

June 29, 2021

Chief Justice Tani G. Cantil-Sakauye & Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: Support for Petition for Review
Ruegg & Ellsworth, et al. v. City of Berkeley, et al.
Case No. S269012

Dear Honorable Chief Justice and Honorable Associate Justices:

The National Trust for Historic Preservation supports the Appellant's Petition for Review, as Supreme Court review is necessary to settle a split in authority of what constitutes a "structure" that is created or deepened by the Court of Appeal's holding.

Interests of the National Trust for Historic Preservation

The National Trust is a private nonprofit organization chartered by Congress in 1949 to "facilitate public participation" in the preservation of our nation's heritage and to further the historic preservation policy of the United States. (54 U.S.C. § 312102(a).) With the strong support of our members and supporters nationwide, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. Of particular relevance here, the National Trust has advocated for the preservation of the West Berkeley Shellmound by including it in our 2020 list of "America's 11 Most Endangered Historic Places."¹ The intention of the list is to shine a light on

¹ National Trust for Historic Preservation, *Discover America's 11 Most Endangered Historic Places for 2020* (Sept. 24, 2020),

nationally significant historic places that are at risk of destruction or irreparable damage. The National Trust is not only concerned about the fate of this unique historic site but is also concerned about the continuing threat to future preservation efforts throughout California if the definition of historic “structure” is not resolved.

This Case Raises the Important Unresolved Issue of What Constitutes a Historic “Structure.”

The decision by the California Court of Appeal to limit the definition of “structure” to a “building,” rather than any site that is “arranged in a definite pattern of organization,” *Wilson v. Handley* (2002) 97 Cal.App.4th 1301, 1306,² creates a split in authority that needs to be resolved. In order to prevent demolition of a “historic structure,” SB 35 provides an exception to a ministerial approval process that would otherwise apply to certain housing developments. (Gov. Code § 65913.4(a)(7)(C).) Although SB 35 does not include a specific definition of “structure,” other California statutes with protections against the demolition of historic structures have defined “structure” more broadly than the definition adopted by the Court of Appeal in this case. For example, the State Historical Building Code’s definition of historical structure encompasses “places, locations, or sites” of historical or cultural significance recognized by local or state governments. (Health & Safety Code § 18955.) As the Court of Appeal acknowledged, the West Berkeley Shellmound is included in the California Register of Historical Resources. (*Ruegg & Ellsworth v. City of Berkeley*, 63 Cal.App.5th 277, 287 (2021).) Due to this split, this Court’s review of the issue by granting the petitions in this case will help to provide clarity and consistency to the definition of “structure.”

<https://savingplaces.org/stories/discover-americas-11-most-endangered-historic-places-for-2020#.YNpy8-hKhPY>.

² (Quoting Merriam-Webster’s Collegiate Dict. (10th ed. 2000) p. 1163, col. 2).

The broader definition of structure is consistent with the plain meaning of SB 35. The legislature chose to use the word “structure” rather than “building.” *Black’s Law Dictionary* defines “structure” as “[a]ny construction, production, or piece of work artificially built up.” (*Structure*, Black’s Law Dict. (11th ed. 2019).) Merriam Webster defines it as “something (such as a building) that is constructed” or “something arranged in a definite pattern of organization.” (Merriam-Webster.com, <https://merriam-webster.com/dictionary/structure> [as of June 25, 2021].)” Here, the Ohlone people actively constructed the Shellmound for a variety of residential and religious purposes, and the fact that they built it with organic materials like shells and clay does not make it less *structural*. Nor does the fact that some of its structure has deteriorated over the years make it less “structural” in nature. Using a more limited definition would create a confusing standard.

Accepting the narrower definition put forward by the Court of Appeal in this case would leave historic places that do not fit the definition of a “building” vulnerable to demolition and would undermine the intent of the legislature. Moreover, the Court of Appeal’s Eurocentric definition of “structure” risks threatening culturally significant indigenous sites throughout the state, such as the Shellmound, by leaving them unprotected.³ Sites like this are not only some of the oldest structures in California but they also remain culturally significant to historically marginalized

³ Since the beginning of this lawsuit, the legislature passed AB 831 amending Government Code section 65913.4 to require tribal consultation pursuant to Public Resources Code section 21080.3.1. Tribal consultation is limited to listed tribes over projects in geographic areas with which those tribes are affiliated. Therefore, while this amendment offers some protection to cultural sites, a more inclusive definition of “structure” is still necessary to ensure careful consideration of sites that are culturally or historically significant to tribes and indigenous communities that may not yet be included in the tribal consultation list.

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communities. Maintaining the broader definition would reduce this threat and help provide consistent standards for careful analysis before construction can begin, thereby appropriately protecting historic places.

For the reasons discussed above, we urge the Court to grant the Petition for Review in this case, in order to clarify this definition.

Sincerely,



William C. Mumby

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing *Support for Petition for Review* with the California Supreme Court by using the TrueFiling ECF system on June 29, 2021. I certify that all participants in the case are registered TrueFiling ECF users and that service will be accomplished by the California Supreme Court TrueFiling ECF system.

s/ William C. Mumby

WILLIAM C. MUMBY
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