



Planning Commission

# AGENDA

## REGULAR MEETING OF THE PLANNING COMMISSION

This meeting is held in a wheelchair accessible location.

**Wednesday, September 4, 2024**

6:00 PM

**North Berkeley Senior Center**

1901 Hearst Avenue, Berkeley

See **“MEETING PROCEDURES”** below.

All written materials identified on this agenda are available on the Planning Commission webpage: <https://berkeleyca.gov/your-government/boards-commissions/planning-commission>

### **PRELIMINARY MATTERS**

- 1. Roll Call:** **Merker, Blaine**, appointed by Councilmember Kesarwani, District 1  
**Vincent, Jeff, Chair**, appointed by Councilmember Taplin, District 2  
**Moore III, John E. “Chip”**, appointed by Councilmember Bartlett, District 3  
**Oatfield, Christina**, appointed by Councilmember Harrison, District 4  
**Mikiten, Elisa**, appointed by Councilmember Hahn, District 5  
**Marthinsen, Emily**, appointed by Councilmember Wengraf, District 6  
**Twu, Alfred**, appointed by Councilmember Robinson, District 7  
**Hauser, Savlan**, appointed by Councilmember Droste, District 8  
**Ghosh, Barnali, Vice Chair**, appointed by Mayor Arreguín
- 2. Land Acknowledgement:** The City of Berkeley recognizes that the community we live in was built on the territory of xučyun (Huchiun (Hooch-yoon)), the ancestral and unceded land of the Chochenyo (Cho-chen-yo)-speaking Ohlone (Oh-low-nee) people, the ancestors and descendants of the sovereign Verona Band of Alameda County. This land was and continues to be of great importance to all of the Ohlone Tribes and descendants of the Verona Band. As we begin our meeting tonight, we acknowledge and honor the original inhabitants of Berkeley, the documented 5,000-year history of a vibrant community at the West Berkeley Shellmound, and the Ohlone people who continue to reside in the East Bay. We recognize that Berkeley’s residents have and continue to benefit from the use and occupation of this unceded stolen land since the City of Berkeley’s incorporation in 1878. As stewards of the laws regulating the City of Berkeley, it is not only vital that we recognize the history of this land, but also recognize that the Ohlone people are present members of Berkeley and other East Bay communities today. The City of Berkeley will continue to build relationships with the Lisjan Tribe and to create meaningful actions that uphold the intention of this land acknowledgement.

- 3. **Order of Agenda:** The Commission may rearrange the agenda or place items on the Consent Calendar.
- 4. **Public Comment:** Comments on subjects not included on the agenda. Speakers may comment on agenda items when the Commission hears those items. (See “Public Testimony Guidelines” below):
- 5. **Planning Staff Report:** In addition to the items below, additional matters may be reported at the meeting. **Next Commission meeting: October 9, 2024**
- 6. **Chairperson’s Report:** Report by Planning Commission Chair.
- 7. **Committee Reports:** Reports by Commission committees or liaisons. In addition to the items below, additional matters may be reported at the meeting.
- 8. **Approval of Minutes:** Approval of Draft Minutes from the regular meeting on July 17, 2024.
- 9. **Future Agenda Items and Other Planning-Related Events:** None.

**AGENDA ITEMS:** All agenda items are for discussion and possible action. Public Hearing items require hearing prior to Commission action.

- 10. **Action:** **Public Hearing: Development Agreement Procedure Revisions**
- Recommendation:** Conduct a public hearing, discuss the proposed amendments to Berkeley Municipal Code (BMC) Chapter 22.16 “Development Agreement Procedures”, and provide a recommendation to the City Council.
- Written Materials:** Attached.
- Presentation:** N/A

**ADDITIONAL AGENDA ITEMS:** In compliance with Brown Act regulations, no action may be taken on these items. However, discussion may occur at this meeting upon Commissioner request.

**Information Items:** None.

**Communications:**

- Middle Housing
- General

**Late Communications:** (Received after the packet deadline):

**Late Communications:** (Received and distributed at the meeting):  
**ADJOURNMENT**

## **Meeting Procedures**

### ***Public Testimony Guidelines:***

Speakers are customarily allotted up to two minutes each and may not cede their time to another speaker. The Commission Chair may limit the number of speakers and the length of time allowed to each speaker to ensure adequate time for all items on the Agenda. **To speak during Public Comment or during a Public Hearing, please line up behind the microphone.** Customarily, speakers are asked to address agenda items when the items are before the Commission rather than during the general public comment period. Speakers are encouraged to submit comments in writing. See “Procedures for Correspondence to the Commissioners” below.

### ***Consent Calendar Guidelines:***

The Consent Calendar allows the Commission to take action with no discussion on projects to which no one objects. The Commission may place items on the Consent Calendar if no one present wishes to testify on an item. Anyone present who wishes to speak on an item should submit a speaker card prior to the start of the meeting, or raise his or her hand and advise the Chairperson, and the item will be pulled from the Consent Calendar for public comment and discussion prior to action.

### ***Procedures for Correspondence to the Commissioners:***

To distribute correspondence to Commissioners prior to the meeting date, submit comments by 12:00 p.m. (noon), eight days before the meeting day (Tuesday) (email preferred):

- If correspondence is more than 20 pages, requires printing of color pages, or includes pages larger than 8.5x11 inches, please provide 15 copies.
- Any correspondence received after this deadline will be given to Commissioners on the day just prior to the meeting.
- Staff will not deliver to Commissioners any additional written (or emailed) materials received after 12:00 p.m. (noon) on the day of the meeting.
- Members of the public may submit written comments themselves early in the meeting. To distribute correspondence at the meeting, please provide 15 copies and submit to the Planning Commission Secretary just before, or at the beginning of, the meeting.
- Written comments should be directed to the Planning Commission Secretary, at the Land Use Planning Division (Attn: Planning Commission Secretary).

***Communications are Public Records:*** Communications to Berkeley boards, commissions, or committees are public records and will become part of the City’s electronic records, which are accessible through the City’s website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to a City board, commission, or committee, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service, or in person, to the Secretary of the relevant board,

commission, or committee. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the Secretary to the relevant board, commission, or committee for further information.

**Written material** may be viewed in advance of the meeting at the Department of Planning & Development, Permit Service Center, **1947 Center Street, 3<sup>rd</sup> Floor**, during regular business hours.

**Note:** *If you object to a project or to any City action* or procedure relating to a project application, any lawsuit which you may later file may be limited to those issues raised by you or someone else in the public hearing on the project, or in written communication delivered at or prior to the public hearing. The time limit within which to commence any lawsuit or legal challenge related to these applications is governed by Section 1094.6, of the Code of Civil Procedure, unless a shorter limitations period is specified by any other provision. Under Section 1094.6, any lawsuit or legal challenge to any quasi-adjudicative decision made by the City must be filed no later than the 90th day following the date on which such decision becomes final. Any lawsuit or legal challenge, which is not filed within that 90-day period, will be barred.

**Meeting Access:** This meeting is being held in a wheelchair accessible location. To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services Specialist, at 981-6418 (V) or 981-6347 (TDD), at least three business days before the meeting date.

*Please refrain from wearing scented products to public meetings.*



Planning Commission

1                   **DRAFT MINUTES OF THE REGULAR PLANNING COMMISSION MEETING**  
2                   **July 17, 2024**

3                   The meeting was called to order at 6:01 p.m.

4                   **Location:** North Berkeley Senior Center, 1901 Hearst Avenue, Berkeley, CA 94709

5                   • **ROLL CALL:**

6                   **Commissioners Present:** Blaine Merker, David Shere, Christina Oatfield, Elisa Mikiten,  
7                   Laurie Capitelli, Alfred Twu, Debbie Sanderson, and Barnali Ghosh.

8  
9                   **Commissioner Absent:** Jeff Vincent (excused), Emily Marthinsen (excused), Savlan  
10                  Hauser (excused), and Chip Moore (excused).

11  
12                  **Staff Present:** Secretary Justin Horner, Clerk Zoe Covello, Robert Rivera, Eleanor  
13                  Hollander, and Anne Hersch.

14                  • **LAND ACKNOWLEDGEMENT.**

15                  The City of Berkeley recognizes that the community we live in was built on the territory of  
16                  xučyun (Huchiun (Hooch-yoon)), the ancestral and unceded land of the Chochenyo (Cho-  
17                  chen-yo)-speaking Ohlone (Oh-low-nee) people, the ancestors and descendants of the  
18                  sovereign Verona Band of Alameda County. This land was and continues to be of great  
19                  importance to all of the Ohlone Tribes and descendants of the Verona Band. As we begin  
20                  our meeting tonight, we acknowledge and honor the original inhabitants of Berkeley, the  
21                  documented 5,000-year history of a vibrant community at the West Berkeley Shellmound,  
22                  and the Ohlone people who continue to reside in the East Bay. We recognize that Berkeley's  
23                  residents have and continue to benefit from the use and occupation of this unceded stolen  
24                  land since the City of Berkeley's incorporation in 1878. As stewards of the laws regulating  
25                  the City of Berkeley, it is not only vital that we recognize the history of this land, but also  
26                  recognize that the Ohlone people are present members of Berkeley and other East Bay  
27                  communities today. The City of Berkeley will continue to build relationships with the Lisjan  
28                  Tribe and to create meaningful actions that uphold the intention of this land  
29                  acknowledgement.

30                  • **ORDER OF AGENDA:** No changes.

31                  • **PUBLIC COMMENT PERIOD:** 0.

32                  • **PLANNING STAFF REPORT:**

- 33                    • July 9, 2024 – City Council finalized the 2<sup>nd</sup> reading of Demolition Ordinance.

- 34 • July 23, 2024 – City Council will be considering the Middle Housing Zoning  
35 Standards.
- 36 • There is no PC Meeting in August.

37 **Information Items:**

- 38 • None.

39 **Communications:**

- 40 • General.

41 **Late Communications:**

- 42 • Supplemental 1.
- 43 • Supplemental 2.
- 44 • Supplemental 3.

45

46 • **CHAIR REPORT:**

- 47 • None.

- 48 • **COMMITTEE REPORT:** Reports by Commission committees or liaisons. In addition to the  
49 items below, additional matters may be reported at the meeting.

50

- 51 • None.

52 **8. APPROVAL OF MINUTES:**

53 Motion/Second/Carried (Mikiten/Merker) to approve the Planning Commission Meeting  
54 Minutes from June 5, 2024.

55

56 Ayes: Merker, Oatfield, Mikiten, Twu, and Ghosh. Noes: None. Abstain: Shere, Capitelli, and  
57 Sanderson. Absent: Moore. (5-0-3-1)

58

59 **9. OTHER PLANNING RELATED EVENTS:**

- 60 • None.

61

62 **AGENDA ITEMS**

63 **10. Public Hearing: State Law Technical Edits 2024**

64 Senior Planner Robert Rivera presented on the revised proposed zoning ordinance  
65 amendments to align the Berkeley Municipal Code (BMC) with state law related to electric  
66 vehicle charging, as well as additional non-substantive edits and corrections. The

67 Commissioners asked questions about the electric vehicle charging station law and how much  
68 discretion the City has to impose design standards; neighbor noticing requirements; and ADU  
69 parking design and layout language. There were no public commenters. Commissioners then  
70 made additional comments on the inclusion of trellises and pergolas in lot coverage calculations  
71 and the allowance of outdoor cafes, but not bars, in the MULI zoning district.

72 Motions/Second/Carried (Mikiten/Twu) to close the public hearing at 6:22 pm.

73  
74 Ayes: Merker, Shere, Oatfield, Mikiten, Capitelli, Twu, Sanderson, and Ghosh. Noes: None.  
75 Abstain: None. Absent: Moore. (8-0-0-1)

76

77 Motions/Second (Mikiten/Oatfield) to recommend that City Council adopt staff's  
78 recommendation, and direct staff to bring to City Council the idea of excluding trellises and  
79 pergolas from lot coverage calculations, and change the word "configuration" mentioned in  
80 Item 15 on the staff report to "location" so that the language reads: "On a lot with an existing  
81 or proposed ADU, replacement of off-street parking for a main building, or off-street parking  
82 for an ADU, is allowed in any **location** on the lot, including within the front setback."

83

84 Friendly Amendment Proposed/Accepted (Sanderson) to take pergola out of the motion given  
85 that it is a permanent structure covering the ground that's more than 30 inches, and may  
86 conflict with other parts of the code.

87

88 Final Motions/Seconded/Carried (Mikiten/Oatfield) to recommend that City Council adopt  
89 staff's recommendation, and direct staff to bring to City Council the idea of excluding trellises  
90 from lot coverage calculations, and change the word "configuration" mentioned in Item 15 on  
91 the staff report to "location" so that the language reads: "On a lot with an existing or proposed  
92 ADU, replacement of off-street parking for a main building, or off-street parking for an ADU, is  
93 allowed in any **location** on the lot, including within the front setback," at 7:17 pm.

94

95 Ayes: Merker, Shere, Oatfield, Mikiten, Capitelli, Twu, Sanderson, and Ghosh. Noes: None.  
96 Abstain: None. Absent: Moore. (8-0-0-1)

97

98 **Public Comments: 0**

99 **11. Public Hearing: Keep Innovation in Berkeley**

100 Principal Planner Justin Horner presented on the Keep Innovation in Berkeley Council referral  
101 and proposed zoning ordinance amendments related to R&D uses and other changes. The  
102 Commissioners asked questions and made comments related, but not limited, to: the  
103 relationship between R&D and the proposed change in the definition of labs; how these uses  
104 sync up with business license tax categories; the economic benefit of this zoning change; how  
105 these changes will be implemented; and ground floor uses. Public comment was taken and a  
106 recommendation was made to City Council.

107

108  
109  
110  
111  
112

Motions/Second/Carried (Merker/Sanderson) to close the public hearing at 7:08 pm.  
Ayes: Merker, Shere, Oatfield, Mikiten, Capitelli, Twu, Sanderson, and Ghosh. Noes: None.  
Abstain: None. Absent: Moore. (8-0-0-1)

113  
114  
115  
116  
117  
118  
119  
120  
121  
122  
123  
124  
125  
126  
127  
128  
129  
130  
131  
132  
133  
134  
135  
136  
137  
138  
139

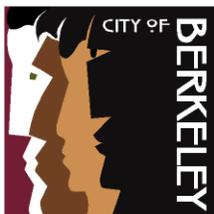
Motions/Second/No Vote (Capitelli/Sanderson) - To move forward staff recommendations, but amend their proposal to prohibit R&D on ground floor in the existing nodes, and to bring it back to Planning Commission with recommendations on nodes on University, and Shattuck outside of downtown.  
Friendly Amendment Proposed/Accepted (Merker) – To move staff recommendation to Council, and add exploring limitations on including the downtown core, and what mechanisms can be used to limit R&D in nodes on important corridors.  
Friendly Amendment Proposed/Accepted (Ghosh) – To remove “prohibit at nodes” from the motion since it’s already prohibited.  
Substitute Motion/Second/Carried (Sanderson/Merker) - To approve staff recommendations, which includes the legal conforming/nonconforming issue, and send it to Council, carried at 8:45 pm.  
Friendly Amendment Proposed/Rejected (Merker) – To direct staff to explicitly address what criteria could be best used to ensure ground floor vibrancy, including existing planning overlays/districts.  
Friendly Amendment Proposed/Rejected (Twu) - To take staff’s recommendation, which includes the legal conforming/nonconforming issue, to Council after Council approves Middle Housing.  
Ayes: Merker, Shere, Capitelli, Sanderson, and Ghosh. Noes: Oatfield. Abstain: Mikiten and Twu. Absent: Moore. (5-1-2-1)

140 **Public Comments: 3**

141  
142  
143  
144  
145

Motion/Second/Carried (Merker/Oatfield) to adjourn the meeting at 8:46 pm.  
Ayes: Merker, Shere, Oatfield, Mikiten, Capitelli, Twu, Sanderson, and Ghosh. Noes: None.  
Abstain: None. Absent: Moore. (8-0-0-1)

146 **Members in the public in attendance: 10**  
147 **Public Speakers: 3**  
148 **Length of the meeting: 2 hr 45 min**



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

**ATTACHMENT 1**

**PLANNING COMMISSION  
RESOLUTION # 2024-01**

**A RESOLUTION OF THE CITY OF BERKELEY PLANNING COMMISSION  
RECOMMENDING THE CITY COUNCIL ADOPT PROPOSED AMENDMENTS TO  
BERKELEY MUNICIPAL CODE CHAPTER 22.16 DEVELOPMENT AGREEMENT  
PROCEDURES**

**WHEREAS**, California Government Code Sections 65864-65869.5 regulates Development Agreements; and

**WHEREAS**, on March 5, 1991 the City of Berkeley City Council adopted Ordinance 6033-N.S. establishing Development Agreement Procedures in the Berkeley Municipal Code; and

**WHEREAS**, on September 20, 2011 a City Council referral was authored by Tom Bates to amend Berkeley Municipal Code Chapter 22.16 “Development Agreement Procedures”; and

**WHEREAS**, on October 30, 2018 City Council referred to the City Manager to amend Berkeley Municipal Code Chapter 22.16 “Development Agreement Procedures” to streamline provisions consistent with state law; and

**WHEREAS**, this project is exempt from CEQA pursuant to CEQA Guidelines Section 15061(b)(3) because it can be seen with certainty 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; and

**WHEREAS**, the Planning Commission held a public hearing and considered all public comments received, the presentation by City staff, the staff report, and all other pertinent documents regarding the proposed request; and

**WHEREAS**, a public hearing notice was published in the Berkeley Voice and posted in three public places pursuant to California Government Code Section 65090 on August 23, 2024 for the public hearing held on September 4, 2024.

**NOW, THEREFORE, IT BE RESOLVED** that the Planning Commission does hereby recommend that the City Council adopt the Development Agreement Ordinance amendments attached hereto as Exhibit A.

**I HEREBY CERTIFY** the foregoing resolution was passed and adopted by the Planning Commission of the City of Berkeley, at a regular meeting thereof, held on the 4<sup>th</sup> day of September 2024 by the following vote:

**AYES:**

**NOES:**

**ABSENT:**

**ABSTAIN:**

---

**Alisa Shen, Principal Planner  
SECRETARY TO THE PLANNING COMMISSION**

**EXHIBIT A**  
**DRAFT**

**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.**

**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. 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.

**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.** ~~4.~~ 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 22.16.030.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 relating to subsequent reimbursement over time for such financing.
- 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.~~

**CB. 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~~ 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.

**DC. 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'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.~~

**ED. 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 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.~~

**FE. 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.

**GF. 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 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.

**HG. 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.~~

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 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. 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 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 who has submitted written or oral comments at the Planning Commission or City Council public hearings specified in subsections 22.16.050(D)-and (F) of this chapter 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.

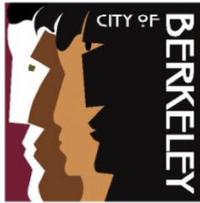
2. Any action or proceeding to attack, review, set aside, void or annul any decision of the City taken pursuant to this chapter shall not be maintained by any person unless the action or proceeding is commenced within ninety days after the effective date of the decision.

**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.

**ATTACHMENT 2**

**Page 1 of 1**



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

[Title of Report]

CONSENT CALENDAR  
October 30, 2018

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)

## Middle Housing Communications

---

**From:** jessica <steppingquietly@gmail.com>  
**Sent:** Tuesday, July 23, 2024 10:33 AM  
**To:** All Council  
**Cc:** Planning Commission  
**Subject:** PLEASE DELAY DECISION on Zoning Ordinance and General Plan Amendments Relating to Middle Housing  
**Attachments:** Samuels City Council\_Planning Commission Letter July 2024.pdf

**WARNING:** This is not a City of Berkeley email. Do not click links or attachments unless you trust the sender and know the content is safe.

To Whom It May Concern,

I am a lifelong resident of the City of Berkeley, and I love it deeply. My father was an architect who served on the Planning Commission. I was raised learning about the challenges our city faces, including issues around housing, development, and other important civic issues.

I am dismayed to have been informed only yesterday that there is a meeting being held today whose potential impact on all of us is so great. I urge you not to rush into a decision today. *It is vital that you take all of our voices into account in this zoning decision.*

Berkeley strives to be a community-based and oriented city. Since this decision did not include adequate resident education and participation to the degree that it could have, I hope you will consider pausing this process and including us more transparently and inclusively.

Sincerely,

Jessica Samuels  
1135 Walnut St.  
Berkeley, CA 94707

July 23, 2024

City Council | City of Berkeley  
2180 Milvia St, Berkeley, CA 94704

Planning Commission  
1947 Center Street, 2nd Floor  
Berkeley, CA 94704

Re: Zoning Ordinance and General Plan Amendments Relating to Middle Housing

To Whom It May Concern,

I am a lifelong resident of the City of Berkeley, and I love it deeply. My father was an architect who served on the Planning Commission. I was raised learning about the challenges our city faces, including issues around housing, development, and other important civic issues.

I am dismayed to have been informed only yesterday that there is a meeting being held today whose potential impact on all of us is so great. I urge you not to rush into a decision today. *It is vital that you take all of our voices into account in this zoning decision.*

Berkeley strives to be a community-based and oriented city. Since this decision did not include adequate resident education and participation to the degree that it could have, I hope you will consider pausing this process and including us more transparently and inclusively.

Sincerely,

Jessica Samuels  
1135 Walnut St.  
Berkeley, CA 94707

## Middle Housing Communications

---

**From:** Matthew G. Lasner <mlasner@proton.me>  
**Sent:** Monday, August 12, 2024 5:55 PM  
**To:** Wengraf, Susan; Berkeley Mayor's Office; Superintendent Ford Morthel; Planning Commission; anavasudeo@berkeley.net  
**Subject:** Housing Construction at Berkeley Adult School

WARNING: This is not a City of Berkeley email. Do not click links or attachments unless you trust the sender and know the content is safe.

Mayor, Vice Mayor, Superintendent, Planning Commission, and School Board:

I have just read that BUSD plans to proceed with construction of a subsidized apartment complex on a portion of the Berkeley Adult School campus for fear of loss of financing. As a Longfellow parent I would urge you to come up with a new plan that prioritizes the long-beleaguered Longfellow community. The construction project, however important, must be delayed until Longfellow MS returns to its campus, even it means derailing it in its current form.

The entire plan to rezone middle schools in advance of Longfellow's renovation, and to renovate Longfellow while students were in attendance, was foolish: a short-sighted failure on the part of BUSD and the school board to look after the interests of the community.

Proceeding with the filing of plans for the apartment complex in June after the decision to move Longfellow to BAS was even more egregious, and I wrote to some of you then to express my disapproval.

That BUSD insists on proceeding is unacceptable. The project should break ground while children are using the building. Other financing can be found and the project delayed for the safety and sanity of students, teachers, staff, and parents at what remains, more so now than ever, the least appealing middle school in the city.

If BUSD will not delay or cancel the housing project, Longfellow should be shut down and the students transferred to King and Willard.

-Matthew Lasner

—

Matthew Gordon Lasner  
matthewlasner.com

Founding co-editor, PLATFORM  
www.platformspace.net

## Communications

---

**From:** BPEorg <bpeorg2024@gmail.com>  
**Sent:** Tuesday, July 30, 2024 8:09 PM  
**To:** Planning Commission  
**Subject:** Planning Commission meeting 7/17/24 video recording by BPE

**WARNING:** This is not a City of Berkeley email. Do not click links or attachments unless you trust the sender and know the content is safe.

Greetings,

Berkeley Public Eye (BPE) video recorded the July 17, 2024 Planning Commission (PC) meeting. The entire meeting can be viewed here --->

[https://youtu.be/b9ax\\_uYMLWo?si=5cAk-tlt64mIXzs8](https://youtu.be/b9ax_uYMLWo?si=5cAk-tlt64mIXzs8)

Our YouTube Channel where other meetings are recorded can be found here --->

<https://www.youtube.com/@BerkeleyPublicEye2024>

BPE is a citizens' initiative to demonstrate that the video recording PC meetings is an important aspect of government transparency. The only official public record that appears on the Berkeley Planning Commission website are action minutes, which only document motions made, the names of the makers and those who seconded the motions, and the votes. Only the number, and not the names of people speaking at public comment are recorded.

The public has no idea what commissioners said—how they justified their votes—or who spoke at public comment, much less what they said. Given the significance of the Planning Commission's actions, this is unacceptable.

BPE has limited funds and we request that the City of Berkeley, like many other cities, record these meetings.

BPE Team  
7/30/2024