



Rashi Kesarwani  
Councilmember District 1

## **SUPPLEMENTAL AGENDA MATERIAL for Supplemental Packet 1**

**Meeting Date:** October 26, 2021

**Item Number:** 32

**Item Description:** **Response to Short Term Referral for Amendments to Accessory Dwelling Unit (ADU) Ordinance to Address Public Safety Concerns: Amending BMC Chapters 23C.24 and 23F.04**

**Submitted by:** Councilmember Rashi Kesarwani

This supplemental item offers six key recommendations to the proposed ordinance:

1. Outside the Hillside District, increase the allowable maximum ADU height by-right to 20 feet.
2. Outside the Hillside District, allow conversion of a garage (or other accessory structure) to an ADU and expand up to the maximum allowed ADU size (with some qualifications).
3. Outside the Hillside District, eliminate the proposed 3-foot separation required between the main dwelling unit and a detached ADU.
4. Within the Hillside District, keep the 4-foot setback clear of any protrusions. Outside the Hillside District, modify the proposed 23C.24.040 (Development Standards) section F by only removing bay windows from the list or architectural features that may protrude into the required setback.
5. Citywide, remove the proposed 23C.24.050 (Special Provisions) subsection A, which allows for rooftop decks by right.
6. Citywide, specify that objective design standards are not required for ADUs of any size, as this would be a new standard to which single-family homes are not subject.



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## ACTION CALENDAR

October 26, 2021

TO: Honorable Mayor and Members of City Council  
 FROM: Councilmember Rashi Kesarwani (Author) and Councilmembers Ben Bartlett, Terry Taplin, and Rigel Robinson (Co-Sponsors)  
 SUBJECT: Accessory Dwelling Unit (ADU) Amendments to Enhance Equity and Mitigate Fire Risk in Hills

### RECOMMENDATION

Recommend adoption of the proposed ADU Ordinance that requires development standards for creation of by-right ADUs that are consistent with state Government Code Section 65852.2, with the following amendments:

1. Outside the Hillside Overlay District (Referred to as Hillside District, BMC 23E.96), increase the allowed maximum ADU height by-right to 20 feet to enable the same construction costs and by-right building opportunities for residents in West Berkeley, where the groundwater table is high and would therefore cause the cost of construction to be higher if the by-right height limit is only 18 feet.
2. Outside the Hillside District, allow conversion of a garage (or other accessory structure) to an ADU to expand up to the maximum allowed ADU size, as long as the new square footage is outside the required setback.
3. Outside the Hillside District, eliminate the proposed 3-foot separation required between a main dwelling unit and a detached ADU so that small parcels have an equal opportunity to create a well-designed ADU that uses less open yard space and pervious surface.
4. Within the Hillside District, delete provision 23C.24.040 (Development Standards) section F to keep the 4-foot setback clear of any protrusions. Outside the Hillside District, modify the proposed 23C.24.040 (Development Standards) section F by only removing bay windows from the list of architectural features (such as water heater enclosures) that may protrude into the required setback. This change will give homeowners in the flats the flexibility to place necessary equipment in the setback (thereby saving additional open yard space), but would remove the

ability for a bay window to protrude into the setback in order to mitigate possible privacy concerns of neighbors.

5. Citywide, remove the proposed 23C.24.050 (Special Provisions) subsection A, which allows for rooftop decks by right, but continue to allow them with an Administrative Use Permit as required for all other rooftop decks.
6. Citywide, specify that objective design standards are not required for ADUs of any size, as this would be a new standard to which single-family homes are not subject. Objective design standards are already banned for certain by-right ADUs pursuant to state law; applying these standards to larger ADUs could preclude the use of pre-fabricated units and would be overly burdensome for structures that are typically in backyards and not visible from the street.

Further, refer to the Nov. 4 City Council Legislative Platform Meeting, a discussion of appropriate changes to state ADU law that the City Council may wish to incorporate into its 2022 State Legislative Platform in order to seek further legally permissible fire safety measures in the Hillside District.

#### CURRENT SITUATION AND ITS EFFECTS

***City of Berkeley Has Already Faced Legal Challenge Related to ADU Restrictions in the Hillside Overlay District<sup>1</sup>***. During 2019, the City of Berkeley required an Administrative Use Permit for ADUs built in the Hillside District on roadways with less than 26 feet width. In late 2019, in response to new state ADU law, the City adopted an urgency ordinance that continued to ban any new dwelling units in Fire District 3 (Panoramic Hill) and banned ADUs on roads less than 26 feet wide in Fire District 2 (See 12-10-2019 City Council Meeting, Item 30: Urgency Ordinance). Hans and Patricia Schmidt, homeowners in the Berkeley hills, sued the City for procedural obstacles to building an ADU. As a result, the City learned that its urgency ordinance violated state ADU law, Government Code Section 65852.2(e) (see Case No. RG20069713) because it wrongfully prohibited ADUs from certain areas in the Hillside District. The City of Berkeley settled out of court, allowed the ADU construction to proceed, and paid the petitioners' legal fees (see 3-9-2021 City Council Item 2). Subsequently, the City repealed its urgency ordinance. Since then, the City has approved ADU permits under the state law provisions, as Berkeley has not yet adopted a local ordinance that complies with Government Code Section 65852.2.

***State Law Allows By-Right ADUs on All Single-Family Properties Beginning January 1, 2020.*** State Government Code Section 65852.2(e) provides two options for creating one ADU "by right" per single-family parcel:

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<sup>1</sup> Area defined as such by the official City of Berkeley Zoning Map, regulated by BMC 23E.96.

(1) A detached or attached “by right” ADU on single-family properties, with cities allowed to apply only three development standards: at least 800 square feet large, at least 16 feet tall, and no more than 4 feet required side and rear yard setbacks.

(2) Allows homeowners to convert a garage (or other accessory building) into an ADU by right, keeping the original footprint and dimensions (or rebuilding at the same location with similar dimensions). Local governments may not further restrict these ADUs as long as they meet the state and local Building Codes. The state Housing and Community Development (HCD) Department refers to these as “statewide exempt ADUs” and notes that “ADUs created under Government Code Section 65852.2(e) shall not be subject to design and development standards except for those that are noted in the subdivision.”<sup>2</sup>

***Prior ADU Restrictions for the Hillside District are No Longer Legally Permissible.***

Over the years, different restrictions on ADUs in the Hillside District have been adopted, proposed, or discussed. As of January 2020, these restrictions (identified below) are no longer legal pursuant to Government Code Section 65852.2(e).

- **Restrictions on Where an ADU Can Be Built Based on Street Width.** Under Government Code Section 65852.2(e), local governments may no longer prohibit ADUs based on street width. Local governments must allow “statewide exempt” ADUs on all single-family properties.
- **Requiring Off-Street Parking.** For years many local jurisdictions required creation of one off-street parking spot to create an ADU, both inside and outside of hillside areas. Government Code Section 65852.2(d) now exempts all parcels that are within a half-mile of transit from any required off-street parking. All of the City of Berkeley meets that standard, so off-street parking may not be required anywhere in Berkeley.
- **Requiring “Replacement Parking.”** In the past, local jurisdictions frequently required the replacement (on-site) of any off-street parking space removed due to the creation of an ADU. Government Code Section 65852.2(a) and (e) now exempt all ADUs from that requirement for enclosed or covered parking spaces.

***Changes by City of Berkeley Staff Will Appropriately Discourage ADU Construction in the Hillside District.***

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<sup>2</sup> See pages 14-15, California Department of Housing and Community Development, *Accessory Dwelling Unit Handbook*, Dec. 2020, [https://www.hcd.ca.gov/policy-research/docs/adu\\_december\\_2020\\_handbook.pdf](https://www.hcd.ca.gov/policy-research/docs/adu_december_2020_handbook.pdf) for further explanations on these rights.

*We support the recent amendment to the Berkeley Fire Code to require fire sprinklers for properties that add an ADU or Junior ADU in the Hillside District. . . Government Code Section 65852.2 (a)(1)(D)(vii) and (e)(3) states that local governments may not require that fire sprinklers be installed in ADUs unless the main dwelling already has fire sprinklers. Berkeley recently avoided conflicting with this restriction by amending the Fire Code to require installation of fire sprinklers in the Hillside District for any new construction over \$100,000, including major renovations, additions, ADUs, and Junior ADUs. Both the new dwelling unit and the existing main dwelling must be sprinklered. Since very few units may be created for less than \$100,000, the requirement applies to ADUs in the Hillside District. The Fire Department estimates that adding fire sprinklers will increase the cost by \$20,000 to \$40,000.*

*. . . but believe the proposed citywide 3-foot separation between ADUs and the main building will have unintended consequences in the flats for small parcels. Staff's proposed ADU Ordinance requires detached ADUs to be at least 3 feet from the dwelling unit citywide. This requirement is appropriate for the Hillside District given its fire risk, but would also have the effect of reducing options for good design on smaller lots in the flats and making it difficult to preserve yard area.*

***Outside the Hillside District, Allow All Garage Conversions to Expand Up To Berkeley's Maximum ADU Size.*** The state law (Government Code Section 65852.2.e.1.A.i) allows all garage conversions to expand by-right up to 150 square feet. Since homeowners may create only one ADU, they often need more space than this addition allows. They could build a larger detached ADU, but homeowners typically want to preserve as much of their open yard space as possible. Many garages in Berkeley are built along a side or rear property line; these garages could not expand more than 150 square feet unless the homeowner demolishes and rebuilds outside the 4-foot setback, according to staff's proposal. Requiring homeowners to demolish and rebuild to get adequate space increases the cost and makes it more difficult to build on small lots and preserve open yard space. We propose that all garage conversions outside the Hillside District be allowed to expand up to the City's maximum ADU size for the flats (850-1000 square feet). This change makes it easier to build an ADU on a small parcel, avoids the cost of an entirely new structure, and allows households to preserve open yard space.

***City Planning Commission and Planning Staff Have Proposed Legally-Permissible ADU Restrictions for the Hillside District, And the Amendments Proposed Here Go Further to Discourage ADUs In Fire Zones.*** Our proposed amendments are designed to discourage ADU construction in the Hillside District while still complying with the state's ADU requirements. As summarized in Exhibits 1A and 1B below, in the

Hillside District, homeowners may only build ADUs by-right up to 800 square feet in size (detached or attached), up to 16 feet high, and at a 4-foot setback. They may also convert their garage to an ADU and expand it only by 150 square feet. As a result, when compared to properties in the flats, building an ADU in the Hillside District will be more expensive--due to installation of fire sprinklers, higher insurance costs, and difficulty meeting the height limit when building on a slope--and therefore less desirable to homeowners. Garage conversions will be less desirable because homeowners may only expand the garage by 150 square feet. Given the fire risk in the Hillside District, we believe it is an appropriate policy choice to enact ADU development standards that make it more costly and less desirable to build an ADU in this area. Outside the Hillside District, however, our proposed ADU standards will give homeowners more options, reduce cost, and incentivize the construction of ADUs.

### Exhibit 1A: Summary of Proposed By-Right ADU Development Standards

Standard	<b>RECOMMEND Hillside District Proposal (Staff/Planning Commission)</b>	<b>Flats Proposal (Staff/Planning Commission)</b>	<b>RECOMMEND Flats Proposal as Amended Here by CMs Kesarwani, Bartlett, Taplin, and Robinson</b>
Maximum Height	16 feet <ul style="list-style-type: none"> <li>• Prevents two story ADUs</li> <li>• More expensive (than 18 or 20 ft.) because it requires some excavation into hillside</li> </ul>	18 feet <ul style="list-style-type: none"> <li>• Allows a 2-story ADU at minimum ceiling height</li> <li>• Lowers cost (compared to 16 ft.) because it requires less digging; but increases cost (compared to 20 ft.) because it could require digging depending on slope of property</li> <li>• Preserves more open yard space and pervious surface by allowing 2 stories (square footage does not increase from maximum of 850-1,000 sq. ft. for 2-story ADU)</li> </ul>	20 feet <ul style="list-style-type: none"> <li>• Provides West Berkeley residents with a high groundwater table the same construction costs and by-right building ability available to other flats residents</li> <li>• In all flat areas, it allows better design and lowers costs (relative to 16 or 18 ft.)</li> <li>• Preserves more open yard space and pervious surface by allowing 2 stories (square footage does not increase from maximum of 850-1,000 sq. ft. for 2-story ADU)</li> </ul>
Square Footage (detached or attached ADU)	800 sq. ft.	850 sq. ft. for a studio or one-bedroom unit; 1000 sq. ft. for a 2-bedroom unit	Same as Flats Proposal from Staff/Planning Commission

Standard	<b><u>RECOMMEND</u> Hillside District Proposal (Staff/Planning Commission)</b>	<b>Flats Proposal (Staff/Planning Commission)</b>	<b><u>RECOMMEND</u> Flats Proposal as Amended Here by CMs Kesarwani, Bartlett, Taplin, and Robinson</b>
Garage Conversion (including when garage is within the 4 ft. setback)	Allows existing garage size plus 150 sq. ft. <ul style="list-style-type: none"> <li>Discourages garage conversion because the resulting ADU will likely be too small for many households</li> </ul>	Allows a garage expansion up to 850-1000 sq. ft., if the homeowner moves the structure outside the 4 ft. setback <ul style="list-style-type: none"> <li>Costly to demolish and rebuild a structure</li> <li>Discourages garage conversion, especially on smaller parcels, because the 4 ft. setback area is not usable for open yard space</li> </ul>	Allows a garage expansion up to 850-1000 sq. ft., without moving the structure outside the 4 ft. setback. <ul style="list-style-type: none"> <li>Costs less than a new detached ADU</li> <li>Preserves more open yard space and pervious surface</li> </ul>

### Exhibit 1B: Summary of Additional Proposed By-Right ADU Development Standards

Standard	<b>Hillside District Proposal (Staff/Planning Commission)</b>	<b>Flats Proposal (Staff/Planning Commission)</b>	<b><u>RECOMMEND</u> Hillside District and Flats Proposal as Amended Here by CMs Kesarwani, Bartlett, Taplin, and Robinson</b>
Protrusions into 4 ft. setback	Allows certain architectural features to protrude into the required setback area.	Allows certain architectural features to protrude into the setback area.	For the Hillside District, delete 23C.24.040.F, which eliminates protrusions into the setback area.  For outside the Hillside District, remove only bay windows from the list of architectural features allowed to protrude into the setback area <ul style="list-style-type: none"> <li>Prevents a fully-windowed extension in the setback</li> <li>Allows equipment (like hot water heaters) to be placed in the setback</li> </ul>

<b>Standard</b>	<b>Hillside District Proposal (Staff/Planning Commission)</b>	<b>Flats Proposal (Staff/Planning Commission)</b>	<b><u>RECOMMEND</u> Hillside District and Flats Proposal as Amended Here by CMs Kesarwani, Bartlett, Taplin, and Robinson</b>
			<ul style="list-style-type: none"> <li>• Preserves more open yard space and pervious surface</li> </ul>
Building Separation	Requires 3 ft. separation between the ADU and the main building	Requires 3 ft. separation between the ADU and the main building	<p>For the Hillside District, keeps 3 ft. separation requirement</p> <p>For outside the Hillside District, eliminates 3 ft. separation requirement</p> <ul style="list-style-type: none"> <li>• Facilitates good design, especially in smaller yards by maximizing options for building location</li> <li>• Maximizes open yard space and pervious surface</li> <li>• Fire, Safety requirements and access are already addressed in the building code</li> </ul>
By-Right Roof Decks	Allows by right	Allows by right	Eliminates ADU roof decks as by right

**CONTACT PERSON**

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Attachment:

Attachment A. Draft language implementing the amendments proposed above



## Attachment A. Draft language implementing the amendments proposed above.

1. Proposed amendment outside the Hillside District to increase the allowed maximum ADU height to 20 feet

### 23C.24.040 Development Standards

C. Maximum Height is applied to ADUs as follows. See Chapter 23F.04 for definition.

1. Maximum Height of a detached, new construction ADU is ~~18~~ 20 feet.
2. Maximum Height of new square footage added to a Single Family Dwelling, Accessory Building or Accessory Structure to create an ADU is ~~18~~ 20 feet.

2. Proposed amendment ~~outside the Hillside District citywide~~ to allow all garages (and ~~or~~ other accessory structures) converted to an ADU ~~to and~~ remains at ~~their~~ its original locations ~~and to~~ expand up to the maximum allowed ADU size (850-1000 square feet), as long as the new square footage is outside the four-foot required setback and meets the height requirement.; ~~continue to allow such~~ ADUs within the Hillside District will still be able to ~~to~~ expand up to the state mandated 150 sq. feet.

### 23C.24.040 Development Standards

#### B. Maximum Size

1. A detached, new construction ADU, or an ADU fully or partially created by addition to an existing or proposed Single Family Dwelling is subject to the following maximum size limits:
  - a. 850 square feet for a studio or one-bedroom ADU.
  - b. 1000 square feet for an ADU with two or more bedrooms.
2. Outside the Hillside District, An ADU created from an existing Accessory Building or Accessory Structure that does not conform to the Development Standards in Paragraphs C and D may ~~include an expansion of not more than 150 square feet beyond the same physical dimensions as the existing building or structure~~ expand beyond the physical dimensions of the existing building or structure if the new construction is outside the four-foot setbacks and conforms to the height limit. Additions shall conform with the Development Standards in this Chapter.

3. An ADU created from an existing Accessory Building or Accessory Structure that conforms to the Development Standards in Paragraphs C and D must comply with one of the following:
  - a. May include an expansion of not more than 150 square feet beyond the same physical dimensions of the existing building or structure; or
  - b. 850 square feet for a studio or one-bedroom ADU; or
  - c. 1000 square feet for an ADU with two or more bedrooms; or
  - d. 150 800-square feet for an ADU in the Hillside District.
  
3. Proposed amendment outside the Hillside District citywide to eliminate the proposed three-foot separation required between a main dwelling unit and detached ADUs citywide.

#### 23C.24.040 Development Standards

A. Development Standards in Paragraphs B through G, below, apply as follows:

1. Detached New Construction. A detached, new construction ADU is subject to Development Standards for ADUs. ~~A detached, new construction ADU is defined as having a 3-foot separation from a Main Building per Section 23E.04.030.~~
  
4. Proposed amendment in the Hillside District to remove 23C.24.040.F. In the Flats proposed amendment citywide to modify 23C.24.040 (Development Standards) section .F by removing Bay Windows from the list of architectural features that may protrude into the required setback.

#### 23C.24.040 Development Standards

F. Projections. Architectural features (Chimneys, Water Heater Enclosures, Flues, Heating and Cooling Equipment, Eaves, Cornices, Canopies, and Awnings and Bay Window) for properties outside the Hillside District may project two feet into the required setbacks, so long as there remains at least a two-foot setback from property lines

\_\_\_\_\_ This provision does not apply to properties within the Hillside District.

5. Proposed amendment citywide to remove 23C.24.050 (Special Provisions) subsection A, which allows for rooftop decks by right, but ~~continues~~ to allow them with an Administrative Use Permit as required for all other rooftop decks.

23C.24.050 Special Provisions

~~A. A rooftop deck may be established provided that the entire roof, deck, and railing comply with Development Standards for ADUs in Section 23C.24.040 Paragraphs C through G.~~

- ~~5. Proposed amendment in the Hillside District to remove 23C.24.040.F. In the Flats proposed amendment citywide to modify 23C.24.040 (Development Standards) section F by removing Bay Windows from the list of architectural features that may protrude into the required setback.~~

~~23C.24.040 Development Standards~~

~~F. Projections. Architectural features (Chimneys, Water Heater Enclosures, Flues, Heating and Cooling Equipment, Eaves, Cornices, Canopies, and Awnings and Bay Window) for properties outside the Hillside District may project two feet into the required setbacks, so long as there remains at least a two-foot setback from property lines~~

~~— This provision does not apply to properties within the Hillside District.~~

6. Proposed amendment citywide to specify that objective design standards are not required for ADUs of any size citywide.

23C.24.050 Special Provisions

~~D. Objective design standards are not required for ADUs of any size.~~