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, v. CITY OF BERKELEY and CITY OF BERKELEY DEPARTMENT OF PLANNING AND DEVELOPMENT, Respondents and Defendants, and CONFEDERATED VILLAGES OF LISJAN and CONFEDERATED VILLAGES OF LISJAN, INC., Intervenors.	Case No. RG18930003 ORDER DENYING PETITION FOR MANDATE

Petitioners and Plaintiffs Ruegg & Ellsworth and Frank Spenger Co. ("Petitioners") bring this action for a traditional writ of mandate and declaratory relief against the City of Berkeley and its planning department ("Respondent") to compel the Respondent to process Petitioners' project application under the provisions of Government Code section 65913.4 ("SB35"). Petitioners proposed to develop a new 260-unit residential development with roughly 28,000 square feet of first-floor commercial space (the "Project"). The Project site is located in the block bordered by

Third Street, Fourth Streets, Hearst Avenue, and University Avenue in Berkeley. It is currently used as a parking lot. The City refused to process the Peitioners' application under the provisions of SB35 in part because it believes the location is situated over an historic site—*i.e.*, the Berkeley Shellmound.

The Confederated Villages of Lisjan ("CVL") and Confederated Villages of Lisjan, Inc. ("CVLI") filed an answer-in-intervention with leave of court on February 8, 2019. As they describe themselves, in their Answer in Intervention, CVL is a traditional Native American tribe, and CVLI is an affiliated non-profit mutual benefit corporation formed to protect and promote the rights of the Ohlone people, whose ancestors lived in this region in prehistoric times.

At hearing on April 16, 2019, the parties stipulated to allow nonparty Californians for Homeownership, Inc. ("CHI") to file briefs regarding this petition as *amicus curiae*. CHI is a nonprofit public benefit corporation organized to advocate for more housing development and to litigate against zoning and land use practices that they believe inhibit the development of new housing stock.

The parties and *amicus curiae* appeared for argument September 13, 2019 and the matter was taken under submission. Having considered the parties' written submissions and the arguments of counsel, the petition is **DENIED**.

I. LEGAL STANDARDS

Courts are authorized to issue writs of mandate under California Code of Civil Procedure ("CCP") section 1085. (CCP §§ 1085(a), 1086; *see also* Cal. Const. art. 6, § 10 [Superior Court has jurisdiction to issue writ of mandate].) "A writ of mandate will lie to 'compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station 'upon the verified petition of the party beneficially interested,' in cases 'where there is not a plain, speedy, and adequate remedy, in the ordinary course of law.'" (*Hutchinson v. City of Sacramento* (1993) 17 Cal.App.4th 791, 796, quoting CCP §§ 1085, 1086, citations omitted.) "Two basic requirements are essential to the issuance of the writ: (1) A clear, present and usually

ministerial duty upon the part of the respondent [citations]; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty [citation]." (*Flores v. Dept. of Corrections & Rehabilitation* (2014) 224 Cal.App.4th 199, 205; *see Hudson v. County of Los Angeles* (2014) 232 Cal.App.4th 392, 408.)

The Court may issue a writ of mandate to correct a public agency's abuse of its discretion. (*Thomas v. Shewry* (2009) 170 Cal.App.4th 1480, 1486 fn.6, citing *Barnes v. Wong* (1995) 33 Cal.App.4th 390, 395; *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297–1298.) The Court will not find there is an abuse of discretion unless the agency's action "is arbitrary, capricious, or entirely lacking in evidentiary support." (*Cal. Public Records Rsrch., Inc. v. County of Alameda* (2019) 37 Cal.App.5th 800, 806; *Summerhill Winchester LLC v. Campbell Union Sch. Dist.* (2018) 30 Cal.App.5th 545, 552; *McGill v. The Regents of Univ. of Cal.* (1996) 44 Cal.App.4th 1776, 1786; *see Am. Coatings Assn. v. S. Coast Air Quality Mgmt. Dist.* (2012) 54 Cal.4th 446, 460-461.) This standard is more deferential to public agency factfinding than the related "substantial evidence" standard commonly applied under CCP section 1094.5 although both standards require a "reasonable basis for the decision." (*Am. Coatings Assn., supra,* 54 Cal.4th at p.460, citing *St. Bd. of Chiropractic Examiners v. Superior Court* (2009) 45 Cal.4th 963, 977, *and Warmington Old Town Assocs. v. Tustin Unified Sch. Dist.* (2002) 101 Cal.App.4th 840, 850; *see also* CCP § 1094.5(c) [specifying "substantial evidence" review for review of administrative factfinding after evidentiary hearing required by law].)

II. DISCUSSION

The City's decision to grant or deny a construction permit under SB35 is a ministerial decision that does not require an evidentiary hearing. (*See* Gov. Code § 65913.4(a) [describing a "ministerial" approval procedure].) The City's decision is therefore subject to review by traditional writ of mandate under Section 1085 rather than administrative mandate under Section 1094.5. (*See* CCP § 1085; § 1094.5(a) [applying administrative mandamus procedures only after "a proceeding in which by law a hearing is required to be given, evidence is required to be taken,

and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer"].)

A. SB35 AND MANDATORY APPROVAL OF HOUSING DEVELOPMENTS

In September 2017, the Legislature of California passed SB35, and it came into effect January 1, 2018. (Stats. 2017 ch.366; *id.* § 6 [effective date January 1, 2018].) With SB35, the legislature intended to establish "a streamlined, ministerial review process for certain multifamily affordable housing projects that are proposed in local jurisdictions that have not met regional housing needs." (*See* Petrs.' RJN Ex. C [Assembly Floor Analysis for SB35, dated Sept. 14, 2017] at p.1.) By designating the review process as ministerial, SB35 removes the discretion of a local jurisdiction to refuse a permit to projects that meet its qualifications. (Stats. 2017, ch.366, § 3, codified at Gov. Code § 65913.4.).

To take advantage of SB35's streamlined application process, a project must meet a number of qualifying criteria, including that it must be "a multifamily housing development that contains two or more residential units"; must be located on a site in an urbanized area or urban cluster (or within the borders of a city containing one) and 75% surrounded by other urban uses and on a site zoned for residential or mixed-use development; must make itself subject to recorded land-use restrictions designating at least half its units as available at affordable housing costs; must be in a locality that has not met its share of regional housing needs by income category; must be consistent with the local jurisdiction's "objective zoning standards, objective subdivision standards, and objective design review standards"; and must be subject to a developer commitment to pay prevailing wages to construction workers.

SB35 also lists a number of exceptions that categorically disqualify a development from ministerial approval. This case turns, in part, on the meaning of an exception disqualifying 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).)

B. THE PROJECT AND ITS REJECTION

Petitioners first applied for a permit to develop a mixed-use residential/commercial building at 1900 4th Street in April 2015. (AR7459-7743 [initial application]; *see* AR7874-7876 [acknowledging receipt].) This application is not directly relevant to the case except to note that it was still pending in 2017 when the Legislature passed SB35. (*See, e.g.*, AR14417-14426 [hearing of City's Landmark Preservation Commission from February 2017 continuing consideration of the Project's Draft Environmental Impact Report].) In March 2018, the petitioners filed a new application seeking ministerial approval of the Project under SB35. (AR6-9; *see also* AR1 [asserting right to ministerial approval under SB35].) The new iteration of the Project proposed a mixed-use development with 260 dwelling units located above a roughly 27,500 square foot first floor including restaurant, retail, and café space, with parking spaces for 290 cars and 140 bicycles. (*See* AR6; AR15-16.) Petitioners undertook to pay prevailing wages to construction workers (AR124-125) and to provide 130 of the 260 dwelling units as "below market rate" units designated as affordable to low-income households, i.e., those making less than 80% of area median income. (*See* AR11.)

The City performed an initial analysis and replied by a letter dated June 5, 2018, stating its intention to deny the Project. (AR4304-4313.) Petitioners submitted a modified application in late June designed to address the City's concerns. (AR3105-3673.) The City responded to the resubmitted application by a letter dated September 4, 2018, denying a permit for the Project. (AR4521-4523.) In that denial letter, the City stated, inter alia, that SB35 unconstitutionally infringed on its right to protect City-designated landmarks. (*Ibid.*) The City also stated that, even if SB35 did apply, the Project was ineligible because it failed to conform to certain elements of the City's planning requirements, including (1) failure to meet the requirement that the Project set aside a portion of its units for "very low income" households or pay a fee in mitigation and (2) failure to meet "applicable performance standards for off-site impacts" including traffic, and (3) requiring the destruction of a registered historical structure. (*Ibid.*) On September 4, 2018,

The City sent another letter confirming that it had denied the permit application under SB35. (AR4521-4523.)

Petitioners have no available procedure for administrative appeal. (AR4658-4659 ["[T]he City has not identified any administrative appeal provision triggered by the Application Denial Letter"].) On October 9, 2018, Petitioners filed a claim with the City. (AR4529, 4531-4532.) The City denied the claim on November 26, 2018 (AR4660) and Petitioners commenced this lawsuit on November 28, 2018.

C. SUBSTANTIAL EVIDENCE SUPPORTS THE CITY'S DETERMINATION THAT THE PROJECT WOULD REQUIRE DESTRUCTION OF THE BERKELEY SHELLMOUND, A REGISTERED HISTORIC STRUCTURE

Residential development projects are not eligible for the streamlined, ministerial permitting process under SB 35 if the project requires the demolition of an historic structure. (Gov. Code § 65913.4(a)(7)(C).) The City argues that the Project would require the destruction of underground remnants of the Berkeley Shellmound.

The Berkeley Shellmound was a prehistoric midden created by the Ohlone people who occupied Alameda and Contra Costa Counties before European contact. It stood at least 15 feet high and was located near the mouth of the Strawberry Creek and the San Francisco Bay. (AR12769-12771.) The shellmound was one of many such mounds located around the San Francisco Bay, and it contained cultural artifacts as well as human and animal remains although, as its name implies, it was mostly composed of shellfish shells. (The shellfish of the San Francisco Bay appear to have been a food source for the pre-contact Ohlone.) Today, no remnants of the Berkeley Shellmound remain above ground. Before the site was designated as a protected cultural landmark, the shellmound sat on private land and was used as a source of inexpensive fill material in local paving and construction projects. (AR379.) The City and CVL argue that intact remnants of the Berkeley Shellmound's lowest layers may nonetheless remain

buried on the site. The petitioners argue in response that underground midden remnants are not a "structure" and that excavating the site would not "demolish" those remnants under the plain meaning of those terms. The petitioners also argue that the archaeological evidence before the City is overwhelmingly convincing that no intact remnants of the Shellmound remain on the Project site.

The City may deny a permit under the "historic structure" exception if it has a reasonable basis for concluding that buried midden remains exists on a site. (*See Am. Coatings Assn.*, *supra*, 54 Cal.4th at p.460 [agency factual conclusions require "reasonable basis" when reviewed for abuse of discretion under CCP § 1085].) The fact that the project *site* is designated as a City landmark is not relevant to the statutory "historical structure" exception. The exception is project-specific: it applies only when "the development" would require the demolition of a historic structure on the site. (Gov. Code § 65913.4(a)(7)(C).) This contrasts with other exceptions that turn on the "site" of the project, including exceptions for sites located within, or including, coastal zones, prime farmland, wetlands, very high fire hazard severity zones, hazardous waste sites, delineated earthquake fault zones, special flood hazard zones, regulatory floodways, lands under conservation easement or subject to natural resource protection plans, habitat for protected species, and existing housing stock. (Gov. Code § 65913.4(a)(6)(A)–(K), (a)(7)(A), (a)(7)(B), (a)(7)(D), (a)(10).)

Petitioners argue that, even if remnants of the Berkeley Shellmound exist on the Project site, they do not constitute a "structure" as a matter of law. In common speech, however, a structure is a collection of elements put together by human artifice, such as a building, wall, bridge, or henge. (Black's Law Dict. (11th ed. 2019), p.1721, col.1 [defining "structure" as "1. Any construction, production, or piece of work artificially built up or composed of parts purposefully joined together . . . ."].) Statutes *in pari materia* define the term "structure" along the same lines. The Public Resource Code defines the term "structure" (for purposes of as-yet undesignated state property) as "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." (Pub. Res. Code § 5024(h).) It is not unreasonable for the City to determine that a pre-contact shell midden such as the Berkeley Shellmound is an immovable work built up by human artifice, and that it falls within the meaning of the term "structure."

Petitioners' argument that the Berkeley Shellmound cannot be "demolished" as a matter of law is likewise unavailing. To the degree that the petitioners argue that the Berkeley Shellmound cannot be demolished because it has already been totally leveled, that is a dispute of fact and not one of statutory interpretation. As commonly used, "demolish" means to "tear down" or "raze." (Merriam Webster's Collegiate Dict. (10th ed. 1997) p.307, col.2.) In the context of the buried or ruined remnants of an historic structure, the plain meaning of the term "demolish" includes destructive excavation that would destroy the historical or archeological integrity of the remnants of the structure. A historic structure does not cease to be a historic structure or capable of demolition because it is ruined or buried. That proviso is without a basis in the text of the statute and would exclude many of the world's most beloved archeological treasures, such as Hezekiah's tunnel in Jerusalem, the Roman ruins at Pompeii, the mausoleum of Qin Shi Huang, the cave cities of Cappacdocia, and the tombs in the Valley of Kings. Any reading of a statute protecting historic structures that would exclude such features from protection must be rejected. (*See Cal. Sch. Empls. Assn. v. Governing Board* (1994) 8 Cal.4th 333, 340 ["We need not follow the plain meaning of a statute when to do so would 'frustrate[ ] the manifest purposes of the legislation as a whole or [lead] to absurd results.'"])

Petitioners also argue that Berkeley has landmarked the *site* of the Berkeley Shellmound rather than the remnants of the shellmound itself. This assertion misconstrues the administrative record. The Shellmound is listed in the City's register of Designated Landmarks as an "archeological feature." (AR4842.) The historical designation "does not include any current above ground buildings, railroad tracks, ties[,] gravel, signal gates, barriers or structures" but in

addition to "the site itself" also specifically includes "all items found subsurface, including artifacts from the earliest native habitation, such as but not limited to native tools, ornaments, and human burials." (AR13849, as modified AR13853-13854.) The registration therefore covers not only the site but also underground remnants of the Berkeley Shellmound.

As part of the 2015 Application, Petitioners hired a professional archeologist consultancy to review the site and determine whether it contained intact remnants of the Berkeley Shellmound. (AR327-481; *see* AR7672-7748 [March 2015 application form]; AR7459-7614 [2014 study as submitted].) In 2014, Petitioners' architects dug core samples and trenches in a regular pattern around the Project site and reviewed these and earlier samples to determine whether they contained intact remnants of the shellmound. (*See* AR7459 at AR7496-7498, AR7527-7614.) Although the study located shells and possible prehistoric artifacts on the site, they were lenticular deposits in the same strata with Victorian-era artifacts and animal bones that had been cut with metal tools, which were not in use among the pre-contact Ohlone. The archaeologists opined that these patterns of codeposition demonstrate that the shells on the site are Victorian-era fill, and are not "intact shellmound remnants".

The City's determination that the Project would require the demolition of a historic structure must be held to be valid so long as it is not arbitrary, capricious, or entirely lacking in evidentiary support. (*See supra,* Section I.) This standard is more deferential than the "substantial evidence" standard applied in administrative mandamus or CEQA proceedings. (*Am. Coatings Assn.*, *supra*, 54 Cal.4th at p.460; *see also* CCP § 1094.5(c); Pub. Res. Code §§ 21168, 21168.5.) Courts in traditional mandate cases "may not engage in a comparative analysis of methodologies employed by different experts." (*O.W.L. Found. v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 593; *see also American Coatings Assn. v. S. Coast Air Quality Mgmt. Dist.* (2012) 54 Cal.4th 446, 478 [noting, in a CEQA case, that "[Petitioner] disagrees with the District's expert technical judgments concerning source categories, achievable emissions limits, and appropriate testing protocols. These disagreements do not establish that the District's

regulations were arbitrary, capricious, or entirely lacking in evidentiary support."].) The Court's role is "limited to determining whether the [City] action is arbitrary, capricious, or entirely lacking in evidentiary support." (*O.W.L. Found.*, *supra*, 168 Cal.App.4th at p.593.)

Although the City's conclusion is strongly contradicted by the results of petitioners' 2014 archeological research, it is not entirely without evidentiary support. The City designated two city blocks including the Project site as a historic landmark on November 13, 2001. (AR13853-13854; *see also* AR4842.) The Administrative Record includes a Cultural Resources Inventory ("CRI") prepared in 2002 as part of a public investment and redevelopment project in West Berkeley. (AR12752-13033.) The CRI summarizes archeological studies of prehistoric settlements and structures in West Berkeley, including the Berkeley Shellmound. These studies include a study from the year 2000 by Dr. Pastron, who also performed respondents' 2014 survey, determining that remnants in the 6-to-8 foot layer of one sample, labeled Boring 19, "probably represents a remnant of [the Berkeley Shellmound]." (*See* AR451.) A 1949 survey, based on an earlier 1907 survey, placed the Berkeley Shellmound on the site. (AR12769.)

Even in the face of the strong evidence from the 2014 archeological research, the Court cannot conclude that the City abused its discretion when it found that remnants of the Shellmound exist on the site because that decision is not entirely lacking in evidentiary support. Nor did the City abuse its discretion in finding that the project would require destructive excavation at least 10 feet underground. (*See, e.g.*, AR184 [elevation diagrams showing underground parking garage 11 feet below ground level].)

The Court therefore finds that the City of Berkeley did not abuse its discretion in determining that the Project would require the demolition of an historical structure; for that reason, it was not required to provide a streamlined ministerial approval under SB35.

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SB35 DOES NOT APPLY TO MIXED-USE DEVELOPMENTS

The first floor of the proposed Project is set aside for commercial retail uses.[1] The City argues that the Project does not qualify to be an SB35 ministerial approval project because of the commercial/retail component of the Project, and petitioners take the position that SB35 allows up to one-third of a development's square footage to be used for non-residential usage while still being eligible for streamlined approval.

The only mention of commercial or mixed use development in Government Code section 65913.4 is in subdivision (a)(2). Subdivision (a)(2) provides restrictions as to sites on which a project can be located and still be eligible for SB35 streamlined approval. One of those restrictions is that the site must be "zoned for residential use or residential mixed-use development, or has a general plan designation that allows residential use or a mix of residential and nonresidential uses, with at least two-thirds of the square footage of the development designated for residential use." (Gov. Code § 65913.4(a)(2)(C).) No other section mentions mixed-use developments, and no other section of SB35 addresses the myriad of issues raised and determined at the local level relating to the approval of a commercial or retail development project.

Petitioners argue that the final phrase of the subpart, "with at least two-thirds of the square footage of the development designated for residential use," relates to a proposed project rather than to a site for a proposed project. The Court disagrees with Petitioners' reading of the statute. The Court reads the last phrase of the subsection as a subordinate clause that acts to modify the immediately preceding independent clause that is, it describes a general plan designation with a mixed use provision, limiting the applicable SB35 sites to mixed use sites which require minimum two-thirds residential use by square feet. Another textual clue is that

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[1] The Project is located in a building zone requiring that the ground floor of buildings in the Fourth Street and University Avenue area, including the Project site, be used "only for retail sales, personal/household services, banks, food and alcohol service, lodging, entertainment and assembly uses, gasoline/automobile fuel stations, enclosed auto repair uses, new car dealers, enclosed used car dealers and required access to and lobbies service upper-story uses." (Berkeley Mun. Code § 23E.64.040(E) and subd. (C)(6) [designating the Project site as being encumbered with quoted restrictions].)

SB35 applies only when the project is a "multifamily housing development." (Gov. Code § 65913.4(a)(1).)

The context and structure of the mixed-use zoning provision also indicate that the two-thirds proviso is part of a restriction on "the site" rather than the development project itself. (Gov. Code § 65913.4(a)(2) ["The development is located *on a site* that satisfies all of the following . . ."] [emphasis added]; *cf., e.g.*, § 65913.4(a)(6), (a)(7), (a)(10) [listing other requirements and restrictions on the site of the development project].) When the authors of SB35 wanted to place limitations on the development project itself rather than its site, they expressly described the requirement as one that the "development satisfies" rather than one that the *site* satisfies. (*See, e.g.*, § 65913.4(a)(4) ["The development satisfies both of the following" affordable housing minimums], (a)(5) ["The development . . . is consistent with objective zoning standards, objective subdivision standards, and objective design review standards . . . ."].)

Given the text of SB35 as then in effect, the structure of the statute, and the canon to construe statutes to avoid constitutional infirmities, the Court finds that the requirement of subdivision (a)(2)(C) describes a requirement of the *site* on which the development project is located. A "multifamily housing development" such as the Project is not eligible for streamlined ministerial approval under SB 35 if it contains non-residential uses for which a discretionary permit is otherwise required.

The Petition for Writ of Mandate must be denied on this independent basis in addition to the above described historical structure basis.

III. ORDER

The Petition for writ of mandate is **DENIED**. Counsel for the City shall provide the Court with a proposed judgment of denial of the petition for the Court's signature within 30 days.

Dated: October 21, 2019

Frank Roesch
Judge of the Superior Court

CLERK'S CERTIFICATE OF MAILING

RE: RG18930003 Ruegg & Ellsworth et al vs City of Berkeley et al.,

I certify that the following is true and correct: I am the Clerk of the above-named court and not a party to this cause. I served this **Order,** by placing copies in envelopes addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Oakland, California, following standard court practices.

Dated: 10/21/19

Chad Finke
Executive Officer/Clerk of the Superior Court

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