



Jesse Arreguín
City Councilmember, District 4

ACTION CALENDAR

February 9, 2016

(Continued from January 12, 2016)

To: Honorable Mayor and Members of the City Council

From: Councilmember Jesse Arreguín

Subject: Zoning Amendments to B.M.C. Chapter 23C.08 – Demolition and Dwelling Unit Controls

RECOMMENDATION:

Adopt first reading of an ordinance (as developed by staff) repealing and re-enacting Berkeley Municipal Code Sections 23C.08.020 and 23C.08.030, and adding Section 23C.08.035 to modify and clarify the conditions under which dwelling units may be demolished.

FISCAL IMPACTS OF RECOMMENDATION:

The proposed amendments will allow for clearer rules for demolition and clarify what conditions are required to mitigate the loss of affordability when controlled rental units are demolished, including payment of a fee or provision of below market rate units.

The new requirements may result in either additional revenue to the Housing Trust Fund to support affordable housing or below market rate units. The new requirements may cause a slight increase in staff time needed to manage below market rate (BMR) units.

CURRENT SITUATION AND ITS EFFECTS:

The issue of when a unit is “available for rent” has been a source of differing opinion between the city staff and Rent Board staff for many years. Several previous attempts were made to reconcile the differences.

The most recent attempt resulted in a City Council referral at the December 6, 2011 City Council meeting. The items in that referral included:

Demolition section:

a. The units are replaced with an equal or greater number of new units inclusive of the current number of existing affordable units; or

b. The current units will be relocated to a new location at the same affordability level; or

c. *The demolition is necessary to permit construction of special needs facilities such as, but not limited to, childcare centers and affordable housing developments that serve the greater good of the entire community and if special findings can be made.*

Demolition will not be allowed if the building has been removed from the rental market under the Ellis Act in the last five (5) years.

In addition, if the units in the building to be demolished are currently occupied, the following measures would apply:

d. *Appropriate notice to sitting tenants including being provided with their rights under the Rent Control Ordinance;*

e. *Assistance with moving expenses consistent with local ordinance;*

f. *Subsidization of the rent differential for a replacement unit until new units are ready for occupancy or for up to 4 years whichever comes sooner; and*

g. *First right of refusal to move into the new building and, if qualified, into the low income units.*

Demolition will not be allowed if there have been verified cases of harassment or illegal evictions in the prior twelve (12) months.

Elimination Section:

1. *A new combined unit will be owner occupied for no less than one year prior to and no less than two years after conversion, before another conversion could occur.*

2. *The currently existing number of units exceeds the density standard for the neighborhood.*

3. *The change is not detrimental to the existing neighborhood.*

4. *If the building is five units or less no more than one unit can be combined per building and the owner must agree to maintain Measure Y protections that apply in five unit buildings for tenants in the other units.*

On April 3, 2013, the Planning Commission forwarded a Demolition Ordinance proposal to the City Council. The Council considered that proposal on June 4, 2013. The Council requested two options be added to the original proposal, with those options considered by Council on July 2, 2013; neither the June 4 nor the July 2 versions were adopted.

The Council referred the two Demolition Ordinance versions to both the Housing Advisory Commission (HAC) and the Planning Commission for consideration. In August 2013 staff proposed a third alternative with language to address some of the legal concerns raised about the first two proposals and to add special exemptions for 100% affordable housing projects.

The HAC considered the three proposals on September 12, 2013. A summary, prepared by Housing staff for the HAC, of the three proposals is included in Attachment 2. During the time since the HAC meeting, the California Supreme Court published its decision in *Sterling Park, LLC v. City of Palo Alto*. Under the *Sterling Park* decision any ordinance that requires new residential developments (rental or for sale) to provide a specified percentage of units at below-market-rate (BMR) prices will be treated as if it were a monetary “exaction” or impact fee under the Mitigation Fee Act. This decision affects the demolition ordinance proposals which require provision of BMR units.

BACKGROUND:

On October 17, 2013, the California Supreme Court issued its decision in *Sterling Park LLC v. City of Palo Alto* holding that an inclusionary housing requirement applicable to new for-sale units was an “exaction” subject to the Mitigation Fee Act (Gov. Code sections 66000 et seq.) The Supreme Court explicitly disagreed with a number of published cases that had held that inclusionary housing requirements were not “exactions”, but rather were akin to zoning requirements like setbacks. Under the *Sterling Park* decision any ordinance that requires new residential developments (rental or for sale) to provide a specified percentage of units at below market-rate (BMR) prices will be treated as if it were a monetary “exaction” or impact fee under the Mitigation Fee Act.

In order to impose an “exaction” under the Mitigation Fee Act, local agencies must:

- Identify the purpose of the exaction;
- Identify the use to which the exaction is to be put;
- Determine how there is a reasonable relationship between the exaction and the type of development project on which it is imposed; and
- Determine how there is a reasonable relationship between the need for BMR housing units and the type of development project on which the exaction is imposed.

In addition, local agencies are required to demonstrate that there is a reasonable relationship between the amount of the exaction and the burden imposed by the development. (See Gov. Code § 66001(a) & (b).) This is the “nexus study” process the City used when it adopted the current affordable housing mitigation fee applicable to newly constructed rental units. (That fee is unaffected by the *Sterling Park* decision.)

Whether we treat the provision of BMR units in relation to demolition as an exaction on the new development or as mitigation for the loss of older affordable units, a nexus study is required.

The 2015 Affordable Housing Nexus Study includes a new section analyzing the impact of demolishing and replacing existing units and the demand for additional affordable housing. The analysis takes into consideration the impacts associated with the loss of rent-stabilized units or other units that are less expensive due to their age, and the units that replace them which are not subject to rent stabilization due to the new date of

construction. The methodology is similar to that previously discussed for new rental and condominium units, except that it analyzes the net difference between new households resulting from employment generated by the new replacement units and the households that are supported by an average rent-stabilized project. The study found the net increase is 26.02 households of which 12.64 have incomes at or less than 100% AMI. The resulting maximum impact fee that can then be supported for replacement units is \$41,768, with the equivalent percentage of affordable units being 12.64%. Staff is also developing a formula to mitigate the loss of affordability when an older, controlled unit is demolished and replaced with a new market-rate unit.

The proposed Demolition Ordinance proposal is compliant with *Sterling Park* because it only sets a procedure and defers actual setting of the value of the exaction to a later City Council resolution. Such a fee resolution would have to be supported by a nexus study specific to the issue of loss of affordability because of demolition of older units.

Adopting the proposed Demolition Ordinance revision will clarify the rules around demolishing existing rental units and the mitigation required. It will enable newer, denser housing and protect existing tenants and mitigate the loss of affordability.

The details on the amount of the replacement fee can be addressed by separate Council action.

RATIONALE FOR RECOMMENDATION:

The proposed language would reconcile an area of difference between the City staff and Rent Board staff allowing for a clearer process for demolition or elimination of rental units built prior to June 1980. The proposed changes would include protection for existing tenants of any unit proposed for demolition.

CONTACT PERSON:

Jesse Arreguín, Councilmember, District 4

(510) 981-7140

Attachments:

1. Ordinance
2. November 6, 2013 Planning Commission staff report, "Demolition Ordinance Council Referral"

ORDINANCE NO. #,###-N.S.

REPEALING AND REENACTING BERKELEY MUNICIPAL CODE SECTIONS 23C.08.020 AND 23C.08.030, AND ADDING SECTION 23C.08.035 REGULATING DEMOLITION AND ELIMINATION OF DWELLING UNITS

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

Section 1. That Section 23C.08.020 of the Berkeley Municipal Code is repealed and reenacted to read as follows:

23C.08.020 Elimination of Dwelling Units through Demolition

A. The Board may approve a Use Permit to demolish a building constructed prior to June 1980 on a property containing two or more dwelling units if it makes the findings required by the foregoing section, and either:

1. The building containing the units is hazardous or unusable and is infeasible to repair; or
2. The building containing the units will be moved to a different location within the City of Berkeley with no net loss of units and no change in the affordability levels of the units; or
3. The demolition is necessary to permit construction of special housing needs facilities such as, but not limited to, childcare centers and affordable housing developments that serve the greater good of the entire community; or
4. The demolition is necessary to permit construction approved pursuant to this Chapter of at least the same number of dwelling units.

When a project is approved under this paragraph, the project applicant shall be required to pay a fee for each unit demolished to mitigate the impact of the loss of affordable housing in the City of Berkeley. The amount of the fee shall be set by resolution of the City Council.

In the case of a unit with a tenant at the time of demolition, the provisions of Section 23C.08.020.C apply and the impact fee is due when that tenant vacates the unit.

In lieu of paying the impact fee, the project applicant may provide a designated unit in the new project at a below market rate in perpetuity. The affordability level of the below market rent shall be set by resolution of the City Council. The project applicant shall enter a regulatory agreement with the City of Berkeley to provide for the provision of any such in lieu units.

B. Notwithstanding Subdivision (A), demolition will not be allowed if the building was removed from the rental market under the Ellis Act during the preceding five (5) years or there have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years.

Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, who will provide an assessment of the evidence and all available documentation to the Zoning Adjustments Board, which shall determine whether harassment or threatened or actual illegal eviction occurred.

C. If the units in a building to be demolished under subdivision (A) are occupied, the following requirements shall apply.

1. Except as set forth in paragraph (2) below:

a. The applicant shall provide all sitting tenants notice of the application to demolish the building no later than the date it is submitted to the City, including notice of their rights under Chapter 13.76.

b. The applicant shall provide assistance with moving expenses equivalent to those set forth in Chapter 13.84.

c. The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy. Funding for the rent differential shall be guaranteed in a manner approved by the City.

2. An applicant under this Chapter who proposes to construct a 100% affordable housing project shall provide relocation benefits that conform to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended and the California Relocation Act (Government Code sections 7260 et seq.).

3. Except as set forth in paragraph (4) below, sitting tenants who are displaced as a result of demolition shall be provided the right of refusal to move into the new building; and tenants of units that are demolished shall have the right of first refusal to rent new below-market rate units designated to replace the units that were demolished, at the rent that would have applied if they had remained in place, as long as their tenancy continues. Income restrictions shall not apply to displaced tenants.

4. In cases where an applicant under this Chapter has constructed a 100% affordable housing project, sitting tenants who are displaced as a result of demolition and who desire to return to the newly constructed building will be granted a right of first refusal subject to their ability to meet income qualifications and other applicable eligibility requirements when the new units are ready for occupancy.

5. The provisions of this section shall not apply to tenants who move in after the application for demolition is submitted to the City provided that the owner informs each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.

D. Notwithstanding anything in Title 23 to the contrary, but subject to any applicable requirements of the Landmarks Preservation Ordinance (BMC Chapter 3.24), accessory buildings of any size, including, but not limited to, garages, carports and sheds, but not including any structure containing a lawfully established dwelling unit, which serves and is located on the same lot as a lawful residential use, may be demolished by right.

Section 2. That Section 23C.08.030 of the Berkeley Municipal Code is repealed and reenacted to read as follows:

23C.08.030 Elimination of Dwelling Units and Accessory Dwelling Units through Conversion and Change of Use

A. The Board may approve a Use Permit for the elimination of a dwelling unit through combination with another dwelling unit for purposes of occupancy by a single household if it finds that:

1. The existing number of dwelling units exceeds the number permitted by the maximum residential density applicable to the District where the subject building is located; and
2. One of the affected dwelling units has been occupied by the applicant's household as its principle place of residence for no less than two years prior to the date of the application and none of the affected units is currently occupied by a tenant.

B. Notwithstanding Subdivision (A), demolition will not be allowed if the building was removed from the rental market under the Ellis Act during the preceding five (5) years or there have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, who will provide an assessment of the evidence and all available documentation to the Zoning Officer or Zoning Adjustments Board, which shall determine whether harassment or threatened or actual illegal eviction occurred.

C. In the event a unit eliminated pursuant to subdivision (A) is not occupied by the applicant's household for at least two consecutive years from the date of elimination, the affected unit must be restored to separate status. This requirement shall be implemented by a condition of approval and a notice of limitation on the property, acceptable to the City, which provides that if the owner's household does not occupy the unit for at least two years from the date of elimination the affected units must either be restored as separate dwelling units and the vacant unit(s) offered for rent within six months or the

owner must pay a fee of \$75,000 in 2013 dollars, adjusted in May of each year according to the Consumer Price Index for the San Francisco Bay Area, which shall be deposited into the City's Housing Trust Fund. The City may exempt an applicant from the two year residency requirement in the event of an unforeseeable life change that requires relocation.

D. In cases where elimination of a dwelling unit reduces the number of units in a building to four (4), the applicant shall record a notice of limitation against the subject property that the limitation on eviction of tenants under Section 13.76.130.A.9.i(iii) shall continue to apply until such time as the building is demolished or sufficient units are added or restored such that the building contains at least five (5) units.

E. Alternatively, the Zoning Officer may issue an AUP for a conversion which eliminates a dwelling unit if he/she finds that the conversion of the building will restore or brings the building closer to the original number of dwelling units that was present at the time it was first constructed, provided the conversion meets the requirements of A.2., B. C. and D. of this section.

F. The Board may approve a Use Permit for a change of use to a community care or a child care facility which eliminates a dwelling unit if it finds that such use is in conformance with the regulations of the District in which it is located.

G. The Board may approve a Use Permit for the elimination of a dwelling unit through combination with another dwelling unit for the purpose of providing private bathrooms, kitchenettes, accessibility upgrades, and/or seismic safety upgrades to Single-Residential Occupancy (SRO) Rooms in residential developments undergoing a publicly-funded rehabilitation. H. Notwithstanding the general Use Permit requirement under 23C.08.010, a lawfully established accessory dwelling unit that is not a controlled rental unit may be eliminated subject to the issuance of a Zoning Certificate when the re-conversion restores the original single family use of the main building or lot, provided that no tenant is evicted.

Section 3. That Section 23C.08.035 is added to the Berkeley Municipal Code to read as follows:

23C.08.035 Private Right of Action

Any affected tenant may bring a private action for injunctive and/or compensatory relief against any applicant and/or owner to prevent or remedy a violation of Sections 23C.08.020 or 23C.08.030. In any such action a prevailing plaintiff may recover reasonable attorney's fees.

Section 4. In adopting these amendments, it is the City Council's intention to permit demolition of existing dwelling units constructed prior to June 1980 only if the impacts of doing so are mitigated as set forth in this ordinance. Accordingly: (1) if any provision of this ordinance is determined to be invalid by a court of competent jurisdiction the entire ordinance shall be deemed automatically repealed, null and void and no force or effect;

and (2) if a use permit or administrative use permit condition implementing any of the mitigations required by this ordinance is determined to be invalid or unenforceable by a court of competent jurisdiction, then the entire use permit or administrative use permit which it conditions shall be deemed to automatically invalid as a consequence, and shall be null and void and of no further force or effect.

Section 5. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of Old City Hall, 2134 Martin Luther King Jr. Way. Within fifteen days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.



Planning and Development Department
Land Use Planning Division

STAFF REPORT

DATE: November 6, 2013
TO: Members of the Planning Commission
FROM: Eric Angstadt, Director, Planning & Development
SUBJECT: Demolition Ordinance Council Referral

Recommendation

That Planning Commission direct staff to set a Public Hearing to consider revised Demolition Ordinance language consistent with the California Supreme Court decision in *Sterling Park, LLC v. City of Palo Alto*.

Summary

Earlier this year the Planning Commission forwarded a demolition ordinance proposal to the City Council. The Council considered that proposal on June 4, 2013. The Council requested two options be added to the original proposal, with those options considered by Council on July 2, 2013; neither the June 4 nor the July 2 versions were adopted. The Council referred the two Demolition Ordinance versions to both the Housing Advisory Commission (HAC) and the Planning Commission for consideration. In August staff proposed a third alternative with language to address some of the legal concerns raised about the first two proposals and to add special exemptions for 100% affordable housing projects.

The HAC considered the three proposals on September 12, 2013. A summary, prepared by Housing staff for the HAC, of the three proposals is included as Attachment 1. The three proposals are included, with the August 30 version in both redline and clean, as Attachments 2-5. The minutes from the HAC meeting are Attachment 6.

During the time since the HAC meeting, the California Supreme Court published its decision in *Sterling Park, LLC v. City of Palo Alto*. Under the *Sterling Park* decision any ordinance that requires new residential developments (rental *or* for sale) to provide a specified percentage of units at below-market-rate (BMR) prices will be treated as if it were a monetary “exaction” or impact fee under the Mitigation Fee Act. This decision affects the demolition ordinance proposals which require provision of BMR units.

Background

On October 17, 2013, the California Supreme Court issued its decision in *Sterling Park LLC v. City of Palo Alto* holding that an inclusionary housing requirement applicable to new for-sale units was an “exaction” subject to the Mitigation Fee Act (Gov. Code sections 66000 *et seq.*) The Supreme Court explicitly disagreed with a number of published cases that had held that inclusionary housing requirements were not “exactions”, but rather were akin to zoning requirements like setbacks. Probably related to this, on September 11, 2013, the Supreme Court granted review in a case that had upheld San Jose’s inclusionary requirements for ownership housing against a similar challenge.

Under the *Sterling Park* decision any ordinance that requires new residential developments (rental *or* for sale) to provide a specified percentage of units at below-market-rate (BMR) prices will be treated as if it were a monetary “exaction” or impact fee under the Mitigation Fee Act.

In order to impose an “exaction” under the Mitigation Fee Act, local agencies must:

- Identify the purpose of the exaction;
- Identify the use to which the exaction is to be put;
- Determine how there is a reasonable relationship between the exaction and the type of development project on which it is imposed; and
- Determine how there is a reasonable relationship between the need for BMR housing units and the type of development project on which the exaction is imposed.

In addition, local agencies are required to demonstrate that there is a reasonable relationship between the amount of the exaction and the burden imposed by the development. (See Gov. Code § 66001(a) & (b).)

This is the “nexus study” process the City used when it adopted the current affordable housing mitigation fee applicable to newly constructed rental units. (That fee is unaffected by the *Sterling Park* decision.)

Discussion

Whether we treat the provision of BMR units in relation to demolition as an exaction on the new development or as mitigation for the loss of older affordable units, a nexus study will be required. The nexus study will also have to look at the proportionality of the exaction. This is used to set the upper limit on the exaction that can be supported as reasonable under the requirements of the Government Code.

Unfortunately, the June 4 and July 2 Demolition Ordinance proposals do not follow the procedures for setting and justifying exactions. The August 30 proposal is compliant with *Sterling Park* because it only sets a procedure and defers actual setting of the value of the exaction to a later City Council resolution. Such a fee resolution would

have to be supported by a nexus study specific to the issue of loss of affordability because of demolition of older units.

Conclusion and Next Steps

Recent court decisions have altered the landscape for local jurisdictions requiring below market rate units as part of the development process. In order to continue providing affordable housing resources as part of a development, nexus studies will now be required to support any exaction whether by fee or by provision of BMR units.

Staff recommends that a Public Hearing be set to consider demolition ordinance text that will be compliant with the Court decision and recommend changes to the City Council.

Attachments:

1. Summary Memo
2. June 4 proposal
3. July 2 proposal
4. August 30 proposal redline against June 4
5. August 30 proposal clean
6. September 12 HAC minutes

To: City of Berkeley Housing Advisory Commission
From: Kate Hartley, Senior Community Development Project Coordinator, HHCS
Date: August 30, 2013
Re: City Council's Request for HAC Recommendations Regarding Proposed
Amendments to the City of Berkeley Demolition Ordinance

A. June 11, 2013 Council Hearing: On June 11, the City Council considered repealing and reenacting BMC Chapters 23C.08.020 and 23C.08.030 and adding 23C.08.035 to modify and clarify the conditions under which dwellings can be demolished. This memo is provided for your convenience and to facilitate discussion on the issues. A table comparing competing amendment proposals is also provided at the conclusion of the narrative for ease of review.

The proposed changes to Section 23C.08.020 include (in summary form):

- 1) Construction of special needs housing, child care, or other community-benefitting uses as a demo-enabling condition.
- 2) Modifications to the existing demo-enabling condition that units must be replaced 1:1, as follows:
 - a) Designated BMR units are equal in number and size to demolished units;
 - b) BMR replacement units are in addition to other BMR units required; and
 - c) BMR units' construction must be guaranteed with a completion bond.
- 3) BMR rental replacement units must be permanently set at a 60% affordability level; for-sale units must be permanently set at 70% affordability.
- 4) Revised protections for sitting tenants:
 - a) Notice;
 - b) Relocation assistance (moving expenses and rent differential coverage);
 - c) Right of first refusal (ROFR) to move into the new building; and
 - d) ROFR to rent new BMR replacement units at the rents that would have applied had the tenants remained in place, without consideration of the tenants' incomes.

The reenacted Section 23C.08.030 restricted conditions under which a dwelling unit can be eliminated through combination with another dwelling unit.

And newly added Section 23C.08.035 enables a private right of action for affected tenants.

Please see the attached 6/11/13 Council information for further details.

Following its discussion, Council directed staff to make further amendments with respect to:

- 1) Imposition of a fee to mitigate the cost of lost affordable units;
- 2) Provision of deed-restricted replacement units at certain established affordability levels; and
- 3) Protections for sitting tenants.

B. July 2, 2013 Council Hearing

Staff submitted proposed revisions to Council on July 2, which included, among other things, that for buildings replaced with the same number of units,

- 1) Developers should pay an impact fee; **or**
- 2) Each demolished unit should be replaced with a unit restricted to the last known rent (or, if the rent was unknown, a 50% AMI rent); **and**
- 3) Replacement units would be subject to vacancy de-control pursuant to Costa-Hawkins Rental Housing Act.

Please see the attached materials from the July 2 hearing for additional details.

Council discussed the proposed amendments and referred the original ordinance and the revised ordinance to the Housing Advisory Commission and the Planning Commission for consideration.

C. Further Considerations

- 1) 100% Affordable Developments. To protect the City's goals regarding development of housing for low-income tenants, HHCS staff has proposed that if demo is required for a 100% affordable development, developers must provide federal and state relocation benefits to sitting tenants, who will then be given a ROFR to the new units only if they meet income and other qualifications attached to the new units when they are ready for leasing.
- 2) SRO Housing. To protect the City's goal of preserving decent, safe SRO housing, HHCS staff has proposed allowing demolition of units by merger with other units in publicly-funded SRO rehabilitations that improve the habitability and safety of the units (e.g. new bathrooms in units, seismic safety, ADA upgrades).
- 3) Mitigation Fee. It appears that any fee levied to mitigate the cost of affordability loss must be clearly separate from the City's existing Affordable Housing Mitigation Fee, and be based upon its own studied calculation.

4) BMR Unit Affordability Levels. Discussions to date on the appropriate rent-setting for new BMR units include 50%, 60%, and 70% AMI.

4) Costa-Hawkins. Whether or not permanent deed restrictions for BMR units built in lieu of paying a mitigation fee violate Costa-Hawkins likely requires further analysis.

Please see attached an updated ordinance responsive to the above issues.

D. Comparison Chart: Please find a chart comparing competing provisions of the three Ordinance Amendment versions below.

Demolition Ordinance Amendment Proposals: Competing Provisions			
Provision	Version 6/4/13	Version 7/2/2013	Version 8/30/2013
Demo approval permitted if same number of units constructed AND	<u>Required</u> 1:1 replacement of demo'd units with BMR units	Applicant has <u>choice</u> : pay per-unit impact fee at Aff. Hsg. Mitigation Fee level or replace demo'd units 1:1 w/designated BMR units	Applicant <u>required</u> to pay impact fee to mitigate the loss of affordable housing; amount TBD
Demo approval permitted if same number of units constructed AND	BMR Units in addition to any BMR units otherwise required	BMR Units in addition to any BMR units otherwise required, "to the extent legally permitted"	In lieu of paying impact fee, applicant may designate BMR units
Replacement Unit Rents	60% AMI cap - rental; 70% AMI cap - for-sale	Last known rent or, if unknown, 50% AMI	TBD by Council
Replacement Unit Term	Permanent	Subject to vacancy decontrol (Costa-Hawkins)	Permanent
Tenant Protections	ROFR to any new unit and BMR units, at rent that would have applied w/o demo. No income tests.	ROFR to any new unit and BMR units, at rent that would have applied w/o demo. No income tests.	ROFR to any new unit and BMR units, at rent that would have applied w/o demo. No income tests.
100% Affordable Housing	No consideration	No consideration	Sitting tenants receive perm relo benefits but only have ROFR to new units if they are income-qualified at lease-up
Elimination of a DU through combination w/another DU	Existing number of DUs exceed density limit; <u>and</u> applicant has occupied one DU for >= 2yrs; <u>and</u> no tenant displacement	Existing number of DUs exceed density limit; <u>and</u> applicant has occupied one DU for >= 2yrs; <u>and</u> no tenant displacement	Same, but, in addition, publicly-funded SRO rehabs may lose units if necessary to improve habitability and life safety

1) Note: All versions protect sitting tenants' ROFR to return to the unit at the rent they would have been paying but for the demolition, with the exception that Version 8/30/13 requires income-eligibility in the case of demolition for the purpose of building 100% affordable housing developments only.

RECEIVED AT
COUNCIL MEETING OF:

JUN 04 2013

23C.08.020 Elimination of Dwelling Units through Demolition

OFFICE OF THE CITY CLERK
CITY OF BERKELEY

- A. The Board may approve a Use Permit to demolish a building constructed prior to June 1980 on a property containing two or more dwelling units if it makes the findings required by the foregoing section, and either:
1. The building containing the units is hazardous or unusable and is infeasible to repair; or
 2. The building containing the units will be moved to a different location within the City of Berkeley with no net loss of units and no change in the affordability levels of the units; or
 3. The demolition is necessary to permit construction of special housing needs facilities such as, but not limited to, childcare centers and affordable housing developments that serve the greater good of the entire community; or
 4. The demolition is necessary to permit construction approved pursuant to this Chapter of at least the same number of dwelling units, and with designated below-market rate units equal in number and comparable in size to the demolished units. These units must will be in addition, to the extent legally permitted, to any below-market rate units otherwise included in the project, including, but not limited to: units proposed pursuant to Government Code section 65915; units provided as a condition of any funding; or units provided in lieu of the City's affordable housing mitigation fee provided to mitigate any other project impacts. The completion of the below market rate units will be secured by

a completion bond or lien against the land or other equivalent security in the amount of \$250,000 per unit in 2013 dollars, with the amount adjusted in May of each year by the increase in the Consumer Price Index of the San Francisco Bay Area, to be paid into the Housing Trust Fund in the event that the project is not completed or the replacement below-market rate units are not provided.

Chapter 23C.08: Demolition and Dwelling Unit Controls

RECEIVED AT
COUNCIL MEETING OF:

Chapter 23C.08

JUN 04 2013

DEMOLITION AND DWELLING UNIT CONTROLS

OFFICE OF THE CITY CLERK
CITY OF BERKELEY

Sections:

- 23C.08.010 Demolition or Elimination of Dwelling Units--General Requirement
- 23C.08.020 Demolitions of Buildings with Residential Uses
- 23C.08.030 Elimination of Dwelling Units and Accessory Dwelling Units (Conversions and Changes of Use)
- 23C.08.040 Elimination of Residential Hotel Rooms
- 23C.08.050 Demolitions of Buildings Used for Commercial, Manufacturing or Community, Institutional or Other Non-residential Uses
- 23C.08.060 Building Relocations
- 23C.08.070 Limitations

Section 23C.08.010 Demolition or Elimination of Dwelling Units--General Requirement

- A. No Dwelling Unit or units may be eliminated or demolished except as authorized by the provisions of this chapter.
- B. The Board may approve a Use Permit for the elimination or demolition of dwelling units only if, in addition to any other findings required by this Ordinance, it finds that the elimination of the dwelling units would not be materially detrimental to the housing needs and public interest of the affected neighborhood and the City. (Ord. 6848-NS § 1 (part), 2005; Ord. 6478-NS § 4 (part), 1999)

Section 23C.08.020 Demolitions of Buildings with Residential Uses

- A. The Board may approve a Use Permit to demolish a building containing one or more dwelling units if it makes the findings required by the foregoing section, and that:
 - 1. The demolition will remove a structure that is hazardous, unusable or is infeasible to repair; or
 - 2. The demolition is necessary to permit construction approved pursuant to this Ordinance, of at least the same number of dwelling units as the demolished structure.
- B. Notwithstanding anything to the contrary, but subject to any applicable requirements of the Landmarks Preservation Ordinance (BMC Chapter 3.24), accessory buildings of any size, including, but not limited to, garages, carports and sheds, but not including any structure containing a lawfully established dwelling unit, which serves and is located on the same lot as a lawful residential use, may be demolished by right. (Ord. 6908-NS §§ 1-2 (part), 2006; Ord. 6478-NS § 4 (part), 1999)

Section 23C.08.030 Elimination of Dwelling Units and Accessory Dwelling Units (Conversions and Changes of Use)

- A. The Board may approve a Use Permit for the elimination of a dwelling unit resulting from a residential conversion or a change of use if it finds that:
 - 1. The number of dwelling units to be eliminated, at the time of the application, exceeds the number permitted by the maximum residential density applicable to the District where the subject building is

Chapter 23C.08: Demolition and Dwelling Unit Controls

located; or

2. The conversion will create common space for residents of a co-housing community, as defined in Section 21.28.030 and is in conformance with the regulations of the District in which it is located; or
 3. The proposed changes would not result in a reduction of housing supply essential to the well-being or housing needs of the City or of persons residing in the neighborhood in the vicinity of the building involved; or
 4. Each dwelling unit affected is situated in an environment unsuitable for residential occupancy and suitable housing will be made available to the present occupants.
- B. Alternatively, the Zoning Officer may issue an AUP for a conversion which eliminates a dwelling unit if he/she finds that the conversion of the building will restore or brings the building closer to the original number of dwelling units that was present at the time it was first constructed.
- C. The Board may approve a Use Permit for a change of use to a community care or a child care facility which eliminates a dwelling unit if it finds that such use is in conformance with the regulations of the District in which it is located.
- D. Notwithstanding the general Use Permit requirement under 23C.08.010, a lawfully established accessory dwelling unit that is not a controlled rental unit may be eliminated subject to the issuance of a Zoning Certificate when the re-conversion restores the original single family use of the main building or lot, provided that no tenant is evicted.
- E. The Board may approve a Use Permit to eliminate a controlled rental unit if it makes all of the following findings:
1. The dwelling unit to be eliminated is neither occupied nor has a rent set at a level that is affordable by a person or a family of very low income, low income or moderate income, as defined by HUD Section 8 program guidelines;
 2. The elimination of the dwelling unit will not adversely affect the supply of housing in the City;
 3. The applicant cannot make a fair return on investment by maintaining the dwelling unit as a part of the rental housing market;
- F. Notwithstanding the above, the Board shall approve a Use Permit to eliminate a controlled rental unit only when it finds that:
1. The dwelling unit is in a building that is seriously deteriorated beyond the conditions which might reasonably be expected due to normal use in the written determination of the Building Official and will be rehabilitated to meet City housing code requirements;
 2. The replacement dwelling unit shall be available for occupancy to Households for Lower Income or Very Low Income Households;
 3. The elimination of the dwelling unit will not cause displacement of any tenant against that tenant's will, and
 4. A signed statement supporting the application has been filed from of all of the tenants whose units will be physically modified and from all tenants who may be required to move temporarily. (Ord. 6908-NS

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§§ 3-4 (part), 2006: Ord. 6848-NS § 2 (part), 2005: Ord. 6478-NS § 4 (part), 1999)

Section 23C.08.040 Elimination of Residential Hotel Rooms

- A. The Board may approve a Use Permit to remove a Residential Hotel Room if it finds that, prior to the removal of any Residential Hotel Rooms, the Residential Hotel owner will provide or cause to be provided standard housing of at least comparable size and quality, at comparable rents and total monthly or weekly charges to each affected tenant; and
1. The Residential Hotel Rooms being removed are replaced by a common use facility, including, but not limited to, a shared kitchen, lounge or recreation room, that will be available to and primarily of benefit to the existing residents of the Residential Hotel and that a majority of existing residents give their consent to the removal of the rooms;
 2. Prior to the date on which the Residential Hotel Rooms are removed, one-for-one replacement of each room to be removed is made, with a comparable room, in one of the methods set forth in this section; or
 3. Residential Hotel Rooms being removed because of building alterations related to seismic upgrade to the building or to improve access to meet the requirements of the American Disabilities Act (ADA).
- B. For purposes of this section, replacement rooms must be substantially comparable in size, location, quality and amenities, and available at comparable rents and total monthly or weekly charges to those being removed. The replacement rooms must also be subject to rent and eviction controls substantially equivalent to those provided by the Rent Stabilization Ordinance or those that applied to the original rooms which are being replaced. Comparable rooms may be provided by:
1. Offering the existing tenants of the affected rooms the right-of-first-refusal to occupy the replacement rooms;
 2. Making available comparable rooms, which are not already classified as Residential Hotel Rooms to replace each of the rooms to be removed; or
 3. Paying to the City's Housing Trust Fund an amount sufficient to provide replacement rooms. The amount to be paid to the City shall be the difference between the replacement cost, including land cost, for the rooms and the amount which the City can obtain by getting a mortgage on the anticipated rents from the newly constructed rooms. The calculations shall assume that rents in the newly constructed rooms shall not exceed the greater of either a level comparable to the weekly or monthly charges for the replaced rooms or the level which would be charged if no current tenant paid more than 30% of such tenant's gross income for rent.
- C. In a Residential Hotel owned and operated by a non-profit organization, recognized as tax-exempt by either the Franchise Tax Board and/or the Internal Revenue Service, Residential Hotel Rooms may be changed to non-residential hotel room uses providing that the average number of Residential Hotel Rooms per day in each calendar year is at least 95% of Residential Hotel Rooms established for that particular Residential Hotel. (Ord. 6478-NS § 4 (part), 1999)

Section 23C.08.050 Demolitions of Buildings Used for Commercial, Manufacturing or Community, Institutional or Other Non-residential Uses

- A. A main building used for non-residential purposes may be demolished subject to issuance of a Use

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Permit.

- B. A demolition of an accessory building containing less than 300 square feet of floor area is permitted as of right; an accessory building containing 300 square feet or more of floor area may be demolished subject to an AUP.
- C. Any application for a Use Permit or AUP to demolish a non-residential building or structure which is 40 or more years old shall be forwarded to the Landmarks Preservation Commission (LPC) for review prior to consideration of the Use Permit or AUP. The LPC may initiate a landmark or structure-of-merit designation or may choose solely to forward to the Board its comments on the application. The Board shall consider the recommendations of the LPC in considering its action on the application.
- D. A Use Permit or an AUP for demolition of a non-residential building or structure may be approved only if the Board or Zoning Officer finds that the demolition will not be materially detrimental to the commercial needs and public interest of any affected neighborhood or the City, and one of the following findings that the demolition:
 - 1. Is required to allow a proposed new building or other proposed new Use;
 - 2. Will remove a building which is unusable for activities which are compatible with the purposes of the District in which it is located or which is infeasible to modify for such uses;
 - 3. Will remove a structure which represents an unabatable attractive nuisance to the public; or
 - 4. Is required for the furtherance of specific plans or projects sponsored by the City or other local district or authority. In such cases, it shall be demonstrated that it is infeasible to obtain prior or concurrent approval for the new construction or new use which is contemplated by such specific plans or projects and that adhering to such a requirement would threaten the viability of the plan or project. (Ord. 6478-NS § 4 (part), 1999)

Section 23C.08.060 Building Relocations

- A. The relocation of a building from a lot is considered a demolition for purposes of this Ordinance.
- B. The relocation of a building to a lot is considered new construction and shall be subject to all requirements applicable to new construction.
- C. When a building is relocated to a different lot within the City, the lot from which the building is being removed shall be known as the source lot and the lot on which the building is to be sited shall be known as the receiving lot. In such cases all notification requirements apply to both the source and receiving lots.
- D. The Board may approve a Use Permit for relocation to a lot if it finds that the building proposed to be relocated is not in conflict with the architectural character, or the building scale of the neighborhood or area in which such building is to be located, and the receiving lot provides adequate separation of buildings, privacy, yards and Usable Open Space. (Ord. 6478-NS §.4 (part), 1999)

Section 23C.08.070 Limitations

- A. Notwithstanding anything to the contrary, if a building or structure is unsafe, presents a public hazard and is not securable and/or is in imminent danger of collapse so as to endanger persons or property, as determined the City's Building Official, it may be demolished without a Use Permit. The Building Official's

Chapter 23C.08: Demolition and Dwelling Unit Controls


determination in this matter shall be governed by the standards and criteria set forth in the most recent edition of the California Building Code that is in effect in the City.

- B. This chapter shall be applied only to the extent permitted by state law as to buildings which have been entirely withdrawn from the rental market pursuant to the state statute known as the Ellis Act. (Ord. 6478-NS § 4 (part), 1999)



Office of the City Manager

ACTION CALENDAR
June 11, 2013
(Continued from June 4, 2013)

To: Honorable Mayor and Members of the City Council
From:  Christine Daniel, City Manager
Submitted by: Eric Angstadt, Director, Planning and Development
Subject: Zoning Amendments to BMC Chapter 23C.08 – Demolition and Dwelling Unit Controls

RECOMMENDATION

Adopt first reading of an Ordinance repealing and reenacting Berkeley Municipal Code Sections 23C.08.020 and 23C.08.030, and adding Section 23C.08.035 to modify and clarify the conditions under which dwelling units may be demolished.

FISCAL IMPACTS OF RECOMMENDATION

The proposed amendments will allow for clearer rules for demolition and clarify what number and type of replacement units are required for certain demolitions. The new requirements may cause a slight increase in staff time needed to manage below market rate (BMR) units.

CURRENT SITUATION AND ITS EFFECTS

On April 3, 2013 the Planning Commission held a public hearing regarding proposed zoning amendments to modify and clarify the requirements for demolitions of dwelling units in the City of Berkeley. The Planning Commission had previously discussed the issue at a meeting on March 20, 2013. At the April 3, 2013 public hearing, the Planning Commission considered the staff proposal and comments from the City of Berkeley Rent Stabilization Board. The Planning Commission found the two approaches to be very similar and made a motion to request that staff from the city and the rent board collaborate to meet and resolve the differences. Motion also requested that the resultant single set of recommendations be forwarded to City Council with Planning Commission support but no formal vote. The motion and vote are below:

Motion/Second/Carried (JS/TD) to request that planning staff collaborate with members of the Rent Control Board outside the Planning Commission meeting to develop a single set of demolition ordinance language revisions to present to City Council with Planning Commission support, but no vote (an unusual procedure, but proposed for the purpose of expediting Council's referral). Ayes: Samuels, Sheahan, Eisen, Davis, Poschman. Noes: None. Abstain: Clarke, Novosel, Lindheim. Absent: Dacey.

Planning staff and Rent Board Staff have met three times and collaborated on a version of the ordinance which only has one point of difference. The point of difference is over the number of years of history prior to a proposed demolition that is examined for evidence of threatening or harassing behavior on the part of the proposed demolisher, with city staff recommending two years and rent board staff recommending three years. The original council referral had suggested one year for this time period.

BACKGROUND

The issue of when a unit is “available for rent” has been a source of differing opinion between the city staff and rent board staff for many years. Several previous attempts were made to reconcile the differences. The most recent attempt resulted in a City Council referral at the December 6, 2011 council meeting.

The items in that referral included:

Demo section:

- a. The units are replaced with an equal or greater number of new units inclusive of the current number of existing affordable units; or
- b. The current units will be relocated to a new location at the same affordability level; or
- c. The demolition is necessary to permit construction of special needs facilities such as, but not limited to, childcare centers and affordable housing developments that serve the greater good of the entire community and if special findings can be made.

Demolition will not be allowed if the building has been removed from the rental market under the Ellis Act in the last five (5) years.

In addition, if the units in the building to be demolished are currently occupied, the following measures would apply:

- d. Appropriate notice to sitting tenants including being provided with their rights under the Rent Control Ordinance;
- e. Assistance with moving expenses consistent with local ordinance;
- f. Subsidization of the rent differential for a replacement unit until new units are ready for occupancy or for up to 4 years whichever comes sooner; and
- g. First right of refusal to move into the new building and, if qualified, into the low income units.

Demolition will not be allowed if there have been verified cases of harassment or illegal evictions in the prior twelve (12) months.

Elimination Section:

1. A new combined unit will be owner occupied for no less than one year prior to and no less than two years after conversion, before another conversion could occur.
2. The currently existing number of units exceeds the density standard for the neighborhood.

3. The change is not detrimental to the existing neighborhood.
4. If the building is five units or less no more than one unit can be combined per building and the owner must agree to maintain Measure Y protections that apply in five unit buildings for tenants in the other units.

RATIONALE FOR RECOMMENDATION

The proposed language would reconcile an area of difference between the City staff and Rent Board staff allowing for a clearer process for demolition or elimination of rental units built prior to June 1980. The proposed changes would include protection for existing tenants of any unit proposed for demolition.

ALTERNATIVE ACTIONS CONSIDERED

None

CONTACT PERSON

Eric Angstadt, Director, Planning Department, 981-7410

Attachment:

1: Ordinance

ORDINANCE NO. #,### - N.S.

REPEALING AND REENACTING BERKELEY MUNICIPAL CODE SECTIONS 23C.08.020 AND 23C.08.030, AND ADDING SECTION 23C.08.035 REGULATING DEMOLITION AND ELIMINATION OF DWELLING UNITS

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

Section 1. That Section 23C.08.020 of the Berkeley Municipal Code is repealed and reenacted to read as follows:

23C.08.020 Elimination of Dwelling Units through Demolition

- A. The Board may approve a Use Permit to demolish a building constructed prior to June 1980 on a property containing two or more dwelling units if it makes the findings required by the foregoing section, and either:
1. The building containing the units is hazardous or unusable and is infeasible to repair; or
 2. The building containing the units will be moved to a different location within the City of Berkeley with no net loss of units and no change in the affordability levels of the units; or
 3. The demolition is necessary to permit construction of special housing needs facilities such as, but not limited to, childcare centers and affordable housing developments that serve the greater good of the entire community; or
 4. The demolition is necessary to permit construction approved pursuant to this Chapter of at least the same number of dwelling units, and with designated below-market rate units equal in number and comparable in size to the demolished units. These units will be in addition to any below-market rate units provided to mitigate any other project impacts. The completion of the below-market rate units will be secured by a completion bond or lien against the land or other equivalent security in the amount of \$250,000 per unit in 2013 dollars, with the amount adjusted in May of each year by the increase in the Consumer Price Index of the San Francisco Bay Area, to be paid into the Housing Trust Fund in the event that the project is not completed or the replacement below-market rate units are not provided.
 5.
 - a. The below-market rate replacement rental units shall be affordable to households with incomes no greater than 60% of area median income, based on the procedures specified in the Housing Trust Fund guidelines. These affordability levels shall remain in place for the life of the building. The below-market rate units shall be rented to people with incomes no greater than 60%

- of area median or sold to people with incomes no greater than 70% of area median, with priority to people who currently live or work in Berkeley, except as provided in Section C.4.
- b. If the replacement project is built as a condominium project, units must first be offered for rent to displaced tenants as provided in Section C.4. Any such units rented to a displaced tenant may count as a required inclusionary unit under Section 23C.12 depending on tenant qualifications. Should any inclusionary unit occupied by a displaced tenant become legally vacant such unit could be sold subject to the in-lieu fee payment requirements of the ordinance.
- B. Notwithstanding Subdivision (A), demolition will not be allowed if the building was removed from the rental market under the Ellis Act during the preceding five (5) years or there have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding (**Staff proposal**: two years; **Rent Board proposal**: three years). Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, who will provide an assessment of the evidence and all available documentation to the Zoning Adjustments Board, which shall determine whether harassment or threatened or actual illegal eviction occurred.
- C. If the units in a building to be demolished under subdivision (A) are occupied, the following requirements shall apply.
1. The applicant shall provide all sitting tenants notice of the application to demolish the building no later than the date it is submitted to the City, including notice of their rights under Chapter 13.76; and
 2. The applicant shall provide assistance with moving expenses equivalent to those set forth in Chapter 13.84; and
 3. The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy. Funding for the rent differential shall be guaranteed in a manner approved by the City.
 4. Sitting tenants who are displaced as a result of demolition shall be provided the right of refusal to move into the new building; and tenants of units that are demolished shall have the right of first refusal to rent new below-market rate units designated to replace the units that were demolished, at the rent that would have applied if they had remained in place, as long as their tenancy continues. Income restrictions shall not apply to displaced tenants.
 5. The provisions of this section shall not apply to tenants who move in after the application for demolition is submitted to the City provided that the owner informs

each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.

- D. Notwithstanding anything in Title 23 to the contrary, but subject to any applicable requirements of the Landmarks Preservation Ordinance (BMC Chapter 3.24), accessory buildings of any size, including, but not limited to, garages, carports and sheds, but not including any structure containing a lawfully established dwelling unit, which serves and is located on the same lot as a lawful residential use, may be demolished by right.

Section 2. That Section 23C.08.030 of the Berkeley Municipal Code is repealed and reenacted to read as follows:

23C.08.030 Elimination of Dwelling Units and Accessory Dwelling Units through Conversion and Change of Use

- A. The Board may approve a Use Permit for the elimination of a dwelling unit through combination with another dwelling unit for purposes of occupancy by a single household if it finds that:
1. The existing number of dwelling units exceeds the number permitted by the maximum residential density applicable to the District where the subject building is located; and
 2. One of the affected dwelling units has been occupied by the applicant's household as its principle place of residence for no less than two years prior to the date of the application and none of the affected units is currently occupied by a tenant.
- B. Notwithstanding Subdivision (A), demolition will not be allowed if the building was removed from the rental market under the Ellis Act during the preceding five (5) years or there have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding (**Staff proposal:** two years; **Rent Board proposal:** three years). Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, who will provide an assessment of the evidence and all available documentation to the Zoning Officer or Zoning Adjustments Board, which shall determine whether harassment or threatened or actual illegal eviction occurred.
- C. In the event a unit eliminated pursuant to subdivision (A) is not occupied by the applicant's household for at least two consecutive years from the date of elimination, the affected unit must be restored to separate status. This requirement shall be implemented by a condition of approval and a notice of limitation on the property, acceptable to the City, which provides that if the owner's household does not occupy the unit for at least two years from the date of elimination the affected units must either be restored as separate dwelling units and the vacant unit(s) offered for rent

within six months or the owner must pay a fee of \$75,000 in 2013 dollars, adjusted in May of each year according to the Consumer Price Index for the San Francisco Bay Area, which shall be deposited into the City's Housing Trust Fund. The City may exempt an applicant from the two year residency requirement in the event of an unforeseeable life change that requires relocation.

- D. In cases where elimination of a dwelling unit reduces the number of units in a building to four (4), the applicant shall record a notice of limitation against the subject property that the limitation on eviction of tenants under Section 13.76.130.A.9.i(iii) shall continue to apply until such time as the building is demolished or sufficient units are added or restored such that the building contains at least five (5) units.
- E. Alternatively, the Zoning Officer may issue an AUP for a conversion which eliminates a dwelling unit if he/she finds that the conversion of the building will restore or brings the building closer to the original number of dwelling units that was present at the time it was first constructed, provided the conversion meets the requirements of A.2., B. C. and D. of this section.
- F. The Board may approve a Use Permit for a change of use to a community care or a child care facility which eliminates a dwelling unit if it finds that such use is in conformance with the regulations of the District in which it is located.
- G. Notwithstanding the general Use Permit requirement under 23C.08.010, a lawfully established accessory dwelling unit that is not a controlled rental unit may be eliminated subject to the issuance of a Zoning Certificate when the re-conversion restores the original single family use of the main building or lot, provided that no tenant is evicted.

Section 3. That Section 23C.08.035 is added to the Berkeley Municipal Code to read as follows:

23C.08.035 Private Right of Action

Any affected tenant may bring a private action for injunctive and/or compensatory relief against any applicant and/or owner to prevent or remedy a violation of Sections 23C.08.020 or 23C.08.030. In any such action a prevailing plaintiff may recover reasonable attorney's fees.

Section 4. In adopting these amendments, it is the City Council's intention to permit demolition of existing dwelling units constructed prior to June 1980 *only* if the impacts of doing so are mitigated as set forth in this ordinance. Accordingly: (1) if any provision of this ordinance is determined to be invalid by a court of competent jurisdiction the entire ordinance shall be deemed automatically repealed, null and void and no force or effect; and (2) if a use permit or administrative use permit condition implementing any of the mitigations required by this ordinance is determined to be invalid or unenforceable by a

court of competent jurisdiction, then the entire use permit or administrative use permit which it conditions shall be deemed to automatically invalid as a consequence, and shall be null and void and of no further force or effect.

Section 5. Copies of this Ordinance shall be posted for two days prior to adoption in the glass case located near the walkway in front of Old City Hall, 2134 Martin Luther King Jr. Way. Within fifteen days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.



Office of the City Manager

ACTION CALENDAR
July 2, 2013

To: Honorable Mayor and Members of the City Council

From:  Christine Daniel, City Manager

Submitted by: Eric Angstadt, Director, Planning and Development

Subject: Zoning Amendments to BMC Chapter 23C.08 – Demolition and Dwelling Unit Controls

RECOMMENDATION

Adopt first reading of an Ordinance repealing and reenacting Berkeley Municipal Code Sections 23C.08.020 and 23C.08.030, and adding Section 23C.08.035 to modify and clarify the conditions under which dwelling units may be demolished.

FISCAL IMPACTS OF RECOMMENDATION

The proposed amendments will allow for clearer rules for demolition and clarify what number and type of replacement units are required for certain demolitions. The new requirements may cause a slight increase in staff time needed to manage below market rate (BMR) units.

CURRENT SITUATION AND ITS EFFECTS

At the June 11 meeting the City Council requested that staff present revised language for the ordinance amendments related to Chapter 23C.08. The revisions requested are attached. The revisions are to Section 23C.08.020 A4 and A5 to allow two options:

- 1) Pay a fee for demolished units equal to the Affordable Housing Mitigation Fee; or
- 2) Replace demolished units with rent increase restricted units with an initial rent at 50% AMI or last known rent if vacant for less than 5 years.

Protections for sitting tenants are provided in Section 23C.08.020 C.

BACKGROUND

Please see June 4, 2013 staff report for full background on this issue.

RATIONALE FOR RECOMMENDATION

The proposed language would reconcile an area of difference between the city staff and rent board staff allowing for a clearer process for demolition or elimination of rental units built prior to June 1980. The proposed changes would include protection for existing tenants of any unit proposed for demolition.

ALTERNATIVE ACTIONS CONSIDERED

None

CONTACT PERSON

Eric Angstadt, Director, Planning Department, 981-7410

Attachments:

- 1: Ordinance
- 2: Ordinance with track changes reflecting revisions requested by Council at the June 11, 2013 meeting

ORDINANCE NO. #,### - N.S.

REPEALING AND REENACTING BERKELEY MUNICIPAL CODE SECTIONS 23C.08.020 AND 23C.08.030, AND ADDING SECTION 23C.08.035 REGULATING DEMOLITION AND ELIMINATION OF DWELLING UNITS

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

Section 1. That Section 23C.08.020 of the Berkeley Municipal Code is repealed and reenacted to read as follows:

23C.08.020 Elimination of Dwelling Units through Demolition

A. The Board may approve a Use Permit to demolish a building constructed prior to June 1980 on a property containing two or more dwelling units if it makes the findings required by the foregoing section, and either:

1. The building containing the units is hazardous or unusable and is infeasible to repair; or
2. The building containing the units will be moved to a different location within the City of Berkeley with no net loss of units and no change in the affordability levels of the units; or
3. The demolition is necessary to permit construction of special housing needs facilities such as, but not limited to, childcare centers and affordable housing developments that serve the greater good of the entire community; or.
4. The demolition is necessary to permit construction approved pursuant to this Chapter of at least the same number of dwelling units and either;
 - a) the developer will pay a fee equal to the Affordable Housing Mitigation Impact Fee in effect at the time the certificate of occupancy is issued; or
 - b) each demolished unit will be replaced with a designated rent increase restricted unit comparable in size to the demolished unit. To the extent legally permitted, these units will be in addition to any below-market rate units otherwise included in the project, including, but not limited to: units proposed pursuant to Government Code section 65915; units provided as a

condition of any funding; or units provided *in lieu* of the City's affordable housing mitigation. The initial rent of these replacement units shall be set at the last known rent prior to the date the demolished unit became vacant. If the last rent is not known or the unit was vacant for more than five years prior to demolition, the initial rent of the replacement unit shall be set at a level affordable to a tenant at 50% AMI. The replacement units will be designated, and their continuing affordability guaranteed, by deed restriction. Each such replacement unit will have its rent increase restricted to the same amount as the annual general adjustment published by the Berkeley Rent Stabilization Board each year, but shall be subject to vacancy decontrol pursuant to the Costa-Hawkins Rental Housing Act.

5. If the replacement project is built as a condominium project, the requirements of the inclusionary zoning ordinance apply. Units must first be offered for rent to displaced tenants as provided in Section C.4. Any such units rented to a displaced tenant may count as a required inclusionary unit depending on tenant qualifications. Should any inclusionary unit occupied by a displaced tenant become legally vacant such unit could be sold subject to the in-lieu fee payment requirements of the ordinance.

B. Notwithstanding Subdivision (A), demolition will not be allowed if the building was removed from the rental market under the Ellis Act during the preceding five (5) years or there have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, who will provide an assessment of the evidence and all available documentation to the Zoning Adjustments Board, which shall determine whether harassment or threatened or actual illegal eviction occurred.

C. If the units in a building to be demolished under subdivision (A) are occupied, the following requirements shall apply.

1. The applicant shall provide all sitting tenants notice of the application to demolish the building no later than the date it is submitted to the City, including notice of their rights under Chapter 13.76; and

2. The applicant shall provide assistance with moving expenses equivalent to those set forth in Chapter 13.84; and

3. The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy. Funding for the rent differential shall be guaranteed in a manner approved by the City.

4. Sitting tenants who are displaced as a result of demolition shall be provided the right of refusal to move into the new building; and shall have the right of first refusal to rent new rent increase restricted units that replace the units that were demolished, at the rent that would have applied if those tenants had remained in place, as long as their tenancy continues, including limitations on rent increases.

5. The provisions of this section shall not apply to tenants who move in after the application for demolition is submitted to the City provided that the owner informs each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.

D.. Notwithstanding anything in Title 23 to the contrary, but subject to any applicable requirements of the Landmarks Preservation Ordinance (BMC Chapter 3.24), accessory buildings of any size, including, but not limited to, garages, carports and sheds, but not including any structure containing a lawfully established dwelling unit, which serves and is located on the same lot as a lawful residential use, may be demolished by right. (Ord. 6908-NS §§ 1-2 (part), 2006; Ord. 6478-NS § 4 (part), 1999)

Section 2. That Section 23C.08.030 of the Berkeley Municipal Code is repealed and reenacted to read as follows:

23C.08.030 Elimination of Dwelling Units and Accessory Dwelling Units through Conversion and Change of Use)

A. The Board may approve a Use Permit for the elimination of a dwelling unit through combination with another dwelling unit for purposes of occupancy by a single household if it finds that:

1. The existing number of dwelling units exceeds the number permitted by the maximum residential density applicable to the District where the subject building is located; and

2. One of the affected dwelling units has been occupied by the applicant's household as its principle place of residence for no less than two years prior to the date of the application and none of the affected units is currently occupied by a tenant.

B. Notwithstanding Subdivision (A), demolition will not be allowed if the building was removed from the rental market under the Ellis Act during the preceding five (5) years or there have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, who will provide an assessment of the evidence and all available documentation to the Zoning Officer or Zoning Adjustments Board, which shall determine whether harassment or threatened or actual illegal eviction occurred.

C. In the event a unit eliminated pursuant to subdivision (A) is not occupied by the applicant's household for at least two consecutive years from the date of elimination, the affected unit must be restored to separate status. This requirement shall be implemented by a condition of approval and a notice of limitation on the property, acceptable to the City, which provides that if the owner's household does not occupy the unit for at least two years from the date of elimination the affected units must either be restored as separate dwelling units and the vacant unit(s) offered for rent within six months or the owner must pay a fee of \$75,000 in 2013 dollars, adjusted in May of each year according to the Consumer Price Index for the San Francisco Bay Area, which shall be deposited into the City's Housing Trust Fund. The City may exempt an applicant from the two year residency requirement in the event of an unforeseeable life change that requires relocation.

D. In cases where elimination of a dwelling unit reduces the number of units in a building to four (4), the applicant shall record a notice of limitation against the subject property that the limitation on eviction of tenants under Section 13.76.130.A.9.i(iii) shall continue to apply until such time as the building is demolished or sufficient units are added or restored such that the building contains at least five (5) units.

E. Alternatively, the Zoning Officer may issue an AUP for a conversion which eliminates a dwelling unit if he/she finds that the conversion of the building will restore or brings the building closer to the original number of dwelling units that was present at the time it was first constructed, provided the conversion meets the requirements of A.2., B. C. and D. of this section.

F. The Board may approve a Use Permit for a change of use to a community care or a child care facility which eliminates a dwelling unit if it finds that such use is in conformance with the regulations of the District in which it is located.

G. Notwithstanding the general Use Permit requirement under 23C.08.010, a lawfully established accessory dwelling unit that is not a controlled rental unit may be eliminated subject to the issuance of a Zoning Certificate when the re-conversion restores the original single family use of the main building or lot, provided that no tenant is evicted.

Section 3. That Section 23C.08.035 is added to the Berkeley Municipal Code to read as follows:

23C.08.035 Private Right of Action

Any affected tenant may bring a private action for injunctive and/or compensatory relief against any applicant and/or owner to prevent or remedy a violation of Sections 23C.08.020 or 23C.08.030. In any such action a prevailing plaintiff may recover reasonable attorney's fees.

Section 4. In adopting these amendments, it is the City Council's intention to permit demolition of existing dwelling units constructed prior to June 1980 *only* if the impacts of doing so are mitigated as set forth in this ordinance. Accordingly: (1) if any provision of this ordinance is determined to be invalid by a court of competent jurisdiction the entire ordinance shall be deemed automatically repealed, null and void and no force or effect; and (2) if a use permit or administrative use permit condition implementing any of the mitigations required by this ordinance is determined to be invalid or unenforceable by a court of competent jurisdiction, then the entire use permit or administrative use permit which it conditions shall be deemed to automatically invalid as a consequence, and shall be null and void and of no further force or effect.

Section 5. Copies of this Ordinance shall be posted for two days prior to adoption in the glass case located near the walkway in front of Old City Hall, 2134 Martin Luther King Jr. Way. Within fifteen days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

Chapter 23C.08 DEMOLITION AND DWELLING UNIT CONTROLS

23C.08.010 Demolition or Elimination of Dwelling Units--General Requirement

A. No Dwelling Unit or units may be eliminated by demolition or conversion except as authorized by this Chapter.

B. The Board may approve a Use Permit for the elimination or demolition of dwelling units only if, in addition to any other findings required by this Title, it finds that the elimination of the dwelling units would not be materially detrimental to the housing needs and public interest of the affected neighborhood and the City. (Ord. 6848-NS § 1 (part), 2005; Ord. 6478-NS § 4 (part), 1999)

23C.08.020 Elimination of Dwelling Units through Demolition

A. The Board may approve a Use Permit to demolish a building constructed prior to June 1980 on a property containing two or more dwelling units if it makes the findings required by the foregoing section, and either:

1. The building containing the units is hazardous or unusable and is infeasible to repair; or
2. The building containing the units will be moved to a different location within the City of Berkeley with no net loss of units and no change in the affordability levels of the units; or
3. The demolition is necessary to permit construction of special housing needs facilities such as, but not limited to, childcare centers and affordable housing developments that serve the greater good of the entire community; or
4. The demolition is necessary to permit construction approved pursuant to this Chapter of at least the same number of dwelling units, and either:

a) the developer will pay a fee equal to the Affordable Housing Mitigation Impact Fee in effect at the time the certificate of occupancy is issued; or

b) each demolished unit will be replaced with a with designated rent increase restricted below-market rate units equal in number and comparable in size to the demolished units. To the extent legally permitted, these units will be in addition to the extent legally permitted, to any below-market rate units otherwise included in the project, including, but not limited to: units proposed pursuant to Government Code section 65915; units provided as a condition of any funding; or

~~units provided in lieu of the City's affordable housing mitigation provided to mitigate any other project impacts. —The initial rent of these replacement units shall be set at the last known rent prior to the date the demolished unit became becoming vacant. If the last rent is not known or the unit was been vacant for more than five years prior to demolition, the initial rent of the replacement unit shall be set at a level affordable to a tenant at 50% AMI. The replacement units will be designated, and their continuing affordability guaranteed, by deed restriction. Each such designated-replacement unit will have its rent increase restricted to the same amount as the annual general adjustment increase published by the Berkeley Rent Stabilization Board each year, but shall be subject to vacancy decontrol as pursuant to the —Should any designated unit become vacant, the rent will be set to market rate as required by Costa-Hawkins Rental Housing Act. completion of the below market rate units will be secured by a completion bond or lien against the land or other equivalent security in the amount of \$250,000 per unit in 2013-dollars, with the amount adjusted in May of each year by the increase in the Consumer Price Index of the San Francisco Bay Area, to be paid into the Housing Trust Fund in the event that the project is not completed or the replacement below market rate units are not provided.~~

5.

a. ~~———— The below market rate replacement rental units shall be affordable to households with incomes no greater than 60% of area median income, based on the procedures specified in the Housing Trust Fund guidelines. These affordability levels shall remain in place for the life of the building. The below market rate units shall be rented to people with incomes no greater than 60% of area median or sold to people with incomes no greater than 70% of area median, with priority to people who currently live or work in Berkeley, except as provided in Section C.4.~~

b. ~~———— If the replacement project is built as a condominium project, the requirements of the inclusionary zoning ordinance apply. Units must first be offered for rent to displaced tenants as provided in Section C.4. Any such units rented to a displaced tenant may count as a required inclusionary unit depending on tenant qualifications. Should any inclusionary unit occupied by a displaced tenant become legally vacant such unit could be sold subject to the in-lieu fee payment requirements of the ordinance.~~

B. Notwithstanding Subdivision (A), demolition will not be allowed if the building was removed from the rental market under the Ellis Act during the preceding five (5) years or there have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding (**Staff proposal:** two

years; **Rent Board proposal:** three years). Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, who will provide an assessment of the evidence and all available documentation to the Zoning Adjustments Board, which shall determine whether harassment or threatened or actual illegal eviction occurred.

C. If the units in a building to be demolished under subdivision (A) are occupied, the following requirements shall apply.

1. The applicant shall provide all sitting tenants notice of the application to demolish the building no later than the date it is submitted to the City, including notice of their rights under Chapter 13.76; and

2. The applicant shall provide assistance with moving expenses equivalent to those set forth in Chapter 13.84; and

3. The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy. Funding for the rent differential shall be guaranteed in a manner approved by the City.

4. Sitting tenants who are displaced as a result of demolition shall be provided the right of refusal to move into the new building; ~~and tenants of units that are demolished and~~ shall have the right of first refusal to rent new rent increase restricted ~~below market rate~~ units ~~that designated to~~ replace the units that were demolished, at the rent that would have applied if the seey tenants had remained in place, as long as their tenancy continues, including limitations on rent increases. ~~Income restrictions shall not apply to displaced tenants.~~

5. The provisions of this section shall not apply to tenants who move in after the application for demolition is submitted to the City provided that the owner informs each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.

D.. Notwithstanding anything in Title 23 to the contrary, but subject to any applicable requirements of the Landmarks Preservation Ordinance (BMC Chapter 3.24), accessory buildings of any size, including, but not limited to, garages, carports and sheds, but not including any structure containing a lawfully established dwelling unit, which serves and is located on the same lot as a lawful residential use, may be demolished by right. (Ord. 6908-NS §§ 1-2 (part), 2006: Ord. 6478-NS § 4 (part), 1999)

23C.08.030 Elimination of Dwelling Units and Accessory Dwelling Units through Conversion and Change of Use)

A. The Board may approve a Use Permit for the elimination of a dwelling unit through combination with another dwelling unit for purposes of occupancy by a single household if it finds that:

1. The existing number of dwelling units exceeds the number permitted by the maximum residential density applicable to the District where the subject building is located; and
2. One of the affected dwelling units has been occupied by the applicant's household as its principle place of residence for no less than two years prior to the date of the application and none of the affected units is currently occupied by a tenant.

B. Notwithstanding Subdivision (A), demolition will not be allowed if the building was removed from the rental market under the Ellis Act during the preceding five (5) years or there have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding (**Staff proposal:** two years; **Rent Board proposal:** three years). Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, who will provide an assessment of the evidence and all available documentation to the Zoning Officer or Zoning Adjustments Board, which shall determine whether harassment or threatened or actual illegal eviction occurred.

C. In the event a unit eliminated pursuant to subdivision (A) is not occupied by the applicant's household for at least two consecutive years from the date of elimination, the affected unit must be restored to separate status. This requirement shall be implemented by a condition of approval and a notice of limitation on the property, acceptable to the City, which provides that if the owner's household does not occupy the unit for at least two years from the date of elimination the affected units must either be restored as separate dwelling units and the vacant unit(s) offered for rent within six months or the owner must pay a fee of \$75,000 in 2013 dollars, adjusted in May of each year according to the Consumer Price Index for the San Francisco Bay Area, which shall be deposited into the City's Housing Trust Fund. The City may exempt an applicant from the two year residency requirement in the event of an unforeseeable life change that requires relocation.

D. In cases where elimination of a dwelling unit reduces the number of units in a building to four (4), the applicant shall record a notice of limitation against the subject property that the limitation on eviction of tenants under Section 13.76.130.A.9.i(iii) shall continue to apply until such time as the building is demolished or sufficient units are added or restored such that the building contains at least five (5) units.

E. Alternatively, the Zoning Officer may issue an AUP for a conversion which eliminates a dwelling unit if he/she finds that the conversion of the building will restore or brings the building closer to the original number of

dwelling units that was present at the time it was first constructed, provided the conversion meets the requirements of A.2., B. C. and D. of this section.

F. The Board may approve a Use Permit for a change of use to a community care or a child care facility which eliminates a dwelling unit if it finds that such use is in conformance with the regulations of the District in which it is located.

G. Notwithstanding the general Use Permit requirement under 23C.08.010, a lawfully established accessory dwelling unit that is not a controlled rental unit may be eliminated subject to the issuance of a Zoning Certificate when the re-conversion restores the original single family use of the main building or lot, provided that no tenant is evicted.

23C.08.035 Private Right of Action

Any affected tenant may bring a private action for injunctive and/or compensatory relief against any applicant and/or owner to prevent or remedy a violation of Sections 23C.08.020 or 23C.08.030. In any such action a prevailing plaintiff may recover reasonable attorney's fees.

23C.08.020 Elimination of Dwelling Units through Demolition

- A. The Board may approve a Use Permit to demolish a building constructed prior to June 1980 on a property containing two or more dwelling units if it makes the findings required by the foregoing section, and either:
1. The building containing the units is hazardous or unusable and is infeasible to repair; or
 2. The building containing the units will be moved to a different location within the City of Berkeley with no net loss of units and no change in the affordability levels of the units; or
 3. The demolition is necessary to permit construction of special housing needs facilities such as, but not limited to, childcare centers and affordable housing developments that serve the greater good of the entire community; or
 4. The demolition is necessary to permit construction approved pursuant to this Chapter of at least the same number of dwelling units. When a project is approved under this paragraph, the project applicant shall be required to pay a fee for each unit demolished to mitigate the impact of the loss of affordable housing in the City of Berkeley. The amount of the fee shall be set by resolution of the City Council. In the case of a unit with an tenant at the time of demolition, the provisions of Section 23C.08.020.C apply and the impact fee is due when that tenant vacates the unit.
 - a. In lieu of paying ment of the impact fee, the project applicant may provide a designated unit in the new project at a below market rate in perpetuity. The affordability level of the below market rent shall be set by resolution of the City Council. The project applicant shall will enter a regulatory agreement with the City of Berkeley to provide for the provision of any such in lieu units.
- ~~, and with designated below market rate units equal in number and comparable in size to the demolished units. These units will be in addition to any below-market rate units provided to mitigate any other project impacts. The completion of the below market rate units will be secured by a completion bond or lien against the land or other equivalent security in the amount of \$250,000 per unit in 2013 dollars, with the amount adjusted in May of each year by the increase in the Consumer Price Index of the San Francisco Bay Area, to be paid into the Housing Trust Fund in the event that the project is not completed or the replacement below-market rate units are not provided.~~
- ~~5. a. The below market rate replacement rental units shall be affordable to households with incomes no greater than 60% of area median income, based on the procedures specified in the Housing Trust Fund guidelines. These affordability levels shall remain in place for the life of the building. The below market rate units shall be rented to people with incomes no greater than 60% of area median or sold to people with incomes no greater than 70% of area median,~~

~~with priority to people who currently live or work in Berkeley, except as provided in Section C.4.~~

- ~~— b. If the replacement project is built as a condominium project, units must first be offered for rent to displaced tenants as provided in Section C.4. Any such units rented to a displaced tenant may count as a required inclusionary unit under Section 23C.12 depending on tenant qualifications. Should any inclusionary unit occupied by a displaced tenant become legally vacant such unit could be sold subject to the in-lieu fee payment requirements of the ordinance.~~

B. Notwithstanding Subdivision (A), demolition will not be allowed if the building was removed from the rental market under the Ellis Act during the preceding five (5) years or there have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding (**Staff proposal:** two years; **Rent Board proposal:** three years). Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, who will provide an assessment of the evidence and all available documentation to the Zoning Adjustments Board, which shall determine whether harassment or threatened or actual illegal eviction occurred.

C. If the units in a building to be demolished under subdivision (A) are occupied, the following requirements shall apply.

1. Except as set forth in paragraph (2) below:

~~— a.~~ The applicant shall provide all sitting tenants notice of the application to demolish the building no later than the date it is submitted to the City, including notice of their rights under Chapter 13.76. ~~;~~ ~~and~~

~~— 2.~~ ~~b.~~ The applicant shall provide assistance with moving expenses equivalent to those set forth in Chapter 13.84. ~~;~~ ~~and~~

~~— 3.~~ ~~c.~~ The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy. Funding for the rent differential shall be guaranteed in a manner approved by the City.

42. An applicant under this Chapter who proposes to construct a 100% affordable housing project shall provide relocation benefits that conform to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended and the California Relocation Act (Government Code sections 7260 et seq.).

~~— 3.~~ Except as set forth in paragraph (4) below, §sitting tenants who are displaced as a result of demolition shall be provided the right of refusal to move into the new building; and tenants of units that are demolished shall have the right of first refusal to rent new below-market rate units designated to replace the units that were demolished, at the rent that would have applied if they had remained in place, as long as their tenancy continues. Income restrictions shall not apply to displaced tenants.

4. In cases where an applicant under this Chapter has constructed a 100% affordable housing project, sitting tenants who are displaced as a result of demolition and who desire to return to the newly constructed building will be

granted a right of first refusal subject to their ability to meet income qualifications and other applicable eligibility requirements when the new units are ready for occupancy.

5. The provisions of this section shall not apply to tenants who move in after the application for demolition is submitted to the City provided that the owner informs each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.
- D. Notwithstanding anything in Title 23 to the contrary, but subject to any applicable requirements of the Landmarks Preservation Ordinance (BMC Chapter 3.24), accessory buildings of any size, including, but not limited to, garages, carports and sheds, but not including any structure containing a lawfully established dwelling unit, which serves and is located on the same lot as a lawful residential use, may be demolished by right.

Section 2. That Section 23C.08.030 of the Berkeley Municipal Code is repealed and reenacted to read as follows:

23C.08.030 Elimination of Dwelling Units and Accessory Dwelling Units through Conversion and Change of Use

- A. The Board may approve a Use Permit for the elimination of a dwelling unit through combination with another dwelling unit for purposes of occupancy by a single household if it finds that:
 1. The existing number of dwelling units exceeds the number permitted by the maximum residential density applicable to the District where the subject building is located; and
 2. One of the affected dwelling units has been occupied by the applicant's household as its principle place of residence for no less than two years prior to the date of the application and none of the affected units is currently occupied by a tenant.
- B. Notwithstanding Subdivision (A), demolition will not be allowed if the building was removed from the rental market under the Ellis Act during the preceding five (5) years or there have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding (**Staff proposal:** two years; **Rent Board proposal:** three years). Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, who will provide an assessment of the evidence and all available documentation to the Zoning Officer or Zoning Adjustments Board, which shall determine whether harassment or threatened or actual illegal eviction occurred.
- C. In the event a unit eliminated pursuant to subdivision (A) is not occupied by the applicant's household for at least two consecutive years from the date of elimination, the affected unit must be restored to separate status. This requirement shall be implemented by a condition of approval and a notice of limitation on the property,

acceptable to the City, which provides that if the owner's household does not occupy the unit for at least two years from the date of elimination the affected units must either be restored as separate dwelling units and the vacant unit(s) offered for rent within six months or the owner must pay a fee of \$75,000 in 2013 dollars, adjusted in May of each year according to the Consumer Price Index for the San Francisco Bay Area, which shall be deposited into the City's Housing Trust Fund. The City may exempt an applicant from the two year residency requirement in the event of an unforeseeable life change that requires relocation.

- D. In cases where elimination of a dwelling unit reduces the number of units in a building to four (4), the applicant shall record a notice of limitation against the subject property that the limitation on eviction of tenants under Section 13.76.130.A.9.i(iii) shall continue to apply until such time as the building is demolished or sufficient units are added or restored such that the building contains at least five (5) units.
- E. Alternatively, the Zoning Officer may issue an AUP for a conversion which eliminates a dwelling unit if he/she finds that the conversion of the building will restore or brings the building closer to the original number of dwelling units that was present at the time it was first constructed, provided the conversion meets the requirements of A.2., B. C. and D. of this section.
- F. The Board may approve a Use Permit for a change of use to a community care or a child care facility which eliminates a dwelling unit if it finds that such use is in conformance with the regulations of the District in which it is located.

G. The Board may approve a Use Permit for the elimination of a dwelling unit through combination with another dwelling unit for the purpose of providing private bathrooms, kitchenettes, accessibility upgrades, and/or seismic safety upgrades to Single-Residential Occupancy (SRO) Rooms in residential developments undergoing a publicly-funded rehabilitation.

GH. Notwithstanding the general Use Permit requirement under 23C.08.010, a lawfully established accessory dwelling unit that is not a controlled rental unit may be eliminated subject to the issuance of a Zoning Certificate when the re-conversion restores the original single family use of the main building or lot, provided that no tenant is evicted.

Section 3. That Section 23C.08.035 is added to the Berkeley Municipal Code to read as follows:

23C.08.035 Private Right of Action

Any affected tenant may bring a private action for injunctive and/or compensatory relief against any applicant and/or owner to prevent or remedy a violation of Sections 23C.08.020 or 23C.08.030. In any such action a prevailing plaintiff may recover reasonable attorney's fees.

Section 4. In adopting these amendments, it is the City Council's intention to permit demolition of existing dwelling units constructed prior to June 1980 *only* if the impacts of doing so are mitigated as set forth in this ordinance. Accordingly: (1) if any provision of this ordinance is determined to be invalid by a court of competent jurisdiction the entire ordinance shall be deemed automatically repealed, null and void and no force or effect; and (2) if a use permit or administrative use permit condition implementing any of the mitigations required by this ordinance is determined to be invalid or unenforceable by a court of competent jurisdiction, then the entire use permit or administrative use permit which it conditions shall be deemed to automatically invalid as a consequence, and shall be null and void and of no further force or effect.

Section 5. Copies of this Ordinance shall be posted for two days prior to adoption in the glass case located near the walkway in front of Old City Hall, 2134 Martin Luther King Jr. Way. Within fifteen days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

23C.08.020 Elimination of Dwelling Units through Demolition

- A. The Board may approve a Use Permit to demolish a building constructed prior to June 1980 on a property containing two or more dwelling units if it makes the findings required by the foregoing section, and either:
1. The building containing the units is hazardous or unusable and is infeasible to repair; or
 2. The building containing the units will be moved to a different location within the City of Berkeley with no net loss of units and no change in the affordability levels of the units; or
 3. The demolition is necessary to permit construction of special housing needs facilities such as, but not limited to, childcare centers and affordable housing developments that serve the greater good of the entire community; or
 4. The demolition is necessary to permit construction approved pursuant to this Chapter of at least the same number of dwelling units.

When a project is approved under this paragraph, the project applicant shall be required to pay a fee for each unit demolished to mitigate the impact of the loss of affordable housing in the City of Berkeley. The amount of the fee shall be set by resolution of the City Council.

In the case of a unit with a tenant at the time of demolition, the provisions of Section 23C.08.020.C apply and the impact fee is due when that tenant vacates the unit.

In lieu of paying the impact fee, the project applicant may provide a designated unit in the new project at a below market rate in perpetuity. The affordability level of the below market rent shall be set by resolution of the City Council. The project applicant shall enter a regulatory agreement with the City of Berkeley to provide for the provision of any such in lieu units.

- B. Notwithstanding Subdivision (A), demolition will not be allowed if the building was removed from the rental market under the Ellis Act during the preceding five (5) years or there have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding (**Staff proposal:** two years; **Rent Board proposal:** three years). Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, who will provide an assessment of the evidence and all available documentation to the Zoning Adjustments Board, which shall determine whether harassment or threatened or actual illegal eviction occurred.

- C. If the units in a building to be demolished under subdivision (A) are occupied, the following requirements shall apply.
1. Except as set forth in paragraph (2) below:
 - a. The applicant shall provide all sitting tenants notice of the application to demolish the building no later than the date it is submitted to the City, including notice of their rights under Chapter 13.76.
 - b. The applicant shall provide assistance with moving expenses equivalent to those set forth in Chapter 13.84.
 - c. The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy. Funding for the rent differential shall be guaranteed in a manner approved by the City.
 2. An applicant under this Chapter who proposes to construct a 100% affordable housing project shall provide relocation benefits that conform to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended and the California Relocation Act (Government Code sections 7260 *et seq.*).
 3. Except as set forth in paragraph (4) below, sitting tenants who are displaced as a result of demolition shall be provided the right of refusal to move into the new building; and tenants of units that are demolished shall have the right of first refusal to rent new below-market rate units designated to replace the units that were demolished, at the rent that would have applied if they had remained in place, as long as their tenancy continues. Income restrictions shall not apply to displaced tenants.
 4. In cases where an applicant under this Chapter has constructed a 100% affordable housing project, sitting tenants who are displaced as a result of demolition and who desire to return to the newly constructed building will be granted a right of first refusal subject to their ability to meet income qualifications and other applicable eligibility requirements when the new units are ready for occupancy.
 5. The provisions of this section shall not apply to tenants who move in after the application for demolition is submitted to the City provided that the owner informs each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.
- D. Notwithstanding anything in Title 23 to the contrary, but subject to any applicable requirements of the Landmarks Preservation Ordinance (BMC Chapter 3.24),

accessory buildings of any size, including, but not limited to, garages, carports and sheds, but not including any structure containing a lawfully established dwelling unit, which serves and is located on the same lot as a lawful residential use, may be demolished by right.

Section 2. That Section 23C.08.030 of the Berkeley Municipal Code is repealed and reenacted to read as follows:

23C.08.030 Elimination of Dwelling Units and Accessory Dwelling Units through Conversion and Change of Use

- A. The Board may approve a Use Permit for the elimination of a dwelling unit through combination with another dwelling unit for purposes of occupancy by a single household if it finds that:
1. The existing number of dwelling units exceeds the number permitted by the maximum residential density applicable to the District where the subject building is located; and
 2. One of the affected dwelling units has been occupied by the applicant's household as its principle place of residence for no less than two years prior to the date of the application and none of the affected units is currently occupied by a tenant.
- B. Notwithstanding Subdivision (A), demolition will not be allowed if the building was removed from the rental market under the Ellis Act during the preceding five (5) years or there have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding (**Staff proposal:** two years; **Rent Board proposal:** three years). Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, who will provide an assessment of the evidence and all available documentation to the Zoning Officer or Zoning Adjustments Board, which shall determine whether harassment or threatened or actual illegal eviction occurred.
- C. In the event a unit eliminated pursuant to subdivision (A) is not occupied by the applicant's household for at least two consecutive years from the date of elimination, the affected unit must be restored to separate status. This requirement shall be implemented by a condition of approval and a notice of limitation on the property, acceptable to the City, which provides that if the owner's household does not occupy the unit for at least two years from the date of elimination the affected units must either be restored as separate dwelling units and the vacant unit(s) offered for rent within six months or the owner must pay a fee of \$75,000 in 2013 dollars, adjusted in May of each year according to the Consumer Price Index for the San Francisco Bay Area, which shall be deposited into the City's Housing Trust Fund. The City may exempt an applicant from the two year residency requirement in the event of an unforeseeable life change that requires relocation.

- D. In cases where elimination of a dwelling unit reduces the number of units in a building to four (4), the applicant shall record a notice of limitation against the subject property that the limitation on eviction of tenants under Section 13.76.130.A.9.i(iii) shall continue to apply until such time as the building is demolished or sufficient units are added or restored such that the building contains at least five (5) units.
- E. Alternatively, the Zoning Officer may issue an AUP for a conversion which eliminates a dwelling unit if he/she finds that the conversion of the building will restore or brings the building closer to the original number of dwelling units that was present at the time it was first constructed, provided the conversion meets the requirements of A.2., B. C. and D. of this section.
- F. The Board may approve a Use Permit for a change of use to a community care or a child care facility which eliminates a dwelling unit if it finds that such use is in conformance with the regulations of the District in which it is located.
- G. The Board may approve a Use Permit for the elimination of a dwelling unit through combination with another dwelling unit for the purpose of providing private bathrooms, kitchenettes, accessibility upgrades, and/or seismic safety upgrades to Single-Residential Occupancy (SRO) Rooms in residential developments undergoing a publicly-funded rehabilitation.
- H. Notwithstanding the general Use Permit requirement under 23C.08.010, a lawfully established accessory dwelling unit that is not a controlled rental unit may be eliminated subject to the issuance of a Zoning Certificate when the re-conversion restores the original single family use of the main building or lot, provided that no tenant is evicted.

Section 3. That Section 23C.08.035 is added to the Berkeley Municipal Code to read as follows:

23C.08.035 Private Right of Action

Any affected tenant may bring a private action for injunctive and/or compensatory relief against any applicant and/or owner to prevent or remedy a violation of Sections 23C.08.020 or 23C.08.030. In any such action a prevailing plaintiff may recover reasonable attorney's fees.

Section 4. In adopting these amendments, it is the City Council's intention to permit demolition of existing dwelling units constructed prior to June 1980 *only* if the impacts of doing so are mitigated as set forth in this ordinance. Accordingly: (1) if any provision of this ordinance is determined to be invalid by a court of competent jurisdiction the entire ordinance shall be deemed automatically repealed, null and void and no force or effect; and (2) if a use permit or administrative use permit condition implementing any of the mitigations required by this ordinance is determined to be invalid or unenforceable by a

court of competent jurisdiction, then the entire use permit or administrative use permit which it conditions shall be deemed to automatically invalid as a consequence, and shall be null and void and of no further force or effect.

Section 5. Copies of this Ordinance shall be posted for two days prior to adoption in the glass case located near the walkway in front of Old City Hall, 2134 Martin Luther King Jr. Way. Within fifteen days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.



HOUSING ADVISORY COMMISSION
Regular Meeting
Thursday, September 12, 2013

Housing Advisory Commission
Time: 7:05 p.m.

South Berkeley Senior Center
2939 Ellis Street – Berkeley
Secretary – Kristen Lee, (510) 981-5427

APPROVED MINUTES

All agenda items are for Discussion and Possible Action.

1. Roll Call

Present: Casalaina, Darrow, Murphy, Sawicki, Skjerpung, Soto-Vigil, Tregub, and Wolfe.
Excused Absence: Feller. Staff Present: Hartley, Lee, Asterino. Staff from Other Departments: Eric Angstadt, Timothy Burroughs, Jenny McNulty and Alex Roshal.
Public: Councilmember Arreguin, Jay Kelekian and approximately 15 others from the public.

2. Agenda Approval

Commissioner Soto-Vigil made a motion to approve the agenda. (M/S/C: Soto-Vigil/Tregub. Ayes: Casalaina, Darrow, Murphy, Sawicki, Skjerpung, Soto-Vigil, Tregub, and Wolfe. Absent: Feller. Noes: None. Abstentions: None).

3. Public Comment

Five members of the public spoke regarding the Soft Story Ordinance.

4. Approval of July 11, 2013 – Meeting Minutes

A date and a grammatical change were requested to be made to draft of the July meeting minutes. Commissioner Sawicki made a motion to approve minutes with the modifications. (M/S/C: Sawicki/Tregub. Ayes: Casalaina, Darrow, Murphy, Sawicki, Skjerpung, Soto-Vigil, Tregub, and Wolfe. Absent: Feller. Noes: None. Abstentions: None).

5. City of Berkeley Soft Story Ordinance Implementation.

Jenny McNulty, of the City Planning Department, presented a summary of the proposed Ordinance which would require the mandatory retrofit of soft, weak, or open front buildings. Alex Roshal, the City's Building Official, was also present for the summary. In July 2012, City Council requested staff to develop amendments to the Berkeley Municipal Code to require owners of multi-unit residential buildings with five or more units to comply with the requirements of the soft story ordinance. The questions from the Commissioners and the public referenced the following issues: requirements only for residential structures with 5 residential units or more; exclusion of other retail and office buildings and hotels; the pass-through of retrofit costs by landlords and owners to tenants through increased rents; retrofits resulting in reduced parking for tenants and displacement; and financial assistance for hardship cases. The staff report, which will include comments, will be submitted on September 26, 2013; however, comments and recommendations made at

the HAC's October meeting could be added to Planning's staff report to Council. Comments were taken from the public and commission members. Motions for recommendations by the Commission will be acted on at the next meeting of the HAC. No action was taken by the HAC.

6. Energy Efficiency in Multi-Family Housing Program Update

Timothy Burroughs, of the City Planning Department, summarized the report prepared by the cities of Berkeley, Oakland, and Emeryville. The report was initiated by the three cities in order to develop strategies to motivate investment in energy upgrades in existing multifamily buildings. The HAC did not take action but agreed to write a letter to PG&E supporting staff's request for release of building-specific energy consumption data.

7. Review Original and Revised Ordinances: BMC 23C.08 Demolition and Dwelling Unit Controls.

Eric Angstadt, Director of the City Planning Department, summarized a report prepared with the staff of the Rent Board. On June 11, 2013 the City Council considered repealing and reenacting certain chapters of the Berkeley Municipal Code to modify and clarify the conditions under which dwellings could be demolished. A comparison chart or table was discussed which reflected three Ordinance amendment proposals dated June 4, July 2, and August 30, 2013. Public comment was taken from attendees requesting to speak.

A motion made by Commissioner Darrow: On July 2, 2013, Council considered two different versions of the demolition ordinance. Council asked HAC for input on the different versions. HAC sees a need to remove unreasonable impediments to development. The new demolition Ordinance is an opportunity to address this need. When relaxing restrictions on demolition, HAC sees a need to obtain a real, substantial community benefit in return for allowing demolition of buildings that would not otherwise be allowed to be demolished. HAC finds that the 1:1 replacement requirements in the June 4th draft is the most appropriate way to ensure that a real, measurable, and consistent community benefit accompanies these demolitions. Commissioner Tregub made a friendly amendment to revise to include the HAC urges Council to use the June 4th draft report as a starting point. "Starting point" was agreed to be changed to "model". Discussion by commissioners followed. A friendly amendment was made by Commissioner Wolfe supporting 1:1 replacement of Below Market Rate (BMR) units at the rent level in place at the time of demolition; but if/when a sitting tenant vacates the unit, subsequent tenants must meet relevant income qualifications in order to occupy the BMR unit. Discussion followed regarding the motion with elements of such things as impact of a 100% affordable housing project and staff suggestions. Commissioner Casalaina made a friendly amendment regarding 1) Sitting tenants receive permanent relocation benefits but only have ROFR to new units if they are income-qualified at lease up and 2) regarding the provision of the elimination of dwelling units through combination with another dwelling unit, in addition, publicly-funded SRO rehabs may lose units if necessary to improve habitability and life safety.

With consideration of the acceptance of the friendly amendments, Commissioner Darrow moved the following motion be approved: The HAC sees a need to obtain a real, substantial community benefit in return for allowing the demolition of buildings that would not otherwise be allowed to be demolished. HAC finds that the 1:1 replacement in the

June 4th Draft is the most appropriate way to ensure that a real, measurable, and consistent community benefit accompanies these demolitions. The HAC urges the City Council to use the June 4th Draft as a model. The HAC supports the 1:1 replacement with BMR units at previous rent levels and a requirement that subsequent tenants be means-tested when occupying those BMR units. HAC further supports implementation of two provisions produced by the staff subsequent to the July 2, 2013-Council Hearing and dated in the HAC meeting packet for reference only (dated August 30, 2013-Attachment #12). These provisions are Chapter 23C.08.020 Paragraph C2 – C4 concerning rights of sitting tenants with respect to the construction of a 100% affordable housing project; and Chapter 23C.08.020, Paragraph G regarding the right to demolish an SRO Dwelling Unit for the purpose of a publicly funded rehabilitation that improves life/safety and habitability. (M/S/C: Darrow/Tregub. Ayes: Casalaina, Darrow, Murphy, Sawicki, Skjerpig, Soto-Vigil, Tregub, and Wolfe. Absent: Feller. Noes: None. Abstentions: None).

8. Mold Ordinance

Commissioner Soto-Vigil distributed a memorandum, dated September 12, 2013 to the Commission members and made a motion that the HAC send a letter to the City Manager and forward four recommendations from the memorandum to the City Council. The motion was seconded by the Commissioner Darrow. Commissioner Casalaina made a friendly amendment that the recommendation #2 in the memorandum be included as background information for Council, and that recommendations 1, 3, and 4 in the Memorandum be recommended as action items for Council. Commissioner Murphy made a friendly amendment that the words “should find” in recommendation #3 be changed to read “should investigate.” The friendly motions were accepted. (M/S/C: Soto-Vigil/Darrow. Ayes: Casalaina, Darrow, Murphy, Sawicki, Skjerpig, Soto-Vigil, Tregub, and Wolfe. Absent: Feller. Noes: None. Abstentions: None).

9. Update on Council Action Regarding the Affordable Housing Mitigation Fee

It was noted that there is no update on the Council item regarding the Affordable Housing Mitigation Fee and it was moved to Council’s meeting on October 15. Commissioner Murphy requested that the presentation be drafted as Council item. If it is too late to submit the item for Council’s meeting on October 15, then the HAC could present its recommendation at the October 15-Council meeting.

10. Future Items (All)

Commissioner Soto-Vigil suggested discussion of the proposed Berkeley Way development, the NAACP recommendations made at a community forum meeting , and the PG&E letter obtaining information suggested by City Planning staff. Commissioner Sawicki requested a staff report of an update of the HTF projects be added as a future item. The Update on Tenant disaster preparedness in multi-family buildings and update on the HAC Appeal made by Mr. Ghosh and appearing on the meeting agenda will be carried forward to a future meeting.

11. Announcements

Announcements included the following: 1) Labor Commission and Minimum Wage, 2) HUD CAPER Update available for public review, 3) the sale of 2748 San Pablo Avenue to Satellite Affordable Housing Associations for the development of the Grayson Street

Apartments, and 4) AB 1229 is currently on the Governor's desk for signature and the public can comment at the Governor's website. Commissioner members thanked and acknowledged the chairperson, Stephen Murphy, for his service to the HAC and congratulations on his appointment to the City Planning Commission. The meeting was followed by a reception for Commissioner Murphy.

12. Adjournment: 10:05 p.m.

(M/S/C: Wolfe/Casalaina. Ayes: Casalaina, Darrow, Murphy, Sawicki, Skjerping, Soto-Vigil, Tregub, and Wolfe. Excused Absence: Feller. Noes: None. Abstentions: None).

Approved on _____

_____, Kristen Lee, Interim Secretary