No. S269012

In the Supreme Court of California

Ruegg & Ellsworth, a California general partnership, and Frank Spenger Company, a California Corporation,

Petitioners, Plaintiffs, and Appellants,

v.

City of Berkeley and City of Berkeley Planning Department,

Defendants and Respondents,

and

Confederated Villages of Lisjan and Confederated Villages of Lisjan, Inc.,

Intervenors and Respondents.

ANSWER TO PETITIONS FOR REVIEW

After a Published Decision of the Court of Appeal,
First Appellate District, Division Two, Case No. A159218,
Reversing a Judgment of the Superior Court of Alameda County,
Case No. RG18930003 (Hon. Frank Roesch)

Jennifer L. Hernandez (SBN 114951)
Daniel R. Golub (SBN 286729)
Emily M. Lieban (SBN 303079)
HOLLAND & KNIGHT LLP
50 California Street, 28th Floor
San Francisco, CA 94111
Tel: 415.743.6900
Fax: 415.743.6910

*Raymond A. Cardozo (SBN 173263)
Brian A. Sutherland (SBN 248486)
REED SMITH LLP
101 Second Street, Suite 1800
San Francisco, CA 94105
Tel: 415.543.8700
Fax: 415.391.8269
rcardozo@reedsmith.com

Attorneys for Ruegg & Ellsworth and Frank Spenger Company

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INTRODUCTION: WHY REVIEW IS NOT WARRANTED AND THIS CASE IS A POOR VEHICLE FOR REVIEW

The petitions for review filed by Berkeley and intervenors raise procedurally forfeited and other issues arising from an opinion that is not only the first published case to address the legislation at issue, but is also an opinion that arose in the brief interval before statutory amendments mooted several of the issues proposed for review. Thus, the petitions not only raise no conflict in the decisional law in need of settling, but they also raise issues that either have been forfeited, are unlikely to recur, or both. And, the petitions seek to perpetuate a continuing violation of the affordable housing law at issue in direct contravention of the Legislature's overriding intent in passing that law to alleviate, as soon as possible, our State's severe affordable housing crisis. There is no reason to deny affordable housing justice further through the delay of yet another round of review of issues that do not meet this Court's criteria for granting review and that are presented through the poor vehicle of procedural forfeiture.

The Legislature enacted SB 35 to create a streamlined, ministerial approval process for developers who apply for a permit to construct affordable housing. The owners of development rights, now Ruegg & Ellsworth and Frank Spenger Company ("the developers") applied for ministerial approval under the new law to construct affordable housing on a concrete parking lot in Berkeley known as "Spenger's Parking Lot."

Berkeley denied the application on the ground that the development would require the demolition of a historic structure. As the court of appeal concluded, however, no evidence shows there is a historic structure on the site. It is a parking lot.

By amending the governing ministerial-approval statute multiple times while this case was pending, the Legislature guaranteed that this case is unique and will remain unique. Accordingly, the court of appeal's opinion does not and could not conflict with any other opinion, and its rulings are unlikely to affect any other case or application for development. This Court need not review legal issues that will never be litigated again, especially in this case, which the court of appeal decided correctly. Thus, review would serve no purpose other than to delay construction of much-needed affordable housing.

The petitions are largely unreviewable in any event. Both Berkeley and intervenors seek to raise new arguments for the first time in *this Court*, which are not only unpreserved but directly contradict their arguments below. In the trial court and in their principal briefs in the court of appeal, Berkeley and intervenors argued that the amendments to the ministerial-approval statute were *legally irrelevant*. In this Court, they make the exact opposite claim, arguing that the court of appeal erred in *failing to apply* amendments to the ministerial-approval statute. Berkeley's and intervenors' new arguments are self-contradictory, nonsensical, and forfeited.

Finally, we note that misstatements of fact pervade the petitions. Although Berkeley and intervenors purport to speak for the Ohlone Indian Tribe, neither one does. The Ohlone Indian Tribe's designated representative was Andrew Galvan, not Berkeley or intervenors. Before the Legislature enacted the ministerial-approval statute, the developers proposed to build an apartment building on the same site and consulted with the Ohlone through its designated representative. The Ohlone did not oppose that earlier construction project, which also entailed excavation of the site, and nothing in the record suggests that they would oppose this one.

Petitioners' repeated assertion that the site is "sacred Ohlone land" not only contradicts the Ohlone's earlier non-opposition but also contradicts the of-record facts that the court of appeal recounted in its opinion. As that opinion notes, what is now the Fourth Street area in West Berkeley was underwater before the first Europeans arrived, nineteenth century development in that area involved excavation and secondary deposits of excavated material from one site to another in that area, and the only thing at the site now is an empty parking lot that, at most, sits above shell fragments secondarily deposited onto the site during the nineteenth century development.

Berkeley's and intervenors' improper attempt to restate the facts in the court of appeal's opinion and invoke the alleged interests of a third-party Native American tribe that is *not* before

the Court and that did *not* oppose construction on the site further demonstrates that these petitions do not merit review.

In short, the petitions present no conflicts in the decisional law, nor important issues likely to recur, the petitions are exceptionally poor vehicles for review because of insurmountable forfeiture problems, and the petitions inequitably seek to prejudice the Court by making assertions about the alleged interests of a third party not before the Court with no record support or basis. This Court should deny review.

STATEMENT OF THE CASE

I. Factual Background

A. Spenger's Parking Lot

Thousands of years ago, inhabitants of land that is now West Berkeley built shellmounds. (Opn./2) These people, known today as the Ohlone, left the shellmounds more than one thousand years ago. (Opn./2; AR/6901) Nothing remains of the West Berkeley Shellmound—a mound that once stood near Spenger's Parking Lot—above ground. (Opn./3) As described in a draft environmental impact report prepared for Berkeley in connection with a 2015 permit application, "by the mid-20th century, 'most of the Shellmound had been systematically demolished by development and related ground disturbance.'" (Opn./3) "A 1950 survey reported that the "original dimensions

and exact limits of the Shellmound could not be determined because most of it had been removed …." (Opn./4)

Ancient maps presented mixed indications as to whether the Shellmound had *ever* been located on Spenger's Parking Lot. (Opn./4) A 2002 "Cultural Resources Inventory" reported that in 1999, Allen Pastron of Archeo-Tec found "no evidence to suggest that remnants of the West Berkeley Shellmound exist" in that area. (Opn./5) In 2000, Pastron conducted testing at the northwest corner of the parking lot and found "silt or silty clay" interspersed with other items. He opined that an underground layer in this section of the parking lot "probably represents a remnant" of the Shellmound, although he found no prehistoric artifacts that were "assuredly" part of the Shellmound. (Opn./5)

"In 2014, Archeo-Tec conducted another investigation of the Spenger's parking lot site, again overseen by Pastron, in consultation with Andrew Galvan, a Native American resource consultant and member of the Ohlone Tribe." (Opn./6) After extensive trenching, Archeo-Tec did not find any "intact shellmound" or "primary shellmound deposits" within the project site. (Opn./6) "The 2014 data led the investigators to conclude that Shellmound materials identified within the parking lot during testing in 1999 and 2000, were in "secondary deposition," not "undisturbed remnants." (Opn./7)

Because of the possibility that shellmound deposits might be found in areas not previously excavated, the draft EIR

recommended mitigation measures that would reduce any impacts to any historical resources to a less-than-significant level. (Opn./8) Galvan, as president of the Board of Directors of Ohlone Indian Tribe, Inc., commented that the draft EIR was "'accurate with respect to the archeological rigor and methodology' to which the site had been subjected and asked that the mitigations be 'vigorously enforced throughout earth working activities.'" (Opn./8-9) Notwithstanding the draft EIR's findings and Galvan's concurrence, the Berkeley Landmark Commission opposed the 2015 application and the project stalled. (Opn./9)

B. The Developers' 2018 Application for Ministerial Approval under SB 35

The State of California has long declared a state interest in ameliorating a "severe shortage in affordable housing" brought about, at least in part, by municipal permitting processes. (Gov. Code, § 65913.)[1] As a matter of law, "the development of a sufficient supply of housing to meet the needs of all Californians is a matter of statewide concern." (§ 65913.9.) In particular, "ensuring access to *affordable housing* is a matter of statewide concern, and not a municipal affair." (Stats. 2017, ch. 366, § 4 (emphasis added).)

To expedite construction of affordable housing, the Legislature enacted SB 35 to streamline housing approvals.

[1] All citations are to the Government Code unless otherwise noted.

(§ 65582.1(p).) SB 35 adds section 65913.4 to the Government Code [Stats. 2017, ch. 366, § 3], which requires cities to provide a "streamlined, ministerial approval process" to an application to develop affordable housing if the development meets certain "objective planning standards" [§ 65913.4(a)]. As relevant here, the ministerial approval process is not available if "[t]he development would require the demolition of a historic structure that was placed on a national, state, or local historic register." (§ 65913.4(a)(7)(C).) This exception ensures that registered historic "structures" are not broken down, leveled, razed, or otherwise demolished. But, the exception does not apply unless the project requires "demolition" of a "historic structure."

In March 2018, petitioners applied for ministerial approval to construct affordable housing under SB 35. (Opn./11) The development would include 260 units of housing, half of which would be reserved for low-income residents, and complied with all of the law's eligibility requirements. (Opn./11; AR/11-23) The development designated 88.8% of its square footage for residential use. (AR/18) The ground floor of the proposed development included commercial uses such as restaurants and retail shops. (AR/15)

In May 2018, project opponents threatened to sue Berkeley if it approved the project. (Opn./11; AR/7439) In June 2018, Berkeley sent the developers a letter stating that the housing development did "not qualify for ministerial approval." (Opn./11;

AR/4304) Berkeley asserted that the development would require demolition of a "historic structure." (Opn./11-12; AR/4309-10) In response, the developers explained that even if the former Shellmound once was a structure, no shellmound or other historic structure currently is present at the site. (AR/3110) Although the development would *not* require demolition of any "structure," the developers reiterated their commitment to provide archaeological and tribal monitoring described in the EIR. (Opn./8-9; AR/3114)

On September 4, 2018, Berkeley issued a letter denying ministerial approval under SB 35. (Opn./12; AR/4521-23) Berkeley began by arguing that SB 35 is unconstitutional as applied to City landmarks. (Opn./12; AR/4521) It added that even if SB 35 were constitutional as applied to the project, the law would not apply because the development would require demolition of a historic structure. (Opn./12; AR/4523)

II. Judicial Proceedings and Legislative Amendments to SB 35

A. The Developers Petition to Compel Compliance with the Ministerial-Approval Statute

The developers filed their verified petition for a writ of mandate and complaint for injunctive and declaratory relief in November 2018. (Opn./12; 1JA/18-48) The petition alleged that Berkeley breached its ministerial duty to issue a permit under Government Code section 65913.4. (1JA/38-43) The petition also

alleged that Berkeley had breached its duty to approve a housing project for low- or moderate-income households under the Housing Accountability Act (HAA). (1JA/43-46) Petitioners sought a writ of mandate compelling Berkeley to issue the permit for which they had applied under SB 35 and attorneys' fees under the HAA. (1JA/47)

The Confederated Villages of Lisjan and the Confederated Villages of Lisjan, Inc. (collectively, "CVL" or "intervenors") moved to intervene. CVL stated that it was a "Native American tribe with over 85 members." (1JA/126 [¶ 2]) CVL was not a recognized tribe under federal or state law. (Opn./13, fn. 7; AR/8773-77, 8935) The trial court allowed CVL to intervene. (1JA/186) The court denied a motion to intervene filed by Californians for Homeownership, Inc. (1JA/301)

B. The Legislature Amends the Statute Multiple Times

The Legislature enacted bills to amend the statute three times between Berkeley's September 4, 2018 denial and the trial court's December 19, 2019 judgment in this case:

On September 27, 2018, the Legislature enacted and the Governor signed SB 765, which clarified that "[i]t is the policy of the state that this section be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, increased housing supply." (Stats. 2018, ch. 840, § 2 [amending statute to include subdivision (*l*),

effective January 1, 2019].) This provision is currently codified at Government Code section 65913.4(n).

On July 31, 2019, the Legislature enacted and the Governor signed AB 101, which clarified the requirement that at least two thirds of the development be designated for residential use by providing that "[a]dditional density, floor area, and units, and any other concession, incentive, or waiver of development standards … shall be included in the square footage calculation." (Stats. 2019, ch. 159, § 8 [amending subdivision (a)(2)(C), effective July 31, 2019].) This provision is currently codified at Government Code section 65913.4(a)(2)(C).

On October 12, 2019, the Legislature enacted and the Governor signed SB 235, which provides that "a development is consistent with the objective planning standards … if there is substantial evidence that would allow a reasonable person to conclude that the development is consistent with the objective planning standards." (Stats. 2019, ch. 844, § 5.3 [amending statute to include subdivision (b)(3), effective January 1, 2020].) This provision is currently codified at Government Code section 65913.4(c)(3).

C. The Trial Court Denies the Petition and the Developers Appeal

The trial court denied the petition on two grounds. It held that: (1) Berkeley's determination that the development would require demolition of a historic structure was not "entirely

lacking" in evidentiary support, and (2) SB 35 does not apply to residential mixed-use developments. (Opn./14; 5JA/1994-97) The developers moved for reconsideration or a new trial on the ground that the above-referenced legislation and accompanying legislative history further clarified that the developers were entitled to a writ compelling Berkeley to grant the permit for development. The trial court denied the motion and the developers timely appealed. (Opn./14)

On appeal, the developers argued that SB 35 as originally enacted, and especially as clarified in multiple subsequent bills, showed that the Legislature did *not* intend for courts to review Berkeley's decision deferentially. (Opn./19-20) In response, Berkeley and CVL argued at length that the Legislature's bills amending the ministerial-approval statute were legally irrelevant because, they argued, the amendments did not apply "retroactively" to Berkeley's decision and did not clarify the Legislature's intent in enacting SB 35. (Berkeley Respondents' Br. 30-36; CVL Respondents' Br. 20-22; see also 5JA/2350-53, 2373-76)

D. While the Developers' Appeal Is Pending, the Legislature Amends the Statute Again and the Parties File Supplemental Briefing

After Berkeley and CVL filed their respondents' briefs in the court of appeal, the Governor signed and approved Assembly Bill 831, which made additional changes to the ministerial-

approval statute. (Stats. 2020, ch. 194 §§ 1.5, 2 (hereafter, "AB 831"); see Opn./29-30 & nn. 16-17) AB 831 created new obligations for developers and local governments that did not exist when the developers submitted their application for ministerial approval or when Berkeley denied it. (*Ibid.*)

AB 831 changed (rather than clarified) the ministerial-approval statute. It amended section 65913.4 to require tribal consultation and provided that a "project shall not be eligible for the streamlined, ministerial process … if … [t]here is a tribal cultural resource that is on a national, state, tribal, or local historic register list located on the site of the project." (AB 831 [§ 65913.4(b)(4)].) The Legislature provided, however, that the relevant "subdivision shall not apply to any project that has been approved under the streamlined, ministerial approval process provided under this section before the effective date of the act adding this subdivision." (AB 831 [§ 65913.4(b)(8)].)

Anticipating that Berkeley or CVL might argue that AB 831 supported Berkeley's decision, the developers sought leave to file supplemental briefing concerning the amendment. The developers argued that AB 831 did not affect the outcome of the appeal and *Berkeley agreed*, expressly conceding that AB 831 was not at issue, did not affect the appeal, and did not apply retroactively. (Opn./32-33) CVL argued that AB 831 was "procedural" and so the court of appeal could apply it for the first

time on appeal or, alternatively, was "substantive" and applied retroactively to all unapproved projects. (CVL Supp. Br. 12-23)

CVL did *not* argue that the court of appeal should determine, in the first instance, whether the developers had complied with AB 831 on the ground that "mandamus must operate in the present." (CVL Pet. 21) To the contrary, CVL continued to argue that the relevant law was the law in effect at the time of Berkeley's permit denial and it conceded that "applying AB 831's consultation procedures to [the application at issue] represents a retroactive application of the statute." (CVL Supp. Br. 10) CVL's claim was that the Legislature intended to change the law retroactively. (CVL Supp. Br. 11) Berkeley made no mandamus-operates-in-the-present arguments either, of course, because Berkeley agreed that AB 831 would not affect the appeal. (Opn./32-33)

E. The Court of Appeal Reverses with Directions to Grant the Petition for Writ of Mandate

The court of appeal concluded that the trial court erred in applying a highly deferential standard of review to Berkeley's decision to deny affordable housing. (Opn./20-24) But it declined to define the proper standard any further because "no evidence in the record" supported Berkeley's determination that the development would require the demolition of a historic structure. (Opn./24) The court reasoned that the term "historic structure" does not have the same meaning as "historical resource,"

"cultural resource," or "site" and that Berkeley and CVL had attempted to elide those differences. (Opn./28-29)

The court of appeal held that while the Shellmound was a historical and cultural resource, "[t]here is no evidence in the record that the Shellmound is now present on the project site in a state that could reasonably be viewed as an existing structure, nor even remnants recognizable as part of a structure." (Opn./31) "There is no evidence in the record of a structure that could be demolished by [the developers'] project." (Opn./32) Berkeley's contrary finding could not be upheld on the record in this case. (Opn./32)

The court of appeal also rejected CVL's argument that AB 831 retroactively invalidated the developers' application. (Opn./32-38) Addressing the only arguments that CVL actually made, the court of appeal reasoned that this Court had already rejected CVL's proposed "procedural/substantive distinction" and that the Legislature did not intend for AB 831 to apply retroactively to projects that should have been approved but were wrongfully denied. (Opn./35-38)

Lastly, as relevant here, the court of appeal held that the ministerial-approval statute is constitutional and does not impermissibly interfere with Berkeley's home-rule authority. (Opn./38-46) The statute "patently addresses a matter of statewide concern." (Opn./40) The Legislature "has repeatedly

emphasized in express findings and declarations that the lack of affordable housing in the state is a crisis and that legislation including [the ministerial-approval statute and Housing Accountability Act] is intended to address that crisis by encouraging and facilitating the construction of housing in general and affordable housing in particular." (Opn./40-41) And there is "a 'direct, substantial connection' between section 65913.4 and the Legislature's purpose of expediting and increasing approvals of affordable housing developments." (Opn./44)

REASONS THIS COURT SHOULD DENY REVIEW

Review of this case is not "necessary" to secure uniformity of decision or settle an important question of law. (Cal. R. Ct. 8.500(b)(1).) This unique case will not be repeated. Berkeley and CVL failed to preserve, and therefore forfeited, their lead argument that AB 831 required the court of appeal to affirm. They fail to identify any genuine conflicts between this case and any other. The court of appeal's decision is correct. Accordingly, review is not warranted here.

I. Because of Legislative Amendments, Most of the Issues in This Case Will Never Be Litigated Again

The version of the statute that the court of appeal construed and applied in this case is no longer in effect; the Legislature amended the statute *four times* between the date of Berkeley's denial and the date of the court of appeal's opinion. As

a result of these amendments, the parties litigated the applicability and meaning of those amendments relating to the standard of judicial review and the issue whether residential mixed-use developments are eligible for ministerial approval, among others.

Those retroactivity issues presumably will never arise again. In this case, for example, the court of appeal declined to decide whether the October 12, 2019 "substantial evidence" amendment (effective Jan. 1, 2020, now codified at § 65913.4(c)(3)) was clarifying or whether it applied retroactively because the court concluded that SB 35, as originally enacted, was incompatible with highly deferential judicial review. (Opn./20-24) In a future case, however, the court will simply apply the amended statutory standard under § 65913.4(c)(3). Similarly, the court's construction of SB 35's original "mixed-use" criterion, as originally enacted, is largely irrelevant in future cases, insofar as subsequent amendments to the statute make crystal clear that residential mixed-use developments are eligible for ministerial approval. (See Opn./56-57)

Moreover, the key issue presented in this case and the one litigated most vigorously below likely will never arise again. Most of the administrative record and briefing addresses the question whether a "historic structure" lies underneath Spenger's Parking Lot. Berkeley and CVL argued that the courts should recognize the existence of a "historic structure" here to protect

tribal cultural resources. That argument was wrong because courts cannot rewrite the statute, among many other reasons, and the court of appeal's opinion rejecting their argument will not affect *future* cases involving tribal cultural resources because the Legislature *can* and *did* rewrite the statute by adding what is now subdivision (b) of § 65913.4.

Similarly, the question whether AB 831 applies retroactively to applications that should have been approved but were instead wrongfully denied almost certainly will not arise again. We are aware of no other case in that procedural posture. Accordingly, the court of appeal's specific retroactivity ruling is not one that will affect a future case.

In sum, because the key issues litigated below are unlikely to arise again, those issues are not important to the development of the law beyond this case and review is not warranted.

II. Berkeley and CVL Forfeited Their Lead Argument in This Court, Which Is Meritless

Berkeley and CVL both assert, as their lead argument, that this Court should grant review because the court of appeal failed to apply the rule that "mandamus must operate in the present." (Berkeley Pet. 15-19; CVL Pet. 21-22) This is the exact opposite of the argument that they made below. (See Opn./56 ["Respondents argue these amendments are inapplicable to the present case because they were adopted and became effective

subsequent to the denial of ministerial approval."]; see also *ante*, 17-19.) Both Berkeley and CVL forfeited their "mandamus-operates-in-the-present" argument not only "by failing to raise it in the Court of Appeal" [*People v. Murphy* (2001) 25 Cal.4th 136, 156; see also *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 458 fn. 3], but even more affirmatively by raising arguments that contradict their current ones. Moreover, Berkeley explicitly conceded that AB 831 had no effect on the outcome of this appeal. (Opn./32-33) Berkeley not only forfeited, but also expressly waived, any argument based on AB 831. Because the parties failed to preserve, forfeited, and/or waived the lead argument they seek to raise in this Court, this case is an inappropriate vehicle for review.

Not surprisingly, Berkeley's and CVL's new argument is meritless in any event—it is so weak that they did not even think of asserting it in the supplemental briefing below. Berkeley and CVL now proceed by assuming the answer to a critical question: Did the Legislature intend for AB 831's new tribal-consultation procedure to apply to permit applications that should have been approved but were wrongfully denied by a municipality? Because the answer to that question is "no," as the court of appeal correctly held in this case (Opn./35-38), the new tribal-consultation procedure does *not* apply to the developers here, as Berkeley should have approved the 2018 application but instead wrongfully denied it. In other words, under the *present* law, the developers are entitled to a petition for writ of mandate because

the *present* law does *not* invalidate applications filed in 2018 on the ground that the applicant didn't follow tribal consultation procedures that did not yet exist.

In *Torres v. City of Montebello* (2015), the principal case on which Berkeley and CVL rely, the court of appeal implicitly concluded that Montebello voters in that case intended for a new competitive-bidding requirement to apply to *any* city contract for waste hauling services, including contracts approved by the city council before the competitive-bidding requirement existed. (234 Cal.App.4th 382, 404.) Whether or not that implicit conclusion was correct, it was understandable because the waste hauling contract at issue appeared to be the tainted result of *quid pro quo* in which a waste hauler made campaign contributions to a council member in exchange for his vote to approve the contract. (See *id.* at 389-390.)

In this case, by contrast, the Legislature plainly did *not* intend for the new tribal consultation provision to apply to each and every case that might be pending in the judicial system because it provided that the relevant "subdivision shall not apply to any project that has been approved under the streamlined, ministerial approval process provided under this section before the effective date of the act adding this subdivision." (AB 831 [§ 65913.4(b)(8)].) Thus, even if the idea that "mandamus of operates in the present" could override this Court's strong presumption against retroactive application of the law (it cannot),

the Legislature made clear in this particular statute that the approval of an SB 35 application submitted before the 2020 amendment does *not* violate the law or public policy.

The core proposition for which cases like *Torres* stand is that "mandamus will not lie to compel the performance of any act which would be void, illegal or contrary to public policy." (*Torres*, 234 Cal.App.4th at p. 403 (quoting and citing cases, quotation marks and brackets omitted).) Because AB 831 conclusively establishes that an approval of an application submitted before 2020 does not violate public policy (even if the applicant did not follow the tribal consultation procedure), the court of appeal's order requiring Berkeley to approve the developers' 2018 application in this case does not and could not violate public policy either. Instead, it accords with the law's presumption against retroactive application and the Legislature's intent to ensure that affordable housing projects that were approved—or that should have been approved but were wrongfully denied—are not retroactively invalidated based on new procedural requirements that did not exist at the time of the developers' submission or Berkeley's wrongful denial.

Ironically, although SB 35 did not have a tribal consultation procedure in 2018, Berkeley and developers *did* consult with the Ohlone Tribe about proposed excavation of the site in connection with an earlier 2015 application submitted before the Legislature enacted the ministerial-approval statute.

As noted, the Ohlone did *not* oppose that project if implemented with proposed mitigation measures and the developers have committed to providing those mitigation measures in connection with this project, even though not required by SB 35. (Opn./8-9, 32) Thus, retroactively invalidating the developers' application to require further consultation would be pointless, wasteful, grossly inequitable, and would violate the Legislature's paramount intent to ensure *swift* approval of affordable housing projects. This posture is another reason why review here is not warranted.

III. Berkeley and CVL Fail to Identify Any Conflicts with the Court of Appeal's Decision, Which Is Correct

In the lower courts, this case turned on a large, fact-intensive administrative record involving numerous geological and archaeological studies of West Berkeley in general and Spenger's Parking Lot in particular. The parties disputed whether there is a "historic structure" on or under Spenger's Parking Lot. That factual dispute is over and the court of appeal correctly and emphatically held that "no evidence" supported Berkeley's denial. (Opn./24, 31, 32) There is no reason for this Court to review the evidentiary record to confirm that there is no historic structure on or under Spenger's Parking Lot.

For the purposes of seeking review, Berkeley and CVL downplay the factual and case-specific issues on which this case turns and instead strain to identify conflicts in the law. As explained below, they fail to identify any.

First, both Berkeley and CVL argue that the court of appeal's opinion here conflicts with decisions holding that a court reviewing a petition for writ of mandate must apply current law. (Berkeley Pet. 15-19; CVL Pet. 21-28) As discussed above, they are incorrect and really just want to re-litigate the court of appeal's conclusion that the Legislature did not intend for AB 831 to apply to applications that should have been approved but were wrongfully denied.

Second, Berkeley and CVL argue that the court of appeal's opinion "deepens" an existing conflict in the law as to when a developer obtains a vested property right. (Berkeley Pet. 19-25; CVL Pet. 28-33) But there is no conflict; this Court's decision in *Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d 785, on which Berkeley and CVL rely, does not stand for the proposition that the Legislature may never create a statutory property right to develop affordable housing. To the contrary, *Avco* held that issuance of a subdivision map or other preliminary approval does not create a vested right to build. (See *City of West Hollywood v. Beverly Towers* (1991) 52 Cal.3d 1184, 1192-93 [construing *Avco*].) In this case, by contrast, the developers had a statutory, ministerial right to build affordable housing under the statute. (Opn./35-36, citing *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 207) There is no conflict; just different facts and different statutes. In any event, the court of appeal's due process reasoning was not

necessary to its decision, because the court held that AB 831 did not apply retroactively. (Opn./32-38)

Third, Berkeley argues that the court of appeal failed properly to apply this Court's four-part test for evaluating a conflict between state law and municipal ordinances. (Berkeley Pet. 25-28) Berkeley is wrong, but even if it were right, an alleged failure to apply a four-part test or some element of that test to unique facts and a new statutes does not create a "conflict" in the law. As Berkeley acknowledges, the court of appeal stated that it was applying this Court's law, and the court of appeal correctly recited that law before applying it to the specific issue here. (Berkeley Pet. 27)

Fourth, CVL argues that the court of appeal's rulings concerning the standard of review conflict with "many appellate decisions." (CVL Pet. 33) CVL identifies no conflict, however, and instead relies on general statements of law in cases not involving a statute enacted for the purpose of limiting local municipalities' discretion to deny permits to build affordable housing. (CVL Pet. 33) Its lengthy factual discussion does not identify conflicts either. The standard of review ultimately made no difference here because the court of appeal agreed with the developers that "no evidence" supported Berkeley's decision. And the standard of review issue under SB 35, as originally enacted, will not arise again because the Legislature amended the statute to specify an explicit standard of review that will govern in all

other cases: "a development is consistent with the objective planning standards … if there is substantial evidence that would allow a reasonable person to conclude that the development is consistent with the objective planning standards." (§ 65913.4(c)(3).)

Fifth, Berkeley and CVL argue that the court of appeal's interpretation of the term "structure" in section 65913.4(a)(7)(C) conflicts with other interpretations of the term "structure" in other statutes. (Berkeley Pet. 28-31; CVL Pet. 40-43) Once again, there is absolutely no conflict in the decisional law on this point. Contrary to Berkeley's misleading argument (Pet. 29), the court of appeal did *not* depart from any other published decision, nor did it hold that West Berkeley Shellmound never was a structure at any time in its history; rather, it held that "[t]here is no evidence in the record that the Shellmound is *now* present on the project site in a state that could reasonably be viewed as an existing structure, nor even remnants recognizable as part of a structure." (Opn./31, italics added) This is because what remains under Spenger's Parking Lot is, at most, fragments of shell and some mammal bone mixed with clay and silt. (Opn./31) Thus, "[t]here is no evidence in the record of a structure that could be demolished by appellant's project." (Opn./32)

IV. The Ministerial-Approval Statute Is Constitutional

The court of appeal correctly held that the ministerial-approval statute is a constitutional exercise of the State's

legislative power. Berkeley and CVL ask the Court to review the statute's constitutionality, but there is no conflict in the law on that question. No other appellate court has reached this precise question, and cases addressing similar questions have decided them consistently and harmoniously with the decision in this case. And, the court of appeal's decision was correct. Accordingly, there is no reason to grant review.

As the court of appeal explained, the Legislature has repeatedly recognized that legislative intervention is necessary to remedy a statewide housing crisis. (Opn./14-17) Without question, the ministerial-approval statute addresses an issue of statewide concern. (Opn./40-42) Berkeley and CVL are left arguing that the statute is not "narrowly tailored" (Berkeley Pet. 28; CVL Pet. 45), but the court of appeal explained that the ministerial-approval statute is narrow in scope, given the number of requirements that a developer must meet under the statute. (Opn./44 & n.23)

The court also noted that the statute does not require a municipality to approve commercial uses that are inconsistent with its objective zoning standards or exempt commercial businesses from permit and licensing requirements. (Opn./58-59) Moreover, because this case is about whether the developers had a ministerial permit to *build* the residential mixed-use affordable housing, it does not present the question whether any particular commercial business should have a license to *operate*. To be sure,

Berkeley may not retaliate against the developers by withholding tenants' licensing or operating permits without reason, but that case is not in front of the Court. In short, there is no reason to review the court of appeal's detailed and well-reasoned opinion.

CONCLUSION

This Court should deny the petitions for review filed by Berkeley and CVL.

DATED: June 16, 2021

Respectfully submitted,

REED SMITH LLP

By /s/ Raymond A. Cardozo
Raymond A. Cardozo
Attorneys for Ruegg & Ellsworth and Frank Spenger Company

WORD COUNT CERTIFICATE

Pursuant to California Rule of Court 8.504(d)(1), I certify that the foregoing ANSWER TO PETITIONS FOR REVIEW contains 5,668 words (not including the cover, the Certificate of Interested Entities or Persons, the tables, the signature block, and this certificate). In preparing this certificate, I have relied on the word count of Microsoft Office Word 2010, the computer program used to prepare the brief.

Executed on June 16, 2021, at Mill Valley, California.

/s/ Brian A. Sutherland
Brian A. Sutherland

PROOF OF SERVICE

Ruegg & Ellsworth, et al. v. City of Berkeley, et al., and Confederated Villages of Lisjan, et al.,
California Supreme Court No. S269012,
First Appellate District, Div. 2, No. A159218,
Alameda County Superior Court No. RG18930003

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, CA 94105. On June 16, 2021, I served the following documents by the method indicated below:

ANSWER TO PETITIONS FOR REVIEW

☒	by causing e-service through TrueFiling to the parties listed below	
Kevin D. Siegel Burke, Williams & Sorensen, LLP 1901 Harrison Street, Suite 900 Oakland, CA 94612		Attorneys for Respondents City of Berkeley and City of Berkeley Planning Department Telephone: (510) 273-8780 Facsimile: (510) 839-9104 Email: ksiegel@bwslaw.com
John Briscoe Lawrence S. Bazel *Peter Prows Kelsey Campbell BRSCOE IVESTER & BAZEL LLP 235 Montgomery Street, Suite 935 San Francisco, CA 94104		Attorneys for Respondents City of Berkeley and City of Berkeley Planning Department Telephone: (415) 402-2700 Facsimile: (415) 398-5630 Email: pprows@briscoelaw.net
Thomas N. Lippe, Esq. Law Offices of Thomas N. Lippe, APC 201 Mission Street, 12th Floor San Francisco, CA 94105		Attorneys for Intervenors and Respondents Confederated Villages of Lisjan and Confederated Villages of Lisjan, Inc. Telephone: (415) 777-5604 Facsimile: (415) 777-5606 Email: lippelaw@sonic.net
Matthew P. Gelfand, Esq. Californians for Homeownership 525 S Virgil Avenue Los Angeles, CA 90020-1403		Attorneys for Amicus Curiae California for Homeownership Telephone: (213) 739-8206 Facsimile: (213) 480-7724 Email: matt@caforhomes.org

Michael G. Colantuono Matthew Thomas Summers Colantuono Highsmith & Whatley PC 420 Sierra College Dr., Suite 140 Grass Valley, CA 95945	Attorneys for Amicus Curiae League of California Cities Tel: 213.542.5700 mcoluantuono@chwlaw.us msummers@chwlaw.us
Courtney Ann Coyle Attorney at Law 1609 Soledad Avenue La Jolla, CA 92037-3817	Attorneys for Amicus Curiae United Auburn Indian Community of Auburn Rancheria Tel: 858.454.8687 courtcoyle@aol.com
Matthew Gordon Adams Sara Dutschke Setshwaelo Kaplan Kirsch & Rockwell LLP 595 Pacific Avenue, 4th Floor San Francisco, CA 94133	Attorneys for Amicus Curiae National Trust for Historic Preservation Tel: 628.209.4151 madams@kaplankirsch.com
☒	by causing the documents listed above to be placed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, 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. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.
Alameda County Superior Court 1221 Oak Street Oakland, CA 94612	Trial Court

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 16, 2021, at Richmond, California.

/s/ Eileen Kroll
Eileen Kroll