



Office of the Mayor

ACTION CALENDAR
July 25, 2023

To: Honorable Mayor and Members of the City Council
 From: Mayor Jesse Arreguín and Councilmember Kate Harrison
 Subject: Waivers for Woolsey Gardens Affordable Housing Project

RECOMMENDATION

Pursuant to Berkeley Municipal Code (BMC) Section 22.20.070 and/or 22.20.080, adopt a Resolution approving the following requests from Northern California Land Trust for the Woolsey Gardens affordable housing project at 3120-3130 Shattuck:

1. Waive the requirement in BMC Section 23C.12.070(C)(4) in force at the time of entitlement that subsequent purchasers of inclusionary units in limited equity housing cooperatives have a yearly gross income of no more than 44 percent of the cost of a unit at the time of sale.
2. Approve the provision of an additional inclusionary unit instead of paying the in-lieu fee equivalent of .44 units as required by BMC Section 23.C.12.040(E) in force at the time of entitlement.

FISCAL IMPACTS OF RECOMMENDATION

If Northern California Land Trust's (NCLT) request is granted, the organization would not pay the inclusionary fee otherwise required under the BMC for inclusionary unit fractions, which are deposited into the City's Housing Trust Fund. Instead, the project costs of producing approximately 65 units of affordable housing would be reduced, which will better leverage City funding for Woolsey Gardens.

CURRENT SITUATION AND ITS EFFECTS

NCLT requested a waiver pursuant to Berkeley Municipal Code (BMC) Sections 22.20.070 and 22.20.080 for Woolsey Gardens (3120-3130 Shattuck). NCLT proposes to develop a 100% affordable homeownership project with 41 residential condominiums and 24 units of shared cooperative housing for low- and moderate-income households.

NCLT submitted its SB 330 application on December 12, 2022, which makes the project subject to the inclusionary housing ordinance in place before City Council adopted updated affordable housing requirements in February 2023. While Woolsey Gardens meets the inclusionary requirements of the new ordinance, the former inclusionary housing ordinance includes two requirements that have since been eliminated. BMC Section 23C.12.070(C)(4) of the ordinance in force at the time of entitlement requires

that “subsequent purchasers of Inclusionary Units in Limited Equity Cooperatives shall be first time home buyers whose yearly Gross Income is no more than 44 percent of the cost of a unit at the time of sale, provided that such income shall be no more than 110 percent of the Oakland PMSA median.”

Due to State of California regulations restricting the initial sales prices for cooperative units, tying the affordability requirements of subsequent purchasers to forty-four percent of the initial sales price would restrict the majority of cooperative units to extremely low-incomes, which could negatively impact the project’s long-term financial feasibility and result in a loss of equity for owners. If this requirement were waived, all units at Woolsey Gardens would still be subject to affordability restrictions established by the inclusionary housing ordinance and the Housing Trust Fund Guidelines.

According to the inclusionary requirements established in the ordinance in force at the time of entitlement, Woolsey Gardens must set aside 12.24 cooperative units and 4.2 of the condominiums as inclusionary units. BMC Section 23C.12.040(E) also requires that in “projects where the calculation of the inclusionary requirement results in a fraction of a unit, such a fraction shall be paid in the form of an in-lieu fee to the City”. Since Woolsey Gardens is a 100% affordable project that will rely on public and philanthropic financing, NCLT proposes to restrict an additional inclusionary unit instead of paying the in-lieu fee equivalent to .44 units.

Supporting Woolsey Gardens is a Strategic Plan Priority Project, advancing our goal to create affordable housing and housing support service for our most vulnerable community members.

BACKGROUND

On June 13, 2023, the Berkeley City Council awarded NCLT with \$1,000,000 in predevelopment funding from the Housing Trust Fund to redevelop the site of its current headquarters at 3120-3130 Shattuck Avenue into a multifamily homeownership project. The Woolsey Gardens site is owned by NCLT, who will continue to own the land after development for permanent stewardship.

NCLT proposes to develop a mixed-use green building with 65 units of limited equity housing at a range of affordability levels for households earning between 30% and 120% AMI. Woolsey Gardens will consist of studio, 1-bedroom, and 2-bedroom apartments. The building will also have ground floor commercial space for nonprofits and emerging entrepreneurs.

As a project aiming to repair historic and current harms of displacement, Woolsey Gardens is partnering with community organizations to provide opportunities for displaced households to return to South Berkeley as well as housing stability for low-income households that still remain.

Enabling Provisions in the Berkeley Municipal Code

BMC Section 22.20.070 establishes the following exception/limit where an applicant establishes inapplicability or unconstitutionality of general requirements:

A. *Notwithstanding any other provision of this chapter, the requirements of this chapter shall not apply or shall be limited as follows:*

1. *No mitigation and/or fees shall be imposed on any applicant or development project where the applicant establishes to the City's satisfaction that the proposed development project will not generate any additional need for affordable housing, child care and/or public facilities, adequate employment training and placement services or amenities or any other impact for which a mitigation and/or fee is otherwise required;*

2. *The amount and/or level of any mitigation and/or fee under this chapter shall not exceed the reasonable cost of either satisfying the additional demand for affordable housing, child care and/or public facilities, adequate employment training and placement services or amenities or of eliminating and/or reducing to an acceptable level any other impact which reasonably may be anticipated to be generated by or attributed to any individual development project;*

3. *The City shall not condition any permit in any manner which results in a deprivation of the applicant's constitutional rights.*

B. *The burden of establishing by satisfactory factual proof the applicability and elements of subsections (A)(1), (A)(2) and (A)(3) of this section shall be on the applicant*

C. *No exemption or limit shall be granted pursuant to this section unless a finding is made, based on satisfactory factual proof provided by the applicant, that at least one of the requirements set forth in subsection (A)(1), (A)(2) or (A)(3) of this section has been satisfied. (Ord. 6179-NS § 7, 1993)*

Furthermore, BMC Section 22.20.080 establishes the following hardship exception:

A. *Notwithstanding any other provision of this chapter, the requirements of this chapter in the discretion of the City may be waived or limited for a particular development project where both of the following findings are made:*

1. *The imposition of the mitigation and/or fees otherwise required by the City make the development of the particular project infeasible; and*

2. *The benefits to the City from the particular development project outweigh its burdens in terms of increased demand for affordable housing, child care and/or public facilities, adequate employment training and placement services and/or amenities and/or other impacts which reasonably may be anticipated to be generated by and/or attributable to the development project.*

B. The burden of establishing by satisfactory factual proof the applicability and elements contained in subsections (A)(1) and (A)(2) of this section shall be on the applicant

On June 23, 2023 NCLT submitted a memorandum requesting a waiver pursuant to BMC Sections 22.20.070 and 22.20.080 (**Attachment 2**), which establishes satisfactory factual proof that the Project will not generate any affordable housing impacts and that paying the in-lieu fee equivalent of .44 units is not feasible for the project.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

Supporting this project will advance sustainability goals put forth in the Climate Action Plan. NCLT is aiming to make Woolsey Gardens a zero net energy building with LEED Platinum certification and extended grid outage resilience utilizing mass timber and cross laminated timber technology.

RATIONALE FOR RECOMMENDATION

As a 100% affordable Housing Trust Fund project, Woolsey Gardens addresses the City's need for affordable housing and approving NCLT's request will maximize the project's overall public benefit.

CONTACT PERSON

Mayor Jesse Arreguín (510) 981-7100

Attachments:

- 1: Resolution
- 2: Memo from Northern California Land Trust to Mayor Arreguín, June 23, 2023

RESOLUTION NO. ##,###-N.S.

WAIVERS FOR THE WOOLSEY GARDENS AFFORDABLE HOUSING PROJECT

WHEREAS, City Council established a Housing Trust Fund Program (HTF) to assist in the development and expansion of housing affordable to low- and moderate-income persons who either work or reside within the City of Berkeley, and authorized the City Manager to implement the Program; and

WHEREAS, on December 12, 2022, Northern California Loan Trust (NCLT) submitted an SB 330 application to construct a new 65-unit affordable housing development at 3120-3130 Shattuck Avenue (Woolsey Gardens); and

WHEREAS, Woolsey Gardens will be a 100 percent affordable housing project, with units affordable to households earning between 30 percent and 120 percent of the area median income; and

WHEREAS, at its June 13, 2023 meeting, City Council approved reserving \$1,000,000 from Housing Trust Fund program funds for a predevelopment loan for Woolsey Gardens; and

WHEREAS, Woolsey Gardens is subject to the inclusionary housing ordinance in effect at the time of its SB 330 application, and said ordinance includes provisions that would negatively impact the project's feasibility if applied; and

WHEREAS, on June 23, 2023, NCLT submitted a memorandum requesting a waiver pursuant to Berkeley Municipal Code (BMC) Sections 22.20.070 and 22.20.080.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that pursuant to Berkeley Municipal Code (BMC) Section 22.20.070 and/or 22.20.080, Council waives for the affordable housing project at 3120-3130 Shattuck the requirement in BMC Section 23C.12.070(C)(4) in force at the time of entitlement that subsequent purchasers of inclusionary units in limited equity housing cooperatives have a yearly gross income of no more than 44 percent of the cost of a unit at the time of sale.

BE IT FURTHER RESOLVED that pursuant to BMC Section 22.20.070 and/or 22.20.080, the affordable housing project at 3120-3130 Shattuck shall provide an additional inclusionary unit instead of paying an in-lieu fee equivalent to .44 units as required by BMC Section 23.C.12.040(E) in force at the time of entitlement.



WOOLSEYGARDENS

Reimagining Affordable Housing in a Carbon-Constrained Future

23 June 2023

Mayor Jesse Arreguín
2180 Milvia Street
Berkeley, CA 94704

RE: BMC WAIVER + MODIFICATION REQUESTS FOR WOOLSEY GARDENS

Dear Mayor Arreguín,

Thank you for your, the Berkeley City Council's, and the City of Berkeley Housing Advisory Commission's support for **Woolsey Gardens**, which aims to be the first-of-its-kind affordable housing project in the United States. Pursuant to Berkeley Municipal Code ("BMC") Sections 22.20.070 and 22.20.080, this letter is a formal request (1) to waive a certain provision, BMC Section 23.C.12.070 (C)(4), which restricts the resale price of limited equity cooperative units satisfying the inclusionary housing provision below their initial affordable price; and (2) to modify another provision, BMC Section 23.C.12.040 (E), so that the Northern California Land Trust ("NCLT") can provide an additional affordable inclusionary unit, versus paying an in-lieu fee, to address the resulting fractional inclusionary units calculated when applying the inclusionary unit formulas to Woolsey Gardens.

City of Berkeley and City Council's Support for Woolsey Gardens

On June 13, 2023, the Berkeley City Council voted to approve a \$1 million predevelopment loan request by NCLT to further predevelopment of Woolsey Gardens. This matches a ~\$1 million predevelopment grant previously awarded by the California Energy Commission ("CEC") to predevelop Woolsey Gardens. The City's loan will enable the project team to submit, by the September 2023 deadline, a competitive application to the CEC EPIC Build Phase Grant program. NCLT is one of three project developers invited to compete for the \$8 million CEC EPIC Build Phase Program's Northern California regional grant.

About Woolsey Gardens: First-of-Its-Kind Affordable Housing Model

The goal of Woolsey Gardens is to provide an opportunity for low- to moderate-income ("LMI") households to own energy efficient housing units and for existing nonprofit tenants to continue delivering critical services to the local community. Furthermore, the broader mission of Woolsey Gardens is to make the case for a viable, long-term alternative solution—one that is replicable, sustainable, and financeable—to the critical affordable housing shortage crisis facing Berkeley, the greater San Francisco Bay Area, and California.

Woolsey Gardens is a proposed mixed-use project to be sited at 3120-3130 Shattuck Avenue in South Berkeley, which is currently owned by NCLT. In addition to nonprofit office and micro-retail spaces, the project aims to offer 100% of the 65 affordable **ownership**, not rental, units to LMI households. Of the total 65 units offered at Woolsey Gardens, 24 will be limited equity cooperative housing units ("coop units" or "LEHCs") and 41 will be limited equity housing condominiums ("condos").

Key features of Woolsey Gardens include the following:

100%
Permanently
Affordable

100%
Ownership Units

Sustainable / Zero
Net Energy

Community
Services + Spaces

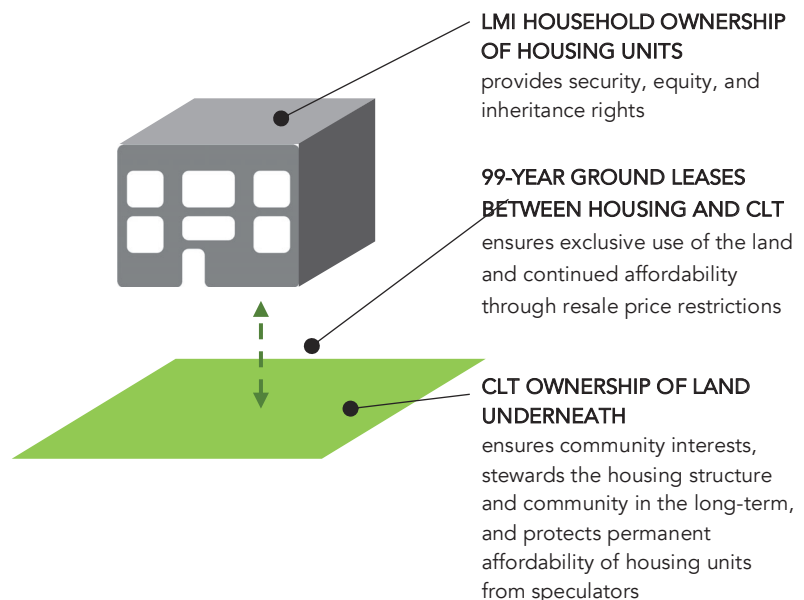
Replicability

- **100% Permanently Affordable Units**, targeting primarily extremely low- (30% AMI) to low-income (80% AMI) households;
- **100% Ownership not Rental, Units**, offering up to 24 limited equity cooperative housing units and up to 41 limited equity housing condominiums;
- **Sustainable / Zero Net Energy (ZNE)**, featuring zero net energy, 100% solar energy generation, mass timber construction, extended grid outage capability, community resilience, enhanced passive house mechanical system, and LEED Platinum certification;
- **Community Services + Spaces**, including ground floor, podium, and rooftop outdoor spaces and community spaces for current nonprofit tenants providing critical services to the surrounding community and retail spaces for local micro entrepreneurs; and
- **Replicability**, providing an alternative small parcel, infill development solution to urban renewal projects that have historically damaged neighborhoods and a viable and alternative strategy to meet California's significant affordable housing shortage.

Benefits of Ownership Housing and The Right to Return, The Right to Stay

As a fifty-year-old nonprofit, NCLT has incubated, provided, and supported permanently affordable housing in the San Francisco Bay Area. While NCLT provides a gamut of permanently affordable housing types, ranging from rental to ownership units, NCLT believes that **ownership housing** is a viable, long-term alternative solution to the current affordable housing shortage crisis because it provides the stability and foundation that support both individuals and the communities around them for the long-term. Based on its long-history with ownership housing in the Bay Area, NCLT has found that community-based ownership and co-stewardship of land and homes help transform housing into a cornerstone for local community empowerment.

NCLT is one of the oldest **Community Land Trusts ("CLT")** in the US. Under the CLT structure, NCLT owns the land under the project and ground leases that land to the individual owners. Ground leases serve as the vehicle by which NCLT restricts the resale prices of units and imposes other community purpose use restrictions on the site in perpetuity. This CLT model has been a long-accepted part of the broader nationwide affordable ownership ecosystem, with Fannie Mae and other major lenders providing loans for CLT homes for more than 20 years. The success of the model is borne out by studies that show the CLT model has the lowest rate of foreclosure of any type of homeownership.





Benefits of owning a CLT home include the following:

- **The Right to Return and The Right to Stay.** CLT homes provide opportunities for residents who have been displaced to return and remain.
- **Affordability.** A Berkeley 2-bedroom CLT condo recently sold for \$280,000, which is significantly lower than nearby similarly sized market-rate condos which sold at a price over \$800,000.
- **Generational Longevity.** CLT homes can be passed on to children.
- **Build Equity.** A recent CLT sale of \$280,000 allowed the seller, a homeowner of 10 years, to leave with \$80,000 in equity and the purchasing household an opportunity to live in South Berkeley affordably.
- **Mortgage Assistance.** CLTs can connect certain potential household owners with up to \$200,000 in down payment assistance and to beneficial lending programs.
- **Support for Residents.** CLTs offer ongoing training and support for residents to manage finances, make decisions together, and nurture community life.

Situated in the Adeline Corridor area of South Berkeley, Woolsey Gardens will provide first-time homebuyers an opportunity to return and stay in South Berkeley. For 120 years, the area has been one of Berkeley's most culturally and economically diverse neighborhoods and has played an important role in Berkeley's Black/African-American and Japanese-American communities; however, in recent decades—fueled by racism, redlining, and gentrification—the neighborhood's demography has shifted, with the Black/African-American population dramatically declining from 47% of the population in 1990 to just 17.6% in 2017¹. In all, Woolsey Gardens aims to leverage the area's offering of amenities, such as mass transit, and critical services, such as schools, and to partner with household owners to create and sustain an enduring and impactful community.

Applicable Statute

In December 2022, NCLT submitted an SB 330 application (aka "Preliminary SB 35 Application") for Woolsey Gardens to the City of Berkeley's Planning Department. This submission established the version of the municipal ordinance to which Woolsey Gardens is subject ("Pre-2023 Version"). Please note that we have attached this version of the relevant chapter, BMC Chapter 23.C.12: Inclusionary Housing Requirements of the Berkeley Municipal Code ("BMC"), in Appendix A of this letter.

Please also note that we attached a copy of BMC Sections 22.20.070 and 22.20.080, which are enabling provisions through which NCLT is pursuing the waiver and modification requests, in Appendix B of this letter.

¹ <https://berkeleyca.gov/sites/default/files/2022-03/Adeline-Corridor-Specific-Plan.pdf>



REQUEST #1: Waiver to BMC Section 23.C.12.070 (C)(4) (“Pre-2023 Version”).

Pursuant to (1) BMC 22.20.070, which provides an exception or limit where applicant establish inapplicability or unconstitutionality of general requirements, and to (2) BMC 22.20.080, which provides a hardship exception, NCLT is requesting a waiver of the provision set forth in BMC Section 23.C.12.070 (C)(4) (“Pre-2023 Version”) that in certain circumstances **would require the initial owner of a permanently affordable limited equity coop unit at Woolsey Gardens to resell their unit to a subsequent purchaser at a price far below the initial sales price.** With regard to the former, Woolsey Gardens is a project offering 100% of units as permanently affordable ownership units to LMI households and, therefore, will not generate any additional need for affordable housing, child care and/or public facilities. With regard to the latter, Woolsey Gardens is a project relying on public funding and, therefore, the strict application of BMC Section 23.C.12.070 (C)(4) would impose a hardship that would render the project infeasible. Furthermore, the benefits of Woolsey Gardens to the City of Berkeley, among which is the provision of affordable housing, outweigh the burdens which reasonably may be anticipated to be generated by and/or attributable to the development project.

In the Pre-2023 version of the Inclusionary Housing chapter, there is a provision that impacts sales of limited equity cooperative units subsequent to initial sale, which states as follows:

*Purchasers of Inclusionary Units in Limited Equity Cooperatives at time of first occupancy shall be first time home buyers with Gross Incomes no greater than 120 percent of the Oakland PMSA median. Subsequent purchasers of Inclusionary Units in Limited Equity Cooperatives shall be first time home buyers whose yearly Gross Income is **no more than 44 percent of the cost of a unit at the time of sale, provided that such income shall be no more than 110 percent of the Oakland PMSA median.** [emphasis added]*

This provision is problematic because it could result in a significant loss of equity to the household owner and loss to the lender (who would probably not provide debt capital in the first place). This not only runs counter to the mission of CLT homeownership but could also jeopardize efforts to secure construction financing for Woolsey Gardens.

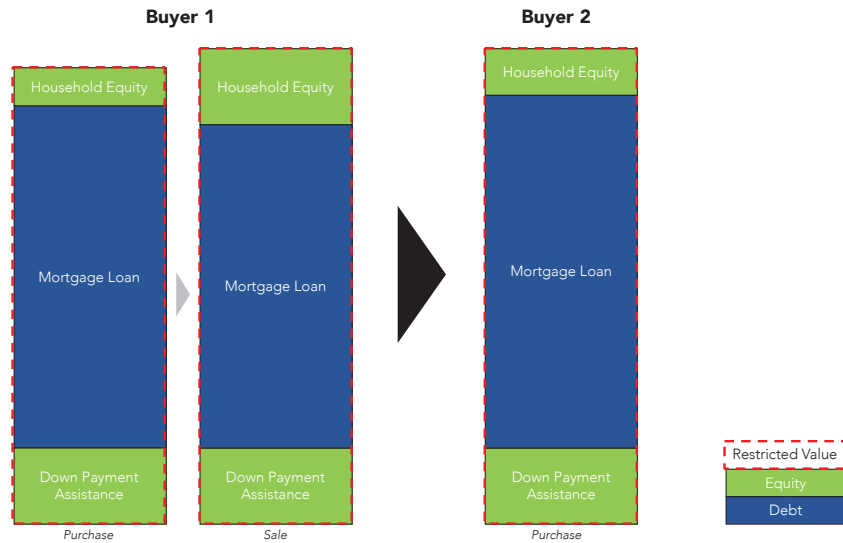
Please note that the initial LEHC share prices are typically limited under state law to 10% of the total development cost of the unit under CA Bus. & Prof. Code §11003.4 (b) (2) which states as follows:

No more than 20 percent of the total development cost of a limited-equity mobile home park, and no more than 10 percent of the total development cost of other limited-equity housing cooperatives, is provided by purchasers of membership shares.

While the BMC restricts the initial sale to a price affordable to a 110% of income household, the BMC provisions do not appear to consider the initial share price limitation of an LEHC share, where the share price represents only a portion of the total monthly housing cost. The Pre-2023 code requires the subsequent resale purchaser’s income to be limited to 44% of the resale share price, but does not account for the monthly carrying charge costs of the limited equity cooperative. For example, a unit set as affordable to an 80% of AMI household with a total development cost of \$500,000 would have its initial share price limited to \$50,000 (10% of the TDC) under state law. If not waived, the Pre-2023 BMC code would require, at the first resale, the income limit for unit purchasers to drop from 110% of AMI to 22% of AMI, without providing any additional subsidy. This could result in a financially devastating loss of equity for our initial purchasers.

As discussed previously, one of the pivotal objectives of providing CLT homeownership opportunities for low-income households is to offer these disadvantaged households an elusive opportunity to build wealth via increasing equity.

How does equity increase in a CLT home? As demonstrated in the illustration below, Buyer 1 provides equity, about 3% to 5% of the unit share’s value. When selling the unit to Buyer 2, despite an affordability ceiling on the value of the unit, because of (1) an increase in regional AMI and (2) mortgage principal paydown during the hold period, a household’s initial equity contribution increases. (Please note that for limited equity cooperative units, the “mortgage loan” represents the limited equity housing cooperative’s master mortgage, rather than the individual unit’s mortgages in the condominium units). Importantly, the unit remains affordable for Buyer 2.



We, therefore, respectfully request that the subsequent resale provision of the Pre-2023 code limiting the subsequent resale of limited equity units to households earning 44% of the resale share price or less be waived in order to avoid potentially devastating losses of equity for our initial LMI purchasers of limited equity cooperative units. Specifically, NCLT is requesting a waiver which would eliminate the problematic language identified below:

Purchasers of Inclusionary Units in Limited Equity Cooperatives at time of first occupancy shall be first time home buyers with Gross Incomes no greater than 120 percent of the Oakland PMSA median. Subsequent purchasers of Inclusionary Units in Limited Equity Cooperatives shall be first time home buyers whose yearly Gross Income is ~~no more than 44 percent of the cost of a unit at the time of sale, provided that such income shall be no more than 110 percent of the Oakland PMSA median.~~

This would not only enable low-income household owners at Woolsey Gardens the opportunity to build wealth via housing ownership but also allow for NCLT to tap critical construction financing for Woolsey Gardens.



REQUEST #2: Modification to BMC Section 23.C.12.040 (E), (“Pre-2023 Version”).

Pursuant to (1) BMC 22.20.070, which provides an exception or limit where applicant establish inapplicability or unconstitutionality of general requirements, and to (2) BMC 22.20.080, which provides a hardship exception, NCLT is requesting a modification of the provision set forth in BMC Section 23.C.12.040 (E) (“Pre-2023 Version”) requiring the projects **where the calculation of the inclusionary requirement results in a fraction of a unit, such a shall be paid in the form of an in-lieu fee to the City.** With regard to the former, Woolsey Gardens is a project offering 100% of units as permanently affordable ownership units to LMI households and, therefore, will not generate any additional need for affordable housing, child care and/or public facilities. With regard to the latter, Woolsey Gardens is a project relying on public funding and, therefore, the strict application of BMC Section 23.C.12.040 (E) would impose a hardship that would render the project infeasible. Furthermore, the benefits of Woolsey Gardens to the City of Berkeley, among which is the provision of affordable housing, outweigh the burdens which reasonably may be anticipated to be generated by and/or attributable to the development project.

The following table sets forth the resulting calculations after application of Inclusionary Housing Requirements on Woolsey Gardens:

	A	B	C	D
Inclusionary	Coop Units	Condo (Studio; 1 BR/1 BA)	Condo (2 BR/1 BA)	Total
All Units	24 units	21 units	20 units	65 units
Inclusionary Units Required Under Pre 2023 Code	51% of units	20% of units	20% of units	20.44 units
	12.24 * units	4.2 * units	4 units	
Max AMI for Inclusionary Units	120% AMI	80% AMI	80% AMI	
Total Proposed Inclusionary Units				21 Units

As distinguished by the asterisks above (*), applying the Inclusionary Housing percentages creates fractional units. According to BMC Section 23.C.12.040 (E),

In projects where the calculation of the inclusionary requirement results in a fraction of a unit, such a fraction shall be paid in the form of an in-lieu fee to the City.

Instead, NCLT would prefer to apply an alternate remedy, specifically providing an additional inclusionary unit versus paying an in-lieu fee. In other words, NCLT is requesting a modification to the provision, resulting in the provision of 21 inclusionary housing units Woolsey Gardens versus paying the City an in-lieu fee.



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Reimagining Affordable Housing in a Carbon-Constrained Future

Conclusion

NCLT believes that Woolsey Gardens offers a viable, long-term alternative solution—one that is replicable, sustainable, and financeable—addressing the critical affordable housing shortage crisis facing Berkeley and acknowledging the reparations called for by the Equity 4 Black Berkeley movement. NCLT appreciates the Berkeley City Council’s past and continued support for this important project and hopes that the Council will consider these waiver and modification requests. Thank you for your time consideration of this critical and urgent request.

Sincerely,

A handwritten signature in black ink, appearing to read "Anne-Marie Flynn".

Anne-Marie Flynn
Interim Executive Director
Northern California Land Trust

A handwritten signature in black ink, appearing to read "Suzanne Kim".

Suzanne Kim
Director of Real Estate Development
Northern California Land Trust

A handwritten signature in black ink, appearing to read "Ian Winters".

Ian Winters
Director of Incubation/Special Projects
Northern California Land Trust

APPENDIX A. Pre-2023 Version of BMC Chapter 23C.12: Inclusionary Housing Requirements

Chapter 23C.12: Inclusionary Housing Requirements

Chapter 23C.12

INCLUSIONARY HOUSING REQUIREMENTS*

Sections:

23C.12.010	Purpose
23C.12.020	Applicability of Regulations
23C.12.030	General Inclusionary Requirement: 20% of Units
23C.12.035	Payment of In-Lieu Fees as an Alternative to Providing Inclusionary Units within a Project
23C.12.040	Requirements Applicable to all Inclusionary Units
23C.12.050	Repealed by Ord. 7644-NS
23C.12.060	Inclusionary Unit Requirements for Rental Housing Projects
23C.12.070	Inclusionary Unit Requirements for Ownership Projects*
23C.12.080	Special Requirements for Avenues Plan Area
23C.12.090	Administrative Regulations*
23C.12.100	Fees

*Specific text which previously amended Berkeley Municipal Code Sections 23C.12.070A, 23C.12.070D, and 23C.12.090 for the period January 27, 2004 through February 19, 2006 was repealed on February 19, 2006 as stated in the sunset provision of Ordinance 6,790-N.S. These specific text amendments were reinstated by Ordinance 6,920-N.S., adopted on May 23, 2006.

Section 23C.12.010 Purpose

The purpose of this chapter is to promote achievement of the City Housing Element goals for developing affordable housing for Households with incomes below the median, as defined in this chapter, or, in the case of Limited Equity Cooperatives, households with incomes below 120% of the median income by requiring the inclusion of affordable Dwelling Units in specified proposed developments, hereinafter referred to as projects. (Ord. 6478-NS § 4 (part), 1999)

Section 23C.12.020 Applicability of Regulations

- A. The following types of projects must comply with the inclusionary housing requirements of this chapter:
1. Residential housing projects for the construction of five or more Dwelling Units;
 2. Residential housing projects for the construction of one to four new Dwelling Units, when such Units are added to an existing one to four unit property, which has been developed after August 14, 1986, and the resulting number of units totals five or more. All Units in such a property are subject to the requirements of this chapter;
 3. Residential housing projects proposed on lots whose size and zoning designation is such to allow construction of five or more Dwelling Units.
- B. This chapter does not apply to Dormitories, Fraternity and Sorority Houses, Boarding Houses, Residential Hotels or Live/Work Units, which are not considered Dwelling Units. Live/Work Units are subject to low income inclusionary provisions set forth in Section 23E.20.080.
- C. This chapter sets forth specific inclusionary housing requirements for the Avenues Plan Area, which prevails over any inconsistent requirements set forth elsewhere in this chapter. (Ord. 6478-NS § 4 (part), 1999)

Chapter 23C.12: Inclusionary Housing Requirements

Section 23C.12.030 General Inclusionary Requirement: 20% of Units

- A. Any project subject to this chapter is required to include at least 20% of the total number of Dwelling Units within the project as Inclusionary Units, except that Limited Equity Cooperatives are required to include at least 51% of their units as Inclusionary Units.
- B. In applying the percentages above, any decimal fraction above a whole number of Dwelling Units shall be paid as an in-lieu fee.
- C. For the purpose of determining the median income levels for Households under this chapter, the City shall use the Oakland Primary Metropolitan Statistical Area (PMSA) statistical figures that are available to the City from the most recent U.S. Census. (Ord. 6478-NS § 4 (part), 1999)

Section 23C.12.035 Payment of In-Lieu Fees as an Alternative to Providing Inclusionary Units within a Project

- A. Applicability. As an alternative to providing inclusionary units required in an ownership project, the applicant may elect to enter in an agreement with the City to pay fees as set forth in this section, in-lieu of providing units that are not required to be provided at below market prices pursuant to Government Code Section 65915.
- B. Purpose. The fee shall be deposited in the City's Housing Trust Fund.
- C. Amount of Fee.
 1. The in-lieu fee shall be sixty two and a half percent (62.5%) of the difference between the permitted sale price for inclusionary units and the amounts for which those units are actually sold by the applicant.
 2. This fee shall be calculated and collected based on the sales prices of all of the units in a project to which the inclusionary requirement applies, such that the fee as charged shall be a percentage of the difference between the actual sales price for each unit, and the sales price that would have been permitted had that unit been an inclusionary unit. The percentage shall be determined using the following formula: the number of units for which an in-lieu fee is substituted for an inclusionary unit divided by the total number of units to which the inclusionary ordinance applies, multiplied by 62.5%.
 3. This fee shall only be applicable to units in a project that are counted in determining the required number of inclusionary units in a project and shall not be applicable to any units provided as a density bonus.
 4. In the event that the City Manager makes a determination that an actual sales price does not reflect the fair market value of a unit, the City Manager shall propose an alternate price based on the fair market value of the unit. In the event that the developer and the City Manager cannot agree on a fair market value the City Manager shall select an appraiser to carry out an appraisal of the unit and the appraised value shall be used as the market value.
- D. Calculation of Inclusionary Sales Price.
 1. The allowable inclusionary sales price for the purpose of calculating the in-lieu fee pursuant to this section shall be three (3) times eighty percent (80%) of the Area Median Income (AMI) last reported as of the closing date of the sale of the unit, with the exception that if the developer has already been authorized to charge an inclusionary sale price based on development costs pursuant to Ordinance 6,790-N.S. (adopted January 27, 2004, sunsetted February 19, 2006) the allowable inclusionary sale price for the purposes of this section shall be the price permitted under that ordinance.
 2. Area median income (AMI) shall be calculated in accordance with the affordability regulations established by the City Manager pursuant to Section 23C.12.090.

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- E. Time of Payment of Fee. The developer shall be required to pay the applicable in-lieu fee no later than the closing date of the sale of a unit as a condition of said closing.
- F. Use Permit Obtained Prior to Adoption of This Section. This section shall apply to projects for which all required Permits have already been issued, as long as no units on those projects to which this section would apply have been sold. (Ord. 6946-NS § 1, 2006)

Section 23C.12.040 Requirements Applicable to all Inclusionary Units

- A. All Inclusionary Units other than those in Limited Equity Cooperatives shall be sold to the City or its designee or to Low Income, Lower Income or Very Low Income Households or shall be rented to Households of similar incomes. Units in Limited Equity Cooperatives shall be sold or rented to Households whose gross incomes do not exceed 120% of the Oakland PMSA median.
- B. The applicant shall execute a written agreement with the City indicating the number, type, location, approximate size and construction schedule of all Dwelling Units and other information as required for determining compliance with this chapter.
- C. All Inclusionary Units in a project and phases of a project shall be constructed concurrently with, or prior to, the construction of non-inclusionary units.
- D. 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.
- E. In projects where the calculation of the inclusionary requirement results in a fraction of a unit, such a fraction shall be paid in the form of an in-lieu fee to the City.
 - 1. The in-lieu fee shall be the fractional value of the difference between development cost (excluding marketing costs and profit) and actual sales price for the average comparable unit in projects, where Government Code Section 65915 does not apply, and the difference between affordable cost for an appropriately-sized household and the fractional value of the average comparable actual sales price for the fraction of the unit in projects where Government Code Section 65915 does apply to require a Density Bonus or equivalent incentive.;
 - 2. The in-lieu fee shall be used by the City or its designee (such as a non-profit housing development corporation), to provide, construct or promote the creation or retention of low income housing in the City. The use of in-lieu fees for specific housing programs shall be brought before the Housing Advisory and Appeals Board for review and approval.
- F. Where the applicant demonstrates, and Staff concurs, that the direct construction and financing costs of the Inclusionary Units, excluding marketing cost and profit (and also excluding land costs if a Density Bonus or equivalent incentive is provided), exceed the selling prices allowed for Inclusionary Units by this chapter, the Board may approve one or more of the following measures to reduce costs or increase profitability:
 - 1. Reduction of the floor area or in the interior amenities of the Inclusionary Units, provided that such units conform to applicable building and housing codes;
 - 2. An increase in the number of bedrooms in the Inclusionary Units;
 - 3. In a home ownership project, construction of rental units in a number required to meet the inclusionary provisions of this chapter applicable to rental housing projects;
 - 4. Waiving of the in-lieu participation fees for fractions of units. (Ord. 6676-NS § 2, 2002: Ord. 6478-NS § 4 (part), 1999)

Chapter 23C.12: Inclusionary Housing Requirements

- E. Time of Payment of Fee. The developer shall be required to pay the applicable in-lieu fee no later than the closing date of the sale of a unit as a condition of said closing.
- F. Use Permit Obtained Prior to Adoption of This Section. This section shall apply to projects for which all required Permits have already been issued, as long as no units on those projects to which this section would apply have been sold. (Ord. 6946-NS § 1, 2006)

Section 23C.12.040 Requirements Applicable to all Inclusionary Units

- A. All Inclusionary Units other than those in Limited Equity Cooperatives shall be sold to the City or its designee or to Low Income, Lower Income or Very Low Income Households or shall be rented to Households of similar incomes. Units in Limited Equity Cooperatives shall be sold or rented to Households whose gross incomes do not exceed 120% of the Oakland PMSA median.
- B. The applicant shall execute a written agreement with the City indicating the number, type, location, approximate size and construction schedule of all Dwelling Units and other information as required for determining compliance with this chapter.
- C. All Inclusionary Units in a project and phases of a project shall be constructed concurrently with, or prior to, the construction of non-inclusionary units.
- D. 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.
- E. In projects where the calculation of the inclusionary requirement results in a fraction of a unit, such a fraction shall be paid in the form of an in-lieu fee to the City.
 - 1. The in-lieu fee shall be the fractional value of the difference between development cost (excluding marketing costs and profit) and actual sales price for the average comparable unit in projects, where Government Code Section 65915 does not apply, and the difference between affordable cost for an appropriately-sized household and the fractional value of the average comparable actual sales price for the fraction of the unit in projects where Government Code Section 65915 does apply to require a Density Bonus or equivalent incentive.;
 - 2. The in-lieu fee shall be used by the City or its designee (such as a non-profit housing development corporation), to provide, construct or promote the creation or retention of low income housing in the City. The use of in-lieu fees for specific housing programs shall be brought before the Housing Advisory and Appeals Board for review and approval.
- F. Where the applicant demonstrates, and Staff concurs, that the direct construction and financing costs of the Inclusionary Units, excluding marketing cost and profit (and also excluding land costs if a Density Bonus or equivalent incentive is provided), exceed the selling prices allowed for Inclusionary Units by this chapter, the Board may approve one or more of the following measures to reduce costs or increase profitability:
 - 1. Reduction of the floor area or in the interior amenities of the Inclusionary Units, provided that such units conform to applicable building and housing codes;
 - 2. An increase in the number of bedrooms in the Inclusionary Units;
 - 3. In a home ownership project, construction of rental units in a number required to meet the inclusionary provisions of this chapter applicable to rental housing projects;
 - 4. Waiving of the in-lieu participation fees for fractions of units. (Ord. 6676-NS § 2, 2002: Ord. 6478-NS § 4 (part), 1999)

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Section 23C.12.050 State of California Density Bonus Requirements

Repealed by Ord. 7644-NS. (Ord. 6848-NS § 3 (part), 2005; Ord. 6478-NS § 4 (part), 1999)

Section 23C.12.060 Inclusionary Unit Requirements for Rental Housing Projects

- A. All Inclusionary Units shall be occupied by Low, Lower or Very Low Income Households.
- B. The maximum rental price for Inclusionary Units shall be affordable, as set forth in Section E below, to an appropriate-sized Household whose income is 81% of the Oakland PMSA median.
- C. In projects requiring more than one Inclusionary Unit, at least 50% of those units shall be rented at a price that is affordable to Low or Lower Income Households, provided that the City can make available rental subsidies through the federal Section 8 Existing Housing Program or an equivalent program. When there is an uneven number of Inclusionary Units, the majority of units shall be priced to be affordable to a Household at 50% of median income if subsidies are available. If no rental subsidies are available, all Inclusionary Unit prices shall be affordable to Households at 81% income of the Oakland PMSA median.
- D. If an applicant agrees to provide 10% Lower Income Inclusionary Units, the rental price for such units shall be affordable to a Household with income that is 60% of the Oakland PMSA median.
- E. A unit shall be considered affordable if the rent (including utilities) does not exceed 30% of a Household's Gross Income.
 1. Gross Household Income and utility allowance shall be calculated according to the guidelines used by the Berkeley Housing Authority for the federal Section 8 Existing Housing Program;
 2. For purposes of calculating rent, appropriate Household size shall be determined by using the schedule contained in the administrative regulations developed for this chapter.
- F. Dwelling Units designated as Inclusionary Units shall remain in conformance with the regulations of this section for the life of the building.
- G. The City or its designee shall screen applicants for the Inclusionary Units and refer eligible Households of the appropriate Household size for the unit. For purposes of occupancy, the appropriate Household size standards used by the Housing Authority for the federal Section 8 Existing Housing Program or any future equivalent program shall be used. The applicant or owner shall retain final discretion in the selection of the eligible Households referred by the City.
- H. The owner shall provide the City with data on vacancies and other information required to insure the long-term affordability of the Inclusionary Units by eligible Households. (Ord. 6478-NS § 4 (part), 1999)

Section 23C.12.070 Inclusionary Unit Requirements for Ownership Projects*

- A. Inclusionary Units in ownership projects shall be sold as set forth below:
 1. Inclusionary Units in ownership projects shall be sold at a price that is affordable to an appropriate-sized Household whose income is no more than 80% of the area median income reported for the Oakland PMSA for households of that size, unless the cost of development of the unit is greater than the affordable sales price. Appropriate sizes of household and the ratio of income to sales price for affordable units shall be defined by City Manager regulation;
 2. Inclusionary ownership units shall be affirmatively marketed to tenants with Section 8 housing vouchers, and who are known to be interested in participating in the Section 8 homeownership program, or other

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equivalent program(s) of the City of Berkeley, which are in effect at the time said units are offered for sale by the developer.

- B. The applicant for a project other than a Limited Equity housing Cooperative shall be required to give right-of-first-refusal to purchase any or all new Inclusionary Units to the City or a City-designated agency or organization for a period of not less than 60 days as evidenced by issuance of a Certificate of Occupancy.
- C. Should the City choose not to exercise its right-of-first-refusal, it shall provide the applicant or owner with a purchaser or with a list of eligible purchasers within a period of not less than 60 days. If the list is not provided, the applicant may select a Low Income purchaser of their choice as long as the City verifies income eligibility and the unit is sold at an affordable price as described in this chapter. The City shall maintain a list of eligible Low Income Households and review the assets and incomes of prospective purchasers of the Inclusionary Units on a project by project basis and refer potential purchasers to the applicant or owner.
1. All purchasers of Inclusionary Units shall be first-time home buyers from Low, Lower or Very Low Income Households. Purchasers shall also be required to occupy the unit except that such requirement may be waived with the approval of the City. In such cases, the unit shall be rented to a Low, Lower or Very Low Income Household at a rent affordable by such Households;
 2. Eligible City Residents will have first preference for Inclusionary Units; second preference will be given to eligible persons employed in the City. Other preferences and priorities may also be established administratively, with Planning Commission review, to help meet the City's Housing Element goals;
 3. The City shall advise all prospective purchasers on the City's eligibility list of the resale restrictions applicable to ownership of Inclusionary Units as specified in this chapter and shall provide purchasers with a Declaration of Restrictions applicable to ownership of Inclusionary Units as specified in this chapter;
 4. Purchasers of Inclusionary Units in Limited Equity Cooperatives at time of first occupancy shall be first time home buyers with Gross Incomes no greater than 120 percent of the Oakland PMSA median. Subsequent purchasers of Inclusionary Units in Limited Equity Cooperatives shall be first time home buyers whose yearly Gross Income is no more than 44 percent of the cost of a unit at the time of sale, provided that such income shall be no more than 110 percent of the Oakland PMSA median.
- D. All Inclusionary Units developed under this chapter except for those in Limited Equity Cooperatives shall be subject to the resale restrictions set forth below.
1. Home ownership Inclusionary Units offered for sale or sold under the requirements of this chapter shall be offered to the City or its designee for a period of at least 60 days by the first purchaser or subsequent purchasers from the date of the owner's notification to the City of intent to sell. The resale price of the unit shall not exceed the original price and customary closing costs, except to allow for the lower of any increase of either the Consumer Price Index (CPI) for all urban consumers (as produced by the U.S. Bureau of Labor Statistics or its successor agencies) applicable to the Oakland PMSA or of the increase as measured in household income guidelines published annually by the U.S. Department of Housing and Urban Development (or its successor agencies) for the Oakland PMSA;
 2. This resale formula shall supercede and replace the earlier resale formula in deed restrictions executed between February 19, 1987 (adoption date for Ordinance 5791-N.S.) and May 23, 2006. The City of Berkeley, or its designee, shall notify each such owner of this change to the resale formula contained in their deed restriction within 60 days of adoption of this section. All other terms and conditions of these deed restrictions shall remain in effect;
 3. If the City does not act on its right-of-first-refusal, the same procedure for new Inclusionary Units shall be used for selection of a purchaser.

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- E. The seller shall not levy or charge any additional fees nor shall any finders fee or other monetary consideration be allowed, other than customary real estate commissions if the services of a licensed real estate agent are employed.
- F. The City or its designee may monitor resale of Inclusionary Units in Limited Equity Cooperatives. The City or its designee shall monitor the resale of ownership Inclusionary Units. The owners of any Inclusionary Units shall attach, lawfully reference in the Grant Deed conveying title of any such inclusionary ownership unit, and record with the County Recorder a Declaration of Restrictions provided by the City, stating the restrictions imposed pursuant to this chapter. Violators of any of the terms thereof may be prosecuted by the City. (Ord. 6920-NS § 1-2 (part), 2006: Ord. 6478-NS § 4 (part), 1999)

*Specific text which previously amended Berkeley Municipal Code Sections 23C.12.070A, 23C.12.070D, and 23C.12.090 for the period January 27, 2004 through February 19, 2006 was repealed on February 19, 2006 as stated in the sunset provision of Ordinance 6,790-N.S. These specific text amendments were reinstated by Ordinance 6,920-N.S., adopted on May 23, 2006.

Section 23C.12.080 Special Requirements for Avenues Plan Area

- A. The City Council finds and determines that:
 1. The Avenues Plan process identified a number of regional and Berkeley-specific barriers to housing development;
 2. Among the Berkeley-specific barriers were high land prices; lengthy, difficult and uncertain permit processes; and insufficient financing, especially for affordable housing projects;
 3. The Avenues Plan area represents a core area of the City where it is particularly appropriate to encourage housing development because of the area's generally good access to workplaces, transit service, senior services and retail stores;
 4. The policy to encourage housing in this area is reflected in a number of documents, including, but not limited to, the City's Housing Element of the Master Plan, the Concept Plan for the General Plan revision, the Downtown Plan, the South Berkeley Area Plan, the West Berkeley Plan and the University Avenue statement of planning of goals;
 5. Despite the City's support for housing in this area, new housing development here has been limited and this has hindered revitalization of the area;
 6. As part of a multi-pronged experimental strategy to create incentives to encourage housing development, relaxation of various inclusionary zoning requirements within the Avenues Plan area as set forth in this section is appropriate;
 7. These changes will also assist the buyer of below market rate Inclusionary Units, by allowing them to gain greater appreciation on their investments (market conditions permitting), making the investment more similar to conventional home ownership, while retaining the long term affordability of Inclusionary Units;
 8. The changes will also encourage the construction of larger, family-sized units rather than the smaller units which have generally been built in multi-family developments;
 9. These changes in inclusionary zoning will be followed by mechanisms to make more financing available and changes in zoning standards and permit processes;
 10. The success of these changes will be reviewed annually, until the five year time period of the Avenues Plan experiment expires July 1, 2000.



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B. This section applies on the streets and the addresses listed in the Table below. The area of applicability consists of the entire C-2 District and portions of the C-1, C-SA, C-W, C-N, R-2A, R-3 and R-4 Districts as indicated in the Table. Within this area, the provisions of this section supersede any inconsistent provisions of this chapter.

Table 23C.12.080

Avenues Plan Area: Street and Address Range

<u>Street</u>	<u>Addresses</u>
Acton	1940-2100
Addison	841-1145 odd, 1846 up
Adeline	All
Alcatraz Avenue	1700-1937
Allston Way	1901-1999 odd, 2000 up
Ashby Avenue	1830-2117, 2118-2198 even
Bancroft Way	2000-2300
Berkeley Square	All
Berkeley Way	1200-1800 even only, 1800-1920, 1920-2000 even only, 2000 up
Blake	1800-2100
Bonar	2000-2099
Bonita	1900-1950 even, 1950-1999
Browning	portion of West Campus only
California	1950-2009
Carleton	2000-2117
Center	All
Channing Way	1800-1850 even, 2000-2200, 2200-2300 odd
Cowper	All
Chestnut	1910-1950 even, 1950 up
Curtis	1900-2100, portion BUSD
Delaware	1041-1112, 2000-2200 even
Derby	2000-2113
Dover	All
Durant Avenue	2000-2300
Dwight Way	1800-1850 even, 1850-2200
Ellis	3124-3320 odd
Emerson	2000-2111
Essex	1901-2106
Fairview	1750 up
Fulton	2200-2400, 2400-2606 even
Grant	1800-1900 odd, 1900-2050, 2501-2599 odd
Harold Way	All
Harmon	1750 up
Harper	2901-3123 odd
Haste	1900-1998 even, 2000-2200
Hearst	1032-1200, 1800-2000 even, 2000-2200
Henry	1900 up
Jefferson Avenue	2000-2050

APPENDIX B. Enabling Provisions: BMC Sections 22.20.070 and 22.20.080

22.20.070 Exception/limit where applicant establishes inapplicability or unconstitutionality of general requirements.



A. Notwithstanding any other provision of this chapter, the requirements of this chapter shall not apply or shall be limited as follows:

1. No mitigation and/or fees shall be imposed on any applicant or development project where the applicant establishes to the City's satisfaction that the proposed development project will not generate any additional need for affordable housing, child care and/or public facilities, adequate employment training and placement services or amenities or any other impact for which a mitigation and/or fee is otherwise required;
2. The amount and/or level of any mitigation and/or fee under this chapter shall not exceed the reasonable cost of either satisfying the additional demand for affordable housing, child care and/or public facilities, adequate employment training and placement services or amenities or of eliminating and/or reducing to an acceptable level any other impact which reasonably may be anticipated to be generated by or attributed to any individual development project;
3. The City shall not condition any permit in any manner which results in a deprivation of the applicant's constitutional rights.

B. The burden of establishing by satisfactory factual proof the applicability and elements of subsections [\(A\)\(1\)](#), [\(A\)\(2\)](#) and [\(A\)\(3\)](#) of this section shall be on the applicant

C. No exemption or limit shall be granted pursuant to this section unless a finding is made, based on satisfactory factual proof provided by the applicant, that at least one of the requirements set forth in subsection [\(A\)\(1\)](#), [\(A\)\(2\)](#) or [\(A\)\(3\)](#) of this section has been satisfied. (Ord. 6179-NS § 7, 1993)

22.20.080 Exception--Hardship.



A. Notwithstanding any other provision of this chapter, the requirements of this chapter in the discretion of the City may be waived or limited for a particular development project where both of the following findings are made:

1. The imposition of the mitigation and/or fees otherwise required by the City make the development of the particular project infeasible; and
2. The benefits to the City from the particular development project outweigh its burdens in terms of increased demand for affordable housing, child care and/or public facilities, adequate employment training and placement services and/or amenities and/or other impacts which reasonably may be anticipated to be generated by and/or attributable to the development project.

B. The burden of establishing by satisfactory factual proof the applicability and elements contained in subsections [\(A\)\(1\)](#) and [\(A\)\(2\)](#) of this section shall be on the applicant. (Ord. 6179-NS § 8, 1993)