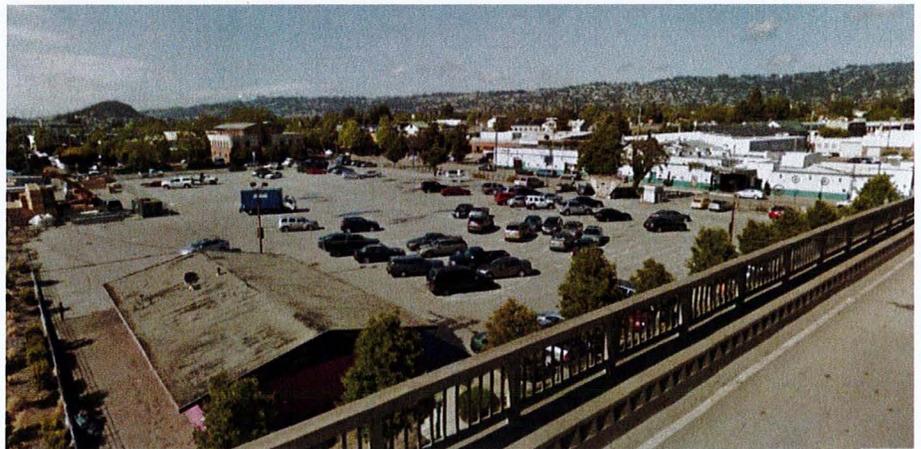


**1900 Fourth Street, Berkeley, California**  
**Government Code Section 65913.4 Project Submittal**  
**Applicant Statement**  
**March 8, 2018**

**INTRODUCTION AND OVERVIEW**

This Applicant Statement is submitted on behalf of West Berkeley Investors, LLC, for a proposed residential mixed-use development project to be located on an existing parking lot located at 1900 Fourth Street. This is an application for a development permit pursuant to Government Code 65913.4, otherwise known as Senate Bill 35. The project proposes to include 260 residential units, **fifty percent** (50%) of which will be affordable to low income households (less than 80% area median income [AMI]).

As has been recently determined by the Department of Housing and Community Development (“HCD”), Berkeley has only permitted 17 low income units in the current Regional Housing Needs Assessment (RHNA) cycle, which is approximately 4% of the City’s low income allocation, so this single project will dramatically increase the City’s production of affordable housing. Further, the project site is ideally situated for mixed-use development: it is transit rich, is adjacent to one of the City’s most vibrant retail areas and has easy access to the I-80 corridor.



The City has long recognized the development potential for the site, long ago identifying it in the West Berkeley Plan as a “node” where “development should be encouraged.” Further, because this application is submitted pursuant to newly enacted Government Code Section 65913.4 (“SB 35”), 100% of the construction workers will be paid prevailing wage and the work will be undertaken by a “skilled and trained workforce.”

The project also includes a density bonus pursuant to Government Code Section 65915, with waivers/modifications and concessions/incentives, as allowed per the statute. The proposed project is subject to Government Code Section 65589.5, also known as the Housing Accountability Act. The project’s consistency with each of these provisions of State law is discussed in detail below. All three of these Government Code sections are state legislative efforts that recognize the severity of California’s housing crisis and the difficulties associated with developing new housing at appropriately zoned, transit-oriented locations. They all also apply to Charter Cities, of which Berkeley is one. The following legislative findings (from Government Code section 65589.5(a)(2)) are instructive of how the City must interpret and implement these laws:

California has a housing supply and affordability crisis of historic proportions. The consequences of failing to effectively and aggressively confront this crisis are hurting millions of Californians,

robbing future generations of the chance to call California home, stifling economic opportunities for workers and businesses, worsening poverty and homelessness, and undermining the state's environmental and climate objectives...

The Legislature's intent in enacting this section in 1982 and in expanding its provisions since then was to significantly increase the approval and construction of new housing for all economic segments of California's communities by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects and emergency shelters. That intent has not been fulfilled...

It is the policy of the state that this section should be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing.

With those laws and policies in mind, the following sets forth the Applicant Statement. This Statement also includes the following attachments:

1. 1900 Fourth Street Compliance with Objective Planning Standards
2. Site Archeological, Geological and Historical Studies
3. Letter from Citi Community Capital Regarding Affordable Housing Financing
4. Letter Certifying Compliance with Prevailing Wage/Skilled Labor Requirements

***SB 35/Government Code Section 65913.4***

The legislature enacted SB 35 in 2017 as a response to California's housing crisis and, specifically, the negative impact that the lack of housing production is having on the state's economic vitality, environmental goals and social diversity.

Under SB 35, cities that are not on track to meet their RHNA housing production obligations will be required to follow a streamlined, ministerial approval process for qualified housing projects. On January 31, 2018, HCD confirmed that Berkeley has produced insufficient below moderate income housing, and is subject to SB 35. The SB 35 approval process requires cities to approve projects within 180 days of submittal of an application and such approval must be based only on whether the project complies with "objective planning standards." To qualify, the project must meet a number of criteria, including providing certain percentages of the units affordable to households with incomes below 80% area median income; paying prevailing wage for construction labor; and meeting all objective zoning and design review standards. The terms "objective zoning standards" and "objective design review standards" are narrowly defined to mean "standards that involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official prior to submittal." A comprehensive checklist of SB 35 requirements is found below. Because the statute mandates that the process is ministerial and that projects are judged purely on objective standards that do not involve the exercise of discretion, CEQA does not apply to the SB 35 process. *See* 14 Cal. Code Regs. 15268(a) ("Ministerial projects are exempt from the requirements of CEQA"); *see also* Pub. Res. Code 21080(b)(1).

For purposes of SB 35, "additional density or any other concessions, incentives, or waivers of development standards granted pursuant to the Density Bonus Law in Section 65915" are not taken into account when

assessing the project's compliance with the City's objective standards. Gov. Code § (a)(5). The project qualifies for the State Density Bonus Law, because the Project will provide 50% of its units with rents affordable to households earning less than 80% of AMI. The benefits afforded under the State Density Bonus Law include waivers/modifications of development standards that would otherwise "physically preclude" the density bonus project, three concessions/incentives, and reduced parking requirements, all as discussed further below.

## **PROJECT DESCRIPTION**

### ***Project Uses***

The proposed project includes 260 dwelling units (130 of which will be available at less than 80% AMI), a 7,333-square foot ground level community open space, 27,891 square feet of commercial uses, resident lobbies with different pedestrian access points, service areas for residential and commercial uses, and direct vehicular access to parking. The project site currently consists of two parcels, which will be merged for the purpose of this development proposal, consistent with Berkeley Municipal Code Section 21.52. The ground floor also includes a community room that will be privately managed, but can be used by the public for meetings or other purposes. The proposed parking is located within the structure, with commercial parking at existing grade level behind the retail spaces and residential parking in a secured basement-level garage. Above the ground floor are residential apartments and residential open space and amenities.

Half of the apartments will be affordable to households with incomes below 80% AMI and the other half will be market rate. The apartments contain a mix of studio, one bedroom, and two bedroom units. For financing purposes, the residential units above the podium are located within either Building 1 or Building 2. Building 1 is the area reserved for the below market rate units and Building 2 will house market rate units. Building 1 may be financed using a variety of options.

All residents of 1900 Fourth Street will have access to interior amenities, including resident lounges and fitness centers, bicycle storage and repair area, and a community room. Each of these common spaces open onto large courtyards and, in addition, residents will have access to a roof deck lounges with San Francisco Bay and other views.

### ***Project Residential Affordability***

The proposed project is subject to three different affordable unit criteria. SB 35 requires 50% of units to be dedicated affordable units, *see* Gov. Code § 65913.4(a)(4)(B)(ii), and the project's compliance with that criterion insures that it meets the requirements of both the City of Berkeley Affordable Housing Mitigation Fee and State Density Bonus Law Thresholds, both of which require 20% of units to be affordable. *See* Gov. Code § 65915(d)(2)(B); BMC § 22.20.065.C.2. By providing 50% of its units for low-income households, the Project is exempt from the City's affordable housing mitigation fee at this time. BMC § 22.20.065.D.

The table below calculates the proportional fee per BMC § 22.20.065.D which specifies the following formula:

$$[(A-B-C) \times \text{Fee}] - [(B+C)/((A-B-C) \times 20\%)] \times ((A-B-C) \times \text{Fee})$$
, with A, B, and C defined below. This calculation results in a negative fee/number since the project exceeds the 20% requirement.

<i>Calculation</i>	<i>Project</i>
A = Total number of units in the project	260
B = Number of Very-Low Income Units provided in the project.	0
C = Number of Low-Income Units provided in the project.	130
Per Unit in-lieu Fee	\$37,000
<b>Proportional Fee Required for Remaining In-Lieu Units</b>	<b>- \$19,240,000</b>

**Location**

The proposed project at 1900 Fourth Street is located at the northwest corner of Hearst Avenue and Fourth Street in the City of Berkeley.

Fourth Street, in the vicinity of the project site, supports a pedestrian-oriented shopping district, which includes a variety of retail and restaurant facilities, as well as offices and other commercial uses, both to the north of the site and directly east of the site across Fourth Street. South of the project site across University Avenue is a mixed-use building with residential units above ground-floor retail. Directly west of the project site is the Truitt and White building material company’s main yard, separated from the project site by the Union Pacific Railroad tracks.



The Berkeley Amtrak Station is located directly south of the project site, at the westernmost end of University Avenue. Adjacent parcels are all zoned C-W, West Berkeley Commercial, within the Designated Node, aside from the Truitt and White site to the west of the project, which is zoned MULI Mixed-Use Light Industrial.

<b>Surrounding Uses and Zoning</b>		
<b>Direction</b>	<b>Use</b>	<b>Zoning</b>
North	Commercial Retail/Office	C-W
East	Commercial Food Service	C-W
South	Mixed-Use Commercial/Residential	C-W
West	Light Industrial	MULI

**Project Design**

The ground plane is varied both vertically and horizontally and includes a community open space element stretching from Fourth Street to the railroad tracks along Hearst Avenue. The pedestrian environment is designed in accordance with the Berkeley Aquatic Park Public Improvement Plan and also contains a variety of commercial storefront design and articulation. The project’s architectural character enhances pedestrian interest and acknowledges architectural efforts and forms already approved north and south on Fourth Street and in West Berkeley generally. The relatively large development site includes a mix of

building forms and materials that reflect West Berkeley's mixed use and industrial past while creating an architectural ensemble that feels more like it was developed over time as multiple projects.

### ***Community Open Space***

The 1900 Fourth Street project will provide 7,333 square feet of land at the north end of the project site for public use as a well-appointed landscaped open space running along the length of Hearst Avenue. This linear open space feature is historically symbolic and designed to reflect the general location where an embankment once existed along Hearst Avenue and adjacent to the wet marshland that once occupied approximately 80% of the site during the Quaternary Period (2.5 million years ago) to its later epoch, the Holocene Period (11.7 thousand years ago) to the early 1900's, when the site was artificially filled for development. (This is described in more detail in the Structural Alteration Permit Findings discussion below). The project also includes a 1,332 square foot community room that will be available for public use and managed by the property owners.

### ***Transit-Oriented and Neighborhood Mixed Use Development***

1900 Fourth Street is in a transit rich environment and will expand the range of uses in this walkable mixed-use neighborhood. It is located adjacent to the west terminus of AC Transit's 51 line, which is a major connective route in the Central East Bay with 15 minute or less headways. AC Transit's 80 and 81 lines are also located adjacent to the site and the Transbay FS, G, and Z lines, with service to San Francisco, stop 2 blocks from the project site. In addition, Berkeley's Amtrak station and train platform are directly adjacent to the project site.

The surrounding neighborhood supports walkable destinations for residential goods and services. A key purpose of the project is to make a substantial contribution to Berkeley's below market rental housing supply and enhance an adjacent retail environment. The proposed project will specifically address the existing small-scale pedestrian-oriented environment of Fourth Street and provide needed residential goods and services for the new housing that has been and will be developed in the area.

### ***Project Statistics***

The project includes the following major elements:

- Lot Size: 96,266 square feet
- Lot Coverage: 87% where 100% is allowed.
- Gross Project Floor Area (parking areas excluded per BMC Section 23F): 286,809 square feet
- Floor Area Ratio: 2.98 where 3.0 is allowed.
- Commercial Gross Floor Area: 27,891 square feet of retail and food service space. As defined in Zoning Ordinance table 23E64.030.A, the West Berkeley node use requirements of 23E.64.040.E, and the definitions found in Zoning Ordinance Section 23F., the non-residential components of the proposed mixed use project will only be used for retail sales, personal/household services, banks, food and alcohol service, lodging, entertainment and assembly uses, and required access to and lobbies serving upper-story uses. Consistent with Berkeley's past practice for initial project occupancy, the commercial tenant space components of the ground floor uses will not be defined

until building permitting. Pursuant to SB 35 none of those particular uses are subject to any additional discretionary approval.

- **Residential Gross Floor Area/Units:** The residential area includes 254,888 gross square feet (197,937 square feet of net unit area) with 260 dwelling units that have an average size of 761 square feet, with a mix of studio, one and two bedroom units.
- **Residential Open Space:** A total of 19,079 square feet of resident open space is provided along with 5,676 square feet of resident amenity space.
- **Parking:** The project provides 190 residential and 100 commercial parking spaces where 170 residential spaces are allowed per State Density Bonus Law and 100 commercial spaces are required per the City of Berkeley parking requirements (0 parking spaces are required per SB 35 because the project is within ½ mile of a major transit facility – Amtrak Station + AC Transit bus stop with <15 minute headways), for a surplus of 45 parking spaces. The project will provide residential parking spaces in the basement parking level. Commercial parking will be located within the ground-floor level of the garage and will be available to the public.

## **PROJECT COMPLIANCE AND APPLICABILITY OF STANDARDS**

### ***Compliance with City of Berkeley Zoning and Design Review Standards***

A comprehensive table analyzing the project's consistency with all applicable zoning and design review standards is included in Attachment 1 of this Applicant Statement.

### ***Compliance with City of Berkeley General Plan and West Berkeley Plan***

The project site is located within the West Berkeley Plan Area. The project's General Plan land use designation is Avenue Commercial. Both the West Berkeley Plan and the General Plan land use designation support intensive mixed use development at this location. The operative zoning for the site is C-W (West Berkeley Commercial), which grew out of the West Berkeley Plan policy process and is also consistent with the general plan land use category Avenue Commercial.

### ***Environmental Review***

SB 35 specifies that the approval process is "ministerial" and approval will be granted if the project complies with "objective standards," meaning standards for which no subjective judgment is exercised. Because CEQA does not apply to ministerial approvals such as this, environmental review is not required for the project.

However, extensive environmental review for the site was recently completed in the form of a Draft Environmental Impact Report for a project very similar in nature and intensity. While that analysis has no bearing on the City's review of this project, we recognize that such information in the Draft EIR may be of interest, and we incorporate such review by reference in the appendices provided on CD.

It should be noted that although the project was designated a City landmark due to the belief that the West Berkeley Shellmound is located on the site, extensive testing and undisputed expert analysis have shown that the shellmound does not actually exist on the project site and never did. (Reference materials

are included in Attachment 2.) The site was substantially a wet marshland until it was filled and paved over the last 100+ years. However, its landmark status requires that design review be conducted pursuant to the Berkeley’s Landmarks Preservation Ordinance, Berkeley Municipal Code Chapter 3.24. The project’s compliance with BMC 3.24 is included in the analysis below and Attachment 1.

**Parcel Map**

Pursuant to Berkeley Municipal Code Title 21, Subdivisions, the project is submitting a parcel map for condominium purposes. A draft map application is being submitted pursuant to the requirements of BMC Section 21.24.

**PROJECT COMPLIANCE WITH ALL APPLICABLE LAWS**

**1. SB 35: Government Code Section 65913.4 (SB 35) Review and Approval Criteria**

As shown in the table below, the proposed submittal complies with the SB 35 eligibility requirements. The following table lists the criteria for a project’s consideration per the Government Code, as demonstrated below and confirms that the project complies.

Government Code Section 65913.4 Eligibility Requirement	Requirement satisfied?
<p>1. <b>Is the project a multifamily housing development with 2 or more units? Subd. (a)(1).</b></p> <p>As stated in the project description the project is a multifamily housing development that will provide 260 new dwelling units, 130 (or 50%) of which will be affordable to households with incoming less than 80% AMI.</p>	Yes
<p>2. <b>Is the project located in an area designated by the U.S. Census Bureau as an urbanized area? Subd. (a)(2)(A).</b></p> <p>The project is located in the City of Berkeley, which is entirely within a U.S. Census urbanized area boundary. <i>See also:</i>  <a href="https://www2.census.gov/geo/maps/dc10map/UAUC_RefMap/ua/ua78904_san_francisco--oakland_ca/DC10UA78904.pdf">https://www2.census.gov/geo/maps/dc10map/UAUC_RefMap/ua/ua78904_san_francisco--oakland_ca/DC10UA78904.pdf</a></p>	Yes
<p>3. <b>Is more than 75% of the project site’s perimeter developed with urban uses? Subds. (a)(2)(B), (h)(8).</b></p> <p>SB 35 defines “urban uses” as “any current or former residential, commercial, public institutional, transit or transportation passenger facility, or retail use, or any combination of those uses.” Based on these standards, the entirety of the Project site’s perimeter is developed with urban uses.</p>	Yes
<p>4. <b>Does the site have either a zoning or a general plan designation that allows for residential use or residential mixed-use development, with at least two-thirds of the square footage designated for residential use? Subd. (a)(2)(C).</b></p>	Yes

<b>Government Code Section 65913.4 Eligibility Requirement</b>	<b>Requirement satisfied?</b>
<p>The Project site is zoned C-W (West Berkeley Commercial), which allows for commercial, residential, and mixed-use development. The General Plan designates the Property "Avenue Commercial" which is for areas "characterized by pedestrian-oriented commercial development and multi-family residential structures."</p> <p>The total square footage of the Project is approximately 286,809 square feet (excluding the parking garage per Zoning Ordinance Section 23F). Of that amount, approximately 254,888 square feet are dedicated to residential uses. Residential uses comprise 88.8% of the total, in excess of the two-thirds requirement.</p>	
<p>5. <b>Has the Department of Housing and Community Development (HCD) determined that the local jurisdiction is subject to SB 35? Gov't Code Sec. 65913.4(a)(4)(A).</b></p> <p>On February 2, 2018, HCD made its determination which jurisdictions throughout the state are subject to streamlined housing development under SB 35. The City of Berkeley is subject to SB 35 because although it is on course to meet its pro rata share of above moderate housing for this RHNA reporting period, it has not done so for below market rate housing. See also:</p> <p><a href="http://www.hcd.ca.gov/community-development/housing-element/docs/bay-area-with-insets.pdf">http://www.hcd.ca.gov/community-development/housing-element/docs/bay-area-with-insets.pdf</a></p>	Yes
<p>6. <b>Will the project include the required percentage of below market rate housing units? Subd. (a)(3) and (a)(4)(B)</b></p> <p>The required percentage of below market rate housing under SB35 is 50% for Berkeley. The Project will include at least 50% of housing units dedicated to households with incomes below 80% of AMI; affordability will be assured through the recordation of a regulatory agreement.</p>	Yes
<p>7. <b>Is the project consistent with "objective zoning standards" and "objective design review standards." Subd. (a)(5)</b></p> <p>The Project will comply with all applicable objective standards, except where waivers and concessions are requested pursuant to State Density Bonus Law requirements and consistent with SB 35. SB 35 defines "objective planning standards" narrowly: "standards that involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official prior to submittal."</p>	Yes

Government Code Section 65913.4 Eligibility Requirement	Requirement satisfied?
See Attachment 1 of this Applicant Statement for a complete list of objective zoning and design review standards associated with this project.	
<p>8. <b>Is the project located outside of all types of areas exempted from SB 35? Subd. (a)(6-7), (10).</b></p> <p>The project site is not located within any of the below exempt areas.</p> <p><u>Subd.(a)(6) exempt areas:</u></p> <ul style="list-style-type: none"> <li>- Coastal zone</li> <li>- Prime farmland or farmland of statewide importance</li> <li>- Wetlands</li> <li>- High or very high fire hazard severity zones</li> <li>- Hazardous waste sites</li> <li>- Earthquake fault zone (unless the development complies with applicable seismic protection building code standards)</li> <li>- Floodplain or floodway designated by FEMA</li> <li>- Lands identified for conservation in an adopted natural community conservation plan or habitat conservation plan</li> <li>- Habitat for a state or federally protected species</li> <li>- Land under a conservation easement</li> </ul> <p>The Project site is not located on any of the above areas.</p> <p><u>Subd. (a)(7) exempt areas:</u></p> <ul style="list-style-type: none"> <li>- A development that would require the demolition of housing that:             <ul style="list-style-type: none"> <li>- Is subject to recorded rent restrictions</li> <li>- Is subject to rent or price control</li> <li>- Was occupied by tenants within the last 10 years</li> </ul> </li> <li>- A site that previously contained housing occupied by tenants within past 10 years</li> <li>- A development that would require the demolition of a historic structure on a national, state, or local register</li> <li>- The property contains housing units that are occupied by tenants, and units at the property are/were offered for sale to the general public by the subdivider or subsequent owner of the property.</li> </ul> <p>There have been no dwelling units on the property at any point during the last ten years, and the project would not require the demolition of any residential or historic structures.</p> <p><u>Subd. (a)(10) exempt areas:</u></p>	<p>Yes</p>

Government Code Section 65913.4 Eligibility Requirement	Requirement satisfied?
<ul style="list-style-type: none"> <li>- Land governed under the Mobilehome Residency Law</li> <li>- Land governed by the Recreational Vehicle Park Occupancy Law</li> <li>- Land governed by the Mobilehome Parks Act</li> <li>- Land governed by the Special Occupancy Parks Act</li> </ul> <p>The project site is not located on land governed by any of the above laws.</p>	
<p>9. <b>Will all construction workers employed in the development project be paid at least the general prevailing wage as required by state law? Subd. (a)(8)(A).</b></p> <p>As detailed in the attached letter, the applicant certifies that all construction workers employed in the execution of the development will be paid at least the general prevailing rate of per diem wages.</p> <p><i>See Attachment 4.</i></p>	Yes
<p>10. <b>Will all construction workers employed in the development project be certified as a “skilled and trained workforce.” Subd. (a)(8)(B).</b></p> <p>As detailed in the attached letter, the applicant certifies that a skilled and trained workforce shall be used to complete the development.</p> <p><i>See Attachment 4.</i></p>	Yes
<p>11. <b>Will the project developer pay prevailing wages and use a “skilled and trained” workforce if the project involves a subdivision, subject to the Subdivision Map Act? Subd. (a)(9)</b></p> <p>The Project will pay prevailing wages and use a “skilled and trained” workforce. See items 9 and 10 above for more information on the applicant’s commitments to prevailing wages and a skilled and trained workforce. The Project application includes a parcel map for condominium purposes, which will create separate condominiums for each residential building and the retail portion.</p>	Yes

**2. Density Bonus: Government Code Section 65915, Affordable Housing Compliance and Density Bonus Entitlement**

The proposed project will provide 260 new apartments, half of which (130), will be affordable to families earning less than 80% AMI.

Pursuant to Government Code section 65915, because more than 20% of the “base” density units will be affordable to low income households, the project is entitled to a 35% density bonus over the otherwise allowable maximum residential density (“base project”). The City must also waive development standards

that if applied would “physically preclude” the density bonus project. Finally, the project is entitled to up to three (3) concessions or incentives that provide actual and identifiable cost reductions.

### ***Density Standard and Bonus***

The C-W zoning district does not establish an otherwise allowable maximum residential density so the General Plan standard is applicable pursuant to Government Code section 65915. The Berkeley General Plan states that commercial area densities are measured over broad areas and that Avenue Commercial Areas will generally have 44 to 88 persons per acre. These broad areas include corridors such as San Pablo Avenue, Shattuck Avenue, Telegraph Avenue, and University Avenue, to which the project site is adjacent.

In order to create a proxy for residential density, given Berkeley’s lack of density standards, the City of Berkeley has created a density bonus methodology (City of Berkeley Procedures for Implementation of State Density Bonus Law, September 15, 2014) that measures the residential floor area of a given project site based on the objective zoning standards (i.e., height and setbacks and other standards that limit allowable floor area), divides the floor area by the applicant’s proposed unit count, and derives a unit density based on those factors. A 35% bonus is then applied to that density and the floor area that supports it. This methodology has been adjudicated and the courts have upheld this methodology in prior cases, including the decisions in *Wollmer I* and *Wollmer II*.

In the case of 1900 Fourth Street, the base project provides 180,000 square feet of residential floor and 237 dwelling units, as shown on page A8.1 of the plan set because the average unit size is 761 square feet. As a result, the project is entitled to a bonus of 63,000 square feet of building program to accommodate an additional 83 dwelling units. In addition, the proposed project includes community accessible open space area and other building articulation at the north end of the property. That removes 44,080 square feet of base project floor area on the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> floors. In order to provide for that public amenity that massing is moved to the fifth and sixth floors along with the density bonus massing.

Therefore, the density bonus area of 83 units plus the additional floor area of 44,080 square feet derived from the public amenity space, are added to the fifth and sixth floors pursuant to the project’s waivers and modifications. The density bonus base project, proposed density bonus floor area, and additional calculations are provided in the project plans.

### ***Waivers and Modifications***

The City must waive any development standards that would have the effect of “physically precluding” the density bonus project, including the concessions discussed below. The following standards, if applied, would physically preclude the project and thus must be waived. Further, if there are other development standards that would physically preclude the project with the density bonus units and incentives/concessions, those must also be waived.

1900 Fourth Street requires the following waivers and modifications of the C-W zoning development standards that would otherwise “physically preclude” the density bonus project:

- **Waiver:** Increase in height and stories beyond the 50’ maximum height standard and four allowed stories for the density bonus floor area, including for the rooftop mechanical equipment, as otherwise required pursuant to Zoning Ordinance Section 23E.64.070. In order to accommodate

the additional massing and floor area for the density bonus units, the project must increase in height to 70'-8" and six stories where the application of the 50' height and four story limits would otherwise physically preclude the density bonus project.

### **Concessions and Incentives**

In addition to granting the density bonus, the City must also grant the Project up to three incentives or concessions pursuant to GC Sec. 65915(d)(1) because more than 30% of the "base density" units will be affordable to low income households. The City is required to grant the concessions/incentives in so far as the request results in identifiable and actual cost reductions to provide for affordable housing costs and do not result in any adverse public health or safety impacts. Although the Project qualifies for three incentives or concessions, the project only requires one as described below.

**Concession #1: Waiver of the City's requirement (BMC Sections 22.20.065.C.2 and 23C.12.040.D) with respect to affordable v. market rate unit size and design. This allows Inclusionary Units to be separated into a separate building on the podium deck for financing purposes and be of different design to non-inclusionary units in terms of appearance, materials and finish quality.**

BMC Sections 23C.12.040.D and 22.20.065.C.2 state the following:

*All Inclusionary Units shall be reasonably dispersed throughout the project, be of the same size and contain, on average, the same number of bedrooms as the non-Inclusionary Units in the project; and be comparable with the design or use of non-inclusionary units in terms of appearance, materials and finish quality.*

Separating the Inclusionary Units into a separate building on the podium deck is required in order to obtain lower cost financing as discussed in the attached letter (See Attachment 3). Cost of capital is a significant component of project cost, so a reduction in the cost of this item represents a clear and identifiable cost savings to the project. In addition, building the inclusionary/BMR units of a different design in terms of appearance, materials and finish quality is intended to reduce costs of construction of the units to a specification consistent with other affordable housing projects. Purpose-built affordable housing projects typically include more cost-effective finishes including but not limited to appliances, cabinetry, lighting, counter tops, fixtures, windows and other items. To the extent such finishes are different from those used on non-inclusionary units, the cost will be reduced for the inclusionary/BMR units.

Although it is the City's burden to make findings in order to deny a project's proposed concessions/incentives, we do not believe it can do so. The concession yields direct savings to the Project and the development standard does not impact public health and safety nor is it required by State or federal law.

### **3. Housing Accountability Act**

As set forth in this Applicant Statement, the project is entitled to streamlined ministerial approval under SB 35. In addition, the Housing Accountability Act (Gov. Code § 65589.5) also requires the City of Berkeley (City) to approve the project.

The project is protected under the Housing Accountability Act for two independent reasons:

1. The project complies with the City's objective standards and criteria, as demonstrated in Attachment 1 of this application statement; and,
2. As described above, the project is providing 50% of its units affordable to families earning less than 80% AMI, which is much more than the minimum 10% of units for lower-income households than is required by the State Density Bonus Law. Gov. Code § 65589.5(d), (h)(3), (j).

The City is only permitted to reject a project under these circumstances if there is a preponderance of evidence that the project would have a significant, unavoidable, and quantifiable impact on "objective, identified written public health or safety standards, policies, or conditions." Gov. Code §65589.5(j). There is no evidence, let alone a preponderance of evidence, that the project would have any impact on public health and safety that cannot be feasibly mitigated.

A broad range of plaintiffs can sue to enforce the Housing Accountability Act, and the City would bear the burden of proof in any challenge. Gov. Code § 65589.5(k). As recently reformed in the 2017 legislative session, the act makes attorney's fees and costs of suit presumptively available to prevailing plaintiffs, requires a minimum fine of \$10,000 per housing unit for jurisdictions that fail to comply with the act within 60 days, and authorizes fines to be multiplied by five times if a court concludes that a local jurisdiction acted in bad faith when rejecting a housing development. *Id.*

### **3. Other State Laws Protecting the Project**

Numerous other State laws also prohibit the City from precluding housing development on this site. These laws include, but are not limited to, California's Housing Element Law (*see* Gov. Code § 65585(i), 65587(b), 65863 & 65913.1(a)), California's Planning & Zoning Law (Gov. Code § 65000, *et seq.*), California's "No Net Loss" housing law (*see* Gov. Code § 65863(b)), and fundamental legal principles that prohibit local governments from regulating land use in a manner that is arbitrary and capricious, discriminatory, or effecting an uncompensated regulatory taking of private property.