

Rashi Kesarwani
Councilmember District 1

SUPPLEMENTAL AGENDA MATERIAL for Supplemental Packet 2

Meeting Date: September 19, 2023

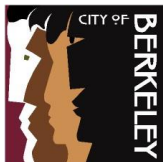
Item Number: #17

Item Description: Amendments to Title 23 Relating to Accessory Dwelling Units (ADUs) and Repeal of Chapter 12.99 to Conform to State Law and Respond to Guidance from the California Department of Housing and Community Development

Submitted by: Rashi Kesarwani

This supplemental item recommends rejecting the three policy alternatives outlined in Supplemental 1 due to the undue burden placed on homeowners seeking to create Accessory Dwelling Units (ADUs) and the additional administrative complexity for City staff.

Further, recommend pausing parking requirement for Hillside Overlay specified in TABLE 23.322-1: REQUIRED OFF-STREET PARKING IN RESIDENTIAL DISTRICTS and TABLE 23.322-2: REQUIRED OFF-STREET PARKING REQUIREMENTS IN COMMERCIAL DISTRICTS (EXCLUDING C-T) pending: 1) preparation of a written analysis from the City Attorney's Office for the City Council's consideration specifying the legal risk, 2) additional City of Berkeley Planning and Development Department consultation with California Housing and Community Development Department (HCD), and 3) Fire Department completion of an evacuation study specific to ADUs, as requested by HCD in its enforcement letter dated Oct. 17, 2022.



Rashi Kesarwani
Councilmember, District 1

ACTION CALENDAR
September 19, 2023

TO: Honorable Mayor and Members of the City Council

FROM: Councilmember Rashi Kesarwani (Author)

SUBJECT: Supplemental 2 Recommendations on Policy Alternatives and Parking in Hillside Overlay District for Accessory Dwelling Units (ADUs)

RECOMMENDATION

Recommend Council reject the three policy alternatives outlined in Supplemental 1 *Amendments to Title 23 Relating to Accessory Dwelling Units (ADUs) and Repeal of Chapter 12.99 to Conform to State Law and Respond to Guidance from the California Department of Housing and Community Development* (pgs. 28-29 of 57) due to the undue burden placed on homeowners seeking to create ADUs and the additional administrative complexity for City staff:

- Reject Policy Alternative 1. Additional prescriptive standards for New Construction ADUs within the front setback (Section 8 of the Recommended Draft Ordinance)
- Reject Policy Alternative 2. Converted ADUs: Maintain time limit based on when the accessory building or structure was created (Section 8 of Recommended Draft Ordinance)
- Reject Policy Alternative 3. Keep Neighbor Noticing Procedures as-is except removing noticing to owner(s) of subject property (Section 8 of Recommended Draft Ordinance)

Further, recommend pausing parking requirement for Hillside Overlay specified in TABLE 23.322-1: REQUIRED OFF-STREET PARKING IN RESIDENTIAL DISTRICTS and TABLE 23.322-2: REQUIRED OFF-STREET PARKING REQUIREMENTS IN COMMERCIAL DISTRICTS (EXCLUDING C-T) pending: 1) preparation of a written analysis from the City Attorney's Office for the City Council's consideration specifying the legal risk, 2) additional City of Berkeley Planning and

Development Department consultation with California Housing and Community Development Department (HCD), and 3) Fire Department completion of an evacuation study specific to ADUs, as requested by HCD in its enforcement letter dated Oct. 17, 2022 and as described below.

CURRENT SITUATION AND ITS EFFECTS

The City Council adopted ADU Ordinance Nos. 7,797-N.S. and 7,799-N.S. on Feb. 8, 2022. In a letter dated Oct. 17, 2022¹, HCD provided written findings to the City of Berkeley Planning and Development Department that Ordinance No. 7,799-N.S. (Wildfire Hazard Evacuation Risk Mitigation Ordinance) did not comply with state ADU law—Government Code Section 65852.2. The state HCD writes in part:

Section 12.99 – *Wildfire Hazard Evacuation Risk Mitigation Ordinance* – To restrict ADUs and Junior Accessory Dwelling Units (JADUs) in the Hillside Overlay District, the Ordinance relies on a local agency’s ability to designate areas where ADUs may be permitted based on the impact on traffic flow and public safety per Government Code 65852.2, subdivision (a)(1)(A). The Ordinance provides general information regarding the Hillside Overlay District and its topography and location within Berkeley’s Very High Fire Hazard Severity Zone (VHFHSZ). In addition, the Ordinance refers to a study published by UC Berkeley, and upon further communication by HCD with the City on March 4, 2022, the City provided information regarding a traffic simulation study (Developing Transportation Response Strategies for Wildfire Evacuations via an Empirically Supported Traffic Simulation of Berkeley, California, Wong, 2021) conducted within the Hillside Overlay District.

However, while HCD is sympathetic to concerns about fire safety and the need to ensure adequate evacuation in the event of a fire, the City has not adequately demonstrated that new ADUs will actually impact public safety in the VHFHSZ. The traffic simulation study is not specific to ADUs and JADUs, and therefore its information and conclusions do not adequately justify the restriction of ADUs in the Hillside Overlay District per Government Code 65852.2, subdivision (a)(1)(A). Specifically, the City relies on the study, which looks at total vehicular use, to conclude that additional ADUs will create an evacuation hazard. **This study, however, does not provide data on how many lots are likely to add ADUs or what specific impact new ADUs might have on evacuations. Moreover, the City does not account for the potential for ADUs to be excluded from requiring a parking space given the availability of public transit in the Hillside Overlay District. HCD is aware that AC Transit serves the Berkeley**

¹ City Manager, Amendments to Title 23 Relating to Accessory Dwelling Units (ADUs) and Repeal of Chapter 12.99 to Conform to State Law and Respond to Guidance from the California Department of Housing and Community Development, <https://berkeleyca.gov/city-council-regular-meeting-eagenda-september-19-2023>, Regular City Council Meeting Item #17, Sept. 19, 2023, pgs. 71-73 of 88

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Hills location, exempting many, if not all, potential lots from parking space requirements for new ADUs (emphasis added).

Furthermore, even if the City would provide adequate justification for this restriction on ADUs under this subdivision, the City may not justify such a restriction on ADUs that fall under subdivision (e), as local development standards (such as an area restriction based on VHFHSZ designation) provided by the Ordinance pursuant to Government Code section 65852.2, subdivisions (a) through (d), do not apply to ADUs created under Government Code section 65852.2, subdivision (e). In summary, the City must remove these restrictions and permit applications pursuant to Government Code 65852.2, subdivisions (a) and (e).

This aforementioned section of the HCD enforcement letter references state ADU law, Government Code Section 65852.2, which states in part:

- (d) Notwithstanding any other law, and whether or not the local agency has adopted an ordinance governing accessory dwelling units in accordance with subdivision (a), all of the following shall apply:
- (1) The local agency shall not impose any parking standards for an accessory dwelling unit in any of the following instances:
 - (A) Where the accessory dwelling unit is located within one-half mile walking distance of public transit.

The entire City of Berkeley is within one-half mile walking distance of public transit, and the plain language of the state Government Code Section 65852.2(d)(1)(A) indicates that it is generally not legally allowable to require off-street parking for ADUs anywhere in the City of Berkeley. It is unclear why the ordinance—as proposed in Supplemental 1—requires off-street parking in the Hillside Overlay District without: 1) providing a written legal analysis, inclusive of consultation with HCD, to the City Council for the basis for violating the plain language of Government Code Section 65852.2 above and 2) completion of an evacuation study specific to ADUs, as described in the HCD Oct. 17, 2022 enforcement letter.

The staff report *Amendments to Title 23 Relating to Accessory Dwelling Units (ADUs) and Repeal of Chapter 12.99 to Conform to State Law and Respond to Guidance from the California Department of Housing and Community Development* provides the following information: “Staff revised the requirements to use the Public Resource Code (PRC) Section 21155 definition of a major public transit or high-quality transit corridor, instead of subdivision (d)(1)4 and (j)(11)5 of Government Code Section 65852.2, as proposed in the July 25th recommended draft ordinance. This change relies on a different interpretation of the definition of “public transit” in Government Code 65852.2, supported by the use of the phrase “including, but not limited to,” which may allow for use of the PRC definition in the parking context, in

addition to the height context. **Staff are unclear whether or not HCD would support this interpretation” (emphasis added).**

In fact, the *HCD ADU Handbook* (updated July 2022)² appears to be clear on this point, as shown in Exhibit 1. Public transit is defined as any location where an individual may access buses, trains, subways, and other forms of transportation that charge set fares, run on fixed routes, and are available to the general public. The handbook is silent about the availability of “major public transit or high-quality transit corridor” for the purposes of imposing parking requirements for ADUs.

Exhibit 1: HCD ADU Handbook Clearly States that a Local Agency Cannot Impose Off-Street Parking Requirements Within One-Half Mile Walking Distance of Public Transit, As Defined

C) Parking Requirements

- **Are certain ADUs exempt from parking requirements?**

Yes. A local agency shall not impose ADU parking standards for any of the following ADUs, pursuant to Government Code section 65852.2, subdivisions (d)(1-5) and (j)(10):

- (1) ADUs located within one-half mile walking distance of public transit.
- (2) ADUs located within an architecturally and historically significant historic district.
- (3) ADUs that are part of the proposed or existing primary residence or an accessory structure.
- (4) When on-street parking permits are required but not offered to the occupant of the ADU.
- (5) When there is a car share vehicle located within one block of the ADU.

Note: For the purposes of State ADU Law, a jurisdiction may use the designated areas where a car share vehicle may be accessed. Public transit is any location where an individual may access buses, trains, subways, and other forms of transportation that charge set fares, run on fixed routes, and are available to the general public. Walking distance is defined as the pedestrian shed to reach public transit. Additional parking requirements to avoid impacts to public access may be required in the Coastal Zone.

Because of the lack of clarity as to whether the proposed change in parking requirements for ADUs in certain areas of the Hillside Overlay District is legally allowable pursuant to state law, it is recommended that this action is paused until more written legal analysis can be provided, inclusive of consultation with HCD, and an evacuation study specific to ADUs in the hills can be conducted. One of the primary goals of adopting a revised ordinance is to comply with state law, as described in the HCD enforcement letter dated Oct. 17, 2022. It is therefore

² California Department of Housing and Community Development, Accessory Dwelling Unit Handbook, <https://www.hcd.ca.gov/sites/default/files/2022-07/ADUHandbookUpdate.pdf>, Updated July 2022

reasonable for the City Council to receive more information about whether the proposed ordinance is creating new legal risk.

RATIONALE FOR RECOMMENDATION

Reject Policy Alternative 1. Additional prescriptive standards for New Construction ADUs within the front setback (Section 23.306.030 Development Standards, p. 12 of 57). Additional prescriptive standards for the front setback create unnecessary burdens for homeowners who are likely creating an ADU in the front yard due to insufficient space or other constraints in the backyard. The proposed ordinance language is adequate:

4. Front Setback, New Construction. An ADU shall not occupy area within the front setback, unless the requirement would preclude an ADU of 800 square feet.

Reject Policy Alternative 2. Converted ADUs: Maintain time limit based on when the accessory building or structure was created (Section 23.306.030 Development Standards, p. 12 of 57). A time limit of three years for a homeowner to submit an ADU application for a legally established accessory building or accessory structure would place an unreasonable burden on a homeowner who may be in immediate need of the additional living space or rental income associated with an ADU. The proposed ordinance language is adequate:

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.

Reject Policy Alternative 3. Keep Neighbor Noticing Procedures as-is except removing noticing to owner(s) of subject property (23.306.040 Permit Procedures, p. 14-15 of 57). Planning staff reported in the May 3, 2023 Planning Commission agenda packet³ that the neighbor noticing requirement is burdensome to staff and frustrates neighbors who may be unaware that ADUs are *not* subject to a public review process. Specifically, staff reported the following in the Planning Commission packet: “ADU permits are building permits, and cannot be printed out or shared online with members of the public (unlike zoning permits). For neighbors

³ Planning Commission Agenda, Item #11 Public Hearing: Accessory Dwelling Unit Amendments, https://berkeleyca.gov/sites/default/files/legislative-body-meeting-agendas/2023-05-03%20PC_Agenda%20Packet.pdf, May 3, 2023, p. 72 of 147

interested in seeing proposed ADU plans, this means that they must visit the Permit Service Center in-person and look at the plans accompanied by a staff member. Additionally, ADU permits are non-discretionary permits, so members of the public ultimately do not have a means of providing feedback on or appealing a proposed ADU. Staff have found there is often an expectation from public posting or receiving notice of a proposed ADU that there is a public review process involved, and there is not.” The current neighbor noticing requirement, including neighbors visiting the Permit Service Center in-person to view plans with staff—for ADUs that are not subject to a public review process—is using valuable staff time that could go toward more productive uses, such as processing permit applications in a timely manner. Further, the cost of materials, postage, and staff time is significant for a homeowner: a fee of \$460. The proposed ordinance language strikes an appropriate balance—recommended by the Planning Commission—to limit notification to only occupants on the subject property. The proposed language is adequate:

B. Noticing.

1. Scope and Timing of Notice. Notice of an ADU application shall be mailed to all occupants of the subject property, excepting the property owner(s), within ten working days of submission of the building permit to the City.

2. Content of Notice. Notice shall provide the address of the project and include allowable hours of construction, a link to the City’s ADU webpage identifying permit and construction resources, and contact information for a Rent Board Housing Counselor.

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

Recommend Pausing Parking Requirement for Hillside Overlay Specified in TABLE 23.322-1: REQUIRED OFF-STREET PARKING IN RESIDENTIAL DISTRICTS and TABLE 23.322-2: REQUIRED OFF-STREET PARKING REQUIREMENTS IN COMMERCIAL DISTRICTS (EXCLUDING C-T) Pending Additional Written Legal Analysis, Consultation with HCD, and Evacuation Study Specific to ADUs in Hillside Overlay. In its enforcement letter to the City of Berkeley Planning and Development Department dated Oct. 17, 2022, HCD provided clear interpretation of state ADU law as it relates to parking: “...the City does not account for the potential for ADUs to be excluded from requiring a parking space given the availability of public transit in the Hillside Overlay District. HCD is aware that AC Transit serves the Berkeley Hills location, exempting many, if not all, potential lots from parking space requirements for new ADUs.”

The HCD interpretation that parking requirements cannot be required for parcels located near public transit (regardless of the frequency of such public transit) derives from Government Code Section 65852.2(d)(1)(a):

(d) Notwithstanding any other law, and whether or not the local agency has adopted an ordinance governing accessory dwelling units in accordance with subdivision (a), all of the following shall apply:

(1) The local agency shall not impose any parking standards for an accessory dwelling unit in any of the following instances:

(A) Where the accessory dwelling unit is located within one-half mile walking distance of public transit.

Additional information is respectfully requested before adoption of ordinance provisions which may be found to be in continued violation of state ADU law.

CONTACT PERSON

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