

FOR SUBCOMMITTEE ACTION  
February 13, 2018

To: City Council Ad-Hoc Subcommittee on Downtown Community Benefits  
From: Mayor Jesse Arreguin and Councilmember Kate Harrison  
Subject: Resolution Amending Process and Standards for Evaluating Significant Community Benefits in the Downtown

RECOMMENDATION

1. That the City Council adopt the proposed resolution amending standards for evaluating “Significant Community Benefit” packages for buildings exceeding 75 feet in the Downtown area, and rescinding Resolution No. 67,172-N.S.
2. That the City Council refer to the City Manager and Planning Commission the development of legislation amending Berkeley Municipal Code Chapter 22.16 to create a streamlined Development Agreement process.

BACKGROUND

**Amendments to Significant Community Benefits Standards**

In 2010, the voters of Berkeley approved Measure R, guiding development of the Downtown. Among the provisions approved was permitting, but not requiring, five buildings to be built in the Downtown exceeding height limits in exchange for significant community benefits from project applicants. Allowing developments to exceed height limits confers added value to the project which should be shared with the community. In response to Measure R, the City Council adopted the 2012 Downtown Area Plan and amendments to the Zoning Ordinance to implement the Plan’s policies. The new C-DMU (Commercial Downtown Mixed Use) zoning permitted five buildings exceeding the 75-foot height limit in exchange for the provision of “significant community benefits”. The definition of “significant community benefits” and process for securing those benefits was not prescribed in the Zoning Ordinance.

In response to a request from the Zoning Adjustments Board (ZAB) for direction as to how it should evaluate significant community benefit proposals, on July 14, 2015, the Berkeley City Council adopted Resolution No. 67,712-N.S. “Establishing a Process and Standards for Evaluating “Significant Community Benefit” Packages for Buildings over 75 feet in the Downtown”. The resolution laid out the categories in which benefits should be provided by developers.

Resolution No. 67,712-N.S.:

- Stated a preference rather than setting policy for community benefits

- Was not specific about the findings and process that the ZAB must make and use to certify a Community Benefits Package
- Delayed payment for detriments to existing on-site non-profits, locally-owned small businesses or cultural and arts amenities until far after those entities would be displaced.

This item revises the process and standards for evaluating Significant Community Benefit packages for buildings over 75 feet in the Downtown area. Specifically, this resolution:

- Clarifies that project developers should address the financial impact of displacement on community resources (non-profits, arts and cultural amenities). Mitigation payments should be made upon issuance of a project's building permit;
- Requires the submission of a Significant Community Benefits package later in the process as opposed to initial permit application. This allows developers more time to engage the ZAB and community in developing a benefits proposal;
- Requiring that applicants indicate at entitlement whether their proposed package of Significant Community Benefits will be included on site or made as payments to the City;
- Amends Section C.4. to state that at least 60% of the remaining benefits amount should be allocated to affordable housing;
- Improves the categories of Additional Community Benefits;
- Requires the ZAB to hold a public hearing specifically on the Significant Community Benefits package prior to approval of the use permit;
- Specifies the types of findings that ZAB needs to make in approving the Significant Community Benefits package;
- In evaluating Significant Community Benefits proposals, the resolution requires that the City consider the highest level that the project can financially support based on an independent economic analysis;

## **Development Agreement Procedures**

Berkeley Municipal Code (BMC) Chapter 22.16 governs the approval of Development Agreements. Since adoption of this ordinance in 1991, no one has applied for a Development Agreement because of the extensive requirements. State law governing development agreements offers a more streamlined process.

Development Agreements are a better tool for approving large and complex land use projects, and in executing community benefits. Revisions to the Development Agreement process could provide a useful planning tool for future applications for tall buildings Downtown.

The Subcommittee should recommend that Council initiate amendments to BMC Chapter 22.16 to create more streamlined Development Agreement procedures.

### FISCAL IMPACTS OF RECOMMENDATION

Staff time to implement new policies. In addition, adopting clearer significant community benefit requirements will result in earlier mitigation for non-profits and small businesses required to relocate due to development and more certainty that benefit fees are set at a reasonable level.

### CONTACT PERSON

Mayor Jesse Arreguin	510-981-7100
Kate Harrison, Councilmember, District 4	510-981-7140

### Attachments:

- 1: Resolution with track changes
- 2: Clean Version of Resolution
3. Berkeley Municipal Code Chapter 22.16 "Development Agreement Procedures"

RESOLUTION NO. - N.S.

AMENDING THE PROCESS AND STANDARDS FOR EVALUATING “SIGNIFICANT COMMUNITY BENEFIT” PACKAGES FOR BUILDINGS OVER 75 FEET IN THE DOWNTOWN

WHEREAS, Berkeley Municipal Code Section 23E.68.090.E provides:

E. In order to approve a Use Permit for buildings over 75 feet in height under Section 23E.68.070.B, the Board must find that the project will provide significant community benefits, either directly or by providing funding for such benefits to the satisfaction of the City, beyond what would otherwise be required by the City. These may include, but are not limited to: affordable housing, supportive social services, green features, open space, transportation demand management features, job training, and/or employment opportunities. The applicable public benefit requirements of this Chapter shall be included as conditions of approval and the owner shall enter into a written agreement that shall be binding on all successors in interest;

and

WHEREAS, the Zoning Adjustments Board has requested the Council to provide direction as to how it should evaluate significant community benefit proposals under Section 23E.68.090.E; and

WHEREAS, the City Council understands the Zoning Adjustments Board’s request as a request for guidance as to how the Council believes Section 23E.68.090.E should be implemented; and

WHEREAS, the Council has considered this request and has agreed to provide guidance to the Zoning Adjustments Board in the form of this Resolution, which is intended solely to express how the Council would be inclined to address the issue of community benefits should a project subject to Berkeley Municipal Code Section 23E.68.090.E come before it.

NOW THEREFORE, BE IT RESOLVED, by the Council of the City of Berkeley as follows:

The following description of how the City Council would be inclined to evaluate the finding required by Section 23E.68.090.E should a project subject to that section come before it, and requests that the Zoning Adjustments Board takes this into consideration when it evaluates such projects.

A. General Principles

1. Entitlements for developments of buildings over 75 feet in the Downtown result in added value to the project developer and such additional value should be shared with the community.

2. "Significant community benefits" shall be defined as follows:

A significant community benefit is defined as a contribution to the broader community made by projects above 75 feet in the C-DMU district in order to satisfy the significant community benefits policy in BMC 23E.68.090E. The value of the significant community benefit will be determined, after consideration of an independent economic analysis, at a level that ensures a relationship to increased value while not resulting in project infeasibility.

3. Project developers should address the financial impact of displacement created by the project on community resources (including but not limited to non-profits and arts and cultural amenities/organizations) which serve the Berkeley community. Such payments should be made upon the issuance of a project's building permit.

#### B. Application

1. Prior to the public hearing required in Section D, the project applicant shall propose a package of significant community benefits, with a total value based on the policy set forth below. The community benefits package should specify whether the project plans to provide benefits on site or as payments to the City; this determination may be modified, but shall be fixed at the time of entitlement. The University of California has voluntarily agreed to comply with the policies of the Downtown Area Plan. Therefore, the University should comply with this significant community benefits policy.

2. The community benefits package shall include a pro forma showing pre-development, soft, and hard cost estimates, as well as the projected rate of return the applicant expects the project to generate, based on revenues (sales price or rental income stream) anticipated once the project is completed. This analysis shall cover two scenarios: (1) a base case building of 75 feet or less; and (2) a high-rise building over 75 feet, taking into account all factors including increased rental rates for higher floors as well as costs associated with building over 75 feet. This analysis shall reflect trends in rental income in determining the dollar range of benefits the City could reasonably request.

3. In addition the applicant shall attempt to provide an estimate of the costs of the proposed benefits or fee package in order for the City to evaluate independently whether the benefits package is adequate in proportion to the value of the additional height (as the Downtown Area Plan requires), and whether the project can achieve a reasonable rate of return while providing the significant community benefits proposed.

4. The financial information will be reviewed by an independent consultant selected by the City and paid for by the applicant. In determining the total value of significant community benefits, the independent consultant shall identify the highest reasonable amount that the project can support. The total value of the benefits must bear a reasonable relationship to the value generated by the project. If necessary, the consultant may require additional information from the applicant in order to clarify assumptions included in the original cost/benefit assessment. The findings of the independent economic analysis will be presented to the Zoning Adjustments Board (ZAB).

### C. Significant Community Benefit Options

1. An applicant for a building over 75 feet shall propose a significant community benefits package that satisfies the criteria of either Option A or Option B, below.
2. Option A: Affordable Housing, Labor, and Other Benefits. Significant community benefits under Option A shall include: (a) an additional affordable housing benefit that exceeds the existing requirements for all projects in the City; (b) a Project Labor Agreement (PLA); and (c) at least 1 other category of significant community benefits depending on the total value of the public benefits that the City determines the project can reasonably bear. In order to incentivize the immediate production of community benefits, developers may provide 90% of that predetermined total value (minus the labor credit) if they complete the community benefits prior to/concurrent with a certificate of occupancy.
3. Option B: Square Footage Flat Fee. Significant community benefits under Option B shall include: (a) a PLA; and (b) a per square foot fee determined by an independent financial consultant that would capture the highest reasonable value while maintaining financial feasibility of the project. Such fees would be paid into a City fund that is restricted to providing the community benefits specified in this Resolution.
4. Under both Options A and B, a PLA shall entitle the applicant to a credit of 5% of the construction cost of the project against the total fee. After the Project Labor Agreement credit is applied, at least 60% of the remaining amount should be allocated to affordable housing units by making a payment to the City's Housing Trust Fund or by providing the equivalent units on site for tenants with qualifying incomes. The remaining percentage shall be allocated to fulfilling the other benefit categories described herein.
5. The community benefit categories are as follows.

### Base Benefits

- a. Affordable Housing. Either (1) additional on-site affordable housing that exceeds standard requirements; or (2) affordable housing fees that exceed standard City requirements.
- b. Labor Requirements. In addition to agreeing to enter into a Project Labor Agreement, applicants would be required to sign an agreement stating that no less than 20% of the project's construction workers be Berkeley or Green Corridor/Alameda County residents, with priority in that order.

### Additional Community Benefits

- a. Arts and Culture. On-site or off-site benefits for arts and culture, including publically accessible art or performance space or an in-lieu fee to the Public Art Fund.
- b. Street and Open Space Requirements (SOSIP). Additional funding for SOSIP beyond what is currently required by law, or construction of SOSIP or similar/updated projects approved by the City, which can include, but are not limited to:
  - Enhanced parks and streetscapes, such as funding for the Center Street Plaza
  - Improving bicycle networks
  - Permeable street paving
  - Pedestrian amenities
  - Transportation mitigations
- c. Sustainable Development and Transportation. Environmentally friendly community benefits beyond what is currently required, such as, but not limited to:
  - State-of-the-art sustainable building practices (e.g. Zero Net Energy, LEED Platinum)
  - On-site gray water infrastructure
  - Rainwater re-use
  - Funding or building green infrastructure projects in the Downtown area
  - Secure bicycle parking for public use
- d. Restoration of Historic Civic Center Buildings. Contributions to the restoration of Old City Hall and/or the Veterans Memorial Hall. Such contributions could be used for other listed community benefits in the event the City determines that restoration of one or both of these buildings is not likely within the foreseeable future.
- e. Supportive Social Services and Shelter. Contributions to supportive social services which may include, but are not limited to:

- Funding for the Pathways Project
  - Funding for Flexible Housing Subsidies Pool
  - Funding for the HUB (Coordinated Entry System) or the Downtown Drop-In Center
  - Public restrooms
  - Funding for non-profit organizations serving Berkeley's youth
6. Alternate Community Benefits Proposals. In the event an applicant believes that compliance with the foregoing community benefits standards would violate any state or federal law or constitutional provision, an applicant may make an alternative proposal.

#### D. Evaluation Process

1. The Zoning Adjustments Board will review the community benefits package proposed by the applicant, along with the independent economic analysis, to determine whether to accept the benefits package, reject it, or propose modifications. ZAB must hold one public hearing to solicit input on the significant community benefits package.
2. In its decision to approve the benefits package, the ZAB should make specific findings that the Significant Community Benefits proposed by the applicant:
  - a. Are beyond what would otherwise be required by the City;
  - b. Do not principally benefit the project or occupants of the project, but rather the broader Berkeley community;
  - c. Consider the highest amount the City determines the project can reasonably afford;
  - d. Comply with the required benefits categories;
  - e. That the value of the community benefits bear a relationship to the value generated by the project.
3. Once the Zoning Adjustments Board approves the community benefits package, the Board can make the finding required by Section 23E.68.090.E.

#### E. Community Benefits Agreement

All significant community benefits agreed to by the applicant and approved by the City shall be included as Conditions of Approval, and shall be reflected in a community benefits agreement and if necessary a notice of limitation, that must be fully executed and recorded against the property on which the project is located prior to issuance of a building permit. Approved Use Permits, including Conditions of Approval requiring provision of Significant Community Benefits, may be subject to the Compliance and Revocation standards as set forth in Berkeley Municipal Code (BMC) Chapter 23B.60.

#### F. Alteration of Community Benefits Package

If after a project's initial pro forma analysis is conducted City staff determine that the project is substantively altered in a way that may impact the project's feasibility or profitability, the pro forma analysis should be updated. If the updated pro forma shows that the change did in fact substantively alter the project's feasibility or profitability, the Community Benefits Agreement should be modified to reflect those changes, following the procedures as set forth in Section (E). Community Benefits Packages approved by the Council shall be subject to the Compliance and Revocation standards as set forth in Chapter 23B.60 of the BMC.

#### G. Exemption To Already Approved Projects

Projects that have already been granted entitlements at the time of the implementation of these standards shall be exempt from the provisions of this resolution and instead shall follow the procedures as set forth at the time of their approval. Projects shall lose their exemption and become subject to all the provisions of this resolution if staff concludes that the Use Permit requires modification under BMC Section 23B.56.020, or the Use Permit is subject to compliance or revocation action under BMC Chapter 23B.60.

AND BE IT FURTHER RESOLVED that Resolution No. 67,172-N.S. is hereby rescinded.

RESOLUTION NO. - N.S.

AMENDING ESTABLISHING A THE PROCESS AND STANDARDS FOR EVALUATING  
“SIGNIFICANT COMMUNITY BENEFIT” PACKAGES FOR BUILDINGS OVER 75 FEET  
IN THE DOWNTOWN

WHEREAS, Berkeley Municipal Code Section 23E.68.090.E provides:

E. In order to approve a Use Permit for buildings over 75 feet in height under Section 23E.68.070.B, the Board must find that the project will provide significant community benefits, either directly or by providing funding for such benefits to the satisfaction of the City, beyond what would otherwise be required by the City. These may include, but are not limited to: affordable housing, supportive social services, green features, open space, transportation demand management features, job training, and/or employment opportunities. The applicable public benefit requirements of this Chapter shall be included as conditions of approval and the owner shall enter into a written agreement that shall be binding on all successors in interest;

and

WHEREAS, the Zoning Adjustments Board has requested the Council to provide direction as to how it should evaluate significant community benefit proposals under Section 23E.68.090.E; and

WHEREAS, the City Council understands the Zoning Adjustments Board’s request as a request for guidance as to how the Council believes Section 23E.68.090.E should be implemented; and

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BE IT FURTHER RESOLVED that Resolution No. 67,172-N.S. is hereby rescinded

## A. General Principles

1. Entitlements for developments of buildings over 75' feet in the Downtown result in added value to the project developer and such additional value should be shared with the community.
2. "Significant community benefits" shall be defined as follows:

A significant community benefit is defined as a contribution to the broader community, ~~either physically constructed or a monetary contribution to the City,~~ made by projects above 75 feet in the C-DMU district in order to satisfy the significant community benefits policy in BMC 23E.68.090E. The value of the significant community benefit will be determined, ~~based on a portion of the after consideration of the an independent economic analysis, at a level that ensures a relationship to increased value while not resultingg increased value. The portion attributable to community benefits must not result in an in~~ project infeasibility opportunity to make a reasonable rate of return.

3. Project developers should address the financial impact of displacement detriment created by the project on ~~non-profits community resources (including but not limited to non-profits, locally owned businesses, and arts and cultural amenities/organizations)~~ which serve the Berkeley community ~~and, as part of their Community Benefits Agreement, pay for the cost of relocation of resources displaced by their development if such payments are not already required of the developer. Such payments shall~~ should be made upon the issuance of a project's building permit.

## B. Application

1. Prior to the public hearing required in Section D, the project applicant shall propose a ~~The initial permit application for a building over 75' feet in the Downtown must include a proposed~~ package of significant community benefits, with a total value based on the policy set forth below. The community benefits package should permit application must also specify whether the project plans to provide benefits on site or as payments to the City; this determination may be modified, but shall be fixed at the time of entitlement. The University of California has voluntarily agreed to comply with the policies of the Downtown Area Plan. Therefore, the University should comply with this significant community benefits policy.

2. The application community benefits package shall include a pro forma showing pre-development, soft, and hard cost estimates, as well as the projected rate of return the applicant expects the project to generate, based on revenues (sales price or rental income stream) anticipated once the project is completed. This analysis shall cover two scenarios: (1) a base case building of 75' feet or less; and (2) a high-rise building over 75' feet, taking into account all factors including increased rental rates for higher floors as well as costs associated with building over 75 feet. This

analysis shall reflect trends in rental income in determining the dollar range of benefits the City could reasonably request.

~~2. The total value of benefits to be provided must consider the highest reasonable amount the City determines that the project can support and must bear a reasonable relationship to the value generated by the project.~~

3. In addition the applicant shall attempt to provide an estimate of the costs of the proposed benefits or fee package in order for the City to evaluate independently whether the benefits package is adequate in proportion to the value of the additional height (as the Downtown Area Plan requires), and whether the project can achieve a reasonable rate of return while providing the significant community benefits proposed.

4. The financial information will be reviewed by an independent consultant selected by the City and paid for by the applicant. In determining the total value of significant community benefits, the independent consultant shall identify the highest reasonable amount that the project can support. The total value of the benefits must bear a reasonable relationship to the value generated by the project. If necessary, the consultant may require additional information from the applicant in order to clarify assumptions included in the original cost/benefit assessment. The findings of the independent economic analysis will be presented to the Zoning Adjustments Board (ZAB).

### C. Significant Community Benefit Options

1. ~~Except as set forth in paragraph 2, a~~An applicant for a building over 75' feet shall propose a significant community benefits package that ~~complies with subsection (A)(3) and~~ satisfies the criteria of either Option A or Option B, below.

~~2. Projects Already in the Permitting Process. For projects that have been in the zoning review permit process for more than two years prior to June 25, 2015, significant community benefits shall consist of the following:~~

~~a. Payment of \$100 per square foot for all rentable residential square footage between 75'-120'; and~~

~~b. Payment of \$150 per square foot for all rentable residential square footage between 121'-180'.~~

~~Alternatively, such projects may propose benefits of an equivalent value, subject to evaluation by the Zoning Adjustments Board as set forth below.~~

~~3-2.~~ Option A: Affordable Housing, Labor, and Other Benefits. Significant community benefits under Option A shall include: (a) an additional affordable housing benefit that exceeds the existing requirements for all projects in the City; (b) a Project Labor Agreement (PLA); and (c) at least 1 other category of significant community benefits depending on the total value of the public benefits that the City determines the project can reasonably bear. In order to

incentivize the immediate production of community benefits, developers may provide 90% of that predetermined total value (minus the labor credit) if they complete the community benefits prior to/concurrent with a certificate of occupancy.

4.3. Option B: Square Footage Flat Fee. Significant community benefits under Option B shall include: (a) a PLA; and (b) a per square foot fee determined by an independent financial consultant that would capture the highest reasonable value while maintaining financial feasibility of the project. Such fees would be paid into a City fund that is restricted to providing the community benefits specified in this Resolution.

5.4. Under both Options A and B, a PLA shall entitle the applicant to a credit of 5% of the construction cost of the project against the total fee. After the Project Labor Agreement credit is applied, at least 60% of the remaining amount ~~should~~ should be allocated to affordable housing units by making a payment to the City's Housing Trust Fund or by providing the equivalent units on site for tenants with qualifying incomes. The remaining ~~40%percentage~~ should ~~shall~~ be allocated to fulfilling the other benefit categories described herein.

6.5. The community benefit categories are as follows.

#### Base Benefits

- a. Affordable Housing. Either (1) additional on-site affordable housing that exceeds standard requirements; or (2) affordable housing fees that exceed standard City requirements.
- b. Labor Requirements. In addition to agreeing to enter into a Project Labor Agreement, applicants would be required to sign an agreement stating that no less than 20% of the project's construction workers be Berkeley or Green Corridor/Alameda County residents, with priority in that order.

#### Additional Community Benefits

- a. Arts and Culture. On-site or off-site benefits for arts and culture, including publically accessible art or performance space or an in-lieu fee to the Public Art Fund.
- b. Street and Open Space Requirements (SOSIP). Additional funding for SOSIP beyond what is currently required by law, or construction of SOSIP or similar/updated projects approved by the City, which can include, but are not limited to:

- Enhanced parks and streetscapes, such as funding for the Center Street Plaza

- Improving bicycle networks
- Permeable street paving
- ~~Tree plantings~~
- Pedestrian amenities
- Transportation mitigations

c. Sustainable Development and Transportation. Environmentally friendly community benefits beyond what is currently required, such as, but not limited to:

- ~~Higher green building standards~~ State-of-the-art sustainable building practices (e.g. Zero Net Energy, LEED Platinum)
- ~~Water and wastewater infrastructure repair and reinvestment~~
- On-site gray water infrastructure
- ~~Waste diversion~~
- Rainwater re-use
- Funding or building green infrastructure projects in the Downtown area
- Secure bicycle parking for public use
- ~~GreenTRIP certification (<http://www.transformca.org/landing-page/greentrip-certification-program>)~~

d. Restoration of Historic Civic Center Buildings. Contributions to the restoration of Old City Hall and/or the Veterans Memorial Hall. Such contributions could be used for other listed community benefits in the event the City determines that restoration of one or both of these buildings is not likely within the foreseeable future.

e. Supportive Social Services and Shelter. Contributions to supportive social services which may include, but are not limited to:

- Funding for the Pathways Project
- Funding for Flexible Housing Subsidies Pool
- Funding for the HUB (Coordinated Entry System) or the Downtown Drop-In Center
- Public restrooms
- Funding for non-profit organizations serving Berkeley's youth

7.6. Alternate Community Benefits Proposals. In the event an applicant believes that compliance with the foregoing community benefits standards would violate any state or federal law or constitutional provision, an applicant may make an alternative proposal.

#### Exclusion of Existing Requirements from Community Benefits Agreements

~~Nothing may be included in a Community Benefits Agreement that is separately legally required of the developer, whether by law or by contractual agreement with any party, public or private, or by any other legally binding means.~~

#### D. Evaluation Process

1. The Zoning Adjustments Board will review the community benefits package proposed by the applicant, along with the independent economic analysis, to determine whether to accept the benefits package, reject it, or propose modifications. ~~Once the Zoning Adjustments Board approves the community benefits package, the Board can make the finding required by Section 23E.68.090.E. ZAB must hold one public hearing to solicit input on the significant community benefits package.~~

2. In its decision to approve the benefits package, the ZAB should make specific findings that the Significant Community Benefits proposed by the applicant:

- a. Are beyond what would otherwise be required by the City;
  - b. Do not principally benefit the project or occupants of the project, but rather the broader Berkeley community;
  - c. ~~Take into consideration~~ Consider the highest amount the City determines the project can reasonably afford;
  - d. Comply with the required benefits categories; -
  - e. That the value of the community benefits bear a relationship to the value generated by the project.
- ~~—Comply with the requirements of subsection (D)~~

3. Once the Zoning Adjustments Board approves the community benefits package, the Board can make the finding required by Section 23E.68.090.E.

#### E. Community Benefits Agreement

All significant community benefits agreed to by the applicant and approved by the City shall be included as Conditions of Approval, and shall be reflected in a community benefits agreement and if necessary a notice of limitation, that ~~shall~~ must be fully executed and recorded against the property on which the project is located prior to issuance of a building permit. Approved Use Permits, including Conditions of Approval requiring provision of Significant Community Benefits, may be subject to the Compliance and Revocation standards as set forth in Berkeley Municipal Code (BMC) Chapter 23B.60.

~~, provided that any payments required by the community benefits agreement would not be due prior to issuance of a building permit, but would be prior to the issuance of a Certificate of Occupancy.~~

#### F. Alteration of Community Benefits Package

If after a project's initial pro forma analysis is conducted City staff determine that the project is substantively altered in a way that may impact the project's feasibility or profitability, the pro forma analysis should be updated. If the updated pro forma shows that the change did in fact substantively alter the project's feasibility or profitability, the Community Benefits Agreement should be modified to reflect those changes, following the procedures as set forth in Section (E). Community Benefits Packages approved by the Council shall be subject to the Compliance and Revocation standards as set forth in Chapter 23B.60 of the BMC.

#### G. Exemption To Already Approved Projects

Projects that have already been granted entitlements at the time of the implementation of these standards shall be exempt from the provisions of this resolution and instead shall follow the procedures as set forth at the time of their approval, ~~except that they shall be subject to the alteration procedures as set forth in Section G above.~~ Projects shall lose their exemption and become subject to all the provisions of this resolution if staff concludes that the Use Permit requires modification under BMC Section 23B.56.020, or the Use Permit is subject to compliance or revocation action under BMC Chapter 23B.60. ~~their approved Community Benefits Package requires compliance, revocation, or modification action as provided for in Section G.~~

AND BE IT FURTHER RESOLVED that Resolution No. 67,172-N.S. is hereby rescinded.

**Chapter 22.16**  
**DEVELOPMENT AGREEMENT PROCEDURES**

## Sections:

- [22.16.010](#) Intent and purpose.
- [22.16.020](#) Definitions.
- [22.16.030](#) Applications.
- [22.16.040](#) Contents of development agreements.
- [22.16.050](#) Consideration of proposed development agreements.
- [22.16.060](#) Recordation.
- [22.16.070](#) Annual review.
- [22.16.080](#) Amendment or cancellation.
- [22.16.090](#) Miscellaneous provisions.

**22.16.010 Intent and purpose.**

## A. Findings and declaration of intent.

1. The City Council finds that development agreements can strengthen the public planning process, encourage private participation in comprehensive planning by providing a greater degree of certainty in that process, reduce the economic costs of development, allow for the orderly planning of public improvements and services, allocate costs to achieve maximum utilization of public and private resources in the development process, and assure that appropriate measures to enhance and protect the environment are achieved
2. The City Council further finds and determines that the public health, safety and general welfare will be furthered by the adoption of an ordinance establishing procedures for entering into and administering development agreements to accomplish the foregoing purposes and corresponding benefits. (Ord. 6033-NS § 1, 1991)

**22.16.020 Definitions.**

## A. Definitions. The following terms when used in this chapter shall have the following respective meanings:

1. "City" means the City of Berkeley, a municipal corporation.
2. "City Clerk" means the Berkeley City Clerk.
3. "City Council" means the Berkeley City Council.
4. "City Manager" means the Berkeley City Manager or the person (s)he designates to carry out all or part of the responsibilities for implementing this chapter.

5. "Applicant" means a person who has a legal or equitable interest in real property, and who applies for a development agreement for a project on that property pursuant to the procedures specified in this chapter, and who executes and is bound by the terms of the development agreement. "Applicant" includes a successor in interest to the rights and duties of the original applicant for a development agreement.
6. "Development agreement" means a development agreement entered into between the City and an applicant pursuant to this chapter.
7. "General plan" means the Berkeley General Plan.
8. "Person" means an individual, group, partnership, firm, association, corporation, trust, governmental agency, governmental official, administrative body, tribunal or any other form of business or legal entity.
9. "Planning Commission" means the Planning Commission of the City.
10. "Project" means the development project that is the subject of a development agreement. (Ord. 6033-NS § 2, 1991)

#### **22.16.030 Applications.**

- A. Authority for adoption. An applicant for a development project may request that the City review the application as a development agreement application in accordance with the following procedures. The City incorporates by reference the provisions of California Government Code Sections 65864-65869.5. In the event of any conflict between these statutory provisions and this chapter, this chapter shall control.
- B. Forms and information. The applicant shall submit an application for a development agreement on a form prescribed by the City Manager. The City Manager shall identify submittal requirements for applications for development agreements. (S)he may require an applicant to submit such additional information and supporting data as (s)he considers necessary to process the application.
- C. Fees. The applicant shall pay such fees and charges for the filing and processing of applications for development agreements and the administration of approved development agreements, including annual reviews, in amounts as may be established by resolution of the City Council.
- D. Qualified applicant. A qualified applicant shall have a legal or equitable interest in the real property which is the subject of the proposed development agreement. The City Manager shall require an applicant to submit proof of his interest in the real property and of the authority of any agent to act for the applicant.
- E. Initial review of application.
  1. The City Manager shall review each application to determine whether it is complete. If the application is found to be incomplete, the City Manager shall reject the application and, within forty-five days after submittal of the application, shall inform the applicant of the items necessary to properly complete the

application. Applicant may appeal the City Manager's determination that the application is incomplete to the City Council. Any such appeal must be filed within fifteen days following the mailing of written notice that the application is incomplete.

2. Within forty-five days after determining a development agreement application to be complete, the City Manager shall make a written recommendation to the Planning Commission whether a development agreement is the appropriate form of entitlement for the proposed project, and shall place it on the Planning Commission agenda at the earliest practicable date. The Planning Commission shall make a recommendation to the City Council concerning appropriateness within thirty days after the date of the meeting at which the item first appears on the commission agenda. If the Planning Commission fails to make a recommendation within this time period, then the City Manager's recommendation shall be placed on the City Council agenda as specified in Section [22.16.030](#) of this chapter. The following criteria shall be followed in making these recommendations:

- a. The project is preliminarily determined to be consistent with the general plan and any applicable specific plan, or applicant has submitted an application for any necessary amendments to the general plan or specific plan; and
- b. EITHER: These three criteria are met:
  - (1) The project site is three acres or more in area.
  - (2) The project proposes to construct or rehabilitate multiple structures on the site, and the total floor area to be constructed and rehabilitated is at least one hundred thousand square feet.
  - (3) The project envisions a long-term or phased build-out such that, at the time of application, designs of all buildings and improvements cannot be reasonably specified in the manner required of use permit applications.

OR: There are other unique or compelling reasons why the project or the potential benefits to the community would warrant consideration in the form of a development agreement.

3. The City Manager's recommendation under subsection 22.16.030E, 2 of this chapter shall include an analysis of how the proposed project comports with regulations of the zoning district in which the property lies, including identification of any aspects of the project which would require a variance were the application subject to review and action under the zoning ordinance.

4. The Planning Commission's recommendation, or, if the Planning Commission does not make a timely recommendation, then the City Manager's recommendation, under subsection 22.16.030E, 2 of this chapter shall be placed on the City Council agenda at the earliest practicable date as an action item, and the City Council may accept or reject the recommendation after consideration of the criteria enumerated in subsection 22.16.030E, 2 of this chapter.

5. The City Council shall make a determination whether a development agreement is the appropriate form of entitlement for the proposed project within thirty days after the date of the meeting at which the item first appears on the City Council agenda. If the City Council fails to make a determination within this time period, then the Planning Commission's recommendation, or, if the Planning Commission failed to make a timely recommendation, then the City Manager's recommendation, under subsection 22.16.030E, 2 of this chapter, shall become the City's final determination as to whether a development agreement is the appropriate form of entitlement for the proposed project. (Ord. 6033-NS § 3, 1991)

**22.16.040 Contents of development agreements.**

- A. A development agreement shall specify its duration; the permitted uses of the subject property; the general location and density or intensity of uses; the general location, maximum height and size of proposed buildings; and provisions for reservation or dedication of land for public purposes. It shall contain provisions concerning its transferability.
- B. A development agreement may include requirements for construction and maintenance of onsite and off-site improvements or payment of fees in lieu of such dedications or improvements.
- C. A development agreement may also include conditions, terms, restrictions, and requirements for subsequent discretionary actions but does not eliminate the applicant's responsibility to obtain all required land use approvals.
- D. A development agreement may include, without limitation, conditions and restrictions imposed by the City with respect to the project including those conditions and restrictions proposed in any environmental impact report applicable to the project prepared and certified under the California Environmental Quality Act, and the City's regulations with respect thereto, in order to eliminate or mitigate adverse environmental impacts of the project.
- E. A development agreement may provide that the project be constructed in specified phases, that construction shall commence within a specified time, and that the project or any phase thereof be completed within a specified time.
- F. If the development agreement requires applicant financing of necessary public facilities, it may include terms relating to subsequent reimbursement over time for such financing.
- G. A development agreement may contain an indemnity clause requiring the applicant to indemnify and hold the City harmless against claims arising out of or in any way related to the actions of applicant in connection with the application or the development process, including all legal fees and costs.
- H. A development agreement may include provisions to guarantee performance of obligations stated in the agreement.

I. A development agreement shall be a contract that is negotiated and voluntarily entered into by City and applicant and may contain any additional or modified conditions, terms or provisions agreed upon by the parties. (Ord. 6033-NS § 4, 1991)

**22.16.050 Consideration of proposed development agreements.**

A. Community workshop; public notice. The Planning Commission shall conduct at least one community workshop prior to commencement of the negotiations referenced in subsection 22.16.050B of this chapter. The purpose of the community workshop(s) is to provide members of the Planning Commission, other advisory bodies to the City Council, and members of the public the opportunity to recommend environmental mitigations, community benefits and other provisions of a development agreement to the City Manager for negotiation. Notice of the community workshop(s) shall be mailed fourteen calendar days in advance to members of the City Council, Planning Commission, and other designated advisory bodies. In addition, notice shall be mailed to owners and occupants of all property within five hundred feet of the project site and shall be published in display ads in newspapers of general circulation in the City of Berkeley.

B. Negotiations. The City Manager shall negotiate the specific components and provisions of the development agreement on behalf of the City for recommendation to the City Council. The City Council may, but need not, appoint a subcommittee of the City Council to participate in the negotiations. The City Council shall appoint a community advisory committee to consult with the City Manager and any subcommittee appointed by the City Council during negotiations. In appointing the members of this committee, the City Council shall give due consideration to obtaining representative views of residents and businesses in affected communities. The City Manager shall not commence negotiations with the applicant as to any specific component or provision of the development agreement until after the Planning Commission has conducted a community workshop pursuant to subsection 22.16.050B of the chapter.

C. Advisory bodies. The Planning Commission shall advise the City Council on development agreements, including the matters specified in subsection 22.16.050F of this chapter. In addition, the City Manager shall designate the following City boards and commissions as advisory bodies to the Planning Commission and the City Council on the following aspects of a proposed development agreement where the project otherwise would be subject to such board or commission's jurisdiction or review were the applicant required to proceed under the City's zoning, design review, or landmarks preservation rules: 1. Zoning Adjustments Board - permitted uses and development standards, community benefits and mitigation programs, and future discretionary review for use permits.

2. Design Review Committee - development standards as they relate to existing and planned urban design of the surrounding area, architectural guidelines, site plan and site plan standards.

3. Landmarks Preservation Commission - development standards as they relate to designated landmarks or structures of merit on the subject site or adjacent sites, mitigation programs for loss of designated landmarks, and demolition of non-residential buildings forty years old or older.

D. Availability of draft development agreement. The City Manager shall make a draft of the proposed development agreement available for public review at least thirty days prior to the Planning Commission public hearing on the proposed development agreement.

The Zoning Adjustments Board, the Design Review Committee and the Landmarks Preservation Commission, may conduct one or more public hearings or community workshops during the review period for the draft development agreement, consistent with the scope of their roles outlined in subsection 22.16.050C of this chapter and their enabling ordinances.

E. Planning Commission public hearing. Prior to making a recommendation for City Council action on a proposed development agreement, the Planning Commission shall hold a noticed public hearing to consider comments on the development agreement from other advisory bodies and from members of the public. Notice of the public hearing to make a recommendation concerning adoption of a development agreement shall be given as provided in subsection 22.16.050A of this chapter, in addition to any other notice required by law for land use approvals to be considered concurrently with the development agreement. The Planning Commission public hearing may, but need not, be held concurrently with the public hearing(s) on other land use approvals for the project.

F. Recommendation by Planning Commission. Within thirty days after closing its public hearing, the Planning Commission shall make its recommendation in writing to the City Council. The recommendation shall include the Planning Commission's determination and supporting reasoning whether or not the proposed development agreement:

1. Is consistent with the goals, objectives, policies, general land uses and programs specified in the general plan and any applicable specific plan.
2. Is compatible with the uses authorized in, and the zoning district in which the real property is located.
3. Has duly considered City mitigation programs in effect at the time of execution of the agreement.
4. Will be non-detrimental to the public health, safety and general welfare of persons residing or working in the neighborhood and to property and improvements in the neighborhood.
5. Complies with the provisions of the California Environmental Quality Act and City's procedures adopted pursuant thereto.

G. City Council public hearing. The City Council shall hold a noticed public hearing prior to adoption of any development agreement. Notice of the public hearing to consider adoption of a development agreement shall be given as provided in subsection 22.16.050A of this chapter, in addition to any other notice required by law for land use approvals to be considered concurrently with the development agreement. The City Council public hearing may, but need not, be held concurrently with the public hearing(s) on other land use approvals for the project.

H. Decision by City Council.

1. After the City Council completes the public hearing, it may accept, reject or conditionally accept the recommendation of the Planning Commission; or in the event the Planning Commission has failed to make a recommendation pursuant to subsection 22.16.050F of this chapter, the City Council shall approve, disapprove or conditionally approve the development agreement. The City Council may, but need not, refer matters not previously considered by the Planning Commission during its hearing back to the Planning Commission for report and recommendation. The Planning Commission may, but need not, hold a public hearing on matters referred back to it by the City Council.

2. The City Council shall not approve a proposed development agreement unless it finds that its provisions are consistent with the general plan and any applicable specific plan. This requirement may be satisfied by a finding that the provisions of a proposed development agreement are consistent with proposed general plan or specific plan provisions which are to be adopted concurrently with the approval of the proposed development agreement. A finding of consistency may be made if, considering the general plan and/or specific plan as a whole and balancing competing provisions as appropriate, the City determines that the proposed development agreement does not conflict with the provisions of the general plan and/or specific plan. This finding need not be supported by detailed explanation or factual findings. Notwithstanding any other provision of law, including Government Code Section 65867.5, this subsection shall not be interpreted to impose upon the City any of the legal requirements applicable to general law cities with respect to general plan or specific plan consistency, including without limitation any prohibition on a finding of general plan consistency in the absence of a complete, legally adequate general plan.

3. A proposed development agreement shall be executed by the applicant before it is placed before the City Council for consideration at a public hearing.

I. Approval of development agreement. The City Council shall have the exclusive authority to approve the development agreement. Approval of a development agreement shall be by ordinance. (Ord. 6106-NS § 4, 1991: Ord. 6033-NS § 5, 1991)

**22.16.060 Recordation.**

A. Execution and recordation of development agreement.

1. Within ten days after the ordinance approving the development agreement takes effect, the City Manager shall execute the development agreement on behalf of the City, and the City Clerk shall record the development agreement with the county recorder.

2. If the parties to the agreement or their successors in interest amend or cancel the development agreement, or if the City terminates or modifies the development agreement for failure of the applicant to fully comply with the provisions of the development agreement, the City Clerk shall record notice of such

action with the Alameda County Recorder. (Ord. 6033-NS § 6, 1991)

**22.16.070 Annual review.**

A. Time for and initiation of review.

1. The City Manager shall review each approved development agreement at least once a year at which time the applicant shall be required to demonstrate compliance with the provisions of the development agreement.
2. The applicant shall initiate the required annual review by submitting a written request at least sixty days prior to the review date specified in the development agreement. The applicant shall also provide evidence as determined necessary by the City Manager to demonstrate compliance with the provisions of the development agreement. The burden of proof by substantial evidence of compliance is upon the applicant.

B. Finding of compliance. If the City Manager, on the basis of substantial evidence, finds compliance by the applicant with the provisions of the development agreement, the City Manager shall issue a finding of compliance, which shall be in recordable form and may be recorded with the county recorder after conclusion of the review.

C. Finding of noncompliance.

1. If the City Manager finds the applicant has not complied with the provisions of the development agreement, the City Manager may issue a finding of noncompliance which may be recorded by the City with the county recorder after it becomes final. The City Manager shall specify in writing to the applicant the respects in which applicant has failed to comply, and shall set forth terms of compliance and specify a reasonable time for the applicant to meet the terms of compliance.
2. If applicant does not comply with any terms of compliance within the prescribed time limits, the development agreement shall be subject to termination or modification pursuant to subsection 22.16.080B of this chapter.

D. Appeal of determination. Within ten days after issuance of a finding of compliance or a finding of noncompliance, any interested person may file a written appeal of the finding with the City Council. The appellant shall pay fees and charges for the filing and processing of the appeal in amounts established by resolution of the City Council. The appellant shall specify the reasons for the appeal. The issuance of a finding of compliance or finding of noncompliance by the City Manager and the expiration of the appeal period without appeal, or the confirmation by the City Council of the issuance of the finding on such appeal, shall conclude the review for the applicable period and such determination shall be final. (Ord. 6033-NS § 7, 1991)

**22.16.080 Amendment or cancellation.**

A. Cancellation or modification by mutual consent. Any development agreement may be canceled or modified

by mutual consent of the parties following compliance with the procedures specified in subsections 22.16.050E and G of this chapter. A development agreement may also specify procedures for administrative approval of minor amendments by mutual consent of the applicant and the City Manager.

B. Termination or modification after finding of noncompliance. If a finding of noncompliance does not include terms of compliance, or if applicant does not comply with the terms of compliance within the prescribed time limits, the City Manager may refer the development agreement to the City Council for termination or modification. The City Council shall conduct a public hearing. After the public hearing, the City Council may terminate the development agreement modify the finding of noncompliance, or rescind the finding of noncompliance, and issue a finding of compliance.

C. Rights of the parties after cancellation or termination. In the event that a development agreement is canceled or terminated, all rights of the applicant, property owner or successors in interest under the development agreement shall terminate. If a development agreement is terminated following a finding of noncompliance, the City may, in its sole discretion, determine to return any and all benefits, including reservations or dedications of land, and payments of fees, received by the City. (Ord. 6033-NS § 8, 1991)

#### **22.16.090 Miscellaneous provisions.**

A. Effect of development agreement.

1. Unless otherwise specified in the development agreement, the City's rules, regulations and official policies governing permitted uses of the property, density and design, and improvement standards and specifications applicable to development of the property shall be those City rules, regulations and official policies in force on the effective date of the development agreement. The applicant shall not be exempt from otherwise applicable City ordinances or regulations pertaining to persons contracting with the City.

2. A development agreement shall not prevent the City, in subsequent actions applicable to the property, from applying new rules, regulations and policies which do not conflict with those rules, regulations and policies applicable to the property as set forth in the development agreement. A development agreement shall not prevent the City from denying or conditionally approving any subsequent land use permit or authorization for the project on the basis of such existing or new rules, regulations, and policies.

3. Unless otherwise specified in the development agreement, a development agreement shall not exempt the applicant from obtaining future discretionary land use approvals.

B. Rules affecting development agreement. In the event that any regulation or law of the State of California or the United States, enacted or interpreted after a development agreement has been entered into prevents or precludes compliance with one or more provisions of the development agreement, then the development agreement may be modified or suspended in the manner and pursuant to the procedures specified in the development agreement, as may be necessary to comply with such regulation or law.

- C. Interpretation. This chapter governs the interpretation of any development agreement approved under this chapter.
- D. Enforcement of a development agreement. The procedures for enforcement, amendment, modification, cancellation or termination of a development agreement specified in this section and in California Government Code Section 65865.4 are non-exclusive. A development agreement may be enforced, amended, modified, canceled or terminated by any manner otherwise provided by law or by the provisions of the development agreement.
- E. Severability clause. Should any provision of this chapter or a subsequent development agreement be held by a court of competent jurisdiction to be either invalid, void, or unenforceable, the remaining provisions of this chapter and the development agreement shall remain in full force and effect unimpaired by the holding, except as may otherwise be provided in the development agreement.
- F. Judicial review; time limitation.
1. Any judicial review of an ordinance approving a development agreement shall be by writ of mandate pursuant to Section 1085 of the California Code of Civil Procedure; and judicial review of any City action taken by the City pursuant to this chapter, other than initial approval of a development agreement, shall be by writ of mandate pursuant to Section 1094.5 of the California Code of Civil Procedure.
  2. Any action or proceeding to attack, review, set aside, void or annul any decision of the City taken pursuant to this chapter shall not be maintained by any person unless the action or proceeding is commenced within ninety days after the effective date of the decision.
- G. Notice requirements. The notice requirements contained in subsections 22.16.050A, E and G of this chapter are directory and not mandatory. The failure of any person to receive notice required by law or this chapter does not affect the authority of the City to enter into a development agreement.
- H. Irregularity in proceedings. No action, inaction, or recommendation regarding a proposed development agreement shall be held void or invalid or be set aside by a court by reason of any error, irregularity, informality, neglect or omission ("error") as to any matter pertaining to the petition, application, notice, finding, record, hearing, report, recommendation, or any matter of procedure whatever, unless the error complained was prejudicial and that by reason of the error, the complaining party sustained and suffered substantial injury, and that a different result would have been probable if the error had not occurred or existed. There is not a presumption that an error is prejudicial or that injury was done if an error is shown. (Ord. 6033-NS § 9, 1991)