

Planning and Development Department
Land Use Planning Division

STAFF REPORT

DATE: June 4, 2025

To: Members of the Planning Commission

From: Branka Tatarevic, Associate Planner

Subject: Amendments to Title 23 (Zoning) to ensure compliance with State ADU laws

RECOMMENDATION:

Conduct a public hearing, receive public comment, and upon conclusion, make a recommendation to the City Council to adopt proposed amendments (see **Attachment 1**) to the Zoning Ordinance to bring the City's Accessory Dwelling Unit (ADU) regulations into compliance with recent changes to State law and to incorporate feedback from the California Department of Housing and Community Development (HCD).

BACKGROUND AND DISCUSSION

At its March 5, 2025 meeting, the Planning Commission received an informational report covering policy issues raised by the May 3, 2024 letter from HCD (see **Attachment 2**), regarding the City's regulation of ADUs, as well as recent changes to State law pertaining to ADUs. The Commission provided input to staff to prepare amendments to Berkeley's ADU ordinance to bring it into compliance with State Law and to incorporate HCD's other recommended changes. Accordingly, the attached ordinance includes the following revisions

- **Number of ADUs Permitted:** Clarify that three ADUs are permitted on a parcel with an existing single-family dwelling (one converted ADU; one new construction ADU; and one JADU) and remove the distinction between detached and attached ADUs.
- **Conversion of Accessory Structures:** Revise the ordinance to remove language requiring a structure to be "legal nonconforming" before it can be converted into an ADU.

Government Code Section 66322(b) states that local jurisdictions must approve ADU applications even when the proposed ADU involves correcting existing zoning or building violations or converting an unpermitted structure, so long as the condition does not pose a health or safety hazard and is not directly impacted by the proposed ADU construction. The amended ordinance ensures compliance with this statutory mandate.

- **JADUs and Enclosed Uses:** Amend the BMC to explicitly state that *all* enclosed uses within a proposed or existing single-family residence, not just those included in the single-family residence or its garage, are eligible for JADU conversions, ensuring compliance with State law and HCD guidance.
- **Deed Restriction:** Amend the BMC to remove the requirement that a deed restriction be submitted as part of a completed ADU application.

HCD cited Government Code Section 66317, which states, “No local ordinance, policy, or regulation shall be the basis for the delay or denial of a building permit or a use permit under this section.” While staff previously interpreted the deed restriction requirement as part of application completeness—and not a condition of approval—the Commission concluded that even this procedural requirement may result in a delay in permit issuance.

- **JADU Rental Term:** Amend the BMC to remove the 30-day minimum rental term requirement for JADUs, ensuring consistency with Government Code Section 66333, which only permits the imposition of a 30-day minimal rental term for ADUs. The 30-day minimum rental term for ADUs remains unchanged, as it is authorized under State law.
- **Front Setback and Building Separation Standards:** Amend the BMC to remove both the front setback and building separation requirements for all ADUs, not just those subject to Government Code Section 66323. This action reflects the Commission’s intent to comprehensively align the City’s ADU regulations with State law.

The proposed zoning amendments are contained in Berkeley Municipal Code Chapter 23.306 (Accessory Dwelling Units). The revisions implement recent changes to State law, respond to comments received from the California Department of Housing and Community Development (HCD), and incorporate direction provided by the Planning Commission, as discussed above. The following table summarizes the proposed revisions:

Table1 Summary of ADU Ordinance Changes – BMC Chapter 23.306

Section	Section Title	Summary of Change	Rationale
23.306.010	Purpose	Updates code references from former Gov. Code sections to new Gov. Code § 66314–66339.	Technical edit: update reference.
23.306.020(C)	Density and Growth Limits	Revises BMC to explicitly state that ADUs do not count toward density, are consistent with GP/zoning, and are exempt from growth controls (per Gov. Code § 66319).	State law requirement.
Table 23.306-1	Number of Units Allowed	Clarifies that one conversion ADU, one new construction ADU, and one JADU are permitted on lots with single-family dwellings. For lots with multifamily dwellings, allows up to 8 detached ADUs (not exceeding number of units) and interior ADUs up to 25% of the total units.	Planning Commission direction.
Table 23.306-2	ADU Development Standards	Removes front setback and building separation standards.	Planning Commission direction.
23.306.030(A)(2)	Duplex or Multi-Family Dwelling Conversion	Updates BMC to reflect State law by replacing “main building” with “multifamily building structures” and refining examples of non-living space. Removes the term “Duplex” for consistency with related changes throughout the BMC.	Technical edits.
23.306.030(A)(3)	Accessory Building or Accessory Structure Conversion	Removes “legally established” requirement and adds 150 sq. ft. ingress/egress allowance without need to meet local development standards (per Gov. Code § 66322(b)).	Planning Commission direction.
23.306.030(A)(4)	Front Setback, New Construction	Removes section for consistency with revisions to Table 23.306-2, Development Standards.	Technical edit: consistency.
23.306.030(A)(7)	Building Separation for Attached ADU	Removes section for consistency with revisions to Table 23.306-2, Development Standards.	Technical edit: consistency.
23.306.040(A)	Zoning Certificate Review	Clarifies that review of ADUs is ministerial, and applications must be approved or denied within 60 days. Adds denial notice requirement per Gov. Code § 66317(b).	State law requirement.
23.306.040(C)	Deed Restriction	Updates section to refer to BMC Chapter 21.29 and state law for separate sale; clarifies JADU	Planning Commission direction.

ADUs - Amendments to BMC to Conform to State Law

Planning Commission
 June 4, 2025

		rental/sale terms per Gov. Code § 66333, 66340–66341.	
23.306.040(D)	Qualified Nonprofit Developer Sales	Updates state law reference to Gov. Code § 66341; clarifies required TIC agreement provisions.	State law requirement.
23.322.030	Parking Requirements	Revises reference to Gov. Code § 66322 for ADU parking exemptions and correct definition of public transit from Gov. Code § 66313(m).	Technical edits: State law requirements.

ENVIRONMENTAL REVIEW

The proposed ordinance amendments are statutorily exempt from the California Environmental Quality Act, per Guidelines Section 15282 "Other Statutory Exemptions" (h) which states:

(h) The adoption of an ordinance regarding second units in a single-family or multifamily residential zone by a city or county to implement the provisions of Sections 65852.1 and 65852.2 of the Government Code as set forth in Section 21080.17 of the Public Resources Code.

NEXT STEPS

Staff recommends that the Planning Commission conduct a public hearing, receive public comment, discuss the proposed ordinance amendments, and forward a recommendation to the City Council to adopt the amendments, including any modifications identified through Commission discussion and action.

CONTACT PERSON

Branka Tatarevic, Associate Planner, Planning and Development, 510-981-7472

Attachments:

1. Resolution;
 Att. A: ADU Ordinance Amendments
- 2: Planning Commission Staff Report, March 5, 2025.
- 3: HCD ADU Ordinance Review Letter
- 4: Public Hearing Notice.

ATTACHMENT 1

**PLANNING COMMISSION
RESOLUTION NO. 2024-06**

**A RESOLUTION OF THE CITY OF BERKELEY PLANNING COMMISSION
RECOMMENDING THE CITY COUNCIL ADOPT PROPOSED AMENDMENTS TO TITLE 23
(ZONING) TO ENSURE COMPLIANCE WITH STATE ADU LAWS**

WHEREAS, the City of Berkeley must ensure that its Zoning Ordinance complies with State law with respect to Accessory Dwelling Units (ADUs), so from time to time must amend the Zoning Ordinance; and

WHEREAS, the amendments do not change the designation of any parcel to reduce the intensity of use allowed under the existing General Plan or zoning pursuant to Gov. Code section 66300(b)(1); and

WHEREAS, on March 5, 2025, the Planning Commission held a publicly-noticed meeting on recent changes to State law regarding ADUs and provided direction to City staff to prepare Zoning Ordinance amendments; and

WHEREAS, on June 4, 2025, 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 May 9, 2025 for the public hearing held on June 4, 2025.

WHEREAS, all documents constituting the record of this proceeding are and shall be retained by the City of Berkeley Planning and Development Department, Land Use Planning Division, at 1947 Center Street, Berkeley, California.

WHEREAS, the proposed ordinance amendments are statutorily exempt from the California Environmental Quality Act, per Guidelines Section 15282(h).

NOW, THEREFORE, IT BE RESOLVED that the Planning Commission does hereby recommend to the City Council of the City of Berkeley to amend Title 23, as shown in Attachment A; and

BE IT FURTHER RESOLVED, that pursuant to Berkeley Municipal Code Section 23.412.060(A)(1)-(3), the Planning Commission makes the following findings to support its recommendation for the zoning ordinance amendments:

- 1. The proposed amendment is consistent with the General Plan and any applicable specific plan or area plan.**

Evidence: Per California Government Code § 66319, an ADU shall be deemed to be an accessory use or an accessory building and shall not be considered to exceed the

allowable density for the lot upon which it is located and shall be deemed to be a residential use that is consistent with the existing general plan and zoning designations for the lot.

2. The proposed amendment is consistent with state law.

Evidence: The proposed amendments are recommended specifically because they are required for the City of Berkeley's ADU regulations to be consistent with state law.

3. The proposed amendment will not be detrimental to the public interest, health, safety, convenience, or welfare.

Evidence: The zoning ordinance amendments serve the public interest by facilitating additional housing capacity and production to better meet housing demand.

BE IT FURTHER RESOLVED, that pursuant to Berkeley Municipal Code Section 23.412.060 (B) the Planning Commission makes the following findings to support its recommendation for the zoning ordinance amendment:

B. The proposed amendment is internally consistent with other applicable provisions of the Zoning Ordinance.

Evidence: Per California Government Code § 66319, an ADU shall be deemed to be an accessory use or an accessory building and shall not be considered to exceed the allowable density for the lot upon which it is located and shall be deemed to be a residential use that is consistent with the zoning designations for the lot.

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 4th day of June 2025, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

Alisa Shen,
SECRETARY TO THE PLANNING COMMISSION

EXHIBIT A
DRAFT
ADU ORDINANCE AMENDMENTS

CHAPTER 23.306
ACCESSORY DWELLING UNITS

Sections:

- 23.306.010 Purpose.**
- 23.306.020 Applicability.**
- 23.306.030 Development Standards**
- 23.306.040 Permit Procedures.**

23.306.010 Purpose

This Chapter establishes accessory dwelling unit (ADU) and junior accessory dwelling unit (Junior ADU) standards that:

- A. Implement California Government Code Sections 66314 through 66339
- B. Increase overall supply and range of housing options in Berkeley.
- C. Expedite small-scale infill development.
- D. Support Housing Element goals of facilitating construction of accessory dwelling units and increasing the number of housing units that are more affordable to Berkeley residents.
- E. Encourage development of accessory dwelling units in zoning districts with compatible land uses and infrastructure.

23.306.020 Applicability

A. The provisions of this chapter apply to zoning districts where residential uses are permitted, on lots that have at least one existing or proposed Dwelling Unit or Group Living Accommodation that is not a Fraternity House, Sorority House or Dormitory.

B. *Number Permitted.* See Table 23.306-1--ADU and Junior ADU Maximum Number of

Units per Lot.

C. *Density Exemption and Growth Limits.* ADUs are considered an accessory use consistent with the parcel’s General Plan and zoning designations, shall not count toward the allowable density, and shall not be subject to any local ordinance, policy, or program that limits residential growth.

Table 23.306-1 ADU AND JUNIOR ADU MAXIMUM NUMBER OF UNITS PER LOT

USE, PRIMARY	ADU AND JADU, MAXIMUM PER LOT
Single Family Dwelling, one unit on lot	1 Conversion ADU, 1 New Construction ADU, and 1 Junior ADU, all are permitted
Single Family Dwelling, more than one unit on lot	1 ADU
Existing Multifamily Dwelling	8 new construction ADUs, provided that the number of ADUs does not exceed the number of existing units, and at least one interior ADU up to 25% of the total number of existing duplex or multi-family dwelling units on the lot.
Proposed Multifamily Dwelling	2 New Construction ADUs
Group Living Accommodation	1 ADU

23.306.030 Development Standards

A. *Basic Standards.* See Table 23.306-2: ADU Development Standards.

Table 23.306-2 ADU DEVELOPMENT STANDARDS

BASIC STANDARDS		SUPPLEMENTAL STANDARDS
Gross Floor Area, Maximum		23.306.030(A)(1)
Studio or 1 bedroom	850 sq. ft.	23.306.030(A)(2)
2+ bedrooms	1,000 sq. ft.	23.306.030(A)(3)
Building Height, Maximum		
Conversion	Same as existing structure	23.306.030(A)(1) 23.306.030(A)(3)
Detached, New Construction	20 ft.	
Attached, New Construction	25 ft.	23.306.030(A)(5) 23.306.030(A)(8)
Lot Line Setbacks, Minimum		
		23.306.030(A)(3)
		23.306.030(A)(4)
		23.306.030(A)(6)
Rear	4 ft.	
Interior Side	4 ft.	
Street Side	4 ft.	
Required Off-Street Parking Spaces		See 23.322.030 – Required

	Parking Spaces
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1. *Existing Building Conversion.* An ADU created entirely through conversion with no modifications to the existing building envelope that exceeds the development standards for maximum gross floor area in Table 23.306-2, ADU Development Standards, is allowed a physical addition of no more than 150 square feet. The addition must comply with maximum height and setback requirements.

2. *Multifamily Dwelling Conversion.* Interior ADU(s) must be created entirely through non-habitable residential portions of the existing multifamily dwelling structures that are not within the living space of a dwelling unit (e.g. basements, attics, garages, storage rooms, boiler rooms, passageways).

3. *Accessory Building or Accessory Structure Conversion.* An ADU converted from an accessory building or accessory structure is allowed to maintain non-conformity to the same location and dimensions of the existing accessory building or accessory structure, provided that the ADU meets fire and safety standards set forth in the California Building Standards Code adopted in BMC Title 19. A physical expansion of up to 150 square feet is permitted to accommodate ingress and egress. Any of the additions must comply with the development standards in Table 23.306-2.

4. *Attached ADU.* An ADU shall be considered attached if sharing a common wall with a primary dwelling.

5. *Detached ADU Setback Exceptions.* If there is a lesser setback allowed in 23.304.060 -- Accessory Buildings and Enclosed Accessory Structures for a comparable accessory building or accessory structure in the underlying zoning district, that setback shall apply.

6. *Attached ADU, New Construction Height.* Attached ADUs with height up to 25 ft. allowed with a Zoning Certificate.

B. *Junior ADUs.*

1. *Basic Standards.* A Junior ADU shall be contained entirely within an existing or proposed single family dwelling (including basements, attics, storage rooms, boiler rooms, and passageways) or its attached garage, and have no more than 500 square feet in floor area.

2. *Shared Sanitation Facility.* If a Junior ADU shares a sanitary facility with a single-family dwelling, an internal connection between the Junior ADU and the main living area of the single family dwelling is required.

3. *Junior ADU Floor Area.* The Junior ADU gross floor area calculation excludes any shared sanitation facility with the single family dwelling.

C. *Projections.*

1. *Outside of the Hillside Overlay.* Chimneys, water heater enclosures, flues, heating and cooling equipment, eaves, cornices, canopies, awnings, bay windows, and balconies may project two feet into the required front and side setbacks, so long as there remains at least a two-foot setback from property lines. Bay windows and balconies may not project into a required rear ADU setback.

2. *Within the Hillside Overlay.* No projections shall be allowed within a required setback.

D. *Rooftop Decks within the Hillside Overlay.* Roofs on ADUs within the Hillside Overlay may not be designed, converted, or used as usable open space.

23.306.040 Permit Procedures

A. *Zoning Certificate.* An application for an ADU or Junior ADU shall be allowed with a Zoning Certificate. The review must be completed, and the application approved or denied, within 60 days of receipt of a completed application. A completed application must include evidence of compliance with this Chapter, including development standards.

1. If an application to create an ADU or Junior ADU is submitted as part of a project that requires discretionary review, a Zoning Certificate for a building permit shall not be issued for the ADU or Junior ADU until the discretionary approval(s) has/have been granted and any applicable appeal periods have expired. See 23.404.060(A) Post-Decision Provisions (Effective Dates).

2. Issuance of a Zoning Certificate shall not be denied for the construction or conversion of an ADU or Junior ADU that complies with the requirements of Government Code Section 66323.

3. Issuance of a Zoning Certificate for the construction or conversion of an ADU or Junior ADU shall not be denied based on the failure of an applicant to correct a nonconforming zoning condition.

4. If the Zoning Officer denies an application, the applicant shall be provided, within the same 60-day period, a written notice identifying all deficiencies in the application and a description of how the application may be corrected.

B. *Neighbor Noticing.*

1. *Scope and Timing of Notice.* Notice of an ADU application shall be mailed to tenants of the subject property, and owners and tenants of the adjacent, confronting, and abutting properties, within ten working days of submission of the building permit application to the City.

2. *Content of Notice.* Notice shall provide the address of the project, allowable hours of construction, a link to the City's ADU webpage, and information for

tenants of the subject property on how to contact a Rent Board Housing Counselor by e-mail or phone and any other resource information deemed relevant.

3. *Mailing Fees.* The applicant shall be responsible for the cost of materials, postage, and staff time necessary to process and mail notices.

C. *Deed Restriction.* The property owner shall file a deed restriction with the Alameda County Recorder which states:

1. The Junior ADU shall not be sold separately from the main building;
2. The ADU shall not be sold separately from the main building, unless authorized under BMC Chapter 21.29 (ADU Condominium Ordinance) or under BMC 23.306.040(D) -- ADUs Developed by a Qualified Nonprofit Developer, or as otherwise permitted by state law. ;
3. The ADU shall not be rented for a term that is shorter than 30 days; and
4. If the property includes a Junior ADU, the Junior ADU or the Single Family Dwelling in which the Junior ADU is located shall be owner-occupied.

D. *ADUs Developed by a Qualified Nonprofit Developer.* An ADU built or developed by a "qualified nonprofit corporation" may be sold or conveyed separately from the main building to a "qualified buyer," as such terms are defined in subdivision (b) of Section 66340 of the California Government Code. The ADU must be held pursuant to a recorded tenancy in common agreement recorded on or after December 31, 2021 that includes the following elements:

1. Delineation of all areas of the property that are for the exclusive use of a cotenant;

2. Delineation of each cotenant’s responsibility for the costs of taxes, insurance, utilities, general maintenance and repair, and improvements associated with the property;
3. Procedures for dispute resolution among cotenants before resorting to legal action;
4. Allocates to each qualified buyer an undivided, unequal interest in the property based on the size of the dwelling each qualified buyer occupies;
5. A repurchase option that requires the qualified buyer to first offer the qualified nonprofit corporation to buy the ADU or primary dwelling if the buyer desires to sell or convey the property;
6. A requirement that the qualified buyer occupy the ADU or primary dwelling as the buyer’s principal residence; and
7. Affordability restrictions on the sale and conveyance of the ADU or primary dwelling that ensure the ADU and primary dwelling will be preserved for low-income housing for 45 years for owner-occupied housing units and will be sold or resold to a qualified buyer.
8. If requested by a utility providing service to the primary residence, the ADU shall have a separate water, sewer, or electrical connection to that utility.

**CHAPTER 23.322.030
 REQUIRED PARKING SPACES**

Table 23.322-1 REQUIRED OFFSTREET PARKING IN RESIDENTIAL DISTRICTS

Land Use	Number of Required Off-Street Parking Spaces
Residential Uses	
Accessory Dwelling Units	<u>Junior ADU</u> : None required <u>ADU outside of Hillside Overlay</u> : None required <u>ADU within Hillside Overlay</u> : 1 per ADU unless the parcel satisfies the criteria in Government Code

	Section 66322, using the definition of public transit as established in subdivision (m) of Government Code 66313.
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Planning and Development Department
Land Use Planning Division

STAFF REPORT
March 5, 2025

TO: Members of the Planning Commission

FROM: Branka Tatarevic, Associate Planner

SUBJECT: Accessory Dwelling Unit (ADU) Ordinance Amendments

RECOMMENDATION

Staff recommends that the Planning Commission review the staff report, receive the staff presentation, consider public comments, and provide feedback to staff on potential amendments to the ADU Ordinance.

BACKGROUND

The consideration of updates to the ADU ordinance has been prompted by a number of factors including a City Council referral for implementation of Assembly Bill (AB) 1033, the California Department of Housing and Community Development's (HCD) review of Berkeley's ADU Ordinance, and changes to state law pertaining to ADUs.

Assembly Bill 1033 (ADU Condominiums)

AB 1033 (Gov. Code § 66340 – 66342), which took effect on January 1, 2024, allows ADUs to be sold separately from the primary residence as condominiums, creating new opportunities for entry-level homeownership. Prior to AB 1033, California law prohibited the separate conveyance of ADUs, requiring them to remain under the same ownership as the primary dwelling unit. AB 1033 lifts this restriction, but local jurisdictions must opt-in by adopting an ordinance to enable separate ADU sales.

On May 14, 2024, the Berkeley City Council approved a referral (***Attachment 1***) directing the City Manager to implement AB 1033 by amending the Berkeley Municipal Code to eliminate restrictions on the sale of ADUs and adopt an ordinance allowing their separate sale. The referral emphasizes the potential of ADU condominiums to increase homeownership opportunities for moderate-income households, help existing homeowners generate equity, and expand naturally affordable housing options in the city.

As of today, the City of San José remains the only jurisdiction in California to have adopted an ADU condominium ordinance (***Attachment 4***). Staff have met with the San José team to discuss their approach to AB 1033 implementation, as well as their processing procedures. San José's ADU Condominium Ordinance is separate from its

existing ADU, subdivision or other land use regulations and applies only to the creation of ADU condominiums. The ordinance limits ADU condo projects to a maximum of four units, as subdivisions with four or fewer units can be processed ministerially as Parcel Maps, rather than through the discretionary process required for Tentative Tract Maps. Unlike Berkeley, San José does not have its own policies to disincentivize condo conversions or mitigate the impacts of condo conversions on the affordability of the rental housing market.

ADU Letter from California Housing and Community Development Department

As part of its oversight of local ADU regulations, HCD issued a letter to the City of Berkeley on May 3, 2024 (***Attachment 2***), reviewing the Berkeley Municipal Code Chapter 23.306 (Accessory Dwelling Units)¹, which was adopted on October 10, 2023. In the letter, HCD asserted that several provisions of BMC Chapter 23.206 do not align with state ADU law and must be amended.

The City responded to HCD's letter on June 3, 2024 (***Attachment 3***). The City's letter determined that:

- a number of the HCD's suggested changes were minor. These minor changes were included in the State Law and Technical Edits package the Planning Commission recommended in June 2024;
- a select number of findings did not require any changes; and
- an additional set of findings required policy consultation with the City Council. These are the findings included in this report for policy recommendations from the Planning Commission.

California Government Code Section 66323 includes types of ADUs that the City must approve ministerially. Generally speaking, these are ADUs that are 800 square feet or less, meet specified height requirements, and comply with specified rear and side setback requirements. While the City can adopt development standards and regulations for larger ADUs, cities are limited in the regulation of these "Section 66323 ADUs"

Senate Bill 1211

Senate Bill 1211 (SB 1211) was signed into law in on September 19, 2024. SB 1211 contains two provisions which could require amendments to the BMC.

Previously, state law allowed only two detached ADUs on a multifamily lot. SB 1211 now permits up to eight detached ADUs on a multifamily lot, or a number equal to the existing units on the lot, whichever is less. BMC Chapter 23.206 is proposed to be amended to comply with SB 1211 as part of the annual State Law and Technical Edits (STLE) package which the Planning Commission will review in the spring.

Additionally, SB 1211 includes a provision which prohibits the City from imposing objective development or design standards on Section 66323 ADUs beyond what is authorized in state law.

¹ <https://berkeley.municipal.codes/BMC/23.306>

DISCUSSION

Assembly Bill 1033 and ADU Condominiums

AB 1033 Local Ordinance Requirements

AB 1033 allows a city to adopt a local ordinance permitting separate sale of the primary dwelling and one or more ADUs as condominiums. To do so, the local ordinance **must** include the following components:

- Compliance with:
 - the Subdivision Map Act;
 - the Davis-Stirling Act (the state law that regulates condominiums); and
 - the City's Subdivision Ordinance (Title 21).
- A procedure to obtain lienholders' consent (i.e., the property owner must get the mortgage lender's sign-off before a separate sale would be permitted).
- A process to conduct and verify a safety inspection. Obtaining a Certificate of Occupancy from the city, or obtaining an inspection report from a HUD-certified inspector are two of the most common approaches to meeting this requirement.
- Mandatory consumer disclosures regarding lender requirements.

If an ADU is tenant-occupied and the property owner seeks to sell the ADU as a separate condominium under an AB 1033 ADU Condominium Ordinance (once the city adopts it), the city may require that a tenant receive a right of first refusal. If the city were interested in implementing an ordinance with a right of first refusal requirement, an AB 1033 ADU Condominium Ordinance could treat ADU condos the same as typical condos under the city's own Condo Conversion Ordinance (BMC Chapter 21.28)², or it could include different requirements for the conversion of ADUs to condos.

Existing City Regulations Governing Condominiums

Existing Subdivision Ordinance (BMC Title 21 (Subdivisions))³

BMC Title 21 (Subdivisions) was enacted for the purpose of adopting regulations to implement and supplement the State's Subdivision Map Act. Title 21 includes:

- A ministerial process for the creating a Parcel Map for four or fewer parcels or condo units;
- A discretionary process for Tentative Maps for creating five or more parcels or condo units;
- Condo conversion regulations; and
- Design requirements, procedures for lot line adjustments and subdivision improvement requirements.

² <https://berkeley.municipal.codes/BMC/21.28>

³ <https://berkeley.municipal.codes/BMC/21>

Existing Condominium Conversion Ordinance (BMC Chapter 21.28)⁴

Berkeley's Condominium Conversion Ordinance lays out the procedures, fees, and required tenant protections for applicants proposing to convert existing dwelling units into condominiums. It also includes the city's annual limit on allowable condo conversions.

Generally, BMC Chapter 21.28 requires:

- Payment of a Condo Conversion Mitigation Fee;
- Tenant protections, including notice, relocation assistance, and right of first refusal.

Since 1992, the City of Berkeley has imposed a Condo Conversion Housing Mitigation Fee. Revenues from the fee accrue to the Berkeley Housing Trust Fund to help finance construction and rehabilitation of permanently affordable housing in Berkeley.

The fee is calculated by dividing the difference between the costs of owning the unit as a condominium less the rental costs by the current fixed mortgage rate. The following is an example of a fee calculation from the city's *Residential Condominium Conversion Packet*.⁵

- Rental Costs = \$1,500 per month x 12 months/year = \$18,000 annually
- Ownership Cost (including principal, interest, taxes, insurance, and homeowners' association dues) = \$2,700 per month x 12 = \$32,400
- Assume a mortgage rate of 6.5 percent.
- Increased housing cost due to ownership conversion of the unit = \$32,400 - \$18,000 = \$14,400
- Mitigation Fee = \$14,400/0.065 = \$221,538

In addition, Berkeley's Condo Conversion Housing Mitigation Fee is designed to encourage property owners to extend protections to their tenants. Owners providing additional tenant protections specified in the Condo Conversion Ordinance receive a decrease in the amount of the fee, which is capped at 8% of the total sales price, or 4% of the total sales prices for 2-unit properties.

Berkeley Rent Ordinance (BMC Chapter 13.76)⁶

⁴ <https://berkeley.municipal.codes/BMC/21.28>

⁵ City of Berkeley, *Residential Condominium Conversion Packet*, Updated: July 1, 2022. https://berkeleyca.gov/sites/default/files/documents/Condo%20Packet%2007-01-2022_Posted%20Online.pdf

⁶ <https://berkeley.municipal.codes/BMC/13.76>

Under Berkeley's Rent Stabilization Ordinance, units with a Certificate of Occupancy issued after June 30, 1980, are generally exempt from rent ceiling controls. Most ADUs fall into this "new construction" exemption, though they still must follow just-cause eviction rules (BMC § 13.76.130).

Policy Questions for Planning Commission Discussion

1) Regulation of ADU Condos.

Should ADU condos be treated as any other condominium under Chapter 21.28—including payment of the Condominium Conversion Mitigation Fee, tenant protections, and discretionary approval for five or more units—or should the city create a streamlined path for ADU condominiums (as San Jose does)?

2) Right of First Refusal.

Should an AB 1033 ordinance require a right of first refusal for any tenant occupying an ADU that is being sold as a separate condominium? If so, should the right be the same as the current Condo Conversion Ordinance (i.e., one year to respond) or should it include a different timeline for ADU condominiums?

ADU Letter from California Housing and Community Development Department

On May 3, 2024, HCD sent a letter regarding the ADU Ordinance (***Attachment 2***), and the city responded on June 3, 2024 (***Attachment 3***). The letter included a set of findings which called for policy consultation with the Planning Commission, which are included below.

Number of ADUs Permitted

In its letter of May 3, 2024, HCD found that BMC Chapter 23.306 did not permit as many Section 66323 ADUs as required under state law. Currently, Table 23.306-1 (Unit Allowance) permits one ADU and one Junior ADU on a parcel with an existing single-family dwelling. HCD asserted that Government Code Section 66323 permits a homeowner, who meets specified requirements, to create one converted ADU; one detached, new construction ADU; and one JADU, for a total of three Section 66323 ADUs.

This is consistent with the latest *HCD ADU Handbook (January 2025)*⁷, which explains that on single-family lots specifically, local agencies must allow Category (a)(1) (converted ADU) and Category (a)(2) (detached ADU) together, plus one JADU (also described in Gov. Code § 66323(a)(1)).

⁷ California Housing and Community Development Department, *Accessory Dwelling Unit Handbook*, January 2025. <https://www.hcd.ca.gov/sites/default/files/docs/policy-and-research/adu-handbook-update.pdf>

Originally, BMC Section 23.306.020(B) was drafted based on HCD's *December 2020 ADU Handbook*, which stated that the two new ADU/JADU categories under former subdivision (e) "are not required to be combined." At that time, it appeared an applicant seeking to build both an ADU and a JADU would have to choose between a single-family ADU+JADU "conversion configuration" or "detached configuration," rather than do both. However, in July 2022, HCD updated its guidance to clarify that the four statutory categories of ADUs "may be combined"—meaning a local government "must allow (A) and (B) together or (C) and (D) together."

Question for the Planning Commission: Should the Berkeley Municipal Code (BMC) be amended to clearly allow up to three units on a single-family property: one interior/converted ADU, one detached new-construction ADU, and one JADU?

Conversion of Accessory Structures

In its letter of May 3, 2024, HCD found that the city must amend the BMC to remove the words "legally established" from BMC Section 23.306.030(A)(3), related to the conversion of accessory structures.

BMC Section 23.306.030(A)(3) states "An ADU converted from a legally established accessory building or accessory structure is allowed to maintain non-conformity to the same location and dimensions of the existing accessory building or accessory structure...."

Question for the Planning Commission: Should the Berkeley Municipal Code (BMC) be amended to remove the requirement that an accessory building or structure be "legally established" to be eligible for conversion to an ADU?

JADUs and Enclosed Uses

BMC Section 23.306.030(B) allows JADUs "within an existing or proposed single family dwelling or its attached garage...." It is later defined in Section 23.502.020(A)(4)(a) as, "A unit that is contained entirely within the walls of an existing or proposed single family dwelling, or a single-family dwelling unit's attached garage."

In its letter of May 3, 2024, HCD found that Government Code Section 66333 provides a broader allowance, stating "For purposes of this subdivision, enclosed uses within the residence, such as attached garages, are considered a part of the proposed or existing single-family residence," and that the BMC must allow JADUs in other enclosed uses not limited to the single-family residence and an attached garage.

City staff interprets the existing BMC language to already include other enclosed areas of the single-family dwelling. Specifically, the BMC definition of "accessory uses" (BMC Section 23.502.020(B)(2)(a)) is broad and extends beyond just the attached garage (e.g., storage rooms, basements). There is no instance staff could envision where an enclosed space would be excluded from conversion under the current definition.

Question for the Planning Commission: Should the Berkeley Municipal Code (BMC) be amended to explicitly expand eligibility to all “enclosed uses”?

Deed Restriction

BMC Section 23.306.040 states that “A completed [ADU] application must include evidence of compliance with this Chapter, including development standards, deed restrictions, and neighborhood noticing.”

In its letter of May 3, 2024, HCD found Government Code section 66317, states, “No local ordinance, policy, or regulation shall be the basis for the delay or denial of a building permit or a use permit under this section,” and therefore the city may not condition approval of an ADU application on the recordation of a deed restriction.

Under the ADU Ordinance, the requirement that a deed restriction be recorded is not a condition of approval; it is a requirement for a completed application. City staff does not interpret this provision as allowing the city to delay or deny a permit solely for lack of a recorded deed restriction.

Question for the Planning Commission: Should the Berkeley Municipal Code (BMC) be amended to remove the deed restriction requirements for a completed application?

JADU Rental Term

BMC Section 23.306.040(C)(3) states that a JADU cannot be rented for a term that is shorter than 30 days. In its letter of May 3, 2024, HCD found that while Government Code section 66333 allows the city to adopt an ordinance to provide for the creation of JADUs, and includes the provisions that can be included in the ordinance, the provisions do not include requiring a minimum rental term of 30 days. Therefore, HCD states that the 30-day rental term minimum for JADUs must be removed. The current 30-day minimum rental term for ADUs complies with state law.

Question for the Planning Commission: Should the Berkeley Municipal Code (BMC) be amended to remove the 30 days minimum rental term for JADUs?

Senate Bill 1211

SB 1211 (signed on September 19, 2024) allows up to eight detached ADUs on a lot with an existing multifamily dwelling (subject to certain limits). Staff intends to incorporate this statutory update into the upcoming State Law and Technical Edits (SLTE) Zoning Amendments package that will come before the Planning Commission for public hearing this Spring.

SB 1211 also includes a provision which prohibits the City from imposing objective development or design standards on Section 66323 ADUs beyond what is authorized in state law. There are two provisions in the BMC which may conflict with this provision.

1) *ADUs in the Front Setback*: BMC Chapter 23.306.030(A)(4) prohibits the placement of ADUs in the front setback unless the only location on a lot that can accommodate an 800 square foot ADU is within the front setback. The section also includes specific front setback requirements that apply only to ADUs that qualify to be located within the front setback. State law currently permits only the establishment of side and rear setbacks for Section 66323 ADUs, not front setbacks. SB 1211 could be interpreted to limit the city's ability to prohibit Section 66323 ADUs in the front setback even if an ADU could be located elsewhere on a lot.

2) *ADU Building Separation*: BMC Chapter 23.306.030(A) includes basic development standards for ADUs, which include building separation standards. State law currently only permits the establishment of side and rear setbacks for Section 66323 ADUs. There is no provision for the establishment of building separation standards, nor is there any explicit prohibition. The building separation requirement was adopted by the City Council to address concerns about fire safety and firefighter access to buildings on a property. State law provides the establishment of side and rear setbacks "for fire safety," but does not specifically mention building separation requirements for Section 66323 ADUs.

Question for the Planning Commission: Should BMC Chapter 23.306.030 be amended to remove the front setback and building separation provisions for Section 66323 ADUs, or should those provisions be removed for all ADUs?

ENVIRONMENTAL REVIEW

There are no identifiable environmental effects or opportunities associated with this informational report.

NEXT STEPS

Staff is currently reviewing HCD's comments and exploring policy options to meet state requirements, particularly regarding separate ADU conveyance and other statutory changes. With Planning Commission's input, we will incorporate them into draft amendments, solicit public feedback, and move forward with the required steps for final adoption of any Zoning Ordinance amendments.

CONTACT PERSON

Branka Tatarevic, Planning and Development Department, 510-981-7472

ATTACHMENTS

1. Referral to Implement AB 1033
2. HCD ADU Ordinance Review Letter
3. City's Response to HCD's Letter
4. San Jose ADU Condominium Ordinance

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov



May 3, 2024

Jordan Klein, Director,
Department of Planning and Development
City of Berkeley
1947 Center St, 2nd Floor
Berkeley, CA 94704

Dear Jordan Klein:

RE: Review of Berkeley's Accessory Dwelling Unit (ADU) Ordinance under State ADU Law (Gov. Code, §§ 66313 - 66342)

Please Note: As of March 25, 2024, with the Chaptering of Senate Bill (SB) 477 (Chapter 7, Statutes of 2024), the sections of Government Code relevant to State ADU and Junior Accessory Dwelling Unit (JADU) Law have been re-numbered (Enclosure 1).

Thank you for submitting the City of Berkeley (City) accessory dwelling unit (ADU) Ordinance No. 7,888-N.S. (Ordinance), adopted October 10, 2023, to the California Department of Housing and Community Development (HCD). HCD has reviewed the Ordinance and submits these written findings pursuant to Government Code section 66326, subdivision (a). HCD finds that the Ordinance does not comply with State ADU and JADU Laws in the manner noted below. Under Government Code section 66326, subdivision (b)(1), the City has up to 30 days to respond to these findings. Accordingly, the City must provide a written response to these findings no later than June 3, 2024.

HCD notes that HCD's previous ADU Ordinance review letter, dated October 17, 2022, raised the issue of the Ordinance's restrictions on ADUs in the Very High Fire Hazard Severity Zone. Upon review of the City's Ordinance 7,888-N.S. and supporting evidence, HCD has determined that the City addressed HCD's findings.

The Ordinance addresses many statutory requirements; however, HCD finds that the Ordinance does not comply with State ADU Law in the following respects:

1. Table 23.306-1 – *Unit Allowance* – The Ordinance states a single-family dwelling is permitted, at maximum, "1 ADU and 1 Junior ADU." However, Government Code section 66323, subdivision (a) states, "Notwithstanding Sections 66314 to 66322, inclusive, a local agency shall ministerially approve an application for a building permit within a residential or mixed-use zone to

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create any of the following: (1) One accessory dwelling unit and one junior accessory dwelling unit per lot with a proposed or existing single-family dwelling...(A) The accessory dwelling unit or junior accessory dwelling unit is within the proposed space of a single family dwelling or existing space of a single-family dwelling or accessory structure.” Subdivision (a)(2) permits, “[o]ne detached, new construction, accessory dwelling unit that does not exceed four-foot side and rear yard setbacks.” The use of the term “any” followed by an enumeration of by-right ADU types permitted indicate that any of these ADU types can be combined on a lot zoned for single family dwellings.

This permits a homeowner, who meets specified requirements, to create one converted ADU; one detached, new construction ADU; and one JADU. Thus, if the local agency approves an ADU that is created from existing (or proposed) space, and the owner subsequently applies for a detached ADU (or vice versa) that meets the size and setbacks pursuant to the subdivision, the local agency cannot deny the application, nor deny a permit for a JADU under this section. Therefore, the City must amend the Ordinance to permit all by-right combinations required by State ADU Law.

2. 23.306.030 A.1 – *150 Sq. ft. Expansion* – The Ordinance states “ADU Development Standards is allowed a physical addition of no more than 150 square feet.” However, Government Code section 66323, subdivision (a)(1)(A) allows, an “expansion of not more than 150 square feet beyond the same physical dimensions as the **existing accessory structure**. An expansion beyond the physical dimensions of the existing accessory structure shall be limited to accommodating ingress and egress.” The statute intends for this expansion only with the conversion of an existing accessory structure. Therefore, the Ordinance allowing expansion for all building conversions is inconsistent with State ADU Law. The City must amend the Ordinance to limit the expansion only in conjunction with the conversion of existing accessory structures.
3. 23.306.030 A.2 – *“Main Building” and Conversion* – The Ordinance states that for a duplex or multifamily building, “Interior ADU(s) must be created entirely through non-habitable residential portions of the existing main building that are not within the living space of a dwelling unit (e.g. basement, attic, garages, storage room).” The term “main building” is problematic as Government Code section 66323, subdivision (a)(3)(1), allows “Multiple accessory dwelling units within the portions of **existing multifamily dwelling structures** that are not used as livable space....” The term “the existing main building” refers to a single building, whereas State ADU Law refers to “existing multifamily dwelling structures.” As worded, the Ordinance could lead to confusion as many multifamily projects could have multiple building with units within them.

Additionally, the adjective “main” is not objective, especially in situations wherein multiple dwelling structures occupy a single lot. Government Code

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section 66314, subdivision (b)(1) requires the use of “objective standards” for ADUs, which are defined in Government Code section 66313, subdivision (h) as “standards that involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official prior to submittal.” The use of such a subjective term is inconsistent with State ADU Law.

In summary, the City must amend the Ordinance to comply with State ADU Law.

4. 23.306.030 A.3. – *Accessory Conversion* – The Ordinance states “An ADU converted from a legally established accessory building or accessory structure is allowed to maintain non-conformity to the same location and dimensions of the existing accessory building or accessory structure....” However, Government Code section 66323, subdivision (a)(1)(A) allows, an “expansion of not more than 150 square feet beyond the same physical dimensions as the existing accessory structure. An expansion beyond the physical dimensions of the existing accessory structure shall be limited to accommodating ingress and egress.” Therefore, the City must amend the Ordinance to allow for the expansion of an accessory structure for ingress and egress.
5. 23.306.030 A.8, 23.306.040 A, 23.324.060 (C) – *Zoning Certificate* – The Ordinance states that, generally, “An application for an ADU or Junior ADU shall be allowed with a Zoning Certificate. Review must be completed within 60 days of submission of a completed application.” It also provides more specific conditions that engage with a zoning certificate, stating “Attached ADUs with height up to 25 ft. allowed with a Zoning Certificate,” allowing specific “...alterations of a lawful nonconforming existing structure or building that is an existing ADU or proposed to be converted to an ADU are permitted with a Zoning Certificate,” and allowing new windows or doors with “...a lawful nonconforming existing structure or building that is an existing ADU or proposed to be converted to an ADU... with a Zoning Certificate.”

The Ordinance states that the “review” will be completed within 60 days. The Ordinance does not specify that the review will end with an approval or denial within the 60-day period. The term “Zoning Certificate” is not defined or explained in Section 23.502.020, and it is unclear whether the review process is ministerial or discretionary. Government Code section 66317, subdivision (a) requires, that a “A permit application for an accessory dwelling unit or a junior accessory dwelling unit shall be considered and approved ministerially without discretionary review. The permitting agency shall either approve or deny the application to create or serve an accessory dwelling unit or a junior accessory dwelling unit within 60 days from the date the permitting agency receives a completed application.” Subdivision (b) further states that “If a permitting agency denies an application for an accessory dwelling unit or junior accessory

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dwelling unit pursuant to subdivision (a), the permitting agency shall, within the time period described in subdivision (a), return in writing a full set of comments to the applicant with a list of items that are defective or deficient and a description of how the application can be remedied by the applicant.”

Therefore, the City must amend the Ordinance to specify ministerial approval or denial within 60 days and add provisions for a denial process according to State ADU Law.

6. 23.306.030 B – JADU Entry – The Ordinance states “A Junior ADU shall be contained entirely within an existing or proposed single family dwelling or its attached garage and have no more than 500 square feet in floor area.” However, Government Code section 66333, subdivision (e) states, that local JADU ordinances must “Require a permitted junior accessory dwelling unit to include a separate entrance from the main entrance to the proposed or existing single-family residence.” Therefore, the City must amend the Ordinance to require a separate entrance to the JADU.
7. 23.306.030 B, 23.502.020 A.4.a – *JADUs and Enclosed Uses* – The Ordinance allows JADUs “within an existing or proposed single family dwelling or its attached garage....” It is later defined in Section 23.502.020 (A)(4)(a) as, “A unit that is contained entirely within the walls of an existing or proposed single family dwelling, or a single-family dwelling unit's attached garage.” However, Government Code section 66333, subdivision (d), provides a broader allowance, stating “For purposes of this subdivision, enclosed uses within the residence, such as attached garages, are considered a part of the proposed or existing single-family residence.” The City must therefore allow JADUs in other enclosed uses not limited to an attached garage. The City must amend the Ordinance accordingly.
8. 23.306.040 A and C – *Deed Restriction* – Ordinance section 23.306.040 A states “A completed application must include evidence of compliance with this Chapter, including development standards, deed restrictions, and neighborhood noticing.” Section 23.306.040 C states, “The property owner shall file a deed restriction with the Alameda County Recorder which states... 2. The ADU shall not be sold separately from the main building unless the conditions of BMC 23.306.040(0) ADUs Developed by a Qualified Nonprofit Developer are met; 3. The ADU... shall not be rented for a term that is shorter than 30 days.”

However, Government Code section 66317, subdivision (c) states, “No local ordinance, policy, or regulation shall be the basis for the delay or denial of a building permit or a use permit under this section,” and section 66315 states “Section 66314 establishes the maximum standards that a local agency shall use to evaluate a proposed accessory dwelling unit on a lot that includes a proposed or existing single-family dwelling. No additional standards, other than those provided in Section 66314, shall be used or imposed....” Section 66314 does not require a deed restriction for a building permit; therefore, this section

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of the Ordinance is not consistent with State ADU Law. The City may not give condition approval of an ADU application on the recordation of a deed restriction. Although the City may have other authority by which to require a deed restriction, this requirement may not be the basis of delay or deny an ADU application and the issuance of a building permit. Therefore, the City must amend the Ordinance accordingly.

Pursuant to Government Code section 66333, subdivision (c) the City shall, “[r]equire the recordation of a deed restriction, which shall run with the land...” The deed restriction is limited to the provisions of subdivision (c)(1) and (c)(2). The deed restriction for JADUs do not include a minimum 30-day rental term. Therefore, the City must amend the Ordinance accordingly.

9. 23.306.040 B – *Neighbor Noticing* – The Ordinance states “Notice of an ADU application shall be mailed to tenants of the subject property, and owners and tenants of the adjacent, confronting, and abutting properties, within ten working days of submission of the building permit application to the City... Notice shall provide the address of the project, allowable hours of construction, a link to the City’s ADU webpage, and information for tenants of the subject property on how to contact a Rent Board Housing Counselor by e-mail or phone and any other resource information deemed relevant.”

However, Government Code section 66317, subdivision (c) states, “No local ordinance, policy, or regulation shall be the basis for the delay or denial of a building permit or a use permit under this section,” and section 66315 states “Section 66314, establishes the maximum standards that a local agency shall use to evaluate a proposed accessory dwelling unit on a lot that includes a proposed or existing single-family dwelling. No additional standards, other than those provided in Section 66314, shall be used or imposed....” Section 66314 does not require neighbor noticing for an ADU building permit. Therefore, the City must remove this section.

10. 23.306.040 C.2 – *Separate Sale* – The Ordinance states “The ADU shall not be sold separately from the main building unless the conditions of BMC 23.306.040(D) ADUs Developed by a Qualified Nonprofit Developer are met....” Please note that Government Code section 66342 states “a local agency may also adopt a local ordinance to allow the separate conveyance of the primary dwelling unit and accessory dwelling unit or units as condominiums...” which are then subject to the standards listed in that section.
11. 23.306.040 C.3 – *JADU Terms* – The Ordinance states “The ADU and/or Junior ADU shall not be rented for a term that is shorter than 30 days....” However, Government Code section 66333 provides, “Notwithstanding Article 2 (commencing with Section 66314), a local agency may, by ordinance, provide for the creation of junior accessory dwelling units in single-family residential zones. The ordinance may require a permit to be obtained for the creation of a junior accessory dwelling unit and shall do all of the following:” The section then

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lists the provisions that are required to be in the JADU ordinance. The provisions do not require a minimum rental term of 30 days. Therefore, the City must amend the Ordinance accordingly.

- 12.23.306.040 C.4 – *JADU Owner Occupancy* – The Ordinance requires that the “Junior ADU or the Single Family Dwelling in which the Junior ADU is located shall be owner-occupied.” However, Government Code section 66333, subdivision (b) states, “Owner-occupancy shall not be required if the owner is another governmental agency, land trust, or housing organization.” Therefore, the City must note the exception.

In response to the findings in this letter, and pursuant to Government Code section 66326, subdivisions (b)(2)(A) and (b)(2)(B), the City must either amend the Ordinance to comply with State ADU Law or adopt the Ordinance without changes. Should the City choose to adopt the Ordinance without the changes specified by HCD, the City must include findings in its resolution that explain the reasons the City finds that the Ordinance complies with State ADU Law despite the findings made by HCD. Accordingly, the City’s response should provide a plan and timeline to bring the Ordinance into compliance.

Please note that, pursuant to Government Code section 66326, subdivision (c)(1), if the City fails to take either course of action and bring the Ordinance into compliance with State ADU Law, HCD may notify the City and the California Office of the Attorney General that the City is in violation of State ADU Law.

HCD appreciates the City’s efforts in the preparation and adoption of the Ordinance and welcomes the opportunity to assist the City in fully complying with State ADU Law. Please contact Mike Van Gorder, of our staff, at (916) 776-7541 or at mike.vangorder@hcd.ca.gov if you have any questions or would like HCD’s technical assistance in these matters.

Sincerely,



Jamie Candelaria
Senior Housing Accountability Unit Manager
Housing Policy Development Division

Enclosure

State ADU/JADU Law Statutory Conversion Table

New Government Code Sections	Previous Government Code Sections
Article 1. General Provisions	
66310	65852.150 (a)
66311	65852.150 (b)
66312	65852.150 (c)
66313	General Definition Section 65852.2 (j) 65852.22 (j)
Article 2. Accessory Dwelling Unit Approvals	
66314	65852.2(a)(1)(A), (D)(i)-(xii), (a)(4)-(5)
66315	65852.2 (a)(8)
66316	65852.2 (a)(6)
66317	65852.2 (a)(3), (a)(7)
66318	65852.2 (a)(9), 65852.2 (a)(2)
66319	65852.2 (a)(10)
66320	65852.2 (b)
66321	65852.2 (c)
66322	65852.2 (d)
66323	65852.2 (e)
66324	65852.2 (f)
66325	65852.2 (g)
66326	65852.2 (h)
66327	65852.2 (i)
66328	65852.2 (k)
66329	65852.2 (l)
66330	65852.2 (m)
66331	65852.2 (n)
66332	65852.23.
Article 3. Junior Accessory Dwelling Units	
66333	65852.22 (a)
66334	65852.22 (b)
66335	65852.22 (c)
66336	65852.22 (d)
66337	65852.22 (e)
66338	65852.22 (f)-(g)
66339	65852.22 (h)
Article 4. Accessory Dwelling Unit Sales	
66340	65852.26 (b)
66341	65852.26 (a)
66342	65852.2 (a)(10)



PLANNING COMMISSION

Notice of Public Hearing

Wednesday, June 4, 2025

Amendments to Berkeley Municipal Code Chapter 23.306 Accessory Dwelling Units

The Planning Commission of the City of Berkeley will hold a public hearing on the above matter, pursuant to Zoning Ordinance Section 23A.20.030, on **Wednesday, June 4, 2025, beginning at 6:00 PM.**

PROJECT DESCRIPTION

Amend the Berkeley Municipal Code (BMC) to codify references to statewide Accessory Dwelling Unit (ADU) regulations in response to Planning Commission feedback received on March 5, 2025. The amendments pertain to the number of allowed units, development standards, and application requirements. Non-substantive technical edits are also included. These changes clarify the structure and language of the ADU ordinance and update it to ensure conformance with State law and local regulations.

LOCATION: Citywide.

ENVIRONMENTAL REVIEW STATUS

The proposed zoning ordinance amendments do not include any allowances for additional development capacity or other new physical changes to the environment that are not already permitted and previously evaluated under CEQA. Adoption of the proposed amendments would in no way have a significant effect on the environment, and therefore is not subject to CEQA (CEQA Guidelines Section 15061(b)(3), Common Sense Exemption).

PUBLIC COMMENT & FURTHER INFORMATION

All persons are welcome to attend the hearing and will be given an opportunity to address the Commission. Comments may be made verbally at the public hearing and/or in writing before the hearing. Written comments must be directed to:

Faye Messner
Planning Commission Clerk
Email: PlanningPC@berkeleyca.gov

City of Berkeley, Land Use Planning Division
1947 Center Street, 2nd Floor
Berkeley, CA 94704

Correspondence received by **12pm on Tuesday, May 27, 2025**, will be included as a Communication in the agenda packet. Correspondence received after this deadline will be conveyed to the Commission and the public in the following manner:

- Correspondence received by **12pm on Monday, June 2, 2025** will be included in a Supplemental Packet, which will be posted to the online agenda as a Late Communication one day before the public hearing.

- Correspondence received by **5pm on Tuesday, June 3, 2025** will be included in a second Supplemental Packet, which will be posted to the online agenda as a Late Communication by 5pm on the day of the public hearing.
- Correspondence received **after** 5pm on Tuesday, June 3, 2025 will be saved as part of the public record.

Members of the public may submit written comments just before or at the beginning of the meeting by providing 15 printed copies of the correspondence to the Planning Commission Secretary.

COMMUNICATION ACCESS

To request a meeting agenda in large print, Braille, or on audiocassette, or to request a sign language interpreter for the meeting, call (510) 981-7410 (voice) or 981-6903 (TDD). Notice of at least five (5) business days will ensure availability. All materials will be made available via the Planning Commission agenda page online at <https://berkeleyca.gov/your-government/boards-commissions/planning-commission>.

FURTHER INFORMATION

Questions should be directed to Branka Tatarevic, at (510) 981-7472 or btatarevic@berkeleyca.gov. Current and past agendas are available on the City of Berkeley website at: <https://berkeleyca.gov/your-government/boards-commissions/planning-commission>.

ATTACHMENT 1

**PLANNING COMMISSION
RESOLUTION NO. 2024-06**

**A RESOLUTION OF THE CITY OF BERKELEY PLANNING COMMISSION
RECOMMENDING THE CITY COUNCIL ADOPT PROPOSED AMENDMENTS TO TITLE 23
(ZONING) TO ENSURE COMPLIANCE WITH STATE ADU LAWS**

WHEREAS, the City of Berkeley must ensure that its Zoning Ordinance complies with State law with respect to Accessory Dwelling Units (ADUs), so from time to time must amend the Zoning Ordinance; and

WHEREAS, the amendments do not change the designation of any parcel to reduce the intensity of use allowed under the existing General Plan or zoning pursuant to Gov. Code section 66300(b)(1); and

WHEREAS, on March 5, 2025, the Planning Commission held a publicly-noticed meeting on recent changes to State law regarding ADUs and provided direction to City staff to prepare Zoning Ordinance amendments; and

WHEREAS, on June 4, 2025, 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 May 9, 2025 for the public hearing held on June 4, 2025.

WHEREAS, all documents constituting the record of this proceeding are and shall be retained by the City of Berkeley Planning and Development Department, Land Use Planning Division, at 1947 Center Street, Berkeley, California.

WHEREAS, the proposed ordinance amendments are statutorily exempt from the California Environmental Quality Act, per Guidelines Section 15282(h).

NOW, THEREFORE, IT BE RESOLVED that the Planning Commission does hereby recommend to the City Council of the City of Berkeley to amend Title 23, as shown in Attachment A; and

BE IT FURTHER RESOLVED, that pursuant to Berkeley Municipal Code Section 23.412.060(A)(1)-(3), the Planning Commission makes the following findings to support its recommendation for the zoning ordinance amendments:

- 1. The proposed amendment is consistent with the General Plan and any applicable specific plan or area plan.**

Evidence: Per California Government Code § 66319, an ADU shall be deemed to be an accessory use or an accessory building and shall not be considered to exceed the

allowable density for the lot upon which it is located and shall be deemed to be a residential use that is consistent with the existing general plan and zoning designations for the lot.

2. The proposed amendment is consistent with state law.

Evidence: The proposed amendments are recommended specifically because they are required for the City of Berkeley's ADU regulations to be consistent with state law.

3. The proposed amendment will not be detrimental to the public interest, health, safety, convenience, or welfare.

Evidence: The zoning ordinance amendments serve the public interest by facilitating additional housing capacity and production to better meet housing demand.

BE IT FURTHER RESOLVED, that pursuant to Berkeley Municipal Code Section 23.412.060 (B) the Planning Commission makes the following findings to support its recommendation for the zoning ordinance amendment:

B. The proposed amendment is internally consistent with other applicable provisions of the Zoning Ordinance.

Evidence: Per California Government Code § 66319, an ADU shall be deemed to be an accessory use or an accessory building and shall not be considered to exceed the allowable density for the lot upon which it is located and shall be deemed to be a residential use that is consistent with the zoning designations for the lot.

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 4th day of June 2025, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

Alisa Shen,
SECRETARY TO THE PLANNING COMMISSION

EXHIBIT A
DRAFT
ADU ORDINANCE AMENDMENTS

CHAPTER 23.306
ACCESSORY DWELLING UNITS

Sections:

- 23.306.010 Purpose.**
- 23.306.020 Applicability.**
- 23.306.030 Development Standards**
- 23.306.040 Permit Procedures.**

23.306.010 Purpose

This Chapter establishes accessory dwelling unit (ADU) and junior accessory dwelling unit (Junior ADU) standards that:

- A. Implement California Government Code Sections 66314 through 66339
- B. Increase overall supply and range of housing options in Berkeley.
- C. Expedite small-scale infill development.
- D. Support Housing Element goals of facilitating construction of accessory dwelling units and increasing the number of housing units that are more affordable to Berkeley residents.
- E. Encourage development of accessory dwelling units in zoning districts with compatible land uses and infrastructure.

23.306.020 Applicability

A. The provisions of this chapter apply to zoning districts where residential uses are permitted, on lots that have at least one existing or proposed Dwelling Unit or Group Living Accommodation that is not a Fraternity House, Sorority House or Dormitory.

B. *Number Permitted.* See Table 23.306-1--ADU and Junior ADU Maximum Number of

Units per Lot.

C. *Density Exemption and Growth Limits.* ADUs are considered an accessory use consistent with the parcel's General Plan and zoning designations, shall not count toward the allowable density, and shall not be subject to any local ordinance, policy, or program that limits residential growth.

Table 23.306-1 ADU AND JUNIOR ADU MAXIMUM NUMBER OF UNITS PER LOT

USE, PRIMARY	ADU AND JADU, MAXIMUM PER LOT
Single Family Dwelling, one unit on lot	1 Conversion ADU, 1 New Construction ADU, and 1 Junior ADU, all are permitted
Single Family Dwelling, more than one unit on lot	1 ADU
Existing Multifamily Dwelling	8 new construction ADUs, provided that the number of ADUs does not exceed the number of existing units, and at least one interior ADU up to 25% of the total number of existing duplex or multi-family dwelling units on the lot.
Proposed Multifamily Dwelling	2 New Construction ADUs
Group Living Accommodation	1 ADU

23.306.030 Development Standards

A. *Basic Standards.* See Table 23.306-2: ADU Development Standards.

Table 23.306-2 ADU DEVELOPMENT STANDARDS

BASIC STANDARDS		SUPPLEMENTAL STANDARDS
Gross Floor Area, Maximum		23.306.030(A)(1)
Studio or 1 bedroom	850 sq. ft.	23.306.030(A)(2)
2+ bedrooms	1,000 sq. ft.	23.306.030(A)(3)
Building Height, Maximum		
Conversion	Same as existing structure	23.306.030(A)(1) 23.306.030(A)(3)
Detached, New Construction	20 ft.	
Attached, New Construction	25 ft.	23.306.030(A)(5) 23.306.030(A)(8)
Lot Line Setbacks, Minimum		
		23.306.030(A)(3)
		23.306.030(A)(4)
		23.306.030(A)(6)
Rear	4 ft.	
Interior Side	4 ft.	
Street Side	4 ft.	
Required Off-Street Parking Spaces		See 23.322.030 – Required

	Parking Spaces
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1. *Existing Building Conversion.* An ADU created entirely through conversion with no modifications to the existing building envelope that exceeds the development standards for maximum gross floor area in Table 23.306-2, ADU Development Standards, is allowed a physical addition of no more than 150 square feet. The addition must comply with maximum height and setback requirements.

2. *Multifamily Dwelling Conversion.* Interior ADU(s) must be created entirely through non-habitable residential portions of the existing multifamily dwelling structures that are not within the living space of a dwelling unit (e.g. basements, attics, garages, storage rooms, boiler rooms, passageways).

3. *Accessory Building or Accessory Structure Conversion.* An ADU converted from an accessory building or accessory structure is allowed to maintain non-conformity to the same location and dimensions of the existing accessory building or accessory structure, provided that the ADU meets fire and safety standards set forth in the California Building Standards Code adopted in BMC Title 19. A physical expansion of up to 150 square feet is permitted to accommodate ingress and egress. Any of the additions must comply with the development standards in Table 23.306-2.

4. *Attached ADU.* An ADU shall be considered attached if sharing a common wall with a primary dwelling.

5. *Detached ADU Setback Exceptions.* If there is a lesser setback allowed in 23.304.060 -- Accessory Buildings and Enclosed Accessory Structures for a comparable accessory building or accessory structure in the underlying zoning district, that setback shall apply.

6. *Attached ADU, New Construction Height.* Attached ADUs with height up to 25 ft. allowed with a Zoning Certificate.

B. *Junior ADUs.*

1. *Basic Standards.* A Junior ADU shall be contained entirely within an existing or proposed single family dwelling (including basements, attics, storage rooms, boiler rooms, and passageways) or its attached garage, and have no more than 500 square feet in floor area.

2. *Shared Sanitation Facility.* If a Junior ADU shares a sanitary facility with a single-family dwelling, an internal connection between the Junior ADU and the main living area of the single family dwelling is required.

3. *Junior ADU Floor Area.* The Junior ADU gross floor area calculation excludes any shared sanitation facility with the single family dwelling.

C. *Projections.*

1. *Outside of the Hillside Overlay.* Chimneys, water heater enclosures, flues, heating and cooling equipment, eaves, cornices, canopies, awnings, bay windows, and balconies may project two feet into the required front and side setbacks, so long as there remains at least a two-foot setback from property lines. Bay windows and balconies may not project into a required rear ADU setback.

2. *Within the Hillside Overlay.* No projections shall be allowed within a required setback.

D. *Rooftop Decks within the Hillside Overlay.* Roofs on ADUs within the Hillside Overlay may not be designed, converted, or used as usable open space.

23.306.040 Permit Procedures

A. *Zoning Certificate.* An application for an ADU or Junior ADU shall be allowed with a Zoning Certificate. The review must be completed, and the application approved or denied, within 60 days of receipt of a completed application. A completed application must include evidence of compliance with this Chapter, including development standards.

1. If an application to create an ADU or Junior ADU is submitted as part of a project that requires discretionary review, a Zoning Certificate for a building permit shall not be issued for the ADU or Junior ADU until the discretionary approval(s) has/have been granted and any applicable appeal periods have expired. See 23.404.060(A) Post-Decision Provisions (Effective Dates).
2. Issuance of a Zoning Certificate shall not be denied for the construction or conversion of an ADU or Junior ADU that complies with the requirements of Government Code Section 66323.
3. Issuance of a Zoning Certificate for the construction or conversion of an ADU or Junior ADU shall not be denied based on the failure of an applicant to correct a nonconforming zoning condition.
4. If the Zoning Officer denies an application, the applicant shall be provided, within the same 60-day period, a written notice identifying all deficiencies in the application and a description of how the application may be corrected.

B. *Neighbor Noticing.*

1. *Scope and Timing of Notice.* Notice of an ADU application shall be mailed to tenants of the subject property, and owners and tenants of the adjacent, confronting, and abutting properties, within ten working days of submission of the building permit application to the City.
2. *Content of Notice.* Notice shall provide the address of the project, allowable hours of construction, a link to the City's ADU webpage, and information for

tenants of the subject property on how to contact a Rent Board Housing Counselor by e-mail or phone and any other resource information deemed relevant.

3. *Mailing Fees.* The applicant shall be responsible for the cost of materials, postage, and staff time necessary to process and mail notices.

C. *Deed Restriction.* The property owner shall file a deed restriction with the Alameda County Recorder which states:

1. The Junior ADU shall not be sold separately from the main building;
2. The ADU shall not be sold separately from the main building, unless authorized under BMC Chapter 21.29 (ADU Condominium Ordinance) or under BMC 23.306.040(D) -- ADUs Developed by a Qualified Nonprofit Developer, or as otherwise permitted by state law. ;
3. The ADU shall not be rented for a term that is shorter than 30 days; and
4. If the property includes a Junior ADU, the Junior ADU or the Single Family Dwelling in which the Junior ADU is located shall be owner-occupied.

D. *ADUs Developed by a Qualified Nonprofit Developer.* An ADU built or developed by a "qualified nonprofit corporation" may be sold or conveyed separately from the main building to a "qualified buyer," as such terms are defined in subdivision (b) of Section 66340 of the California Government Code. The ADU must be held pursuant to a recorded tenancy in common agreement recorded on or after December 31, 2021 that includes the following elements:

1. Delineation of all areas of the property that are for the exclusive use of a cotenant;

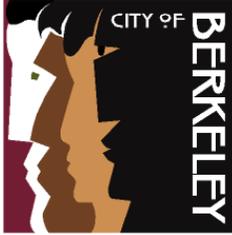
2. Delineation of each cotenant’s responsibility for the costs of taxes, insurance, utilities, general maintenance and repair, and improvements associated with the property;
3. Procedures for dispute resolution among cotenants before resorting to legal action;
4. Allocates to each qualified buyer an undivided, unequal interest in the property based on the size of the dwelling each qualified buyer occupies;
5. A repurchase option that requires the qualified buyer to first offer the qualified nonprofit corporation to buy the ADU or primary dwelling if the buyer desires to sell or convey the property;
6. A requirement that the qualified buyer occupy the ADU or primary dwelling as the buyer’s principal residence; and
7. Affordability restrictions on the sale and conveyance of the ADU or primary dwelling that ensure the ADU and primary dwelling will be preserved for low-income housing for 45 years for owner-occupied housing units and will be sold or resold to a qualified buyer.
8. If requested by a utility providing service to the primary residence, the ADU shall have a separate water, sewer, or electrical connection to that utility.

**CHAPTER 23.322.030
 REQUIRED PARKING SPACES**

Table 23.322-1 REQUIRED OFFSTREET PARKING IN RESIDENTIAL DISTRICTS

Land Use	Number of Required Off-Street Parking Spaces
Residential Uses	
Accessory Dwelling Units	<u>Junior ADU</u> : None required <u>ADU outside of Hillside Overlay</u> : None required <u>ADU within Hillside Overlay</u> : 1 per ADU unless the parcel satisfies the criteria in Government Code

	Section 66322, using the definition of public transit as established in subdivision (m) of Government Code 66313.
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Planning and Development Department
Land Use Planning Division

STAFF REPORT
March 5, 2025

TO: Members of the Planning Commission
FROM: Branka Tatarevic, Associate Planner
SUBJECT: Accessory Dwelling Unit (ADU) Ordinance Amendments

RECOMMENDATION

Staff recommends that the Planning Commission review the staff report, receive the staff presentation, consider public comments, and provide feedback to staff on potential amendments to the ADU Ordinance.

BACKGROUND

The consideration of updates to the ADU ordinance has been prompted by a number of factors including a City Council referral for implementation of Assembly Bill (AB) 1033, the California Department of Housing and Community Development's (HCD) review of Berkeley's ADU Ordinance, and changes to state law pertaining to ADUs.

Assembly Bill 1033 (ADU Condominiums)

AB 1033 (Gov. Code § 66340 – 66342), which took effect on January 1, 2024, allows ADUs to be sold separately from the primary residence as condominiums, creating new opportunities for entry-level homeownership. Prior to AB 1033, California law prohibited the separate conveyance of ADUs, requiring them to remain under the same ownership as the primary dwelling unit. AB 1033 lifts this restriction, but local jurisdictions must opt-in by adopting an ordinance to enable separate ADU sales.

On May 14, 2024, the Berkeley City Council approved a referral (***Attachment 1***) directing the City Manager to implement AB 1033 by amending the Berkeley Municipal Code to eliminate restrictions on the sale of ADUs and adopt an ordinance allowing their separate sale. The referral emphasizes the potential of ADU condominiums to increase homeownership opportunities for moderate-income households, help existing homeowners generate equity, and expand naturally affordable housing options in the city.

As of today, the City of San José remains the only jurisdiction in California to have adopted an ADU condominium ordinance (***Attachment 4***). Staff have met with the San José team to discuss their approach to AB 1033 implementation, as well as their processing procedures. San José's ADU Condominium Ordinance is separate from its

existing ADU, subdivision or other land use regulations and applies only to the creation of ADU condominiums. The ordinance limits ADU condo projects to a maximum of four units, as subdivisions with four or fewer units can be processed ministerially as Parcel Maps, rather than through the discretionary process required for Tentative Tract Maps. Unlike Berkeley, San José does not have its own policies to disincentivize condo conversions or mitigate the impacts of condo conversions on the affordability of the rental housing market.

ADU Letter from California Housing and Community Development Department

As part of its oversight of local ADU regulations, HCD issued a letter to the City of Berkeley on May 3, 2024 (***Attachment 2***), reviewing the Berkeley Municipal Code Chapter 23.306 (Accessory Dwelling Units)¹, which was adopted on October 10, 2023. In the letter, HCD asserted that several provisions of BMC Chapter 23.206 do not align with state ADU law and must be amended.

The City responded to HCD's letter on June 3, 2024 (***Attachment 3***). The City's letter determined that:

- a number of the HCD's suggested changes were minor. These minor changes were included in the State Law and Technical Edits package the Planning Commission recommended in June 2024;
- a select number of findings did not require any changes; and
- an additional set of findings required policy consultation with the City Council. These are the findings included in this report for policy recommendations from the Planning Commission.

California Government Code Section 66323 includes types of ADUs that the City must approve ministerially. Generally speaking, these are ADUs that are 800 square feet or less, meet specified height requirements, and comply with specified rear and side setback requirements. While the City can adopt development standards and regulations for larger ADUs, cities are limited in the regulation of these "Section 66323 ADUs"

Senate Bill 1211

Senate Bill 1211 (SB 1211) was signed into law in on September 19, 2024. SB 1211 contains two provisions which could require amendments to the BMC.

Previously, state law allowed only two detached ADUs on a multifamily lot. SB 1211 now permits up to eight detached ADUs on a multifamily lot, or a number equal to the existing units on the lot, whichever is less. BMC Chapter 23.206 is proposed to be amended to comply with SB 1211 as part of the annual State Law and Technical Edits (STLE) package which the Planning Commission will review in the spring.

Additionally, SB 1211 includes a provision which prohibits the City from imposing objective development or design standards on Section 66323 ADUs beyond what is authorized in state law.

¹ <https://berkeley.municipal.codes/BMC/23.306>

DISCUSSION

Assembly Bill 1033 and ADU Condominiums

AB 1033 Local Ordinance Requirements

AB 1033 allows a city to adopt a local ordinance permitting separate sale of the primary dwelling and one or more ADUs as condominiums. To do so, the local ordinance **must** include the following components:

- Compliance with:
 - the Subdivision Map Act;
 - the Davis-Stirling Act (the state law that regulates condominiums); and
 - the City's Subdivision Ordinance (Title 21).
- A procedure to obtain lienholders' consent (i.e., the property owner must get the mortgage lender's sign-off before a separate sale would be permitted).
- A process to conduct and verify a safety inspection. Obtaining a Certificate of Occupancy from the city, or obtaining an inspection report from a HUD-certified inspector are two of the most common approaches to meeting this requirement.
- Mandatory consumer disclosures regarding lender requirements.

If an ADU is tenant-occupied and the property owner seeks to sell the ADU as a separate condominium under an AB 1033 ADU Condominium Ordinance (once the city adopts it), the city may require that a tenant receive a right of first refusal. If the city were interested in implementing an ordinance with a right of first refusal requirement, an AB 1033 ADU Condominium Ordinance could treat ADU condos the same as typical condos under the city's own Condo Conversion Ordinance (BMC Chapter 21.28)², or it could include different requirements for the conversion of ADUs to condos.

Existing City Regulations Governing Condominiums

Existing Subdivision Ordinance (BMC Title 21 (Subdivisions))³

BMC Title 21 (Subdivisions) was enacted for the purpose of adopting regulations to implement and supplement the State's Subdivision Map Act. Title 21 includes:

- A ministerial process for the creating a Parcel Map for four or fewer parcels or condo units;
- A discretionary process for Tentative Maps for creating five or more parcels or condo units;
- Condo conversion regulations; and
- Design requirements, procedures for lot line adjustments and subdivision improvement requirements.

² <https://berkeley.municipal.codes/BMC/21.28>

³ <https://berkeley.municipal.codes/BMC/21>

Existing Condominium Conversion Ordinance (BMC Chapter 21.28)⁴

Berkeley's Condominium Conversion Ordinance lays out the procedures, fees, and required tenant protections for applicants proposing to convert existing dwelling units into condominiums. It also includes the city's annual limit on allowable condo conversions.

Generally, BMC Chapter 21.28 requires:

- Payment of a Condo Conversion Mitigation Fee;
- Tenant protections, including notice, relocation assistance, and right of first refusal.

Since 1992, the City of Berkeley has imposed a Condo Conversion Housing Mitigation Fee. Revenues from the fee accrue to the Berkeley Housing Trust Fund to help finance construction and rehabilitation of permanently affordable housing in Berkeley.

The fee is calculated by dividing the difference between the costs of owning the unit as a condominium less the rental costs by the current fixed mortgage rate. The following is an example of a fee calculation from the city's *Residential Condominium Conversion Packet*.⁵

- Rental Costs = \$1,500 per month x 12 months/year = \$18,000 annually
- Ownership Cost (including principal, interest, taxes, insurance, and homeowners' association dues) = \$2,700 per month x 12 = \$32,400
- Assume a mortgage rate of 6.5 percent.
- Increased housing cost due to ownership conversion of the unit = \$32,400 - \$18,000 = \$14,400
- Mitigation Fee = \$14,400/0.065 = \$221,538

In addition, Berkeley's Condo Conversion Housing Mitigation Fee is designed to encourage property owners to extend protections to their tenants. Owners providing additional tenant protections specified in the Condo Conversion Ordinance receive a decrease in the amount of the fee, which is capped at 8% of the total sales price, or 4% of the total sales prices for 2-unit properties.

Berkeley Rent Ordinance (BMC Chapter 13.76)⁶

⁴ <https://berkeley.municipal.codes/BMC/21.28>

⁵ City of Berkeley, *Residential Condominium Conversion Packet*, Updated: July 1, 2022. https://berkeleyca.gov/sites/default/files/documents/Condo%20Packet%2007-01-2022_Posted%20Online.pdf

⁶ <https://berkeley.municipal.codes/BMC/13.76>

Under Berkeley's Rent Stabilization Ordinance, units with a Certificate of Occupancy issued after June 30, 1980, are generally exempt from rent ceiling controls. Most ADUs fall into this "new construction" exemption, though they still must follow just-cause eviction rules (BMC § 13.76.130).

Policy Questions for Planning Commission Discussion

1) Regulation of ADU Condos.

Should ADU condos be treated as any other condominium under Chapter 21.28—including payment of the Condominium Conversion Mitigation Fee, tenant protections, and discretionary approval for five or more units—or should the city create a streamlined path for ADU condominiums (as San Jose does)?

2) Right of First Refusal.

Should an AB 1033 ordinance require a right of first refusal for any tenant occupying an ADU that is being sold as a separate condominium? If so, should the right be the same as the current Condo Conversion Ordinance (i.e., one year to respond) or should it include a different timeline for ADU condominiums?

ADU Letter from California Housing and Community Development Department

On May 3, 2024, HCD sent a letter regarding the ADU Ordinance (***Attachment 2***), and the city responded on June 3, 2024 (***Attachment 3***). The letter included a set of findings which called for policy consultation with the Planning Commission, which are included below.

Number of ADUs Permitted

In its letter of May 3, 2024, HCD found that BMC Chapter 23.306 did not permit as many Section 66323 ADUs as required under state law. Currently, Table 23.306-1 (Unit Allowance) permits one ADU and one Junior ADU on a parcel with an existing single-family dwelling. HCD asserted that Government Code Section 66323 permits a homeowner, who meets specified requirements, to create one converted ADU; one detached, new construction ADU; and one JADU, for a total of three Section 66323 ADUs.

This is consistent with the latest *HCD ADU Handbook (January 2025)*⁷, which explains that on single-family lots specifically, local agencies must allow Category (a)(1) (converted ADU) and Category (a)(2) (detached ADU) together, plus one JADU (also described in Gov. Code § 66323(a)(1)).

⁷ California Housing and Community Development Department, *Accessory Dwelling Unit Handbook*, January 2025. <https://www.hcd.ca.gov/sites/default/files/docs/policy-and-research/adu-handbook-update.pdf>

Originally, BMC Section 23.306.020(B) was drafted based on HCD's *December 2020 ADU Handbook*, which stated that the two new ADU/JADU categories under former subdivision (e) "are not required to be combined." At that time, it appeared an applicant seeking to build both an ADU and a JADU would have to choose between a single-family ADU+JADU "conversion configuration" or "detached configuration," rather than do both. However, in July 2022, HCD updated its guidance to clarify that the four statutory categories of ADUs "may be combined"—meaning a local government "must allow (A) and (B) together or (C) and (D) together."

Question for the Planning Commission: Should the Berkeley Municipal Code (BMC) be amended to clearly allow up to three units on a single-family property: one interior/converted ADU, one detached new-construction ADU, and one JADU?

Conversion of Accessory Structures

In its letter of May 3, 2024, HCD found that the city must amend the BMC to remove the words "legally established" from BMC Section 23.306.030(A)(3), related to the conversion of accessory structures.

BMC Section 23.306.030(A)(3) states "An ADU converted from a legally established accessory building or accessory structure is allowed to maintain non-conformity to the same location and dimensions of the existing accessory building or accessory structure...."

Question for the Planning Commission: Should the Berkeley Municipal Code (BMC) be amended to remove the requirement that an accessory building or structure be "legally established" to be eligible for conversion to an ADU?

JADUs and Enclosed Uses

BMC Section 23.306.030(B) allows JADUs "within an existing or proposed single family dwelling or its attached garage...." It is later defined in Section 23.502.020(A)(4)(a) as, "A unit that is contained entirely within the walls of an existing or proposed single family dwelling, or a single-family dwelling unit's attached garage."

In its letter of May 3, 2024, HCD found that Government Code Section 66333 provides a broader allowance, stating "For purposes of this subdivision, enclosed uses within the residence, such as attached garages, are considered a part of the proposed or existing single-family residence," and that the BMC must allow JADUs in other enclosed uses not limited to the single-family residence and an attached garage.

City staff interprets the existing BMC language to already include other enclosed areas of the single-family dwelling. Specifically, the BMC definition of "accessory uses" (BMC Section 23.502.020(B)(2)(a)) is broad and extends beyond just the attached garage (e.g., storage rooms, basements). There is no instance staff could envision where an enclosed space would be excluded from conversion under the current definition.

Question for the Planning Commission: Should the Berkeley Municipal Code (BMC) be amended to explicitly expand eligibility to all “enclosed uses”?

Deed Restriction

BMC Section 23.306.040 states that “A completed [ADU] application must include evidence of compliance with this Chapter, including development standards, deed restrictions, and neighborhood noticing.”

In its letter of May 3, 2024, HCD found Government Code section 66317, states, “No local ordinance, policy, or regulation shall be the basis for the delay or denial of a building permit or a use permit under this section,” and therefore the city may not condition approval of an ADU application on the recordation of a deed restriction.

Under the ADU Ordinance, the requirement that a deed restriction be recorded is not a condition of approval; it is a requirement for a completed application. City staff does not interpret this provision as allowing the city to delay or deny a permit solely for lack of a recorded deed restriction.

Question for the Planning Commission: Should the Berkeley Municipal Code (BMC) be amended to remove the deed restriction requirements for a completed application?

JADU Rental Term

BMC Section 23.306.040(C)(3) states that a JADU cannot be rented for a term that is shorter than 30 days. In its letter of May 3, 2024, HCD found that while Government Code section 66333 allows the city to adopt an ordinance to provide for the creation of JADUs, and includes the provisions that can be included in the ordinance, the provisions do not include requiring a minimum rental term of 30 days. Therefore, HCD states that the 30-day rental term minimum for JADUs must be removed. The current 30-day minimum rental term for ADUs complies with state law.

Question for the Planning Commission: Should the Berkeley Municipal Code (BMC) be amended to remove the 30 days minimum rental term for JADUs?

Senate Bill 1211

SB 1211 (signed on September 19, 2024) allows up to eight detached ADUs on a lot with an existing multifamily dwelling (subject to certain limits). Staff intends to incorporate this statutory update into the upcoming State Law and Technical Edits (SLTE) Zoning Amendments package that will come before the Planning Commission for public hearing this Spring.

SB 1211 also includes a provision which prohibits the City from imposing objective development or design standards on Section 66323 ADUs beyond what is authorized in state law. There are two provisions in the BMC which may conflict with this provision.

1) *ADUs in the Front Setback*: BMC Chapter 23.306.030(A)(4) prohibits the placement of ADUs in the front setback unless the only location on a lot that can accommodate an 800 square foot ADU is within the front setback. The section also includes specific front setback requirements that apply only to ADUs that qualify to be located within the front setback. State law currently permits only the establishment of side and rear setbacks for Section 66323 ADUs, not front setbacks. SB 1211 could be interpreted to limit the city's ability to prohibit Section 66323 ADUs in the front setback even if an ADU could be located elsewhere on a lot.

2) *ADU Building Separation*: BMC Chapter 23.306.030(A) includes basic development standards for ADUs, which include building separation standards. State law currently only permits the establishment of side and rear setbacks for Section 66323 ADUs. There is no provision for the establishment of building separation standards, nor is there any explicit prohibition. The building separation requirement was adopted by the City Council to address concerns about fire safety and firefighter access to buildings on a property. State law provides the establishment of side and rear setbacks "for fire safety," but does not specifically mention building separation requirements for Section 66323 ADUs.

Question for the Planning Commission: Should BMC Chapter 23.306.030 be amended to remove the front setback and building separation provisions for Section 66323 ADUs, or should those provisions be removed for all ADUs?

ENVIRONMENTAL REVIEW

There are no identifiable environmental effects or opportunities associated with this informational report.

NEXT STEPS

Staff is currently reviewing HCD's comments and exploring policy options to meet state requirements, particularly regarding separate ADU conveyance and other statutory changes. With Planning Commission's input, we will incorporate them into draft amendments, solicit public feedback, and move forward with the required steps for final adoption of any Zoning Ordinance amendments.

CONTACT PERSON

Branka Tatarevic, Planning and Development Department, 510-981-7472

ATTACHMENTS

1. Referral to Implement AB 1033
2. HCD ADU Ordinance Review Letter
3. City's Response to HCD's Letter
4. San Jose ADU Condominium Ordinance

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

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May 3, 2024

Jordan Klein, Director,
Department of Planning and Development
City of Berkeley
1947 Center St, 2nd Floor
Berkeley, CA 94704

Dear Jordan Klein:

RE: Review of Berkeley's Accessory Dwelling Unit (ADU) Ordinance under State ADU Law (Gov. Code, §§ 66313 - 66342)

Please Note: As of March 25, 2024, with the Chaptering of Senate Bill (SB) 477 (Chapter 7, Statutes of 2024), the sections of Government Code relevant to State ADU and Junior Accessory Dwelling Unit (JADU) Law have been re-numbered (Enclosure 1).

Thank you for submitting the City of Berkeley (City) accessory dwelling unit (ADU) Ordinance No. 7,888-N.S. (Ordinance), adopted October 10, 2023, to the California Department of Housing and Community Development (HCD). HCD has reviewed the Ordinance and submits these written findings pursuant to Government Code section 66326, subdivision (a). HCD finds that the Ordinance does not comply with State ADU and JADU Laws in the manner noted below. Under Government Code section 66326, subdivision (b)(1), the City has up to 30 days to respond to these findings. Accordingly, the City must provide a written response to these findings no later than June 3, 2024.

HCD notes that HCD's previous ADU Ordinance review letter, dated October 17, 2022, raised the issue of the Ordinance's restrictions on ADUs in the Very High Fire Hazard Severity Zone. Upon review of the City's Ordinance 7,888-N.S. and supporting evidence, HCD has determined that the City addressed HCD's findings.

The Ordinance addresses many statutory requirements; however, HCD finds that the Ordinance does not comply with State ADU Law in the following respects:

1. Table 23.306-1 – *Unit Allowance* – The Ordinance states a single-family dwelling is permitted, at maximum, "1 ADU and 1 Junior ADU." However, Government Code section 66323, subdivision (a) states, "Notwithstanding Sections 66314 to 66322, inclusive, a local agency shall ministerially approve an application for a building permit within a residential or mixed-use zone to

Jordan Klein, Director, Department of Planning and Development
Page 2

create any of the following: (1) One accessory dwelling unit and one junior accessory dwelling unit per lot with a proposed or existing single-family dwelling...(A) The accessory dwelling unit or junior accessory dwelling unit is within the proposed space of a single family dwelling or existing space of a single-family dwelling or accessory structure.” Subdivision (a)(2) permits, “[o]ne detached, new construction, accessory dwelling unit that does not exceed four-foot side and rear yard setbacks.” The use of the term “any” followed by an enumeration of by-right ADU types permitted indicate that any of these ADU types can be combined on a lot zoned for single family dwellings.

This permits a homeowner, who meets specified requirements, to create one converted ADU; one detached, new construction ADU; and one JADU. Thus, if the local agency approves an ADU that is created from existing (or proposed) space, and the owner subsequently applies for a detached ADU (or vice versa) that meets the size and setbacks pursuant to the subdivision, the local agency cannot deny the application, nor deny a permit for a JADU under this section. Therefore, the City must amend the Ordinance to permit all by-right combinations required by State ADU Law.

2. 23.306.030 A.1 – *150 Sq. ft. Expansion* – The Ordinance states “ADU Development Standards is allowed a physical addition of no more than 150 square feet.” However, Government Code section 66323, subdivision (a)(1)(A) allows, an “expansion of not more than 150 square feet beyond the same physical dimensions as the **existing accessory structure**. An expansion beyond the physical dimensions of the existing accessory structure shall be limited to accommodating ingress and egress.” The statute intends for this expansion only with the conversion of an existing accessory structure. Therefore, the Ordinance allowing expansion for all building conversions is inconsistent with State ADU Law. The City must amend the Ordinance to limit the expansion only in conjunction with the conversion of existing accessory structures.
3. 23.306.030 A.2 – *“Main Building” and Conversion* – The Ordinance states that for a duplex or multifamily building, “Interior ADU(s) must be created entirely through non-habitable residential portions of the existing main building that are not within the living space of a dwelling unit (e.g. basement, attic, garages, storage room).” The term “main building” is problematic as Government Code section 66323, subdivision (a)(3)(1), allows “Multiple accessory dwelling units within the portions of **existing multifamily dwelling structures** that are not used as livable space....” The term “the existing main building” refers to a single building, whereas State ADU Law refers to “existing multifamily dwelling structures.” As worded, the Ordinance could lead to confusion as many multifamily projects could have multiple building with units within them.

Additionally, the adjective “main” is not objective, especially in situations wherein multiple dwelling structures occupy a single lot. Government Code

Jordan Klein, Director, Department of Planning and Development
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section 66314, subdivision (b)(1) requires the use of “objective standards” for ADUs, which are defined in Government Code section 66313, subdivision (h) as “standards that involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official prior to submittal.” The use of such a subjective term is inconsistent with State ADU Law.

In summary, the City must amend the Ordinance to comply with State ADU Law.

4. 23.306.030 A.3. – *Accessory Conversion* – The Ordinance states “An ADU converted from a legally established accessory building or accessory structure is allowed to maintain non-conformity to the same location and dimensions of the existing accessory building or accessory structure....” However, Government Code section 66323, subdivision (a)(1)(A) allows, an “expansion of not more than 150 square feet beyond the same physical dimensions as the existing accessory structure. An expansion beyond the physical dimensions of the existing accessory structure shall be limited to accommodating ingress and egress.” Therefore, the City must amend the Ordinance to allow for the expansion of an accessory structure for ingress and egress.
5. 23.306.030 A.8, 23.306.040 A, 23.324.060 (C) – *Zoning Certificate* – The Ordinance states that, generally, “An application for an ADU or Junior ADU shall be allowed with a Zoning Certificate. Review must be completed within 60 days of submission of a completed application.” It also provides more specific conditions that engage with a zoning certificate, stating “Attached ADUs with height up to 25 ft. allowed with a Zoning Certificate,” allowing specific “...alterations of a lawful nonconforming existing structure or building that is an existing ADU or proposed to be converted to an ADU are permitted with a Zoning Certificate,” and allowing new windows or doors with “...a lawful nonconforming existing structure or building that is an existing ADU or proposed to be converted to an ADU... with a Zoning Certificate.”

The Ordinance states that the “review” will be completed within 60 days. The Ordinance does not specify that the review will end with an approval or denial within the 60-day period. The term “Zoning Certificate” is not defined or explained in Section 23.502.020, and it is unclear whether the review process is ministerial or discretionary. Government Code section 66317, subdivision (a) requires, that a “A permit application for an accessory dwelling unit or a junior accessory dwelling unit shall be considered and approved ministerially without discretionary review. The permitting agency shall either approve or deny the application to create or serve an accessory dwelling unit or a junior accessory dwelling unit within 60 days from the date the permitting agency receives a completed application.” Subdivision (b) further states that “If a permitting agency denies an application for an accessory dwelling unit or junior accessory

Jordan Klein, Director, Department of Planning and Development
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dwelling unit pursuant to subdivision (a), the permitting agency shall, within the time period described in subdivision (a), return in writing a full set of comments to the applicant with a list of items that are defective or deficient and a description of how the application can be remedied by the applicant.”

Therefore, the City must amend the Ordinance to specify ministerial approval or denial within 60 days and add provisions for a denial process according to State ADU Law.

6. 23.306.030 B – JADU Entry – The Ordinance states “A Junior ADU shall be contained entirely within an existing or proposed single family dwelling or its attached garage and have no more than 500 square feet in floor area.” However, Government Code section 66333, subdivision (e) states, that local JADU ordinances must “Require a permitted junior accessory dwelling unit to include a separate entrance from the main entrance to the proposed or existing single-family residence.” Therefore, the City must amend the Ordinance to require a separate entrance to the JADU.
7. 23.306.030 B, 23.502.020 A.4.a – *JADUs and Enclosed Uses* – The Ordinance allows JADUs “within an existing or proposed single family dwelling or its attached garage....” It is later defined in Section 23.502.020 (A)(4)(a) as, “A unit that is contained entirely within the walls of an existing or proposed single family dwelling, or a single-family dwelling unit's attached garage.” However, Government Code section 66333, subdivision (d), provides a broader allowance, stating “For purposes of this subdivision, enclosed uses within the residence, such as attached garages, are considered a part of the proposed or existing single-family residence.” The City must therefore allow JADUs in other enclosed uses not limited to an attached garage. The City must amend the Ordinance accordingly.
8. 23.306.040 A and C – *Deed Restriction* – Ordinance section 23.306.040 A states “A completed application must include evidence of compliance with this Chapter, including development standards, deed restrictions, and neighborhood noticing.” Section 23.306.040 C states, “The property owner shall file a deed restriction with the Alameda County Recorder which states... 2. The ADU shall not be sold separately from the main building unless the conditions of BMC 23.306.040(0) ADUs Developed by a Qualified Nonprofit Developer are met; 3. The ADU... shall not be rented for a term that is shorter than 30 days.”

However, Government Code section 66317, subdivision (c) states, “No local ordinance, policy, or regulation shall be the basis for the delay or denial of a building permit or a use permit under this section,” and section 66315 states “Section 66314 establishes the maximum standards that a local agency shall use to evaluate a proposed accessory dwelling unit on a lot that includes a proposed or existing single-family dwelling. No additional standards, other than those provided in Section 66314, shall be used or imposed....” Section 66314 does not require a deed restriction for a building permit; therefore, this section

Jordan Klein, Director, Department of Planning and Development
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of the Ordinance is not consistent with State ADU Law. The City may not give condition approval of an ADU application on the recordation of a deed restriction. Although the City may have other authority by which to require a deed restriction, this requirement may not be the basis of delay or deny an ADU application and the issuance of a building permit. Therefore, the City must amend the Ordinance accordingly.

Pursuant to Government Code section 66333, subdivision (c) the City shall, “[r]equire the recordation of a deed restriction, which shall run with the land...” The deed restriction is limited to the provisions of subdivision (c)(1) and (c)(2). The deed restriction for JADUs do not include a minimum 30-day rental term. Therefore, the City must amend the Ordinance accordingly.

9. 23.306.040 B – *Neighbor Noticing* – The Ordinance states “Notice of an ADU application shall be mailed to tenants of the subject property, and owners and tenants of the adjacent, confronting, and abutting properties, within ten working days of submission of the building permit application to the City... Notice shall provide the address of the project, allowable hours of construction, a link to the City’s ADU webpage, and information for tenants of the subject property on how to contact a Rent Board Housing Counselor by e-mail or phone and any other resource information deemed relevant.”

However, Government Code section 66317, subdivision (c) states, “No local ordinance, policy, or regulation shall be the basis for the delay or denial of a building permit or a use permit under this section,” and section 66315 states “Section 66314, establishes the maximum standards that a local agency shall use to evaluate a proposed accessory dwelling unit on a lot that includes a proposed or existing single-family dwelling. No additional standards, other than those provided in Section 66314, shall be used or imposed....” Section 66314 does not require neighbor noticing for an ADU building permit. Therefore, the City must remove this section.

10. 23.306.040 C.2 – *Separate Sale* – The Ordinance states “The ADU shall not be sold separately from the main building unless the conditions of BMC 23.306.040(D) ADUs Developed by a Qualified Nonprofit Developer are met....” Please note that Government Code section 66342 states “a local agency may also adopt a local ordinance to allow the separate conveyance of the primary dwelling unit and accessory dwelling unit or units as condominiums...” which are then subject to the standards listed in that section.
11. 23.306.040 C.3 – *JADU Terms* – The Ordinance states “The ADU and/or Junior ADU shall not be rented for a term that is shorter than 30 days....” However, Government Code section 66333 provides, “Notwithstanding Article 2 (commencing with Section 66314), a local agency may, by ordinance, provide for the creation of junior accessory dwelling units in single-family residential zones. The ordinance may require a permit to be obtained for the creation of a junior accessory dwelling unit and shall do all of the following:” The section then

Jordan Klein, Director, Department of Planning and Development
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lists the provisions that are required to be in the JADU ordinance. The provisions do not require a minimum rental term of 30 days. Therefore, the City must amend the Ordinance accordingly.

- 12.23.306.040 C.4 – *JADU Owner Occupancy* – The Ordinance requires that the “Junior ADU or the Single Family Dwelling in which the Junior ADU is located shall be owner-occupied.” However, Government Code section 66333, subdivision (b) states, “Owner-occupancy shall not be required if the owner is another governmental agency, land trust, or housing organization.” Therefore, the City must note the exception.

In response to the findings in this letter, and pursuant to Government Code section 66326, subdivisions (b)(2)(A) and (b)(2)(B), the City must either amend the Ordinance to comply with State ADU Law or adopt the Ordinance without changes. Should the City choose to adopt the Ordinance without the changes specified by HCD, the City must include findings in its resolution that explain the reasons the City finds that the Ordinance complies with State ADU Law despite the findings made by HCD. Accordingly, the City’s response should provide a plan and timeline to bring the Ordinance into compliance.

Please note that, pursuant to Government Code section 66326, subdivision (c)(1), if the City fails to take either course of action and bring the Ordinance into compliance with State ADU Law, HCD may notify the City and the California Office of the Attorney General that the City is in violation of State ADU Law.

HCD appreciates the City’s efforts in the preparation and adoption of the Ordinance and welcomes the opportunity to assist the City in fully complying with State ADU Law. Please contact Mike Van Gorder, of our staff, at (916) 776-7541 or at mike.vangorder@hcd.ca.gov if you have any questions or would like HCD’s technical assistance in these matters.

Sincerely,



Jamie Candelaria
Senior Housing Accountability Unit Manager
Housing Policy Development Division

Enclosure

State ADU/JADU Law Statutory Conversion Table

New Government Code Sections	Previous Government Code Sections
Article 1. General Provisions	
66310	65852.150 (a)
66311	65852.150 (b)
66312	65852.150 (c)
66313	General Definition Section 65852.2 (j) 65852.22 (j)
Article 2. Accessory Dwelling Unit Approvals	
66314	65852.2(a)(1)(A), (D)(i)-(xii), (a)(4)-(5)
66315	65852.2 (a)(8)
66316	65852.2 (a)(6)
66317	65852.2 (a)(3), (a)(7)
66318	65852.2 (a)(9), 65852.2 (a)(2)
66319	65852.2 (a)(10)
66320	65852.2 (b)
66321	65852.2 (c)
66322	65852.2 (d)
66323	65852.2 (e)
66324	65852.2 (f)
66325	65852.2 (g)
66326	65852.2 (h)
66327	65852.2 (i)
66328	65852.2 (k)
66329	65852.2 (l)
66330	65852.2 (m)
66331	65852.2 (n)
66332	65852.23.
Article 3. Junior Accessory Dwelling Units	
66333	65852.22 (a)
66334	65852.22 (b)
66335	65852.22 (c)
66336	65852.22 (d)
66337	65852.22 (e)
66338	65852.22 (f)-(g)
66339	65852.22 (h)
Article 4. Accessory Dwelling Unit Sales	
66340	65852.26 (b)
66341	65852.26 (a)
66342	65852.2 (a)(10)



PLANNING COMMISSION

Notice of Public Hearing

Wednesday, June 4, 2025

Amendments to Berkeley Municipal Code Chapter 23.306 Accessory Dwelling Units

The Planning Commission of the City of Berkeley will hold a public hearing on the above matter, pursuant to Zoning Ordinance Section 23A.20.030, on **Wednesday, June 4, 2025, beginning at 6:00 PM.**

PROJECT DESCRIPTION

Amend the Berkeley Municipal Code (BMC) to codify references to statewide Accessory Dwelling Unit (ADU) regulations in response to Planning Commission feedback received on March 5, 2025. The amendments pertain to the number of allowed units, development standards, and application requirements. Non-substantive technical edits are also included. These changes clarify the structure and language of the ADU ordinance and update it to ensure conformance with State law and local regulations.

LOCATION: Citywide.

ENVIRONMENTAL REVIEW STATUS

The proposed zoning ordinance amendments do not include any allowances for additional development capacity or other new physical changes to the environment that are not already permitted and previously evaluated under CEQA. Adoption of the proposed amendments would in no way have a significant effect on the environment, and therefore is not subject to CEQA (CEQA Guidelines Section 15061(b)(3), Common Sense Exemption).

PUBLIC COMMENT & FURTHER INFORMATION

All persons are welcome to attend the hearing and will be given an opportunity to address the Commission. Comments may be made verbally at the public hearing and/or in writing before the hearing. Written comments must be directed to:

Faye Messner
Planning Commission Clerk
Email: PlanningPC@berkeleyca.gov

City of Berkeley, Land Use Planning Division
1947 Center Street, 2nd Floor
Berkeley, CA 94704

Correspondence received by **12pm on Tuesday, May 27, 2025**, will be included as a Communication in the agenda packet. Correspondence received after this deadline will be conveyed to the Commission and the public in the following manner:

- Correspondence received by **12pm on Monday, June 2, 2025** will be included in a Supplemental Packet, which will be posted to the online agenda as a Late Communication one day before the public hearing.

- Correspondence received by **5pm on Tuesday, June 3, 2025** will be included in a second Supplemental Packet, which will be posted to the online agenda as a Late Communication by 5pm on the day of the public hearing.
- Correspondence received **after** 5pm on Tuesday, June 3, 2025 will be saved as part of the public record.

Members of the public may submit written comments just before or at the beginning of the meeting by providing 15 printed copies of the correspondence to the Planning Commission Secretary.

COMMUNICATION ACCESS

To request a meeting agenda in large print, Braille, or on audiocassette, or to request a sign language interpreter for the meeting, call (510) 981-7410 (voice) or 981-6903 (TDD). Notice of at least five (5) business days will ensure availability. All materials will be made available via the Planning Commission agenda page online at <https://berkeleyca.gov/your-government/boards-commissions/planning-commission>.

FURTHER INFORMATION

Questions should be directed to Branka Tatarevic, at (510) 981-7472 or btatarevic@berkeleyca.gov. Current and past agendas are available on the City of Berkeley website at: <https://berkeleyca.gov/your-government/boards-commissions/planning-commission>.

Supplemental Correspondence

From: Navarre Oaks <navarreoaks@gmail.com>
Sent: Friday, May 30, 2025 11:21 AM
To: Messner, Faye
Subject: Comment RE Adoption of a Zoning Map Amendment to Redesignate Parcels R-1A to R-2

Follow Up Flag: Follow up
Flag Status: Completed

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.

Good morning,

This email is in regards to a notification posted on a utility pole in my neighborhood regarding the "Adoption of a Zoning Map Amendment to Redesignate Parcels R-1A to R-2." I fully support the City moving forward with amendments that simplify zoning and implement the adopted Housing Element.

Thank you,

Navarre Oaks
1310 Neilson Street, Apt C
Berkeley, CA 94702

Supplemental Correspondence

From: lauren parsons <laurengae@hotmail.com>
Sent: Friday, May 30, 2025 8:40 PM
To: Messner, Faye
Cc: All Council
Subject: R-1A Zoning District

Follow Up Flag: Flag for follow up
Flag Status: Flagged

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.

Dear Clerk of Planning Commission,

I live in the area of D1 that is up for review for zoning change from R-1A to R-2.

The appeal of west Berkeley is scale: modest sized homes on small lots, some deeper than others, with yards for outdoor enjoyment and privacy.

I do not consider my area of Berkeley low density. Many homes have additions or more than one building on a lot. Current zoning allows this. There is no reason to ruin this area with potential for overbuilding and destroying the enjoyment of living in a moderate sized house on a moderate sized lot.

Key zoning changes trigger large alarms:

Going from R-1A with 2 units allowed to

- 1) R-2 with 6 units? — left out is any mention of state density bonus potential.**
- 2) Lot coverage from 40% to 60%?**
- 3) Setback from 20' down to 5'?**

I invite you to visit my lovely home, designed with consideration to neighbors' privacy, that sits on a 30' x 100' lot and imagine what overbuilding to new zoning standards will create and ultimately destroy.

This new zoning will open the door to developers with deep pockets who will descend on Berkeley like vultures, devouring what has been for my husband and I and many others, a comfortable, pleasant place to live.

No to zoning change!

Sincerely,

Lauren Parsons

Sent from my iPhone

Supplemental Correspondence

From: Ilah Jarvis <jarvis.ilah@gmail.com>
Sent: Sunday, June 1, 2025 10:37 AM
To: Planning Commission
Subject: Increase apartments in West Berkeley

Follow Up Flag: Follow up
Flag Status: Flagged

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.

Dear Planning Commission,

This proposed change in Zoning in West Berkeley has nothing to do with lack of housing. West Berkeley is full of new, overpriced apartments with plenty of vacancies. Every person I've ever met who has lived in one of these apartments has complained of poor management, cheap new appliances that break quickly, and one person even complained of cockroaches. The only person I know who has stayed for more than a couple of years had to compete for one of the few "affordable" apartments, and can't afford to move. She complains bitterly about the inadequacies of her building. These apartments are destroying our communities and making the housing crisis worse, not better.

We need to hold the current apartments accountable for bad business practices. The proposal to increase apartments and building height to three stories is just another money grab. I'm ashamed that the members of our city government are complicit with this facade and have let down the citizens of our city.

--

Ilah Jarvis
(510) 499-8358
www.ilahjarvis.com

Supplemental Correspondence

From: Debra Sanderson <debsanderson51@gmail.com>

Sent: Sunday, June 1, 2025 4:53 PM

To: Planning Dept. Mailbox <Planning@berkeleyca.gov>

Subject: Planning Comm Meeting 6-4-25

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.

Attached are comments from the ADU Task Force for the upcoming Planning Commission meeting.

--

Debra R. Sanderson

Member, Casita Coalition

Co-chair, ADU Task Force

debsanderson51@gmail.com

510-812-8781

June 1, 2025

To: Planning Commission

From: The Accessory Dwelling Unit (ADU) Task Force

Re: Public Hearing Amendments to Title 23 (Zoning) to ensure compliance with State ADU laws (Planning Commission Meeting, Wed., June 4)

The ADU Task Force recommends three changes to the proposed ADU Ordinance:

1. ***Increase Maximum ADU Unit Size to 1,200 Square Feet And Remove Bedroom Restrictions.***

- To maximize flexibility for homeowners and future ADU residents, amend ordinance to increase maximum unit size from 1,000 square feet to 1,200 square feet (the maximum allowed under state ADU law); and
- Remove bedroom restrictions (see Berkeley Municipal Code [BMC] 23.306.030.A).

These two changes will enable ADUs of any size up to 1,200 square feet (the maximum under state ADU law) with no bedroom specifications so that homeowners may design an ADU that meets their individualized needs.

2. ***Allow Full Expansion of Accessory Structures/Buildings When Legally-Established, While Limiting Unpermitted Structures to 150 Square Feet Expansions Per State Guidance.***

- Keep Berkeley's current ADU ordinance language that allows an expansion of more than 150 square feet for *legally* established structures/buildings (BMC 23.C.306.A.1.3).
- Further, to align with the state Housing and Community Development (HCD) letter from May 3, 2024, add new language that adopts the requested 150 square foot expansion limit for unpermitted structures (BMC 23.306.A.1.3).

3. ***Add Language to Allow a Protrusion of a Maximum of Nine Feet on all ADU Roofs to Enable Rooftop Access to Restore Open Space.*** Out of consideration that an ADU may take up considerable open space on a parcel, encourage the creation of new open space on a roof. A protrusion of a maximum of nine feet would enable an access door to be built on the roof. Remove restriction on rooftop decks in the hillside overlay zone.

Rationale for ADU Taskforce Recommendations and proposed changes

1. ***Increase Maximum ADU Unit Size to 1,200 Square Feet And Remove Bedroom Restrictions.*** We propose simplifying the ordinance by adopting 1,200 square feet as the maximum unit size for both attached and detached ADUs with no restrictions on the number of bedrooms to be included.

See BMC Section 23.306.030 Development Standards
Table 23.306-2. ADU DEVELOPMENT STANDARDS

Gross Floor Area, Maximum 1,200 sq. ft.		23.306.030(A)(1); 23.306.030(A)(2); 23.306.030(A)(3)
Studio or 1 bedroom	850 sq. ft.	
2+ bedrooms	1,000 sq. ft.	

State law allows local governments to set minimum and maximum sizes for both attached and detached ADUs.¹ State law specifies that the maximum unit size *cannot be less than* 850 square feet for a studio or one-bedroom ADU and not less than 1,000 square feet for two-bedrooms or more.² Berkeley's current ADU ordinance uses the smallest maximum sizes that the state requires. We can provide greater flexibility and more residential living space by increasing our maximum to the maximum allowed by state ADU law of 1,200 square feet. Eliminating the bedroom requirements gives homeowners greater control in how best to design an ADU that meets their needs and preferences.³

We believe that decisions about size (up to 1,200 square feet) and the number of bedrooms are best made by each individual homeowner. For ADUs that serve as a family home, the additional 200 square feet allowed by this amendment can make a big difference in terms of the livability of the ADU.

2. ***Allow Full Expansion of Accessory Structures/Buildings When Legally Established, While Limiting Unpermitted Structures to 150 Square Feet Expansions Per State Guidance.*** The current Berkeley rule on converting accessory structures/buildings applies to legally-established accessory buildings/structures, allowing a full expansion up to the maximum size limits for ADUs as long as the added new space meets ADU Development Standards.

¹ Gov Code 66321.a.

² Gov Code 66321.b

³ Gov Code 66314.d.5 State Law allows a maximum size of 1200 sq. ft. for detached ADUs but does not specify a maximum size for attached ADUs.

However, the proposed amendment (BMC 23.306.030.A.1.3) appears to be an error in that it amends Berkeley's current code to remove the right to expand an accessory structure/building beyond 150 square feet when converting it to an ADU.

The ADU Task Force recommends that we keep greater flexibility for legally-established accessory structures/buildings while limiting unpermitted structures to expansion of only 150 square feet as requested by the state Housing and Community Development Department (HCD) in their May 3, 2024 letter to the City of Berkeley.

Keep this current BMC requirement:

23.306.030.A.3. Accessory Building or Accessory Structure Conversion. An ADU converted from a legally established accessory building or accessory structure is allowed to maintain non-conformity to the same location and dimensions of the existing accessory building or accessory structure, provided that the ADU meets fire and safety standards set forth in the California Building Standards Code adopted in BMC Title 19. Any physical additions to the existing accessory building or accessory structure shall comply with the development standards in Table 23.306-2 ADU Development Standards.

Add the proposed additional requirement to comply with HCD:

*NEW 23.306.030.A.1.#. Accessory Building or Accessory Structure Conversion. An ADU converted from an **unpermitted** accessory building or accessory structure is allowed to maintain non-conformity to the same location and dimensions of the existing accessory building or accessory structure, provided that the ADU meets fire and safety standards set forth in the California Building Standards Code adopted in BMC Title 19. A physical expansion of up to 150 square feet is permitted to accommodate ingress and egress. Any of the additions must comply with the development standards in Table 23.306-2.*

- 3. Add Language to Allow a Protrusion of a Maximum of Nine Feet on all ADU Roofs to Enable Rooftop Access to Restore Open Space.** Out of consideration that an ADU may take up considerable open space on a parcel, encourage the creation of new open space on a roof.

The ADU Ordinance should be amended as suggested:

*23.306.030.D Rooftop Decks ~~within the Hillside Overlay~~. Roofs on ADUs ~~within the Hillside Overlay~~ may not be designed, converted, or used as usable open space **with a maximum additional height allowance of nine feet only to enable rooftop access**. (Ord. 7888-NS § 8, 2023; Ord. 7799-NS § 1, 2022; Ord. 7797-NS § 1, 2022; Ord. 7787-NS § 2 (Exh. A), 2021. Formerly 23.306.040)*

Supplemental Correspondence

From: James Lloyd <james@calhdf.org>
Sent: Monday, June 2, 2025 9:51 AM
To: Messner, Faye
Cc: City Attorney's Office; Manager, C; City Clerk; Planning Dept. Mailbox; Shen, Alisa; Horner, Justin
Subject: public comment re item 10B, ADU ordinance, for 6/4/25 Planning Commission meeting
Attachments: Berkeley - ADU ordinance comment - PC - 2 June 2025.pdf

Follow Up Flag: Follow up
Flag Status: Completed

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.

Dear Berkeley Planning Commission,

The California Housing Defense Fund (“CalHDF”) submits the attached public comment for the Planning Commission meeting of June 4, 2025 regarding item 10B, proposed amendments to the City’s regulations for ADUs and JADUs.

Of note, in the agenda packet for this meeting, the staff report for this item is missing the first page.

Sincerely,

James M. Lloyd
Director of Planning and Investigations
California Housing Defense Fund
james@calhdf.org
CalHDF is grant & donation funded
Donate today - <https://calhdf.org/donate/>



Jun 2, 2025

City of Berkeley
2180 Milvia St
Berkeley, CA 94704

Re: Proposed Amendments to City's ADU Ordinance

By email: fmessner@berkeleyca.gov

Cc: attorney@berkeleyca.gov; CManager@berkeleyca.gov; clerk@berkeleyca.gov; planning@berkeleyca.gov; ashen@berkeleyca.gov; jhorner@berkeleyca.gov

Dear Berkeley Planning Commission,

The California Housing Defense Fund ("CalHDF") submits this letter as a public comment for the Planning Commission meeting of June 4, 2025 regarding item 10B, proposed amendments to the City's regulations for ADUs and JADUs. CalHDF would like to thank the City for making multiple changes to its ordinance in response to our previous letters.

However, the City's proposed ADU regulations fail to comply with state law in several ways, and the City should address these issues before adopting the ordinance.

Background

The law gives local governments authority to enact zoning ordinances that implement a variety of development standards on ADUs. (Gov. Code, § 66314.) The standards in these local ordinances are limited by state law so as not to overly restrict ADU development. (See *id.*) Separately from local ADU ordinances, Government Code section 66323 establishes a narrower set of ADU types that local governments have a ministerial duty to approve. "Notwithstanding Sections 66314 to 66322 ... a local agency shall ministerially approve" these types of ADUs. (*Id.* at subd. (a).) This means that ADUs that satisfy the minimal requirements of section 66323 must be approved regardless of any contrary provisions of the local ADU ordinance. (*Ibid.*) Local governments may not impose their own standards on such ADUs. (Gov. Code, § 66323, subd. (b) ["A local agency shall not impose any objective development or design standard that is not authorized by this section upon any accessory dwelling unit that meets the requirements of any of paragraphs (1) to (4), inclusive, of subdivision (a)."].)

In addition, ADUs that qualify for the protections of Government Code section 66323, like other ADUs, must be processed by local governments within 60 days of a complete permit application submittal. (Gov. Code, § 66317, subd. (a).)

State law also prohibits creating regulations on ADU development not explicitly allowed by state law. Government Code Section 66315 states, “No additional standards, other than those provided in Section 66314, shall be used or imposed, including an owner-occupant requirement, except that a local agency may require that the property may be used for rentals of terms 30 days or longer.”

Impermissible Permitting Requirements

City code 23.306.040 requires a Zoning Certificate for all ADUs or JADUs. However, this permitting step is forbidden by state law for ADUs that meet the standards of Government Code section 66323. From section 66323, subdivision (a): “Notwithstanding Sections 66314 to 66322, inclusive, a local agency shall ministerially approve **an application for a building permit ...**” This requirement was imposed by AB 3182 in 2020.

The City should amend its code to make clear that a Zoning Certificate is not required for ADUs and JADUs that meet the requirements of Government Code section 66323. Rather, the City must approve such ADUs and JADUs via a building permit application only.

Additionally, the City’s noticing requirements for ADU applications are illegal. City code 23.306.040(B)(3) requires applicants to pay for material cost, postage, and staff time to mail notices of an ADU application to “tenants of the subject property, and owners and tenants of the adjacent, confronting, and abutting properties, within ten working days of submission of the building permit application to the City.”

As discussed *supra*, Government Code section 66315 forbids the imposition of any standards not contained in Government Code 66314 on ADU development, and Government Code section 66323, subdivision (b) forbids imposition of any design or development standards beyond what is contained in section 66323. Reimbursing the City to notify neighbors is a “development standard” and the City therefore may not impose it on ADU applications.

Furthermore, the public purpose of such noticing is unclear, when these are ministerial approvals and the public has no opportunity to provide input on an individual ADU or JADU project.

Impermissible Parking Requirements

City code Table 23.322-1 imposes off-street parking requirements on ADUs. Table 23.322-1 imposes a parking requirement of one space per ADU in the Hillside Overlay unless the parcel is near public transit.

However, as discussed *supra*, the City may not impose any development standards on ADUs eligible for the protections of Government Code section 66323, subdivision (a) beyond the height and setback requirements specified by state law. (Gov. Code, § 66323, subd. (b).) This means that the City may not impose any off-street parking requirements on such ADUs.

Page 20 of the January 2025 HCD ADU [Handbook](#) is instructive (emphasis added):

“What design, zoning, or other local standards can be imposed on 66323 Units? A local agency may not impose development or design standards, including both local standards and standards found in State ADU Law, on 66323 Units that are not specifically listed in Government Code section 66323. (Gov. Code, § 66323, subs. (a), (b).) This includes, but is not limited to, **parking**, height, setbacks, or other zoning provisions (e.g., lot size, open space, floor area ratio, etc.).

The City should amend the code to eliminate this off-street parking requirement, as it is clearly forbidden by state law.

Impermissible Setback Requirements for 150 Square Foot Additions

City code section 23.306.030(A)(1) mandates that a 150 square foot addition to an existing structure for an ADU conversion comply with “maximum height and setback requirements.” It is unclear which setback requirements this section of code is referring to. However, assuming that it is referring to the requirements of the underlying zoning district, Government Code section 66323, subdivision (a)(1)(A) allows for a 150 square foot addition to conversion ADUs to facilitate ingress and egress. Furthermore, as discussed *supra*, Government Code section 66323 does not allow for the imposition of any underlying zoning standards. The City must allow such a 150 square foot expansion even if it is located within a setback area and must apply only the setbacks listed in section 66323 to ADUs that meet that code section’s requirements.

Impermissible Deed Restriction Requirement

City code section 23.306.040(C) requires an ADU applicant to place a deed restriction on the property as a condition of the application. This is a clear violation of Government Code section 66323, which prohibits any standards not explicitly authorized in that section. Deed restrictions are also not permitted by Government Code section 66315, which forbids standards not listed in section 66314, and it is unclear why the City would want applicants to

go through the trouble of filing such a deed restriction, other than to discourage ADU development by increasing development cost.

The California Department of Housing and Community Development (“HCD”) has communicated that such deed restrictions are unlawful. The January 2025 HCD ADU [Handbook](#) specifically forbids deed restrictions as a condition of ADU development (see page 22): “A local agency cannot impose a deed restriction on an ADU.”

Additionally, such deed restrictions imposed on ADUs (or on other accessory structures) are unenforceable. This is due to the absence of horizontal privity between the City and the applicant. In other words, since the City does not own the applicant’s property at the time of the application, and does not own a neighboring property to whose benefit the proposed restriction(s) redound, black letter property law bars the restrictions from binding future property owners. (See, e.g., *Scaringe v. J. C. C. Enters* (1988) 205 Cal.App.3d 1536 [describing the types of privity relationship between covenanting parties that allow enforcement of a deed restriction]; see also Civ. Code, §§ 1460 et seq.)



CalHDF appreciates the City’s effort to implement state law governing ADU construction. However, the City should amend its ordinance to ensure that it complies with state law.

CalHDF is a 501(c)(3) non-profit corporation whose mission includes advocating for increased access to housing for Californians at all income levels, including low-income households. You may learn more about CalHDF at www.calhdf.org.

Sincerely,

A handwritten signature in blue ink, appearing to read "Dylan Casey".

Dylan Casey
CalHDF Executive Director

A handwritten signature in black ink, appearing to read "James M. Lloyd".

James M. Lloyd
CalHDF Director of Planning and Investigations