



Office of the City Manager

ACTION CALENDAR
November 19, 2024

To: Honorable Mayor and Members of the City Council
From: Paul Buddenhagen, City Manager
Submitted by: Jordan Klein, Director, Planning and Development Department
Subject: Amendments to BMC Chapter 22.16, Development Agreement Procedures

RECOMMENDATION

Adopt first reading of an Ordinance amending BMC Chapter 22.16, "Development Agreement Procedures."

SUMMARY

Development Agreements (DAs) are negotiated contracts between a public agency and a project sponsor that govern land use, benefiting both parties. Although BMC Chapter 22.16 outlines DA procedures, no DAs have been executed since the Chapter's adoption in 1991. City staff propose amendments to streamline the process in alignment with State law aiming to encourage the use of DAs for large projects and maximize community benefits.

FISCAL IMPACTS OF RECOMMENDATION

Developing streamlined procedures that attract developers and promote the completion of agreements on large projects could increase community benefits, local investments and workforce opportunities for Berkeley residents.

CURRENT SITUATION AND ITS EFFECTS

BMC Chapter 22.16 "Development Agreement Procedures" establishes the City process and requirements for DAs. Since its adoption in 1991, no DAs have actually been executed. Staff speculate that project applicants are deterred by the complexity of the Chapter's additional local requirements, which exceed what is required under State law. Primarily, BMC Chapter 22.16 introduces additional public hearings—some mandated and others optional, as determined by advisory bodies—leading to uncertainty regarding the timeline for negotiation and completion of a DA. The additional procedural steps mandated by the BMC 22.16 have limited the use of DAs as a planning tool to advance City priorities for complex development projects.

The proposed ordinance amendments would streamline the Development Agreement procedures by revising these three items:

1. Removing the requirement that the City Manager obtain approval from the Planning Commission and City Council to determine whether a DA is an appropriate entitlement. Instead, the City Manager would determine whether a DA is the appropriate entitlement after reviewing a project sponsor's application. The Planning Commission and City Council would retain authority to review and approve any DAs.
2. Removing the requirement that the Planning Commission hold at least one preliminary community workshop prior to the commencement of DA negotiations. The Planning Commission and City Council would still hold public hearings for the review and approval of the DA, and applicants would be encouraged to perform community outreach.
3. Removing the ability of the Zoning Adjustments Board, Design Review Committee, and Landmarks Preservation Commissions to call their own public hearings prior to the Planning Commission's consideration a DA. The Planning Commission would still be encouraged to seek recommendations from these bodies on policies or programs pertaining to each body's scope of expertise.

In addition to these three key amendments, staff propose the addition of section titles, the expansion of existing titles, and other copy edits.

BACKGROUND

Thirty-five years ago, the City of Berkeley negotiated a long-term DA with Bayer Pharmaceuticals for its West Berkeley campus, setting a precedent for public/private partnerships. The City adopted its current DA procedures shortly after that agreement was reached.

Development Agreements are negotiated contracts between a public agency and project sponsor that govern land uses within a specific area. A DA establishes site-specific standards for a project that must also be consistent with local land use policies, and may freeze existing zoning to provide assurance that the project will not be blocked by future regulatory changes.

A DA can reduce the risk a project sponsor faces by vesting certain rights, and can benefit a city by funding improvements that would not otherwise be required under zoning. Other benefits, such as off-site improvements, community benefits, or project components, can also be negotiated. The process is elective and both parties must agree to enter into the negotiating process.

The state development agreement statute, codified in California Government Code Sections 65864-65869.5, was adopted in 1979 to provide developers with early certainty about the requirements that would apply to their projects. In exchange for providing large-scale infrastructure or other benefits, DAs help developers obtain vested rights, thereby reducing their risk and increasing confidence among investors and creditors. DAs are often accompanied by specific plans that establish unique development and zoning standards for the project.

A. City Council Referrals

The proposed amendments to BMC Chapter 22.16 respond to two City Council referrals (***Attachment 2***): one from September 20, 2011, authored by then-Mayor Tom Bates, and a second referral from October 30, 2018, authored by Mayor Jesse Arreguin and co-sponsored by Councilmembers Sophie Hahn, Lori Droste, and Kate Harrison. Both referrals directed staff to update and streamline the DA procedures consistent with State law.

B. Planning Commission Comments

On September 4, 2024, the Planning Commission conducted a public hearing and City staff presented amendments to BMC Chapter 22.16 (***Attachment 4***). The Commissioners expressed support for the decision to update the Development Agreement Procedures and the potential community benefits that could result from the use of DAs. The Planning Commission recommended that City Council adopt the proposed ordinance, with revisions (M/S Mikiten/Vincent. Ayes: Merker, Vincent, Moore, Mikiten, Marthinsen, Twu, Hauser, and Ghosh. Noes: None. Abstain: Oatfield. Absent: None. (8-0-1-0)).

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

The project is exempt from CEQA pursuant to Section 15061(b)(3) of the CEQA Guidelines, which provides that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.

RATIONALE FOR RECOMMENDATION

The additional procedural steps mandated by the City's current ordinance have limited the use of DA procedures as a standard planning tool for complex development projects. The proposed Ordinance would reduce the steps and meetings required, while still maintaining requirements mandated by state law. A simplified DA procedure will attract developers, increase community benefits, and boost local investment.

ALTERNATIVE ACTIONS CONSIDERED

The Council could consider taking no action on the recommendations proposed by staff. In this case, the BMC Chapter 22.16 will remain in place, and developers would remain unlikely to approach the City with new proposed agreements.

CONTACT PERSON

Uttara Ramakrishnan, Associate Planner, Planning and Development Department, 510-981-7483

Attachments:

1: Draft Ordinance Amending BMC Chapter 22.16 Development Agreement Procedures.

2: City Council Referrals

September 20, 2011 City Manager Referral: Revisions to the Development Agreement Procedures.

October 30, 2018 City Manager and Planning Commission Referral: Update BMC Chapter 22.16 Development Agreement Procedure

3: September 4, 2024 – Planning Commission staff report.

ORDINANCE NO. -N.S.

DEVELOPMENT AGREEMENT PROCEDURES AMENDMENTS

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

Section 1. That Berkeley Municipal Code Chapter 22.16 is amended to read as follows:

DEVELOPMENT AGREEMENT PROCEDURES AMENDMENTS

Chapter 22.16

DEVELOPMENT AGREEMENT PROCEDURES

Sections:

22.16.010 Intent and purpose.

22.16.020 Definitions.

22.16.030 Applications.

22.16.040 Contents of development agreements.

22.16.050 Consideration of proposed development agreements and their enabling ordinances.

22.16.060 Recordation.

22.16.070 Annual review.

22.16.080 Amendment or cancellation.

22.16.090 Miscellaneous provisions.

Section 22.16.010 Intent and purpose.

A. Declaration of intent and purpose.

~~1. The City Council finds that development agreements can strengthen the public planning process, encourage private participation in comprehensive planning by providing a greater degree of certainty in that process, reduce the economic costs of development, allow for the orderly planning of public improvements and services, allocate costs to achieve maximum utilization of public and private resources in the development process, and assure that appropriate measures to enhance and protect the environment are achieved.~~

1. Intent. A development agreement is a contract that is negotiated and voluntarily entered into by the City and an applicant and may contain any additional or modified conditions, terms or provisions agreed upon by the parties. Development agreements provide assurance to the applicant that the project may proceed in accordance with existing policies, rules and regulations, and subject to conditions of approval, thereby strengthening the public planning process, encouraging private participation in comprehensive planning, and reducing the economic costs of development. Development agreements promote

the orderly planning of public improvements and services, allocate costs to achieve maximum utilization of public and private resources in the development process, and ensure that appropriate measures to enhance and protect the environment are achieved.

~~2. The City Council further finds and determines that the public health, safety and general welfare will be furthered by the adoption of an ordinance establishing procedures for entering into and administering development agreements to accomplish the foregoing purposes and corresponding benefits.~~

2. **Purpose.** Where there are unique or compelling circumstances, development agreements may be used to advance community benefits that are mutually beneficial to the City and the applicant and cannot otherwise be achieved through the land use regulatory process.

Section 22.16.020 Definitions.

A. Definitions. The following terms when used in this chapter shall have the following respective meanings:

1. "City" means the City of Berkeley, a municipal corporation.
2. "City Clerk" means the Berkeley City Clerk.
3. "City Council" means the Berkeley City Council.
4. "City Manager" means the Berkeley City Manager or the person they designate to carry out all or part of the responsibilities for implementing this chapter.
5. "Applicant" means a person who has a legal or equitable interest in real property, and who applies for a development agreement for a project on that property pursuant to the procedures specified in this chapter, and who executes and is bound by the terms of the development agreement. "Applicant" includes a successor in interest to the rights and duties of the original applicant for a development agreement.
6. "Development agreement" means a development agreement entered into between the City and an applicant pursuant to this chapter.
7. "General plan" means the Berkeley General Plan.
8. "Person" means an individual, group, partnership, firm, association, corporation, trust, governmental agency, governmental official, administrative body, tribunal or any other form of business or legal entity.
9. "Planning Commission" means the Planning Commission of the City of Berkeley.

10. "Project" means the development project that is the subject of a development agreement.

Section 22.16.030 Applications.

A. **Authority for Adoption.** An applicant for a development project may request that the City review the application as a development agreement application in accordance with the following procedures. The City incorporates by reference the provisions of California Government Code Sections 65864-65869.5. In the event of any conflict between these statutory provisions and this chapter, this chapter shall control, to the extent permitted by state law.

B. **Forms and Information.** The applicant shall submit an application for a development agreement on a form prescribed by the City Manager. The City Manager shall identify submittal requirements for applications for development agreements. They may require an applicant to submit such additional information and supporting data as they consider necessary to process the application.

C. **Fees.** The applicant shall pay such fees and charges for the filing and processing of applications for development agreements and the administration of approved development agreements, including annual reviews, in amounts as may be established by resolution of the City Council.

D. **Qualified Applicant.** A qualified applicant shall have a legal or equitable interest in the real property which is the subject of the proposed development agreement. The City Manager shall require an applicant to submit proof of their interest in the real property, and of the authority of any agent to act for the applicant.

E. Initial review of application.

1. Complete Application. The City Manager shall review each application to determine ~~whether it is complete~~ness. If the application is deemed complete, the City Manager shall, within forty-five (45) days after submittal of the application, inform the applicant.

2. Incomplete Application. If the application is found to be incomplete, the City Manager shall, ~~reject the application and,~~ within forty-five (45) days after submittal of the application, ~~shall~~ inform the applicant that the application has been rejected and provide a list of the items necessary to properly complete the application. ~~Applicant may appeal the City Manager's determination that the application is incomplete to the City Council. Any such appeal must be filed within fifteen days following the mailing of written notice that the application is incomplete.~~

~~2. Within forty-five days after determining a development agreement application to be complete, the City Manager shall make a written recommendation to the Planning Commission whether a development agreement is the appropriate form~~

~~of entitlement for the proposed project, and shall place it on the Planning Commission agenda at the earliest practicable date. The Planning Commission shall make a recommendation to the City Council concerning appropriateness within thirty days after the date of the meeting at which the item first appears on the commission agenda. If the Planning Commission fails to make a recommendation within this time period, then the City Manager's recommendation shall be placed on the City Council agenda as specified in Section 22.16.030 of this chapter. The following criteria shall be followed in making these recommendations:~~

~~a. The project is preliminarily determined to be consistent with the general plan and any applicable~~

~~specific plan, or applicant has submitted an application for any necessary amendments to the general plan or specific plan; and~~

~~b. EITHER: These three criteria are met:~~

~~(1) The project site is three acres or more in area.~~

~~(2) The project proposes to construct or rehabilitate multiple structures on the site, and the total floor~~

~~area to be constructed and rehabilitated is at least one hundred thousand square feet.~~

~~(3) The project envisions a long-term or phased build-out such that, at the time of application, designs of~~

~~all buildings and improvements cannot be reasonably specified in the manner required of use permit applications.~~

~~OR: There are other unique or compelling reasons why the project or the potential benefits to the community would warrant consideration in the form of a development agreement.~~

~~3. The City Manager's recommendation under subsection 22.16.030E, 2 of this chapter shall include an analysis of how the proposed project comports with regulations of the zoning district in which the property lies, including identification of any aspects of the project which would require a variance were the application subject to review and action under the zoning ordinance.~~

~~4. The Planning Commission's recommendation, or, if the Planning Commission does not make a timely recommendation, then the City Manager's recommendation, under subsection 22.16.030E, 2 of this chapter shall be placed on the City Council agenda at the earliest practicable date as an action item, and the City Council may accept or reject the recommendation after consideration of the criteria enumerated in subsection 22.16.030.E, 2 of this chapter.~~

~~5. The City Council shall make a determination whether a development agreement is the appropriate form of entitlement for the proposed project within thirty days after the date of the meeting at which the item first appears on the City Council agenda. If the City Council fails to make a determination within this time~~

~~period, then the Planning Commission's recommendation, or, if the Planning Commission failed to make a timely recommendation, then the City Manager's recommendation, under subsection 22.16.030E, 2 of this chapter, shall become the City's final determination as to whether a development agreement is the appropriate form of entitlement for the proposed project.~~

Section 22.16.040 Contents of development agreements.

- A. **Project Description.** A development agreement shall specify its duration; the permitted uses of the subject property; the general location and density or intensity of uses; the general location, maximum height and size of proposed buildings; and provisions for reservation or dedication of land for public purposes. It shall contain provisions concerning its transferability.
- B. **Improvements & Fees.** A development agreement may include requirements for construction and maintenance of onsite and off-site improvements or payment of fees in lieu of such dedications or improvements.
- C. **Requirement for Project Approvals.** A development agreement may also include conditions, terms, restrictions, and requirements for subsequent discretionary actions but does not eliminate the applicant's responsibility to obtain all required land use approvals.
- D. **CEQA.** A development agreement may include, without limitation, conditions and restrictions imposed by the City with respect to the project including those conditions and restrictions proposed in any environmental impact report or mitigated negative declaration applicable to the project prepared and certified under the California Environmental Quality Act, and the City's regulations with respect thereto, in order to eliminate or mitigate adverse environmental impacts of the project.
- E. **Phased Development.** A development agreement may provide that the project be constructed in specified phases, that construction shall commence within a specified time, and that the project or any phase thereof be completed within a specified time.
- F. **Public Financing.** If the development agreement requires applicant financing of necessary public facilities, it may include terms.
- G. **Indemnification.** A development agreement may contain an indemnity clause requiring the applicant to indemnify and hold the City harmless against claims arising out of or in any way related to the actions of applicant in connection with the application or the development process, including all legal fees and costs.
- H. **Performance Guarantee.** A development agreement may include provisions to guarantee performance of obligations stated in the agreement.

- I. **Terms.** A development agreement shall be a contract that is negotiated and voluntarily entered into by City and applicant and may contain any additional or modified conditions, terms or provisions agreed upon by the parties.

Section 22.16.050 Consideration of proposed development agreements and their enabling ordinances.

~~A. Community workshop; public notice. The Planning Commission shall conduct at least one community workshop prior to commencement of the negotiations referenced in subsection 22.16.050B of this chapter. The purpose of the community workshop(s) is to provide members of the Planning Commission, other advisory bodies to the City Council, and members of the public the opportunity to recommend environmental mitigations, community benefits and other provisions of a development agreement to the City Manager for negotiation. Notice of the community workshop(s) shall be mailed fourteen calendar days in advance to members of the City Council, Planning Commission, and other designated advisory bodies. In addition, notice of this chapter shall be mailed to owners and occupants of all property within five hundred feet of the project site and shall be published in display ads in newspapers of general circulation in the City of Berkeley.~~

~~A.B. Negotiations. The City Manager shall negotiate the specific components and provisions of the development agreement on behalf of the City for recommendation to the City Council. The City Council may, but need not, appoint a subcommittee of the City Council to advise the City Manager on the negotiations. ~~The participate in the negotiations. City Council shall appoint a community advisory committee to consult with the City Manager and any subcommittee appointed by the City Council during negotiations. In appointing the members of this committee, the City Council shall give due consideration to obtaining representative views of residents and businesses in affected communities. The City Manager shall not commence negotiations with the applicant as to any specific component or provision of the development agreement until after the Planning Commission has conducted a community workshop pursuant to subsection 22.16.050B of the chapter.~~~~

~~B.C. Advisory bodies. The Planning Commission shall advise the City Council on development agreements, including the matters specified in subsection 22.16.050 (E) of this chapter. In addition, the City Manager shall designate the following City boards and commissions as advisory bodies to t The Planning Commission may seek recommendations from the following boards or commissions consistent with the charge of those bodies as set forth below. and the City Council on the following aspects of a proposed development agreement where the project otherwise would be subject to such board or commission's jurisdiction or review were the applicant required to proceed under the City's zoning, design review, or landmarks preservation rules:~~

1. Zoning Adjustments Board - permitted uses and development standards, ~~community benefits and mitigation programs~~, and future discretionary review for use permits.
2. Design Review Committee - development standards as they relate to existing and planned urban design of the surrounding area, architectural guidelines, site plan and site plan standards.
3. Landmarks Preservation Commission - development standards as they relate to designated landmarks or structures of merit on the subject site or adjacent sites, mitigation programs for loss of designated landmarks, and demolition of non-residential buildings forty years old or older.

C-D. Availability of draft development agreement. The City Manager shall make a draft of the proposed development agreement available for public review at least thirty ~~(30)~~ days prior to the Planning Commission's public hearing on the proposed development agreement.

~~The Zoning Adjustments Board, the Design Review Committee and the Landmarks Preservation Commission, may conduct one or more public hearings or community workshops during the review period for the draft development agreement, consistent with the scope of their roles outlined in subsection 22.16.030E, 2 of this chapter.~~

D E. Planning Commission public hearing. Prior to making a recommendation for City Council action on a proposed development agreement, the Planning Commission shall hold a noticed public hearing to consider comments on the development agreement ~~from other advisory bodies and~~ from members of the public. Notice of the intention to consider adoption of a development agreement shall be given as provided in California Government Code Sections 65090 and 65091~~public hearing to make a recommendation concerning adoption of a development agreement shall be given as provided in subsection 22.16.050A of this chapter~~, in addition to any other notice required by law for land use approvals to be considered concurrently with the development agreement. ~~The Planning Commission public hearing may, but need not, be held concurrently with the public hearing(s) on other land use approvals for the project.~~

E.F. Recommendation by Planning Commission. Within thirty days after closing its public hearing, the Planning Commission shall make its recommendation in writing to the City Council. The recommendation shall include the Planning Commission's determination and supporting reasoning whether or not the proposed development agreement:

1. Is consistent with the goals, objectives, policies, general land uses and programs specified in the general plan and any applicable specific plan.
2. Is compatible with the uses authorized in, and the zoning district in which the real property is located.

3. Has duly considered City mitigation programs in effect at the time of execution of the agreement.
4. Will be non-detrimental to the public health, safety and general welfare of persons residing or working in the neighborhood and to property and improvements in the neighborhood.
5. Complies with the provisions of the California Environmental Quality Act and City's procedures adopted pursuant thereto.

F G. City Council public hearing. The City Council shall hold a noticed public hearing prior to adoption of any development agreement. Notice of the intention to consider adoption of a development agreement shall be given as provided in California Government Code Sections 65090 and 65091~~public hearing to consider adoption of a development agreement shall be given as provided in subsection 22.16.050A of this chapter~~, in addition to any other notice required by law for land use approvals to be considered concurrently with the development agreement. The City Council public hearing may, but need not, be held concurrently with the public hearing(s) on other land use approvals for the project.

G H. Decision by City Council.

1. After the City Council completes the public hearing, it may accept, reject or conditionally accept the recommendation of the Planning Commission; or in the event the Planning Commission has failed to make a recommendation pursuant to subsection 22.16. 050 E F of this chapter, the City Council shall approve, disapprove or conditionally approve the development agreement. ~~The City Council may, but need not, refer matters not previously considered by the Planning Commission during its hearing back to the Planning Commission for report and recommendation. The Planning Commission may, but need not, hold a public hearing on matters referred back to it by the City Council.~~

2. The City Council shall not approve a proposed development agreement unless it finds that its provisions are consistent with the general plan and any applicable specific plan. This requirement may be satisfied by a finding that the provisions of a proposed development agreement are consistent with proposed general plan or specific plan provisions which are to be adopted concurrently with the approval of the proposed development agreement. A finding of consistency may be made if, considering the general plan and/or specific plan as a whole and balancing competing provisions as appropriate, the City determines that the proposed development agreement does not conflict with the provisions of the general plan and/or specific plan. ~~This finding need not be supported by detailed explanation or factual findings.~~

The City Council shall not approve a proposed development agreement that includes a subdivision, unless the agreement provides that any tentative map prepared for the subdivision will comply with California Government Code Section 66473.7.

Notwithstanding any other provision of law, ~~including Government Code Section 65867.5,~~ this subsection shall not be interpreted to impose upon the City any of the legal requirements applicable to general law cities ~~but not charter cities. with respect to general plan or specific plan consistency, including without limitation any prohibition on a finding of general plan consistency in the absence of a complete, legally adequate general plan.~~

3. A proposed development agreement shall be executed by the applicant before it is placed before the City Council for consideration at a public hearing.

H.I. Approval of development agreement. The City Council shall have the exclusive authority to approve the development agreement. Approval of a development agreement shall be by ordinance.

Section 22.16.060 Recordation.

A. Execution and recordation of development agreement.

1. Within ten days after the ordinance approving the development agreement takes effect, the City Manager shall execute the development agreement on behalf of the City, and the City Clerk shall record the development agreement with the ~~Alameda county County recorder~~Recorder.

2. If the parties to the agreement or their successors in interest amend or cancel the development agreement, or if the City terminates or modifies the development agreement for failure of the applicant to fully comply with the provisions of the development agreement, the City Clerk shall record notice of such action with the Alameda County Recorder.

Section 22.16.070 Annual review.

A. Time for and initiation of review.

1. The City Manager shall review each approved development agreement at least once a year at which time the applicant shall be required to demonstrate compliance with the provisions of the development agreement.

2. The applicant shall initiate the required annual review by submitting a written request at least sixty (60) days prior to the review date specified in the development agreement. The applicant shall also provide evidence as determined necessary by the City Manager to demonstrate compliance with the provisions of the development agreement. The burden of proof by substantial evidence of compliance is upon the applicant.

B. Finding of compliance. If the City Manager, on the basis of substantial evidence, finds compliance by the applicant with the provisions of the development agreement, the City Manager shall issue a finding of compliance, which shall be in recordable form and may be recorded with the county recorder after conclusion of the review.

C. Finding of noncompliance.

1. If the City Manager finds the applicant has not complied with the provisions of the development agreement, the City Manager may issue a finding of noncompliance which may be recorded by the City with the county recorder after it becomes final. The City Manager shall specify in writing to the applicant the respects in which applicant has failed to comply, and shall set forth terms of compliance and specify a reasonable time for the applicant to meet the terms of compliance.
2. If applicant does not comply with any terms of compliance within the prescribed time limits, the development agreement shall be subject to termination or modification pursuant to subsection 22.16.080B of this chapter.

D. Appeal of determination. Within ten (10) days after issuance of a finding of compliance or a finding of noncompliance, any interested person may file a written appeal of the finding with the City Council. The appellant shall pay fees and charges for the filing and processing of the appeal in amounts established by resolution of the City Council. The appellant shall specify the reasons for the appeal. The issuance of a finding of compliance or finding of noncompliance by the City Manager and the expiration of the appeal period without appeal, or the confirmation by the City Council of the issuance of the finding on such appeal, shall conclude the review for the applicable period and such determination shall be final.

Section 22.16.080 Amendment or cancellation.

A. Cancellation or modification by mutual consent. Any development agreement may be canceled or modified by mutual consent of the parties following compliance with the procedures specified in subsections 22.16.050(D)E and (F) G of this chapter. A development agreement may also specify procedures for administrative approval of minor amendments by mutual consent of the applicant and the City Manager.

B. Termination or modification after finding of noncompliance. If a finding of noncompliance does not include terms of compliance, or if applicant does not comply with the terms of compliance within the prescribed time limits, the City Manager may refer the development agreement to the City Council for termination or modification. The City Council shall conduct a public hearing. After the public hearing, the City Council may terminate the development agreement modify the finding of noncompliance, or rescind the finding of noncompliance, and issue a finding of compliance

C. Rights of the parties after cancellation or termination. In the event that a development agreement is canceled or terminated, all rights of the applicant, property owner or successors in interest under the development agreement shall terminate. If a development agreement is terminated following a finding of noncompliance, the City may, in its sole discretion, determine to return any and all benefits, including reservations or dedications of land, and payments of fees, received by the City.

Section 22.16.090 Miscellaneous provisions.

A. Effect of development agreement.

1. Unless otherwise provided by the development agreement, the City's rules, regulations, and official policies governing permitted uses of the property land, governing density, and governing design, ~~and~~ improvement, and construction standards and specifications, applicable to development of the property subject to a development agreement, shall be those City-rules, regulations, and official policies in force at the time of execution of the agreement. The applicant shall not be exempt from otherwise applicable City ordinances or regulations pertaining to persons contracting with the City.

2. A development agreement shall not prevent the City, in subsequent actions applicable to the property, from applying new rules, regulations and policies which do not conflict with those rules, regulations and policies applicable to the property as set forth in the development agreement. A development agreement shall not prevent the City from denying or conditionally approving any subsequent land use permit or authorization for the project on the basis of such existing or new rules, regulations, and policies.

~~3. Unless otherwise specified in the development agreement, a development agreement shall not exempt the applicant from obtaining future discretionary land use approvals~~

B. Rules affecting development agreement. In the event that any regulation or law of the State of California or the United States, enacted or interpreted after a development agreement has been entered into prevents or precludes compliance with one or more provisions of the development agreement, then the development agreement may shall be modified or suspended in the manner and pursuant to the procedures specified in the development agreement, as may be necessary to comply with such regulation or law.

C. Interpretation. This chapter governs the interpretation of any development agreement approved under this chapter.

D. Enforcement of a development agreement. The procedures for enforcement, amendment, modification, cancellation or termination of a development agreement specified in this section and in California Government Code Section 65865.4 are non-exclusive. A development agreement may be enforced, amended, modified, canceled or terminated by any manner otherwise provided by law or by the provisions of the development agreement.

E. Severability Clause. Should any provision of this chapter or a subsequent development agreement be held by a court of competent jurisdiction to be either invalid, void, or unenforceable, the remaining provisions of this chapter and the development agreement shall remain in full force and effect unimpaired by the holding, except as may otherwise be provided in the development agreement.

F. Judicial review; time limitation.

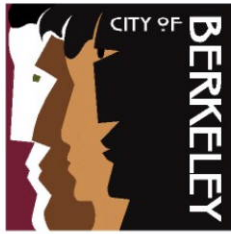
1. Any judicial review of an ordinance approving a development agreement shall be by writ of mandate pursuant to Section 1085 of the California Code of Civil Procedure; and judicial review of any City action taken by the City pursuant to this chapter, other than initial approval of a development agreement, shall be by writ of mandate pursuant to Section 1094.5 of the California Code of Civil Procedure.

2. Any action or proceeding to attack, review, set aside, void or annul any decision of the City taken pursuant to this chapter shall not be maintained by any person unless the action or proceeding is commenced within ninety days after the effective date of the decision.

G. Notice requirements. ~~The notice requirements contained in subsections 22.16.050A, E and G of this chapter are directory and not mandatory.~~ The failure of any person to receive notice required by law or this chapter does not affect the authority of the City to enter into a development agreement.

H. Irregularity in proceedings. No action, inaction, or recommendation regarding a proposed development agreement shall be held void or invalid or be set aside by a court by reason of any error, irregularity, informality, neglect or omission ("error") as to any matter pertaining to the petition, application, notice, finding, record, hearing, report, recommendation, or any matter of procedure whatever, unless the error complained was prejudicial and that by reason of the error, the complaining party sustained and suffered substantial injury, and that a different result would have been probable if the error had not occurred or existed. There is not a presumption that an error is prejudicial or that injury was done if an error is shown.

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.



Office of the Mayor

ACTION CALENDAR
September 20, 2011

TO: Members of the City Council

FROM: Mayor Tom Bates

SUBJECT: City Manager Referral: Revisions to the Development Agreement Procedures

RECOMMENDATION:

Request that the City Manager develop revisions to the Development Agreement procedures in the Berkeley Municipal Code to be more consistent with State law.

BACKGROUND:

Berkeley Municipal Code (BMC) chapter 22.16 defines the procedures for the City to enter into a development agreement with an applicant. The purpose of development agreements is to strengthen the public planning process, encourage participation in comprehensive planning by providing a greater degree of certainty, allow for the orderly planning of public improvements and services, allocate cost to achieve maximum utilization of public and private resource in the development process, and assure that appropriate measures to enhance and protect the environment are achieved.

Since its adoption in 1991, no applicant has ever successfully utilized the procedure because the process to implement this chapter has proven so complex and cumbersome. Since its adoption only one applicant, a large medical facility, has attempted to pursue a development agreement but ultimately backed away. The successful Bayer Development Agreement was negotiated prior to the adoption of this ordinance.

The recent Downtown Plan and West Berkeley Project efforts have highlighted the need for the City to have an effective tool to comprehensively plan developments in such a way that all parties involved: the applicants, the community, and the City are provided more certainty in what is allowed to be built in exchange for community benefits.

FINANCIAL IMPLICATIONS:

Unknown

CONTACT PERSON:

Mayor Tom Bates

510-981-7100



Office of the Mayor

CONSENT CALENDAR

October 30, 2018

To: Honorable Members of the City Council

From: Mayor Jesse Arreguín, Councilmember Sophie Hahn, Councilmember Lori Droste, and Councilmember Kate Harrison

Subject: Referral to the City Manager and Planning Commission: Update BMC Chapter 22.16 Development Agreement Procedures

RECOMMENDATION

Refer to the City Manager and Planning Commission to review and update the Berkeley Municipal Code Chapter 22.16 Development Agreement Procedures to create a streamlined process that maximizes community benefits and conforms to State law.

BACKGROUND

A Development Agreement (DA) is a contract between a local jurisdiction and property owner or applicant that sets standards and mitigations for developing a site. They can be an important land use tool that balance the needs of the developer – such as setting consistent zoning laws over the course of the agreement - with the needs of the community. Mitigations or community benefits that result from DAs can include improvements to adjacent streets, sidewalks, right of ways, and public spaces, as well as the payment of “in lieu” fees that go towards funds for the public good.

Nearly 30 years ago, the City of Berkeley successfully negotiated a long-term DA with Bayer Pharmaceuticals regarding their West Berkeley site, which was one of the earliest biopharmaceutical manufacturing facilities. Since then, it has served as a model for public/private partnerships. After negotiations were complete, the City Council adopted Chapter 22.16 of the Berkeley Municipal Code, Development Agreement Procedure, to put in place a process for future projects. However, since its adoption in 1991, not a single applicant has utilized the process due to its complexity. Additionally, our Development Agreement Procedure is non-compliant with State law.

In 2011, Council referred to the City Manager to develop revisions to the BMC Development Agreement Procedures so that there would be more consistent with State law. This referral was never implemented.

With the landmark agreement between the City and Bayer set to expire in 2022, the need to have a streamlined procedure in place for other potential large developments in the future, we are overdue to review and update the existing process. Updating our DA procedure will ensure that the city can successfully and efficiently work with future

applicants to complete comprehensive plans for large projects, resulting in maximum community benefits and positive impacts to our economic development.

FINANCIAL IMPLICATIONS

Staff time. Developing streamlined procedures that attract developers and ensure the completion of agreements on large projects, could greatly increase community benefits, local investments and workforce opportunity for Berkeley residents, while also reducing staff resources during process.

ENVIRONMENTAL SUSTAINABILITY

No environmental impacts.

CONTACT PERSON

Mayor Jesse Arreguín 510-981-7100

Attachments:

1. BMC Chapter 22.16 Development Agreement Procedures
2. September 20, 2011 City Manager Referral: Revisions to the Development Agreement Procedures

Chapter 22.16 DEVELOPMENT AGREEMENT PROCEDURES

Sections:

- [22.16.010](#) Intent and purpose.
- [22.16.020](#) Definitions.
- [22.16.030](#) Applications.
- [22.16.040](#) Contents of development agreements.
- [22.16.050](#) Consideration of proposed development agreements.
- [22.16.060](#) Recordation.
- [22.16.070](#) Annual review.
- [22.16.080](#) Amendment or cancellation.
- [22.16.090](#) Miscellaneous provisions.

22.16.010 Intent and purpose.

A. Findings and declaration of intent.

1. The City Council finds that development agreements can strengthen the public planning process, encourage private participation in comprehensive planning by providing a greater degree of certainty in that process, reduce the economic costs of development, allow for the orderly planning of public improvements and services, allocate costs to achieve maximum utilization of public and private resources in the development process, and assure that appropriate measures to enhance and protect the environment are achieved
2. The City Council further finds and determines that the public health, safety and general welfare will be furthered by the adoption of an ordinance establishing procedures for entering into and administering development agreements to accomplish the foregoing purposes and corresponding benefits. (Ord. 6033-NS § 1, 1991)

22.16.020 Definitions.

A. Definitions. The following terms when used in this chapter shall have the following respective meanings:

1. "City" means the City of Berkeley, a municipal corporation.
2. "City Clerk" means the Berkeley City Clerk.
3. "City Council" means the Berkeley City Council.
4. "City Manager" means the Berkeley City Manager or the person (s)he designates to carry out all or part of the responsibilities for implementing this chapter.
5. "Applicant" means a person who has a legal or equitable interest in real property, and who applies for a

development agreement for a project on that property pursuant to the procedures specified in this chapter, and who executes and is bound by the terms of the development agreement. "Applicant" includes a successor in interest to the rights and duties of the original applicant for a development agreement.

6. "Development agreement" means a development agreement entered into between the City and an applicant pursuant to this chapter.

7. "General plan" means the Berkeley General Plan.

8. "Person" means an individual, group, partnership, firm, association, corporation, trust, governmental agency, governmental official, administrative body, tribunal or any other form of business or legal entity.

9. "Planning Commission" means the Planning Commission of the City.

10. "Project" means the development project that is the subject of a development agreement. (Ord. 6033-NS § 2, 1991)

22.16.030 Applications.

A. Authority for adoption. An applicant for a development project may request that the City review the application as a development agreement application in accordance with the following procedures. The City incorporates by reference the provisions of California Government Code Sections 65864-65869.5. In the event of any conflict between these statutory provisions and this chapter, this chapter shall control.

B. Forms and information. The applicant shall submit an application for a development agreement on a form prescribed by the City Manager. The City Manager shall identify submittal requirements for applications for development agreements. (S)he may require an applicant to submit such additional information and supporting data as (s)he considers necessary to process the application.

C. Fees. The applicant shall pay such fees and charges for the filing and processing of applications for development agreements and the administration of approved development agreements, including annual reviews, in amounts as may be established by resolution of the City Council.

D. Qualified applicant. A qualified applicant shall have a legal or equitable interest in the real property which is the subject of the proposed development agreement. The City Manager shall require an applicant to submit proof of his interest in the real property and of the authority of any agent to act for the applicant.

E. Initial review of application.

1. The City Manager shall review each application to determine whether it is complete. If the application is found to be incomplete, the City Manager shall reject the application and, within forty-five days after submittal of the application, shall inform the applicant of the items necessary to properly complete the application. Applicant may appeal the City Manager's determination that the application is incomplete to the

City Council. Any such appeal must be filed within fifteen days following the mailing of written notice that the application is incomplete.

2. Within forty-five days after determining a development agreement application to be complete, the City Manager shall make a written recommendation to the Planning Commission whether a development agreement is the appropriate form of entitlement for the proposed project, and shall place it on the Planning Commission agenda at the earliest practicable date. The Planning Commission shall make a recommendation to the City Council concerning appropriateness within thirty days after the date of the meeting at which the item first appears on the commission agenda. If the Planning Commission fails to make a recommendation within this time period, then the City Manager's recommendation shall be placed on the City Council agenda as specified in Section [22.16.030](#) of this chapter. The following criteria shall be followed in making these recommendations:

- a. The project is preliminarily determined to be consistent with the general plan and any applicable specific plan, or applicant has submitted an application for any necessary amendments to the general plan or specific plan; and
- b. EITHER: These three criteria are met:
 - (1) The project site is three acres or more in area.
 - (2) The project proposes to construct or rehabilitate multiple structures on the site, and the total floor area to be constructed and rehabilitated is at least one hundred thousand square feet.
 - (3) The project envisions a long-term or phased build-out such that, at the time of application, designs of all buildings and improvements cannot be reasonably specified in the manner required of use permit applications.

OR: There are other unique or compelling reasons why the project or the potential benefits to the community would warrant consideration in the form of a development agreement.

3. The City Manager's recommendation under subsection 22.16.030E, 2 of this chapter shall include an analysis of how the proposed project comports with regulations of the zoning district in which the property lies, including identification of any aspects of the project which would require a variance were the application subject to review and action under the zoning ordinance.

4. The Planning Commission's recommendation, or, if the Planning Commission does not make a timely recommendation, then the City Manager's recommendation, under subsection 22.16.030E, 2 of this chapter shall be placed on the City Council agenda at the earliest practicable date as an action item, and the City Council may accept or reject the recommendation after consideration of the criteria enumerated in subsection 22.16.030E, 2 of this chapter.

5. The City Council shall make a determination whether a development agreement is the appropriate form of entitlement for the proposed project within thirty days after the date of the meeting at which the item first appears on the City Council agenda. If the City Council fails to make a determination within this time period, then the Planning Commission's recommendation, or, if the Planning Commission failed to make a timely recommendation, then the City Manager's recommendation, under subsection 22.16.030E, 2 of this chapter, shall become the City's final determination as to whether a development agreement is the appropriate form of entitlement for the proposed project. (Ord. 6033-NS § 3, 1991)

22.16.040 Contents of development agreements.

- A. A development agreement shall specify its duration; the permitted uses of the subject property; the general location and density or intensity of uses; the general location, maximum height and size of proposed buildings; and provisions for reservation or dedication of land for public purposes. It shall contain provisions concerning its transferability.
- B. A development agreement may include requirements for construction and maintenance of onsite and off-site improvements or payment of fees in lieu of such dedications or improvements.
- C. A development agreement may also include conditions, terms, restrictions, and requirements for subsequent discretionary actions but does not eliminate the applicant's responsibility to obtain all required land use approvals.
- D. A development agreement may include, without limitation, conditions and restrictions imposed by the City with respect to the project including those conditions and restrictions proposed in any environmental impact report applicable to the project prepared and certified under the California Environmental Quality Act, and the City's regulations with respect thereto, in order to eliminate or mitigate adverse environmental impacts of the project.
- E. A development agreement may provide that the project be constructed in specified phases, that construction shall commence within a specified time, and that the project or any phase thereof be completed within a specified time.
- F. If the development agreement requires applicant financing of necessary public facilities, it may include terms relating to subsequent reimbursement over time for such financing.
- G. A development agreement may contain an indemnity clause requiring the applicant to indemnify and hold the City harmless against claims arising out of or in any way related to the actions of applicant in connection with the application or the development process, including all legal fees and costs.
- H. A development agreement may include provisions to guarantee performance of obligations stated in the agreement.
- I. A development agreement shall be a contract that is negotiated and voluntarily entered into by City and

applicant and may contain any additional or modified conditions, terms or provisions agreed upon by the parties. (Ord. 6033-NS § 4, 1991)

22.16.050 Consideration of proposed development agreements.

A. Community workshop; public notice. The Planning Commission shall conduct at least one community workshop prior to commencement of the negotiations referenced in subsection 22.16.050B of this chapter. The purpose of the community workshop(s) is to provide members of the Planning Commission, other advisory bodies to the City Council, and members of the public the opportunity to recommend environmental mitigations, community benefits and other provisions of a development agreement to the City Manager for negotiation. Notice of the community workshop(s) shall be mailed fourteen calendar days in advance to members of the City Council, Planning Commission, and other designated advisory bodies. In addition, notice shall be mailed to owners and occupants of all property within five hundred feet of the project site and shall be published in display ads in newspapers of general circulation in the City of Berkeley.

B. Negotiations. The City Manager shall negotiate the specific components and provisions of the development agreement on behalf of the City for recommendation to the City Council. The City Council may, but need not, appoint a subcommittee of the City Council to participate in the negotiations. The City Council shall appoint a community advisory committee to consult with the City Manager and any subcommittee appointed by the City Council during negotiations. In appointing the members of this committee, the City Council shall give due consideration to obtaining representative views of residents and businesses in affected communities. The City Manager shall not commence negotiations with the applicant as to any specific component or provision of the development agreement until after the Planning Commission has conducted a community workshop pursuant to subsection 22.16.050B of the chapter.

C. Advisory bodies. The Planning Commission shall advise the City Council on development agreements, including the matters specified in subsection 22.16.050F of this chapter. In addition, the City Manager shall designate the following City boards and commissions as advisory bodies to the Planning Commission and the City Council on the following aspects of a proposed development agreement where the project otherwise would be subject to such board or commission's jurisdiction or review were the applicant required to proceed under the City's zoning, design review, or landmarks preservation rules: 1. Zoning Adjustments Board - permitted uses and development standards, community benefits and mitigation programs, and future discretionary review for use permits.

2. Design Review Committee - development standards as they relate to existing and planned urban design of the surrounding area, architectural guidelines, site plan and site plan standards.

3. Landmarks Preservation Commission - development standards as they relate to designated landmarks or structures of merit on the subject site or adjacent sites, mitigation programs for loss of designated landmarks, and demolition of non-residential buildings forty years old or older.

D. Availability of draft development agreement. The City Manager shall make a draft of the proposed

development agreement available for public review at least thirty days prior to the Planning Commission public hearing on the proposed development agreement.

The Zoning Adjustments Board, the Design Review Committee and the Landmarks Preservation Commission, may conduct one or more public hearings or community workshops during the review period for the draft development agreement, consistent with the scope of their roles outlined in subsection 22.16.050C of this chapter and their enabling ordinances.

E. Planning Commission public hearing. Prior to making a recommendation for City Council action on a proposed development agreement, the Planning Commission shall hold a noticed public hearing to consider comments on the development agreement from other advisory bodies and from members of the public. Notice of the public hearing to make a recommendation concerning adoption of a development agreement shall be given as provided in subsection 22.16.050A of this chapter, in addition to any other notice required by law for land use approvals to be considered concurrently with the development agreement. The Planning Commission public hearing may, but need not, be held concurrently with the public hearing(s) on other land use approvals for the project.

F. Recommendation by Planning Commission. Within thirty days after closing its public hearing, the Planning Commission shall make its recommendation in writing to the City Council. The recommendation shall include the Planning Commission's determination and supporting reasoning whether or not the proposed development agreement:

1. Is consistent with the goals, objectives, policies, general land uses and programs specified in the general plan and any applicable specific plan.
2. Is compatible with the uses authorized in, and the zoning district in which the real property is located.
3. Has duly considered City mitigation programs in effect at the time of execution of the agreement.
4. Will be non-detrimental to the public health, safety and general welfare of persons residing or working in the neighborhood and to property and improvements in the neighborhood.
5. Complies with the provisions of the California Environmental Quality Act and City's procedures adopted pursuant thereto.

G. City Council public hearing. The City Council shall hold a noticed public hearing prior to adoption of any development agreement. Notice of the public hearing to consider adoption of a development agreement shall be given as provided in subsection 22.16.050A of this chapter, in addition to any other notice required by law for land use approvals to be considered concurrently with the development agreement. The City Council public hearing may, but need not, be held concurrently with the public hearing(s) on other land use approvals for the project.

H. Decision by City Council.

1. After the City Council completes the public hearing, it may accept, reject or conditionally accept the recommendation of the Planning Commission; or in the event the Planning Commission has failed to make a recommendation pursuant to subsection 22.16.050F of this chapter, the City Council shall approve, disapprove or conditionally approve the development agreement. The City Council may, but need not, refer matters not previously considered by the Planning Commission during its hearing back to the Planning Commission for report and recommendation. The Planning Commission may, but need not, hold a public hearing on matters referred back to it by the City Council.
2. The City Council shall not approve a proposed development agreement unless it finds that its provisions are consistent with the general plan and any applicable specific plan. This requirement may be satisfied by a finding that the provisions of a proposed development agreement are consistent with proposed general plan or specific plan provisions which are to be adopted concurrently with the approval of the proposed development agreement. A finding of consistency may be made if, considering the general plan and/or specific plan as a whole and balancing competing provisions as appropriate, the City determines that the proposed development agreement does not conflict with the provisions of the general plan and/or specific plan. This finding need not be supported by detailed explanation or factual findings. Notwithstanding any other provision of law, including Government Code Section 65867.5, this subsection shall not be interpreted to impose upon the City any of the legal requirements applicable to general law cities with respect to general plan or specific plan consistency, including without limitation any prohibition on a finding of general plan consistency in the absence of a complete, legally adequate general plan.
3. A proposed development agreement shall be executed by the applicant before it is placed before the City Council for consideration at a public hearing.

I. Approval of development agreement. The City Council shall have the exclusive authority to approve the development agreement. Approval of a development agreement shall be by ordinance. (Ord. 6106-NS § 4, 1991: Ord. 6033-NS § 5, 1991)

22.16.060 Recordation.

A. Execution and recordation of development agreement.

1. Within ten days after the ordinance approving the development agreement takes effect, the City Manager shall execute the development agreement on behalf of the City, and the City Clerk shall record the development agreement with the county recorder.
2. If the parties to the agreement or their successors in interest amend or cancel the development agreement, or if the City terminates or modifies the development agreement for failure of the applicant to fully comply with the provisions of the development agreement, the City Clerk shall record notice of such action with the Alameda County Recorder. (Ord. 6033-NS § 6, 1991)

22.16.070 Annual review.**A. Time for and initiation of review.**

1. The City Manager shall review each approved development agreement at least once a year at which time the applicant shall be required to demonstrate compliance with the provisions of the development agreement.
2. The applicant shall initiate the required annual review by submitting a written request at least sixty days prior to the review date specified in the development agreement. The applicant shall also provide evidence as determined necessary by the City Manager to demonstrate compliance with the provisions of the development agreement. The burden of proof by substantial evidence of compliance is upon the applicant.

B. Finding of compliance. If the City Manager, on the basis of substantial evidence, finds compliance by the applicant with the provisions of the development agreement, the City Manager shall issue a finding of compliance, which shall be in recordable form and may be recorded with the county recorder after conclusion of the review.

C. Finding of noncompliance.

1. If the City Manager finds the applicant has not complied with the provisions of the development agreement, the City Manager may issue a finding of noncompliance which may be recorded by the City with the county recorder after it becomes final. The City Manager shall specify in writing to the applicant the respects in which applicant has failed to comply, and shall set forth terms of compliance and specify a reasonable time for the applicant to meet the terms of compliance.
2. If applicant does not comply with any terms of compliance within the prescribed time limits, the development agreement shall be subject to termination or modification pursuant to subsection 22.16.080B of this chapter.

D. Appeal of determination. Within ten days after issuance of a finding of compliance or a finding of noncompliance, any interested person may file a written appeal of the finding with the City Council. The appellant shall pay fees and charges for the filing and processing of the appeal in amounts established by resolution of the City Council. The appellant shall specify the reasons for the appeal. The issuance of a finding of compliance or finding of noncompliance by the City Manager and the expiration of the appeal period without appeal, or the confirmation by the City Council of the issuance of the finding on such appeal, shall conclude the review for the applicable period and such determination shall be final. (Ord. 6033-NS § 7, 1991)

22.16.080 Amendment or cancellation.

A. Cancellation or modification by mutual consent. Any development agreement may be canceled or modified by mutual consent of the parties following compliance with the procedures specified in subsections 22.16.050E

and G of this chapter. A development agreement may also specify procedures for administrative approval of minor amendments by mutual consent of the applicant and the City Manager.

B. Termination or modification after finding of noncompliance. If a finding of noncompliance does not include terms of compliance, or if applicant does not comply with the terms of compliance within the prescribed time limits, the City Manager may refer the development agreement to the City Council for termination or modification. The City Council shall conduct a public hearing. After the public hearing, the City Council may terminate the development agreement modify the finding of noncompliance, or rescind the finding of noncompliance, and issue a finding of compliance.

C. Rights of the parties after cancellation or termination. In the event that a development agreement is canceled or terminated, all rights of the applicant, property owner or successors in interest under the development agreement shall terminate. If a development agreement is terminated following a finding of noncompliance, the City may, in its sole discretion, determine to return any and all benefits, including reservations or dedications of land, and payments of fees, received by the City. (Ord. 6033-NS § 8, 1991)

22.16.090 Miscellaneous provisions.

A. Effect of development agreement.

1. Unless otherwise specified in the development agreement, the City's rules, regulations and official policies governing permitted uses of the property, density and design, and improvement standards and specifications applicable to development of the property shall be those City rules, regulations and official policies in force on the effective date of the development agreement. The applicant shall not be exempt from otherwise applicable City ordinances or regulations pertaining to persons contracting with the City.

2. A development agreement shall not prevent the City, in subsequent actions applicable to the property, from applying new rules, regulations and policies which do not conflict with those rules, regulations and policies applicable to the property as set forth in the development agreement. A development agreement shall not prevent the City from denying or conditionally approving any subsequent land use permit or authorization for the project on the basis of such existing or new rules, regulations, and policies.

3. Unless otherwise specified in the development agreement, a development agreement shall not exempt the applicant from obtaining future discretionary land use approvals.

B. Rules affecting development agreement. In the event that any regulation or law of the State of California or the United States, enacted or interpreted after a development agreement has been entered into prevents or precludes compliance with one or more provisions of the development agreement, then the development agreement may be modified or suspended in the manner and pursuant to the procedures specified in the development agreement, as may be necessary to comply with such regulation or law.

C. Interpretation. This chapter governs the interpretation of any development agreement approved under this

chapter.

D. Enforcement of a development agreement. The procedures for enforcement, amendment, modification, cancellation or termination of a development agreement specified in this section and in California Government Code Section 65865.4 are non-exclusive. A development agreement may be enforced, amended, modified, canceled or terminated by any manner otherwise provided by law or by the provisions of the development agreement.

E. Severability clause. Should any provision of this chapter or a subsequent development agreement be held by a court of competent jurisdiction to be either invalid, void, or unenforceable, the remaining provisions of this chapter and the development agreement shall remain in full force and effect unimpaired by the holding, except as may otherwise be provided in the development agreement.

F. Judicial review; time limitation.

1. Any judicial review of an ordinance approving a development agreement shall be by writ of mandate pursuant to Section 1085 of the California Code of Civil Procedure; and judicial review of any City action taken by the City pursuant to this chapter, other than initial approval of a development agreement, shall be by writ of mandate pursuant to Section 1094.5 of the California Code of Civil Procedure.

2. Any action or proceeding to attack, review, set aside, void or annul any decision of the City taken pursuant to this chapter shall not be maintained by any person unless the action or proceeding is commenced within ninety days after the effective date of the decision.

G. Notice requirements. The notice requirements contained in subsections 22.16.050A, E and G of this chapter are directory and not mandatory. The failure of any person to receive notice required by law or this chapter does not affect the authority of the City to enter into a development agreement.

H. Irregularity in proceedings. No action, inaction, or recommendation regarding a proposed development agreement shall be held void or invalid or be set aside by a court by reason of any error, irregularity, informality, neglect or omission ("error") as to any matter pertaining to the petition, application, notice, finding, record, hearing, report, recommendation, or any matter of procedure whatever, unless the error complained was prejudicial and that by reason of the error, the complaining party sustained and suffered substantial injury, and that a different result would have been probable if the error had not occurred or existed. There is not a presumption that an error is prejudicial or that injury was done if an error is shown. (Ord. 6033-NS § 9, 1991)



Planning and Development Department
Land Use Planning Division

STAFF REPORT
September 4, 2024

TO: Members of the Planning Commission

FROM: Uttara Ramakrishnan, Planning and Development Department

SUBJECT: Amendments to BMC Chapter 22.16 Development Agreement Procedures

RECOMMENDATION

Conduct a public hearing, discuss the proposed resolution (**Attachment 1**) which includes amendments to Berkeley Municipal Code (BMC) Chapter 22.16 "Development Agreement Procedures," and provide a recommendation to the City Council.

CURRENT SITUATION AND ITS EFFECTS

Thirty-five years ago, the City of Berkeley negotiated a long-term Development Agreement (DA) with Bayer Pharmaceuticals for their West Berkeley campus, setting a precedent for public/private partnerships. BMC Chapter 22.16 "Development Agreement Procedures" was adopted shortly thereafter, in 1991 to put in place a process for future projects. The Development Agreement ordinance has not been used as part of a project. This is due in part to the complexity of the ordinance as well as the fact that local requirements that extend beyond the procedures of State law. The additional procedural steps mandated by the City's current ordinance have limited the use of the Development Agreement procedures as a standard planning tool that is used for complex development projects.

BACKGROUND

These amendments address two City Council referrals. The first referral from September 20, 2011 was authored by then-Mayor Tom Bates (**Attachment 2**). The second referral, from October 30, 2018, was authored by Mayor Jesse Arreguin and Councilmembers Sophie Hahn, Lori Droste, and Kate Harrison (**Attachment 3**). Both referrals directed staff to update and streamline the DA procedures consistent with State law.

DISCUSSION

Development Agreements (DA) are negotiated contracts between a public agency and project sponsor that govern land uses within a specific area. A DA establishes site-specific standards for a project that must also be consistent with local land use policies and may freeze existing zoning to provide assurance that the project will not be blocked by future regulatory changes.

A DA can reduce the risk a project sponsor faces by vesting certain rights and can benefit a city by funding improvements that would not otherwise be required under zoning. Other benefits, such as off-site improvements, community benefits, or project components, can also be negotiated. The process is elective and both parties must agree to enter into the negotiating process.

The development agreement statute, codified in Government Code Sections 65864-65869.5, was adopted in 1979 to provide developers with early certainty about the requirements that would apply to their projects. In exchange for providing large-scale infrastructure, DAs help developers obtain vested rights, thereby reducing their risk and increasing confidence among investors and creditors. DAs are often accompanied by specific plans that establish unique development and zoning standards for the project.

In three key respects, BMC 22.16 imposes additional requirements compared to those imposed by state law:

1. BMC Chapter 22.16 requires that the City Manager request that the Planning Commission and the City Council approve that a DA is a proper entitlement type for a proposed project during the “initial review of application.”
2. BMC Chapter 22.16 requires community workshops and public notifications before negotiations even begin.
3. BMC Chapter 22.16 requires meetings before the Zoning Adjustments Board, Design Review Committee, and the Landmarks Preservation Commission when a DA is considered, whereas state law requires only public hearings before the Planning Commission and the City Council.

The proposed ordinance amendments would streamline the Development Agreement procedures by revising these three items:

1. The proposed ordinance amendments would remove the requirement that the City Manager obtain approval from the Planning Commission and City Council to determine whether a DA is an appropriate entitlement. The Planning Commission and City Council would retain authority to review and approve DAs.
2. The proposed ordinance amendments would remove the requirement that the Planning Commission hold at least one preliminary community workshop prior to the commencement of DA negotiations. The Planning Commission and City

Council would still hold public hearings for the review and approval of the DA, and applicants would be encouraged to perform community outreach.

3. The proposed ordinance amendments would remove the requirement that the Planning Commission consult with the Zoning Adjustments Board, Design Review Committee, and Landmarks Preservation Commission before acting on a DA. The Planning Commission would still be permitted to seek recommendation from the Commissions on policies or programs pertaining to each Commission's scope of expertise.

The revised DA provisions are consistent with state law and will provide another planning tool that can be utilized by the City and project sponsors.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

The project is exempt from CEQA pursuant to Section 15061(b)(3) of the CEQA Guidelines, which provides that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.

NEXT STEPS

Hold a public hearing, and provide a recommendation to the City Council on the proposed resolution and zoning ordinance amendments (**Attachment 1**).

CONTACT PERSON

Uttara Ramakrishnan, Associate Planner, Planning and Development Department, 510-981-7483

Attachments:

1. Planning Commission Resolution 2024-01 with Exhibit A: Draft Ordinance Amending BMC Chapter 22.16 Development Agreement Procedures
2. September 20, 2011 City Manager Referral: Revisions to the Development Agreement Procedures
3. October 30, 2018 City Manager and Planning Commission Referral: Update BMC Chapter 22.16 Development Agreement Procedure