

December 31, 2008
(Editorial correction Feb. 2, 2009)

CRITICISM OF DRAFT EIS/EIR (URS Oct. 2008)
BERKELEY/ALBANY FERRY TERMINAL STUDY
AND
PRESENTATION OF WATERFRONT AS
CULTURAL LANDSCAPE ELIGIBLE
FOR NATIONAL REGISTER OF HISTORIC PLACES

Submitted by

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Albany Waterfront Committee
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RE: **Criticisms of the Berkeley/Albany Ferry Terminal Study (Oct 2008) and Presentation of Waterfront as Eligible for National Register of Historic Places**

FROM: Edward C. Moore
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INTRODUCTION

As some of you know, I have repeatedly since 1984 advocated on behalf of a broadly drawn public the defense of a loosely designated class of human interests that are implicated in any physical development at the Waterfront in Albany and Berkeley California.¹ Given the uniquely expressive location and attributes of this artificially created "upland" landfill, I have in the past and will again herein use the word "Aesthetics" as a short-hand expression² for those public interests which I would see protected and enhanced by way of future Waterfront development.

1

My use of the word "Waterfront" herein means the waterfront in Albany *and* Berkeley *in it's unified wholeness* notwithstanding the numerous boundaries that invisibly layer and divide that geographic area for governmental and other purposes.

2

My use of the word "Aesthetics" refers to resources that have cultural, historical, archaeological and/or aesthetic significance protected by State and federal law.

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I take strong issue with your negative findings and consequent superficial study of the foreseeable impacts on the cultural, historical, archeological and aesthetic resources at the Waterfront. I am also addressing my criticisms and arguments to the Albany Waterfront Committee because in an October 29, 2008, letter to that Committee, I took a public position contrary to the findings in this ferry-terminal study on that subject. The Albany Waterfront Committee is lead agency directing a \$600,000 "shared vision" planning study regarding future Albany waterfront development, which is being conducted by Fern Tiger Associates of Oakland California (see *post*, p. 7). It is my belief, based upon reasons sketched in this memorandum, that the Waterfront in Albany and Berkeley, as a unified whole, *is eligible* for listing on the National Register of Historic Places on several grounds. While I am not recommending application be made for any historic preservation listing (see *post*, pp. 4-5), I would have my presentation on this subject made part of the administrative record pertaining to both these public-agency actions.

LEGAL BASIS OF TWO MAJOR CRITICISMS

My two major criticisms of the draft BERKELEY/ALBANY FERRY TERMINAL EIS/EIR STUDY (Oct. 2008, referred to FERRY EIS/EIR herein) are summarized as follows:

I. WATERFRONT ELIGIBILITY FOR NATIONAL REGISTER. The National Historical Preservation Act of 1966, 16 United States Code section 470 et seq., requires that prior to the Federal Transit Administration approving an undertaking such as the ferry terminal under study, the effects on any "district, site, building, structure, or object . . . *eligible for inclusion in the National Register*" shall be taken into account. (16 U.S.C. § 470f, italicized emphasis added.)

Because the FERRY EIS/EIR finds no area potentially affected by the projected ferry terminal meets the eligibility criteria for listing on the National Register of Historic Places (see FERRY EIS/EIR, p. 3-85), the Federal Transit Administration and the Water Emergency Transportation Authority of California sidestep the more

rigorous assessment required by federal regulation for the protection of eligible historic properties (see 36 CFR § 800.1 et seq.) Therefore, if I am correct in my contention that the Waterfront is in fact "eligible for inclusion in the National Register" within meaning of 16 United States Code section 470f, those parts of the FERRY EIS/EIR pertaining to Waterfront Aesthetics must be done over again to comply with federal statute (see, e.g., 49 U.S.C. § 303((c), (d)(2)(A)(i)&(ii)) and regulation in coordination with this federal environmental impact study (EIS), as mandated by law (36 CFR § 800.8).

II. INCREASED VEHICULAR TRAFFIC AS ADVERSELY AFFECTING RECREATION AREA.

In furtherance of a national policy that "special effort should be made to preserve ... public park and recreation lands, [and] wildlife and waterfowl refuges ..." (49 U.S.C. § 303(a)), because this federal ferry-terminal project "requir[es] the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State or local significance ...", it can be approved by the Secretary of Transportation *only if*:

"(1) there is no prudent and feasible alternative to using that land; and

"(2) the project includes *all possible planning* to minimize harm to the park, recreation area, wildlife and waterfowl refuge ... resulting from such use."

(49 U.S.C. § 303((c), (d)(2)(A)(i)&(ii), italicized emphasis added.) A finding the proposed ferry terminal will have a de minimis impact on the parks, recreation areas and/or wildlife or waterfowl refuges at the Waterfront may be made only if it is properly determined that the "*project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge*" (*Id.*, § 303(d)(1)(B)&(3), italicized emphasis added.)

Leaving to others better informed whether or not projected increases in vehicular traffic caused by a ferry terminal will adversely affect the ecology now being restored at the Waterfront incident to planned State Park development, I contend projected traffic increases to and from the ferry-terminal sites, especially on

University Avenue and the frontage road located west of Highways 80/580, will adversely affect current and planned activities, features and attributes of the Waterfront as a whole, especially at the East Shore State Park, the municipal park in Berkeley, and the Berkeley Marina (a public recreational area hosting largely local conveniences). Therefore, if I am correct in my contention, the ferry terminal project cannot proceed absent showing no prudent and feasible alternative site exists (e.g., ferry terminal at Emeryville waterfront), and/or much more extensive planning to minimize the harms (e.g., some means of ferry access other than automobiles).

DETAILED DISCUSSION OF TWO MAJOR CRITICISMS

I. WATERFRONT ELIGIBILITY FOR NATIONAL REGISTER

A. INTRODUCTION

1. Basic Contention: The Waterfront is an oddly shaped but physically unified bay-side landfill that is set apart and isolated from the urban environment to the east by a 10-lane Interstate 80/580 freeway. Having only recently emerged from primordial ooze and mixed waters at a strategic setting directly opposite the Golden Gate, this Waterfront possesses complex symbolic power and local, regional, national, and international cultural and historic significance. Developing under tutelage provided by an extended university community in which the University of California and the Graduate Theological Union are members, this particular Waterfront, a Cultural Landscape, arguably the foremost in California and presently eligible for the National Register, appears as a rough-cut and an as-yet unfinished central jewel, an emerging keystone in a waterfront Crown that will soon encircle the San Francisco Bay and irradiate its environs.

2. Cautionary Clarification: While I contend the Waterfront is eligible on several independent grounds for listing on the National Register of Historic Places and analogous listing(s) in the State of California, *I am not recommending that*

application for any listing be made -- at least not at this time. Formal listing may have consequences that work to detract from the eventual objectification of aesthetic potentials inherent in what *this Waterfront* represents. And issues about whether or not the racetrack will continue operations and for how long are unresolved.

What is important is that people involved over time in public and private planning and design for this Waterfront be more explicitly conversant with and consciously sensitive to the manifold significance that makes *this Waterfront* special and eligible for State and national listings. As future developments will be *collectively* envisioned, designed, constructed, managed, and changed over time, informed conversation would enable the public, private, lay and professional persons who are and will be involved in the *on-going development process* to approach their work and that of others with the knowledge, understanding and respect this slowly emerging building site is due.

3. Terminology and Evaluation Criteria: The Secretary of the Interior's Standards for the Treatment of Historic Properties are designed for application to all types of historic resource included in the National Register of Historic Places, whether buildings, sites, structures, landscapes, districts or objects. (See Nat. Park Service, Guidelines for the Treatment of Cultural Landscapes [Guidelines], Using the Standards + Guidelines.) **The Guidelines define the term Cultural Landscape as "a geographic area, including both cultural and natural resources and the wildlife or domestic animals therein, associated with a historic event, activity, or person or exhibiting other cultural or aesthetic values."**

Eligibility for listing as a Cultural Landscape on the National Register requires satisfying evaluation criteria specified in the Code of Federal Regulations. A proposed landscape must not only be shown as **significant** under the criteria specified, but - importantly - it must also have **integrity**. In relevant part the pertinent federal regulation reads as follows (36 CFR § 60.4):

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"*National Register criteria for evaluation.* The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, [landscapes] and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and

"(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

"(b) that are associated with the lives of persons significant in our past; or

"(c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possesses high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

"(d) that have yielded, or may be likely to yield, information important in prehistory or history.

"*Criteria considerations.* Ordinarily properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years shall not be considered eligible for the National Register. However, such properties will qualify if they fall within the following categories:

"
"(f) A property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; or

"(g) A property achieving significance within the past 50 years if it is of exceptional importance."

4. Current Evaluation Context. Before spelling out reasons for my belief the Waterfront satisfies on several grounds the significance and integrity standards for purposes of National Register eligibility, you should be aware of certain facts and circumstances that have developed in Albany since this ferry-site study began.

(a) In General: While the majority of acreage at the Waterfront is publically owned and controlled by one public entity or another and is subject to

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several public trusts and joint agreements, a single corporate landowner reputedly owns all privately held "upland"³ at the Waterfront. This privately owned real property comprises a substantial part of the Waterfront (i.e., 140 acres more or less), consisting of adjoining parcels the whole of which is bounded by the freeway to the east and the San Francisco Bay to the west. This privately owned upland consists of (a) tide marsh enclosing a prominent rock outcropping, which is one of two "cerritos" that defined the boundary of the Rancho San Antonio, that was sold by heirs of the original 1820 Spanish colonial grantee; and (b) former tideland and submerged land sold out of the public domain into private ownership by the State of California, subsequently diked and filled with municipal refuse beginning in the 1940's or 1950's. Since about 1942 the privately owned real property has been used to house and operate an equestrian racetrack known as Golden Gate Fields. This real property together with racetrack buildings and operations *straddles the municipal boundary* between the Cities of Albany and Berkeley. In other words, part of the racetrack property lies in Albany and part in Berkeley. In the face of long-standing and widespread public dissatisfaction with how the waterfront in Albany is utilized and how a succession of corporate landowners repeatedly propound commercialized shopping-malls, office and residential development a la the waterfront in neighboring Emeryville, the City of Albany earlier this year embarked on a \$600,000 "planning study" to discern *from Albany residents* a Shared Vision for future development *of the Albany waterfront*. Fern Tiger Associates of Oakland, California, was hired to conduct the study and articulate the Shared Vision, which is scheduled for completion in November 2009.

(b) Racetrack: One critical aspect of the Shared Vision planning study is that citizens of Albany will be asked to imagine Golden Gate Fields racetrack relocated elsewhere with the clubhouse, viewing stands, track and ancillary buildings torn down and no longer existing when envisioning a future development for the Albany waterfront. *This presupposition is no idle fantasy.*

3

Upland is land *above* the mean (average) highwater mark, thus being distinguished from lower-laying tideland and submerged land.

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As a local resident since 1979, I can attest to widely shared doubts that the racetrack is the best use for the Waterfront, especially since the people of California spent tens of millions of dollars in or about 1998 to purchase for the East Shore State Park all the privately owned Waterfront *in Berkeley* south of racetrack operations. While the current land use as a racetrack is consistent with zoning regulation in both Albany and Berkeley, and racetrack operations are reputedly profitable, the corporate owner and/or it's parent corporation are reportedly bankrupt and the privately owned Waterfront real property may soon again be up for sale (see S. F. Chronicle, Dec. 19, 2008, pp. B1, B9). Conceivably a new owner may have very different ideas for land use at the Waterfront, more in tune with it's status as a world-class but still-emerging natural and cultural "re-creation" area. Further, supposing my contentions about Waterfront Aesthetics are substantiated with official findings at some point and locally supported, and further supposing the community elects to develop the Waterfront publically and privately as an "historic district," but the private landowner wants to persist in racetrack operations, I am informed⁴ and believe that land use as a racetrack might lawfully be curtailed by adopting a specific "historic district" plan for Waterfront development in Albany and Berkeley that requires amortization of the owner's investment over a period of years followed by cessation of racetrack operations. While this is a complicated subject legally, politically and as a practical matter, the important point for purposes of this FERRY EIS/EIR study is that it is reasonable, timely and even publicly prudent to conduct a planning study that imaginatively envisions future waterfront development as if the racetrack has been effectively relocated and no longer exists at this Cultural Landscape.

4

See Manaster & Selmi, California Environmental Law and Land Use Practice (Lexis Nexis 2008), volume 5, Historic Preservation, pages 71-5 to 71-35 (explaining recent evolution of American historic preservation law, and circumstances allowing local government to use police power to regulate land use of private property for historic preservation purposes without that regulation constituting a "taking" of private property requiring payment of just compensation under State and federal Constitutions, and the leading Supreme Court case on this subject, *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed.2d 631, and related judicial decisions of the State of California).

B. SIGNIFICANCE OF WATERFRONT IN AMERICAN ARCHEOLOGY, CULTURE AND/OR HISTORY, AND POTENTIALLY IN AMERICAN ARCHITECTURE AND ENGINEERING.

1. **Introduction.** If any *one* of several criteria (see *ante*, p. 6 for text) are satisfied, *the significance* needed with regard to American history, architecture, archeology, engineering and/or culture is “present” for purposes of eligibility for listing on the National Register. Specifically, I contend the Waterfront as a whole is emergent and significant enough *currently* to merit listing under the subject of American history and/or American culture. And while a good argument can be made for archeology too (see *post*, p. 17), that significance is almost certainly too subtle for current purposes. Conceivably the Waterfront may one day also merit listing under the American architecture and/or engineering subject areas of significance, depending upon the affectional creativeness of planners, architects, engineers, owner(s) and builders in further developing and enhancing the Waterfront as a central jewel in a crowning bay-side landscape long meant to sustainably inspire our peoples’ general health and welfare.

2. **Criterion (c): “Possessing high artistic values.”** Understanding the significance of one criterion, namely, that the Waterfront “**possess high artistic values**” (36 CFR § 60.4, Criterion (c), quoted *ante*, p. 6), seems to me the surest way the “present” significance of each met criterion can best be seen and appreciated for each of the different subject areas of significance (e.g., culture and/or history). If indeed the Waterfront possesses the high-artistic values claimed for it, that seen there is not unlike an optical aid or device, a map or keystone *by or through which* the higher and/or deeper cultural, historical and/or archeological significance becomes a participatory discernment. The problem, of course, for a Doctors Commons like the Waterfront, is getting the darn thing into focus in such a way that each looker can become with practice a reliable seer.

(a) Meaning. An initial question is what does Criterion (c) mean with regard to a resource needing to “possess high artistic values” to qualify for the National Register? I have no definitive answer. Grammatically, Criterion (c)

refers to plural values rather than some single value, and to values "possessed" by the resource itself, not by an artist associated with it's creation. Lawyerly intuition in this university community tells me the meaning of "high" in "high artistic values" connotes many of the same meanings of "high" in higher education, learning, criticism and law. And being expressly limited to "artistic" values, the focus of this criterion on a scale of values is presumably toward those found in the social sciences and humanities and even fine arts, as contrasted with metrically "high values" in almost any form.

(b) How Waterfront "Possesses" Value? The Waterfront possesses artistic values not in the sense of ownership or domination, but because of the combined effects of our cultural heritages and the Waterfront's strategic location and attributes of form.

What is so interesting is that unlike a profound composition by an artistic genius, no human being is composing the landscapes seen at the Waterfront. Apart from a few (albeit important) decisions about siting and elevations, little if anything has yet been put into place with an intention to effect or affect the visual images seen from there. The natural setting, our California culture (material and incorporeal) and the local atmosphere creates scenery with the semblance of fine landscape paintings. While naturalists will have at times a different perspective, for me the ground and it's keeping recedes into a perceptual background when walking about out there. It is strategic location and relative isolation *and quiet* of the Waterfront, dynamically contrasted with visual images of the ever-present, high-rpm energy and movement of a 10-lane freeway, and the distant, complex, multi-dimensional and interconnected (yet again, largely silent) urban environments, softened by the underlying natural presence of Mt. Tamalpais and Angel Island and the big skies and waters at the Golden Gate, that makes for presentational success in opening and reorienting the recreating observer.

The Waterfront's possession of artistic value being based on things other than ownership or domination, this form of possession is vulnerable to loss if the aesthetic values reflected there are, for example, not understood or appreciated;

or taken for granted; or being positively misunderstood, are ignored, marginalized or denied; or if their vehicle of expression is materially manipulated in some inartistic way.

(c) What Are the Waterfront's "high artistic values." What follows is a representative list and brief description of "high artistic values" possessed by the Waterfront, presented in a descending order of appreciation. Others may well name and describe these or other high-artistic values there "present" differently.

(i) Holism. Some places possess the inward unity of ideal and appearance characteristic of profound works of art. The Waterfront is just such a place, in my opinion. Such places are universally credited with a capacity to convey experiences of holistic unity. Such experiences effect a synthesis that discloses (i.e., opens up and exposes to view) for the participant the higher or deeper aspects of reality that otherwise may have only been heard or read about, believed perhaps in good faith alone. This power to disclose, through personal experience of a semipermeable envelopment in a reality with responsive heights and depths, is *the highest* artistic value possessed by Golden Gate landscapes seen at the Waterfront. At times and depending upon atmospheric pressures, opaque egoic armor with which one is normally clothed can simply fall away on their own accord, revealing a diaphanous (i.e., thinly veiled, transparent) participation in a world of holistic unity, theretofore unbeknownst experientially.

(ii) Multiversity Symbol. A place's capacity to convey experiences of holistic unity relies in part upon symbols that unite meanings found at the place with meanings known to the observer. While not everyone may yet be moved to a moment or two of holistic unity, most everyone finds some powerfully meaningful symbol at the Waterfront. Beautifully displayed is a natural setting with anciently longed-for analogues that only very recently became overlaid with a multiversity of cultural symbol -- historical, cultural, aesthetic, archeological, architectural and engineering. In this regard, a veritable Treasure Trove of California is hidden in

plain sight.⁵ The depth and richness of that rather effortlessly seen there, the unity of the ideal in its appearances, is *no doubt* a major reason why this place is named for the philosopher George Berkeley (1685-1753), former Anglican Bishop of Cloyne, Ireland; and why the College of California; and the original and still-main campus of the University of California; and California's School for the Deaf, Speechless and Blind; and the Graduate Theological Union; and the California College of Arts and Crafts; and the Wright Institute; and Berkeley City College (formerly Vista College); and Mills College; and other local educational institutions, are sited hereabouts. "A place has no feelings apart from human experience there. But a place is a location of experience. It evokes and organizes memories, images, feelings, sentiments, meanings, and the work of imagination. The feelings of a place are indeed the mental projections of individuals, but *they come from collective experience and they do not happen anywhere else. They belong to the place.*"⁶ If the reader struggles to find a meaningful symbol, try looking at the Waterfront as a threshold for a Golden Gate with a narrow Pacific view to the East from the western edge of the West. To my mind this situated actuality is very high art indeed. A host of other symbols are there too, each more or less evident depending upon sharpness of vision and whatever the attentive recreator brings to play.

(iii) Memory Device. Assuming notions of "holistic unity" are too "far out" Berkeleyan for the reader, and the symbols that excite your personality type are best understood metrically and not through the social sciences or liberal arts, that the Waterfront works as a mnemonic (i.e., a memory device) is one high-artistic value that an engineer or builder in this locale might especially appreciate.

5

A Legal Aside: If we continue to just grab at the Treasure, we will increasingly possess what we grasp not as owners, but collectively as thieves. One still has to pay the price to buy the field to credibly believe, "the Treasure is Mine and belongs to me." In this latter sense, the Gold Rush in California remains a renewable resource.

6

E.V. Walter, *Placeways, A Theory of the Human Environment* (Univ. of North Carolina Press 1988), page 21, italicized emphasis added (refuting application to a place of what logicians call the "pathetic fallacy," i.e., a mental error that projects feelings onto a thing, a relationship, or some "external" state of affairs).

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The modern world in its positive aspects is seen from there. The easily remembered images of modernity can work to help organize knowledge and serve as a reminder of how it all does and does not fit together well. At a time and place when there is so very much to know and too many distractions, the big pictures become easily lost or distorted not only by students. As a "memory device" may be the best lens through which to view the significance of the Waterfront for National Register purposes, thus working to instill more widely shared appreciations of the height, depth, simultaneity and congruence of that present there.

(iv) Local Ecological Cure: With the East Shore State Park buying into the Waterfront, efforts are being made by the East Bay Regional Parks to manage and develop the State Park site to restore ecological health and vibrancy to the Waterfront. Such efforts befit the East Bay especially, as well as the Bay Area generally as home to some of America's foremost ecological and environmental consciences and voices. Did not the Sierra Club, the Bay Conservation and Development Commission and the Green Revolution begin in Berkeley? So too, recycling, Urban Ore and Green business development? How about hopes for an Ecotopia? While I suspect that for decades successful Waterfront ecological restoration will give little more than a semblance of health, appearances of that kind are critically important for their psychological effects in reassuring the public that things are getting better environmentally, not to mention inspiring the hopes and aspiration of each new generation of higher learners. Current efforts at the Waterfront to create and preserve habitat for the burrowing owl, to restore the wetlands, to root eel grass, and to effectively design and plant subsurface habitats to serve as nurseries of live food for young salmon as they prepare for their Pacific migration, will yield long-term benefits of high aesthetic value that needs recognition as such.

3. Criterion (a): "Associated With Events That Have Made Significant Contribution to Broad Patterns of Our History." That the Waterfront is "associated" with a host of rather world-shaking events, thus making "present" the significance of Criterion (a) (36 CFR § 60.4, quoted *ante*, p. 6) with regard to history *and* culture, seems obvious. That drafters of the FERRY EIS/EIR

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concluded otherwise is not easy to understand other than as a developmental handicap, or as a prejudicial bias common enough these days.

(a) **Shortcomings of FERRY EIS/EIR Study.** A review of Table ES-2 at pages ES 23-25 of the executive summary, which summarizes the foreseen environmental impacts to "Aesthetics and Visual Resources" and "Cultural Resources," and of parts of the study itself describing the potentially affected areas (pp. 3-56 to 3-79) and assessing the impacts (pp. 4-40 to 4-53), reveals far too much effort given to naysaying any archeological significance, and no where near enough understanding and effort being given to the Waterfront's historical, cultural and aesthetic significance. For example:

- ▶ The ferry-terminal study seems rather generic, as if the Waterfront has the same Aesthetic importance as sites in Alameda, Vallejo, Tiburon or anywhere else on the San Francisco Bay. The meaning of "aesthetics" in the FERRY EIS/EIR was left undefined in the description of Visual and Aesthetic Resources. The word seemingly is used as a limp synonym for "visual" (§ 3.5, pp. 3-56 to 3-58), presumably to make it appear to a superficial reader that all bases are covered regarding the California Environmental Quality Act.⁷ Descriptions of the alternative ferry-terminal sites (*ibid*), and the accompanying color photographs (figures 3-12 to 3-18), point out the masts of boats, the low-lying industrial buildings, the dark boulders forming the riprap, the slender utility poles, the racetrack and it's "vast parking" areas, and an Albany shoreline defined by riprap, without meaningful mention of the Golden Gate view or the symbolically strategic centrality of that location.

- ▶ Apart from the various official record searches (which concedely do not name the Waterfront as an historical or cultural resource), it seems the

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Public Resources Code, section 21084.1, and the California Code of Regulations, title 14, section 15064.5, requires study and mitigation for projected physical changes to an environment with significant "aesthetics."

site's history was substantially ignored and the term "cultural" used as a synonym for "archeological." That, although not listed, the Waterfront might *be eligible* for the National Register of Historic Places seems not to have occurred to persons conducting the ferry-terminal study. This does not surprise me given that two earlier Program Environmental Impact Reports touching the Waterfront (i.e., Berkeley 1986, pp. 195-196, and Albany 1989, pp. 509-510) erroneously gave the subject short shrift too. (See Moore Letter to Albany Waterfront Comm., Oct. 29, 2008, pp. 1-2 and appended two-page copies of earlier CEQA "findings.")

- ▶ While the Berkeley Master Plan's Waterfront Plan (1986), and the Waterfront Specific Plan (c. 1986) may be badly out of date (see paragraph following quoted goals, *post*, p. 16), these documents set forth land-use regulation for the Berkeley waterfront apart from the Marina. *The FERRY EIS/EIR, in setting forth the Regulatory Framework governing review and analysis of land use in the study area, inadvertently omits at page 3-26 to state the five goals of the Waterfront Master Plan.* Those goals are:

"GOALS FOR THE WATERFRONT:

- "1. Establish the Waterfront as an area primarily for recreational, open space, and environmental uses, with preservation and enhancement of beaches, marshes, and other natural habitats.
- "2. Develop the Waterfront as part of a continuous East Bay shoreline open space system.
- "3. Provide for an appropriate amount and type of private development, to make the Waterfront part of Berkeley's vibrant urban community, attractive to and usable by Berkeleyans, neighboring Bay Area residents and other visitors.
- "4. In all types of development, meet the needs of unemployed and underemployed Berkeley residents, in both construction and permanent jobs.

"5. Establish uses and activities that reflect and enhance the unique character of the Waterfront and foster the community's relationship with the shoreline." (Berkeley Waterfront Plan: Amendment to the City's Master Plan (adopted Oct. 7, 1986), p. 4.)

The above-quoted Berkeley Waterfront Plan established policies in 1986 for the protection, enhancement and development of the *then* privately owned 170-acre area bounded by Interstate 80 on the east, the Berkeley Marina on the west, and the Albany and Emeryville city limits on the north and south. About 13 years later, the East Shore State Park acquired all privately owned upland south of racetrack operations in Berkeley, thus making the hotel and other private developments anticipated for the North Basin Strip highly unlikely. And within the past several months, a complex of soccer fields on public land adjacent to the racetrack in an area covered by the Berkeley Waterfront Plan has been dedicated that reputedly will provide much needed fields of play for many thousands of young people.

The long and short of this point is the existing land-use goals above quoted and omitted on p. 3-26 of your study, which govern that part of the Waterfront that is most vulnerable to disturbance by new vehicular traffic accessing a ferry terminal, have not been used in your study.

(b) Events With Which Waterfront is Associated that Have Made Significant Contributions to the Broad Patterns of Our History. How far back must I go? I hardly know where to begin. Let me give it another try:

(i) Recent State of Nature. A most significant event this Cultural Landscape is associated with is the very lateness of Western Civilization taking up habitation here. That part of California laying within New Albion (1579) and the Old Dominion (1609) (see *post*, pp. 17-21) was a bountifully rich and unspoiled geography in a state of nature. Human life may have been short by modern-day standards, but life here was pacific, not brutal. Pace of change was

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geologic, experienced in each generation as unchangingly cyclical (not linear or progressive or culturally violent). A near-perfect climate and melted snow in river and spring; fertile soils never having felt the bite of a plow; coastal forests composed of beautifully straight and tall 2,000-year-old trees; oak-covered hills and wildlife in estuaries, woods, fields and rivers; and yet, for all the abundance of food and material resources for at least the preceding 2,500 years, sparsely populated as such things go,⁸ with gold nuggets still in the beds of water courses and poking out of the ground in clumps. Little has it been realized until recently that Nature Herself was constantly groomed, tended and harvested by local peoples of a pacific temperament. Shields and other defensive armor were unknown; male clothing donned to dance and sing a deeper union with all that is. *This very recent actuality is no small local event historically or culturally given the various heritages from which most non-native Californians emerge!*

Demise of the primeval existence hereabouts is so very recent the resonant quality of it's presence can still be felt. This presence is visible at times from the Bulb at the Waterfront in Albany, especially (for me) at sunset and twilight in October, notwithstanding cultural overlays on the natural scene. This presence, a gently haunting one of primeval participation in being human, might well imply, as suggested above (*ante*, p. 9), an "archaeological" significance for the Waterfront and any local ecological cure developing there (see *ante*, p.13), but for a modern emphasis on "objective" knowledge of "material" remains, as contrasted with an aboriginal spirituality known to that discipline and this place.

(ii) New Albion and Virginia as Fealty Overlay. In late May 1579, English Sea Captain and General Francis Drake (later Sir Francis, referred to as Drake herein) made landfall on the other side of Mt. Tamalpais. He surely had

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The geographic area now known as California was the most densely populated area of America north of Mexico. With an indigenous population of about 300,000 people living in "a dense network of groups, large and small, speaking more than sixty languages, occupying about 256,000 square miles of varied terrain," the population density is said to have averaged about one person per two square miles, a higher figure than average for North America five centuries ago. (See Fagan, *Before California - An Archaeologist Looks at Our Earliest Inhabitants* (AltaMira Press 2004), p. 4.)

heard tell of California. He and his companions spent six weeks hereabouts, reconditioning their treasure-laden ship in preparing to cross the Pacific in a first English circumnavigation of the world. I am informed and believe his Anglican Chaplain presided at the first Eucharist celebrated on the North American continent using the Book of Common Prayer. I am further informed and believe Drake and his companions journeyed inland for reconnaissance and other purposes. He and others in that company of Europeans were world-wise and sophisticated enough even back then to appreciate two obvious things: the beholding of a very richly endowed and sparsely populated land with near-perfect climate in an unspoiled state of nature; and a naked, pacific innocence of the human inhabitants.

Cutting an involved explanation short, technically, as a legal matter, it appears Drake solemnly accepted "livery of seisin," that is, delivery of possession⁹ to him of New Albion California (*Albion* is an old Latin name for Britain) on behalf of his Queen Elizabeth I. Appropriate expressions of union, fidelity and homage, communicated by ceremony, oaths, ritual and symbolic gestures -- not necessarily misunderstood by either party -- were surely treated at the big meet between these peoples in June 1579. For a late feudal monarchy such as Tudor England, this livery of seisin, the acceptance of "possession" of a New Albion from the California Americans, had a legal effect of obligating the English Crown, in good faith, *as tenant in possession*, to aid and defend the Grantor (the Californians) should the need arise. *This event too (a seriously misunderstood event) is no small local matter, historically or culturally.*

Falty given in exchange for New Albion California appears to have been ratified by the English Crown and respected internationally for 200 years and more. No doubt, as a practical matter, speculations and uncertainty among European Heads of State about how California, a reputed golden island with pearly gates to its southeast, plays into long-anticipated hopes for a terrestrial Return and Inheritance, coupled with geographic isolation, made that feudal burden and the respect it was due easy for many to bear in a turbulent age of European growth

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Legal possession, but not habitation or ownership.

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and development. With hindsight it is clear the English never meant to take up habitation here. Rather, the English Crown appears to have in good faith undertaken to preserve Californians in their G-d-given natural wealth and innocence by claiming a feudal status of tenant in possession of New Albion, entitled to a tenant's legal rights and privileges against trespass to the estate, as newly developing principles of international law were being forged for social intercourse with a New World. European Heads of State would all have then trusted that G-d's will for California would be made plain in due course.

While much regarding the foregoing can be inferred from early English charters,¹⁰ the critical point is the feudal undertaking to defend the superior by whom tenancy is acquired in good faith. To strengthen the claim to a feudal tenancy and thereby bolster the security of the Californians, the colony of Virginia was extended to New Albion and California north of Monterey.¹¹ However -- and this is very important -- the English Adventurers and Planters were explicitly

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As early as 1584 (four years after Drake's return to England), in a Charter given Sir Walter Raleigh, Queen Elizabeth I granted a defensible 200 league (i.e., 600 mile) buffer around any New World habitation begun by Raleigh or his assigns. (Charter to Sir Walter Raleigh - 1584, in Poore, *The Federal and State Constitutions Colonial Charters and Other Organic Laws of the United States* (2d ed. Burt Franklin 1972), Pt. II, pp. 1379, 1380.)

After a Secret Treaty between the English, Dutch and Spanish in 1609, which created ground rules for subdividing the New World into spheres of European influence, English King James I in 1609 expanded Virginia from a 100-mile-deep New World grant of habitation into a swath of land 200-miles north *and* 200-miles south of Point Comfort Virginia, "lying from the Sea Coast of the Precinct aforesaid, *up into the Land throughout from Sea to Sea, West and Northwest[.]*" (The Second Charter of Virginia, in Poore, *op. cit. supra*, p.1897.) And in 1663 the grant of Carolina had the effect of fixing Virginia's southern boundary at 36 degrees and 30 minutes north latitude (Charter of Carolina - 1663, in Poore, *op. cit. supra*, p. 1383), which was the latitude that had been published for Monterey Bay California.

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I am aware King James I revoked the Virginia Charter in about 1625. I am also aware that as warfare and relations between European colonial powers unfolded during the 17th and 18th Centuries, at some point the western boundary of the English colony Virginia was stopped at the Mississippi River. These events would not necessarily have impacted the English "possession" of New Albion, nor any "comity of nations" extended to California. Just as today, varying combinations of facts and circumstances and more-or-less reliable intelligence appears to have worked to engender a sacrosanct quality to the geography depicted on maps as the golden Island of California on the western edge of the World.

required to begin their New World habitations of Virginia on the east coast of America. Thus, it was sure to be many lifetimes before the Peace treated at New Albion California would be disturbed by any European obeying the rules. In actual fact, it was not until after the Battle of Lexington and Concord in April 1775, at which a "shot heard around the World" (Emerson) was fired by British soldiers on American minutemen patriots, and Virginia's subsequent Declaration of Independence from England (July 1776), creating a republic of largely Anglo-American citizenry rather than subjects of the royal English Crown, that the Kingdom of Spain *first settled* in any part of the former "Old Dominion" in California, moving north of Monterey (Spanish settled 1770), to find and found what has become San Francisco (settled Sept. 1776) and the San Francisco Bay Area in New Albion.

The Waterfront in Berkeley and Albany is associated with these goings on across the bay at New Albion, as contributing to the broad patterns of our American history and culture, for three of many reasons:

First The Waterfront is coterminous with the Golden Gate National Recreation Area, which quietly enshrines New Albion. Nothing but air and light and water between here and there (apart from the invisible boundaries between cities and counties, and legislative and judicial districts, for example).

Second Landscape seen at the Waterfront, coupled with homonymous naming of places and things seen (e.g., university; theological union; Richmond, capitol of Virginia; Albany, capitol of New Amsterdam and New York; San Francisco (Saint Francis); millstone grit of Emeryville; Sir Francis Drake Boulevard; Delaware and Virginia Streets; Angel Island; Treasure Island; Buena Vista; Jacob's Landing; the Golden Gate and it's "re-creation" area; etc.), and mental associations thus triggered while recreating (e.g., peace and quiet; safe harbor and arrival; presence and exhilarating openness; a gold rush; local influence of the Delaware, the Dutch and Virginia; transcontinental railroads; a descent and nearness of Heaven, Gold Mountain and a terrestrial paradise, a Promised Land; the unity of that known as G-d -- *an endless succession in a*

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university community with perpetual needs for insight), can assist people seeking higher learning in reorienting themselves, a seeming precondition for higher levels of discernment. Perhaps more than a memory device (see *ante*, p.12), Waterfront vistas can operate like a world map, an incorporeal-orientation map; or, for the more metaphysically minded, a crystal-clear and bona-fide keystone. Map and keystone are not just figments of my imagination, but are words used as metaphorical characterizations of a complex, multifaceted and dynamic unity, a present reality at this Cultural Landscape. Assuming our ravenously short-sighted and selfishly egocentric economic practices of the 19th and 20th Centuries will be successfully transformed in the 21st Century largely by the university educated creating technologies enabling sustainable lifestyles, thus sidestepping economic and ecological exhaustion and collapse of the world, I predict a time may yet come when the Pacific Union between the California Americans and the English Europeans treated at New Albion California in 1579 will again be shared in celebration.

Third One great compromise in American history was Virginia ceding it's western land claims to a newly constituted United States in 1784. The first act of legislation by the First Congress of the United States created a federal public domain consisting of western-land claims ceded by the new American States to the federal union. Over time western lands were divided into territories and new States, surveyed into townships six miles square, consisting of 36 one-square mile sections, and sold into private ownership. When California entered the Union in 1850, lands laying below the mean high water mark of the San Francisco Bay became by operation of law public domain subjected to a sovereign public trust meant to benefit the people of California in perpetuity. The meets and bounds by which tideland and submerged-land lots in this public domain are defined and upon which "upland" at the Waterfront was subsequently constructed, are located by reference to the Mt. Diablo Baseline that traverses the Waterfront near where Albany is separated from Berkeley. The public domain at this Cultural Landscape was once the western edge of the Old Dominion at this latitude, *and before that of* New Albion California laying to the east and north of an as-yet unknown and undiscovered Golden Gate, 197 years before the Spanish settled the Bay Area.

Hispanic Americans and Roman Catholics¹² have very different stories about how California came to be for them. So too do many other people. So what? All such stories share a perspectival quality (albeit with idiosyncratic colorings) reflected through the recreational optics sensed at the Cultural Landscape in Albany and Berkeley California.

(iii) Golden Gate Threshold and Its Pacific Portal. Recollecting that Golden Gate Fields clubhouse sits atop a Spanish colonial landmark and royal boundaries, and that much of the Waterfront was built up with domestic and commercial refuses which, if not reminding each of us of middens (i.e., refuse heaps of indigenous peoples), may yet be of interest to archaeologists 500 years from now, the upland *lying below the hills directly opposite the Golden Gate* is a threshold to and from the continent of North America and the United States. This upland became an instant cultural *and* historical sight/site with the Spanish "discovery" of the bay in or about 1770. The cultural and historical significance were only amplified by the Spanish settlement of San Francisco in 1776; the Spanish royal grant of the Peralta Rancho in 1820; Mexico's independence from Spain in 1821 and cession from California in 1848; by California's admission to the American Union in 1850; by creating and siting of the University of California at that threshold (c. 1868); and by creation of an adjoining Golden Gate National Recreation Area (c. 1976) and the East Shore State Park at the Waterfront (c. 1998). In the fullness of time an intellectual and spiritual portal of international renown has opened up at that threshold through the auspices of our public

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California histories speak of Spanish concern about encroachment by Russia in the late 1760's. While such may have concerned a few commanding personages, it was long anticipated by very many people of good faith and will that when the threat of European encroachment became an imminent present reality for California, an orderly "reduction" of indigenous peoples in Alta California by way of a "gradual" introduction to "civilization" would be undertaken by the Roman Catholic Church with funding made available from the Pius Fund. Reduction is never easy for the generation of reducee. Endeavoring to avoid mistakes made in other places, the plan of settlement was an heroic undertaking by the Franciscan Order and Spain in Alta California, and this is so notwithstanding modern criticism of time- and culture-bound human frailties and shortcomings of the Padres.

University and the Graduate Theological Union, among others. As it turns out, domestic needs for housing, business, employment, shopping and transportation being what they have become, much of the overt symbolism of that threshold and portal is now concentrated on "upland" located west of Interstates 80 and 580, much of which in turn, was deliberately newly constructed atop San Francisco Bay's marshlands, submerged lands and tidelands, some of which had been sold into private ownership for gold dollars in the 1870's by the State of California to endow the University (but sold still burdened by a sovereign public trust).¹³

Much of cultural and historical significance found at the Waterfront is really rather obvious, even pedestrian. But enfolded within the obvious are certain actualities and potentialities that portend powerfully positive personal, societal and Waterfront transformations, but are of a much, much more subtle, artistic and even mythopoetic nature. *Subtle, sensitive enfoldments to which I refer are of utmost importance to a premier University, I am reliably informed and believe, as well as for our general health and welfare, whether one is affiliated with the University or not.* And the foregoing is true, I believe I can persuasively show, even if 99 percent of the people are now oblivious to it, which thankfully is *not the case* in this intellectually sophisticated community. My objective is to foster a much more articulate sense of the less pedestrian and more subtle intellectual, psychological and poetic significance of that seen and of what can lawfully be done to protect and enhance the *existing* physical and human environment so as to enable, rather than obstruct, retard or frighten away, a continual unpacking of the actualities and conscious realizations of the potentialities.

(iv) The Rush for Gold Mountain. Surely the panoramic view of the Golden Gate available from the East Bay's Waterfront is the best single sighting in California of the rush for gold occasioned by the instantaneous and seemingly

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Statutes of California 1870, Chapter CCCCLX, sections 1 & 2, page 668; *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 534-536.

miraculous opening of a California “freely” given to the world.¹⁴ Thousands of ships came from all over the place through that Golden Gate, literally overnight disembarking tens of thousands of people from all over the world. Surely the sight alone is “association” enough with this broad pattern of American culture and history to merit a finding of sufficient “presence” of Criterion (a).

4. Other Criteria Satisfiable By Rephrasing *Ante*, Parts B2 and B3. If the descriptions of Criterion (c), possessing high artistic values, and Criterion (a), associated with events significant to broad patterns of our history, were differently phrased and expressed, other criteria of significance listed in Criteria for Evaluation (36 CFR § 60.4, see *ante*, p. 6 for text) could be met. For example, this Cultural Landscape can under Criterion (c) be understood as now representing “a significant and distinguishable entity whose components lack individual distinction,” or as “embodying distinctive characteristics of a type, period or method of construction,” or under Criterion (d) (especially if my interpretation of New Albion has merit), as “having yielded information important in prehistory or history.” While personally I do not experience the Waterfront as primarily commemorative in nature, nor as having achieved significance only in the past 50 years (see 36 CFR § 60.4, Criteria Considerations), but should it be so deemed, it nevertheless qualifies because it’s “symbolic value has invested it with its own exceptional significance” (*id.*, (f)), and/or “exceptional importance.” (*Id.*, (g)).

C. “INTEGRITY” OF WATERFRONT

1. **Definition.** The last hurdle to eligibility for National Register listing as a Cultural Landscape is need for showing the Waterfront has “integrity” (see 36 CFR § 60.4., 1st par., quoted *ante*, p. 6). “Integrity” for purposes of the National Register is generally said to be *the ability of a property to convey the significance*. Technically, **integrity** in this context is a term of art defined by Section 60.4 (see

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I would not want to be misunderstood as minimizing in any way the sufferings of the indigenous peoples of California as the World suddenly broke into their pacific existence and uprooted it forever.

ante, p. 6) to have seven aspects, namely, **location, design, setting, materials, workmanship, feeling and association.**

The Integrity is intact because the Waterfront's footprint is fixed and it's upland form is still emerging. Nothing impairing the ability of that Cultural Landscape to convey it's significance has yet been built, including Golden Gate Fields. Horse racing is after all the "sport of kings," and -- very importantly -- the spacious parking lots are empty most of the time. For me, what would endanger the integrity of this Cultural Landscape for National Register purposes would be a proliferation of noisy and distracting secondary uses that work to obscure or eliminate the profundity otherwise seen and experienced there. What is so exciting about Albany's Shared Vision planning study is a real possibility that local architects and designers will envision upland forms and uses that work to focus, augment and excite pedestrian imaginations, rather than once again numbing, dumbing or distracting them.

2. Location and Setting. Location, location, location! The location is a close-to-perfect setting. Segregated and set apart from the neighboring urban mix and intensity, forming sort of a liminal space, a symbolic threshold for a strait Golden Gate with a narrow Pacific view.

3. Design and Workmanship. Design of this Cultural Landscape is still emerging from our collective consciences. Not everyone sees the Waterfront in the same way. In some quarters needs for revenue generation, municipal and otherwise, are keenly felt. Others worry about costs of design and construction, maintenance and operations, and wages for employment. By imagining the racetrack and it's buildings removed, a clearance opens for designs and workmanship that will enhance the several historic significances sketched in this memorandum. For example, the Waterfront consists partially of Fleming Point, a small rocky hill (*cerrito*) that was part of the northern landmark boundary¹⁵ for the Rancho San Antonio (c. 1820). The *cerrito* was leveled by half sometime in the 19th Century and adjoining marshland filled over to facilitate land use for various

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The United States v. Peralta, 19 How. 343, 346-347, 15 L. Ed 678, 680 (1856).

purposes including as a docking area for a chemical works (dynamite manufacture). Since the 1940's Point Fleming has supported the racetrack's clubhouse and viewing stands. The track itself surrounds what remains of the marshland. Fleming Point could easily be restored to it's original height. I am informed and believe that marshland eastward of that cerrito can be restored together with a creek that empties into the bay there.

4. Materials. Materials used so far have the charm of being at once practical and effective, relatively low cost and maintenance free and appropriately symbolic. Municipal domestic and commercial refuses, construction debris and earth landfill, riprap, clay dump covers, restored and composted soils. Because the design of this Cultural Landscape is still emerging, materials are not much of a current "integrity" issue.

5. Feeling and Association. This too is not much of an issue regarding the current presence of "integrity" at this site because the Cultural Landscape is still being envisioned. I have tried to explain above what I see and feel and associate with the Waterfront. Others will have different feelings and associations. Currently the threat to integrity as a Cultural Landscape would be from too many distracting secondary uses. Battles against such uses were successfully waged and fought for decades with regard to developing and preserving the original design and intention for Central Park in New York City. More threatening still would be commercialized building in Albany or Berkeley. Neither *threat*, however, works to deny a present "integrity" of this Cultural Landscape for National Register purposes.

II. INCREASED VEHICULAR TRAFFIC AS ADVERSELY AFFECTING RECREATION AREA.

A. Basic Contention: I like the idea of a ferry terminal. My sense is that the preferred Alternative B site would be the right location. What I am opposed to is the projected increases in vehicular traffic on University Avenue and the frontage road west of Highway 80/580, and also the need for 400 additional automobile

parking spaces. After the Waterfront's Aesthetics have been again and better studied as required by the National Historical Preservation Act (16 U.S.C. § 470f, see *ante*, pp. 2-3), I suggest a great deal more creative thought be given to how to get passengers to and from a ferry without needing automobiles trips.¹⁶

B. Some Additional Points:

1. Installation of a traffic signal at the intersection of University Avenue and the frontage road west of Interstate 80/580 would be, I believe, a disaster for aesthetic ambiance and ecology of the Eastshore State Park and the Waterfront generally. It would do little more than encourage more and more vehicular traffic on the frontage road, serving as a wedge opening the Waterfront to further automobile access and calls for commercialized secondary uses. It would be much better to assess motor-vehicle-access issues as a subsidiary part of an official analysis, explanation and findings pertaining to the long-term aesthetic objectives for this Cultural Landscape. As it stands now, there is no unified planning effort going on between the Cities of Albany and Berkeley and State and regional park officials.

2. To have hundreds if not thousands of new automobile and bus trips to and from the Berkeley Marina and along the frontage road is going to make the Waterfront increasingly appear as any other busy urban setting in the East Bay, and will work to eliminate the dynamic contrasts between, on one hand, the State parklands and the wildness of the Bulb, and on the other, the 10-lane freeway. This contrast is a quite important part of aesthetic dynamics at the Waterfront.

3. A most important potential new center for Waterfront development is

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Assuming a trolley is too expensive, how about a tram encircling Berkeley and Albany (e.g., ferry to University to Sacramento to Gilman and back to ferry)? How about free transport for bicyclists; half fare for passengers proving public transit; regular fare for automobile passengers and walk ins; and double fare and parking fee for drivers? How about timely shuttle services or targeted increases in bus service.

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where the racetrack currently conducts operations. Hopefully what is most desirable and feasible for this Cultural Landscape will emerge from the clearing being created through Albany's Shared Vision planning study.

End