



Fair Campaign Practices Commission  
Open Government Commission

## CONCURRENT MEETING OF THE FAIR CAMPAIGN PRACTICES COMMISSION AND THE OPEN GOVERNMENT COMMISSION

### MEETING AGENDA

April 15, 2021

7:00 p.m.

Pursuant to Executive Order N-29-20 issued by the Governor on March 17, 2020, this meeting will be held telephonically. Members of the public interested in attending will be able to observe and address the meeting using the following information:

Please use the following link to join the meeting:

<https://us02web.zoom.us/j/89688058545>

Or Telephone: +1 669 900 6833

Meeting ID: 896 8805 8545

Secretary: Samuel Harvey

### **The Commission may act on any item on this agenda**

1. Call to Order 7:00 p.m.
2. Roll Call.
3. Public Comment. *Comments on subjects not on the agenda that are within the Commissions' purview are heard at the beginning of meeting. Speakers may comment on agenda items when the Commission hears those items.*
4. Approval of minutes for March 18, 2021 FCPC-OGC Concurrent Regular Meeting

### **Fair Campaign Practices Commission (FCPC) Agenda**

5. Reports.
  - a. Report from Chair.
  - b. Report from Staff.
6. Mandated Cost of Living Adjustments for Public Financing Program; discussion and possible action
7. Developing policies allowing administrative closure of inactive campaign committees; discussion and possible action.

### **Open Government Commission (OGC) Agenda**

8. Reports.
  - a. Reports from Chair.
  - b. Reports from Staff.
9. Handling of public communications submitted to City legislative bodies as part of public record in land use proceedings; discussion and possible action.
10. Brown Act and Open Government Ordinance complaints submitted by Shirley Dean related to City Council land use items; discussion and possible action:

### **Joint FCPC-OGC Agenda**

11. Report and discussion re Council Agenda & Rules Committee action on officeholder accounts and councilmember budget ("D-13 Account") grants; discussion and action.
12. Adjournment.

### **Communications**

- None

This meeting is being held in a wheelchair accessible location. To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at 981-6418 (V) or 981-6347 (TDD). Please refrain from wearing scented products to this meeting.

Communications to Berkeley boards, commissions or committees are public record and will become part of the City's electronic records, which are accessible through the City's website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to a City board, commission or committee, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service or in person to the secretary of the relevant board, commission or committee. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the secretary to the relevant board, commission or committee for further information. **SB 343 Disclaimer:** Any writings or documents provided to a majority of the Commission regarding any item on this agenda will be made available for public inspection at the City Attorney's Office at 2180 Milvia St., 4<sup>th</sup> Fl., Berkeley, CA.



Fair Campaign Practices Commission  
Open Government Commission

## DRAFT MINUTES

March 18, 2021

### CONCURRENT REGULAR MEETING OF THE FAIR CAMPAIGN PRACTICES COMMISSION AND THE OPEN GOVERNMENT COMMISSION

Pursuant to Executive Order N-29-20 issued by the Governor on March 17, 2020, this meeting was held telephonically.

Secretary: Samuel Harvey, Deputy City Attorney

Members Present: Brad Smith (Chair), Jedidiah Tsang (Vice Chair), Janis Ching, Dean Metzger, Patrick O'Donnell, Patrick Sheahan, Jessica Blome, James Hynes

Also Present: Samuel Harvey, Staff Secretary

1. **Call to Order**

Chair called the meeting to order at 7:00 p.m.

2. **Roll Call**

Roll call taken.

3. **Public Comment (items not on agenda)**

One speaker.

4. **Approval of minutes:**

a. **February 18, 2021 FCPC Special Meeting**

- i. Public comment: No speakers.
- ii. Commission discussion and action.

*Motion to approve* (M/S/C: O'Donnell/Metzger; Ayes: Metzger, O'Donnell, Ching, Sheahan, Blome, Hynes, Tsang, Smith; Noes: none; Abstain: none; Absent: none.)

**b. February 18, 2021 FCPC-OGC Concurrent Regular Meeting**

- i. Public comment: No speakers.
- ii. Commission discussion and action.

*Motion to approve (M/S/C: O'Donnell/Metzger; Ayes: Metzger, O'Donnell, Ching, Sheahan, Blome, Hynes, Tsang, Smith; Noes: none; Abstain: none; Absent: none.)*

**Fair Campaign Practices Commission (FCPC) Agenda**

5. **FCPC Reports**

- a. Report from Chair.
- b. Report from Staff.

6. **Mandated Cost of Living Adjustments for Public Financing Program**

- a. Public comment: Three speakers.
- b. Commission discussion and action.

*Motion to approve cost of living adjustments (M/S/C: O'Donnell/Metzger; Ayes: Metzger, O'Donnell, Ching, Sheahan, Blome, Hynes, Tsang, Smith; Noes: none; Abstain: none; Absent: none.)*

7. **Developing policies allowing administrative closure of inactive campaign committees**

- a. Public comment: No speakers.
- b. Commission discussion and action.

*Motion to direct staff to obtain information from City Clerk about appropriate deadlines for administrative closure of non-responsive campaign committees (M/S/C: Metzger/Sheahan; Ayes: Metzger, O'Donnell, Ching, Sheahan, Blome, Hynes, Tsang, Smith; Noes: none; Abstain: none; Absent: none.)*

8. **Providing guidance and clarification to candidate slates, potentially including amendments to BERA and FCPC Regulations**

- a. Public comment: no speakers.
- b. Commission discussion and action.

*Motion to accept staff report and recommendation for incorporating information into training materials about candidate slates (M/S/C: Metzger/Hynes; Ayes: Metzger, O'Donnell, Ching, Sheahan, Blome, Hynes, Tsang, Smith; Noes: none; Abstain: none; Absent: none.)*

**Open Government Commission (OGC) Agenda**

9. **OGC Reports**

- a. Report from Chair.
- b. Report from Staff.

10. **Lobbying enforcement referrals and procedures**

- a. Public comment: No speakers.
- b. Commission discussion.

11. **Handling of public communications submitted to City legislative bodies as part of public record in land use proceedings**

- a. Public comment: One speaker.
- b. Commission discussion.

**Joint FCPC-OGC Agenda**

12. **Report and discussion re Council Agenda & Rules Committee action on officeholder accounts and councilmember budget grants**

- a. Public comment: No speakers.
- b. Commission discussion.

13. **Adjournment**

*Motion to adjourn.* (M/S/C: Ching/O'Donnell; Ayes: Metzger, O'Donnell, Ching, Sheahan, Blome, Hynes, Tsang, Smith; Noes: none; Abstain: none; Absent: none.)

The meeting adjourned at 9:27 p.m.



Fair Campaign Practices Commission

Date: March 29, 2021  
To: Fair Campaign Practices Commission  
From: Commissioner Dean Metzger  
Subject: Mandated Cost of Living Adjustments for Public Financing Program

At the Commission meeting of March 18, 2021 the City Clerk provided the commission with the required up-dates to the dollar amounts required for administration, contributions, and distribution of public financing funds for the next election cycle per BMC § 2.12.545.

In reviewing the information provided, the question is, can the program sustain itself? The FCPC should review BMC § 2.12.545 and determine if any changes should be made. The areas that should be reviewed are:

1. Per resident Allocation - \$4.00
2. Cap in Fund Balance - \$2,000,000
3. Qualified Contributions - \$50.00
4. Initial Qualified Contributions - \$10.00
5. Initial Qualified Contributions – Total - \$500.00
6. Aggregate Totals for Fund Payments – Mayor - \$120,000
7. Aggregate Totals for Fund Payments – Council - \$40.00
8. Capital Asset cap - \$500.00

Values shown are the 2016 starting amounts.

These items should be left at the amounts initially set when the ordinance was passed and reviewed per BMC § 2.12.545. The FCPC should review the numbers and with staffs help determine if the funds provided at the out-set of the ordinance are sufficient to carry on a valid campaign for office. With staff input the FCPC could adjust the amounts if needed.

These items were laid-out in the ballot initiative that the voters passed. By omitting the above items from BMC 2.12.545 the ordinance would be more in line with what the voters thought they were passing.

Attachments:

1. Relevant Sections of Berkeley Election Reform Act (BMC ch. 2.12.)
2. Report from City Clerk from March 18, 2021 FCPC meeting

**2.12.075 Adjusting an amount for cost of living changes.**

"Adjusting an amount for cost of living changes" means adjusting upward or downward by the percent change in the Consumer Price Index as last computed in accordance with State of California Government Code, Section 82001. (Ord. 4977-NS § 1 (part), 1977: Ord. 4700-NS § 201, 1974)

**2.12.167 Qualified contribution.**

"Qualified Contribution" means a monetary contribution, excluding loans, made directly in aid of the nomination or election of one or more candidates not greater than fifty dollars (\$50) made by a natural person resident of the City of Berkeley. This dollar amount may be adjusted for cost-of-living changes by the Commission through regulation, pursuant to Section 2.12.545. (Ord. 7691-NS § 1, 2020: Ord. 7564-NS § 3, 2017: Ord. 7524-NS § 3.2 (part), 2016)

**2.12.500 Eligibility for Fair Elections campaign funding.**

A. To be eligible to be certified as a participating candidate, a candidate must:

- 1) During the qualifying period for the election involved, choose to participate in the Fair Elections program by filing with the City a written application for certification as a participating candidate in such form as may be prescribed by the Commission, containing the identity of the candidate, the office that the candidate seeks, and the candidate's signature, under penalty of perjury, certifying that:
  - a) The candidate has complied with the restrictions of this chapter during the election cycle to date;
  - b) The candidate's campaign committee has filed all campaign finance reports required by law during the election cycle to date and that they are complete and accurate; and
  - c) The candidate will comply with the requirements of this Act during the remainder of the election cycle and, specifically, if certified an eligible participating candidate, will comply with the requirements applicable to participating candidates.
- 2) Meet all requirements to be eligible to hold the office of Mayor or Councilmember as set forth in Sections 9 and 10 of Article V of the Charter of the City of Berkeley;
- 3) Before the close of the qualifying period, collect and submit at least 30 qualified contributions, from at least 30 unique contributors, of at least ten dollars (\$10), for a total dollar amount of at least five-hundred dollars (\$500).
  - a) Each qualified contribution shall be acknowledged by a receipt to the contributor, with a copy retained by the candidate. The receipt shall include the contributor's signature, printed name, home address, and telephone number, if any, and the name of the candidate on whose behalf the contribution is made. In addition, the receipt shall

indicate by the contributor's signature that the contributor understands that the purpose of the qualified contribution is to help the candidate qualify for Fair Elections campaign funding and that the contribution is made without coercion or reimbursement.

- b) A contribution for which a candidate has not obtained a signed and fully completed receipt shall not be counted as a qualified contribution.
  - 4) Maintain such records of receipts and expenditures as required by the Commission;
  - 5) Obtain and furnish to the Commission or City staff any information they may request relating to his or her campaign expenditures or contributions and furnish such documentation and other proof of compliance with this chapter as may be requested by such Commission or City staff;
  - 6) Not make expenditures from or use his or her personal funds or funds jointly held with his or her spouse, domestic partner, or unemancipated children in connection with his or her election except as a monetary or non-monetary contribution to his or her controlled committee of \$250 or less. Contributions from a participating candidate to his or her own controlled committee are not eligible for matching funds.
  - 7) Not accept contributions in connection with the election for which Fair Elections funds are sought other than qualified contributions, contributions not greater than fifty dollars (\$50) made by a natural person non-resident of Berkeley, or non-monetary contributions with a fair market value not greater than fifty dollars (\$50). The aggregate value of all contributions from any individual must not be greater than fifty dollars (\$50);
  - 8) Not solicit or direct contributions in connection with any election during the election cycle in which Fair Elections funds are sought other than qualified contributions, contributions not greater than fifty dollars (\$50) made by a natural person non-resident of Berkeley, or non-monetary contributions with fair market value not greater than fifty dollars (\$50) to such candidate's controlled committee.
  - 9) Not accept loans from any source.
  - 10) The City has the authority to approve a candidate's application for public financing, despite a violation by the candidate related to participation and qualification in the public financing program, if the violation is minor in scope and the candidate demonstrates a timely, good-faith effort to remedy the violation. The Commission shall adopt regulations setting forth guidelines for what constitutes a minor violation under this provision.
- B. At the earliest practicable time after a candidate files with the City a written application for certification as a participating candidate, the City shall certify that the candidate is or is not eligible. Eligibility can be revoked if the Commission determines that a candidate has committed a substantial violation of the requirements of this Act, in which case all Fair Elections funds shall be repaid.



C. At the discretion of the Commission or at the applying candidate's request, the City's denial of eligibility is subject to review by the Commission. The Commission's determination is final except that it is subject to a prompt judicial review pursuant to Section 2.12.235.

D. If the City or Commission determines that a candidate is not eligible, the candidate is not required to comply with provisions of this Act applicable only to participating candidates. (Ord. 7723-NS § 1, 2020: Ord. 7691-NS § 2, 2020: Ord. 7674-NS § 1, 2019: Ord. 7564-NS § 7, 2017: Ord. 7524-NS § 3.6 (part), 2016)

### **2.12.505 Fair Elections fund payments.**

A. A candidate who is certified as an eligible participating candidate shall receive payment of Fair Elections funds equal to six-hundred percent (600 percent) of the amount of qualified contributions received by the candidate during the election cycle with respect to a single election subject to the aggregate limit on the total amount of Fair Elections funds payments to a candidate specified in Section 2.12.505.B.

B. The aggregate amount of Fair Elections funds payments that may be made to a participating candidate during an election cycle may not exceed:

- 1) \$120,000 for a candidate running for the office of Mayor;
- 2) \$40,000 for a candidate running for the office of City Council.

C. A participating candidate's application for Fair Elections funds, including an initial request submitted with an application for certification as a participating candidate, shall be made using a form prescribed by the Commission and shall be accompanied by qualified contribution receipts and any other information the Commission deems necessary. This application shall be accompanied by a signed statement from the candidate indicating that all information on the qualified contribution receipts is complete and accurate to the best of the candidate's knowledge.

- 1) All Qualified Contributions, of any dollar amount, eligible for matching Fair Elections funds must be publicly disclosed with the contributor information required under Sections 2.12.280 and 2.12.283.
- 2) All campaign filings must be current in order for a Participating Candidate to receive a disbursement of Fair Elections funds and the Participating Candidate and a Participating Candidate's controlled committee must not have any outstanding fines related to campaign filings or violations of municipal, state or federal election law. All applications for Fair Elections funds shall include a certification by the Participating Candidate that the Participating Candidate or his or her controlled committee does not have any outstanding fines or penalties related to campaign filings. Upon submission of outstanding campaign filings and payment of any outstanding fines, withheld Fair Elections funds will be disbursed at the next regularly scheduled distribution for that election cycle.

D. The City shall verify that a candidate's qualified contributions meet all of the requirements and restrictions of this Act prior to the disbursement of Fair Elections funds to the candidate. A participating candidate who receives a qualified contribution that is not from the person listed on the qualified contribution receipt shall be liable to pay the Fair Elections Fund the entire amount of the inaccurately identified contribution, in addition to any penalties.

E. The City shall make an initial payment of Fair Elections funds within seven business days of the City's certification of a participating candidate's eligibility, or as soon thereafter as is practicable. City staff shall report a certification or denial to the Commission no later than the Commission's next regular meeting, consistent with the Brown Act.

F. The Commission shall establish a schedule for the submission of Fair Elections funds payment requests, permitting a candidate to submit a Fair Elections funds payment request at least once per month. However, the Commission shall schedule a minimum of three payment request submission dates within the thirty days prior to an election.

G. The City shall provide each participating candidate with a written determination specifying the basis for any non-payment of Fair Elections funds. The Commission shall provide participating candidates with a process by which they may immediately upon receipt of such determination petition the Commission for reconsideration of any such non-payment and such reconsideration shall occur within seven business days of the filing of such petition. In the event that the Commission denies such petition then it shall immediately notify the candidate of his or her right to seek judicial review of the Commission's denial pursuant to Section 2.12.235.

H. Unspent funds of any Participating Candidate who does not remain a candidate until the election for which they were distributed, or such funds that remain unspent by a Participating Candidate following the date of the election for which they were distributed shall be deposited into the Fair Elections Fund. A Participating Candidate shall deposit all unspent funds into the Fair Elections Fund, up to the total amount of funds that the Participating Candidate received as Fair Elections Fund distributions in that election cycle, within sixty (60) days after the date of the election. (Ord. 7723-NS § 2, 2020: Ord. 7691-NS § 3, 2020: Ord. 7674-NS § 2, 2019: Ord. 7564-NS § 8, 2017: Ord. 7524-NS § 3.6 (part), 2016)

#### **2.12.530 Use of Fair Elections funds.**

A. A participating candidate shall use Fair Elections funds and contributions only for direct campaign purposes.

B. A participating candidate shall not use Fair Elections funds or contributions for:

- 1) Costs of legal defense in any campaign law enforcement proceeding under this Act, or penalties arising from violations of any local, state, or federal campaign laws;
- 2) The candidate's personal support or compensation to the candidate or the candidate's family;

- 3) Indirect campaign purposes, including but not limited to:
- a) Any expense that provides a direct personal benefit to the candidate, including clothing and other items related to the candidate's personal appearance;
  - b) Capital assets having a value in excess of five hundred dollars (\$500) and useful life extending beyond the end of the current election period determined in accordance with generally accepted accounting principles;
  - c) A contribution or loan to the campaign committee of another candidate or to a party committee or other political committee;
  - d) An independent expenditure as defined in Berkeley Municipal Code Section 2.12.142 as may be amended;
  - e) Any payment or transfer for which compensating value is not received;

C. The term "Contribution" is defined in 2.12.100 and includes "Qualified Contributions" as defined in 2.12.167 and contributions from non-residents of Berkeley as described in 2.12.500.A.7.

D. The dollar amounts in Section 2.12.530.B.3.b may be adjusted for cost-of-living changes by the Commission through regulation, pursuant to Section 2.12.545. (Ord. 7691-NS § 4, 2020: Ord. 7674-NS § 3, 2019: Ord. 7564-NS § 9, 2017: Ord. 7524-NS § 3.6 (part), 2016)

**2.12.545 Cost of living adjustments.**

The Commission shall adjust the dollar amounts specified in Sections 2.12.167, 2.12.500.A.3, 2.12.505.B and 2.12.530.B.3.b for cost of living changes pursuant to Section 2.12.075 in January of every odd-numbered year following Council implementation. Such adjustments shall be rounded to the nearest ten dollars (\$10) with respect to Sections 2.12.167, 2.12.500.A.3 and 2.12.530.B.3.b and one thousand dollars (\$1,000) with respect to Section 2.12.505.B. (Ord. 7691-NS § 5, 2020: Ord. 7564-NS § 10, 2017: Ord. 7524-NS § 3.6 (part), 2016)



City Clerk Department

March 5, 2021

To: Fair Campaign Practices Commission  
From: Mark Numainville, City Clerk  
Subject: Mandated Cost of Living Adjustments for Public Financing Program

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Under the Fair Elections Act of 2016 (Public Financing), certain data points and dollar amounts are required to be adjusted by the Commission in January of each odd-numbered year (BMC 2.12.545).

The adjustment for the dollar amounts is Consumer Price Index for the San Francisco Area. The formula established by the State Fair Political Practices Commission for adjusting contribution limits for state candidates is the formula that was used for the adjusting the limits for Berkeley's Public Financing Program. The factors labeled "2016 Dollar Amounts" and "2016 Annual CPI" will remain constant when the formula is applied in all subsequent odd-numbered years because those reflect the original amounts in the ballot measure. The numerator will change to reflect the year in which the adjustment is calculated.

$$2016 \text{ Dollar Amounts} \times \frac{2020 \text{ Annual CPI}}{2016 \text{ Annual CPI}} = 2021 \text{ Dollar Amounts}$$

The CPI numbers used are the December 2016 number (269.5) and the December 2020 number (302.9). The December number is used because the State Department of Finance does not calculate the standard CPI-U in January.

The chart in Attachment 1 shows all of the amounts that are subject to the inflator, the original amount, the new amount (raw and rounded), and the code reference.

Since its inception in 2016, the Public Financing Program has had an initial contribution cap at \$50.00, with a matching contribution from the City of \$300.00, for a total of

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E-Mail: [clerk@cityofberkeley.info](mailto:clerk@cityofberkeley.info) Website: <http://www.cityofberkeley.info/clerk>

\$350.00 from a single donor. This election cycle is the first time that there is an increase in the contribution limit, from \$50.00 to \$60.00 based on the CPI inflator. As the City matches the contribution on a 6-to-1 basis, a \$60.00 contribution will now increase to \$360.00. A public financing candidate is now eligible to receive \$420.00 from a single donor.

Upon approval by the Commission, all manuals and materials related to Public Financing will be updated to reflect the new dollar amounts.

Item Subject to Inflator	Starting Amount (Dec 2016)	Inflator	Adjusted Amount 2021	Rounding	Rounded Amount 2021	Timing of Adjustment	Amount Reference	Inflator Reference
Population	120,972	Census Update	121,353	Up to nearest whole number	<b>121,353</b>	Not stated	Art. III, Sec.6.2 (2)(a)	Art. III, Sec.6.2 (3)
Admin Costs (four year cycle)	\$250,000	302.9/260.3	290914.33	None	<b>\$290,914.33</b>	Not stated	Art. III, Sec.6.2 (1)(b)	Art. III, Sec.6.2 (3)
Per Resident Allocation	\$4.00	302.9/260.3	4.65	None	<b>\$4.65</b>	Not stated	Art. III, Sec.6.2 (1)(b)	Art. III, Sec.6.2 (3)
Cap in Fund Balance	\$2,000,000	302.9/260.3	2327314.64	None	<b>\$2,327,314.64</b>	Not stated	Art. III, Sec.6.2 (1)(b)	Art. III, Sec.6.2 (3)
Qualified Contribution	\$50.00	302.9/260.3	58.18	Nearest \$10	<b>\$60.00</b>	January of odd-year	2.12.167	2.12.545
Initial Qualified Contributions	\$10.00	302.9/260.3	11.64	Nearest \$10	<b>\$10.00</b>	January of odd-year	2.12.500.A.3.	2.12.545
Initial Qualified Contributions - Total	\$500.00	302.9/260.3	581.83	Nearest \$10	<b>\$580.00</b>	January of odd-year	2.12.500.A.3.	2.12.545
Aggregate Totals for Fund Payments - Mayor	\$120,000	302.9/260.3	139638.88	Nearest \$1,000	<b>\$140,000.00</b>	January of odd-year	2.12.505.B.	2.12.545
Aggregate Totals for Fund Payments - Council	\$40,000	302.9/260.3	46546.29	Nearest \$1,000	<b>\$47,000.00</b>	January of odd-year	2.12.505.B.	2.12.545
Capital Asset Cap	\$500.00	302.9/260.3	581.83	Nearest \$10	<b>\$580.00</b>	January of odd-year	2.12.530.B.2.c	2.12.545



Fair Campaign Practices Commission

Date: April 15, 2021  
To: Fair Campaign Practices Commission  
From: Samuel Harvey, Secretary  
Subject: Administrative Closure of Inactive Campaign Committees

At the Commission's March 18, 2021 meeting, staff presented an item regarding the development of a process for administratively closing inactive campaign committees. This item was presented following the recent referral by the City Clerk to the Commission of multiple campaign committees which had been inactive and unresponsive to Clerk Department requests to resolve outstanding campaign reports. As part of its evaluation of those committees, the Commission requested that the Secretary review the possibility of creating a process by which the Commission could administratively close inactive, unresponsive campaign committees.

The Commission Secretary presented sample administrative closure regimes from the California Fair Political Practices Commission ("FPPC") and the federal Fair Elections Commission ("FEC"). (Included with March 18, 2021 staff report, Attachment 1.)

Based on the Commission's discussion at the March 18, 2021 meeting and subsequent discussion with the City Clerk Department. The Commission Secretary has identified the following elements to be considered for inclusion in FPPC Regulations to establish a process for administrative closure of non-responsive committees.

1. The regulation should have clearly outlined standards for when a committee qualifies for administrative closure:
  - a. The City Clerk has recommended that committees be non-responsive for a minimum of one year before becoming eligible for administrative closure. In a non-election year, an open committee is required to file two semi-annual reports, on January 31<sup>st</sup> and July 31<sup>st</sup>. Staff has envisioned that the requisite "non-responsiveness" would involve failure to file reports and failure to respond to City staff inquiries about outstanding reports.
  - b. Committee filed a Statement of Organization in error
  - c. Person responsible for the committee is deceased or incapacitated
  - d. Staff had identified other reason why the committee should be submitted to the Commission for administrative closure

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2. Recommending administrative closure should remain at City staff's discretion. This would provide staff flexibility in special circumstances and be consistent with the intent of creating a tool for staff to streamline workflow related to campaign filings.
3. Committees should receive adequate notice that staff will be submitting a request for administrative closure to the Commission. The FPPC regulations provide for a 45 day notice period.
4. The Commission should review staff's recommendation of administrative termination and make a determination. Committee representatives should have an opportunity to attend and speak at the Commission meeting.
5. The committee should be notified of the Commission's decision to administratively close the committee.
6. FPPC regulations allow a committee to be reinstated if it (1) files a request for reinstatement, (2) files all outstanding reports, and (3) pays all outstanding fees or penalties.
7. Administrative closure should not prevent the Commission from pursuing any other enforcement options. Staff believe that being administratively closed should not "wipe the slate clean" for the committee.

Attachments:

1. California Fair Political Practices Commission Regulations – 2 CCR § 18404.2 – Administrative Termination.
2. Federal Election Commission Regulations – 11 CFR § 102.4 – Administrative Termination.





Fair Campaign Practices Commission

Date: March 18, 2021  
To: Fair Campaign Practices Commission  
From: Samuel Harvey, Secretary  
Subject: Administrative Closure of Inactive Campaign Committees

The City Clerk Department recently referred to the Commission multiple campaign committees which had been inactive and unresponsive to Clerk Department requests to resolve outstanding campaign reports. In one case, it was determined that the candidate had moved out of the City and was unaware of ongoing filing obligations which had resulted from the Secretary of State's rejection of the committee's closing Statement of Organization. In another case, one or more of the committee's officers continue to be active in City campaigns but have not consistently responded to Clerk Department requests to resolve outstanding filing obligations.

As part of its evaluation of these committees, the Commission requested that the Secretary review the possibility of creating a process by which the Commission could administratively close inactive, unresponsive campaign committees.

The Commission Secretary has reviewed the following "administrative closure" or "administrative termination" practices in other jurisdictions:

- The California Fair Political Practices Commission (FPPC) (Attachment 1)
- Federal Election Commission (Attachment 2)

The administrative closure regimes generally contain the following elements:

1. A set of factors or reasons one or more of which must exist to justify closure, including:
  - a. Failure to file campaign statements for a certain period of time (e.g., 12 months, 48 months)
  - b. Failure to respond to one or more efforts by staff to contact the committee about outstanding reports or filing fees
  - c. Maximum thresholds for cash balances (e.g., no more than \$3,000 cash balance).
  - d. Minimal economic activity (e.g., no more than \$5,000 in financial activity).
  - e. Committee has only made filings recently to disclose outstanding debts
  - f. Committee filed a Statement of Organization in error

February 18, 2021

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- g. Person responsible for the committee is deceased or incapacitated
2. A set of procedures for closure:
  - a. Written notice of proposed termination
  - b. Opportunity for committee to object to termination
  - c. Process for Commission to evaluate staff request to close
  - d. Opportunity for reinstatement of a closed committee

The Commission has broad authority under the Berkeley Election Reform Act (BERA) to “adopt, amend and rescind rules and regulations to carry out the purposes of [BERA], and to govern the procedures of the commission.” (BMC § 2.12.210.) The Commission Secretary therefore concludes it would be permissible for the Commission to promulgate regulations to create an administrative “closure” or “termination” process if the Commission chooses to do so.

Staff recommends the Commission discuss whether to promulgate such regulations and if so to discuss the provisions that should be contained in such regulations. Staff can then return at a future meeting with draft regulations for Commission consideration.

Attachments:

1. California Fair Political Practices Commission Regulations – 2 CCR § 18404.2 – Administrative Termination.
2. Federal Election Commission Regulations – 11 CFR § 102.4 – Administrative Termination.

(Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations.)

**§ 18404.2. Administrative Termination.**

(a) Bases for Administrative Termination. The Chief of the Enforcement Division may terminate a recipient committee for any of the following reasons:

(1) The committee failed to file a campaign statement in the previous 12 months, and the committee had an ending cash balance of \$3,000 or less on its last campaign statement;

(2) The committee failed to file a campaign statement in the previous 12 months, the committee had an ending cash balance of \$5,000 or less on its last campaign statement, and the committee owes \$2,000 or more to the controlling candidate;

(3) The committee filed a Statement of Organization in error;

(4) The committee failed to file a campaign statement in the previous 48 months; or

(5) The committee failed to respond to the Enforcement Division's reasonable efforts to contact the committee regarding the committee's failure to file campaign statements or pay annual fees. "Reasonable efforts to contact the committee" means sending a written notice by certified mail to the committee treasurer at the treasurer's address listed on the committee's statement of organization, and attempting to contact an individual identified as a controlling candidate, principal officer, treasurer, or assistant treasurer on the committee's most recent campaign statement or statement of organization at the telephone number or email address listed on the statement.

(6) The Chief of the Enforcement Division obtains evidence to show the person responsible for the committee is deceased or incapacitated.

(b) 45 Day Notice of Termination. The Enforcement Division must provide a committee with written notice of a proposed termination 45 days prior to terminating the committee.

(c) Objection to Termination. The Enforcement Division will not terminate a committee if the committee files a written objection to a proposed termination. If no written objection is received within 45 days, the committee automatically terminates without further notice.

(d) Reinstatement. The Executive Director must reinstate a terminated committee if the committee files a written request for reinstatement with the Commission, files any delinquent statements required by the Enforcement Division, and pays any outstanding fees or fines.

(e) Prohibited Activity after Termination. A committee may not receive contributions or make expenditures exceeding the ending cash balance on the committee's last campaign statement after the Enforcement Division terminates the committee, except to pay outstanding filing fees or fines.

(f) Notice to Filing Officers. The Commission will provide notice of a termination or reinstatement of a committee within 90 days to the filing officers with whom the committee was required to file its last campaign statement.

Note: Authority cited: Sections 83112 and 84212, Government Code. Reference: Sections 82013 and 84212, Government Code.

### **HISTORY**

1. New section filed 1-5-2012; operative 2-4-2012. Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements and not

subject to procedural or substantive review by OAL) (Register 2012, No. 1). For prior history of section 18404.2, see Register 2002, No. 7.

2. Repealer and new section filed 7-15-2015; operative 8-14-2015. Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements and not subject to procedural or substantive review by OAL) (Register 2015, No. 29).

3. Amendment of subsections (a)-(a)(2), new subsections (a)(3) and (a)(6), subsection renumbering and amendment of newly designated subsections (a)(4)-(5) filed 11-16-2020; operative 1-1-2021 pursuant to Cal. Code Regs., tit. 2, section 18312(e). Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements and not subject to procedural or substantive review by OAL) (Register 2020, No. 47).

Code of Federal Regulations  
Title 11. Federal Elections  
Chapter I. Federal Election Commission  
Subchapter A. General  
Part 102. Registration, Organization, and Recordkeeping by Political Committees (52 U.S.C. 30103)  
(Refs & Annos)

## 11 C.F.R. § 102.4

## § 102.4 Administrative termination (52 U.S.C. 30103(d)(2)).

Effective: December 29, 2014  
Currentness

(a) The Commission, on its own initiative or upon the request of the political committee itself, may administratively terminate a political committee's reporting obligation on the basis of the following factors:

- (1) The committee's aggregate reported financial activity in one year is less than \$5000;
- (2) The committee's reports disclose no receipt of contributions for the previous year;
- (3) The committee's last report disclosed minimal expenditures;
- (4) The committee's primary purpose for filing its reports has been to disclose outstanding debts and obligations;
- (5) The committee has failed to file reports for the previous year;
- (6) The committee's last report disclosed that the committee's outstanding debts and obligations do not appear to present a possible violation of the prohibitions and limitations of 11 CFR parts 110 and 114;
- (7) The committee's last report disclosed that the Committee does not have substantial outstanding accounts receivable;
- (8) The committee's outstanding debts and obligations exceed the total of the committee's reported cash on hand balance.

(b) The Commission shall send a notification to the committee treasurer of its intent to administratively terminate that committee and may request the treasurer to submit information with regard to the factors set forth at 11 CFR 102.4(a). The treasurer shall respond, in writing, within 30 days of receipt of the Commission's notice or request and if the committee objects to such termination, the committee's response shall so state.

(c) The Commission shall administratively terminate a committee if such committee fails to object to the Commission's action under 11 CFR 102.4(b) and the Commission determines that either:

- (1) The committee has complied with the debt settlement procedures set forth at 11 CFR part 116.
- (2) The Commission has approved the forgiveness of any loan(s) owed the committee which would have otherwise been considered a contribution under the Act in violation of 11 CFR part 110;
- (3) It does not appear from evidence available that a contribution in violation of 11 CFR parts 110 and 114 will result.

**Credits**

[60 FR 64273, Dec. 14, 1995; 61 FR 10269, March 13, 1996; 79 FR 77846, Dec. 29, 2014]

SOURCE: 45 FR 15104, March 7, 1980; 65 FR 38422, June 21, 2000; 75 FR 31, Jan. 4, 2010; 79 FR 77845, Dec. 29, 2014, unless otherwise noted.

AUTHORITY: 52 U.S.C. 30102, 30103, 30104(a)(11), 30111(a)(8), and 30120.

Current through March 4, 2021; 86 FR 12549.

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End of Document

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**Open Government Commission**

Date: April 8, 2021

To: Open Government Commission

From: Sam Harvey, Secretary

Subject: Complaints filed by Shirley Dean alleging violations of the Open Government Ordinance and the Brown Act

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**INTRODUCTION**

This report is presented to the Commission as part of its process for considering complaints pursuant to the Open Government Ordinance (“OGO”), BMC Section 2.06.190.A.1, which provides in relevant part:

The Open Government Commission shall:

- a) hear complaints by any person concerning alleged non-compliance with this Ordinance, the Brown Act, the Public Records Act, or the Lobbyist Registration Act, by the City or any of its legislative bodies, elected or appointed officials, officers or employees;
- b) consider ways to informally resolve those complaints and make recommendations to the Council regarding such complaints;
- c) seek advice from the City Attorney concerning those complaints;
- d) advise the City Council of its opinion, conclusion or recommendation as to any complaint . . . .

**BACKGROUND**

On March 5, 2021, Complainant Shirley Dean submitted two complaints to the Commission. The complaints address two City Council Agenda Items:

1. Resolution to End Exclusionary Zoning in Berkeley (“Zoning Resolution” or “Item 1”) (Attachment 4)
2. Quadplex Zoning (“Quadplex Item” or “Item 2”) (Attachment 5)



April 8, 2021

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One complaint alleges that the handling of these items has violated the City's Open Government Ordinance ("OGO"). The second complaint alleges violations of the Brown Act. On March 22, 2021, the Complainant submitted an amendment to the Brown Act Complaint. The three documents received from the Complainant are:

1. Complaint of Shirley Dean Alleging Violations of the Open Government Ordinance (Mar. 5, 2021) ("Open Government Complaint") (Attachment 1)
2. Complaint of Shirley Dean Alleging Violations of the Brown Act ("Brown Act Complaint") (Mar. 5, 2021) (Attachment 2)
3. Amendment to Complaint of Shirley Dean Alleging Violations of the Brown act (Mar. 22, 2021) ("Amendment") (Attachment 3)

The complaints do not identify specific provisions of the OGO or Brown Act alleged to have been violated, but instead lay out a series of procedural concerns with the handling of the two Council Items.

The first Council item – Resolution to End Exclusionary Zoning in Berkeley – is a non-binding resolution stating the intent of the City Council to end single-family zoning in the City of Berkeley. This resolution was authored or sponsored by Councilmembers Lori Droste, Terry Taplin, Ben Bartlett, and Rigel Robinson. This item was approved by the City Council at its February 23, 2021 meeting.

The second Council item – Quadplex Zoning – proposes revisions to the City's Zoning Code and General Plan to allow for increased City approval of housing developments of up to four residential units. This item was authored or sponsored by Councilmembers Lori Droste, Terry Taplin, Rashi Kesarwani, and Mayor Jesse Arreguín. This item was referred to the City Council's Land Use, Housing & Economic Development Committee ("Land Use Committee"). It has since been withdrawn.

### **Alleged Violations**

The complaints do not identify specific provisions of the OGO or Brown Act which the Complainant alleges have been violated. Instead, the complaints outline a series of procedural concerns about the handling of the two Council items.

#### **A. Alleged Open Government Ordinance Violations**

The Open Government Complaint presents four broad categories of concern. First, in paragraphs 1 through 3, the Complaint expresses concern about the timing of action on the Quadplex Item, particularly as it relates to revisions made to the item. The Complaint states that revisions to the Quadplex Item were made "at the very beginning" of the Land Use Committee's March 1, 2021 meeting, depriving the public of an opportunity to respond. (Paragraph 1.) The Complaint states that when an item is carried over from one meeting to the next, the public needs greater advance notice of changes or additions to the item. (Paragraph 2.) The Complaint states that if significant

April 8, 2021

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revisions are made to an item during a meeting, action should be deferred until a future meeting to give the public more time to respond. (Paragraph 3.)

The Complaint has not alleged failure to adequately agendaize an item or provide notice to the public that an item will be considered. Rather, these concerns focus on substantive changes made to an item prior to or during a meeting at which the item is considered. Staff have concluded that these concerns do not state a potential violation of the OGO. Substantive changes or additions to an agendaized item presented prior to or during a public meeting are a common practice for the City Council as well as City boards and commissions.

Second, the Complaint asserts that a one-minute time limit on public comment is insufficient. (Paragraph 4.) The City Council Rules of Procedure and Order provide that

If ten or fewer persons are interested in speaking, each speaker may speak for two minutes. If there are more than ten persons interested in speaking, the Presiding Officer may limit the public comment for all speakers to one minute per speaker. (Council Rules of Procedure and Order, sec. IV.A.2.)

A one-minute time limit is therefore permissible where the number of interested speakers is more than ten. Staff has reviewed the recordings of the March 1<sup>st</sup> and 4<sup>th</sup> Land Use Committee meetings and determined that the process for public comment was consistent with the Council's Rules of Procedure and Order and the Brown Act.

Third, the Complaint states that unregistered lobbyists may have played a role in drafting one or more Council items. (Paragraph 5.) While a person who is compensated, either as an independent contractor or a paid employee, to influence City legislation may qualify as a City lobbyist, the Complaint has not provided any specific facts alleging that one or more individuals have failed to register as City lobbyists. A blanket statement that the potential lobbyist status of individuals "should be stated and independently determined" is insufficient to support a claim of a violation of the City's Lobbyist Registration Act (BMC Ch. 2.09).

Fourth, the Complaint expresses concerns that authors or sponsors of items are serving on the committees to which the items are referred. (Paragraph 6.) This assertion is discussed further in the discussion of the complainant's Brown Act Complaint. The Council's Rules of Procedure and Order outline the rules for consideration of items by committee members who are authors or sponsors of those items. Those rules allow one of the item's authors or co-sponsors to sit on a committee and act on their item. (See Council Rules of Procedure and Order § III.G.3.) The complaint has not alleged that more than one authoring or co-sponsoring member has participated in the Land Use committee's discussion of the Quadplex Item.

After reviewing the allegations and assertions provided in the Complainant's Open Government Complaint, staff have determined that the Complaint does not state a

April 8, 2021

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violation of the Open Government Ordinance and should be dismissed by the Commission.

### **B. Alleged Brown Act Violations**

The Complainant has submitted a Brown Act Complaint as well as an amendment to that complaint. The complaint asserts that a five-member majority of the Council has “been involved in the behind closed door discussion of the process and substance of implementing the Council’s goal to end single family zoning.” Rather than articulate an alleged violation, the complaint presents a timeline of events. Staff have done their best to glean any possible Brown Act concerns from this listing of events and address them below.

The Brown Act Complaint focuses on the relationship between the Zoning Resolution and the Quadplex Item as well as the handling of the Quadplex Item before the Land Use Committee. As noted above, the Zoning Resolution was co-sponsored/authored by Councilmembers Droste, Taplin, Bartlett, and Robinson, and the Quadplex Item was co-sponsored/authored by Councilmembers Droste, Taplin, Kesarwani, and Mayor Arreguín. Significantly, the Quadplex Item has been withdrawn by the author, Councilmember Droste.

The complaint asserts a connection between the two items, but does not articulate how this connection constitutes a Brown Act violation. It is possible that the Complainant is concerned that the cumulative authorship/co-sponsorship of the two items results in a total of six councilmembers having authored or co-sponsored at least one of the items.

The Brown Act’s ban on “serial meetings” provides that, “[a] majority of the members of a legislative body shall not, outside a meeting ... use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.” (Cal. Gov. Code § 54952.2(b)(1).)

The City Council’s co-sponsorship and co-authorship rules are designed to prevent violations of the Brown Act. The Council’s Procedures provide that “Council agenda items are limited to a maximum of four Authors and Co-Sponsors, in any combination that includes at least one Author.” (City Council Rules of Procedure and Order, § III.B.1.) The four-member limit exists to prevent a five-member majority of the Council from reaching consensus on an item outside of an open meeting, thereby creating a serial meeting under the Brown Act. However, co-sponsorship of an item does not create a de facto link in a serial meeting chain. This is because a councilmember may join an item as a co-sponsor by requesting to be added to the item in a public Council or committee meeting. (City Council Rules of Procedure and Order, § III.B.1.) As a result, Staff concludes that the cumulative co-sponsorship/authorship of the two items does not create a clear Brown Act violation.

April 8, 2021

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Importantly, the Brown Act bans the use of serial meetings to discuss or take action on any “item of business” within the Council’s jurisdiction. Staff have been unable to locate any legal authority to support the assertion that the authors/co-sponsors for two Council items that bear a relation to each other should be aggregated for the sake of the Brown Act. Moreover, because the Quadplex Item has been withdrawn, any potential Brown Act violation that could have resulted from the relationship between the two items has been eliminated.

Additionally, the Complaint asserts that the handling of the Quadplex Item by the Land Use Committee violated the Brown Act by resulting in five Councilmembers being involved in discussions about the item. The Complainant asserts that the four co-sponsors/authors of the item (Councilmembers Droste, Taplin, Kesarwani, and Mayor Arreguín) should be aggregated with Councilmember Robinson who participated in the discussion and action on the item at the Land Use Committee’s March 4, 2021 meeting.

It is unclear why the Complainant does not also include Councilmember Hahn in this chain, who, along with Councilmembers Droste and Robinson, was also present as a member of the Land Use Committee. Nonetheless, this reasoning does not articulate a violation of the Brown Act. Consideration of an item in a public committee meeting, does not add those committee members to a Brown Act chain. Therefore, the fact that four members have sponsored an item – and presumably discussed it behind the scenes – does not mean that additional members of the Council or a committee who discuss that item in a public meeting are added to that Brown Act chain. Were this the case, every Council item with four authors or co-sponsors that comes before a committee containing at least one member that is not an author or co-sponsor would violate the Brown Act. Moreover, although staff has not identified a Brown Act violation based on these facts, any potential violation has been eliminated by the fact that the Quadplex Item has been withdrawn.

The Complainant submitted an amendment to her Brown Act Complaint on March 22, 2021 (Attachment 3). The Amendment asserts that a new item submitted for consideration by the Council at a March 25, 2021 special meeting further violates the Brown Act. The item “Initiation of a Public Process and Zoning Concepts for 2023-2031 Housing Element Update” (“Housing Element Item”) (Attachment 6) was submitted by Mayor Arreguín and Councilmembers Droste, Kesarwani and Taplin. The Amendment states that because this item is a continuation of a series of proposals including the Zoning Resolution and Quadplex Item, the Brown Act violations created by those items attach to this item.

As discussed above, staff have concluded that the actions of Councilmembers around the Zoning Resolution and Quadplex Item do not present a Brown Act violation. As a result, there is no “continuing” Brown Act violation to attach to the Housing Element Item. Moreover, the new Housing Element Item is a separate item from the two earlier items. Simply touching upon similar topics or building upon an earlier item does not create a connection between the earlier items and the new items that is recognized by the Brown Act.

April 8, 2021  
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The remainder of the Amendment articulates concerns and frustrations with the degree to which public participation in the proposed “public process” is articulated in the Housing Element Item. These concerns do not appear relevant to a potential violation of the Brown Act or the Open Government Ordinance.

### RECOMMENDATION

As noted above, staff have determined that the complaints do not articulate a violation of the Brown Act or the Open Government Ordinance. Staff, therefore, recommend the Commission dismiss the complaints.

### Attachments:

1. Complaint of Shirley Dean Alleging Violations of the Open Government Ordinance (Mar. 5, 2021)
2. Complaint of Shirley Dean Alleging Violations of the Brown Act (Mar. 5, 2021)
3. Amendment to Complaint of Shirley Dean Alleging Violations of the Brown act (Mar. 22, 2021)
4. Resolution to End Exclusionary Zoning in Berkeley
5. Quadplex Zoning Item
6. Housing Element Item



Open Government Commission

**Complaint of Noncompliance # 2**

**Open Government Ordinance ("OGO"), the Brown Act, the Public Records Act, and the Lobbyist Registration Act**

Name: SHIRLEY DEAN

Date: MARCH 5, 2021

Mailing Address/  
Contact Info: SHIRLEY.DEAN@SBCGLOBAL.NET

Identify the area of noncompliance (check all that apply):

- OGO
- Brown Act
- Public Records Act
- Lobbyist Registration Act

Describe the act(s) of noncompliance. (Attach additional page if more space is needed.)

SEE ATTACHED

List the date(s) on which the noncompliance occurred.

SEE ATTACHED

Describe any steps taken to address the noncompliance directly with City of Berkeley staff and/or elected official, including the name of any staff person involved, if known.

NONE

Documents:

Attach any written requests or complaints submitted to the City and any responses received. You should also attach any additional information that you believe will assist the Commission and staff in reviewing your complaint.

Use this "Complaint of Noncompliance" form if you would like the Open Government Commission to review your complaint and possibly forward their recommendation(s) to the City Council. Filing a Complaint with the Open Government Commission does not constitute a demand to cure or correct under California Government Code § 54960.1.

March 5, 2021

This is the second complaint that I am filing with the Open Government Commission. This complaint involves the violation of fundamental Open Government procedures that concern transparency and the reasonable opportunity for public participation in governmental decisions. These violations bolster my previous statement for the need for a temporary halt to any further discussion, consideration, and action on the subject of ending single family zoning. I feel that such a halt should remain in effect until the violations are examined and subsequent corrections are implemented. I remind you that both of my complaints are not meant to change in any way the nature of the subject that is involved. My complaints are entirely in regard to the process by which the subject was introduced and subsequent actions taken.

A List of Examples of Open Government Procedures That Have Recently Been Violated

1. The public has the right to be fully informed about what will be discussed. Example of violation: At the March 1, 2021 meeting of the Land Use Committee, revisions to the posted item were made at the very beginning of the meeting so that no member of the public knew how best to respond.
2. If an item is carried over from one meeting to the next in order to inform both the media and the public of the details to be discussed, there should be sufficient time to post the item before proceeding. Example: On March 1, 2021, the Land Use Committee voted to take no action on the QuadPlex Zoning item and to refer it to the Agenda Committee. At the following Land Use Committee meeting held on March 4, 2021 the QuadPlex item once more appeared on their agenda in its original form and included in the packet for that meeting was a 407 page report containing proposed revisions previously presented but not included in the item that appear on the agenda for that meeting. Not only had members of the public assumed the matter would no longer be before the Committee, but members of the Committee itself seemed unsure of its status before the Committee, precipitating a long and complicated staff and Committee member discussion.
3. If significant revisions to an item are made at a meeting, it is suggested that action be deferred to a future meeting in order to give notice and time for the public to respond. Example: Revisions were made at the February 23, 2021 Council meeting regarding establishing the end of single family zoning, but the Resolution of Intent to accomplish that goal is still not posted on the City's website so that people could be assured of exactly what the Council included in their approval. Further, it would be excellent for the Open Government Commission to establish a protocol that after receiving public comment on such a major issue that action be deferred to an upcoming meeting in order to allow a brief period for the council to reflect on what they had heard from the public.
4. Members of the public are allowed only one minute in which to make their remarks. Example: Almost every land use meeting held by the City. One minute is simply not enough time to make a meaningful comment, but while written comments are also taken,

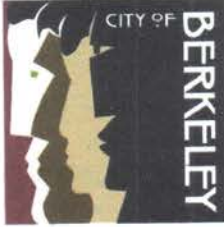
too frequently, these one minute oral comments have to be made in response to sudden late revisions to the item at hand.

5. The status of those who work for, or who volunteer in the offices of any Councilmember or staff person should be stated and independently determined as to whether that person should be registered as a lobbyist regarding that particular issue. Example: the status of a person who is a policy analyst in a statewide organization that would be supportive of the local action at hand, who heavily participated in the drafting of our local ordinance, was only acting as a volunteer, was never addressed leaving many questions unresolved. The Commission must clarify the status of such individuals under our local ordinance
6. In making a referral of issues to the various Council policy committees, the status of the committee membership in each such referral must be considered so there is not a majority of the policy committee membership that has been involved in the previous discussion and preparation of the matter being referred to that particular committee. This is to ensure that an independent consideration of the issue is provided to the Council and also that if the committee member is not involved in the preparation of the item at the beginning of the referral, to ensure that person could not be counted toward the commission of violation of the Brown Act. Example: my first complaint regarding how this happened in regard to the issue of modifying implementation of the goal to end single family zoning.

The experience of the last few weeks regarding the issue of ending single family zoning has highlighted some fundamental issues regarding transparency and the opportunity to ensure public participation in governmental decisions. That experience must be addressed. It cannot be forgotten and swept under the rug as it involves not only the future vision of our City but also how we demonstrate what we call the values that define our City.

I reserve the right to amend this complaint in the future and I look forward to appearing before you. Thank you for the opportunity to make and discuss such complaints.





Open Government Commission

**Complaint of Noncompliance - # 1**  
**Open Government Ordinance ("OGO"), the Brown Act or the Public Records Act**

Name: SHIRLEY DEAN

Date: MARCH 5, 2021

Mailing Address/  
Contact Info: SHIRLEY.DEAN@SBGGLOBAL.NET

Identify the area of noncompliance (check all that apply):

OGO     Brown Act     Public Records Act

Describe the act(s) of noncompliance. (Attach additional page if more space is needed.)

SEE ATTACHED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

List the date(s) on which the noncompliance occurred.

SEE ATTACHED  
\_\_\_\_\_

Describe any steps taken to address the noncompliance directly with City of Berkeley staff and/or elected official, including the name of any staff person involved, if known.

NONE  
\_\_\_\_\_  
\_\_\_\_\_

**Documents:**

Attach any written requests or complaints submitted to the City and any responses received. You should also attach any additional information that you believe will assist the Commission and staff in reviewing your complaint.

Use this "Complaint of Noncompliance" form if you would like the Open Government Commission to review your complaint and possibly forward their recommendation(s) to the City Council. Filing a Complaint with the Open Government Commission does not constitute a demand to cure or correct under California Government Code § 54960.1.

March 5, 2021

This is to inform the Open Government Commission that I am filing two separate but related complaints, one concerning violations of the letter and spirit of the Brown Act, and the other a violation of fundamental Open Government procedures. Additionally, I am requesting that the Open Government Commission take immediate action to seek a temporary halt to any further discussion, consideration, and action on the subject of ending single family zoning. Such a halt should remain in effect until the violations are examined and subsequent corrections are implemented. Both of these complaints are not meant to change in any way the nature of the subject matter that is involved. My complaints are entirely in regard to the process by which the subject matter was introduced and subsequent actions taken.

Complaint regarding the Brown Act:

February 18, 2021:

The Council's Land Use Committee considered an item entitled *QuadPlex Zoning*, submitted by Councilmembers Droste, Taplin, and Kesarwani as authors, and Mayor Arreguin as a co-sponsor. The item referred to the City Manager and Planning Commission revisions to the zoning code and General Plan that would allow ministerial approved of up to four units in proposed housing developments under certain circumstances. The Committee discussed the item and continued it to a future meeting.

February 23, 2021:

The Council considered an item entitled *Resolution to End Exclusionary Zoning*, submitted by Councilmembers Droste, Taplin, Bartlett and Robinson. The language of this item did not say let's consider whether the City should end single family zoning. Instead, the item stated that ending single family zoning would be the end result, and directs the City Manager and Planning Commission to craft language that would implement that goal. The item was discussed, amended and unanimously approved by the Council. The QuadPlex Zoning item is not included .

March 1, 2021:

The Land Use Council Committee once again considered the *QuadPlex Zoning* item. The February 23 2021 item is almost word for word, including attachments ,with the QuadPlex item, it was stated by Councilmember Droste that there hadn't been enough time to include it in the February 23 Council action. However, taken together, the QuadPlex item modifies the February 23 action, by allowing up to four units in single family homes and includes the "by right" concept.

The Land Use Committee is composed of Councilmembers Robinson (chair), Droste and Hahn. Councilmember Droste submitted amendments, including one that was presented only minutes before the starting time of the meeting so that it was entirely unknown to the large number of speakers who wanted to comment. Councilmember Hahn had submitted a series of questions about the QuadPlex item (which now had a new title) and Councilmember Droste had prepared written comments in response, there was much confusion expressed by members of the public. The Committee heard public comments and discussed various aspects in the proposal..

Eventually, Councilmember Hahn indicated that she had to leave the Committee to attend another scheduled meeting but before leaving, indicating that she felt the item needed further consideration by the Committee. However, Councilmembers Droste and Robinson voted to take no action and to refer the matter to the Agenda Committee to schedule the item for a special Council meeting or workshop.

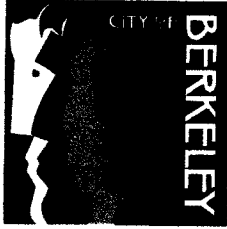
There are now four Councilmembers, Droste, Taplin and Kesarwani as authors of the QuadPlex item and Robinson as Land Use Committee member involved in the discussion of the substance and process of implementing the goal to end single family zoning. Councilmember Droste consistently uses the pronoun “we” in her written responses to Councilmember Hahn’s questions, presumably on behalf of her fellow authors of the QuadPlex item. I have not included Mayor Arreguin in this list because he was a co-sponsor which does not necessarily mean that he was involved in the preparation of that item.

March 4, 2021:

The re-named original QuadPlex item is once again on the agenda of the Land Use Committee. A long and complicated discussion is held as to whether the item was still “live” with the Land Use Committee as the Committee had taken no action and referred it to the Agenda Committee. It was ultimately determined by the Committee with staff input that the item was still under the Committee’s purview. During this discussion, Councilmember Droste stated specifically that she would not withdraw the item and present it to the Agenda Committee with the request that the Council hold a special meeting or workshop even though the Council would be allowed to take action at a special meeting but would not be able to do that at a workshop. She further stated that she had an appointment with Mayor Arreguin that afternoon to discuss the matter and that she would inform the public of what would happen by Monday, March 8, 2021.

By her own admission, there are now five members of the City Council involved in the behind closed doors discussion of the process and substance of implementing the Council’s goal to end single family zoning. This is a violation of the letter and spirit of the Brown Act which can only be resolved by the Council pausing, rescinding earlier actions and taking corrective “do overs”

I request that this complaint be placed on the next agenda of the Open Government Commission. I reserve the right to make amendments to this complaint before that date.



Open Government Commission

**Complaint of Noncompliance**  
**Open Government Ordinance (“OGO”), the Brown Act, the Public Records Act,**  
**and the Lobbyist Registration Act**

Name: Shirley Dean

Date: March 22, 2021

Mailing Address/  
Contact Info: shirley.dean@sbcglobal.net

Identify the area of noncompliance (check all that apply):

OGO     Brown Act     Public Records Act     Lobbyist Registration Act

Describe the act(s) of noncompliance. (Attach additional page if more space is needed.)

This is an amendment to the Brown Act complaint I filed on March 5, 2021.  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

List the date(s) on which the noncompliance occurred.

See attached.

Describe any steps taken to address the noncompliance directly with City of Berkeley staff and/or elected official, including the name of any staff person involved, if known.

See attached.  
\_\_\_\_\_  
\_\_\_\_\_

Documents:

Attach any written requests or complaints submitted to the City and any responses received. You should also attach any additional information that you believe will assist the Commission and staff in reviewing your complaint.

Use this “Complaint of Noncompliance” form if you would like the Open Government Commission to review your complaint and possibly forward their recommendation(s) to the City Council. Filing a Complaint with the Open Government Commission does not constitute a demand to cure or correct under California Government Code § 54960.1.

March 22, 2021

As you are aware, I have been told by your staff that my March 5, 2021 Brown Act complaint was not placed on your March 18, 2021 agenda because my complaint was submitted to you 13 days in advance of that date when you require an advance of 14 days. I understand that the Commission is considering a special meeting regarding that complaint, and I greatly appreciate that consideration. However, I am now submitting an amendment to my March 5<sup>th</sup> complaint and to inform you that the Council action which prompts this amendment is scheduled to be considered at a Special Council Meeting on March 25, 2021.

Once again, I remind you my complaint and its amendment are not meant to change in any way the nature of the subject matter that is involved. My March 5<sup>th</sup> complaint and this amendment are entirely in regard to the proposed actions that have been undertaken by some members of the Council following the Council's unanimous approval on February 23, 2021 that established the intent "To End Exclusionary Zoning."

The February 23, 2021 Resolution of Intent did not provide for the end result to be considered as to whether it would be done or not, nor did it indicate a process by which a different end result could be arrived at, it established a specified end result. Following that Council action, a number of Council sponsored items concerning "Quadplex Zoning" were introduced under different names, all of which indicated the identical ways that would be included in achieving the end result called for on February 23, but not change it. In my March 5<sup>th</sup> complaint, given the statement made by Council Member Droste at the March 4, 2021 meeting of the Council's Land Use Committee that she would discuss her proposal, now titled "Inclusive Neighborhood Scale Zoning" with Mayor Arreguin later that day. On March 5<sup>th</sup>, I filed the complaint that five members of the Council (Council Members Droste, Kesarwani, Taplin, Robinson and Mayor Arreguin) were involved in specifying, outside of public view, what those subjects would be, hence a violation of the Brown Act.

On the March 25, 2021 Special Meeting of the Council, Item 1, "Initiation of Public Process and Zoning Concepts for 2023-2031 Housing Element Update" was submitted by Mayor Arreguin, now Vice Mayor Droste and Council Members Kesarwani and Taplin. The item refers to the City Manager and Planning Commission an 18-month public process to update the Housing Element of the General Plan that includes a list of key principles and zoning concepts. While casting the item as a public participation process in response to a future mandated action to update our General Plan, the item continues to push forward the same zoning methods that have been discussed since the passage of the February 23 Resolution of Intent and, therefore, constitutes a continued Brown Act violation. I arrive at this conclusion based on the following:

1. The item does not in any way change or cancel the Resolution of Intent approved by the Council on February 23, 2021. It is a continuation of a series of proposals to indicate what is to be done to achieve the end result of that resolution.
2. Language within Item 1 on the March 25 Council agenda states that "planning staff, consultants and the Planning Commission should consider a list of zoning concepts as part of the process. (Emphasis added). "Should" is defined in the dictionary (American

Heritage, college edition) as “used to express obligation or duty.” Further, listed in that same section and in the background section of Item 1 are the same zoning directives found in all of the previous items regarding adding duplex, triplex and four plex units throughout the City except in some areas of “elevated high risk.” The item also directs the City Manager to initiate this work immediately and the Planning Commission to incorporate it in its current work plan. Despite any reference to participation by the public which is required by law in addressing zoning changes, what is to be done is spelled out before that public participation occurs.

3. On the March 25<sup>th</sup> agenda, Item 1 pre-empts Item 2 submitted by Council Members Hahn and Harrison which outlines a straight-forward public participation process that does not direct specific methods that are to be included in amendments to the General Plan. Item 1 even borrows some of the participation concepts found in Item 2. Item 2 was submitted well in advance of Item 1 as it had been placed on the agenda of the next regular meeting of the Council. When the Mayor called the March 25 Special Meeting, Item 2 was switched to this earlier meeting, but placed in the second rather than the first position on the agenda, thus insuring that if Item 1 is approved, Item 2 will be dropped. Furthermore, Item 1’s position on the agenda and it’s expanded content seemingly is meant to support a claim that this is an entirely new proposal which is different from any previous ones that have been floated and as such any Brown Act violation can be eliminated.
4. In addition, no reason has ever been given for why the March 25 Special Meeting was called to ostensibly address a future years-off mandate when an open public participation process without directed outcomes could be held and the results, whatever they might be, would then be used to meet the deadline for the mandate for an updated General Plan.

I look forward to discussing this matter with members and staff of the Open Government Commission.



Lori Droste  
Vice Mayor, District 8

## CONSENT CALENDAR

February 23, 2021

**To:** Honorable Mayor and Members of the City Council

**From:** Vice Mayor Lori Droste, Councilmember Terry Taplin, Councilmember Ben Bartlett, and Councilmember Rigel Robinson

**Subject:** Resolution to End Exclusionary Zoning in Berkeley

### **Recommendation**

Adopt a resolution to state Berkeley City Council's intent to end exclusionary zoning in Berkeley by December of 2022.

### **Current Problem and Its Effects**

Single family residential zoning has its roots in racist exclusionary zoning policy and leads to racial and economic segregation.

### **Background**

#### ***History of Exclusionary Zoning, Racial and Economic Segregation, and Current Zoning***

Single family residential zoning was born in Berkeley in the Elmwood neighborhood in 1916. This zoning regulation forbade the construction of anything other than one home per lot. In 1915, Berkeley's City Attorney Frank V. Cornish wrote "Apartment houses are the bane of the owner of the single family dwelling" while the consultant who penned Berkeley's zoning ordinance stated, "[The] great principle of protecting the home

against the intrusion of the less desirable and floating renter class.”<sup>1</sup> Subsequently, the Mason McDuffie Company’s use of Berkeley’s zoning laws and racially-restrictive property deeds and covenants prevented Black, Indigenous, and People of Color from purchasing or leasing property in east Berkeley.<sup>2</sup>

Mason-McDuffie race-restrictive covenants stated, “if prior to the first day of January 1930 any person of African or Mongolian descent shall be allowed to purchase or lease said property or any part thereof, then this conveyance shall be and become void...”<sup>3</sup> In 1916, McDuffie began lobbying for the exclusionary zoning ordinances in Berkeley to protect against the “disastrous effects of uncontrolled development”<sup>4</sup> and restrict Chinese laundromats and African American dance halls, particularly in the Elmwood and Claremont neighborhoods.<sup>5</sup>

After *Buchanan v Wareley* in 1917, explicit racially restrictive zoning became illegal. However, consideration to maintaining the character of districts became paramount and Mason-McDuffie contracts still stipulated that property owners must be white.

In 1933, the federal government created a Home Owners Loan Corporation (HOLC), which produced residential maps of neighborhoods to identify mortgage lending risks for real estate agents, lenders, etc. These maps were based on racial composition, quality of housing stock, access to amenities, etc. and were color coded to identify best (green), still desirable (blue), definitely declining (yellow), and hazardous (red) neighborhoods. These maps enabled discriminatory lending practices (later called ‘redlining’) and allowed lenders to enforce local segregation standards.<sup>6</sup> These maps extensively referenced single-family zoning as on par with racial covenants in appreciating property values, unaffordability and excluding people of color. For example, when describing the Berkeley Hills: “Zoned first residential, single family, deed restrictions prohibit Asiatics and Negroes.”

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<sup>1</sup> Frank V. Cornish. “The Legal Status of Zone Ordinances” and Charles Cheney. “The Necessity for a Zone Ordinance in Berkeley.” *Berkeley Civic Bulletin*, May 18, 1915.

<sup>2</sup> Wollenberg, *Berkeley, A City in History*, 2008.

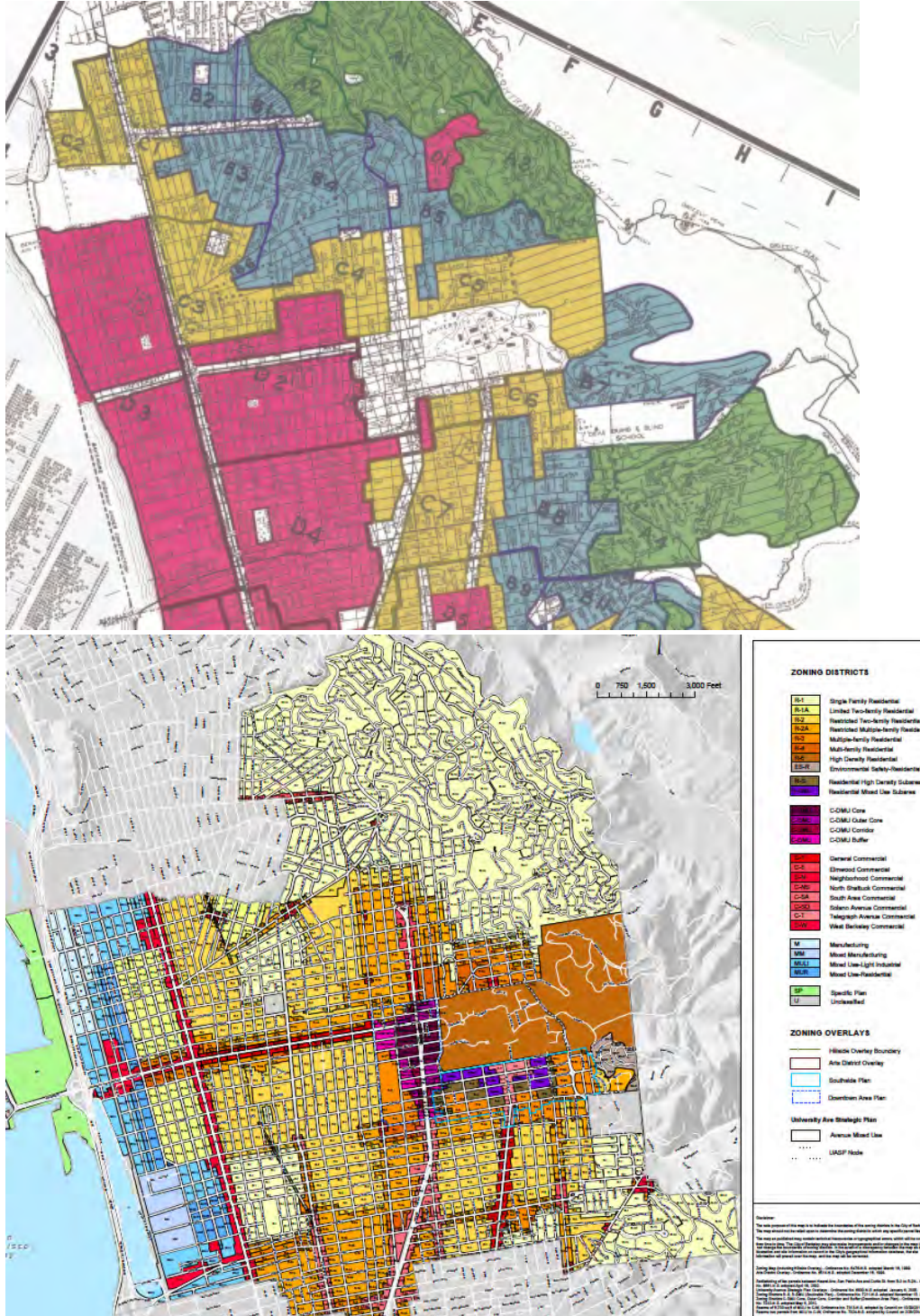
<sup>3</sup> Claremont Park Company Indenture, 1910

<sup>4</sup> Lory, Maya Tulip. “A History of Racial Segregation, 1878–1960.” *The Concord Review*, 2013. <http://www.schoolinfosystem.org/pdf/2014/06/04SegregationinCA24-2.pdf>

<sup>5</sup> Weiss, M. A. (1986). Urban Land Developers and the Origins of Zoning Laws: The Case of Berkeley. *Berkeley Planning Journal*, 3(1). Retrieved from <https://escholarship.org/uc/item/26b8d8zh>

<sup>6</sup> NCRC Opening Doors to Economic Opportunity, “HOLC “REDLINING” MAPS: The persistent structure of segregation and economic inequality.” Bruce Mitchell and Juan Franco. [https://ncrc.org/wp-content/uploads/dlm\\_uploads/2018/02/NCRC-Research-HOLC-10.pdf](https://ncrc.org/wp-content/uploads/dlm_uploads/2018/02/NCRC-Research-HOLC-10.pdf)





The images above compare a HOLC-era (Thomas Bros Map) map of Berkeley with a current zoning map. Neighborhoods identified as “best” in green on the HOLC-era map typically remain zoned as single family residential areas today. Red ‘hazardous’ neighborhoods in the first map are now largely zoned as manufacturing, mixed use, light industrial, or limited two family residential.<sup>7</sup>

<sup>7</sup> Robert K. Nelson, LaDale Winling, Richard Marciano, Nathan Connolly, et al., “Mapping Inequality,” American Panorama, ed. Robert K. Nelson and Edward L. Ayers, <https://dsl.richmond.edu/panorama/redlining/#loc=10/37.8201/-122.4399&opacity=0.8&sort=17&city=oakland-ca&advview=full>

Prior to the 1970s and the passage of the Neighborhood Preservation Ordinance, a variety of missing middle housing --duplexes, triplexes, and other smaller multi-unit building typologies-- was still being produced and made available to families throughout the Bay Area, particularly in Berkeley. In 1973, the residents of Berkeley passed the Neighborhood Preservation Ordinance which outlawed multi-unit housing in certain parts of Berkeley. As Councilmember Ben Bartlett and Yelda Bartlett wrote in their 2017 *Berkeleyside* op-ed, the neighborhood preservation ordinance “[the Neighborhood Preservation Ordinance] did not mention race, but instead tried to preserve ‘neighborhood character.’ As a result, from 1970 to 2000, fewer than 600 dwelling units were built in Berkeley. Areas zoned for single family residential (R-1), limited two-family residential (R-1A), and restricted two-family residential (R-2) are now some of the most expensive parts of our city—especially on a per-unit basis.”<sup>8</sup>

Until 1984, Martin Luther King Jr Way was known as Grove Street. For decades, Grove Street created a wall of segregation down the center of Berkeley. Asian-Americans and African-Americans could not live east of Grove Street due to race-restrictive covenants that barred them from purchasing or leasing property. While race-restrictive covenants no longer prohibit individuals from purchasing or leasing homes, most cities still retain the vestiges of exclusionary zoning practices.

The UC Othring and Belonging Institute recently released a study on racial segregation and zoning practices which revealed that 83% of residential land in the Bay Area is zoned for single family homes.<sup>9</sup> The authors found that the ramifications of such zoning practices leads to a greater percentage of white residents, as recounted in KQED’s “The Racist History of Single Family Zoning.”<sup>10</sup> By banning less expensive housing options, such as duplexes, tri-/four-plexes, courtyard apartments, bungalow courts, and townhouses, in low-density, “desirable” places in Berkeley, the current zoning map dictates that only wealthier families will be able to live or rent in certain parts of Berkeley, mainly in North and East Berkeley. Today, with the median home sale price at \$1.3 million<sup>11</sup> and the typical White family having eight times the wealth of the typical Black family,<sup>12</sup> this de-facto form of segregation is even more pronounced.

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<sup>8</sup>Ben Bartlett, Yelda Bartlett. "Berkeley's zoning laws wall off communities of color, seniors, low-income people and others." *Berkeleyside*, 13 June 2017. Op-ed.

<https://www.berkeleyside.com/2017/06/13/opinion-berkeleys-zoning-laws-wall-off-communities-color-seniors-low-income-people-others>

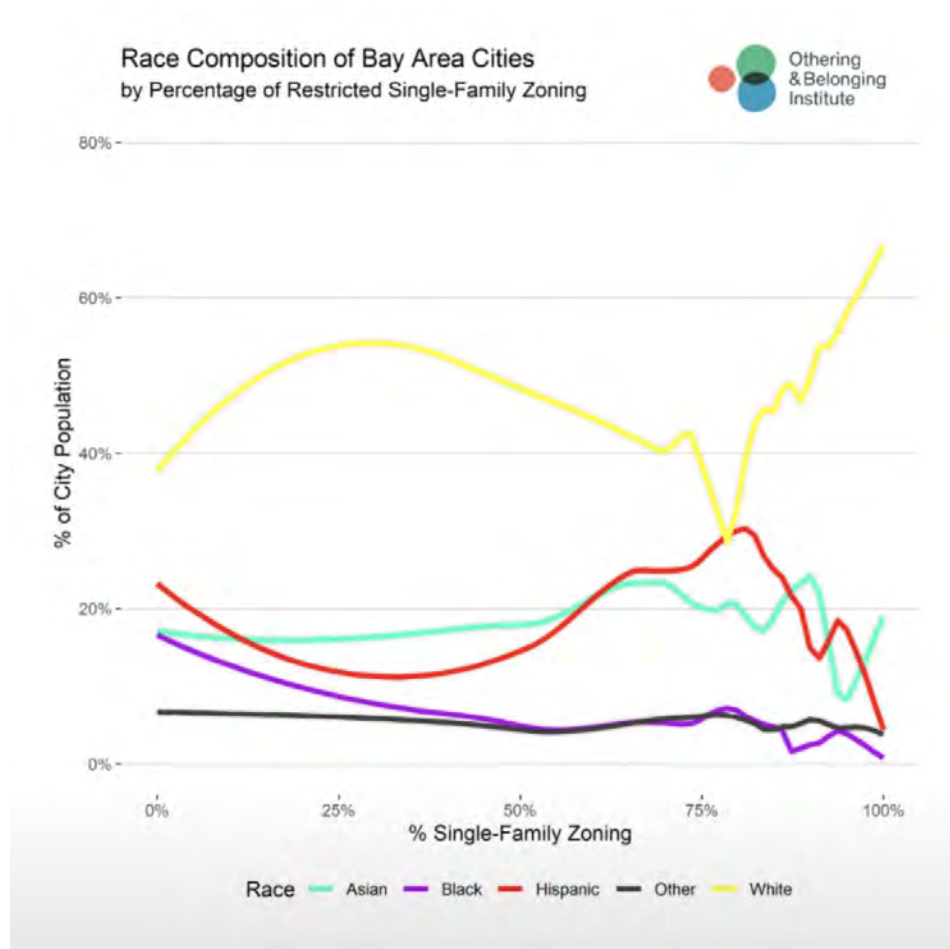
<sup>9</sup>Racial Segregation in the San Francisco Bay Area (2020) UC Othring and Belonging Institute.

<https://belonging.berkeley.edu/racial-segregation-san-francisco-bay-area-part-5>

<sup>10</sup> Baldassari, Erin and Molly Solomon (2020). “The Racist History of Single Family Zoning.”

<https://www.kqed.org/news/11840548/the-racist-history-of-single-family-home-zoning>

<sup>11</sup> Berkeley, CA Real Estate Market (2021). [https://www.realtor.com/realestateandhomes-search/Berkeley\\_CA/overview](https://www.realtor.com/realestateandhomes-search/Berkeley_CA/overview)



According to the data mapped by UC Berkeley’s Urban Displacement Project, most of the low-income tracts in Berkeley are at-risk or have ongoing displacement and gentrification. Higher-income tracts in Berkeley are classified as ‘at-risk of exclusion’, currently feature ‘ongoing exclusion’, or are at stages of ‘advanced exclusion’. Degrees of exclusion are measured by a combination of data: the loss of low-income households over time, presence of high income households, being considered in a ‘hot housing market,’ and migration patterns. The Urban Displacement Project’s findings indicate that exclusion is more prevalent than gentrification in the Bay Area.<sup>13</sup> While Berkeley has created policies and designated funding to prevent gentrification, policies that focus on preventing exclusion have lagged.

University of California-Berkeley Professor Karen Chapple, anti-displacement expert and director of the Urban Displacement Project, stated that “the Urban Displacement

<sup>12</sup> Survey of Consumer Finances (2020). Federal Reserve.

<https://www.federalreserve.gov/econres/scfindex.htm>

<sup>13</sup> Zuk, M., & Chapple, K. (2015). Urban Displacement Project. <http://www.urbandisplacement.org/map/sf>

Project has established a direct connection between the neighborhood designations by the Home Owners Loan Corporation (HOLC), and 75% of today's exclusionary areas in the East Bay... Thus, this historic legacy, compounded by Berkeley's early exclusionary zoning practices, continues to shape housing opportunity and perpetuate inequities today."<sup>14</sup> Not surprisingly, Chapple has indicated that zoning reform "has the potential not just to address the housing crisis but also to become a form of restorative or even transformative justice. There is no more important issue for planners to tackle today."<sup>15</sup>

### ***Historic Redlining***

Redlining was a practice whereby certain neighborhoods or areas were designated as being high-risk for investment. These high-risk designations were literally marked on maps using red coloring or lines, hence "redlining." The designations were typically applied to areas with large non-white and/or economically disadvantaged populations, and resulted in people who lived in or wanted to move to these areas being denied loans, or only being provided loans on much worse terms than their counterparts who could access non-redlined areas, due to their ethnicity or higher economic status.

Because redlining practices were contemporaneous with segregationist race-restricted deeds that largely locked minorities out of non-redlined neighborhoods, most non-white households were effectively forced to live in areas where buying and/or improving residential property was extremely difficult. Consequently, low-income and minority families were often locked out of homeownership, and all the opportunities for stability and wealth-building that entails. Therefore redlining tended to reinforce the economic stagnation of the areas to which it was applied, further depressing property values and leading to disinvestment. Although redlining is no longer formally practiced in the fashion it was historically, its effects continued to be felt in wealth disparities, educational opportunity gaps, and other impacts.

One way in which the practice of redlining continues to be felt is through the continuation of exclusionary zoning. By ensuring that only those wealthy enough to afford a single family home with a relatively large plot of land could live in certain areas, exclusionary zoning worked hand in hand with redlining to keep low-income families out of desirable neighborhoods with good schools and better economic opportunity. Cities, including Berkeley, adopted zoning that effectively prohibited multi-family homes in the same areas that relied on race restrictive deeds to keep out non-whites, meaning that

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<sup>14</sup> Karen Chapple's February 25, 2019 letter to Berkeley City Council in support of this proposal. <https://www.berkeleyside.com/wp-content/uploads/2019/02/Letter-on-Council-Item-22-Chapple-2.25.19.pdf>

<sup>15</sup>Ibid.

other areas, including redlined areas, were more likely to continue allowing multi-family buildings.

Ironically, because these patterns of zoning have persisted, many areas that were historically redlined are now appealing areas for new housing development precisely because they have continued to allow multi-family homes. Any area which sees its potential housing capacity increase will become more appealing for new housing development. When these changes are made in historically redlined areas where lower-income and minority households tend to be more concentrated, it is especially important to ensure those policies do not result in displacement or the loss of rent-controlled or naturally affordable housing units.

### ***Current Discourse on Exclusionary Zoning Regulations***

In 2019, Councilmembers Lori Droste, Ben Bartlett, Rashi Kesarwani and Rigel Robinson introduced Missing Middle Housing legislation in order to facilitate the construction of naturally affordable missing middle housing. The final legislation passed by Council was an agreement to **study** how the City of Berkeley can incorporate varying building types throughout Berkeley and address exclusionary practices. While the entire City Council voted unanimously to study this, the COVID-19 pandemic led to budget cuts which would have funded such a study. In July of 2020, Berkeley City Council additionally supported Senate Bill 902, which allowed for missing middle housing in transit-oriented or jobs-rich areas.<sup>16</sup>

Exclusionary zoning laws also became a prevalent national topic during the 2020 Presidential campaign under the guise of “protect[ing] America’s suburbs.”<sup>17</sup> Celebrity Apprentice host and former President Donald Trump and his Housing and Urban Development Secretary Ben Carson expressed a concern that removing exclusionary zoning laws would prevent single family home ownership and “destroy suburbs” despite the fact that these reforms don’t bar single family home construction but allow the creation of duplexes, triplexes, and other multi-unit properties. Furthermore, exclusionary zoning practices were amplified with the termination of the 2015 Obama-era Fair Housing rule which outlawed discrimination in housing. In doing so, Trump stated that Democrats wanted to “eliminate single-family zoning, bringing who knows into your suburbs, so your communities will be unsafe and your housing values will go

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<sup>16</sup>[https://www.cityofberkeley.info/Clerk/City\\_Council/2020/07\\_Jul/Documents/07-28\\_Annotated\\_Agenda\\_pdf.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2020/07_Jul/Documents/07-28_Annotated_Agenda_pdf.aspx)

<sup>17</sup> Trump, Donald J and Ben Carson. “We’ll Protect America’s Suburbs.” Wall Street Journal. <https://www.wsj.com/articles/well-protect-americas-suburbs-11597608133>

down.”<sup>18</sup> On the other hand, Democratic Presidential candidates embraced zoning reform, most notably Elizabeth Warren and Cory Booker. President Biden has also indicated that he plans to invest \$300 million in local housing policy grants to give communities the planning support they need to eliminate exclusionary zoning.<sup>19</sup>

In January 2021, the Association of Bay Area Governments voted to approve the implementation of Senate Bill 828 which was designed to address the extreme housing shortage across California. As a result, Bay Area cities will have to zone for 441,000 new homes. Berkeley will see a 19% increase — approximately 8,900 — in the number of homes for which it must zone.

According to the U.S. Census American Community Survey, newly built missing middle housing like duplexes and quadplexes more often houses middle and lower income families in Berkeley, while single-family homes, no matter what year built, are exclusively higher income.

<b>Median household income, Berkeley &amp; Albany, by building age &amp; type</b>					
	Pre-1950	1950-1969	1970-1989	1990-2004	2005-
Single-family detached	148,590	139,295	107,081	131,004	148,835
Single-family attached	84,903	126,930	96,233	167,025	134,460
2-4 units	79,012	63,973	53,335	45,403	48,691
5-19 units	46,037	41,104	39,811	42,243	27,950
20+ units	25,628	42,319	41,387	23,585	40,518

Source: American Community Survey, 2014-18, Public Use Microdata Set, US Census.

## **ALTERNATIVE ACTIONS CONSIDERED**

Berkeley City Council previously authorized a study on missing middle housing. Due to the impending rezoning mandated by new Regional Housing Needs Allocations, Council wanted to ensure that there was a willingness on Council to address and acknowledge the implications of single family zoning on affordability and racial and economic segregation.

## **FINANCIAL IMPLICATIONS**

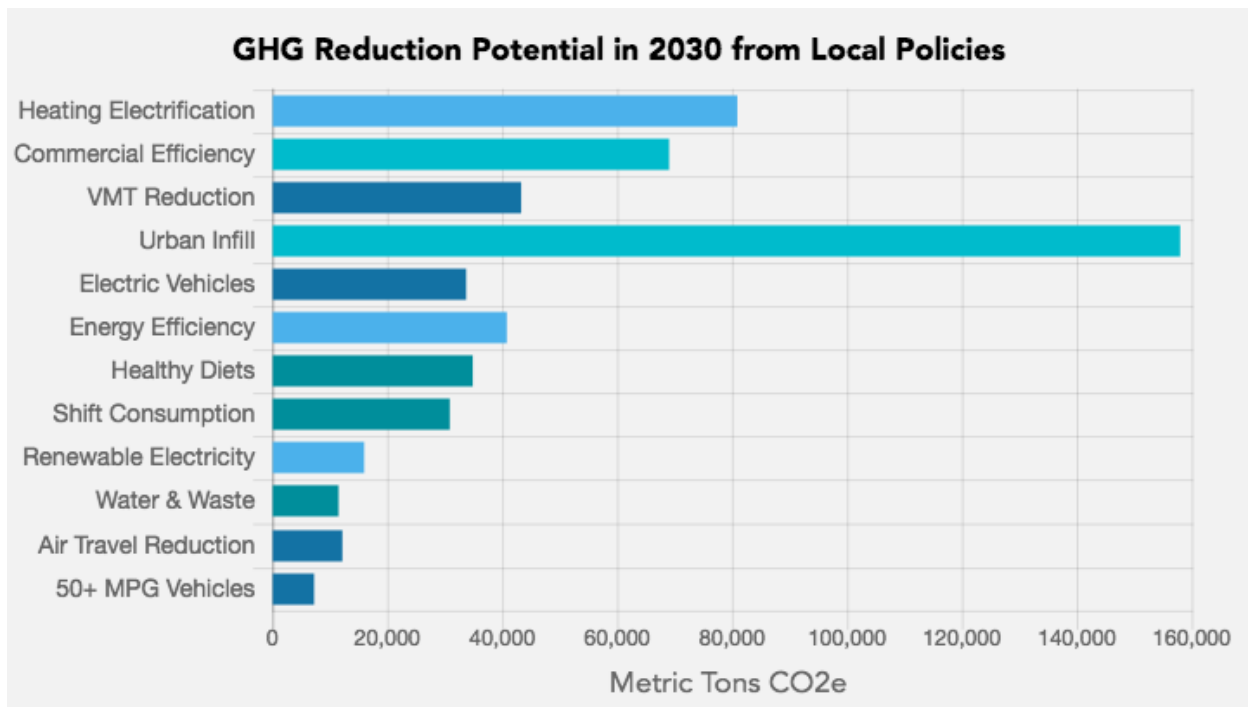
There are no financial implications in approving a resolution of intent.

<sup>18</sup> “Seeking Suburban Votes, Trump to Repeal Rule Combating Racial Bias in Housing.” (2020). NPR <https://www.npr.org/2020/07/21/893471887/seeking-suburban-votes-trump-targets-rule-to-combat-racial-bias-in-housing>

<sup>19</sup> “The Biden Plan for Investing in Our Communities Through Housing.” (2020) <https://joebiden.com/housing/>

## ENVIRONMENTAL SUSTAINABILITY

Berkeley declared a climate emergency in 2018. Among other concerns, wildfires and sea level rise are constant ecological threats to our community. The City of Berkeley needs to act urgently to address this imminent danger. Last year, climate researchers in Berkeley quantified local and state opportunities to reduce greenhouse gases from a “comprehensive consumption-based perspective.”<sup>20</sup> The most impactful local policy to potentially reduce greenhouse gas consumption by 2030 is urban infill. In short, Berkeley can meaningfully address climate change if we allow the production of more homes near job centers and transit.<sup>21</sup>



### CONTACT PERSON(S):

Lori Droste, 510-981-7180

<sup>20</sup> “Carbon Footprint Planning: Quantifying Local and State Mitigation Opportunities for 700 California Cities.” Christopher M. Jones, Stephen M. Wheeler, and Daniel M. Kammen. *Urban Planning* (ISSN: 2183–7635) 2018, Volume 3, Issue 2. <https://rael.berkeley.edu/wp-content/uploads/2018/04/Jones-Wheeler-Kammen-700-California-Cities-Carbon-Footprint-2018.pdf>

<sup>21</sup> “Why Housing Policy Is Climate Policy.” Scott Wiener and Daniel Kammen. *New York Times*. March 25, 2019. <https://www.nytimes.com/2019/03/25/opinion/california-home-prices-climate.html>

## RESOLUTION NO. XX

WHEREAS the City of Berkeley was the first city in the country to implement single-family zoning in 1916; and

WHEREAS the City of Berkeley's current zoning is still greatly influenced by maps developed by the federal government's Home Owners Loan Corporation which sought to maintain racial segregation through discriminatory lending practices; and

WHEREAS with the passage of the Neighborhood Preservation Ordinance in 1973, the City of Berkeley restricted the creation of multifamily units in residential zones;

WHEREAS the prohibition of apartments and multi-family homes in the City of Berkeley coincide with the most unaffordable neighborhoods and the origins of the City's affordability crisis starting in the late 1970s;<sup>22</sup>

WHEREAS there is deeply racist history to zoning practices all over the country, particularly as a proxy for overt racial restrictions, and inequities still exist today as a result of redlining; and

WHEREAS exclusionary zoning creates a system of de facto rather than de jure racial and economic segregation, which creates strong adverse effects in life outcomes for residents; and

WHEREAS zoning reform does not ban single family homes but allows for a greater mix of home types and home affordability levels in more Berkeley neighborhoods; and

WHEREAS zoning reform can reduce real housing cost-burdens for low- and middle-income households; and

WHEREAS the League of California Cities called for cities to allow up to fourplexes in single family zones in their *Blueprint for More Housing 2020*;

BE IT FURTHER RESOLVED that the City of Berkeley registers its intent to allow for more multifamily housing throughout Berkeley; and

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<sup>22</sup>[https://www.cityofberkeley.info/uploadedFiles/Rent\\_Stabilization\\_Board/Level\\_3\\_-\\_General/Berkeley\\_Rent\\_Control\\_1978-1994\\_1998\\_Planning\\_Dept\\_report.pdf](https://www.cityofberkeley.info/uploadedFiles/Rent_Stabilization_Board/Level_3_-_General/Berkeley_Rent_Control_1978-1994_1998_Planning_Dept_report.pdf)



BE IT FURTHER RESOLVED that City Council will pursue zoning reform that takes into account the public safety in all parts of Berkeley, including areas within CalFire's Very High Hazard Severity Zones; and

BE IT FURTHER RESOLVED that in neighborhood interiors that already contain a mix of housing types from single family homes to apartments, allow new housing within that existing range; and

BE IT FURTHER RESOLVED that the City of Berkeley encourage inclusion of homes that can accommodate families in new and rehabilitated multifamily housing developments; and

BE IT FURTHER RESOLVED that the City of Berkeley will no longer ban multi-family housing, and by extension, affordable housing in certain parts of Berkeley.





Lori Droste  
Vice Mayor, District 8

**ACTION CALENDAR**  
February 23, 2021

**To:** Honorable Mayor and Members of the City Council

**From:** Vice Mayor Lori Droste, Councilmember Terry Taplin, Councilmember Rashi Kesarwani, Mayor Jesse Arreguin

**Subject:** Quadplex Zoning

**RECOMMENDATION**

1. Refer to the City Manager and Planning Commission revisions to the zoning code and General Plan, to require proposed housing developments containing up to 4 residential units to be considered ministerially, if the proposed housing development meets certain requirements but not limited to:
  - that the proposed housing development would not require demolition or alteration of housing that is subject to a recorded covenant, ordinance, or law that restricts rents to levels affordable to persons and families of moderate, low, or very low income,
  - that the development is not located within a historic district, is not included in the State Historic Resources Inventory, or is not within a site that is legally designated or listed as a city or county landmark or historic property or district.
  - that the development is not located within particularly vulnerable high fire wildfire danger areas, as specified by Cal Fire.

Additional considerations:

- Consider a local affordable housing density bonus for deeper affordability in certain jobs-rich or transit-oriented areas if a certain percentage of the units are affordable to 80% of area median income.<sup>1</sup>
- Conduct a displacement risk analysis and consider possible ways that zoning changes can be crafted to prevent and mitigate negative externalities which could affect tenants and low and moderate-income homeowners.
- Allow for the possibility of existing homes/footprints/zoning envelopes to be divided into up to four units, potentially scaling the floor area ratio (FAR) to increase as the number of units increase onsite, creating homes that are more affordable, saving and lightly modifying an older structure as part of internally dividing it into more than one unit.<sup>2</sup>

Council directs that staff initiate this work immediately and the Planning Commission incorporate zoning reform into its 2021 and 2022 work plan to institute these changes in anticipation of the Housing Element update. Staff and the commission should examine how other cities have prepared for and implemented missing middle housing in Minneapolis, Portland, and Sacramento and conduct extensive community outreach during the course of this update.

### **CURRENT PROBLEM AND ITS EFFECTS**

The nine-county Bay Area region is facing an extreme shortage of homes that are affordable for working families. The Metropolitan Transportation Commission illustrates the job-housing imbalance in a report showing that only one home is added for every 3.5 jobs created in the Bay Area region.<sup>3</sup> Governor Gavin Newsom has called for a “Marshall Plan for affordable housing” and has pledged to create millions of more homes in California to tackle the state’s affordability and homelessness crisis.

In Berkeley, the median sale price of a home is \$1.4 million (as of December 2020)—an increase of 56% over the median sale price in December 2015 of \$895,000.<sup>4</sup> These escalating costs coincided with an increase of 14% in Berkeley’s homeless population from 2017 to 2019, and a 34% increase from 2015 to 2019 point-in-time counts.<sup>5</sup> These skyrocketing housing costs put extreme pressure on low-, moderate- and middle-income households, as they are forced to spend an increasing percentage share of their income on housing (leaving less for other necessities like food and medicine), live in

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<sup>1</sup> Jobs-rich and transit-oriented definitions should be defined by the Planning Commission in consultation with staff.

<sup>2</sup> City of Portland, <https://www.portlandoregon.gov/bps/article/711691>

<sup>3</sup> Metropolitan Transportation Commission, 2018. <http://www.vitalsigns.mtc.ca.gov/>

<sup>4</sup> Berkeley Home Prices and Values, <https://www.zillow.com/berkeley-ca/home-values/>

<sup>5</sup> [https://everyonehome.org/wp-content/uploads/2019/09/2019HIRDReport\\_Berkeley\\_2019-Final.pdf](https://everyonehome.org/wp-content/uploads/2019/09/2019HIRDReport_Berkeley_2019-Final.pdf)

overcrowded conditions, or endure super-commutes of 90 minutes or more in order to make ends meet.

#### *Low-Income Households Cannot Afford to Live in Berkeley*

Recently, low-income households experienced the greatest increases in rent as a portion of their monthly income. The U.S. Department of Housing and Urban Development (HUD) defines "affordable" as housing that costs no more than 30 percent of a household's monthly income. Households are considered to be "rent burdened" when more than a third of their income goes toward housing costs. In Alameda County, "Although rent burden increased across all income groups, it rose most substantially for low- and very low-income households. In both 2000 and 2015, extremely low-income renters were by far the most likely to experience severe rent burden, with nearly three quarters spending more than half their income on rent."<sup>6</sup>

Although residents of Berkeley passed Measure O which will substantially increase funding for affordable housing, low-income units are increasingly expensive to create. Low-income housing units typically cost well over \$500,000 to create and the demand for this type of affordable/subsidized housing exceeds the supply.<sup>7</sup> Without a substantial additional increase in funding for affordable housing, the City will be increasingly challenged to create enough subsidized housing to meet the demand. For example, roughly 700 seniors applied for the 42 affordable/subsidized units at Harpers Crossings in Berkeley. This project cost \$18 million to build.<sup>8</sup> While Berkeley should continue to support subsidized housing, subsidized housing alone is insufficient to address the growing housing and homelessness crisis.

#### *Middle-Income Households Can't Afford to Live in Berkeley*

In the Bay Area, those earning middle incomes are facing similar challenges in finding affordable homes. The Pew Research Center classifies middle income households as those with "adults whose annual household income is two-thirds to double the national median." In 2018, middle income households were those earning approximately \$48,500 to \$145,500 for a household of three.<sup>9</sup> According to the Pew Research Center, "The San Francisco-Oakland-Hayward metropolitan area in California is one of the most expensive areas, with a price level that was 31.6% higher than the national average. Thus, to step over the national middle-class

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<sup>6</sup> Zuk, M., & Chapple, K. (2015). Urban Displacement Project.

[http://www.urbandisplacement.org/sites/default/files/images/alameda\\_final.pdf](http://www.urbandisplacement.org/sites/default/files/images/alameda_final.pdf)

<sup>7</sup> "The Cost of Building Housing" *The Turner Center* <https://turnercenter.berkeley.edu/construction-costs-series>

<sup>8</sup> Flood, Lucy. (1/18/2018). "Berkeley low-income seniors get a fresh start at Harper Crossing."

<https://www.berkeleyside.com/2018/01/18/berkeley-low-income-seniors-get-fresh-start-harper-crossing>

<sup>9</sup> <https://www.pewresearch.org/fact-tank/2020/07/23/are-you-in-the-american-middle-class/>

threshold of \$48,500... a household in the San Francisco area needs a reported income of about \$63,800, or 31.6% more than the U.S. norm, to join the middle class.”<sup>10</sup>

In the Bay Area, a family currently has to earn \$200,000 annually to afford the principal, interest, taxes and insurance payments on a median-priced home in the Bay Area (assuming they can pay 20 percent of the median home price of \$1.4 million up front).<sup>11</sup> This means that many City of Berkeley employees couldn't afford to live where they work: a fire captain (making \$144,000) with a stay at home spouse wouldn't be able to afford a home. Even a firefighter (earning \$112,000 annually) and a groundskeeper (making \$64,000), or two librarians (making \$89,000 each) couldn't buy a house.<sup>12</sup>

Berkeley Unified School District employees have recently been advocating for teacher housing. Unfortunately, the housing options for teachers are insufficient for the overwhelming need. According to a recent Berkeley Unified School District (BUSD) survey, 69% of teachers or staff who rent believe that high housing costs will impact their ability to retain their BUSD positions.<sup>13</sup> Since individual K-12 teacher salaries average ~\$75,962,<sup>14</sup> the majority of teachers are not classified as low-income (<\$62,750), according to Housing and Urban Development guidelines. As a result, many cannot qualify for affordable housing units. Since middle-income individuals and families can't qualify for affordable housing units and very few subsidies are available to help, the vast majority have to rely on non-governmental subsidized methods and the private market to live in the Bay Area.

### *Families Are Struggling to Live in Berkeley*

Many families are fleeing the Bay Area due to the high cost of living. According to a study by the Turner Center for Housing Innovation, the income and racial patterns of out-migration and in-migration indicate that “the region risks backsliding on inclusion and diversity and displacing its economically vulnerable and minority residents to areas of more limited opportunity.”<sup>15</sup> Rent for a two-bedroom apartment in Berkeley costs approximately \$2,070/month<sup>16</sup> while the median child care cost in Alameda County is

<sup>10</sup> <https://www.pewresearch.org/fact-tank/2020/07/23/are-you-in-the-american-middle-class/>

<sup>11</sup> “The salary you must earn to buy a home in the 50 largest metros” (10/14/2018). HSH.com <https://www.hsh.com/finance/mortgage/salary-home-buying-25-cities.html#>

<sup>12</sup> City of Berkeley Human Resources, “Job Descriptions” <http://agency.governmentjobs.com/berkeley/default.cfm?action=agencyspecs&agencyID=1568>

<sup>13</sup> Berkeley Unified School District, “Recommendation for District-Owned Rental Housing for Employees”, <https://documentcloud.adobe.com/link/track?uri=urn%3Aaaid%3Aascds%3AUS%3Adfd74865-9541-4ff8-b6a6-4dcbd30acdc3>

<sup>14</sup> Education Data Partnership, “Teacher Salaries” <http://www.ed-data.org/district/Alameda/Berkeley-Unified>

<sup>15</sup> Romem, Issa and Elizabeth Kneebone, 2018. “Disparity in Departure: Who Leaves the Bay Area and Where Do They Go?” <https://turnercenter.berkeley.edu/disparity-in-departure>

<sup>16</sup> Berkeley Rentals, <https://www.zumper.com/blog/san-francisco-bay-area-metro-report/>

\$1,824 a month, an increase of 36% in the past four years.<sup>17</sup> Consequently, many families are paying well over \$60,000 for living and childcare expenses alone.

### *Homelessness is on the Rise in the Bay Area*

High housing costs also lead to California having among the highest rates of poverty in the nation at 19%.<sup>18</sup> Consequently, homelessness is on the rise throughout California. The Bay Area has one of the largest and least-sheltered homeless populations in North America.<sup>19</sup> The proliferation of homeless encampments—from select urban neighborhoods to locations across the region—is the most visible manifestation of the Bay Area’s extreme housing affordability crisis. According to the 2019 point-in-time count, Berkeley had approximately 1,108 individuals experiencing homelessness on any given night.<sup>20</sup> In order to act in accordance with best practices research on alleviating homelessness and help homeless individuals get housed, the City needs to create more homes.<sup>21</sup> Tighter housing markets are associated with higher rates of homelessness, indicating that the creation of additional housing for all income levels is key to mitigating the crisis.<sup>22</sup> In the 1,000 Person Plan to Address Homelessness, Berkeley’s Health, Housing and Community Services staff also recommend that Council prioritizes “implementing changes to Berkeley’s Land Use, Zoning, Development Review Requirements for new housing with an eye toward alleviating homelessness.”

## **BACKGROUND**

In 2019, Councilmembers Lori Droste, Ben Bartlett, Rashi Kesarwani and Rigel Robinson introduced Missing Middle Housing legislation in order to facilitate the construction of naturally affordable missing middle housing. Missing middle housing refers to small multi-unit buildings that are compatible in scale with single-family neighborhoods. The final legislation passed by Council was an agreement to **study** how the City of Berkeley can incorporate varying building types throughout Berkeley and

<sup>17</sup> D'Souza, Karen, 2/3/19. “You think Bay Area housing is expensive? Child care costs are rising, too.” <https://www.mercurynews.com/2019/02/03/you-think-bay-area-housing-is-expensive-childcare-costs-are-rising-too/amp/>

<sup>18</sup> The U.S. Census The Supplemental Poverty Measure adjusts thresholds based on cost of living indexes.

<sup>19</sup> SPUR: Ideas and Action for a Better City. “Homelessness in the Bay Area: Solving the problem of homelessness is arguably our region’s greatest challenge.” Molly Turner, Urbanist Article, October 23, 2017 <https://www.spur.org/publications/urbanist-article/2017-10-23/homelessness-bay-area>

<sup>20</sup> Berkeley Homeless Point-in-Time Count and Survey Data, 2019. [https://everyonehome.org/wp-content/uploads/2019/09/2019HIRDReport\\_Berkeley\\_2019-Final.pdf](https://everyonehome.org/wp-content/uploads/2019/09/2019HIRDReport_Berkeley_2019-Final.pdf)

<sup>21</sup> United States Interagency Council on Homelessness “The Evidence behind Approaches that Drive an End to Homelessness” December 2017, [https://www.usich.gov/resources/uploads/asset\\_library/evidence-behind-approaches-that-end-homelessness.pdf](https://www.usich.gov/resources/uploads/asset_library/evidence-behind-approaches-that-end-homelessness.pdf)

<sup>22</sup> *Homeless in America, Homeless in California*. John M. Quigley, Steven Raphael, and Eugene Smolensky. The Review of Economics and Statistics, February 2001, 83(1): 37–51 © 2001 by the President and Fellows of Harvard College and the Massachusetts Institute of Technology. [https://urbanpolicy.berkeley.edu/pdf/qrs\\_restat01pb.pdf](https://urbanpolicy.berkeley.edu/pdf/qrs_restat01pb.pdf)

address exclusionary zoning practices. While the entire City Council voted unanimously to study this, the COVID-19 pandemic led to budget cuts which would have funded such a study. In July of 2020, Berkeley City Council additionally supported Senate Bill 902, which would have allowed missing middle housing in transit-oriented or jobs-rich areas.<sup>23</sup>

### *Regional Housing Needs Goals*

In January of 2021, the Association of Bay Area Governments passed new Regional Housing Needs Allocations for the Bay Area. As a result, Berkeley will have to plan for approximately 8,900 homes. This is a significant increase over the previous years. As a result, Berkeley needs to zone for significantly more housing. One way Berkeley can address this proposed increase is to allow quadplexes throughout Berkeley and undo the legacy of exclusionary zoning.

### **Quadplexes**

*What are quadplexes?*

Quadplexes are:

1. A type of missing middle housing that has up to four units within a structure that is often similar in size, scale, and design to a large single-family home.
2. Housing types that are naturally affordable and less expensive than most housing options available within Berkeley.

The current housing market has led to “barbell” housing delivery. That is, new units tend to be highly-priced (market rate or luxury) or highly subsidized (affordable).

Consequently, the majority of the population can’t access quadplexes and other missing middle units because the dearth of funding, scarcity of land, and high construction costs impose challenges on viability. One study found that individuals trying to create missing middle housing cannot compete financially with larger projects in areas zoned for higher density, noting “many smaller developers have difficulty obtaining the necessary resources, including the competitive funding, required to offset the high initial per-unit development costs, and larger developers with deeper pockets and more experience navigating complex regulatory systems will almost always opt to build projects that are large enough to achieve the bulk per-unit development rate.”<sup>24</sup>

Additionally, missing middle housing is not permitted in areas zoned R1 (single family family and one accessory dwelling unit only), R1A (limited two family), and R2

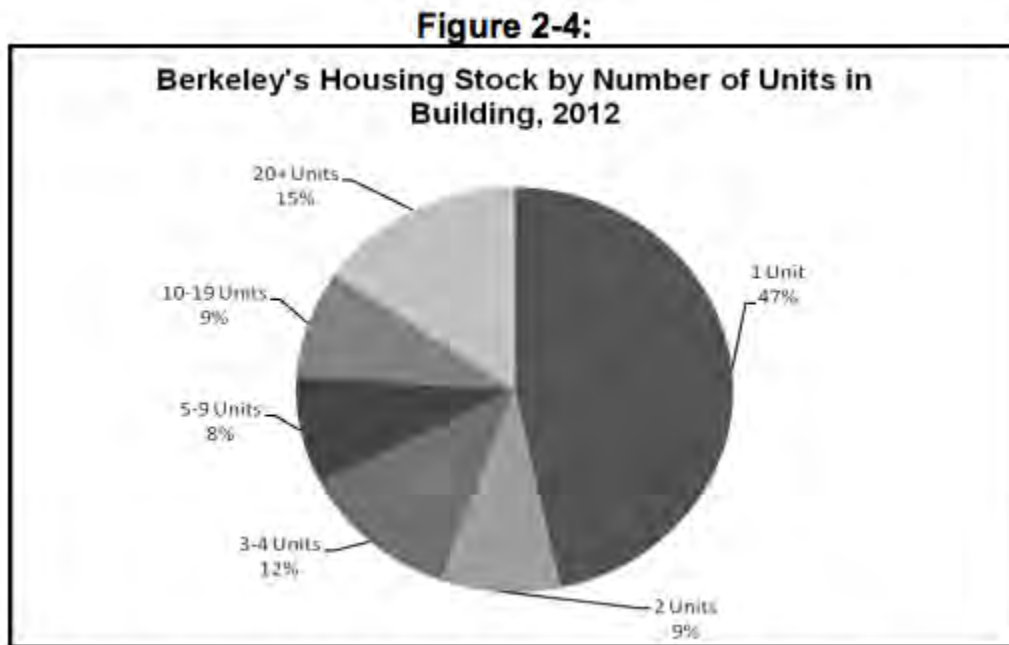
<sup>23</sup>[https://www.cityofberkeley.info/Clerk/City\\_Council/2020/07\\_Jul/Documents/07-28\\_Annotated\\_Agenda\\_pdf.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2020/07_Jul/Documents/07-28_Annotated_Agenda_pdf.aspx)

<sup>24</sup> The Montgomery Planning Dept., “The Missing Middle Housing Study,” September 2018. [http://montgomeryplanning.org/wp-content/uploads/2018/09/MissingMiddleHousingStudy\\_9-2018.pdf](http://montgomeryplanning.org/wp-content/uploads/2018/09/MissingMiddleHousingStudy_9-2018.pdf)



(restricted two family). Other factors that may prevent the creation of missing middle housing include lot coverage ratios and setback and parking requirements.<sup>25</sup>

One home within a quadplex is undeniably less expensive than comparable single family homes, leading to greater accessibility to those earning median, middle, or lower incomes. Currently, the median price of a single family home in Berkeley is \$1.4 million dollars, which is out of reach for the majority of working people.<sup>26</sup> While some may erroneously argue that the *only* way to address the needs of low- or moderate- income families is to provide subsidized housing, ample research indicates this is not the case because the distribution of land costs can be spread across multiple units and construction costs are lower. Approximately half of Berkeley's housing stock consists of single family units<sup>27</sup> and more than half of Berkeley's residential land is zoned in ways that preclude most quadplexes. As a result, today, only wealthy households can afford homes in Berkeley.



Source: US Census, ACS 2008-2012 5-Year Estimate., Table B25024

Quadplexes generally have small- to medium-sized footprints and are often two stories or less, allowing them to blend into the existing neighborhood while still encouraging greater socioeconomic diversity. These types of homes exist in every district of Berkeley, having been built before they were banned in districts only allowing single

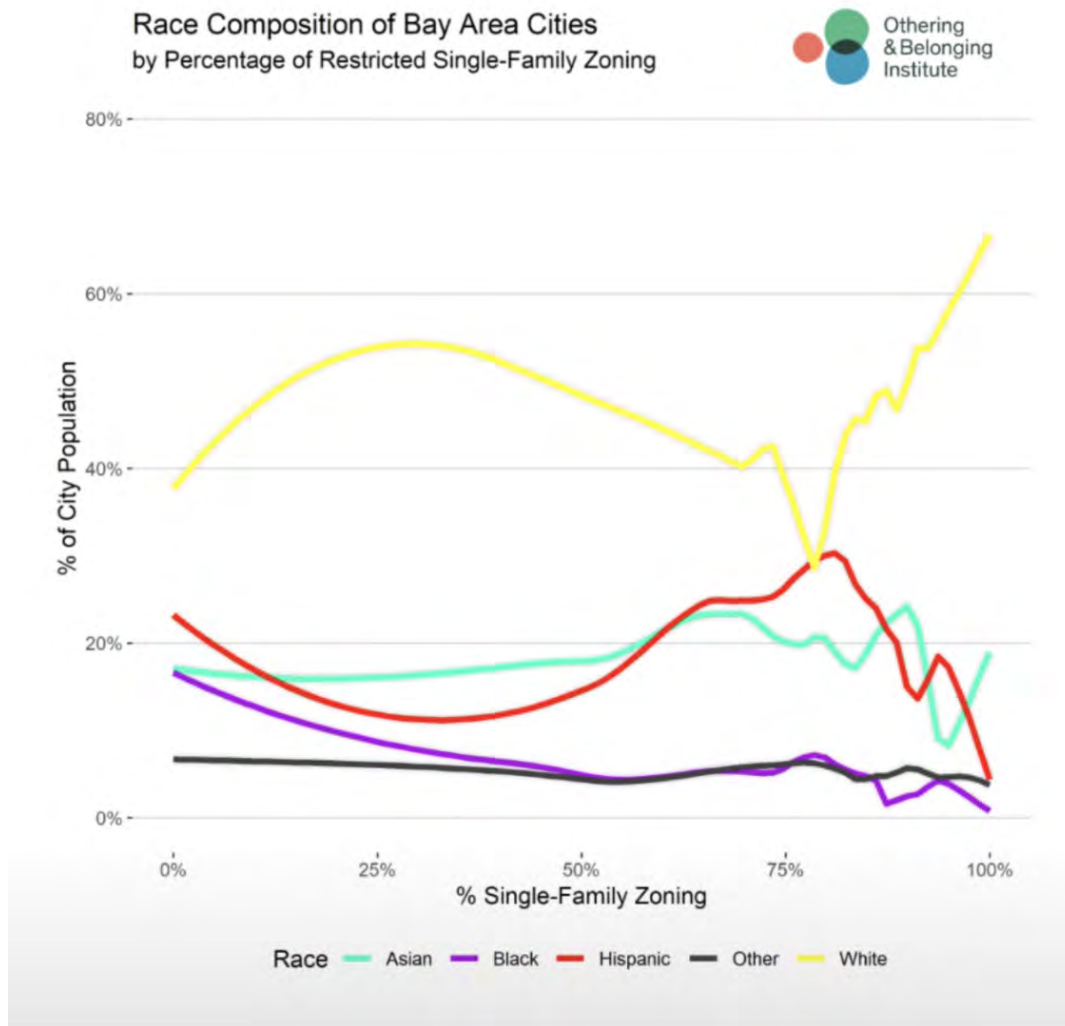
<sup>25</sup> Ibid.

<sup>26</sup> Berkeley Home Prices and Values, <https://www.zillow.com/berkeley-ca/home-values/>

<sup>27</sup> City of Berkeley 2015 -2023 Housing Element.

[https://www.cityofberkeley.info/uploadedFiles/Planning\\_and\\_Development/Level\\_3\\_-\\_Commissions/Commission\\_for\\_Planning/2015-2023%20Berkeley%20Housing%20Element\\_FINAL.pdf](https://www.cityofberkeley.info/uploadedFiles/Planning_and_Development/Level_3_-_Commissions/Commission_for_Planning/2015-2023%20Berkeley%20Housing%20Element_FINAL.pdf)

family homes. Quadplexes were severely limited in other districts by zoning changes initiated in 1973 with the Neighborhood Preservation Ordinance. Regardless of the original intent of the Neighborhood Preservation Ordinance, the effect of this citizen-led measure was to downzone large swaths of Berkeley. Downzoning meant that fewer housing units were allowed to be built in Berkeley over the past 47 years. Many scholars have studied the effect of land use policies and have concluded that downzoning leads to higher housing costs and economic and racial segregation.<sup>28</sup>



<sup>28</sup> Lens, Michael and Paavo Monkonnen. (2015). "Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?" <https://www.tandfonline.com/doi/full/10.1080/01944363.2015.1111163#abstract>

### ***History of Exclusionary Zoning, Racial and Economic Segregation, and Current Zoning***

Single family residential zoning was born in Berkeley in the Elmwood neighborhood in 1916. This zoning regulation forbade the construction of anything other than one home per lot. In 1915, Berkeley's City Attorney Frank V. Cornish wrote, "Apartment houses are the bane of the owner of the single family dwelling" while the consultant who penned Berkeley's zoning ordinance stated, "[The] great principle of protecting the home against the intrusion of the less desirable and floating renter class."<sup>29</sup> Subsequently, the Mason McDuffie Company's use of Berkeley's zoning laws and racially-restrictive property deeds and covenants prevented Black, Indigenous, and People of Color from purchasing or leasing property in east Berkeley.<sup>30</sup>

Mason-McDuffie race-restrictive covenants stated, "if prior to the first day of January 1930 any person of African or Mongolian descent shall be allowed to purchase or lease said property or any part thereof, then this conveyance shall be and become void..."<sup>31</sup> In 1916, McDuffie began lobbying for the exclusionary zoning ordinances in Berkeley to protect against the "disastrous effects of uncontrolled development"<sup>32</sup> and restrict Chinese laundromats and African American dance halls, particularly in the Elmwood and Claremont neighborhoods.<sup>33</sup>

After *Buchanan v. Warley* in 1917, explicit racially restrictive zoning became illegal. However, consideration to maintaining the character of districts became paramount and Mason-McDuffie contracts still stipulated that property owners must be white.

In 1933, the federal government created a Home Owners Loan Corporation (HOLC), which produced residential maps of neighborhoods to identify mortgage lending risks for real estate agents, lenders, etc. These maps were based on racial composition, quality of housing stock, access to amenities, etc. and were color coded to identify best (green), still desirable (blue), definitely declining (yellow), and hazardous (red) neighborhoods. These maps enabled discriminatory lending practices (later called 'redlining') and allowed lenders to enforce local segregation standards.<sup>34</sup>

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<sup>29</sup> Frank V. Cornish. "The Legal Status of Zone Ordinances" and Charles Cheney. "The Necessity for a Zone Ordinance in Berkeley." Berkeley Civic Bulletin, May 18, 1915.

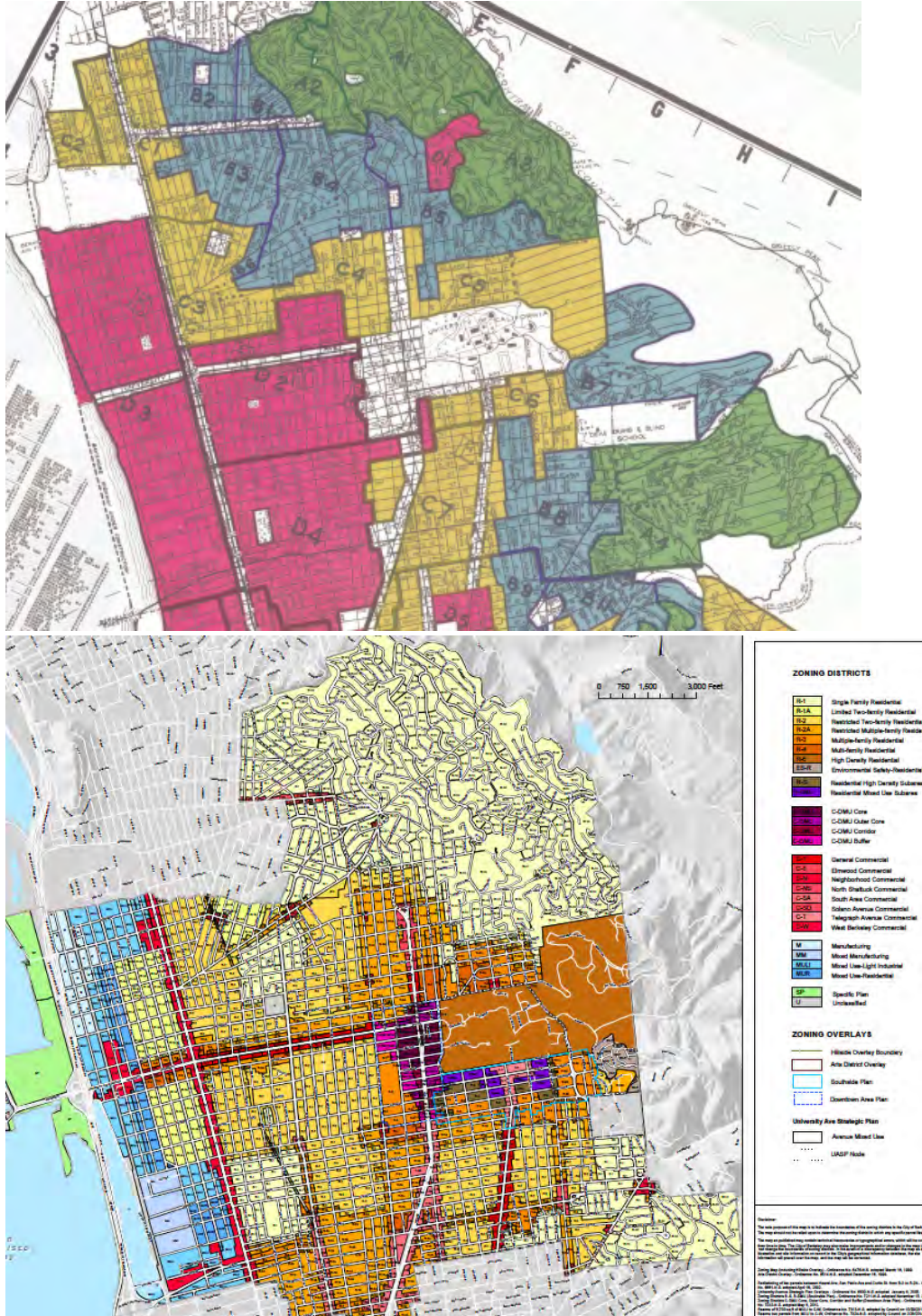
<sup>30</sup> Wollenberg, *Berkeley, A City in History*, 2008.

<sup>31</sup> Claremont Park Company Indenture, 1910

<sup>32</sup> Lory, Maya Tulip. "A History of Racial Segregation, 1878–1960." *The Concord Review*, 2013. <http://www.schoolinfosystem.org/pdf/2014/06/04SegregationinCA24-2.pdf>

<sup>33</sup> Weiss, M. A. (1986). Urban Land Developers and the Origins of Zoning Laws: The Case of Berkeley. Berkeley Planning Journal, 3(1). Retrieved from <https://escholarship.org/uc/item/26b8d8zh>

<sup>34</sup> NCRC Opening Doors to Economic Opportunity, "HOLC "REDLINING" MAPS: The persistent structure of segregation and economic inequality." Bruce Mitchell and Juan Franco. [https://ncrc.org/wp-content/uploads/dlm\\_uploads/2018/02/NCRC-Research-HOLC-10.pdf](https://ncrc.org/wp-content/uploads/dlm_uploads/2018/02/NCRC-Research-HOLC-10.pdf)



The images above compare a HOLC-era (Thomas Bros Map) map of Berkeley with a current zoning map. Neighborhoods identified as “best” in green on the HOLC-era map typically remain zoned as single family residential areas today. Red ‘hazardous’ neighborhoods in the first map are now largely zoned as manufacturing, mixed use, light industrial, or limited two family residential.<sup>35</sup>

<sup>35</sup> Robert K. Nelson, LaDale Winling, Richard Marciano, Nathan Connolly, et al., “Mapping Inequality,” American Panorama, ed. Robert K. Nelson and Edward L. Ayers, <https://dsl.richmond.edu/panorama/redlining/#oc=10/37.8201/-122.4399&opacity=0.8&sort=17&city=oakland-ca&adview=full>

Prior to the 1970s and the passage of the Neighborhood Preservation Ordinance, a variety of missing middle housing --duplexes, triplexes, and other smaller multi-unit building typologies-- was still being produced and made available to families throughout the Bay Area, particularly in Berkeley. In 1973, the residents of Berkeley passed the Neighborhood Preservation Ordinance which outlawed multi-unit housing in certain parts of Berkeley. As Councilmember Ben Bartlett and Yelda Bartlett wrote in their 2017 *Berkeleyside* op-ed, the neighborhood preservation ordinance “[the Neighborhood Preservation Ordinance] did not mention race, but instead tried to preserve ‘neighborhood character.’ As a result, from 1970 to 2000, fewer than 600 dwelling units were built in Berkeley. Areas zoned for single family residential (R-1), limited two-family residential (R-1A), and restricted two-family residential (R-2) are now some of the most expensive parts of our city—especially on a per-unit basis.”<sup>36</sup>

Until 1984, Martin Luther King Jr Way was known as Grove Street. For decades, Grove Street created a wall of segregation down the center of Berkeley. Asian-Americans and African-Americans could not live east of Grove Street due to race-restrictive covenants that barred them from purchasing or leasing property. While race-restrictive covenants no longer prohibit individuals from purchasing or leasing homes, most cities still retain the vestiges of exclusionary zoning practices.

The UC Othring and Belonging Institute recently released a study on racial segregation and zoning practices which revealed that 83% of residential land in the Bay Area is zoned for single family homes.<sup>37</sup> The authors found that the ramifications of such zoning practices leads to a greater percentage of white residents, as recounted in KQED’s “The Racist History of Single Family Zoning.”<sup>38</sup> By banning less expensive housing options, such as duplexes, tri-/four-plexes, courtyard apartments, bungalow courts, and townhouses, in low-density, “desirable” places in Berkeley, the current zoning map dictates that only wealthier families will be able to live or rent in certain parts of Berkeley, mainly in North and East Berkeley. Today, with the median home sale price at \$1.3 million<sup>39</sup> and the typical White family having eight times the wealth of the typical Black family,<sup>40</sup> this de-facto form of segregation is even more pronounced. *Missing*

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<sup>36</sup><https://www.berkeleyside.com/2017/06/13/opinion-berkeleys-zoning-laws-wall-off-communities-color-seniors-low-income-people-others>

<sup>37</sup>Racial Segregation in the San Francisco Bay Area (2020) UC Othring and Belonging Institute. <https://belonging.berkeley.edu/racial-segregation-san-francisco-bay-area-part-5>

<sup>38</sup> <https://www.kqed.org/news/11840548/the-racist-history-of-single-family-home-zoning>

<sup>39</sup> Berkeley, CA Real Estate Market (2021). [https://www.realtor.com/realestateandhomes-search/Berkeley\\_CA/overview](https://www.realtor.com/realestateandhomes-search/Berkeley_CA/overview)

<sup>40</sup> Survey of Consumer Finances (2020). Federal Reserve. <https://www.federalreserve.gov/econres/scfindex.htm>

*middle housing can directly benefit those harmed by this modern-day exclusionary zoning practice that perpetuates socioeconomic and racial segregation.*

According to the data mapped by UC Berkeley's Urban Displacement Project, most of the low-income tracts in Berkeley are at-risk or have ongoing displacement and gentrification. Higher-income tracts in Berkeley are classified as 'at-risk of exclusion', currently feature 'ongoing exclusion', or are at stages of 'advanced exclusion'. Degrees of exclusion are measured by a combination of data: the loss of low-income households over time, presence of high income households, being considered in a 'hot housing market,' and migration patterns. The Urban Displacement Project's findings indicate that exclusion is more prevalent than gentrification in the Bay Area.<sup>41</sup> While Berkeley has created policies and designated funding to prevent gentrification, policies that focus on preventing exclusion have lagged.

University of California-Berkeley Professor Karen Chapple, anti-displacement expert and director of the Urban Displacement Project, stated that "the Urban Displacement Project has established a direct connection between the neighborhood designations by the Home Owners Loan Corporation (HOLC), and 75% of today's exclusionary areas in the East Bay... Thus, this historic legacy, compounded by Berkeley's early exclusionary zoning practices, continues to shape housing opportunity and perpetuate inequities today."<sup>42</sup> Not surprisingly, Chapple has indicated that zoning reform "has the potential not just to address the housing crisis but also to become a form of restorative or even transformative justice. There is no more important issue for planners to tackle today."<sup>43</sup>

### ***Historic Redlining***

Redlining was a practice whereby certain neighborhoods or areas were designated as being high-risk for investment. These high-risk designations were literally marked on maps using red coloring or lines, hence "redlining." The designations were typically applied to areas with large non-white and/or economically disadvantaged populations, and resulted in people who lived in or wanted to move to these areas being denied loans, or only being provided loans on much worse terms than their counterparts who could access non-redlined areas, due to their ethnicity or higher economic status.

Because redlining practices were contemporaneous with segregationist race-restricted deeds that largely locked minorities out of non-redlined neighborhoods, most non-white

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<sup>41</sup> Zuk, M., & Chapple, K. (2015). Urban Displacement Project. <http://www.urbandisplacement.org/map/sf>

<sup>42</sup> Karen Chapple's February 25, 2019 letter to Berkeley City Council in support of this proposal. <https://www.berkeley.com/wp-content/uploads/2019/02/Letter-on-Council-Item-22-Chapple-2.25.19.pdf>

<sup>43</sup>Ibid.

households were effectively forced to live in areas where buying and/or improving residential property was extremely difficult. Consequently, low-income and minority families were often locked out of homeownership, and all the opportunities for stability and wealth-building that entails. Therefore redlining tended to reinforce the economic stagnation of the areas to which it was applied, further depressing property values and leading to disinvestment. Although redlining is no longer formally practiced in the fashion it was historically, its effects continued to be felt in wealth disparities, educational opportunity gaps, and other impacts.

One way in which the practice of redlining continues to be felt is through the continuation of exclusionary zoning. By ensuring that only those wealthy enough to afford a single family home with a relatively large plot of land could live in certain areas, exclusionary zoning worked hand in hand with redlining to keep low-income families out of desirable neighborhoods with good schools and better economic opportunity. Cities, including Berkeley, adopted zoning that effectively prohibited multi-family homes in the same areas that relied on race restrictive deeds to keep out non-whites, meaning that other areas, including redlined areas, were more likely to continue allowing multi-family buildings.

Ironically, because these patterns of zoning have persisted, many areas that were historically redlined are now appealing areas for new housing development precisely because they have continued to allow multi-family homes. Any area which sees its potential housing capacity increase will become more appealing for new housing development. When these changes are made in historically redlined areas where lower-income and minority households tend to be more concentrated, it is especially important to ensure those policies do not result in displacement or the loss of rent-controlled or naturally affordable housing units.

### **ALTERNATIVE ACTIONS CONSIDERED**

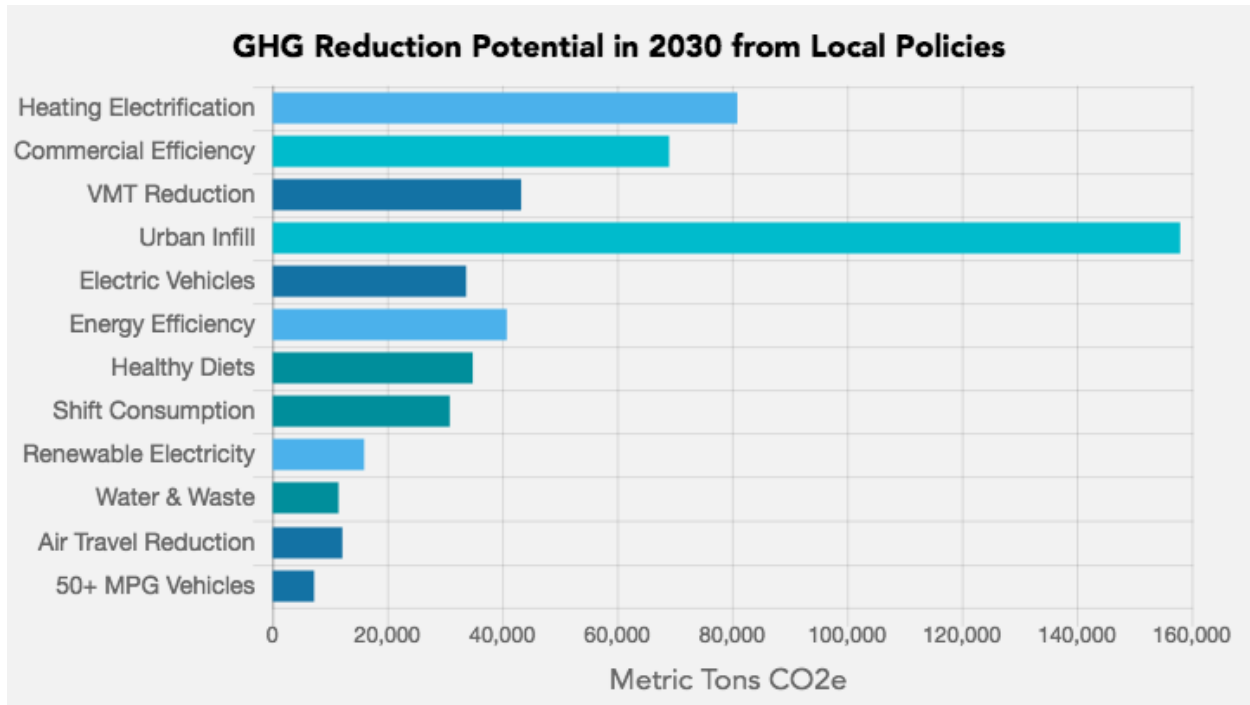
The authors considered passing a budget referral to fund another study for missing middle housing. However, given the new Regional Housing Needs Allocations and the scarcity of housing for individuals and families throughout the Bay Area, we felt the need to act immediately and not wait to study this issue.

### **FINANCIAL IMPLICATIONS**

Costs for consultants to provide additional analysis can range from \$25,000-\$100,000. Staff should also consider augmenting existing work on the Housing Element update and density standard study to align with the objectives of this legislation.

### **ENVIRONMENTAL SUSTAINABILITY**

Berkeley declared a climate emergency in 2018. Among other concerns, wildfires and sea level rise are constant ecological threats to our community. The City of Berkeley needs to act urgently to address this imminent danger. Last year, climate researchers in Berkeley quantified local and state opportunities to reduce greenhouse gases from a “comprehensive consumption-based perspective.”<sup>44</sup> The most impactful local policy to potentially reduce greenhouse gas consumption by 2030 is urban infill. In short, Berkeley can meaningfully address climate change if we allow the production of more homes near job centers and transit.



**CONTACT PERSON(S):**

Lori Droste, 510-981-7180

**ATTACHMENTS/LINKS:**

Minneapolis Plan:

[https://minneapolis2040.com/media/1428/pdf\\_minneapolis2040\\_with\\_appendices.pdf](https://minneapolis2040.com/media/1428/pdf_minneapolis2040_with_appendices.pdf)

Seattle Plan:

<sup>44</sup> “Carbon Footprint Planning: Quantifying Local and State Mitigation Opportunities for 700 California Cities.” Christopher M. Jones, Stephen M. Wheeler, and Daniel M. Kammen. Urban Planning (ISSN: 2183-7635) 2018, Volume 3, Issue 2. <https://rael.berkeley.edu/wp-content/uploads/2018/04/Jones-Wheeler-Kammen-700-California-Cities-Carbon-Footprint-2018.pdf>



<http://www.seattle.gov/Documents/Departments/SeattlePlanningCommission/SPCNeighborhoodsForAllFINAL121318digital.pdf>

Sacramento's Plan:

[https://sacramento.granicus.com/MetaViewer.php?view\\_id=22&clip\\_id=4822&meta\\_id=612624](https://sacramento.granicus.com/MetaViewer.php?view_id=22&clip_id=4822&meta_id=612624)

**Berkeleyside****Opinion: We can design our way out of Berkeley's housing crisis with 'missing middle' buildings**

*A Berkeley architect argues that Berkeley should build more small-scale, multi-unit buildings such as duplexes, bungalow courts, fourplexes, and small mansion apartments.*

By Daniel Parolek  
Dec. 19, 2017

Berkeley's housing problems have gone national recently, as The New York Times' Conor Dougherty highlighted in a thought-provoking article, "The Great American Single-Family Home Problem." Dougherty examines the conflicting interests and regulations that threatened to halt the development of one lot on Haskell Street, and shows how those conflicting forces are contributing to the affordable housing crisis we are seeing in our state – and across the country.

As an architect and urban designer based in Berkeley for the past 20 years, I agree that California municipalities have an urgent need to deliver more housing. That said, just delivering more housing is not enough. We need to think about how this housing reinforces a high quality built environment and how to provide a range of housing for all segments of the market, including moderate and low-income households. More small-scale, multi-unit buildings such as duplexes, bungalow courts, fourplexes, and small mansion apartments, or what I call "Missing Middle Housing," should be a key focus of that housing.

Unfortunately, the design proposed for the Haskell Street site in Berkeley does not deliver on reinforcing a high quality built environment or affordability and, as the NYT article makes clear, does not deliver on any level of affordability. There are better design solutions that deliver a more compatible form, that have more and a broader range of housing units, and that can be more effective at building local support for this and similar infill projects.

For example, the 50' x 150' lot at 310 Haskell Street is big enough to accommodate a traditional fourplex, with two units down and two units above in a building that is the scale of a house (see image attached from our Missing Middle research). The units would typically be between 750-900 square feet each. An important characteristic of this housing type is that they do not go deeper onto the lot than a traditional house, thus eliminating the concern about privacy and shading and providing high-quality outdoor

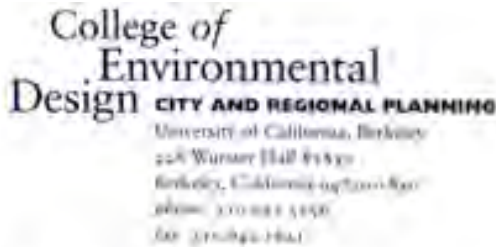
living spaces. These fourplex housing types exist all over Berkeley and are often successfully integrated onto blocks with single-family homes.

So how do we get there? Berkeley and most cities across the country need to sharpen their pencils on their outdated zoning codes, first to remove barriers for better solutions and secondly, to create a set of regulations that ensure that inappropriate design solutions like the one proposed for Haskell Street or even worse are not allowed on these sites. Lower densities do not equal better design solutions and higher densities do not need to mean larger or more buildings. This is a delicate balance that few zoning codes achieve and few code writers fully understand.

We also need to change the way we communicate about housing needs in our communities. If we are using George Lakoff's rules for effective communication we would never go into a housing conversation with a community and use terms like "increasing density, adding multi-family, or upzoning a neighborhood." I can think of few neighborhoods that would feel good about saying yes to any of those options if they were framed in that way, but which can mostly get on board with thinking about aging within a neighborhood, or ensuring their kids or grandkids can afford to move back to the city they grew up in. Beginning this conversation by simply showing photographic and/or local existing documented examples of good Missing Middle housing types often disarms this conversation and leads to more fruitful results.

Berkeley's challenges related to housing are not going to go away anytime soon. We need to thoughtfully remove barriers to enable a broad range of solutions like the fourplex that have been a core part of choices provided in our communities already and learn how to effectively build consensus and support for good design solutions such as Missing Middle housing types.

*Daniel Parolek is an architect and urban designer who co-authored the book "Form-Based Codes," coined the term Missing Middle Housing ([www.missingmiddlehousing.com](http://www.missingmiddlehousing.com)) and speaks and consults nationally on these topics.*



February 25, 2019

Honorable Mayor and City Council members:

I am writing to convey my strong support for the "Missing Middle Report" on your 2/26 Council meeting.

As the Council item co-authored by Councilmembers Droste, Bartlett, Kesarwani, and Robinson points out, Berkeley's housing crisis today is a legacy of its past racist and exclusionary practices. I commend their effort to push Berkeley to confront its history in order to build a more inclusive future.

Our research at the Urban Displacement Project has established a direct connection between the neighborhood designations by the Home Owners Loan Corporation (HOLC) and today's patterns of residential displacement and exclusion.<sup>1</sup> Overall, 83% of today's gentrifying areas in the East Bay were rated as "hazardous" (red) or "definitely declining" (yellow) by the HOLC, and 75% of today's exclusionary areas in the East Bay were rated as "best" (green) or "still desirable" (blue) by HOLC. Thus, this historic legacy, compounded by Berkeley's early exclusionary zoning practices, continues to shape housing opportunity and perpetuate inequities today.

Should Berkeley elect to proceed to study the potential for zoning reform, it will be in good company. As the item authors note, Minneapolis and Seattle are already experimenting with ways to open up single-family zones, and Berkeley should be leading the charge as well.<sup>2</sup> Zoning reform has the potential not just to address the housing crisis but also to become a form of restorative or even transformative justice. There is no more important issue for planners to tackle today.

I urge you to vote yes on Item 22 to request a Missing Middle report. Please do not hesitate to call on me if any research on zoning impacts or alternatives is needed.

Sincerely,

Karen Chapple  
Professor, City and Regional Planning  
Carmel P. Friesen Chair in Urban Studies  
Faculty Director, The Urban Displacement Project

<sup>1</sup> See <http://www.urbandisplacement.org/redlining>

<sup>2</sup> Interestingly, leading the charge in Minneapolis is City Council President Lisa Bender, a graduate of UC-Berkeley's Department of City and Regional Planning.



## **ACTION CALENDAR**

March 25, 2021

**To:** Members of the City Council

**From:** Vice Mayor Lori Droste, Mayor Jesse Arreguín,  
Councilmember Rashi Kesarwani and Councilmember Terry Taplin

**Subject:** Initiation of Public Process and Zoning Concepts for 2023-2031 Housing  
Element Update

### **RECOMMENDATION**

Refer to the City Manager and Planning Commission to initiate an inclusive 18 month public process to develop the state-mandated update to the Housing Element of the Berkeley's General Plan and forward the following key principles and zoning concepts for consideration to achieve equitable and sustainable housing and compliance with new Regional Housing Needs Allocation (RHNA) requirements.

### **KEY PRINCIPLES**

Staff, consultants, and the Planning Commission should incorporate the following key principles (further explained in Background section) in their work developing an updated Housing Element and the necessary zoning changes and General Plan amendments:

- **Robust Community Engagement**
- **Equity – geographic equity, equity in housing types and access**
- **Affordability and Community Benefits**
- **Public Safety**
- **Transit Proximity and Reducing Vehicles Miles Traveled**
- **Design, Neighborhood Context, and Historic Preservation**
- **Tenant Protections, Anti-Displacement, and Anti-Speculation Provisions**

## **ZONING CONCEPTS**

Planning staff, consultants, and the Planning Commission should consider and evaluate the following zoning concepts as part of the Housing Element process:

- ***Prioritizing new housing in Priority Development Areas (PDAs)***  
The Planning Commission should prioritize housing development in areas designated as Priority Development Areas. Cities with PDAs have access to significant additional funding and plans and infrastructure improvements focused in those areas.
- ***Focus growth on transit and commercial corridors***  
Transit corridors are defined as corridors with an existing rail station or bus stop with peak service frequency of 15 minutes or less to accommodate the vast majority of new homes required pursuant to the RHNA allocation for the City of Berkeley.
- ***Equitable Neighborhood Scale Housing***
  - Enable two, three and four units on parcels in the R-1, R-1A, R-2 and R-2A and other building forms that are *similar in scale* to building forms currently allowable in these zones (except for areas with public safety impacts). Allow the subdivision of existing single family homes, standalone multi-family structures or multiple units on a single family parcel.
  - Incentivize Accessory Dwelling Units and Junior ADUs on single family parcels.
  - Ensure that neighborhood scale housing is in a manner that is similar in look and scale to existing residential housing forms in these zoning districts.
  - Permit a variety of building types (attached, detached, bungalow courts) to maximize flexibility, neighborhood scale and potential opportunities for home ownership (split lots and condominiums)
  - Maintain historic fabric and character of neighborhoods, including prohibitions on the demolition of historically designated properties, limitations on the demolition of building facades or replacements resulting in significant increase in building mass.

The City Council directs the City Manager to initiate this work immediately and the Planning Commission to incorporate zoning reform and updating the Housing Element into its 2021 and 2022 work plan. Staff and the commission, with consultants, should conduct extensive community outreach during the course of this update and examine how other cities, such as Minneapolis, Portland, Austin, San Diego, and Sacramento have prepared for and implemented similar missing middle housing.

**BACKGROUND**

California law requires that communities adequately plan to meet the housing needs for everyone in the community by adopting a Housing Element that “provides opportunities for (and does not unduly constrain) housing development.”<sup>1</sup> In 2021, the Association of Bay Area Governments (ABAG) approved the draft Regional Housing Needs Allocation (RHNA) for 2023-2031, which requires each community to plan and zone for a significant number of new homes at all income levels—from very low to above moderate— by January 2023.<sup>2</sup> In Berkeley, our community is required to plan for an additional 8,934 homes, a 201 percent increase over the City’s prior RHNA allocation eight years ago, as follows:

FIGURE 1: CITY OF BERKELEY’S DRAFT REGIONAL HOUSING NEEDS ALLOCATION					
	VERY LOW INCOME <50% of Area Median Income	LOW INCOME 50%-80% of Area Median Income	MODERATE INCOME 80%-120% of Area Median Income	ABOVE MODERATE INCOME >120% of Area Median Income	TOTAL
2014-2022	532	442	584	1401	2,959
2023-2031	2,446	1,408	1,416	3,664	8,934
Increase	+1,914	+966	+832	+2,263	+5,975

In response to regional state-mandated requirement to zone for 8,934 new homes at all income levels, the City Manager is requested to initiate the process of updating our Housing Element considering the Key Principles and Zoning Concepts presented in this item.

**KEY PRINCIPLES**

***Robust Community Engagement***

General Plan revisions or Housing Element updates are always accompanied by community engagement processes. However, by initiating the update process and community engagement *now*, the authors are seeking *greater* community input than has previously been required during Housing Element updates. In previous Housing Element cycles, community engagement didn’t begin until the fall prior to the Housing Element adoption deadline. Although Council is not required to adopt the new Housing Element until December of 2022, the authors want to spend additional months engaging the community due to the new large state-mandated housing unit allocations.

<sup>1</sup> Regional Housing Needs Allocation and Housing Elements. (2021). *Housing and Community Development*. <https://www.hcd.ca.gov/community-development/housing-element/index.shtml>

<sup>2</sup> The Regional Housing Needs Development is based on a California Department of Finance formula, available here: [https://abag.ca.gov/sites/default/files/rhnd\\_overview\\_0.pdf](https://abag.ca.gov/sites/default/files/rhnd_overview_0.pdf)

Staff and consultants should launch a robust community process with specific focus on affected neighborhoods and businesses. Per local and state Housing Element update protocol, staff and hired consultants will consult with the community in various forums. Suggested forums include advertised neighborhood meetings, surveys, design charrettes, and online forums to allow comments on Housing Element drafts and zoning proposals. This should be in addition to any legally required public hearings.

The Planning Commission will engage with the public with input from City commissions working on issues related to environment, housing, homelessness, disability, equity, and health as well as the Berkeley Rent Stabilization Board.

Staff and hired consultants will also reach out to a variety of stakeholder groups in person, via email and on social media, targeting community members and organizations, including but not limited to:

- Local neighborhood, environmental, student, housing and climate organizations;
- Residents in sensitive communities and communities of concern
- Groups who have historically been marginalized from planning processes (low-income residents, communities of color, working parents of young children, English-as-a-Second-Language residents, etc.); and
- Nonprofit and for-profit housing providers

***Equity – Geographic equity and equity in housing types and access***

Policies, opportunity site identification, and any necessary rezoning should ensure geographic equity in housing opportunities throughout the City of Berkeley, including allowing neighborhood scale housing in residential neighborhoods. The Housing Element should also prioritize a diversity of housing types including larger multi-unit structures, and smaller projects including Accessory Dwelling Units, Junior Accessory Dwelling Units, duplexes, triplexes, and fourplexes including subdivision of existing single family homes, attached and detached structures, and bungalow courts. In addition, the Housing Element should encourage alternative housing models including cooperatives, land trusts, and social housing concepts as well as home ownership models. Equity in access and affordability of housing should be a key priority in the development of policies and zoning.

***Affordability and Community Benefits***

The Planning Commission, staff and consultants should seek to maximize opportunities for the development and preservation of Below Market Rate (BMR) units in a manner which is financially feasible. Considerations may include, but is not limited to density bonuses, Affordable Housing Trust Fund fees, overlays, zoning or streamlining incentives. Additionally, the equitable residential zoning recommendations permits



affordable housing and other affordability models, like social housing, land trusts, or cooperatives, in many areas where it is currently barred.

Zoning changes should take into consideration the City Council's 2017 Resolution No. 68,133-N.S. requiring evaluation of land value recapture as part of any rezoning or area plan process along with financial feasibility, and consider the potential for additional community benefits including but not limited to: labor standards, affordable units/funding, streetscape improvements, and/or transportation benefits.

### **Public Safety**

With any zoning changes, public safety is a primary concern and Berkeley City Council passed a resolution reaffirming this.<sup>3</sup> While zoning reform should examine all residential and commercial districts, the following criteria should apply:

- That increased development should not be located in areas at elevated risk from natural hazards that would contribute to excessive risk of loss of life or injury based on objective geological, topographical, seismic, or wildland-urban interface fire safety standards.
- That increased development should not be located in areas with substandard emergency vehicular access, inadequate water pressure, or are exceptionally vulnerable to severe damage or destruction from fire and earthquake hazards based on objective geological, seismic, or wildland-urban interface fire safety standards.

Public safety is of paramount importance and is *already* currently embedded in our regulations that govern zoning changes, including a 'Disaster Preparedness and Safety' element within Berkeley's General Plan which was further updated with an appendix on Local Hazard Mitigation. Furthermore, several statewide resources –Fire Hazard Planning Technical Advisory and Cal Fire's Land Use Planning Program, regularly assist the city in planning efforts to properly mitigate fire hazards in the wildland-urban interface, as well as other potential disasters. Potential housing constraints and hazards are also routinely considered and planned for during Berkeley's Housing Element discussion. Additionally, Housing Element updates and major zoning revisions are subject to California's Environmental Quality Act (CEQA). CEQA analysis takes into account the environmental impact of proposed projects on a variety of factors, including wildfire, water quality, air quality, and hazards.

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<sup>3</sup> "Whereas public safety, in particular in the face of earthquakes, fire, and sea level rise, is of critical importance...Be it further resolved that City Council will pursue zoning reform that takes into account public safety in all parts of Berkeley." City of Berkeley (2021) *Declaring the Intent of the City Council to Allow Multi-Family Housing in Residential Neighborhoods Throughout Berkeley*,

***Transit Proximity and Reducing Vehicles Miles Traveled***

The Housing Element should prioritize policies and zoning requirements that locate new housing in close proximity to existing transit stations and transit lines. Locating housing close to public transit, along with parking minimums and Transportation Demand Management requirements, will incentivize people to take alternative modes of transportation and reduce vehicles miles traveled (VMT). Reducing Vehicle Miles Traveled and greenhouse gas emissions should be a key focus of Housing Element and RHNA compliance. This is critical to meet the City of Berkeley's Climate Action Plan and Climate Emergency goals.

***Design, Neighborhood Context, and Historic Preservation***

With any zoning changes, it is important to consider scale and adopt thoughtful development standards in the zoning code in order to manage maximum building height, building spacing, open space, and privacy, such as through form-based codes and to harmonize with the existing neighborhood. To the greatest extent possible, zoning changes should seek to connect with the existing look and feel of the area or corridor. Adaptive reuse and contextual addition should be incentivized.

The zoning changes should consider specifications to ensure appropriate transitions between a transit-rich area or corridor and an abutting residential street or between adjacent residential parcels by, for example, requiring a stepped-down height or other form-based design features to connect with the look and feel of residential streets.

Additionally, any development that is located within a historic district should be sensitive to surrounding historic resources and not demolish or damage a structure or place that is included in the State Historic Resources Inventory or National Register of Historic Places, or is legally designated or listed as a city or county landmark or historic property or district designated prior to Berkeley's 6th Cycle Housing Element adoption.

Additionally the Planning Commission, staff and consultants should consider a preference for addition and subdivision of units in existing properties over demolition to reduce waste, embodied energy and incentivize the creation of new rent controlled units.

***Tenant Protections, Anti-Displacement, and Anti-Speculation Provisions***

It is essential to ensure that existing tenants are protected and residents do not experience involuntary displacement. The following criteria are suggested:

- That the proposed housing development does not require demolition or elimination of housing that is subject to a recorded covenant, ordinance, or law that restricts rents to levels affordable to persons and families of moderate, low, or very low income, or which otherwise limits the rate at which rents may be increased or the circumstances under which a sitting tenant may be evicted (i.e. subsidized affordable units, inclusionary housing or units under Section 8 contract) or units subject to Berkeley's Rent Stabilization and Eviction for Good Cause Ordinance.
- That if the development would involve the demolition or renovation of any units with sitting tenants or which recently housed (within 5 years) tenants, expanded and permanent tenant protections consistent with Government Code 66300<sup>4</sup> would apply, including but not limited to increased relocation payments and right-to-return and relocation benefits that would also apply to tenants in rental units not covered by Berkeley's Rent Stabilization Ordinance.
- Projects involving the demolition of an existing single family home or multi-unit property to create a new project shall be subject to the city's Demolition Ordinance, BMC Chapter 23C.08.
- Consistent with the city's Demolition Ordinance prohibit demolition if the building was removed from the rental housing market under the Ellis Act during the preceding five years or there have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years.
- Require notice be provided to tenants of an application for demolition, elimination, subdivision, or consolidation of units.
- Prior to adoption of zoning or municipal code changes pursuant to this item, conduct a displacement risk analysis
- Consider other possible ways that zoning changes can be crafted a) to prevent and mitigate negative externalities which could affect low and moderate-income tenants and homeowners (e.g. predatory home buying) and b) increase housing security and equity for low-income homeowners

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<sup>4</sup>Skinner, N. (2019). The Housing Crisis Act of 2019. *California Legislative Information*, [https://leginfo.ca.gov/faces/codes\\_displayText.xhtml?lawCode=GOV&division=1.&title=7.&part=&chapter=12.&article=](https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=GOV&division=1.&title=7.&part=&chapter=12.&article=)

**ZONING CONCEPTS**

The Planning Commission, staff, and consultants should engage with relevant Boards and Commissions (e.g. Housing Advisory Commission, Transportation Commission, Landmarks Preservation Commission, Rent Stabilization Board), community stakeholders, and technical experts in the areas of financial feasibility, affordable housing, form-based zoning, and other relevant areas of expertise as needed to consider the following zoning concepts:

**Zoning Concept #1: Prioritizing Growth in PDAS and Transit Corridors**

Planning staff should prioritize growth in designated Priority Development Areas and also explore zoning transit and commercial corridors. Staff should conduct a capacity analysis to determine which additional corridors to include to achieve a compliant Housing Element. Transit corridors are defined as corridors with an existing rail station or bus stop with peak service frequency of 15 minutes or less<sup>5</sup> to accommodate the vast majority of new homes required pursuant to the RHNA allocation for the City of Berkeley.

***Priority Development Areas***

Adeline Priority Development Area	Shattuck Priority Development Area
Downtown Priority Development Area	Telegraph Priority Development Area
San Pablo Priority Development Area	University Priority Development Area

Specific considerations include:

- ***Prioritization of Housing Development in Priority Development Areas (PDAs)***

The Planning Commission should prioritize housing development in areas designated as Priority Development Areas. Cities with PDAs have access to significant additional funding and plans and infrastructure improvements focused in those areas.

- ***Zoning that is Contextual with the Existing Look and Feel of Areas and Corridors***

Any increases in zoning in Priority Development Areas and transit corridors over the existing baseline zoning envelope should take into account the average parcel size within the area or corridor, street width, underutilized lots, the current mix of residential and commercial uses, as well as the height and building form of existing residential and commercial buildings.

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<sup>5</sup> Using pre-pandemic 2019 AC Transit bus schedules

## **Zoning Concept #2: Equitable, Neighborhood Scale Housing**

Regulate R-1, R-1A, R-2, and R-2A residential zones similarly to allow for a greater degree of density per parcel in all four zones in a manner that is similar in look and scale to existing residential housing forms in these four zones. Newly allowable missing middle housing types can include but are not limited to: duplexes, triplexes, fourplexes and other building forms that are similar in scale to the building forms currently allowable across these zones.

Specific additional *considerations* for residential zoning should include:

- Treatment of Accessory Dwelling Unit(s) and/or Junior Accessory Dwelling Unit(s) in relation to the new development standards in order to ensure adequate lot size, setbacks, and lot coverage.
- Permitting a variety of building types (attached, detached, bungalow courts, etc.) to maximize flexibility and potential opportunities for homeownership (split lots and condominiums).<sup>6</sup>
- Possibility of existing homes/footprints/zoning envelopes to be divided into multiple units, potentially creating homes that are more affordable, saving and lightly modifying an older structure as part of internally dividing it into more than one unit, adhering to habitability and seismic safety standards.<sup>7</sup>
- Standards to preserve historic fabric and character of public street elevations such as limitations on demolition of building facades

## **CURRENT SITUATION AND ITS EFFECTS**

### ***Regional Housing Needs Allocation***

Since October 2019, a subcommittee of the Association of Bay Area Governments (ABAG), made up of elected officials and staff, has been working to draft the Regional Housing Needs Assessment (RHNA) which “calculates the number of housing units assigned to each city and county, and the formula also distributes each jurisdiction’s housing unit allocation.”<sup>8</sup> Identifying and fulfilling RHNA goals are required by state law. As noted by the chart below, Berkeley is responsible for zoning residential capacity for an additional 8,934 units, which is a 201% increase over the previous RHNA allocations (Figure 2).

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<sup>6</sup> Austin, TX allows ADUs to be sold separately.

<sup>7</sup> City of Portland, (2019). *About the Residential Infill Project*. <https://www.portland.gov/bps/rip/about-project>

<sup>8</sup> Regional Housing Needs Allocations Draft Methodology: San Francisco Bay Area 2023-2031. (2021). *Association of Bay Area Governments*. [https://abag.ca.gov/sites/default/files/documents/2021-02/ABAG\\_Draft\\_RHNA\\_Methodology\\_Report\\_2023-2031.pdf](https://abag.ca.gov/sites/default/files/documents/2021-02/ABAG_Draft_RHNA_Methodology_Report_2023-2031.pdf)

Figure 2

**Illustrative Allocations from the Draft RHNA Methodology**

This table shows jurisdiction allocations from the draft RHNA methodology. These are shown for illustrative purposes only.

Following HCD's review of the draft RHNA methodology, ABAG will use the state agency's feedback to develop a final methodology and issue draft allocations in Spring 2021. This will be followed by an appeal period before ABAG issues Final Allocations by the end of 2021. Jurisdiction Housing Elements will be due to HCD by January 2023.

Jurisdiction	VERY LOW INCOME (<50% of Area Median Income)	LOW INCOME (50-80% of Area Median Income)	MODERATE INCOME (80-120% of Area Median Income)	ABOVE MODERATE INCOME (>120% of Area Median Income)	TOTAL
<b>ALAMEDA COUNTY</b>					
Alameda	1,421	818	868	2,246	5,353
Albany	308	178	175	453	1,114
Berkeley	2,446	1,408	1,416	3,664	8,934
Dublin	1,085	625	560	1,449	3,719
Emeryville	451	259	308	797	1,815
Fremont	3,640	2,096	1,996	5,165	12,897
Hayward	1,075	617	817	2,115	4,624
Livermore	1,317	758	696	1,799	4,570
Newark	464	268	318	824	1,874
Oakland	6,511	3,750	4,457	11,533	26,251
Piedmont	163	94	92	238	587
Pleasanton	1,750	1,008	894	2,313	5,965
San Leandro	862	495	696	1,802	3,855
Unincorporated Alameda County	1,251	721	763	1,976	4,711
Union City	862	496	382	988	2,728

The ABAG Regional Housing Needs Allocations were based on a carefully crafted statutory objectives that assessed the entire region in order to:

- increase housing supply and mix of housing types,
- promote infill development and socioeconomic equity,
- promote intra-regional jobs-housing relationship,
- balance disproportionate household income distributions, and
- affirmatively further fair housing.<sup>9</sup>

**Objective 1: Increasing Housing Supply and Mix of Housing Types, Tenure and Affordability**

The nonpartisan California Legislative Analyst's Office examined California's high housing costs and outlined various causes, including a significant housing shortage in California's coastal regions. Beginning in 1980, California's housing construction was significantly slower than national and historic averages.<sup>10</sup> Even though there was a national housing boom in the mid 2000s, California's housing production was relatively

<sup>9</sup>Ibid.

<sup>10</sup> California's High Housing Costs, Causes and Consequences. (2015). *Legislative Analyst's Office*. <https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.aspx>

stagnant. Additionally, only 10% of Berkeley’s housing units were built after 1980.<sup>11</sup> There are many reasons why housing is expensive but a significant factor is scarcity.<sup>12</sup> Over the time of sluggish construction, California’s housing costs began to rise and surpass the rest of the country. Now, Berkeley’s home prices are \$1.4 million in comparison with \$269,000 nationally.<sup>13</sup> By contrast, Berkeley’s median household income was \$85,530 in 2019, just 25% higher than the national median of \$68,703.<sup>14</sup>

**Housing Construction Has Slowed in California's Coastal Metros**

*Annual Growth in Housing Units in Major Metros*

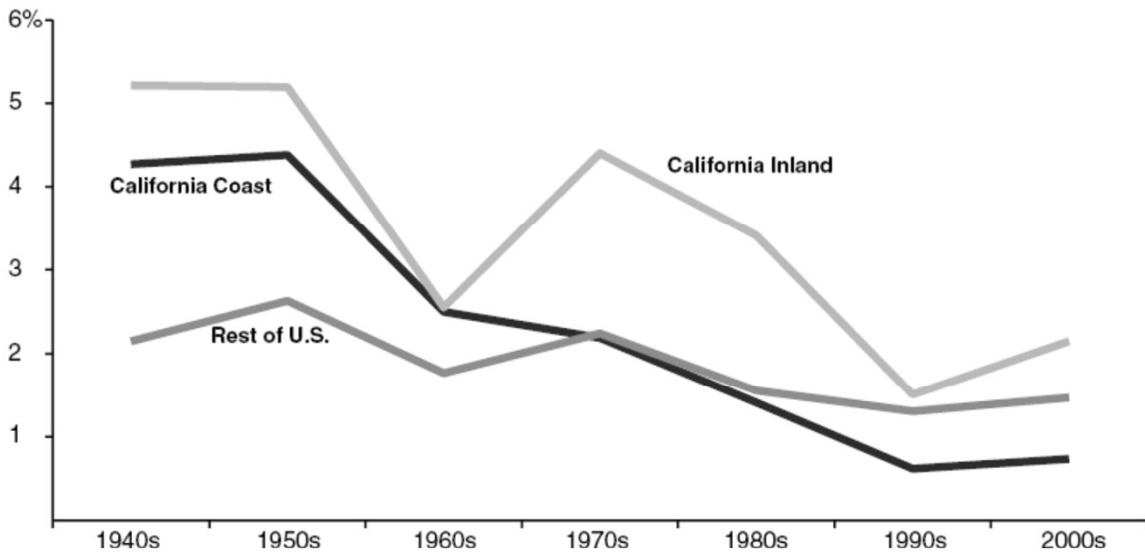


Figure 3: “California’s High Housing Costs, Causes and Consequences,” Legislative Analyst’s Office, 2015.

Due to high costs, Californians pay a larger percentage of their income on housing and the Bay Area has become the most expensive metro region in the United States.<sup>15</sup> Consequently, overcrowding is often a result of insufficient housing supply and a larger share of new below market rate (BMR) subsidized affordable homes are needed because fewer residents are able to afford exorbitant housing costs.

Unfortunately, affordable housing is expensive to create—one unit of new BMR affordable housing costs upwards of \$660,000 to build in the Bay Area and is just as

<sup>11</sup> 2015-2023 Berkeley Housing Element. (2014). *City of Berkeley*. [https://www.cityofberkeley.info/uploadedFiles/Planning\\_and\\_Development/Level\\_3\\_-\\_Commissions/Commission\\_for\\_Planning/2015-2023%20Berkeley%20Housing%20Element\\_FINAL.pdf](https://www.cityofberkeley.info/uploadedFiles/Planning_and_Development/Level_3_-_Commissions/Commission_for_Planning/2015-2023%20Berkeley%20Housing%20Element_FINAL.pdf)  
<sup>12</sup> California’s High Housing Costs, Causes and Consequences. (2015). *Legislative Analyst’s Office*. <https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.aspx>, p.12.  
<sup>13</sup> Home Values (2021) *Zillow*. <https://www.zillow.com/home-values/>  
<sup>14</sup> Income and Poverty in the United States: 2019. (2020). *U.S. Census Bureau*. <https://www.census.gov/library/publications/2020/demo/p60-270.html>  
<sup>15</sup> Family Budget Calculator (2018) *Economic Policy Institute*. <https://www.epi.org/resources/budget/>

difficult for individuals to access.<sup>16</sup> Waitlists for subsidized affordable housing are notoriously long and the likelihood of acquiring an affordable unit is small.<sup>17</sup> In order to fund the construction of those subsidized affordable units, cities require a certain percentage to be built in new projects or in-lieu affordable housing fees which can be leveraged for additional funding to create 100% non-profit affordable housing. Since funding Berkeley’s share of very low- and low-income housing would amount to 2.5 billion dollars,<sup>18</sup> jurisdictions are compelled to “zone at higher densities to accommodate their allocations of low- and very-low income units.”<sup>19</sup> Furthermore, due to Berkeley’s relatively higher cost of living, its regionally assigned housing needs allocation include a greater share of very low-income and low-income unit allocations.

In “Closing California’s Housing Gap,” the McKinsey Global Institute offered specific remedies to address housing insecurity facing residents of the state. Specifically, the authors recommend addressing housing scarcity by identifying hot spots for housing creation. The top three potential housing “hot spots” are housing ½ mile around transit hubs, underutilized urban lots, and adding additional units to single family homes.<sup>20</sup>

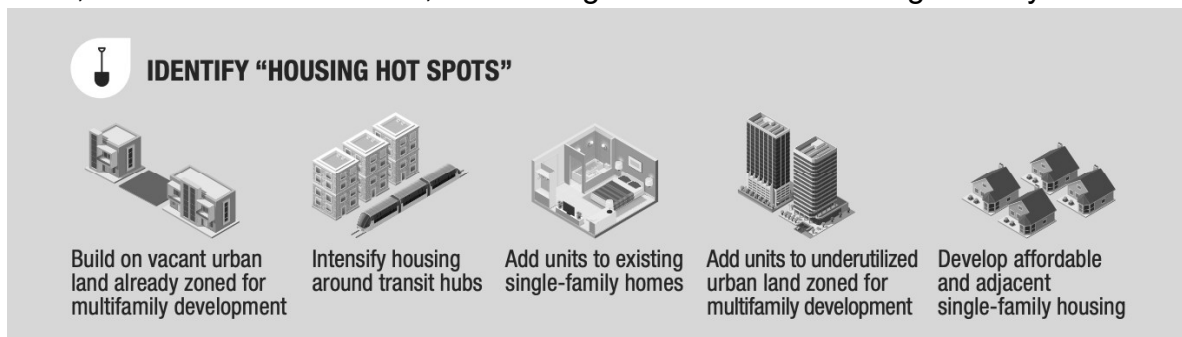


Figure 4: McKinsey Global Institute, 2016

<sup>16</sup> How Much Does it Cost to Construct One Unit of Below Market Housing in the Bay Area. (2019). *Bay Area Council Economic Group*. <http://www.bayareaeconomy.org/how-much-does-it-cost-to-produce-one-unit-of-below-market-housing-in-the-bay-area/#:~:text=In%202019%2C%20the%20average%20construction,of%20below%20market%20rate%20housing>.

<sup>17</sup> For example, in San Francisco, 6,580 people applied for 95 affordable apartments while in Berkeley, 700 applied for 42 affordable units. <https://www.nytimes.com/2018/05/12/upshot/these-95-apartments-promised-affordable-rent-in-san-francisco-then-6580-people-applied.html> and <https://www.berkeleyside.com/2018/01/18/berkeley-low-income-seniors-get-fresh-start-harper-crossing>

<sup>18</sup> 3,854 units x \$660,000

<sup>19</sup> Regional Housing Needs Allocations Draft Methodology: San Francisco Bay Area 2023-2031. (2021). *Association of Bay Area Governments*. [https://abag.ca.gov/sites/default/files/documents/2021-02/ABAG\\_Draft\\_RHNA\\_Methodology\\_Report\\_2023-2031.pdf](https://abag.ca.gov/sites/default/files/documents/2021-02/ABAG_Draft_RHNA_Methodology_Report_2023-2031.pdf)

<sup>20</sup> Woetzel, J., Mischke, J., Peloquin, S., and Weisfield, D. (2016, October). A Toolkit to Close California’s Housing Gap: 3.5 Million Homes by 2025. *McKinsey Global Institute*. <https://www.mckinsey.com/~media/McKinsey/Industries/Public%20and%20Social%20Sector/Our%20Insights/Closing%20Californias%20housing%20gap/Closing-Californias-housing-gap-Full-report.pdf>



**Objective 2: Promoting Infill Development and Socioeconomic Equity**

There is a growing demand for infill housing. *Plan Bay Area 2050* identifies Priority Development Areas (PDAs) as places with convenient public transit services and jobs which should accommodate more homes. Cities with PDAs have access to funding and plans and infrastructure improvements focused in those areas. According to a recent City of Berkeley report, the Metropolitan Transportation Commission has invested more than \$630 million in PDA projects that advance community goals, including new sidewalks and bike lanes, improved transit access, and development of housing, including affordable units.”<sup>21</sup> In addition, many competitive state transportation and housing funding programs now prioritize projects in places that implement regional plans such as PDAs.

ABAG’s draft methodology also promotes socioeconomic equity by increasing the types of housing options available in the Bay Area metropolitan region with special significance placed on creating homes affordable to lower-income residents in cities “with high resource areas to promote socioeconomic mobility.”<sup>22</sup>

Significant portions of the Bay Area are rent-burdened and Berkeley is no exception. The definition of rent-burdened means that a household pays over 30% for rent. Households are considered severely rent-burdened if they pay over 50% for rent. The Urban Displacement Project tracked the rising rent burdens by households in Alameda County and found that a majority of extremely low income households are severely rent-burdened while over 75% of low-income and extremely low income households are rent-burdened. Almost half of low-income households are rent-burdened while a significant portion of moderate-income households are rent-burdened as well.<sup>23</sup>

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<sup>21</sup> Priority Development Area Nomination (2019). *City of Berkeley*. [https://www.cityofberkeley.info/Clerk/City\\_Council/2019/11\\_Nov/Documents/2019-11-19\\_Item\\_06\\_Priority\\_Development\\_Area\\_Nomination.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2019/11_Nov/Documents/2019-11-19_Item_06_Priority_Development_Area_Nomination.aspx)

<sup>22</sup> Regional Housing Needs Allocations Draft Methodology: San Francisco Bay Area 2023-2031. (2021). *Association of Bay Area Governments*. [https://abag.ca.gov/sites/default/files/documents/2021-02/ABAG\\_Draft\\_RHNA\\_Methodology\\_Report\\_2023-2031.pdf](https://abag.ca.gov/sites/default/files/documents/2021-02/ABAG_Draft_RHNA_Methodology_Report_2023-2031.pdf)

<sup>23</sup> Rising Housing Costs and Resegregation in Alameda County (2018). *Urban Displacement Project*. [https://www.urbandisplacement.org/sites/default/files/images/alamedafinal9\\_18.pdf](https://www.urbandisplacement.org/sites/default/files/images/alamedafinal9_18.pdf)

**Figure 3.** Rising Rent Burdens by Household Income Category (2000-2015)

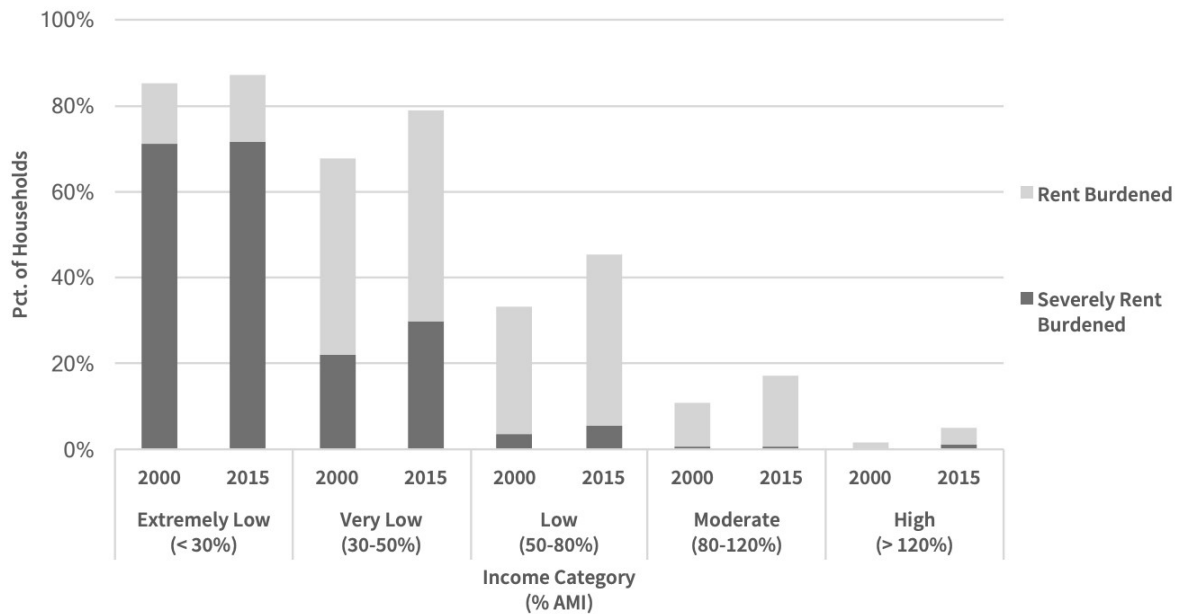


Figure 5: UC Berkeley's Urban Displacement Project, 2018

While the impact of high housing costs is clearly a racial and socioeconomic issue, the generational divide is apparent as well. Nearly half of households aged 18-34 are rent-burdened.<sup>24</sup> The scarcity of affordable housing near jobs and mounting student debt has led to the net worth for young households that is 20 percent lower than it was for baby boomers in 1989 and 40 percent lower than for Generation X families in 2001.<sup>25</sup> Homeownership is also increasingly out of reach for younger generations, as millennials are 8% less likely to own homes than baby boomers and Gen Xers. The Urban Institute conducted a comprehensive study of the barriers to millennial home ownership and provided a series of policy recommendations—changing land use and zoning restrictions, particularly in areas with inelastic housing supply, was one of the chief recommendations.<sup>26</sup>

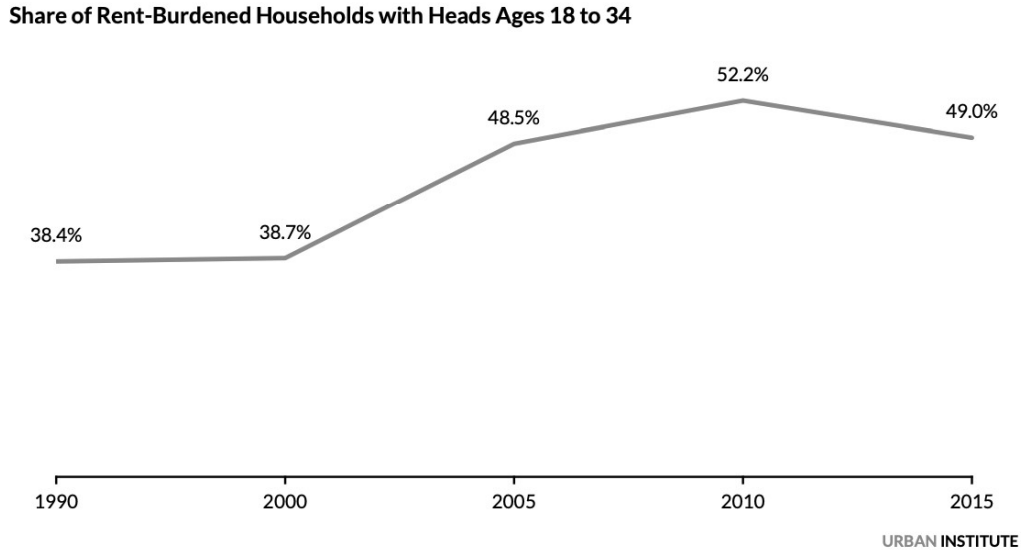
<sup>24</sup> Choi, J., Zhu, J., Goodman, L., Ganesh, B., and Stochak, S. (July 2018). Millennial Homeownership. *The Urban Institute*.

[https://www.urban.org/sites/default/files/publication/98729/millennial\\_homeownership.pdf](https://www.urban.org/sites/default/files/publication/98729/millennial_homeownership.pdf)

<sup>25</sup> Grabar, Henry. (2019). I Got Mine. *Slate Magazine*. <https://slate.com/business/2019/05/california-housing-crisis-boomer-gerontocracy.html>

<sup>26</sup> Choi, J., Zhu, J., Goodman, L., Ganesh, B., and Stochak, S. (July 2018). Millennial Homeownership. *The Urban Institute*.

[https://www.urban.org/sites/default/files/publication/98729/millennial\\_homeownership.pdf](https://www.urban.org/sites/default/files/publication/98729/millennial_homeownership.pdf)



Sources: The Decennial Census and the American Community Survey.

Figure 6: Urban Institute, 2018

**Objective 3: Promoting Intra-Regional Jobs-Housing Relationship**

This metric seeks to address the jobs-housing imbalance and increase the availability of low-income housing in communities where low-wage workers are employed. From 2010-2015, the San Francisco-East Bay Area created one home per 6.8 new jobs, leading to a significant jobs housing balance, which was the nation’s worst jobs-housing permit imbalance.<sup>27</sup> Due to the scarcity of affordable housing near jobs, workers are often forced to commute long distances to find cheaper housing further away from job opportunity centers. These super-commuters, those who travel more than 90 minutes to jobs, may even be underestimated in the Bay Area’s Regional Housing Needs Allocation allocations.<sup>28</sup>

Additionally, the Sustainable Communities and Climate Protection Act of 2008 (SB375) directed regions to institute strategies to reduce greenhouse gas emissions by proactively addressing jobs-to-housing imbalances. Aligning land use and transportation by encouraging transit-oriented development can reduce Vehicle Miles Travelled (VMT). SB375 was a direct result of Assembly Bill 32, the Global Warming Solutions Act of 2006 which required ambitious targets for greenhouse gas reductions.

<sup>27</sup> Salviati, C. (2017). Housing Shortage: Where Is the Undersupply of New Construction the Worst? *Apartment List*. <https://www.apartmentlist.com/research/housing-shortage-undersupply-of-new-construction>

<sup>28</sup> Elmendorf, C., Elkind, E. and Lens, M. (2021). Regional Housing Need in California: San Francisco Bay Area. *UCLA Lewis Center for Regional Policy Studies*, <https://www.lewis.ucla.edu/research/regional-housing-need-san-francisco-bay-area/>

**Objective 4: Balance Disproportionate Household Income Distributions**

This ABAG objective seeks to equalize and integrate the Bay Area with respect to income distributions in particular cities. According to the McKinsey Global Institute, virtually all extremely low-, very low- and low-income households cannot afford homes in California while approximately half of moderate income earners are unable to afford housing.<sup>29</sup>

Figure 7:

**Nearly 100 percent of low-income Californians cannot afford the local cost of housing; more than half of those with moderate incomes are squeezed**

Income level	Definition % of AMI	Total California households Million	Share of California households %	% unable to afford housing <sup>1</sup>	% extremely unable to afford housing <sup>2</sup>
Above moderate	>120	6.1	49	5	0
Moderate	80–120	1.7	13	53	0
Low	50–80	1.8	14	96	40
Very low	30–50	1.6	13	100	97
Extremely low	<30	1.4	11	100	100

<sup>1</sup> >30% of income required to cover local cost of housing.  
<sup>2</sup> >50% of income required to cover local cost of housing.

SOURCE: US Census Bureau; Zillow; McKinsey Global Institute analysis

In ABAG’s methodology, areas with high median home values in high opportunity areas were assigned a higher number of low-income affordable units while cities with higher poverty rates were assigned more moderate and higher income allocations. One factor in determining “access to opportunity” is the state’s Tax Credit Allocation Committee (TCAC) 2020 Opportunity Map methodology.<sup>30</sup>

<sup>29</sup> Using HUD’s definition of >30% of income to cover housing costs.

<sup>30</sup> Regional Housing Needs Allocations Draft Methodology: San Francisco Bay Area 2023-2031. (2021). *Association of Bay Area Governments*. [https://abag.ca.gov/sites/default/files/documents/2021-02/ABAG\\_Draft\\_RHNA\\_Methodology\\_Report\\_2023-2031.pdf](https://abag.ca.gov/sites/default/files/documents/2021-02/ABAG_Draft_RHNA_Methodology_Report_2023-2031.pdf)

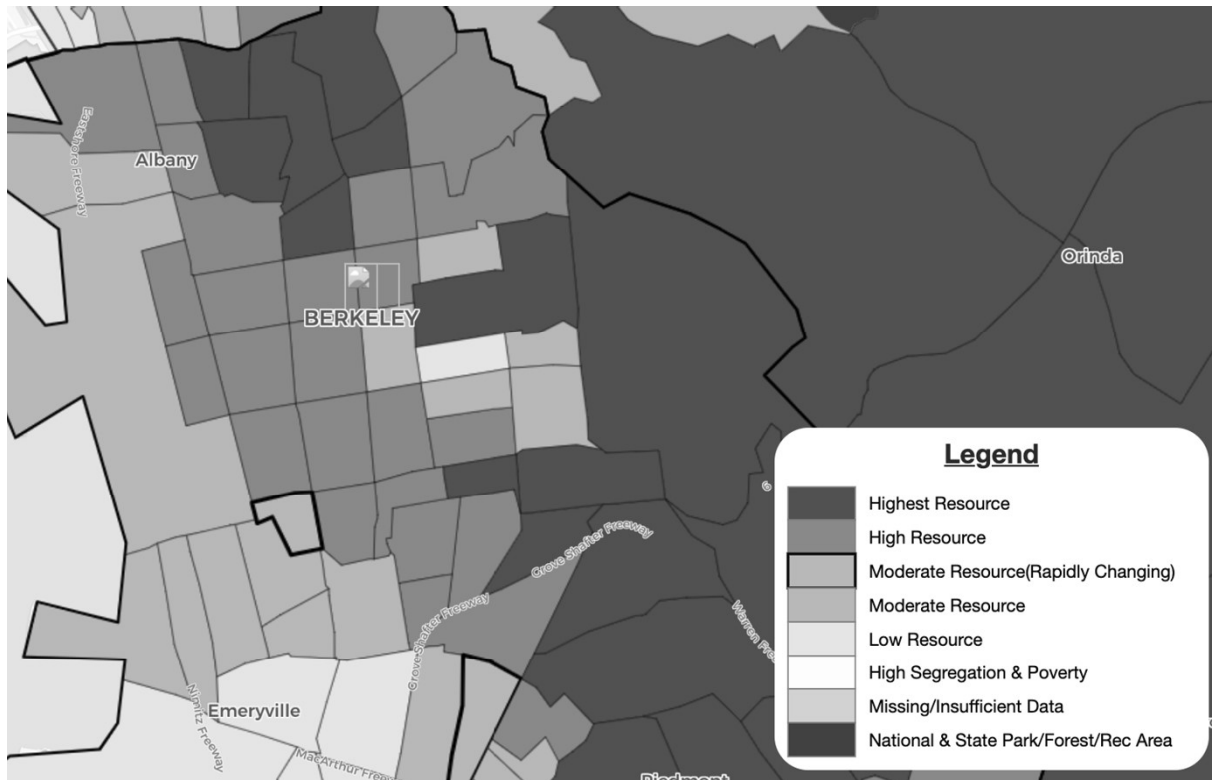


Figure 8: 2021 TCAC/HCD Opportunity Map

Furthermore, moderate income earners are often unable to access Below Market Rate (BMR) in addition to being unable to afford market rate units. As a result, this barbell-shaped delivery does not help address the need of middle income earners.

Naturally affordable housing options, like missing middle housing and accessory dwelling units often provide an avenue for lower-cost living. A Turner Center analysis of Accessory Dwelling Units (ADUs) found that 58% percent of owners rented their ADUs at below-market rates.<sup>31</sup> Since missing middle homes often are smaller housing types or offer economies of scale, they are frequently less expensive to owners and renters than single-family homes.

**Objective 5: Affirmatively Further Fair Housing**

This objective seeks to overcome patterns of segregation and foster inclusive communities.

*Affirmatively furthering fair housing, which means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.*

<sup>31</sup> Garcia, D. (2017). ADU Update: Early Lessons and Impacts of California’s State and Local Policy Changes. *Turner Center for Housing Innovation*. [https://turnercenter.berkeley.edu/wp-content/uploads/pdfs/ADU\\_Update\\_Brief\\_December\\_2017\\_.pdf](https://turnercenter.berkeley.edu/wp-content/uploads/pdfs/ADU_Update_Brief_December_2017_.pdf)

*Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.<sup>32</sup>*

Additionally, California cities have to proactively address and engage constituents on housing inequality and discrimination and embed these revisions into their General Plans after the passage of Assembly Bill 686 (Santiago).<sup>33</sup> Berkeley City Council unanimously passed a resolution on February 23, 2021 that acknowledged the role exclusionary zoning plays in our current land use patterns and pledged to eliminate it and allow multi-unit housing in Berkeley by 2022.<sup>34</sup>

In 1916, Berkeley pioneered single family zoning, which was “primarily designed to protect the developers and owners of large and expensive homes on the east side of the city, and the developers and owners of factories and railroad property on the west side.”<sup>35</sup> By petitioning for single family zoning, neighborhoods were able to formally prevent unwanted businesses, often operated by people of color, from locating nearby.

In the late 1930s, the federal government developed Home Owners’ Loan Corporation (HOLC) maps to guide and direct households’ access to credit in neighborhoods throughout the United States. By failing to guarantee mortgages and loans in neighborhoods deemed detrimental because they were home to communities of color, those neighborhoods suffered from disinvestment that has had lasting impact.<sup>36</sup> In a report titled “Housing Costs and Re-Segregation in Alameda County,” UC Berkeley’s Urban Displacement Project summarizes this connection: “Disinvestment in these

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<sup>32</sup> Regional Housing Needs Allocations Draft Methodology: San Francisco Bay Area 2023-2031. (2021). *Association of Bay Area Governments*. [https://abag.ca.gov/sites/default/files/documents/2021-02/ABAG\\_Draft\\_RHNA\\_Methodology\\_Report\\_2023-2031.pdf](https://abag.ca.gov/sites/default/files/documents/2021-02/ABAG_Draft_RHNA_Methodology_Report_2023-2031.pdf)

<sup>33</sup> Santiago, M. (2018). Assembly Bill 686. *California Legislative Information*. [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180AB686](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB686)

<sup>34</sup> Droste, L., Taplin, T., Robinson, R. and Bartlett, B (2021) Resolution to End Exclusionary Zoning in Berkeley. *Berkeley City Council*. [https://d3n8a8pro7vhm.cloudfront.net/berkeleydistrict8/pages/77/attachments/original/1616017869/Droste\\_Resolution\\_to\\_Eliminate\\_Single\\_Family\\_Zoning\\_Final.pdf?1616017869](https://d3n8a8pro7vhm.cloudfront.net/berkeleydistrict8/pages/77/attachments/original/1616017869/Droste_Resolution_to_Eliminate_Single_Family_Zoning_Final.pdf?1616017869)

<sup>35</sup> Weiss, Marc A. (1986). Urban Land Developers and the Origins of Zoning Laws: The Case of Berkeley *Berkeley Planning Journal* 3 (1). <https://escholarship.org/content/qt26b8d8zh/qt26b8d8zh.pdf?t=pog62p&v=lq>

<sup>36</sup> Has Oakland’s Fruitvale Neighborhood Ever Recovered from ‘Redlining? (February 2018). *KQED News - The California Report*, <https://www.kqed.org/news/11648307/has-oaklands-fruitvale-neighborhood-recovered-from-redlining>

neighborhoods during the 20th century paved the way for today’s processes of gentrification and displacement.”

The report elaborates on this further, noting that between 2000 and 2015, as housing prices rose, Berkeley lost thousands of low-income Black households and Berkeley saw increases of well over 30% in median rent paid (inflation-adjusted dollars).<sup>37</sup> An analysis of demographic changes over time comparing Berkeley’s Adeline Corridor (noted as the “study area” in the chart below), the City of Berkeley as a whole, and Alameda County, further portrays the continual loss of racial diversity:<sup>38</sup>

*Race and Ethnicity, 1990-2013*

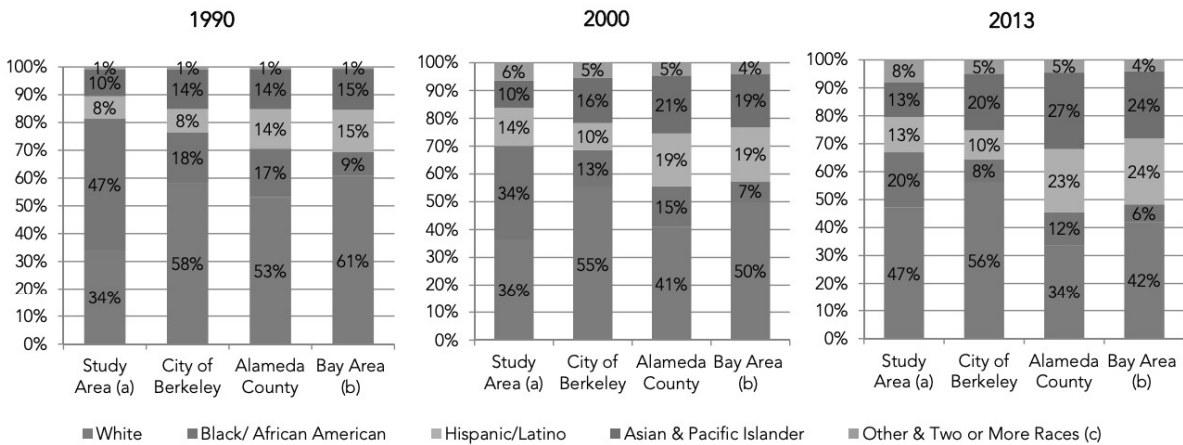


Figure 9, City of Berkeley, 2015

In a 2020 report on racial and income segregation throughout the Bay Area, UC Berkeley’s Othering and Belonging Institute summarizes that “the prevalence and over-abundance of this type of restrictive zoning is a direct impediment to the development of affordable housing and certain types of housing, including dense, multi-family housing, that make integration feasible and segregation more difficult to sustain. Without addressing this problem, an integration agenda is out of reach.”<sup>39</sup> While Berkeley is less exclusionary than other neighboring jurisdictions, Stephen Menendian, the study’s lead researcher and fair housing policy expert, has stated that “while zoning reform is not a silver bullet to remedying racial and economic exclusion, it is a necessary precondition

<sup>37</sup> Rising Housing Costs and Resegregation in Alameda County. (2018). *Urban Displacement Project*, [https://www.urbandisplacement.org/sites/default/files/images/alameda\\_final.pdf](https://www.urbandisplacement.org/sites/default/files/images/alameda_final.pdf)

<sup>38</sup> Adeline Corridor Specific Plan - Existing Conditions Report. (2015). *City of Berkeley*. [https://www.cityofberkeley.info/uploadedFiles/Planning\\_and\\_Development/Level\\_3\\_-\\_Land\\_Use\\_Division/3\\_DemogEcon.pdf](https://www.cityofberkeley.info/uploadedFiles/Planning_and_Development/Level_3_-_Land_Use_Division/3_DemogEcon.pdf)

<sup>39</sup> Menendian, S. et al. (2020). Racial Segregation in the San Francisco Bay Area, Part 5. *UC Berkeley Othering and Belonging Institute*. <https://belonging.berkeley.edu/racial-segregation-san-francisco-bay-area-part-5>

to address housing segregation, lack of affordable housing, new housing production, homelessness and housing precarity, climate, displacement and gentrification.”<sup>40</sup>

**FISCAL IMPACTS**

Refer \$500,000 to the budget process to assist in zoning revisions and ensure the City of Berkeley has a compliant Housing Element. Staff is encouraged to seek regional, state and federal grants to support this work.

**ENVIRONMENTAL SUSTAINABILITY**

Increasing the availability of homes is a core environmental issue and is part of the City of Berkeley’s Climate Action Plan. Climate researchers at University of California created a local government climate policy tool to measure policies based upon how well they reduce carbon footprints. In their analysis of 700 cities, these researchers determined that infill housing has the biggest impact.<sup>41</sup>

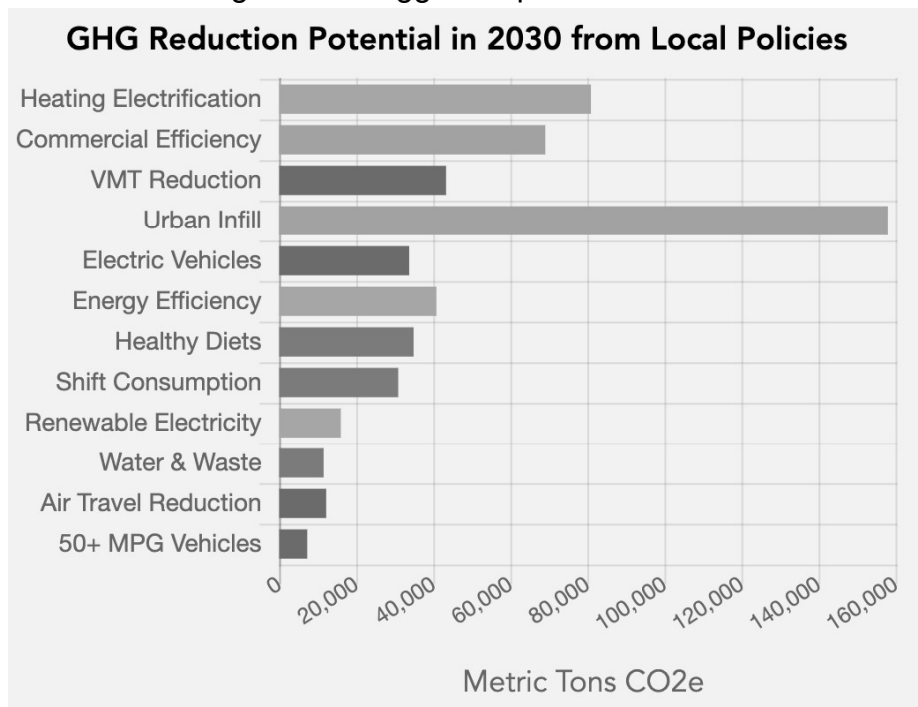


Figure 10: Cool Climate Network, 2018

The Environmental Protection Agency promotes the investment in infill housing near jobs and transit in order to reduce urban sprawl, greenhouse gas emissions, and traffic.<sup>42</sup> Currently, 59% of Berkeley’s greenhouse gas emissions come from

<sup>40</sup> Correspondence with Stephen Menendian, February 22, 2021.

<sup>41</sup> Jones, C, Wheeler, S, and Kammen, D. (2018) California Local Government Climate Policy Tool. *Cool Climate Network*. <https://coolclimate.berkeley.edu/ca-scenarios/index.html>

<sup>42</sup> Smart Growth and Economic Success: Investing in Infill Development. (2014). *Environmental Protection Agency, Office of Sustainable Communities*. <https://www.epa.gov/sites/production/files/2014-06/documents/developer-infill-paper-508b.pdf>



transportation. In order to protect environmental and agricultural resources, development patterns should be in high opportunity areas to reduce commute times. Accordingly, the Association of Bay Area Governments focus the centering homes in high opportunity areas with low vehicle miles travelled (VMT). Berkeley’s Climate Action Plan cites the need for density along transit corridors and adaptive reuse of historic buildings when feasible in order to meet our climate goals.<sup>43</sup>

## 2018 Greenhouse Gas Emissions Inventory

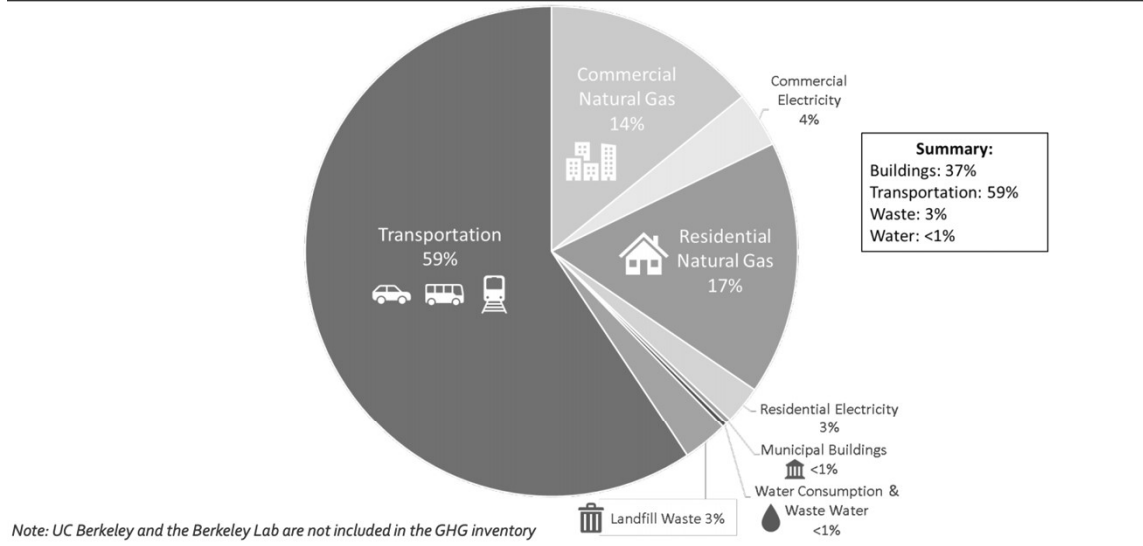


Figure 11: Climate Action Plan Update, 2020

### **CONTACT PERSON**

Vice Mayor Lori Droste  
510-981-7180  
[ldroste@cityofberkeley.info](mailto:ldroste@cityofberkeley.info)

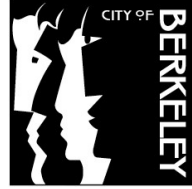
Mayor Jesse Arreguín  
510-981-7100  
[jarreguin@cityofberkeley.info](mailto:jarreguin@cityofberkeley.info)

Councilmember Rashi Kesarwani  
510-981-7110  
[rkesarwani@cityofberkeley.info](mailto:rkesarwani@cityofberkeley.info)

Councilmember Terry Taplin  
510-981-7120  
[ttaplin@cityofberkeley.in](mailto:ttaplin@cityofberkeley.in)

<sup>43</sup> Climate Action Plan. (2009). *City of Berkeley*.  
[https://www.cityofberkeley.info/uploadedFiles/Planning\\_and\\_Development/Level\\_3\\_-\\_Energy\\_and\\_Sustainable\\_Development/Berkeley%20Climate%20Action%20Plan.pdf](https://www.cityofberkeley.info/uploadedFiles/Planning_and_Development/Level_3_-_Energy_and_Sustainable_Development/Berkeley%20Climate%20Action%20Plan.pdf)

ITEM 10  
Attachment 6



**BERKELEY CITY COUNCIL AGENDA & RULES COMMITTEE  
SPECIAL MEETING**

**MONDAY, MARCH 29, 2021**

**2:00 P.M.**

Committee Members:

Mayor Jesse Arreguin, Councilmembers Sophie Hahn and Susan Wengraf

Alternate: Councilmember Lori Droste

**PUBLIC ADVISORY: THIS MEETING WILL BE CONDUCTED EXCLUSIVELY THROUGH VIDEOCONFERENCE AND TELECONFERENCE**

Pursuant to Section 3 of Executive Order N-29-20, issued by Governor Newsom on March 17, 2020, this meeting of the City Council Agenda & Rules Committee will be conducted exclusively through teleconference and Zoom videoconference. Please be advised that pursuant to the Executive Order, and to ensure the health and safety of the public by limiting human contact that could spread the COVID-19 virus, there will not be a physical meeting location available.

To access the meeting remotely using the internet: Join from a PC, Mac, iPad, iPhone, or Android device: Use URL <https://us02web.zoom.us/j/88348188573>. If you do not wish for your name to appear on the screen, then use the drop down menu and click on "rename" to rename yourself to be anonymous. To request to speak, use the "raise hand" icon on the screen.

To join by phone: Dial **1-669-900-9128 or 1-877-853-5257 (Toll Free)** and Enter Meeting ID: **883 4818 8573**. If you wish to comment during the public comment portion of the agenda, press \*9 and wait to be recognized by the Chair.

Written communications submitted by mail or e-mail to the Agenda & Rules Committee by 5:00 p.m. the Friday before the Committee meeting will be distributed to the members of the Committee in advance of the meeting and retained as part of the official record. City offices are currently closed and cannot accept written communications in person.

## AGENDA

### Roll Call

### Public Comment

1. **Amendments to the Berkeley Election Reform Act (BERA) to Regulate Officeholder Accounts and Proposed Changes to City Council Office Budget Expenditure and Reimbursement Policies (Resolution 67,992-N.S.)**  
*(Item contains supplemental material.)*  
**From: Fair Campaign Practices Commission**  
**Referred: January 11, 2021**  
**Due: June 1, 2021**  
**Recommendation:** Form a joint subcommittee of members of the City Council and members of the Fair Campaign Practices and Open Government Commissions to (1) prepare an ordinance amending the Berkeley Election Reform Act (BMC Chapter 2.12) to prohibit or regulate officeholder accounts and (2) prepare a change in City Council Expenditure and Reimbursement policies (Resolution 67,992-N.S.) to have donations to nonprofit organizations made in the name of the entire Berkeley City Council on behalf of the citizens of Berkeley rather than from individual Council members.  
**Financial Implications:** None  
 Contact: Sam Harvey, Commission Secretary, (510) 981-6950

### Items for Future Agendas

- **Discussion of items to be added to future agendas**

### Adjournment – Next Meeting Monday, April 5, 2021

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### Additional items may be added to the draft agenda per Council Rules of Procedure.

*Written communications addressed to the Agenda Committee and submitted to the City Clerk Department by 5:00 p.m. the Friday before the Committee meeting, will be distributed to the Committee prior to the meeting.*

*This meeting will be conducted in accordance with the Brown Act, Government Code Section 54953 and applicable Executive Orders as issued by the Governor that are currently in effect. Members of the City Council who are not members of the standing committee may attend a standing committee meeting even if it results in a quorum being present, provided that the non-members only act as observers and do not participate in the meeting. If only one member of the Council who is not a member of the committee is present for the meeting, the member may participate in the meeting because less than a quorum of the full Council is present. Any member of the public may attend this meeting. Questions regarding this matter may be addressed to Mark Numainville, City Clerk, (510) 981-6900.*

**COMMUNICATION ACCESS INFORMATION:**

To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at (510) 981-6418 (V) or (510) 981-6347 (TDD) at least three business days before the meeting date.

\* \* \*

I hereby certify that the agenda for this special meeting of the Berkeley City Council was posted at the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way, as well as on the City's website, on March 25, 2021.

A handwritten signature in black ink that reads "Mark Numainville".

Mark Numainville, City Clerk

**Communications**

*Communications submitted to City Council Policy Committees are on file in the City Clerk Department at 2180 Milvia Street, 1st Floor, Berkeley, CA, and are available upon request by contacting the City Clerk Department at (510) 981-6908 or [policycommittee@cityofberkeley.info](mailto:policycommittee@cityofberkeley.info).*

## MEMORANDUM

DATE: March 29, 2021

TO: Mayor Jesse Arreguin and Councilmembers Sophie Hahn and Susan Weingraf, Members of the Council Agenda and Rules Committee

FROM: Brad Smith, Patrick O'Donnell and Jedidiah Tsang, Delegation from the Fair Campaign Practices and Open Government Commissions

SUBJECT: Officeholder Accounts

Two main approaches have been considered regarding local Officeholder Accounts in California. The first, adopted by the City of San Jose, would prohibit these accounts. The second, adopted by the city of Oakland, would permit these accounts but regulate them.

For the reasons discussed below, the FCPC previously recommended that Officeholder Accounts be prohibited (Exhibit 3). However, the Council decided in February 2020 not to approve the FCPC's recommendation and referred the issue of Officeholder Accounts, along with concomitant issues related to D-13 accounts, to the Council's Agenda and Rules Committee.

The Fair Campaign Practices and Open Government Commissions have been studying Officeholder and D-13 Accounts since 2019. At its regular meeting on November 21, 2019, the FCPC voted without opposition to recommend amendments to the Berkeley Election Reform Act (BERA) that would prohibit Officeholder Accounts. The FCPC's recommendation was presented to the City Council at a February 4, 2020 special meeting. (A copy of the Report to Council is attached as Exhibit 3.)

Although the Council did not approve the FCPC's recommendations at that time and is considering alternatives that would allow for regulated Officeholder Accounts, a discussion in which the FCPC is glad to participate, the FCPC continues to believe that the prohibition of such accounts may ultimately be the preferable solution.

Briefly, our reasons for recommending prohibiting Officeholder Accounts are as follows:

1. Donations to an elected official's Officeholder Account may put that contributor in a more favorable light with the elected official than might otherwise be the case.
2. The City of San Jose has prohibited Officeholder Accounts (Section 12.06.810) since January 2008, providing as a rationale "to prevent the perception by the public that such contributions may give rise to undue or improper influence over elected officials" (Section 12.06.1100).

3. There are a number of permissible expenditures that could be made from Officeholder Accounts, now made from the Councilmember's discretionary council office budget (D-13 account), that put the elected official in a favorable light. Such expenditures include contributions to nonprofit organizations and newsletters mailed to constituents related to events, information or an officeholder's position on matters before the Council. We are not arguing these expenditures should be prohibited, only not paid for by funds collected in Officeholder Accounts.

4. As evidenced by contributions to nonprofit organizations from the Councilmember's D-13 accounts, which in total increased from \$50,938 in FY 2017 to \$113,526 in FY2018, enough funds are now available to Councilmembers to cover office expenses. It stretches the imagination to see donations to nonprofit organizations as an "office expense." If not enough funds are available for office expenses, the allocation to the D-13 accounts should be increased by the Council rather than relying on funds solicited from donors for an Officeholder Account.

5. Members of the FCPC are concerned about the amount of staff time required to track paperwork required for the administration of Officeholder Accounts and to assist in the enforcement process.

6. Members of the FCPC have discussed concerns that Councilmembers from wealthier areas of the City will have an easier time of raising funds for Officeholder Accounts.

7. Finally, we note the Officeholder Account has been rarely used in Berkeley, only once in the last several years that we are aware of.

While we look forward to a good, frank discussions and careful consideration of the alternative of permitting and regulating Officeholder Accounts, we respectfully request that Council members continue to consider that a prohibition of these accounts may, in the end, be the preferable approach.

Exhibit 1. Although the FCPC continues to support prohibition, it has prepared a draft version of an ordinance that would allow for regulated Officeholder Accounts. This draft identifies the issues that a regulated approach, if pursued, would need to address.

Exhibit 2. RESOLUTION NO. 67,992-N.S. (City Council Expenditures and Reimbursement Policies), referred to in the proposed language for changes to BERA to regulate Officeholder Accounts.

Exhibit 3. Language for amending the Berkeley Election Reform Act to prohibit Officeholder Accounts included in the FCPC submission to the City Council of February 4, 2020.

[DRAFT]

[Annotations are in RED. These include ISSUES for discussion and RECOMMENDATIONS of the three FCPC members participating in the joint meetings.]

ORDINANCE NO. -N.S.

AMENDING THE BERKELEY ELECTION REFORM ACT TO REGULATE  
OFFICEHOLDER ACCOUNTS

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

Section 1. That the Berkeley Municipal Code section 2.12.157 is added to read as follows:

**Section 2.12.157 Officeholder Account.**

“Officeholder Account” means any bank account maintained by an elected officer or by any person or committee on behalf of an elected officer, and whose funds are used for expenses associated with holding office and not for direct campaign purposes.

Section 2. That Article 9 of Chapter 2.12 of the Berkeley Municipal Code is added to read as follows

Article 9. Officeholder Accounts

**Section. 2.12.600 Regulation of Officeholder Accounts.**

A. The Mayor and Council members (the “officeholder” or “office holders”) shall each be permitted to establish one Officeholder Account, as defined in section 2.12.157.

ISSUE: What limitations should be placed on which public officials may be authorized to open Officeholder Accounts? Currently, Berkeley law is silent on this issue, as it is generally with respect to matters relating to Officeholder Accounts. Should the authorization to have Officeholder Accounts be limited to the Mayor and Council members?

State law applies to “elected state officeholder[s],” which includes the Governor, members of the state senate and assembly, and “other statewide elected official[s] other than the Governor.” (Gov. Code sec.85316(b)(1).)

RECOMMENDATION: Amendments to BERA authorizing Officeholder Accounts should be limited to the offices of Mayor and members of the City Council. Extending the authorization more broadly appears to other city officeholders at this time appears to be fiscally unnecessary and would impose significant burdens on the clerk’s office and the FCPC, which would be responsible for compliance with reporting requirements and the enforcement of the laws relating to Officeholder Accounts. If Berkeley’s experience with Officeholder Accounts proves to be positive, BERA could be amended in the future to expand the categories of elected officials authorized to establish Officeholder Accounts.

B. All donations deposited into an Officeholder Account shall be deemed to be held in trust solely for expenses associated with holding the office currently held by the elected city



officer. For the purpose of this section, “donation” means a gift, subscription, loan, advance, deposit, pledge, forgiveness of indebtedness, payment of a debt by a third party, contract, agreement, or promise of money or anything of value or other obligation, whether or not legally enforceable, in support of the office currently held by an elected official.

ISSUE: This draft uses the term “donation” throughout new section 2.12.600 instead of “contribution.” The use of the term “donation” in the proposed new section of the BERA reflects that funds made for Officeholder Accounts are different from campaign contributions; prevents making all the legal provisions applicable to campaign fund arguably applicable to officeholder donations; and avoids confusion in how the funds for this specific purpose are treated.

RECOMMENDATION: Include the new definition of “donation” in this section and use it – and related terms such as “donor” – consistently throughout, instead of using the term “contribution” in the new section on Officeholder Accounts.

C. Only a natural person who is a resident of the City may make a donation to an Officeholder Account.

ISSUE: To prevent undue influence in election campaigns, BERA currently contains limitations on who may make contributions to such campaigns. Proposed new paragraph C. would provide a similar limitation for donations to Officeholder Accounts. Specifically, like the limitation similar in the Berkeley Elections Reform Act (BERA sec. 2.12.167.), it would limit donations to Officeholder Accounts to natural persons residing in Berkeley.

There is a need for an express provision on this subject to be included in the proposed amendments. As currently written, neither of the BERA limitations relating to campaign contributions would apply by their own terms to donations to Officeholder Accounts nor would a cross-reference work.

The limitation in the Berkeley Election Reform Act to natural person residing in Berkeley is part of the definition of “qualifying contribution” to be eligible for public financing (BERA sec. 2.12.167); and so would not apply to Officeholder Accounts. The limitation in BERA section 2.12.440 prohibits “contributions” by any “proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, including non-profit corporations, or labor union”; but such contributions are prohibited only to “any candidate or committee (supporting or opposing any candidate)” and so would not apply to Officeholder Accounts. Cross-references to these sections would be confusing since by their own terms the referenced sections apply only to campaign contributions, and not to donations to Officeholder Accounts.

RECOMMENDATION: The proposed language that would expressly limit the persons eligible to make donations to “natural persons who are residents of the City of Berkeley” should be adopted. This will avoid undue influence by entities and persons outside Berkeley whose donations might improperly influence officeholders.

D. Donations to an Officeholder Account must be made by a separate check or other separate written instrument. Single donations may not be divided between the Officeholder Account and any candidate committee or other entity.

E. No donor shall make, and no elected officer shall receive from a donor, a donation or donations under this section totaling more than fifty [or two-hundred and fifty] dollars (\$50.00 [or \$250.00]) per person for the calendar year. "Donor" means a natural person, who is a resident of the City who makes a donation as defined in paragraph B.

ISSUE: Any regulated scheme for Officeholder Accounts should include a limit on the amount of that each individual is permitted to donate each year. The amount of the individual donations permitted each year is an issue that the Council and the FCPC need to decide, as well as the manner in which this limit is prescribed.

The California state statute on Officeholder Accounts provides explicit limits on the amount that a person is permitted to make for each officeholder per calendar year (e.g., \$3,000 for Senate and Assembly members and \$20,000 for Governor). (Gov. Code sec. 85316(b)(1)(A)-(B).)

The proposed draft amendments to the BERA, above, currently provide for a limit on donations in the range of \$50-\$250; the exact amount is an issue to be determined. Assuming the amount chosen is \$250, this amount could be explicitly placed in the ordinance, as the draft does. Alternatively, the amount might be specified by cross-reference to the maximum campaign amount permitted under BERA (e.g., by a cross-reference stating the amounts of any individual annual donation shall not exceed the amount of a campaign contribution permitted for a single election under BERA section 2.12.415).]

RECOMMENDATION: An explicit amount should be included in the new section of BERA on Officeholder Accounts. This will make the officeholder section—including the exact amount of the donation limit—clear and easy to understand. If in the future the campaign limits under BERA are increased and it makes sense also to increase the amount of the permitted annual individual donations to Officeholder Accounts to a similar (or other) amount, the permissible amount of the donations can be revised at that time.

F. For the office of Mayor, total donations to an Officeholder Account from all donors shall not exceed ten thousand dollars (\$10,000.00) in the aggregate per calendar year. For each member of the City Council, total donations to an Officeholder Account from all donors shall not exceed five thousand dollars (\$5,000.00) in the aggregate per calendar year.

ISSUE: Any regulated scheme for Officeholder Accounts should also include a limit on the total amount of donations from all donors that can be contributed to an officeholder each year. The amount of the total “cap” is an issue that the Council and the FCPC need to decide.

RECOMMENDATION: The total aggregate donations permitted to be made to specific officeholders in Berkeley should be proportional to their offices’ size, scope, and needs.

G. All donations received for, and expenditures made from, an Officeholder Account during a calendar year shall be reported at least annually on the date or dates prescribed by the FCPC and the report shall be made available to the public promptly thereafter. The FCPC shall adopt or designate a form or forms for the purpose of reporting the information about each elected officer’s Officeholder Account. The forms shall be filed electronically. The information on the form or forms shall be verified by the officeholder. The information that shall be included in the Officeholder Account report shall include the following:

1. The name of the officeholder and the office held;
2. The reporting period covered by the report;
3. A description of all receipts and expenditures.
4. The full name of each donor from whom a donation or donations has been received together with their street address, occupation, and the name of their employer, if any, or the principal place of business if they are self-employed; the amount which they donated; the date on which the each donation was received during the period covered by the report; and the cumulative amount that the donor donated. Loans received shall be set forth in a separate schedule and the foregoing information shall be stated with regard to each lender, together with the date and amount of the loan, and if the loan has been repaid, the date of the payment and by whom paid;
5. The full name and street address of each person to whom an expenditure or expenditures have been made, together with the amount of each separate expenditure to each person during the period covered by the report; a description of the purpose for which the expenditure was made; and the full name and street address of the person receiving the expenditure.
6. Under the heading "receipts," the total amount of donations received, and under the heading "expenditures," the total amount of expenditures made during the reporting period and cumulative amount of such totals;
7. The balance of cash and cash equivalents, including the amounts in the officeholder bank account, at the beginning and end of each period covered by the report.

ISSUE: The amended BERA provisions on Officeholder Accounts (Section 2.12.600.G.1-7, above), like those for campaign statements (see BERA sec. 2.12.200 A.-K.), would specify the information that must be disclosed. In new section 2.12.600, the provisions have been tailored to address donations, donors, donors' names and addresses, and so forth. Having these requirements specified in the ordinance will provide the legal foundation for the information requested about Officeholder Accounts on statements or forms. Also, having these requirements in the ordinance will make it possible for the City more easily to add or modify the information required on statements.

Subsection G. also provides that the FCPC shall adopt or designate a form or forms for the purpose of reporting the information about each elected officer's Officeholder Account. This would permit, but not require, the City to require officeholders to use California Form 460 or 470 to comply with the reporting requirements. This flexibility is important so that the City will be able to exercise its discretion as to what information needs to be reported about donations to, and expenditures from, Officeholder Accounts.

Finally, this section provides that the commission shall prescribe the time for filing the forms and that the forms shall be verified and filed electronically. These provisions will improve the effectiveness of the reporting on Officeholder Accounts.

RECOMMENDATION: Section G. should be adopted as proposed for the reasons stated above.

H. Expenditures from an Officeholder Account may be made only for lawful officeholder

purposes, and may not be used for any of the purposes prohibited in subsections J. and K. of this section.

ISSUE: This provision clarifies the intent of these amendments—that they authorize “true” Officeholder Accounts whose purpose is strictly limited to lawful officeholder purposes—and are not intended for any other broader purposes. This approach should help officeholders avoid the pitfalls of running afoul of campaign finance laws (as warned against in past opinions by the Berkeley City Attorney).

RECOMMENDATION: Section H. should be adopted as proposed for the reasons stated above.

I. Allowable expenses from an Officeholder Account are limited to expenses for travel, meals, and lodging incurred in connection with the following types of activities:

1. Communicating with representatives of local, regional, state and national governments on City policy positions;
2. Attending educational seminars designed to improve officials’ skill and information levels, provided that a brief report of such seminar shall be made by the Mayor and Council at a subsequent Council meeting;
3. Participating in local, regional, state and national organizations of cities whose activities affect the City’s interests;
4. Recognizing service to the City (for example, thanking a longtime employee with a retirement gift or celebration of normal value and cost);
5. Attending City events; or events sponsored by organizations or entities whose activities affect the City’s interests where the primary purpose of the event is to discuss subjects which relate to City business;
6. Implementing City approved policies; and
7. Meals where the primary purpose of the meal is to conduct City-related business (other than simply meeting constituents) as long as the amount of such meal does not exceed the daily maximum set forth in city, state, and federal standards for when meal reimbursement may be allowed.

J. Expenditures from an Officeholder Account shall not be used for any of the following types of activities:

- 1 The personal portion of any trip, such as where the official is on his/her own vacation activities;
2. Political contributions or attendance at political or charitable events;
3. Family expenses, including partner’s expenses when accompanying the official on agency-related business, as well as children or pet-related expenses;
4. Entertainment expenses, including theater, movies (either in-room or at the theater), sporting events (including gym, massage, and or golf related expenses); or other recreational and cultural events;
5. Alcoholic beverages;
6. Non-mileage personal automobile expenses, including repairs, traffic, citations, insurance or gasoline; and
7. Personal losses incurred while on City Business.

RECOMMENDATION: Sections I. and J. should be based on the list of Authorized Activities and Unauthorized Expenses in Sections IIA. and B. of the City Council Expenditure and Reimbursement Policies, Resolution No. 67,992—N.S. (“Policies”). The lists identified in the Policies are thoughtful, carefully prepared lists of which expenses are permissible or impermissible for officeholders under current law. The policies were unanimously adopted

by the Berkeley City Council on May 30, 2017. For the purposes of the proposed ordinance on Officeholder Accounts, the lists in the Policies are more appropriate for adoption than the lists developed by the Oakland City Council that appear to be based largely on state laws relating to on campaign expenditures.

I. Prohibitions:

1. No funds may be contributed or transferred from an Officeholder Account to any candidate or committee, as defined in sections 2.12.085 and 2.12.095 of this chapter, including to any committee in which the officeholder is a candidate. An officeholder may not redesignate his or her Officeholder Account as a committee for a future term of the same office or redesignate his or her Officeholder Account funds to be used as campaign funds by his or her committee for a future term of the same office.

2. No funds may be used from an Officeholder Account to pay any campaign expenses.

3. An officeholder may not transfer or contribute funds from any other committee he or she controls to the Officeholder Account.

ISSUE: These prohibitions make it clear that funds from an Officeholder Account may never be used for any type of campaign purposes. This is consistent with the ordinance's intent that Officeholder Accounts be strictly limited to officeholder purposes. The provision also makes it explicit that these strictly officeholder funds cannot be redesignated as funds for a future campaign.

L. Once an officeholder's term of office ends or she or he leaves that office, whichever is earlier, the former officeholder may use his or her Officeholder Account funds only for the following purposes:

1. Paying for legitimate, outstanding officeholder expenses.

2. Repaying contributions to donors to the Officeholder Accounts.

3. Making a donation to a bona fide charitable, educational, civic, religious or similar tax-exempt, non-profit organization if no substantial part of the proceeds will have a material financial effect on the officeholder, a member of his or her immediate family, or his or her committee treasurer.

M. The officeholder shall terminate the Officeholder Account within 90 days of the date that the officeholder's term of office ends or he or she leaves that office, whichever is earlier. The FCPC may for good cause extend the termination date. The disposition of all funds from the closed Officeholder Account, including the identification of all persons and entities that have received funds from the account and the amounts distributed, shall be described on a form prescribed by the FCPC. The officeholder must verify and file the form electronically no later the date prescribed for the termination of the Officeholder Account or an approved extension thereof.

N. All funds from a closed Officeholder Account not properly disposed of within the 90 day period prescribed above, or an approved extension thereof, shall be deposited in the City's General Fund.

ISSUES: Several issues exist with respect to the termination of Officeholder Accounts.

Draft sections 2.12.600 L.-N., above, propose procedures for terminating Officeholder Accounts in Berkeley based, in large part, on the state regulations on terminating Officeholder Accounts and committees (see Regulations of the Fair Political Practices Commission, Cal. Code of Reg., sec. 18531.63(g)).

The proposed provisions include the main options for disposing of Officeholder Account funds listed in the regulations (i.e., paying legitimate expenses, returning funds to donors, and making donations to bona fide organizations). However, the provision in the state regulations (sec. 18531.63(g)(2)) allowing for redesignation of Officeholder Accounts as accounts for a future campaign has been omitted because the Berkeley ordinance would authorize only strict Officeholder Accounts, prohibit the use of those accounts for any campaign purposes, and prohibit the redesignation of those accounts for use by campaign committees.

The proposed provisions, though, are incomplete: they do not address what should happen to an Officeholder Account if an incumbent wins re-election? Maybe it would be appropriate, under certain circumstances, for an incumbent who is elected to a new term of office, to redesignate a previous Officeholder Account for use in the officeholder's new term of office (as envisaged in the state regulations (see sec. 18531.63(g)(3)). Alternatively, as suggested at a previous joint meeting, perhaps it might be better for incumbents to terminate their Officeholder Accounts completely by a certain time before an election; and, if successful, they could open up a new Officeholder Account after their re-election.

The issues around the termination of Officeholder Accounts should be discussed by the joint committee and decisions made about what additions or modifications to the proposed ordinance are warranted.

**M. Violations of this article involving the unlawful use of Officeholder Accounts are subject to the procedures of, and the penalties in, Article 7 of this chapter.**

ISSUE: Are there any other issues on enforcement besides this general provision that need to be addressed?

\* \* \*

**OTHER ISSUES TO BE CONSIDERED:**

Some of the other issues not yet incorporated into the draft, but which merit consideration, include:

**1. Establishment of an Officeholder Committee.** State law requires an officeholder to create an Officeholder Controlled Committee if the officeholder receives more than \$2,000; and it provides guidance on the procedures for establishing such a committee, the committee's name, and other requirements. (Cal. Code of Reg., sec. 18531.63(c).) The Berkeley ordinance should probably include similar provisions.

**2. Return of Excess Contributions/Donations.** State law requires that an excess contribution to an officeholder be returned. (Gov. Code sec.85316(b)(3).) The regulations prescribe that the officeholder return the contribution within 14 days. (Cal. Code of Reg., sec. 18531.63(f).) The Berkeley ordinance should probably include similar provisions.

**3. Conforming Amendments to BERA.** A BERA section on the disposition of excess

## ITEM 11

campaign funds will probably need to be amended to be consistent with the new section 2.12.600 on Officeholder Accounts (see BERA sec. 2.12.245.C.). There may be other sections to BERA that require similar conforming changes.

## Officeholder Accounts – Draft for Discussion

This set of terms is presented as a basis to discuss a potential amendments to the Berkeley Election Reform Act (“BERA”) (BMC Ch. 2.12) to regulate the maintenance of officeholder accounts by elected officials in Berkeley. The proposal following elements are proposed for discussion by the Agenda Committee:

### General Requirements and Donation Limits

1. **Amend BERA to expressly permit the creation of officeholder accounts** by elected officials in Berkeley (Mayor, Council, and possibly others – TBD).
2. Officeholder accounts would **be subject to the same donor requirements as campaign accounts under BERA**:
  - a. May only receive donations from natural persons.
  - b. Per-person donation limit set the same as the contribution limit under BERA (currently \$250; if BERA changes, so would these limits – idea is for them to always be parallel)
  - c. Etc. – All requirements and limitations on who can give, how much, and how donations can be made would be “by reference” to BERA and thus identical over time.
3. Officeholder accounts would be **subject to the same registration and reporting regime as campaign accounts under BERA**. State law currently requires Officeholder Accounts to report using the same forms as campaign accounts; this proposal would also incorporate the reporting requirements of BERA – for example lower thresholds for initial reporting, lower amounts reported, etc.
4. **Cumulative annual donations, not including an officeholder’s own donations to their officeholder account would be capped at fixed amounts**. Suggest the amount be set at the approximate cost of producing and mailing one newsletter to constituents, although use of funds would not be limited to that use (see below). Amount should be indexed.
5. As with campaign accounts, **an officeholder’s own donations to their officeholder account would not be subject to any limits** but would be reported. An officeholder would also still be allowed to spend their own money on officeholder expenses without using an officeholder account. This is a First Amendment issue that can’t be infringed upon.

### Complete Separation from Campaign Accounts and Expenditures

1. An officeholder would **not be allowed to simultaneously maintain an officeholder account and a campaign account of any kind**:
  - a. A winning candidate taking office would be required to close their campaign account before opening an officeholder account.
  - b. An incumbent officeholder running for re-election or running for any other elected position – local, state, or federal – would be required to close their officeholder account before opening a campaign account.



[Proposal submitted by Councilmember Hahn at Agenda & Rules Committee March 29, 2021 Meeting]

2. An officeholder could not redesignate their officeholder account as a campaign account or use any officeholder funds to pay campaign expenses, ever.
3. Officeholder account funds could not be transferred to or from a candidate committee account for any elective office, local, state or federal.
4. "Extra" funds in an officeholder account could be used only for a legitimate officeholder expense, refunded to donors on a pro rata basis, or donated to the City's General Fund.

### **Impermissible and Permissible Uses of Officeholder Funds**

5. **Officeholder accounts would not be used for the following** expenditures:
  - a. Expenditures in connection with an election for any city, county, regional, state, or federal elective office or ballot measure
  - b. Campaign consulting, research, polling, and similar expenditures related to any campaign
  - c. Membership in athletic, social, fraternal, veteran, or religious organizations
  - d. Supplemental compensation for employees for performance of their ordinary duties
  - e. Any expenditure that would violate BERA or state law
6. **Officeholder accounts would only be used for the following** expenditures  
(list likely needs to be honed/expanded – this list reflects narrowing and adaptation of the Oakland ordinance, which is overly broad):
  - f. Office equipment, furnishings, and office supplies
  - g. Officeholder communications not related to a campaign, including but not limited to:
    - i. Mailings, newsletters, and other communications, whether by electronic or traditional media
    - ii. Websites and communications by all media including email, publication, and social media
    - iii. Email and address management
    - iv. Professional/consulting services and/or staff time related to communications.
  - h. Registration, travel, lodging, meals, and related expenses for attending an activity which supports a legislative or governmental purpose, including but not limited to:
    - i. Conferences, meetings, receptions, and other events
    - ii. Membership and participation in programs for civic, service, or professional organizations
    - iii. Educational, training, and professional development courses and events  
when incurred by the officeholder, their staff, or a community representative of the officeholder (but not a family member or an individual whose organization or who themselves is subject to registration under the City's Lobbyist Ordinance)
  - i. Fundraising for the officeholder account.

[Proposal submitted by Councilmember Hahn at Agenda & Rules Committee March 29, 2021 Meeting]

- j. Consulting, research, surveys, photographic or similar services not related to a campaign.
- k. Expressions of congratulations, appreciation or condolences to constituents or other persons the officeholder communicates/works with in their official capacity.
- l. Salaries or other compensation for consultants/staff working on officeholder activities, including for time spent by regular staff on officeholder activities separate/different from their ordinary duties.
- m. Tax liabilities and other official fees/costs incurred by the officeholder account.
- n. Accounting, legal, and other professional services provided to the officeholder account.
- o. Attorneys' fees and other costs related to administrative procedures, litigation, or other processes arising from the officeholder's activities, duties, or status as an elected officer.

### **Termination of Account on Leaving Office (+ Not running for any office)**

1. An officeholder would be **required to terminate their account within 90 days after leaving office.**
2. An officeholder **could not make expenditures after their last day in office** except to pay outstanding officeholder debts, repay donations on a pro rata basis, or donate remaining funds to the City's general fund.
3. Officeholders running for another office, local, state, or federal, would be required to close their officeholder account before opening a campaign account (see above).

### **Enforcement**

1. Violations of the officeholder account rules **would be subject to all enforcement provisions under BERA**, including enforcement by the Fair Campaign Practices Commission ("FCPC").