



Office of the City Attorney

CONSENT CALENDAR

March 12, 2024

To: Honorable Mayor and Members of the City Council

From: Farimah Faiz Brown, City Attorney
Brendan Darrow, Assistant City Attorney

Subject: Acquisition of Real Property Located at 1900 Fourth Street

RECOMMENDATION

Adopt first reading of an Ordinance authorizing the City to acquire the portion of the West Berkeley Shellmound located at 1900 Fourth Street and also authorizing the City to transfer that property to the Sogorea Te Land Trust, thereby returning the land to the Ohlone people.

FISCAL IMPACTS OF RECOMMENDATION

The City would contribute \$1,500,000 from the General Fund. The remaining \$25,500,000 shall be provided by the Sogorea Te' Land Trust for the benefit of the Confederated Villages of Lisjan Nation.

CURRENT SITUATION AND ITS EFFECTS

The Confederated Villages of Lisjan Nation and the Sogorea Te' Land Trust seek to rematriate the portion of the West Berkeley Shellmound located at 1900 Fourth Street. In 2018, the owner of 1900 Fourth Street filed a lawsuit against the City (*Ruegg & Ellsworth v. City of Berkeley*, Alameda County Superior Court Case No. RG18930003). In Closed Session on March 7, 2024, the City Council approved the use of \$1,500,000 to settle the litigation by acquiring the property and transferring it to the Sogorea Te' Land Trust. Notice of Conditional Settlement of that litigation was filed on March 11, 2024.

BACKGROUND

The West Berkeley Shellmound site is one of the most significant and earliest known Ohlone villages on the shores of San Francisco Bay, dating back 5,700 years.¹ It served as a burial and ceremonial ground, as well as a lookout and communications site, with the repository of shells, ritual objects, and artifacts accumulated over thousands of years forming an impressive mound.

¹ According to the 1999 Landmark Application for the site, the age of the West Berkeley Shellmound was determined by radiocarbon dating performed by UC Berkeley geologist B. Lynn Ingram in 1997.

In the late 19th Century and early 20th Century, shellmounds throughout the Bay Area, including the West Berkeley Shellmound, were desecrated. Gold Rush settlers removed Shell material to fertilize farms and line streets. UC Berkeley archeologists removed Native American human remains and associated funerary items, and an estimated 3,400 artifacts from the site in the 1950s. The depth of the bottom of the shellmound is unknown, but the nearby Emeryville shellmound is known to extend at least 8 feet below the current surface.

The area of Fourth Street to the north of the site was redeveloped in the 1980s; redevelopment of 1900 Fourth Street has been contemplated since at least 1999. On February 7, 2000, the Landmarks Preservation Commission considered and granted an application to landmark the area of the West Berkeley Shellmound, including 1900 Fourth Street. On October 17, 2000, the City Council adopted Resolution 60,806-N.S. designating the West Berkeley Shellmound as a City of Berkeley Landmark.

In 2015, the previous property owner proposed a mixed-use project to build housing and retail at 1900 Fourth Street; then in 2018 the developer proposed a different project for streamlined approval. The City denied that permit in light of the existence of the West Berkeley Shellmound on the site. The property owner filed a lawsuit (*Ruegg & Ellsworth v. City of Berkeley*, Alameda County Superior Court Case No RG18 RG18930003) to force the City to issue the permit. The Confederated Villages of Lisjan Nation (“the Tribe”) appeared in the lawsuit as intervenors, and the trial upheld the City’s denial of the permit.

The property owner appealed, and while the appeal was pending, the Legislature amended state law to expressly prohibit the issuance of streamlined permits for sites like 1900 Fourth Street that contain a tribal cultural resource that is listed on a national, tribal, state or local historic register. (Assembly Bill 168, 2020.)

The City’s denial of the 2018 permit was ultimately overturned by the Court of Appeal, and the Supreme Court denied the petitions of the City and the Tribe for review of that decision. The City issued the permit on September 1, 2022.

After the permit was issued in 2022, the property owner did not apply for building permits and instead pursued further litigation by filing a motion for awards of attorney fees, fines, and damages against the City and the Tribe. The City and the Tribe contested these newly raised claims but the City ultimately settled the attorney fees claim for \$1.4M on February 5, 2024. On February 15, 2024, the trial court held that the City acted in good faith, and therefore could only be ordered to pay the minimum fine of \$2.6M into the City’s own Housing Trust Fund. A trial over whether or not the property owner suffered damages was scheduled for April 15, 2024, but has been vacated as result of the filing of a Notice of Conditional Settlement on March 11, 2024.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

Rematriation of the Shellmound site to the Ohlone people does not commit the City to implement any public improvement or to take any action that may result in physical changes in the environment. Under Section 21065 of the California Environmental Quality Act (CEQA) (Pub. Res. Code § 21065) and Section 15378 of the CEQA Guidelines (14 Cal. Code Regs. § 15378), the rematriation is not a “project” as defined in CEQA. By approving this Ordinance and restoring title to the Shellmound site to the Ohlone people, the City has not, and is not, making any commitment to (a) issue a lease, permit, license, certificate, or other entitlement for use, or (b) develop, construct, or improve any facilities or cause any other physical changes in the environment. The rematriation of the Shellmound is further exempt from environmental review under CEQA Guidelines Section 15061, paragraphs (b)(2) and (b)(3), and Sections 15301, 15304, and 15325. No unusual circumstances, within the meaning of CEQA Guidelines Section 15300.2(c), exist, and this Ordinance will not cause a substantial adverse change in the significance of a historical resource, within the meaning of CEQA Guidelines Section 15300.2(e).

RATIONALE FOR RECOMMENDATION

The rematriation of West Berkeley Shellmound site located at 1900 Fourth Street is intended to restore control of that land to the Ohlone people. The acquisition of the property also resolves the *Ruegg & Ellsworth v. City of Berkeley* litigation.

CONTACT PERSON

Farimah Faiz Brown, City Attorney, 510-981-6998

Attachments:

1: Ordinance

ORDINANCE NO XX,XXX-N.S.

ORDINANCE AUTHORIZING ACQUISITION OF REAL PROPERTY LOCATED AT 1900
FOURTH STREET

BE IT ORDAINED, by the City Council of Berkeley, as follows:

Section 1. Purpose and Intent.

The purpose and intent of this Ordinance are to rematriate a portion of the historic West Berkeley Shellmound to the Ohlone people from whom the land was unjustly taken without compensation or consent prior to the founding of the City of Berkeley.

Section 2. Findings.

A. The Ohlone people, indigenous to the region now known as Berkeley, represent an enduring culture with deep connections to the land. The Ohlone had a balanced rather than exploitative relationship with the land and lived in harmony with the natural environment.

B. The Shellmound Site is one of the most significant and earliest known Ohlone settlements on the shores of San Francisco Bay, with a village dating back 5,700 years. It served as a burial and ceremonial ground, as well as a lookout and communications site, with the repository of shells, ritual objects, and artifacts forming an impressive mound.

C. In the late 19th Century and early 20th Century, shellmounds throughout the Bay Area, including the West Berkeley Shellmound, were desecrated. Gold Rush settlers removed Shell material to fertilize farms and line streets. UC Berkeley archeologists removed human burials and an estimated 3,400 artifacts in the 1950s, by which time the leveling of the site was complete.

D. The West Berkeley Shellmound is one of the few remaining shellmound sites that have not been completely destroyed; although it was leveled near the turn of the 20th Century, and UC Berkeley archeologists removed many artifacts and human remains from the site. The material beneath the current grade has not been excavated.

E. To preserve some of what little is left of the Ohlone people in Berkeley, in 2000 the City designated the Shellmound a Landmark and listed it on the California Register of Historical Resources.

F. The Sogorea Te Land Trust desires to rematriate the portion of the West Berkeley Shellmound that can be restored to the control of the Ohlone people.

G. The City Council finds that the rematriation of this, the oldest and one of the largest shellmounds established in the Bay Area, could partially rectify a historic wrong committed by the ancestors of the people of Berkeley against the Ohlone people, while promoting historical and cultural understanding of the broader community.

H. The City has not committed, and nothing in this Ordinance commits the City, to approve any changes in the land use designation, zoning, or uses currently permitted on the West Berkeley Shellmound.

Section 3. Exemption from Environmental Review.

The City Council finds that rematriation of the Shellmound site to the Ohlone people does not commit the City to implement any public improvement or to take any action that may result in physical changes in the environment. Under Section 21065 of the California Environmental Quality Act (CEQA) (Pub. Res. Code § 21065) and Section 15378 of the CEQA Guidelines (14 Cal. Code Regs. § 15378), the rematriation is not a “project” as defined in CEQA. By approving this Ordinance and restoring title to the Shellmound site to the Ohlone people, the City has not, and is not, making any commitment to (a) issue a lease, permit, license, certificate, or other entitlement for use, or (b) develop, construct, or improve any facilities or cause any other physical changes in the environment. The rematriation of the Shellmound is further exempt from environmental review under CEQA Guidelines Section 15061, paragraphs (b)(2) and (b)(3), and Sections 15301, 15304, and 15325.

Section 4. Acquisition and Transfer of Property.

The City Manager is hereby authorized to acquire on behalf of the City of Berkeley, the real property located at 1900 Fourth Street, Berkeley, CA, APNs 057-2101-001-03 and 057-2101-005-00 for the price of \$27,000,000.00, and to execute all contracts and other documents necessary and any other necessary actions to complete the acquisition. The City Manager is also authorized to transfer the aforementioned real property to the Sogorea Te Land Trust and to execute all contracts and other documents necessary to complete the transfer.

Section 5. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King, Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

