



Rashi Kesarwani
Councilmember District 1

SUPPLEMENTAL AGENDA MATERIAL for Supplemental Packet 2

Meeting Date: December 14, 2021

Item Number: 46

Item Description: Response to City Council Action on October 26, 2021 regarding Short Term Referral for Amendments to Accessory Dwelling Unit (ADU) Ordinance

Submitted by: Councilmember Rashi Kesarwani

The purpose of this supplemental report is to provide minor clarifying changes to the proposed ADU Ordinance in order to ensure its consistency with Council's direction on October 26, 2021 and with state Government Code Section 65852.2 and 22.



Rashi Kesarwani
Councilmember District 1

CONSENT CALENDAR
December 13, 2021

TO: Honorable Mayor and Members of the City Council

FROM: Councilmember Rashi Kesarwani (Author)

SUBJECT: Response to City Council Action on October 26, 2021 regarding Short Term Referral for Amendments to Accessory Dwelling Unit (ADU) Ordinance (Item #46)

The purpose of this supplemental report is to provide minor clarifying changes to the proposed ADU Ordinance in order to ensure its consistency with Council’s direction on October 26, 2021 and with state Government Code Section 65852.2 and 22. Each proposed change is described below, followed by an amended ADU Ordinance.

1. Further restrict areas in multi-family buildings that may be converted to ADUs in order to protect non-habitable space that may be within a tenant’s dwelling unit. (23.102.020.B.3.b)

The proposed zoning ordinances states that “non-habitable” portions of multi-family buildings may be converted to ADUs. State law, however, applies a different standard—that the area must be *outside a dwelling unit*. “Non-habitable space” can occur both inside and outside of dwelling units. To protect the non-habitable space that may be within a tenant’s dwelling unit, it is proposed that Berkeley specify that these spaces be outside the walls of a dwelling unit to qualify for conversion.

Berkeley’s Baseline Zoning Ordinance states that storage areas are not habitable space.¹ If it’s within a dwelling unit, it *may not be converted* to an ADU according to State law; if it’s *outside of a dwelling unit*, it may. State law allows conversion of areas “that are not used as livable space” but it does not define “livable space.” To resolve this problem, the state’s Housing and Community Development Department (HCD) has interpreted “livable space” in this case to mean “outside the walls of the living area.”²

¹ See Berkeley Baseline Zoning Ordinance Section 23.502.020.H.1. *Habitable Space*. A space in a building which is used or designed to be used for living, sleeping, eating or cooking, but not including garages, bathrooms, utility, storage and laundry rooms, halls or closets.

² HCD Official Correspondence 22: Livable space is the area within a building that is within the walls of an individual dwelling unit. Unused non-livable space may be converted to ADUs in multi-family buildings. Note: “Habitable space,” as defined in the Building Code, is not the appropriate term in this case because it excludes spaces such as baths, kitchens, hallways, etc. These excluded areas—called non-habitable

2. Clarify rules that apply to Accessory Structures being converted into ADUs.

The footnotes in Table 23.306-1 ADU and JADU Development Standards explain how the development standards apply to accessory structures under different circumstances. The three minor proposed changes here seek simply to clarify when these standards apply.

- **In Footnote #1, delete date “prior to December 1, 2021” so that all legally-established accessory structures are eligible to be converted into a full size ADU (850 or 1,000 square feet).** Footnote #1 specifies that only accessory structures built before December 1, 2021 may be converted into full-sized ADUs (850 or 1,000 square feet). This arbitrary date would go against the spirit of Council’s direction on October 26, 2021 that all legally-established existing accessory structures should be able to be converted into ADUs.
- **In Footnote #2, clarify that only accessory structures that exceed the development standards in the table are limited to a physical addition of no more than 150 square feet.** Footnote #2 currently refers to “non-compliant” accessory structures, which is not as clear as specifying that the footnote is only applicable to accessory structures that “exceed” the development standards specified in the table.
- **In Footnote #4, clarify that replacement parking for ADUs and JADUs is optional.** Footnote #4 is not clear that replacement parking is not required. A sentence has been added to specify that replacement parking is not required.

3. Clarify owner occupancy requirement for JADUs

The language requiring owner-occupancy for properties with a JADU mentions that the owner may occupy either the JADU or the main dwelling. Since a single-family parcel may include an ADU and a JADU, it is recommended that the language clarify that they owner may also occupy an ADU on the same property. The modification applies to the language required for the Deed Restriction and the language in the definition of a JADU:

- 23.306.050 Deed Restrictions
- 23.502.020.J.1 Junior Accessory Dwelling Unit (JADU)

4. Modify noticing requirements for tenants and neighbors (23.306.060)

The proposed noticing requirement applies to ADUs proposed for both single-family homes and multi-family properties. It requires noticing of both tenants and neighbors before the owner has submitted the ADU application. The purposes of these notices differ. For tenants, it is to ensure that they are aware of the changes proposed so any

space—may not be converted to an ADU if they are within an individual dwelling unit (Last Modified: 2021-08-27). State Government Code Section 65852.20(e)(1)(C)(i) reads, “Multiple accessory dwelling units within the portions of existing multifamily dwelling structures that are not used as livable space, including, but not limited to, storage rooms, boiler rooms, passageways, attics, basements, or garages, if each unit complies with state building standards for dwellings” (Last Modified: 2020-01-01).

problems that tenants might encounter may be resolved early in the permit process. For the neighbors, it is to provide a courtesy notice about pending construction, the rules that apply, and the name and phone number of someone to contact in case there are problems.

Given these differences, we propose two notices that differ in timing, content, and recipients.

- The notice to tenants should be given before the application is submitted and should be submitted to tenants of the subject property.
- The notice to neighbors should be given before construction begins and should be submitted to owners and occupants of both the subject and neighboring properties.

CONTACT PERSON

Councilmember Rashi Kesarwani, District 1

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ORDINANCE NO. -N.S.

AMENDMENTS TO THE ACCESSORY DWELLING UNIT (ADU) ORDINANCE (BMC 23.306) AND DEFINED TERMS (BMC 23.502.020) RELATING TO ADUS

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

Section 1. That Berkeley Municipal Code 23.306 is amended to read as follows:

23.306 Accessory Dwelling Units

Sections:

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23.306.040– Development Standards

23.306.050– Deed Restrictions

23.306.060– Neighborhood Noticing

23.102.010 – Purposes

The purposes of this Chapter are to:

- A. Implement California Government Code Section 65852.2 and 65852.22.
- 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.
- F. Reduce potential impacts of new development in high fire severity areas and the Hillside Overlay District due to unique conditions and hazards within these areas that require additional restrictions on ADUs and JADUs because of impacts of traffic flow and public safety, consistent with Government Code 65852.2, subdivision (a)(1)(A), which allows local agencies to regulate ADUs based on "adequacy of water and sewer service, and the impacts of traffic flow and public safety."

23.102.020 – 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.
1. Exceptions. The provisions of this chapter that permit ADUs and JADUs do not apply to lots in the R-1H (Single-Family Residential—Hillside Overlay), R-2H (Restricted Two-Family Residential—Hillside Overlay), or R-2AH (Restricted Multiple-Family Residential—Hillside Overlay) Districts. In such districts, ADUs and JADUs shall only be permitted to the extent required by subdivision (e)(1) of Government Code Section 65852.2.
- B. Number of ADUs and JADUs Permitted Per Lot.
1. Lot with one Single Family Dwelling: One ADU and/or one JADU.
 2. Lot with more than one Single Family Dwelling: One ADU.
 3. Lot with a Duplex or Multi-Family Dwelling, either:
 - a. Up to two detached ADUs; or
 - b. At least one ADU converted from non-habitable 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 maximum number of ADUs converted from ~~non-habitable~~ portions of the existing Main Building that are not within the living space of a dwelling unit shall not exceed 25% of the total number of existing Dwelling Units on the lot.
 4. Lot with a Group Living Accommodation that is not a Fraternity House, Sorority House or Dormitory: One ADU.

23.102.030 – Permit Procedures

- A. Zoning Certificate. An application for an ADU or JADU shall be allowed with a Zoning Certificate. Review must be completed within 60 days of submission of a completed application. A completed application must include evidence of compliance with this Chapter, including Development Standards, Deed Restrictions, and Neighborhood Noticing.
1. If an application to create an ADU or JADU 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 JADU until the discretionary approval(s) has/have been granted and any applicable appeal periods have expired.
 2. Issuance of a Zoning Certificate shall not be denied for the construction or conversion of an ADU or JADU that complies with the requirements of Government Code Section 65852.2(e)(1).

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

23.306.040 Development Standards

A. Basic Standards. See Table 23.306-1: ADU and JADU Development Standards.

TABLE 23.306-1 ADU AND JADU DEVELOPMENT STANDARDS

| | ADU ¹ | JADU |
|---|-----------------------------|--------|
| Maximum Size ² | | 500 sf |
| Studio or 1 bedroom | 850 sf | N/A |
| 2 + bedrooms | 1000 sf | |
| Maximum Height | 20 ft. | |
| Front Yard Setback | Same as underlying district | |
| Rear Setback | 4 ft ³ | |
| Side Setback | 4 ft ³ | |
| Required Off-Street Parking | None ⁴ | |
| <p>[1] An ADU converted from an Accessory Building or Accessory Structure legally established prior to December 1, 2021 that does not comply with the Maximum Height, Size, and/or Rear and Side Setback requirements is allowed to maintain non-conformity to the same dimensions of the existing Accessory Building or Accessory Structure. Any physical additions to the existing Accessory Building or Accessory Structure shall comply with the development standards in this table.</p> <p>[2] An ADU created entirely through conversion, with no modifications to the existing building envelope that exceeds non-compliant with the development standards in this table is allowed a physical addition of no more than 150 square feet. The addition must that <u>complies</u> with Maximum Height and Setback requirements in this table.</p> <p>[3] If there is a lesser setback allowed for a comparable Accessory Building or Accessory Structure in the underlying zoning district, that setback shall apply.</p> <p>[4] <u>Replacement parking is not required.</u> Replacement of off-street parking for the Main Building is allowed and does not need to comply with Parking Maximums (BMC 23.322.070) nor Parking Layout and Design (BMC 23.322.080).</p> | | |

B. Projections. Architectural features (Chimneys, Water Heater Enclosures, Flues, Heating and Cooling Equipment, Eaves, Cornices, Canopies, Awnings) may project two feet into the required setbacks, so long as there remains at least a two-foot setback from property lines. Bay windows may not project into a setback.

23.306.050 - Deed Restrictions

A. The property owner shall file a deed restriction with the Alameda County Recorder which states:

1. The JADU shall not be sold separately from the Main Building;

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2. The ADU shall not be sold separately from the Main Building unless the conditions of BMC 23.306.050 B are met;
3. The ADU and/or JADU shall not be rented for a term that is shorter than 30 days; and
4. If the property includes a JADU, the JADU, ~~or~~ the Single Family Dwelling in which the JADU is located, or an ADU shall be owner-occupied.

B. 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 65852.26 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.

23.306.060 – Neighbor Noticing

A. A-Tenant Notices

1. Scope and Timing of Notice. Notice of an ADU application on a multi-family parcel shall be mailed to ~~owners and~~ tenants of the subject, ~~adjacent, confronting and abutting~~ propertyies within ten working days of submission to the Planning Department.

2. ~~B.~~ Content of Notice. Notice shall provide the address of the project, allowable hours of construction, and a link to the City’s ADU webpage.

B. Neighbor Notices

1. Scope and Timing of Notice. Notice of an ADU application shall be mailed to owners and tenants of the subject, adjacent, confronting and abutting properties when the Building Permit is issued.

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

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

Section 2. That the definition of Accessory Dwelling Unit in Berkeley Municipal Code Chapter 23.502.020.A.4 is amended to read as follows:

23.502.020.A.4

Accessory Dwelling Unit. A secondary dwelling unit that is located on a lot in a zoning district where residential uses are permitted with a proposed or existing Single Family Dwelling, Duplex, Multi-Family Dwelling Use or Group Living Accommodation. An Accessory Dwelling Unit must comply with local building, housing, safety and other code requirements, except as expressly modified in Chapter 23.306, and provide the following features independent of the primary dwelling unit: 1) exterior or independent access to Accessory dwelling unit; 2) living and sleeping quarters; 3) a full kitchen; and 4) a full bathroom. An Accessory Dwelling Unit also includes the following:

- a. An efficiency unit, as defined in Section 17958.1 of the Health and Safety Code.
- b. A manufactured home, as defined in Section 18007 of the Health and Safety Code.

Section 3. That the definition of Primary Dwelling Unit in Berkeley Municipal Code Chapter 23.502.020.P.16 is rescinded.

23.502.020.P.16

~~**Primary Dwelling Unit:** A legally established Single Family Dwelling that is on a lot with an Accessory Dwelling Unit.~~

Section 4. That the definition of Efficiency Kitchen is adopted in Berkeley Municipal Code Chapter 23.502.020.E.1 as follows:

23.502.020.E.1

Efficiency Kitchen: A kitchen that includes a sink, a cooking facility with appliances (e.g. microwave, toaster, oven, hot plate), and food preparation counter space and cabinets.

Section 5. That the definition of Junior Accessory Dwelling Unit (JADU) is adopted in Berkeley Municipal Code Chapter 23.502.020.J.1 as follows:

23.502.020.J.1

1. **Junior Accessory Dwelling Unit (JADU):** A unit that is contained entirely within the walls of a Single Family Dwelling. A JADU must include a separate exterior entrance and an Efficiency Kitchen with a working refrigerator. A JADU may include separate sanitation facilities or may share sanitary facilities with a Single Family Dwelling. The property-owner must reside in ~~either~~ the Single Family Dwelling, ~~or~~ the JADU, or an ADU on the property.

Section 6. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.