



Office of the City Manager

## **REVISED AGENDA MATERIAL for Supplemental Packet 1**

**Meeting Date:** March 26, 2024

**Item Number:** 23

**Item Description:** Zoning Ordinance Amendments to Berkeley Municipal Code Chapter 23.326 Demolition and Dwelling Unit Controls

**Submitted by:** Jordan Klein, Planning and Development

Staff have revised Attachments 1 and 2 to amend sub-section 23.326.020(A)(5)(c), which describes a type of Protected Unit, to accurately reflect California Government Code Section 66300.5(a)(h)(3):

c. Rented by a household at ~~50%~~ 80% Area Median Income or lower within the previous five years.

ORDINANCE NO.

AMENDING BERKELEY MUNICIPAL CODE CHAPTER 23.326, DEMOLITION  
AND DWELLING UNIT CONTROLS

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

Section 1. That Berkeley Municipal Code Chapter 23.326 is hereby amended to read as follows:

**23.326 DEMOLITION AND DWELLING UNIT CONTROL**

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**Sections:**

23.326.010– Chapter Purpose.

23.326.020– General Requirements.

23.326.030–~~Demolition—Eliminating Dwelling Units through Demolition~~ of Residential Units.

23.326.040– ~~Eliminating Dwelling Units through—Eliminating Dwelling Units through Combination with Other Units. Conversion and Change of Use~~

23.326.050—Demolition of Accessory Buildings.

~~23.326.050~~~~23.326.0560~~ – ~~Private Right of Action.~~

~~23.326.060—Elimination of Residential Hotel Rooms~~

23.326.070– Demolitions of Non-Residential Buildings.

23.326.080– Building Relocations.

23.326.090– Limitations.

23.326.100—Severability.

**23.326.010 – Chapter Purpose**

This chapter establishes demolition and dwelling unit control standards that promote the affordable housing, aesthetic, and safety goals of the City.

**23.326.020 – General Requirements**

- A. **Applicability.** No ~~dwelling unit~~ Residential Unit(s) ~~or units~~ may be eliminated or demolished except as authorized by this chapter.

1. “Residential Unit” means, for purposes of this Chapter, any Dwelling Unit, any Live-Work Unit, any Residential Hotel unit, or any bedroom of a Group Living Accommodation (GLA), except a GLA in a University-recognized fraternity, sorority or co-op, or any lawfully-permitted Accessory Dwelling Unit (“ADU”) of Junior Accessory Dwelling Unit (“JADU”).

2. “Residential Unit” includes Dwelling Units, ADUs, or JADUs created without proper zoning approvals or Building Permit(s) if they have been registered with the Rent Stabilization Board, or the Rent Stabilization Board has otherwise determined that a tenant-landlord relationship existed during the preceding five years.
3. “Residential Unit” does not include a lawfully-permitted ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU, as defined in BMC Chapter 23.306, where the landlord also occupies a unit in the same property as their principal residence. This shall only apply to properties containing a single ADU or JADU, shall only apply to units compliant with all applicable requirements of BMC Chapter 23.306 (“Accessory Dwelling Units”), and shall only apply to tenancies created after November 7, 2018.
4. “Comparable Unit” means a Residential Unit of similar size (square footage and number of bedrooms), common interior amenities, and location within the city (neighborhood and school attendance area). In the case of a Single-Family Dwelling being replaced, a Comparable Unit is not required to have the same or similar square footage or the same number of total rooms, but must provide the same number of bedrooms if the Single-Family Dwelling includes three or fewer bedrooms, or three bedrooms if the Single-Family Dwelling contains four or more bedrooms.
5. “Protected Unit” includes a Residential Unit:
  - a. Subject to a low-income deed restriction for any of the previous five years;
  - b. Subject to rent or price control under BMC Chapter 13.76; or
  - c. Rented by a household at 80% Area Median Income or lower within the previous five years.

~~B. **Findings.** In addition to the requirements below, the Zoning Adjustments Board (ZAB) may approve a Use Permit to eliminate or demolish a dwelling unit only upon finding that eliminating the dwelling unit would not be materially detrimental to the housing needs and public interest of the affected neighborhood and Berkeley.~~

**23.326.030 – ~~Eliminating Dwelling Units through Demolition~~ Demolition of Residential Units**

~~A. **Buildings with Two or More Units Constructed Before June 1980.**~~

~~1. **Applicability.** This subsection only applies to building with two or more units constructed before June 1980.~~

~~2. **Limitation.**~~

~~(a) A. Demolition is not allowed if:~~

1. The ~~building~~ Residential Unit(s) was removed from the rental market ~~under the Ellis Act~~ through a no-fault eviction during the preceding five years; or
2. There ~~have been verified cases~~ is substantial evidence 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, whose determination may be appealed to the Rent Stabilization Board.

~~(b) 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. The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The ZAB shall determine whether harassment or threatened or actual illegal eviction occurred.~~

3B. Procedure and Findings.

1. ~~The ZAB may approve a~~ A Use Permit is required to eliminate or demolish one or more Residential Units, except where otherwise provided by the Zoning Ordinance. a building constructed before June 1980 on a property containing two or more dwelling units ~~The ZAB shall only approve the Use Permit if any one of the following are~~ is true:

- (a) The building containing the ~~units~~ Residential Unit(s) is hazardous or unusable and is infeasible to repair.
- (b) The building containing the ~~units~~ Residential Units(s) will be moved to a different location within Berkeley with no net loss of units and no change in the affordability levels of the unit(s).
- ~~(c) 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.~~
- ~~(d)~~ (c) The demolition is necessary to permit construction approved pursuant to this chapter of at least the same number of dwelling units.

2. A Single-Family Dwelling without sitting tenants can be demolished with an AUP, if the demolition is part of a development project that would result in a net increase in residential density.

3. In the event of a demolition of a Protected Unit created without proper Use Permit(s) or Building Permit(s), as defined in 23.326.020(A)(2), the Building Official, Zoning Officer or Fire Marshal may determine that the replacement of such a unit is infeasible and not required under this Chapter. Such a

determination shall include a finding that the replacement of the unit could not occur in compliance with Zoning Code, Building Code, Fire Code or other regulations related to public health and safety

C. Landmarks and Structures of Merit. Demolition of a designated landmark or structure of merit, or of a structure in a designated historical district, must be approved by the Landmarks Preservation Commission, pursuant to Chapter 3.24.

**4. Fee Required.**

~~(a) The applicant shall pay a fee for each unit demolished to mitigate the impact of the loss of affordable housing in Berkeley.~~

~~(b) The amount of the fee shall be set by resolution of the City Council.~~

~~(c) In Lieu of a Fee.~~

~~1. In lieu of paying the impact fee, the applicant may provide a designated unit in the new project at a below market rate to a qualifying household in perpetuity.~~

~~2. The affordability level of the below market rent and the income level of the qualifying household shall be set by resolution of the City Council.~~

~~3. The applicant shall enter into a regulatory agreement with the City of Berkeley to provide the in lieu units.~~

D. Conditions of Approval. Any Protected Unit that is demolished shall be replaced with a Comparable Unit that shall comply with the affordability requirements in Chapter 23.328 [Affordable Housing Requirements] and Chapter 23.330 [Density Bonus] as they may be amended from time to time.

1. In the event that a displaced household has an income below 50% AMI, a Comparable Unit shall be offered at a rent that is affordable to households at 30% of AMI, and the displaced household shall have the first right of refusal for that unit. Such a Comparable Unit shall be counted as a Very Low-Income unit for applicable affordability requirements in Chapter 23.328.

2. In the event that a demolished Residential Unit is not a Protected Unit and the income of the displaced household is unknown, the Residential Unit shall be presumed to have been occupied by Low- or Lower-Income households in the same proportion as Residential Units throughout the City. The City shall rely upon US Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy (CHAS) data to determine the number of such Residential Units that must be replaced with Affordable Units as defined in Chapter 23.328.

3. In the event that a Protected Unit was subject to rent or price controls under BMC Chapter 13.76, and the income level of the displaced household is unknown, the unit shall be replaced with an Affordable Unit as defined in Chapter 23.328.

E. Requirements for Occupied Units.

~~(a)~~1. Applicability. These requirements do not apply to tenants who move in after the application for demolition is submitted to the City if the owner informs each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.

~~1. The requirements in this subsection apply if units to be demolished are occupied.~~

~~2. These requirements do not apply to tenants who move in after the application for demolition is submitted to the City if the owner informs each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.~~

~~(b)~~2. Notice. 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 Municipal Code Section 13.76 (Rent Stabilization and Eviction for Good Cause Program), Chapter 13.77 (Requirements, Procedures, Restrictions and Mitigations Concerning the Withdrawal of Residential Rental Accommodations from Rent or Lease), 13.79 (Tenant Protections: Automatically Renewing Leases and Buyout Agreements) and 13.84 (Relocation Services and Payments for Residential Tenant Households).

~~(c)~~3. General Requirements. The applicant shall provide moving and relocation assistance equivalent to the requirements set forth in Municipal Code Chapter 13.84 (Relocation Services and Payments for Residential Tenant Households) or Government Code section 66300.6(b)(4)(A), whichever requires greater relocation assistance to displaced tenants, and shall not be subject to the limitations in section 13.84.070.B.3(a). 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. Within five days of the issuance of the Certificate of Occupancy, tenants shall be notified in writing that the units will be ready for move-in on a date specified. Tenants shall confirm in writing their intent to lease the available unit at any time before 20 days after the issuance of the Certificate of Occupancy. Funding for the rent differential shall be guaranteed in a manner approved by City Council Resolution; provided, however, that any project that is carried out or funded by the state or federal government shall be subject to applicable provisions of the California Relocation Act (Government Code section 7260 et seq.) and/or

the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. sections 4601- 4655).

~~The applicant shall provide assistance with moving expenses equivalent to in Chapter 13.84 (Relocation Services and Payments for Residential Tenant Households).~~

~~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.~~

~~3.(a) Exception.~~ An applicant who proposes to construct a 100 percent affordable housing project is not required to comply with this subsection but must comply with 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.).

(b) Exception for Tenants in ADUs and Unpermitted Units that Cannot Be Replaced. Applicants are required to provide moving and relocation assistance, in an amount provided in BMC Section 13.76.130(A)(9)(g), to the following groups of tenants: (i) tenants who occupy a lawfully-permitted ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU, where the landlord also occupies a unit in the same property as his/her principal residence; and (ii) tenants who occupy a unit created without proper zoning approvals that cannot be replaced for public health or safety reasons, pursuant to BMC Section 23.326.030(B)(3). However, applicants are not required to (i) provide such tenants with a temporary replacement unit while a new unit is being constructed, (ii) notify such tenants when a new unit is ready for occupancy; or (iii) provide such tenants with a right for first refusal for the new unit.

~~(d)~~4. Sitting Tenants Rights.

(a) ~~Sitting~~ Any tenants of a Protected Unit that is permitted to be demolished under this section ~~who are displaced as a result of demolition shall be provided~~ have the right of first refusal to ~~move into~~ rent a Comparable Unit in the new building project.

(b) In the event that a displaced household is ineligible for below-market rate replacement units, a market rate Comparable Unit shall be made available to that household at the same rent as had been previously charged, or a lesser rent if that is the market rate. ~~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.~~

(c) Where a displaced tenant exercises the right to rent a Comparable Unit, any increase in rent for the Comparable Unit for the duration of their tenancy shall be no greater than the lesser of 65% of the increase in the Consumer Price Index for All Urban Consumers (CPI-U) in the San Francisco-Oakland-San Jose region (as reported and published by the U.S. Department of Labor, Bureau of Labor Statistics for the twelve-month period ending the previous December 31) or 65% of the corresponding increase in Area Median Income (AMI) for the same calendar year. ~~Income restrictions do not apply to displaced tenants.~~

(d) Exceptions.

- i. An applicant who proposes to construct a 100 percent affordable housing project is not required to comply with ~~23.326.030.A.4.a, b, and c,~~ the preceding requirements but must comply with the following requirement.
- ii. 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.~~

## ~~B. Buildings with a Single Dwelling Unit.~~

~~1. Applicability. This subsection only applies to buildings with a single dwelling unit.~~

### ~~2. Limitation.~~

~~(a) Demolition is not allowed if:~~

- ~~i. The building was removed from the rental market under the Ellis Act during the preceding five years; or~~
- ~~ii. There have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years.~~

~~(b) 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. The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The ZAB shall determine whether harassment or threatened or actual illegal eviction occurred.~~



~~C. **Accessory Buildings.** Notwithstanding anything in Municipal Code Title 23 (Zoning Ordinance) to the contrary, but subject to any applicable requirements in Municipal Code Section 3.24 (Landmarks Preservation Ordinance), 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.~~

**23.326.040 – Eliminating Dwelling Units through ~~Conversion and Change of Use~~ Combination with Other Units**

A. ~~*Process for Projects Where Density Exceeds Current Allowance*~~ **General.** ~~The ZAB may approve a~~ A Use Permit is required to eliminate one or more Residential Units by combining with another unit when the existing development exceeds currently-allowable density. for the elimination of a dwelling unit in combination with another dwelling unit used for occupancy by a single household. ~~The ZAB shall approve a Use Permit for the elimination of one or more Residential Units by combining with another unit only if it finds that:~~

1. The existing number of ~~dwelling units~~ Residential Units exceeds ~~the current~~ maximum allowed residential density in the district where the building is located; and
2. One of the following is true:
  - (a) One of the affected dwelling units has been owner-occupied ~~by the applicant's household~~ as it's a principal place of residence for no less than two years before the date of the application and none of the affected units are currently occupied by a tenant.
  - (b) All of the affected ~~dwelling units~~ Residential Units are being sold by an estate and the decedent occupied the units as their principal residence for no less than two years before the date of their death.

B. *Limitations.* ~~Demolition~~ Combination is not allowed if:

1. The building was removed from the rental market ~~under the Ellis Act~~ through a no-fault eviction during the preceding five years; or
2. There ~~have been verified cases~~ is substantial evidence 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, whose determination may be appealed to the Rent Stabilization Board. ~~The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The~~

~~ZAB shall determine whether harassment or threatened or actual illegal eviction occurred.~~

C. ~~Effect of Noncompliance with the~~ Two-Year Occupancy Requirement Following Elimination.

1. ~~In a unit eliminated under Subsection A (General)~~ If a Residential Unit that is eliminated through combination is not owner-occupied ~~by the applicant's household~~ for at least two consecutive years from the date of elimination, the affected ~~unit~~ Residential Unit must be restored to separate status.
2. This requirement shall be implemented by a condition of approval and a notice of limitation on the property, acceptable to the City of Berkeley.
3. The condition and notice will provide that if the ~~owner's household does not occupy the unit~~ Residential Unit is not owner-occupied 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. The fee shall be deposited into the City of Berkeley's Housing Trust Fund.
4. The City of Berkeley may exempt an applicant from the two-year residency requirement if of an unforeseeable life change that requires relocation.

D. *Effect of Eliminating a Dwelling Unit.*

1. If eliminating a ~~dwelling unit~~ Residential Unit reduces the number of units in a building to four or fewer, the applicant shall record a notice of limitation against the subject property that the limitation on eviction of tenants under Chapter 13 (Public Peace, Morals and Welfare) shall continue to apply until:
  - (a) The building is demolished; or
  - (b) Sufficient units are added or restored such that the building contains at least five units.
2. The Zoning Officer may issue an AUP for a building conversion which eliminates a ~~dwelling unit~~ Residential Unit upon finding that the conversion will restore or bring 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 23.326.040.A.1 and 2 and 23.326.040.B and C.

E. *Exceptions.* The ZAB may approve a Use Permit to eliminate a dwelling unit through combination with another dwelling unit for the purpose of providing private bathrooms, kitchenettes, accessibility upgrades, and/or seismic safety upgrades, or other elements required by funding sources or programmatic needs to single-

residential occupancy rooms in residential developments undergoing a publicly-funded rehabilitation.

- ~~1. The ZAB 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.~~
- ~~2. The ZAB may approve a Use Permit to eliminate 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 rooms in residential developments undergoing a publicly-funded rehabilitation.~~
- ~~3. Notwithstanding the general Use Permit requirement under 23.326.020 (General Requirements), a lawfully established accessory dwelling unit that is not a controlled rental unit may be eliminated with a Zoning Certificate if:
  - ~~(a) The re-conversion restores the original single-family use of the main building or lot; and~~
  - ~~(b) No tenant is evicted.~~~~

**23.326.050 – ~~Private Right of Action~~ Demolition of Accessory Buildings.**

A. Notwithstanding anything in Municipal Code Title 23 (Zoning Ordinance) to the contrary, but subject to any applicable requirements in Municipal Code Section 3.24 (Landmarks Preservation Ordinance), Accessory Buildings of any size, including, but not limited to, garages, carports, and sheds may be demolished by right except where the Accessory Building is occupied by a residential tenant (regardless of whether it is lawfully permitted) or otherwise contains a lawfully established Residential Unit, which serves and is located on the same lot as a lawful residential use. Such Accessory Buildings are considered Residential Units for the purposes of this Chapter.

**23.326.060 – ~~Elimination of Residential Hotel Rooms~~ Private Right of Action**

A. 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 23.326.030 (Eliminating Dwelling Units through Demolition) and 23.326.040 (Eliminating Dwelling Units through Conversion and Change of Use). In any such action a prevailing plaintiff shall recover reasonable attorney's fees.

~~A. **General Requirements.** Before removal, the following requirements must be met for the ZAB to approve a Use Permit for the elimination of residential hotel rooms:~~

- ~~1. The residential hotel owner shall 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~~

~~2. One of the following three requirements shall be met:~~

- ~~(a) 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.~~
- ~~(b) Before 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.~~
- ~~(c) Residential hotel rooms are 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. Criteria for Replacement Rooms.** For purposes of this section, replacement rooms must be:~~

- ~~1. Substantially comparable in size, location, quality, and amenities;~~
- ~~2. 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; and~~
- ~~3. Available at comparable rents and total monthly or weekly charges to those being removed. Comparable rooms may be provided by:~~
  - ~~(a) Offering the existing tenants of the affected rooms the right of first refusal to occupy the replacement rooms;~~
  - ~~(b) Making available comparable rooms, which are not already classified as residential hotel rooms to replace each of the rooms to be removed; or~~
  - ~~(c) Paying to the City of Berkeley's Housing Trust Fund an amount sufficient to provide replacement rooms.~~
    - ~~1. The amount to be paid to the City of Berkeley shall be the difference between the replacement cost, including land cost, for the rooms and the amount which the City of Berkeley can obtain by getting a mortgage on the anticipated rents from the newly constructed rooms.~~
    - ~~2. 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 percent of such tenant's gross income for rent.~~

~~**C. Exception for Non-Profit Ownership.** 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 if the average number of residential hotel rooms per day in each calendar year is at least 95 percent of residential hotel rooms established for that particular residential hotel.~~

### **23.326.070 – Demolitions of Non-Residential Buildings**

A. **Main Non-Residential Buildings.** A Use Permit is required to demolish a main building used for non-residential purposes ~~may be demolished with a Use Permit on any lot.~~

B. **Accessory Buildings.**

1. Demolishing an accessory building with less than 300 square feet of floor area is permitted as of right.
2. An accessory building with 300 square feet or more of floor area may be demolished with an AUP.

C. **Landmarks Preservation Commission Review.**

1. 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 before consideration of the Use Permit or AUP.
2. The LPC may initiate a landmark or structure-of-merit designation or may choose solely to forward to the ZAB its comments on the application.
3. The ZAB or Zoning Officer shall consider the recommendations of the LPC ~~in~~ when acting on the application.

D. **Findings.** A Use Permit or an AUP for demolition of a non-residential building or structure may be approved only if the ZAB or the Zoning Officer finds that:

1. The demolition will not be materially detrimental to the commercial needs and public interest of any affected neighborhood or the City of Berkeley; and
2. The demolition:
  - (a) Is required to allow a proposed new building or other proposed new use;
  - (b) 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;
  - (c) Will remove a structure which represents an inhabitable attractive nuisance to the public; or
  - (d) Is required for the furtherance of specific plans or projects sponsored by the City of Berkeley or other local district or authority upon a

demonstration 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.~~

### 23.326.080 – Building Relocations

#### A. Treatment of Building Relocation.

1. Relocating a building from a lot is considered a demolition for purposes of this chapter.
2. Relocating a building to a lot is considered new construction and is subject to all requirements applicable to new construction.
3. When a building is relocated to a different lot within ~~in~~ Berkeley, the lot from which the building is 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.

#### B. Findings. The ZAB may approve a Use Permit to relocate a building upon finding that:

5. The building to be relocated is not in conflict with the architectural character, or the building scale of the neighborhood or area to which it will be relocated; and
6. The receiving lot provides adequate separation of buildings, privacy, yards, and usable open space.

### 23.326.090 – Limitations

#### A. Unsafe, Hazard, or Danger.

1. 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 by the city's ~~building official~~ Building Official, it may be demolished without a Use Permit.
2. The Building Official's determination in this matter shall be governed by the standards and criteria in the most recent edition of the California Building Code that is in effect in the City of Berkeley.

#### B. Ellis Act. 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 Ellis Act (California Government Code Chapter 12.75).

**23.326.100 Severability.**

A. If any part or provision of this Chapter, or the application of this Chapter to any person or circumstance, is held invalid, the remainder of this Chapter, including the application of such part or provision to other persons or circumstances, shall not be affected by such a holding and shall continue in full force and effect. To this end, the provisions of this Chapter are severable.

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

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DWELLING UNIT CONTROLS

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

Section 1. That Berkeley Municipal Code Chapter 23.326 is hereby amended to read as follows:

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23.326.090	Limitations.
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**23.326.010 Chapter Purpose.**

This chapter establishes demolition and dwelling unit control standards that promote the affordable housing, and safety goals of the City.

**23.326.020 General Requirements.**

A. No Residential Unit(s) may be eliminated or demolished except as authorized by this chapter.

1. "Residential Unit" means, for purposes of this Chapter, any Dwelling Unit, any Live-Work Unit, any Residential Hotel unit, any bedroom of a Group Living Accommodation (GLA), except a GLA in a University-
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recognized fraternity, sorority or co-op, or any lawfully-permitted Accessory Dwelling Unit (“ADU”) or Junior Accessory Dwelling Unit (“JADU”).

2. “Residential Unit” includes Dwelling Units, ADUs, or JADUs created without proper zoning approvals or Building Permit(s) if they have been registered with the Rent Stabilization Board, or the Rent Stabilization Board has otherwise determined that a tenant-landlord relationship existed during the preceding five years.
3. “Residential Unit” does not include a lawfully-permitted ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU, as defined in BMC Chapter 23.306, where the landlord also occupies a unit in the same property as their principal residence. This shall only apply to properties containing a single ADU or JADU, shall only apply to units compliant with all applicable requirements of BMC Chapter 23.306 ("Accessory Dwelling Units"), and shall only apply to tenancies created after November 7, 2018.
4. “Comparable Unit” means a Residential Unit of similar size (square footage and number of bedrooms), common interior amenities, and location within the city (neighborhood and school attendance area). In the case of a Single-Family Dwelling being replaced, a Comparable Unit is not required to have the same or similar square footage or the same number of total rooms, but must provide the same number of bedrooms if the Single-Family Dwelling includes three or fewer bedrooms, or at least three bedrooms if the Single-Family Dwelling contains four or more bedrooms.
5. “Protected Unit” includes a Residential Unit:
  - a. Subject to a low-income deed restriction for any of the previous five years;
  - b. Subject to rent or price control under BMC Chapter 13.76; or
  - c. Rented by a household at 80% Area Median Income or lower within the previous five years.

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**23.326.030 Demolition of Residential Units.**

A. Demolition is not allowed if:

1. The Residential Unit(s) was removed from the rental market through a no-fault eviction during the preceding five years; or
2. There is substantial evidence 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, whose determination may be appealed to the Rent Stabilization Board.

B. Procedure and Findings.

1. A Use Permit is required to eliminate or demolish one or more Residential Units, except where otherwise provided by the Zoning Ordinance. The ZAB shall only approve the Use Permit if one of the following is true:
  - (a) The building containing the Residential Unit(s) is hazardous or unusable and is infeasible to repair.
  - (b) The building containing the Residential Unit(s) will be moved to a different location within Berkeley with no net loss of units and no change in the rent levels of the unit(s).
  - (c) The demolition is necessary to permit construction approved pursuant to this Chapter of at least the same number of Dwelling Units.
2. A Single-Family Dwelling without sitting tenants can be demolished with an AUP, if the demolition is part of a development project that would result in a net increase in residential density.
3. In the event of a demolition of a Residential Unit created without proper zoning approvals or Building Permit(s), as defined in 23.326.020(A)(3), the Building Official, Zoning Officer or Fire Marshal may determine that the replacement of such a unit is infeasible and not required under this Chapter. Such a determination shall include a finding that the replacement of the unit could not

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occur in compliance with Zoning Code, Building Code, Fire Code or other regulations related to public health and safety.

C. *Landmarks and Structures of Merit.* Demolition of a designated landmark or structure of merit, or of a structure in a designated historic district, must be approved by the Landmarks Preservation Commission, pursuant to Chapter 3.24.

D. *Conditions of Approval.* Any Protected Unit that is demolished shall be replaced with a Comparable Unit that shall comply with the maximum allowable rent requirements for Affordable Units in Chapter 23.328 [Affordable Housing Requirements] and Chapter 23.330 [Density Bonus] as they may be amended from time to time.

1. In the event that a displaced household has an income below 50% AMI, a Comparable Unit shall be offered at a rent that is affordable to households at 30% of AMI, and the displaced household shall have the first right of refusal for that unit. Such a Comparable Unit shall be counted as a Very Low-Income unit for applicable affordability requirements in Chapter 23.328.
2. In the event that a demolished Residential Unit is not a Protected Unit and the income of the displaced household is unknown, the Residential Unit shall be presumed to have been occupied by Low- or Lower-Income households in the same proportion as Residential Units throughout the City. The City shall rely upon US Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy (CHAS) data to determine the number of such Residential Units that must be replaced with Affordable Units as defined in Chapter 23.328.
3. In the event that a Protected Unit was subject to rent or price controls under BMC Chapter 13.76, and the income level of the displaced household is unknown, the unit shall be replaced with an Affordable Unit as defined in Chapter 23.328.

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E. *Requirements for Occupied Units.*

1. *Applicability.* The following requirements do not apply to tenants who move in after the application for demolition is submitted to the City if the owner informs each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.
2. *Notice.* The applicant shall provide all sitting tenants and the Rent Stabilization Board notice of the application to demolish the Residential Unit(s) no later than the date the application is submitted to the City, including notice of their rights under Municipal Code Chapter 13.76 (Rent Stabilization and Eviction for Good Cause Program), Chapter 13.77 (Requirements, Procedures, Restrictions and Mitigations Concerning the Withdrawal of Residential Rental Accommodations from Rent or Lease), 13.79 (Tenant Protections: Automatically Renewing Leases and Buyout Agreements) and 13.84 (Relocation Services and Payments for Residential Tenant Households).
3. *General Requirements.* The applicant shall provide moving and relocation assistance equivalent to the requirements set forth in Municipal Code Chapter 13.84 (Relocation Services and Payments for Residential Tenant Households) or Government Code section 66300.6(b)(4)(A), whichever requires greater relocation assistance to displaced tenants, and shall not be subject to the limitations in section 13.84.070.B.3(a). 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. Within five days of the issuance of the Certificate of Occupancy, tenants shall be notified in writing that the units will be ready for move-in on a date specified. Tenants shall confirm in writing their intent to lease the available unit at any time before 20 days after the issuance of the Certificate of Occupancy. Funding for the rent differential shall be guaranteed in a manner approved by City Council Resolution; provided, however, that any project that is carried out or funded by the state or federal government shall be subject to applicable provisions of the California Relocation Act (Government Code section 7260 *et seq.*) and/or the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. sections 4601- 4655).

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(a) *Exception.* An applicant who proposes to construct a 100-percent affordable housing project is not required to comply with this subsection but must comply with 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.).

(b) *Exception for Tenants in ADUs.* Applicants are required to provide moving and relocation assistance, in an amount provided in BMC Section 13.76.130(A)(9)(g), to tenants who occupy a lawfully-permitted ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU, where the landlord also occupies a unit in the same property as his/her principal residence. Applicants are not required to (i) provide such tenants with a temporary replacement unit while a new unit is being constructed, (ii) notify such tenants when a new unit is ready for occupancy; or (iii) provide such tenants with a right for first refusal for the new unit.

#### 4. *Sitting Tenants Rights.*

(a) Any tenant of a Protected Unit that is permitted to be demolished under this section shall have the right of first refusal to rent a Comparable Unit in the new project.

(b) In the event that a displaced household is ineligible for below-market rate replacement units, a market rate Comparable Unit shall be made available to that household at the same rent as had been previously charged, or a lesser rent if that is the market rate.

(c) Where a displaced tenant exercises the right to rent a Comparable Unit, any increase in rent for the Comparable Unit for the duration of their tenancy shall be no greater than the lesser of 65% of the increase in the Consumer Price Index for All Urban Consumers (CPI-U) in the San Francisco-Oakland-San Jose region (as reported and published by the U.S. Department of Labor, Bureau of Labor Statistics for the twelve-month period ending the previous December 31) or 65% of the corresponding increase in Area Median Income (AMI) for the same calendar year.

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(d) *Exceptions.*

- i. An applicant who proposes to construct a 100 percent affordable housing project is not required to comply with the preceding requirements but must comply with the following requirement.
- ii. Sitting tenants who are displaced as a result of demolition and who desire to return to the newly constructed affordable housing project will be granted a right of first refusal subject to their ability to meet income qualifications and other applicable eligibility requirements.

**23.326.040 Eliminating Dwelling Units through Combination with Other Units.**

A. *Process for Projects Where Density Exceeds Current Allowance.* A Use Permit is required to eliminate one or more Residential Units by combining with another unit when the existing development exceeds currently-allowable density. The ZAB shall approve a Use Permit for the elimination of one or more Residential Units by combining with another unit only if it finds that:

1. The existing number of Residential Units exceeds the current maximum allowed residential density in the zoning district where the units are located; and
2. One of the following is true:
  - (a) One of the affected Residential Units has been owner-occupied as a principal place of residence for no less than two years before the date of the application and none of the affected units are currently occupied by a tenant.
  - (b) All of the affected Residential Units are being sold by an estate and the decedent occupied the Residential Units as their principal residence for no less than two years before the date of their death.

B. *Limitations.* Combination is not allowed if:

1. The building was removed from the rental market through a no-fault

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eviction during the preceding five years; or

2. There is substantial evidence 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, whose determination may be appealed to the Rent Stabilization Board.

*C. Two-Year Occupancy Requirement Following Elimination*

1. If a Residential Unit that is eliminated through combination is not owner-occupied for at least two consecutive years from the date of elimination, the affected Residential Unit must be restored to separate status.
2. This requirement shall be implemented by a condition of approval and a notice of limitation on the property, acceptable to the City of Berkeley.
3. The condition of approval and notice will provide that if the Residential Unit is not owner-occupied for at least two years from the date of elimination then the affected Residential Unit(s) must either be restored as separate Residential Unit(s) and the vacant Residential 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. The fee shall be deposited into the City of Berkeley's Housing Trust Fund.
4. The City of Berkeley may exempt an applicant from the two-year residency requirement if there is an unforeseeable life change that requires relocation.

*D. Effect of Eliminating a Residential Unit.*

1. If eliminating a Residential Unit reduces the number of Residential Units in a building to four or fewer, the applicant shall record a notice of limitation against the subject property that the limitation on eviction of tenants under Chapter 13 (Public Peace, Morals and Welfare) shall continue to apply until:

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(a) The building is demolished; or

(b) Sufficient Residential Units are added or restored such that the building contains at least five Residential Units.

2. The Zoning Officer may issue an AUP for a building conversion which eliminates a Residential Unit upon finding that the conversion will restore or bring the building closer to the original number of Residential Units that was present at the time it was first constructed, provided the conversion meets the requirements of 23.326.040.A.1 and 2 and 23.326.040.B and C.

*E. Exception.* The ZAB may approve a Use Permit to eliminate a Residential Unit through combination with another Residential Unit for the purpose of providing private bathrooms, kitchenettes, accessibility upgrades, and/or seismic safety upgrades, or other elements required by funding sources or programmatic needs to single resident occupancy rooms in residential developments undergoing a publicly-funded rehabilitation.

#### **23.326.050 Demolition of Accessory Buildings.**

A. Notwithstanding anything in Municipal Code Title 23 (Zoning Ordinance) to the contrary, but subject to any applicable requirements in Municipal Code Section 3.24 (Landmarks Preservation Ordinance), Accessory Buildings of any size, including, but not limited to, garages, carports, and sheds may be demolished by right except where the Accessory Building is occupied by a residential tenant (regardless of whether it is lawfully permitted) or otherwise contains a lawfully established Residential Unit, which serves and is located on the same lot as a lawful residential use. Such Accessory Buildings are considered Residential Units for the purposes of this Chapter.

#### **23.326.060 Private Right of Action.**

A. 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 23.326.030 (Eliminating Dwelling Units through Demolition) and 23.326.040 (Eliminating Dwelling Units through Conversion and Change of Use). In any such action a prevailing plaintiff shall recover reasonable attorney's fees.



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**23.326.070 Demolitions of Non-Residential Buildings.**

A. *Main Non-Residential Buildings.* A Use Permit is required to demolish a main building used for non-residential purposes on any lot.

B. *Accessory Buildings.* For any lot located in a non-residential zoning district, Accessory Buildings may be demolished as follows:

1. Demolishing an accessory building with less than 300 square feet of floor area is permitted as of right.
2. An accessory building with 300 square feet or more of floor area may be demolished with an AUP.

C. *Landmarks Preservation Commission Review.*

1. Any application for a Use Permit or AUP to demolish a non-residential building or structure that is 40 or more years old shall be forwarded to the Landmarks Preservation Commission (LPC) for review before consideration of the Use Permit or AUP.
2. The LPC may initiate a landmark or structure-of-merit designation or may choose solely to forward to the ZAB or Zoning Officer its comments on the application.
3. The ZAB or Zoning Officer shall consider the recommendations of the LPC in when acting on the application.

D. *Findings.* A Use Permit or an AUP for demolition of a main building used for non-residential purposes on any lot or an accessory building located on a lot in a non-residential district may be approved only if the ZAB or the Zoning Officer finds that:

1. The demolition will not be materially detrimental to the commercial needs and public interest of any affected neighborhood or the City of Berkeley; and
2. The demolition:
  - (a) Is required to allow a proposed new building or other proposed new

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use;

(b) 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;

(c) Will remove a structure which represents an uninhabitable attractive nuisance to the public; or

(d) Is required for the furtherance of specific plans or projects sponsored by the City of Berkeley or other local district or authority upon a demonstration by the applicant that it would be infeasible to obtain prior or concurrent approval for the new construction or new use.

### **23.326.080 Building Relocations.**

#### *A. Treatment of Building Relocation.*

1. Relocating a building from a lot is considered a demolition for purposes of this chapter.
2. Relocating a building to a lot within the city is subject to all requirements applicable to new construction.
3. When a building is relocated to a different lot within in Berkeley, the lot from which the building is 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.
4. Nothing in this subsection shall exempt Residential Units relocated to the receiving lot from the provisions of BMC Section 13.76 after a building relocation if the Residential Units located within a building were otherwise subject to BMC Chapter 13.76 in the source lot.

B. *Findings.* The Zoning Officer shall approve Zoning Certificate to relocate a building upon finding that: the resulting development on the receiving lot is in conformance with applicable zoning code development standards.

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**23.326.090 Limitations.**

A. *Unsafe, Hazard, or Danger.*

1. 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 by the city's Building Official, it may be demolished without a Use Permit.
2. The Building Official's determination in this matter shall be governed by the standards and criteria in the most recent edition of the California Building Code that is in effect in the City of Berkeley.

B. *Ellis Act.* 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 Ellis Act (California Government Code Chapter 12.75).

**23.326.100 Severability.**

A. If any part or provision of this Chapter, or the application of this Chapter to any person or circumstance, is held invalid, the remainder of this Chapter, including the application of such part or provision to other persons or circumstances, shall not be affected by such a holding and shall continue in full force and effect. To this end, the provisions of this Chapter are severable.

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.