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SB 35 Streamlining Upheld Against “Home Rule” Challenge

Senate Bill 35 (Government Code section 65913.4) was enacted in 2017 as part of an effort by the State Legislature to increase housing production. The law compels local agencies, including charter cities, to issue



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qualify for streamlined, ministerial approvals under SB 35, a project is required to comply with several criteria, among them that the development is not located where it would require demolishing "a historic structure" placed on a national, state, or local historic register. (Gov't Code § 65913.4(a)(7)(C).) In *Ruegg*, the City of Berkeley denied a streamlining application on several grounds, including that the controversial, proposed mixed-use development would affect part of the West Berkeley Shellmound, a designated local landmark. The court rejected the City's determination, finding there was no evidence that this (widely-acknowledged) *subsurface* resource reasonably could be viewed as an existing "historic structure" under SB 35. The court also held that the Legislature was not prohibited from addressing through SB 35 the "municipal affair" of local historic preservation. SB 35, the court determined, addresses a matter of statewide concern—the lack of affordable housing—and the streamlining law is reasonably related to resolving that issue and does not unduly interfere with the City's historic preservation authority. On these grounds, the court determined that the project at issue was not subject to a requirement in Berkeley's Landmark Preservation Ordinance that a city commission approve construction in a designated landmark. The court's conclusion rested, in part, on its recognition that "historical preservation is precisely the kind of subjective discretionary land use decision the Legislature sought to prevent local government from using to defeat affordable housing development." In upholding SB 35, the court had little trouble sustaining the direct connection the Legislature drew between subjective local land use decisions and the

statewide affordable housing crisis.

## **Authors**