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July 8, 2021

Hon. Tani Cantil-Sakauye, Chief Justice
And Associate Justices
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, California 94102-4797

RE: Amicus Curiae Letter in Support of Review
Ruegg & Ellsworth, et al. v. City of Berkeley, et al.
First District Court of Appeal, Case No. A159218
California Supreme Court No. S269012

Dear Chief Justice Cantil-Sakauye and Associate Justices:

This firm submits this letter as amicus curiae on behalf of Richard Schwartz, a long-standing Berkeley historian who has specialized in finding, recording, and studying Native American sites in Berkeley and the Bay Area. Mr. Schwartz has recorded many hundreds of Native American sites, including burial locations with the California Historical Resources Information System (CHRIS), the state archive. These records included sites within the CA-ALA-307 historic cultural resource at issue in the above-referenced case. Schwartz's data shed light on this site's meaning and significance to our collective past and future here in California, especially the Bay Area. Mr. Schwartz requests this Court grant the Petitions for Review.

Interest of Amicus Curiae

Mr. Schwartz has been a resident of Berkeley since 1973 and has a deep personal and professional interest in CA-ALA-307 (hereinafter "Site"), as Mr. Schwartz has studied the Site and the surrounding vicinity for many decades. In 2001-2002, Mr. Schwartz was an historic consultant to Garcia and Associates ("GANDA") for their city-hired study of the location of CA-ALA-307 and other cultural resources in the vicinity and is named in that GANDA report, "Archeological Survey Report for Public Improvement Projects and Maintenance in the West Berkeley Redevelopment Area, City of Berkeley, Alameda County,

California”, 2002. In 2006, he was honored as a “Pioneer of Berkeley Archeology” by Dr. Kent Lightfoot, UC Berkeley, Anthropology Professor and Interim Director, Phoebe Hearst Museum of Anthropology, University of California. Mr. Schwartz has worked for Tremaine & Associates to locate previously unknown Native American sites and perform pedestrian surveys for a project with Cal-Trans and the City of Richmond. Kim Tremaine was listed as a consultant to the GANDA study of CA-ALA-307. Further, Mr. Schwartz is scheduled to be working with professors and students at the University of California, Berkeley and the CHRIS commencing in the fall of 2021 to record the data collected from Mr. Schwartz’s year-long pedestrian survey of Berkeley near its waterways and Native American sites throughout the Bay Area.

In February 2014, Mr. Schwartz was hired as a historical consultant by Archeo-Tec’s Dr. Allen Pastron, the Developers’ archeologists, to share his historical data of the Site and surrounding vicinity for Archeo-Tec’s 2014 study and report used in the Draft Environmental Impact Report for the initial proposed project at issue in the subject litigation. Mr. Schwartz was personally on-site during much of the 2014 digging and excavations. He was in contact with a number of the field archeologists on this dig, and communicated with them and other archeologists including Dr. Kent Lightfoot and Dr. Christopher Dore many times in person, by email and by phone about the dig and the relevance and utilization of the historical data Mr. Schwartz had given Archeo-Tec.

Mr. Schwartz’s interest in this case as *amicus curiae* in support of review is to assist in shedding light on some of the facts involved in the 2014 Archeo-Tec Report that was relied upon by the Court of Appeal. These facts, some of which are admittedly not contained in the administrative record, include the failure of Archeo-Tec to include significant, relevant data provided to it by Mr. Schwartz, despite the fact that Archeo-Tec had requested this data. This documentary evidence demonstrates the existence of burials and undisturbed shellmound structures on and surrounding the proposed project site. In addition, Mr. Schwartz explains how the 2014 Archeo-Tec Report’s appendix boring and trenching field logs (AR 007369-007432), demonstrate the existence of undisturbed shellmound structures. Mr. Schwartz concludes that it is virtually impossible for the project lot to be ringed on all sides by burials and undisturbed shellmound structure (found by GANDA study and also Richard Schwartz) and not possess similar characteristics within the project lot in question.

Argument in Support of Review

CA-ALA-307 was designated Landmark # 227 by the City of Berkeley Landmarks Preservation Commission in 2000. Berkeley determined at that time that the site is “most highly significant to native descendants as a sacred burial ground.” The site was also listed in the California Register of Historical Resources, and determined to be eligible for the National Register of Historic Places.

The Court of Appeal incorrectly assumes the term “ministerial” in SB35 affects the City of Berkeley’s factual determination as to whether a project satisfies SB35’s eligibility criteria in the first place, including whether an historic structure is located on the proposed project site. (Op 21.) Such an interpretation would render SB35 unconstitutional because it would result in an unduly broad incursion by the state legislature into legitimate municipal interests. (*City of Watsonville v. State Dept. of Health Services* (2005) 133 Cal.App.4th 875, 883; *Johnson v. Bradley* (1992) 4 Cal.4th 389, 404.) A court should interpret a statute in a manner that does not lead to absurd results, including unconstitutional results. A more reasonable reading of SB35 is that the legislature intended the local agency to determine whether a proposed housing project satisfies the SB35 eligibility criteria, and if it does, then project approval is deemed ministerial. Nothing in SB35 suggests that the legislature meant to curtail a city’s authority or responsibility to make determinations of fact that are prerequisite to finding that an eligibility criterion is satisfied. The City of Berkeley made the factual determination that the West Berkeley shellmound, which is part of CA-ALA-307, is an historical structure located within the project site. It was on that factual basis that the City lawfully determined that the City could not approve the project ministerially, since SB35 does not provide ministerial approval of a project in a location of an historical structure.

An agency’s finding of fact in mandamus actions brought under C.C.P., section 1085, such as here, is subject to a highly deferential standard; namely, whether the determination is arbitrary, capricious, or devoid of evidentiary support. (*Golden Drugs Co., Inc. v. Maxwell-Jolly* (2009) 179 Cal.App.4th 1455.) Here, the Court of Appeal did not give the proper deference to the City’s factual determination that the West Berkeley Shellmound is an historic structure. That factual determination was supported by evidence in the record, including the opinions of Dr. Christopher Dore and Dr. Stephen Bryne (co-authors of the city’s 2002 GANDA Report), as well as scientific data taken from the project site itself. As described in detail below, the City’s factual determination is supported by borings taken by the

Developer's archeologist, Archeo-Tec, in 2000, as well as a 1990 Report co-authored by Archeo-Tec. That the 2014 Archeo-Tec Report failed to include all relevant information and data available to it demonstrating that the West Berkeley Shellmound was located within the proposed project site is further reason that the City of Berkeley was justified in not relying on that 2014 Archeo-Tec report's conclusions and instead drawing a different conclusion about the character and location of the West Berkeley Shellmound structure within the proposed project site.

A. Historical Evidence Mr. Schwartz provided to the Developer's Archeology Firm, As Per Their Request, Was Not Utilized in the Developer's 2014 Report to the City

Despite having been paid for his work by Archeo-Tec, Archeo-Tec inexplicably did not use any of the historical data and information that Mr. Schwartz provided to the firm. This historical data and information had previously been generally unknown but was subsequently recorded with CHRIS.

For example, Mr. Schwartz recorded with the CHRIS details from a 1884 newspaper article, where ten burials were found on the proposed project site, as later recorded by William Self and Associates, Inc. (WSA) in the report on the Simpson Sports Center at UC Berkeley (<https://www.berkeley.edu/news/media/releases/2009/01/stadium-archreport.pdf>) on page 24. Mr. Schwartz also hand delivered this 1884 newspaper article to Dr. Allen Pastron, principal of Archeo-Tech, in 2014 when Mr. Schwartz was hired by him. Yet, this information is missing from the 2014 Pastron Report.

Mr. Schwartz also recorded with CHRIS an *Oakland Tribune* newspaper article dated 8/8/1875, which reported that a French scientist named Alphonse Pinart had recently come to Berkeley: "M. Pinart, a French scientist who has for several years been investigating the antiquities of this coast, and who knows more about them, probably than any living man, recently examined the mound at Strawberry Creek. On making an excavation he found three hundred skeletons, and quite a variety of stone implements." Based on the geographical information contained in the article and Pinart's field notes and map that Mr. Schwartz found, and the known changes that were taking place in transportation at that time in history (clearing certain roads for wagon travel, etc.), Mr. Schwartz deduced that these 1875 finds were on and/or around the proposed project site. He therefore shared this article with Dr. Pastron. In March of 2014, Mr. Schwartz sent Guido Pezzarossi, the head field archeologist

for Archeo-Tec, photos of some of the artifacts Pinart took from the shellmound site around the project-site area in 1875. This was new, never recorded information. Yet, none of this information was included in Archeo-Tec's 2014 Report.

The *Oakland Tribune* reported on July 1, 1954, UCB's Edward W. Gifford testified to the Indian Claims Commission that there was an Indian village along the lower portion of Berkeley's University Avenue. It was discovered when the University Overpass was being constructed in about 1951. It ran from the East Shore Freeway to Sixth St. in Berkeley. Through carbon-14 dating the site was dated. "In the Berkeley village, [Dr. Gifford] later explained, we determined the age of various bone, stone and shell artifacts to be 2,200 years old at the eight-foot level, and 2,700 years old at the 12 to 13-foot levels." The overpass abuts the proposed project site on the project's south side. Mr. Schwartz provided this article to Dr. Pastron, yet none of this information was included in Archeo-Tec's 2014 Report.

The fact that Collin Busby, principal archeologist of Basin Research, who performed the required archeological monitoring of a project at Fifth and University, in proximity of the proposed project site, unearthed undisturbed shellmound on his project site, corroborates that the village described as under the University Overpass continued at least to the southern boundaries of the proposed project site.

Mr. Schwartz also provided Dr. Pastron with documentary evidence that there were numerous human bones unearthed at Third and University Avenue in the 1940s while digging for an elevator shaft. The foreman at the burial site said that it was "generally believed that about 50 feet east of yesterday's discovery, an extensive Indian burial mound was used long before either the Spanish or American pioneers settled in California." None of this information was documented in Archeo-Tec's 2014 Report, despite the fact it is clearly relevant to evaluating whether the shellmound structure is located on the proposed project site as the elevator shaft is in the northeast quadrant of that lot, abutting the railroad tracks, some feet west of the project lot.

In short, Mr. Schwartz has recorded about 400 burials on and around the proposed project site. He handed this data to Mr. Pastron in 2014, yet none of these burials were even mentioned in Pastron's 2014 report.

Further, the city commissioned GANDA report documented that undisturbed cultural remains were found in the coring program in the streets ringing the area of and

beyond the proposed project site – that is, all around the proposed project site in every direction. None of these undisturbed cultural remains, believed by Dr. Dore to be CA-ALA-307, were mentioned in Archeo-Tec’s 2014 Report’s final assessment of the Site, even after Dr. Pastron noted them in his 3.6 section titled “Other Studies (2000s).” (AR 007311).

Thus, one may conclude that Archeo-Tec intentionally omitted relevant data and information in its 2014 Report which would definitively demonstrate the shellmound structure is located on the proposed project site. This concerns amicus curiae because the Court of Appeal, in determining that SB35 applied to the proposed project, accepted the conclusions of the Archeo-Tec 2014 Report that there was no evidence of the West Berkeley Shellmound on the project site. This is especially disconcerting given that the Archeo-Tec Report observed, (AR 007303-4) “CA--ALA--307 was not officially recorded with the state clearinghouse until 1949 when Pilling, using data from Nelson’s early 20th century survey, compiled the formal site documents. In the site record forms, Pilling estimated that the West Berkeley Shellmound measured approximately 300 yards N--S by roughly 100 yards E-W. He placed the archaeological deposit on the north bank of Strawberry Creek, “between Hearst and University streets and between 2nd and 4th 23 streets (Furlong et al. 2006).” which places the West Berkeley Shellmound geographically smack within the proposed project lot, further confirming Dr. Pastron’s boring finds of shellmound structure on the project lot. Thus, even the Archeo-Tec 2014 Report acknowledges that other experts have concluded, based upon evidence, that the West Berkeley Shellmound is located within the proposed project site.

As explained herein, the data collected for purposes of the Archeo-Tec 2014 Report is woefully deficient and not at all conclusive of whether the shellmound structure is located on the proposed project site. The City of Berkeley decisionmakers should be allowed to perform their discretionary review of the historical cultural evidence presented, including the information that Mr. Schwartz has shared, so as to make the most informed and environmentally-protective decision regarding the use of the proposed project site.

B. Archeologist Experts Disapproved of the Developer’s Archeologist’s Methodologies and Disagreed with Their Conclusions

It is important to note that the shellmound is just one element of the much larger CA-ALA-307 and not the only element. The Archeo-Tec 2014 Report limits its investigation and evaluation to the shellmound, but should have looked at the entire area of CA-ALA-307

to determine whether other historical cultural resources exist in the project area. According to Dr. Christopher Dore in his March 2, 2017 Responses to the Draft Environmental Impact Report, “significant archeological deposits that are not directly associated with the shellmound have been documented at the edge of the project area. These deposits have no less, and in fact may have more, archeological significance than deposits within the project area, the probability is high that such deposits do exist but were not located.” Dore goes on to comment, “there are significant undisturbed cultural and natural deposits not directly related to the mound still remaining within the site boundary.” (15.1). Dore states (17.1) “the archeological sampling design utilized to locate deposits in 2014 was inappropriate given the a priori knowledge of the distribution of intact deposits in the site that the investigators acknowledge in the 2012 archeological report (Pastron, 2012) on the project parcel, a report not discussed in this DEIR.”

Dr. Bryne wrote in his 2017 responses to the Draft EIR: “the Archeo-Tec report is flawed. The Archeo-Tec (2014) report, while it appears to support the project, do not agree with nearly all of the earlier archaeological findings, including Archeo-Tec’s own (2012) results, regarding this important prehistoric site.” “Dore et al. (2002) stated, “An approximate boundary of CA-ALA-307, based on interpretation 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.” “For example, the earlier Archeo-Tec report (2012:3) states, “Based on the results of past archaeological investigations in and around Spenger’s Parking lot site, it is evident that they property lies within the historical boundaries of the West Berkeley Shellmound (CA-ALA-307).”

Further, “The Archeo-Tec (2014) report concludes, somewhat confoundingly, “It is the conclusion of the Principal Investigator that development within the Spenger’s Parking Lot site will not result in adverse impacts to CEQA-significant prehistoric or historic period cultural resources. However, it cannot be eliminated with absolute certainty that significant historic and/or prehistoric period cultural materials exist within the Spenger’s Parking Lot site.”

C. Archeo-Tec 2014 Report Interpretations Conflict with his 2000 Report Findings

Archeo-Tech found undisturbed cultural remains on the project site as evidenced in bore #19 from his 2000 augering. (Pages 114-5 in Pastron 2014 report (AR 007401-2)). Yet the

2014 Report, prepared for the Developers, explains away this finding by concluding “we did locate secondarily redeposited shellmound material” (AR 007328) – but that find was well above the depth where the undisturbed deposits were found by Archeo-Tec in 2000. It is unreasonable to dismiss some physical evidence but not others in drawing such a conclusion.

Further, a close look at Archeo-Tec’s year 2000 borings in the central area of the project site reveals that multi-foot thick cultural remains were found over that large area, not “small pockets” as concluded in the Archeo-Tech 2014 Report prepared for the Developers. (Map Figure 1 (AR 007279)).

In 2000, Dr. Pastron performed augering between 6-10 feet, and found undisturbed archeological remains, but in 2014, Dr. Paston only dug to 5 feet. Even “at 5 feet below the surface, there is an abrupt change to gray/black, dry silty- clay clayey silt mixed with an abundance of mussel and clam shell fragments, some oyster shell and some Mammal bones. This layer probably represents a remnant of the West Berkeley Shellmound deposit known by the CA- -ALA- -307.” (AR 007400) [emphasis added].) Many of Dr. Pastron’s bore logs from 2000 and interpretations in the 2000 Report demonstrate that Dr. Pastron concluded that portions of the West Berkeley Shellmound were evident on the proposed project site, despite the Archeo-Tec 2014 Report’s Executive Summary and Interpretations to the contrary. (E.g., 2000 Report, AR 007420-1, [“However several borings in the remaining three quadrants indicated seemingly intact or disturbed shellmound deposits that might significantly expand the knowledge base of the West Berkeley Shellmound”]; Bore #34 at 6-8’ depth [“indicators of a remnant of the West Berkeley Shellmound”]; AR 007424 [Bore #36 at 7-8’ “seems to be a remnant of CA-ALA-307”]; AR 007432 [Bore #43 at 6-8’, possible remnant of CA-ALA-307- the West Berkeley Shellmound].)

In another report that Dr. Pastron and his firm Archeo-Tec co-authored, it states, “In addition, recent archaeological research at various places throughout the San Francisco Bay region have conclusively demonstrated that highly significant, deeply buried, essentially intact pre-contact deposits can survive below the surface of the ground, despite more than a century of intense urban development.” (AR007285). Dr. Pastron’s circa 2000 borings at the project site are consistent with said 1988a, 1899b, Archeo-Tec 1990 reports’ conclusions as those borings found deeply buried cultural remains 6-9’ below the current surface grade of the project lot.

Conclusion

There were estimated to be at least 600 shellmounds around the Bay Area, but the vast majority have already been demolished by present-day development and excavation. The cumulative effect of all this destruction with no concern for the history, sense of place or culture of the Ohlone, living and past, is to destroy the Ohlone culture, and indeed our collective history, one construction project at a time. There is no turning back once these sacred places have been destroyed. CA-ALA-307 is the oldest known village site in the Bay Area.

There are plenty of locations where housing can be built. With respect to proposing new housing development in areas where historic cultural resources are located, especially the oldest Ohlone structure remaining in the Bay Area, ethically a balance of values should be weighed – the Ohlone people also must be taken into account, as must our collective cultural history. This balance should be struck by the proper finder of fact and makers of land use policy – here, the City of Berkeley – not the Court of Appeal. Neither should it be inferred by the courts that the Legislature intended to strip cities and counties of their discretion to balance the rights of native peoples with the rights of private property owners and the need for new housing. This could not possibly be what the Legislature intended. The fact the Legislature deemed there was an “oversight” in the language of SB35 demonstrates that the Legislature did not in fact intend to deny the City of Berkeley of its discretion to review housing projects that may have impacts on historical cultural resources, including historical structures, located either above ground or underground. Amicus Curiae respectfully requests this Court grant review of this case.

Sincerely,

/s/ Sabrina Venskus

Sabrina Venskus
Attorney for Richard Schwartz

PROOF OF SERVICE

I am over the age of 18 and not a party to this action. I am employed in the County of Ventura. My business address is 603 West Ojai Avenue, Suite F, Ojai, California 93023.

On July 8, 2021, I served true copies of the foregoing document, entitled **Amicus Curiae Letter in Support of Review**, by the method indicated below:

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X- by causing e-service through TrueFiling to the parties listed below	
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<p>X - by causing the documents listed above to be placed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Ojai, California, addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.</p>	
<p>Alameda County Superior Court 1221 Oak Street Oakland, CA 94612</p>	<p>Trial Court</p>

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true, and that I have executed this proof of service in the County of Ventura, California, on July 8, 2021.

/s/ Rachael Kimball
Rachael Kimball

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