



Rashi Kesarwani
 Councilmember, District 1

REVISED AGENDA MATERIAL

For Supplemental Packet #2

MEETING DATE: March 26, 2024

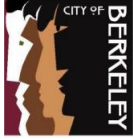
ITEM NUMBER: 23

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, 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 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.~~

(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.