

ORDINANCE NO.7,941-N.S.

DEVELOPMENT AGREEMENT PROCEDURES AMENDMENTS; AMENDING
BERKELEY MUNICIPAL CODE CHAPTER 22.16

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. 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. 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 completeness. 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, within forty-five (45) days after submittal of the application, inform the applicant that the application has been rejected and provide a list of the items necessary to properly complete the application.

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. **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.

B **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. The Planning Commission may seek recommendations from the following boards or commissions consistent with the charge of those bodies as set forth below.

1. Zoning Adjustments Board - permitted uses and development standards, 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. 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.

D. 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 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, in addition to any other notice required by law for land use approvals to be considered concurrently with the development agreement.

E. 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. 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, 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. 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 of this chapter, the City Council shall approve, disapprove or conditionally approve the development agreement.

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.

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, 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.

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. 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 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) and (F) 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 land, governing density, and governing design, improvement, and construction standards and specifications applicable to development of the property subject to a development agreement, shall be those 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.

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 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 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.

At a regular meeting of the Council of the City of Berkeley held on November 19, 2024, this Ordinance was passed to print and ordered published by posting by the following vote:

Ayes: Bartlett, Hahn, Humbert, Kesarwani, Lunaparra, Taplin, Tregub, Wengraf, and Arreguin.

Noes: None.

Absent: None.