of alternatives to the proposal, and balancing the interest of the public in preserving the designated landmark, historic district or structure of merit *or portion thereof* ....) (BMC § 3.24.260, subd. C.2 [italics added].)

- BMC Chapter 3.24 requires the LPC to "establish and maintain a list of" and designate "structures, sites and areas having a special historical, architectural or aesthetic interest or value" and provides that this list and the designated properties "may include single *structures or sites*, *portions of structures*, groups of structures, *man-made or natural landscape elements*, works of art, or integrated combinations thereof. (BMC §§ 3.24.050, subd. A; 3.24.060, subd. A [italics added].) As noted below, Plaintiffs' own consultant found "portions" of the shellmound structure within the Project site.

Therefore, the phrase "structure" in Subparagraph C should be interpreted to include all historic resources or properties placed on a national, state, or local historic registers, including the historic property known as the West Berkeley Shellmound or CA-ALA-307.

4. The City's determination is that shellmound is present on the site is a factual determination which not "devoid of evidentiary support" or is supported by "substantial evidence."

The evidence, including "substantial evidence," supporting the City's finding includes the following.

a. Historical Sources Place the Shellmound Portion of the Historic Property at Least Partially on the Project Site.

In 2002, the City of Berkeley commissioned an archaeological investigation of the area around the Project site, prepared by Christopher Dore of Garcia and Associates (Dore 2002). (AR 6647) Dore 2002 reviewed the existing literature regarding the West Berkeley Shellmound, including its location, and also drilled numerous core samples in the street rights of way immediately adjacent to and surrounding the Project site. Dore 2002 reports a 1949 survey, which locates the shellmound squarely on the Project site. (AR 6665.) The Dore 2002 study found that numerous core samples showed primary (or in situ) cultural deposits. (AR 6651.) Several of the cores showing primary, in-situ, shellmound cultural deposits are located immediately adjacent to the Project site, including cores U-80, U-81, U-82, U-81, U-81, FO-47, FO-49, and H-56. (AR 6651; 6706 [Map 6].)

"Map 1" at AR 6439 shows the area of the historic property listed on the national and state registers (CA-ALA-307) in orange; the boundaries of City Landmark 227, in red-dashed line; the Project site, in red and labeled "Spenger's Parking Lot;" two shellmounds, one east and one west of the Project site, in yellow; all superimposed on Berkeley's street grid. The shellmound on the western side of the Project site is a

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

shellmound portion of the West Berkeley Shellmound historic property/City landmark. This shellmound is mostly within the block west of the Project site, bounded by University, 3rd, Hearst and 4th, but part of this shellmound extends into the northwest corner of the Project site.

Map 1 was created by CVL's graphics and video consultants, Christopher Walker and Toby McLeod. Mr. Walker and Mr. McLeod started with a 1957 USGS map, then found the 1856 US Coast Survey map referenced as the historic source map for the 1957 USGS map, aligned the two maps, and then registered a 2018 OpenStreetMap to accurately place the "shellmound" portion of the West Berkeley Shellmound historic property on the current street grid and to show its spatial relationship to the Project site. The sequence of fourteen resulting maps is presented at AR 6440. A detailed description of how these maps were created is presented at AR 6459.

b. The 2014 Archeo-Tec Report and its redactions.

Plaintiffs contend that shellmound has never been on the Project site based on a report they commissioned from Archeo-Tec, Inc. in 2014. This report was prepared by lead investigator Dr. Allen G. Pastron. A redacted version of the report that Plaintiffs submitted to the City during the permit process is at AR 327 (Redacted Archeo-Tec 2014). The unredacted version of the report that Plaintiffs submitted to the City during the permit process is at AR 7277 (Unredacted Archeo-Tec 2014). (See AR 6403.)

Some of the redacted material contains information of great value in understanding the spatial relationships between the shellmound portion of the historic property, the entire historic property, and the Project site. For example, the Unredacted Archeo-Tec 2014 clarifies that "Based on the results of past archaeological investigations in and around the Spenger's Parking Lot site, it is evident that the property lies within the historical boundaries of the West Berkeley Shellmound (CA-ALA-307). Additionally, two other officially registered shell middens (CA-ALA-390) and (CA-ALA-611) are located within a quarter-mile of the project site." (AR 7301.) *This passage confirms the accuracy of Map 1's depiction the spatial relationship of these features*.

Also, "An approximate boundary of CA-ALA-307 based on interpretation of one of Nelson's maps from ca. 1909 and the LaRamie findings, revealed that the majority of the Spenger's Parking Lot block might contain intact shellmound deposits (Dore et al. 2002a)." (AR 7312.) *This passage confirms that Map 1's depiction of part of the shellmound portion of the historic property on the Project site is reasonable and based on well-known historic data.*

//

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

c. The DEIR and the 2000 and 2014 Archeo-Tec excavations.

The DEIR summarizes evidence of "Shellmound materials identified within the parking lot" (AR 2193), citing Archeo-Tec 2014. The applicant retained Archeo-Tec to conduct both "archival research and field investigations of the Project site/Spenger's Parking Lot" regarding the presence of archaeological resources. (AR 7278.) Archeo-Tec 2014 also includes previous "stratigraphic soil profiles of boring data" conducted and analyzed by Archeo-Tec in 1999-2000. (AR 7369.) Archeo-Tec drilled Boring 19 in the year 2000 in the northwestern corner of the Project site where Map 1 shows part of the shellmound portion of the historic property on the Project site. (AR 7401.) Boring 19 was "positive," which "guided" Archeo-Tec to excavate a new trench in the same area in 2014, as shown by the yellow polygon surrounding Boring 19 on Figure 1. (AR 7279.)

In 2000, Dr. Pastron judged two areas of the Project site to be "culturally sensitive" based on the "cultural material" found in borings conducted at that time. (AR 7310.) Dr. Pastron also opined that the cultural material found in Boring 19 in 2000 from the 6-8 feet layer "*probably represents a remnant* of CA-ALA-307. (AR 7401-02 [italics added].) The report describes the sample from the 8-10 feet layer in Boring 19 as follows: "This lower portion of this level probably represents the interface between the overlying disturbed midden and the underlying native soils." (AR 7402.) The use of the term "midden" is important, because this is the functional term used to the describe Native American shellmounds.

In Dr. Pastron's professional opinion in 2000, the "cultural" material found in Boring 19 "probably represents a remnant of CA-ALA-307 [i.e., the Shellmound]." (AR 7401-02.) In 2014, however, Dr. Pastron—now in the employ of Plaintiffs —changed his opinion, stating: "the data recovered during the current [i.e., 2014] phase of research within the Spenger's Parking Lot are sufficient to determine that the previously identified areas of pre-contact cultural material represent zones of secondary deposition" and "we think it is not possible that the culturally derived deposits we encountered were undisturbed remnants *of the eastern edge*[5] of the West Berkeley Shellmound." (AR 7311.) Based on the excavation work done in Trench 21 in 2014, Dr. Pastron says: "Upon closer examination, we determined that Boring #19 probably did not originally contain intact shellmound between 5 and 9 feet below surface level, as we only encountered a thin layer of crushed shell, much like that seen elsewhere in the parking lot site." (AR 7325.)

But the 2014 excavation did not provide any new facts on which to base a change of opinion. As noted above, the "culturally sensitive" midden deposits found in 2000 in Boring 19 were found in the 6-8

[5]The italicized text was redacted from the originally posted version of the 2014 Archeo-Tec Report.

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

feet and 8-10 feet layers. In 2014, "Trench 21 was essentially centered on Boring #19." (AR 7325.) But the 2014 excavation in Trench 21 only reached a depth of 5.3 feet! (AR 7325.) Since the 2014 excavation in Trench 21 did not go below 6 feet, it did not provide Archeo-Tec any new information that would support changing its original opinion that the "culturally sensitive" midden deposits he found below 6 feet in 2000 "probably represent a remnant of CA-ALA-307." Nor does the report refer to any such new information. "Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value." (*Pacific Gas & Elec. Co. v. Zuckerman* (1987) 189 Cal.App. 3d 1113, 1135-1136 (internal citations omitted); *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center* (1998) 62 Cal.App.4th 1123, 1137 ["opinion testimony of expert witnesses does not constitute substantial evidence when it is based upon conclusions or assumptions not supported by evidence in the record"].)

Archeo-Tec explained its change in opinion, as follows:

> First, we found mainly lenticular pockets of material.[6] Half (4 of 8) of our positive trenches in the eastern section contained only small lenses of midden material. This does not appear to be an artifact of trench orientation as our north-south and east-west (long axis) trenches did not show continuous midden bodies in most cases. Second, most of the midden deposits we saw were very thin and mixed with sand and rounded gravel lag. We interpret this as Strawberry Creek bed load, which may suggest that the midden material was eroded from elsewhere, entrained in the creek flow, and redeposited. Third, very few examples of known midden constituents (e.g., shells, charcoal) were large or intact pieces. Last, we found faunal elements that appeared to have been butchered by metal implements. The fact that these processed bones were intermingled with midden material suggests that these deposits were temporally mixed at some time in the recent past, probably during the late 19th and early 20th centuries.

(AR 7318.)

Archeo-Tec admits that the first reason—lenticular pockets of material— does not apply to "Trench 19" because "the midden level" in that area was a "continuous deposit." (AR 7318.) Archeo-Tec does not say the second and third reasons (i.e., "thinness of the cultural layer" and "few large, intact midden constituents" apply to Trench 19, but presumably they do not, because it found the midden level here was "a thicker (several inches) ... deposit." (AR 7318.) Also, the presence of "few" large, intact midden constituents reveals that some are present. Archeo-Tec does not say whether these three reasons apply to

[6] "Lenticular" means shaped like a lens.

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

Boring 19 and Trenches 21/22. (Trench 21 was "centered on Boring #19" (AR 7325).) Nor could it because Trenches 21/22 only reached 5.3 and 5.5 feet in depth, respectively, which is not deep enough to sample the 6-10 feet layers where Boring 19 found shellmound. (AR 7367-68.) Boring 19 and Trenches 21/22 are in the area where Map 1 shows part of the shellmound portion of the historic property on the Project site. Archeo-Tec also does not say whether the fourth reason—animal bones butchered with metal tools—applies to Boring 19 and Trenches 21/22. But it clearly does not, because the bones with cut marks found in Trench 22 were cut with stone, not metal. (AR 7326.)

Archeo-Tec's final conclusion is: "We found no evidence *whatever* that the West Berkeley Shellmound was ever located on the Spenger's Parking Lot site." (AR 7329 [italics added].) In fact, however, Archeo-Tec found extensive evidence that the shellmound portion of the historic property extended onto the Spenger's Parking Lot/Project site, including past surveys and excavations (e.g. the Dore 2002 study referenced in Figure 6 of the 2014 Archeo-Tec Report (see AR 7309 [2014 Archeo-Tec], 6652 [Dore]); CVL's map compilations (AR 6439; 6441-6457; 6459-6475); as well as Boring 19 and Borings 34, 35, 36, 41, and 43 conducted in the year 2000. Also, Dore 2002 reports a 1949 survey, which locates the shellmound squarely on the Project site. (AR 6665 ["A.R. Pilling, using data from Nelson's earlier survey, placed the archaeological deposit on the north bank of Strawberry Creek, 'between Hearst and University streets and between Second and Fourth Streets' (Pilling 1949)."

In sum, Archeo-Tec's 2014 excavations did not produce a single piece of relevant evidence that contradicts these previous findings or its own previous opinion that Boring 19 revealed "culturally sensitive" midden deposits below 6 feet that "probably represent a remnant of CA-ALA-307."

d. Expert opinion regarding flaws in Archeo-Tec 2014's Methodology.

The City has discretion to choose between competing expert opinions in making its factual determinations. (*Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1397 ["the decisionmaker is 'permitted to give more weight to some of the evidence and to favor the opinions and estimates of some of the experts over the others.' [Citations.]"].) The criticisms of Archeo-Tec 2014 described above, as well as additional criticisms, were submitted to the City in connection with the Draft EIR for the first project (See e.g., AR 11429-11441) and in connection with the request for SB 35 processing of the second project (AR 6403-29.)

In his comments on the DEIR, Registered Professional Archaeologist Dr. Christopher Dore commented that the testing done to date is not reliable. (AR 6627-28.) Another expert commenter on the

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

Draft EIR criticized the methodology used in Archeo-Tec 2014, stating: "Another issue with Pastron's methodology, and a potential reason why he said that he did not find 'intact' deposits was because he used augers and backhoes. For his borings in 1999, Pastron used an auger, which spins the earth to the surface, thus mixing the contents of the soil. Dore and Garcia and associates used corings in order to be able to identify whether deposits were intact or not." (AR 11433) These criticisms of Archeo-Tec 2014 are substantial evidence supporting the City's Subparagraph C determination.

5. The historical significance of the shellmound materials found on the Project site is not at issue in this case.

The presence of "cultural" shellmound material within the Project site is not disputed. (See e.g., AR 2193 ["Shellmound material found within the Project site"].) But Plaintiffs devote considerable ink to describing these deposits as "disturbed" or "secondary." For example, the difference between Archeo-Tec's year 2000 opinion and its year 2014 opinion is not whether shellmound material is present in the Project site, it is whether it is "primary" vs "secondary deposition." Thus, the Draft EIR for the first project states: "Archaeological deposits that are not intact, as is the case with the Shellmound deposits identified at the Project site, do not qualify for listing in either the National Register or California Register due to a lack of integrity. (AR 2193; see also AR 7350 [Archeo-Tec 2014 "significance finding"].)

Simply put, these considerations are irrelevant to the City's Subparagraph C determination under SB 35. To be sure, whether shellmound materials on the project have "integrity" or "historical significance" are important for listing the property on the California Registers of Historic Places. (See e.g., Title 14, Cal Code Regs. § 4851.) But the Project site is already placed on national, state, and local historic registers, so the question of whether the area "qualifies" for any of these listings is moot. The City's Subparagraph C determination is not an opportunity for Plaintiffs' to reopen these listing decisions.

Similarly, whether shellmound materials on the project site are "historically significant" is an important consideration under CEQA. (Pub. Res. Code § 21084.1; CEQA Guidelines, § 15064.5.) If the City had certified a final EIR finding these deposits were not historically significant, this would undoubtedly have resulted in a dispute between the CVL and the City on CEQA grounds. Plaintiffs, however, elected to terminate the CEQA process. Having done, so, they cannot litigate whether the shellmound materials on the project site are "historically significant" by challenging the City's Subparagraph C determination.

V. CONCLUSION

For the reasons set forth above, the Court should deny the Petition.

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606

Dated: July 14, 2019

Law Offices of Thomas N. Lippe, APC

Thomas N. Lippe
Attorney for Intervenors Confederated Villages of Lisjan and Confederated Villages of Lisjan, Inc.

T:\TL\Shellmound\Trial\Briefs on Merits\MB005f Merits Opp Brief.wpd

Law Offices of
Thomas N. Lippe
201 Mission St. 12th Floor
San Francisco, CA 94105
Tel: 415-777-5604
Fax: 415-7775606