

**REVISED PROCLAMATION
CALLING A SPECIAL MEETING OF THE
BERKELEY CITY COUNCIL
(REVISED TO REMOVE A TELECONFERENCE LOCATION)**

In accordance with the authority in me vested, I do hereby call the Berkeley City Council in special session as follows:

**Tuesday, June 25, 2024
3:30 PM**

SCHOOL DISTRICT BOARD ROOM - 1231 ADDISON STREET, BERKELEY, CA 94702

TELECONFERENCE LOCATION - 1404 LE ROY AVE, BERKELEY, CA 94708

JESSE ARREGUIN, MAYOR

Councilmembers:

DISTRICT 1 – RASHI KESARWANI
DISTRICT 2 – TERRY TAPLIN
DISTRICT 3 – BEN BARTLETT
DISTRICT 4 – VACANT

DISTRICT 5 – SOPHIE HAHN
DISTRICT 6 – SUSAN WENGRAF
DISTRICT 7 – CECILIA LUNAPARRA
DISTRICT 8 – MARK HUMBERT

This meeting will be conducted in a hybrid model with both in-person attendance and virtual participation. If you are feeling sick, please do not attend the meeting in person.

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*Remote participation by the public is available through Zoom. To access the meeting remotely: Join from a PC, Mac, iPad, iPhone, or Android device: Please use this URL: <https://cityofberkeley-info.zoomgov.com/j/1602106200>. To request to speak, use the “raise hand” icon by rolling over the bottom of the screen. To join by phone: Dial **1-669-254-5252 or 1-833-568-8864 (Toll Free)** and enter Meeting ID: **160 210 6200**. If you wish to comment during the public comment portion of the agenda, Press *9 and wait to be recognized by the Chair. Please be mindful that the meeting will be recorded.*

To submit a written communication for the City Council's consideration and inclusion in the public record, email council@berkeleyca.gov.

This meeting will be conducted in accordance with the Brown Act, Government Code Section 54953 and applicable Executive Orders as issued by the Governor that are currently in effect. Any member of the public may attend this meeting. Questions regarding public participation may be addressed to the City Clerk Department (510) 981-6900. The City Council may take action related to any subject listed on the Agenda.

Pursuant to the City Council Rules of Procedure and State Law, the presiding officer may remove, or cause the removal of, an individual for disrupting the meeting. Prior to removing an individual, the presiding officer shall warn the individual that their behavior is disrupting the meeting and that their failure to cease their behavior may result in their removal. The presiding officer may then remove the individual if they do not promptly cease their disruptive behavior. “Disrupting” means engaging in behavior during a meeting of a legislative body that actually disrupts, disturbs, impedes, or renders infeasible the orderly conduct of the meeting and includes, but is not limited to, a failure to comply with reasonable and lawful regulations adopted by a legislative body, or engaging in behavior that constitutes use of force or a true threat of force.

Preliminary Matters

Roll Call:

Action Calendar – Public Hearings

Staff shall introduce the public hearing item and present their comments. For certain hearings, this is followed by five-minute presentations each by the appellant and applicant. The Presiding Officer will request that persons wishing to speak line up at the podium, or use the "raise hand" function in Zoom, to be recognized and to determine the number of persons interested in speaking at that time.

Up to ten (10) speakers may speak for two minutes. If there are more than ten persons interested in speaking, the Presiding Officer may limit the public comment for all speakers to one minute per speaker. Speakers are permitted to yield their time to one other speaker, however no one speaker shall have more than four minutes. The Presiding Officer may with the consent of persons representing both sides of an issue allocate a block of time to each side to present their issue.

When applicable, each member of the City Council shall verbally disclose all ex parte contacts concerning the subject of the hearing. Councilmembers shall also submit a report of such contacts in writing prior to the commencement of the hearing. Written reports shall be available for public review in the office of the City Clerk.

- 1. Zoning Ordinance Amendments to Berkeley Municipal Code Chapter 23.326 Demolition and Dwelling Unit Controls**
From: City Manager
Recommendation: Conduct a public hearing and upon conclusion, adopt first reading of an Ordinance regarding amendments to Berkeley Municipal Code Chapter 23.326 Demolition and Dwelling Unit Control Ordinance.
Financial Implications: See report
Contact: Jordan Klein, Planning and Development, (510) 981-7400

Adjournment

I hereby request that the City Clerk of the City of Berkeley cause personal notice to be given to each member of the Berkeley City Council on the time and place of said meeting, forthwith.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the official seal of the City of Berkeley to be affixed on June 20, 2024.



Jesse Arreguin, Mayor

Public Notice – this Proclamation serves as the official agenda for this meeting.

ATTEST:



Date: June 20, 2024
Mark Numainville, City Clerk

NOTICE CONCERNING YOUR LEGAL RIGHTS: *If you object to a decision by the City Council to approve or deny an appeal, the following requirements and restrictions apply: 1) Pursuant to Code of Civil Procedure Section 1094.6 and Government Code Section 65009(c)(1)(E), no lawsuit challenging a City decision to deny or approve a Zoning Adjustments Board decision may be filed and served on the City more than 90 days after the date the Notice of Decision of the action of the City Council is mailed. Any lawsuit not filed within that 90-day period will be barred. 2) In any lawsuit that may be filed against a City Council decision to approve or deny a Zoning Adjustments Board decision, the issues and evidence will be limited to those raised by you or someone else, orally or in writing, at a public hearing or prior to the close of the last public hearing on the project.*

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Communications to the City Council are public record and will become part of the City's electronic records, which are accessible through the City's website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to the City Council, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service to the City Clerk Department at 2180 Milvia Street. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the City Clerk Department for further information.

Any writings or documents provided to a majority of the City Council regarding any item on this agenda will be made available for public inspection at the public counter at the City Clerk Department located on the first floor of City Hall located at 2180 Milvia Street as well as posted on the City's website at <https://berkeleyca.gov/>.

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<https://berkeleyca.gov/your-government/city-council/city-council-agendas>

and may be read at reference desks at the following locations:

City Clerk Department - 2180 Milvia Street, First Floor

Tel: 510-981-6900, TDD: 510-981-6903, Fax: 510-981-6901

Email: clerk@berkeleyca.gov

Libraries: Main – 2090 Kittredge Street,

Claremont Branch – 2940 Benvenue, West Branch – 1125 University,

North Branch – 1170 The Alameda, Tarea Hall Pittman South Branch – 1901 Russell

COMMUNICATION ACCESS INFORMATION:

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To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at (510) 981-6418 (V) or (510) 981-6347 (TDD) at least three business days before the meeting date.

Please refrain from wearing scented products to this meeting.



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Office of the City Manager

PUBLIC HEARING

June 25, 2024

To: Honorable Mayor and Members of the City Council

From: Dee Williams-Ridley, City Manager

Submitted by: Jordan Klein, Director, Planning and Development Department

Subject: Zoning Ordinance Amendments to Berkeley Municipal Code Chapter 23.326 Demolition and Dwelling Unit Controls

RECOMMENDATION

Conduct a public hearing and upon conclusion, adopt first reading of an Ordinance regarding amendments to Berkeley Municipal Code Chapter 23.326 *Demolition and Dwelling Unit Control Ordinance*.

SUMMARY

State law SB 330 (Housing Crisis Act of 2019) established new provisions related to demolition of residential units, including the rights of sitting tenants and affordability requirements for demolished units. The law provides different options to comply with these requirements.

The proposed ordinance (***Attachment 1 (redlined)*** and ***Attachment 2 (clean)***) includes provisions to bring the current Demolition Ordinance (***Attachment 4***) into conformance with SB 330, clarify replacement unit requirements, maximize tenant protections, and preserve the existing affordable housing stock. The proposed ordinance includes a number of new Berkeley-specific provisions as recommended by the 4x4 Joint Task Force Committee on Housing and the Planning Commission, and includes a number of text edits, including grammatical corrections and renumbering.

Staff prepared a staff report and proposed ordinance for the City Council's March 26, 2024 meeting. This report and the attached proposed ordinance include the same content, with the following revisions:

- The March 26, 2024 staff report and ordinance stated that a protected unit is a unit occupied by a household at 50% area median income (AMI) or below. The attached ordinance incorporates the correction made by staff in supplemental materials for the March 26 meeting to state that a protected unit includes a unit occupied by a household at 80% AMI or below, which is consistent with State Law.

- The March 26, 2024 staff report and ordinance stated that the ordinance would apply to dwelling units, Accessory Dwelling Units (ADUs), and Junior Accessory Dwelling Units (JADUs) built without benefit of permit. The attached ordinance expands that applicability to also include residential hotel units and Group Living Accommodation (GLAs) built without benefit of permit.

FISCAL IMPACTS OF RECOMMENDATION

The proposed ordinance is not anticipated to have a noticeable impact on staffing needs or workload, and any fiscal impacts would be minimal.

The proposed ordinance includes the removal of an option to pay a fee for affordable housing in lieu of replacing new units, as State law requires the replacement of demolished units.

CURRENT SITUATION AND ITS EFFECTS

Revising Berkeley Municipal Code Chapter 23.326 *Demolition and Dwelling Unit Controls* (“the Demolition Ordinance”) supports the City’s Strategic Plan Goal to create affordable housing and housing support services for its most vulnerable community members.

The existing Demolition Ordinance (***Attachment 4***) requires a Use Permit for the demolition or elimination of one or more dwelling units in Berkeley. The Zoning Adjustments Board (ZAB) may issue a Use Permit for the demolition of a dwelling unit for specific listed reasons:

- A building is “hazardous or unusable and is infeasible to repair.”
- “Demolition is necessary to permit construction... of at least the same number of dwelling units.”
- “The elimination of the dwelling units would not be materially detrimental to the housing needs and public interest of the affected neighborhood and the City.”

The existing Demolition Ordinance includes provisions for unit replacement and the rights of sitting tenants, as well as additional situations such as:

- When housing units are demolished and no new housing units are proposed to be developed at the site (e.g., commercial development);
- When tenants have been unlawfully evicted, such as forcing a tenant out of a unit without a court order; and
- When units are being merged or converted within an existing building rather than physically demolished.

The existing Demolition Ordinance includes a provision whereby applicants may pay a fee rather than provide below-market-rate replacement units. However, the amount of that fee has never been established.

Demolition of dwelling units is prohibited where a residential building has been removed from the rental market under the Ellis Act during the preceding five years. Demolition is also prohibited where there have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years. Project applicants are generally required to provide relocation benefits, including moving expenses and differential rent payments to tenants. In addition, displaced tenants are provided a right of first refusal to rent new units after the lot has been redeveloped.

The existing ordinance also includes provisions related to the demolition of non-residential buildings, accessory buildings and building relocations. Changes to these provisions are not proposed.

Proposed Demolition Ordinance Provisions

The proposed ordinance includes provisions to bring the Demolition Ordinance into conformance with State law and includes a number of new Berkeley-specific provisions as recommended by the 4x4 Joint Task Force Committee on Housing. The proposed ordinance also includes a number of text edits, including grammatical corrections and renumbering.

The most significant changes are summarized in Table 1 and discussed in detail below. The primary rationales for the proposed changes include clarifying the applicability of the ordinance, expanding tenant protections, bringing the ordinance into conformance with State law, and assigning the Rent Stabilization Board (Rent Board) to administer some aspects of the ordinance rather than the ZAB.

Applicable Unit

The existing ordinance indicates that it applies to a “dwelling unit or units.” The proposed ordinance includes clarifications that it applies to dwelling units, group living accommodations, live-work units, residential hotel rooms, certain ADUs and units constructed without a building permit.

Regarding ADUs, the 4x4 Committee proposed incorporating ADUs into the ordinance, subject only to the tenant notice and relocation requirements. This means an ADU wouldn't be obligated to meet replacement or affordability requirements. The Planning Commission expressed concern that applying these requirements to ADUs would discourage their production, specifically in cases where there was one single-family

home and one ADU on a lot. However, Planning Commission also determined that ADUs within larger, multi-unit rental properties should be subject to replacement requirements. As a result, the Planning Commission recommended exempting an ADU entirely on lots which include only one single-family dwelling and one ADU. All other ADUs would be treated similarly to other units.

Protected Unit

SB 330 includes a no net loss provision that requires that a residential development project that includes the demolition of existing units must result in at least as many units as are demolished. In addition, certain types of units—“protected units”—are subject to specific replacement and affordability provisions. The proposed ordinance includes a definition of protected unit consistent with SB 330, and includes units that have been:

- Subject to a low-income deed restriction for any of the previous five years;
- Subject to rent control per Berkeley Municipal Code 13.76; or
- Rented by a household at 80% Area Median Income or lower.

Comparable Unit

The existing ordinance refers to a “comparable unit” when referring to replacement units, but does not define “comparable unit.” The proposed ordinance includes an explicit definition of “comparable unit,” indicating that it should be of a comparable size, include similar amenities, and be located in a similar area of the city as the demolished unit.

Units Built Without Proper Permits

The proposed ordinance applies to dwelling units, group living accommodations, residential hotel rooms, ADUs and JADUs that are protected units created without proper zoning approvals or building permits (i.e., “illegal units”). These units, and the tenants residing in them, would be treated as properly permitted units for the purposes of the proposed ordinance, with the following distinctions:

- For a unit built without proper permits to qualify as a residential unit, it would have to be registered with the Rent Stabilization, or the Rent Stabilization Board must determine that a tenant-landlord relationship existed during the previous five years.
- The proposed ordinance includes a provision that allows the Building Officer, Zoning Officer or Fire Marshal to determine that the replacement of such a unit is not required when the replacement of the unit would be infeasible given existing Zoning, Building or Fire Code requirements.

Prohibited Demolitions

The existing ordinance prohibits demolition for units that have been removed from the rental stock through the Ellis Act within the past five years, or in cases where there has been substantial evidence of tenant harassment by a rental property owner, or an attempted or actual illegal eviction, within the past three years. In the latter case, the determination of whether harassment has occurred is made by the ZAB.

The proposed ordinance expands tenant protections to include any no fault eviction within the past five years, not just removal of a rental unit from the market through the Ellis Act. A “no fault eviction” is when the property owner or landlord wants to evict a tenant at no fault of the tenant, for example, when the property owner wants to move into the property.

The Rent Stabilization Board is proposed to be the deciding body for questions regarding harassment and illegal eviction, instead of the ZAB.

Mitigation Fee

The existing ordinance includes a requirement to pay an in-lieu mitigation fee for every unit demolished, or the option to replace a comparable affordable unit on-site.

State law (SB330) imposes a requirement that any housing development project that requires the demolition of dwelling units must create at least as many residential dwelling units as will be demolished on-site, and requires that the City condition approval on the provision of replacement units. Therefore, an option to “fee out” of the replacement requirement is a violation of State law, because it would not provide replacement units at the sizes and affordability levels required by SB 330. Accordingly, the proposed ordinance removes the mitigation fee section.

Landmarks and Structures of Merit

While the provisions of BMC Chapter 3.24 (Landmarks Preservation Commission) apply to units proposed for demolition, the existing ordinance does not explicitly refer to this chapter. Accordingly, the proposed ordinance includes specific language referring to Chapter 3.24.

Affordability of Replacement Units

The existing ordinance includes a requirement that any replacement units must be affordable units, and that the income levels of the qualifying households, and rents for the replacement units, shall be set by a resolution of the City Council. The existing

ordinance also includes a requirement that the project applicant enter into a regulatory agreement with the City to provide these units.

The proposed ordinance includes more detailed provisions addressing the affordability levels of replacement units that are in concert with the requirements under State law:

- The proposed ordinance requires that any demolished protected unit shall be replaced with equivalent units and comply with the applicable affordability requirements for Affordable Units included in BMC 23.328 (Affordable Housing Requirements) and BMC 23.330 (Density Bonus). Referencing these sections clarifies the appropriate affordability levels for replacement units,¹ and establishes consistent requirements across a number of affordable housing-related provisions in the BMC.
- The proposed ordinance includes a provision that if a displaced household has an income below 50% AMI, a comparable replacement unit shall be offered at a rent that is affordable to households at 30% of AMI.
- The proposed ordinance also includes a provision that in cases where the household income of a displaced tenant(s) is unknown, households would be presumed to be low income in proportion to households throughout the city, as calculated using the US Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy (CHAS) database.

Attachment 3 includes illustrations of how these provisions could be applied.

Sitting Tenants' Rights

The existing ordinance establishes certain rights for sitting tenants. Sitting tenants in demolished units are entitled to a right of first refusal to move into the new building, have a right of first refusal for any BMR units, and retain those rights even if they have incomes that do not qualify for BMR units.

The proposed ordinance clarifies that tenants who do not qualify for BMR replacement units due to income limits above the area median income must still be provided a market-rate replacement unit at their prior rent. Additionally, the rent for the duration of that tenancy would be subject to Berkeley's rent control regulations. This section was

¹ BMC Section 23.328.030 requires that development projects subject to Inclusionary Zoning requirement include at least 20% of the units as Affordable Units. At least 50% of required Affordable Units must be offered at a rent that is affordable to Very Low Income Households (50% AMI or lower); the balance of units can be offered at rents affordable to Low Income Households (80% AMI).

added by the 4x4 Committee to provide additional rights to sitting tenants who may not qualify for BMR units.

The proposed ordinance includes additional provisions related to sitting tenants' rights. The revisions clarify that a sitting tenant's right of first refusal extends to a *comparable* unit (not just any unit) in the building, and includes provisions which set the rent levels for those units. These provisions go beyond what is required under State law. The proposed ordinance also includes a specific timeline by which a displaced tenant must indicate interest in returning to a replacement unit.

Elimination of Units through Combination with Other Units

The existing ordinance includes provisions regulating the elimination of dwelling units through physical combination with other units. This usually occurs in cases where two units are combined to make a single larger unit. The existing ordinance requires a Use Permit, with specific findings, to move forward with such an elimination. It also prohibits such an elimination if the building was removed from the rental market through the Ellis Act in the past five years, or if there is evidence of tenant harassment or illegal eviction within the past three years, as determined by the ZAB.

The proposed ordinance permits combined units through an Administrative Use Permit (AUP) approval, if such a combination would return the building to, or move it closer towards, its permitted density. This is a provision to make it easier for units in owner-occupied buildings to be combined. The AUP requirement still includes discretionary review, the ability to set conditions, and an appeal option to the ZAB.

Elimination of a unit for a combination would not be approved if the building was vacated through any no-fault eviction, not just due to the Ellis Act, or if the tenant was subject to landlord harassment or an illegal eviction. The determination of whether landlord harassment or a real or attempted illegal eviction occurred would be made by the Rent Board Hearing Examiner, with an appeal option to the Rent Stabilization Board, instead of by the ZAB.

Demolition of Single-Family Homes

The existing ordinance requires a Use Permit to demolish a single-family home. The adopted Housing Element Update, Program 19—Middle Housing—includes a requirement that the City Council consider permitting the demolition of single-family homes with a Zoning Certificate (ZC) if the demolition is part of a middle housing project that results in a net increase in density.

The proposed ordinance includes a provision to allow the demolition of a single-family home without sitting tenants with an AUP if it is part of a project that results in a net increase in density. While the Planning Commission understood the rationale for streamlining review of projects that increase density, it concluded an AUP was the more appropriate level of discretion, and that the ordinance should specifically indicate that a single-family home with sitting tenants would not be permitted to be demolished with an AUP. The Planning Commission also acknowledged its intent to reconsider this issue later in 2024 as part of the Middle Housing legislative package.

Demolition of Accessory Buildings

The existing ordinance includes a provision that permits the demolition of an accessory building that does not contain a dwelling unit, such as garages, carports, and sheds, with a ZC. The proposed ordinance includes additional clarifying language that an accessory building that is occupied by a residential tenant shall be considered a residential unit for the purposes of this chapter.

Residential Hotel Rooms

The existing ordinance includes a section regulating the elimination of Residential Hotel Rooms. These provisions include requirements related to monthly and weekly charges, and permit Residential Hotel Rooms to be removed for the purpose of providing common use facilities (such as a kitchen, lounge, or recreation room) for remaining residents or to undertake seismic upgrades or meet the requirements of the Americans with Disabilities Act. They also include a provision allowing an owner to meet the replacement requirements through a payment to the Housing Trust Fund, which, as noted above, is not permitted under State law.

The proposed ordinance removes the Residential Hotel Rooms section entirely. Residential Hotel Rooms would therefore receive the same treatment under the proposed ordinance as other residential units

Technical Edits, Reorganization and Renumbering

The proposed ordinance also includes a variety of purely technical edits, and reorganization, retitling, and renumbering of some sections and subsections.

Table 1. Summary of Revisions to Demolition Ordinance

Policy Area	Current Ordinance	Proposed Ordinance	Rationale
Applicable Unit	“Dwelling unit or units.”	Dwelling Unit, GLA, ADU, JADU, and units built without permits	Clarification of the types of units covered.
Protected Unit	No definition.	BMR unit, rent controlled unit, or unit occupied by household at 80% AMI.	State Law: protected units are subject to specific replacement requirements.
Comparable Unit	No definition.	“Similar size, amenities and location within the city.”	Clarification by providing a definition.
Units Built Without Proper Permits	Not mentioned.	Includes units built without proper permits if registered with Rent Board or landlord-tenant relationship has existed in past five years.	Clarification of the types of units covered.
Demolition Prohibition: Ellis Act	Prohibition applies to any unit removed via Ellis Act within the past 5 years	Prohibition applies to any “no-fault” eviction.	Expansion of tenant protections beyond just one type of no-fault eviction (Ellis Act).
Demolition Prohibition: Tenant Harassment	Determination made by ZAB.	Determination made by Rent Board.	For tenant-landlord issues, the Rent Board is the subject-expert body.
Mitigation Fee	Includes mitigation fee option.	Removes mitigation fee option.	State Law: Demolished units must be replaced (SB 330).

Policy Area	Current Ordinance	Proposed Ordinance	Rationale
Landmarks and Structures of Merit	No reference to Landmarks Preservation Commission (LPC) procedures.	Includes reference to LPC procedures.	Clarification that LPC procedures apply.
Replacement Units -- Affordability	<ul style="list-style-type: none"> • Replacement unit must be affordable in perpetuity; • Affordability level to be set by Council resolution; • Regulatory agreement with the City required. 	<ul style="list-style-type: none"> • Replacement unit must comply with Chapter 23.328 (Affordability Requirements) and 23.330 (Density Bonus); • For demolished unit with household at 50% AMI or below, replacement unit must be set at 30% AMI; and • Allows Zoning Officer and Fire Marshall to waive replacement of illegal units for health and safety 	State Law: Existing tenant income levels impact type/affordability of replacement units (SB 330).
Sitting Tenants Rights	<ul style="list-style-type: none"> • Right of first refusal to move into the building • Right of first refusal for BMR units 	<ul style="list-style-type: none"> • Right of first refusal for a comparable unit • For displaced tenants who rent a comparable unit, rent is controlled for 	State Law: Tenant income levels impact type/affordability of replacement units (SB 330).

Policy Area	Current Ordinance	Proposed Ordinance	Rationale
	<ul style="list-style-type: none"> Income restrictions do not apply 	duration of tenancy <ul style="list-style-type: none"> For households ineligible for BMR units, a replacement unit shall be offered at prior rent, with increases limited equivalent to rent control. 	Additional local requirement: Income restrictions do not apply to displaced households upon their return to the property after completion of the project.
Elimination of Units through Combination with other Units	Use Permit required in all cases, with findings.	AUP to combine units when the combination would return the building to, or move it closer towards, its original density.	Simplification: Allow conversion of owner-occupied buildings with a lesser standard.
	Combination not allowed if the building was removed via Ellis Act within the past 5 years	Combination not allowed if vacated through no fault eviction within the past 5 years.	Expansion of tenant protections beyond just one type of no-fault eviction (Ellis Act).
	Combination not allowed if tenant harassment. Determination made by ZAB	Determination made by Rent Board Hearing Examiner, with appeal to Rent Board.	For tenant-landlord issues, the Rent Board is the subject-expert body.
Demolition of Single Family Homes	Requires a Use Permit.	Would be permitted with an AUP if the single family home were not tenant-occupied and the demolition was part	Provide streamlined process to encourage middle housing projects.

Policy Area	Current Ordinance	Proposed Ordinance	Rationale
		of a project that increased density.	
Demolition of Accessory Buildings	Can be demolished by right.	Added language to clarify that Accessory Buildings that are occupied by residential tenants are considered Residential Units. <i>23.326.050</i>	Expansion of demolition controls and tenant protections.
Elimination of Residential Hotel Rooms	Section 23.326.060 provides specific procedures for removal of residential hotel rooms	Section removed.	Residential Hotel Rooms are considered Residential Units for purpose of ordinance. <i>23.326.010(A)(1)</i>

BACKGROUND

The impetus for these revisions is recent changes in State law that provide additional requirements for new housing development projects that involve the demolition of existing residential units. These provisions of SB 330 (Housing Crisis Act of 2019), which modified Government Code sections relating to zoning and density bonus, require all new housing development projects to provide replacement units of equivalent size, defined as having the same number of bedrooms as the demolished units.

In early 2022, Planning & Development staff, in consultation with the City Attorney’s Office, drafted revisions to the Demolition Ordinance to reflect these changes to State law. The 4x4 Joint Task Force Committee on Housing considered the draft at its meetings in April 2022 and December 2022, and made recommendations pertaining primarily to replacement unit requirements and expanded tenant protections. Staff revised the draft ordinance to incorporate that feedback and advanced the ordinance to Planning Commission for review.

At its meeting of February 1, 2023, the Planning Commission scheduled a public hearing to adopt a recommendation for the City Council of changes to the Demo

Ordinance. The Planning Commission deferred a final recommendation pending recommendations from the 4x4 Joint Task Force Committee on Housing. Staff returned to the 4x4 Joint Task Force Committee in September and October 2023 for discussion and recommendations. The Planning Commission conducted a public hearing at its December 6, 2023 meeting and moved to create a Subcommittee to review the proposed ordinance in detail, and to consider suggestions and recommendations made by Commissioners at that meeting. The Subcommittee met on December 20, 2023 and recommended a number of changes to the ordinance. At its meeting of January 17, 2024, the Planning Commission held a public hearing and made a recommendation to the City Council.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

California Public Resource Code Section 21065 defines a “project” under CEQA as “an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” The proposed ordinance amendments relate only to the requirements to demolish existing structures, and would not result in any physical changes to the environment. The proposed ordinance does not consist of a discretionary action that would permit or cause any direct or indirect change in the environment. The proposed ordinance is therefore not a project under CEQA.

RATIONALE FOR RECOMMENDATION

The proposed ordinance includes changes required by state law, as well as policy changes recommended by the 4x4 Joint Committee Task Force on Housing and the Planning Commission.

ALTERNATIVE ACTIONS CONSIDERED

The December 9, 2023 and January 17, 2024 Planning Commission agenda reports include rationales for the provisions included in the proposed ordinance, and note some of the alternative policies considered. Most notable among these alternative suggestions were the treatment of ADUs similarly to any other residential unit, and permitting the demolition of single-family dwellings with a ZC.

A notable difference between the recommendations from the 4x4 Committee and the Planning Commission was the definition of Comparable Unit. The 4x4 Committee had recommended a definition which included a unit of similar size, in a similar location within the city, with similar amenities, notably private open space. The Planning Commission opted for a slightly different recommendation that included similar shared *indoor* amenities and did not include private open space. The Planning Commission felt that offering comparable private open space after the demolition of, for example, an existing single-family dwelling with a large back yard, could limit the redevelopment potential of single-family parcels.

CONTACT PERSON

Justin Horner, Associate Planner, Planning and Development Department, 510-981-5754.

Attachments:

- 1: Proposed Ordinance, redlined version.
- 2: Proposed Ordinance, clean version.
- 3: Replacement Unit Provisions, Examples
- 4: Existing Demolition Ordinance (BMC 23.326)
- 5: Planning Commission Reports: December 9, 2023 and January 17, 2024.
- 6: Public Hearing Notice

ORDINANCE NO.

AMENDING BERKELEY MUNICIPAL CODE CHAPTER 23.326, DEMOLITION
AND DWELLING UNIT CONTROLS

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

Section 1. That Berkeley Municipal Code Chapter 23.326 is hereby amended to read as follows:

23.326 DEMOLITION AND DWELLING UNIT CONTROL

Sections:

- 23.326.010– Chapter Purpose
- 23.326.020– General Requirements
- 23.326.030– ~~Eliminating Dwelling Units through~~ Demolition of Residential Units
- 23.326.040– Eliminating Dwelling Units through Combination with Other Units
- ~~Conversion and Change of Use~~
- 23.326.050—Demolition of Accessory Buildings
- 23.326.~~0560~~– Private Right of Action
- ~~23.326.060—Elimination of Residential Hotel Rooms~~
- 23.326.070– Demolitions of Non-Residential Buildings
- 23.326.080– Building Relocations
- 23.326.090– Limitations
- 23.326.100-- Severability

23.326.010 – Chapter Purpose

This chapter establishes demolition and dwelling unit control standards that promote the affordable housing, aesthetic, and safety goals of the City.

23.326.020 – General Requirements

A. Applicability. No ~~dwelling-unit Residential Unit(s) or units~~ may be eliminated or demolished except as authorized by this chapter.

1. “Residential Unit” means, for purposes of this Chapter, any Dwelling Unit, any Live-Work Unit, any Residential Hotel unit, any bedroom of a Group Living Accommodation (GLA), except a GLA in a University-recognized fraternity, sorority or co-op, or any lawfully-permitted Accessory Dwelling Unit (“ADU”) or Junior Accessory Dwelling Unit (“JADU”).
2. “Residential Unit” includes Dwelling Units, Residential Hotel units, any bedroom of a Group Living Accommodation (GLA), except a GLA in a

University-recognized fraternity, sorority or co-op, ADUs, and JADUs created without proper zoning approvals or Building Permit(s) if they have been registered with the Rent Stabilization Board, or the Rent Stabilization Board has otherwise determined that a tenant-landlord relationship existed during the preceding five years.

3. “Residential Unit” does not include an ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU, as defined in BMC Chapter 23.306, where the landlord also occupies a unit in the same property as their principal residence. This shall only apply to properties containing a single ADU or JADU, shall only apply to units compliant with all applicable requirements of BMC Chapter 23.306 (“Accessory Dwelling Units”), and shall only apply to tenancies created after November 7, 2018.
4. “Comparable Unit” means a Residential Unit of similar size (square footage and number of bedrooms), common interior amenities, and location within the city (neighborhood and school attendance area). In the case of a Single-Family Dwelling being replaced, a Comparable Unit is not required to have the same or similar square footage or the same number of total rooms, but must provide the same number of bedrooms if the Single-Family Dwelling includes three or fewer bedrooms, or three bedrooms if the Single-Family Dwelling contains four or more bedrooms.
5. “Protected Unit” includes a Residential Unit:
 - a. Subject to a low-income deed restriction for any of the previous five years;
 - b. Subject to rent or price control under BMC Chapter 13.76; or
 - c. Rented by a household at 80% Area Median Income or lower within the previous five years.

~~B. **Findings.** In addition to the requirements below, the Zoning Adjustments Board (ZAB) may approve a Use Permit to eliminate or demolish a dwelling unit only upon finding that eliminating the dwelling unit would not be materially detrimental to the housing needs and public interest of the affected neighborhood and Berkeley.~~

23.326.030 – Eliminating Dwelling Units through Demolition of Residential Units

~~**A. Buildings with Two or More Units Constructed Before June 1980.**~~

- ~~1. **Applicability.** This subsection only applies to building with two or more units constructed before June 1980.~~
- ~~2. **Limitation.**~~

~~A. (a) Demolition is not allowed if:~~

1. The ~~building Residential Unit(s)~~ was removed from the rental market ~~under the Ellis Act through a no-fault eviction~~ during the preceding five years; or
2. There ~~have been verified cases~~ is substantial evidence of harassment or threatened or actual illegal eviction during the immediately preceding three years. ~~Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, whose determination may be appealed to the Rent Stabilization Board.~~

~~(b) Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner. The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The ZAB shall determine whether harassment or threatened or actual illegal eviction occurred.~~

3.B. Procedure and Findings.

~~1. The ZAB may approve a A Use Permit is required to eliminate or demolish one or more Residential Units, except where otherwise provided by the Zoning Ordinance. a building constructed before June 1980 on a property containing two or more dwelling units The ZAB shall only approve the Use Permit if any one of the following are is true:~~

- (a) The building containing the Residential Unit(s) units is hazardous or unusable and is infeasible to repair.
- (b) The building containing the Residential Unit(s) units will be moved to a different location within Berkeley with no net loss of units and no change in the affordability levels of the unit(s).
- ~~(c) The demolition is necessary to permit construction of special housing needs facilities such as, but not limited to, childcare centers and affordable housing developments that serve the greater good of the entire community.~~
- ~~(d) (c)~~ The demolition is necessary to permit construction approved pursuant to this chapter of at least the same number of dwelling units.

2. A Single-Family Dwelling without sitting tenants can be demolished with an AUP, if the demolition is part of a development project that would result in a net increase in residential density.

3. In the event of a demolition of a Residential Unit created without proper Use Permit(s) or Building Permit(s), as defined in 23.326.020(A)(3), the Building Official, Zoning Officer or Fire Marshal may determine that the replacement of such a unit is infeasible and not required under this Chapter. Such a

determination shall include a finding that the replacement of the unit could not occur in compliance with Zoning Code, Building Code, Fire Code or other regulations related to public health and safety

C. Landmarks and Structures of Merit. Demolition of a designated landmark or structure of merit, or of a structure in a designated historical district, must be approved by the Landmarks Preservation Commission, pursuant to Chapter 3.24.

4. Fee Required.

~~(a) The applicant shall pay a fee for each unit demolished to mitigate the impact of the loss of affordable housing in Berkeley.~~

~~(b) The amount of the fee shall be set by resolution of the City Council.~~

~~(c) In Lieu of a Fee.~~

~~1. In lieu of paying the impact fee, the applicant may provide a designated unit in the new project at a below market rate to a qualifying household in perpetuity.~~

~~2. The affordability level of the below market rent and the income level of the qualifying household shall be set by resolution of the City Council.~~

~~3. The applicant shall enter into a regulatory agreement with the City of Berkeley to provide the in lieu units.~~

D. Conditions of Approval. Any Protected Unit that is demolished shall be replaced with a Comparable Unit that shall comply with the affordability requirements in Chapter 23.328 [Affordable Housing Requirements] and Chapter 23.330 [Density Bonus] as they may be amended from time to time.

1. In the event that a displaced household has an income below 50% AMI, a Comparable Unit shall be offered at a rent that is affordable to households at 30% of AMI, and the displaced household shall have the first right of refusal for that unit. Such a Comparable Unit shall be counted as a Very Low-Income unit for applicable affordability requirements in Chapter 23.328.

2. In the event that a demolished Residential Unit is not a Protected Unit and the income of the displaced household is unknown, the Residential Unit shall be presumed to have been occupied by Low- or Lower-Income households in the same proportion as Residential Units throughout the City. The City shall rely upon US Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy (CHAS) data to determine the number of such Residential Units that must be replaced with Affordable Units as defined in Chapter 23.328.

3. In the event that a Protected Unit was subject to rent or price controls under BMC Chapter 13.76, and the income level of the displaced household is unknown, the unit shall be replaced with an Affordable Unit as defined in Chapter 23.328.

E. Requirements for Occupied Units.

~~(a)~~ 1. Applicability. The following requirements do not apply to tenants who move in after the application for demolition is submitted to the City if the owner informs each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.

- ~~1. The requirements in this subsection apply if units to be demolished are occupied.~~
- ~~2. These requirements do not apply to tenants who move in after the application for demolition is submitted to the City if the owner informs each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.~~

~~(b)~~ 2. Notice. The applicant shall provide all sitting tenants and the Rent Stabilization Board notice of the application to demolish the building for demolition no later than the date it is submitted to the City, including notice of their rights under Municipal Code Section 13.76 (Rent Stabilization and Eviction for Good Cause Program), Chapter 13.77 (Requirements, Procedures, Restrictions and Mitigations Concerning the Withdrawal of Residential Rental Accommodations from Rent or Lease), 13.79 (Tenant Protections: Automatically Renewing Leases and Buyout Agreements) and 13.84 (Relocation Services and Payments for Residential Tenant Households).

~~(c)~~ 3. General Requirements. The applicant shall provide moving and relocation assistance equivalent to the requirements set forth in Municipal Code Chapter 13.84 (Relocation Services and Payments for Residential Tenant Households) or Government Code section 66300.6(b)(4)(A), whichever requires greater relocation assistance to displaced tenants, and shall not be subject to the limitations in section 13.84.070.B.3(a). The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy. Within five days of the issuance of the Certificate of Occupancy, tenants shall be notified in writing that the units will be ready for move-in on a date specified. Tenants shall confirm in writing their intent to lease the available unit at any time before 20 days after the issuance of the Certificate of Occupancy. Funding for the rent differential shall be guaranteed in a manner approved by City Council Resolution; provided, however, that any project that is carried out or funded by the state or federal government shall be subject to applicable provisions of

the California Relocation Act (Government Code section 7260 et seq.) and/or the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. sections 4601- 4655).

- ~~1. The applicant shall provide assistance with moving expenses equivalent to in Chapter 13.84 (Relocation Services and Payments for Residential Tenant Households).~~
- ~~2. The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy. Funding for the rent differential shall be guaranteed in a manner approved by the City.~~
3. (a) *Exception.* An applicant who proposes to construct a 100 percent affordable housing project is not required to comply with this subsection but must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended and the California Relocation Act (Government Code sections 7260 et seq.).

(b) *Exception for Tenants in ADUs or Unpermitted Units that Cannot Be Replaced.* Applicants are required to provide moving and relocation assistance, in an amount provided in BMC Section 13.76.130(A)(9)(g), to the following groups of tenants: (i) tenants who occupy an ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU, where the landlord also occupies a unit in the same property as his/her principal residence; and (ii) tenants who occupy a unit created without proper zoning approvals that cannot be replaced for public health or safety reasons, pursuant to BMC 23.326.030(B)(3). However, applicants are not required to (i) provide such tenants with a temporary replacement unit while a new unit is being constructed, (ii) notify such tenants when a new unit is ready for occupancy; or (iii) provide such tenants with a right for first refusal for the new unit.

~~(d)~~ 4. *Sitting Tenants Rights.*

- (a) Sitting Any tenants of a Protected Unit that is permitted to be demolished under this section who are displaced as a result of demolition shall be provided have the right of first refusal to move into rent a Comparable Unit in the new project building.
- (b) In the event that a displaced household is ineligible for below-market rate replacement units, a market rate Comparable Unit shall be made available to that household at the same rent as had been previously charged, or a lesser rent if that is the market rate. Tenants of units that are demolished shall have the right of first refusal to rent new below-

~~market rate units designated to replace the units that were demolished, at the rent that would have applied if they had remained in place, as long as their tenancy continues.~~

- (c) ~~Where a displaced tenant exercises the right to rent a Comparable Unit, any increase in rent for the Comparable Unit for the duration of their tenancy shall be no greater than the lesser of 65% of the increase in the Consumer Price Index for All Urban Consumers (CPI-U) in the San Francisco-Oakland-San Jose region (as reported and published by the U.S. Department of Labor, Bureau of Labor Statistics for the twelve-month period ending the previous December 31) or 65% of the corresponding increase in Area Median Income (AMI) for the same calendar year .Income restrictions do not apply to displaced tenants.~~
- (d) ~~Exceptions.~~
- i. An applicant who proposes to construct a 100 percent affordable housing project is not required to comply with ~~the preceding requirements 23.326.030.A.4.a, b, and c,~~ but must comply with the following requirement.
 - ii. Sitting tenants who are displaced as a result of demolition and who desire to return to the newly constructed building will be granted a right of first refusal subject to their ability to meet income qualifications and other applicable eligibility requirements ~~when the new units are ready for occupancy.~~

~~C Buildings with a Single Dwelling Unit.~~

3. ~~**Applicability.** This subsection only applies to buildings with a single dwelling unit.~~
4. ~~**Limitations.**~~
 - (a) ~~Demolition is not allowed if:~~
 1. ~~The building was removed from the rental market under the Ellis Act during the preceding five years; or~~
 2. ~~There have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years.~~
 - (b) ~~Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner. The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The ZAB shall determine whether harassment or threatened or actual illegal eviction occurred.~~

~~D. **Accessory Buildings.** Notwithstanding anything in Municipal Code Title 23 (Zoning Ordinance) to the contrary, but subject to any applicable requirements in Municipal Code Section 3.24 (Landmarks Preservation Ordinance), accessory buildings of any size, including, but not limited to, garages, carports, and sheds, but not including any structure containing a lawfully established dwelling unit, which serves and is located on the same lot as a lawful residential use, may be demolished by right.~~

23.326.040 – Eliminating Dwelling Units through Combination with Other Units Conversion and Change of Use

A. ~~Process for Projects Where Density Exceeds Current Allowance~~ **General.** ~~The ZAB may approve a A Use Permit is required to eliminate one or more Residential Units by combining with another unit when the existing development exceeds currently-allowable density. for the elimination of a dwelling unit in combination with another dwelling unit used for occupancy by a single household. The ZAB shall approve a Use Permit for the elimination of one or more Residential Units by combining with another unit only if it finds that:~~

1. The existing number of ~~Residential Units~~ dwelling units exceeds ~~the current maximum~~ allowed residential density in the district where the building is located; and
2. One of the following is true:
 - (a) One of the affected dwelling units has been ~~owner-occupied by the applicant's household~~ as ~~it's a~~ principal place of residence for no less than two years before the date of the application and none of the affected units are currently occupied by a tenant.
 - (b) All of the affected ~~Residential Units~~ dwelling units are being sold by an estate and the decedent occupied the units as their principal residence for no less than two years before the date of their death.

B. ~~Limitations.~~ ~~Demolition~~ Combination is not allowed if:

1. The building was removed from the rental market ~~under the Ellis Act~~ through a no-fault eviction during the preceding five years; or
2. There ~~have been verified cases~~ is substantial evidence of harassment or threatened or actual illegal eviction during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, whose determination may be appealed to the Rent Stabilization Board. ~~The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The~~

~~ZAB shall determine whether harassment or threatened or actual illegal eviction occurred.~~

C. ~~Effect of Noncompliance with the~~ Two-Year Occupancy Requirement Following Elimination.

1. ~~In a unit eliminated under Subsection A (General) If a Residential Unit that is eliminated through combination~~ is not ~~owner-~~occupied ~~by the applicant's household~~ for at least two consecutive years from the date of elimination, the affected ~~unit~~ Residential Unit must be restored to separate status.
2. This requirement shall be implemented by a condition of approval and a notice of limitation on the property, acceptable to the City of Berkeley.
3. The condition and notice will provide that if the Residential Unit owner's household does not occupy the unit is not owner-occupied for at least two years from the date of elimination the affected units must either be restored as separate dwelling units and the vacant unit(s) offered for rent within six months or the owner must pay a fee of \$75,000 in 2013 dollars, adjusted in May of each year according to the Consumer Price Index for the San Francisco Bay Area. The fee shall be deposited into the City of Berkeley's Housing Trust Fund.
4. The City of Berkeley may exempt an applicant from the two-year residency requirement if of an unforeseeable life change that requires relocation.

D. *Effect of Eliminating a Dwelling Unit.*

1. If eliminating a ~~dwelling-unit~~ Residential Unit reduces the number of units in a building to four or fewer, the applicant shall record a notice of limitation against the subject property that the limitation on eviction of tenants under Chapter 13 (Public Peace, Morals and Welfare) shall continue to apply until:
 - (a) The building is demolished; or
 - (b) Sufficient units are added or restored such that the building contains at least five units.
2. The Zoning Officer may issue an AUP for a building conversion which eliminates a ~~dwelling-unit~~ Residential Unit upon finding that the conversion will restore or bring the building closer to the original number of dwelling units that was present at the time it was first constructed, provided the conversion meets the requirements 23.326.040.A.1 and 2 and 23.326.040.B and C.

E. *Exceptions.* The ZAB may approve a Use Permit to eliminate a dwelling unit through combination with another dwelling unit for the purpose of providing private bathrooms, kitchenettes, accessibility upgrades, and/or seismic safety upgrades, or other elements required by funding sources or programmatic needs to single-

residential occupancy rooms in residential developments undergoing a publicly-funded rehabilitation.

1. ~~The ZAB may approve a Use Permit for a change of use to a community care or a child care facility which eliminates a dwelling unit if it finds that such use is in conformance with the regulations of the district in which it is located.~~
2. ~~The ZAB may approve a Use Permit to eliminate a dwelling unit through combination with another dwelling unit for the purpose of providing private bathrooms, kitchenettes, accessibility upgrades, and/or seismic safety upgrades to single-residential occupancy rooms in residential developments undergoing a publicly-funded rehabilitation.~~
3. ~~Notwithstanding the general Use Permit requirement under 23.326.020 (General Requirements), a lawfully established accessory dwelling unit that is not a controlled rental unit may be eliminated with a Zoning Certificate if:
 - (a) ~~The re-conversion restores the original single-family use of the main building or lot; and~~
 - (b) ~~No tenant is evicted.~~~~

23.326.050 – ~~Private Right of Action~~ Demolition of Accessory Buildings.

A. Notwithstanding anything in Municipal Code Title 23 (Zoning Ordinance) to the contrary, but subject to any applicable requirements in Municipal Code Section 3.24 (Landmarks Preservation Ordinance), Accessory Buildings of any size, including, but not limited to, garages, carports, and sheds may be demolished by right except where the Accessory Building is occupied by a residential tenant (regardless of whether it is lawfully permitted) or otherwise contains a lawfully established Residential Unit, which serves and is located on the same lot as a lawful residential use. Such Accessory Buildings are considered Residential Units for the purposes of this Chapter.

23.326.060 – ~~Elimination of Residential Hotel Rooms~~ Private Right of Action

A. Any affected tenant may bring a private action for injunctive and/or compensatory relief against any applicant and/or owner to prevent or remedy a violation of Sections 23.326.030 (Eliminating Dwelling Units through Demolition) and 23.326.040 (Eliminating Dwelling Units through Conversion and Change of Use). In any such action a prevailing plaintiff shall recover reasonable attorney's fees.

~~A. **General Requirements.** Before removal, the following requirements must be met for the ZAB to approve a Use Permit for the elimination of residential hotel rooms:~~

- ~~1. The residential hotel owner shall provide or cause to be provided standard housing of at least comparable size and quality, at comparable rents and total monthly or weekly charges to each affected tenant~~

2. ~~One of the following three requirements shall be met:~~

- ~~(a) The residential hotel rooms being removed are replaced by a common-use facility, including, but not limited to, a shared kitchen, lounge, or recreation room, that will be available to and primarily of benefit to the existing residents of the residential hotel and that a majority of existing residents give their consent to the removal of the rooms.~~
- ~~(b) Before the date on which the residential hotel rooms are removed, one-for-one replacement of each room to be removed is made, with a comparable room, in one of the methods set forth in this section.~~
- ~~(c) Residential hotel rooms are removed because of building alterations related to seismic upgrade to the building or to improve access to meet the requirements of the American Disabilities Act (ADA).~~

B. Criteria for Replacement Rooms. ~~For purposes of this section, replacement rooms must be:~~

- ~~1. Substantially comparable in size, location, quality, and amenities;~~
- ~~2. Subject to rent and eviction controls substantially equivalent to those provided by the Rent Stabilization Ordinance or those that applied to the original rooms which are being replaced; and~~
- ~~3. Available at comparable rents and total monthly or weekly charges to those being removed. Comparable rooms may be provided by:~~
 - ~~(a) Offering the existing tenants of the affected rooms the right of first refusal to occupy the replacement rooms;~~
 - ~~(b) Making available comparable rooms, which are not already classified as residential hotel rooms to replace each of the rooms to be removed; or~~
 - ~~(c) Paying to the City of Berkeley's Housing Trust Fund an amount sufficient to provide replacement rooms.~~
 - ~~1. The amount to be paid to the City of Berkeley shall be the difference between the replacement cost, including land cost, for the rooms and the amount which the City of Berkeley can obtain by getting a mortgage on the anticipated rents from the newly constructed rooms.~~
 - ~~2. The calculations shall assume that rents in the newly constructed rooms shall not exceed the greater of either a level comparable to the weekly or monthly charges for the replaced rooms or the level which would be charged if no current tenant paid more than 30 percent of such tenant's gross income for rent.~~

C. Exception for Non-Profit Ownership. ~~In a residential hotel owned and operated by a non-profit organization, recognized as tax-exempt by either the Franchise Tax~~

~~Board and/or the Internal Revenue Service, residential hotel rooms may be changed to non-residential hotel room uses if the average number of residential hotel rooms per day in each calendar year is at least 95 percent of residential hotel rooms established for that particular residential hotel.~~

23.326.070 – Demolitions of Non-Residential Buildings

- A. **Main Non-Residential Buildings.** A Use Permit is required to demolish a main building used for non-residential purposes on any lot may be demolished with a Use Permit.
- B. **Accessory Buildings.**
1. Demolishing an accessory building with less than 300 square feet of floor area is permitted as of right.
 2. An accessory building with 300 square feet or more of floor area may be demolished with an AUP.
- C. **Landmarks Preservation Commission Review.**
1. Any application for a Use Permit or AUP to demolish a non-residential building or structure which is 40 or more years old shall be forwarded to the Landmarks Preservation Commission (LPC) for review before consideration of the Use Permit or AUP.
 2. The LPC may initiate a landmark or structure-of-merit designation or may choose solely to forward to the ZAB its comments on the application.
 3. The ZAB or Zoning Officer shall consider the recommendations of the LPC in when acting on the application.
- D. **Findings.** A Use Permit or an AUP for demolition of a non-residential building or structure may be approved only if the ZAB or the Zoning Officer finds that:
1. The demolition will not be materially detrimental to the commercial needs and public interest of any affected neighborhood or the City of Berkeley; and
 2. The demolition:
 - (a) Is required to allow a proposed new building or other proposed new use;
 - (b) Will remove a building which is unusable for activities which are compatible with the purposes of the district in which it is located or which is infeasible to modify for such uses;
 - (c) Will remove a structure which represents an inhabitable attractive nuisance to the public; or
 - (d) Is required for the furtherance of specific plans or projects sponsored by the City of Berkeley or other local district or authority upon a

demonstration that it is infeasible to obtain prior or concurrent approval for the new construction or new use ~~which is contemplated by such specific plans or projects and that adhering to such a requirement would threaten the viability of the plan or project.~~

23.326.080 – Building Relocations

A. Treatment of Building Relocation.

1. Relocating a building from a lot is considered a demolition for purposes of this chapter.
2. Relocating a building to a lot is considered new construction and is subject to all requirements applicable to new construction.
3. When a building is relocated to a different lot within in Berkeley, the lot from which the building is removed shall be known as the source lot and the lot on which the building is to be sited shall be known as the receiving lot. In such cases all notification requirements apply to both the source and receiving lots.

B. Findings. The ZAB may approve a Use Permit to relocate a building upon finding that:

5. The building to be relocated is not in conflict with the architectural character, or the building scale of the neighborhood or area to which it will be relocated; and
6. The receiving lot provides adequate separation of buildings, privacy, yards, and usable open space.

23.326.090 – Limitations

A. Unsafe, Hazard, or Danger.

1. Notwithstanding anything to the contrary, if a building or structure is unsafe, presents a public hazard, and is not securable and/or is in imminent danger of collapse so as to endanger persons or property, as determined by the city's ~~building official~~ Building Official, it may be demolished without a Use Permit.
2. The Building Official's determination in this matter shall be governed by the standards and criteria in the most recent edition of the California Building Code that is in effect in the City of Berkeley.

B. Ellis Act. This chapter shall be applied only to the extent permitted by state law as to buildings which have been entirely withdrawn from the rental market pursuant to the Ellis Act (California Government Code Chapter 12.75).

23.326.100 Severability.

A. If any part or provision of this Chapter, or the application of this Chapter to any person or circumstance, is held invalid, the remainder of this Chapter, including the application of such part or provision to other persons or circumstances, shall not be affected by such a holding and shall continue in full force and effect. To this end, the provisions of this Chapter are severable.

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

ORDINANCE NO.

AMENDING BERKELEY MUNICIPAL CODE CHAPTER 23.326, DEMOLITION AND DWELLING UNIT CONTROLS

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

Section 1. That Berkeley Municipal Code Chapter 23.326 is hereby amended to read as follows:

Chapter 23.326 DEMOLITION AND DWELLING UNIT CONTROLS

Sections:

- 23.326.010 Chapter Purpose.
- 23.326.020 General Requirements.
- 23.326.030 Demolition of Residential Units.
- 23.326.040 Eliminating Dwelling Units through Combination with Other Units.
- 23.326.050 Demolition of Accessory Buildings.
- 23.326.060 Private Right of Action.
- 23.326.070 Demolitions of Non-Residential Buildings.
- 23.326.080 Building Relocations.
- 23.326.090 Limitations.
- 23.326.100 Severability

23.326.010 Chapter Purpose.

This chapter establishes demolition and dwelling unit control standards that promote the affordable housing, and safety goals of the City.

23.326.020 General Requirements.

A. No Residential Unit(s) may be eliminated or demolished except as authorized by this chapter.

1. "Residential Unit" means, for purposes of this Chapter, any Dwelling Unit, any Live-Work Unit, any Residential Hotel unit, any bedroom of a Group Living Accommodation (GLA), except a GLA in a University-

recognized fraternity, sorority or co-op, or any Accessory Dwelling Unit (“ADU”) or Junior Accessory Dwelling Unit (“JADU”).

2. “Residential Unit” includes Dwelling Units, any Residential Hotel unit, any bedroom of a Group Living Accommodation (GLA), except a GLA in a University-recognized fraternity, sorority or co-op, ADUs, and JADUs created without proper zoning approvals or Building Permit(s) if they have been registered with the Rent Stabilization Board, or the Rent Stabilization Board has otherwise determined that a tenant-landlord relationship existed during the preceding five years.
3. “Residential Unit” does not include an ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU, as defined in BMC Chapter 23.306, where the landlord also occupies a unit in the same property as their principal residence. This shall only apply to properties containing a single ADU or JADU, shall only apply to units compliant with all applicable requirements of BMC Chapter 23.306 (“Accessory Dwelling Units”), and shall only apply to tenancies created after November 7, 2018.
4. “Comparable Unit” means a Residential Unit of similar size (square footage and number of bedrooms), common interior amenities, and location within the city (neighborhood and school attendance area). In the case of a Single-Family Dwelling being replaced, a Comparable Unit is not required to have the same or similar square footage or the same number of total rooms, but must provide the same number of bedrooms if the Single-Family Dwelling includes three or fewer bedrooms, or at least three bedrooms if the Single-Family Dwelling contains four or more bedrooms.
5. “Protected Unit” includes a Residential Unit:
 - a. Subject to a low-income deed restriction for any of the previous five years;
 - b. Subject to rent or price control under BMC Chapter 13.76; or
 - c. Rented by a household at 80% Area Median Income or lower within

the previous five years.

23.326.030 Demolition of Residential Units.

A. Demolition is not allowed if:

1. The Residential Unit(s) was removed from the rental market through a no-fault eviction during the preceding five years; or
2. There is substantial evidence of harassment or threatened or actual illegal eviction during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, whose determination may be appealed to the Rent Stabilization Board.

B. Procedure and Findings.

1. A Use Permit is required to eliminate or demolish one or more Residential Units, except where otherwise provided by the Zoning Ordinance. The ZAB shall only approve the Use Permit if one of the following is true:
 - (a) The building containing the Residential Unit(s) is hazardous or unusable and is infeasible to repair.
 - (b) The building containing the Residential Unit(s) will be moved to a different location within Berkeley with no net loss of units and no change in the rent levels of the unit(s).
 - (c) The demolition is necessary to permit construction approved pursuant to this Chapter of at least the same number of Dwelling Units.
2. A Single-Family Dwelling without sitting tenants can be demolished with an AUP, if the demolition is part of a development project that would result in a net increase in residential density.
3. In the event of a demolition of a Residential Unit created without proper zoning approvals or Building Permit(s), as defined in 23.326.020(A)(2), the Building Official, Zoning Officer or Fire Marshal may determine that the replacement of such a unit is infeasible and not required under this Chapter. Such a

determination shall include a finding that the replacement of the unit could not occur in compliance with Zoning Code, Building Code, Fire Code or other regulations related to public health and safety.

C. *Landmarks and Structures of Merit.* Demolition of a designated landmark or structure of merit, or of a structure in a designated historic district, must be approved by the Landmarks Preservation Commission, pursuant to Chapter 3.24.

D. *Conditions of Approval.* Any Protected Unit that is demolished shall be replaced with a Comparable Unit that shall comply with the maximum allowable rent requirements for Affordable Units in Chapter 23.328 [Affordable Housing Requirements] and Chapter 23.330 [Density Bonus] as they may be amended from time to time.

1. In the event that a displaced household has an income below 50% AMI, a Comparable Unit shall be offered at a rent that is affordable to households at 30% of AMI, and the displaced household shall have the first right of refusal for that unit. Such a Comparable Unit shall be counted as a Very Low-Income unit for applicable affordability requirements in Chapter 23.328.
2. In the event that a demolished Residential Unit is not a Protected Unit and the income of the displaced household is unknown, the Residential Unit shall be presumed to have been occupied by Low- or Lower-Income households in the same proportion as Residential Units throughout the City. The City shall rely upon US Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy (CHAS) data to determine the number of such Residential Units that must be replaced with Affordable Units as defined in Chapter 23.328.
3. In the event that a Protected Unit was subject to rent or price controls under BMC Chapter 13.76, and the income level of the displaced household is unknown, the unit shall be replaced with an Affordable Unit as defined in Chapter 23.328.

E. *Requirements for Occupied Units.*

1. *Applicability.* The following requirements do not apply to tenants who move in after the application for demolition is submitted to the City if the owner informs each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.
2. *Notice.* The applicant shall provide all sitting tenants and the Rent Stabilization Board notice of the application for demolition no later than the date the application is submitted to the City, including notice of their rights under Municipal Code Chapter 13.76 (Rent Stabilization and Eviction for Good Cause Program), Chapter 13.77 (Requirements, Procedures, Restrictions and Mitigations Concerning the Withdrawal of Residential Rental Accommodations from Rent or Lease), 13.79 (Tenant Protections: Automatically Renewing Leases and Buyout Agreements) and 13.84 (Relocation Services and Payments for Residential Tenant Households).
3. *General Requirements.* The applicant shall provide moving and relocation assistance equivalent to the requirements set forth in Municipal Code Chapter 13.84 (Relocation Services and Payments for Residential Tenant Households) or Government Code section 66300.6(b)(4)(A), whichever requires greater relocation assistance to displaced tenants, and shall not be subject to the limitations in section 13.84.070.B.3(a). The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy. Within five days of the issuance of the Certificate of Occupancy, tenants shall be notified in writing that the units will be ready for move-in on a date specified. Tenants shall confirm in writing their intent to lease the available unit at any time before 20 days after the issuance of the Certificate of Occupancy. Funding for the rent differential shall be guaranteed in a manner approved by City Council Resolution; provided, however, that any project that is carried out or funded by the state or federal government shall be subject to applicable provisions of the California Relocation Act (Government Code section 7260 *et seq.*) and/or the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. sections 4601- 4655).

(a) *Exception.* An applicant who proposes to construct a 100-percent affordable housing project is not required to comply with this subsection but must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended and the California Relocation Act (Government Code sections 7260 et seq.).

(b) *Exception for Tenants in ADUs or Unpermitted Units that Cannot be Replaced.* Applicants are required to provide moving and relocation assistance, in an amount provided in BMC Section 13.76.130(A)(9)(g), to the following groups of tenants: (i) tenants who occupy an ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU, where the landlord also occupies a unit in the same property as his/her principal residence; and (ii) tenants who occupy a unit created without proper zoning approvals that cannot be replaced for public health or safety reasons, pursuant to BMC 23.326.030(B)(3). However, applicants are not required to (i) provide such tenants with a temporary replacement unit while a new unit is being constructed, (ii) notify such tenants when a new unit is ready for occupancy; or (iii) provide such tenants with a right for first refusal for the new unit.

4. *Sitting Tenants Rights.*

(a) Any tenant of a Protected Unit that is permitted to be demolished under this section shall have the right of first refusal to rent a Comparable Unit in the new project.

(b) In the event that a displaced household is ineligible for below-market rate replacement units, a market rate Comparable Unit shall be made available to that household at the same rent as had been previously charged, or a lesser rent if that is the market rate.

(c) Where a displaced tenant exercises the right to rent a Comparable Unit, any increase in rent for the Comparable Unit for the duration of their tenancy shall be no greater than the lesser of 65% of the increase in the Consumer Price Index for All Urban Consumers (CPI-U) in the San

Francisco-Oakland-San Jose region (as reported and published by the U.S. Department of Labor, Bureau of Labor Statistics for the twelve-month period ending the previous December 31) or 65% of the corresponding increase in Area Median Income (AMI) for the same calendar year.

(d) *Exceptions.*

- i. An applicant who proposes to construct a 100 percent affordable housing project is not required to comply with the preceding requirements but must comply with the following requirement.
- ii. Sitting tenants who are displaced as a result of demolition and who desire to return to the newly constructed affordable housing project will be granted a right of first refusal subject to their ability to meet income qualifications and other applicable eligibility requirements.

23.326.040 Eliminating Dwelling Units through Combination with Other Units.

A. Process for Projects Where Density Exceeds Current Allowance. A Use Permit is required to eliminate one or more Residential Units by combining with another unit when the existing development exceeds currently-allowable density. The ZAB shall approve a Use Permit for the elimination of one or more Residential Units by combining with another unit only if it finds that:

1. The existing number of Residential Units exceeds the current maximum allowed residential density in the zoning district where the units are located; and
2. One of the following is true:
 - (a) One of the affected Residential Units has been owner-occupied as a principal place of residence for no less than two years before the date of the application and none of the affected units are currently occupied by a tenant.
 - (b) All of the affected Residential Units are being sold by an estate and the decedent occupied the Residential Units as their principal

residence for no less than two years before the date of their death.

B. *Limitations.* Combination is not allowed if:

1. The building was removed from the rental market through a no-fault eviction during the preceding five years; or
2. There is substantial evidence of harassment or threatened or actual illegal eviction during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, whose determination may be appealed to the Rent Stabilization Board.

C. *Two-Year Occupancy Requirement Following Elimination*

1. If a Residential Unit that is eliminated through combination is not owner-occupied for at least two consecutive years from the date of elimination, the affected Residential Unit must be restored to separate status.
2. This requirement shall be implemented by a condition of approval and a notice of limitation on the property, acceptable to the City of Berkeley.
3. The condition of approval and notice will provide that if the Residential Unit is not owner-occupied for at least two years from the date of elimination then the affected Residential Unit(s) must either be restored as separate Residential Unit(s) and the vacant Residential Unit(s) offered for rent within six months or the owner must pay a fee of \$75,000 in 2013 dollars, adjusted in May of each year according to the Consumer Price Index for the San Francisco Bay Area. The fee shall be deposited into the City of Berkeley's Housing Trust Fund.
4. The City of Berkeley may exempt an applicant from the two-year residency requirement if there is an unforeseeable life change that requires relocation.

D. *Effect of Eliminating a Residential Unit.*

1. If eliminating a Residential Unit reduces the number of Residential Units in a building to four or fewer, the applicant shall record a notice of limitation against the subject property that the limitation on eviction of tenants under Chapter 13 (Public Peace, Morals and Welfare) shall continue to apply until:
 - (a) The building is demolished; or
 - (b) Sufficient Residential Units are added or restored such that the building contains at least five Residential Units.
2. The Zoning Officer may issue an AUP for a building conversion which eliminates a Residential Unit upon finding that the conversion will restore or bring the building closer to the original number of Residential Units that was present at the time it was first constructed, provided the conversion meets the requirements of 23.326.040.A.1 and 2 and 23.326.040.B and C.

E. *Exception.* The ZAB may approve a Use Permit to eliminate a Residential Unit through combination with another Residential Unit for the purpose of providing private bathrooms, kitchenettes, accessibility upgrades, and/or seismic safety upgrades, or other elements required by funding sources or programmatic needs to single resident occupancy rooms in residential developments undergoing a publicly-funded rehabilitation.

23.326.050 Demolition of Accessory Buildings.

A. Notwithstanding anything in Municipal Code Title 23 (Zoning Ordinance) to the contrary, but subject to any applicable requirements in Municipal Code Section 3.24 (Landmarks Preservation Ordinance), Accessory Buildings of any size, including, but not limited to, garages, carports, and sheds may be demolished by right except where the Accessory Building is occupied by a residential tenant (regardless of whether it is lawfully permitted) or otherwise contains a lawfully established Residential Unit, which serves and is located on the same lot as a lawful residential use. Such Accessory Buildings are considered Residential Units for the purposes of this Chapter.

23.326.060 Private Right of Action.

A. Any affected tenant may bring a private action for injunctive and/or compensatory relief

against any applicant and/or owner to prevent or remedy a violation of Sections 23.326.030 (Eliminating Dwelling Units through Demolition) and 23.326.040 (Eliminating Dwelling Units through Conversion and Change of Use). In any such action a prevailing plaintiff shall recover reasonable attorney's fees.

23.326.070 Demolitions of Non-Residential Buildings.

A. *Main Non-Residential Buildings.* A Use Permit is required to demolish a main building used for non-residential purposes on any lot.

B. *Accessory Buildings.* For any lot located in a non-residential zoning district, Accessory Buildings may be demolished as follows:

1. Demolishing an accessory building with less than 300 square feet of floor area is permitted as of right.
2. An accessory building with 300 square feet or more of floor area may be demolished with an AUP.

C. *Landmarks Preservation Commission Review.*

1. Any application for a Use Permit or AUP to demolish a non-residential building or structure that is 40 or more years old shall be forwarded to the Landmarks Preservation Commission (LPC) for review before consideration of the Use Permit or AUP.
2. The LPC may initiate a landmark or structure-of-merit designation or may choose solely to forward to the ZAB or Zoning Officer its comments on the application.
3. The ZAB or Zoning Officer shall consider the recommendations of the LPC when acting on the application.

D. *Findings.* A Use Permit or an AUP for demolition of a main building used for non-residential purposes on any lot or an accessory building located on a lot in a non-residential district may be approved only if the ZAB or the Zoning Officer finds that:

1. The demolition will not be materially detrimental to the commercial needs and public interest of any affected neighborhood or the City of Berkeley;

and

2. The demolition:

- (a) Is required to allow a proposed new building or other proposed new use;
- (b) Will remove a building which is unusable for activities which are compatible with the purposes of the district in which it is located or which is infeasible to modify for such uses;
- (c) Will remove a structure which represents an uninhabitable attractive nuisance to the public; or
- (d) Is required for the furtherance of specific plans or projects sponsored by the City of Berkeley or other local district or authority upon a demonstration by the applicant that it would be infeasible to obtain prior or concurrent approval for the new construction or new use.

23.326.080 Building Relocations.

A. Treatment of Building Relocation.

- 1. Relocating a building from a lot is considered a demolition for purposes of this chapter.
- 2. Relocating a building to a lot within the city is subject to all requirements applicable to new construction.
- 3. When a building is relocated to a different lot within in Berkeley, the lot from which the building is removed shall be known as the source lot and the lot on which the building is to be sited shall be known as the receiving lot.
- 4. Nothing in this subsection shall exempt Residential Units relocated to the receiving lot from the provisions of BMC Section 13.76 after a building relocation if the Residential Units located within a building were otherwise subject to BMC Chapter 13.76 in the source lot.

B. Findings. The Zoning Officer shall approve Zoning Certificate to relocate a building

upon finding that: the resulting development on the receiving lot is in conformance with applicable zoning code development standards.

23.326.090 Limitations.

A. Unsafe, Hazard, or Danger.

1. Notwithstanding anything to the contrary, if a building or structure is unsafe, presents a public hazard, and is not securable and/or is in imminent danger of collapse so as to endanger persons or property, as determined by the city's Building Official, it may be demolished without a Use Permit.
2. The Building Official's determination in this matter shall be governed by the standards and criteria in the most recent edition of the California Building Code that is in effect in the City of Berkeley.

B. Ellis Act. This chapter shall be applied only to the extent permitted by state law as to buildings which have been entirely withdrawn from the rental market pursuant to the Ellis Act (California Government Code Chapter 12.75).

23.326.100 Severability.

A. If any part or provision of this Chapter, or the application of this Chapter to any person or circumstance, is held invalid, the remainder of this Chapter, including the application of such part or provision to other persons or circumstances, shall not be affected by such a holding and shall continue in full force and effect. To this end, the provisions of this Chapter are severable.

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

Demolition of SFH for Fourplex

Household
Above 80% AMI



Market
Rate

Market
Rate

Market
Rate

Market
Rate

Right of first refusal
Rent at prior rent
Rent controlled for
sitting tenancy

Household
50% AMI or Below



Market
Rate

**30%
AMI
BMR**

Market
Rate

Market
Rate

Right of first refusal
Permanent BMR unit

Affordability Requirement

- 30% AMI for each protected unit with 50% AMI household
- Permanently Affordable

Demolition of SFH + ADU for Fourplex

Households
Above 80% AMI



Four Market Rate Units

Right of first refusal for SFH tenant only
Rent at prior rent
Rent controlled for *sitting* tenancy

Households
50% AMI or
Below



Three Market Rate Units

30% AMI BMR

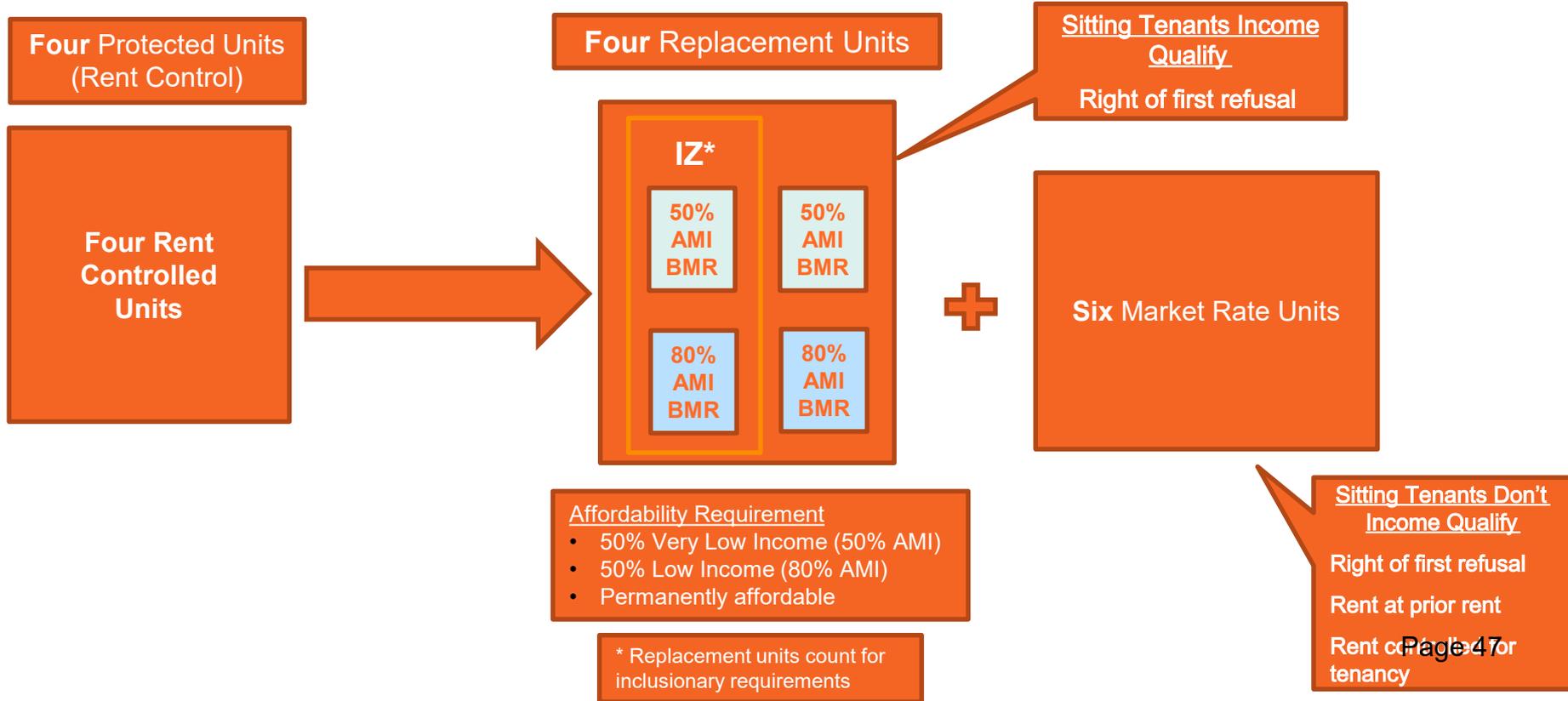
Right of first refusal for SFH tenant only
Permanent BMR unit

ADUs are not replaced when there is one SFH and one ADU on a lot

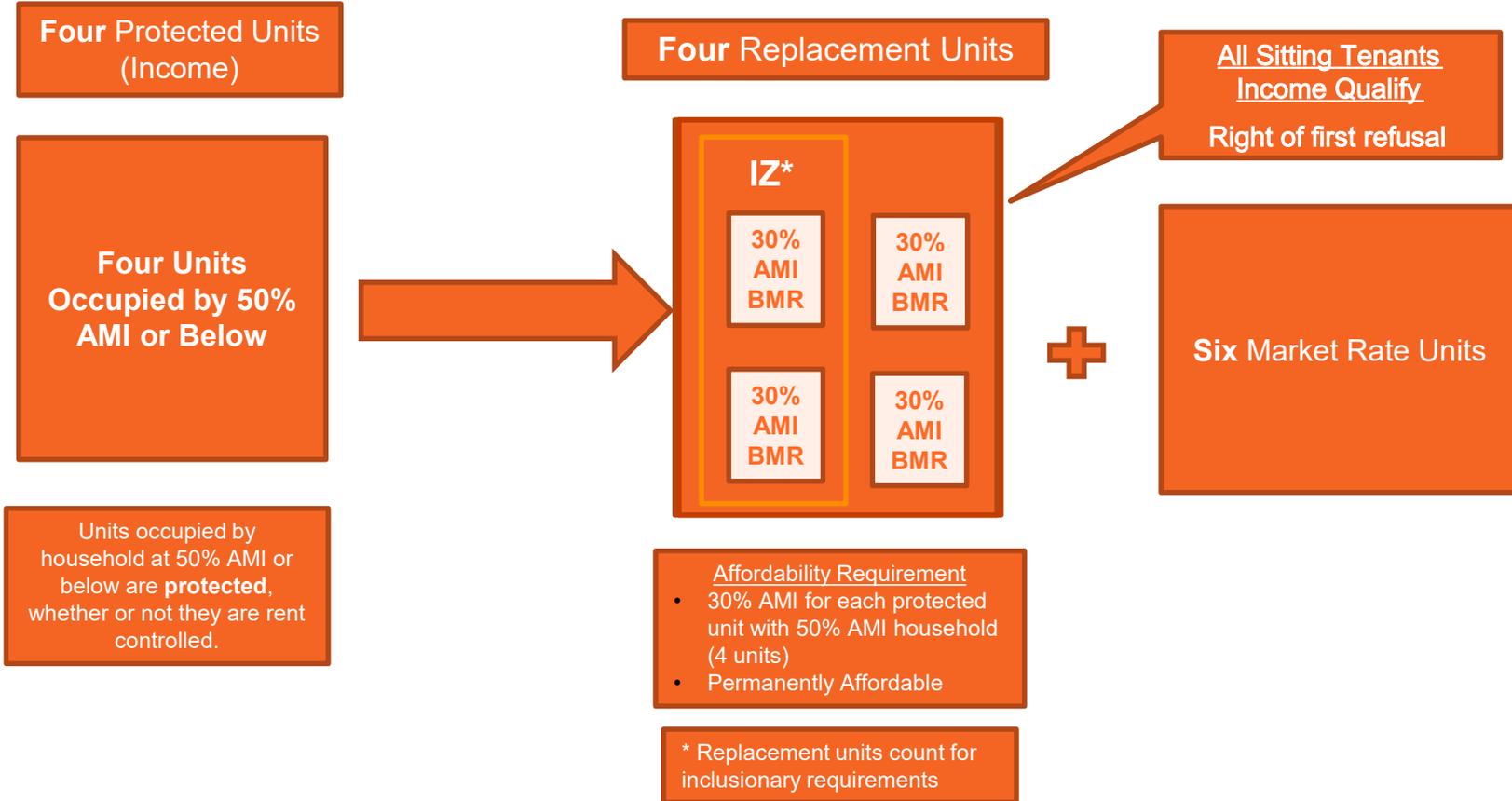
Affordability Requirement

- 30% AMI for each protected unit with 50% AMI household
- Permanently Affordable

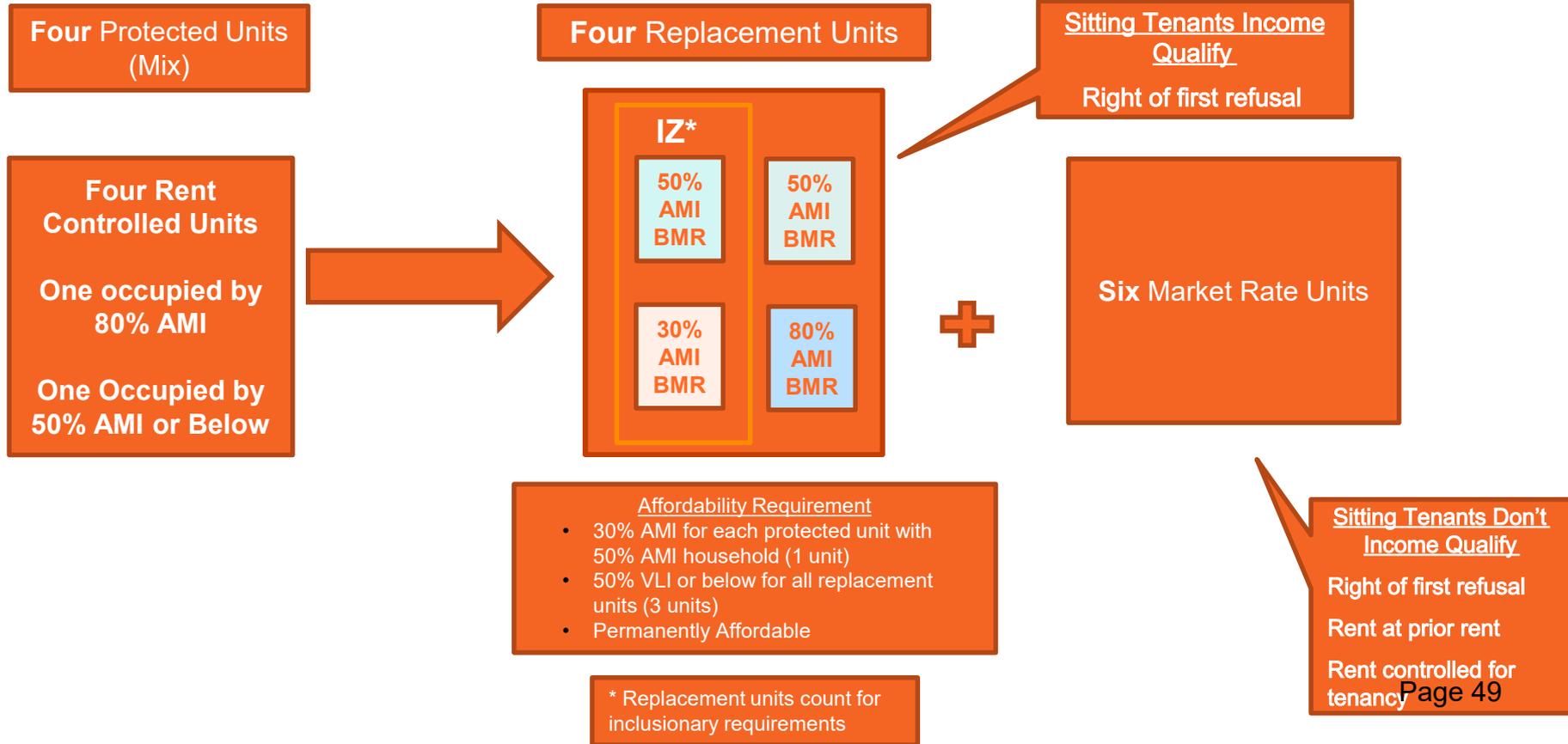
Demolition of Fourplex for Ten Units



Demolition of Rent - Controlled Fourplex for Ten Units



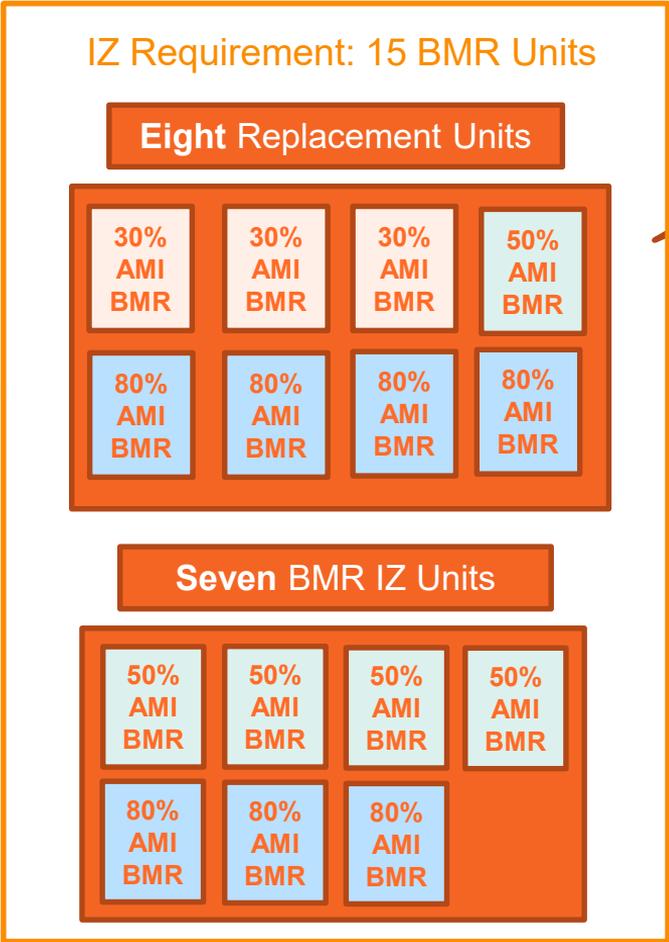
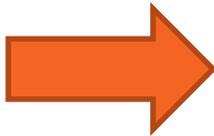
Demolition of Fourplex for Ten Units



Demolition of 8 Unit Building for 75 Unit Building

Eight Protected Units

Eight Rent Controlled Units
Three Occupied by 50% AMI or Below



Sitting Tenants Income Qualify
Right of first refusal



60 Market Rate Units

Sitting Tenants Don't Income Qualify
Right of first refusal
Rent at prior rent
Rent controlled for tenancy

- Affordability Requirement
- 30% AMI for each protected unit with 50% AMI household (3 units)
 - 50% AMI or lower for half of all IZ units (8 units)
 - Permanently Affordable

Attachment 4 – Existing Demolition Ordinance

Chapter 23.326
DEMOLITION AND DWELLING UNIT CONTROL

Sections:

23.326.010	Chapter Purpose.
23.326.020	General Requirements.
23.326.030	Eliminating Dwelling Units through Demolition.
23.326.040	Eliminating Dwelling Units through Conversion and Change of Use.
23.326.050	Private Right of Action.
23.326.060	Elimination of Residential Hotel Rooms.
23.326.070	Demolitions of Non-Residential Buildings.
23.326.080	Building Relocations.
23.326.090	Limitations.

23.326.010 Chapter Purpose.

This chapter establishes demolition and dwelling unit control standards that promote the affordable housing, aesthetic, and safety goals of the City.

23.326.020 General Requirements.

A. *Applicability.* No dwelling unit or units may be eliminated or demolished except as authorized by this chapter.

B. *Findings.* In addition to the requirements below, the Zoning Adjustments Board (ZAB) may approve a Use Permit to eliminate or demolish a dwelling unit only upon finding that eliminating the dwelling unit would not be materially detrimental to the housing needs and public interest of the affected neighborhood and Berkeley.

23.326.030 Eliminating Dwelling Units through Demolition.

A. *Buildings with Two or More Units Constructed Before June 1980.*

1. *Applicability.* This subsection only applies to building with two or more units constructed before June 1980.

2. *Limitation.*

Attachment 4 – Existing Demolition Ordinance

(a) Demolition is not allowed if:

- i. The building was removed from the rental market under the Ellis Act during the preceding five years; or
- ii. There have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years.

(b) Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner. The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The ZAB shall determine whether harassment or threatened or actual illegal eviction occurred.

3. *Findings.* The ZAB may approve a Use Permit to demolish a building constructed before June 1980 on a property containing two or more dwelling units if any of the following are true:

- (a) The building containing the units is hazardous or unusable and is infeasible to repair.
- (b) The building containing the units will be moved to a different location within Berkeley with no net loss of units and no change in the affordability levels of the units.
- (c) The demolition is necessary to permit construction of special housing needs facilities such as, but not limited to, childcare centers and affordable housing developments that serve the greater good of the entire community.
- (d) The demolition is necessary to permit construction approved pursuant to this chapter of at least the same number of dwelling units.

4. *Fee Required.*

- (a) The applicant shall pay a fee for each unit demolished to mitigate the impact of the loss of affordable housing in Berkeley.
- (b) The amount of the fee shall be set by resolution of the City Council.
- (c) *In Lieu of a Fee.*

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- i. In lieu of paying the impact fee, the applicant may provide a designated unit in the new project at a below market rate to a qualifying household in perpetuity.
- ii. The affordability level of the below market rent and the income level of the qualifying household shall be set by resolution of the City Council.
- iii. The applicant shall enter into a regulatory agreement with the City of Berkeley to provide the in lieu units.

5. *Occupied Units.*

(a) *Applicability.*

- i. The requirements in this subsection apply if units to be demolished are occupied.
- ii. These requirements do not apply to tenants who move in after the application for demolition is submitted to the City if the owner informs each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.

(b) *Notice.* The applicant shall provide all sitting tenants notice of the application to demolish the building no later than the date it is submitted to the City, including notice of their rights under Municipal Code Section 13.76 (Rent Stabilization and Eviction for Good Cause Program).

(c) *General Requirements.*

- i. The applicant shall provide assistance with moving expenses equivalent to in Chapter 13.84 (Relocation Services and Payments for Residential Tenant Households).
- ii. The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy. Funding for the rent differential shall be guaranteed in a manner approved by the City.

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iii. *Exception.* An applicant who proposes to construct a 100 percent affordable housing project is not required to comply with this subsection but must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended and the California Relocation Act (Government Code sections 7260 et seq.).

(d) *Sitting Tenants Rights.*

i. Sitting tenants who are displaced as a result of demolition shall be provided the right of first refusal to move into the new building.

ii. Tenants of units that are demolished shall have the right of first refusal to rent new below-market rate units designated to replace the units that were demolished, at the rent that would have applied if they had remained in place, as long as their tenancy continues.

iii. Income restrictions do not apply to displaced tenants.

iv. *Exception.*

(1) An applicant who proposes to construct a 100 percent affordable housing project is not required to comply with 23.326.030.A.5.a, b, and c, but must comply with the following requirement.

(2) Sitting tenants who are displaced as a result of demolition and who desire to return to the newly constructed building will be granted a right of first refusal subject to their ability to meet income qualifications and other applicable eligibility requirements when the new units are ready for occupancy.

B. *Buildings with a Single Dwelling Unit.*

1. *Applicability.* This subsection only applies to buildings with a single dwelling unit.

2. *Limitation.*

(a) Demolition is not allowed if:

i. The building was removed from the rental market under the Ellis Act during the preceding five years; or

Attachment 4 – Existing Demolition Ordinance

ii. There have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years.

(b) Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner. The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The ZAB shall determine whether harassment or threatened or actual illegal eviction occurred.

C. *Accessory Buildings.* Notwithstanding anything in Municipal Code Title 23 (Zoning Ordinance) to the contrary, but subject to any applicable requirements in Municipal Code Section 3.24 (Landmarks Preservation Ordinance), accessory buildings of any size, including, but not limited to, garages, carports, and sheds, but not including any structure containing a lawfully established dwelling unit, which serves and is located on the same lot as a lawful residential use, may be demolished by right.

23.326.040 Eliminating Dwelling Units through Conversion and Change of Use.

A. *General.* The ZAB may approve a Use Permit for the elimination of a dwelling unit in combination with another dwelling unit used for occupancy by a single household if it finds that:

1. The existing number of dwelling units exceeds maximum residential density in the district where the building is located; and
2. One of the following is true:
 - (a) One of the affected dwelling units has been occupied by the applicant's household as its principal place of residence for no less than two years before the date of the application and none of the affected units are currently occupied by a tenant.
 - (b) All of the affected dwelling units are being sold by an estate and the decedent occupied the units as their principal residence for no less than two years before the date of their death.

B. *Limitations.*

1. Demolition is not allowed if:

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(a) The building was removed from the rental market under the Ellis Act during the preceding five years; or

(b) There have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years.

2. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner. The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The ZAB shall determine whether harassment or threatened or actual illegal eviction occurred.

C. *Effect of Noncompliance with the Two-Year Requirement.*

1. If a unit eliminated under Subsection A (General) is not occupied by the applicant's household for at least two consecutive years from the date of elimination, the affected unit must be restored to separate status.

2. This requirement shall be implemented by a condition of approval and a notice of limitation on the property, acceptable to the City of Berkeley.

3. The condition and notice will provide that if the owner's household does not occupy the unit for at least two years from the date of elimination the affected units must either be restored as separate dwelling units and the vacant unit(s) offered for rent within six months or the owner must pay a fee of \$75,000 in 2013 dollars, adjusted in May of each year according to the Consumer Price Index for the San Francisco Bay Area. The fee shall be deposited into the City of Berkeley's Housing Trust Fund.

4. The City of Berkeley may exempt an applicant from the two-year residency requirement if of an unforeseeable life change that requires relocation.

D. *Effect of Eliminating a Dwelling Unit.*

1. If eliminating a dwelling unit reduces the number of units in a building to four, the applicant shall record a notice of limitation against the subject property that the limitation on eviction of tenants under Chapter 13 (Public Peace, Morals and Welfare) shall continue to apply until:

Attachment 4 – Existing Demolition Ordinance

- (a) The building is demolished; or
- (b) Sufficient units are added or restored such that the building contains at least five units.

2. The Zoning Officer may issue an AUP for a building conversion which eliminates a dwelling unit upon finding that the conversion will restore or bring the building closer to the original number of dwelling units that was present at the time it was first constructed, provided the conversion meets the requirements 23.326.040.A.1 and 2 and 23.326.040.B and C.

E. *Exceptions.*

1. The ZAB may approve a Use Permit for a change of use to a community care or a child care facility which eliminates a dwelling unit if it finds that such use is in conformance with the regulations of the district in which it is located.

2. The ZAB may approve a Use Permit to eliminate a dwelling unit through combination with another dwelling unit for the purpose of providing private bathrooms, kitchenettes, accessibility upgrades, and/or seismic safety upgrades to single-residential occupancy rooms in residential developments undergoing a publicly-funded rehabilitation.

3. Notwithstanding the general Use Permit requirement under 23.326.020 (General Requirements), a lawfully established accessory dwelling unit that is not a controlled rental unit may be eliminated with a Zoning Certificate if:

- (a) The re-conversion restores the original single-family use of the main building or lot; and
- (b) No tenant is evicted.

23.326.050 Private Right of Action.

Any affected tenant may bring a private action for injunctive and/or compensatory relief against any applicant and/or owner to prevent or remedy a violation of Sections 23.326.030 (Eliminating Dwelling Units through Demolition) and 23.326.040 (Eliminating Dwelling Units through Conversion and Change of Use). In any such action a prevailing plaintiff may recover reasonable attorney's fees.

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23.326.060 Elimination of Residential Hotel Rooms.

A. *General Requirements.* Before removal, the following requirements must be met for the ZAB to approve a Use Permit for the elimination of residential hotel rooms:

1. The residential hotel owner shall provide or cause to be provided standard housing of at least comparable size and quality, at comparable rents and total monthly or weekly charges to each affected tenant.
2. One of the following three requirements shall be met:
 - (a) The residential hotel rooms being removed are replaced by a common use facility, including, but not limited to, a shared kitchen, lounge, or recreation room, that will be available to and primarily of benefit to the existing residents of the residential hotel and that a majority of existing residents give their consent to the removal of the rooms.
 - (b) Before the date on which the residential hotel rooms are removed, one-for-one replacement of each room to be removed is made, with a comparable room, in one of the methods set forth in this section.
 - (c) Residential hotel rooms are removed because of building alterations related to seismic upgrade to the building or to improve access to meet the requirements of the American Disabilities Act (ADA).

B. *Criteria for Replacement Rooms.* For purposes of this section, replacement rooms must be:

1. Substantially comparable in size, location, quality, and amenities;
2. Subject to rent and eviction controls substantially equivalent to those provided by the Rent Stabilization Ordinance or those that applied to the original rooms which are being replaced; and
3. Available at comparable rents and total monthly or weekly charges to those being removed. Comparable rooms may be provided by:
 - (a) Offering the existing tenants of the affected rooms the right of first refusal to occupy the replacement rooms;

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- (b) Making available comparable rooms, which are not already classified as residential hotel rooms to replace each of the rooms to be removed; or
- (c) Paying to the City of Berkeley's Housing Trust Fund an amount sufficient to provide replacement rooms.
 - i. The amount to be paid to the City of Berkeley shall be the difference between the replacement cost, including land cost, for the rooms and the amount which the City of Berkeley can obtain by getting a mortgage on the anticipated rents from the newly constructed rooms.
 - ii. The calculations shall assume that rents in the newly constructed rooms shall not exceed the greater of either a level comparable to the weekly or monthly charges for the replaced rooms or the level which would be charged if no current tenant paid more than 30 percent of such tenant's gross income for rent.

C. *Exception for Non-Profit Ownership.* In a residential hotel owned and operated by a non-profit organization, recognized as tax-exempt by either the Franchise Tax Board and/or the Internal Revenue Service, residential hotel rooms may be changed to non-residential hotel room uses if the average number of residential hotel rooms per day in each calendar year is at least 95 percent of residential hotel rooms established for that particular residential hotel.

23.326.070 Demolitions of Non-Residential Buildings.

A. *Main Non-Residential Buildings.* A main building used for non-residential purposes may be demolished with a Use Permit.

B. *Accessory Buildings.*

1. Demolishing an accessory building with less than 300 square feet of floor area is permitted as of right.
2. An accessory building with 300 square feet or more of floor area may be demolished with an AUP.

C. *Landmarks Preservation Commission Review.*

Attachment 4 – Existing Demolition Ordinance

1. Any application for a Use Permit or AUP to demolish a non-residential building or structure which is 40 or more years old shall be forwarded to the Landmarks Preservation Commission (LPC) for review before consideration of the Use Permit or AUP.
2. The LPC may initiate a landmark or structure-of-merit designation or may choose solely to forward to the ZAB its comments on the application.
3. The ZAB shall consider the recommendations of the LPC in when acting on the application.

D. *Findings.* A Use Permit or an AUP for demolition of a non-residential building or structure may be approved only if the ZAB or the Zoning Officer finds that:

1. The demolition will not be materially detrimental to the commercial needs and public interest of any affected neighborhood or the City of Berkeley; and
2. The demolition:
 - (a) Is required to allow a proposed new building or other proposed new use;
 - (b) Will remove a building which is unusable for activities which are compatible with the purposes of the district in which it is located or which is infeasible to modify for such uses;
 - (c) Will remove a structure which represents an inhabitable attractive nuisance to the public; or
 - (d) Is required for the furtherance of specific plans or projects sponsored by the City of Berkeley or other local district or authority upon a demonstration that it is infeasible to obtain prior or concurrent approval for the new construction or new use which is contemplated by such specific plans or projects and that adhering to such a requirement would threaten the viability of the plan or project.

23.326.080 Building Relocations.

A. *Treatment of Building Relocation.*

Attachment 4 – Existing Demolition Ordinance

1. Relocating a building from a lot is considered a demolition for purposes of this chapter.
2. Relocating a building to a lot is considered new construction and is subject to all requirements applicable to new construction.
3. When a building is relocated to a different lot within in Berkeley, the lot from which the building is removed shall be known as the source lot and the lot on which the building is to be sited shall be known as the receiving lot. In such cases all notification requirements apply to both the source and receiving lots.

B. *Findings*. The ZAB may approve a Use Permit to relocate a building upon finding that:

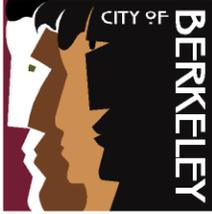
1. The building to be relocated is not in conflict with the architectural character, or the building scale of the neighborhood or area to which it will be relocated; and
2. The receiving lot provides adequate separation of buildings, privacy, yards, and usable open space.

23.326.090 Limitations.

A. *Unsafe, Hazard, or Danger*.

1. Notwithstanding anything to the contrary, if a building or structure is unsafe, presents a public hazard, and is not securable and/or is in imminent danger of collapse so as to endanger persons or property, as determined by the city's building official, it may be demolished without a Use Permit.
2. The Building Official's determination in this matter shall be governed by the standards and criteria in the most recent edition of the California Building Code that is in effect in the City of Berkeley.

B. *Ellis Act*. This chapter shall be applied only to the extent permitted by state law as to buildings which have been entirely withdrawn from the rental market pursuant to the Ellis Act (California Government Code Chapter 12.75).



Planning and Development Department
Land Use Planning Division

STAFF REPORT
December 6, 2023

TO: Members of the Planning Commission

FROM: Justin Horner, Associate Planner

SUBJECT: Zoning Ordinance Amendments to Berkeley Municipal Code Chapter 23.326 (Demolition and Dwelling Unit Controls)

RECOMMENDATION

Make a recommendation to the City Council regarding amendments to Berkeley Municipal Code Chapter 23.326 (Demo Ordinance). The existing and proposed redlined ordinances are presented in **Attachments 1** and **2**, respectively.

SUMMARY

State law SB 330 (Housing Crisis Act of 2019) includes new provisions related to demolition of residential units. SB 330 provides optional ways to comply with these requirements, based on whether the units are occupied or vacant, whether existing tenants are low income, whether the units are subject to local rent control (in Berkeley, this would be most properties with more than two units built before 1980), or whether the units were removed from the rental market pursuant to the Ellis Act.¹ In particular, replacement units required by SB 330 may be deed restricted to low income households or they may be subject to local rent control. The law also addresses the rights of existing tenants that would be displaced by demolition, including relocation benefits and a right of first refusal to return to the new units at below market rate (BMR) rent. Density bonus law now mirrors these requirements.

The proposed ordinance (**Attachment 2**) includes provisions to bring the Demo Ordinance into conformance with State law, and includes a number of new Berkeley-specific provisions as recommended by the 4x4 Joint Task Force Committee on

¹ Under a state law called the Ellis Act (CA Gov. Code Sec. 7060 et seq.), an owner can evict tenants in order to withdraw a rental property from the rental housing market. A local ordinance, Berkeley Municipal Code Chapter 13.77, establishes specific procedures under the state law.

Housing. The proposed ordinance also includes a number of text edits, including grammatical corrections and renumbering.

CURRENT SITUATION AND ITS EFFECTS

The existing Demo Ordinance (Attachment 1) requires a Use Permit for the demolition or elimination of one or more dwelling units in Berkeley. The Zoning Adjustments Board (ZAB) may issue a Use Permit for the demolition of a dwelling unit for specific enumerated reasons:

- A building is “hazardous or unusable and is infeasible to repair”;
- “Demolition is necessary to permit construction... of at least the same number of dwelling units.”
- “The elimination of the dwelling units would not be materially detrimental to the housing needs and public interest of the affected neighborhood and the City.”

The existing ordinance includes provisions for unit replacement and the rights of sitting tenants, as well as additional situations such as:

- When housing units are demolished and no new housing units are being developed at the site (e.g., commercial development);
- When tenants have been unlawfully evicted, such as forcing a tenant out of a unit without a court order; and
- When units are being merged or converted within an existing building rather than physically demolished.

The existing ordinance includes a provision whereby applicants may pay a fee rather than provide below-market-rate replacement units, however the amount of the fee has never been established.

Demolition of dwelling units is prohibited where a building has been removed from the rental market under the Ellis Act during the preceding five years or where there have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years. Applicants are generally required to provide relocation benefits, including moving expenses and differential rent payments. In addition, displaced tenants are provided a right of first refusal to rent new units after the lot has been redeveloped.

Proposed Demolition Ordinance Provisions

The proposed ordinance (**Attachment 2**) includes provisions to bring the Demo Ordinance into conformance with State law, and includes a number of new Berkeley-specific provisions as recommended by the 4x4 Joint Task Force Committee on Housing. The proposed ordinance also includes a number of text edits, including grammatical corrections and renumbering.

The most significant changes are summarized below in Table 1, and discussed in more detail below. The primary rationales for the proposed changes include clarifying the applicability of the ordinance, expanding tenant protections, bringing the ordinance into conformance with State law, and assigning the Rent Stabilization Board (Rent Board) to administer some aspects of the ordinance rather than the ZAB.

Applicable Unit.

The existing ordinance indicates that it applies to a “dwelling unit or units.” The proposed ordinance includes clarifications that it applies to dwelling units, group living accommodations, residential hotel rooms, accessory dwelling units (ADUs), junior accessory dwelling (JADUs) units, and units built without permits.

Comparable Unit.

The existing ordinance refers to a “comparable unit” when referring to replacement units, but does not define “comparable unit.” The proposed ordinance includes an explicit definition of “comparable unit”, indicating that it should be of a comparable size, include similar amenities, and be located in a similar area of the city as the demolished unit.

Prohibited Demolitions.

The existing ordinance indicates that demolition is prohibited for units that have been removed from the rental stock through the Ellis Act within the past five years, or in cases where there has been substantial evidence of tenant harassment by a rental property owner, or an attempted or actual illegal eviction, within the past three years. In the latter case, the determination of whether harassment has occurred is made by the ZAB.

The proposed ordinance expands tenant protections to include any no fault eviction within the past five years, not just removal of a rental unit from the market through the Ellis Act. A “no fault eviction” is when the property owner or landlord wants to evict a tenant at no fault of the tenant, for example, when the property owner wants to move into the property.

The Rent Stabilization Board is proposed to be the deciding body for questions regarding harassment and illegal eviction, instead of the ZAB.

Mitigation Fee.

The existing ordinance includes a requirement to pay an in-lieu mitigation fee for every unit demolished, or the option to replace a comparable BMR unit on-site.

State law (SB330) imposes a requirement that any housing development project that requires the demolition of dwelling units must create at least as many residential dwelling units as will be demolished on-site, and requires that the City condition

approval on the provision of replacement units. Therefore, an option to “fee out” of the replacement requirement is a violation of State law, because it would not provide replacement units at the sizes and affordability levels required by SB 330. Accordingly, the proposed ordinance removes the mitigation fee section.

Landmarks and Structures of Merit.

While the provisions of BMC Chapter 3.24 (Landmarks Preservation Commission) apply to units proposed for demolition, the existing ordinance does not explicitly refer to this chapter. Accordingly, the proposed ordinance includes specific language referring to Chapter 3.24.

Affordability of Replacement Units.

The existing ordinance includes a requirement that any replacement units must be BMR units, and that the income levels of the qualifying households, and rents for the replacement units, shall be set by a resolution of the City Council. The existing ordinance also includes a requirement that the project applicant enter into a regulatory agreement with the city to provide these units.

The proposed ordinance includes more detailed provisions addressing the affordability levels of replacement units:

- The proposed ordinance requires that any demolished unit shall be replaced with equivalent units and comply with the applicable affordability requirements included in BMC 23.328 (Affordable Housing Requirements) and BMC 23.330 (Density Bonus). Referencing these sections clarifies the appropriate affordability levels for replacement units, and establishes consistent requirements across a number of affordable housing-related provisions in the BMC.
- The proposed ordinance also includes a provision that if a displaced household has an income below 50% AMI, a comparable replacement unit shall be offered at a rent that is affordable to households at 30% of AMI.

Sitting Tenants' Rights.

The existing ordinance establishes certain rights for sitting tenants. Sitting tenants in demolished units are entitled to a right of first refusal to move into the new building, have a right of first refusal for any BMR units, and retain those rights even if they have incomes that do not qualify for BMR units.

The proposed ordinance clarifies that tenants who do not qualify for BMR replacement units due to income limits above the area median income must still be provided a market-rate replacement unit at their prior rent. Additionally, the rent for the duration of that tenancy would be subject to Berkeley's rent control regulations. This section was added by the 4x4 Committee to provide additional rights to sitting tenants who may not qualify for BMR units.

The proposed ordinance includes additional provisions related to sitting tenants' rights. The revisions clarify that a sitting tenant's right of first refusal extends to a *comparable* unit (not just any unit) in the building, and sets the initial rent and subsequent rents for sitting tenant households that are ineligible for BMR units. These provisions go beyond what is required under State law.

Elimination of Units through Combination with Other Units.

The existing ordinance includes provisions regulating the elimination of dwelling units through physical combination with other units. This is usually done in cases where two units are combined to make a single larger unit. The existing ordinance requires a Use Permit, with specific findings, to move forward with such an elimination. It also prohibits such an elimination if the building was removed from the rental market through the Ellis Act in the past five years, or if there is evidence of tenant harassment or illegal eviction within the past three years, as determined by the ZAB.

The proposed ordinance permits combined units through an AUP approval if such a combination would return the building to, or move it closer towards, its permitted density. This is a provision to make it easier for units in owner-occupied buildings to be combined. The AUP requirement still includes discretionary review, the ability to set conditions, and an appeal option to the ZAB.

Elimination of a unit for a combination would not be approved if the building was vacated through any no-fault eviction, not just due to the Ellis Act, or if the tenant was subject to landlord harassment or an illegal eviction. The determination of whether landlord harassment or a real or attempted illegal eviction occurred would be made by the Rent Board Hearing Examiner, with an appeal option to the Rent Stabilization Board, instead of by the ZAB.

Demolition of ADUs that are not Controlled.

The existing ordinance includes a provision that allows the demolition, with a Zoning Certificate (ZC), of ADUs that are not rent controlled. The proposed ordinance removes this section, and clarifies that ADUs and JADUs are considered residential units for the purposes of the ordinance, and therefore require a Use Permit for demolition or elimination.

Demolition of Accessory Buildings

The existing ordinance includes a provision that permits the demolition of an accessory building that does not contain a dwelling unit, such as garages, carports, and sheds, with a ZC. The proposed ordinance includes additional clarifying language that an accessory building that is occupied by a residential tenant shall be considered a residential unit for the purposes of this chapter.

Residential Hotel Rooms

The existing ordinance includes a section specifically regulating the elimination of residential hotel rooms. These provisions include specific requirements related to monthly and weekly charges, and permit residential hotel rooms to be removed for the purpose of providing common use facilities (such as a kitchen, lounge, or recreation room) for remaining residents or to undertake seismic upgrades or meet the requirements of the Americans with Disabilities Act. They also include a provision allowing an owner to meet the replacement requirements through a payment to the Housing Trust Fund, which, as noted above, is not permitted under State law. The proposed ordinance removes this section, and includes language indicating that residential hotel rooms are treated as residential units for the purpose of this ordinance.

Technical Edits, Reorganization and Renumbering

The proposed ordinance also includes a variety of purely technical edits, and reorganization, retitling, and renumbering of some sections and subsections.

Table 1. Summary of Revisions to Demolition Ordinance

Policy Area	Current Ordinance	Proposed Ordinance	Rationale
Applicable unit	“Dwelling unit or units.”	Dwelling Unit, GLA, ADU, JADU, and units built without permits 23.326.010(A)(1) – (3)	Clarification of the types of units covered.
Comparable unit	No definition.	“Similar size, amenities and location within the city.” 23.326.010(A)(4)	Clarification by providing a definition.
Demolition Prohibition: Ellis Act	Prohibition applies to any unit removed via Ellis Act within the past 5 years	Prohibition applies to any “no-fault” eviction. 23.326.030(A)	Expansion of tenant protections beyond just one type of no-fault eviction (Ellis Act).
Demolition Prohibition: Tenant Harassment	Determination made by ZAB.	Determination made by Rent Board. 23.326.030(A)(2)	For tenant-landlord issues, the Rent Board is the subject-expert body.
Mitigation Fee	Includes mitigation fee option.	Removes mitigation fee option.	State Law: Demolished units must be replaced (SB 330).
Landmarks and Structures of Merit	No reference to Landmarks Preservation Commission (LPC) procedures.	Includes reference to LPC procedures. 23.326.030(C)	Clarification that LPC procedures apply.
Replacement Units -- Affordability	<ul style="list-style-type: none"> Replacement unit must be “BMR” in perpetuity; 	<ul style="list-style-type: none"> Replacement unit must comply with Chapter 23.328 (Affordability Requirements) and 	State Law: Existing tenant income levels impact type/affordability of replacement units (SB 330).

Policy Area	Current Ordinance	Proposed Ordinance	Rationale
	<ul style="list-style-type: none"> Affordability level to be set by Council resolution; Regulatory agreement with the City required. 	23.330 (Density Bonus); <ul style="list-style-type: none"> For demolished unit with household at 50% AMI or below, replacement unit must be set at 30% AMI; and Allows Zoning Officer and Fire Marshall to waive replacement for health and safety 23.326.030(C)	
Sitting Tenants Rights	<ul style="list-style-type: none"> Right of first refusal to move into the building Right of first refusal for BMR units Income restrictions do not apply 	<ul style="list-style-type: none"> Right of first refusal for a comparable unit For displaced tenants who rent a comparable unit, rent is controlled for duration of tenancy For households ineligible for BMR units, a replacement unit shall be offered at prior rent 23.326.030(E)(4)	State Law: Tenant income levels impact type/affordability of replacement units (SB 330). Additional local requirement: Income restrictions do not apply to displaced households upon their return to the property after completion of the project.
Elimination of Units through Combination with other Units	Use Permit required in all cases, with findings.	AUP to combine units when the combination would return the building to, or move it closer towards, its original density 23.326.040(B)	Simplification: Allow conversion of owner-occupied buildings with a lesser standard.
	Combination not allowed if the building was removed via Ellis Act within the past 5 years	Combination not allowed if vacated through no fault eviction within the past 5 years 23.326.040(C)	Expansion of tenant protections beyond just one type of no-fault eviction (Ellis Act).
	Combination not allowed if tenant harassment. Determination made by ZAB	Determination made by Rent Board Hearing Examiner, with appeal to Rent Board 23.326.040(C)	For tenant-landlord issues, the Rent Board is the subject-expert body.

Policy Area	Current Ordinance	Proposed Ordinance	Rationale
Demolition of ADUs	Provides path to demolition with ZC for ADUs that are not rent controlled.	Section removed. All ADUs and JADUs, regardless of rent control status, are regulated as a residential unit.	ADUs and JADUs are considered Residential Units for purpose of ordinance. <i>23.326.010(A)(2)</i>
Demolition of Accessory Buildings	Can be demolished by right.	Added language to clarify that Accessory Buildings that are occupied by residential tenants are considered Residential Units. <i>23.326.050</i>	Expansion of demolition controls and tenant protections.
Elimination of Residential Hotel Rooms	Section 23.326.060 provides specific procedures for removal of residential hotel rooms	Section removed.	Residential Hotel Rooms are considered Residential Units for purpose of ordinance. <i>23.326.010(A)(1)</i>

BACKGROUND

The impetus for these revisions is recent changes in State law that provide additional requirements for new housing development projects that involve the demolition of existing residential units. These provisions of SB 330 (Housing Crisis Act of 2019), which modified Government Code sections relating to zoning and density bonus, require all new housing development projects to provide replacement units of equivalent size, defined as having the same number of bedrooms as the demolished units.

At its meeting of February 1, 2023, the Planning Commission scheduled a public hearing to adopt a recommendation for the City Council of changes to the Demo Ordinance (**Attachment 3**). The Planning Commission deferred a final recommendation pending recommendations from the 4x4 Joint Task Force Committee on Housing. Staff returned to the 4x4 Joint Task Force Committee in September and October of 2023 for discussion and recommendations, which are reflected in **Attachment 2**. The proposed amendments do not include changes in permit requirement for by-right demolition of single-family homes, which will be considered in the future as part of a larger package of ‘middle housing’ zoning amendments.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

California Public Resource Code Section 21065 defines a “project” under CEQA as “an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” The proposed ordinance amendments relate only to the requirements to demolish existing structures, and would not result in any physical changes to the environment. The proposed ordinance does not consist of a discretionary action that would permit or cause any

direct or indirect change in the environment. The proposed ordinance is therefore not a project under CEQA.

RATIONALE FOR RECOMMENDATION

The proposed ordinance includes changes required by state law, as well as policy changes recommended by the 4x4 Joint Committee Task Force on Housing.

NEXT STEPS

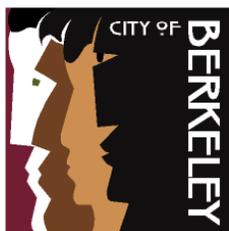
After the Planning Commission holds a public hearing and makes a recommendation to the City Council, the City Council shall hold a public hearing and vote to adopt the proposed ordinance amendments

CONTACT PERSON

Justin Horner, Associate Planner, Planning and Development, jhorner@berkeleyca.gov; 510-981-7476

Attachments:

1. Existing Demolition Ordinance (BMC Chapter 23.326)
2. Proposed Demolition Ordinance – Redlined (BMC Chapter 23.326)
3. Planning Commission Staff Report – Feb 1, 2023.
4. Public Hearing Notice



Planning and Development Department
Land Use Planning Division

STAFF REPORT
January 17, 2024

TO: Members of the Planning Commission

FROM: Justin Horner, Associate Planner

SUBJECT: Zoning Ordinance Amendments to Berkeley Municipal Code Chapter 23.326 (Demolition and Dwelling Unit Controls)

RECOMMENDATION

Conduct a public hearing and make a recommendation to the City Council regarding amendments to Berkeley Municipal Code Chapter 23.326 (Demolition and Dwelling Unit Control Ordinance). The existing and proposed redlined ordinances are presented in **Attachments 1** and **2**, respectively.

SUMMARY

State law SB 330 (Housing Crisis Act of 2019) established new provisions related to demolition of residential units. SB 330 provides optional ways to comply with these requirements. These include unit occupancy or vacancy, existing tenant income status (ex. low income), local rent control applicability (in Berkeley, this would be most properties with more than two units built before 1980), or if units were removed from the rental market pursuant to the Ellis Act.¹ In particular, replacement units required by SB 330 may be deed restricted to low income households or subject to local rent control. The law also addresses the rights of existing tenants that would be displaced by demolition, including relocation benefits and a right of first refusal to return to the new units at below market rate (BMR) rent. Density bonus law now reflects these requirements.

The proposed ordinance (**Attachment 2**) includes provisions to bring the Demolition Ordinance into conformance with State law, and includes a number of new Berkeley-specific provisions as recommended by the 4x4 Joint Task Force Committee on Housing and the Planning Commission's Subcommittee meeting of December 20, 2023. The proposed ordinance also includes a number of text edits, including grammatical corrections and renumbering.

¹ Under a state law called the Ellis Act (CA Gov. Code Sec. 7060 et seq.), an owner can evict tenants in order to withdraw a rental property from the rental housing market. A local ordinance, Berkeley Municipal Code Chapter 13.77, establishes specific procedures under the State law.

REVISIONS TO DECEMBER 6, 2023 PROPOSED ORDINANCE

The proposed ordinance presented to the Planning Commission at its December 2, 2023 meeting was prepared based on multiple Planning Commission meetings and meetings of the 4x4 Joint Task Force Committee on Housing. The staff report for the December 6th 2023 Planning Commission meeting (**Attachment 3**) includes detailed discussion of those meetings, as well as the rationale for the development of the proposed ordinance.

At its December 6, 2023 meeting, the Planning Commission moved to create a Subcommittee to review the proposed ordinance in detail, and to consider suggestions and recommendations made by Commissioners at that meeting. The Subcommittee met on December 20, 2023 and recommended a number of changes to the ordinance presented to the Planning Commission at the December 6, 2023 meeting. These changes are detailed below.

- **Demolition of Single-Family Dwellings with a Zoning Certificate.** The ordinance presented on December 6, 2023 included a provision that requires a Use Permit (UP) to demolish any dwelling unit. *Program 29-Middle Housing* of the recently-adopted Housing Element includes a provision requiring the City Council to consider by-right demolition of single-family homes to encourage the development of middle housing.

Proposed Modification: The proposed ordinance includes a provision to allow the demolition of a single-family dwelling with a Zoning Certificate if the demolition is part of a development project that would result in a net increase in residential density. This provision changes the required permit for the demolition from a Use Permit to a Zoning Certificate. All other aspects of the ordinance, including tenant notice, tenant protections, unit replacement requirements and other provisions, would continue to apply to the demolition of single-family dwellings.

- **Demolition of Residential Units for Non-Residential Projects.** The ordinance presented on December 6, 2023 included a provision which would allow the Zoning Adjustments Board (ZAB) to approve the demolition of residential units with a finding that the demolition is necessary to permit construction of “economically beneficial uses;” that is, projects that are non-residential. Residential units demolished under this finding would not have been required to be replaced.

Proposed Modification: The Subcommittee recommended removal of this provision. AB 1218,² recently signed into law, applies SB 330 residential unit replacement requirements to proposed projects that do not include residential units.

- **“Equivalent” vs. “Comparable” Units.** The ordinance presented to the Planning Commission on December 6, 2023 included a requirement that residential units that are demolished shall be replaced with “equivalent” units.

² <https://legiscan.com/CA/text/AB1218/id/2845253>

Proposed Modification: Neither the ordinance, nor Title 23, includes a definition of “equivalent,” for this context. The Subcommittee therefore replaced “equivalent” with “comparable,” which is defined in the proposed ordinance.

- **Tenants’ Intent to Return.** The ordinance presented to the Planning Commission on December 6, 2023 included a provision that “tenants shall have until the date that the new units *are ready* for occupancy to decide whether to move into the newly constructed building.” [emphasis added]

Proposed Modification: The Subcommittee recommended more precise language to indicate the timeline by which a tenant should inform an owner of their intent to return to a unit. The proposed ordinance includes new provisions that:

- a) an owner must inform a tenant within five days of the issuance of a Certificate of Occupancy that a new unit will be ready for move in on a specific date; and
- b) tenants are to confirm in writing their intent to lease a replacement unit at any time between learning of a demolition and twenty days after the issuance of a Certificate of Occupancy for a new unit.

- **Combination of Units, Findings.** The ordinance presented to the Planning Commission on December 6, 2023 included a provision that allows the ZAB to approve a UP to eliminate a unit within a single-resident occupancy residential development undergoing a publicly-funded rehabilitation through combination with another unit, for the purposes of providing private bathrooms, kitchenettes, accessibility upgrades, or seismic safety upgrades.

Proposed Modification: The Subcommittee recommended additional language to broaden the acceptable purposes to include “other elements required by funding sources or programmatic needs.”

- **Combination of Units, Applicant Requirements.** The ordinance presented to the Planning Commission on December 6, 2023 includes two requirements relating to applicants intending to demolish units through combination. One requirement is that the ZAB must find that the applicant’s household has occupied the affected unit for no less than two years, and the other is that an applicant’s household must occupy the combined unit for at least two years after its completion.

Proposed Modification: The proposed ordinance changes this requirement from applying to the “applicant,” to applying to an “owner.” This revision would still require owner-occupancy, maintaining prohibitions on evicting tenants to combine units or immediately renting combined units, but would permit an owner-to-owner sale of a property.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

California Public Resource Code Section 21065 defines a “project” under CEQA as “an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” The proposed ordinance amendments relate only to the requirements to demolish existing structures, and would not result in any physical changes to the environment. The proposed ordinance does not consist of a discretionary action that would permit or cause any direct or indirect change in the environment. The proposed ordinance is therefore not a project under CEQA.

RATIONALE FOR RECOMMENDATION

The proposed ordinance includes changes required by state law, as well as policy changes recommended by the 4x4 Joint Committee Task Force on Housing and the Planning Commission’s Subcommittee.

NEXT STEPS

After the Planning Commission holds a public hearing and makes a recommendation to the City Council, the City Council shall hold a public hearing and vote to adopt the proposed ordinance amendments.

CONTACT PERSON

Justin Horner, Associate Planner, Planning and Development, jhorner@berkeleyca.gov; 510-981-7476

Attachments:

1. Existing Demolition Ordinance (BMC Chapter 23.326)
2. Proposed Demolition Ordinance – Redlined (BMC Chapter 23.326)
3. Planning Commission Staff Report – December 6, 2023.
4. Public Hearing Notice

**NOTICE OF PUBLIC HEARING
BERKELEY CITY COUNCIL**

**Zoning Ordinance Amendments to Berkeley Municipal Code
Section 23.326 (Demolition and Dwelling Unit Controls)**

The public may participate in this hearing by remote video or in-person.

The Department of Planning and Development is proposing amendments to the Demolition Ordinance, Berkeley Municipal Code Chapter 23.326, that are required or permitted pursuant to recent changes in State law that provide additional requirements for new housing development projects that involve the demolition of existing residential units. The proposed amendments would also detail additional tenant protections and affordability requirements for replacement of demolished units.

The hearing will be held on, **June 25, 2024 at 3:30 p.m.** in the School District Board Room, located at 1231 Addison Street, Berkeley CA 94702.

A copy of the agenda material for this hearing will be available on the City’s website at <https://berkeleyca.gov/> as of June 13, 2024. **Once posted, the agenda for this meeting will include a link for public participation using Zoom video technology, as well as any health and safety requirements for in-person attendance.**

For further information, please contact Justin Horner, Associate Planner at 510-981-7476. Written comments should be mailed or delivered directly to the City Clerk, 2180 Milvia Street, Berkeley, CA 94704, or e-mailed to council@berkeleyca.gov in order to ensure delivery to all Councilmembers and inclusion in the agenda packet.

Communications to the Berkeley City Council are public record and will become part of the City’s electronic records, which are accessible through the City’s website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to the City Council, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service or in person to the City Clerk. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the City Clerk at (510) 981-6900 or clerk@berkeleyca.gov for further information.

Published: June 14, 2024 – The Berkeley Voice

Public Hearing required by BMC 23.412.050 and Govt Code 65853; notice provided according to Govt Code 65090 and BMC 23.404.040.



I hereby certify that the Notice for this Public Hearing of the Berkeley City Council was posted at the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way, as well as on the City's website, on June 13, 2024.

Mark Numainville, City Clerk



Rashi Kesarwani
Councilmember, District 1

REVISED AGENDA MATERIAL

For Supplemental Packet #2

MEETING DATE: March 26, 2024

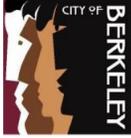
ITEM NUMBER: 23

ITEM DESCRIPTION: Amendments to Berkeley Municipal Code Chapter 23.326
Demolition and Dwelling Unit Controls

SUBMITTED BY: Councilmembers Rashi Kesarwani, Mark Humbert, and Terry Taplin

Supplemental #2 reflects staff changes in Supplemental Packet #1 and contains the following edits to Councilmember Kesarwani’s Supplemental Packet #1 in order to put forward a consensus approach that aligns with state law and balances the priorities of encouraging more homes while protecting displaced tenants.

23.326.020.A.5.c	Protected Unit —staff change reflected in ordinance (p.15)
23.326.030.A.1 & 23.326.040.B.1	No Fault Eviction vs. Ellis Act Evictions —keeps 4x4/staff version (p.6,15 &19)
23.326.030.A.2 & 23.326.040.B.2	Appeal to the Rent Stabilization Board —restores Rent Stabilization Board appeal oversight (p.6-7,16,19-20)
23.326.030.D	Conditions of Approval —strikes “excepting those not considered ‘Residential Unit’ under 23.326.020.A.3” (p.9&17)
23.326.030.D.1-3	Conditions of Approval —modifies 23.326.030.D.1, 23.326.030.D.2 and deletes D.3 (p.9-10,17)



Rashi Kesarwani
Councilmember, District 1

ACTION CALENDAR
March 26, 2024

TO: Honorable Mayor and Members of the Council

FROM: Councilmember Rashi Kesarwani (Author), **and** Councilmembers Mark Humbert **and** Terry Taplin (Co-Sponsors)

SUBJECT: Amendments to Berkeley Municipal Code Chapter 23.326 Demolition and Dwelling Unit Controls

RECOMMENDATION

Adopt recommended amendments for:

23.326.020.A.2	General Requirements—Unpermitted Units
23.326.020.A.3	General Requirements—Exemptions
23.326.020.A.4	General Requirements—Comparable Units
23.326.020.A.6	General Requirements—Tenant-Occupied (new)
23.326.020.A.7	General Requirements—Golden Duplex Units (new)
23.326.030.A.1 & 23.326.040.B.1	Ellis Act vs. No-Fault Eviction
23.326.030.A.2 & 23.326.040.B.2	Harassment & Appeal to the Rent Board
23.326.030.B.3	Demolition without Proper Zoning Approvals
23.326.030.C	Landmarks Preservation Commission
23.326.030.D.1-3	Conditions of Approval
23.326.030.E.3&3.b	Requirements for Occupied Units and Exceptions
23.326.030.E.4.b-c	Sitting Tenants’ Rights

Note that "Current Proposal" refers to the revised text of the ordinance proposed by the 4x4 Committee/Planning Commission, with red text showing changes made to the existing language.

"Recommendation" modifies the "Current Proposal" by incorporating Councilmember Kesarwani’s recommendations to improve alignment with the City’s housing objectives, tenant protection regulations, and state law. Red text indicates alterations made to the "Current Proposal."

23.326.020.A.2 General Requirements—Unpermitted Units*Current Proposal:*

2. “Residential Unit” includes Dwelling Units, ADUs, or JADUs created without proper zoning approvals or Building Permit(s) if they have been registered with the Rent Stabilization Board, or the Rent Stabilization Board has otherwise determined that a tenant-landlord relationship existed during the preceding five years.

Recommendation:

2. “Residential Unit” includes tenant-occupied Dwelling Units, ADUs, or JADUs created without proper zoning approvals or Building Permit(s) ~~if they have been registered with the Rent Stabilization Board, or the Rent Stabilization Board has otherwise determined that a tenant-landlord relationship existed during the preceding five years.~~

Rationale:

As currently drafted, Section 23.326.020.A.2 mandates that *unpermitted units* must comply with demolition controls and replacement unit requirements. There will invariably be a subset of unpermitted units for which legalizing the unit proves financially prohibitive and/or physically infeasible. Moreover, broadening the coverage of the demolition ordinance to encompass any unit that has been registered with the Rent Stabilization Board (or rented within the past five years) presents its own set of distinct and problematic implications. The Rent Stabilization Board mandates the registration of spaces based on their functional use; if a space serves as the primary residence for an individual tenant, it must be registered with the Rent Stabilization Board. As outlined in Regulation 403(A)¹, a space merely needs to provide basic amenities such as living, sleeping, eating, and sanitation to qualify as a “Rental Unit” necessitating registration. Essentially, if this ordinance is approved in its current form, any space utilized for independent living—even lacking a kitchen or basic cooking facilities—will be classified as a Residential Unit under the demolition ordinance. This classification could lead to the permanent subdivision of the property in numerous instances.

While it is important to uphold the policy goal of preserving the housing stock, this should not extend to maintaining unsafe unpermitted housing that cannot reasonably be replaced. Instead, the City should actively promote the legalization and improvement of these units. On November 19, 2019, the Berkeley City Council approved an amnesty program for unpermitted accessory dwelling units (ADUs) with the aim “to promote certification of unpermitted or undocumented secondary units while ensuring that they are safe, healthy and habitable, and once certified, to allow them to be legally used to provide needed housing to the Berkeley community.” The intent of the November 2019 proposal is to create a pathway to legalize and document these unpermitted units as ADUs.²

¹ Berkeley Rent Board. “Rent Stabilization Board Regulation 403(A) *City of Berkeley*, https://berkeleyca.gov/sites/default/files/2022-01/CHAPTER%204_Definitions.pdf

²“Amnesty Program for Unpermitted Dwelling Units.” City of Berkeley, November 15, 2022, <https://berkeleyca.gov/sites/default/files/documents/2022-11-15%20WS%20Item%2001%20Referral%20Response%20Amnesty%20Program.pdf>

If the intent of this section is to help prevent tenant displacement while allowing owners to demolish an unpermitted unit, inserting the phrase “tenant-occupied” (as defined below in our proposed recommendation in Section 23.326.020.A.6&7) addresses both problems. If legalizing an unpermitted unit proves to be cost-prohibitive and the unit is not tenant-occupied, then an owner should be able to demolish the unit. This issue is further addressed below in our proposed recommendation for Section 23.326.030.B.3 Procedure and Findings–Demolitions without Proper Zoning or Building Permit Approvals.

23.326.020.A.3 General Requirements—Exemptions

Current Proposal:

3. “Residential Unit” does not include a lawfully-permitted ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU, as defined in BMC Chapter 23.306, where the landlord also occupies a unit in the same property as their principal residence. This shall only apply to properties containing a single ADU or JADU, shall only apply to units compliant with all applicable requirements of BMC Chapter 23.306 (“Accessory Dwelling Units”), and shall only apply to tenancies created after November 7, 2018.

Recommendation:

3. “Residential Unit” does not include a lawfully-permitted ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU as defined in BMC Chapter 23.306, where the ~~owner landlord~~ also occupies a unit in the same property as their principal residence. ~~This shall only apply to properties containing a single ADU or JADU, shall only apply to units compliant with all applicable requirements of BMC Chapter 23.306 (“Accessory Dwelling Units”), and shall only apply to tenancies created after November 7, 2018.~~

Rationale:

The inclusion of the date November 7, 2018 stems from the Measure Q exemption of ADUs from rent control, approved by voters in November 2018. However, applying this date renders the exemption for ADUs and JADUs inapplicable to owner-occupied properties with tenancies initiated prior to November 7, 2018, which appears to have no rational policy basis. It is therefore recommended that the last sentence be deleted.

23.326.020.A.4 General Requirements—Comparable Units

Current Proposal:

4. “Comparable Unit” means a Residential Unit of similar size (square footage and number of bedrooms), common interior amenities, and location within the city (neighborhood and school attendance area). In the case of a Single-Family Dwelling being replaced, a Comparable Unit is not required to have the same or similar square footage or the same number of total rooms, but must provide the same number of bedrooms if the Single-Family Dwelling includes three or fewer bedrooms, or at least three bedrooms if the Single-Family Dwelling contains four or more bedrooms.

Recommendation:

4. “Comparable Unit” means a Residential Unit that contains the same number of bedrooms of similar size than the demolished unit, in accordance with the “equivalent size” requirements of state Government Code § 65915 (Density Bonus Law) and § 66300 (Housing Crisis Act) (square footage and number of bedrooms), common interior amenities, and location within the city (neighborhood and school attendance area). In the case of a Single-Family Dwelling being replaced, a Comparable Unit is not required to have the same or similar square footage or the same number of total rooms, but must provide the same number of bedrooms if the Single-Family Dwelling includes three or fewer bedrooms, or at least three bedrooms if the Single-Family Dwelling contains four or more bedrooms.

Rationale:

In Section 23.326.020.A.4, the “Comparable Unit” is overly prescriptive and would pose a significant barrier to numerous demolitions and subsequent rebuilds, thereby impeding efforts to increase the housing stock. For example, requiring similar square footage eliminates the incentive to replace a duplex with a small apartment building. Prospective multi-family projects would necessitate the replication of specific rooms' square footage, precluding any deviations. This requirement not only complicates the architect's task of designing cost-effective solutions but also renders the transition from smaller-scale to denser buildings economically impractical. State Government Code (§66300.d.2.F.iii) defines “Equivalent Size” and is a reasonable standard for replacement units.

23.326.020.A.6&7 General Requirements—Tenant-Occupied and Golden Duplex Unit Definition

The current proposal does not have a definition for “tenant-occupied” or “Golden Duplex.” The recommendation is to include definitions.

6. “Tenant-occupied” shall refer to a Residential Unit that has been occupied for more than 182 days within the last 365 days preceding the date of the demolition permit application.

7. “Golden Duplex” shall refer to units that are exempt from Rent Stabilization under Section 13.76.050.F. and shall not be considered to be subject to price control under Chapter 13.76 if they are occupied by the owner as their principal residence.

Rationale:

In order to guard against tenant displacement, a clear standard for “tenant-occupied” should be established in the ordinance. The recommended language aligns with the Measure M Vacancy Tax (adopted by voters in November 2022). Similarly, Golden Duplex is defined for purposes of applying the same tenant rights and relocation requirements as is applicable to ADUs/Junior ADUs.

**23.326.030.A.1 Demolition of Residential Units–Ellis Act vs. No-Fault Eviction and
23.326.040.B.1 Combination Units– Ellis Act vs. No-Fault Eviction**

Current Proposal for 23.326.030.A.1:

~~A.-(a)~~ Demolition is not allowed if:

1. ~~i.~~ The building Residential Unit (s) was removed from the rental market ~~under the Ellis Act through a no-fault eviction~~ during the preceding five years; or

Current Proposal for 23.326.040.B.1:

~~B. Limitations. Combination Demolition~~ is not allowed if:

1. ~~i.~~ The building was removed from the rental market ~~under the Ellis Act through a no-fault eviction~~ during the preceding five years; or

Rationale:

This Supplemental 2 report restores the “no-fault eviction” language of the current proposal. No-fault evictions are defined in the Berkeley Municipal Code Section 23.314.020 as “an eviction pursuant to the Ellis Act or Sections 13.76.130.A.9 or 10 of the Municipal Code.” Sections 13.76.130.A.9 or 10 include owner (or immediate family) move-in evictions, including “a landlord or lessor seeks in good faith to recover possession of the rental unit for his/her occupancy as a principal residence.” Restoring the “no-fault eviction” language goes beyond the Ellis Act standard imposed by state law in SB330/SB8.³ However, in Berkeley, a no-fault eviction requires an owner to live in the unit for at least three years.⁴ The standard created here enables demolition after an additional two years for a total five-year waiting period.

23.326.030.A.2 Demolition of Residential Units and 23.326.040.B.2 Eliminating Dwelling Units through Combination with Other Units—Appeal to the Rent Stabilization Board

Current Proposal of 23.326.030.A.2 and 23.326.040.B.2:

There ~~have been verified cases is substantial evidence~~ of harassment or threatened or actual illegal eviction during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, ~~whose determination may be appealed to the Rent Stabilization Board. The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The ZAB shall determine whether harassment or threatened or actual illegal eviction occurred,~~

Recommendation:

There is ~~substantial~~ a preponderance of evidence of harassment or threatened or actual illegal eviction provided by either the existing tenant or property manager/owner during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, whose determination may be appealed to the Rent Stabilization Board.

³ California Government Code § 66300, Title 7 Planning and Land Use, Division 1, Planning and Zoning, Chapter 12 “Housing Crisis Act of 2019.” <https://law.justia.com/codes/california/2022/code-gov/title-7/division-1/chapter-12/section-66300/>

⁴ Owner Move-In Eviction, Local Rules and Relocation Assistance Payments, <https://rentboard.berkeleyca.gov/rights-responsibilities/evictions/owner-move-eviction#:~:text=The%20landlord%20or%20relative%20must,time%20limit%20on%20this%20requirement>

Rationale:

The preponderance of evidence standard is superior to substantial evidence as it requires a greater degree of certainty, ensuring a more thorough assessment of the facts in legal proceedings. It is also crucial to clarify that only affected parties should have the ability to bring harassment complaints, preventing this aspect of the ordinance from being exploited by third-party actors. Finally, the Supplemental 2 report restores the decision authority to the Rent Stabilization Board, which possesses greater subject matter expertise than the Zoning Adjustments Board (ZAB) on these matters.

23.326.030.B.3 Procedure and Findings—Demolitions without Proper Zoning or Building Permit Approvals

Current Proposal:

3. In the event of a demolition of a Residential Unit created without proper zoning approvals or Building Permit(s), as defined in 23.326.020(A)(2), the Building Official, Zoning Officer or Fire Marshal may determine that the replacement of such a unit is infeasible and not required under this Chapter. Such a determination shall include a finding that the replacement of the unit could not occur in compliance with Zoning Code, Building Code, Fire Code or other regulations related to public health and safety.

Recommendation

3. In the event of a demolition of a Residential Unit created without proper zoning approvals or Building Permit(s), as defined in 23.326.020(A)(2), the Building Official, Zoning Officer or Fire Marshal may determine that the replacement of such a unit is infeasible and not required under this Chapter. Such a determination shall include a finding that the replacement of the unit could not occur in compliance with Zoning Code, Building Code, Fire Code or other regulations related to public health and safety.

In the event that the Building Official, Zoning Officer or Fire Marshal determines that the replacement unit is feasible, if a Dwelling Unit, ADU, or JADU was created without proper zoning approvals or Building Permit(s), as defined in 23.326.020(A)(2) and is not tenant-occupied, it can be demolished and eliminated with a Zoning Certificate and all appropriate building permits. In order to receive the Zoning Certificate, the owner shall sign under penalty of perjury that the unit to be eliminated is not tenant-occupied (as defined) and would present a financial hardship to replace.

Rationale:

The recommended amendments address scenarios in which a property owner may be financially unable to create a legally-permitted replacement unit—only for instances in which the unit is not tenant-occupied.

23.326.030.C—Landmarks Preservation Commission

Current Proposal:

C. Landmarks and Structures of Merit. Demolition of a designated landmark or structure of merit, or of a structure in a designated historic district, must be approved by the Landmarks Preservation Commission, pursuant to Chapter 3.24.

Recommendation:

C. *Landmarks and Structures of Merit.* Demolition of a designated landmark or structure of merit or of a structure in a designated historic district, classified as such prior to zoning application, must be approved by the Landmarks Preservation Commission, pursuant to Chapter 3.24.

Rationale:

Section 15064.5 of the California Environmental Quality Act already contains a provision that requires review of properly designated historic structures, for those projects that qualify. Furthermore, clarifying that landmarks, structures of merit, or designated historic districts must be established before deliberation by the Landmarks Preservation Commission ensures that obstructive housing challenges do not arise after the submission of a building or demolition application. This amendment reinforces Government Code § 65913.10, which states that a landmark determination must be made at the time the application for the housing development project is deemed complete (at the time when the application was submitted).⁵

23.326.030.D: Demolition of Residential Units—Conditions of Approval*Current Proposal:*

D. Conditions of Approval. Any Protected Unit(s) that is demolished shall be replaced with a Comparable Unit that shall comply with the maximum allowable rent requirements for Affordable Units in Chapter 23.328 [Affordable Housing Requirements] and Chapter 23.330 [Density Bonus] as they may be amended from time to time.

1. In the event that a displaced household has an income below 50% AMI, a Comparable Unit shall be offered at a rent that is affordable to households at 30% of AMI, and the displaced household shall have the first right of refusal for that unit. Such a unit shall be counted as a Very Low-Income unit for applicable affordability requirements in Chapter 23.328.

2. In the event that a demolished Residential Unit is not a Protected Unit and the income of the displaced household is unknown, the Residential Unit shall be presumed to have been occupied by Low- or Lower-Income households in the same proportion as Residential Units throughout the City. The City shall rely upon US Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy (CHAS) data to determine the number of such Residential Units that must be replaced with Affordable Units as defined in Chapter 23.328.

3. In the event that a Protected Unit was subject to rent or price controls under BMC Chapter 13.76, and the income level of the displaced household is unknown, the unit shall be replaced with an Affordable Unit as defined in Chapter 23.328.

Recommendation:

D. *Conditions of Approval.* Any Protected Unit(s), that is demolished and is known to have been occupied by a Low- or Lower-Income household within the prior 5 years shall be replaced with a

⁵ California Government Code §65913, Title 7 Planning and Land Use, Division 1, Planning and Zoning, Chapter 4.2 "Housing Development Approvals: Determination of a Historic Site." <https://casetext.com/statute/california-codes/california-government-code/title-7-planning-and-land-use/division-1-planning-and-zoning/chapter-42-housing-development-approvals/section-6591310-effective-until-112030-determination-of-historic-site>

Comparable Unit that shall comply with the maximum allowable rent requirements for Affordable Units in Chapter 23.328 [Affordable Housing Requirements] and Chapter 23.330 [Density Bonus] as they may be amended from time to time.

~~1. In the event that a displaced household has an income below 50% AMI, a Comparable Unit shall be offered at a rent that is affordable to households at 30% of AMI, and the displaced household shall have the first right of refusal for that unit. Such a unit shall be counted as a Very Low Income unit for applicable affordability requirements in Chapter 23.328.~~

1. In the event that a demolished Residential Unit was subject to a low-income deed restriction for any of the previous five years, the unit shall be replaced with an Affordable Unit at the same income level as defined in Chapter 23.328 [Affordable Housing Requirements], and the displaced household shall have the first right of refusal for that unit.

2. In the event that a demolished Residential Unit is ~~not a Protected Unit and the income of the displaced household is unknown~~ not known to have been occupied by a Low- or Lower-Income household within the prior five years, the Residential Unit shall be presumed to have been occupied by Low- or Lower-Income households in the same proportion as Residential Units throughout the City. The City shall rely upon US Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy (CHAS) data to determine the number of such Residential Units that must be replaced with Affordable Units as defined in Chapter 23.328.

~~3. In the event that a Protected Unit was subject to rent or price controls under BMC Chapter 13.76, and the income level of the displaced household is unknown, the unit shall be replaced with an Affordable Unit as defined in Chapter 23.328.~~

Rationale:

As 23.326.030.D.1 is currently written, a Protected Unit would encompass any unit rented to an individual earning less than 50 percent of the Area Median Income (AMI) as outlined in Section 23.326.020.A.5.C. This provision would likely cover the majority of buildings in the Southside or those near the U.C. Berkeley campus. Requiring a deed-restricted below-market-rate (BMR) subsidized affordable housing replacement unit with similar square footage, amenities, and neighborhood location in areas predominantly inhabited by students, who generally cannot qualify for such units, would impede the creation of homes near the U.C. Berkeley campus (Downtown and Southside). Further, it is unclear why the current proposal requires a replacement unit to be affordable at 30 percent AMI to a tenant whose income may fall within the range of 31 percent to 49 percent AMI. It is recommended that deed-restricted BMR units should be replaced with similar deed-restricted BMR units. Some minor clean-up language has been added to the recommended 23.326.030.D and 23.326.030.D.1 in the Supplemental 2 report. Further, the Supplemental 2 report modifies 23.326.030.D.2 and deletes paragraph 3 (no longer necessary here) to align this section with the Planning Department's existing practice that has proven to be workable for affected parties.

23.326.030.E.3 Requirements for Occupied Units—General Requirements

Current Proposal:

3. ~~i.~~ General Requirements The applicant shall provide assistance with moving expenses and relocation assistance equivalent to the requirements set forth in Municipal Code Chapter 13.84 (Relocation Services and Payments for Residential Tenant Households) ~~ii.~~ or Government Code section 66300.6(b)(4)(A), whichever requires greater relocation assistance to displaced tenants, and shall not be subject to the limitations in section 13.84.070.B.3(a). The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy. Within five days of the issuance of the Certificate of Occupancy, tenants shall be notified in writing that the units will be ready for move-in on a date specified. Tenants shall confirm in writing their intent to lease the available unit at any time before 20 days after the issuance of the Certificate of Occupancy. Funding for the rent differential shall be guaranteed in a manner approved by ~~the~~ City Council Resolution; provided, however, that any project that is carried out or funded by the state or federal government shall be subject to applicable provisions of the California Relocation Act (Government Code section 7260 et seq.) and/or the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. sections 4601- 4655).

~~(a)-iii.~~ *Exception.* An applicant who proposes to construct a 100-percent affordable housing project is not required to comply with this subsection but must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended and the California Relocation Act (Government Code sections 7260 et seq.).

(b) Exception for Tenants in ADUs and Unpermitted Units That Cannot Be Replaced. Applicants are required to provide moving and relocation assistance, in an amount provided in BMC Section 13.76.130(A)(9)(g), to the following groups of tenants: (i) tenants who occupy a lawfully permitted ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU, where the landlord also occupies a unit in the same property as his/her principal residence; and (ii) tenants who occupy a unit created without proper zoning approvals that cannot be replaced for public health or safety reasons, pursuant to BMC Section 23.326.030(B)(3). However, applicants are not required to (i) provide such tenants with a temporary replacement unit while a new unit is being constructed, (ii) notify such tenants when a new unit is ready for occupancy; or (iii) provide such tenants with a right for first refusal for the new unit.

Recommendation:

3. *General Requirements* The applicant shall provide moving and relocation assistance equivalent to the requirements set forth in Municipal Code Chapter 13.84 (Relocation Services and Payments for Residential Tenant Households) or Government Code § 66300.6(b)(4)(A), whichever requires greater relocation assistance to displaced tenants, and shall ~~not~~ be subject to the limitations in section 13.84.070.B.3(a). ~~The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy.~~ Within five days of the issuance of the Certificate of Occupancy, tenants shall be notified in writing that the units will be ready for move-in on a date specified. Tenants shall confirm in writing their intent to lease the available unit at any time before 20 days after the issuance of the Certificate of Occupancy. ~~Funding for the rent differential shall be guaranteed in a manner approved by City Council Resolution; provided, h~~However, ~~that~~ any project that is

carried out or funded by the state or federal government shall be subject to applicable provisions of the California Relocation Act (Government Code section 7260 et seq.) and/or the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. sections 4601- 4655).

(a) *Exception.* An applicant who proposes to construct a 100-percent affordable housing project is not required to comply with this subsection but must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended and the California Relocation Act (Government Code sections 7260 et seq.).

(b) *Exception for Tenants in ADUs, Golden Duplexes, and Unpermitted Units That Cannot Be Replaced.* Applicants are required to provide moving and relocation assistance, in an amount provided in BMC Section 13.76.130(A)(9)(g), to the following groups of tenants: (i) tenants who occupy a Golden Duplex or a lawfully permitted ADU or JADU on a residential property containing only a Single Family Dwelling and one lawfully established and fully permitted ADU or JADU, where the landlord also occupies a unit in the same property as his/her principal residence; and (ii) tenants who occupy a unit created without proper zoning approvals that cannot be replaced for public health or safety reasons, pursuant to BMC Section 23.326.030(B)(3). However, applicants are not required to (i) provide such tenants with a temporary replacement unit while a new unit is being constructed, (ii) notify such tenants when a new unit is ready for occupancy; or (iii) provide such tenants with a right for first refusal for the new unit.

Rationale:

The City's Relocation Ordinance in Section 13.84.070.B.3(a) already provides for a fair rent differential payment to displaced tenants: "The rent differential payment shall not exceed a ceiling established annually by the City based on the average market rent statistics gathered and published by the rent stabilization program for the prior calendar year." This calculation specified in the Relocation Ordinance is a fair method for providing a displaced tenant with a rent differential payment. Further, there does not appear to be a rational policy basis to provide a more generous rent differential when displacement is the result of demolition as opposed to remodeling or other unit improvements.

The proposed demolition ordinance meets SB330/SB8 exemptions for owner-occupied ADUs and JADUs, but does not extend them for owner-occupied properties referred to as "Golden Duplexes."⁶ The Demolition Ordinance should treat owner-occupied Golden Duplexes the same as ADUs and JADUs, whenever allowable under state law, because they are a similar housing type in terms of proximity of property owner to tenant on a single parcel and the likelihood that the property owner is a regular homeowner who is not acting as a landlord in a full-time business capacity.

⁶ "Golden Duplexes" refer to owner occupied-properties that contain a single-family unit and a rental unit, which is exempt from the Rent Control Ordinance, if it "would have been exempt under the provisions of this chapter [i.e., BMC 13.76] had this chapter been in effect on December 31, 1979" [13.76.050.F]. They function much like accessory dwelling units, and their exemptions from Rent Control Ordinance are similar.

23.326.030.E.4b&c—Requirements for Occupied Units—Sitting Tenants’ Rights

Current Proposal:

~~(a) Sitting Any tenants of a Protected Unit that is permitted to be demolished under this section who are displaced as a result of demolition shall be provided have the right of first refusal to move into rent a Comparable Unit in the new building project.~~

~~(b) In the event that a displaced household is ineligible for below-market rate replacement units, a market rate units designated to Comparable uUnit shall be made available to replace the units that were demolished household at the same rent that would have applied as had been previously charged, or a lesser rent if they had remained in place, as long as their tenancy continues that is the market rate.~~

~~(c) Where a displaced tenant exercises the right to rent a Comparable Unit, any increase in rent for the Comparable Unit for the duration of their tenancy shall be no greater than the lesser of 65% of the increase in the Consumer Price Index for All Urban Consumers (CPI-U) in the San Francisco-Oakland-San Jose region (as reported and published by the U.S. Department of Labor, Bureau of Labor Statistics for the twelve-month period ending the previous December 31) or 65% of the corresponding increase in Area Median Income (AMI) for the same calendar year.~~

Recommendation:

(a) Any tenant of a Protected Unit that is permitted to be demolished under this section shall have the right of first refusal to rent a Comparable Unit in the new project.

~~(b) In the event that a displaced household is ineligible for below-market rate replacement units, a market rate Comparable Unit shall be made available to that household at the same rent as had been previously charged, or a lesser rent if that is the market rate.~~

~~(c) Where a displaced tenant exercises the right to rent a Comparable Unit, any increase in rent for the Comparable Unit for the duration of their tenancy shall be no greater than the lesser of 65% of the increase in the Consumer Price Index for All Urban Consumers (CPI-U) in the San Francisco-Oakland-San Jose region (as reported and published by the U.S. Department of Labor, Bureau of Labor Statistics for the twelve-month period ending the previous December 31) or 65% of the corresponding increase in Area Median Income (AMI) for the same calendar year.~~

Rationale:

The proposed amendment is to strike Sections b and c. Mandating that a new market rate unit must reduce its market rent for a household earning more than 50 percent AMI establishes a level of subsidy that could render projects infeasible. Further financial feasibility study is warranted before undertaking this policy choice.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

According to Section 21065 of the California Public Resource Code, a "project" under CEQA is described as an endeavor that could lead to either a direct or reasonably anticipated indirect alteration of the environment. The amendments proposed in the ordinance solely pertain to the regulations governing the demolition of current structures and do not entail any alterations to the environment. This proposed ordinance does not involve any discretionary actions that would authorize or result in environmental changes, either direct or indirect. Consequently, it does not qualify as a project under CEQA.

CONTACT PERSON

Councilmember Rashi Kesarwani
(510) 981-9110

COUNCILMEMBER RASHI KESARWANI RECOMMENDATION

(amending Planning Commission/Planning staff/4x4's 3/26/2024 version of current ordinance)

ORDINANCE NO.
AMENDING BERKELEY MUNICIPAL CODE CHAPTER 23.326, DEMOLITION AND
DWELLING UNIT CONTROLS

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

Section 1. That Berkeley Municipal Code Chapter 23.326 is hereby amended to read as follows:

Chapter 23.326
DEMOLITION AND DWELLING UNIT CONTROLS

Sections:

- 23.326.010 Chapter Purpose.
- 23.326.020 General Requirements.
- 23.326.030 Demolition of Residential Units.
- 23.326.040 Eliminating Dwelling Units through Combination with Other Units.
- 23.326.050 Demolition of Accessory Buildings.
- 23.326.060 Private Right of Action.
- 23.326.070 Demolitions of Non-Residential Buildings.
- 23.326.080 Building Relocations.
- 23.326.090 Limitations.
- 23.326.100 Severability

23.326.010 Chapter Purpose.

This chapter establishes demolition and dwelling unit control standards that promote the affordable housing and safety goals of the City.

23.326.020 General Requirements.

A. No Residential Unit(s) may be eliminated or demolished except as authorized by this chapter.

1. "Residential Unit" means, for purposes of this Chapter, any Dwelling Unit, any Live-Work Unit, any Residential Hotel unit, any bedroom of a Group Living Accommodation (GLA), except a GLA in a University-recognized fraternity, sorority or co-op, or any lawfully-permitted Accessory Dwelling Unit ("ADU") or Junior Accessory Dwelling Unit ("JADU").

2. "Residential Unit" includes tenant-occupied Dwelling Units, ADUs, or JADUs created without proper zoning approvals or Building Permit(s) ~~if they have been registered with~~

~~the Rent Stabilization Board, or the Rent Stabilization Board has otherwise determined that a tenant-landlord relationship existed during the preceding five years.~~

3. "Residential Unit" does not include a lawfully-permitted ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU as defined in BMC Chapter 23.306, where the owner/landlord also occupies a unit in the same property as their principal residence. ~~This shall only apply to properties containing a single ADU or JADU, shall only apply to units compliant with all applicable requirements of BMC Chapter 23.306 ("Accessory Dwelling Units"), and shall only apply to tenancies created after November 7, 2018.~~

4. "Comparable Unit" means a Residential Unit that contains the same number of bedrooms of similar size than the demolished unit, in accordance with the "equivalent size" requirements of CA Government Section Code § 65915 (Density Bonus Law) and §66300 (Housing Crisis Act). ~~(square footage and number of bedrooms), common interior amenities, and location within the city (neighborhood and school attendance area).~~ In the case of a Single-Family Dwelling being replaced, a Comparable Unit is not required to have the same or similar square footage or the same number of total rooms, but must provide the same number of bedrooms if the Single-Family Dwelling includes three or fewer bedrooms, or at least three bedrooms if the Single-Family Dwelling contains four or more bedrooms.

5. "Protected Unit" includes a Residential Unit:

- a. Subject to a low-income deed restriction for any of the previous five years;
- b. Subject to rent or price control under BMC Chapter 13.76; or
- c. Rented by a household at 80% Area Median Income or lower within the previous five years.

6. "Tenant-occupied" shall refer to a Residential Unit that has been occupied for more than 182 days within the last 365 days preceding the date of the demolition permit application.

7. "Golden Duplex" shall refer to units that are exempt from Rent Stabilization under Section 13.76.050.F. and shall not be considered to be subject to price control under Chapter 13.76 if they are occupied by the owner as their principal residence."

23.326.030 Demolition of Residential Units

A. Demolition is not allowed if:

1. The Residential Unit (s) was removed from the rental market through a no-fault eviction during the preceding five years; or

2. There is substantial a preponderance of evidence of harassment or threatened or actual illegal eviction provided by either the existing tenant or property manager/owner during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, whose determination may be appealed to the Rent Stabilization Board.

B. Procedure and Findings.

1. A Use Permit is required to eliminate or demolish one or more Residential Units, except where otherwise provided by the Zoning Ordinance. The Board shall only approve the Use Permit if one of the following is true:

(a) The building containing the Residential Unit(s) is hazardous or unusable and is infeasible to repair.

(b) The building containing the Residential Unit(s) will be moved to a different location within Berkeley with no net loss of units and no change in the rent levels of the unit(s).

(c) The demolition is necessary to permit construction approved pursuant to this chapter of at least the same number of dwelling units.

2. A Single-Family Dwelling without sitting tenants can be demolished with an AUP, if the demolition is part of a development project that would result in a net increase in residential density.

3. In the event of a demolition of a Residential Unit created without proper zoning approvals or Building Permit(s), as defined in 23.326.020(A)(3), the Building Official, Zoning Officer or Fire Marshal may determine that the replacement of such a unit is infeasible and not required under this Chapter. Such a determination shall include a finding that the replacement of the unit could not occur in compliance with Zoning Code, Building Code, Fire Code or other regulations related to public health and safety. Further, even if the Building Official, Zoning Officer or Fire Marshal determines that the replacement unit is feasible, if a Dwelling Unit, ADU, or JADU was created without proper zoning approvals or Building Permit(s), as defined in 23.326.020(A)(2) and is not tenant-occupied, it can be demolished and eliminated with a Zoning Certificate and all appropriate building permits. In order to receive the Zoning Certificate, the owner shall sign under penalty of perjury that the unit to be eliminated is not tenant-occupied and would present a financial hardship to replace.

C. *Landmarks and Structures of Merit.* Demolition of a designated landmark or structure of merit or of a structure in a designated historic district, classified as such prior to zoning application, must be approved by the Landmarks Preservation Commission, pursuant to Chapter 3.24.

D. *Conditions of Approval.* Any Protected Unit(s), that is demolished and is known to have been occupied by a Low- or Lower-Income household within the prior 5 years shall be replaced with a Comparable Unit that shall comply with the maximum allowable rent requirements for Affordable Units in Chapter 23.328 [Affordable Housing Requirements] and Chapter 23.330 [Density Bonus] as they may be amended from time to time.

~~1. In the event that a displaced household has an income below 50% AMI, a Comparable Unit shall be offered at a rent that is affordable to households at 30% of AMI, and the displaced household shall have the first right of refusal for that unit. Such a unit shall be counted as a Very Low Income unit for applicable affordability requirements in Chapter 23.328.~~

1. In the event that a demolished Residential Unit was subject to a low-income deed restriction for any of the previous five years, the unit shall be replaced with an Affordable Unit at the same income level as defined in Chapter 23.328 [Affordable Housing Requirements], and the displaced household shall have the first right of refusal for that unit.

2. In the event that a demolished Residential Unit is ~~not a Protected Unit and the income of the displaced household is unknown~~ not known to have been occupied by a Low-or Lower-Income household within the prior five years, the Residential Unit shall be presumed to have been occupied by Low- or Lower-Income households in the same proportion as Residential Units throughout the City. The City shall rely upon US Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy (CHAS) data to determine the number of such Residential Units that must be replaced with Affordable Units as defined in Chapter 23.328.

~~3. In the event that a Protected Unit was subject to rent or price controls under BMC Chapter 13.76, and the income level of the displaced household is unknown, the unit shall be replaced with an Affordable Unit as defined in Chapter 23.328.~~

E. *Requirements for Occupied Units.*

1. *Applicability.* These requirements do not apply to tenants who move in after the application for demolition is submitted to the City if the owner informs each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.

2. *Notice.* The applicant shall provide all sitting tenants and the Rent Stabilization Board notice of the application to demolish the Residential Unit(s) no later than the date the application is submitted to the City, including notice of their rights under Municipal Code Chapter 13.76 (Rent Stabilization and Eviction for Good Cause Program), Chapter 13.77 (Requirements, Procedures, Restrictions and Mitigations Concerning the Withdrawal of Residential Rental Accommodations from Rent or Lease), 13.79 (Tenant Protections: Automatically Renewing Leases and Buyout Agreements) and 13.84 (Relocation Services and Payments for Residential Tenant Households).

3. *General Requirements.* The applicant shall provide moving and relocation assistance equivalent to the requirements set forth in Municipal Code Chapter 13.84 (Relocation Services and Payments for Residential Tenant Households) or Government Code section 66300.6(b)(4)(A), whichever requires greater relocation assistance to displaced tenants, and shall ~~not~~ be subject to the limitations in section 13.84.070.B.3(a). ~~The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy.~~ Within five days of the issuance of the Certificate of Occupancy, tenants shall be notified in writing that the units will be ready for move-in on a date specified. Tenants shall confirm in writing their intent to lease the available unit at any time before 20 days after the issuance of the Certificate of Occupancy. ~~Funding for the rent differential shall be guaranteed in a manner approved by City Council Resolution; provided, however, that~~ any project that is carried out or funded by the state or federal government shall be subject to applicable provisions of the California Relocation Act (Government Code section 7260 et seq.) and/or the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. sections 4601- 4655).

(a) *Exception.* An applicant who proposes to construct a 100-percent affordable housing project is not required to comply with this subsection but must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended and the California Relocation Act (Government Code sections 7260 et seq.).

(b) *Exception for Tenants in ADUs, Golden Duplexes, and Unpermitted Units That Cannot Be Replaced.* Applicants are required to provide moving and relocation assistance, in an amount provided in BMC Section 13.76.130(A)(9)(g), to the following groups of tenants: (i) tenants who occupy a Golden Duplex or a lawfully permitted ADU or JADU on a residential property containing only a Single Family Dwelling and one lawfully established and fully permitted ADU or JADU, where the landlord also occupies a unit in the same property as his/her principal residence; and (ii) tenants who occupy a unit created without proper zoning approvals that cannot be replaced for public health or safety reasons, pursuant to BMC Section 23.326.030(B)(3). However, applicants are not required to (i) provide such tenants with a temporary replacement unit while a new unit is being constructed, (ii) notify such tenants when a new unit is ready for occupancy; or (iii) provide such tenants with a right for first refusal for the new unit.

4. Sitting Tenants Rights

(a) Any tenant of a Protected Unit that is permitted to be demolished under this section shall have the right of first refusal to rent a Comparable Unit in the new project.

~~(b) In the event that a displaced household is ineligible for below-market rate replacement units, a market rate Comparable Unit shall be made available to that household at the same rent as had been previously charged, or a lesser rent if that is the market rate.~~

~~(c) Where a displaced tenant exercises the right to rent a Comparable Unit, any increase in rent for the Comparable Unit for the duration of their tenancy shall be no greater than the lesser of 65% of the increase in the Consumer Price Index for All Urban Consumers (CPI-U) in the San Francisco-Oakland-San Jose region (as reported and published by the U.S. Department of Labor, Bureau of Labor Statistics for the twelve-month period ending the previous December 31) or 65% of the corresponding increase in Area Median Income (AMI) for the same calendar year.~~

(db) *Exceptions.*

i. An applicant who proposes to construct a 100 percent affordable housing project is not required to comply with the preceding requirements but must comply with the following requirement.

ii. Sitting tenants who are displaced as a result of demolition and who desire to return to the newly constructed affordable housing project will be granted a right of first refusal subject to their ability to meet income qualifications and other applicable eligibility requirements.

23.326.040 Eliminating Dwelling Units through Combination with Other Units.

A. Process for Projects Where Density Exceeds Current Allowance. A Use Permit is required to eliminate one or more Residential Units by combining with another unit when the existing development exceeds currently-allowable density. The ZAB shall approve a Use Permit for the elimination of one or more Residential Units by combining with another unit only if it finds that:

1. The existing number of Residential Units exceeds the current maximum allowed residential density in the zoning district where the units are located; and

2. One of the following is true:

(a) One of the affected Residential Units has been owner-occupied as a principal place of residence for no less than two years before the date of the application and none of the affected units are currently occupied by a tenant.

(b) All of the affected Residential Units are being sold by an estate and the decedent occupied the Residential Units as their principal residence for no less than two years before the date of their death.

B. Limitations. Combination is not allowed if:

1. The building was removed from the rental market through a no-fault eviction during the preceding five years; or

2. There is substantial a preponderance of evidence of harassment or threatened or actual illegal eviction provided by either the existing tenant or property manager/owner during the

immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, whose determination may be appealed to the Rent Stabilization Board.

C. Two-Year Occupancy Requirement Following Elimination

1. If a Residential Unit that is eliminated through combination is not owner-occupied for at least two consecutive years from the date of elimination, the affected Residential Unit must be restored to separate status.
2. This requirement shall be implemented by a condition of approval and a notice of limitation on the property, acceptable to the City of Berkeley.
3. The condition of approval and notice will provide that if the Residential Unit is not owner-occupied for at least two years from the date of elimination then the affected Residential Unit(s) must either be restored as separate Residential Unit(s) and the vacant Residential Unit(s) offered for rent within six months or the owner must pay a fee of \$75,000 in 2013 dollars, adjusted in May of each year according to the Consumer Price Index for the San Francisco Bay Area. The fee shall be deposited into the City of Berkeley's Housing Trust Fund.
4. The City of Berkeley may exempt an applicant from the two-year residency requirement if there is an unforeseeable life change that requires relocation.

D. Effect of Eliminating a Residential Unit.

1. If eliminating a Residential Unit reduces the number of Residential Units in a building to four or fewer, the applicant shall record a notice of limitation against the subject property that the limitation on eviction of tenants under Chapter 13 (Public Peace, Morals and Welfare) shall continue to apply until:

(a) The building is demolished; or

(b) Sufficient Residential Units are added or restored such that the building contains at least five Residential Units.

2. The Zoning Officer may issue an AUP for a building conversion which eliminates a Residential Unit upon finding that the conversion will restore or bring the building closer to the original number of Residential Units that was present at the time it was first constructed, provided the conversion meets the requirements of 23.326.040.A.1 and 2 and 23.326.040.B and C.

E. Exception. The ZAB may approve a Use Permit to eliminate a Residential Unit through combination with another Residential Unit for the purpose of providing private bathrooms, kitchenettes, accessibility upgrades, and/or seismic safety upgrades, or other elements required

by funding sources or programmatic needs to single resident occupancy rooms in residential developments undergoing a publicly-funded rehabilitation.

23.326.050 Demolition of Accessory Buildings.

A. Notwithstanding anything in Municipal Code Title 23 (Zoning Ordinance) to the contrary, but subject to any applicable requirements in Municipal Code Section 3.24 (Landmarks Preservation Ordinance), Accessory Buildings of any size, including, but not limited to, garages, carports, and sheds may be demolished by right except where the Accessory Building is occupied by a residential tenant (regardless of whether it is lawfully permitted) or otherwise contains a lawfully established Residential Unit, which serves and is located on the same lot as a lawful residential use. Such Accessory Buildings are considered Residential Units for the purposes of this Chapter.

23.326.060 Private Right of Action.

A. Any affected tenant may bring a private action for injunctive and/or compensatory relief against any applicant and/or owner to prevent or remedy a violation of Sections 23.326.030 (Eliminating Dwelling Units through Demolition) and 23.326.040 (Eliminating Dwelling Units through Conversion and Change of Use). In any such action a prevailing plaintiff shall recover reasonable attorney's fees.

23.326.070 Demolition of Non-Residential Buildings.

A. *Main Non-Residential Buildings.* A Use Permit is required to demolish a main building used for non-residential purposes on any lot.

B. *Accessory Buildings.* For any lot located in a non-residential zoning district, Accessory Buildings may be demolished as follows:

1. Demolishing an accessory building with less than 300 square feet of floor area is permitted as of right.

2. An accessory building with 300 square feet or more of floor area may be demolished with an AUP.

C. *Landmarks Preservation Commission Review.*

1. Any application for a Use Permit or AUP to demolish a non-residential building or structure that is 40 or more years old shall be forwarded to the Landmarks Preservation Commission (LPC) for review before consideration of the Use Permit or AUP.

2. The LPC may initiate a landmark or structure-of-merit designation or may choose solely to forward to the ZAB or Zoning Officer its comments on the application.

3. The ZAB or Zoning Officer shall consider the recommendations of the LPC in when acting on the application.

D. *Findings.* A Use Permit or an AUP for demolition of a main building used for nonresidential purposes on any lot or an accessory building located on a lot in a nonresidential district may be approved only if the ZAB or the Zoning Officer finds that:

1. The demolition will not be materially detrimental to the commercial needs and public interest of any affected neighborhood or the City of Berkeley; and

2. The demolition:

(a) Is required to allow a proposed new building or other proposed new use;

(b) Will remove a building which is unusable for activities which are compatible with the purposes of the district in which it is located or which is infeasible to modify for such uses;

(c) Will remove a structure which represents an uninhabitable attractive nuisance to the public; or

(d) Is required for the furtherance of specific plans or projects sponsored by the City of Berkeley or other local district or authority upon a demonstration that it is infeasible to obtain prior or concurrent approval for the new construction or new use which is contemplated by such specific plans or projects and that adhering to such a requirement would threaten the viability of the plan or project.

23.326.080 Building Relocations.

A. Treatment of Building Relocation.

1. Relocating a building from a lot is considered a demolition for purposes of this chapter.

2. Relocating a building to a lot within the city is subject to all requirements applicable to new construction.

3. When a building is relocated to a different lot within Berkeley, the lot from which the building is removed shall be known as the source lot and the lot on which the building is to be sited shall be known as the receiving lot.

4. Nothing in this subsection shall exempt Residential Units relocated to the receiving lot from the provisions of BMC Section 13.76 after a building relocation if the Residential

Units located within a building were otherwise subject to BMC Chapter 13.76 in the source lot.

B. Findings. The Zoning Officer shall approve Zoning Certificate to relocate a building upon finding that upon finding that the resulting development on the receiving lot is in conformance with applicable zoning code development standards

23.326.090 Limitations.

A. Unsafe, Hazard, or Danger.

1. Notwithstanding anything to the contrary, if a building or structure is unsafe, presents a public hazard, and is not securable and/or is in imminent danger of collapse so as to endanger persons or property, as determined by the city's building official, it may be demolished without a Use Permit.

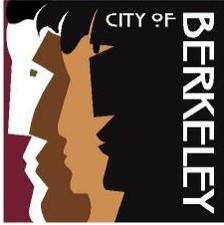
2. The Building Official's determination in this matter shall be governed by the standards and criteria in the most recent edition of the California Building Code that is in effect in the City of Berkeley.

B. Ellis Act. This chapter shall be applied only to the extent permitted by state law as to buildings which have been entirely withdrawn from the rental market pursuant to the Ellis Act (California Government Code Chapter 12.75).

23.326.100 Severability.

A. If any part or provision of this Chapter, or the application of this Chapter to any person or circumstance, is held invalid, the remainder of this Chapter, including the application of such part or provision to other persons or circumstances, shall not be affected by such a holding and shall continue in full force and effect. To this end, the provisions of this Chapter are severable.

Internal



Office of the City Manager

REVISED AGENDA MATERIAL for Supplemental Packet 1

Meeting Date: March 26, 2024

Item Number: 23

Item Description: Zoning Ordinance Amendments to Berkeley Municipal Code Chapter 23.326 Demolition and Dwelling Unit Controls

Submitted by: Jordan Klein, Planning and Development

Staff have revised Attachments 1 and 2 to amend sub-section 23.326.020(A)(5)(c), which describes a type of Protected Unit, to accurately reflect California Government Code Section 66300.5(a)(h)(3):

c. Rented by a household at ~~50%~~ 80% Area Median Income or lower within the previous five years.

ORDINANCE NO.

AMENDING BERKELEY MUNICIPAL CODE CHAPTER 23.326, DEMOLITION AND DWELLING UNIT CONTROLS

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

Section 1. That Berkeley Municipal Code Chapter 23.326 is hereby amended to read as follows:

23.326 DEMOLITION AND DWELLING UNIT CONTROL

Sections:

23.326.010– Chapter Purpose.

23.326.020– General Requirements.

~~23.326.030–Demolition–Eliminating Dwelling Units through Demolition~~ of Residential Units.

~~23.326.040– Eliminating Dwelling Units through–Eliminating Dwelling Units through Combination with Other Units. Conversion and Change of Use~~

~~23.326.050–Demolition of Accessory Buildings.~~

~~23.326.05023.326.0560 –Private Right of Action.~~

~~23.326.060–Elimination of Residential Hotel Rooms~~

23.326.070– Demolitions of Non-Residential Buildings.

23.326.080– Building Relocations.

23.326.090– Limitations.

23.326.100–Severability.

23.326.010 – Chapter Purpose

This chapter establishes demolition and dwelling unit control standards that promote the affordable housing, aesthetic, and safety goals of the City.

23.326.020 – General Requirements

A. **Applicability.** ~~No dwelling unit Residential Unit(s) or units~~ may be eliminated or demolished except as authorized by this chapter.

1. “Residential Unit” means, for purposes of this Chapter, any Dwelling Unit, any Live-Work Unit, any Residential Hotel unit, or any bedroom of a Group Living Accommodation (GLA), except a GLA in a University-recognized fraternity, sorority or co-op, or any lawfully-permitted Accessory Dwelling Unit (“ADU”) of Junior Accessory Dwelling Unit (“JADU”).

2. “Residential Unit” includes Dwelling Units, ADUs, or JADUs created without proper zoning approvals or Building Permit(s) if they have been registered with the Rent Stabilization Board, or the Rent Stabilization Board has otherwise determined that a tenant-landlord relationship existed during the preceding five years.
3. “Residential Unit” does not include a lawfully-permitted ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU, as defined in BMC Chapter 23.306, where the landlord also occupies a unit in the same property as their principal residence. This shall only apply to properties containing a single ADU or JADU, shall only apply to units compliant with all applicable requirements of BMC Chapter 23.306 (“Accessory Dwelling Units”), and shall only apply to tenancies created after November 7, 2018.
4. “Comparable Unit” means a Residential Unit of similar size (square footage and number of bedrooms), common interior amenities, and location within the city (neighborhood and school attendance area). In the case of a Single-Family Dwelling being replaced, a Comparable Unit is not required to have the same or similar square footage or the same number of total rooms, but must provide the same number of bedrooms if the Single-Family Dwelling includes three or fewer bedrooms, or three bedrooms if the Single-Family Dwelling contains four or more bedrooms.
5. “Protected Unit” includes a Residential Unit:
 - a. Subject to a low-income deed restriction for any of the previous five years;
 - b. Subject to rent or price control under BMC Chapter 13.76; or
 - c. Rented by a household at 80% Area Median Income or lower within the previous five years.

~~**B. Findings.** In addition to the requirements below, the Zoning Adjustments Board (ZAB) may approve a Use Permit to eliminate or demolish a dwelling unit only upon finding that eliminating the dwelling unit would not be materially detrimental to the housing needs and public interest of the affected neighborhood and Berkeley.~~

23.326.030 – ~~Eliminating Dwelling Units through Demolition~~ of Residential Units

~~**A. Buildings with Two or More Units Constructed Before June 1980.**~~

~~**1. Applicability.** This subsection only applies to building with two or more units constructed before June 1980.~~

~~**2. Limitation.**~~

~~(a) **A.** Demolition is not allowed if:~~

1. The ~~building~~ Residential Unit(s) was removed from the rental market ~~under the Ellis Act~~ through a no-fault eviction during the preceding five years; or
2. There ~~have been verified cases~~ is substantial evidence of harassment or threatened or actual illegal eviction during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, whose determination may be appealed to the Rent Stabilization Board.

~~(b) Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner. The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The ZAB shall determine whether harassment or threatened or actual illegal eviction occurred.~~

3B. Procedure and Findings.

1. ~~The ZAB may approve a~~ A Use Permit is required to eliminate or demolish one or more Residential Units, except where otherwise provided by the Zoning Ordinance. a building constructed before June 1980 on a property containing two or more dwelling units The ZAB shall only approve the Use Permit if any one of the following are is true:

- (a) The building containing the ~~units~~ Residential Unit(s) is hazardous or unusable and is infeasible to repair.
- (b) The building containing the ~~units~~ Residential Units(s) will be moved to a different location within Berkeley with no net loss of units and no change in the affordability levels of the unit(s).

~~(c) The demolition is necessary to permit construction of special housing needs facilities such as, but not limited to, childcare centers and affordable housing developments that serve the greater good of the entire community.~~

~~(d)~~ (c) The demolition is necessary to permit construction approved pursuant to this chapter of at least the same number of dwelling units.

2. A Single-Family Dwelling without sitting tenants can be demolished with an AUP, if the demolition is part of a development project that would result in a net increase in residential density.

3. In the event of a demolition of a Protected Unit created without proper Use Permit(s) or Building Permit(s), as defined in 23.326.020(A)(2), the Building Official, Zoning Officer or Fire Marshal may determine that the replacement of such a unit is infeasible and not required under this Chapter. Such a

determination shall include a finding that the replacement of the unit could not occur in compliance with Zoning Code, Building Code, Fire Code or other regulations related to public health and safety

C. Landmarks and Structures of Merit. Demolition of a designated landmark or structure of merit, or of a structure in a designated historical district, must be approved by the Landmarks Preservation Commission, pursuant to Chapter 3.24.

4. Fee Required.

~~(a) The applicant shall pay a fee for each unit demolished to mitigate the impact of the loss of affordable housing in Berkeley.~~

~~(b) The amount of the fee shall be set by resolution of the City Council.~~

~~(c) In Lieu of a Fee.~~

~~1. In lieu of paying the impact fee, the applicant may provide a designated unit in the new project at a below market rate to a qualifying household in perpetuity.~~

~~2. The affordability level of the below market rent and the income level of the qualifying household shall be set by resolution of the City Council.~~

~~3. The applicant shall enter into a regulatory agreement with the City of Berkeley to provide the in lieu units.~~

D. Conditions of Approval. Any Protected Unit that is demolished shall be replaced with a Comparable Unit that shall comply with the affordability requirements in Chapter 23.328 [Affordable Housing Requirements] and Chapter 23.330 [Density Bonus] as they may be amended from time to time.

1. In the event that a displaced household has an income below 50% AMI, a Comparable Unit shall be offered at a rent that is affordable to households at 30% of AMI, and the displaced household shall have the first right of refusal for that unit. Such a Comparable Unit shall be counted as a Very Low-Income unit for applicable affordability requirements in Chapter 23.328.

2. In the event that a demolished Residential Unit is not a Protected Unit and the income of the displaced household is unknown, the Residential Unit shall be presumed to have been occupied by Low- or Lower-Income households in the same proportion as Residential Units throughout the City. The City shall rely upon US Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy (CHAS) data to determine the number of such Residential Units that must be replaced with Affordable Units as defined in Chapter 23.328.

3. In the event that a Protected Unit was subject to rent or price controls under BMC Chapter 13.76, and the income level of the displaced household is unknown, the unit shall be replaced with an Affordable Unit as defined in Chapter 23.328.

E. Requirements for Occupied Units.

~~(a)~~1. Applicability. These requirements do not apply to tenants who move in after the application for demolition is submitted to the City if the owner informs each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.

~~1. The requirements in this subsection apply if units to be demolished are occupied.~~

~~2. These requirements do not apply to tenants who move in after the application for demolition is submitted to the City if the owner informs each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.~~

~~(b)~~2. Notice. The applicant shall provide all sitting tenants notice of the application to demolish the building no later than the date it is submitted to the City, including notice of their rights under Municipal Code Section 13.76 (Rent Stabilization and Eviction for Good Cause Program), Chapter 13.77 (Requirements, Procedures, Restrictions and Mitigations Concerning the Withdrawal of Residential Rental Accommodations from Rent or Lease), 13.79 (Tenant Protections: Automatically Renewing Leases and Buyout Agreements) and 13.84 (Relocation Services and Payments for Residential Tenant Households).

~~(c)~~3. General Requirements. The applicant shall provide moving and relocation assistance equivalent to the requirements set forth in Municipal Code Chapter 13.84 (Relocation Services and Payments for Residential Tenant Households) or Government Code section 66300.6(b)(4)(A), whichever requires greater relocation assistance to displaced tenants, and shall not be subject to the limitations in section 13.84.070.B.3(a). The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy. Within five days of the issuance of the Certificate of Occupancy, tenants shall be notified in writing that the units will be ready for move-in on a date specified. Tenants shall confirm in writing their intent to lease the available unit at any time before 20 days after the issuance of the Certificate of Occupancy. Funding for the rent differential shall be guaranteed in a manner approved by City Council Resolution; provided, however, that any project that is carried out or funded by the state or federal government shall be subject to applicable provisions of the California Relocation Act (Government Code section 7260 et seq.) and/or

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the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. sections 4601- 4655).

~~The applicant shall provide assistance with moving expenses equivalent to in Chapter 13.84 (Relocation Services and Payments for Residential Tenant Households).~~

~~3. The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy. Funding for the rent differential shall be guaranteed in a manner approved by the City.~~

~~3.(a) Exception.~~ An applicant who proposes to construct a 100 percent affordable housing project is not required to comply with this subsection but must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended and the California Relocation Act (Government Code sections 7260 et seq.).

(b) Exception for Tenants in ADUs and Unpermitted Units that Cannot Be Replaced. Applicants are required to provide moving and relocation assistance, in an amount provided in BMC Section 13.76.130(A)(9)(g), to the following groups of tenants: (i) tenants who occupy a lawfully-permitted ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU, where the landlord also occupies a unit in the same property as his/her principal residence; and (ii) tenants who occupy a unit created without proper zoning approvals that cannot be replaced for public health or safety reasons, pursuant to BMC Section 23.326.030(B)(3). However, applicants are not required to (i) provide such tenants with a temporary replacement unit while a new unit is being constructed, (ii) notify such tenants when a new unit is ready for occupancy; or (iii) provide such tenants with a right for first refusal for the new unit.

~~(d)4. Sitting Tenants Rights.~~

(a) ~~Sitting~~ Any tenants of a Protected Unit that is permitted to be demolished under this section ~~who are displaced as a result of demolition shall be provided~~ have the right of first refusal to ~~move into~~ rent a Comparable Unit in the new building project.

(b) In the event that a displaced household is ineligible for below-market rate replacement units, a market rate Comparable Unit shall be made available to that household at the same rent as had been previously charged, or a lesser rent if that is the market rate. ~~Tenants of units that are demolished shall have the right of first refusal to rent new below-market rate units designated to replace the units that were demolished,~~

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~~at the rent that would have applied if they had remained in place, as long as their tenancy continues.~~

(c) Where a displaced tenant exercises the right to rent a Comparable Unit, any increase in rent for the Comparable Unit for the duration of their tenancy shall be no greater than the lesser of 65% of the increase in the Consumer Price Index for All Urban Consumers (CPI-U) in the San Francisco-Oakland-San Jose region (as reported and published by the U.S. Department of Labor, Bureau of Labor Statistics for the twelve-month period ending the previous December 31) or 65% of the corresponding increase in Area Median Income (AMI) for the same calendar year. ~~Income restrictions do not apply to displaced tenants.~~

(d) Exceptions.

- i. An applicant who proposes to construct a 100 percent affordable housing project is not required to comply with ~~23.326.030.A.4.a, b, and c,~~ the preceding requirements but must comply with the following requirement.
- ii. Sitting tenants who are displaced as a result of demolition and who desire to return to the newly constructed building will be granted a right of first refusal subject to their ability to meet income qualifications and other applicable eligibility requirements ~~when the new units are ready for occupancy.~~

~~B. Buildings with a Single Dwelling Unit.~~

~~1. Applicability. This subsection only applies to buildings with a single dwelling unit.~~

~~2. Limitation.~~

~~(a) Demolition is not allowed if:~~

- ~~i. The building was removed from the rental market under the Ellis Act during the preceding five years; or~~
- ~~ii. There have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years.~~

~~(b) Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner. The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The ZAB shall determine whether harassment or threatened or actual illegal eviction occurred.~~

~~C. **Accessory Buildings.** Notwithstanding anything in Municipal Code Title 23 (Zoning Ordinance) to the contrary, but subject to any applicable requirements in Municipal Code Section 3.24 (Landmarks Preservation Ordinance), accessory buildings of any size, including, but not limited to, garages, carports, and sheds, but not including any structure containing a lawfully established dwelling unit, which serves and is located on the same lot as a lawful residential use, may be demolished by right.~~

23.326.040 – Eliminating Dwelling Units through ~~Conversion and Change of Use~~ Combination with Other Units

A. ~~Process for Projects Where Density Exceeds Current Allowance~~ **General.** ~~The ZAB may approve a~~ A Use Permit is required to eliminate one or more Residential Units by combining with another unit when the existing development exceeds currently-allowable density. for the elimination of a dwelling unit in combination with another dwelling unit used for occupancy by a single household. ~~The ZAB shall approve a Use Permit for the elimination of one or more Residential Units by combining with another unit only~~ if it finds that:

1. The existing number of ~~dwelling units~~ Residential Units exceeds ~~the current~~ maximum allowed residential density in the district where the building is located; and
2. One of the following is true:
 - (a) One of the affected dwelling units has been owner-occupied ~~by the applicant's household~~ as it's a principal place of residence for no less than two years before the date of the application and none of the affected units are currently occupied by a tenant.
 - (b) All of the affected ~~dwelling units~~ Residential Units are being sold by an estate and the decedent occupied the units as their principal residence for no less than two years before the date of their death.

B. *Limitations.* ~~Demolition~~ Combination is not allowed if:

1. The building was removed from the rental market ~~under the Ellis Act~~ through a no-fault eviction during the preceding five years; or
2. There ~~have been verified cases~~ is substantial evidence of harassment or threatened or actual illegal eviction during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, whose determination may be appealed to the Rent Stabilization Board. ~~The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The~~

~~ZAB shall determine whether harassment or threatened or actual illegal eviction occurred.~~

C. ~~Effect of Noncompliance with the~~ Two-Year Occupancy Requirement Following Elimination.

1. ~~In a unit eliminated under Subsection A (General)~~ If a Residential Unit that is eliminated through combination is not owner-occupied ~~by the applicant's household~~ for at least two consecutive years from the date of elimination, the affected ~~unit~~ Residential Unit must be restored to separate status.
2. This requirement shall be implemented by a condition of approval and a notice of limitation on the property, acceptable to the City of Berkeley.
3. The condition and notice will provide that if the ~~owner's household does not occupy the unit~~ Residential Unit is not owner-occupied for at least two years from the date of elimination the affected units must either be restored as separate dwelling units and the vacant unit(s) offered for rent within six months or the owner must pay a fee of \$75,000 in 2013 dollars, adjusted in May of each year according to the Consumer Price Index for the San Francisco Bay Area. The fee shall be deposited into the City of Berkeley's Housing Trust Fund.
4. The City of Berkeley may exempt an applicant from the two-year residency requirement if of an unforeseeable life change that requires relocation.

D. Effect of Eliminating a Dwelling Unit.

1. If eliminating a ~~dwelling unit~~ Residential Unit reduces the number of units in a building to four or fewer, the applicant shall record a notice of limitation against the subject property that the limitation on eviction of tenants under Chapter 13 (Public Peace, Morals and Welfare) shall continue to apply until:
 - (a) The building is demolished; or
 - (b) Sufficient units are added or restored such that the building contains at least five units.
2. The Zoning Officer may issue an AUP for a building conversion which eliminates a ~~dwelling unit~~ Residential Unit upon finding that the conversion will restore or bring the building closer to the original number of dwelling units that was present at the time it was first constructed, provided the conversion meets the requirements 23.326.040.A.1 and 2 and 23.326.040.B and C.

E. Exceptions. The ZAB may approve a Use Permit to eliminate a dwelling unit through combination with another dwelling unit for the purpose of providing private bathrooms, kitchenettes, accessibility upgrades, and/or seismic safety upgrades, or other elements required by funding sources or programmatic needs to single-

residential occupancy rooms in residential developments undergoing a publicly-funded rehabilitation.

- ~~1. The ZAB may approve a Use Permit for a change of use to a community care or a child care facility which eliminates a dwelling unit if it finds that such use is in conformance with the regulations of the district in which it is located.~~
- ~~2. The ZAB may approve a Use Permit to eliminate a dwelling unit through combination with another dwelling unit for the purpose of providing private bathrooms, kitchenettes, accessibility upgrades, and/or seismic safety upgrades to single residential occupancy rooms in residential developments undergoing a publicly-funded rehabilitation.~~
- ~~3. Notwithstanding the general Use Permit requirement under 23.326.020 (General Requirements), a lawfully established accessory dwelling unit that is not a controlled rental unit may be eliminated with a Zoning Certificate if:

 - ~~(a) The re-conversion restores the original single-family use of the main building or lot; and~~
 - ~~(b) No tenant is evicted.~~~~

23.326.050 – ~~Private Right of Action~~ Demolition of Accessory Buildings.

A. Notwithstanding anything in Municipal Code Title 23 (Zoning Ordinance) to the contrary, but subject to any applicable requirements in Municipal Code Section 3.24 (Landmarks Preservation Ordinance), Accessory Buildings of any size, including, but not limited to, garages, carports, and sheds may be demolished by right except where the Accessory Building is occupied by a residential tenant (regardless of whether it is lawfully permitted) or otherwise contains a lawfully established Residential Unit, which serves and is located on the same lot as a lawful residential use. Such Accessory Buildings are considered Residential Units for the purposes of this Chapter.

23.326.060 – ~~Elimination of Residential Hotel Rooms~~ Private Right of Action

A. Any affected tenant may bring a private action for injunctive and/or compensatory relief against any applicant and/or owner to prevent or remedy a violation of Sections 23.326.030 (Eliminating Dwelling Units through Demolition) and 23.326.040 (Eliminating Dwelling Units through Conversion and Change of Use). In any such action a prevailing plaintiff shall recover reasonable attorney's fees.

~~A. **General Requirements.** Before removal, the following requirements must be met for the ZAB to approve a Use Permit for the elimination of residential hotel rooms:~~

- ~~1. The residential hotel owner shall provide or cause to be provided standard housing of at least comparable size and quality, at comparable rents and total monthly or weekly charges to each affected tenant~~

~~2. One of the following three requirements shall be met:~~

- ~~(a) The residential hotel rooms being removed are replaced by a common-use facility, including, but not limited to, a shared kitchen, lounge, or recreation room, that will be available to and primarily of benefit to the existing residents of the residential hotel and that a majority of existing residents give their consent to the removal of the rooms.~~
- ~~(b) Before the date on which the residential hotel rooms are removed, one-for-one replacement of each room to be removed is made, with a comparable room, in one of the methods set forth in this section.~~
- ~~(c) Residential hotel rooms are removed because of building alterations related to seismic upgrade to the building or to improve access to meet the requirements of the American Disabilities Act (ADA).~~

~~**B. Criteria for Replacement Rooms.** For purposes of this section, replacement rooms must be:~~

- ~~1. Substantially comparable in size, location, quality, and amenities;~~
- ~~2. Subject to rent and eviction controls substantially equivalent to those provided by the Rent Stabilization Ordinance or those that applied to the original rooms which are being replaced; and~~
- ~~3. Available at comparable rents and total monthly or weekly charges to those being removed. Comparable rooms may be provided by:~~
 - ~~(a) Offering the existing tenants of the affected rooms the right of first refusal to occupy the replacement rooms;~~
 - ~~(b) Making available comparable rooms, which are not already classified as residential hotel rooms to replace each of the rooms to be removed; or~~
 - ~~(c) Paying to the City of Berkeley's Housing Trust Fund an amount sufficient to provide replacement rooms.~~
 - ~~1. The amount to be paid to the City of Berkeley shall be the difference between the replacement cost, including land cost, for the rooms and the amount which the City of Berkeley can obtain by getting a mortgage on the anticipated rents from the newly constructed rooms.~~
 - ~~2. The calculations shall assume that rents in the newly constructed rooms shall not exceed the greater of either a level comparable to the weekly or monthly charges for the replaced rooms or the level which would be charged if no current tenant paid more than 30 percent of such tenant's gross income for rent.~~

~~**C. Exception for Non-Profit Ownership.** In a residential hotel owned and operated by a non-profit organization, recognized as tax-exempt by either the Franchise Tax~~

~~Board and/or the Internal Revenue Service, residential hotel rooms may be changed to non-residential hotel room uses if the average number of residential hotel rooms per day in each calendar year is at least 95 percent of residential hotel rooms established for that particular residential hotel.~~

23.326.070 – Demolitions of Non-Residential Buildings

- A. **Main Non-Residential Buildings.** A Use Permit is required to demolish a main building used for non-residential purposes ~~may be demolished with a Use Permit on any lot.~~
- B. **Accessory Buildings.**
1. Demolishing an accessory building with less than 300 square feet of floor area is permitted as of right.
 2. An accessory building with 300 square feet or more of floor area may be demolished with an AUP.
- C. **Landmarks Preservation Commission Review.**
1. Any application for a Use Permit or AUP to demolish a non-residential building or structure which is 40 or more years old shall be forwarded to the Landmarks Preservation Commission (LPC) for review before consideration of the Use Permit or AUP.
 2. The LPC may initiate a landmark or structure-of-merit designation or may choose solely to forward to the ZAB its comments on the application.
 3. The ZAB or Zoning Officer shall consider the recommendations of the LPC ~~in~~ when acting on the application.
- D. **Findings.** A Use Permit or an AUP for demolition of a non-residential building or structure may be approved only if the ZAB or the Zoning Officer finds that:
1. The demolition will not be materially detrimental to the commercial needs and public interest of any affected neighborhood or the City of Berkeley; and
 2. The demolition:
 - (a) Is required to allow a proposed new building or other proposed new use;
 - (b) Will remove a building which is unusable for activities which are compatible with the purposes of the district in which it is located or which is infeasible to modify for such uses;
 - (c) Will remove a structure which represents an inhabitable attractive nuisance to the public; or
 - (d) Is required for the furtherance of specific plans or projects sponsored by the City of Berkeley or other local district or authority upon a

demonstration that it is infeasible to obtain prior or concurrent approval for the new construction or new use ~~which is contemplated by such specific plans or projects and that adhering to such a requirement would threaten the viability of the plan or project.~~

23.326.080 – Building Relocations

A. Treatment of Building Relocation.

1. Relocating a building from a lot is considered a demolition for purposes of this chapter.
2. Relocating a building to a lot is considered new construction and is subject to all requirements applicable to new construction.
3. When a building is relocated to a different lot within ~~in~~ Berkeley, the lot from which the building is removed shall be known as the source lot and the lot on which the building is to be sited shall be known as the receiving lot. In such cases all notification requirements apply to both the source and receiving lots.

B. Findings. The ZAB may approve a Use Permit to relocate a building upon finding that:

5. The building to be relocated is not in conflict with the architectural character, or the building scale of the neighborhood or area to which it will be relocated; and
6. The receiving lot provides adequate separation of buildings, privacy, yards, and usable open space.

23.326.090 – Limitations

A. Unsafe, Hazard, or Danger.

1. Notwithstanding anything to the contrary, if a building or structure is unsafe, presents a public hazard, and is not securable and/or is in imminent danger of collapse so as to endanger persons or property, as determined by the city's ~~building official~~ Building Official, it may be demolished without a Use Permit.
2. The Building Official's determination in this matter shall be governed by the standards and criteria in the most recent edition of the California Building Code that is in effect in the City of Berkeley.

B. Ellis Act. This chapter shall be applied only to the extent permitted by state law as to buildings which have been entirely withdrawn from the rental market pursuant to the Ellis Act (California Government Code Chapter 12.75).

23.326.100 Severability.

A. If any part or provision of this Chapter, or the application of this Chapter to any person or circumstance, is held invalid, the remainder of this Chapter, including the application of such part or provision to other persons or circumstances, shall not be affected by such a holding and shall continue in full force and effect. To this end, the provisions of this Chapter are severable.

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

ORDINANCE NO.

AMENDING BERKELEY MUNICIPAL CODE CHAPTER 23.326, DEMOLITION AND DWELLING UNIT CONTROLS

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

Section 1. That Berkeley Municipal Code Chapter 23.326 is hereby amended to read as follows:

Chapter 23.326 DEMOLITION AND DWELLING UNIT CONTROLS

Sections:

23.326.010	Chapter Purpose.
23.326.020	General Requirements.
23.326.030	Demolition of Residential Units.
23.326.040	Eliminating Dwelling Units through Combination with Other Units.
23.326.050	Demolition of Accessory Buildings.
23.326.060	Private Right of Action.
23.326.070	Demolitions of Non-Residential Buildings.
23.326.080	Building Relocations.
23.326.090	Limitations.
23.326.100	Severability

23.326.010 Chapter Purpose.

This chapter establishes demolition and dwelling unit control standards that promote the affordable housing, and safety goals of the City.

23.326.020 General Requirements.

A. No Residential Unit(s) may be eliminated or demolished except as authorized by this chapter.

1. "Residential Unit" means, for purposes of this Chapter, any Dwelling Unit, any Live-Work Unit, any Residential Hotel unit, any bedroom of a Group Living Accommodation (GLA), except a GLA in a University-

recognized fraternity, sorority or co-op, or any lawfully-permitted Accessory Dwelling Unit (“ADU”) or Junior Accessory Dwelling Unit (“JADU”).

2. “Residential Unit” includes Dwelling Units, ADUs, or JADUs created without proper zoning approvals or Building Permit(s) if they have been registered with the Rent Stabilization Board, or the Rent Stabilization Board has otherwise determined that a tenant-landlord relationship existed during the preceding five years.
3. “Residential Unit” does not include a lawfully-permitted ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU, as defined in BMC Chapter 23.306, where the landlord also occupies a unit in the same property as their principal residence. This shall only apply to properties containing a single ADU or JADU, shall only apply to units compliant with all applicable requirements of BMC Chapter 23.306 (“Accessory Dwelling Units”), and shall only apply to tenancies created after November 7, 2018.
4. “Comparable Unit” means a Residential Unit of similar size (square footage and number of bedrooms), common interior amenities, and location within the city (neighborhood and school attendance area). In the case of a Single-Family Dwelling being replaced, a Comparable Unit is not required to have the same or similar square footage or the same number of total rooms, but must provide the same number of bedrooms if the Single-Family Dwelling includes three or fewer bedrooms, or at least three bedrooms if the Single-Family Dwelling contains four or more bedrooms.
5. “Protected Unit” includes a Residential Unit:
 - a. Subject to a low-income deed restriction for any of the previous five years;
 - b. Subject to rent or price control under BMC Chapter 13.76; or
 - c. Rented by a household at 80% Area Median Income or lower within the previous five years.

23.326.030 Demolition of Residential Units.

A. Demolition is not allowed if:

1. The Residential Unit(s) was removed from the rental market through a no-fault eviction during the preceding five years; or
2. There is substantial evidence of harassment or threatened or actual illegal eviction during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, whose determination may be appealed to the Rent Stabilization Board.

B. Procedure and Findings.

1. A Use Permit is required to eliminate or demolish one or more Residential Units, except where otherwise provided by the Zoning Ordinance. The ZAB shall only approve the Use Permit if one of the following is true:
 - (a) The building containing the Residential Unit(s) is hazardous or unusable and is infeasible to repair.
 - (b) The building containing the Residential Unit(s) will be moved to a different location within Berkeley with no net loss of units and no change in the rent levels of the unit(s).
 - (c) The demolition is necessary to permit construction approved pursuant to this Chapter of at least the same number of Dwelling Units.
2. A Single-Family Dwelling without sitting tenants can be demolished with an AUP, if the demolition is part of a development project that would result in a net increase in residential density.
3. In the event of a demolition of a Residential Unit created without proper zoning approvals or Building Permit(s), as defined in 23.326.020(A)(3), the Building Official, Zoning Officer or Fire Marshal may determine that the replacement of such a unit is infeasible and not required under this Chapter. Such a determination shall include a finding that the replacement of the unit could not

occur in compliance with Zoning Code, Building Code, Fire Code or other regulations related to public health and safety.

C. *Landmarks and Structures of Merit.* Demolition of a designated landmark or structure of merit, or of a structure in a designated historic district, must be approved by the Landmarks Preservation Commission, pursuant to Chapter 3.24.

D. *Conditions of Approval.* Any Protected Unit that is demolished shall be replaced with a Comparable Unit that shall comply with the maximum allowable rent requirements for Affordable Units in Chapter 23.328 [Affordable Housing Requirements] and Chapter 23.330 [Density Bonus] as they may be amended from time to time.

1. In the event that a displaced household has an income below 50% AMI, a Comparable Unit shall be offered at a rent that is affordable to households at 30% of AMI, and the displaced household shall have the first right of refusal for that unit. Such a Comparable Unit shall be counted as a Very Low-Income unit for applicable affordability requirements in Chapter 23.328.
2. In the event that a demolished Residential Unit is not a Protected Unit and the income of the displaced household is unknown, the Residential Unit shall be presumed to have been occupied by Low- or Lower-Income households in the same proportion as Residential Units throughout the City. The City shall rely upon US Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy (CHAS) data to determine the number of such Residential Units that must be replaced with Affordable Units as defined in Chapter 23.328.
3. In the event that a Protected Unit was subject to rent or price controls under BMC Chapter 13.76, and the income level of the displaced household is unknown, the unit shall be replaced with an Affordable Unit as defined in Chapter 23.328.

E. *Requirements for Occupied Units.*

1. *Applicability.* The following requirements do not apply to tenants who move in after the application for demolition is submitted to the City if the owner informs each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.
2. *Notice.* The applicant shall provide all sitting tenants and the Rent Stabilization Board notice of the application to demolish the Residential Unit(s) no later than the date the application is submitted to the City, including notice of their rights under Municipal Code Chapter 13.76 (Rent Stabilization and Eviction for Good Cause Program), Chapter 13.77 (Requirements, Procedures, Restrictions and Mitigations Concerning the Withdrawal of Residential Rental Accommodations from Rent or Lease), 13.79 (Tenant Protections: Automatically Renewing Leases and Buyout Agreements) and 13.84 (Relocation Services and Payments for Residential Tenant Households).
3. *General Requirements.* The applicant shall provide moving and relocation assistance equivalent to the requirements set forth in Municipal Code Chapter 13.84 (Relocation Services and Payments for Residential Tenant Households) or Government Code section 66300.6(b)(4)(A), whichever requires greater relocation assistance to displaced tenants, and shall not be subject to the limitations in section 13.84.070.B.3(a). The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy. Within five days of the issuance of the Certificate of Occupancy, tenants shall be notified in writing that the units will be ready for move-in on a date specified. Tenants shall confirm in writing their intent to lease the available unit at any time before 20 days after the issuance of the Certificate of Occupancy. Funding for the rent differential shall be guaranteed in a manner approved by City Council Resolution; provided, however, that any project that is carried out or funded by the state or federal government shall be subject to applicable provisions of the California Relocation Act (Government Code section 7260 *et seq.*) and/or the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. sections 4601- 4655).

(a) *Exception.* An applicant who proposes to construct a 100-percent affordable housing project is not required to comply with this subsection but must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended and the California Relocation Act (Government Code sections 7260 et seq.).

(b) *Exception for Tenants in ADUs.* Applicants are required to provide moving and relocation assistance, in an amount provided in BMC Section 13.76.130(A)(9)(g), to tenants who occupy a lawfully-permitted ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU, where the landlord also occupies a unit in the same property as his/her principal residence. Applicants are not required to (i) provide such tenants with a temporary replacement unit while a new unit is being constructed, (ii) notify such tenants when a new unit is ready for occupancy; or (iii) provide such tenants with a right for first refusal for the new unit.

4. *Sitting Tenants Rights.*

(a) Any tenant of a Protected Unit that is permitted to be demolished under this section shall have the right of first refusal to rent a Comparable Unit in the new project.

(b) In the event that a displaced household is ineligible for below-market rate replacement units, a market rate Comparable Unit shall be made available to that household at the same rent as had been previously charged, or a lesser rent if that is the market rate.

(c) Where a displaced tenant exercises the right to rent a Comparable Unit, any increase in rent for the Comparable Unit for the duration of their tenancy shall be no greater than the lesser of 65% of the increase in the Consumer Price Index for All Urban Consumers (CPI-U) in the San Francisco-Oakland-San Jose region (as reported and published by the U.S. Department of Labor, Bureau of Labor Statistics for the twelve-month period ending the previous December 31) or 65% of the corresponding increase in Area Median Income (AMI) for the same calendar year.

(d) *Exceptions.*

- i. An applicant who proposes to construct a 100 percent affordable housing project is not required to comply with the preceding requirements but must comply with the following requirement.
- ii. Sitting tenants who are displaced as a result of demolition and who desire to return to the newly constructed affordable housing project will be granted a right of first refusal subject to their ability to meet income qualifications and other applicable eligibility requirements.

23.326.040 Eliminating Dwelling Units through Combination with Other Units.

A. *Process for Projects Where Density Exceeds Current Allowance.* A Use Permit is required to eliminate one or more Residential Units by combining with another unit when the existing development exceeds currently-allowable density. The ZAB shall approve a Use Permit for the elimination of one or more Residential Units by combining with another unit only if it finds that:

1. The existing number of Residential Units exceeds the current maximum allowed residential density in the zoning district where the units are located; and
2. One of the following is true:
 - (a) One of the affected Residential Units has been owner-occupied as a principal place of residence for no less than two years before the date of the application and none of the affected units are currently occupied by a tenant.
 - (b) All of the affected Residential Units are being sold by an estate and the decedent occupied the Residential Units as their principal residence for no less than two years before the date of their death.

B. *Limitations.* Combination is not allowed if:

1. The building was removed from the rental market through a no-fault

eviction during the preceding five years; or

2. There is substantial evidence of harassment or threatened or actual illegal eviction during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, whose determination may be appealed to the Rent Stabilization Board.

C. Two-Year Occupancy Requirement Following Elimination

1. If a Residential Unit that is eliminated through combination is not owner-occupied for at least two consecutive years from the date of elimination, the affected Residential Unit must be restored to separate status.
2. This requirement shall be implemented by a condition of approval and a notice of limitation on the property, acceptable to the City of Berkeley.
3. The condition of approval and notice will provide that if the Residential Unit is not owner-occupied for at least two years from the date of elimination then the affected Residential Unit(s) must either be restored as separate Residential Unit(s) and the vacant Residential Unit(s) offered for rent within six months or the owner must pay a fee of \$75,000 in 2013 dollars, adjusted in May of each year according to the Consumer Price Index for the San Francisco Bay Area. The fee shall be deposited into the City of Berkeley's Housing Trust Fund.
4. The City of Berkeley may exempt an applicant from the two-year residency requirement if there is an unforeseeable life change that requires relocation.

D. Effect of Eliminating a Residential Unit.

1. If eliminating a Residential Unit reduces the number of Residential Units in a building to four or fewer, the applicant shall record a notice of limitation against the subject property that the limitation on eviction of tenants under Chapter 13 (Public Peace, Morals and Welfare) shall continue to apply until:

-
- (a) The building is demolished; or
 - (b) Sufficient Residential Units are added or restored such that the building contains at least five Residential Units.

- 2. The Zoning Officer may issue an AUP for a building conversion which eliminates a Residential Unit upon finding that the conversion will restore or bring the building closer to the original number of Residential Units that was present at the time it was first constructed, provided the conversion meets the requirements of 23.326.040.A.1 and 2 and 23.326.040.B and C.

E. *Exception.* The ZAB may approve a Use Permit to eliminate a Residential Unit through combination with another Residential Unit for the purpose of providing private bathrooms, kitchenettes, accessibility upgrades, and/or seismic safety upgrades, or other elements required by funding sources or programmatic needs to single resident occupancy rooms in residential developments undergoing a publicly-funded rehabilitation.

23.326.050 Demolition of Accessory Buildings.

A. Notwithstanding anything in Municipal Code Title 23 (Zoning Ordinance) to the contrary, but subject to any applicable requirements in Municipal Code Section 3.24 (Landmarks Preservation Ordinance), Accessory Buildings of any size, including, but not limited to, garages, carports, and sheds may be demolished by right except where the Accessory Building is occupied by a residential tenant (regardless of whether it is lawfully permitted) or otherwise contains a lawfully established Residential Unit, which serves and is located on the same lot as a lawful residential use. Such Accessory Buildings are considered Residential Units for the purposes of this Chapter.

23.326.060 Private Right of Action.

A. Any affected tenant may bring a private action for injunctive and/or compensatory relief against any applicant and/or owner to prevent or remedy a violation of Sections 23.326.030 (Eliminating Dwelling Units through Demolition) and 23.326.040 (Eliminating Dwelling Units through Conversion and Change of Use). In any such action a prevailing plaintiff shall recover reasonable attorney's fees.

23.326.070 Demolitions of Non-Residential Buildings.

A. *Main Non-Residential Buildings.* A Use Permit is required to demolish a main building used for non-residential purposes on any lot.

B. *Accessory Buildings.* For any lot located in a non-residential zoning district, Accessory Buildings may be demolished as follows:

1. Demolishing an accessory building with less than 300 square feet of floor area is permitted as of right.
2. An accessory building with 300 square feet or more of floor area may be demolished with an AUP.

C. *Landmarks Preservation Commission Review.*

1. Any application for a Use Permit or AUP to demolish a non-residential building or structure that is 40 or more years old shall be forwarded to the Landmarks Preservation Commission (LPC) for review before consideration of the Use Permit or AUP.
2. The LPC may initiate a landmark or structure-of-merit designation or may choose solely to forward to the ZAB or Zoning Officer its comments on the application.
3. The ZAB or Zoning Officer shall consider the recommendations of the LPC in when acting on the application.

D. *Findings.* A Use Permit or an AUP for demolition of a main building used for non-residential purposes on any lot or an accessory building located on a lot in a non-residential district may be approved only if the ZAB or the Zoning Officer finds that:

1. The demolition will not be materially detrimental to the commercial needs and public interest of any affected neighborhood or the City of Berkeley; and
2. The demolition:
 - (a) Is required to allow a proposed new building or other proposed new

use;

(b) Will remove a building which is unusable for activities which are compatible with the purposes of the district in which it is located or which is infeasible to modify for such uses;

(c) Will remove a structure which represents an uninhabitable attractive nuisance to the public; or

(d) Is required for the furtherance of specific plans or projects sponsored by the City of Berkeley or other local district or authority upon a demonstration by the applicant that it would be infeasible to obtain prior or concurrent approval for the new construction or new use.

23.326.080 Building Relocations.

A. Treatment of Building Relocation.

1. Relocating a building from a lot is considered a demolition for purposes of this chapter.
2. Relocating a building to a lot within the city is subject to all requirements applicable to new construction.
3. When a building is relocated to a different lot within in Berkeley, the lot from which the building is removed shall be known as the source lot and the lot on which the building is to be sited shall be known as the receiving lot.
4. Nothing in this subsection shall exempt Residential Units relocated to the receiving lot from the provisions of BMC Section 13.76 after a building relocation if the Residential Units located within a building were otherwise subject to BMC Chapter 13.76 in the source lot.

B. Findings. The Zoning Officer shall approve Zoning Certificate to relocate a building upon finding that: the resulting development on the receiving lot is in conformance with applicable zoning code development standards.

23.326.090 Limitations.

A. *Unsafe, Hazard, or Danger.*

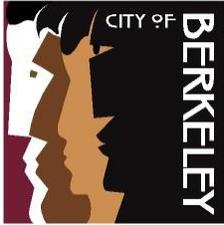
1. Notwithstanding anything to the contrary, if a building or structure is unsafe, presents a public hazard, and is not securable and/or is in imminent danger of collapse so as to endanger persons or property, as determined by the city's Building Official, it may be demolished without a Use Permit.
2. The Building Official's determination in this matter shall be governed by the standards and criteria in the most recent edition of the California Building Code that is in effect in the City of Berkeley.

B. *Ellis Act.* This chapter shall be applied only to the extent permitted by state law as to buildings which have been entirely withdrawn from the rental market pursuant to the Ellis Act (California Government Code Chapter 12.75).

23.326.100 Severability.

A. If any part or provision of this Chapter, or the application of this Chapter to any person or circumstance, is held invalid, the remainder of this Chapter, including the application of such part or provision to other persons or circumstances, shall not be affected by such a holding and shall continue in full force and effect. To this end, the provisions of this Chapter are severable.

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.



Rashi Kesarwani
Councilmember District 1

REVISED AGENDA MATERIAL for Supplemental Packet 1

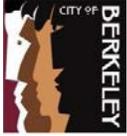
Meeting Date: March 26, 2024

Item Number: 23

Item Description: Zoning Ordinance Amendments to Berkeley Municipal Code Chapter 23.326 Demolition and Dwelling Unit Controls

Submitted by: Councilmembers Rashi Kesarwani and Mark Humbert

This supplemental material recommends amendments to the Demolition Ordinance passed by the 4x4 Joint Task Force Committee on Housing and the Planning Commission.



Rashi Kesarwani
Councilmember, District 1

ACTION CALENDAR
March 26, 2024

TO: Honorable Mayor and Members of the Council

FROM: Councilmember Rashi Kesarwani (Author) and Councilmember Mark Humbert (Co-Sponsor)

SUBJECT: Amendments to Berkeley Municipal Code Chapter 23.326 Demolition and Dwelling Unit Controls

RECOMMENDATION

Adopt recommended amendments for:

23.326.020.A.2	General Requirements—Unpermitted Units
23.326.020.A.3	General Requirements—Exemptions
23.326.020.A.4	General Requirements—Comparable Units
23.326.020.A.6	General Requirements—Tenant-Occupied Definition
23.326.020.A.7	General Requirements—Golden Duplex Units
23.326.030.A.1 & 23.326.040.B.1	Ellis Act vs. No-Fault Eviction
23.326.030.A.2 & 23.326.040.B.2	Harassment & Appeal to the Rent Board
23.326.030.B.3	Demolition without Proper Zoning Approvals
23.326.030.C	Landmarks Preservation Commission
23.326.030.D.1-3	Conditions of Approval
23.326.030.E.3&3.b	Requirements for Occupied Units and Exceptions
23.326.030.E.4.b-c	Sitting Tenants’ Rights

Note that "Current Proposal" refers to the revised text of the ordinance proposed by the 4x4 Committee/Planning Commission, with red text showing changes made to the existing language.

"Recommendation" modifies the "Current Proposal" by incorporating Councilmember Kesarwani’s recommendations to improve alignment with the City’s housing objectives, tenant protection regulations, and state law. Red text indicates alterations made to the "Current Proposal."

23.326.020.A.2 General Requirements—Unpermitted Units*Current Proposal:*

2. “Residential Unit” includes Dwelling Units, ADUs, or JADUs created without proper zoning approvals or Building Permit(s) if they have been registered with the Rent Stabilization Board, or the Rent Stabilization Board has otherwise determined that a tenant-landlord relationship existed during the preceding five years.

Recommendation:

2. “Residential Unit” includes tenant-occupied Dwelling Units, ADUs, or JADUs created without proper zoning approvals or Building Permit(s) ~~if they have been registered with the Rent Stabilization Board, or the Rent Stabilization Board has otherwise determined that a tenant-landlord relationship existed during the preceding five years.~~

Rationale:

As currently drafted, Section 23.326.020.A.2 mandates that *unpermitted units* must comply with demolition controls and replacement unit requirements. There will invariably be a subset of unpermitted units for which legalizing the unit proves financially prohibitive and/or physically infeasible. Moreover, broadening the coverage of the demolition ordinance to encompass any unit that has been registered with the Rent Stabilization Board (or rented within the past five years) presents its own set of distinct and problematic implications. The Rent Stabilization Board mandates the registration of spaces based on their functional use; if a space serves as the primary residence for an individual tenant, it must be registered with the Rent Stabilization Board. As outlined in Regulation 403(A)¹, a space merely needs to provide basic amenities such as living, sleeping, eating, and sanitation to qualify as a “Rental Unit” necessitating registration. Essentially, if this ordinance is approved in its current form, any space utilized for independent living—even lacking a kitchen or basic cooking facilities—will be classified as a Residential Unit under the demolition ordinance. This classification could lead to the permanent subdivision of the property in numerous instances.

While it is important to uphold the policy goal of preserving the housing stock, this should not extend to maintaining unsafe unpermitted housing that cannot reasonably be replaced. Instead, the City should actively promote the legalization and improvement of these units. On November 19, 2019, the Berkeley City Council approved an amnesty program for unpermitted accessory dwelling units (ADUs) with the aim “to promote certification of unpermitted or undocumented secondary units while ensuring that they are safe, healthy and habitable, and once certified, to allow them to be legally used to provide needed housing to the Berkeley community.” The intent of November 2019 proposal is to create a pathway to legalize and document these unpermitted units as ADUs.²

¹ Berkeley Rent Board. “Rent Stabilization Board Regulation 403(A) *City of Berkeley*, https://berkeleyca.gov/sites/default/files/2022-01/CHAPTER%204_Definitions.pdf

²“Amnesty Program for Unpermitted Dwelling Units.” City of Berkeley, November 15, 2022, <https://berkeleyca.gov/sites/default/files/documents/2022-11-15%20WS%20Item%2001%20Referral%20Response%20Amnesty%20Program.pdf>

If the intent of this section is to help prevent tenant displacement while allowing owners to demolish an unpermitted unit, inserting the phrase “tenant-occupied” (as defined below in our proposed recommendation in Section 23.326.020.A.6&7) addresses both problems. If legalizing an unpermitted unit proves to be cost-prohibitive and the unit is not tenant-occupied, then an owner should be able to demolish the unit. This issue is further addressed below in our proposed recommendation for Section 23.326.030.B.3 Procedure and Findings–Demolitions without Proper Zoning or Building Permit Approvals.

23.326.020.A.3 General Requirements—Exemptions

Current Proposal:

3. “Residential Unit” does not include a lawfully-permitted ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU, as defined in BMC Chapter 23.306, where the landlord also occupies a unit in the same property as their principal residence. This shall only apply to properties containing a single ADU or JADU, shall only apply to units compliant with all applicable requirements of BMC Chapter 23.306 (“Accessory Dwelling Units”), and shall only apply to tenancies created after November 7, 2018.

Recommendation:

3. “Residential Unit” does not include a lawfully-permitted ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU as defined in BMC Chapter 23.306, where the owner landlord also occupies a unit in the same property as their principal residence. ~~This shall only apply to properties containing a single ADU or JADU, shall only apply to units compliant with all applicable requirements of BMC Chapter 23.306 (“Accessory Dwelling Units”), and shall only apply to tenancies created after November 7, 2018.~~

Rationale:

The inclusion of the date November 7, 2018 stems from the Measure Q exemption of ADUs from rent control, approved by voters in November 2018. However, applying this date renders the exemption for ADUs and JADUs inapplicable to owner-occupied properties with tenancies initiated prior to November 7, 2018, which appears to have no rational policy basis. It is therefore recommended that the last sentence be deleted.

23.326.020.A.4 General Requirements—Comparable Units

Current Proposal:

4. “Comparable Unit” means a Residential Unit of similar size (square footage and number of bedrooms), common interior amenities, and location within the city (neighborhood and school attendance area). In the case of a Single-Family Dwelling being replaced, a Comparable Unit is not required to have the same or similar square footage or the same number of total rooms, but must provide the same number of bedrooms if the Single-Family Dwelling includes three or fewer bedrooms, or at least three bedrooms if the Single-Family Dwelling contains four or more bedrooms.

Recommendation:

4. “Comparable Unit” means a Residential Unit that contains the same number of bedrooms of similar size than the demolished unit, in accordance with the “equivalent size” requirements of state Government Code § 65915 (Density Bonus Law) and § 66300 (Housing Crisis Act) (square footage and number of bedrooms), common interior amenities, and location within the city (neighborhood and school attendance area). In the case of a Single-Family Dwelling being replaced, a Comparable Unit is not required to have the same or similar square footage or the same number of total rooms, but must provide the same number of bedrooms if the Single-Family Dwelling includes three or fewer bedrooms, or at least three bedrooms if the Single-Family Dwelling contains four or more bedrooms.

Rationale:

In Section 23.326.020.A.4, the “Comparable Unit” is overly prescriptive and would pose a significant barrier to numerous demolitions and subsequent rebuilds, thereby impeding efforts to increase the housing stock. For example, requiring similar square footage eliminates the incentive to replace a duplex with a small apartment building. Prospective multi-family projects would necessitate the replication of specific rooms' square footage, precluding any deviations. This requirement not only complicates the architect's task of designing cost-effective solutions but also renders the transition from smaller-scale to denser buildings economically impractical. State Government Code (§66300.d.2.F.iii) defines “Equivalent Size” and is a reasonable standard for replacement units.

Furthermore, requiring similar interior amenities is unnecessary considering that the Rent Stabilization Board also has a means to address the loss of amenities via the Individual Rent Adjustment petition for a Reduction in Services.³ Interior amenities could also conceivably include older designs that are incompatible with modern uses or needs (e.g., ground floor community rooms).

23.326.020.A.6&7 General Requirements—Tenant-Occupied and Golden Duplex Unit Definition

The current proposal does not have a definition for “tenant-occupied” or “Golden Duplex.” The recommendation is to include definitions.

6. “Tenant-occupied” shall refer to a Residential Unit that has been occupied for more than 182 days within the last 365 days preceding the date of the demolition permit application.

7. “Golden Duplex” shall refer to units that are exempt from Rent Stabilization under Section 13.76.050.F. and shall not be considered to be subject to price control under Chapter 13.76 if they are occupied by the owner as their principal residence.

Rationale:

³ Berkeley Rent Board. “Rent Adjustment Petitions” *City of Berkeley*, <https://rentboard.berkeleyca.gov/services/rent-adjustment-petitions>

In order to guard against tenant displacement, a clear standard for “tenant-occupied” should be established in the ordinance. The recommended language aligns with the Measure M Vacancy Tax (adopted by voters in November 2022). Similarly, Golden Duplex is defined for purposes of applying the same tenant rights and relocation requirements as is applicable to ADUs/Junior ADUs.

**23.326.030.A.1 Demolition of Residential Units–Ellis Act vs. No-Fault Eviction and
23.326.040.B.1 Combination Units– Ellis Act vs. No-Fault Eviction**

Current Proposal for 23.326.030.A.1:

~~A. (a)~~ Demolition is not allowed if:

1. ~~+~~ The ~~building Residential Unit (s)~~ was removed from the rental market ~~under the Ellis Act through a no-fault eviction~~ during the preceding five years; or

Current Proposal for 23.326.040.B.1:

~~B. Limitations. Combination Demolition~~ is not allowed if:

1. ~~+~~ The building was removed from the rental market ~~under the Ellis Act through a no-fault eviction~~ during the preceding five years; or

Recommendation for 23.326.030.A.1:

A. Demolition is not allowed if:

1. The Residential Unit (s) was removed from the rental market ~~under the Ellis Act through a no-fault eviction~~ during the preceding five years; or

Recommendation for 23.326.040.B.1:

~~B. Limitations. Combination~~ is not allowed if:

1. The building was removed from the rental market ~~under the Ellis Act through a no-fault eviction~~ during the preceding five years; or

Rationale:

The Ellis Act provision is a more appropriate benchmark for demolition prohibitions. No-fault evictions are defined in the Berkeley Municipal Code Section 23.314.020 as “an eviction pursuant to the Ellis Act or Sections 13.76.130.A.9 or 10 of the Municipal Code.” Sections 13.76.130.A.9 or 10 include owner (or immediate family) move-in evictions, including “a landlord or lessor seeks in good faith to recover possession of the rental unit for his/her occupancy as a principal residence.” The proposed ordinance goes beyond state law in that it prohibits demolition for owner move-ins that occurred in the previous five years. Prohibiting an owner from moving into their own home, demolishing it, and creating more housing units during an unprecedented housing crisis is not a reasonable standard. Furthermore, SB330/SB8 only applies to units removed from the rental market through the Ellis Act.⁴

Council’s direction on January 18, 2023 in adopting the Housing Element, specified that demolition should not occur in the event of an Ellis Act eviction (*not a no-fault eviction*) within

⁴California Government Code § 66300, Title 7 Planning and Land Use, Division 1, Planning and Zoning, Chapter 12 “Housing Crisis Act of 2019.” <https://law.justia.com/codes/california/2022/code-gov/title-7/division-1/chapter-12/section-66300/>

the past five years. The current version of the ordinance exceeds the standard established in the City's approved Housing Element and could be construed as imposing an impediment to the creation of middle housing (Program 29).

23.326.030.A.2 Demolition of Residential Units and 23.326.040.B.2 Eliminating Dwelling Units through Combination with Other Units—Appeal to the Rent Stabilization Board

Current Proposal of 23.326.030.A.2 and 23.326.040.B.2:

There ~~have been verified cases~~ is substantial evidence of harassment or threatened or actual illegal eviction during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, whose determination may be appealed to the Rent Stabilization Board. ~~The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The ZAB shall determine whether harassment or threatened or actual illegal eviction occurred,~~

Recommendation:

There is substantial a preponderance of evidence of harassment or threatened or actual illegal eviction provided by either the existing tenant or property manager/owner during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, ~~whose determination may be appealed to the Rent Stabilization Board.~~ The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The ZAB shall determine whether harassment or threatened or actual illegal eviction occurred.

Rationale:

The preponderance of evidence standard is superior to substantial evidence as it requires a greater degree of certainty, ensuring a more thorough assessment of the facts in legal proceedings. It is also crucial to clarify that only affected parties should have the ability to bring harassment complaints, preventing this aspect of the ordinance from being exploited by third-party actors. Finally, the recommendation returns the decision authority to the Zoning Adjustments Board (ZAB).

23.326.030.B.3 Procedure and Findings—Demolitions without Proper Zoning or Building Permit Approvals

Current Proposal:

3. In the event of a demolition of a Residential Unit created without proper zoning approvals or Building Permit(s), as defined in 23.326.020(A)(2), the Building Official, Zoning Officer or Fire Marshal may determine that the replacement of such a unit is infeasible and not required under this Chapter. Such a determination shall include a finding that the replacement of the unit could not occur in compliance with Zoning Code, Building Code, Fire Code or other regulations related to public health and safety.

Recommendation

3. In the event of a demolition of a Residential Unit created without proper zoning approvals or Building Permit(s), as defined in 23.326.020(A)(2), the Building Official, Zoning Officer or Fire Marshal may determine that the replacement of such a unit is infeasible and not required under this Chapter. Such a determination shall include a finding that the replacement of the unit could not occur in compliance with Zoning Code, Building Code, Fire Code or other regulations related to public health and safety.

In the event that the Building Official, Zoning Officer or Fire Marshal determines that the replacement unit is feasible, if a Dwelling Unit, ADU, or JADU was created without proper zoning approvals or Building Permit(s), as defined in 23.326.020(A)(2) and is not tenant-occupied, it can be demolished and eliminated with a Zoning Certificate and all appropriate building permits. In order to receive the Zoning Certificate, the owner shall sign under penalty of perjury that the unit to be eliminated is not tenant-occupied (as defined) and would present a financial hardship to replace.

Rationale:

The recommended amendments address scenarios in which a property owner may be financially unable to create a legally-permitted replacement unit—only for instances in which the unit is not tenant-occupied.

23.326.030.C—Landmarks Preservation Commission

Current Proposal:

C. Landmarks and Structures of Merit. Demolition of a designated landmark or structure of merit, or of a structure in a designated historic district, must be approved by the Landmarks Preservation Commission, pursuant to Chapter 3.24.

Recommendation:

C. *Landmarks and Structures of Merit.* Demolition of a designated landmark or structure of merit or of a structure in a designated historic district, classified as such prior to zoning application, must be approved by the Landmarks Preservation Commission, pursuant to Chapter 3.24.

Rationale:

Section 15064.5 of the California Environmental Quality Act already contains a provision that requires review of properly designated historic structures, for those projects that qualify. Furthermore, clarifying that landmarks, structures of merit, or designated historic districts must be established before deliberation by the Landmarks Preservation Commission ensures that obstructive housing challenges do not arise after the submission of a building or demolition application. This amendment reinforces Government Code § 65913.10, which states that a

landmark determination must be made at the time the application for the housing development project is deemed complete (at the time when the application was submitted).⁵

23.326.030.D: Demolition of Residential Units—Conditions of Approval

Current Proposal:

D. Conditions of Approval. Any Protected Unit(s) that is demolished shall be replaced with a Comparable Unit that shall comply with the maximum allowable rent requirements for Affordable Units in Chapter 23.328 [Affordable Housing Requirements] and Chapter 23.330 [Density Bonus] as they may be amended from time to time.

1. In the event that a displaced household has an income below 50% AMI, a Comparable Unit shall be offered at a rent that is affordable to households at 30% of AMI, and the displaced household shall have the first right of refusal for that unit. Such a unit shall be counted as a Very Low-Income unit for applicable affordability requirements in Chapter 23.328.

2. In the event that a demolished Residential Unit is not a Protected Unit and the income of the displaced household is unknown, the Residential Unit shall be presumed to have been occupied by Low- or Lower-Income households in the same proportion as Residential Units throughout the City. The City shall rely upon US Department of Housing and Urban Development’s Comprehensive Housing Affordability Strategy (CHAS) data to determine the number of such Residential Units that must be replaced with Affordable Units as defined in Chapter 23.328.

3. In the event that a Protected Unit was subject to rent or price controls under BMC Chapter 13.76, and the income level of the displaced household is unknown, the unit shall be replaced with an Affordable Unit as defined in Chapter 23.328.

Recommendation:

D. Conditions of Approval. Any Protected Unit(s), excepting those not considered a “Residential Unit” under 23.326.020.A.3 that is demolished shall be replaced with a Comparable Unit that shall comply with the maximum allowable rent requirements for Affordable Units in Chapter 23.328 [Affordable Housing Requirements] and Chapter 23.330 [Density Bonus] as they may be amended from time to time.

~~1. In the event that a displaced household has an income below 50% AMI, a Comparable Unit shall be offered at a rent that is affordable to households at 30% of AMI, and the displaced household shall have the first right of refusal for that unit. Such a unit shall be counted as a Very Low-Income unit for applicable affordability requirements in Chapter 23.328.~~

⁵ California Government Code §65913, Title 7 Planning and Land Use, Division 1, Planning and Zoning, Chapter 4.2 “Housing Development Approvals: Determination of a Historic Site.”
<https://casetext.com/statute/california-codes/california-government-code/title-7-planning-and-land-use/division-1-planning-and-zoning/chapter-42-housing-development-approvals/section-6591310-effective-until-112030-determination-of-historic-site>

1. In the event that a demolished Residential Unit was subject to a low-income deed restriction for any of the previous five years, the unit shall be replaced with an Affordable Unit as defined in Chapter 23.328 [Affordable Housing Requirements].

2. In the event that a demolished Residential Unit is not a Protected Unit and the income of the displaced household is unknown, the Residential Unit shall be presumed to have been occupied by Low- or Lower-Income households in the same proportion as Residential Units throughout the City. The City shall rely upon US Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy (CHAS) data to determine the number of such Residential Units that must be replaced with Affordable Units as defined in Chapter 23.328.

3. In the event that a Protected Unit was subject to rent or price controls under BMC Chapter 13.76, and the income level of the displaced household is unknown, the unit shall be replaced with a Comparable Unit with similar rent requirements, an Affordable Unit as defined in Chapter 23.328.

Rationale:

The amended recommendation reiterates that the Conditions of Approval allow an exemption for an owner-occupied home with an additional unit from providing a Comparable Unit. State law specifies that a Comparable Unit is required only when the tenant exercises their right of first refusal. All other replacement units may be equivalent units.

As 23.326.030.D.1 is currently written, a Protected Unit would encompass any unit rented to an individual earning less than 50 percent of the Area Median Income (AMI) as outlined in Section 23.326.020.A.5.C. This provision would likely cover the majority of buildings in the Southside or those near the U.C. Berkeley campus. Requiring a deed-restricted below-market-rate (BMR) subsidized affordable housing replacement unit with similar square footage, amenities, and neighborhood location in areas predominantly inhabited by students, who generally cannot qualify for such units, would impede the creation of homes near the U.C. Berkeley campus (Downtown and Southside). Further, it is unclear why the current proposal requires a replacement unit to be affordable at 30 percent AMI to a tenant whose income may fall within the range of 31 percent to 49 percent AMI. It is recommended that deed-restricted BMR units should be replaced with similar deed-restricted BMR units.

Most importantly, the financial burden of replacing rent-controlled units with deed-restricted BMR affordable units could render projects financially infeasible. It is more reasonable to replace like with like (i.e., rent-controlled units with rent-controlled ones and BMR units with comparable BMR units). State law allows cities to replace rent-controlled units with either affordable units or rent-controlled units pursuant to Government Code § 66300(d)(2)(A)(iii).

23.326.030.E.3 Requirements for Occupied Units—General Requirements

Current Proposal:

3. i. General Requirements The applicant shall provide assistance with moving expenses and relocation assistance equivalent to the requirements set forth in Municipal Code Chapter 13.84

(Relocation Services and Payments for Residential Tenant Households)~~ii~~; or Government Code section 66300.6(b)(4)(A), whichever requires greater relocation assistance to displaced tenants, and shall not be subject to the limitations in section 13.84.070.B.3(a). The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy. Within five days of the issuance of the Certificate of Occupancy, tenants shall be notified in writing that the units will be ready for move-in on a date specified. Tenants shall confirm in writing their intent to lease the available unit at any time before 20 days after the issuance of the Certificate of Occupancy. Funding for the rent differential shall be guaranteed in a manner approved by ~~the~~ City Council Resolution; provided, however, that any project that is carried out or funded by the state or federal government shall be subject to applicable provisions of the California Relocation Act (Government Code section 7260 et seq.) and/or the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. sections 4601- 4655).

(a)~~iii~~. *Exception.* An applicant who proposes to construct a 100-percent affordable housing project is not required to comply with this subsection but must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended and the California Relocation Act (Government Code sections 7260 et seq.).

(b) *Exception for Tenants in ADUs and Unpermitted Units That Cannot Be Replaced.* Applicants are required to provide moving and relocation assistance, in an amount provided in BMC Section 13.76.130(A)(9)(g), to the following groups of tenants: (i) tenants who occupy a lawfully permitted ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU, where the landlord also occupies a unit in the same property as his/her principal residence; and (ii) tenants who occupy a unit created without proper zoning approvals that cannot be replaced for public health or safety reasons, pursuant to BMC Section 23.326.030(B)(3). However, applicants are not required to (i) provide such tenants with a temporary replacement unit while a new unit is being constructed, (ii) notify such tenants when a new unit is ready for occupancy; or (iii) provide such tenants with a right for first refusal for the new unit.

Recommendation:

3. *General Requirements* The applicant shall provide moving and relocation assistance equivalent to the requirements set forth in Municipal Code Chapter 13.84 (Relocation Services and Payments for Residential Tenant Households) or Government Code § 66300.6(b)(4)(A), whichever requires greater relocation assistance to displaced tenants, and shall ~~not~~ be subject to the limitations in section 13.84.070.B.3(a). ~~The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy.~~ Within five days of the issuance of the Certificate of Occupancy, tenants shall be notified in writing that the units will be ready for move-in on a date specified. Tenants shall confirm in writing their intent to lease the available unit at any time before 20 days after the issuance of the Certificate of Occupancy. ~~Funding for the rent differential shall be guaranteed in a manner approved by City Council Resolution; provided, however, that~~ any project that is carried out or funded by the state or federal government shall be subject to applicable provisions of the California Relocation Act (Government Code section 7260 et seq.) and/or the

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. sections 4601- 4655).

(a) *Exception.* An applicant who proposes to construct a 100-percent affordable housing project is not required to comply with this subsection but must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended and the California Relocation Act (Government Code sections 7260 et seq.).

(b) *Exception for Tenants in ADUs, Golden Duplexes, and Unpermitted Units That Cannot Be Replaced.* Applicants are required to provide moving and relocation assistance, in an amount provided in BMC Section 13.76.130(A)(9)(g), to the following groups of tenants: (i) tenants who occupy a Golden Duplex or a lawfully permitted ADU or JADU on a residential property containing only a Single Family Dwelling and one lawfully established and fully permitted ADU or JADU, where the landlord also occupies a unit in the same property as his/her principal residence; and (ii) tenants who occupy a unit created without proper zoning approvals that cannot be replaced for public health or safety reasons, pursuant to BMC Section 23.326.030(B)(3). However, applicants are not required to (i) provide such tenants with a temporary replacement unit while a new unit is being constructed, (ii) notify such tenants when a new unit is ready for occupancy; or (iii) provide such tenants with a right for first refusal for the new unit.

Rationale:

The City's Relocation Ordinance in Section 13.84.070.B.3(a) already provides for a fair rent differential payment to displaced tenants: "The rent differential payment shall not exceed a ceiling established annually by the City based on the average market rent statistics gathered and published by the rent stabilization program for the prior calendar year." This calculation specified in the Relocation Ordinance is a fair method for providing a displaced tenant with a rent differential payment. Further, there does not appear to be a rational policy basis to provide a more generous rent differential when displacement is the result of demolition as opposed to remodeling or other unit improvements.

The proposed demolition ordinance meets SB330 and SB8 exemptions for owner-occupied ADUs and JADUs, but does not extend them for owner-occupied properties referred to as "Golden Duplexes."⁶ The Demolition Ordinance should treat owner-occupied Golden Duplexes the same as ADUs and JADUs, whenever allowable under state law, because they are a similar housing type in terms of proximity of property owner to tenant on a single parcel and the likelihood that the property owner is a regular homeowner who is not acting as a landlord in a full-time business capacity.

⁶ "Golden Duplexes" refer to owner occupied-properties that contain a single-family unit and a rental unit, which is exempt from the Rent Control Ordinance, if it "would have been exempt under the provisions of this chapter [i.e., BMC 13.76] had this chapter been in effect on December 31, 1979" [13.76.050.F]. They function much like accessory dwelling units, and their exemptions from Rent Control Ordinance are similar.

23.326.030.E.4b&c—Requirements for Occupied Units—Sitting Tenants’ Rights

Current Proposal:

~~(a) Sitting Any tenants of a Protected Unit that is permitted to be demolished under this section who are displaced as a result of demolition shall be provided have the right of first refusal to move into rent a Comparable Unit in the new building project.~~

~~(b) In the event that a displaced household is ineligible for below-market rate replacement units, a market rate units designated to Comparable uUnit shall be made available to replace the units that were demolished household at the same rent that would have applied as had been previously charged, or a lesser rent if they had remained in place, as long as their tenancy continues that is the market rate.~~

~~(c) Where a displaced tenant exercises the right to rent a Comparable Unit, any increase in rent for the Comparable Unit for the duration of their tenancy shall be no greater than the lesser of 65% of the increase in the Consumer Price Index for All Urban Consumers (CPI-U) in the San Francisco-Oakland-San Jose region (as reported and published by the U.S. Department of Labor, Bureau of Labor Statistics for the twelve-month period ending the previous December 31) or 65% of the corresponding increase in Area Median Income (AMI) for the same calendar year.~~

Recommendation:

(a) Any tenant of a Protected Unit that is permitted to be demolished under this section shall have the right of first refusal to rent a Comparable Unit in the new project.

~~(b) In the event that a displaced household is ineligible for below-market rate replacement units, a market rate Comparable Unit shall be made available to that household at the same rent as had been previously charged, or a lesser rent if that is the market rate.~~

~~(c) Where a displaced tenant exercises the right to rent a Comparable Unit, any increase in rent for the Comparable Unit for the duration of their tenancy shall be no greater than the lesser of 65% of the increase in the Consumer Price Index for All Urban Consumers (CPI-U) in the San Francisco-Oakland-San Jose region (as reported and published by the U.S. Department of Labor, Bureau of Labor Statistics for the twelve-month period ending the previous December 31) or 65% of the corresponding increase in Area Median Income (AMI) for the same calendar year.~~

Rationale:

The proposed amendment is to strike Sections b and c. Mandating that a new market rate unit must reduce its market rent for a household earning more than 50 percent AMI establishes a level of subsidy that could render projects infeasible. Further financial feasibility study is warranted before undertaking this policy choice.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

According to Section 21065 of the California Public Resource Code, a "project" under CEQA is described as an endeavor that could lead to either a direct or reasonably anticipated indirect alteration of the environment. The amendments proposed in the ordinance solely pertain to the regulations governing the demolition of current structures and do not entail any alterations to the environment. This proposed ordinance does not involve any discretionary actions that would authorize or result in environmental changes, either direct or indirect. Consequently, it does not qualify as a project under CEQA.

CONTACT PERSON

Councilmember Rashi Kesarwani
(510) 981-9110

COUNCILMEMBER RASHI KESARWANI RECOMMENDATION

(amending Planning Commission/Planning staff/4x4's 3/26/2024 version of current ordinance)

ORDINANCE NO.
AMENDING BERKELEY MUNICIPAL CODE CHAPTER 23.326, DEMOLITION AND
DWELLING UNIT CONTROLS

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

Section 1. That Berkeley Municipal Code Chapter 23.326 is hereby amended to read as follows:

Chapter 23.326
DEMOLITION AND DWELLING UNIT CONTROLS

Sections:

- 23.326.010 Chapter Purpose.
- 23.326.020 General Requirements.
- 23.326.030 Demolition of Residential Units.
- 23.326.040 Eliminating Dwelling Units through Combination with Other Units.
- 23.326.050 Demolition of Accessory Buildings.
- 23.326.060 Private Right of Action.
- 23.326.070 Demolitions of Non-Residential Buildings.
- 23.326.080 Building Relocations.
- 23.326.090 Limitations.
- 23.326.100 Severability

23.326.010 Chapter Purpose.

This chapter establishes demolition and dwelling unit control standards that promote the affordable housing and safety goals of the City.

23.326.020 General Requirements.

A. No Residential Unit(s) may be eliminated or demolished except as authorized by this chapter.

1. "Residential Unit" means, for purposes of this Chapter, any Dwelling Unit, any Live-Work Unit, any Residential Hotel unit, any bedroom of a Group Living Accommodation (GLA), except a GLA in a University-recognized fraternity, sorority or co-op, or any lawfully-permitted Accessory Dwelling Unit ("ADU") or Junior Accessory Dwelling Unit ("JADU").

2. "Residential Unit" includes tenant-occupied Dwelling Units, ADUs, or JADUs created without proper zoning approvals or Building Permit(s) ~~if they have been registered with~~

~~the Rent Stabilization Board, or the Rent Stabilization Board has otherwise determined that a tenant-landlord relationship existed during the preceding five years.~~

3. "Residential Unit" does not include a lawfully-permitted ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU as defined in BMC Chapter 23.306, where the owner landlord also occupies a unit in the same property as their principal residence. ~~This shall only apply to properties containing a single ADU or JADU, shall only apply to units compliant with all applicable requirements of BMC Chapter 23.306 ("Accessory Dwelling Units"), and shall only apply to tenancies created after November 7, 2018.~~

4. "Comparable Unit" means a Residential Unit that contains the same number of bedrooms of similar size than the demolished unit, in accordance with the "equivalent size" requirements of CA Government Section Code § 65915 (Density Bonus Law) and §66300 (Housing Crisis Act).~~(square footage and number of bedrooms), common interior amenities, and location within the city (neighborhood and school attendance area).~~ In the case of a Single-Family Dwelling being replaced, a Comparable Unit is not required to have the same or similar square footage or the same number of total rooms, but must provide the same number of bedrooms if the Single-Family Dwelling includes three or fewer bedrooms, or at least three bedrooms if the Single-Family Dwelling contains four or more bedrooms.

5. "Protected Unit" includes a Residential Unit:

- a. Subject to a low-income deed restriction for any of the previous five years;
- b. Subject to rent or price control under BMC Chapter 13.76; or
- c. Rented by a household at 50% Area Median Income or lower within the previous five years.

6. "Tenant-occupied" shall refer to a Residential Unit that has been occupied for more than 182 days within the last 365 days preceding the date of the demolition permit application.

7. "Golden Duplex" shall refer to units that are exempt from Rent Stabilization under Section 13.76.050.F. and shall not be considered to be subject to price control under Chapter 13.76 if they are occupied by the owner as their principal residence"

23.326.030 Demolition of Residential Units

A. Demolition is not allowed if:

1. The Residential Unit (s) was removed from the rental market under the Ellis Act through a no-fault eviction during the preceding five years; or

2. There is substantial a preponderance of evidence of harassment or threatened or actual illegal eviction provided by either the existing tenant or property manager/owner during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner., ~~whose determination may be appealed to the Rent Stabilization Board.~~ The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The ZAB shall determine whether harassment or threatened or actual illegal eviction occurred.

B. Procedure and Findings.

1. A Use Permit is required to eliminate or demolish one or more Residential Units, except where otherwise provided by the Zoning Ordinance. The Board shall only approve the Use Permit if one of the following is true:

(a) The building containing the Residential Unit(s) is hazardous or unusable and is infeasible to repair.

(b) The building containing the Residential Unit(s) will be moved to a different location within Berkeley with no net loss of units and no change in the rent levels of the unit(s).

(c) The demolition is necessary to permit construction approved pursuant to this chapter of at least the same number of dwelling units.

2. A Single-Family Dwelling without sitting tenants can be demolished with an AUP, if the demolition is part of a development project that would result in a net increase in residential density.

3. In the event of a demolition of a Residential Unit created without proper zoning approvals or Building Permit(s), as defined in 23.326.020(A)(3), the Building Official, Zoning Officer or Fire Marshal may determine that the replacement of such a unit is infeasible and not required under this Chapter. Such a determination shall include a finding that the replacement of the unit could not occur in compliance with Zoning Code, Building Code, Fire Code or other regulations related to public health and safety. Further, even if the Building Official, Zoning Officer or Fire Marshal determines that the replacement unit is feasible, if a Dwelling Unit, ADU, or JADU was created without proper zoning approvals or Building Permit(s), as defined in 23.326.020(A)(2) and is not tenant-occupied, it can be demolished and eliminated with a Zoning Certificate and all appropriate building permits. In order to receive the Zoning Certificate, the owner shall sign

under penalty of perjury that the unit to be eliminated is not tenant-occupied and would present a financial hardship to replace.

C. *Landmarks and Structures of Merit.* Demolition of a designated landmark or structure of merit or of a structure in a designated historic district, classified as such prior to zoning application, must be approved by the Landmarks Preservation Commission, pursuant to Chapter 3.24.

D. *Conditions of Approval.* Any Protected Unit(s), excepting those not considered a “Residential Unit” under 23.326.020.A.3 that is demolished shall be replaced with a Comparable Unit that shall comply with the maximum allowable rent requirements for Affordable Units in Chapter 23.328 [Affordable Housing Requirements] and Chapter 23.330 [Density Bonus] as they may be amended from time to time.

~~1. In the event that a displaced household has an income below 50% AMI, a Comparable Unit shall be offered at a rent that is affordable to households at 30% of AMI, and the displaced household shall have the first right of refusal for that unit. Such a unit shall be counted as a Very Low-Income unit for applicable affordability requirements in Chapter 23.328.~~

1. In the event that a demolished Residential Unit was subject to a low-income deed restriction for any of the previous five years, the unit shall be replaced with an Affordable Unit as defined in Chapter 23.328 [Affordable Housing Requirements].

2. In the event that a demolished Residential Unit is not a Protected Unit and the income of the displaced household is unknown, the Residential Unit shall be presumed to have been occupied by Low- or Lower-Income households in the same proportion as Residential Units throughout the City. The City shall rely upon US Department of Housing and Urban Development’s Comprehensive Housing Affordability Strategy (CHAS) data to determine the number of such Residential Units that must be replaced with Affordable Units as defined in Chapter 23.328.

3. In the event that a Protected Unit was subject to rent or price controls under BMC Chapter 13.76, and the income level of the displaced household is unknown, the unit shall be replaced with a Comparable Unit with similar rent requirements, ~~an Affordable Unit as defined in Chapter 23.328.~~

E. Requirements for Occupied Units.

1. *Applicability.* These requirements do not apply to tenants who move in after the application for demolition is submitted to the City if the owner informs each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.

2. *Notice.* The applicant shall provide all sitting tenants and the Rent Stabilization Board notice of the application to demolish the Residential Unit(s) no later than the date the application is submitted to the City, including notice of their rights under Municipal Code Chapter 13.76 (Rent Stabilization and Eviction for Good Cause Program), Chapter 13.77 (Requirements,

Procedures, Restrictions and Mitigations Concerning the Withdrawal of Residential Rental Accommodations from Rent or Lease), 13.79 (Tenant Protections: Automatically Renewing Leases and Buyout Agreements) and 13.84 (Relocation Services and Payments for Residential Tenant Households).

3. *General Requirements.* The applicant shall provide moving and relocation assistance equivalent to the requirements set forth in Municipal Code Chapter 13.84 (Relocation Services and Payments for Residential Tenant Households) or Government Code section 66300.6(b)(4)(A), whichever requires greater relocation assistance to displaced tenants, and shall not be subject to the limitations in section 13.84.070.B.3(a). ~~The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy.~~ Within five days of the issuance of the Certificate of Occupancy, tenants shall be notified in writing that the units will be ready for move-in on a date specified. Tenants shall confirm in writing their intent to lease the available unit at any time before 20 days after the issuance of the Certificate of Occupancy. ~~Funding for the rent differential shall be guaranteed in a manner approved by City Council Resolution; provided, however, that~~ any project that is carried out or funded by the state or federal government shall be subject to applicable provisions of the California Relocation Act (Government Code section 7260 et seq.) and/or the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. sections 4601- 4655).

(a) *Exception.* An applicant who proposes to construct a 100-percent affordable housing project is not required to comply with this subsection but must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended and the California Relocation Act (Government Code sections 7260 et seq.).

(b) *Exception for Tenants in ADUs, Golden Duplexes, and Unpermitted Units That Cannot Be Replaced.* Applicants are required to provide moving and relocation assistance, in an amount provided in BMC Section 13.76.130(A)(9)(g), to the following groups of tenants: (i) tenants who occupy a Golden Duplex or a lawfully permitted ADU or JADU on a residential property containing only a SingleFamily Dwelling and one lawfully established and fully permitted ADU or JADU, where the landlord also occupies a unit in the same property as his/her principal residence; and (ii) tenants who occupy a unit created without proper zoning approvals that cannot be replaced for public health or safety reasons, pursuant to BMC Section 23.326.030(B)(3). However, applicants are not required to (i) provide such tenants with a temporary replacement unit while a new unit is being constructed, (ii) notify such tenants when a new unit is ready for occupancy; or (iii) provide such tenants with a right for first refusal for the new unit.

4. Sitting Tenants Rights

(a) Any tenant of a Protected Unit that is permitted to be demolished under this section shall have the right of first refusal to rent a Comparable Unit in the new project.

~~(b) In the event that a displaced household is ineligible for below-market rate replacement units, a market rate Comparable Unit shall be made available to that household at the same rent as had been previously charged, or a lesser rent if that is the market rate.~~

~~(c) Where a displaced tenant exercises the right to rent a Comparable Unit, any increase in rent for the Comparable Unit for the duration of their tenancy shall be no greater than the lesser of 65% of the increase in the Consumer Price Index for All Urban Consumers (CPI-U) in the San Francisco-Oakland-San Jose region (as reported and published by the U.S. Department of Labor, Bureau of Labor Statistics for the twelve-month period ending the previous December 31) or 65% of the corresponding increase in Area Median Income (AMI) for the same calendar year.~~

(d) *Exceptions.*

- i. An applicant who proposes to construct a 100 percent affordable housing project is not required to comply with the preceding requirements but must comply with the following requirement.
- ii. Sitting tenants who are displaced as a result of demolition and who desire to return to the newly constructed affordable housing project will be granted a right of first refusal subject to their ability to meet income qualifications and other applicable eligibility requirements.

23.326.040 Eliminating Dwelling Units through Combination with Other Units.

A. Process for Projects Where Density Exceeds Current Allowance. A Use Permit is required to eliminate one or more Residential Units by combining with another unit when the existing development exceeds currently-allowable density. The ZAB shall approve a Use Permit for the elimination of one or more Residential Units by combining with another unit only if it finds that:

1. The existing number of Residential Units exceeds the current maximum allowed residential density in the zoning district where the units are located; and

2. One of the following is true:

(a) One of the affected Residential Units has been owner-occupied as a principal place of residence for no less than two years before the date of the application and none of the affected units are currently occupied by a tenant.

(b) All of the affected Residential Units are being sold by an estate and the decedent occupied the Residential Units as their principal residence for no less than two years before the date of their death.

B. Limitations. Combination is not allowed if:

1. The building was removed from the rental market under the Ellis Act through a no-fault eviction during the preceding five years; or
2. There is substantial a preponderance of evidence of harassment or threatened or actual illegal eviction provided by either the existing tenant or property manager/owner during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner., ~~whose determination may be appealed to the Rent Stabilization Board.~~ The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The ZAB shall determine whether harassment or threatened or actual illegal eviction occurred.

C. Two-Year Occupancy Requirement Following Elimination

1. If a Residential Unit that is eliminated through combination is not owner-occupied for at least two consecutive years from the date of elimination, the affected Residential Unit must be restored to separate status.
2. This requirement shall be implemented by a condition of approval and a notice of limitation on the property, acceptable to the City of Berkeley.
3. The condition of approval and notice will provide that if the Residential Unit is not owner-occupied for at least two years from the date of elimination then the affected Residential Unit(s) must either be restored as separate Residential Unit(s) and the vacant Residential Unit(s) offered for rent within six months or the owner must pay a fee of \$75,000 in 2013 dollars, adjusted in May of each year according to the Consumer Price Index for the San Francisco Bay Area. The fee shall be deposited into the City of Berkeley's Housing Trust Fund.
4. The City of Berkeley may exempt an applicant from the two-year residency requirement if there is an unforeseeable life change that requires relocation..

E. Effect of Eliminating a Residential Unit.

1. If eliminating a Residential Unit reduces the number of Residential Units in a building to four or fewer, the applicant shall record a notice of limitation against the subject property that the limitation on eviction of tenants under Chapter 13 (Public Peace, Morals and Welfare) shall continue to apply until:
 - (a) The building is demolished; or

(b) Sufficient Residential Units are added or restored such that the building contains at least five Residential Units.

2. The Zoning Officer may issue an AUP for a building conversion which eliminates a Residential Unit upon finding that the conversion will restore or bring the building closer to the original number of Residential Units that was present at the time it was first constructed, provided the conversion meets the requirements of 23.326.040.A.1 and 2 and 23.326.040.B and C.

E. Exception. The ZAB may approve a Use Permit to eliminate a Residential Unit through combination with another Residential Unit for the purpose of providing private bathrooms, kitchenettes, accessibility upgrades, and/or seismic safety upgrades, or other elements required by funding sources or programmatic needs to single resident occupancy rooms in residential developments undergoing a publicly-funded rehabilitation.

~~3. Notwithstanding the general Use Permit requirement under 23.326.020 (General Requirements), a lawfully established accessory dwelling unit that is not a controlled rental unit may be eliminated with a Zoning Certificate if:~~

~~(a) The re-conversion restores the original single-family use of the main building or lot; and~~

~~(b) No tenant is evicted.~~

23.326.050 Demolition of Accessory Buildings.

A. Notwithstanding anything in Municipal Code Title 23 (Zoning Ordinance) to the contrary, but subject to any applicable requirements in Municipal Code Section 3.24 (Landmarks Preservation Ordinance), Accessory Buildings of any size, including, but not limited to, garages, carports, and sheds may be demolished by right except where the Accessory Building is occupied by a residential tenant (regardless of whether it is lawfully permitted) or otherwise contains a lawfully established Residential Unit, which serves and is located on the same lot as a lawful residential use. Such Accessory Buildings are considered Residential Units for the purposes of this Chapter.

23.326.060 Private Right of Action.

Any affected tenant may bring a private action for injunctive and/or compensatory relief against any applicant and/or owner to prevent or remedy a violation of Sections 23.326.030 (Eliminating Dwelling Units through Demolition) and 23.326.040 (Eliminating Dwelling Units through Conversion and Change of Use). In any such action a prevailing plaintiff shall recover reasonable attorney's fees.

23.326.070 Demolition of Non-Residential Buildings.

A. Main Non-Residential Buildings. A Use Permit is required to demolish a main building used for non-residential purposes on any lot.

B. Accessory Buildings. For any lot located in a non-residential zoning district, Accessory Buildings may be demolished as follows:

1. Demolishing an accessory building with less than 300 square feet of floor area is permitted as of right.
2. An accessory building with 300 square feet or more of floor area may be demolished with an AUP.

C. Landmarks Preservation Commission Review.

1. Any application for a Use Permit or AUP to demolish a non-residential building or structure that is 40 or more years old shall be forwarded to the Landmarks Preservation Commission (LPC) for review before consideration of the Use Permit or AUP.
2. The LPC may initiate a landmark or structure-of-merit designation or may choose solely to forward to the ZAB or Zoning Officer its comments on the application.
3. The ZAB or Zoning Officer shall consider the recommendations of the LPC in when acting on the application.

D. Findings. A Use Permit or an AUP for demolition of a main building used for nonresidential purposes on any lot or an accessory building located on a lot in a nonresidential district may be approved only if the ZAB or the Zoning Officer finds that:

1. The demolition will not be materially detrimental to the commercial needs and public interest of any affected neighborhood or the City of Berkeley; and

2. The demolition:

(a) Is required to allow a proposed new building or other proposed new use;

(b) Will remove a building which is unusable for activities which are compatible with the purposes of the district in which it is located or which is infeasible to modify for such uses;

(c) Will remove a structure which represents an uninhabitable attractive nuisance to the public; or

(d) Is required for the furtherance of specific plans or projects sponsored by the City of Berkeley or other local district or authority upon a demonstration that it is infeasible to obtain prior or

concurrent approval for the new construction or new use which is contemplated by such specific plans or projects and that adhering to such a requirement would threaten the viability of the plan or project.

23.326.080 Building Relocations.

A. Treatment of Building Relocation.

1. Relocating a building from a lot is considered a demolition for purposes of this chapter.
2. Relocating a building to a lot within the city is subject to all requirements applicable to new construction.
3. When a building is relocated to a different lot within Berkeley, the lot from which the building is removed shall be known as the source lot and the lot on which the building is to be sited shall be known as the receiving lot.
4. Nothing in this subsection shall exempt Residential Units relocated to the receiving lot from the provisions of BMC Section 13.76 after a building relocation if the Residential Units located within a building were otherwise subject to BMC Chapter 13.76 in the source lot.

B. Findings. The Zoning Officer shall approve Zoning Certificate to relocate a building upon finding that upon finding that the resulting development on the receiving lot is in conformance with applicable zoning code development standards

23.326.090 Limitations.

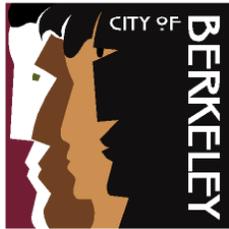
A. Unsafe, Hazard, or Danger.

1. Notwithstanding anything to the contrary, if a building or structure is unsafe, presents a public hazard, and is not securable and/or is in imminent danger of collapse so as to endanger persons or property, as determined by the city's building official, it may be demolished without a Use Permit.
2. The Building Official's determination in this matter shall be governed by the standards and criteria in the most recent edition of the California Building Code that is in effect in the City of Berkeley.

B. Ellis Act. This chapter shall be applied only to the extent permitted by state law as to buildings which have been entirely withdrawn from the rental market pursuant to the Ellis Act (California Government Code Chapter 12.75).

23.326.100 Severability.

A. If any part or provision of this Chapter, or the application of this Chapter to any person or circumstance, is held invalid, the remainder of this Chapter, including the application of such part or provision to other persons or circumstances, shall not be affected by such a holding and shall continue in full force and effect. To this end, the provisions of this Chapter are severable.



Office of the City Manager

PUBLIC HEARING

March 26, 2024

To: Honorable Mayor and Members of the City Council
From: Dee Williams-Ridley, City Manager
Submitted by: Jordan Klein, Director, Planning and Development
Subject: Zoning Ordinance Amendments to Berkeley Municipal Code Chapter 23.326 Demolition and Dwelling Unit Controls

RECOMMENDATION

Conduct a public hearing and upon conclusion, adopt first reading of an Ordinance regarding amendments to Berkeley Municipal Code Chapter 23.326 *Demolition and Dwelling Unit Control Ordinance*.

SUMMARY

State law SB 330 (Housing Crisis Act of 2019) established new provisions related to demolition of residential units, including the rights of sitting tenants and affordability requirements for demolished units. The law provides different options to comply with these requirements.

The proposed ordinance (***Attachment 1 (redlined) and Attachment 2 (clean)***) includes provisions to bring the current Demolition Ordinance (***Attachment 4***) into conformance with SB 330, clarify replacement unit requirements, maximize tenant protections, and preserve the existing affordable housing stock. The proposed ordinance includes a number of new Berkeley-specific provisions as recommended by the 4x4 Joint Task Force Committee on Housing and the Planning Commission, and includes a number of text edits, including grammatical corrections and renumbering.

FISCAL IMPACTS OF RECOMMENDATION

The proposed ordinance is not anticipated to have a noticeable impact on staffing needs or workload, and any fiscal impacts would be minimal.

The proposed ordinance includes the removal of an option to pay a fee for affordable housing in lieu of replacing new units, as State law requires the replacement of demolished units.

CURRENT SITUATION AND ITS EFFECTS

Revising Berkeley Municipal Code Chapter 23.326 *Demolition and Dwelling Unit Controls* (“the Demolition Ordinance”) supports the City’s Strategic Plan Goal to create affordable housing and housing support services for its most vulnerable community members.

The existing Demolition Ordinance (***Attachment 4***) requires a Use Permit for the demolition or elimination of one or more dwelling units in Berkeley. The Zoning Adjustments Board (ZAB) may issue a Use Permit for the demolition of a dwelling unit for specific listed reasons:

- A building is “hazardous or unusable and is infeasible to repair.”
- “Demolition is necessary to permit construction... of at least the same number of dwelling units.”
- “The elimination of the dwelling units would not be materially detrimental to the housing needs and public interest of the affected neighborhood and the City.”

The existing Demolition Ordinance includes provisions for unit replacement and the rights of sitting tenants, as well as additional situations such as:

- When housing units are demolished and no new housing units are proposed to be developed at the site (e.g., commercial development);
- When tenants have been unlawfully evicted, such as forcing a tenant out of a unit without a court order; and
- When units are being merged or converted within an existing building rather than physically demolished.

The existing Demolition Ordinance includes a provision whereby applicants may pay a fee rather than provide below-market-rate replacement units. However, the amount of that fee has never been established.

Demolition of dwelling units is prohibited where a residential building has been removed from the rental market under the Ellis Act during the preceding five years. Demolition is also prohibited where there have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years. Project applicants are generally required to provide relocation benefits, including moving expenses and differential rent payments to tenants. In addition, displaced tenants are provided a right of first refusal to rent new units after the lot has been redeveloped.

The existing ordinance also includes provisions related to the demolition of non-residential buildings, accessory buildings and building relocations. Changes to these provisions are not proposed.

Proposed Demolition Ordinance Provisions

The proposed ordinance includes provisions to bring the Demolition Ordinance into conformance with State law and includes a number of new Berkeley-specific provisions as recommended by the 4x4 Joint Task Force Committee on Housing. The proposed ordinance also includes a number of text edits, including grammatical corrections and renumbering.

The most significant changes are summarized in Table 1 and discussed in detail below. The primary rationales for the proposed changes include clarifying the applicability of the ordinance, expanding tenant protections, bringing the ordinance into conformance with State law, and assigning the Rent Stabilization Board (Rent Board) to administer some aspects of the ordinance rather than the ZAB.

Applicable Unit

The existing ordinance indicates that it applies to a “dwelling unit or units.” The proposed ordinance includes clarifications that it applies to dwelling units, group living accommodations, residential hotel rooms, certain ADUs and units constructed without a building permit.

Regarding Accessory Dwelling Units (ADUs), the 4x4 Committee proposed incorporating ADUs into the ordinance, subject only to the tenant notice and relocation requirements. This means an ADU wouldn't be obligated to meet replacement or affordability requirements. The Planning Commission expressed concern that applying these requirements to ADUs would discourage their production, specifically in cases where there was one single-family home and one ADU on a lot. However, Planning Commission also determined that ADUs within larger, multi-unit rental properties should be subject to replacement requirements. As a result, the Planning Commission recommended exempting an ADU entirely on lots which include only one single-family dwelling and one ADU. All other ADUs would be treated similarly to other units.

Protected Unit

SB 330 includes a no net loss provision that requires that a residential development project that includes the demolition of existing units must result in at least as many units as are demolished. In addition, certain types of units—“protected units”—are subject to specific replacement and affordability provisions. The proposed ordinance includes a definition of protected unit consistent with SB 330, and includes units that have been:

- Subject to a low-income deed restriction for any of the previous five years;
- Subject to rent control per Berkeley Municipal Code 13.76; or
- Rented by a household at 50% Area Median Income or lower.

Comparable Unit

The existing ordinance refers to a “comparable unit” when referring to replacement units, but does not define “comparable unit.” The proposed ordinance includes an explicit definition of “comparable unit,” indicating that it should be of a comparable size, include similar amenities, and be located in a similar area of the city as the demolished unit.

Units Built Without Proper Permits

The proposed ordinance applies to Dwelling Units, ADUs and JADUs that were created without proper zoning approvals or building permits (i.e. “illegal units”). These units, and the tenants residing in them, would be treated as properly permitted units for the purposes of the proposed ordinance, with the following distinctions:

- For a unit built without proper permits to qualify as a residential unit, it would have to be registered with the Rent Stabilization, or the Rent Stabilization Board must determine that a tenant-landlord relationship existed during the previous five years.
- The proposed ordinance includes a provision that allows the Building Officer, Zoning Officer or Fire Marshal to determine that the replacement of such a unit is not required when the replacement of the unit would be infeasible given existing Zoning, Building or Fire Code requirements.

Prohibited Demolitions

The existing ordinance prohibits demolition for units that have been removed from the rental stock through the Ellis Act within the past five years, or in cases where there has been substantial evidence of tenant harassment by a rental property owner, or an attempted or actual illegal eviction, within the past three years. In the latter case, the determination of whether harassment has occurred is made by the ZAB.

The proposed ordinance expands tenant protections to include any no fault eviction within the past five years, not just removal of a rental unit from the market through the Ellis Act. A “no fault eviction” is when the property owner or landlord wants to evict a tenant at no fault of the tenant, for example, when the property owner wants to move into the property.

The Rent Stabilization Board is proposed to be the deciding body for questions regarding harassment and illegal eviction, instead of the ZAB.

Mitigation Fee

The existing ordinance includes a requirement to pay an in-lieu mitigation fee for every unit demolished, or the option to replace a comparable affordable unit on-site.

State law (SB330) imposes a requirement that any housing development project that requires the demolition of dwelling units must create at least as many residential dwelling units as will be demolished on-site, and requires that the City condition approval on the provision of replacement units. Therefore, an option to “fee out” of the replacement requirement is a violation of State law, because it would not provide replacement units at the sizes and affordability levels required by SB 330. Accordingly, the proposed ordinance removes the mitigation fee section.

Landmarks and Structures of Merit

While the provisions of BMC Chapter 3.24 (Landmarks Preservation Commission) apply to units proposed for demolition, the existing ordinance does not explicitly refer to this chapter. Accordingly, the proposed ordinance includes specific language referring to Chapter 3.24.

Affordability of Replacement Units

The existing ordinance includes a requirement that any replacement units must be affordable units, and that the income levels of the qualifying households, and rents for the replacement units, shall be set by a resolution of the City Council. The existing ordinance also includes a requirement that the project applicant enter into a regulatory agreement with the City to provide these units.

The proposed ordinance includes more detailed provisions addressing the affordability levels of replacement units that are in concert with the requirements under State law:

- The proposed ordinance requires that any demolished protected unit shall be replaced with equivalent units and comply with the applicable affordability requirements for Affordable Units included in BMC 23.328 (Affordable Housing Requirements) and BMC 23.330 (Density Bonus). Referencing these sections clarifies the appropriate affordability levels for replacement units,¹ and

¹ BMC Section 23.328.030 requires that development projects subject to Inclusionary Zoning requirement include at least 20% of the units as Affordable Units. At least 50% of required Affordable Units must be offered at a rent that is affordable to Very Low Income Households (50% AMI or lower); the balance of units can be offered at rents affordable to Low Income Households (80% AMI).

establishes consistent requirements across a number of affordable housing-related provisions in the BMC.

- The proposed ordinance includes a provision that if a displaced household has an income below 50% AMI, a comparable replacement unit shall be offered at a rent that is affordable to households at 30% of AMI.
- The proposed ordinance also includes a provision that in cases where the household income of a displaced tenant(s) is unknown, households would be presumed to be low income in proportion to households throughout the city, as calculated using the US Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy (CHAS) database.

Attachment 3 includes illustrations of how these provisions could be applied.

Sitting Tenants' Rights

The existing ordinance establishes certain rights for sitting tenants. Sitting tenants in demolished units are entitled to a right of first refusal to move into the new building, have a right of first refusal for any BMR units, and retain those rights even if they have incomes that do not qualify for BMR units.

The proposed ordinance clarifies that tenants who do not qualify for BMR replacement units due to income limits above the area median income must still be provided a market-rate replacement unit at their prior rent. Additionally, the rent for the duration of that tenancy would be subject to Berkeley's rent control regulations. This section was added by the 4x4 Committee to provide additional rights to sitting tenants who may not qualify for BMR units.

The proposed ordinance includes additional provisions related to sitting tenants' rights. The revisions clarify that a sitting tenant's right of first refusal extends to a *comparable* unit (not just any unit) in the building, and includes provisions which set the rent levels for those units. These provisions go beyond what is required under State law. The proposed ordinance also includes a specific timeline by which a displaced tenant must indicate interest in returning to a replacement unit.

Elimination of Units through Combination with Other Units

The existing ordinance includes provisions regulating the elimination of dwelling units through physical combination with other units. This usually occurs in cases where two units are combined to make a single larger unit. The existing ordinance requires a Use Permit, with specific findings, to move forward with such an elimination. It also prohibits

such an elimination if the building was removed from the rental market through the Ellis Act in the past five years, or if there is evidence of tenant harassment or illegal eviction within the past three years, as determined by the ZAB.

The proposed ordinance permits combined units through an Administrative Use Permit (AUP) approval, if such a combination would return the building to, or move it closer towards, its permitted density. This is a provision to make it easier for units in owner-occupied buildings to be combined. The AUP requirement still includes discretionary review, the ability to set conditions, and an appeal option to the ZAB.

Elimination of a unit for a combination would not be approved if the building was vacated through any no-fault eviction, not just due to the Ellis Act, or if the tenant was subject to landlord harassment or an illegal eviction. The determination of whether landlord harassment or a real or attempted illegal eviction occurred would be made by the Rent Board Hearing Examiner, with an appeal option to the Rent Stabilization Board, instead of by the ZAB.

Demolition of Single-Family Homes

The existing ordinance requires a Use Permit to demolish a single-family home. The adopted Housing Element Update, Program 19—Middle Housing—includes a requirement that the City Council consider permitting the demolition of single-family homes with a Zoning Certificate (ZC) if the demolition is part of a middle housing project that results in a net increase in density.

The proposed ordinance includes a provision to allow the demolition of a single-family home without sitting tenants with an AUP if it is part of a project that results in a net increase in density. While the Planning Commission understood the rationale for streamlining review of projects that increase density, it concluded an AUP was the more appropriate level of discretion, and that the ordinance should specifically indicate that a single-family home with sitting tenants would not be permitted to be demolished with an AUP. The Planning Commission also acknowledged its intent to reconsider this issue later in 2024 as part of the Middle Housing legislative package.

Demolition of Accessory Buildings

The existing ordinance includes a provision that permits the demolition of an accessory building that does not contain a dwelling unit, such as garages, carports, and sheds, with a ZC. The proposed ordinance includes additional clarifying language that an accessory building that is occupied by a residential tenant shall be considered a residential unit for the purposes of this chapter.

Residential Hotel Rooms

The existing ordinance includes a section regulating the elimination of Residential Hotel Rooms. These provisions include requirements related to monthly and weekly charges, and permit Residential Hotel Rooms to be removed for the purpose of providing common use facilities (such as a kitchen, lounge, or recreation room) for remaining residents or to undertake seismic upgrades or meet the requirements of the Americans with Disabilities Act. They also include a provision allowing an owner to meet the replacement requirements through a payment to the Housing Trust Fund, which, as noted above, is not permitted under State law.

The proposed ordinance removes the Residential Hotel Rooms section entirely. Residential Hotel Rooms would therefore receive the same treatment under the proposed ordinance as other residential units

Technical Edits, Reorganization and Renumbering

The proposed ordinance also includes a variety of purely technical edits, and reorganization, retitling, and renumbering of some sections and subsections.

Table 1. Summary of Revisions to Demolition Ordinance

Policy Area	Current Ordinance	Proposed Ordinance	Rationale
Applicable Unit	“Dwelling unit or units.”	Dwelling Unit, GLA, ADU, JADU, and units built without permits	Clarification of the types of units covered.
Protected Unit	No definition.	BMR unit, rent controlled unit, or unit occupied by household at 50% AMI.	State Law: protected units are subject to specific replacement requirements.
Comparable Unit	No definition.	“Similar size, amenities and location within the city.”	Clarification by providing a definition.
Units Built Without Proper Permits	Not mentioned.	Includes units built without proper permits if registered with Rent Board or	Clarification of the types of units covered.

Policy Area	Current Ordinance	Proposed Ordinance	Rationale
		landlord-tenant relationship has existed in past five years.	
Demolition Prohibition: Ellis Act	Prohibition applies to any unit removed via Ellis Act within the past 5 years	Prohibition applies to any “no-fault” eviction.	Expansion of tenant protections beyond just one type of no-fault eviction (Ellis Act).
Demolition Prohibition: Tenant Harassment	Determination made by ZAB.	Determination made by Rent Board.	For tenant-landlord issues, the Rent Board is the subject-expert body.
Mitigation Fee	Includes mitigation fee option.	Removes mitigation fee option.	State Law: Demolished units must be replaced (SB 330).
Landmarks and Structures of Merit	No reference to Landmarks Preservation Commission (LPC) procedures.	Includes reference to LPC procedures.	Clarification that LPC procedures apply.
Replacement Units -- Affordability	<ul style="list-style-type: none"> • Replacement unit must be affordable in perpetuity; • Affordability level to be set by Council resolution; • Regulatory agreement with the City required. 	<ul style="list-style-type: none"> • Replacement unit must comply with Chapter 23.328 (Affordability Requirements) and 23.330 (Density Bonus); • For demolished unit with household at 50% AMI or below, replacement unit 	State Law: Existing tenant income levels impact type/affordability of replacement units (SB 330).

Policy Area	Current Ordinance	Proposed Ordinance	Rationale
		must be set at 30% AMI; and <ul style="list-style-type: none"> • Allows Zoning Officer and Fire Marshall to waive replacement of illegal units for health and safety 	
Sitting Tenants Rights	<ul style="list-style-type: none"> • Right of first refusal to move into the building • Right of first refusal for BMR units • Income restrictions do not apply 	<ul style="list-style-type: none"> • Right of first refusal for a comparable unit • For displaced tenants who rent a comparable unit, rent is controlled for duration of tenancy • For households ineligible for BMR units, a replacement unit shall be offered at prior rent, with increases limited equivalent to rent control. 	State Law: Tenant income levels impact type/affordability of replacement units (SB 330). Additional local requirement: Income restrictions do not apply to displaced households upon their return to the property after completion of the project.
Elimination of Units through Combination with other Units	Use Permit required in all cases, with findings.	AUP to combine units when the combination would return the building to, or move it closer towards, its original density.	Simplification: Allow conversion of owner-occupied buildings with a lesser standard.

Policy Area	Current Ordinance	Proposed Ordinance	Rationale
	Combination not allowed if the building was removed via Ellis Act within the past 5 years	Combination not allowed if vacated through no fault eviction within the past 5 years.	Expansion of tenant protections beyond just one type of no-fault eviction (Ellis Act).
	Combination not allowed if tenant harassment. Determination made by ZAB	Determination made by Rent Board Hearing Examiner, with appeal to Rent Board.	For tenant-landlord issues, the Rent Board is the subject-expert body.
Demolition of Single Family Homes	Requires a Use Permit.	Would be permitted with an AUP if the single family home were not tenant-occupied and the demolition was part of a project that increased density.	Provide streamlined process to encourage middle housing projects.
Demolition of Accessory Buildings	Can be demolished by right.	Added language to clarify that Accessory Buildings that are occupied by residential tenants are considered Residential Units. <i>23.326.050</i>	Expansion of demolition controls and tenant protections.
Elimination of Residential Hotel Rooms	Section 23.326.060 provides specific procedures for removal of residential hotel rooms	Section removed.	Residential Hotel Rooms are considered Residential Units for purpose of ordinance. <i>23.326.010(A)(1)</i>

BACKGROUND

The impetus for these revisions is recent changes in State law that provide additional requirements for new housing development projects that involve the demolition of existing residential units. These provisions of SB 330 (Housing Crisis Act of 2019), which modified Government Code sections relating to zoning and density bonus, require all new housing development projects to provide replacement units of equivalent size, defined as having the same number of bedrooms as the demolished units.

In early 2022, Planning & Development staff, in consultation with the City Attorney's Office, drafted revisions to the Demolition Ordinance to reflect these changes to State law. The 4x4 Joint Task Force Committee on Housing considered the draft at its meetings in April 2022 and December 2022, and made recommendations pertaining primarily to replacement unit requirements and expanded tenant protections. Staff revised the draft ordinance to incorporate that feedback and advanced the ordinance to Planning Commission for review.

At its meeting of February 1, 2023, the Planning Commission scheduled a public hearing to adopt a recommendation for the City Council of changes to the Demo Ordinance. The Planning Commission deferred a final recommendation pending recommendations from the 4x4 Joint Task Force Committee on Housing. Staff returned to the 4x4 Joint Task Force Committee in September and October 2023 for discussion and recommendations. The Planning Commission conducted a public hearing at its December 6, 2023 meeting and moved to create a Subcommittee to review the proposed ordinance in detail, and to consider suggestions and recommendations made by Commissioners at that meeting. The Subcommittee met on December 20, 2023 and recommended a number of changes to the ordinance. At its meeting of January 17, 2024, the Planning Commission held a public hearing and made a recommendation to the City Council.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

California Public Resource Code Section 21065 defines a "project" under CEQA as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." The proposed ordinance amendments relate only to the requirements to demolish existing structures, and would not result in any physical changes to the environment. The proposed ordinance does not consist of a discretionary action that would permit or cause any direct or indirect change in the environment. The proposed ordinance is therefore not a project under CEQA.

RATIONALE FOR RECOMMENDATION

The proposed ordinance includes changes required by state law, as well as policy changes recommended by the 4x4 Joint Committee Task Force on Housing and the Planning Commission.

ALTERNATIVE ACTIONS CONSIDERED

The December 9, 2023 and January 17, 2024 Planning Commission agenda reports include rationales for the provisions included in the proposed ordinance, and note some of the alternative policies considered. Most notable among these alternative suggestions were the treatment of ADUs similarly to any other residential unit, and permitting the demolition of single-family dwellings with a ZC.

A notable difference between the recommendations from the 4x4 Committee and the Planning Commission was the definition of Comparable Unit. The 4x4 Committee had recommended a definition which included a unit of similar size, in a similar location within the city, with similar amenities, notably private open space. The Planning Commission opted for a slightly different recommendation that included similar shared *indoor* amenities and did not include private open space. The Planning Commission felt that offering comparable private open space after the demolition of, for example, an existing single-family dwelling with a large back yard, could limit the redevelopment potential of single-family parcels.

CONTACT PERSON

Justin Horner, Associate Planner, Planning and Development Department, 510-981-5754.

Attachments:

- 1: Proposed Ordinance, redlined version.
- 2: Proposed Ordinance, clean version.
- 3: Replacement Unit Provisions, Examples
- 4: Existing Demolition Ordinance (BMC 23.326)
- 5: Planning Commission Reports: December 9, 2023 and January 17, 2024.
- 6: Public Hearing Notice

ORDINANCE NO.

AMENDING BERKELEY MUNICIPAL CODE CHAPTER 23.326, DEMOLITION
AND DWELLING UNIT CONTROLS

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

Section 1. That Berkeley Municipal Code Chapter 23.326 is hereby amended to read as follows:

23.326 DEMOLITION AND DWELLING UNIT CONTROL

Sections:

23.326.010– Chapter Purpose.

23.326.020– General Requirements.

23.326.030– ~~Eliminating Dwelling Units through~~ Demolition of Residential Units.

23.326.040– Eliminating Dwelling Units through Combination with Other Units.

~~Conversion and Change of Use~~

23.326.050—Demolition of Accessory Buildings.

23.326.0560 – Private Right of Action.

~~23.326.060—Elimination of Residential Hotel Rooms~~

23.326.070– Demolitions of Non-Residential Buildings.

23.326.080– Building Relocations.

23.326.090– Limitations.

23.326.100—Severability.

23.326.010 – Chapter Purpose

This chapter establishes demolition and dwelling unit control standards that promote the affordable housing, aesthetic, and safety goals of the City.

23.326.020 – General Requirements

A. **Applicability.** No ~~dwelling unit Residential Unit(s) or units~~ may be eliminated or demolished except as authorized by this chapter.

1. “Residential Unit” means, for purposes of this Chapter, any Dwelling Unit, any Live-Work Unit, any Residential Hotel unit, or any bedroom of a Group Living Accommodation (GLA), except a GLA in a University-recognized fraternity, sorority or co-op, or any lawfully-permitted Accessory Dwelling Unit (“ADU”) of Junior Accessory Dwelling Unit (“JADU”).

2. “Residential Unit” includes Dwelling Units, ADUs, or JADUs created without proper zoning approvals or Building Permit(s) if they have been registered

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with the Rent Stabilization Board, or the Rent Stabilization Board has otherwise determined that a tenant-landlord relationship existed during the preceding five years.

3. “Residential Unit” does not include a lawfully-permitted ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU, as defined in BMC Chapter 23.306, where the landlord also occupies a unit in the same property as their principal residence. This shall only apply to properties containing a single ADU or JADU, shall only apply to units compliant with all applicable requirements of BMC Chapter 23.306 (“Accessory Dwelling Units”), and shall only apply to tenancies created after November 7, 2018.
4. “Comparable Unit” means a Residential Unit of similar size (square footage and number of bedrooms), common interior amenities, and location within the city (neighborhood and school attendance area). In the case of a Single-Family Dwelling being replaced, a Comparable Unit is not required to have the same or similar square footage or the same number of total rooms, but must provide the same number of bedrooms if the Single-Family Dwelling includes three or fewer bedrooms, or three bedrooms if the Single-Family Dwelling contains four or more bedrooms.
5. “Protected Unit” includes a Residential Unit:
 - a. Subject to a low-income deed restriction for any of the previous five years;
 - b. Subject to rent or price control under BMC Chapter 13.76; or
Rented by a household at 50% Area Median Income or lower within the previous five years.

~~B. **Findings.** In addition to the requirements below, the Zoning Adjustments Board (ZAB) may approve a Use Permit to eliminate or demolish a dwelling unit only upon finding that eliminating the dwelling unit would not be materially detrimental to the housing needs and public interest of the affected neighborhood and Berkeley.~~

23.326.030 – Eliminating Dwelling Units through Demolition of Residential Units

~~A. **Buildings with Two or More Units Constructed Before June 1980.**~~

- ~~1. **Applicability.** This subsection only applies to building with two or more units constructed before June 1980.~~
- ~~2. **Limitation.**~~

~~(a) **A.** Demolition is not allowed if:~~

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1. The ~~building~~ Residential Unit(s) was removed from the rental market under the Ellis Act through a no-fault eviction during the preceding five years; or
2. There ~~have been verified cases~~ is substantial evidence of harassment or threatened or actual illegal eviction during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, whose determination may be appealed to the Rent Stabilization Board.

~~(b) Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner. The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The ZAB shall determine whether harassment or threatened or actual illegal eviction occurred.~~

3B. Procedure and Findings.

~~1. The ZAB may approve a~~ A Use Permit is required to eliminate or demolish one or more Residential Units, except where otherwise provided by the Zoning Ordinance. a building constructed before June 1980 on a property containing two or more dwelling units ~~The ZAB shall only approve the Use Permit if any one of the following~~ are is true:

- (a) The building containing the ~~units~~ Residential Unit(s) is hazardous or unusable and is infeasible to repair.
- (b) The building containing the ~~units~~ Residential Units(s) will be moved to a different location within Berkeley with no net loss of units and no change in the affordability levels of the unit(s).
- ~~(c) The demolition is necessary to permit construction of special housing needs facilities such as, but not limited to, childcare centers and affordable housing developments that serve the greater good of the entire community.~~
- ~~(d)~~ (c) The demolition is necessary to permit construction approved pursuant to this chapter of at least the same number of dwelling units.

2. A Single-Family Dwelling without sitting tenants can be demolished with an AUP, if the demolition is part of a development project that would result in a net increase in residential density.

3. In the event of a demolition of a Protected Unit created without proper Use Permit(s) or Building Permit(s), as defined in 23.326.020(A)(2), the Building Official, Zoning Officer or Fire Marshal may determine that the replacement of such a unit is infeasible and not required under this Chapter. Such a

determination shall include a finding that the replacement of the unit could not occur in compliance with Zoning Code, Building Code, Fire Code or other regulations related to public health and safety

C. Landmarks and Structures of Merit. Demolition of a designated landmark or structure of merit, or of a structure in a designated historical district, must be approved by the Landmarks Preservation Commission, pursuant to Chapter 3.24.

4. Fee Required.

~~(a) The applicant shall pay a fee for each unit demolished to mitigate the impact of the loss of affordable housing in Berkeley.~~

~~(b) The amount of the fee shall be set by resolution of the City Council.~~

~~(c) In Lieu of a Fee.~~

~~1. In lieu of paying the impact fee, the applicant may provide a designated unit in the new project at a below market rate to a qualifying household in perpetuity.~~

~~2. The affordability level of the below market rent and the income level of the qualifying household shall be set by resolution of the City Council.~~

~~3. The applicant shall enter into a regulatory agreement with the City of Berkeley to provide the in lieu units.~~

D. Conditions of Approval. Any Protected Unit that is demolished shall be replaced with a Comparable Unit that shall comply with the affordability requirements in Chapter 23.328 [Affordable Housing Requirements] and Chapter 23.330 [Density Bonus] as they may be amended from time to time.

1. In the event that a displaced household has an income below 50% AMI, a Comparable Unit shall be offered at a rent that is affordable to households at 30% of AMI, and the displaced household shall have the first right of refusal for that unit. Such a Comparable Unit shall be counted as a Very Low-Income unit for applicable affordability requirements in Chapter 23.328.

2. In the event that a demolished Residential Unit is not a Protected Unit and the income of the displaced household is unknown, the Residential Unit shall be presumed to have been occupied by Low- or Lower-Income households in the same proportion as Residential Units throughout the City. The City shall rely upon US Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy (CHAS) data to determine the number of such Residential Units that must be replaced with Affordable Units as defined in Chapter 23.328.

3. In the event that a Protected Unit was subject to rent or price controls under BMC Chapter 13.76, and the income level of the displaced household is unknown, the unit shall be replaced with an Affordable Unit as defined in Chapter 23.328.

E. Requirements for Occupied Units.

~~(a)1. **Applicability.** These requirements do not apply to tenants who move in after the application for demolition is submitted to the City if the owner informs each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.~~

~~1. The requirements in this subsection apply if units to be demolished are occupied.~~

~~2. These requirements do not apply to tenants who move in after the application for demolition is submitted to the City if the owner informs each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.~~

~~(b)2. **Notice.** The applicant shall provide all sitting tenants notice of the application to demolish the building no later than the date it is submitted to the City, including notice of their rights under Municipal Code Section 13.76 (Rent Stabilization and Eviction for Good Cause Program), Chapter 13.77 (Requirements, Procedures, Restrictions and Mitigations Concerning the Withdrawal of Residential Rental Accommodations from Rent or Lease), 13.79 (Tenant Protections: Automatically Renewing Leases and Buyout Agreements) and 13.84 (Relocation Services and Payments for Residential Tenant Households).~~

~~(c)3. **General Requirements.** The applicant shall provide moving and relocation assistance equivalent to the requirements set forth in Municipal Code Chapter 13.84 (Relocation Services and Payments for Residential Tenant Households) or Government Code section 66300.6(b)(4)(A), whichever requires greater relocation assistance to displaced tenants, and shall not be subject to the limitations in section 13.84.070.B.3(a). The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy. Within five days of the issuance of the Certificate of Occupancy, tenants shall be notified in writing that the units will be ready for move-in on a date specified. Tenants shall confirm in writing their intent to lease the available unit at any time before 20 days after the issuance of the Certificate of Occupancy. Funding for the rent differential shall be guaranteed in a manner approved by City Council Resolution; provided, however, that any project that is carried out or funded by the state or federal government shall be subject to applicable provisions of the California Relocation Act (Government Code section 7260 et seq.) and/or~~

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the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. sections 4601- 4655).

~~The applicant shall provide assistance with moving expenses equivalent to in Chapter 13.84 (Relocation Services and Payments for Residential Tenant Households).~~

~~3. The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy. Funding for the rent differential shall be guaranteed in a manner approved by the City.~~

~~3.(a) *Exception.* An applicant who proposes to construct a 100 percent affordable housing project is not required to comply with this subsection but must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended and the California Relocation Act (Government Code sections 7260 et seq.).~~

~~*(b) Exception for Tenants in ADUs and Unpermitted Units that Cannot Be Replaced.* Applicants are required to provide moving and relocation assistance, in an amount provided in BMC Section 13.76.130(A)(9)(g), to the following groups of tenants: (i) tenants who occupy a lawfully-permitted ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU, where the landlord also occupies a unit in the same property as his/her principal residence; and (ii) tenants who occupy a unit created without proper zoning approvals that cannot be replaced for public health or safety reasons, pursuant to BMC Section 23.326.030(B)(3). However, applicants are not required to (i) provide such tenants with a temporary replacement unit while a new unit is being constructed, (ii) notify such tenants when a new unit is ready for occupancy; or (iii) provide such tenants with a right for first refusal for the new unit.~~

~~(d)4. *Sitting Tenants Rights.*~~

~~(a) *Sitting Any tenants of a Protected Unit that is permitted to be demolished under this section who are displaced as a result of demolition shall be provided have the right of first refusal to move interest a Comparable Unit in the new building project.*~~

~~(b) *In the event that a displaced household is ineligible for below-market rate replacement units, a market rate Comparable Unit shall be made available to that household at the same rent as had been previously charged, or a lesser rent if that is the market rate. Tenants of units that are demolished shall have the right of first refusal to rent new below-market rate units designated to replace the units that were demolished,*~~

Internal

~~at the rent that would have applied if they had remained in place, as long as their tenancy continues.~~

~~(c) Where a displaced tenant exercises the right to rent a Comparable Unit, any increase in rent for the Comparable Unit for the duration of their tenancy shall be no greater than the lesser of 65% of the increase in the Consumer Price Index for All Urban Consumers (CPI-U) in the San Francisco-Oakland-San Jose region (as reported and published by the U.S. Department of Labor, Bureau of Labor Statistics for the twelve-month period ending the previous December 31) or 65% of the corresponding increase in Area Median Income (AMI) for the same calendar year. Income restrictions do not apply to displaced tenants.~~

~~(d) Exceptions.~~

- ~~i. An applicant who proposes to construct a 100 percent affordable housing project is not required to comply with 23.326.030.A.4.a, b, and c, the preceding requirements but must comply with the following requirement.~~
- ~~ii. Sitting tenants who are displaced as a result of demolition and who desire to return to the newly constructed building will be granted a right of first refusal subject to their ability to meet income qualifications and other applicable eligibility requirements when the new units are ready for occupancy.~~

~~B. Buildings with a Single Dwelling Unit.~~

~~1. Applicability. This subsection only applies to buildings with a single dwelling unit.~~

~~2. Limitation.~~

~~(a) Demolition is not allowed if:~~

- ~~i. The building was removed from the rental market under the Ellis Act during the preceding five years; or~~
- ~~ii. There have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years.~~

~~(b) Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner. The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The ZAB shall determine whether harassment or threatened or actual illegal eviction occurred.~~

~~C. **Accessory Buildings.** Notwithstanding anything in Municipal Code Title 23 (Zoning Ordinance) to the contrary, but subject to any applicable requirements in Municipal Code Section 3.24 (Landmarks Preservation Ordinance), accessory buildings of any size, including, but not limited to, garages, carports, and sheds, but not including any structure containing a lawfully established dwelling unit, which serves and is located on the same lot as a lawful residential use, may be demolished by right.~~

23.326.040 – Eliminating Dwelling Units through ~~Conversion and Change of Use~~ Combination with Other Units

A. ~~*Process for Projects Where Density Exceeds Current Allowance*~~ **General.** ~~The ZAB may approve a A Use Permit is required to eliminate one or more Residential Units by combing with another unit when the existing development exceeds currently-allowable density. for the elimination of a dwelling unit in combination with another dwelling unit used for occupancy by a single household. The ZAB shall approve a Use Permit for the elimination of one or more Residential Units by combining with another unit only if it finds that:~~

1. The existing number of ~~dwelling units~~Residential Units exceeds ~~the current~~ maximum allowed residential density in the district where the building is located; and
2. One of the following is true:
 - (a) One of the affected dwelling units has been owner-occupied ~~by the applicant's household~~ as it's a principal place of residence for no less than two years before the date of the application and none of the affected units are currently occupied by a tenant.
 - (b) All of the affected ~~dwelling units~~Residential Units are being sold by an estate and the decedent occupied the units as their principal residence for no less than two years before the date of their death.

B. *Limitations.* ~~Demolition-Combination~~ is not allowed if:

1. The building was removed from the rental market ~~under the Ellis Act~~through a no-fault eviction during the preceding five years; or
2. There ~~have been verified cases~~ is substantial evidence of harassment or threatened or actual illegal eviction during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, whose determination may be appealed to the Rent Stabilization Board. ~~The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The~~

~~ZAB shall determine whether harassment or threatened or actual illegal eviction occurred.~~

C. ~~Effect of Noncompliance with the Two-Year~~ Occupancy Requirement Following Elimination.

1. ~~In a unit eliminated under Subsection A (General)~~ If a Residential Unit that is eliminated through combination is not owner-occupied by the applicant's household for at least two consecutive years from the date of elimination, the affected ~~unit~~ Residential Unit must be restored to separate status.
2. This requirement shall be implemented by a condition of approval and a notice of limitation on the property, acceptable to the City of Berkeley.
3. The condition and notice will provide that if the ~~owner's household does not occupy the unit~~ Residential Unit is not owner-occupied for at least two years from the date of elimination the affected units must either be restored as separate dwelling units and the vacant unit(s) offered for rent within six months or the owner must pay a fee of \$75,000 in 2013 dollars, adjusted in May of each year according to the Consumer Price Index for the San Francisco Bay Area. The fee shall be deposited into the City of Berkeley's Housing Trust Fund.
4. The City of Berkeley may exempt an applicant from the two-year residency requirement if of an unforeseeable life change that requires relocation.

D. *Effect of Eliminating a Dwelling Unit.*

1. If eliminating a ~~dwelling unit~~ Residential Unit reduces the number of units in a building to four or fewer, the applicant shall record a notice of limitation against the subject property that the limitation on eviction of tenants under Chapter 13 (Public Peace, Morals and Welfare) shall continue to apply until:
 - (a) The building is demolished; or
 - (b) Sufficient units are added or restored such that the building contains at least five units.
2. The Zoning Officer may issue an AUP for a building conversion which eliminates a ~~dwelling unit~~ Residential Unit upon finding that the conversion will restore or bring the building closer to the original number of dwelling units that was present at the time it was first constructed, provided the conversion meets the requirements 23.326.040.A.1 and 2 and 23.326.040.B and C.

E. *Exceptions.* The ZAB may approve a Use Permit to eliminate a dwelling unit through combination with another dwelling unit for the purpose of providing private bathrooms, kitchenettes, accessibility upgrades, and/or seismic safety upgrades, or other elements required by funding sources or programmatic needs to single-

residential occupancy rooms in residential developments undergoing a publicly-funded rehabilitation.

- ~~1. The ZAB may approve a Use Permit for a change of use to a community care or a child care facility which eliminates a dwelling unit if it finds that such use is in conformance with the regulations of the district in which it is located.~~
- ~~2. The ZAB may approve a Use Permit to eliminate a dwelling unit through combination with another dwelling unit for the purpose of providing private bathrooms, kitchenettes, accessibility upgrades, and/or seismic safety upgrades to single-residential occupancy rooms in residential developments undergoing a publicly-funded rehabilitation.~~
- ~~3. Notwithstanding the general Use Permit requirement under 23.326.020 (General Requirements), a lawfully established accessory dwelling unit that is not a controlled rental unit may be eliminated with a Zoning Certificate if:

 - ~~(a) The re-conversion restores the original single-family use of the main building or lot; and~~
 - ~~(b) No tenant is evicted.~~~~

23.326.050 – Private Right of Action Demolition of Accessory Buildings.

A. Notwithstanding anything in Municipal Code Title 23 (Zoning Ordinance) to the contrary, but subject to any applicable requirements in Municipal Code Section 3.24 (Landmarks Preservation Ordinance), Accessory Buildings of any size, including, but not limited to, garages, carports, and sheds may be demolished by right except where the Accessory Building is occupied by a residential tenant (regardless of whether it is lawfully permitted) or otherwise contains a lawfully established Residential Unit, which serves and is located on the same lot as a lawful residential use. Such Accessory Buildings are considered Residential Units for the purposes of this Chapter.

23.326.060 – Elimination of Residential Hotel Rooms Private Right of Action

A. Any affected tenant may bring a private action for injunctive and/or compensatory relief against any applicant and/or owner to prevent or remedy a violation of Sections 23.326.030 (Eliminating Dwelling Units through Demolition) and 23.326.040 (Eliminating Dwelling Units through Conversion and Change of Use). In any such action a prevailing plaintiff shall recover reasonable attorney's fees.

~~A. **General Requirements.** Before removal, the following requirements must be met for the ZAB to approve a Use Permit for the elimination of residential hotel rooms:~~

- ~~1. The residential hotel owner shall provide or cause to be provided standard housing of at least comparable size and quality, at comparable rents and total monthly or weekly charges to each affected tenant~~

~~2. One of the following three requirements shall be met:~~

- ~~(a) The residential hotel rooms being removed are replaced by a common-use facility, including, but not limited to, a shared kitchen, lounge, or recreation room, that will be available to and primarily of benefit to the existing residents of the residential hotel and that a majority of existing residents give their consent to the removal of the rooms.~~
- ~~(b) Before the date on which the residential hotel rooms are removed, one-for-one replacement of each room to be removed is made, with a comparable room, in one of the methods set forth in this section.~~
- ~~(c) Residential hotel rooms are removed because of building alterations related to seismic upgrade to the building or to improve access to meet the requirements of the American Disabilities Act (ADA).~~

~~B. **Criteria for Replacement Rooms.** For purposes of this section, replacement rooms must be:~~

- ~~1. Substantially comparable in size, location, quality, and amenities;~~
- ~~2. Subject to rent and eviction controls substantially equivalent to those provided by the Rent Stabilization Ordinance or those that applied to the original rooms which are being replaced; and~~
- ~~3. Available at comparable rents and total monthly or weekly charges to those being removed. Comparable rooms may be provided by:~~
 - ~~(a) Offering the existing tenants of the affected rooms the right of first refusal to occupy the replacement rooms;~~
 - ~~(b) Making available comparable rooms, which are not already classified as residential hotel rooms to replace each of the rooms to be removed; or~~
 - ~~(c) Paying to the City of Berkeley's Housing Trust Fund an amount sufficient to provide replacement rooms.

 - ~~1. The amount to be paid to the City of Berkeley shall be the difference between the replacement cost, including land cost, for the rooms and the amount which the City of Berkeley can obtain by getting a mortgage on the anticipated rents from the newly constructed rooms.~~
 - ~~2. The calculations shall assume that rents in the newly constructed rooms shall not exceed the greater of either a level comparable to the weekly or monthly charges for the replaced rooms or the level which would be charged if no current tenant paid more than 30 percent of such tenant's gross income for rent.~~~~

~~C. **Exception for Non-Profit Ownership.** In a residential hotel owned and operated by a non-profit organization, recognized as tax-exempt by either the Franchise Tax~~

~~Board and/or the Internal Revenue Service, residential hotel rooms may be changed to non-residential hotel room uses if the average number of residential hotel rooms per day in each calendar year is at least 95 percent of residential hotel rooms established for that particular residential hotel.~~

23.326.070 – Demolitions of Non-Residential Buildings

- A. **Main Non-Residential Buildings.** A Use Permit is required to demolish a main building used for non-residential purposes ~~may be demolished with a Use Permit on any lot.~~
- B. **Accessory Buildings.**
1. Demolishing an accessory building with less than 300 square feet of floor area is permitted as of right.
 2. An accessory building with 300 square feet or more of floor area may be demolished with an AUP.
- C. **Landmarks Preservation Commission Review.**
1. Any application for a Use Permit or AUP to demolish a non-residential building or structure which is 40 or more years old shall be forwarded to the Landmarks Preservation Commission (LPC) for review before consideration of the Use Permit or AUP.
 2. The LPC may initiate a landmark or structure-of-merit designation or may choose solely to forward to the ZAB its comments on the application.
 3. The ZAB or Zoning Officer shall consider the recommendations of the LPC ~~in~~ when acting on the application.
- D. **Findings.** A Use Permit or an AUP for demolition of a non-residential building or structure may be approved only if the ZAB or the Zoning Officer finds that:
1. The demolition will not be materially detrimental to the commercial needs and public interest of any affected neighborhood or the City of Berkeley; and
 2. The demolition:
 - (a) Is required to allow a proposed new building or other proposed new use;
 - (b) Will remove a building which is unusable for activities which are compatible with the purposes of the district in which it is located or which is infeasible to modify for such uses;
 - (c) Will remove a structure which represents an inhabitable attractive nuisance to the public; or
 - (d) Is required for the furtherance of specific plans or projects sponsored by the City of Berkeley or other local district or authority upon a

demonstration that it is infeasible to obtain prior or concurrent approval for the new construction or new use ~~which is contemplated by such specific plans or projects and that adhering to such a requirement would threaten the viability of the plan or project.~~

23.326.080 – Building Relocations

A. Treatment of Building Relocation.

1. Relocating a building from a lot is considered a demolition for purposes of this chapter.
2. Relocating a building to a lot is considered new construction and is subject to all requirements applicable to new construction.
3. When a building is relocated to a different lot within ~~in~~ Berkeley, the lot from which the building is removed shall be known as the source lot and the lot on which the building is to be sited shall be known as the receiving lot. In such cases all notification requirements apply to both the source and receiving lots.

B. Findings. The ZAB may approve a Use Permit to relocate a building upon finding that:

5. The building to be relocated is not in conflict with the architectural character, or the building scale of the neighborhood or area to which it will be relocated; and
6. The receiving lot provides adequate separation of buildings, privacy, yards, and usable open space.

23.326.090 – Limitations

A. Unsafe, Hazard, or Danger.

1. Notwithstanding anything to the contrary, if a building or structure is unsafe, presents a public hazard, and is not securable and/or is in imminent danger of collapse so as to endanger persons or property, as determined by the city's ~~building official~~ Building Official, it may be demolished without a Use Permit.
2. The Building Official's determination in this matter shall be governed by the standards and criteria in the most recent edition of the California Building Code that is in effect in the City of Berkeley.

B. Ellis Act. This chapter shall be applied only to the extent permitted by state law as to buildings which have been entirely withdrawn from the rental market pursuant to the Ellis Act (California Government Code Chapter 12.75).

23.326.100 Severability.

A. If any part or provision of this Chapter, or the application of this Chapter to any person or circumstance, is held invalid, the remainder of this Chapter, including the application of such part or provision to other persons or circumstances, shall not be affected by such a holding and shall continue in full force and effect. To this end, the provisions of this Chapter are severable.

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

ORDINANCE NO.

AMENDING BERKELEY MUNICIPAL CODE CHAPTER 23.326, DEMOLITION AND DWELLING UNIT CONTROLS

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

Section 1. That Berkeley Municipal Code Chapter 23.326 is hereby amended to read as follows:

Chapter 23.326 DEMOLITION AND DWELLING UNIT CONTROLS

Sections:

- 23.326.010 Chapter Purpose.
- 23.326.020 General Requirements.
- 23.326.030 Demolition of Residential Units.
- 23.326.040 Eliminating Dwelling Units through Combination with Other Units.
- 23.326.050 Demolition of Accessory Buildings.
- 23.326.060 Private Right of Action.
- 23.326.070 Demolitions of Non-Residential Buildings.
- 23.326.080 Building Relocations.
- 23.326.090 Limitations.
- 23.326.100 Severability

23.326.010 Chapter Purpose.

This chapter establishes demolition and dwelling unit control standards that promote the affordable housing, and safety goals of the City.

23.326.020 General Requirements.

A. No Residential Unit(s) may be eliminated or demolished except as authorized by this chapter.

1. "Residential Unit" means, for purposes of this Chapter, any Dwelling Unit, any Live-Work Unit, any Residential Hotel unit, any bedroom of a Group Living Accommodation (GLA), except a GLA in a University-

recognized fraternity, sorority or co-op, or any lawfully-permitted Accessory Dwelling Unit (“ADU”) or Junior Accessory Dwelling Unit (“JADU”).

2. “Residential Unit” includes Dwelling Units, ADUs, or JADUs created without proper zoning approvals or Building Permit(s) if they have been registered with the Rent Stabilization Board, or the Rent Stabilization Board has otherwise determined that a tenant-landlord relationship existed during the preceding five years.
3. “Residential Unit” does not include a lawfully-permitted ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU, as defined in BMC Chapter 23.306, where the landlord also occupies a unit in the same property as their principal residence. This shall only apply to properties containing a single ADU or JADU, shall only apply to units compliant with all applicable requirements of BMC Chapter 23.306 (“Accessory Dwelling Units”), and shall only apply to tenancies created after November 7, 2018.
4. “Comparable Unit” means a Residential Unit of similar size (square footage and number of bedrooms), common interior amenities, and location within the city (neighborhood and school attendance area). In the case of a Single-Family Dwelling being replaced, a Comparable Unit is not required to have the same or similar square footage or the same number of total rooms, but must provide the same number of bedrooms if the Single-Family Dwelling includes three or fewer bedrooms, or at least three bedrooms if the Single-Family Dwelling contains four or more bedrooms.
5. “Protected Unit” includes a Residential Unit:
 - a. Subject to a low-income deed restriction for any of the previous five years;
 - b. Subject to rent or price control under BMC Chapter 13.76; or
 - c. Rented by a household at 50% Area Median Income or lower within the previous five years.

23.326.030 Demolition of Residential Units.

A. Demolition is not allowed if:

1. The Residential Unit(s) was removed from the rental market through a no-fault eviction during the preceding five years; or
2. There is substantial evidence of harassment or threatened or actual illegal eviction during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, whose determination may be appealed to the Rent Stabilization Board.

B. Procedure and Findings.

1. A Use Permit is required to eliminate or demolish one or more Residential Units, except where otherwise provided by the Zoning Ordinance. The ZAB shall only approve the Use Permit if one of the following is true:
 - (a) The building containing the Residential Unit(s) is hazardous or unusable and is infeasible to repair.
 - (b) The building containing the Residential Unit(s) will be moved to a different location within Berkeley with no net loss of units and no change in the rent levels of the unit(s).
 - (c) The demolition is necessary to permit construction approved pursuant to this Chapter of at least the same number of Dwelling Units.
2. A Single-Family Dwelling without sitting tenants can be demolished with an AUP, if the demolition is part of a development project that would result in a net increase in residential density.
3. In the event of a demolition of a Residential Unit created without proper zoning approvals or Building Permit(s), as defined in 23.326.020(A)(2), the Building Official, Zoning Officer or Fire Marshal may determine that the replacement of such a unit is infeasible and not required under this Chapter. Such a determination shall include a finding that the replacement of the unit could not

occur in compliance with Zoning Code, Building Code, Fire Code or other regulations related to public health and safety.

C. *Landmarks and Structures of Merit.* Demolition of a designated landmark or structure of merit, or of a structure in a designated historic district, must be approved by the Landmarks Preservation Commission, pursuant to Chapter 3.24.

D. *Conditions of Approval.* Any Protected Unit that is demolished shall be replaced with a Comparable Unit that shall comply with the maximum allowable rent requirements for Affordable Units in Chapter 23.328 [Affordable Housing Requirements] and Chapter 23.330 [Density Bonus] as they may be amended from time to time.

1. In the event that a displaced household has an income below 50% AMI, a Comparable Unit shall be offered at a rent that is affordable to households at 30% of AMI, and the displaced household shall have the first right of refusal for that unit. Such a Comparable Unit shall be counted as a Very Low-Income unit for applicable affordability requirements in Chapter 23.328.
2. In the event that a demolished Residential Unit is not a Protected Unit and the income of the displaced household is unknown, the Residential Unit shall be presumed to have been occupied by Low- or Lower-Income households in the same proportion as Residential Units throughout the City. The City shall rely upon US Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy (CHAS) data to determine the number of such Residential Units that must be replaced with Affordable Units as defined in Chapter 23.328.
3. In the event that a Protected Unit was subject to rent or price controls under BMC Chapter 13.76, and the income level of the displaced household is unknown, the unit shall be replaced with an Affordable Unit as defined in Chapter 23.328.

E. *Requirements for Occupied Units.*

1. *Applicability.* The following requirements do not apply to tenants who move in after the application for demolition is submitted to the City if the owner informs each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.
2. *Notice.* The applicant shall provide all sitting tenants and the Rent Stabilization Board notice of the application to demolish the Residential Unit(s) no later than the date the application is submitted to the City, including notice of their rights under Municipal Code Chapter 13.76 (Rent Stabilization and Eviction for Good Cause Program), Chapter 13.77 (Requirements, Procedures, Restrictions and Mitigations Concerning the Withdrawal of Residential Rental Accommodations from Rent or Lease), 13.79 (Tenant Protections: Automatically Renewing Leases and Buyout Agreements) and 13.84 (Relocation Services and Payments for Residential Tenant Households).
3. *General Requirements.* The applicant shall provide moving and relocation assistance equivalent to the requirements set forth in Municipal Code Chapter 13.84 (Relocation Services and Payments for Residential Tenant Households) or Government Code section 66300.6(b)(4)(A), whichever requires greater relocation assistance to displaced tenants, and shall not be subject to the limitations in section 13.84.070.B.3(a). The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy. Within five days of the issuance of the Certificate of Occupancy, tenants shall be notified in writing that the units will be ready for move-in on a date specified. Tenants shall confirm in writing their intent to lease the available unit at any time before 20 days after the issuance of the Certificate of Occupancy. Funding for the rent differential shall be guaranteed in a manner approved by City Council Resolution; provided, however, that any project that is carried out or funded by the state or federal government shall be subject to applicable provisions of the California Relocation Act (Government Code section 7260 *et seq.*) and/or the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. sections 4601- 4655).

(a) *Exception.* An applicant who proposes to construct a 100-percent affordable housing project is not required to comply with this subsection but must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended and the California Relocation Act (Government Code sections 7260 et seq.).

(b) *Exception for Tenants in ADUs and Unpermitted Units that Cannot Be Replaced.* Applicants are required to provide moving and relocation assistance, in an amount provided in BMC Section 13.76.130(A)(9)(g), to the following groups of tenants: (i) tenants who occupy a lawfully-permitted ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU, where the landlord also occupies a unit in the same property as his/her principal residence; and (ii) tenants who occupy a unit created without proper zoning approvals that cannot be replaced for public health or safety reasons, pursuant to BMC Section 23.326.030(B)(3). However, applicants are not required to (i) provide such tenants with a temporary replacement unit while a new unit is being constructed, (ii) notify such tenants when a new unit is ready for occupancy; or (iii) provide such tenants with a right for first refusal for the new unit.

4. *Sitting Tenants Rights.*

(a) Any tenant of a Protected Unit that is permitted to be demolished under this section shall have the right of first refusal to rent a Comparable Unit in the new project.

(b) In the event that a displaced household is ineligible for below-market rate replacement units, a market rate Comparable Unit shall be made available to that household at the same rent as had been previously charged, or a lesser rent if that is the market rate.

(c) Where a displaced tenant exercises the right to rent a Comparable Unit, any increase in rent for the Comparable Unit for the duration of their tenancy shall be no greater than the lesser of 65% of the increase in the Consumer Price Index for All Urban Consumers (CPI-U) in the San

Francisco-Oakland-San Jose region (as reported and published by the U.S. Department of Labor, Bureau of Labor Statistics for the twelve-month period ending the previous December 31) or 65% of the corresponding increase in Area Median Income (AMI) for the same calendar year.

(d) *Exceptions.*

- i. An applicant who proposes to construct a 100 percent affordable housing project is not required to comply with the preceding requirements but must comply with the following requirement.
- ii. Sitting tenants who are displaced as a result of demolition and who desire to return to the newly constructed affordable housing project will be granted a right of first refusal subject to their ability to meet income qualifications and other applicable eligibility requirements.

23.326.040 Eliminating Dwelling Units through Combination with Other Units.

A. Process for Projects Where Density Exceeds Current Allowance. A Use Permit is required to eliminate one or more Residential Units by combining with another unit when the existing development exceeds currently-allowable density. The ZAB shall approve a Use Permit for the elimination of one or more Residential Units by combining with another unit only if it finds that:

1. The existing number of Residential Units exceeds the current maximum allowed residential density in the zoning district where the units are located; and
2. One of the following is true:
 - (a) One of the affected Residential Units has been owner-occupied as a principal place of residence for no less than two years before the date of the application and none of the affected units are currently occupied by a tenant.
 - (b) All of the affected Residential Units are being sold by an estate and the decedent occupied the Residential Units as their principal

residence for no less than two years before the date of their death.

B. Limitations. Combination is not allowed if:

1. The building was removed from the rental market through a no-fault eviction during the preceding five years; or
2. There is substantial evidence of harassment or threatened or actual illegal eviction during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, whose determination may be appealed to the Rent Stabilization Board.

C. Two-Year Occupancy Requirement Following Elimination

1. If a Residential Unit that is eliminated through combination is not owner-occupied for at least two consecutive years from the date of elimination, the affected Residential Unit must be restored to separate status.
2. This requirement shall be implemented by a condition of approval and a notice of limitation on the property, acceptable to the City of Berkeley.
3. The condition of approval and notice will provide that if the Residential Unit is not owner-occupied for at least two years from the date of elimination then the affected Residential Unit(s) must either be restored as separate Residential Unit(s) and the vacant Residential Unit(s) offered for rent within six months or the owner must pay a fee of \$75,000 in 2013 dollars, adjusted in May of each year according to the Consumer Price Index for the San Francisco Bay Area. The fee shall be deposited into the City of Berkeley's Housing Trust Fund.
4. The City of Berkeley may exempt an applicant from the two-year residency requirement if there is an unforeseeable life change that requires relocation.

D. Effect of Eliminating a Residential Unit.

1. If eliminating a Residential Unit reduces the number of Residential Units in a building to four or fewer, the applicant shall record a notice of limitation against the subject property that the limitation on eviction of tenants under Chapter 13 (Public Peace, Morals and Welfare) shall continue to apply until:
 - (a) The building is demolished; or
 - (b) Sufficient Residential Units are added or restored such that the building contains at least five Residential Units.
2. The Zoning Officer may issue an AUP for a building conversion which eliminates a Residential Unit upon finding that the conversion will restore or bring the building closer to the original number of Residential Units that was present at the time it was first constructed, provided the conversion meets the requirements of 23.326.040.A.1 and 2 and 23.326.040.B and C.

E. *Exception.* The ZAB may approve a Use Permit to eliminate a Residential Unit through combination with another Residential Unit for the purpose of providing private bathrooms, kitchenettes, accessibility upgrades, and/or seismic safety upgrades, or other elements required by funding sources or programmatic needs to single resident occupancy rooms in residential developments undergoing a publicly-funded rehabilitation.

23.326.050 Demolition of Accessory Buildings.

A. Notwithstanding anything in Municipal Code Title 23 (Zoning Ordinance) to the contrary, but subject to any applicable requirements in Municipal Code Section 3.24 (Landmarks Preservation Ordinance), Accessory Buildings of any size, including, but not limited to, garages, carports, and sheds may be demolished by right except where the Accessory Building is occupied by a residential tenant (regardless of whether it is lawfully permitted) or otherwise contains a lawfully established Residential Unit, which serves and is located on the same lot as a lawful residential use. Such Accessory Buildings are considered Residential Units for the purposes of this Chapter.

23.326.060 Private Right of Action.

A. Any affected tenant may bring a private action for injunctive and/or compensatory relief

against any applicant and/or owner to prevent or remedy a violation of Sections 23.326.030 (Eliminating Dwelling Units through Demolition) and 23.326.040 (Eliminating Dwelling Units through Conversion and Change of Use). In any such action a prevailing plaintiff shall recover reasonable attorney's fees.

23.326.070 Demolitions of Non-Residential Buildings.

A. *Main Non-Residential Buildings.* A Use Permit is required to demolish a main building used for non-residential purposes on any lot.

B. *Accessory Buildings.* For any lot located in a non-residential zoning district, Accessory Buildings may be demolished as follows:

1. Demolishing an accessory building with less than 300 square feet of floor area is permitted as of right.
2. An accessory building with 300 square feet or more of floor area may be demolished with an AUP.

C. *Landmarks Preservation Commission Review.*

1. Any application for a Use Permit or AUP to demolish a non-residential building or structure that is 40 or more years old shall be forwarded to the Landmarks Preservation Commission (LPC) for review before consideration of the Use Permit or AUP.
2. The LPC may initiate a landmark or structure-of-merit designation or may choose solely to forward to the ZAB or Zoning Officer its comments on the application.
3. The ZAB or Zoning Officer shall consider the recommendations of the LPC when acting on the application.

D. *Findings.* A Use Permit or an AUP for demolition of a main building used for non-residential purposes on any lot or an accessory building located on a lot in a non-residential district may be approved only if the ZAB or the Zoning Officer finds that:

1. The demolition will not be materially detrimental to the commercial needs and public interest of any affected neighborhood or the City of Berkeley;

and

2. The demolition:

- (a) Is required to allow a proposed new building or other proposed new use;
- (b) Will remove a building which is unusable for activities which are compatible with the purposes of the district in which it is located or which is infeasible to modify for such uses;
- (c) Will remove a structure which represents an uninhabitable attractive nuisance to the public; or
- (d) Is required for the furtherance of specific plans or projects sponsored by the City of Berkeley or other local district or authority upon a demonstration by the applicant that it would be infeasible to obtain prior or concurrent approval for the new construction or new use.

23.326.080 Building Relocations.

A. Treatment of Building Relocation.

- 1. Relocating a building from a lot is considered a demolition for purposes of this chapter.
- 2. Relocating a building to a lot within the city is subject to all requirements applicable to new construction.
- 3. When a building is relocated to a different lot within Berkeley, the lot from which the building is removed shall be known as the source lot and the lot on which the building is to be sited shall be known as the receiving lot.
- 4. Nothing in this subsection shall exempt Residential Units relocated to the receiving lot from the provisions of BMC Section 13.76 after a building relocation if the Residential Units located within a building were otherwise subject to BMC Chapter 13.76 in the source lot.

B. Findings. The Zoning Officer shall approve Zoning Certificate to relocate a building

upon finding that: the resulting development on the receiving lot is in conformance with applicable zoning code development standards.

23.326.090 Limitations.

A. Unsafe, Hazard, or Danger.

1. Notwithstanding anything to the contrary, if a building or structure is unsafe, presents a public hazard, and is not securable and/or is in imminent danger of collapse so as to endanger persons or property, as determined by the city's Building Official, it may be demolished without a Use Permit.
2. The Building Official's determination in this matter shall be governed by the standards and criteria in the most recent edition of the California Building Code that is in effect in the City of Berkeley.

B. Ellis Act. This chapter shall be applied only to the extent permitted by state law as to buildings which have been entirely withdrawn from the rental market pursuant to the Ellis Act (California Government Code Chapter 12.75).

23.326.100 Severability.

A. If any part or provision of this Chapter, or the application of this Chapter to any person or circumstance, is held invalid, the remainder of this Chapter, including the application of such part or provision to other persons or circumstances, shall not be affected by such a holding and shall continue in full force and effect. To this end, the provisions of this Chapter are severable.

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

Demolition of SFH for Fourplex

Household
Above 50% AMI



Market Rate

Market Rate

Market Rate

Market Rate

Right of first refusal
Rent at prior rent
Rent controlled for sitting tenancy

Household
50% AMI or Below



Market Rate

30% AMI BMR

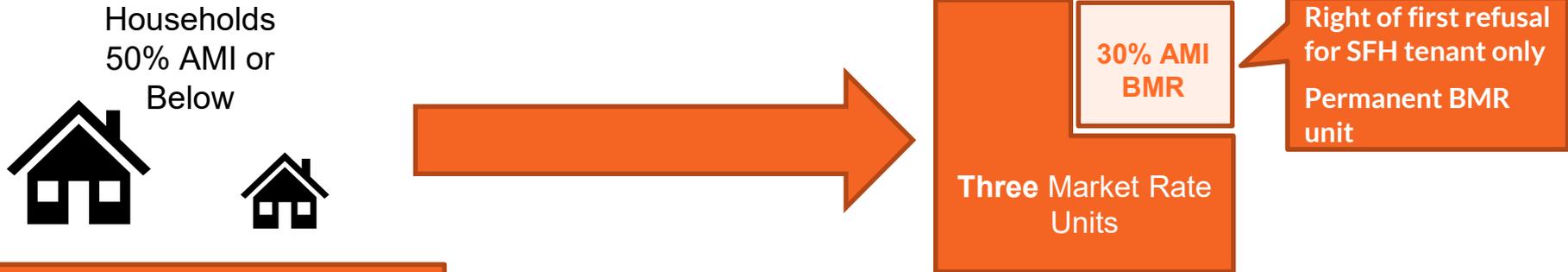
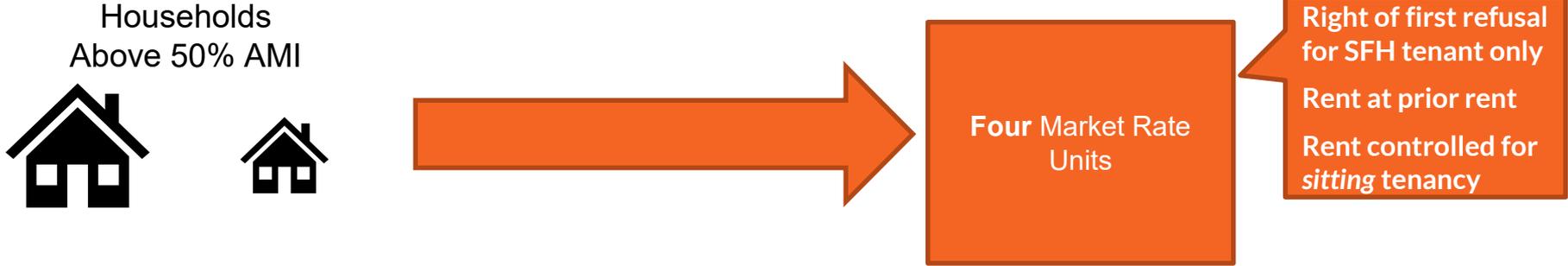
Market Rate

Market Rate

Right of first refusal
Permanent BMR unit

- Affordability Requirement
- 30% AMI for each protected unit with 50% AMI household
 - Permanently Affordable

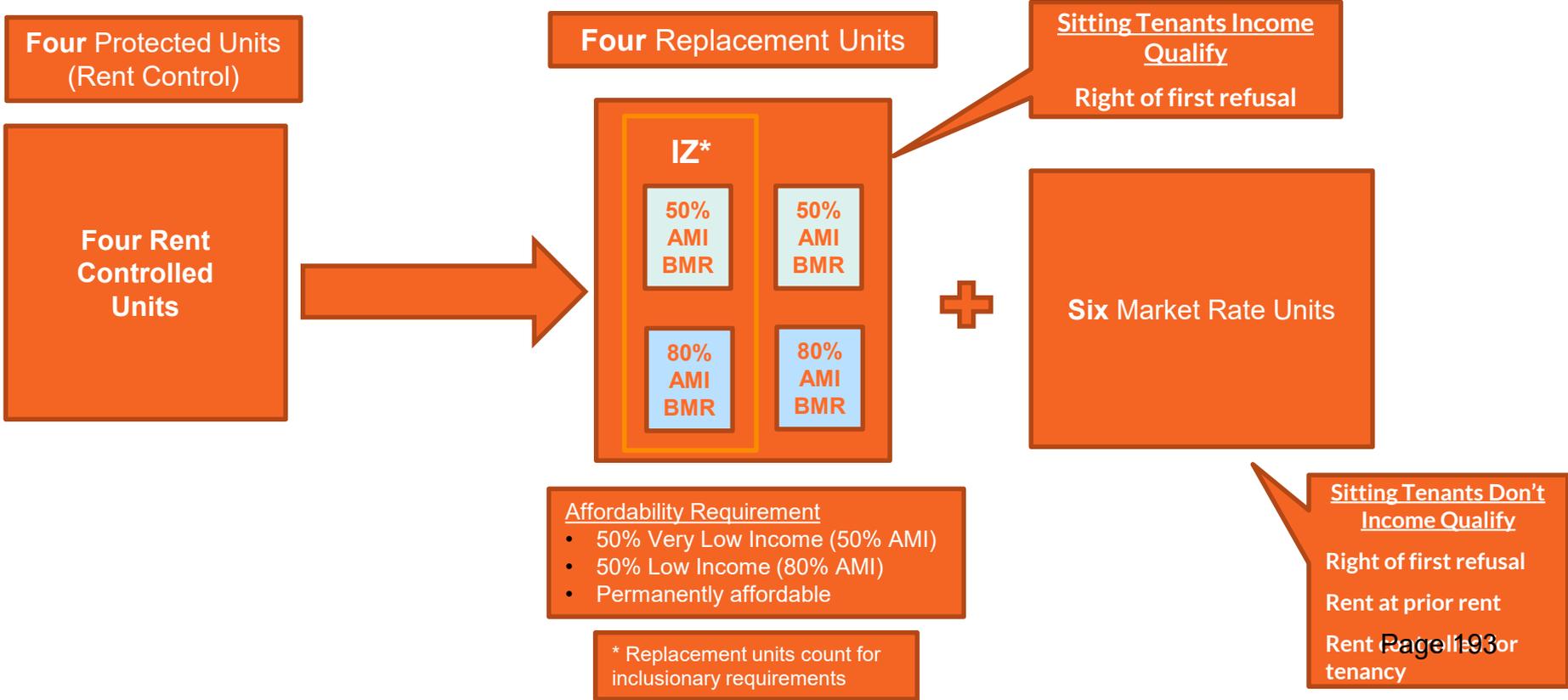
Demolition of SFH + ADU for Fourplex



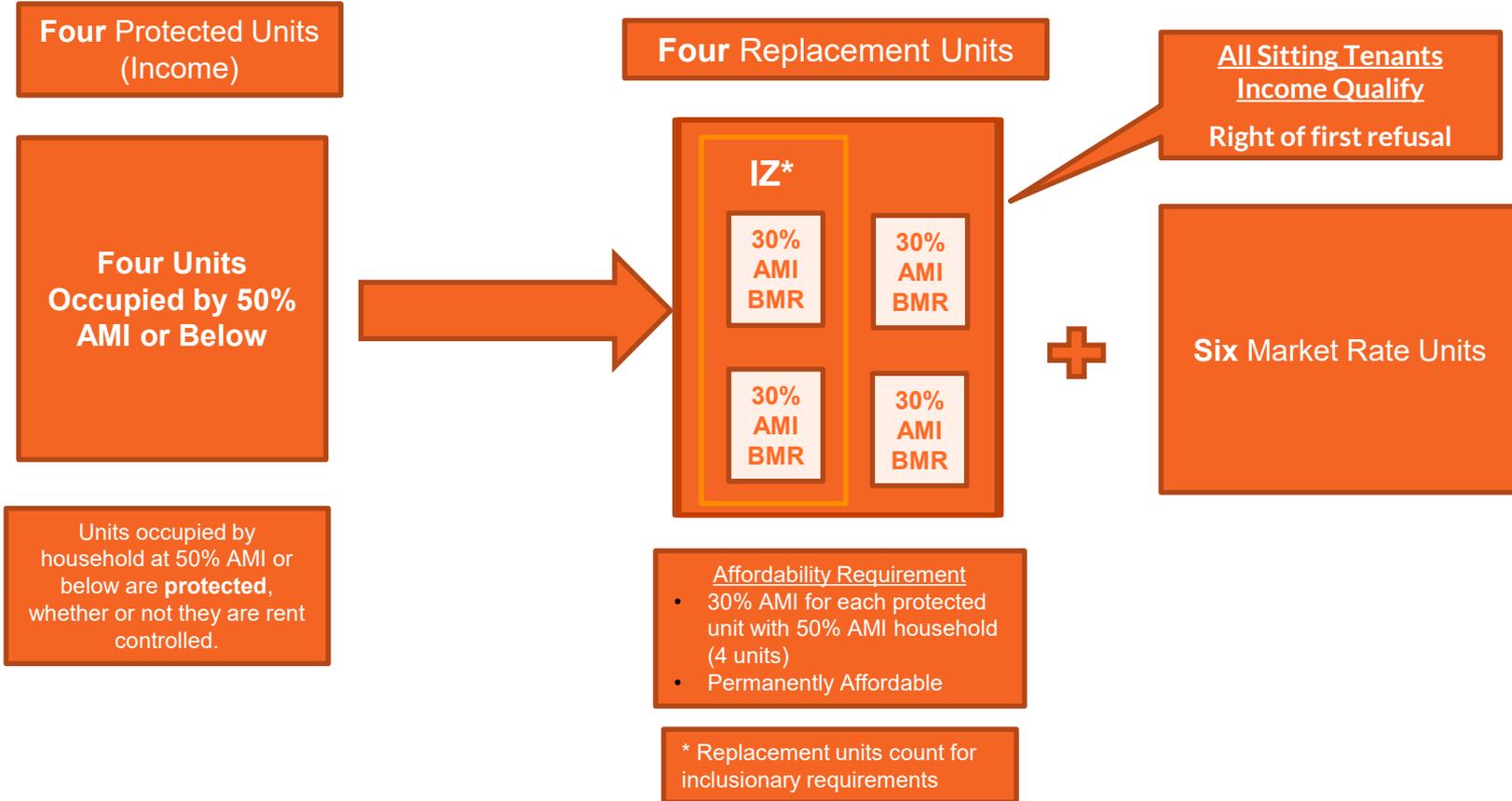
ADUs are not replaced when there is one SFH and one ADU on a lot

- Affordability Requirement
- 30% AMI for each protected unit with 50% AMI household
 - Permanently Affordable

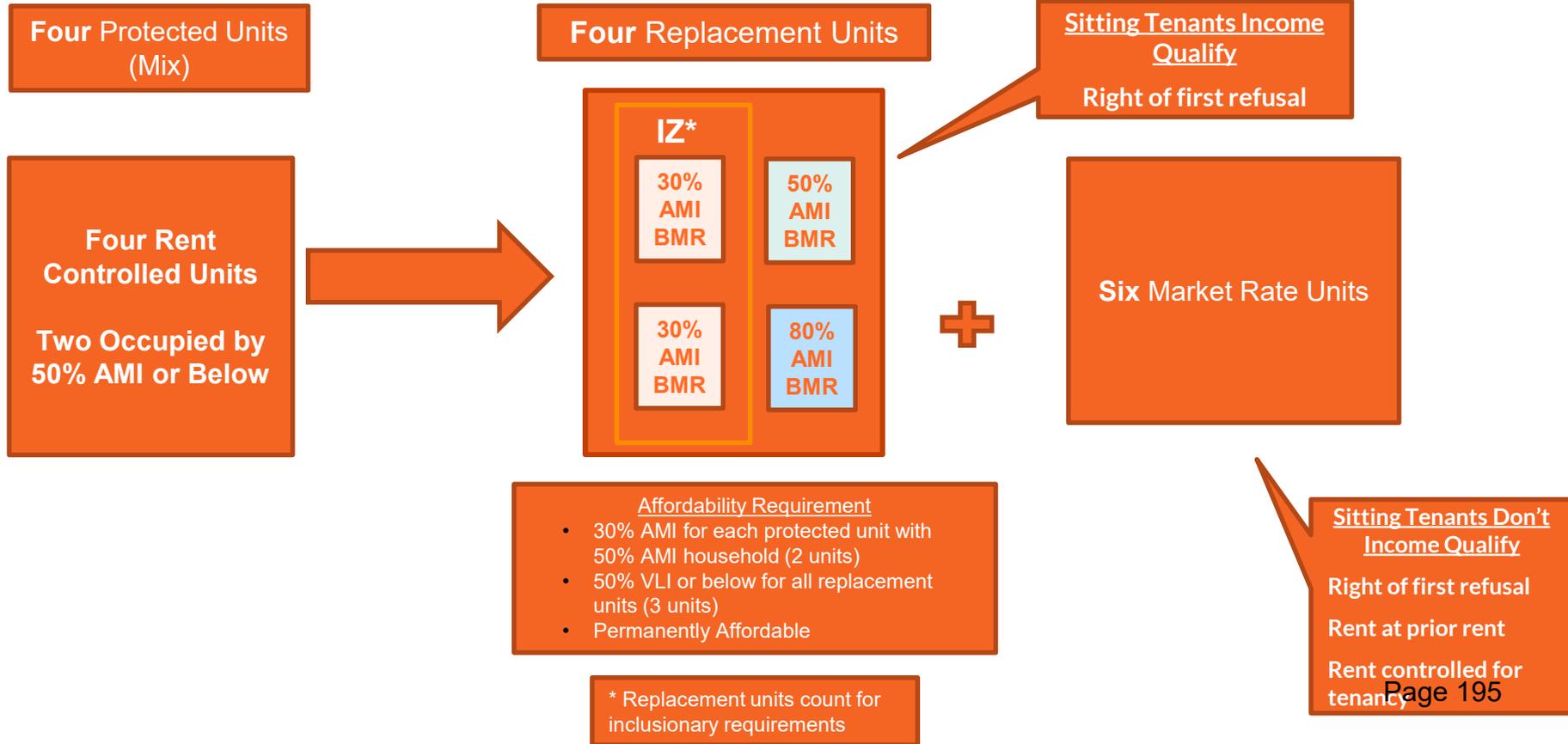
Demolition of Fourplex for Ten Units



Demolition of Rent-Controlled Fourplex for Ten Units



Demolition of Fourplex for Ten Units

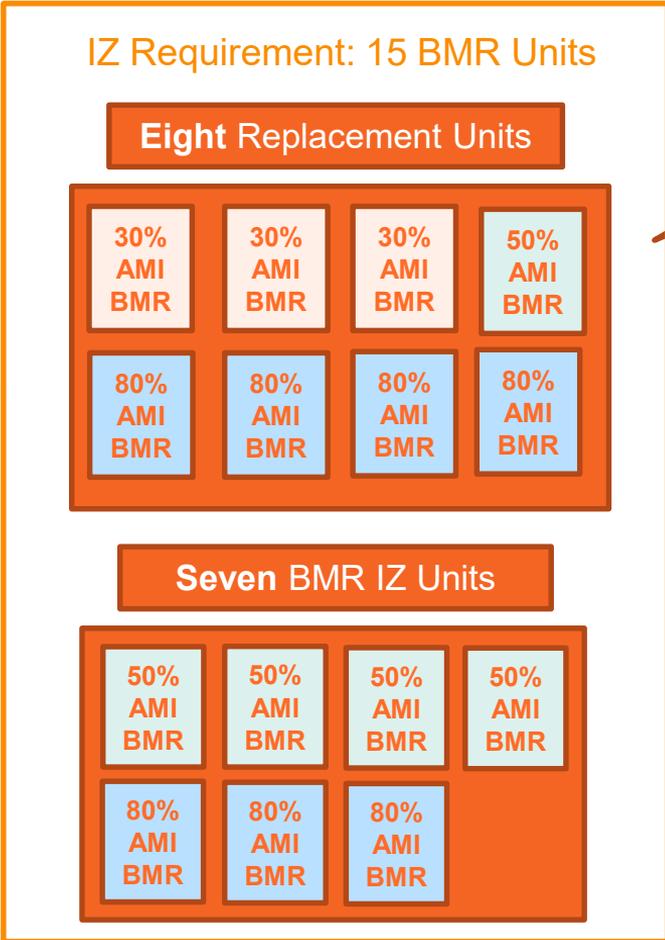


Demolition of 8 Unit Building for 75 Unit Building

Eight Protected Units

Eight Rent Controlled Units

Three Occupied by 50% AMI or Below



Sitting Tenants Income Qualify
Right of first refusal



60 Market Rate Units

Sitting Tenants Don't Income Qualify
Right of first refusal
Rent at prior rent
Rent controlled for tenancy

- Affordability Requirement
- 30% AMI for each protected unit with 50% AMI household (3 units)
 - 50% AMI or lower for half of all IZ units (8 units)
 - Permanently Affordable

Attachment 4 – Existing Demolition Ordinance

Chapter 23.326
DEMOLITION AND DWELLING UNIT CONTROL

Sections:

23.326.010	Chapter Purpose.
23.326.020	General Requirements.
23.326.030	Eliminating Dwelling Units through Demolition.
23.326.040	Eliminating Dwelling Units through Conversion and Change of Use.
23.326.050	Private Right of Action.
23.326.060	Elimination of Residential Hotel Rooms.
23.326.070	Demolitions of Non-Residential Buildings.
23.326.080	Building Relocations.
23.326.090	Limitations.

23.326.010 Chapter Purpose.

This chapter establishes demolition and dwelling unit control standards that promote the affordable housing, aesthetic, and safety goals of the City.

23.326.020 General Requirements.

A. *Applicability.* No dwelling unit or units may be eliminated or demolished except as authorized by this chapter.

B. *Findings.* In addition to the requirements below, the Zoning Adjustments Board (ZAB) may approve a Use Permit to eliminate or demolish a dwelling unit only upon finding that eliminating the dwelling unit would not be materially detrimental to the housing needs and public interest of the affected neighborhood and Berkeley.

23.326.030 Eliminating Dwelling Units through Demolition.

A. *Buildings with Two or More Units Constructed Before June 1980.*

1. *Applicability.* This subsection only applies to building with two or more units constructed before June 1980.

2. *Limitation.*

Attachment 4 – Existing Demolition Ordinance

(a) Demolition is not allowed if:

- i. The building was removed from the rental market under the Ellis Act during the preceding five years; or
- ii. There have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years.

(b) Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner. The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The ZAB shall determine whether harassment or threatened or actual illegal eviction occurred.

3. *Findings.* The ZAB may approve a Use Permit to demolish a building constructed before June 1980 on a property containing two or more dwelling units if any of the following are true:

- (a) The building containing the units is hazardous or unusable and is infeasible to repair.
- (b) The building containing the units will be moved to a different location within Berkeley with no net loss of units and no change in the affordability levels of the units.
- (c) The demolition is necessary to permit construction of special housing needs facilities such as, but not limited to, childcare centers and affordable housing developments that serve the greater good of the entire community.
- (d) The demolition is necessary to permit construction approved pursuant to this chapter of at least the same number of dwelling units.

4. *Fee Required.*

- (a) The applicant shall pay a fee for each unit demolished to mitigate the impact of the loss of affordable housing in Berkeley.
- (b) The amount of the fee shall be set by resolution of the City Council.
- (c) *In Lieu of a Fee.*

Attachment 4 – Existing Demolition Ordinance

- i. In lieu of paying the impact fee, the applicant may provide a designated unit in the new project at a below market rate to a qualifying household in perpetuity.
- ii. The affordability level of the below market rent and the income level of the qualifying household shall be set by resolution of the City Council.
- iii. The applicant shall enter into a regulatory agreement with the City of Berkeley to provide the in lieu units.

5. *Occupied Units.*

(a) *Applicability.*

- i. The requirements in this subsection apply if units to be demolished are occupied.
- ii. These requirements do not apply to tenants who move in after the application for demolition is submitted to the City if the owner informs each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.

(b) *Notice.* The applicant shall provide all sitting tenants notice of the application to demolish the building no later than the date it is submitted to the City, including notice of their rights under Municipal Code Section 13.76 (Rent Stabilization and Eviction for Good Cause Program).

(c) *General Requirements.*

- i. The applicant shall provide assistance with moving expenses equivalent to in Chapter 13.84 (Relocation Services and Payments for Residential Tenant Households).
- ii. The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy. Funding for the rent differential shall be guaranteed in a manner approved by the City.

Attachment 4 – Existing Demolition Ordinance

iii. *Exception.* An applicant who proposes to construct a 100 percent affordable housing project is not required to comply with this subsection but must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended and the California Relocation Act (Government Code sections 7260 et seq.).

(d) *Sitting Tenants Rights.*

i. Sitting tenants who are displaced as a result of demolition shall be provided the right of first refusal to move into the new building.

ii. Tenants of units that are demolished shall have the right of first refusal to rent new below-market rate units designated to replace the units that were demolished, at the rent that would have applied if they had remained in place, as long as their tenancy continues.

iii. Income restrictions do not apply to displaced tenants.

iv. *Exception.*

(1) An applicant who proposes to construct a 100 percent affordable housing project is not required to comply with 23.326.030.A.5.a, b, and c, but must comply with the following requirement.

(2) Sitting tenants who are displaced as a result of demolition and who desire to return to the newly constructed building will be granted a right of first refusal subject to their ability to meet income qualifications and other applicable eligibility requirements when the new units are ready for occupancy.

B. *Buildings with a Single Dwelling Unit.*

1. *Applicability.* This subsection only applies to buildings with a single dwelling unit.

2. *Limitation.*

(a) Demolition is not allowed if:

i. The building was removed from the rental market under the Ellis Act during the preceding five years; or

Attachment 4 – Existing Demolition Ordinance

ii. There have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years.

(b) Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner. The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The ZAB shall determine whether harassment or threatened or actual illegal eviction occurred.

C. *Accessory Buildings.* Notwithstanding anything in Municipal Code Title 23 (Zoning Ordinance) to the contrary, but subject to any applicable requirements in Municipal Code Section 3.24 (Landmarks Preservation Ordinance), accessory buildings of any size, including, but not limited to, garages, carports, and sheds, but not including any structure containing a lawfully established dwelling unit, which serves and is located on the same lot as a lawful residential use, may be demolished by right.

23.326.040 Eliminating Dwelling Units through Conversion and Change of Use.

A. *General.* The ZAB may approve a Use Permit for the elimination of a dwelling unit in combination with another dwelling unit used for occupancy by a single household if it finds that:

1. The existing number of dwelling units exceeds maximum residential density in the district where the building is located; and
2. One of the following is true:
 - (a) One of the affected dwelling units has been occupied by the applicant's household as its principal place of residence for no less than two years before the date of the application and none of the affected units are currently occupied by a tenant.
 - (b) All of the affected dwelling units are being sold by an estate and the decedent occupied the units as their principal residence for no less than two years before the date of their death.

B. *Limitations.*

1. Demolition is not allowed if:

Attachment 4 – Existing Demolition Ordinance

(a) The building was removed from the rental market under the Ellis Act during the preceding five years; or

(b) There have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years.

2. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner. The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The ZAB shall determine whether harassment or threatened or actual illegal eviction occurred.

C. *Effect of Noncompliance with the Two-Year Requirement.*

1. If a unit eliminated under Subsection A (General) is not occupied by the applicant's household for at least two consecutive years from the date of elimination, the affected unit must be restored to separate status.

2. This requirement shall be implemented by a condition of approval and a notice of limitation on the property, acceptable to the City of Berkeley.

3. The condition and notice will provide that if the owner's household does not occupy the unit for at least two years from the date of elimination the affected units must either be restored as separate dwelling units and the vacant unit(s) offered for rent within six months or the owner must pay a fee of \$75,000 in 2013 dollars, adjusted in May of each year according to the Consumer Price Index for the San Francisco Bay Area. The fee shall be deposited into the City of Berkeley's Housing Trust Fund.

4. The City of Berkeley may exempt an applicant from the two-year residency requirement if of an unforeseeable life change that requires relocation.

D. *Effect of Eliminating a Dwelling Unit.*

1. If eliminating a dwelling unit reduces the number of units in a building to four, the applicant shall record a notice of limitation against the subject property that the limitation on eviction of tenants under Chapter 13 (Public Peace, Morals and Welfare) shall continue to apply until:

Attachment 4 – Existing Demolition Ordinance

- (a) The building is demolished; or
- (b) Sufficient units are added or restored such that the building contains at least five units.

2. The Zoning Officer may issue an AUP for a building conversion which eliminates a dwelling unit upon finding that the conversion will restore or bring the building closer to the original number of dwelling units that was present at the time it was first constructed, provided the conversion meets the requirements 23.326.040.A.1 and 2 and 23.326.040.B and C.

E. *Exceptions.*

1. The ZAB may approve a Use Permit for a change of use to a community care or a child care facility which eliminates a dwelling unit if it finds that such use is in conformance with the regulations of the district in which it is located.

2. The ZAB may approve a Use Permit to eliminate a dwelling unit through combination with another dwelling unit for the purpose of providing private bathrooms, kitchenettes, accessibility upgrades, and/or seismic safety upgrades to single-residential occupancy rooms in residential developments undergoing a publicly-funded rehabilitation.

3. Notwithstanding the general Use Permit requirement under 23.326.020 (General Requirements), a lawfully established accessory dwelling unit that is not a controlled rental unit may be eliminated with a Zoning Certificate if:

- (a) The re-conversion restores the original single-family use of the main building or lot; and
- (b) No tenant is evicted.

23.326.050 Private Right of Action.

Any affected tenant may bring a private action for injunctive and/or compensatory relief against any applicant and/or owner to prevent or remedy a violation of Sections 23.326.030 (Eliminating Dwelling Units through Demolition) and 23.326.040 (Eliminating Dwelling Units through Conversion and Change of Use). In any such action a prevailing plaintiff may recover reasonable attorney's fees.

Attachment 4 – Existing Demolition Ordinance

23.326.060 Elimination of Residential Hotel Rooms.

A. *General Requirements.* Before removal, the following requirements must be met for the ZAB to approve a Use Permit for the elimination of residential hotel rooms:

1. The residential hotel owner shall provide or cause to be provided standard housing of at least comparable size and quality, at comparable rents and total monthly or weekly charges to each affected tenant.
2. One of the following three requirements shall be met:
 - (a) The residential hotel rooms being removed are replaced by a common use facility, including, but not limited to, a shared kitchen, lounge, or recreation room, that will be available to and primarily of benefit to the existing residents of the residential hotel and that a majority of existing residents give their consent to the removal of the rooms.
 - (b) Before the date on which the residential hotel rooms are removed, one-for-one replacement of each room to be removed is made, with a comparable room, in one of the methods set forth in this section.
 - (c) Residential hotel rooms are removed because of building alterations related to seismic upgrade to the building or to improve access to meet the requirements of the American Disabilities Act (ADA).

B. *Criteria for Replacement Rooms.* For purposes of this section, replacement rooms must be:

1. Substantially comparable in size, location, quality, and amenities;
2. Subject to rent and eviction controls substantially equivalent to those provided by the Rent Stabilization Ordinance or those that applied to the original rooms which are being replaced; and
3. Available at comparable rents and total monthly or weekly charges to those being removed. Comparable rooms may be provided by:
 - (a) Offering the existing tenants of the affected rooms the right of first refusal to occupy the replacement rooms;

Attachment 4 – Existing Demolition Ordinance

- (b) Making available comparable rooms, which are not already classified as residential hotel rooms to replace each of the rooms to be removed; or
- (c) Paying to the City of Berkeley's Housing Trust Fund an amount sufficient to provide replacement rooms.
 - i. The amount to be paid to the City of Berkeley shall be the difference between the replacement cost, including land cost, for the rooms and the amount which the City of Berkeley can obtain by getting a mortgage on the anticipated rents from the newly constructed rooms.
 - ii. The calculations shall assume that rents in the newly constructed rooms shall not exceed the greater of either a level comparable to the weekly or monthly charges for the replaced rooms or the level which would be charged if no current tenant paid more than 30 percent of such tenant's gross income for rent.

C. *Exception for Non-Profit Ownership.* In a residential hotel owned and operated by a non-profit organization, recognized as tax-exempt by either the Franchise Tax Board and/or the Internal Revenue Service, residential hotel rooms may be changed to non-residential hotel room uses if the average number of residential hotel rooms per day in each calendar year is at least 95 percent of residential hotel rooms established for that particular residential hotel.

23.326.070 Demolitions of Non-Residential Buildings.

A. *Main Non-Residential Buildings.* A main building used for non-residential purposes may be demolished with a Use Permit.

B. *Accessory Buildings.*

1. Demolishing an accessory building with less than 300 square feet of floor area is permitted as of right.
2. An accessory building with 300 square feet or more of floor area may be demolished with an AUP.

C. *Landmarks Preservation Commission Review.*

Attachment 4 – Existing Demolition Ordinance

1. Any application for a Use Permit or AUP to demolish a non-residential building or structure which is 40 or more years old shall be forwarded to the Landmarks Preservation Commission (LPC) for review before consideration of the Use Permit or AUP.
2. The LPC may initiate a landmark or structure-of-merit designation or may choose solely to forward to the ZAB its comments on the application.
3. The ZAB shall consider the recommendations of the LPC in when acting on the application.

D. *Findings.* A Use Permit or an AUP for demolition of a non-residential building or structure may be approved only if the ZAB or the Zoning Officer finds that:

1. The demolition will not be materially detrimental to the commercial needs and public interest of any affected neighborhood or the City of Berkeley; and
2. The demolition:
 - (a) Is required to allow a proposed new building or other proposed new use;
 - (b) Will remove a building which is unusable for activities which are compatible with the purposes of the district in which it is located or which is infeasible to modify for such uses;
 - (c) Will remove a structure which represents an inhabitable attractive nuisance to the public; or
 - (d) Is required for the furtherance of specific plans or projects sponsored by the City of Berkeley or other local district or authority upon a demonstration that it is infeasible to obtain prior or concurrent approval for the new construction or new use which is contemplated by such specific plans or projects and that adhering to such a requirement would threaten the viability of the plan or project.

23.326.080 Building Relocations.

A. *Treatment of Building Relocation.*

Attachment 4 – Existing Demolition Ordinance

1. Relocating a building from a lot is considered a demolition for purposes of this chapter.
2. Relocating a building to a lot is considered new construction and is subject to all requirements applicable to new construction.
3. When a building is relocated to a different lot within in Berkeley, the lot from which the building is removed shall be known as the source lot and the lot on which the building is to be sited shall be known as the receiving lot. In such cases all notification requirements apply to both the source and receiving lots.

B. *Findings.* The ZAB may approve a Use Permit to relocate a building upon finding that:

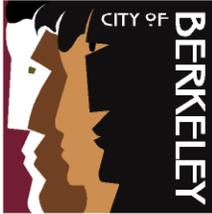
1. The building to be relocated is not in conflict with the architectural character, or the building scale of the neighborhood or area to which it will be relocated; and
2. The receiving lot provides adequate separation of buildings, privacy, yards, and usable open space.

23.326.090 Limitations.

A. *Unsafe, Hazard, or Danger.*

1. Notwithstanding anything to the contrary, if a building or structure is unsafe, presents a public hazard, and is not securable and/or is in imminent danger of collapse so as to endanger persons or property, as determined by the city's building official, it may be demolished without a Use Permit.
2. The Building Official's determination in this matter shall be governed by the standards and criteria in the most recent edition of the California Building Code that is in effect in the City of Berkeley.

B. *Ellis Act.* This chapter shall be applied only to the extent permitted by state law as to buildings which have been entirely withdrawn from the rental market pursuant to the Ellis Act (California Government Code Chapter 12.75).



Planning and Development Department
 Land Use Planning Division

STAFF REPORT
 December 6, 2023

TO: Members of the Planning Commission

FROM: Justin Horner, Associate Planner

SUBJECT: Zoning Ordinance Amendments to Berkeley Municipal Code Chapter 23.326 (Demolition and Dwelling Unit Controls)

RECOMMENDATION

Make a recommendation to the City Council regarding amendments to Berkeley Municipal Code Chapter 23.326 (Demo Ordinance). The existing and proposed redlined ordinances are presented in **Attachments 1** and **2**, respectively.

SUMMARY

State law SB 330 (Housing Crisis Act of 2019) includes new provisions related to demolition of residential units. SB 330 provides optional ways to comply with these requirements, based on whether the units are occupied or vacant, whether existing tenants are low income, whether the units are subject to local rent control (in Berkeley, this would be most properties with more than two units built before 1980), or whether the units were removed from the rental market pursuant to the Ellis Act.¹ In particular, replacement units required by SB 330 may be deed restricted to low income households or they may be subject to local rent control. The law also addresses the rights of existing tenants that would be displaced by demolition, including relocation benefits and a right of first refusal to return to the new units at below market rate (BMR) rent. Density bonus law now mirrors these requirements.

The proposed ordinance (**Attachment 2**) includes provisions to bring the Demo Ordinance into conformance with State law, and includes a number of new Berkeley-specific provisions as recommended by the 4x4 Joint Task Force Committee on

¹ Under a state law called the Ellis Act (CA Gov. Code Sec. 7060 et seq.), an owner can evict tenants in order to withdraw a rental property from the rental housing market. A local ordinance, Berkeley Municipal Code Chapter 13.77, establishes specific procedures under the state law.

Housing. The proposed ordinance also includes a number of text edits, including grammatical corrections and renumbering.

CURRENT SITUATION AND ITS EFFECTS

The existing Demo Ordinance (Attachment 1) requires a Use Permit for the demolition or elimination of one or more dwelling units in Berkeley. The Zoning Adjustments Board (ZAB) may issue a Use Permit for the demolition of a dwelling unit for specific enumerated reasons:

- A building is “hazardous or unusable and is infeasible to repair”;
- “Demolition is necessary to permit construction... of at least the same number of dwelling units.”
- “The elimination of the dwelling units would not be materially detrimental to the housing needs and public interest of the affected neighborhood and the City.”

The existing ordinance includes provisions for unit replacement and the rights of sitting tenants, as well as additional situations such as:

- When housing units are demolished and no new housing units are being developed at the site (e.g., commercial development);
- When tenants have been unlawfully evicted, such as forcing a tenant out of a unit without a court order; and
- When units are being merged or converted within an existing building rather than physically demolished.

The existing ordinance includes a provision whereby applicants may pay a fee rather than provide below-market-rate replacement units, however the amount of the fee has never been established.

Demolition of dwelling units is prohibited where a building has been removed from the rental market under the Ellis Act during the preceding five years or where there have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years. Applicants are generally required to provide relocation benefits, including moving expenses and differential rent payments. In addition, displaced tenants are provided a right of first refusal to rent new units after the lot has been redeveloped.

Proposed Demolition Ordinance Provisions

The proposed ordinance (**Attachment 2**) includes provisions to bring the Demo Ordinance into conformance with State law, and includes a number of new Berkeley-specific provisions as recommended by the 4x4 Joint Task Force Committee on Housing. The proposed ordinance also includes a number of text edits, including grammatical corrections and renumbering.

The most significant changes are summarized below in Table 1, and discussed in more detail below. The primary rationales for the proposed changes include clarifying the applicability of the ordinance, expanding tenant protections, bringing the ordinance into conformance with State law, and assigning the Rent Stabilization Board (Rent Board) to administer some aspects of the ordinance rather than the ZAB.

Applicable Unit.

The existing ordinance indicates that it applies to a “dwelling unit or units.” The proposed ordinance includes clarifications that it applies to dwelling units, group living accommodations, residential hotel rooms, accessory dwelling units (ADUs), junior accessory dwelling (JADUs) units, and units built without permits.

Comparable Unit.

The existing ordinance refers to a “comparable unit” when referring to replacement units, but does not define “comparable unit.” The proposed ordinance includes an explicit definition of “comparable unit”, indicating that it should be of a comparable size, include similar amenities, and be located in a similar area of the city as the demolished unit.

Prohibited Demolitions.

The existing ordinance indicates that demolition is prohibited for units that have been removed from the rental stock through the Ellis Act within the past five years, or in cases where there has been substantial evidence of tenant harassment by a rental property owner, or an attempted or actual illegal eviction, within the past three years. In the latter case, the determination of whether harassment has occurred is made by the ZAB.

The proposed ordinance expands tenant protections to include any no fault eviction within the past five years, not just removal of a rental unit from the market through the Ellis Act. A “no fault eviction” is when the property owner or landlord wants to evict a tenant at no fault of the tenant, for example, when the property owner wants to move into the property.

The Rent Stabilization Board is proposed to be the deciding body for questions regarding harassment and illegal eviction, instead of the ZAB.

Mitigation Fee.

The existing ordinance includes a requirement to pay an in-lieu mitigation fee for every unit demolished, or the option to replace a comparable BMR unit on-site.

State law (SB330) imposes a requirement that any housing development project that requires the demolition of dwelling units must create at least as many residential dwelling units as will be demolished on-site, and requires that the City condition

approval on the provision of replacement units. Therefore, an option to “fee out” of the replacement requirement is a violation of State law, because it would not provide replacement units at the sizes and affordability levels required by SB 330. Accordingly, the proposed ordinance removes the mitigation fee section.

Landmarks and Structures of Merit.

While the provisions of BMC Chapter 3.24 (Landmarks Preservation Commission) apply to units proposed for demolition, the existing ordinance does not explicitly refer to this chapter. Accordingly, the proposed ordinance includes specific language referring to Chapter 3.24.

Affordability of Replacement Units.

The existing ordinance includes a requirement that any replacement units must be BMR units, and that the income levels of the qualifying households, and rents for the replacement units, shall be set by a resolution of the City Council. The existing ordinance also includes a requirement that the project applicant enter into a regulatory agreement with the city to provide these units.

The proposed ordinance includes more detailed provisions addressing the affordability levels of replacement units:

- The proposed ordinance requires that any demolished unit shall be replaced with equivalent units and comply with the applicable affordability requirements included in BMC 23.328 (Affordable Housing Requirements) and BMC 23.330 (Density Bonus). Referencing these sections clarifies the appropriate affordability levels for replacement units, and establishes consistent requirements across a number of affordable housing-related provisions in the BMC.
- The proposed ordinance also includes a provision that if a displaced household has an income below 50% AMI, a comparable replacement unit shall be offered at a rent that is affordable to households at 30% of AMI.

Sitting Tenants' Rights.

The existing ordinance establishes certain rights for sitting tenants. Sitting tenants in demolished units are entitled to a right of first refusal to move into the new building, have a right of first refusal for any BMR units, and retain those rights even if they have incomes that do not qualify for BMR units.

The proposed ordinance clarifies that tenants who do not qualify for BMR replacement units due to income limits above the area median income must still be provided a market-rate replacement unit at their prior rent. Additionally, the rent for the duration of that tenancy would be subject to Berkeley's rent control regulations. This section was added by the 4x4 Committee to provide additional rights to sitting tenants who may not qualify for BMR units.

The proposed ordinance includes additional provisions related to sitting tenants' rights. The revisions clarify that a sitting tenant's right of first refusal extends to a *comparable* unit (not just any unit) in the building, and sets the initial rent and subsequent rents for sitting tenant households that are ineligible for BMR units. These provisions go beyond what is required under State law.

Elimination of Units through Combination with Other Units.

The existing ordinance includes provisions regulating the elimination of dwelling units through physical combination with other units. This is usually done in cases where two units are combined to make a single larger unit. The existing ordinance requires a Use Permit, with specific findings, to move forward with such an elimination. It also prohibits such an elimination if the building was removed from the rental market through the Ellis Act in the past five years, or if there is evidence of tenant harassment or illegal eviction within the past three years, as determined by the ZAB.

The proposed ordinance permits combined units through an AUP approval if such a combination would return the building to, or move it closer towards, its permitted density. This is a provision to make it easier for units in owner-occupied buildings to be combined. The AUP requirement still includes discretionary review, the ability to set conditions, and an appeal option to the ZAB.

Elimination of a unit for a combination would not be approved if the building was vacated through any no-fault eviction, not just due to the Ellis Act, or if the tenant was subject to landlord harassment or an illegal eviction. The determination of whether landlord harassment or a real or attempted illegal eviction occurred would be made by the Rent Board Hearing Examiner, with an appeal option to the Rent Stabilization Board, instead of by the ZAB.

Demolition of ADUs that are not Controlled.

The existing ordinance includes a provision that allows the demolition, with a Zoning Certificate (ZC), of ADUs that are not rent controlled. The proposed ordinance removes this section, and clarifies that ADUs and JADUs are considered residential units for the purposes of the ordinance, and therefore require a Use Permit for demolition or elimination.

Demolition of Accessory Buildings

The existing ordinance includes a provision that permits the demolition of an accessory building that does not contain a dwelling unit, such as garages, carports, and sheds, with a ZC. The proposed ordinance includes additional clarifying language that an accessory building that is occupied by a residential tenant shall be considered a residential unit for the purposes of this chapter.

Residential Hotel Rooms

The existing ordinance includes a section specifically regulating the elimination of residential hotel rooms. These provisions include specific requirements related to monthly and weekly charges, and permit residential hotel rooms to be removed for the purpose of providing common use facilities (such as a kitchen, lounge, or recreation room) for remaining residents or to undertake seismic upgrades or meet the requirements of the Americans with Disabilities Act. They also include a provision allowing an owner to meet the replacement requirements through a payment to the Housing Trust Fund, which, as noted above, is not permitted under State law. The proposed ordinance removes this section, and includes language indicating that residential hotel rooms are treated as residential units for the purpose of this ordinance.

Technical Edits, Reorganization and Renumbering

The proposed ordinance also includes a variety of purely technical edits, and reorganization, retitling, and renumbering of some sections and subsections.

Table 1. Summary of Revisions to Demolition Ordinance

Policy Area	Current Ordinance	Proposed Ordinance	Rationale
Applicable unit	"Dwelling unit or units."	Dwelling Unit, GLA, ADU, JADU, and units built without permits <i>23.326.010(A)(1) – (3)</i>	Clarification of the types of units covered.
Comparable unit	No definition.	"Similar size, amenities and location within the city." <i>23.326.010(A)(4)</i>	Clarification by providing a definition.
Demolition Prohibition: Ellis Act	Prohibition applies to any unit removed via Ellis Act within the past 5 years	Prohibition applies to any "no-fault" eviction. <i>23.326.030(A)</i>	Expansion of tenant protections beyond just one type of no-fault eviction (Ellis Act).
Demolition Prohibition: Tenant Harassment	Determination made by ZAB.	Determination made by Rent Board. <i>23.326.030(A)(2)</i>	For tenant-landlord issues, the Rent Board is the subject-expert body.
Mitigation Fee	Includes mitigation fee option.	Removes mitigation fee option.	State Law: Demolished units must be replaced (SB 330).
Landmarks and Structures of Merit	No reference to Landmarks Preservation Commission (LPC) procedures.	Includes reference to LPC procedures. <i>23.326.030(C)</i>	Clarification that LPC procedures apply.
Replacement Units -- Affordability	<ul style="list-style-type: none"> Replacement unit must be "BMR" in perpetuity; 	<ul style="list-style-type: none"> Replacement unit must comply with Chapter 23.328 (Affordability Requirements) and 	State Law: Existing tenant income levels impact type/affordability of replacement units (SB 330).

Policy Area	Current Ordinance	Proposed Ordinance	Rationale
	<ul style="list-style-type: none"> Affordability level to be set by Council resolution; Regulatory agreement with the City required. 	23.330 (Density Bonus); <ul style="list-style-type: none"> For demolished unit with household at 50% AMI or below, replacement unit must be set at 30% AMI; and Allows Zoning Officer and Fire Marshall to waive replacement for health and safety 23.326.030(C)	
Sitting Tenants Rights	<ul style="list-style-type: none"> Right of first refusal to move into the building Right of first refusal for BMR units Income restrictions do not apply 	<ul style="list-style-type: none"> Right of first refusal for a comparable unit For displaced tenants who rent a comparable unit, rent is controlled for duration of tenancy For households ineligible for BMR units, a replacement unit shall be offered at prior rent 23.326.030(E)(4)	State Law: Tenant income levels impact type/affordability of replacement units (SB 330). Additional local requirement: Income restrictions do not apply to displaced households upon their return to the property after completion of the project.
Elimination of Units through Combination with other Units	Use Permit required in all cases, with findings.	AUP to combine units when the combination would return the building to, or move it closer towards, its original density 23.326.040(B)	Simplification: Allow conversion of owner-occupied buildings with a lesser standard.
	Combination not allowed if the building was removed via Ellis Act within the past 5 years	Combination not allowed if vacated through no fault eviction within the past 5 years 23.326.040(C)	Expansion of tenant protections beyond just one type of no-fault eviction (Ellis Act).
	Combination not allowed if tenant harassment. Determination made by ZAB	Determination made by Rent Board Hearing Examiner, with appeal to Rent Board 23.326.040(C)	For tenant-landlord issues, the Rent Board is the subject-expert body.

Policy Area	Current Ordinance	Proposed Ordinance	Rationale
Demolition of ADUs	Provides path to demolition with ZC for ADUs that are not rent controlled.	Section removed. All ADUs and JADUs, regardless of rent control status, are regulated as a residential unit.	ADUs and JADUs are considered Residential Units for purpose of ordinance. <i>23.326.010(A)(2)</i>
Demolition of Accessory Buildings	Can be demolished by right.	Added language to clarify that Accessory Buildings that are occupied by residential tenants are considered Residential Units. <i>23.326.050</i>	Expansion of demolition controls and tenant protections.
Elimination of Residential Hotel Rooms	Section 23.326.060 provides specific procedures for removal of residential hotel rooms	Section removed.	Residential Hotel Rooms are considered Residential Units for purpose of ordinance. <i>23.326.010(A)(1)</i>

BACKGROUND

The impetus for these revisions is recent changes in State law that provide additional requirements for new housing development projects that involve the demolition of existing residential units. These provisions of SB 330 (Housing Crisis Act of 2019), which modified Government Code sections relating to zoning and density bonus, require all new housing development projects to provide replacement units of equivalent size, defined as having the same number of bedrooms as the demolished units.

At its meeting of February 1, 2023, the Planning Commission scheduled a public hearing to adopt a recommendation for the City Council of changes to the Demo Ordinance (**Attachment 3**). The Planning Commission deferred a final recommendation pending recommendations from the 4x4 Joint Task Force Committee on Housing. Staff returned to the 4x4 Joint Task Force Committee in September and October of 2023 for discussion and recommendations, which are reflected in **Attachment 2**. The proposed amendments do not include changes in permit requirement for by-right demolition of single-family homes, which will be considered in the future as part of a larger package of 'middle housing' zoning amendments.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

California Public Resource Code Section 21065 defines a "project" under CEQA as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." The proposed ordinance amendments relate only to the requirements to demolish existing structures, and would not result in any physical changes to the environment. The proposed ordinance does not consist of a discretionary action that would permit or cause any

direct or indirect change in the environment. The proposed ordinance is therefore not a project under CEQA.

RATIONALE FOR RECOMMENDATION

The proposed ordinance includes changes required by state law, as well as policy changes recommended by the 4x4 Joint Committee Task Force on Housing.

NEXT STEPS

After the Planning Commission holds a public hearing and makes a recommendation to the City Council, the City Council shall hold a public hearing and vote to adopt the proposed ordinance amendments

CONTACT PERSON

Justin Horner, Associate Planner, Planning and Development, jhorner@berkeleyca.gov; 510-981-7476

Attachments:

1. Existing Demolition Ordinance (BMC Chapter 23.326)
2. Proposed Demolition Ordinance – Redlined (BMC Chapter 23.326)
3. Planning Commission Staff Report – Feb 1, 2023.
4. Public Hearing Notice



Planning and Development Department
Land Use Planning Division

STAFF REPORT
January 17, 2024

TO: Members of the Planning Commission

FROM: Justin Horner, Associate Planner

SUBJECT: Zoning Ordinance Amendments to Berkeley Municipal Code Chapter 23.326 (Demolition and Dwelling Unit Controls)

RECOMMENDATION

Conduct a public hearing and make a recommendation to the City Council regarding amendments to Berkeley Municipal Code Chapter 23.326 (Demolition and Dwelling Unit Control Ordinance). The existing and proposed redlined ordinances are presented in **Attachments 1** and **2**, respectively.

SUMMARY

State law SB 330 (Housing Crisis Act of 2019) established new provisions related to demolition of residential units. SB 330 provides optional ways to comply with these requirements. These include unit occupancy or vacancy, existing tenant income status (ex. low income), local rent control applicability (in Berkeley, this would be most properties with more than two units built before 1980), or if units were removed from the rental market pursuant to the Ellis Act.¹ In particular, replacement units required by SB 330 may be deed restricted to low income households or subject to local rent control. The law also addresses the rights of existing tenants that would be displaced by demolition, including relocation benefits and a right of first refusal to return to the new units at below market rate (BMR) rent. Density bonus law now reflects these requirements.

The proposed ordinance (**Attachment 2**) includes provisions to bring the Demolition Ordinance into conformance with State law, and includes a number of new Berkeley-specific provisions as recommended by the 4x4 Joint Task Force Committee on Housing and the Planning Commission's Subcommittee meeting of December 20, 2023. The proposed ordinance also includes a number of text edits, including grammatical corrections and renumbering.

¹ Under a state law called the Ellis Act (CA Gov. Code Sec. 7060 et seq.), an owner can evict tenants in order to withdraw a rental property from the rental housing market. A local ordinance, Berkeley Municipal Code Chapter 13.77, establishes specific procedures under the State law.

REVISIONS TO DECEMBER 6, 2023 PROPOSED ORDINANCE

The proposed ordinance presented to the Planning Commission at its December 2, 2023 meeting was prepared based on multiple Planning Commission meetings and meetings of the 4x4 Joint Task Force Committee on Housing. The staff report for the December 6th 2023 Planning Commission meeting (**Attachment 3**) includes detailed discussion of those meetings, as well as the rationale for the development of the proposed ordinance.

At its December 6, 2023 meeting, the Planning Commission moved to create a Subcommittee to review the proposed ordinance in detail, and to consider suggestions and recommendations made by Commissioners at that meeting. The Subcommittee met on December 20, 2023 and recommended a number of changes to the ordinance presented to the Planning Commission at the December 6, 2023 meeting. These changes are detailed below.

- **Demolition of Single-Family Dwellings with a Zoning Certificate.** The ordinance presented on December 6, 2023 included a provision that requires a Use Permit (UP) to demolish any dwelling unit. *Program 29-Middle Housing* of the recently-adopted Housing Element includes a provision requiring the City Council to consider by-right demolition of single-family homes to encourage the development of middle housing.

Proposed Modification: The proposed ordinance includes a provision to allow the demolition of a single-family dwelling with a Zoning Certificate if the demolition is part of a development project that would result in a net increase in residential density. This provision changes the required permit for the demolition from a Use Permit to a Zoning Certificate. All other aspects of the ordinance, including tenant notice, tenant protections, unit replacement requirements and other provisions, would continue to apply to the demolition of single-family dwellings.

- **Demolition of Residential Units for Non-Residential Projects.** The ordinance presented on December 6, 2023 included a provision which would allow the Zoning Adjustments Board (ZAB) to approve the demolition of residential units with a finding that the demolition is necessary to permit construction of “economically beneficial uses;” that is, projects that are non-residential. Residential units demolished under this finding would not have been required to be replaced.

Proposed Modification: The Subcommittee recommended removal of this provision. AB 1218,² recently signed into law, applies SB 330 residential unit replacement requirements to proposed projects that do not include residential units.

- **“Equivalent” vs. “Comparable” Units.** The ordinance presented to the Planning Commission on December 6, 2023 included a requirement that residential units that are demolished shall be replaced with “equivalent” units.

² <https://legiscan.com/CA/text/AB1218/id/2845253>

Proposed Modification: Neither the ordinance, nor Title 23, includes a definition of “equivalent,” for this context. The Subcommittee therefore replaced “equivalent” with “comparable,” which is defined in the proposed ordinance.

- **Tenants’ Intent to Return.** The ordinance presented to the Planning Commission on December 6, 2023 included a provision that “tenants shall have until the date that the new units *are ready* for occupancy to decide whether to move into the newly constructed building.” [emphasis added]

Proposed Modification: The Subcommittee recommended more precise language to indicate the timeline by which a tenant should inform an owner of their intent to return to a unit. The proposed ordinance includes new provisions that:

- a) an owner must inform a tenant within five days of the issuance of a Certificate of Occupancy that a new unit will be ready for move in on a specific date; and
- b) tenants are to confirm in writing their intent to lease a replacement unit at any time between learning of a demolition and twenty days after the issuance of a Certificate of Occupancy for a new unit.

- **Combination of Units, Findings.** The ordinance presented to the Planning Commission on December 6, 2023 included a provision that allows the ZAB to approve a UP to eliminate a unit within a single-resident occupancy residential development undergoing a publicly-funded rehabilitation through combination with another unit, for the purposes of providing private bathrooms, kitchenettes, accessibility upgrades, or seismic safety upgrades.

Proposed Modification: The Subcommittee recommended additional language to broaden the acceptable purposes to include “other elements required by funding sources or programmatic needs.”

- **Combination of Units, Applicant Requirements.** The ordinance presented to the Planning Commission on December 6, 2023 includes two requirements relating to applicants intending to demolish units through combination. One requirement is that the ZAB must find that the applicant’s household has occupied the affected unit for no less than two years, and the other is that an applicant’s household must occupy the combined unit for at least two years after its completion.

Proposed Modification: The proposed ordinance changes this requirement from applying to the “applicant,” to applying to an “owner.” This revision would still require owner-occupancy, maintaining prohibitions on evicting tenants to combine units or immediately renting combined units, but would permit an owner-to-owner sale of a property.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

California Public Resource Code Section 21065 defines a “project” under CEQA as “an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” The proposed ordinance amendments relate only to the requirements to demolish existing structures, and would not result in any physical changes to the environment. The proposed ordinance does not consist of a discretionary action that would permit or cause any direct or indirect change in the environment. The proposed ordinance is therefore not a project under CEQA.

RATIONALE FOR RECOMMENDATION

The proposed ordinance includes changes required by state law, as well as policy changes recommended by the 4x4 Joint Committee Task Force on Housing and the Planning Commission’s Subcommittee.

NEXT STEPS

After the Planning Commission holds a public hearing and makes a recommendation to the City Council, the City Council shall hold a public hearing and vote to adopt the proposed ordinance amendments.

CONTACT PERSON

Justin Horner, Associate Planner, Planning and Development, jhorner@berkeleyca.gov; 510-981-7476

Attachments:

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3. Planning Commission Staff Report – December 6, 2023.
4. Public Hearing Notice

**NOTICE OF PUBLIC HEARING
BERKELEY CITY COUNCIL**

**Zoning Ordinance Amendments to Berkeley Municipal Code
Section 23.326 (Demolition and Dwelling Unit Controls)**

The public may participate in this hearing by remote video or in-person.

The Department of Planning and Development is proposing amendments to the Demolition Ordinance, Berkeley Municipal Code Chapter 23.326, that are required or permitted pursuant to recent changes in State law that provide additional requirements for new housing development projects that involve the demolition of existing residential units. The proposed amendments would also detail additional tenant protections and affordability requirements for replacement of demolished units.

The hearing will be held on, **March 26, 2024 at 6:00 p.m.** in the School District Board Room, located at 1231 Addison Street, Berkeley CA 94702.

A copy of the agenda material for this hearing will be available on the City’s website at <https://berkeleyca.gov/> as of March 14, 2024. **Once posted, the agenda for this meeting will include a link for public participation using Zoom video technology, as well as any health and safety requirements for in-person attendance.**

For further information, please contact Justin Horner, Associate Planner at 510-981-7476. Written comments should be mailed or delivered directly to the City Clerk, 2180 Milvia Street, Berkeley, CA 94704, or e-mailed to council@berkeleyca.gov in order to ensure delivery to all Councilmembers and inclusion in the agenda packet.

Communications to the Berkeley City Council are public record and will become part of the City’s electronic records, which are accessible through the City’s website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to the City Council, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service or in person to the City Clerk. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the City Clerk at (510) 981-6900 or clerk@berkeleyca.gov for further information.

Published: March 15, 2024

Public Hearing required by BMC 23.412.050 and Govt Code 65853; notice provided according to Govt Code 65090 and BMC 23.404.040.



I hereby certify that the Notice for this Public Hearing of the Berkeley City Council was posted at the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way, as well as on the City's website, on March 14, 2026.

Mark Numainville, City Clerk