



**BERKELEY CITY COUNCIL LAND USE, HOUSING, & ECONOMIC
DEVELOPMENT COMMITTEE
REGULAR MEETING**

**Thursday, November 7, 2019
10:30 AM**

2180 Milvia Street, 1st Floor – Cypress Room

Committee Members:

Mayor Jesse Arreguin, and Councilmembers Sophie Hahn and Lori Droste

AGENDA

Roll Call

Public Comment on Non-Agenda Matters

Minutes for Approval

Draft minutes for the Committee's consideration and approval.

1. Minutes - October 24, 2019

Committee Action Items

The public may comment on each item listed on the agenda for action as the item is taken up. The Chair will determine the number of persons interested in speaking on each item. Up to ten (10) speakers may speak for two minutes. If there are more than ten persons interested in speaking, the Chair may limit the public comment for all speakers to one minute per speaker. Speakers are permitted to yield their time to one other speaker, however no one speaker shall have more than four minutes.

Following review and discussion of the items listed below, the Committee may continue an item to a future committee meeting, or refer the item to the City Council.

Committee Action Items

- 2. Adopt an Ordinance adding a new Chapter 9.50 to the Berkeley Municipal Code Requiring Legal Rights for Legal Tender** *(Item contains revised and supplemental materials)*
From: Councilmembers Harrison, Hahn, Davila, and Bartlett
Referred: June 10, 2019
Due: March 5, 2020
Recommendation: Adopt an ordinance adding a new Chapter 9.50 to the Berkeley Municipal Code requiring legal rights for legal tender, requiring that all covered businesses accept cash.
Financial Implications: Staff time
Contact: Kate Harrison, Councilmember, District 4, 981-7140
- 3. Ronald V. Dellums Fair Chance Access to Housing and Public Health and Safety Ordinance** *(Item contains revised materials)*
From: Mayor Arreguin, Councilmember Davila, Councilmember Harrison, Councilmember Robinson
Referred: July 8, 2019
Due: December 24, 2019
Recommendation: Adopt a first reading of the Ronald V. Dellums Fair Chance Access to Housing and Public Health and Safety Ordinance.
Financial Implications: Unknown
Contact: Jesse Arreguin, Mayor, 981-7100
- 4. Spring 2019 Bi-Annual Report on Funding for Housing Programs**
From: Housing Advisory Commission *(Item contains supplemental materials)*
Referred: September 10, 2019
Due: February 18, 2020
Recommendation: Accept the Housing Advisory Commission's (HAC) recommendations for the allocation of U1 General Fund revenues to increase the supply of affordable housing and protect residents of Berkeley from homelessness.
Financial Implications: See report
Contact: Mike Uberti, Commission Secretary, (510) 981-7400

Committee Action Items

5. Disposition of City-Owned, Former Redevelopment Agency Properties at 1631 Fifth Street and 1654 Fifth Street

From: City Manager

Referred: October 1, 2019

Due: March 10, 2020

Recommendation: 1. Adopt first reading of an Ordinance authorizing the sale of two City-owned, former Redevelopment Agency properties at 1631 Fifth Street and 1654 Fifth Street at market rate and deposit the proceeds in the City's Housing Trust Fund (HTF).

2. Direct the City Manager to issue a Request for Proposals to select a real estate broker to manage the sale.

Financial Implications: See report

Note: *At the June 11, 2019 meeting, Council approved a recommendation directing the City Manager to issue a Request for Proposals to select a qualified organization to purchase the single family home at 1654 Fifth Street to operate as housing for the homeless.*

Contact: Kelly Wallace, Housing and Community Services, 981-5400

6. Inclusionary Units in Qualified Opportunity Zones

From: Councilmembers Harrison, Hahn, Davila, and Bartlett

Referred: October 15, 2019

Due: March 24, 2020

Recommendation: Adopt an ordinance amending Berkeley Municipal Code chapter 23C.12.035 requiring onsite inclusionary units in developments in Qualified Opportunity Zones (QOZs). Refer to the Adeline Corridor Subcommittee of the Planning Commission to consider how such a requirement would affect the Adeline Corridor Plan.

Financial Implications: See report

Contact: Kate Harrison, Councilmember, District 4, (510) 981-7140

Committee Action Items

7. Proposed Formula Retail (Chain Store) Regulations

From: Councilmember Hahn

Referred: October 29, 2019

Due: April 7, 2020

Recommendation:

1. Refer to the City Manager and Planning Commission to finalize and return to the City Council for adoption an Ordinance and related amendments to the Berkeley Municipal Code, if any, based on the Draft Formula Retail Ordinance attached hereto, to establish Formula Retail regulations for Commercial and Manufacturing Districts in the City of Berkeley.

2. Refer to the City Manager and Planning Commission to: a. Recommend establishment of Business District boundaries and names, as provided for in Section 23E.18.030(B) of the proposed Formula Retail Ordinance, and b. Through a process that includes public notice and input, as described in the proposed Formula Retail Ordinance, recommend for each Business District whether to allow unlimited Formula Retail, limited Formula Retail (some or all use categories allowed with a Use Permit, Neighborhood Notice, Design Review and findings) or to prohibit Formula Retail.

Financial Implications: See report

Contact: Sophie Hahn, Councilmember, District 5, (510) 981-7150

Unscheduled Items

These items are not scheduled for discussion or action at this meeting. The Committee may schedule these items to the Action Calendar of a future Committee meeting.

Items for Future Agendas

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

Adjournment

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*Written communications addressed to the Land Use, Housing & Economic Development Committee and submitted to the City Clerk Department will be distributed to the Committee prior to the meeting.*

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



### COMMUNICATION ACCESS INFORMATION:

This meeting is being held in a wheelchair accessible location. To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at (510) 981-6418 (V) or (510) 981-6347 (TDD) at least three business days before the meeting date. Attendees at public meetings are reminded that other attendees may be sensitive to various scents, whether natural or manufactured, in products and materials. Please help the City respect these needs.

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I hereby certify that the agenda for this special meeting of the Berkeley City Council was posted at the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way, as well as on the City's website, on October 31, 2019.



Mark Numainville, City Clerk

## **Communications**

*Communications submitted to City Council Policy Committees are on file in the City Clerk Department at 2180 Milvia Street, 1st Floor, Berkeley, CA.*



**BERKELEY CITY COUNCIL LAND USE, HOUSING, & ECONOMIC  
DEVELOPMENT COMMITTEE  
SPECIAL MEETING MINUTES**

**Thursday, October 24, 2019  
10:30 AM**

1947 Center Street, 3rd Floor - Magnolia Room

Committee Members:

Mayor Jesse Arreguin, and Councilmembers Sophie Hahn and Lori Droste

**Roll Call:** 10:32 a.m. Councilmember Hahn absent.

**Public Comment on Non-Agenda Matters – 3 speakers**

Councilmember Hahn present at 10:34 a.m.

**Minutes for Approval**

**1. Minutes - October 3, 2019**

**Action:** M/S/C (Droste/Hahn) to approve the minutes of October 3, 2019.

**Vote:** All Ayes.

**Committee Action Items**

*The public may comment on each item listed on the agenda for action as the item is taken up. The Chair will determine the number of persons interested in speaking on each item. Up to ten (10) speakers may speak for two minutes. If there are more than ten persons interested in speaking, the Chair may limit the public comment for all speakers to one minute per speaker. Speakers are permitted to yield their time to one other speaker, however no one speaker shall have more than four minutes.*

*Following review and discussion of the items listed below, the Committee may continue an item to a future committee meeting, or refer the item to the City Council.*

## Committee Action Items

2. **Referral to City Manager to Return to Council with an Amnesty Program for Legalizing Unpermitted Dwelling Units** *(Item contains supplemental materials)*  
**From: Councilmembers Wengraf, Harrison, and Hahn, and Mayor Arreguin**  
**Referred: April 8, 2019**

**Due: December 6, 2019**

**Recommendation:** That the City of Berkeley create and launch an Amnesty Program to incentivize the legalization of unpermitted dwelling units in order to improve the health/safety and preserve and possibly increase the supply of units available. A set of simple and clearly defined standards and a well-defined path for meeting those standards should be established in order to achieve the greatest success.

**Financial Implications:** See report

Contact: Susan Wengraf, Councilmember, District 6, 981-7160

**Action:** 6 speakers. Discussion held. M/S/C (Droste/Hahn) to move the item with revisions as submitted with a positive recommendation and to include the following: 1. Add certificate of compliance for Health and Safety on page 3; 2. To the checklist add Fire Department staff; 3. Change the duration of the program to reflect a limited timeframe but include language to extend to accommodate phasing or workflow.

**Vote:** All Ayes.

3. **Adopt an Ordinance adding a new Chapter 9.50 to the Berkeley Municipal Code Requiring Legal Rights for Legal Tender** *(Item contains revised materials)*  
**From: Councilmembers Harrison, Hahn, and Davila**  
**Referred: June 10, 2019**

**Due: March 5, 2020**

**Recommendation:** Adopt an ordinance adding a new Chapter 9.50 to the Berkeley Municipal Code requiring legal rights for legal tender, requiring that all brick-and-mortar businesses accept cash.

**Financial Implications:** None

Contact: Kate Harrison, Councilmember, District 4, 981-7140

**Action:** 5 speakers. Discussion held. Councilmember Harrison will submit a revised item that includes a definition change (intention is for retailers), more information on the single transaction limit, enhances the private right of action and includes more information in the financial implications section.

Item continued to next meeting on November 7, 2019



## Committee Action Items

**4. Ronald V. Dellums Fair Chance Access to Housing and Public Health and Safety Ordinance**

**From:** Mayor Arreguin, Councilmember Davila, Councilmember Harrison, Councilmember Robinson

**Referred:** July 8, 2019

**Due:** December 24, 2019

**Recommendation:** Adopt a first reading of the Ronald V. Dellums Fair Chance Access to Housing and Public Health and Safety Ordinance.

**Financial Implications:** Unknown

Contact: Jesse Arreguin, Mayor, 981-7100

**Action:** 6 speakers. Discussion held.

Item continued to next meeting on November 7, 2019.

**5. Spring 2019 Bi-Annual Report on Funding for Housing Programs**

**From:** Housing Advisory Commission

**Referred:** September 10, 2019

**Due:** February 18, 2020

**Recommendation:** Accept the Housing Advisory Commission's (HAC) recommendations for the allocation of U1 General Fund revenues to increase the supply of affordable housing and protect residents of Berkeley from homelessness.

**Financial Implications:** See report

Contact: Mike Uberti, Commission Secretary, (510) 981-7400

**Action:** 2 speakers. Discussion held.

Item continued to next meeting on November 7, 2019.

**6. Disposition of City-Owned, Former Redevelopment Agency Properties at 1631 Fifth Street and 1654 Fifth Street**

**From:** City Manager

**Referred:** October 1, 2019

**Due:** March 10, 2020

**Recommendation:** 1. Adopt first reading of an Ordinance authorizing the sale of two City-owned, former Redevelopment Agency properties at 1631 Fifth Street and 1654 Fifth Street at market rate and deposit the proceeds in the City's Housing Trust Fund (HTF).

2. Direct the City Manager to issue a Request for Proposals to select a real estate broker to manage the sale.

**Financial Implications:** See report

Contact: Kelly Wallace, Housing and Community Services, 981-5400

**Note:** At the June 11, 2019, meeting Council approved a recommendation directing the City Manager to issue a Request for Proposals to select a qualified organization to purchase the single family home at 1654 Fifth Street to operate as housing for the homeless.

## Committee Action Items

Item continued to next meeting on November 7, 2019.

7. **Inclusionary Units in Qualified Opportunity Zones**  
**From: Councilmembers Harrison, Hahn, Davila, and Bartlett**  
**Referred: October 15, 2019**  
**Due: March 24, 2020**

**Recommendation:** Adopt an ordinance amending Berkeley Municipal Code chapter 23C.12.035 requiring onsite inclusionary units in developments in Qualified Opportunity Zones (QOZs). Refer to the Adeline Corridor Subcommittee of the Planning Commission to consider how such a requirement would affect the Adeline Corridor Plan.

**Financial Implications:** See report

Contact: Kate Harrison, Councilmember, District 4, (510) 981-7140

Item continued to next meeting on November 7, 2019.

## Unscheduled Items

*These items are not scheduled for discussion or action at this meeting. The Committee may schedule these items to the Action Calendar of a future Committee meeting.*

- **None**

## Items for Future Agendas

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

## Adjournment

**Action:** M/S/C (Hahn/Droste) to adjourn the meeting.

**Vote:** All Ayes.

Adjourned at 12:31 p.m.

I hereby certify that this is a true and correct record of the Land Use, Housing, & Economic Development Committee meeting held on October 24, 2019.

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April Richardson, Assistant City Clerk

## Communications

*Communications submitted to City Council Policy Committees are on file in the City Clerk Department at 2180 Milvia Street, 1st Floor, Berkeley, CA.*



Kate Harrison  
Councilmember District 4

02

ACTION CALENDAR  
November 19th, 2019

To: Honorable Mayor and Members of the City Council  
From: Councilmembers Harrison, Hahn, Davila, and Bartlett  
Subject: Adopt an Ordinance adding a new Chapter 9.50 to the Berkeley Municipal Code Requiring Legal Rights for Legal Tender

RECOMMENDATION

Adopt an ordinance adding a new Chapter 9.50 to the Berkeley Municipal Code requiring legal rights for legal tender, requiring that all covered businesses accept cash.

FISCAL IMPACTS OF RECOMMENDATION

Some staff time necessary for outreach to businesses, and for processing claims in the event a violation is brought.

Following outreach, this ordinance will be largely self-enforced, with possible assistance from the Alameda County Department of Weights and Measures to check for the existence of a cash box during yearly inspections.

ENVIRONMENTAL SUSTAINABILITY

Consistent with sustainability goals.

BACKGROUND

For many Berkeley residents, particularly those who are denied access to credit or are unable to obtain bank accounts, the ability to purchase goods and services is depends on the ability to pay in cash. According to the 2017 Unbanked and Underbanked Households Survey,<sup>1</sup> 17% of all African American households and 14% of all Latino households in the United States had no bank account. Cash is an accessible medium of exchange in America, and stores not accepting cash payment systematically excludes segments of the population that are largely low-income people of color. Cashless business models may also have significant detrimental impacts on young people who do not meet age requirements for credit cards, for the elderly (many of whom have not transitioned to credit and digital payment modes or have restricted their access to them

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<sup>1</sup> <https://www.fdic.gov/householdsurvey/>

to avoid credit scams), and for other vulnerable groups such as homeless and immigrant populations.

Recently, San Francisco<sup>2</sup> joined Philadelphia<sup>3</sup> and New Jersey<sup>4</sup> in requiring that all brick-and-mortar businesses in the jurisdiction accept cash. As of today, there are few stores in Berkeley that do not accept cash, and so now is a good opportunity to guarantee that these discriminatory practices are not permitted in our City.

#### REVIEW OF EXISTING PLANS, PROGRAMS, POLICIES, AND LAWS

Consistent with the City's Strategic Plan goal of championing social and racial equity.

#### RATIONALE FOR RECOMMENDATION

A ban on cashless establishments permits all to participate in Berkeley's economy, particularly the homeless and very poor.

#### IMPLEMENTATION, ADMINISTRATION AND ENFORCEMENT

The Sealer of the Weights and Measures Division, and the Sealer's employees, agents, or other designees, has the authority to enforce this Article. Additionally, the ordinance may be enforced through a private right of action. The obligation of compliance shall fall only on the business. No employee or independent contractor shall be held liable for any violation of this Article.

#### CONTACT PERSON

Kate Harrison, District 4 510-981-7140

#### ATTACHMENT:

1: Proposed Ordinance Adding BMC Chapter 9.50

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<sup>2</sup> <https://www.courthousenews.com/%EF%BB%BFsan-francisco-will-require-stores-to-accept-cash/>

<sup>3</sup> <https://6abc.com/politics/bill-looks-to-require-philly-businesses-to-accept-cash/5121309/>

<sup>4</sup> <https://www.wbgo.org/post/bill-would-require-nj-retailers-accept-cash-payments#stream/0>

ORDINANCE NO. –N.S.

ADDING A NEW CHAPTER 9.50 TO THE BERKELEY MUNICIPAL CODE  
REQUIRING ~~BRICK-AND-MORTAR~~ BUSINESSES TO ACCEPT CASH

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

Section 1. That Chapter 9.50 of the Berkeley Municipal Code is added to read as follows:

**Chapter 9.50**

**LEGAL RIGHTS FOR LEGAL TENDER**

**Sections:**

**9.50.010 Findings and Purpose**

**9.50.020 Definitions**

**9.50.030 ~~Brick-and-Mortar~~Covered Businesses Required to Accept Cash**

**9.50.040 Exceptions**

**9.50.050 Enforcement**

**9.50.060 Severability**

### 9.50.010 Findings and Purpose.

The Council finds and declares as follows:

- A. The City of Berkeley is ~~duty-bound~~committed to providing~~ing~~ its community with transactional access to the goods and services provided by Berkeley's businesses. For many City residents, such as those unable to obtain bank accounts, the ability to engage in consumer transactions, including goods and services vital to health and safety, depends on the ability to pay with legal cash tender established by the federal government of United States.
- B. Cashless business models present significant detrimental impacts to vulnerable groups, especially low-income people, as they require financial institution-sponsored payment in credit or debit cards, or other non-cash forms of payment.
- C. Cash payment, in the form of the United States Dollar, has been the official legal tender since ~~the country's founding in~~ 1792 and shall be recognized by ~~brick-and-mortar~~ businesses alongside other forms of legal tender.
- D. It is the intent of the Council to ensure Berkeley's economy is inclusionary and accessible to everyone, including those who lack access to non-cash forms of payment.

### 9.50.020 Definitions.

- A. ~~"Brick-and-Mortar Business" means~~Covered Business shall mean any ~~place of business~~Drugstore, Food Products Store, or Retail Products Store operating at a fixed, permanent, physical premises. ~~Brick and mortar~~Covered businesses ~~do~~ not include any ~~business operating~~transactions occurring in from a vehicle or other mobile space (for example a food ~~truck~~vending facility).
- B. "Cash" means United States currency, in the form of both paper Federal Reserve Notes and metal coins.
- C. "Drugstore" shall have the same meaning as defined in BMC 23F.04.010.
- D. "Food Products Store" shall have the same meaning as defined in BMC 23F.04.010.
- ~~B-E.~~ "Retail Products Store" shall have the same meaning as defined in BMC 23F.04.010.

### 9.50.030 ~~Brick-and-Mortar~~Covered Businesses Required to Accept Cash.

- A. Except as set forth in 9.50.040, every ~~Brick-and-Mortar~~Covered Business within the City must accept payment in Cash, if offered, for any transaction involving the purchase of any tangible good and/or service.
- B. Except as set forward in 9.50.040, a ~~Brick-and-Mortar~~Covered Business may not charge a fee or place any other condition on its acceptance of Cash as required by subsection A.

### 9.50.040 Exceptions.

The provisions set forward in this Act shall not apply in cases of:

- A. Suspected counterfeit currency. A ~~Brick-and-MortarCovered~~ Business may refuse to accept Cash that the business reasonably suspects to be counterfeit.
- B. Large denominations. A ~~Brick-and-MortarCovered~~ Business may refuse to accept Cash in any denomination larger than a twenty dollar note, but shall otherwise accept any combination of Federal Reserve Notes and metal coins in connection with any transaction.
- C. Single transactions above \$5,000. Where a single transaction involves the purchase of one or more goods and/or services, the total price of which (including tax) exceeds \$5,000, a ~~Brick-and-MortarCovered~~ Business must accept Cash that is offered as payment for any amount up to \$5,000, but may refuse to accept Cash that is offered as payment for the remainder of the amount due.
- ~~C-D.~~ Reservations made without Cash. Where a Covered Business requires the purchaser make an appointment or reservation using a noncash form of payment (such as a credit or debit card), the business may require that the transaction in question be paid for using the noncash payment already on file.

#### **9.50.050 Enforcement.**

- A. The obligation to ensure that a ~~Brick-and-MortarCovered~~ Business complies with this Chapter 9.50 shall fall only on the business or, in the case that the owners of the business are responsible for a policy or practice causing a violation of this Chapter, on the owner or owners of the business. No employee or independent contractor working at a ~~Brick-and-MortarCovered~~ Business shall be held liable for any violation of this Chapter.
- B. Each transaction or attempted transaction in which a ~~Brick-and-MortarCovered~~ Business fails to accept Cash shall constitute a separate violation of this Chapter.
- ~~B-C.~~ Any aggrieved person who believes the provisions of this Chapter have been violated shall have the right to file an action for injunctive relief and/or damages. In any action to enforce the provisions of the chapter, the prevailing party shall be entitled to recover reasonable attorneys' fees and costs.
- ~~C-D.~~ Any violation of this Chapter shall be an infraction or misdemeanor punishable as hereinafter specified: The City may issue an Administrative Citation pursuant to Chapter 1.28 of the Berkeley Municipal Code for any violation of this Chapter. The amount of this fine shall be determined as specified below:
  - a. For a first violation, an infraction punishable by a fine not exceeding \$100 and not less than \$50.
  - b. For a second violation within a twelve month period, an infraction punishable by a fine not exceeding \$200 and not less than \$100.
  - c. For a third violation within a twelve month period, an infraction punishable by a fine not exceeding \$1,000 and not less than \$500.

#### **9.50.060 Severability.**

If any word, phrase, sentence, part, section, subsection, or other portion of this Chapter, or any application thereof to any person or circumstance is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the prescribed application thereof, shall be severable, and the remaining provisions of this Chapter, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect. The City Council hereby declares that it would have passed this title, and each section, subsection, sentence, clause and phrase of this Chapter, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases is declared invalid or unconstitutional.

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 Council Chambers, 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.





Councilmember District 3

**SUPPLEMENTAL**  
**City Council: Policy Committee: Land Use, Housing &**  
**Economic Development**  
**AGENDA MATERIAL**  
**for Supplemental Packet 1**

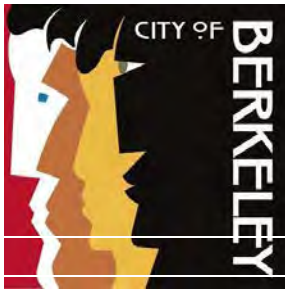
**Meeting Date: November 6, 2019**

**Item Number: ##**

**Item Description: No-Cash Establishment Ban**

**Submitted by: Councilmember Ben Bartlett**

Attached is additional information to be considered regarding the No-Cash Establishment Ban on brick-and-mortar businesses.



Page 8 of 33  
Councilmember Ben Bartlett

City of Berkeley, District 3  
2180 Milvia Street, 5<sup>th</sup> Floor  
Berkeley, CA 94704  
PHONE 510-981-7130  
EMAIL: [bbartlett@cityofberkeley.info](mailto:bbartlett@cityofberkeley.info)

ACTION CALENDAR  
November 6th, 2019

To: City Council: Policy Committee: Land Use, Housing & Economic Development, Honorable Mayor, and Members of the City Council  
From: Councilmember Ben Bartlett  
Subject: Additional resources and articles to consider for No-Cash Establishment Ban

Please consider these additional resources for the No-Cash Establishment Ban.

- [“As more cities ban cashless businesses, New York Wants to follow”](#), by Rebecca Bellan, City Lab.
- [“Sf approves ban on cashless stores”](#) by Joshua Sabatini, San Francisco Examiner.
- [“Philadelphia’s ban on cashless stores went into effect on Tuesday”](#) by Lauren Spillane, The Daily Pennsylvanian.
- [“New Jersey becomes second state to ban cashless shops and restaurants”](#) by Megan Geuss, ars Technia.

Attachments

1. [Citing Civil Rights, Cities Are Banning Cashless Retail - CityLab](#)
2. [SF approves ban on cashless stores – The San Francisco Examiner](#)
3. [Philadelphia’s ban on cashless stores went into effect Tuesday The Daily Pennsylvanian](#)
4. [New Jersey becomes second state to ban cashless shops and restaurants Ars Technica](#)

CONTACT PERSON

Councilmember Ben Bartlett:  
James Chang  
Fallon Funseth

510-981-7130  
[jchang@cityofberkeley.info](mailto:jchang@cityofberkeley.info)  
510-981-7130

ATTACHMENTS AND MATERIALS

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Philadelphia, San Francisco, and Washington in banning them.

In February, New York City Councilmember Ritchie Torres introduced legislation that would prohibit retail establishments from refusing to accept payments in cash. The council hasn't made a decision on the bill yet, but Torres is confident that it will pass by mid-year. If it does, cashless businesses could face fines of up to \$500 for every violation.

The legislation protects consumer choice of payment, but the conversation surrounding the bill echoes that of many nationwide challenges to the movement toward a cashless economy: A cashless business discriminates against low-income people, and often they are people of color and undocumented immigrants.

In New York City, the majority of the nearly 12 percent of unbanked and 25 percent underbanked residents are people of color. Close to 17 percent of black New Yorkers and 14 percent of Latinx New Yorkers are unbanked, compared to just 3 percent of white New Yorkers. This policy brings a bigger question to life in New York: Considering the fact that the majority of New Yorkers without bank accounts are people of color, is closing off services to the unbanked racial discrimination?

Recently, cities across the country have been issuing legislation to stymie the growing number of cashless businesses, and some locales have decades-old laws preventing cashless retail. Philadelphia just signed off on a law at the end of February, which goes into effect July 1, that would require shops to take cash, with fines up to \$2,000. Also in February, both houses of New Jersey's state legislature passed a similar bill and are only awaiting the governor's signature. San Francisco has recently proposed a similar ordinance, and Washington D.C. and Chicago have also introduced legislation that would make it illegal to discriminate against cash as a form of payment. A Massachusetts law dating to 1978 says that retailers cannot "discriminate against a cash buyer by requiring the use of credit," and Pennsylvania's 1984 Cash Consumer Protection Act made it illegal for businesses to refuse services to people without credit cards.

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## **Considering that the majority of New Yorkers without bank accounts are people of color, is closing off services to the unbanked racial discrimination?**

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The lawmakers behind these bills across the country are concerned that the cashless trend discriminates against low-income residents and people of color, as communities of color have higher percentages of unbanked: In California, 20.4 percent of black households and 14.6 percent of Latinx households are unbanked, and Philadelphia's rates are similar to New York's.

The federal Civil Rights Act mandates that all persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, and privileges, advantages, and accommodations of any place of public accommodation without discrimination or segregation on the ground of race, color, religion, or national origin.

A business can refuse service as long as their policies aren't purposely discriminating against a person's race, religion, sex, or national origin, which owners of cashless institutions would argue their policies aren't. A number of cities posit their laws as preventing discrimination against low-income people, but low-income people aren't a protected group.



A sign on the door of a Dig Inn dining and take-out establishment in New York City. (Rebecca Bellan/CityLab)

A capitalist economy breeds wealth discrimination: Many of the cashless institutions in NYC are not moderately priced. Theoretically anyone can buy a \$12 salad at Sweetgreen, one of the cashless pioneers, yet can they really? But the resulting exclusion of New Yorkers of color and the undocumented, based on their lack of a bank account, still counts as discrimination, according to Marie Napoli, a lawyer and civil rights advocate.

However, Napoli said the ban on cashless likely wouldn't stand up in Supreme Court should one of the cash-free businesses choose to bring the issue to higher courts. "The clash between businesses' right to refuse service, and other compelling interests have resulted in allowing these forms of discrimination to continue," Napoli told CityLab.

Cash-free businesses generally cite increased efficiency, saving time and money by cutting out the need for armored cars to transport cash, and safety of their employees against the threat of robbery as reasons for adopting cashless policies.

“It saddens me that a decision made for the best interest of my employees could be misconstrued as classist or discriminatory,” said Michelle Gauthier, founder of quick-food restaurant Mulberry & Vine with five locations in New York, at the New York City Council hearing on February 14. Gauthier said her original reasoning behind going cashless was to protect employees and remove the burden of dealing with cash on a daily basis. She said she’s never turned away a customer for an inability to pay. “Many of my employees are the same people I’m supposedly discriminating against, yet they wholeheartedly agree with my decision to go cashless.”

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**“In the end, I think the need for equity outweighs the efficiency gains of a cashless business model. Human rights takes precedence over efficiency gains.”**

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At the same hearing, Leo Kremer, co-owner of Dos Toros Taqueria, testified that his business decided to go cashless for a host of reasons, including past robberies and his customers’ tendency to pay with plastic. Cash transactions, Kremer said, made up less than 10 percent of overall transactions. He said Dos Toros pays their employees \$15 an hour, and provides benefits and room for growth. This has been easier to do, Kremer says, with the increased efficiency and self-sustainability resulting from going cashless. “For a business, running an efficient operation is the difference between staying open and shutting down.”

Yet Torres, whose Bronx city council district includes some of the New York’s poorest neighborhoods, said to CityLab that, “In the end, I think the need for equity outweighs the efficiency gains of a cashless business model. Human rights takes precedence over efficiency gains.”

“Cashless institutions encourage a FinTech Jim Crow by restricting the places where people of color can shop, eat, and receive basic services,” said Edgard Laborde, deputy political director of the Retail Wholesale Department Store Union (RWDSU), during his testimony. “By refusing to serve communities of color, cashless establishments carve out niches in gentrified neighborhoods through cash exclusion in an already unaffordable city.”

Poor and low-income New Yorkers face numerous barriers in accessing banking. The poorest neighborhoods of New York's five boroughs have the fewest bank branches in the city. Andy Collado, assistant director of services at The Financial Clinic in Sunset Park Brooklyn, an organization that helps the working poor navigate financial systems, said that there is only one bank branch operating in his neighborhood. And while technically the ID NYC card that can be issued to undocumented New Yorkers enables them to open a bank account, Collado said that most of his undocumented clients—about a third of the total clientele—are unaware of this information, and less than 30 percent of banks and credit unions in the city accept ID NYC as valid identification.

“Should we accept, as opponents of this bill do, that there are just some places where undocumented New Yorkers can't shop or buy food?” said Collado. Despite the fact that the undocumented don't have the same federal protections against discrimination as citizens do, Collado told CityLab that he thinks they should have the same rights, as our neighbors and fellow residents, when it comes to the operating of their lives. “We are a sanctuary city,” he said in a phone interview. “We want to create the safest environment and one of freedom for whoever comes into this state.”

Some might say that the cashless naysayers sound a bit apocalyptic. After all, not every business has gone cashless. There are other places to buy a salad or a cup of coffee, and at least one representative of a group that helps undocumented New Yorkers navigate financial hurdles said they haven't noticed complaints, but as it becomes more widespread that could change.

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**“I certainly don't think [this bill] is the right long-term solution. The future does not lie in this direction. The future lies in giving people free debit cards and financial inclusion.”**

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How close are we to a cashless NYC really? To speculate on such a question, one could look to countries that are on the fast track to becoming cashless. In Sweden, bills and coins make up only 1 percent of the economy. Trends in the U.S. show a preference among Americans for plastic. A report from the Federal Reserve found that in 2017, debit and credit card payments made up 48 percent of transactions, with cash making up 30 percent. However, households that made under \$25,000 annually used cash for more than half of their transactions.

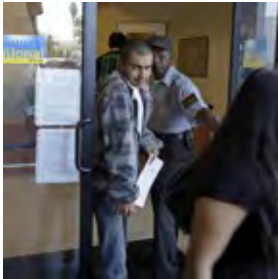
“We are already where Sweden was five to seven years ago, and given another five to seven years, we will be where Sweden is now,” said Kenneth Rogoff, a Harvard economics professor and author of *The Curse of Cash: How Large Denomination Bills Aid Crime and Tax Evasion Constrain Monetary Policy*.

“It seems to me there’s a paradigm shift to a cashless business model,” said Torres in a phone interview. “A company like Amazon could surely spread the model more widely, and Amazon is intent on opening more Amazon Go stores in major cities like New York. It might seem like it’s at the margins at the moment, but the trend could spread a lot faster than people might think.”

Yet, when it has served their interests, Amazon has figured out a way to sell even its online products to the unbanked as it does in Kenya, where it is pioneering a program to allow people without debit, charge, or credit cards to pay for its products at Western Union so that it can access the vast unbanked market there.

## Recommended

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**The Tax on Black and Brown Customers When Dealing With Community Banks**

BRENTIN MOCK / DAVID MONTGOMERY  
JUN 21, 2018



**Who Wins When Cash Is No Longer King?**

SIDNEY FUSSELL  
DEC 26, 2018



“I certainly don’t think [this bill] is the right long-term solution,” said Rogoff. “The future does not lie in this direction. The future lies in giving people free debit cards and financial inclusion.” He cited the case of India. The country launched a program to decrease the number of unbanked and saw the percentage decrease from 47 percent of adults in 2014 to 20 percent unbanked in 2017 according to the World Bank Global Findex Report. “If India can manage to give people free debit cards, so can the U.S.” Rogoff said.

Casey Adams, director of City Legislative Affairs for the NYC Department of Consumer Affairs, stressed that financial inclusion should be prioritized with unbanked and underbanked New Yorkers connected to safe and affordable financial products.

“For these New Yorkers, the financial challenges go further and deeper than an inability to use cash to purchase goods and services at retail establishments,” he said.

## About the Author

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**Rebecca Bellan**



 [@REBECCABELLAN](#) /  [FEED](#)

Rebecca Bellan writes about cities, culture, health, and travel.

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Legislation approved by the Board of Supervisors Tuesday will require businesses to accept cash payments. (Kevin N. Hume/S.F. Examiner)

# SF approves ban on cashless stores

City law requiring businesses to accept cash follows similar moves in Philadelphia, New Jersey

JOSHUA SABATINI / May. 7, 2019 2:25 p.m. / THE CITY

San Francisco outlawed cashless businesses Tuesday, ending a practice widely viewed as discriminatory against low income residents.

The Board of Supervisor unanimously approved legislation introduced by Supervisor Vallie Brown that will impose a ban on cashless businesses 90 days after its final approval.

The vote follows Philadelphia's cashless business ban, approved in February, and New Jersey's, which passed last month.

Brown said that the "future may be cashless," but in the meantime denying cash payments is "excluding too many people."

“This legislation will go far in ensuring all San Franciscans have equitable access to the city’s economy,” she said

In the United States, 17 percent of all African-American households and 14 percent of all Latino households had no bank account, according to a 2017 Federal Deposit Insurance Corporation survey.

There are currently only a handful of businesses that do not accept cash in San Francisco, requiring payment through smart phone applications tied to a person’s bank account or credit card. The number, however, was increasing. Those without bank accounts or credit are unable to purchase goods in these types of stores.

“The City must remain vigilant in ensuring its economy is inclusionary and accessible to everyone,” the legislation states. “The purpose of this [law] is to ensure that all City residents — including those who lack access to other forms of payment — are able to participate in the City’s economic life by paying cash for goods and many services.”

Businesses argue going cashless creates a safer work environment and more efficient service.

But in the face of new laws seeking to beat back the trend, one of the most well-known cashless stores, Amazon Go, which is also devoid of cash registers, announced last month it would start accepting cash.

Amazon Go’s latest location to open in New York City on Tuesday was also the first of its 12 locations to start accepting cash, according to an Amazon Go spokesperson.

The company plans to over time start accepting cash payments at its other locations, including the three in San Francisco.

Under the legislation, repeat violations would constitute a misdemeanor and carry a fine of up to \$1,000.

The law applies to brick-and-mortar businesses, those with a fixed location. It does not impact food trucks, ride hail services or temporary “pop up” retail.

A second and final vote on the legislation is scheduled for next week.

In other business, Mayor London Breed jointly introduced with board president Norman Yee a \$500 million bond for the November ballot that they said would help start construction on about 2,000 units of affordable housing over the next four years.

The funding breakdown includes \$150 million to repair and rebuild public housing, \$210 million to build, acquire or rehabilitate low-income housing and about \$20 million for middle-income housing, including to fund down payment assistance loans, land purchases and construction.

In addition, \$90 million would go toward acquiring and building senior housing and \$30 million “for the acquisition and rehabilitation of rental housing at risk of losing affordability, whether through market forces or a building’s physical decline.”

Supervisor Gordon Mar also asked the budget analyst to study the social and economic impacts of proposed City College of San Francisco budget cuts that would reduce the

number of classes offered. The request comes as a discussion about the “proposed course changes and reductions” is scheduled for Friday before the Board of Supervisors’ newly formed Joint City, School District, and City College Select Committee.

[jsabatini@sfexaminer.com](mailto:jsabatini@sfexaminer.com)

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# The Daily Pennsylvanian

## Philadelphia's ban on cashless stores went into effect Tuesday

By Lauren Spillane | 10/03/19 7:33pm



Sweetgreen CEO Jonathan Neman said the cashless payment system mitigates armed robbery rates in storefronts. Credit: [Erica Xin](#)

On Oct. 1, Philadelphia officially became the first major U.S. city to completely ban cashless stores, requiring city-wide retail locations to accept cash payments. Businesses that fail to comply with the bill's demands will incur charges of up to \$2,000, [CBS Philly](#) reported.

**USA Today** reported that proponents of this bill argue that cashless establishments are discriminatory towards low income groups with limited access to credit cards and banking accounts. In Philadelphia, 24.5 percent of the population is below the poverty line, according to a 2018 report from the **U.S. Census Bureau**.

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However, the bill has faced pushback from business owners, who say going cashless reduces waiting times, hygiene problems, and the risk of theft. Sweetgreen CEO **Jonathan Neman** said the cashless payment system mitigates armed robbery rates in storefronts.

Not all business owners are opposed to the bill. **Jason Magowan**, the co-partner of Steve's Prince of Steaks, told **USA Today** that cashless stores have a negative societal impact.

"I think it ends up breeding class warfare in a way," Magowan told **USA TODAY**. "Going cashless is just a way to control people. I think it's totally wrong and it holds people down."

The ban on cashless establishments will affect several establishments near Penn. In addition to Sweetgreen, located on 39th and Walnut streets, the bill will also impact stores in **Franklin's Table**, located on 34th and Walnut streets.

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## PennConnects



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Penn students slam new associate PPE director over 2018 paper, 'Defending eugenics'



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# New Jersey becomes second state to ban cashless shops and restaurants

The new law takes aim at Amazon Go and others.

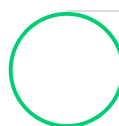
MEGAN GEUSS - 3/18/2019, 3:23 PM



frankieleon / Flickr

On Monday, New Jersey Governor Phil Murphy signed a bill banning cashless retail stores and restaurants in the Garden State. Murphy's signature makes New Jersey the second state in the US to ban cashless stores, after Massachusetts banned them in 1978.

More recently, New Jersey's move follows that of Philadelphia, which banned cashless stores earlier this month. Philadelphia's legislation was a reaction to a growing number of stores that only accept credit cards or require customers to pay with an app, like Amazon's new Amazon Go stores.



#### FURTHER READING

[Sorry Amazon: Philadelphia bans cashless stores](#)

Ars contacted Amazon for comment on the new law, but the company did not respond.

Much like Philadelphia's new law, [New Jersey's law makes an exception](#) for parking garages and car rental companies, where a credit card is required upfront for incidentals. There is also an exception carved out for some airport stores, according to NJ.com.

Proponents of cashless stores say that they prevent theft, speed up customer convenience, and are generally more modern. Opponents say that cashless stores unfairly disadvantage people who don't or can't have credit cards and who don't want the fees associated with prepaid debit cards.

According to NJ.com, State Assemblyman Paul Moriarty said in a statement that "Many people don't have access to consumer credit, and any effort by retail establishments to ban the use of cash is discriminatory towards those people."

Privacy concerns are another reason customers might resist the rise of cashless stores. Moriarty [told WNYC](#) that the bill also protects people who "don't want every aspect of their life recorded, stored, and monetized by credit card companies, right down to the purchase of a stick of gum."

Businesses that violate New Jersey's new law will be fined \$2,500 for a first offense and \$5,000 for a second offense. Fines would climb from there.

Currently, the New York City Council is discussing a similar ban on cashless stores.

## READER COMMENTS

## SHARE THIS STORY

**MEGAN GEUSS**

Megan is a staff editor at Ars Technica. She writes breaking news and has a background in fact-checking and research.

**EMAIL** [megan.geuss@arstechnica.com](mailto:megan.geuss@arstechnica.com) // **TWITTER** [@MeganGeuss](https://twitter.com/MeganGeuss)



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ORDINANCE NO. –N.S.

ADDING A NEW CHAPTER 9.50 TO THE BERKELEY MUNICIPAL CODE  
REQUIRING BRICK-AND-MORTAR BUSINESSES TO ACCEPT CASH

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

Section 1. That Chapter 9.50 of the Berkeley Municipal Code is added to read as follows:

**Chapter 9.50**

**LEGAL RIGHTS FOR LEGAL TENDER**

**Sections:**

**9.50.010 Findings and Purpose**

**9.50.020 Definitions**

**9.50.030 Brick-and-Mortar Businesses Required to Accept Cash**

**9.50.040 Exceptions**

**9.50.050 Enforcement**

**9.50.060 Severability**

**RECEIVED AT  
COUNCIL MEETING OF:**

**OCT 24 2019**

**OFFICE OF THE CITY CLERK  
CITY OF BERKELEY**

### **9.50.010 Findings and Purpose.**

The Council finds and declares as follows:

- A. The City of Berkeley is ~~duty-bound~~ committed to providing its community with transactional access to the goods and services provided by Berkeley's businesses. For many City residents, such as those unable to obtain bank accounts, the ability to engage in consumer transactions, including goods and services vital to health and safety, depends on the ability to pay with legal cash tender established by the federal government of United States.
- B. Cashless business models present significant detrimental impacts to vulnerable groups, especially low-income people, as they require financial institution-sponsored payment in credit or debit cards, or other non-cash forms of payment.
- C. Cash payment, in the form of the United States Dollar, has been the official legal tender since ~~the country's founding in 1792~~ and shall be recognized by brick-and-mortar businesses alongside other forms of legal tender.
- D. It is the intent of the Council to ensure Berkeley's economy is inclusionary and accessible to everyone, including those who lack access to non-cash forms of payment.

### **9.50.020 Definitions.**

- A. "Brick-and-Mortar Business" means any place of business operating at a fixed, ~~permanent, physical premises~~. Brick and mortar business does not include any ~~business operating transactions occurring in from~~ a vehicle or other mobile space (for example a food truck vending facility).
- B. "Cash" means United States currency, in the form of both paper Federal Reserve Notes and metal coins.

### **9.50.030 Brick-and-Mortar Businesses Required to Accept Cash.**

- A. Except as set forth in 9.50.040, every Brick-and-Mortar Business within the City must accept payment in Cash, if offered, for any transaction involving the purchase of any tangible good and/or service.
- B. Except as set forward in 9.50.040, a Brick-and-Mortar Business may not charge a fee or place any other condition on its acceptance of Cash as required by subsection A.

### **9.50.040 Exceptions.**

The provisions set forward in this Act shall not apply in cases of:

- A. Suspected counterfeit currency. A Brick-and-Mortar Business may refuse to accept Cash that the business reasonably suspects to be counterfeit.
- B. Large denominations. A Brick-and-Mortar Business may refuse to accept Cash in any denomination larger than a twenty dollar note, but shall otherwise accept any combination of Federal Reserve Notes and metal coins in connection with any transaction.

C. Single transactions above \$5,000. Where a single transaction involves the purchase of one or more goods and/or services, the total price of which (including tax) exceeds \$5,000, a Brick-and-Mortar Business must accept Cash that is offered as payment for any amount up to \$5,000, but may refuse to accept Cash that is offered as payment for the remainder of the amount due.

~~C.D.~~ Reservations made without Cash. Where a brick-and-mortar business requires the purchaser make an appointment or reservation using a noncash form of payment (such as a credit or debit card), the business may require that the transaction in question be paid for using the noncash payment already on file.

#### **9.50.050 Enforcement.**

- A. The obligation to ensure that a Brick-and-Mortar Business complies with this Chapter 9.50 shall fall only on the business or, in the case that the owners of the business are responsible for a policy or practice causing a violation of this Chapter, on the owner or owners of the business. No employee or independent contractor working at a Brick-and-Mortar Business shall be held liable for any violation of this Chapter.
- B. Each transaction or attempted transaction in which a Brick-and-Mortar Business fails to accept Cash shall constitute a separate violation of this Chapter.
- C. ~~Any violation of this Chapter shall be an infraction or misdemeanor punishable as hereinafter specified:~~ Where prompt compliance is not forthcoming, the City may issue an Administrative Citation pursuant to Chapter 1.28 of the Berkeley Municipal Code. The amount of this fine shall vary as specified below:
  - a. For a first violation, an infraction punishable by a fine not exceeding \$100 and not less than \$50.
  - b. For a second violation within a twelve month period, an infraction punishable by a fine not exceeding \$200 and not less than \$100.
  - c. For a third violation within a twelve month period, an infraction punishable by a fine not exceeding \$1,000 and not less than \$500.

#### **9.50.060 Severability.**

If any word, phrase, sentence, part, section, subsection, or other portion of this Chapter, or any application thereof to any person or circumstance is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the prescribed application thereof, shall be severable, and the remaining provisions of this Chapter, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect. The City Council hereby declares that it would have passed this title, and each section, subsection, sentence, clause and phrase of this Chapter, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases is declared invalid or unconstitutional.

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 Council Chambers, 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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- B. Cashless business models present significant detrimental impacts to vulnerable groups, especially low-income people, as they require financial institution-sponsored payment in credit or debit cards, or other non-cash forms of payment.
- C. Cash payment, in the form of the United States Dollar, has been the official legal tender since ~~the country's founding in~~ 1792 and shall be recognized by brick-and-mortar businesses alongside other forms of legal tender.
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- B. "Cash" means United States currency, in the form of both paper Federal Reserve Notes and metal coins.

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- A. Except as set forth in 9.50.040, every Brick-and-Mortar Business within the City must accept payment in Cash, if offered, for any transaction involving the purchase of any tangible good and/or service.
- B. Except as set forward in 9.50.040, a Brick-and-Mortar Business may not charge a fee or place any other condition on its acceptance of Cash as required by subsection A.

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- A. Suspected counterfeit currency. A Brick-and-Mortar Business may refuse to accept Cash that the business reasonably suspects to be counterfeit.
- B. Large denominations. A Brick-and-Mortar Business may refuse to accept Cash in any denomination larger than a twenty dollar note, but shall otherwise accept any combination of Federal Reserve Notes and metal coins in connection with any transaction.

- C. Single transactions above \$5,000. Where a single transaction involves the purchase of one or more goods and/or services, the total price of which (including tax) exceeds \$5,000, a Brick-and-Mortar Business must accept Cash that is offered as payment for any amount up to \$5,000, but may refuse to accept Cash that is offered as payment for the remainder of the amount due.

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Office of the Mayor

03

ACTION CALENDAR

November 7, 2019

To: Honorable Mayor and Members of the City Council

From: Mayor Jesse Arreguín, Councilmembers Cheryl Davila, Kate Harrison, Rigel Robinson

Subject: Ronald V. Dellums Fair Chance Access to Housing and Public Health and Safety Ordinance

RECOMMENDATION

Adopt a first reading of the Ronald V. Dellums Fair Chance Access to Housing and Public Health and Safety Ordinance.

BACKGROUND

Structural barriers faced by formerly incarcerated people continue to exist, with the stigma of incarceration blocking housing opportunities for many. A lack of access to stable housing increases the risk of recidivism, furthering the cycle caused by an inequitable criminal justice system. A 2019 survey by UC Berkeley's Goldman School for Public Policy found that a third of formerly incarcerated Alameda County residents had experienced homelessness or housing insecurity, and 54% had been denied either housing or the opportunity to live with a family member because of their criminal record.

Multiple jurisdictions across the country, including regional neighbors such as San Francisco and Richmond, have passed a Fair Chance Ordinance, which prohibits landlords from prohibiting tenancy based on an individual's criminal history. The Berkeley Housing Element calls for the creation and enforcement of fair housing laws.

In October 2018, the City Council unanimously approved a referral to the City Manager and the 4x4 Committee to establish a Fair Chance Ordinance. The 4x4 Committee discussed this during their meetings in May and June 2019, in consultation with the Alameda County Fair Chance Housing Coalition, the Just Cities/the Dellums Institute for Social Justice, and various stakeholders. The Committee took the following action at its June 3rd meeting:

*M/S/C (Arreguín/Davila) Recommendation to Council to support the proposed Fair Chance Ordinance with the following changes: (1) eliminate the ADU exemption; (2) add an education and training component; (3) rather than having separate standards for "private" vs. "publically subsidized" housing, differentiate between "publically subsidized/inclusionary" housing (including privately owned below market rate units) and "private non-inclusionary" housing; (4) specify the level of detail (in addition to existing state law requirements) that must be provided in written explanations for*

*housing denials; (5) any provision (to the extent allowed by law) requiring certain housing providers that violate the ordinance to offer the next available unit to the applicant should state that the unit must be comparable (in rent, size, condition, amenities/accommodations, etc.) to the unit that was denied, and must be available within a reasonable timeframe. Carried 7-0-0-1. Absent: Tregub.*

The proposed Ordinance would prohibit landlords from advertising or using a policy that automatically excludes people with criminal histories from rental housing; asking about or requiring disclosure of someone's criminal history; or taking adverse action against an applicant or tenant based on his or her criminal history. Exceptions would be made to single-family dwellings where the owner occupies the dwelling, and for federally assisted housing complying with federal regulations that require them to automatically exclude tenants based on certain types of criminal history.

#### SUMMARY

As research and lived experience demonstrate, formerly incarcerated people experience significant barriers beyond the high cost of rent that prevent them from securing housing. They are screened out when applying to rent housing due to criminal background checks in private rental, nonprofit affordable housing, and public housing units. Even living with family members is not always a viable solution as it may put their family's housing at risk-- rental agreements may prohibit or limit people with criminal histories from residing in the units. Fair Chance Housing is legislation that prohibits the use of criminal histories for most offenses in determining access to housing. It also bans the use of advertising language that excludes people with arrest records, conviction records, or criminal history. In short, Fair Chance Housing legislation removes structural barriers to housing and enables landlords to consider the merits of individual housing applications—providing people with a fair chance.

Led by Just Cities/the Dellums Institute for Social Justice, The Alameda County Fair Chance Housing Coalition has been working to remove such structural exclusionary barriers for people coming home from prison. The Fair Chance Housing Ordinance would result in:

- 1) Clear rules and standards for all landlords regarding the use of criminal background checks in the housing application process and the elimination of the current arbitrary system that relies on inaccurate criminal background databases.
- 2) Landlords assessing the merits of individual housing applications rather than the current status of blanket exclusion of applications solely on the basis of criminal records.
- 3) Formerly incarcerated people and their family members having access to safe, stable, and affordable housing that they need in order to reclaim their lives and effectively re-integrate into the community.
- 4) Decrease in recidivism rates by removing structural barriers to stable housing, including with family members, for formerly incarcerated people.

#### CURRENT SITUATION AND ITS EFFECTS

Attachment 1 provides additional situational information, including citations.

Research shows that government repositories of criminal records are routinely incomplete, thus making commercial criminal background reports inaccurate and/or misleading. Incomplete data at the state and federal levels undermine the fairness and accuracy of commercial criminal background reports, which rely upon governmental data. In particular, out-of-date information about the final disposition of a case means that data about arrests are routinely listed in background reports even when the charges were eventually dropped, reduced, or disproven in court. The consequences of these database gaps are significant.

Unlike government screens, commercial background checks are conducted using basic personal information, like names. In the late 1990s, a task force consisting of state and federal agencies found that, compared with fingerprint-based checks, name-based checks resulted in a false-positive rate of 5.5%. This means that around 1 in 20 apparent identifications of a crime was ascribed to a person who did not in fact commit that crime.

Alameda County service providers and national researchers have documented barriers to access to both private rental and publicly subsidized affordable housing faced by formerly incarcerated residents. Results of a 2019 Goldman School survey and interviews of formerly incarcerated persons in Alameda County found that many formerly incarcerated persons could not stay in public housing with a relative or family member due to public housing rules or were denied private or public rental housing due to their incarceration record. In addition, a recent survey by the Berkeley Property Owners Association found that the majority of landlord survey respondents conducted criminal background checks.

California has the second highest population of people currently in prison or jail in the country. Alameda County has a total of 7,900 people on probation or parole. Incarceration and lack of housing can lead to severely limited economic opportunity, thereby increasing the chances of recidivism and public safety impacts. Research has shown that access to stable and affordable housing enables people to successfully re-integrate into society.

Extensive research also shows the direct link between incarceration history, homelessness, and health. A recent participatory action research project between Just Cities, The Village, and the UC Berkeley Goldman School for Public Policy's Center for Civility & Democratic Engagement found that 73% of unhoused residents interviewed in Oakland's encampments were formerly incarcerated. Based upon anecdotal and other data, it is assumed that unhoused people in Berkeley are also disproportionately formerly incarcerated. In the 2019 Point In Time count, one of the top six reasons listed for the primary cause of homelessness was incarceration (10%).

In addition, there are an estimated 10 million children nationwide that are impacted by a parent or close relative who are in the criminal justice system. These children suffer from an increased rate of depression, antisocial behavior, drug use, and suicide.

There is an extreme racial disparity in criminal conviction and incarceration rates, which translates to a racial disparity in access to housing and statistical racial disparities at every stage of the criminal justice system. Research has demonstrated that African Americans are more likely to be stopped by police, prosecuted disproportionately, and punished more harshly than other ethnic groups. As a result, Black men—one third of whom are likely to serve time in prison or jail at some point in their lives—are incarcerated at a rate that is five times that of White men. Whites who were initially charged with a felony were an estimated 15% more likely to end up convicted of a misdemeanor instead. In addition, Whites who were initially charged with a misdemeanor were an estimated 75% more likely to be convicted of a crime carrying no possible incarceration, or not convicted at all. Racial bias in plea-bargaining, which accounts for the vast majority of new criminal convictions, is a significant source of the disparity in incarceration.

ALTERNATIVE ACTIONS CONSIDERED Berkeley's Fair Chance Ordinance builds upon the work of other coalitions and communities to advance fair chance housing policies, namely in the cities of Richmond, Seattle, and Portland. Seattle and Portland have first in time housing policies which limit landlord discretion in the selection of their tenants. Alameda County cities do not have such a policy.

Comparison between the Berkeley proposal and policies enacted by the cities of Richmond, Seattle, and Portland:

- Similar to Seattle and Portland, the Berkeley proposal would apply to all housing units, private and publicly subsidized.
- Similar to Richmond and Seattle, the Berkeley proposal would enable Housing Providers who are funded by HUD to conduct criminal records checks after a Conditional Offer of Housing has been granted and subject to certain procedures.
- Similar to Richmond, the Berkeley proposal would provide for a private right of action in addition to City enforcement. The City of Seattle, instead, utilizes its robust Department of Civil Rights which enforces civil rights violations.
- Similar to Seattle, the Berkeley proposal would prohibit the use of criminal records checks in the housing application process, with the exception that allows for the review of sex offender registry.
- Unlike Portland and Seattle, the Berkeley proposal DOES NOT have a first in time tenant acceptance requirement. In addition, the Berkeley proposal maintains landlord discretion in the review of relevant information including landlord references, employment and income status, and credit report checks.



Less comprehensive versions of fair chance policies have passed in other cities including San Francisco; Urbana, Illinois; Madison, Wisconsin; New York, New York; and Newark, New Jersey.

FINANCIAL IMPLICATIONS

The costs of this ordinance would include the cost to support the administrative hearing process, as well as the staff time required for annual reporting, which shall be determined and incorporated in a future budget process.

The coalition has indicated that they have partners interested in supporting the city with community education and a participatory action impact study.

ENVIRONMENTAL SUSTAINABILITY

Not applicable

CONTACT PERSON

Mayor Jesse Arreguín      510-981-7100

Attachments:

- 1: Ordinance
- 2: Berkeley Fair Chance Housing Policy Brief-Just Cities, October 28, 2019



**DRAFT**  
**The Ronald V. Dellums Fair Chance Housing Public Health & Safety Ordinance**  
**October 24, 2019**

**I. XX.XXX.010 Title**

**I. Title**

This Ordinance shall be known as the "Ronald V. Dellums Fair Chance Access to Housing and Public Health and Safety Ordinance."

**II. XX.XXX.020 Findings**

Commented [ML1]: Research Cites were deleted

- ~~A. Mass incarceration is a national crisis and restoring the rights of people affected by mass incarceration is a national priority.~~
- ~~A. The City of Berkeley is committed to equity, dignity, and public health and safety.~~
- ~~B. Studies have found that private criminal databases pull source information from inadequate records and lack accountability procedures to ensure that the database records provided to Housing Providers are accurate. Many housing providers in conducting criminal background checks are relying on such inaccurate information in evaluating housing applications.~~
- ~~B. The unmet housing needs of formerly incarcerated people in Berkeley are an acute challenge to the dignity, public health and safety, and equal opportunity for this population and the broader community.~~
- ~~C. Formerly incarcerated persons face barriers to access to both private rental and publicly subsidized affordable housing. Research has found that access to housing reduces recidivism, and the lack of housing can be a significant barrier to successful reintegration after incarceration.~~
- ~~D. Homelessness is a critical issue in Berkeley and formerly incarcerated people are disproportionately affected by homelessness, which can prevent a formerly incarcerated person from getting a job, from visiting with their children, and from fulfilling other needs that are fundamental to reintegrating with community after incarceration. Homelessness is a critical issue in Berkeley and formerly incarcerated people are disproportionately affected by homelessness. Recent surveys reflect the direct correlation between housing barriers for formerly incarcerated people and homelessness. In a 2019 survey conducted by the Goldman School for Public Policy at UC Berkeley of formerly incarcerated Alameda County residents, one third of formerly incarcerated residents surveyed had experienced homelessness or housing insecurity and 54% had been denied either housing or the opportunity to live with a family member because of their criminal record. Another 2019 Goldman Survey of unhoused people residing in East Bay homeless encampments found that 72% of encampment residents surveyed had been formerly incarcerated. In the 2017 Point in Time count for Berkeley homeless residents, one of the top six reasons listed for the primary cause of homelessness was incarceration (6% of respondents).~~

- ~~C. The unmet housing needs of formerly incarcerated people in Berkeley are an acute challenge to the dignity, public health and safety, and equal opportunity for this population and the broader community.~~
- ~~D. F. Research has found that access to housing reduces recidivism, and the lack of housing can be a significant barrier to successful reintegration after incarceration.~~
- ~~E. G. Reliance on criminal history to select tenants impedes formerly incarcerated persons from gaining access to housing in the City of Berkeley, to the detriment of health, welfare, and public safety of the City's residents.~~
- ~~E. Research and community engagement by the Alameda County Fair Chance Housing Coalition and Just Cities/the Dellums Institute for Social Justice have identified a policy gap in the city's treatment of housing providers and their consideration of past convictions that has generated unfair and harmful barriers to housing for people with past convictions.~~
- ~~F. Several jurisdictions, including Cook County, Illinois; Urbana, Illinois; Madison, Wisconsin; New York, New York; Richmond, California; San Francisco, California; Newark, New Jersey; and Seattle, Washington have passed policies that restore rights and remove barriers to housing for people with past criminal convictions.~~
- ~~G. On or about April 4, 2016, the United States Department of Housing and Urban Development issued the "Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions" in which it states that "Policies that exclude persons based on criminal history must be tailored to serve the housing provider's substantial, legitimate, nondiscriminatory interest and take into consideration such factors as the type of the crime and the length of the time since conviction."~~
- ~~H. It has been documented by service providers providing assistance to formerly incarcerated residents in Alameda County and national researchers that significant first source housing for people coming out of incarceration is publicly subsidized affordable housing. {See Corinne Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 University of Toledo Law Review 545; Caterina Gouvis Roman and Jeremy Travis, Urban Institute, *Taking Stock: Housing, Homelessness and Prisoner Re-Entry* (2004); and *Every Door Closed: Barriers Facing Parents With Criminal Records*, CLASP and CLS Report (Chapter 3, "Criminal Records and Subsidized Housing: Families Losing the Opportunity for Decent Shelter".)}~~
- ~~I. Alameda County service providers and national researchers have documented barriers to access to both private rental and publicly subsidized affordable housing faced by formerly incarcerated residents. {See Corinne Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 University of Toledo Law Review 545; Caterina Gouvis Roman and Jeremy Travis, Urban Institute, *Taking Stock: Housing, Homelessness and Prisoner Re-Entry* (2004); and *Every Door Closed: Barriers Facing Parents With Criminal Records*, CLASP and CLS Report (Chapter 3, "Criminal Records and Subsidized Housing: Families Losing the Opportunity for Decent Shelter".)}~~

- J. ~~The City of Berkeley's Housing Element advances fair housing goals. The City Council in 2018 adopted a resolution supporting the development of a Fair Chance Housing policy.~~
- K. ~~Not having a home can prevent a formerly incarcerated person from getting a job, from visiting with his or her children, and from fulfilling other needs that are fundamental to reintegrating with community after incarceration.~~
- L. ~~Mass incarceration is a national crisis and restoring the rights of people affected by mass incarceration is a national priority.~~
- M. ~~The United States incarcerates more than twenty-five percent (25%) of the world's prisoners while the country comprises only five percent (5%) of the world's population.~~
- N. ~~The City of Berkeley has shown a consistent interest in removing barriers faced by people coming home from incarceration, by adopting policies like the city's "Ban the Box" resolution, which removed barriers to employment.~~
- O. ~~According to the City of Berkeley's 2015-2023 Housing Element, there are a total of 25,696 rental housing units.~~
- P. ~~The Fair Chance Housing ordinance is rightly named after former Berkeley City Councilmember, Congressperson, Oakland Mayor, and global humanitarian Ronald V. Dellums who passed away in July 2018. For over fifty years, Ron Dellums practiced courageous and principled leadership to advance the human rights and needs of all peoples, especially those who have been discriminated against and marginalized. He was born in 1935 and grew up in a segregated West Oakland. He had a troubled youth and almost did not graduate from high school. After serving in the Marines, Ron Dellums became a UC Berkeley trained psychiatric social worker and a community organizer. At the age of 31, Dellums was on his way to a PhD program at Brandeis when he was recruited by activists to serve on the Berkeley City Council.~~

~~As Berkeley City Councilmember from 1967 to 1970, Ron Dellums championed progressive values of anti-war, peace, and justice including opposition to the death penalty, development of the People's Park and opposition to the declaration of martial law by then Governor Ronald Reagan, and successfully forcing BART to put train tracks in Berkeley underground.~~

~~As Congressperson representing Berkeley and Oakland from 1970 to 1997, Ron Dellums was the first African American to represent the district and one of the first Democratic Socialists in Congress. He was elected to Congress as an anti-Vietnam War activist and a prominent member of President Nixon's infamous "enemies list." Yet, he rose to become Chair of the powerful House Armed Services Committee, while maintaining his integrity, activism, and principles. Decades ahead of the "mainstream," his initially lonely efforts against Apartheid in South Africa, and against the major nuclear war-fighting systems, all eventually became the official positions of the nation. He was a staunch critic of discrimination in the military, a key supporter of gay rights in the military, and consistently challenged the militarization of U.S. foreign policy, while advocating for improving the living conditions of military personnel. Ron Dellums also chaired the House DC Committee where he pushed for meaningful Home Rule and Statehood for~~

the District of Columbia, and also focused on the problems in America's cities. He was equally well known for presenting comprehensive policy proposals including the Dellums Alternative Military Budget and the Congressional Black Caucus Alternative Budget. He authored comprehensive bills to provide free healthcare to all Americans, a national comprehensive housing program, and climate change legislation.

After leaving Congress, Dellums led the development of his envisioned Marshall Plan for HIV/AIDs resulting in the federal PEPFAR programs which has saved 17 million lives in Sub-Saharan Africa, and the Dellums Commission on Boys and Men of Color, the precursor to President Obama's My Brother's Keeper initiative.

Already in his 70s, Ron Dellums was drafted to serve as Mayor of Oakland from 2007 to 2010, where he opened up City Hall for Oakland's people to develop Oakland as a model city for the world. To institutionalize civic engagement, Ron Dellums created 41 Citizen Task Forces that involved over 800 residents and resulted in policy changes such as the adoption of an industrial lands policy to facilitate economic development and jobs for Oakland residents and strategies to improve air quality from Port operations. He created a Re-Entry Services program out of the Mayor's office that welcomed formerly incarcerated residents home and helped them find jobs, housing, and support. Ron Dellums developed a comprehensive public safety plan which resulted in a 38% decline in homicides and a 25% decline in all Part I (major) crimes. He reformed the Oakland Police Department and advanced community and constitutional policing. He led unprecedented City efforts involving business, labor, education, and community leaders to develop a comprehensive vision for a sustainable and equitable local economy, which resulted in \$550 million of new funding for projects and the generation of over 14,000 jobs during the Great Recession.

By naming the Fair Chance Housing Ordinance after Ronald V. Dellums, we seek to inspire community youth to believe in their potential for greatness and government officials to lead with courage, integrity, compassion for the most marginalized, and big vision for justice.

### XX.XXX.030 Definitions

- A. "Adverse Action" shall means to fail or refuse to rent or lease Housing to an individual; fail or refuse to continue to rent or lease Housing to an individual; fail or refuse to add a household member to an existing lease rental agreement for Housing; to reduce the amount or term of any tenant subsidy for Housing; to treat an individual differently from other applicants or tenants such as requiring higher security deposit or rent; or to treat an individual as ineligible for a tenant-based rental assistance program, including, but not limited to, the Section 8 tenant-based voucher program (42 U.S.C. Section 1437f), or fail to permit the addition of a tenant's Close Family Member to occupy a rental unit while the occupying tenant remains in occupancy.
- B. "Affordable Housing" shall mean any Housing that (i) has received or is receiving City, County, State, or Federal funding, tax credits, or other subsidies connected in whole or in part to developing, rehabilitating, restricting rents, subsidizing ownership, or otherwise providing rental housing for extremely low income, very low income, low income, and moderate income households (collectively, "Public Funding"), with the exception of Housing

where the only Public Funding received is in the form of a Local, State or Federal tenant-based voucher, such as through the Section 8 tenant-based voucher program (42 U.S.C. Section 1437f); or (ii) is subject to affordability and related requirements pursuant to the City's Below Market-Rate Rental Housing Program, including, but not limited to, the Inclusionary Housing Ordinance (BMC Chapter 23C.12), the Affordable Housing Mitigation Fee Ordinance (BMC Chapter 22.20), the State Density Bonus law (California Government Code Sections 65915-65918 and BMC Chapter 23C.14), and the Low Income Inclusionary Live/Work Units Ordinance (BMC 23E.20.080).

C. "Affordable Housing Provider" shall mean any Housing Provider that owns, master leases, manages, or develops Affordable Housing in the City. Any agent, such as a property management company, that makes tenancy decisions on behalf of the above-described Housing Providers, and any government agency, including, but not limited to, the Berkeley Housing Authority, that makes eligibility decisions for tenant-based rental assistance programs, including, but not limited to, the Section 8 program (42 U.S.C. Section 1437f), shall also be considered an "Affordable Housing Provider".

D. "Aggrieved Person" means an Applicant who believes they were subject to an Adverse Action; a tenant who believes they or their Close Family Member was subject to an Averse Action at their rental unit based on the application of an Applicant to reside in such family member's rental unit; a tenant who believes they were subject to an Adverse Action based on the application of person to reside in such tenant's rental unit to replace an existing tenant or to sublet..

D.E. "Applicant" ~~shall~~ means a person who seeks information about, visits or applies to rent or lease Housing, who applies for a tenant-based rental assistance program, including, but not limited to, the Section 8 program (42 U.S.C. ~~Section~~section-1437f), who seeks to be added as a household member to an existing lease for Housing or, with respect to any Criminal History that occurred prior to the beginning of the person's tenancy, who currently rents or has a lease for Housing.

E.F. "Arrest" ~~shall~~ means a record from any jurisdiction that does not result in a Conviction and includes information indicating that a person has been questioned, apprehended, taken into custody or detained, or held for investigation by a law enforcement, police, or prosecutorial agency and/or charged with, indicted, or tried and acquitted for any felony, misdemeanor or other criminal offense.

G. "Background Check Report" ~~shall~~ means any report regarding an Applicant's Criminal History, including, but not limited to, those produced by the California Department of Justice, the Federal Bureau of Investigation, other law enforcement agencies, courts, or by any consumer reporting or tenant screening agency.

F.H. "Close Family Member" means a sibling, parent, grandparent, or grandchild.

G.I. "Conviction" ~~shall~~ means a record from any jurisdiction that includes information indicating that a person has been convicted of a felony or misdemeanor or other criminal offense and for which the person placed on probation, fined, imprisoned and/or paroled.

H.J. "Criminal History" ~~shall~~ means information transmitted orally or in writing or by any other means, and obtained from any source, including, but not limited to, the individual to whom

the information pertains, a government agency or a Background Check Report, regarding: one or more Convictions or Arrests; a Conviction that has been sealed, dismissed, vacated, expunged, sealed, voided, invalidated, or otherwise rendered inoperative by judicial action or by statute (for example, under California Penal Code sections 1203.1 or 1203.4); a determination or adjudication in the juvenile justice system; a matter considered in or processed through the juvenile justice system; or participation in or completion of a diversion or a deferral of judgment program.

K. "Housing" means any residential rental housing, building, or unit in the City of Berkeley, with the exception of the following:

1. single-family dwellings where the owner occupies the dwelling as their principal residence;
2. Accessory Dwelling Units, as defined in B.M.C. 23F.04.010, where the main unit is occupied by the owner as their principal residence;
3. duplexes or triplexes where one of the units is occupied by the owner as their principal residence;
3. units rented pursuant to B.M.C. 13.76.130 A.10; and
4. tenant-occupied units where an occupying tenant seeks to replace an existing co-tenant or sublet the unit, provided that the occupying tenant remains in occupancy.

~~I. "Housing" shall mean any residential rental housing, building, or unit in the City of Berkeley, with the exception of single family dwellings where the owner occupies the dwelling as his/her principal residence.~~

J.L. "Housing Provider" shall mean any Person that owns, master leases, manages, or develops Housing in the City. Any agent, such as a property management company, that makes tenancy decisions on behalf of the above-described Persons, and any government agency, including, but not limited to, the Berkeley Housing Authority, that makes eligibility decisions for tenant-based rental assistance programs, including, but not limited to, the Section 8 program (42 U.S.C. Section 1437f), shall also be considered a "Housing Provider".

~~K. "Inquire" shall mean engage in any direct or indirect action, written or oral, intended to gather information from or about an Applicant for Housing using any mode of communication, including, but not limited to, application forms, interviews, and Background Check Reports.~~

L.M. "Person" shall mean one or more individuals, partnerships, organizations, trade or professional associations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, or any political or civil subdivision or agency or instrumentality of the City.

#### XX.XXX.040 Use of Criminal History in Housing Decisions

A. Except as provided in paragraphs B and C of this section, Housing Provider shall not, at any time or by any means, whether direct or indirect, inquire with an Applicant about their Criminal History, require an Applicant to disclose Criminal History, require an Applicant to authorize the release of Criminal History or, if such information is received, base an Adverse



~~Action in whole or in part on an Applicant's Criminal History~~A Housing Provider shall not, at any time or by any means, inquire about, require disclosure of, or, if such information is received, base an Adverse Action in whole or in part on an Applicant's Criminal History.

- B. It shall not be a violation of this Ordinance for a Housing Provider to comply with ~~specific~~ Federal or State laws that ~~apply to the particular transaction at issue and that~~ require the Housing Provider ~~or to treat an that restrict providing Housing to an~~ Applicant ~~as ineligible~~ based on ~~the Applicant's~~ Criminal History, e.g. Ineligibility of Dangerous Sex Offenders for Admission to Public Housing (42 U.S.C. Sec. 13663(a) and Ineligibility of Individuals Convicted for Manufacturing Methamphetamine on Premises of Federally Assisted Housing for Admission to Public Housing and Housing Choice Voucher Programs (24 C.F.R. Sec. 982.553)), provided that if such a requirement applies, the Housing Provider shall not inquire about, require disclosure of, or, if such information is received, review an Applicant's Criminal History until the Housing Provider has first:
- (1) Determined that the Applicant is qualified to rent the Housing under all of the Housing Provider's criteria for assessing Applicants except for any criteria related to Criminal History; and
  - (2) Provided to the Applicant a conditional lease agreement that commits the Housing to the Applicant as long as the Applicant meets the Housing Provider's Criminal History criteria.
- ~~C. The Housing Provider has the ability to review the State registry of lifetime sex offenders operated by the State of California Department of Justice, provided that if such a requirement applies, the Housing Provider shall not inquire about, require disclosure of, or, if such information is received, review an Applicant's Criminal History until the Housing Provider has first:~~
- ~~(1) Determined that the Applicant is qualified to rent the Housing under all of the Housing Provider's criteria for assessing Applicants except for any criteria related to Criminal History; and~~
  - ~~(2) Provided to the Applicant a conditional lease agreement that commits the Housing to the Applicant as long as the Applicant meets the Housing Provider's Criminal History criteria.~~
- D. If and when the Housing Provider requests written consent from the Applicant to obtain a Background Check Report regarding Criminal History as permitted under ~~subsection (V)(b) paragraphs B and C of this section above~~, the Housing Provider must also request consent to share the Criminal History record with the Applicant and with the City of Berkeley (only for the purposes of addressing a complaint by an Applicant), and must provide the Applicant offer the Applicant an opportunity to provide evidence of inaccuracy of information in the Criminal History record.
- ~~C.E. If any Adverse Action is based in whole or in part on the Applicant's Criminal History, the Housing Provider shall provide the Applicant with a copy of any Criminal History, Background Check Report, or other information related to the Applicant's Criminal History that served as a basis for the Adverse Action. The Housing Provider shall not require reimbursement or payment from the Applicant for providing any Criminal History or Criminal Background Check Report~~

**XX.XXX.050 Requirements for Housing Providers**

~~(a) Housing Providers shall state in all solicitations or advertisements for the rental or lease of Housing that the Housing Provider will consider for tenancy any qualified Applicant regardless of the Applicant's Criminal History except in the very limited circumstances required by State or Federal law.~~

A. ~~(b)~~ It shall be unlawful for any Housing Provider to produce or disseminate any advertisement related to Housing that expresses, directly or indirectly, that any person with Criminal History will not be considered for the rental or lease of real property or may not apply for the rental or lease of real property, except as required by State or Federal law.

B. ~~(c)~~ The City shall publish and make available to Housing Providers, in English, Spanish, and Chinese and all languages spoken by more than five percent (5%) of the City's population, a notice suitable for posting that informs Applicants for Housing of their rights under this Ordinance. The notice shall contain the following information:

- (1) A description of the restrictions and requirements of this Act;
  - (2) Instructions for submitting a complaint to the City regarding a violation of this Ordinance; and
- Information about community resources available to assist an Applicant in connection with a violation of the Ordinance.

C. Housing Providers shall ~~include post~~ the notice described in XX.XXX.050.C subsection (VI)(c) prominently on their application materials, websites and at any locations under their control that are frequently visited by Applicants.

~~(e) Housing Providers shall comply with all applicable Federal, State, and Local fair credit reporting and tenant screening laws and regulations regarding the provision of written notices to Applicants, including, but not limited to, the Fair Credit Reporting Act (15 U.S.C. Section 1681 et seq.), the California Consumer Credit Reporting Agencies Act (California Civil Code Section 1785 et seq.), and the California Investigative Consumer Reporting Agencies Act (California Civil Code Section 1786 et seq.).~~

D. ~~(f)~~ In addition to the requirements in Paragraphs A-C of this section subsections (VI)(a)-(e) above, Affordable Housing Providers shall also:

(1) Provide any Applicant subject to an Adverse Action a written notice regarding the Adverse Action that includes, at a minimum, the reason(s) for the Adverse Action; instructions regarding how to file a complaint about the Adverse Action with the City, including applicable deadlines as set forth in subsection (VII)(d) below; a list of local legal services providers including contact information; and, if the Adverse Action is based in whole or in part on information in an Applicant's Criminal History, a copy of any Criminal History or Background Check Report obtained by the Affordable Housing Provider.

(2) Submit to the City an annual certificate of compliance with the requirements of this Ordinance in the form provided by the City.

**XX.XXX.060 Retaliation Prohibited**

A. It shall be a violation of this Chapter to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this Chapter, or to take any Adverse Action against any Person because the Person exercised or attempted in good faith to exercise any right protected under this chapter

**XX.XXX.070. Recordkeeping and Confidentiality**

A. Housing Providers shall maintain a record of any Criminal History obtained for any Applicant for Housing for a period of at least three years. To the maximum extent permitted by law, any information obtained regarding an Applicant's Criminal History shall remain confidential.

B. Nothing in this section shall prohibit a Housing Provider from complying with a request by the City to provide records for purposes of demonstrating compliance with the requirements of this Chapter.

**XX.XXX.080 Implementation**

**VII. Implementation and Enforcement by the City**

~~A. The Ordinance will take effect six months from the date of the passage of the Ordinance. In the six-month time period prior to implementation, Housing Providers are required to prepare and provide to all Applicants written policies compliant with this Ordinance that include, at a minimum, a description of the application process and of the City's complaint process.~~

~~B. The requirements of this Ordinance will apply to all new and existing Housing in the City. The terms of the Ordinance will be incorporated into all new and existing contracts between an Affordable Housing Provider and any entity providing Public Funding or that relate to the City's Below Market Rate Rental Housing Program.~~

~~C.A. Within six months of the Ordinance's passage, the City Manager or designee is required to:~~

- ~~(1) Promulgate appropriate regulations consistent with this Ordinance.~~
- ~~(2) Designate hearing officers and other necessary staffing for administrative review of complaints regarding violations of this Ordinance;~~
- ~~(3) Develop the timelines and procedures for complaints regarding violations of this Ordinance that include, at a minimum, the items described in subsection (d) below;~~
- ~~(4) Develop notices, the annual compliance certification form, and other implementation documents, including written materials for Housing Providers and potential Applicants;~~
- ~~(5) conduct outreach and prepare a plan to provide ongoing training about this Ordinance to Housing Providers;~~
- ~~(6) Prepare an annual implementation budget and identify funding sources; and~~
- ~~(7) Undertake other elements of effective implementation.~~

~~D.B. The City's administrative review process shall include, at a minimum, the following:~~

(1) Any Applicant subject to an Adverse Action who believes the Adverse Action was based on a violation of this Ordinance shall have the right to submit a complaint to the City within one year of the date the Applicant submitted an application to the Housing Provider or the date of the violation, whichever is earlier. The City will complete its administrative review of any complaint, including the hearing and issuance of a final decision, within 90 days of submission of the complaint.

(2) During the City's administrative review of a complaint regarding an Adverse Action, the parties shall have the following rights: to have an advocate of their choosing to represent them at the hearing; to present any relevant witnesses and evidence and the evidence will be considered without regard to the admissibility under the Rules of Evidence applicable to a judicial proceeding; to examine the other party's evidence and to rebut and cross examine any witnesses; to request a translator; to request any reasonable accommodation needed to participate in the hearing process; and to record the hearing.

(3) Where the City determines that a violation of the Ordinance has occurred, the City shall issue a determination and order any appropriate relief under this Ordinance.

E.C. In addition to providing an administrative review process for complaints, the City is required to take appropriate steps to enforce this Ordinance and coordinate enforcement, including by investigating any possible violations of this Ordinance.

F.D. The City Manager or designee shall provide annual public reports to the City Council on the implementation and enforcement of this Ordinance. The annual reports shall include, at a minimum: information from the annual compliance certifications submitted by Affordable Housing Providers; the number of complaints filed with the City regarding violations of this Ordinance and the outcomes of such complaints, the number of notices filed with the City regarding private court action brought under the Ordinance and the outcomes of such court proceedings.

#### XX.XXX.090 Enforcement

A. The City may issue an administrative citation under Chapter 1.28 to any Person who violates any provision of this Chapter

B. The City Attorney may bring an action on behalf of the City of Berkeley seeking injunctive relief to restrain or enjoin any violation of this Chapter. The City may recover civil penalties in an amount not to exceed \$1,000 for each violation of this Chapter and attorneys' fees and costs of suit.

C. Any Aggrieved Person who believes that the provisions of this Chapter have been violated shall have a private right of action for injunctive relief, and actual damages or statutory damages up to three times the amount of the monthly rent that the Housing Provider charged for the unit in question at the time of the violation. In addition to actual or statutory damages, a court may award punitive damages where it is proven by clear and convincing evidence that a violation of this chapter has been committed with oppression, fraud, or malice. In any action brought under this Chapter, the court may award reasonable attorneys' fees to any prevailing party. The Aggrieved Person shall provide notice to the City within ten days of filing court action against the Housing

Commented [JCD2]: The plaintiff would need to pick one or the other.

~~Provider, and inform the City of the outcome of the court action within ten days of any settlement or final judgment.~~

~~A.D.~~ Applicants subject to Adverse Actions in violation of this Ordinance shall have a private right of action to enforce the Ordinance and shall, if they prevail, be entitled to: statutory damages equal to the greater of actual damages or three (3) times the amount of the monthly rent that the Housing Provider charged for the unit in question at the time of the violation; attorney's fees and costs of action; and punitive damages. This private right of action does not require an Applicant to have filed a prior complaint with the City of Berkeley.

Commented [LS3]: This is from Berkeley's Source of Income ordinance.

~~B.E.~~ An award of actual damages under this Ordinance may include an award for mental and/or emotional distress and/or suffering. The amount of actual damages awarded to a prevailing plaintiff shall be trebled by the Court if a defendant is found to have acted in knowing violation of, or in reckless disregard of, the provisions of this Ordinance.

~~C.F.~~ In addition to any other award of damages or grant of injunctive relief, a court of competent jurisdiction may order that a civil penalty be assessed against the Housing Provider to vindicate the public interest, which penalty shall be payable to The City of Berkeley. The civil penalty assessed against a Housing Provider shall be at least one thousand dollars (\$1,000) and shall not exceed ten thousand dollars (\$10,000) for each violation of the Ordinance. A defendant shall be liable for an additional civil penalty of up to five thousand dollars (\$5,000) for each violation of this Ordinance committed against a person who is disabled within the meaning of California Government Code section 12926, *et seq.*, or aged sixty-five (65) or over.

Commented [LS4]: From Berkeley's TPO

~~D.G.~~ An attorney who represents an Applicant in litigation against a Housing Provider brought under this Ordinance shall provide notice to the City within ten (10) days of filing court action against the Housing Provider, and inform the City of the outcome of the court action within ten (10) days of any final judgment.

**IX. Remedies**

~~(a) Any person who commits an act in violation of this Ordinance may be enjoined therefrom by any court of competent jurisdiction.~~

~~(b) Where the City determines through administrative review of a complaint or otherwise that a violation of the Ordinance has occurred, the City shall, in order to vindicate the public interest, assess against the Person found to have violated the Ordinance a fine payable to The City of Berkeley in the amount of the lesser of \$1,000 or the maximum amount permitted under State and Local law.~~

Commented [LS5]: The amount of the fine was raised as a concern at the meeting with Rent Board staff. This issue needs input from the City Attorney.

**X. Retaliation Prohibited**

~~(a) No person shall interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this Ordinance.~~

~~(b) No person shall take any Adverse Action against any person because the person has exercised in good faith the rights protected under this Ordinance. Such rights include but are not limited to the right to fair chance housing and regulation of the use of criminal history~~

~~in housing by this Ordinance; the right to make inquiries about the rights protected under this Ordinance; the right to inform others about their rights under this Ordinance; the right to inform the person's legal counsel or any other person about an alleged violation of this Ordinance; the right to file an oral or written complaint with the City for an alleged violation of this Ordinance; the right to cooperate with the City in its investigations of this Ordinance; the right to testify in a proceeding under or related to this Ordinance; the right to refuse to participate in an activity that would result in a violation of City, State, or Federal law; and the right to oppose any policy, practice, or act that is unlawful under this Ordinance.~~

~~(c) No person shall communicate to a person exercising rights protected in this Ordinance, directly or indirectly, the willingness to inform a government employee that the person is not lawfully in the United States, or to report, or to make an implied or express assertion of a willingness to report, suspected citizenship or immigration status of an Applicant or a member of their household to a Federal, State, or Local agency because the Applicant has exercised a right under this Ordinance.~~

~~(d) There shall be a rebuttable presumption of retaliation if a Housing Provider or any other person takes an Adverse Action against a person within 90 days of the person's exercise of rights protected in this Section. The Housing Provider may rebut the presumption with clear and convincing evidence that the Adverse Action was taken for a permissible purpose.~~

~~(f) The protections afforded under this Ordinance shall apply to any person who mistakenly but in good faith alleges violations of this Ordinance.~~

~~(g) A complaint or other communication by any person triggers the protections of this Ordinance regardless of whether or not the complaint or communication is in writing or makes explicit reference to this Ordinance.~~

#### **XI. Records to Be Maintained**

~~(a) Housing Providers must maintain a record for each Applicant that includes any Criminal History obtained regarding the Applicant, and the determination of eligibility following any review by the Housing Provider of such Criminal History.~~

~~(b) Housing Providers shall maintain full and complete documentation of their compliance with this Ordinance.~~

~~(c) Housing Providers shall~~

~~(1) Permit the City to have access to Housing Provider records for the purpose of making an audit, examination or review of performance data pertaining to this Ordinance; and~~

~~(2) Maintain such records for a period of at least three years.~~

#### **XII. Confidentiality**

~~To the fullest extent permitted by law, any information pertaining to an Applicant's Criminal History obtained in conjunction with the rental, lease, ownership, or sublease process shall remain confidential and shall only be shared with individuals who have a need to know for the purpose of evaluating an Applicant's application for Housing.~~

#### **XX.XXX.110XIII. Severability**

If any word, phrase, sentence, part, section, subsection, or other portion of this chapter, or any application thereof to any person or circumstance is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the proscribed application thereof, shall be severable, and the remaining provisions of this chapter, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect. The City Council hereby declares that it would have passed this title, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases had been declared invalid or unconstitutional.

~~If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Ordinance is for any reason held to be unconstitutional or invalid, such a decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause or phrase of this Ordinance irrespective of the unconstitutionality or invalidity of any section, subsection, subdivision, paragraph, sentence, clause or phrase.~~

**XX.XXX.120 Effective Date**

The provisions of this Chapter shall take effect on \_\_\_\_\_, 2020.

~~This Ordinance becomes effective six (6) months after its final passage and adoption.~~



**A Policy Justice Brief for  
Berkeley Mayor Jesse Arreguin**

**DATE:** October 28, 2019

**TO:** City of Berkeley Mayor Jesse Arreguin and Land Use Committee

**FROM:** Just Cities: Margaretta Lin, JD, MA, Executive Director; John Jones III, Director of Community & Political Engagement; Richard Illgen, Senior Advisor; Tim Tsai, MPP, Policy Justice Research Associate; Alex Werth, PhD, Policy Justice Research Associate

**SUBJECT:** Fair Chance Housing Ordinance that removes structural barriers for people with criminal histories in applications for rental housing

## **SUMMARY**

As research and lived experience demonstrate, formerly incarcerated people experience significant barriers beyond the high cost of rent that prevent them from securing housing. They are screened out when applying to rent housing due to criminal background checks in private rental, nonprofit affordable housing, and public housing units. Even living with family members is not always a viable solution as it may put their family's housing at risk-- rental agreements may prohibit or limit people with criminal histories from residing in the units. Fair Chance Housing is legislation that prohibits the use of criminal histories for most offenses in determining access to housing. It also bans the use of advertising language that excludes people with arrest records, conviction records, or criminal history. In short, Fair Chance Housing legislation removes structural barriers to housing and enables landlords to consider the merits of individual housing applications—providing people with a fair chance.

Led by Just Cities/the Dellums Institute for Social Justice, The **Alameda County Fair Chance Housing Coalition** has been working to remove such structural exclusionary barriers for people coming home from prison. The Coalition partners and supporters include: All of Us or None, Berkeley NAACP, Berkeley Oakland Support Services (BOSS), Community Works, Church by the Side of the Road, East Bay Community Law Center, East Bay for Everyone, East Bay Young Democrats, Essie Justice Group, Friends of Adeline, Just Cities, Justice Reinvestment Coalition, Laney College Restoring Our Communities Center, League of Women Voters for Oakland, Make Oakland Better Now, McGee Baptist Church, National Housing Law Project, Our Beloved Community Action Network, PolicyLink, Root & Rebound, Safe Return Project, Tech Equity Collaborative, Underground Scholars of UC Berkeley, and The Way Church.

The Fair Chance Housing Ordinance would result in:

- 1) Clear rules and standards for all landlords regarding the use of criminal background checks in the housing application process and the elimination of the current arbitrary system that relies on inaccurate criminal background databases.





- 2) Landlords assessing the merits of individual housing applications rather than the current status of blanket exclusion of applications solely on the basis of criminal records.
- 3) Formerly incarcerated people and their family members having access to safe, stable, and affordable housing that they need in order to reclaim their lives and effectively re-integrate into the community.
- 4) Decrease in recidivism rates by removing structural barriers to stable housing, including with family members, for formerly incarcerated people.

## **BACKGROUND**

### **SUMMARY OF FLAWS WITH CRIMINAL BACKGROUND DATABASE SYSTEMS**

Research shows that government repositories of criminal records are routinely incomplete, thus making commercial criminal background reports inaccurate and/or misleading. In 2006, the U.S. Department of Justice (DOJ) found that an estimated 50% of FBI arrest records, which are used by many background check companies, were missing information on the final disposition of the cases in question.<sup>1</sup> In 2016, the DOJ found that an estimated 32% of records in state criminal history repositories were missing final disposition data.<sup>2</sup> Incomplete data at the state and federal levels undermine the fairness and accuracy of commercial criminal background reports, which rely upon governmental data. In particular, out-of-date information about the final disposition of a case means that data about arrests are routinely listed in background reports even when the charges were eventually dropped, reduced, or disproven in court.

The consequences of these database gaps are significant. According to the National Employment Law Project (NELP), “one third of felony arrests do not result in conviction and many others are reduced to misdemeanors.”<sup>3</sup> While industry-wide data on the inaccuracies of commercial criminal background reports are unavailable, the NELP estimates that 1.8 million workers are subject to FBI checks that include faulty or incomplete information each year. Further, many on-line databases accessible through search engines are also inaccurate, even representing persons without criminal records as having been arrested or convicted.

The lack of accurate disposition data is one of many issues that undermine the accuracy of private criminal background reports. According to a review by the National Consumer Law Center, such reports suffer from a range of problems, including: the publication of sealed or expunged records; the

<sup>1</sup> U.S. Department of Justice. (2006). *The Attorney General's Report on Criminal History Background Checks*, p. 3.

<sup>2</sup> National Consortium of Justice Statistics. (2018). *Survey of State Criminal History Information Systems, 2016: A Criminal Justice Information Policy Report*, p. 2.

<sup>3</sup> National Employment Law Project. (2013). *Wanted: Accurate FBI Background Checks for Employment*, pp. 1-2.



misclassification of crimes (e.g. reporting a misdemeanor as a felony); the assignment of crimes to an individual who did not commit them, otherwise known as a “false positive”; and the display of data in a misleading manner (e.g. reporting a single arrest multiple times because it appears in multiple databases).<sup>4</sup> Unlike government screens, such commercial background checks are conducted using basic personal information, like names. In the late 1990s, a task force consisting of state and federal agencies found that, compared with fingerprint-based checks, name-based checks resulted in a false-positive rate of 5.5%.<sup>5</sup> This means that around 1 in 20 apparent identifications of a crime was ascribed to a person who did not in fact commit that crime.

### **SUMMARY OF HOUSING ACCESS BARRIERS FOR PEOPLE WITH CRIMINAL RECORDS**

Alameda County service providers and national researchers have documented barriers to access to both private rental and publicly subsidized affordable housing faced by formerly incarcerated residents.<sup>6</sup> Results of a 2019 Goldman School survey and interviews of formerly incarcerated persons in Alameda County found that many formerly incarcerated persons could not stay in public housing with a relative or family member due to public housing rules or were denied private or public rental housing due to their incarceration record.<sup>7</sup> In addition, a recent survey by the Berkeley Property Owners Association found that the majority of landlord survey respondents conducted criminal background checks. We note that persons paroled from incarceration are generally to be returned to the county of their residence (CA Penal Code 3003); therefore, parolees from this area will be returning home.

### **SUMMARY OF PUBLIC HEALTH & SAFETY IMPACTS FROM HOUSING BARRIERS:**

As the state with the second highest population of people currently in prison or jail in the country,<sup>8</sup> California will need to house formerly incarcerated people as they reenter society in a highly impacted housing market. Alameda County has a total of 7,900 people on probation or parole.<sup>9</sup> Incarceration and lack of housing can lead to severely limited economic opportunity, thereby increasing the chances of recidivism and public safety impacts.

<sup>4</sup> National Consumer Law Center. (2012). *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses*, p. 15.

<sup>5</sup> National Association of Professional Background Screeners. (2005). *The National Crime Information Center: A Review and Evaluation*, pp. 11-2.

<sup>6</sup> See Corinne Carey, No Second Chance: People with Criminal Records Denied Access to Public Housing, 36 University of Toledo Law Review 545; Caterina Gouvis Roman and Jeremy Travis, Urban Institute, Taking Stock: Housing, Homelessness and Prisoner Re-Entry (2004); and Every Door Closed: Barriers Facing Parents With Criminal Records, CLASP and CLS Report, Chapter 3, “Criminal Records and Subsidized Housing: Families Losing the Opportunity for Decent Shelter”.

<sup>7</sup> Rodriguez, Anthony (2019) “A Just Return Home: Identifying and Removing Barriers to Housing for Formerly Incarcerated Residents Through Suggested Policies for County of Alameda” Report for Just Cities and Goldman School of Public Policy. p.23

<sup>8</sup> California 2017 raw numbers. “State-by-State Data.” The Sentencing Project. Accessed October 4, 2019. <https://www.sentencingproject.org/the-facts/#detail?state1Option=U.S.Total&state2Option=0>

<sup>9</sup> Total population in probation, Q4 2018 “Alameda County Probation Department Data Dashboard”. Alameda County. Accessed October 4, 2019. <https://www.acgov.org/probation/dashboard.htm>.



Research has shown that access to stable and affordable housing enables people to successfully re-integrate into society. For example, two studies in Ohio<sup>10</sup> and Maryland<sup>11</sup> found that providing housing subsidies or public housing to recently released incarcerated persons reduced the chances that they would be rearrested in the first year. A government study conducted in the United Kingdom found that stable housing was associated with a 20% reduction in the chance of being reconvicted.<sup>12</sup>

Extensive research also shows the direct link between incarceration history, homelessness, and health.<sup>13</sup> For example, a recent participatory action research project between Just Cities, The Village, and the UC Berkeley Goldman School for Public Policy's Center for Civility & Democratic Engagement found that 73% of unhoused residents interviewed in Oakland's encampments were formerly incarcerated!<sup>14</sup> Based upon anecdotal and other data, we believe that unhoused people in Berkeley are also disproportionately formerly incarcerated. For example, in the 2017 Point in Time count for Berkeley homeless residents, one of the top six reasons listed for the primary cause of homelessness was incarceration (6% of respondents).

In addition, there are an estimated 10 million children nationwide that are impacted by a parent or close relative who are in the criminal justice system.<sup>15</sup> These children suffer from an increased rate of depression, antisocial behavior, drug use, and suicide.<sup>16</sup>

### **SUMMARY OF RACIAL DISPARITY:**

There is an extreme racial disparity in criminal conviction and incarceration rates, which translates to a racial disparity in access to housing.

<sup>10</sup> Fontaine, Jocelyn, Douglas Gilchrist-Scott, John Roman, Samuel Taxy, and Caterina Roman. "Supportive Housing for Returning Prisoners: Outcomes and Impacts of the Returning Home-Ohio Pilot Project." PsycEXTRA Dataset, August 2012. <https://doi.org/10.1037/e527702013-001>.

<sup>11</sup> Kirk, David S., Geoffrey C. Barnes, Jordan M. Hyatt, and Brook W. Kearley. "The Impact of Residential Change and Housing Stability on Recidivism: Pilot Results from the Maryland Opportunities through Vouchers Experiment (MOVE)." *Journal of Experimental Criminology* 14, no. 2 (2017): 213–26. <https://doi.org/10.1007/s11292-017-9317-z>.

<sup>12</sup> Kirk, David S., Geoffrey C. Barnes, Jordan M. Hyatt, and Brook W. Kearley. "The Impact of Residential Change and Housing Stability on Recidivism: Pilot Results from the Maryland Opportunities through Vouchers Experiment (MOVE)." *Journal of Experimental Criminology* 14, no. 2 (2017): 213–26. <https://doi.org/10.1007/s11292-017-9317-z>.

<sup>13</sup> Roman, Caterina Gouvis, and Jeremy Travis. "Taking Stock: Housing, Homelessness, and Prisoner Reentry." PsycEXTRA Dataset, 2004. [http://webarchive.urban.org/UploadedPDF/411096\\_taking\\_stock.pdf](http://webarchive.urban.org/UploadedPDF/411096_taking_stock.pdf) p.7-8

<sup>14</sup> Tsai, Tim. "Standing Together: A Prevention-Oriented Approach to Ending Homelessness in Oakland." <http://bit.ly/HomelessPrevention2019> p.12

<sup>15</sup> Hirsch, Amy E, Sharon M Dietrich, Rue Landau, Peter D Schneider, Irv Ackelsberg, Judith Bernstein-Baker, and Joseph Hohenstein. *Every Door Closed: Barriers Facing Parents with Criminal Records*. Philadelphia, PA: Community Legal Services, Inc, 2002. p.1 [https://www.clasp.org/sites/default/files/publications/2018/01/every\\_door\\_closed.pdf](https://www.clasp.org/sites/default/files/publications/2018/01/every_door_closed.pdf)

<sup>16</sup> Davis, Laurel, and Rebecca J. Shlafer. "Mental Health of Adolescents with Currently and Formerly Incarcerated Parents." *Journal of Adolescence* 54 (2017): 120–34. <https://doi.org/10.1016/j.adolescence.2016.10.006>. Shlafer, Rebecca J, Erica Gerrity, Ebony Ruhland, and Marc Wheeler. "Children with Incarcerated Parents – Considering Children's Outcomes in the Context of Complex Family Experiences." *Children, Youth, and Family Consortium*, 2013. <https://www.prisonpolicy.org/scans/umn/June2013ereview.pdf>. p.3



There are statistical racial disparities at every stage of the criminal justice system. Research has demonstrated that African Americans are more likely to be stopped by police,<sup>17</sup> prosecuted disproportionately, and punished more harshly than other ethnic groups.<sup>18</sup> As a result, Black men—one third of whom are likely to serve time in prison or jail at some point in their lives—are incarcerated at a rate that is five times that of White men. Racial bias in plea-bargaining, which accounts for the vast majority of new criminal convictions, is a significant source of the disparity in incarceration. In a recent study of more than 48,000 cases in Wisconsin, legal scholar Carlos Berdejó found that White defendants were 25% more likely than Black ones to have their most serious charge either dropped or reduced to a less serious charge.<sup>19</sup> As a result, Whites who were initially charged with a felony were an estimated 15% more likely to end up convicted of a misdemeanor instead. In addition, Whites who were initially charged with a misdemeanor were an estimated 75% more likely to be convicted of a crime carrying no possible incarceration, or not convicted at all.<sup>20</sup>

These disparities are even more acute in California. According to the Public Policy Institute of California, in 2017, African Americans made up 5.6% of the state’s adult men but 28.5% of its male prisoners.<sup>21</sup> As a result, Black men were ten times more likely than White men to be incarcerated. Latino men were more than twice as likely as White men to be incarcerated. There were significant disparities among Black women, too, who were five times more likely than White women to be incarcerated.<sup>22</sup> Inequalities in incarceration were driven in part by inequalities in policing. Again, according to the Public Policy Institute of California, Black male residents were three times more likely than White ones to be arrested in 2016.<sup>23</sup>

Here in Alameda County, 48% of probationers are African American<sup>24</sup> even though African Americans make up only 11% of the population.<sup>25</sup>

**This means that both nationally and locally, a disproportionate number of African Americans are impacted by criminal background checks in housing applications.**

<sup>17</sup> “Findings” Stanford Open Policing Project. Accessed October 4, 2019. <https://openpolicing.stanford.edu/findings/>.

<sup>18</sup> Porter, Nicole D., Nazgol Ghandnoosh, Josh Rovner, and Jean Chung. “Racial Disparity.” The Sentencing Project, September 30, 2019. <https://www.sentencingproject.org/issues/racial-disparity/>.

<sup>19</sup> Berdejó, Carlos. (2018). *Criminalizing Race: Racial Disparities in Plea-Bargaining*. *Boston College Law Review*, 59(4), pp. 1189-91.

<sup>20</sup> Berdejó, Carlos. (2018). *Criminalizing Race: Racial Disparities in Plea-Bargaining*. *Boston College Law Review*, 59(4), pp. 1189-91.

<sup>21</sup> Public Policy Institute of California. (2019). *California’s Prison Population*, p. 1.

<sup>22</sup> Public Policy Institute of California. (2019). *California’s Prison Population*, p. 1.

<sup>23</sup> Public Policy Institute of California. (2019). *Racial Disparities in California Arrests*, p. 1.

<sup>24</sup> Total population in probation, Q4 2018 “Alameda County Probation Department Data Dashboard”. Alameda County. Accessed October 4, 2019. <https://www.acgov.org/probation/dashboard.htm>.

<sup>25</sup> “U.S. Census Bureau QuickFacts: Alameda County, California.” United States Census Bureau. Accessed October 4, 2019. <https://www.census.gov/quickfacts/alamedacountycalifornia>.



### **SUMMARY OF HUD GUIDANCE:**

On or about April 4, 2016, the United States Department of Housing and Urban Development issued the “Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions” in which it states that “Policies that exclude persons based on criminal history must be tailored to serve the housing provider’s substantial, legitimate, nondiscriminatory interest and take into consideration such factors as the type of the crime and the length of the time since conviction.”

### **SUMMARY OF OTHER FAIR CHANCE HOUSING POLICIES:**

The Coalition’s efforts build upon the remarkable work of other coalitions and communities to advance fair chance housing policies, namely in the cities of Richmond, Seattle, and Portland. In 2016, the Safe Return Project and its coalition partners including the Dellums Institute worked with the City of Richmond to pass legislation to remove housing barriers for formerly incarcerated residents to access any publicly subsidized housing. In 2017, Seattle community leaders in the Mayor’s Fair Housing Task Force worked with the City of Seattle to enact legislation that removed housing barriers for formerly incarcerated residents to access private or publicly subsidized rental housing. In 2019, the City of Portland enacted a Fair Chance Housing policy similar to Seattle’s policy.

We note that the cities of Seattle and Portland have first in time housing policies which limit landlord discretion in the selection of their tenants. Alameda County cities do not have such a policy.

Here’s a summary of the main comparison between the Berkeley proposal and policies enacted by the cities of Richmond, Seattle, and Portland:

- Similar to Seattle and Portland, the Berkeley proposal would apply to all housing units, private and publicly subsidized.
- Similar to Richmond and Seattle, the Berkeley proposal would enable Housing Providers who are funded by HUD to conduct criminal records checks after a Conditional Offer of Housing has been granted and subject to certain procedures.
- Similar to Richmond, the Berkeley proposal would provide for a private right of action in addition to City enforcement. The City of Seattle, instead, utilizes its robust Department of Civil Rights which enforces civil rights violations.
- Similar to Seattle, the Berkeley proposal would prohibit the use of criminal records checks in the housing application process, with the exception that allows for the review of sex offender registry.
- Unlike Portland and Seattle, the Berkeley proposal DOES NOT have a first in time tenant acceptance requirement. In addition, the Berkeley proposal maintains landlord discretion in the review of relevant information including landlord references, employment and income status, and credit report checks.



Less comprehensive versions of fair chance policies have passed in other cities including San Francisco; Urbana, Illinois; Madison, Wisconsin; New York, New York; and Newark, New Jersey.

**POLICY DEVELOPMENT PROCESS--CENTERING PEOPLE MOST IMPACTED BY THE POLICY PROBLEM:**

Building on their successful anti-displacement funding efforts with Alameda County and the cities of Berkeley and Oakland in 2017, the Our Beloved Community Action Network<sup>26</sup> (BCAN) leaders led by Just Cities/the Dellums Institute resolved to work together to address the removal of housing barriers for formerly incarcerated people. Through the advocacy of BCAN partner, the TechEquity Collaborative, the Chan Zuckerberg Initiative has provided resources for the development of the Alameda County Fair Chance Housing Coalition, including a leadership development program for formerly incarcerated people or their family members—the Policy and Outreach Leaders (POLs). The following community leaders have served as the POLs: Ms. Towanda Sherry, Ms. Anita Wills, Katie Dixon, and Taqwaa Bonner.

With support from Just Cities staff, the POLs have convened community forums and listening sessions with formerly incarcerated people and their family members, as well as participated in multiple research and policy design workshops. They have also worked with the UC Berkeley Goldman School of Public Policy’s Center on Civility and Democratic Engagement to design and implement a survey to assess the individual, family, and community impacts of today’s housing barriers for people with criminal records. In addition, Richard Illgen, former Oakland Deputy City Attorney, the Safe Return Project, and the National Housing Law Project have provided technical assistance to Just Cities and the POLs in developing the draft ordinance.

**SUMMARY OF FAIR CHANCE HOUSING POLICY TERMS**

The following is a summary of the proposed Fair Chance Housing policy. These policies were crafted after more than seven public hearings before the City of Berkeley’s 4x4 and Land Use Committees; multiple meetings with the leaders of the Berkeley Property Owners Association; community forums with Berkeley residents and community organizations; and separate meetings with the Mayor and Council offices.

**NAMED AFTER CONGRESSMAN RON DELLUMS:**

The Coalition is proposing to name the Fair Chance Housing policy after former Berkeley City Councilmember, Congressman, Oakland Mayor, and world humanitarian Ronald V. Dellums in honor of his legacy and to inspire policymakers across the nation to champion human rights. Congressman Dellums passed away in July 2018. For over fifty years, Ron Dellums practiced courageous and principled leadership to advance the human rights and needs of all peoples, especially those who have

<sup>26</sup> For more information about the **Our Beloved Community Action Network**: <http://dellumsinstitute.org/bcan>



been discriminated against and marginalized. He was born in 1935 and grew up in a segregated West Oakland. He had a troubled youth and almost did not graduate from high school. After serving in the Marines, Ron Dellums became a UC Berkeley trained psychiatric social worker and a community organizer. At the age of 31, Ron Dellums was on his way to a PhD program at Brandeis when he was recruited by activists to serve on the Berkeley City Council.

As Berkeley City Councilmember from 1967 to 1970, Ron Dellums championed progressive values of anti-war, peace, and justice including opposition to the death penalty, development of the People's Park and opposition to the declaration of martial law by then Governor Ronald Reagan, and successfully forcing BART to put train tracks in Berkeley underground.

As Congressperson representing Berkeley and Oakland from 1970 to 1997, Ron Dellums was the first African American to represent the district and one of the first Democratic Socialists in Congress. He was elected to Congress as an anti-Vietnam War activist and a prominent member of President Nixon's infamous "enemies list." Yet, he rose to become Chair of the powerful House Armed Services Committee, while maintaining his integrity, activism, and principles. Decades ahead of the "mainstream," his initially lonely efforts against Apartheid in South Africa, and against the major nuclear war-fighting systems, all eventually became the official positions of the nation. He was a staunch critic of discrimination in the military, a key supporter of gay rights in the military, and consistently challenged the militarization of U.S. foreign policy, while advocating for improving the living conditions of military personnel. Ron Dellums also chaired the House DC Committee where he pushed for meaningful Home Rule and Statehood for the District of Columbia, and also focused on the problems in America's cities. He was equally well known for presenting comprehensive policy proposals including the Dellums Alternative Military Budget and the Congressional Black Caucus Alternative Budget. He authored comprehensive bills to provide free healthcare to all Americans, a national comprehensive housing program, and climate change legislation.

After leaving Congress, Dellums led the development of his envisioned Marshall Plan for HIV/AIDs resulting in the federal PEPFAR programs which has saved 17 million lives in Sub-Saharan Africa, and the Dellums Commission on Boys and Men of Color, the precursor to President Obama's My Brother's Keeper initiative.

Already in his 70s, Ron Dellums was drafted to serve as Mayor of Oakland from 2007 to 2010, where he opened up City Hall for Oakland's people to develop Oakland as a model city for the world. To institutionalize civic engagement, Ron Dellums created 41 Citizen Task Forces that involved over 800 residents and resulted in policy changes such as the adoption of an industrial lands policy to facilitate economic development and jobs for Oakland residents and strategies to improve air quality from Port operations. He created a Re-Entry Services program out of the Mayor's office that welcomed formerly incarcerated residents home and helped them find jobs, housing, and support. Ron Dellums developed a comprehensive public safety plan which resulted in a 38% decline in homicides and a 25% decline in



all Part I (major) crimes. He reformed the Oakland Police Department and advanced community and constitutional policing. He led unprecedented City efforts involving business, labor, education, and community leaders to develop a comprehensive vision for a sustainable and equitable local economy, which resulted in \$550 million of new funding for projects and the generation of over 14,000 jobs during the Great Recession.

In 2016, at the tender age of 80, Ron Dellums co-founded the Dellums Institute for Social Justice to create a platform for the collective advancement of racial and social justice.

By naming the Fair Chance Housing Ordinance after Ronald V. Dellums, we seek to inspire community youth to believe in their potential for greatness and government officials to lead with courage, integrity, compassion for the most marginalized, and big vision for justice.

**POLICY GOALS:**

1. Remove current structural barriers faced by formerly incarcerated people when they apply for private or publicly subsidized housing to enable them to be considered on the merits of their present situation, rather than the albatross of their past.
2. Create a due process system that a) enables formerly incarcerated people the ability to complain to the City and also sue to enforce their rights under the Ordinance; and b) builds on the City's current administrative systems and capacity.
3. Design policy terms based upon an understanding of the different application and review processes by private and multiple kinds of Affordable Housing providers.
4. Create reporting requirements that are streamlined and also helps Affordable Housing providers transform their current application and review systems.
5. Avoid unintended consequences by not having burdensome or complex requirements for landlords.
6. Address the realities and special considerations of landlords who reside on their rental property that are smaller buildings, e.g. triplexes and smaller.





**MAIN PROPOSED POLICY TERMS:**

The following is a summary of the proposed fair chance housing policy.

| Housing Provider                          | Criminal Background Check                                                                         | Due Process                    | Reporting to City                  | Potential Remedies for Violations                                     |
|-------------------------------------------|---------------------------------------------------------------------------------------------------|--------------------------------|------------------------------------|-----------------------------------------------------------------------|
| Private (Non-Affordable Housing Provider) | No                                                                                                | City Complaint or Sue in Court | None                               | City complaint w/ fine. Court action w/ damages or injunctive relief. |
| Publicly Subsidized & Not HUD Funded      | No                                                                                                | City Complaint or Sue in Court | Annual certification of compliance | City complaint w/ fine. Court action w/ damages or injunctive relief. |
| HUD Funded                                | After conditional offer, can check on 2 crimes per HUD rules & following due process protections. | City Complaint or Sue in Court | Annual certification of compliance | City complaint w/ fine. Court action w/ damages or injunctive relief. |

**CRIMINAL BACKGROUND CHECKS:**

The proposed ordinance prohibits ALL landlords from:

- (a) Advertising or using a policy that automatically excludes people with criminal histories from rental housing,
- (b) Asking about or requiring disclosure of someone’s criminal history, or
- (c) Taking adverse action against an applicant or tenant based on his or her criminal history.

Exemptions to the ordinance:

- o The following properties where the owner occupies the property are exempt from the ordinance: ADUs, single family homes, duplexes, and triplexes.
- o Property owners renting their primary dwelling when they are on sabbatical.
- o Tenants renting out available bedrooms in the unit in which they reside.
- o Landlords can review and consider whether an applicant is on the State operated registry of lifetime sex offenders after a conditional offer has been made and upon written consent from the applicant. If a housing denial is based upon the registry information, the landlord must provide that information to the applicant and provide the applicant with the opportunity to rebut or provide mitigating information.
- o Landlords of HUD funded housing have a partial exemption from the ordinance if they are complying with federal regulations that require them to automatically exclude tenants based on certain types of criminal history (lifetime sex offender registration requirement or making meth on a federally assisted housing property). However, the landlord can only conduct the background check after a conditional offer has been made and upon written consent from the applicant. If a housing denial is based upon one of the two HUD prescribed crimes, the landlord must provide that



information to the applicant and provide the applicant with the opportunity to rebut or provide mitigating information.

### **IMPLEMENTATION & ENFORCEMENT:**

#### 1. Private Rental Housing Application & Complaint Process

- Denial: If an applicant has been denied housing, they are entitled to any notices required by state and federal law and can also request that the landlord provide a reason for the denial.
- Due Process, Remedies & Enforcement—See below

#### 2. Affordable Housing Rental Housing Application and Appeal/Complaint Process

- Definition: any housing provider receiving direct local, county, state, or federal subsidy. We have removed Section 8 landlords from the definition of Affordable Housing provider since the Housing Authority conducts the background checks for Section 8 voucher holders and because of Berkeley's source of income anti-discrimination law.
- Conditional Offer, Background Check, and Denial: For HUD funded housing providers, after a conditional offer of housing has been provided, the housing provider may conduct a background check if required by federal requirements. The housing provider must provide in writing the grounds for denial of housing and state whether a criminal records background check was conducted and, if so, what the results were of the check.
- Annual Reports: only publicly subsidized housing providers would submit an annual certification of compliance to the City utilizing a City template. The Coalition would like to work with the City on designing the compliance template.

#### 3. Due Process, Remedies and Enforcement for Both Private & Publicly Subsidized Rental Housing

- Complaint Process:
  - The applicant would have the right to file a complaint with the City Manager's designated hearing officer within one year from the date of application for housing.
  - The public and complainant would be informed of available City or community resources to assist in the filing of the complaint or preparing for the hearing, including the gathering of evidence.
- Similar to current local tenant law, private right of action and attorney's fees for the prevailing applicant are provided.

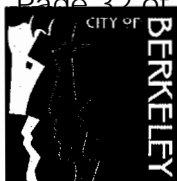


- Berkeley’s current administrative penalty system is also integrated into the proposal.
- Landlord retaliation is explicitly prohibited.
- Landlords are required to maintain documentation of any conviction history that they obtain on applicants for at least three years.
- Effective date of the ordinance is 6 months after its adoption.
- The City Manager or their designee would provide an annual status report to the City Council and public including: a) which Affordable Housing providers submitted an annual certification of compliance; b) number of complaints filed with the City and the resolution; c) information from local service providers and community organizations on the number of court cases filed and the resolution or other compliance information.

## **CONCLUSION**

In the words of Just Cities’ Director of Community & Political Engagement, John Arthur Jones III,

*The only place in America where one is guaranteed a roof over their head is in prison/jail. This Ordinance will take steps towards addressing the major intersection of Mass Incarceration and Housing barriers- BOTH resulting from policies and programs that were created and/or sanctioned by government- locally, statewide and nationally. In addition to constituting a human right, housing is also a Public Health and Public Safety issue. The impact of having a criminal record severely harms and impacts those who have never been arrested, including the children, parents, partners, and loved ones of those who are formerly incarcerated. Just as criminal records cannot and does not strip one of the legal duty of paying taxes, neither legally should having a criminal record strip anyone of one of the most quintessential elements of human rights- and that is housing.*



Office of the Mayor

Jesse Arreguín, Mayor

October 23, 2019

To: Land Use Committee Councilmembers Lori Droste and Sophie Hahn  
Fr: Mayor Jesse Arreguin

Re: Proposed Amendments to Berkeley's Fair Chance Housing Ordinance

In light of the conversation we had at the October 3<sup>rd</sup> Land Use Committee meeting regarding the draft Fair Chance Housing Ordinance, I am proposing several amendments. The proposals address the concerns raised of 1) small Housing Providers not having access to information and/or the capacity to implement many changes to their existing systems; and 2) owner occupied Housing Providers having special considerations.

I have discussed my proposed changes with the leaders of Just Cities and the Alameda County Fair Chance Housing Coalition and have their support.

- I. **Housing Provider Advertisement:** Remove the additional requirement that Housing Providers must include affirmative advertisement language that they do not disqualify applicants because of their criminal records. The remaining requirement that Housing Providers cannot include advertisement language that disqualifies applicants because of their criminal records addresses the structural barrier that applicants with criminal records confront.
- II. **Owner Occupied Housing Unit Exemption:** Include owner occupied duplexes and triplexes as an exemption from the Ordinance, in addition to owner occupied single family homes.
- III. **ADU Exemption:** Include Accessory Dwelling Units where the property owner occupies the property as an exemption from the Ordinance.
- IV. **Sabbatical Exemption:** Include the sabbatical exemption that's in Berkeley's rent control law as an exemption to the Fair Chance Housing Ordinance.
- V. **Lifetime Sex Offender Registry:** All housing providers would be able to review as part of the application process whether an applicant is on the lifetime sex offender's registry, also known as Megan's Law website that is operated by the California Department of Justice. However, if the housing provider is basing their denial because of the registry, the housing provider must affirmatively communicate the basis for the denial and provide the applicant with the opportunity to dispute the accuracy or relevance of the conviction.
- VI. **Problems with Criminal Records Databases:** Include in the Ordinance findings the research regarding the inaccuracy of private criminal records databases. This research is of critical importance in community education of the design of the Berkeley Ordinance specific policy terms.

**RECEIVED AT  
COUNCIL MEETING OF:**

**OCT 24 2019**

**DRAFT**  
**The Ronald V. Dellums Fair Chance Housing Public Health & Safety Ordinance**  
**June 21, 2019**

**To be inserted in the Berkeley Municipal Code**

**I. Title**

**This Ordinance shall be known as the “Ronald V. Dellums Fair Chance Access to Housing and Public Health and Safety Ordinance.”**

**II. Authority**

**This Ordinance is adopted pursuant to the powers vested in the City of Berkeley under the laws and Constitution of the State of California and the City Charter.**

**III. Findings**

- (a) The City of Berkeley is committed to equity, dignity, and public health and safety.
- (b) The unmet housing needs of formerly incarcerated people in Berkeley are an acute challenge to the dignity, public health and safety, and equal opportunity for this population and the broader community.
- (c) Research has found that access to housing reduces recidivism, and the lack of housing can be a significant barrier to successful reintegration after incarceration.
- (d) Homelessness is a critical issue in Berkeley and formerly incarcerated people are disproportionately affected by homelessness. Recent surveys reflect the direct correlation between housing barriers for formerly incarcerated people and homelessness. In a 2019 survey conducted by the Goldman School for Public Policy at UC Berkeley of formerly incarcerated Alameda County residents, one third of formerly incarcerated residents surveyed had experienced homelessness or housing insecurity and 54% had been denied either housing or the opportunity to live with a family member because of their criminal record. Another 2019 Goldman Survey of unhoused people residing in East Bay homeless encampments found that 72% of encampment residents surveyed had been formerly incarcerated. In the 2017 Point in Time count for Berkeley homeless residents, one of the top six reasons listed for the primary cause of homelessness was incarceration (6% of respondents).
- (e) Research and community engagement by the Alameda County Fair Chance Housing Coalition and Just Cities/the Dellums Institute for Social Justice have identified a policy gap in the city’s treatment of housing providers and their consideration of past convictions that has generated unfair and harmful barriers to housing for people with past convictions.

**DRAFT**

**The Ronald V. Dellums Fair Chance Housing Public Health & Safety Ordinance  
June 21, 2019**

- (f) Several jurisdictions, including Cook County, Illinois; Urbana, Illinois; Madison, Wisconsin; New York, New York; Richmond, California; San Francisco, California; Newark, New Jersey; and Seattle, Washington have passed policies that restore rights and remove barriers to housing for people with past criminal convictions.
- (g) On or about April 4, 2016, the United States Department of Housing and Urban Development issued the “Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions” in which it states that “Policies that exclude persons based on criminal history must be tailored to serve the housing provider’s substantial, legitimate, nondiscriminatory interest and take into consideration such factors as the type of the crime and the length of the time since conviction.”
- (h) It has been documented by service providers providing assistance to formerly incarcerated residents in Alameda County and national researchers that significant first source housing for people coming out of incarceration is publicly subsidized affordable housing. {See Corinne Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 University of Toledo Law Review 545; Caterina Gouvis Roman and Jeremy Travis, Urban Institute, *Taking Stock: Housing, Homelessness and Prisoner Re-Entry* (2004); and *Every Door Closed: Barriers Facing Parents With Criminal Records*, CLASP and CLS Report (Chapter 3, “Criminal Records and Subsidized Housing: Families Losing the Opportunity for Decent Shelter”).}
- (i) Alameda County service providers and national researchers have documented barriers to access to both private rental and publicly subsidized affordable housing faced by formerly incarcerated residents. {See Corinne Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 University of Toledo Law Review 545; Caterina Gouvis Roman and Jeremy Travis, Urban Institute, *Taking Stock: Housing, Homelessness and Prisoner Re-Entry* (2004); and *Every Door Closed: Barriers Facing Parents With Criminal Records*, CLASP and CLS Report (Chapter 3, “Criminal Records and Subsidized Housing: Families Losing the Opportunity for Decent Shelter”).}
- (j) The City of Berkeley’s Housing Element advances fair housing goals. The City Council in 2018 adopted a resolution supporting the development of a Fair Chance Housing policy.
- (k) Not having a home can prevent a formerly incarcerated person from getting a job, from visiting with his or her children, and from fulfilling other needs that are fundamental to reintegrating with community after incarceration.
- (l) Mass incarceration is a national crisis and restoring the rights of people affected by mass incarceration is a national priority.

**DRAFT**

**The Ronald V. Dellums Fair Chance Housing Public Health & Safety Ordinance  
June 21, 2019**

- (m) The United States incarcerates more than twenty-five percent (25%) of the world's prisoners while the country comprises only five percent (5%) of the world's population.
- (n) The City of Berkeley has shown a consistent interest in removing barriers faced by people coming home from incarceration, by adopting policies like the city's "Ban the Box" resolution, which removed barriers to employment.
- (o) According to the City of Berkeley's 2015-2023 Housing Element, there are a total of 25,696 rental housing units.
- (p) The Fair Chance Housing ordinance is rightly named after former Berkeley City Councilmember, Congressperson, Oakland Mayor, and global humanitarian Ronald V. Dellums who passed away in July 2018. For over fifty years, Ron Dellums practiced courageous and principled leadership to advance the human rights and needs of all peoples, especially those who have been discriminated against and marginalized. He was born in 1935 and grew up in a segregated West Oakland. He had a troubled youth and almost did not graduate from high school. After serving in the Marines, Ron Dellums became a UC Berkeley trained psychiatric social worker and a community organizer. At the age of 31, Dellums was on his way to a PhD program at Brandeis when he was recruited by activists to serve on the Berkeley City Council.

As Berkeley City Councilmember from 1967 to 1970, Ron Dellums championed progressive values of anti-war, peace, and justice including opposition to the death penalty, development of the People's Park and opposition to the declaration of martial law by then Governor Ronald Reagan, and successfully forcing BART to put train tracks in Berkeley underground.

As Congressperson representing Berkeley and Oakland from 1970 to 1997, Ron Dellums was the first African American to represent the district and one of the first Democratic Socialists in Congress. He was elected to Congress as an anti-Vietnam War activist and a prominent member of President Nixon's infamous "enemies list." Yet, he rose to become Chair of the powerful House Armed Services Committee, while maintaining his integrity, activism, and principles. Decades ahead of the "mainstream," his initially lonely efforts against Apartheid in South Africa, and against the major nuclear war-fighting systems, all eventually became the official positions of the nation. He was a staunch critic of discrimination in the military, a key supporter of gay rights in the military, and consistently challenged the militarization of U.S. foreign policy, while advocating for improving the living conditions of military personnel. Ron Dellums also chaired the House DC Committee where he pushed for meaningful Home Rule and Statehood for the District of Columbia, and also focused on the problems in America's cities. He was equally well known for presenting comprehensive policy proposals including the Dellums Alternative Military Budget and the Congressional Black Caucus Alternative Budget. He authored comprehensive bills to provide free healthcare to all Americans, a national comprehensive housing program, and climate change legislation.

**DRAFT****The Ronald V. Dellums Fair Chance Housing Public Health & Safety Ordinance  
June 21, 2019**

After leaving Congress, Dellums led the development of his envisioned Marshall Plan for HIV/AIDS resulting in the federal PEPFAR programs which has saved 17 million lives in Sub-Saharan Africa, and the Dellums Commission on Boys and Men of Color, the precursor to President Obama's My Brother's Keeper initiative.

Already in his 70s, Ron Dellums was drafted to serve as Mayor of Oakland from 2007 to 2010, where he opened up City Hall for Oakland's people to develop Oakland as a model city for the world. To institutionalize civic engagement, Ron Dellums created 41 Citizen Task Forces that involved over 800 residents and resulted in policy changes such as the adoption of an industrial lands policy to facilitate economic development and jobs for Oakland residents and strategies to improve air quality from Port operations. He created a Re-Entry Services program out of the Mayor's office that welcomed formerly incarcerated residents home and helped them find jobs, housing, and support. Ron Dellums developed a comprehensive public safety plan which resulted in a 38% decline in homicides and a 25% decline in all Part I (major) crimes. He reformed the Oakland Police Department and advanced community and constitutional policing. He led unprecedented City efforts involving business, labor, education, and community leaders to develop a comprehensive vision for a sustainable and equitable local economy, which resulted in \$550 million of new funding for projects and the generation of over 14,000 jobs during the Great Recession.

By naming the Fair Chance Housing Ordinance after Ronald V. Dellums, we seek to inspire community youth to believe in their potential for greatness and government officials to lead with courage, integrity, compassion for the most marginalized, and big vision for justice.

**IV. Definitions**

For the purposes of this Article, the following words and phrases shall mean and include:

- (a) "Adverse Action" shall mean to fail or refuse to rent or lease Housing to an individual; fail or refuse to continue to rent or lease Housing to an individual; fail or refuse to add a household member to an existing lease for Housing; to reduce the amount or term of any tenant subsidy for Housing; to treat an individual differently from other applicants or tenants such as requiring higher security deposit or rent; or to treat an individual as ineligible for a tenant-based rental assistance program, including, but not limited to, the Section 8 tenant-based voucher program (42 U.S.C. Section 1437f).
- (b) "Affordable Housing" shall mean any Housing that (i) has received or is receiving City, County, State, or Federal funding, tax credits, or other subsidies connected in whole or in part to developing, rehabilitating, restricting rents, subsidizing ownership, or otherwise providing rental housing for extremely low income, very low income, low income, and moderate income households (collectively, "Public Funding"), with the exception of Housing where the only Public Funding received is in the form of a Local, State or Federal tenant-based voucher, such as through the Section 8 tenant-based voucher program (42 U.S.C.



**DRAFT**  
**The Ronald V. Dellums Fair Chance Housing Public Health & Safety Ordinance**  
**June 21, 2019**

Section 1437f); or (ii) is subject to affordability and related requirements pursuant to the City's Below Market-Rate Rental Housing Program, including, but not limited to, the Inclusionary Housing Ordinance (BMC Chapter 23C.12), the Affordable Housing Mitigation Fee Ordinance (BMC Chapter 22.20), the State Density Bonus law (California Government Code Sections 65915-65918 and BMC Chapter 23C.14), and the Low Income Inclusionary Live/Work Units Ordinance (BMC 23E.20.080).

Commented [LS1]: Exception for Section 8 landlords with no other public subsidies.

- (c) "Affordable Housing Provider" shall mean any Housing Provider that owns, master leases, manages, or develops Affordable Housing in the City. Any agent, such as a property management company, that makes tenancy decisions on behalf of the above-described Housing Providers, and any government agency, including, but not limited to, the Berkeley Housing Authority, that makes eligibility decisions for tenant-based rental assistance programs, including, but not limited to, the Section 8 program (42 U.S.C. Section 1437f), shall also be considered an "Affordable Housing Provider".
- (d) "Applicant" shall mean a person who seeks information about, visits or applies to rent or lease Housing, who applies for a tenant-based rental assistance program, including, but not limited to, the Section 8 program (42 U.S.C. Section 1437f), who seeks to be added as a household member to an existing lease for Housing or, with respect to any Criminal History that occurred prior to the beginning of the person's tenancy, who currently rents or has a lease for Housing.
- (e) "Arrest" shall mean a record from any jurisdiction that does not result in a Conviction and includes information indicating that a person has been questioned, apprehended, taken into custody or detained, or held for investigation by a law enforcement, police, or prosecutorial agency and/or charged with, indicted, or tried and acquitted for any felony, misdemeanor or other criminal offense.
- (f) "Background Check Report" shall mean any report regarding an Applicant's Criminal History, including, but not limited to, those produced by the California Department of Justice, the Federal Bureau of Investigation, other law enforcement agencies, courts, or by any consumer reporting or tenant screening agency.
- (g) "Conviction" shall mean a record from any jurisdiction that includes information indicating that a person has been convicted of a felony or misdemeanor or other criminal offense and for which the person placed on probation, fined, imprisoned and/or paroled.
- (h) "Criminal History" shall mean information transmitted orally or in writing or by any other means, and obtained from any source, including, but not limited to, the individual to whom the information pertains, a government agency or a Background Check Report, regarding: one or more Convictions or Arrests; a Conviction that has been sealed, dismissed, vacated, expunged, sealed, voided, invalidated, or otherwise rendered inoperative by judicial action or by statute (for example, under California Penal Code sections 1203.1 or 1203.4); a determination or adjudication in the juvenile justice system; a matter considered in or

**DRAFT**  
**The Ronald V. Dellums Fair Chance Housing Public Health & Safety Ordinance**  
**June 21, 2019**

processed through the juvenile justice system; or participation in or completion of a diversion or a deferral of judgment program.

- (i) “Housing” shall mean any residential rental housing, building, or unit in the City of Berkeley, with the exception of single family dwellings where the owner occupies the dwelling as his/her principal residence.
- (j) “Housing Provider” shall mean any Person that owns, master leases, manages, or develops Housing in the City. Any agent, such as a property management company, that makes tenancy decisions on behalf of the above-described Persons, and any government agency, including, but not limited to, the Berkeley Housing Authority, that makes eligibility decisions for tenant-based rental assistance programs, including, but not limited to, the Section 8 program (42 U.S.C. Section 1437f), shall also be considered a “Housing Provider”.
- (k) “Inquire” shall mean engage in any direct or indirect action, written or oral, intended to gather information from or about an Applicant for Housing using any mode of communication, including, but not limited to, application forms, interviews, and Background Check Reports.
- (l) "Person" shall mean one or more individuals, partnerships, organizations, trade or professional associations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, or any political or civil subdivision or agency or instrumentality of the City.

**V. Use of Criminal History in Housing Decisions**

- (a) A Housing Provider shall not, at any time or by any means, inquire about, require disclosure of, or, if such information is received, base an Adverse Action in whole or in part on an Applicant’s Criminal History.
- (b) It shall not be a violation of this Ordinance for a Housing Provider to comply with specific Federal or State laws that apply to the particular transaction at issue and that require the Housing Provider to treat an Applicant as ineligible based on Criminal History, *e.g.* Ineligibility of Dangerous Sex Offenders for Admission to Public Housing (42 U.S.C. Sec. 13663(a) and Ineligibility of Individuals Convicted for Manufacturing Methamphetamine on Premises of Federally Assisted Housing for Admission to Public Housing and Housing Choice Voucher Programs (24 C.F.R. Sec. 982.553)), provided that if such a requirement applies, the Housing Provider shall not inquire about, require disclosure of, or, if such information is received, review an Applicant’s Criminal History until the Housing Provider has first:
  - (1) Determined that the Applicant is qualified to rent the Housing under all of the Housing Provider’s criteria for assessing Applicants except for any criteria related to Criminal History; and
  - (2) Provided to the Applicant a conditional lease agreement that commits the Housing to the Applicant as long as the Applicant meets the Housing Provider's Criminal History criteria.

**DRAFT**  
**The Ronald V. Dellums Fair Chance Housing Public Health & Safety Ordinance**  
**June 21, 2019**

- (c) If and when the Housing Provider requests written consent from the Applicant to obtain a Background Check Report regarding Criminal History as permitted under subsection (V)(b) above, the Housing Provider must also request consent to share the Criminal History record with the Applicant and with the City of Berkeley (only for the purposes of addressing a complaint by an Applicant), and must provide the Applicant offer the Applicant an opportunity to provide evidence of inaccuracy of information in the Criminal History record.

**VI. Requirements for Housing Providers**

- (a) Housing Providers shall state in all solicitations or advertisements for the rental or lease of Housing that the Housing Provider will consider for tenancy any qualified Applicant regardless of the Applicant's Criminal History except in the very limited circumstances required by State or Federal law.
- (b) It shall be unlawful for any Housing Provider to produce or disseminate any advertisement related to Housing that expresses, directly or indirectly, that any person with Criminal History will not be considered for the rental or lease of real property or may not apply for the rental or lease of real property, except as required by State or Federal law.
- (c) The City shall publish and make available to Housing Providers, in English, Spanish, and Chinese and all languages spoken by more than five percent (5%) of the City's population, a notice suitable for posting that informs Applicants for Housing of their rights under this Ordinance. The notice shall contain the following information:
- (1) A description of the restrictions and requirements of this Act;
  - (2) Instructions for submitting a complaint to the City regarding a violation of this Ordinance; and
  - (3) Information about community resources available to assist an Applicant in connection with a violation of the Ordinance.
- (d) Housing Providers shall post the notice described in subsection (VI)(c) prominently on their application materials, websites and at any locations under their control that are frequently visited by Applicants.
- (e) Housing Providers shall comply with all applicable Federal, State, and Local fair credit reporting and tenant screening laws and regulations regarding the provision of written notices to Applicants, including, but not limited to, the Fair Credit Reporting Act (15 U.S.C. Section 1681 et seq.), the California Consumer Credit Reporting Agencies Act (California Civil Code Section 1785 et seq.), and the California Investigative Consumer Reporting Agencies Act (California Civil Code Section 1786 et seq.).
- (f) In addition to the requirements in subsections (VI)(a)-(e) above, Affordable Housing Providers shall also:

**DRAFT**  
**The Ronald V. Dellums Fair Chance Housing Public Health & Safety Ordinance**  
**June 21, 2019**

(1) Provide any Applicant subject to an Adverse Action a written notice regarding the Adverse Action that includes, at a minimum, the reason(s) for the Adverse Action; instructions regarding how to file a complaint about the Adverse Action with the City, including applicable deadlines as set forth in subsection (VII)(d) below; a list of local legal services providers including contact information; and, if the Adverse Action is based in whole or in part on information in an Applicant's Criminal History, a copy of any Criminal History or Background Check Report obtained by the Affordable Housing Provider.

(2) Submit to the City an annual certificate of compliance with the requirements of this Ordinance in the form provided by the City.

**VII. Implementation and Enforcement by the City**

- (a) The Ordinance will take effect six months from the date of the passage of the Ordinance. In the six-month time period prior to implementation, Housing Providers are required to prepare and provide to all Applicants written policies compliant with this Ordinance that include, at a minimum, a description of the application process and of the City's complaint process.
- (b) The requirements of this Ordinance will apply to all new and existing Housing in the City. The terms of the Ordinance will be incorporated into all new and existing contracts between an Affordable Housing Provider and any entity providing Public Funding or that relate to the City's Below Market-Rate Rental Housing Program.
- (c) Within six months of the Ordinance's passage, the City Manager or designee is required to:
- (1) Promulgate appropriate regulations consistent with this Ordinance.
  - (2) Designate hearing officers and other necessary staffing for administrative review of complaints regarding violations of this Ordinance;
  - (3) Develop the timelines and procedures for complaints regarding violations of this Ordinance that include, at a minimum, the items described in subsection (d) below;
  - (4) Develop notices, the annual compliance certification form, and other implementation documents, including written materials for Housing Providers and potential Applicants;
  - (5) conduct outreach and prepare a plan to provide ongoing training about this Ordinance to Housing Providers;
  - (6) Prepare an annual implementation budget and identify funding sources; and
  - (7) Undertake other elements of effective implementation.
- (d) The City's administrative review process shall include, at a minimum, the following:
- (1) Any Applicant subject to an Adverse Action who believes the Adverse Action was based on a violation of this Ordinance shall have the right to submit a complaint to the City within one year of the date the Applicant submitted an application to the Housing Provider or the date of the violation, whichever is earlier. The City will

**DRAFT****The Ronald V. Dellums Fair Chance Housing Public Health & Safety Ordinance  
June 21, 2019**

complete its administrative review of any complaint, including the hearing and issuance of a final decision, within 90 days of submission of the complaint.

(2) During the City's administrative review of a complaint regarding an Adverse Action, the parties shall have the following rights: to have an advocate of their choosing to represent them at the hearing; to present any relevant witnesses and evidence and the evidence will be considered without regard to the admissibility under the Rules of Evidence applicable to a judicial proceeding; to examine the other party's evidence and to rebut and cross examine any witnesses; to request a translator; to request any reasonable accommodation needed to participate in the hearing process; and to record the hearing.

(3) Where the City determines that a violation of the Ordinance has occurred, the City shall issue a determination and order any appropriate relief under this Ordinance.

- (e) In addition to providing an administrative review process for complaints, the City is required to take appropriate steps to enforce this Ordinance and coordinate enforcement, including by investigating any possible violations of this Ordinance.
- (f) The City Manager or designee shall provide annual public reports to the City Council on the implementation and enforcement of this Ordinance. The annual reports shall include, at a minimum: information from the annual compliance certifications submitted by Affordable Housing Providers; the number of complaints filed with the City regarding violations of this Ordinance and the outcomes of such complaints, the number of notices filed with the City regarding private court action brought under the Ordinance and the outcomes of such court proceedings.

**VIII. Private Right of Action**

- (a) Applicants subject to Adverse Actions in violation of this Ordinance shall have a private right of action to enforce the Ordinance and shall, if they prevail, be entitled to: statutory damages equal to the greater of actual damages or three (3) times the amount of the monthly rent that the Housing Provider charged for the unit in question at the time of the violation; attorney's fees and costs of action; and punitive damages. This private right of action does not require an Applicant to have filed a prior complaint with the City of Berkeley.
- (b) An award of actual damages under this Ordinance may include an award for mental and/or emotional distress and/or suffering. The amount of actual damages awarded to a prevailing plaintiff shall be trebled by the Court if a defendant is found to have acted in knowing violation of, or in reckless disregard of, the provisions of this Ordinance.
- (c) In addition to any other award of damages or grant of injunctive relief, a court of competent jurisdiction may order that a civil penalty be assessed against the Housing Provider to vindicate the public interest, which penalty shall be payable to The City of

Commented [LS2]: This is from Berkeley's Source of Income ordinance.

**DRAFT**  
**The Ronald V. Dellums Fair Chance Housing Public Health & Safety Ordinance**  
**June 21, 2019**

Berkeley. The civil penalty assessed against a Housing Provider shall be at least one thousand dollars (\$1,000) and shall not exceed ten thousand dollars (\$10,000) for each violation of the Ordinance. A defendant shall be liable for an additional civil penalty of up to five thousand dollars (\$5,000) for each violation of this Ordinance committed against a person who is disabled within the meaning of California Government Code section 12926, *et seq.*, or aged sixty-five (65) or over.

Commented [LS3]: From Berkeley's TPO

- (d) An attorney who represents an Applicant in litigation against a Housing Provider brought under this Ordinance shall provide notice to the City within ten (10) days of filing court action against the Housing Provider, and inform the City of the outcome of the court action within ten (10) days of any final judgment.

**IX. Remedies**

- (a) Any person who commits an act in violation of this Ordinance may be enjoined therefrom by any court of competent jurisdiction.
- (b) Where the City determines through administrative review of a complaint or otherwise that a violation of the Ordinance has occurred, the City shall, in order to vindicate the public interest, assess against the Person found to have violated the Ordinance a fine payable to The City of Berkeley in the amount of the lesser of \$1,000 or the maximum amount permitted under State and Local law.

Commented [LS4]: The amount of the fine was raised as a concern at the meeting with Rent Board staff. This issue needs input from the City Attorney.

**X. Retaliation Prohibited**

- (a) No person shall interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this Ordinance.
- (b) No person shall take any Adverse Action against any person because the person has exercised in good faith the rights protected under this Ordinance. Such rights include but are not limited to the right to fair chance housing and regulation of the use of criminal history in housing by this Ordinance; the right to make inquiries about the rights protected under this Ordinance; the right to inform others about their rights under this Ordinance; the right to inform the person's legal counsel or any other person about an alleged violation of this Ordinance; the right to file an oral or written complaint with the City for an alleged violation of this Ordinance; the right to cooperate with the City in its investigations of this Ordinance; the right to testify in a proceeding under or related to this Ordinance; the right to refuse to participate in an activity that would result in a violation of City, State, or Federal law; and the right to oppose any policy, practice, or act that is unlawful under this Ordinance.
- (c) No person shall communicate to a person exercising rights protected in this Ordinance, directly or indirectly, the willingness to inform a government employee that the person is not lawfully in the United States, or to report, or to make an implied or express assertion of a willingness to report, suspected citizenship or immigration status of an Applicant or a member of

**DRAFT**  
**The Ronald V. Dellums Fair Chance Housing Public Health & Safety Ordinance**  
**June 21, 2019**

their household to a Federal, State, or Local agency because the Applicant has exercised a right under this Ordinance.

(d) There shall be a rebuttable presumption of retaliation if a Housing Provider or any other person takes an Adverse Action against a person within 90 days of the person's exercise of rights protected in this Section. The Housing Provider may rebut the presumption with clear and convincing evidence that the Adverse Action was taken for a permissible purpose.

(f) The protections afforded under this Ordinance shall apply to any person who mistakenly but in good faith alleges violations of this Ordinance.

(g) A complaint or other communication by any person triggers the protections of this Ordinance regardless of whether or not the complaint or communication is in writing or makes explicit reference to this Ordinance.

**XI. Records to Be Maintained**

(a) Housing Providers must maintain a record for each Applicant that includes any Criminal History obtained regarding the Applicant, and the determination of eligibility following any review by the Housing Provider of such Criminal History.

(b) Housing Providers shall maintain full and complete documentation of their compliance with this Ordinance.

(c) Housing Providers shall

- (1) Permit the City to have access to Housing Provider records for the purpose of making an audit, examination or review of performance data pertaining to this Ordinance; and
- (2) Maintain such records for a period of at least three years.

**XII. Confidentiality**

To the fullest extent permitted by law, any information pertaining to an Applicant's Criminal History obtained in conjunction with the rental, lease, ownership, or sublease process shall remain confidential and shall only be shared with individuals who have a need to know for the purpose of evaluating an Applicant's application for Housing.

**XIII. Severability**

If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Ordinance is for any reason held to be unconstitutional or invalid, such a decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause or phrase of this Ordinance irrespective of the unconstitutionality or invalidity of any section, subsection, subdivision, paragraph, sentence, clause or phrase.

**DRAFT**  
**The Ronald V. Dellums Fair Chance Housing Public Health & Safety Ordinance**  
**June 21, 2019**

**XIV. Effective Date**

This Ordinance becomes effective six (6) months after its final passage and adoption.

DRAFT





**Alameda County  
Fair Chance Housing Coalition**

June 20, 2019

**To: City of Berkeley 4x4 Joint Task Force Committee on Housing**

**Fr: The Alameda County Fair Chance Housing Coalition: Policy and Outreach Leaders: Ms. Anita Wills** with Essie Justice Group; **Ms. Sherry** with OCO, Our Beloved Community Action Network; **Taqwaa Bonner** and **Katie Dixon** with All of Us or None; **Coalition Advisors: Tamisha Walker** with the Safe Return Project, and **Deborah Thrope** and **Lisa Sitkin** with the National Housing Law Project. **Coalition Staff: John Jones III & Margaretta Lin** with Just Cities and the Our Beloved Community Action Network

**Re: Updates on Proposed Policy Terms on Fair Chance Housing proposal**

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We remain grateful for your partnership to remove housing barriers faced by formerly incarcerated residents. The discussions we have had with you in Committee and individual meetings have helped us refine what we believe will be the nation's best Fair Chance Housing policy. In addition, we have had invaluable feedback from the Rent Board Executive Director and lawyers, and a former Deputy City Attorney for Oakland. In light of their feedback regarding implementation and enforcement considerations, we have made further refinements to the proposed Fair Chance Housing ordinance.

We look forward to working with Mayor Arreguin and the Berkeley City Attorney's office on any further modification needs to the proposed ordinance.

**COALITION POLICY GOALS:**

1. Remove current structural barriers faced by formerly incarcerated people when they apply for private or publicly subsidized housing to enable them to be considered on the merits of their present situation, rather than the albatross of their past.
2. Create a due process system that 1) enables formerly incarcerated people the ability to complain to the City and also sue to enforce their rights under the Ordinance; and 2) builds on the City's current administrative systems and capacity.
3. Design policy terms based upon an understanding of the different application and review processes by private and multiple kinds of Affordable Housing providers.
4. Create reporting requirements that are streamlined and also helps Affordable Housing providers transform their current application and review systems.
5. Avoid unintended consequences by not having burdensome or complex requirements for landlords.



**MAIN PROPOSED POLICY TERMS:** the following is a summary of the proposed fair chance housing policy for your consideration.

| Housing Provider                                     | Criminal Background Check                                    | Due Process                    | Reporting to City                  | Potential Remedies for Violations                                                                         |
|------------------------------------------------------|--------------------------------------------------------------|--------------------------------|------------------------------------|-----------------------------------------------------------------------------------------------------------|
| <b>Private (Non-Affordable Housing Provider)</b>     | No                                                           | City Complaint<br>Sue in Court | None                               | City complaint w/ fine OR City negotiation of next unit.<br>Court action w/ damages or injunctive relief. |
| <b>Publicly Subsidized, BMR &amp; Not HUD Funded</b> | No                                                           | City Complaint<br>Sue in Court | Annual certification of compliance | City complaint w/ fine OR City negotiation of next unit.<br>Court action w/ damages or injunctive relief. |
| <b>HUD Funded</b>                                    | After conditional offer, can check on 2 crimes per HUD rules | City Complaint<br>Sue in Court | Annual certification of compliance | City complaint w/ fine OR City negotiation of next unit.<br>Court action w/ damages or injunctive relief. |

- ❖ **NAMED AFTER RON DELLUMS:** The Coalition is proposing to name the Fair Chance Housing policy after former Berkeley City Councilmember, Congressman, Oakland Mayor, world humanitarian Ronald V. Dellums in honor of his legacy and to inspire policymakers across the nation to champion human rights.
- ❖ **PUBLIC POLICY RATIONALE:** California State law may pre-empt local jurisdictions from enacting local housing anti-discrimination laws. However, local jurisdictions are able to enact public health and safety laws. There is substantive and compelling research, data, and lived experience demonstrating the direct public health and safety impacts from restricting the access of formerly incarcerated residents to private and publicly subsidized rental housing. In addition, research and data also shows the direct connection between housing barriers for formerly incarcerated residents and homelessness.

**CRIMINAL BACKGROUND CHECKS:**

- The proposed ordinance for Berkeley prohibits ALL landlords from:
  - (a) Advertising or using a policy that automatically excludes people with criminal histories from rental housing,
  - (b) Asking about or requiring disclosure of someone’s criminal history, or
  - (c) Taking adverse action against an applicant or tenant based on his or her criminal history.
- Landlords also have to include in all advertising and application materials the information that they are not allowed to ask about criminal history or take adverse action on the basis of criminal history except in very limited circumstances.



- **Exceptions:**
  - (a) **Single-family dwellings where the owner occupies the dwelling** are exempt.
  - (b) **Landlords of federally assisted housing** have a partial exemption from the ordinance if they are complying with federal regulations that require them to automatically exclude tenants based on certain types of criminal history (lifetime sex offender registration requirement or making meth on a federally assisted housing property).

## **IMPLEMENTATION & ENFORCEMENT:**

### **1. Private Rental Housing Application & Complaint Process**

- **Denial:** If an applicant has been denied housing, they are entitled to any notices required by state and federal law and can also request that the landlord provide a reason for the denial.
- **Due Process, Remedies & Enforcement—See below**

### **2. Affordable Housing Rental Housing Application and Appeal/Complaint Process**

- **Definition:** any housing provider receiving direct local, county, state, or federal subsidy, including **private developers with units in Berkeley’s BMR program**. We have removed Section 8 landlords from the definition of Affordable Housing provider since the Housing Authority conducts the background checks for Section 8 voucher holders and because Berkeley’s source of income anti-discrimination law potentially makes every landlord a Section 8 landlord.
- **Conditional Offer, Background Check, and Denial:** For federally funded housing providers, after a conditional offer of housing has been provided, the housing provider may conduct a background check if required by federal requirements. The housing provider must provide in writing the grounds for denial of housing and state whether a criminal records background check was conducted and, if so, what the results were of the check.
- **The Viability of Holding Units Open:** Our original proposal required that Affordable Housing providers hold their units open up to 30 days if an applicant files a complaint within 14 days of receiving a denial. However, after important information from Rent Board staff, we realize that it is not possible for someone to file a complaint with the City and to both hold a hearing and have a determination issued within 30 days. Given this reality and the potential impact to other applicants if we required that housing units be held open for 60 or 90 days, the Coalition has decided to remove the



requirement of holding units open. Instead, for complaints filed with the City and a City determination of a violation, we strongly encourage the City to waive the fine and instead negotiate for the next available comparable unit as the fair remedy.

- **Annual Reports:** the housing provider must submit an annual certification of compliance to the City utilizing a City template. The Coalition would like to work with the City on designing the compliance template.

### **3. Due Process, Remedies and Enforcement for Both Private & Publicly Subsidized Rental Housing**

- **Complaint Process:**
  - The applicant would have the right to file a complaint with the City's Rent Board within **one year** from the date of application for housing.
  - The public and complainant would be informed of available City or community resources to assist in the filing of the complaint or preparing for the hearing, including the gathering of evidence.
- Similar to current Berkeley tenant law, **private right of action and attorney's fees** for the prevailing applicant are provided.
- Berkeley's current **civil penalty system** is also integrated into the proposal.
- **Landlord retaliation** is explicitly prohibited.
- Landlords are required to maintain **documentation** of any conviction history that they obtain on applicants for at least three years.
- **Effective date** of the ordinance is 6 months after its adoption.
- The City Manager or their designee would provide an **annual status report** to the City Council and public including: a) which Affordable Housing providers submitted an annual certification of compliance; b) number of complaints filed with the City and the resolution; c) information from local service providers and community organizations on the number of court cases filed and the resolution or other compliance information.

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**CONTACT:** John Jones III, Community + Political Engagement Director, Just Cities, [john@justcities.work](mailto:john@justcities.work); Margaretta Lin, Managing Director, Just Cities, [margaretta@justcities.work](mailto:margaretta@justcities.work)



Housing Advisory Commission

04

CONSENT CALENDAR  
September 10, 2019

To: Honorable Mayor and Members of the City Council  
 From: Housing Advisory Commission  
 Submitted by: Xavier Johnson, Chairperson, Housing Advisory Commission  
 Subject: Spring 2019 Bi-Annual Report on Funding for Housing Programs

RECOMMENDATION

Accept the Housing Advisory Commission's (HAC) recommendations for the allocation of U1 General Fund revenues to increase the supply of affordable housing and protect residents of Berkeley from homelessness.

SUMMARY

This report is the first Bi-Annual Report in 2019 that the HAC is submitting to the Council. The expenditure of \$5 million dollars of discretionary funds recommended in this Report (Small Sites/Community Land Trusts, Housing Trust Fund, and Development of New Housing Programs) is broad enough to be useful for existing, proposed, and future housing programs. In late 2019 or early 2020, the Housing Advisory Commission will submit a second bi-annual report. This forthcoming report will, to the extent feasible, report on the actual expenditures and commitments of funds for 2019, as well as lay out a clear, structured, and goals oriented process as to how the City should establish and fund programs to increase the supply of affordable housing and protect residents of Berkeley from homelessness.

FISCAL IMPACTS OF RECOMMENDATION

The funds to pay for these recommendations come from a special Business License tax that is charged on properties consisting of five or more units. It is estimated that the revenues will total approximately \$5 million during the upcoming fiscal year. Staff time is included within the administrative costs listed in the summary table of proposed allocations.

CURRENT SITUATION AND ITS EFFECTS

At the May 2, 2019 meeting, the HAC took the following vote to adopt the Bi-Annual Housing Policy Report Subcommittee recommendations to Council, as amended by Commissioner Johnson, to Council to allocate \$5 million in General Fund revenue as follows:

|                                                                   |                    |
|-------------------------------------------------------------------|--------------------|
| Small Sites/Community Land Trusts                                 | \$1,000,000        |
| Housing Trust Fund                                                | \$2,500,000        |
| Development of New Housing Programs (Housing Co-Ops, Land Trusts) | \$250,000          |
| Anti-Displacement                                                 | \$900,000          |
| Administrative Costs                                              | \$350,000          |
| <b>Total (2019)</b>                                               | <b>\$5,000,000</b> |

M/S/C (Wright/Tregub):

Ayes: Johnson, Lewis, Sargent, Sharenko, Tregub, Wolfe and Wright. Noes: Lord.  
Abstain: None. Absent: Owens (unexcused) and Simon-Weisberg (excused).

### BACKGROUND

Ballot Measure U1 charged the Housing Advisory Commission with providing annual or bi-annual recommendations to the City Council on “how and to what extent the City should establish and fund programs to increase the supply of affordable housing and protect residents of Berkeley from homelessness.” This report is the first Bi-Annual Report in 2019 that the HAC is submitting to the Council. The expenditure of \$5 million dollars of discretionary funds recommended in this Report (Small Sites/Community Land Trusts, Housing Trust Fund, and Development of New Housing Programs) is broad enough to be useful for existing, proposed, and future housing programs.

In late 2019 or early 2020, the Housing Advisory Commission will submit a second bi-annual report. This forthcoming report will, to the extent feasible, report on the actual expenditures and commitments of funds for 2019, as well as lay out a clear, structured, and goals oriented process as to how the City should establish and fund programs to increase the supply of affordable housing and protect residents of Berkeley from homelessness.

### ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects or opportunities associated with the subject of this report, since the City does not know at this time the locations of the housing units to be assisted.

### RATIONALE FOR RECOMMENDATION

The actions recommended by the HAC are consistent with Berkeley’s existing housing programs and policies. Recommended expenditures support existing programs and potential new programs to be explored, such as alternative forms of housing ownership.

### ALTERNATIVE ACTIONS CONSIDERED

Another option for the City to consider would be to deposit all U1 General Fund Revenues into the City’s Housing Trust Fund (HTF). However since one of the uses of

U1 General Fund Revenues is to protect Berkeley residents from homelessness, the HAC decided not to deposit all the funds into the HTF in order to provide revenues for anti-displacement activities. In addition, U1 General Fund Revenues are, by definition, more discretionary than other funds deposited into the HTF. This will allow the City to assist innovated programs needed given the housing affordability crisis.

#### CITY MANAGER

The City Manager recommends referring these recommendations to a Council Policy Committee for further discussion.

The City Council has already authorized General Fund revenue received pursuant to Measure U1 for the following projects:

- \$150,000 to the Berkeley Unified School District as a planning grant for educator housing;
- \$368,000 for Resources for Community Development predevelopment loan application for its proposed development at 2001 Ashby Avenue;
- \$900,000 for anti-displacement activities each year for FY20 and FY21; and
- \$100,000 capacity building for housing cooperatives each year for FY20 and FY21.

At the time of the writing Resources for Community Development has applied for an additional \$1.2M for a predevelopment loan for its proposed development at 2001 Ashby Avenue.

#### CONTACT PERSON

Mike Uberti, Commission Secretary, HHCS, (510) 981-5114

#### Attachments:

- 1: Spring 2019 Revised Draft Bi-Annual Report
- 2: Housing Revenues and Expenditures
- 3: Future Program Recommendations in Development by the HAC
- 4: Funding Summary Table as of May 2, 2019

To: Members of the Housing Advisory Commission

From: Xavier Johnson, Chairperson, Housing Advisory Commission

Subject: Spring 2019 Revised Draft Bi-Annual Report

Date: April 25, 2019

### RECOMMENDATION

In keeping with the Housing Advisory Commission's (HAC) annual/biannual obligation to "make recommendations...to what extent the City should establish and fund programs to increase the supply of affordable housing and protect residents of Berkeley from homelessness," this Report recommends the City of Berkeley allocate \$5 million in general fund revenue as follows:

|                                                                        |                           |
|------------------------------------------------------------------------|---------------------------|
| ● Small Sites/Community Land Trusts                                    | \$1,000,000               |
| ● Housing Trust Fund                                                   | \$2,500,000               |
| ● Development of New Housing Programs<br>(Housing Co-Ops, Land Trusts) | \$250,000                 |
| ● Anti-Displacement                                                    | \$900,000                 |
| ● Administrative Costs                                                 | \$350,000                 |
| <b><u>Total (2019)</u></b>                                             | <b><u>\$5,000,000</u></b> |

Further information on how the City of Berkeley should establish programs to increase the supply of affordable housing and protect Berkeley residents from homelessness will follow in future reports to the Berkeley City Council.

### SUMMARY

The City of Berkeley (City) is currently experiencing a major shortfall in funding for affordable housing for its residents, and many existing residents find that they are unable to keep up with rising rents and may face displacement from their current homes. The purpose of U1, a ballot measure that passed by a majority of Berkeley's residents in November 2016 was to increase funding for these two vitals areas (increasing the supply of affordable housing and preventing displacement). However, since these funds are part of the General Fund, the City actually has the option of spending them on non-housing related expenditures.

Measure U1 charged the Housing Advisory Commission with providing annual or bi-annual recommendations to the City Council on "how and to what extent the City should establish and fund programs to increase the supply of affordable housing and protect residents of Berkeley from homelessness." This report is the first Bi-Annual Report in 2019 that the HAC is submitting to the Council. The expenditure of \$5 million dollars of discretionary funds recommended in this Report (Small Sites/Community Land Trusts,



**Attachment 1: Spring 2019 Revised Draft Bi-Annual Report**

Housing Trust Fund, and Development of New Housing Programs) is broad enough to be useful for existing, proposed, and future housing programs.

In late 2019 or early 2020, the Housing Advisory Commission will submit a second bi-annual report. This forthcoming report will, to the extent feasible, report on the actual expenditures and commitments of funds for 2019, as well as lay out a clear, structured, and goals oriented process as to how the City should establish and fund programs to increase the supply of affordable housing and protect residents of Berkeley from homelessness.

### FISCAL IMPACTS OF RECOMMENDATION

This report recommends the allocation of \$5 million dollars in General Fund revenue. It is acknowledged that the City has already, in some cases temporarily and in other cases indefinitely, committed various sources of revenue to various projects. To truly be able to maximize the allocation and effectiveness of resources this recommendation suggests the City will have to take into account all available funding sources and commitments made by the City; this will ensure there are no more additional unfunded commitments moving forward.

### CURRENT SITUATION AND ITS EFFECTS

The City of Berkeley continues to be in the midst of a major housing crisis. U1 directed the Housing Advisory Commission to look at all possible avenues and strategies the City can take to increase the supply of affordable housing and protect Berkeley residents from homelessness.

### BACKGROUND

This report provides the following information:

1. *History*  
The history of Measure U1, as well as the previous reports the Housing Advisory Commission has issued.
2. *Current Funding for Affordable Housing and Prevention of Displacement:*  
An approximate summary of expenditures and allocations for affordable housing and prevention of homelessness. While this list is subject to constant change, and the number of sources grows, this list offers some context and background on some of the many resources currently available to the City.

**Attachment 1: Spring 2019 Revised Draft Bi-Annual Report**

3. *Recommendations for 2019 Expenditures*

Recommendations for future expenditures for housing as well as potential programs and ideas, will be more thoroughly explored and evaluated by the Housing Advisory Commission as part of its regular business.

4. *Potential Future Recommendations under Consideration by the Housing Advisory Commission*

As part of our 2018 Work Plan, the HAC came up with numerous ideas for programs and funding that it is currently evaluating and reviewing. While the HAC is beginning to start the 2019 process, we thought it was important to review the ideas that are still in the works and under review.

1. *History*

Measure U1, which was passed in November 2016, authorized an increase in the Business License Tax charged on properties that consist of five or more residential units. In addition and separately, Measure U1 provided that the HAC will make recommendations on how and to what extent the City should establish and fund programs to increase the supply of affordable housing and protect residents of Berkeley from homelessness. After the measure passed, it was incorporated into Berkeley's Municipal Code. The HAC was required under measure U1 to provide a report to the City Council and specified that HAC make annual or bi-annual recommendations to the Council. The HAC has chosen to set as its timeline April and October as reporting dates for each year.

In its first annual report to the City Council in 2018, the HAC recommended funding at these levels for the following uses:

|                                         |                 |
|-----------------------------------------|-----------------|
| ● Anti-Displacement                     | \$550,000       |
| ● Small Sites Program                   | \$1,000,000     |
| ● Housing Trust Fund                    | \$2,000,000     |
| ● Reserve for pipeline housing programs | \$400,000       |
| ● Administrative Costs                  | <u>\$50,000</u> |
| <br>Total                               | <br>\$4,000,000 |

This report is the second report to the City Council and is the first Bi-Annual Report for 2019. It provides information to the City Council to assist the Council in its decision-making regarding the allocation of funds to increase the supply of affordable housing and protect residents of Berkeley from homelessness.

**Attachment 1: Spring 2019 Revised Draft Bi-Annual Report****2. Current Funding for Affordable Housing and Prevention of Displacement**

The City of Berkeley has a number of sources of funding available to expand the supply of affordable housing and prevent homelessness. The subcommittee decided it would be good to understand the overall level of funds designated for affordable housing and homelessness prevention. First, Table 1 provides information on the most recent commitments from General Fund revenue

Secondly, working with staff, the subcommittee obtained information on housing related expenditure and allocations from several local sources including General Funds, In-Lieu and Housing Mitigation Fees, and federal sources, such as HOME and CDBG. This information is summarized in Table 2 and more information on actual expenditures is presented in Attachment 1.<sup>1</sup> Finally Attachment 3 provides information on committed expenditures.

**Table 1: Allocations<sup>2</sup>**

|                                           | Allocation       |
|-------------------------------------------|------------------|
| <b>COMMITTED EXPENDITURES</b>             |                  |
| <i>Anti-Displacement</i>                  |                  |
| FY 2018                                   |                  |
| Eviction Defense (Rent Board)             | \$300,000        |
| Retention - East Bay Comm Law Center HHCS | \$250,000        |
| Rapid Rehousing HHCS                      | \$100,000        |
| <i>Subtotal</i>                           | <i>\$650,000</i> |
| FY 2019 EXPENDITURES                      |                  |
| Eviction Defense (Rent Board)             | \$300,000        |
| Retention - East Bay Comm Law Center HHCS | \$250,000        |
| Rapid Rehousing HHCS                      | \$100,000        |
| <i>Subtotal</i>                           | <i>\$650,000</i> |
| <i>STAFF AND ADMIN. FY 2018</i>           |                  |
| Staff Position                            | \$150,757        |
| Other Administrative Costs                | \$199,243        |

<sup>1</sup> Note: The total HOME funds listed in Table 2 do not include funding for public services projects, planning and administration, public facilities, and all ESG, since these uses do not fall directly under the policy framework for U1. ESG is primarily used to help those who are already homeless.

<sup>2</sup>As of February 2019. Also, Table 1 does not include expenditures from ESG or City's matching funds for ESG. See tables in Attachment 1  
Source: City Staff

## Attachment 1: Spring 2019 Revised Draft Bi-Annual Report

|                                              |                    |
|----------------------------------------------|--------------------|
| Subtotal                                     | \$350,000          |
| <i>HOUSING</i>                               |                    |
| Future Small Sites Program Activities - HHCS | \$950,000          |
| Organizational Capacity Building (BACLT)     | \$50,000           |
| Subtotal                                     | \$1,000,000        |
| <b>TOTAL: COMMITTED AND ASSIGNED</b>         | <b>\$2,650,000</b> |

Table 2: FY 2018-19 Committed and Reserved Funds for Housing

| <i>Committed Housing Trust Funds</i>                     | <i>CDBG</i> | <i>Home</i> | <i>Local Funds (1)</i> | <i>Total</i> |
|----------------------------------------------------------|-------------|-------------|------------------------|--------------|
| Bridge/Berkeley Food & Housing                           |             |             | \$3,967,548            | \$3,967,548  |
| 1638 Stuart St (BACLT Small Sites)                       |             |             | \$50,000               | \$50,000     |
| SAHA (Oxford Street)                                     |             |             | \$25,000               | \$25,000     |
| SAHA/Grayson Apartments                                  | \$876,000   | \$1,020,827 | \$598,173              | \$2,495,000  |
| Subtotal                                                 |             |             |                        | \$6,537,548  |
| <i>Development - Reserved</i>                            |             |             |                        |              |
| Bridge/Berkeley Food & Housing(2)                        |             |             |                        | \$23,500,000 |
| BACLT Small Sites                                        |             |             | \$950,000              | \$950,000    |
| SAHA (2)                                                 |             |             |                        | \$6,000,000  |
| Subtotal                                                 |             |             |                        | \$30,450,000 |
| Total HOME Projects                                      |             |             |                        | \$813,509    |
| Community Allocations for Housing Development and Rehab. |             |             |                        | \$451,662    |
| <i>Prevention of Displacement</i>                        |             |             |                        |              |
| FY 2018                                                  |             |             | \$650,000              | \$650,000    |
| FY 2019                                                  |             |             | \$650,000              | \$650,000    |
| Subtotal                                                 |             |             |                        | \$1,300,000  |

## Attachment 1: Spring 2019 Revised Draft Bi-Annual Report

|                                                   |  |  |  |                     |
|---------------------------------------------------|--|--|--|---------------------|
| <i>Staffing and Administration</i>                |  |  |  |                     |
| Subtotal                                          |  |  |  | \$350,000           |
| <b>TOTAL FUNDS<br/>COMMITTED AND<br/>RESERVED</b> |  |  |  | <b>\$39,902,719</b> |

- 1) Local funding sources include Housing Trust Funds, U1 and additional General Funds.
- 2) No sources indicated.

Finally, the City passed Measure O in Fall 2018. This measure authorized the City to issue up to \$135 million in bonds to be paid for by an increase in the property tax for 36 years. These bonds can be used "to fund housing for "low-, very low-, low-, median, and middle-income individuals and working families, including teachers, seniors, veterans, the homeless, students, people with disabilities, and other vulnerable populations," according to ballot language. These bonds have not yet been issued, so the future financial resources from this bond measure are not included in this report.3.

#### *Recommendations for 2019 Expenditures*

Table 3 provides the Housing Advisory Commission's funding recommendations for 2019 designed to increase the supply of affordable housing and protect Berkeley residents from homelessness. It should be noted that there is some overlap. For example, funding for a small sites program could be provided by the Housing Trust Fund, and a small sites program could also be based on a land trust model. In addition, this is not intended to be an exhaustive list of the City's expenditures for increasing the supply of affordable housing or for protecting residents from homelessness.

**Table 3: 2019 Funding Recommendations**

|                                                      |             | <b>% of Committed Funds</b> |
|------------------------------------------------------|-------------|-----------------------------|
| Anti-Displacement                                    | \$900,000   | 18%                         |
| Administrative Costs                                 | \$350,000   | 7%                          |
| Small Sites/Community Land Trusts                    | \$1,000,000 | 20%                         |
| Housing Trust Fund                                   | \$2,500,000 | 50%                         |
| Development of New Housing Programs (Housing Co-Ops) | \$250,000   | 5%                          |
| Total (2019)                                         | \$5,000,000 | 100%                        |

**Attachment 1: Spring 2019 Revised Draft Bi-Annual Report***4. Potential Future Recommendations under Consideration by the Housing Advisory Commission*

As part of the 2018 work plan, the Housing Advisory Commission identified numerous potential programs, which it is in the process of evaluating and designing. Moving forward, the HAC may put some of these ideas forward to the City Council. The current nine members of the Housing Commission responded to a poll regarding some of the strategies/programs included in the most recent Work Plan.<sup>3</sup> Table 4 presents poll results. The poll required a “yes” or “no” vote.

- The strategies supported by all commissioners included funds for the Housing Trust Fund and Community Land Trusts.
- Those strategies supported by almost all of the Commissioners included anti-displacement services, expansion of the small sites program, and group equity/zero equity co-ops.
- Finally, home sharing and supportive mental health services received support from less than two-thirds of the Commissioners, but still a majority of the members.<sup>4</sup>

Since a majority of Commissioners supported all these activities/strategies, they represent a good starting point for recommendations on how 2019/20 housing funds could be allocated. With the exception of home sharing and supportive mental health services, three-quarters of the commissioners supported the other strategies listed in Table 4.

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<sup>3</sup> A more detailed description of these Work Plan recommendations can be found at [https://www.cityofberkeley.info/uploadedFiles/Housing/Commissions/Commission\\_for\\_Housing\\_Advisory/2018-7-11%20HAC%20Agenda%20Packet%20COMPLETE\(2\).pdf](https://www.cityofberkeley.info/uploadedFiles/Housing/Commissions/Commission_for_Housing_Advisory/2018-7-11%20HAC%20Agenda%20Packet%20COMPLETE(2).pdf)

<sup>4</sup>According to two commissioners who provided comments, mental health services are outside the auspices of the HAC and Housing Division. Another member indicated that they need more information in order to assess support for these services. Additional comments included in the poll results are included in Attachment 2.

## Attachment 1: Spring 2019 Revised Draft Bi-Annual Report

**Table 4: Commissioner Poll Results**

| <b>Activities/Strategies</b>                                                             | <b>Percent Supporting</b> |
|------------------------------------------------------------------------------------------|---------------------------|
| East Bay Community Law Center to help tenants who are at-risk of displacement (1)        | 88%                       |
| Supportive Mental Health Services to assist Residents who have housing remain housed (1) | 63%                       |
| Expand Supply of Affordable Housing (Small Sites Program)                                | 89%                       |
| Housing Trust Fund (for leveraging of new construction)                                  | 100%                      |
| ADU Development                                                                          | 78%                       |
| Tenant Option to Purchase                                                                | 78%                       |
| Group Equity and Zero Equity Co-ops (1)                                                  | 88%                       |
| Community Land Trusts                                                                    | 100%                      |
| Home Sharing                                                                             | 56%                       |

- (1) The percentage of HAC members supporting these three issues is based on responses from eight out of nine members of the HAC. One of the members did not vote on these three strategies, because the member indicated more information was needed to provide input.

## Attachment 2: Housing Revenues and Expenditures

**Table 1.1:  
February 2019 U1 Revenues**

|                      |                    |
|----------------------|--------------------|
| FY 2018 Revenues     | \$5,161,615        |
| FY 2019 YTD Revenues | \$865,451          |
| <b>Total</b>         | <b>\$6,027,066</b> |

Source: City of Berkeley

**Table 1.2: February 2019 Committed Expenditures Preventing Homelessness**

| Use                                              | Anti-Displacement FY18 | Anti-Displacement FY19 |
|--------------------------------------------------|------------------------|------------------------|
| Eviction Defense - Rent Board                    | \$300,000              | \$300,000              |
| Retention - East Bay Community Law Center - HHCS | \$250,000              | \$250,000              |
| Rapid Rehousing - HHCS                           | \$100,000              | \$100,000              |
| <b>Total</b>                                     | <b>\$650,000</b>       | <b>\$650,000</b>       |

Source: City of Berkeley

**Table 1.3: February 2019 Committed Expenditures Increasing Housing Supply**

|                                                                 |                    |
|-----------------------------------------------------------------|--------------------|
| Future Small Sites Program Activities – HHCS (not yet provided) | \$950,000          |
| Organizational Capacity Building (BACLT Contract)               | \$50,000           |
| <b>Sub-Total</b>                                                | <b>\$1,000,000</b> |

Source: City of Berkeley

**Table 1.4: Staff and Administrative Costs Funded by the General Fund**

|                                             |                  |
|---------------------------------------------|------------------|
| Finance Development Spec II Position - FY18 | \$150,757        |
| Other Administrative Costs - Fin FY18       | \$199,243        |
| <b>Sub-total</b>                            | <b>\$350,000</b> |

**Table 1.5: HOME Projects Allocations FY 2018-2019**

|                                            |                  |
|--------------------------------------------|------------------|
| HOME Admin.                                | \$81,351         |
| CHDO Operating Funds                       | \$28,115         |
| Housing Trust Fund                         | \$704,043        |
| <b>Subtotal HOME Projects FY 2018-2019</b> | <b>\$813,509</b> |

Source: City of Berkeley Annual Action Plan. (Does not include all funding)



### **Attachment 3: Future Program Recommendations in Development by the HAC**

Additional comments written on the Commissioner's Poll include the following:

- Small Sites Program - Perhaps use funds for organizational/program development minor support rather than support for purchasing sites at this time. Developers that have experience in affordable housing development should only be considered given the financial risks of this type of development and the complexities of small scattered-site developments.
- Tenant Option to Purchase - This is good for apartment buildings that contain fewer than 20 units. This approach could be combined with the institutional structure of Community Land Trusts. CLTs are an important model that can be used to support these types of ownership structures.
- Group Equity and Zero Equity Co-ops - It is possible that those most interested in co-ops would be UC Berkeley students. Is this the City of Berkeley's priority given the transient nature of university students?
- Home Sharing - Assistance to a service organization like HIP Housing is a good idea, but this strategy is a service and not affordable housing development of new units. Also, the City should be very careful with supporting this type of service given potential for abuse by tenants and/or landlords.

**Attachment 4: Summary Table as of May 2, 2019**

|                                                 | CDBG 2018-19     | HOME 2018-19       | Housing Trust Fund | Other           | General Fund<br>2018-19 | General Fund<br>2019-2020 | No Source           | Total               |
|-------------------------------------------------|------------------|--------------------|--------------------|-----------------|-------------------------|---------------------------|---------------------|---------------------|
| <b>Committed-New Affordable Housing</b>         |                  |                    |                    |                 |                         |                           |                     |                     |
| Bridge/Berkeley Food & Housing Project          |                  |                    | \$3,967,548        |                 |                         |                           | \$23,500,000        | \$27,467,548        |
| SAHA (Oxford Street)                            |                  |                    | \$25,000           |                 |                         |                           |                     | \$25,000            |
| SAHA (Grayson Apartments)                       | \$876,000        | \$1,020,827        | \$598,173          |                 |                         |                           |                     | \$2,495,000         |
| SAHA (Oxford Street)                            |                  |                    |                    |                 |                         |                           | \$6,000,000         |                     |
| <b>Subtotal-New Affordable Housing</b>          | <b>\$876,000</b> | <b>\$1,020,827</b> | <b>\$4,590,721</b> |                 |                         |                           | <b>\$29,500,000</b> | <b>\$35,987,548</b> |
| <b>Committed-Preservation</b>                   |                  |                    |                    |                 |                         |                           |                     |                     |
| BACLT Small Sites Program (1638 Stuart St.)     |                  |                    |                    |                 | \$950,000               |                           |                     | \$950,000           |
| BACLT Small Sites Capacity Building             |                  |                    |                    |                 | \$50,000                |                           |                     | \$50,000            |
| Housing Development & Rehabilitation            | \$380,613        |                    |                    | \$56,230        | \$14,819                |                           |                     | \$451,662           |
| <b>Subtotal-Preservation</b>                    | <b>\$380,613</b> |                    |                    | <b>\$56,230</b> | <b>\$1,014,819</b>      |                           |                     | <b>\$1,451,662</b>  |
| <b>Home Projects Allocations (FY 2018-2019)</b> |                  |                    |                    |                 |                         |                           |                     |                     |
| Administration                                  |                  | \$81,351           |                    |                 |                         |                           |                     | \$81,351            |
| CHDO Operating Funds                            |                  | \$28,115           |                    |                 |                         |                           |                     | \$28,115            |
| Housing Trust Fund                              |                  |                    | \$704,043          |                 |                         |                           |                     | \$704,043           |
| <b>Subtotal Home Projects</b>                   |                  | <b>\$109,466</b>   | <b>\$704,043</b>   |                 |                         |                           |                     | <b>\$813,509</b>    |
| <b>Committed-Anti-Displacement</b>              |                  |                    |                    |                 |                         |                           |                     |                     |
| Eviction Defense-Rent Board                     |                  |                    |                    |                 | \$300,000               | \$300,000                 |                     | \$600,000           |
| East Bay Community Law Center                   |                  |                    |                    |                 | \$250,000               | \$250,000                 |                     | \$500,000           |
| Rapid Re-Housing                                |                  |                    |                    |                 | \$100,000               | \$100,000                 |                     | \$200,000           |
| <b>Subtotal – Anti- Displacement</b>            |                  |                    |                    |                 | <b>\$650,000</b>        | <b>\$650,000</b>          |                     | <b>\$1,300,000</b>  |
| <b>Administrative Overhead</b>                  |                  |                    |                    |                 |                         |                           |                     |                     |
| Finance Development Specialist II               |                  |                    |                    |                 |                         | \$150,757                 |                     |                     |
| Other Administrative Costs                      |                  |                    |                    |                 |                         | \$199,243                 |                     |                     |
| <b>Subtotal-Administrative Overhead</b>         |                  |                    |                    |                 |                         | <b>\$350,000</b>          |                     | <b>\$350,000</b>    |

|                                           | CDBG 2018-19       | Home 2018-19       | Housing Trust Fund | Other           | General Fund<br>2018-19 | General Fund<br>2019-2020 | No Source           | Total               |
|-------------------------------------------|--------------------|--------------------|--------------------|-----------------|-------------------------|---------------------------|---------------------|---------------------|
| <b>Total Funds Committed and Reserved</b> | <b>\$1,256,613</b> | <b>\$1,130,293</b> | <b>\$5,294,764</b> | <b>\$56,230</b> | <b>\$1,664,819</b>      | <b>\$1,000,000</b>        | <b>\$29,500,000</b> | <b>\$39,902,719</b> |







Office of the City Manager

05

CONSENT CALENDAR  
September 25, 2018

To: Honorable Mayor and Members of the City Council

From: Dee Williams-Ridley, City Manager

Submitted by: Kelly Wallace, Interim Director, Health, Housing & Community Services

Subject: Disposition of City-Owned, Former Redevelopment Agency Properties at 1631 Fifth Street and 1654 Fifth Street

RECOMMENDATION

1. Adopt first reading of an Ordinance authorizing the sale of two City-owned, former Redevelopment Agency properties at 1631 Fifth Street and 1654 Fifth Street at market rate and deposit the proceeds in the City's Housing Trust Fund (HTF).
2. Direct the City Manager to issue a Request for Proposals to select a real estate broker to manage the sale.

SUMMARY

The City received two properties, a vacant lot and vacant single family home, that the Redevelopment Agency planned to sell prior to the statewide dissolution of redevelopment. The City Council previously approved the market rate sale of these properties as part of the state-mandated Long Range Development Management Plan adoption in 2014.

Neither site is large enough or zoned densely enough to support the cost-effective development and operation of affordable housing. Both properties would require investment of additional City funds before they could be used as housing. Selling the properties will yield a return on the City's Community Development Block Grant (CDBG) investment that will be applied to the City's priorities for permanent affordable housing via the Housing Trust Fund (HTF).

The sale of City properties requires City Council approval via ordinance. To maximize the number of interested buyers, staff are requesting Council authorization in advance of offering them for sale in the single family home market in lieu of requiring the buyer to wait for a sale contract to go to Council for approval.

FISCAL IMPACTS OF RECOMMENDATION

Staff estimate the combined sales may yield \$800,000 to \$1.5M, and that a broker's fee for selling them may be 3% of the sale price, or \$24,000 to \$45,000. The properties have not yet been appraised but will be during the sale process.

The properties were acquired with CDBG funds, which restricts revenue from their sales to CDBG-eligible uses. Staff recommend depositing the proceeds in the HTF so they can be used for CDBG-eligible housing activities including acquisition and rehabilitation. Staff will provide an information report following the sales to confirm the total contribution to the HTF.

#### CURRENT SITUATION AND ITS EFFECTS

The City owns two properties it received as the Successor Agency to Redevelopment: a 5,000 square foot vacant lot at 1631 Fifth Street and a vacant single family home at 1654 Fifth Street. The former Redevelopment Agency intended to sell both properties, but the process was halted due to redevelopment's dissolution statewide. Neither property has sufficient size or appropriate zoning to develop affordable housing efficiently, and any proposed affordable housing would be small scale and require additional City subsidies. The City also is incurring ongoing maintenance costs and liabilities while it holds the properties.

City staff consulted with legal counsel at Goldfarb & Lipman, LLP and the City Attorney's Office to review the applicability of the Surplus Lands Act to these former redevelopment agency properties. They concluded that process was not required and the properties could be sold at market rate. Given the relatively rapid pace of single family sales, staff are requesting the Council authorize the sale via ordinance prior to moving to market, and will provide an information report with the final revenue following the sales.

Staff are recommending the City issue an RFP to identify a local real estate broker with experience selling single family homes and small parcels. A private broker will have the expertise to manage single family sales (including marketing) and reach the broadest pool of Bay Area homebuyers.

At its July 11, 2018 meeting, the Housing Advisory Commission voted to support the staff recommendation:

Action: M/S/C (Owens/Amezcuca) to recommend to Council to approve the sale of two Successor Agency to Redevelopment properties at 1631 Fifth Street and 1654 Fifth Street at market value and deposit the proceeds in the Housing Trust Fund.

Vote: Ayes: Amezcua, Holman, Johnson, Kesarwani, Lewis, Owens, and Winters.  
Noes: Lord. Abstain: None. Absent: Tregub (excused), Wolfe (excused), and Wright (excused).

The possibility of using either of these properties in the Small Sites program was discussed at the July HAC meeting. An NCLT representative provided input on NCLT's past attempt to develop 1631 and inability to identify a feasible project, and, considering the additional investment of City funds that would be required for rehabilitation and development, it was determined that neither site is appropriate for this program.

**BACKGROUND**

Following the dissolution of all California redevelopment agencies, the Berkeley Redevelopment Agency prepared a state-mandated Long Range Development Management Plan (LRDMP) which the City Council, acting as the Successor Agency, adopted in 2014. The LRDMP included the recommendation to sell both sites at market rate. In 2015, for reasons related to Redevelopment law and the dissolution process, and acting at the direction of the State Department of Finance, the Redevelopment Agency’s Oversight Board removed these two properties from the LRDMP and listed them as housing assets to facilitate their disposition on the market.

The former Redevelopment Agency acquired these parcels with other acquisitions in this neighborhood between 1969 and 1971 as part of a larger "Neighborhood Development Program". The characteristics of each property are provided in *Figure 1*.

**Figure 1. Property Characteristics**

|                 | <b>1631 Fifth Street</b> | <b>1654 Fifth Street</b>  |
|-----------------|--------------------------|---------------------------|
| <b>Land Use</b> | Vacant Lot               | Vacant Single Family Home |
| <b>Lot Area</b> | 5,525 sq ft              | 5,353 sq ft               |
| <b>Acres</b>    | 0.13                     | 0.12                      |
| <b>Zoning</b>   | MU-R                     | MU-R/MULI                 |

**1631 Fifth Street**

In 1983, the Redevelopment Agency demolished a residential building at 1631 Fifth Street to build new affordable housing, but abandoned the plans after discovering high levels of lead contamination. The lot has remained vacant since this time. In 1997, the Redevelopment Agency approved the remediation and development of the site, but the selected developer was unable to execute an agreement and the sale was never completed.

The Redevelopment Agency conducted an RFP for housing at the site in 2008, but the only response was Northern California Land Trust’s (NCLT) proposal to move the Kenney Cottage (now at 1281 University Avenue) to the site. This proposal did not come to fruition due to NCLT’s bankruptcy, but NCLT did manage a small community garden at the site from 2009 to 2011. Staff confirmed the use of 1631 as a community garden does not make it subject to the limitations of Measure L related to parks and open space.

**1654 Fifth Street**

Records for this property between 1969 and 1986 are not readily available. In 1987, the property was rented to low-income tenants. In 1993, the property was renovated and

the tenants were provided a new lease with an option to purchase after ten years. The tenants did not secure financing when the Redevelopment Agency provided the option to purchase in 2004. In 2006 and 2007, the Agency solicited proposals for non-profit affordable housing developers to determine the viability of sale, however response was limited. NCLT submitted an offer to purchase, but the Redevelopment Agency rescinded its offer to sell following NCLT's bankruptcy filing. In 2010, the tenants were relocated from the site. In 2011, the Redevelopment Agency began proceedings for a market-rate sale of the property, but was forced to abandon its efforts following the adoption of the redevelopment dissolution legislation. The house has remained vacant since this time.

### ***Administration***

When the Redevelopment Agency dissolved, the Department of Health, Housing and Community Services took over managing its housing assets and other remaining responsibilities on behalf of the Successor Agency, although no staffing was added to handle these responsibilities. Former Redevelopment Agency assets assumed include 13 homebuyer loans, two properties under long-term leases and these two sites. HHCS pays the Public Works Department to provide periodic landscaping services for these properties and has responded to issues identified by the Fire Department associated with the neighbor's storage of materials outside 1654. As long as the City owns the sites, it will retain these ongoing costs and liabilities.

### **ENVIRONMENTAL SUSTAINABILITY**

There are no sustainability effects associated with the recommendation of this report.

### **RATIONALE FOR RECOMMENDATION**

Both sites have been intended for sale since they were first acquired by the Redevelopment Agency in the late 1960s and early 1970s as part of a neighborhood development initiative. The City Council previously approved the market rate sale of these properties as part of the LRDMP adoption in 2015.

Neither site is large enough or zoned densely enough to support the cost-effective development and operation of affordable housing. Both would require investment of additional City funds before they could be used as housing, whether in the rehabilitation of 1654 or construction at 1631. Selling the properties will yield a return on the City's CDBG investment that will be applied to the City's affordable housing priorities via the Housing Trust Fund. In addition to the Berkeley Way development commitment, the HTF recently provided two other proposed developments predevelopment loans — Satellite Affordable Housing Associates' Oxford Apartments and Bay Area Community Land Trust's Stuart Street rehabilitation. Staff also received HTF inquiries related to other development activities.

A small single family home and small vacant lot are not typical government real estate assets, and are better suited for sales by a real estate broker familiar with these types of properties and the local market. Private brokers have the resources and knowledge



needed for single family sales (including marketing) and are likely to reach the broadest pool of Bay Area homebuyers. The City opted to select a local real estate broker, Korman & Ng, for its most recent single family home sale of 2931 Shasta Road (a former Fire Department house) in 2012.

#### ALTERNATIVE ACTIONS CONSIDERED

The City could consider:

- Retaining these properties for a future determination on their usefulness. Staff are not recommending this option due to the small size and location of these properties as well as the costs and liabilities associated with holding vacant properties.
- Leasing the single family home (1654) to an individual household at an affordable rate. Staff are not recommending this option since the City does not have residential property management staff. Hiring an outside property management firm would not be financially feasible for a single property. The house has only had minimal maintenance since at least 2010 and likely has deferred maintenance and, at a minimum, minor rehabilitation needs, which would require additional investment.
- Selling or leasing both properties to a housing organization for development and operation as affordable housing. Staff are not recommending this option because it would require additional investment of City funds which are needed for developments currently in the pipeline. Rehabilitating and operating housing at this scale is not efficient and cannot leverage much (if any) non-City funds. The Redevelopment Agency did not receive viable proposals for previous attempts to develop affordable housing. HHCS received inquiries related to leasing the vacant site for the placement of tiny homes for the homeless or other populations but is recommending the market rate sale with proceeds going in to the Housing Trust Fund in order to expand permanent affordable housing opportunities.

#### CONTACT PERSON

Amy Davidson, Senior Community Development Project Coordinator, Health, Housing & Community Services, (510) 981-5406

Mike Uberti, Community Development Project Coordinator, Health, Housing & Community Services, (510) 981-5114

Attachments:

1: Ordinance

ORDINANCE NO. -N.S.

AUTHORIZING THE CITY MANAGER TO SELL CITY-OWNED, FORMER REDEVELOPMENT AGENCY PROPERTIES LOCATED AT 1631 FIFTH STREET AND 1654 FIFTH STREET

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

Section 1. The Council finds as follows:

- a. The City acquired the properties at 1631 Fifth Street and 1654 Fifth Street via its role as the Successor Agency to the Redevelopment Agency of the City of Berkeley.
- b. The Redevelopment Agency planned to sell each site prior to the redevelopment dissolution legislation.
- c. The Successor Agency Oversight Board, acting at the direction of the State Department of Finance, designated each property as a housing asset to facilitate their sale.
- d. City Charter Article VIII, Section 44(7) requires the sale of public property shall be by City Ordinance.
- e. The sites' status as former Redevelopment properties enables the City to follow redevelopment law's disposition requirements for market rate returns, and exempts the City from the Surplus Land Act (AB 2135).
- f. These properties were acquired with Community Development Block Grant (CDBG) funds, which restricts revenue from their sales to CDBG-eligible uses, including the Housing Trust Fund.
- g. The General Plan's Housing Element Policy H-2 states the City should aggressively search out, advocate for, and develop additional sources of funds for permanently affordable housing, including housing for people with extremely low incomes and special needs.
- h. Selling the properties at market rate will maximize Housing Trust Fund contributions, and provide leverage for permanent affordable housing projects.

Section 2. The City Manager is hereby authorized to take to necessary actions to sell the real property located at 1631 Fifth Street and 1654 Fifth Street, including:

- a. Establishing a purchase price that shall be equal to or greater than the appraised market value of the each property.
- b. Depositing the proceeds of the sale into the Housing Trust Fund.

- c. Issuing a Request for Proposals to contract with appropriate real estate professionals to market and sell the each property.
- d. Upon consultation with the City Attorney, the City Manager, or her designee, will execute all necessary documents to engage a vendor and to sell the each property.

Section 3. Copies of this Ordinance shall be posted for two days prior to adoption in the glass case located near the walkway in front of Old City Hall, 2134 Martin Luther King Jr. Way. Within 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.





Kate Harrison  
Councilmember District 4

06

ACTION CALENDAR  
October 29, 2019

To: Honorable Mayor and Members of the City Council  
From: Councilmembers Kate Harrison, Sophie Hahn, Cheryl Davila,  
and Ben Bartlett  
Subject: Inclusionary Units in Qualified Opportunity Zones

RECOMMENDATION

Adopt an ordinance amending Berkeley Municipal Code chapter 23C.12.035 requiring onsite inclusionary units in developments in Qualified Opportunity Zones (QOZs). Refer to the Adeline Corridor Subcommittee of the Planning Commission to consider how such a requirement would affect the Adeline Corridor Plan.

BACKGROUND

Qualified Opportunity Zones are urban areas associated with the 2017 Trump tax cuts.<sup>1</sup> The stated goal of QOZs is to incentivize investment in under-resourced urban areas by delaying capital gains taxes and circumventing altogether federal taxes on profits made in QOZs.<sup>2</sup> Ten years after an initial investment into a QOZ, the investor can sell the real estate and not owe any taxes on the profits. Investments in Qualified Opportunity Zones can increase an investor’s returns by 70%, according to the Congressional Research Service.<sup>3</sup> Though touted as a way to invest in under-resourced communities, many of the QOZs are in rapidly growing areas, with 75% of the tracts experiencing significant economic growth between 2001 and 2015<sup>4</sup> and 64% of tracts seeing a significant increase in new businesses during the same period.<sup>5</sup> Also, in the Bay Area, QOZs are often in gentrifying areas, reflecting a national pattern: almost 70% of all neighborhoods in

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<sup>1</sup> <https://www.nytimes.com/2019/08/31/business/tax-opportunity-zones.html>

<sup>2</sup> *Ibid.*

<sup>3</sup> [https://www.novoco.com/sites/default/files/atoms/files/crs\\_tax\\_incentives\\_for\\_ozs\\_112018.pdf](https://www.novoco.com/sites/default/files/atoms/files/crs_tax_incentives_for_ozs_112018.pdf)

<sup>4</sup> <https://www.opportunityzonelaw.com/single-post/2018/07/03/Five-Keys-from-the-Novogradac-2018-Opportunity-Zones-Workshop>

<sup>5</sup> *Ibid.*

America that gentrified between 2000 and 2017 either are in a Qualified Opportunity Zone or are adjacent to one.<sup>6</sup>

Five census tracts in Berkeley have been designated as Qualified Opportunity Zones, including Downtown, the Adeline Corridor and South Shattuck, South Berkeley between Sacramento and Shattuck, and part of West Berkeley between University and Dwight, San Pablo and 5<sup>th</sup> Street.<sup>7</sup> The five census tracts<sup>8</sup> in Berkeley are almost all low-income and predominantly Black communities and communities of color. They are as follows:

### Berkeley Opportunity Zone Demographics

| Tract Number | Bordering Streets                                                             | Poverty Rate       | Average Income |
|--------------|-------------------------------------------------------------------------------|--------------------|----------------|
| 4232         | West Berkeley between University and Dwight; San Pablo and 5 <sup>th</sup> St | 19.2%              | \$81,453       |
| 4229         | Downtown Berkeley between University and Dwight; Oxford and MLK               | 47.3%              | \$52,250       |
| 4235         | South Berkeley between Dwight and Ashby; Fulton and MLK                       | 20.9%              | \$62,386       |
| 4239.01      | Southern end of Adeline Corridor                                              | 13.9% <sup>9</sup> | \$90,882       |
| 4240.01      | Southern Berkeley between Ashby and City Limits; Sacramento and Adeline       | 18.1%              | \$60,809       |

### Inclusionary Housing in Berkeley

The Berkeley Housing Trust Fund (HFT) was established in 1990 to pool money from a variety of sources (including developer in-lieu fees) into a single pot for the purpose of constructing affordable housing.<sup>10</sup> From 2009<sup>11</sup> to 2017, localities were required by state law to offer project applicants the option of either building affordable units onsite or paying

<sup>6</sup> <https://ncrc.org/oz/>

<sup>7</sup> <https://opzones.ca.gov/oz-map/>

<sup>8</sup> <https://www.arcgis.com/home/item.html?id=92e085b0953348a2857d3d3dac930337#visualize>

<sup>9</sup> Please note that this poverty rate is too low to be considered a “low income census tract.”

<sup>10</sup> <https://www.cityofberkeley.info/ContentDisplay.aspx?id=6532>

<sup>11</sup> [http://www.reubenlaw.com/palmer\\_case\\_shakes\\_up\\_inclusionary\\_housing\\_rules\\_for\\_rental\\_projects/](http://www.reubenlaw.com/palmer_case_shakes_up_inclusionary_housing_rules_for_rental_projects/)

the in-lieu fee. Thus, pursuant to BMC 23C.12, all new projects in Berkeley with five or more units are currently required to *either* set aside 20% of their units as affordable, pay an in-lieu fee to the HFT, or some combination of both.

AB 2502 (known as the “Palmer Fix”) passed in 2017 and gives jurisdictions the authority to require onsite units instead of giving developers the option to pay an in-lieu fee. The decision to charge in-lieu fees, require inclusionary units, or leave the decision to developers is now set according to prevailing market forces and the desires of local policymakers.<sup>12</sup> Berkeley traditionally incentivized paying in-lieu fees, because the HTF was under-resourced and other funding sources were not available. This approach allowed construction of entirely affordable buildings by non-profits but had several drawbacks:

- Constructing affordable housing projects using in-lieu fees requires capital to be accrued over many years and results in delays in production that market-rate developers may not face.
- Building affordable units in primarily market-rate developments promotes integration of housing throughout the City.
- The state density bonus requires projects to set aside 10% of units for very low income households (at 30-50% the area median income), but there are not comparable state incentives for units affordable to low income households (earning from 50%-80% of area median income). Thus, the majority of project applicants who invoke the state density bonus build 10% of their units to be affordable to very low income households and then pay the in-lieu fee for the remaining local obligation, which would otherwise be required to be built for low-income households. According to the 2019 Housing Pipeline Report, of the 56 market-rate developments currently in the pipeline, 24 elected to utilize the density bonus and pay fees in lieu of the other 10% of affordable units and an additional 21 did not take advantage of the state density bonus and paid in-lieu fees for all or substantial proportion of the requirement. In contrast, 11 projects provided all 20% affordable units onsite. Thus, 80% (24 plus 21 out of 56) paid fees in lieu of some of the required units. Of the 23 projects listed that are now in a Qualified Opportunity Zone, 11 had no onsite affordable units, and seven took advantage of the state density bonus (see attachment 2).
- As a result of these mismatched incentives, Berkeley has achieved only 15% of its low income housing target<sup>13</sup> and 65% of the target set for very low income housing.<sup>14</sup>

<sup>12</sup> <http://inclusionaryhousing.org/designing-a-policy/off-site-development/in-lieu-fees/>

<sup>13</sup> <https://abag.ca.gov/our-work/housing/rhna-regional-housing-need-allocation>

<sup>14</sup> We see in the 2019 Housing Pipeline Report that Berkeley has achieved 65% of its Very Low Income housing goals, 15% of its Low Income housing goals, and 0% of both Extremely Low and Moderate Income goals.

- Since the passage of Measure O, much more funding for non-profit built affordable housing is available. It is critical, given the displacement occurring in Berkeley, to consider requiring some on-site units instead of providing the option of in-lieu fees.

Qualified Opportunity Zones are an ideal place to begin to require inclusionary on-site units. QOZs are intended to revitalize low-income communities, and requiring units affordable to lower-income households in these zones will prevent low-income individuals from being priced out of their own communities. Developers are given significant financial benefits under Opportunity Zones, and thus can include on-site units and still realize a profit.

#### FINANCIAL IMPLICATIONS

Will reduce contributions to the Affordable Housing Trust Fund.

#### ENVIRONMENTAL SUSTAINABILITY

The Qualified Opportunity Zones in Berkeley are along major transit corridors (Shattuck, Adeline, and San Pablo). Last year, Berkeley researchers concluded that infill housing along transit corridors is one of the most impactful policies municipalities can adopt to combat climate change.<sup>15</sup>

#### CONTACT PERSON

Councilmember Kate Harrison, Council District 4, (510) 981-7140

#### ATTACHMENTS

- 1: Ordinance
- 2: 2019 Housing Pipeline Report, highlighted with projects that are in Qualified Opportunity Zones as currently defined.

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<sup>15</sup> <https://rael.berkeley.edu/wp-content/uploads/2018/04/Jones-Wheeler-Kammen-700-California-Cities-Carbon-Footprint-2018.pdf>



AMENDING CHAPTER 23C.12.035 OF THE BERKELEY MUNICIPAL CODE TO  
REQUIRE ON-SITE INCLUSIONARY HOUSING UNITS IN QUALIFIED  
OPPORTUNITY ZONES

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

Section 1. That Berkeley Municipal Code Section 23C.12.035 is hereby amended to read as follows:

**23C.12.035 Payment of In-Lieu Fees as an Alternative to Providing Inclusionary Units within a Project**

A.

1. Applicability. As an alternative to providing inclusionary units required in an ownership project, the applicant may elect to enter in an agreement with the City to pay fees as set forth in this section, in-lieu of providing units that are not required to be provided at below market prices pursuant to Government Code Section 65915.

2. The contents of Section 23C.12.035 are not applicable to residential housing projects in Qualified Opportunity Zones

B. Purpose. The fee shall be deposited in the City's Housing Trust Fund.

C. Amount of Fee.

1. The in-lieu fee shall be sixty two and a half percent (62.5%) of the difference between the permitted sale price for inclusionary units and the amounts for which those units are actually sold by the applicant.

2. This fee shall be calculated and collected based on the sales prices of all of the units in a project to which the inclusionary requirement applies, such that the fee as charged shall be a percentage of the difference between the actual sales price for each unit, and the sales price that would have been permitted had that unit been an inclusionary unit. The percentage shall be determined using the following formula: the number of units for which an in-lieu fee is substituted for an inclusionary unit divided by the total number of units to which the inclusionary ordinance applies, multiplied by 62.5%.

3. This fee shall only be applicable to units in a project that are counted in determining the required number of inclusionary units in a project and shall not be applicable to any units provided as a density bonus.

4. In the event that the City Manager makes a determination that an actual sales price does not reflect the fair market value of a unit, the City Manager shall propose an alternate price based on the fair market value of the unit. In the event that the developer and the City Manager cannot agree on a fair market value the City Manager shall select an appraiser to carry out an appraisal of the unit and the appraised value shall be used as the market value.

D. Calculation of Inclusionary Sales Price.

1. The allowable inclusionary sales price for the purpose of calculating the in-lieu fee pursuant to this section shall be three (3) times eighty percent (80%) of the Area Median Income (AMI) last reported as of the closing date of the sale of the unit, with the exception that if the developer has already been authorized to charge an inclusionary sale price based on development costs pursuant to Ordinance 6,790-N.S. (adopted January 27, 2004, sunsetted February 19, 2006) the allowable inclusionary sale price for the purposes of this section shall be the price permitted under that ordinance.

2. Area median income (AMI) shall be calculated in accordance with the affordability regulations established by the City Manager pursuant to Section 23C.12.090.

E. Time of Payment of Fee. The developer shall be required to pay the applicable in-lieu fee no later than the closing date of the sale of a unit as a condition of said closing.

F. Use Permit Obtained Prior to Adoption of This Section. This section shall apply to projects for which all required Permits have already been issued, as long as no units on those projects to which this section would apply have been sold. (Ord. 6946-NS § 1, 2006)

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.

| Table 2 - Approved projects with more than 5 units: No Active Building Permit. |              |            |                        |                       |                      |                       |              |              |                |                     |         |                                    |                                                                                |          |                                                                    |
|--------------------------------------------------------------------------------|--------------|------------|------------------------|-----------------------|----------------------|-----------------------|--------------|--------------|----------------|---------------------|---------|------------------------------------|--------------------------------------------------------------------------------|----------|--------------------------------------------------------------------|
| #                                                                              | Street Name  | Zoning     | Ext Low<br><30%<br>AMI | VLI<br>31%-50%<br>AMI | LI<br>51%-80%<br>AMI | MOD<br>81-120%<br>AMI | BMR<br>Total | Above<br>MOD | Total<br>Units | Entitlement<br>Year | By:     | Building<br>Permit<br>Applied For? | Subtotals                                                                      |          |                                                                    |
| 2009                                                                           | Addison      | C-DMU      |                        |                       |                      |                       | 0            | 44           | 44             | 2018/2019           | ZAB     | No                                 | Units in<br>Approved<br>projects, no<br>BP yet applied<br>for:<br><b>1,289</b> |          |                                                                    |
| 2902                                                                           | Adeline      | C-SA & R-4 |                        | 4                     | 4                    | 1                     | 9            | 41           | 50             | 2017                | Council |                                    |                                                                                |          |                                                                    |
| 3051                                                                           | Adeline      | C-SA       |                        | 0                     | 0                    | 0                     | 0            | 11           | 11             | 2016                | ZAB     |                                    |                                                                                |          |                                                                    |
| 2028                                                                           | Bancroft     | C-DMU      |                        | 2                     |                      |                       | 2            | 35           | 37             | 2019                | ZAB     |                                    |                                                                                |          |                                                                    |
| 2012                                                                           | Berkeley Way | C-DMU      | 53                     | 54                    | 17                   |                       | 124          | 1            | 125            | 2018                | SB35    |                                    |                                                                                |          |                                                                    |
| 2211                                                                           | Harold       | C-DMU      |                        | 0                     | 0                    | 0                     | 0            | 302          | 302            | 2015                | Council |                                    |                                                                                |          |                                                                    |
| 1601                                                                           | Oxford       | R-3        |                        | 13                    | 21                   | 0                     | 34           | 3            | 37             | 2018                | SB35    |                                    |                                                                                |          |                                                                    |
| 1200                                                                           | San Pablo    | C-W        |                        | 5                     |                      |                       | 5            | 52           | 57             | 2018                | ZAB     |                                    |                                                                                |          |                                                                    |
| 1201                                                                           | San Pablo    | C-W        |                        | 0                     | 0                    | 5                     | 5            | 22           | 27             | 2006                | Council |                                    |                                                                                |          |                                                                    |
| 1740                                                                           | San Pablo    | C-W        |                        | 4                     |                      |                       | 4            | 48           | 52             | 2018                | ZAB     |                                    |                                                                                |          |                                                                    |
| 2100                                                                           | San Pablo    | C-W        |                        | 0                     | 0                    | 0                     | 0            | 96           | 96             | 2017/2019           | ZAB     |                                    |                                                                                |          |                                                                    |
| 2198                                                                           | San Pablo    | C-W        |                        | 5                     |                      |                       | 5            | 52           | 57             | 2019                | ZAB     |                                    |                                                                                |          |                                                                    |
| 2720                                                                           | San Pablo    | C-W        |                        | 0                     | 3                    | 0                     | 3            | 15           | 18             | 2007                | ZAB     |                                    |                                                                                |          |                                                                    |
| 2190                                                                           | Shattuck     | C-DMU      |                        | 0                     | 0                    | 0                     | 0            | 274          | 274            | 2019                | Council |                                    |                                                                                |          |                                                                    |
| 2701                                                                           | Shattuck     | C-SA       |                        | 0                     | 0                    | 4                     | 4            | 20           | 24             | 2007                | Council |                                    |                                                                                |          |                                                                    |
| 3000                                                                           | Shattuck     | C-SA       |                        | 2                     | 2                    | 0                     | 4            | 19           | 23             | 2018                | Council |                                    |                                                                                |          |                                                                    |
| 1040                                                                           | University   | C-W & R-3  |                        | 27                    | 0                    | 0                     | 27           | 0            | 27             | 2012                | ZAB     |                                    |                                                                                |          |                                                                    |
| 1717                                                                           | University   | C-1        |                        | 3                     | 0                    | 0                     | 3            | 25           | 28             | 2017                | ZAB     |                                    |                                                                                |          |                                                                    |
| 2072                                                                           | Addison      | C-DMU      |                        |                       |                      |                       | 0            | 55           | 55             | 2018/2019           | ZAB     |                                    |                                                                                | 10/26/18 | Units in<br>Approved<br>projects, BP<br>applied for:<br><b>284</b> |
| 2542                                                                           | Durant       | C-T        |                        | 0                     | 0                    | 0                     | 0            | 32           | 32             | 2018                | ZAB     |                                    |                                                                                | 4/4/19   |                                                                    |
| 2527                                                                           | San Pablo    | C-W        |                        | 6                     | 5                    | 0                     | 11           | 57           | 68             | 2018                | Council | 8/17/18                            |                                                                                |          |                                                                    |
| 3020                                                                           | San Pablo    | C-W        |                        | 2                     | 2                    | 0                     | 4            | 25           | 29             | 2007                | ZAB     | 2/11/15                            |                                                                                |          |                                                                    |
| 2628                                                                           | Shattuck     | C-SA       |                        |                       |                      |                       | 0            | 78           | 78             | 2019                | ZAB     | 5/9/19                             |                                                                                |          |                                                                    |
| 2556                                                                           | Telegraph    | C-T        |                        |                       |                      |                       | 0            | 22           | 22             | 2018                | ZAB     | 12/19/18                           |                                                                                |          |                                                                    |
| <b>Totals:</b>                                                                 |              |            | <b>53</b>              | <b>127</b>            | <b>54</b>            | <b>10</b>             | <b>244</b>   | <b>1,329</b> | <b>1,573</b>   |                     |         |                                    |                                                                                |          |                                                                    |

Table 3 – Approved projects with more than 5 units: Building permit issued.

| #              | Street Name | Zoning     | VLI<br>31%-50%<br>AMI | LI<br>51%-80%<br>AMI | MOD<br>81-120%<br>AMI | BMR<br>Total | Above<br>MOD | Total<br>Units | Entitlement<br>Year | By:     | Building<br>Permit<br>Issued | Est.<br>Completion<br>Date |
|----------------|-------------|------------|-----------------------|----------------------|-----------------------|--------------|--------------|----------------|---------------------|---------|------------------------------|----------------------------|
| 1950           | Addison     | C-DMU      | 5                     | 0                    | 0                     | 5            | 106          | 111            | 2016                | ZAB     | 11/17/17                     | 2019                       |
| 2126           | Bancroft    | C-DMU      | 5                     | 0                    | 0                     | 5            | 45           | 50             | 2016                | ZAB     | 11/6/17                      | 2019                       |
| 2580           | Bancroft    | C-T        | 11                    |                      |                       | 11           | 111          | 122            | 2018                | ZAB     | 5/21/19                      | 2020                       |
| 2035           | Blake       | C-SA       | 4                     | 0                    | 0                     | 4            | 78           | 82             | 2016                | Council | 8/10/17                      | 2020                       |
| 739            | Channing    | MU-R       |                       |                      |                       | 0            | 10           | 10             | 2018                | ZAB     | 6/12/18                      | Unknown                    |
| 2510           | Channing    | C-T        | 3                     |                      |                       | 3            | 37           | 40             | 2018                | ZAB     | 4/5/18                       | 2020                       |
| 2631           | Durant      | R-SMU      | 0                     | 0                    | 0                     | 0            | 56           | 56             | 2016                | Council | 12/1/17                      | 2020                       |
| 1500           | San Pablo   | C-W & R-1A | 16                    | 0                    | 0                     | 16           | 154          | 170            | 2016                | Council | 12/21/17                     | 2020                       |
| 2747           | San Pablo   | C-W        | 3                     | 3                    | 0                     | 6            | 33           | 39             | 2007                | ZAB     | 8/18/17                      | 2020                       |
| 2748           | San Pablo   | C-W        | 23                    | 0                    | 0                     | 23           | 0            | 23             | 2014                | ZAB     | 5/17/18                      | 2019                       |
| 2539           | Telegraph   | C-T        | 6                     | 0                    | 0                     | 6            | 64           | 70             | 2016                | ZAB     | 10/20/17                     | 2019                       |
| 2597           | Telegraph   | C-T & R-2  | 1                     | 0                    | 0                     | 1            | 9            | 10             | 2017                | Council | 8/9/18                       | 2020                       |
| 1698           | University  | C-1        | 3                     | 0                    | 0                     | 3            | 33           | 36             | 2014                | ZAB     | 10/19/18                     | 2020                       |
| 2067           | University  | C-DMU      | 4                     | 0                    | 0                     | 4            | 46           | 50             | 2016                | ZAB     | 10/10/18                     | 2020                       |
| 2111           | University  | C-DMU      | 6                     | 0                    | 0                     | 6            | 62           | 68             | 2013                | ZAB     | 6/27/18                      | 2020                       |
| 2131           | University  | C-DMU      | 2                     | 0                    | 0                     | 2            | 19           | 21             | 2013                | ZAB     | 6/27/18                      | 2020                       |
| 2145           | University  | C-DMU      | 3                     | 0                    | 0                     | 3            | 33           | 36             | 2013                | ZAB     | 6/27/18                      | 2020                       |
| 1900           | Walnut      | C-DMU      | 7                     | 0                    | 0                     | 7            | 73           | 80             | 2013                | ZAB     | 6/27/18                      | 2020                       |
| <b>Totals:</b> |             |            | <b>102</b>            | <b>3</b>             | <b>0</b>              | <b>105</b>   | <b>969</b>   | <b>1,074</b>   |                     |         |                              |                            |

| Table 4 – Approved projects with more than 5 units: Building Permit Issued after 2014 and now occupied. |             |             |                       |                      |                       |              |              |                |                     |         |                              |                  |
|---------------------------------------------------------------------------------------------------------|-------------|-------------|-----------------------|----------------------|-----------------------|--------------|--------------|----------------|---------------------|---------|------------------------------|------------------|
| #                                                                                                       | Street Name | Zoning      | VLI<br>31%-50%<br>AMI | LI<br>51%-80%<br>AMI | MOD<br>81-120%<br>AMI | BMR<br>Total | Above<br>MOD | Total<br>Units | Entitlement<br>Year | By:     | Building<br>Permit<br>Issued | Complete<br>Date |
| 1935                                                                                                    | Addison     | C-DMU       | 0                     | 0                    | 0                     | 0            | 69           | 69             | 2013                | Council | 10/17/14                     | 5/26/17          |
| 2002                                                                                                    | Addison     | C-DMU       | 0                     | 0                    | 0                     | 0            | 6            | 6              | 2016                | ZAB     | 2/1/18                       | 8/28/18          |
| 2024                                                                                                    | Durant      | C-DMU       | 0                     | 0                    | 0                     | 0            | 78           | 78             | 2013                | Council | 7/8/14                       | 12/7/15          |
| 2526                                                                                                    | Durant      | C-T         | 0                     | 0                    | 0                     | 0            | 44           | 44             | 2014                | ZAB     | 2/18/14                      | 6/30/17          |
| 2532                                                                                                    | Durant      | C-T         | 0                     | 0                    | 0                     | 0            | 7            | 7              | 2016                | ZAB     | 6/23/17                      | 1/30/19          |
| 2107                                                                                                    | Dwight      | C-DMU       | 9                     | 0                    | 0                     | 9            | 90           | 99             | 2012                | ZAB     | 12/1/17                      | 3/24/17          |
| 2201                                                                                                    | Dwight      | R-S         | 7                     | 0                    | 0                     | 7            | 70           | 77             | 2013                | ZAB     | 6/3/15                       | 11/17/16         |
| 2227                                                                                                    | Dwight      | R-3         | 0                     | 0                    | 0                     | 0            | 6            | 6              | 2013                | Council | 9/7/15                       | 5/25/18          |
| 2001                                                                                                    | Fourth      | C-W         | 12                    | 0                    | 0                     | 12           | 140          | 152            | 2014                | ZAB     | 4/1/16                       | 7/31/18          |
| 2441                                                                                                    | Haste       | C-T         | 0                     | 0                    | 0                     | 0            | 42           | 42             | 2013                | ZAB     | 5/7/14                       | 6/27/16          |
| 3132                                                                                                    | MLK         | C-SA        | 0                     | 41                   | 0                     | 41           | 1            | 42             | 2007                | ZAB     | 11/20/15                     | 12/7/17          |
| 3015                                                                                                    | San Pablo   | C-W         | 8                     | 7                    | 0                     | 15           | 83           | 98             | 2007                | Council | 3/19/14                      | 2/16/16          |
| 2598                                                                                                    | Shattuck    | C-SA & R-2A | 4                     | 3                    | 0                     | 7            | 25           | 32             | 2014                | Council | 5/1/15                       | 5/31/17          |
| 2600                                                                                                    | Shattuck    | C-SA & R-2A | 12                    | 12                   | 0                     | 24           | 99           | 123            | 2014                | Council | 1/1/14                       | 3/17/17          |
| 2711                                                                                                    | Shattuck    | C-SA        | 0                     | 0                    | 0                     | 0            | 18           | 18             | 2016                | ZAB     | 9/6/17                       | 9/1/18           |
| 800                                                                                                     | University  | C-W         | 4                     | 0                    | 0                     | 4            | 54           | 58             | 2013                | ZAB     | 7/15/14                      | 12/2/15          |
| 824                                                                                                     | University  | C-W         | 4                     | 0                    | 0                     | 4            | 44           | 48             | 2015                | ZAB     | 8/20/15                      | 2/6/18           |
| 1812                                                                                                    | University  | C-1         | 4                     | 0                    | 0                     | 4            | 40           | 44             | 2014                | ZAB     | 6/25/15                      | 3/7/17           |
| 1974                                                                                                    | University  | C-DMU       | 8                     | 0                    | 0                     | 8            | 90           | 98             | 2014                | ZAB     | 9/29/15                      | 10/3/17          |
| <b>Totals:</b>                                                                                          |             |             | <b>72</b>             | <b>63</b>            | <b>0</b>              | <b>135</b>   | <b>1,006</b> | <b>1,141</b>   |                     |         |                              |                  |





**SOPHIE HAHN**  
Berkeley City Council, District 5  
2180 Milvia Street, 5th Floor  
Berkeley, CA 94704  
(510) 981-7150  
shahn@cityofberkeley.info

07

**ACTION CALENDAR**  
October 29, 2019

To: Honorable Members of the City Council  
From: Councilmember Sophie Hahn  
Subject: Proposed Formula Retail (Chain Store) Regulations

**RECOMMENDATION**

1. Refer to the City Manager and Planning Commission to finalize and return to the City Council for adoption an Ordinance and related amendments to the Berkeley Municipal Code, if any, based on the Draft Formula Retail Ordinance attached hereto, to establish Formula Retail regulations for Commercial and Manufacturing Districts in the City of Berkeley.
2. Refer to the City Manager and Planning Commission to:
  - a. Recommend establishment of Business District boundaries and names, as provided for in Section 23E.18.030(B) of the proposed Formula Retail Ordinance, and
  - b. Through a process that includes public notice and input, as described in the proposed Formula Retail Ordinance, recommend for each Business District whether to allow unlimited Formula Retail, limited Formula Retail (some or all use categories allowed with a Use Permit, Neighborhood Notice, Design Review and findings) or to prohibit Formula Retail.

**SUMMARY STATEMENT**

Small businesses are the backbone of Berkeley’s economic health, and represent a significant portion of our living-wage jobs. Unfortunately, they are threatened by increasing costs, displacement, and growing competition from online stores and chain retailers. Though chain or “Formula Retail” establishments have a role in the mix of businesses operating in Berkeley, an oversaturation of Formula Retail negatively impacts the local character of business districts and makes it more difficult for small businesses to become established, to survive, and to thrive.

Berkeley can strengthen protections for small, local and diverse businesses by limiting the number and location of Formula Retail uses in each business district. Formula Retail restrictions, in place in San Francisco for over 15 years and operative in other California cities that value local business and character, are simple and flexible, and tailored to meet the unique needs, values and sensibilities of each business district.

Formula Retail restrictions establish a definition of Formula Retail and then determine, on a business district by business district basis, whether the district will allow an unlimited amount of Formula Retail; limited Formula Retail; Formula Retail only under specified conditions; or whether a business district will prohibit Formula Retail entirely. Where Formula Retail is limited or allowed only under specified conditions, a Use Permit to establish a Formula Retail Use is required. In districts where no Formula Retail is allowed, or where unlimited Formula Retail is allowed, a Formula Retail Use Permit is not required. Businesses that do not meet the definition of Formula Retail -- smaller and local businesses, including small local chains with up to 20 outlets -- have no new requirements under the regulations.

San Francisco's Formula Retail Ordinance is an excellent model for Berkeley to adapt and follow. It has been in place for more than 15 years, and was the subject of a comprehensive evaluation, which resulted in a revised -- and improved -- regulatory framework. This item proposes that the City of Berkeley implement Formula Retail legislation, patterned after San Francisco, to limit saturation of Formula Retail, support small and local businesses, and preserve the character and quality of our business districts and neighborhood shopping areas.

## **BACKGROUND**

Berkeley's unique character is owed in large part to the presence of small businesses, and these businesses contribute significantly to the economic and cultural vitality of the City. However, small and locally owned businesses face significant challenges due to increasing costs of doing business, constraints of available space, and growing competition from online stores and expanding chain retailers.

### **Challenges Facing Small and Local Businesses**

A basic challenge that many small and local businesses face is finding an affordable location. Commercial rents throughout the Bay Area, including in Berkeley, have risen dramatically in recent years. One estimate found that between 2016 and 2018 office rents in Berkeley increased 15% to 20%.<sup>1</sup> Small businesses are much less likely than chain stores to be able to afford high initial rents when finding new space or to endure annual rent increases, while chain stores are well-equipped to negotiate better rents or afford higher ones. Berkeley's rent stabilization ordinance, which protects and regulates residential rents, does not apply to commercial property as commercial rent control is prohibited by the State.

Small businesses also struggle to find appropriately-sized store fronts. In the Bay Area, 80% of local, independent businesses occupy locations smaller than 3,000 square feet, while 85% of

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<sup>1</sup> [https://www.cityofberkeley.info/uploadedFiles/Manager/Economic\\_Development/2017-01-16%20WS%20Item%2001%20Economic%20Development%20Worksession.pdf](https://www.cityofberkeley.info/uploadedFiles/Manager/Economic_Development/2017-01-16%20WS%20Item%2001%20Economic%20Development%20Worksession.pdf)



chain retailers occupy a space larger than 3,000 square feet.<sup>2</sup> As demand for small commercial space has increased in urban neighborhoods, supply has not kept pace. In addition, once a space has been occupied by a chain store, or several spaces have been combined for a chain store, and the space has been changed to suit larger-scale needs, it is less likely that a smaller retailer will be able to occupy the space in the future. Thus, storefronts that have been occupied by chain stores can prohibit small businesses from taking hold, even when a property is vacant.

Because most existing commercial spaces in neighborhood commercial districts are small, the proliferation of larger-floorplate uses -- whether through the combination of existing spaces or construction of new buildings -- not only displaces existing neighborhood businesses but can permanently destroy the character and scale of the district.

With the benefits of global supply chains, public subsidies, and, often, reduced competition, chain and online stores are able to undercut small and independent businesses. A study of West Side Chicago businesses found that the opening of a Walmart in 2006:

*"led to the closure of about one-quarter of the businesses within a four-mile radius [...] By the second year, 82 of the businesses had closed. Businesses within close proximity of Walmart had a 40 percent chance of closing. The probability of going out of business fell 6 percent with each mile away from Walmart."*<sup>3</sup>

This data suggests that large chain retailers negatively impact surrounding businesses because they undercut prices. However these reduced prices do not last for long:

*"Once the chain has eliminated the local competition, prices tend to rise. In Virginia, a survey of several Walmart stores statewide found prices varied by as much as 25 percent. The researchers concluded that prices rose in markets where the retailer faced little competition. A similar conclusion was reached in a survey of Home Depot. Prices were as much as 10 percent higher in Atlanta compared to the more competitive market in Greensboro, North Carolina."*<sup>4</sup>

Local independent businesses are also threatened by online platforms and online marketing by chain retailers. For example, one study showed that 55% of online shoppers search for products directly on Amazon, bypassing search engines that may show local results. This means a local retailer wishing to sell its products and services online can easily be undercut and driven out of business, even if demand for their products persists in their community. In part due to market consolidation, the number of new businesses launched each year has fallen by nearly two-thirds in recent decades. Between 2005 and 2015, the number of small retailers fell by 21%.

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<sup>2</sup> <https://ilsr.org/watch-san-franciscos-anmarie-rodders-on-how-the-citys-formula-business-policy-works/>

<sup>3</sup> <http://journals.sagepub.com/doi/abs/10.1177/0891242412457985>

<sup>4</sup> Elizabeth Humstone and Thomas Muller, "Impact of Wal-Mart on Northwestern Vermont," prepared for the Preservation Trust of Vermont, the Vermont Natural Resources Council, and Williston Citizens for Responsible Growth, 1995; Chris Rouch, "Home Depot using predatory pricing tactics, critics say," *Atlanta Journal & Constitution*, March 18, 1995, p. 1B.

Large chains and online retailers are able to absorb costs and suffer losses where small and local businesses cannot. Amazon, as an extreme example, can regularly undercut other online prices for extended periods of time to drive out competition, even if it means taking a temporary loss on those items; monopoly pricing on other items is a more than adequate offset. By contrast, small businesses, often run on razor-thin margins, lack the necessary financial and structural cushions to survive even a few months' downturn in sales or rise in rent, and cannot match anti-competitive pricing at below cost levels.

### **Benefits of Small and Local Businesses**

Small and locally-owned businesses provide numerous benefits to the communities they serve through the creation of locally-owned supply chains and investment in local employees. In fact, they stimulate local economies to a greater degree than chains. Small businesses reinvest a higher percentage of their profits into the local economy than chains, recirculating 45% of their revenue back into the local economy, compared to 17% recirculated locally by chain stores.<sup>5</sup> A study in Austin, Texas, showed that independent book and music stores returned more than three times as many dollars to the local economy than a proposed large chain book and music outlet would have returned.<sup>6</sup>

Local businesses tend to purchase goods and services from other local businesses, while large chains leverage global supply chains and sometimes even global workforces. Chains have little reason to invest capital in a local economy when more profitable alternatives exist elsewhere, which leads to a lower percentage of their revenue recirculating into the local economy.<sup>7</sup>

Besides contributing to local economic activity, the presence of small and locally-owned businesses results in higher incomes and lower levels of poverty in their communities, while big-box retailers depress wages and benefits for retail employees. Workers in chain retailers also rely more heavily on government subsidies and public assistance, due to the low wages they receive. In Massachusetts, a report showed that of the 50 companies that had the most employees enrolled in the state's low-income and safety net health insurance programs, about half were employees of retail and restaurant chains.<sup>8</sup>

Beyond economic factors, small and locally-owned businesses also contribute to vibrant and engaged commercial centers and neighborhoods. High concentrations of small businesses can lead to improved public health outcomes,<sup>9</sup> stronger social ties, higher levels of civic

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<http://nebula.wsimg.com/31f003d5633c543438ef0a5ca8e8289f?AccessKeyId=8E410A17553441C49302&disposition=0&alloworigin=1>

<sup>6</sup> <https://www.amiba.net/resources/multiplier-effect/>

<sup>7</sup> [http://www.independentwestand.org/wp-content/uploads/ThinkingOutsidetheBox\\_1.pdf](http://www.independentwestand.org/wp-content/uploads/ThinkingOutsidetheBox_1.pdf)

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<http://ilsr.org/wp-content/uploads/2011/12/massachusetts-50-plus-employers.pdf>

<sup>9</sup> "The Health and Wealth of US Counties: How the Small Business Environment Impacts Alternative Measures of Development," Troy C. Blanchard, et al., *Cambridge Journal of Regions, Economy, and Society*, 2011

engagement, and more resilient communities overall.<sup>10</sup> Data from three major cities (San Francisco, Seattle, and Washington D.C.) showed that commercial districts within cities with fewer chain stores and more local businesses performed better in certain economic, social, and environmental outcomes, by increasing the walk and transit score of the city, offering business districts that are more affordable and flexible to a larger variety of entrepreneurs, and helping the local economy thrive by providing more jobs per square foot.<sup>11,12</sup>

### **What is Formula Retail?**

Formula retailers -- chain stores -- are establishments with multiple locations that utilize standardized features or a recognizable appearance to encourage patronage. Recognition is dependent upon the repetition of characteristics of one store in multiple locations. Though formula retailers can serve a role within a shopping district, an oversaturation of formula retail outlets reduces the unique character of a district and can contribute to reduced economic activity overall, and make it more difficult for small businesses to survive. Moreover, the generic quality of formula retail runs contrary to General Plan and other Berkeley policies which support enhancement of the unique character of shopping districts and a diversity of business types.

### **Regulating Formula Retail**

Communities across the country have employed different strategies to address problems raised by over-concentration of formula retail. Formula retail legislation typically seeks to define the following factors:

- Number of worldwide locations a retailer must have to qualify as a “formula retailer”
- Characteristics that create a recognizable brand across multiple locations, including standardized features, employee uniforms, products, displays, or signage
- Types of retail uses or services that are subject to formula retail legislation and districts where formula retail is limited or prohibited, and
- Administrative process for prohibiting, managing, or modifying formula retail across the community or in specific districts.

### **San Francisco’s Formula Retail Framework**

Of the many communities that have implemented a formula retail ordinance, San Francisco has most fully articulated these principles in crafting its policies. Because of the significant resources San Francisco has committed to formula retail regulation, and the length of time regulations have been in place, its regulatory framework has been subject to improvements over time, and provides an excellent model for Berkeley to adapt and follow.

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<sup>10</sup> <https://ilsr.org/why-care-about-independent-locally-owned-businesses/>

<sup>11</sup>

<http://forum.savingplaces.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=b73e8fc7-7fb2-0fc7-202c-d0ed58ff3089&forceDialog=0>

<sup>12</sup> <https://www.frbatlanta.org/community-development/publications/discussion-papers/2013/01-do-local-business-ownership-size-matter-for-local-economic-well-being-2013-08-19.aspx>

In 2004, San Francisco first enacted legislation to regulate formula retail. The ordinance was revised in 2014, reflecting recommendations outlined in a study of the first ten years of the policy.<sup>13</sup> The ordinance remains in force, and is an effective deterrent against a proliferation of chain stores. Thanks in part to its formula retail policies, San Francisco has more independent businesses and fewer chains per capita than other big cities.<sup>14</sup>

The San Francisco ordinance establishes a conditional use application process for any retail store or restaurant that meets the definition of formula retail. A formula retailer is defined as:

*“a type of retail sales activity or retail sales establishment that has eleven or more other retail sales establishments in operation, or with local land use or permit entitlements already approved, located anywhere in the world. In addition to the **eleven or more** other retail sales establishments located in the World, maintains two or more of the following features: a **standardized** array of **merchandise**, a standardized **facade**, a standardized **decor and color scheme**, a uniform **apparel**, standardized **signage**, a trademark or a servicemark.” (SF Planning Code, § 303.1)*

In certain districts, formula retail is unrestricted (e.g., the downtown district) or entirely disallowed (e.g., North Beach, parts of Chinatown). In most of San Francisco, including the city’s Neighborhood Commercial Districts, formula retail is allowed through a conditional use process in which the business application is reviewed by the SF Planning Commission, discussed at a public hearing, and approved (or denied) on a case-by-case basis. Each application is evaluated based on a number of factors:

- Existing concentration of formula retail businesses within the neighborhood
- Availability of similar goods or services within the area
- Compatibility of the proposed business with the character of the neighborhood (including aesthetic features)
- Retail vacancy rates in the area, and
- The balance of neighborhood-serving versus citywide or regional-serving businesses.<sup>15</sup>

This process allows the SF Planning Commission to exercise discretion and respond to on a case-by-case basis to each business district’s unique character and mix of businesses. By limiting formula retail, rents have remained lower in some districts, reducing costs for independent retailers.<sup>16</sup> San Francisco’s conditional use permits allow the City to require formula retailers to have pedestrian friendly designs, aesthetics that do not detract from local character, and meet other aesthetic standards.<sup>17</sup> Of the applications submitted by formula

<sup>13</sup> [http://208.121.200.84/ftp/files/legislative\\_changes/form\\_retail/Final\\_Formula\\_Retail\\_Report\\_06-06-14.pdf](http://208.121.200.84/ftp/files/legislative_changes/form_retail/Final_Formula_Retail_Report_06-06-14.pdf)

<sup>14</sup> <https://ilsr.org/rule/formula-business-restrictions/2321-2/>

<sup>15</sup> <https://ilsr.org/rule/formula-business-restrictions/2321-2/>

<sup>16</sup> [http://default.sfplanning.org/legislative\\_changes/form\\_retail/Final\\_Formula\\_Retail\\_Report\\_06-06-14.pdf](http://default.sfplanning.org/legislative_changes/form_retail/Final_Formula_Retail_Report_06-06-14.pdf)

<sup>17</sup> <https://ilsr.org/watch-san-franciscos-anmarie-rodgers-on-how-the-citys-formula-business-policy-works/>

retailers during 2004-14, approximately 70% were approved, often with modifications, demonstrating that the conditional permit process is well crafted to balance interests, without unduly restricting formula retail.

Research conducted by San Francisco in 2014 found that only 5% of “chains” had 20 or fewer worldwide locations.<sup>18</sup> While San Francisco did not adopt 20 as the threshold for defining a formula retail activity or enterprise, we are proposing 20 as the threshold to ensure that fast-growing start-ups in the region can grow and thrive. Many small businesses that originate in Berkeley or the Bay Area establish outlets region-wide to help make their businesses sustainable. Berkeley can benefit by having these local emerging small chains in our community while still receiving the economic benefits of local or regional ownership.

## **REVIEW OF EXISTING PLANS, PROGRAMS, POLICIES, AND LAWS**

### **General Plan**

The City of Berkeley has taken an active role in economic development and legislation to better serve the needs of the small and local business community, and to promote the positive economic and social outcomes associated with a thriving small business environment. The policies of the General Plan and Office of Economic Development guide the City's actions towards actively promoting community and neighborhood values with independent, locally owned, and neighborhood serving businesses.

- Goal #1 of the General Plan is to “Preserve Berkeley’s unique character & quality of life”, which includes protecting the City’s economic diversity.
- Goal #2 of the General Plan also identifies supporting local businesses and neighborhood-serving businesses as a key step toward ensuring Berkeley’s supply of decent housing, living-wage jobs, and businesses providing basic goods and services, further stating that a limited number of chain stores “contribut[es] to the vitality of Berkeley’s commercial areas”.<sup>19</sup>
- More specifically, Economic Development Actions ED-3 and ED-4 directly address retaining and developing businesses that serve local neighborhood needs, implementing a small business preference program, and utilizing zoning mechanisms to limit “development of undesirable chain stores, formula businesses, and big-box developments” while enabling the expansion of local businesses.<sup>20</sup>

### **Berkeley Policies that Support Small Businesses**

<sup>18</sup> [http://default.sfplanning.org/legislative\\_changes/form\\_retail/Final\\_Formula\\_Retail\\_Report\\_06-06-14.pdf](http://default.sfplanning.org/legislative_changes/form_retail/Final_Formula_Retail_Report_06-06-14.pdf)

<sup>19</sup>

[https://www.cityofberkeley.info/Planning\\_and\\_Development/Home/General\\_Plan\\_-\\_Economic\\_Development\\_and\\_Employment\\_Element.aspx](https://www.cityofberkeley.info/Planning_and_Development/Home/General_Plan_-_Economic_Development_and_Employment_Element.aspx)

<sup>20</sup> [https://www.cityofberkeley.info/Planning\\_and\\_Development/Home/General\\_Plan\\_-\\_Economic\\_Development\\_and\\_Employment\\_Element.aspx](https://www.cityofberkeley.info/Planning_and_Development/Home/General_Plan_-_Economic_Development_and_Employment_Element.aspx)

The City of Berkeley has taken action in the past to support local business and limit chains by banning new fast food chains, limiting the number of pharmacies in close proximity to each other, establishing a maximum square footage for big box stores and imposing quotas in commercial districts.

In response to merchant concerns about rising rents demanded by commercial landlords, the City Council in 1985 enacted the “Telegraph Urgency Ordinance”.<sup>21</sup> At the time, the ordinance was the nation’s only program of commercial rent regulation. After commercial rent control was outlawed by the State, Berkeley enacted quotas on various use types in some retail districts, which were intended to preserve diversity and local ownership among businesses and discourage unwanted commercial uses as defined in each commercial district’s purposes. These quotas, which could be violated with a Use Permit and were often exceeded, were eventually removed or greatly simplified.<sup>22</sup>

Berkeley has also acted to limit the size, number and concentration of drugstores that can operate in the City.<sup>23</sup> This was done to prevent pharmacy chains from opening too close to each other while leaving other areas of Berkeley underserved and to preserve a diversity of uses in neighborhood business districts, allowing them to retain their unique character.<sup>24</sup>

In April 2017, the City Council approved a Small Business Support Package, authored by Councilmember Hahn and Mayor Arreguin, to support new and sustain existing small and locally-owned businesses.<sup>25</sup> The package included measures to provide financial support to small businesses and nonprofits impacted by development projects; fees on vacant storefronts and empty lots; a local business advocacy center; streamlining of zoning, permitting, and licensing for small businesses; strengthening Berkeley’s Revolving Loan Fund program; expanding Buy Local preferences; and exploring a Legacy Business-type program for Berkeley.

In April 2019, the Council approved another important measure to support Berkeley businesses interested in the worker cooperative ownership model.<sup>26</sup> Owned and run by employees, worker cooperatives typically provide higher wages, benefits, professional development, job security, and upward mobility for low to moderate income people. Also, these small businesses provide a diversity of locally owned services. In Berkeley, worker cooperatives such as The Cheese Board Collective, Biofuel Oasis, and Missing Link Bicycle Cooperative have become an integral part of

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<sup>21</sup> [https://www.cityofberkeley.info/Planning\\_and\\_Development/Home/Southside\\_Plan\\_-\\_DSS\\_6\\_Economic\\_Development.aspx](https://www.cityofberkeley.info/Planning_and_Development/Home/Southside_Plan_-_DSS_6_Economic_Development.aspx)

<sup>22</sup> [https://www.cityofberkeley.info/uploadedFiles/Planning\\_and\\_Development/Level\\_3\\_-\\_Commissions/Commission\\_for\\_Planning/2015-12-16\\_Item%209\\_Quotas-Combined.pdf](https://www.cityofberkeley.info/uploadedFiles/Planning_and_Development/Level_3_-_Commissions/Commission_for_Planning/2015-12-16_Item%209_Quotas-Combined.pdf)

<sup>23</sup> [https://www.cityofberkeley.info/Clerk/City\\_Council/2014/07\\_Jul/Documents/2014-07-01\\_Item\\_01\\_Ordinance\\_7354.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2014/07_Jul/Documents/2014-07-01_Item_01_Ordinance_7354.aspx)

<sup>24</sup> <https://www.cityofberkeley.info/recordsonline/export/16418086.pdf>

<sup>25</sup> [https://www.cityofberkeley.info/Clerk/City\\_Council/2017/04\\_Apr/Documents/2017-04-25\\_Item\\_41\\_Small\\_Business.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2017/04_Apr/Documents/2017-04-25_Item_41_Small_Business.aspx)

<sup>26</sup> [https://www.cityofberkeley.info/Clerk/City\\_Council/2019/02\\_Feb/Documents/2019-02-26\\_Revised\\_Packet\\_2019-02-26\\_Item\\_A\\_Referral\\_Response\\_Supporting\\_Worker\\_Cooperatives\\_pdf.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2019/02_Feb/Documents/2019-02-26_Revised_Packet_2019-02-26_Item_A_Referral_Response_Supporting_Worker_Cooperatives_pdf.aspx)

the community's fabric. These and other worker owned businesses create higher quality jobs, increase local reinvestment, and have demonstrable positive impact on business retention.

According to the City of Berkeley's Office of Economic Development (OED),

*“small businesses are a critical part of our local economy: they provide access to essential goods and services, create jobs and economic opportunities, and make essential contributions to Berkeley's vitality and distinct character. In recent years, the viability of small businesses has been threatened by a broad range of issues including the increasing costs of doing business, physical conditions of commercial districts, competition from the Internet, and difficulty engaging with the City of Berkeley.”*

The OED is focused on supporting small and local businesses, cooperatives, not for profits and arts organizations -- which make up the majority of Berkeley enterprises. In response to Council direction, and in light of the important role of these types of enterprises in the economic and cultural vitality of the City, the OED has launched five new policy initiatives<sup>27</sup>:

- Improve outreach and communications with small businesses
- Increase support for businesses navigating the permitting process
- Recommend modifications to the zoning ordinance to support small businesses
- Pilot small business retention programs, and
- Support independently owned retailers with marketing, networking and education.

The objectives of these programs include boosting the profitability and sustainability of small businesses, preventing the closure and displacement of small businesses, sustaining and growing business-related municipal revenues, and improving Berkeley's reputation as a place to do business.

#### **ACTIONS/ALTERNATIVES CONSIDERED**

San Francisco, Sausalito, San Juan Bautista, Pacific Grove, and other cities across the country have passed legislation regulating formula retailers, tailored to the unique character and needs of their communities. Nantucket, MA, banned all formula retail from its historic downtown district. Cities such as San Francisco, Ojai, and Arcata, CA, and Bristol, RI, have implemented a conditional use framework to limit the number of formula retailers allowed in their commercial districts. Rather than impose outright bans or quotas on formula retail, these cities have a special application process and require robust findings for formula retailers to operate in regulated districts.

Communities have the power to maintain their integrity and character as set forth by their general plans. Only one formula retail ordinance has been challenged and overturned. Islamorada, a vacation destination in the Florida Keys, implemented formula retail restrictions nearly a decade ago. The court reviewing a legal challenge to the ordinance found it would fail

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<sup>27</sup> [https://www.cityofberkeley.info/Clerk/City\\_Council/2019/02\\_Feb/Documents/2019-02-05\\_WS\\_Item\\_02\\_Referral\\_Response\\_Small\\_Business\\_pdf.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2019/02_Feb/Documents/2019-02-05_WS_Item_02_Referral_Response_Small_Business_pdf.aspx)

to “help the town preserve its character,” noting for the record that Islamorada “has not demonstrated that it has any small town character to preserve”.<sup>28</sup>

The goal of formula retail legislation is not to eliminate formula retail entirely. A key to crafting effective formula retail regulations is to avoid arbitrary quotas or limits on formula retailers, to be responsive to existing community and local flavor, and to adapt any regulations accordingly.

As noted above, Berkeley has experimented with commercial rent control and quotas, among other measures, but currently has very limited regulations in place to support the establishment and continuation of small, local and diverse businesses and curtail the proliferation of chains. Currently, formula retail regulation is considered to be the best tool to achieve these goals.

### **CONSULTATION/OUTREACH OVERVIEW AND RESULTS**

Because this item proposes an Ordinance, it will be routed to a Council Committee for discussion. Through this process we will reach out to small businesses and property owners to invite them to bring their comments to the committee. In addition, this item is a referral to the City Manager and Planning Commission. Assuming it is sent from the policy committee with a positive recommendation to the City Council and is referred by Council to the City Manager and Planning Commission, there will be many opportunities for citizen, business and property-owner input through the many public meetings envisioned to make this ordinance a reality.

### **RATIONALE FOR RECOMMENDATION**

Berkeley’s small businesses, which are vital to the city’s character and economic health, are threatened by the growth of online stores and chain retailers. Other communities have successfully protected their small and independent businesses by placing restrictions on formula retail. San Francisco’s comprehensive, longstanding and carefully crafted formula retail regulations are an appropriate model for Berkeley -- adapted and carefully tailored to fit Berkeley’s specific qualities and needs, and to help preserve the important character and quality of the City’s commercial districts and neighborhood shopping areas.

This item refers to the City Manager and Planning Commission to undertake all elements necessary to craft and implement successful formula retail regulations in Berkeley.

A draft ordinance is provided, starting the process of adapting San Francisco’s formula retail regulations to Berkeley’s existing regulatory framework and processes. The City Manager and Planning Commission are tasked with completing the ordinance and preparing any complementary code amendments necessary to achieve the full regulatory framework. It is expected that the “Uses Permitted” Section of each Commercial and Manufacturing District will require small amendments to reflect the addition of the new Formula Retail Use.

The City Manager is further requested to recommend boundaries and names, if applicable, for Business Districts and, through a process that includes robust community outreach, to

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<sup>28</sup> <https://ilsr.org/bloomberg-restrict-chains/>



recommend for each Business District whether formula retail will be allowed without restriction; allowed with a Use Permit, Neighborhood Notification, Design Review and findings; or disallowed.

Public meetings to discuss whether a Business District should allow, disallow or allow with a Use Permit the establishment of formula retail uses are expected to be organized by the Office of Economic Development and/or Planning Department in collaboration with Councilmember representatives of Business Districts. Notice for such meetings shall, at a minimum, be the same as the notice proposed to obtain a Use Permit for Formula Retail. Several Business Districts can be considered at one meeting, so long as each Business District and surrounding area are noticed.

Notice to obtain a Use Permit for Formula Retail includes the following:

*In addition to the public notice requirements for a Use Permit pursuant to Section 23B.32.020, public notice shall include all businesses and residents (all mailing addresses) and all owners of properties within the Business District where the Formula Retail use is proposed and within a 500 foot radius of the proposed Formula Retail use.*

Formula retail legislation, modeled after San Francisco's policy, will help Berkeley maintain the unique character of its business districts and complement existing efforts and policies to support independent and local merchants. By carefully tailoring Formula Retail legislation to Berkeley's specific needs, the City can ensure a balanced mix of national brands while making sure that small and local businesses lacking the economic muscle to pay high rents and weather downturns still have a chance to thrive.

### **IMPLEMENTATION, ADMINISTRATION, AND ENFORCEMENT**

At the outset, implementation will require creating new forms to be filled out by applicants for business licenses to establish new business or new ownership of existing businesses in Berkeley and zoning permits for new or expanded uses. These can be adapted from San Francisco's forms. Additional forms may require amendment, and some training will be required for staff who process licenses and permit applications.

Once in place, Use Permits for Formula Retail will be administered in the same manner as all other Use Permits and Design Review will also be undertaken in the usual manner. Enhanced notice requirements will require more notices to be sent than in the usual case for a Use Permit, representing minor additional costs.

Regular fees for a Use Permit will be required, ensuring that the Planning Department's costs are covered by the Formula Retail applicant. It is not expected that a large number of applications for Formula Retail Use Permits will be processed in any given year, as a limited number of new businesses open each year and many will not meet the definition of Formula Retail. For those that do meet the definition, only a subset, those that seek to establish themselves in business districts that limit formula retail, will be required to obtain a Use Permit.

### **ENVIRONMENTAL SUSTAINABILITY**

This item supports the Berkeley General Plan goal to protect local and regional environmental quality, as local stores help to sustain vibrant, compact, walkable town centers, which in turn are essential to reducing sprawl, automobile use, habitat loss, and air and water pollution. As stated in a recent OED report, “small businesses often contribute to sustainable transportation and consumer behavior by providing opportunities for residents to shop locally in neighborhood commercial districts that are accessible by foot, bicycle and transit. Successful initiatives that support small businesses in turn promote both environmental and economic sustainability.”

### **FISCAL IMPACTS**

By regulating formula retail, Berkeley should reap the well-documented benefits of local ownership. As noted above, small and locally-owned businesses stimulate local economies to a greater degree than chain retailers, increasing tax revenues overall. Automobile sales, one of the largest sales-tax generating use uses in Berkeley, is not subject to Formula Retail regulations; income from this sector would not be impacted.

Once established, formula retail regulations will require limited additional staff time to implement, in the form of new Use Permits being processed by the Planning Department. A new form will need to be created for businesses seeking permits to attest to the number of outlets affiliated with their establishment. This and other forms and administrative regulations are easily adapted from San Francisco’s models.

Processing of Formula Retail Use Permits will be done simultaneously with other permit processing, and will only be required in the few instances where a Formula Retail use is seeking to establish itself in a business district that requires a Use Permit for formula retail. In these instances, applicants will pay the usual fees for Use Permit processing, which cover the costs of permit administration.

All non-Formula Retail uses *are exempt* from these regulations, so their permitting process will not be impacted in any way, other than needing to fill out a new form attesting that they do not meet the definition of Formula Retail. A successful formula retail policy will provide significant community and economic benefits and help realize Berkeley’s strong commitment to supporting small and local businesses; incurring few costs for the City of Berkeley and increasing economic activity overall.

### **OUTCOMES AND EVALUATION**

San Francisco did an evaluation of their original Formula Retail regulations ten years after the program was in place. The evaluation resulted in improvements to their ordinance. The version of the San Francisco ordinance proposed for adoption in Berkeley reflects those improvements.

Berkeley’s formula retail regulations will be considered successful if the business community and neighborhoods surrounding Berkeley’s business districts have had the opportunity to weigh in on the appropriateness of bringing specific formula retail uses into the business district, and

some, but not all, formula retail businesses will have received Use Permits. In addition, it is hoped that the implementation of these regulations will result in less rapid inflation of rents, which often reflect rental rates that can be sustained by chains, but are prohibitive for locally owned businesses.

Data about formula retail and the impacts of these regulations should be included in the Office of Economic Development's Economic Dashboards and other reports to the City Council.

**CONTACT INFORMATION**

Councilmember Sophie Hahn, Council District 5, (510) 981-7150

**ATTACHMENTS/SUPPORTING MATERIALS**

1. Draft Formula Retail Ordinance for Berkeley
2. Commission Guide for Formula Retail, San Francisco Planning Department, August 2018
3. San Francisco Planning Code Section 303.1: Formula Retail Uses
4. San Francisco Municipal Code Section 703.4: Conditional Use Authorization for Formula Retail Uses
5. San Francisco Municipal Code Section 803.6: Formula Retail Uses in Article 8 Districts
6. Stacy Mitchell, Institute for Local Self-Reliance, "The Impact of Chain Stores on Community"
7. Marie Donahue, Institute for Local Self-Reliance, "Why Care about Independent, Locally Owned Businesses?"

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

ADDING CHAPTER 23E.XX TO THE BERKELEY MUNICIPAL CODE TO ADOPT THE BERKELEY FORMULA RETAIL ORDINANCE

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

Section 1. That a new Chapter 23E.18 is hereby added to the Berkeley Municipal code to read as follows:

Chapter 23E.18  
FORMULA RETAIL USES

Sections:

- 23E.18.010 Findings and Purpose
- 23E.18.020 Applicability
- 23E.18.030 Definitions
- 23E.18.040 Business Districts - Formula Retail Prohibited
- 23E.18.050 Business Districts - Formula Retail Permitted Without Restrictions
- 23E.18.060 Business Districts - Formula Retail Permitted with Use Permit, Neighborhood Notification, Design Review and Findings
- 23E.18.070 Formula Retail Use Permit - Neighborhood Notification - Design Review - Findings
- 23E.18.080 Determination of Formula Retail Use
- 23E.18.090 Change, Enlargement or Intensification of Formula Retail Use

**23E.18.010 Findings and Purpose**

The Council of the City of Berkeley finds and declares as follows:

- (1) The first goal of the City of Berkeley’s General Plan is to “Preserve Berkeley’s unique character and quality of life.” Berkeley’s diverse and distinct neighborhoods are strongly identified by the local character of their commercial and manufacturing districts.
- (2) A top priority of Berkeley’s General Plan Economic Development and Employment Element is to “support businesses that are independent, locally owned and neighborhood serving.”
- (3) Policy ED-3 of Berkeley’s General Plan Economic Development and Employment Element is to “[p]romote policies, programs, and services that support a diverse local economy providing a range of goods and services, that support existing local businesses, and that encourage new, independent business ventures.”

- (4) Policy ED-3 (E) of Berkeley's General Plan Economic Development and Employment Element speaks directly to the need to regulate chain, formula and big-box businesses by developing and implementing "[p]lanning and zoning mechanisms that promote community-serving commercial diversity and that limit development of undesirable chain stores, formula businesses, and big-box developments without limiting the ability of local businesses to grow and expand and, when needed, to establish additional outlets in various parts of the city."
- (5) Policy ED-4 (B) of Berkeley's General Plan Economic Development and Employment Element, relating to Neighborhood and Avenue Commercial Districts, seeks to "[m]aintain a diverse mix of commercial goods and services in the shopping districts" and to "establish criteria" for "local ownership."
- (6) Policy ED-9.1 of the Downtown Area Plan recommends economic development strategies that encourage the establishment of new businesses with ownership structures that keep consumer dollars in the local economy
- (7) Policy ED-5 (A) of Berkeley's Southside Plan seeks to support the attraction and retention of locally owned, small businesses and provide technical assistance through citywide programs for potential small business owners.
- (8) Policy Goal 7 of the West Berkeley Plan is to, "Protect small businesses, particularly arts and crafts businesses, so they can continue to flourish in West Berkeley."
- (9) Policy Strategies 12 and 13 of the University Avenue Strategic Plan broadly support small and local business. Strategy 13(C) outlines the importance of attracting locally-owned businesses.
- (10) The unregulated establishment of Formula Retail uses negatively impacts business establishment opportunities for smaller and medium-size businesses and decreases the diversity and uniqueness of merchandise and services available to residents and visitors, and the diversity of business owners.
- (12) Formula Retail regulations are in place in numerous California cities that value the local character of business districts and support local, diverse and unique retail stores, services and ownership including San Francisco, Sausalito, San Juan Bautista, Pacific Grove, Ojai and Arcata.
- (13) Formula Retail regulations have been in place for more than 15 years in San Francisco; their impacts have been studied and their regulations have been updated and refined over time, providing a carefully crafted and successful model for Berkeley to adapt and follow.
- (14) Formula Retail regulations, based on the San Francisco model, are inherently flexible, allowing different criteria for Formula Retail to be applied in each district, and allowing for

adjustments over time in response to changing neighborhood and district values, goals and needs.

### **23E.18.020 Applicability**

Formula Retail Regulations shall be applicable in all Commercial (C) and Manufacturing (M) Districts, as defined in BMC Title 23(E).

### **23E.18.030 Definitions**

- A. A **Formula Retail** use is a type of retail sales or service activity or establishment that has twenty (20) or more other retail sales or service activities or establishments in operation, or with local land use or permit entitlements already approved, under the same or different ownership, located anywhere in the world, that maintains two or more of the following features in common with such other activities or establishments:
1. A Standardized Array of Merchandise or Services
  2. Standardized Uniform Apparel
  3. A standardized Facade
  4. Standardized Decor and/or Color Scheme
  5. Standardized Signage
  6. A standardized Trademark
  7. A Standardized Servicemark.
- B. **Business District** shall be defined as any Commercial or Manufacturing District, or portion thereof, with business activities or enterprises clustered together, usually at one or more corners or on contiguous, abutting, confronting or adjacent blocks.

For purposes of this Chapter, Business Districts shall be: *[Business Districts to be recommended by staff or Planning Commission as entire Zoning Districts or meaningful sub-areas of large Zoning Districts. Where a Business District is not an entire Zoning District, the borders of such District, and a name, will need to be expressly provided. The following are examples/suggestions]*

1. C-1 - South Telegraph (Parker to Oakland Border?)
2. C-1 - University Corridor (MLK to Curtis?)
3. C-N - Euclid District *[to be delineated]*
4. C-N - Hopkins/Monterey District *[to be delineated]*
5. C-N - El Dorado District *[to be delineated]*
6. C-N - Alcatraz District *[to be delineated]*
7. C-N - Dwight/Sacramento *[to be delineated]*
8. C-N - MLK/Virginia *[to be delineated]*
9. C-N - Gilman *[to be delineated]*
10. C-N - Neighborhood *[Etc. - each node to be delineated]*
11. C-E - Elmwood District
12. C-NS + C-1 - North Shattuck District (Rose to Hearst)
13. C-T Telegraph District
14. C-SO Solano District

15. C-DMU - Central Downtown District (University to Bancroft?)
16. C-DMU - North Downtown District (North of University Ave.)
17. C-DMU - South Downtown District (South of Bancroft?)
18. C-SA - Lorin District *[to be delineated]*
19. C-SA - South Sacramento (Stuart to Oakland Border?)
20. C-SA - Dwight/Sacramento *[to be delineated]*
21. C-SA - *[Etc. - each Business District to be delineated]*
22. C-W - Fourth Street (C-W West of 6th from Addison to Virginia?)
23. C-W + C-1 - International District (University from 6th to Curtis & San Pablo from Delaware to Dwight?)
24. C-W - South San Pablo (Dwight to Oakland Border + areas West of San Pablo?)
25. C-W - North San Pablo (Delaware to Albany Border + areas West of San Pablo?)
26. *[ETC.]*

- C. **Standardized Array of Merchandise or Services** shall be defined as 50% or more of merchandise from a single distributor or bearing uniform markings or 50% or more of merchandise or services uniform across activities or establishments in the United States.
- D. **Trademark** shall be defined as a word, phrase, name, symbol or design, or a combination of words, phrases, names, symbols, or designs that identifies and distinguishes the source of merchandise from one establishment from those of others.
- E. **Servicemark** shall be defined as a word, phrase, name, symbol, or design, or a combination of words, phrases, names, symbols or designs that identifies and distinguishes a service or array of services from one establishment from those of others.
- F. **Decor** shall be defined as the style of interior finishes and furnishings, which may include but is not limited to wall coverings, carpeting, furniture, layout, color scheme, interior signage, and fixtures.
- G. **Facade** is defined as provided in BMC Section 23F.04.010
- H. **Signage** is defined as provided in BMC Section 20.08.220.
- I. **Uniform Apparel** shall be defined as standardized items of clothing including but not limited to standardized aprons, pants, shirts, smocks or dresses, hats, and pins (other than name tags) and standardized colors of apparel.
- J. **Retail Sales or Service Activity or Retail Sales or Service Establishment**  
For the purposes of this Section, a retail sales or service activity or retail sales or service establishment shall include the following uses, whether functioning as a principal, Accessory, Ancillary or Incidental Use.

- Adult-oriented Business
- Alcoholic Beverage Sales
- Alcoholic Beverage Service
- Amusement Device Arcade
- Appliance Store
- Automobile Repair and Service
- Automobile Used Car Establishment
- Bakery
- Bingo Parlor
- Business Support Service
- Cannabis Uses
- Childcare Business or Facility
- Clothing Store
- Commercial Recreation Center
- Dance, Exercise, Martial Arts or Music Studio
- Department Store
- Drive-in Use
- Drugstore
- Dry Cleaning and Laundry Agent
- Entertainment Establishment
- Financial Services, Retail
- Food Products Store
- Food Service establishment
- Gift/Novelty Shop
- Hobby Shop
- Hotel, Tourist
- Personal/household Service
- Retail Products Store
- Service use
- Smoke Shop
- Tobacco Retailers

*[These business types are taken from Definitions (+ Tobacco Retailers). There may be additional Business types defined elsewhere in the code to be considered for listing or exclusion]*

*[NOT included - do not list:*

- *Automatic teller machine*
- *Automobile Parts Store*
- *Automobile Rentals*
- *Automobile Sales*
- *Automobile Use Automobile Wrecking Establishment*
- *Chair Massage*
- *Charitable Use*
- *Commercial Use*
- *Community Care Facility*
- *Community and Institutional Use*
- *Firearm/Munitions Business*
- *Gasoline/Automobile Fuel Station*
- *Media Production*
- *Medical Practitioner Office*
- *Mini-Storage Warehouse*
- *Non-Chartered Financial Institution*
- *Nursing Home*
- *Plumbing Shop*
- *Recycling Redemption Center*
- *Seasonal Product Sales*
- *Theater]*

**23E.18.040 Business Districts - Formula Retail Prohibited**

Formula Retail is prohibited in the following Business Districts:

*[ list ]*

*[Business Districts where Formula Retail is Prohibited to be recommended through public meetings organized by Economic Development and/or Planning Department in collaboration with Councilmember representatives of Business Districts. Notice for such meetings shall, at a minimum, be the same as required notice to obtain a Use Permit for Formula Retail. Several Business Districts can be considered at one meeting. Recommendations go to Planning Commission(?) and then Council for approval]*



**23E.18.050 Business Districts - Formula Retail Permitted Without Restrictions**

Formula Retail is permitted without restrictions in the following Business Districts:

*[ list ]*

*[Business Districts where Formula Retail is allowed without restriction to be recommended through public meetings organized by Economic Development and/or Planning Department in collaboration with Councilmember representatives of Business Districts. Notice for such meetings shall, at a minimum, be the same as required notice to obtain a Use Permit for Formula Retail. Several Business Districts can be considered at one meeting. Recommendations go to Planning Commission(?) and then Council for approval]*

**23E.18.060 Business Districts - Formula Retail Permitted with Use Permit, Neighborhood Notification, Design Review and Findings**

Formula Retail or specific types of Formula Retail is permitted with a Use Permit, Neighborhood Notification, Design Review and Findings in the following Business Districts:

*[ list ]*

*[Business Districts where Formula Retail is allowed with a Use Permit, Neighborhood Notification, Findings and Design Review to be recommended through public meetings organized by Economic Development and/or Planning Department in collaboration with Councilmember representatives of Business Districts. Notice for such meetings shall, at a minimum, be the same as required notice to obtain a Use Permit for Formula Retail. Several Business Districts can be considered at one meeting. Recommendations go to Planning Commission(?) and then Council for approval.]*

*Formula Retail with a Use Permit may be allowed in a District only for certain Retail Sales or Service Activity or Retail Sales or Service Establishment types (and not for others) and, in addition to the findings required for a Use Permit and findings required for Formula Retail (Section 23E.18.070), may be subject to additional findings unique to a specific District or type of Retail Sales or Service Activity or Retail Sales or Service Establishment (i.e., restaurants, financial services, etc.)]*

**23E.18.070 Formula Retail Use Permit - Neighborhood Notification - Design Review - Findings**

To obtain a Use Permit for a Formula Retail use, in addition to the requirements at Chapter 23B.32, in this Chapter, and elsewhere in the Berkeley Municipal Code, Neighborhood Notification, Design Review and additional findings are required, as provided below:

- A. **Neighborhood Notification.** In addition to the public notice requirements for a Use Permit pursuant to Section 23B.32.020, public notice shall include all businesses and

residents (all mailing addresses) and all owners of properties within the Business District where the Formula Retail use is proposed and within a 500 foot radius of the proposed Formula Retail use.

- B. **Design Review.** Facades, Signage and all other features visible from the public right of way shall be subject to Design Review pursuant to BMC Sections 23B.08, 23E.08, and 23E.12 and in accordance with Design Review Guidelines promulgated pursuant to BMC Section 23E.08.040.A.
- C. **Findings.** In addition to the Use Permit findings required in BMC 23B.32.040 and any additional findings required by this Chapter or the Berkeley Municipal Code, the Zoning Adjustments Board shall make the following findings with regard to any proposed Formula Retail use:
1. The Formula Retail use at its proposed location conforms with or largely supports the Purposes, as stated in BMC Title 23E, of the Commercial or Manufacturing District in which such use is proposed. In making this finding, all Purposes for the Commercial or Manufacturing District in which the Formula Retail Use is proposed shall be explicitly considered.
  2. The Formula Retail use at its proposed location conforms with or largely supports any Plan adopted by the City Council that covers some or all of the Business District in which it is proposed. Such plans include, but are not limited to, the Southside Plan, the South Shattuck Strategic Plan, the University Avenue Strategic Plan, the West Berkeley Plan and the South Berkeley Area Plan and Appendices.
  3. The existing concentration of Formula Retail uses is appropriate for the Business District in which the Formal Retail use is proposed, and the addition of the Formula Retail use will not substantially change the character of the Business District, nor contribute to, or create, an over-concentration of Formula Retail within the Business District.
  4. The proposed Formula Retail use provides goods or services that are not otherwise available within the Business District or that would complement existing uses.
  5. The proposed Formula Retail use is compatible with the existing architectural and aesthetic character of the district.
  6. In Business Districts with average vacancy rates of more than [10%? 5%?] over the 3 years preceding the year in which the application for the Formula Retail Use Permit was filed, the proposed Formula Retail Use will bring needed vitality to the Business District.

**23E.18.080 Determination of Formula Retail Use**

- A. In Business Districts in which Formula Retail uses are prohibited pursuant to Section 23E.18.040 or subject to a Use Permit pursuant to Section 23E.18.060, any application for a [Business License or Zoning Permit] determined by the City to be for a Formula Retail use that does not identify the use as a Formula Retail use is incomplete and cannot be processed until the omission is corrected.
- B. Any [license granted or] entitlement approved that is determined by the City to have been, at the time of application, for a Formula Retail use that did not identify the use as Formula Retail is subject to revocation at any time.
- C. If the City determines that a [license or] entitlement, or an application for the same, is for a Formula Retail use, the applicant or holder of the license or entitlement bears the burden of proving to the City that the proposed or existing use is not a Formula Retail use.

**23E.18.090 Change, Enlargement or Intensification of Formula Retail Use**

- A. In Business Districts subject to to BMC Section 23E.18.040, a change to another Formula Retail use or enlargement or intensification in use for a nonconforming Formula Retail use is prohibited.
- B. In Business Districts subject to BMC Section 23E.18.060:
  - 1. Enlargement or intensification of existing Formula Retail uses and changes of Formula Retail from one use category to another, including a change from one use to another within the sub-categories of uses set forth in the definitions of Food Products Store, Food Service Establishment, Personal/Household Service and Retail Products Store at BMC Section 23R.04.010, require a new Formula Retail Use Permit.
  - 2. Changes of Formula Retail owner or operator within the same use category do not require a new Use Permit but any changes to the Facade, Signage and other features visible from the public right of way are subject to Design Review, applied and approved administratively by the Zoning Officer [subject to an appropriate fee as set forth in XXX.]

***[Concept to Consider from SF Regs - add to .070(C)(3)?:*** To determine the existing concentration of Formula Business Uses within a Business District, the Planning Department shall calculate the percentage of the total linear street frontage within the Business District that is occupied by Formula Retail and non-Formula Retail businesses. For each property, the Planning Department shall divide the total linear frontage of the lot facing a public-right of way by the number of storefronts, and then calculate the percentage of the total linear frontage for Formula Retail and non-Formula Retail.

***Use Tables for each C and M District will need to be amended to specify the conditions under which Formula Retail, if any, is allowed in the District or in Business Districts within the District, and additional District or Business District-specific findings, if any, required]***

DRAFT



SAN FRANCISCO  
PLANNING  
DEPARTMENT

# Commission Guide for Formula Retail

DETERMINING LOCATIONAL APPROPRIATENESS AND  
PERFORMANCE-BASED DESIGN GUIDELINES

SAN FRANCISCO PLANNING DEPARTMENT | UPDATED: AUGUST 2018





Originally Published: July 2014

### San Francisco Planning Commission

- Cindy Wu, *President*
- Rodney Fong, *Vice President*
- Michael J. Antonini
- Gwyneth Borden
- Rich Hillis
- Kathrin Moore
- Hisashi Sugaya

### San Francisco Planning Department

John Rahaim, *Planning Director*

Senior Management Team:

- Jeff Joslin, *Director of Current Planning*
- Scott Sanchez, *Zoning Administrator*

Project Team:

- AnMarie Rodgers, *Senior Policy Advisor*
- Kanishka Burns, *Project Manager*
- Matthew Dito, *Planner Technician*
- Gary Chen, *Graphic Design*

In addition to the project team, this work was informed by the formula retail stakeholder group and the project consultant, Strategic Economics.

Cover Photograph: GGP Inc.

The purpose of this document is to evaluate the appropriateness of each individual formula retail establishment's use, design, and necessity, to help preserve the character of the City's neighborhoods.



Photos by Matthew Dito



## PURPOSE

The Commission Guide to Formula Retail is intended to maintain the character and aesthetic qualities of San Francisco neighborhoods. It is designed to encourage harmony between retailers and the districts they reside in.

This document seeks to promote such harmony in two ways. First, the document establishes the methodology the Department will use in evaluating the appropriateness of the formula retail use in the neighborhood. Second, this document articulates Performance-Based Design Guidelines to ensure that the proposed formula retail use is aesthetically compatible with the neighborhood.

### RELEVANT CODE SECTIONS

*Section 303.1:* Formula Retail Uses

*Section 703.4:* Conditional Use Authorization for Formula Retail Uses

*Section 803.6:* Formula Retail Uses in Article 8 Districts

*Article 6:* Signs

*Article 11:* Preservation of Buildings and Districts of Architectural, Historical, and Aesthetic Importance in the C-3 Districts

## INTRODUCTION

Formula retail can act as a homogenizing force in neighborhoods if its presence overwhelms neighborhood character. Formula retail, by nature, is repetitive. If not properly regulated, this repetition can detract from San Francisco's vibrant neighborhoods by inundating them with familiar brands that lack the uniqueness the City strives to maintain.

San Francisco is a city of surprises. Its diverse and distinct neighborhoods are identified in large part by the character of their commercial areas. This feeling of surprise invites both residents and visitors alike to explore the City.

Urban neighborhood streets should invite walking and bicycling. The City's mix of architecture contributes to a strong sense of neighborhood community within the larger City. Many formula retail concepts are developed and refined in suburban locations. Standard store design that primarily accommodates automobile traffic may not work in dense, transit-oriented cities.

The Performance-Based Design Guidelines can improve pedestrian walkability and encourage more walking in neighborhoods by helping to preserve a safe, aesthetically pleasing area that feels connected from beginning to end. This is achieved by improving pedestrian accessibility and by creating stores with unique visual identities that also don't overpower one another.

The increase of formula retail businesses in the City's neighborhood commercial areas, if not monitored and regulated, will hamper the City's goal of a diverse retail



While any one formula retail establishment may fit well in a neighborhood, overconcentration of formula retail can degrade the character of a street.

Illustration by Raven Keller  
for The Bold Italic

base with distinct neighborhood retailing personalities comprised of a mix of businesses.

These standards are intended to lessen the visual impacts that the repetitiveness of formula retail brings by first evaluating whether the formula retail use is either necessary or desirable in the neighborhood. See a discussion of this topic in Part I: Determining Locational Appropriateness. Once the use is deemed appropriate, the next step is to ensure aesthetic compatibility. For more information on this topic, see "Part II: Performance-Based Design Guidelines."

While a factor in the homogenization of neighborhoods, formula retail does provide lower-cost goods and services, and is generally recognized to provide more employment opportunities to minorities and low-income workers. Formula retail is neither good nor bad – and it plays an irrefutable role in the City. To best accentuate the benefits of formula retail, the City should regulate it with care, helping to reduce its standardized features.

San Francisco needs to protect its vibrant small business sector and create a supportive environment for new business innovations. One of the eight Priority Policies of the City's General Plan resolves that "existing neighborhood-serving retail uses be preserved and enhanced and future opportunities for resident employment in and ownership of such businesses enhances."

The Planning Department recognizes the benefits formula retail can bring to the City. Where the use would provide a necessary or desirable addition to the neighborhood, staff will work with applicants to improve their aesthetics, including signage, storefront design, transparency, and pedestrian accessibility, to help them successfully integrate into San Francisco's neighborhoods.



# I. Determining Locational Appropriateness

For every conditional use authorization the Planning Commission must determine if the proposed use is necessary or desirable for the community and compatible with the neighborhood, per Planning Code Sec. 303(c) (1). Beyond the general consideration of “necessary or desirable,” the Commission reviews five more specific criteria in consideration of conditional use authorization for formula retail. This document establishes the methodology the department will use in assessing these five determining criteria, as required by Planning Code Sec. 303.1.

Determining location appropriateness should be by informed quantitative and qualitative analysis. In general, professional discretion should be used to identify factors not specifically required in this document. For example, if a daily need use is located immediately outside the selected appropriate vicinity, it should still be discussed in the case report. In addition to analyzing the five Planning Code required criteria, professional analysis of locational appropriateness should include the following:

**A characterization of the district as a whole**, based on the stated intent of the district as well as how the district has evolved since it was created. Describe the scale and massing of buildings and uses. Discuss the dominant design orientation people vs. auto-orientation. Consider if the district can be described in other ways: family oriented, entertainment district, culturally-specific, for example. Determine whether there are capital

improvements or large development projects in the pipeline.

**A characterization of the immediate vicinity of the proposed establishment location.** A characterization of the immediate vicinity within 300’ of the subject property is a standard distance that would generally be appropriate. For projects that require conditional use authorization for use size, or occupy a tenant space larger than 10,000 square feet, a one-quarter mile vicinity is more appropriate and should be used. The vicinity concentration should include all commercial uses, not just those within the same Zoning District.

**A description of the commercial nature of the district.**  
Are there retail anchors or clusters present or developing?  
Are there retail or other trends emerging?

**Identification of long term vacancies and/or any commercial use related issues and concerns.**

**Identification of the unique characteristics of the District and/or neighborhood**, where appropriate.

## CRITERIA AND METHODOLOGY

The five criteria and methodology for analyzing locational appropriateness should be examined as described below:

### Existing concentrations of formula retail uses within general vicinity of the proposed project.

- The concentration of formula retail uses is the percentage (%) of formula retail ground floor commercial uses amongst all ground floor commercial uses within the vicinity.
- Generally, the appropriate “vicinity” when determining a concentration is 300’. However, if the proposed use requires conditional use authorization for use size, or proposes to occupy a tenant space that is equal to or greater than 10,000 square feet, a one-quarter mile vicinity should be used.
- Calculation shall include all parcels that are wholly or partially located within the selected radius that are also zoned commercial or contain commercial uses.
- An evaluation of the linear frontage concentration of formula retail establishments within the selected vicinity shall be done.
- An evaluation of the linear frontage concentration of formula retail establishments within the selected vicinity. Concentration is based on Planning Commission Resolution No. 18843, adopted on April 11, 2013 and summarized below. Staff will calculate the concentration of formula retail linear frontage within the selected vicinity of the subject property. Corner parcels are more heavily weighted when counting linear frontage due to their greater aesthetic impacts.
- The methodology is as follows: for each property, including the subject property, the total linear frontage of the lot facing a public right-of-way is divided by the number of storefronts. Formula retail storefronts and their linear frontage are separated from the non-formula retail establishments and their linear frontage. The final calculations are the percentages (%) of formula retail and non-formula retail frontages (half of a percentage shall be rounded up).
- An evaluation of the number of formula retail uses as a percentage (%) of all commercial uses within the selected vicinity. This calculation will count all ground floor storefronts as a commercial use.

→ The Department does not identify an ideal concentration threshold because it varies significantly by zoning district. This variation is based on pre-existing uses, vacancy rates, massing and use sizes, and neighborhood needs. Comparisons of the formula retail concentration to citywide numbers and to comparable neighborhoods are encouraged.

→ Concentration thresholds may also vary significantly based on proximity to a zoning district more favorable to formula retail, or to a Commercial District that principally permits formula retail.

### The availability of other similar uses within the vicinity of the proposed project.

- An evaluation of similar retail uses within the district requires a concentration calculation of retail sales and/or service uses that offer the similar products or services to those being proposed. This concentration shall be based on the number of available uses as a percentage of all commercial uses.
- Using the same selected appropriate vicinity as identified in criterion 1B, an evaluation and accompanying map shall be produced showing the location of similar uses throughout the vicinity. If no similar uses are available within the vicinity or district, the closest offerings may be identified.

### The compatibility of the proposed formula retail use with the existing architectural and aesthetic character of the district.

- Use the Performance-Based Design Guidelines to ensure compatibility with the signage, storefront design, storefront transparency, and pedestrian accessibility.
- Identify the business’ place in the District (corner, anchor, recessed from street) and whether it is in a protected viewshed in the General Plan.

### The existing retail vacancy rates within the district.

- Identify current vacancy rates in district and compared to historic vacancy rates, if this information is available.

→ Identify vacancies within the selected vicinity and discuss the conditions and potential impacts of vacant buildings within the selected vicinity.

**The existing mix of Citywide-serving retail uses and daily needs serving retail uses within the appropriate vicinity of the proposed location.** Neighborhood Commercial Districts are intended to serve the daily needs of the neighborhood residents. As such, daily needs service retailers are those that provide goods and services that residents want within walking distance of their residence or workplace.

It is important to note that formula retail uses can also be daily needs serving uses; the terms are not mutually exclusive. For example, banks and other financial institutions are subject to formula retail controls; however, having a bank within walking distance is a valuable amenity to a neighborhood.

→ Evaluate the provision of daily needs for the immediate vicinity in relation to the district's defined intent. Some districts are intended to only support residents. Conversely, the district may be intended to meet resident needs and wider shopping or tourist needs.

→ The following uses are considered "Daily Needs" uses:

- Limited Restaurant, as defined by Planning Code Sec. 102
- Specific Other Retail, Sales, and Services, as defined by the following subsections of Planning Code Sec. 102:
  - (a) General Grocery
  - (b) Specialty Grocery
  - (c) Pharmaceutical drugs and personal toiletries
  - (e) Self-service Laundromats and dry cleaning
  - (f) Household goods and services
  - (g) Variety merchandise, pet supply stores, and pet grooming services
  - (l) Books, music, sporting goods, etc.
- Personal services, as defined by Planning Code Sec. 102
- Limited Financial Service, as defined by Planning Code Sec. 102, and/or Financial Service, as defined by Planning Code Sec. 102
- Trade Shops as defined by the following subsections of Planning Code Sec. 102
  - (1) Repair of personal apparel, accessories, household goods, appliances, furniture and similar items, but excluding repair of motor vehicles and structures
  - (6) Tailoring

## II. Performance-Based Design Guidelines



### **FORMULA RETAIL SIGNAGE**

This section establishes design guidelines to ensure the aesthetic compatibility of formula retail uses.

Signage creates visual impacts which affect how residents feel about their neighborhood and play a role in the attraction of visitors who are important to the City's economy. Signs serve as markers and create individual identities for businesses that add to the greater identity of a neighborhood and district, hence the need for guidelines to ensure compatibility between businesses and their surroundings.

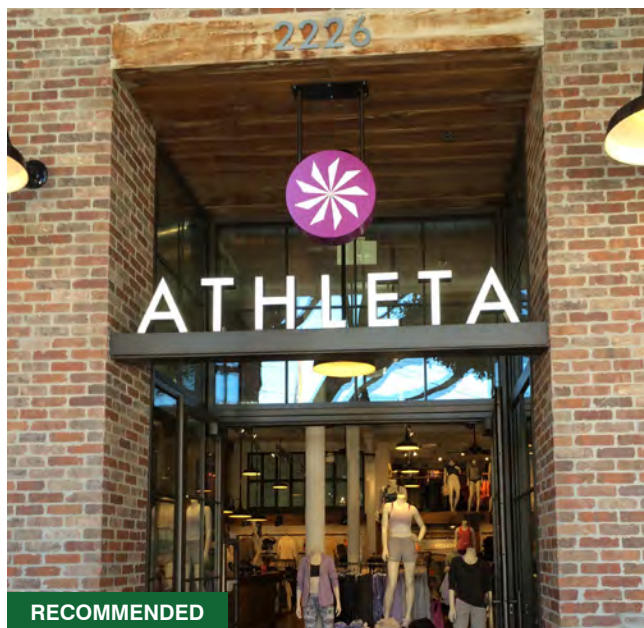
Formula retail uses can have a homogenizing effect on neighborhood character. This is largely due to standardized signage and branded features that promote recognition. These Performance-Based Design Guidelines seek to minimize the uniform aspects of formula retail signage.

Business signs are generally regulated to ensure an appropriate and equitable degree of commercial communication without contributing to visual clutter.

Photos by Matthew Dito



Scale of sign is inappropriate and extends beyond the storefront entrance.



Sign does not extend out and beyond the width of the storefront opening.

Signage guidelines for formula retail business signs<sup>1</sup> are as follows:

- One sign per tenant shall be permitted. A ground floor establishment with a corner storefront may have one sign on each building façade. Signs should not extend beyond with width of the storefront opening.
- Signage, painted on glass doors, windows, and transoms, where the sign does not exceed 25% of the glazed area, is permitted.
- Sign depth should be reduced by placing the transformer in a remote location and not housed within the sign itself.
- Signs that are located on the inside of a storefront should be setback a minimum of 6" from the display glass.
- Scale of signs and placement on the building should be appropriate to the elements of the building and the character of the neighborhood.

- Upper story establishments with a corner storefront may have one sign adjacent to the building entrance. It should be a small identification sign or plaque, installed adjacent to the ground floor entrances.
- Signs should be constructed of durable high-quality materials that retain their characteristics within a high-traffic area over time. Acrylic and vinyl signs are discouraged.
- Signage is to be scaled and placed primarily for pedestrian legibility, and secondarily for vehicular visibility.
- Materials should be compatible with the craftsmanship, and finishes associated with the District. Glossy or highly reflective surfaces will not be approved.
- Signs should be attached in a manner that avoids damaging or obscuring any of the character-defining features associated with the subject building. Signs should be attached in a manner that allows for their removal without adversely impacting the exterior of the building, ideally pin-mounted.

<sup>1</sup> A business sign is defined as a sign which directs attention to a business, commodity, service, industry, or other activity which is sold, offered, or conducted, other than incidentally, on the premises upon which such sign is located, or to which it is affixed.

Photos by Matthew Dito



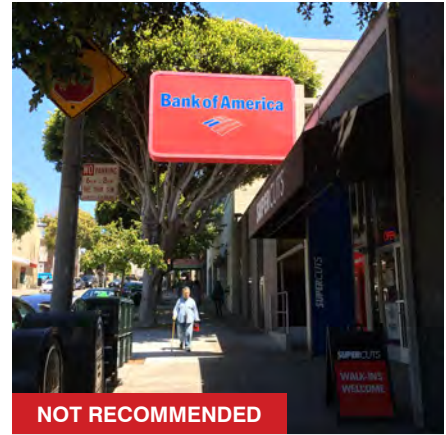
**NOT RECOMMENDED**

There is an excessive number of wall signs attached to the building facade, and the windows are covered, preventing visibility.



**NOT RECOMMENDED**

Sign is directly lit with visible lighting conduits.



**NOT RECOMMENDED**

Scale, placement, and design of sign are inappropriate to the building and its surroundings.



**RECOMMENDED**

A corner storefront with one sign on each building facade, as permitted.



**RECOMMENDED**

Sign is indirectly lit with a reduced profile due to a light emitting diode (LED) method of illumination.



**RECOMMENDED**

Sign is attached above the entrance bay, and does not detract from the buildings aesthetic qualities.

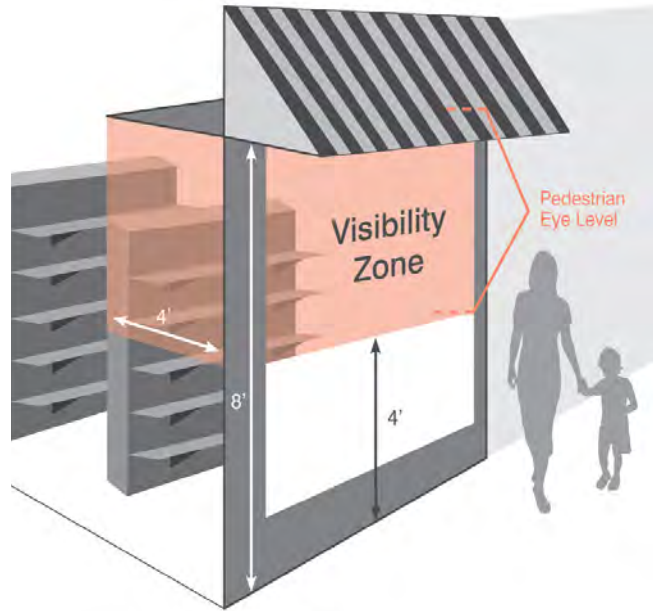
- Signs should be externally illuminated, or appear to be indirectly illuminated, such as by installing an external fixture to illuminate the sign or by using a reverse channel halo-lit means of illumination.
- Signs should have an opaque background that does not transmit light and text.
- Signs should be minimized in profile or depth, for example, by using a light emitting diode method of illumination.

- Sign legibility shall be of minimum appropriate intensity to be visible while not being visually dominating.
- Signage lights should be dimmed or off when business is closed.
- Businesses should not use exterior digital or LED screens to amplify branding beyond the signage limits.

## FORMULA RETAIL TRANSPARENCY

A transparent storefront welcomes customers inside with products and services on display, discourages crime with more “eyes on the street”, reduces energy consumption by allowing natural light into stores, and enhances the curb appeal and value of the store, as well as the entire neighborhood. As mentioned earlier, successful city living depends on surprise to maintain interest. Even if the formula retailer is familiar, a view into the store may spur interest in the people and products inside.

The City strives to ensure that tenant spaces remain transparent to the exterior, contribute to the activity of the public realm and do not devolve into de facto sign boards for tenants.



### Visibility Requirements

To ensure visibility into active spaces, any fenestration provided at eye level must have visibility beyond a window display and into the store.

The following definitions apply:

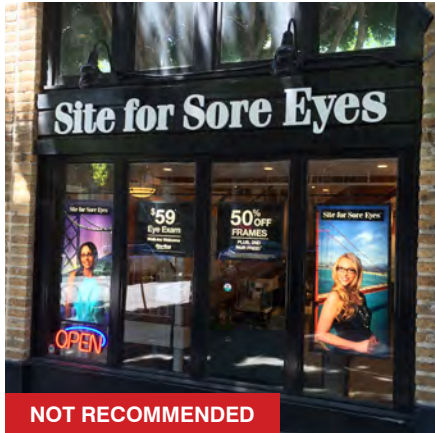
- **Pedestrian Eye Level:** the space between 4-feet and 8-feet in height above the adjacent sidewalk level, following the slope if applicable.
- **Visibility to the Inside of the Building:** the area inside the building within 4-feet of the window surface at pedestrian eye level must be 75 percent (%) open to perpendicular view.

Therefore, any fenestration of frontages with active uses must have visibility to the inside of the building with at least 75 percent (%) open to perpendicular view with a 4-foot by 4-foot “visibility zone” at pedestrian eye level. In addition, 60 percent (%) of all street frontages must be transparent windows, while any railings or grillwork placed in front of or behind storefront windows must be at least 75 percent (%) transparent at a perpendicular view.

To ensure visibility, business signs may not exceed one-third the area of the window in which the sign is located. The Department will work with applicants to improve visibility wherever possible.

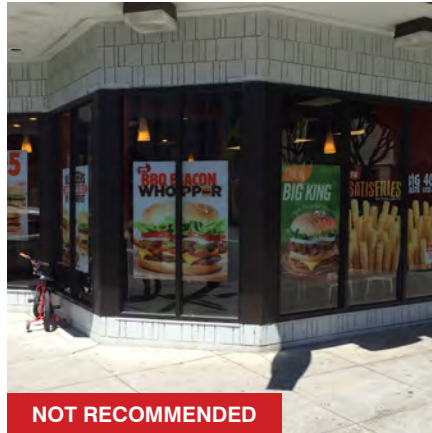
The Performance-Based Design Guidelines require formula retail applicants to work with staff to determine what transparency improvements can be made. Changes required may include converting windows to transparent glazing, relocating shelving and displays away from windows, or removing security grilles and other window coverings.

Photos by Matthew Dito



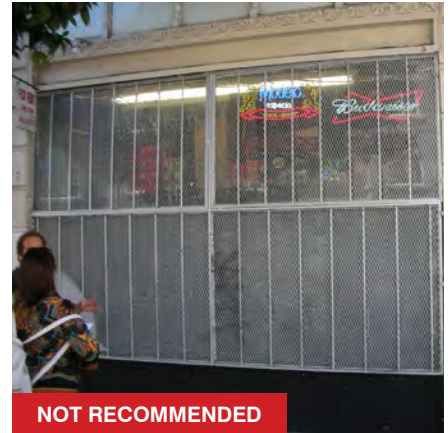
**NOT RECOMMENDED**

Views through the frontage fenestration are obstructed by advertising signs and business identifiers.



**NOT RECOMMENDED**

The 4-foot by 4-foot visibility zone inside the establishment is obstructed by excessive signage.



**NOT RECOMMENDED**

The security grille does not have at least 75% transparency at a perpendicular view.



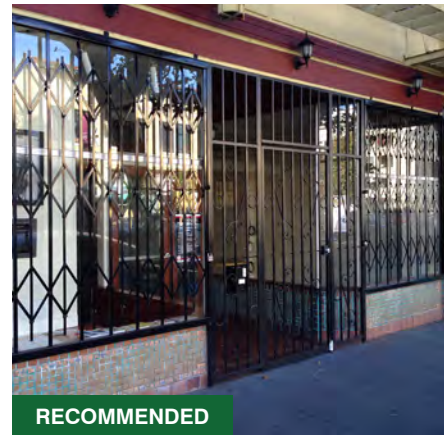
**RECOMMENDED**

The space between 4 feet and 8 feet above the sidewalk has at least 75% of its frontage fenestrations open to perpendicular view.



**RECOMMENDED**

Limited window signage maximizes visibility inside the store.



**RECOMMENDED**

The security grille allows for visibility of at least 75% at a perpendicular view.

**What This Means For Formula Retail Uses**

1. Windows that have been covered over with boards, film, or paint must be restored to transparency.
2. Security gates or grillwork on the inside or outside of the window glass must be primarily transparent (at least 75 percent (%) open to perpendicular view).
3. Shelving, display cases, appliances, and other items placed within four feet of the window glass must be no taller than four feet or be primarily transparent (at least 75 percent [%] open to perpendicular view).
4. All exterior signs must have a sign permit or must be removed.
5. Business signs affixed to the window (painted or adhered to the glass) can be no larger than one-third the size of the window on which they are placed.



## FORMULA RETAIL STOREFRONT DESIGN

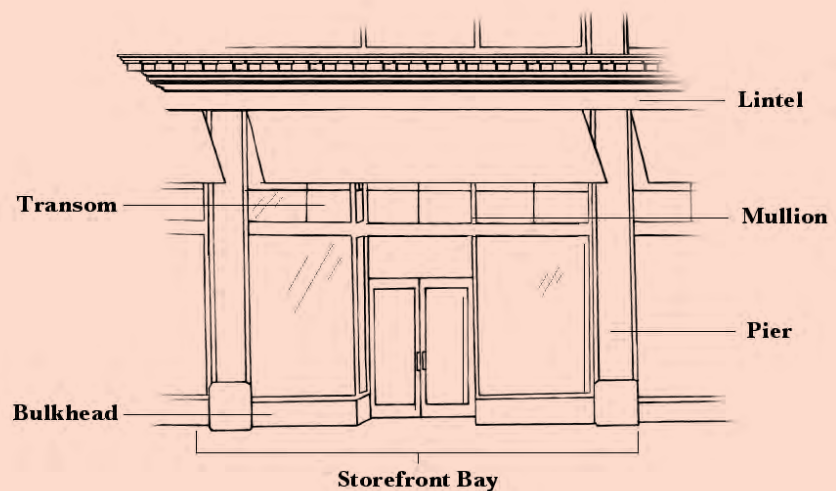
Storefront design can be used to extend branding beyond the dimensions of signage. To maintain emphasis on architecture and to prevent formula retail from overwhelming neighborhood character, it's important to prevent facades from becoming defacto branding opportunities.

Historic qualities present in a storefront should be preserved and maintained, as well as integrated into additions or modifications made to the storefront. The most successful storefronts combine contemporary design with sensitivity to the character defining storefront components.



### Storefront Components

The components of Performance-Based Design Guidelines for Storefront Design are: facades and street walls, corner lots, storefront bays, entrances, bulkheads, and display windows.



#### TYPICAL FEATURES INCLUDE:

**Bulkhead:** The low paneled base of a storefront bay that supports the glazing and elevates merchandise for pedestrian viewing.

**Façade Materials:** Original exterior cladding, typically brick, wood or stone provide a sense of permanence, scale and texture and often convey the work of skilled craftsmen.

**Lintel:** The horizontal structural element that spans above the storefront bays to support the weight of the upper façade.

**Mullion:** The vertical element that separates window units or storefront glazing; typically not a structural support for the building.

**Pier:** The vertical structural or decorative elements, also known as a column, which supports and/or frames the glazing.

**Storefront Bay:** Defined by the height of the lintel and separated by piers, a storefront bay is composed of bulkhead, glazing, transom, and entry.

**Transom:** The small, operable or inoperable framed windows above the glazing and below the lintel that filter light into the ground floor space; sometimes sheltered by awnings.

Photos by Matthew Dito



Design, including colors, finish, and texture, is inconsistent with the surrounding buildings.



Storefront design is consistent with surrounding buildings, and the setback creates a continuous street wall and edge.

### Façades and Street Walls

The façade is the exterior wall of the building, or frontage, and should utilize traditional building materials such as terra cotta, brick, stone, and scored stucco. The color should be limited to different tones of one color, and said color should be similar in profile to the surrounding buildings. Buildings should have a finished texture that is smooth and painted with a satin or light finish. Color washing an entire storefront to extend branding detracts from the character of a neighborhood and will not be permitted.

The design should remain consistent with surrounding buildings in the neighborhood. As such, the setback should be as such that it creates a consistent, continuous street wall and edge.

### Corner Lots

Many buildings on corner lots exhibit special features that emphasize the corner and add accent to both intersecting streets, providing visual interest to pedestrians. Corner entrances, storefront windows, and displays that extend along both street façades emphasize corner lots are encouraged.

Where entrances are not located at the corner, storefront windows should turn the corner, in addition to windows on each side of the building.

### Storefront Bays

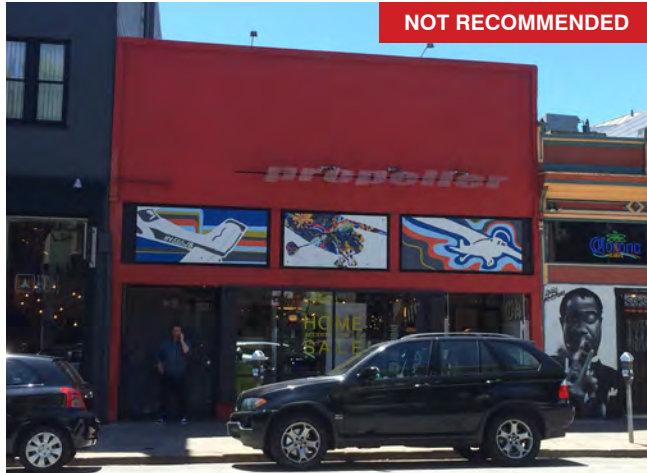
Appropriate alignment and proportions of the storefront bay are critical in creating a unified appearance within the district.

Windows should be consistent in height and design with storefront doors to create a cohesive appearance, however, slight variations in alignment can add visual interest. Piers and lintels should be treated and designed as a single component. The lintel establishes the top of the storefront bay, visually separating it from upper floors. Proper proportions must be maintained between windows and the lintel. Elements such as signs and awnings that obscure the spacing of the bays or other elements that define those bays should be avoided. Colors should be similar in profile to the surrounding buildings, and limited to different tones of one color.

### Entrances

Typically, entrances are recessed by about two to six feet from the sidewalk, allowing for protection from the rain, providing additional display frontage, and creating a rhythm of defined commercial spaces. Together, these features can establish a sense of scale and identify business entrances. In San Francisco, entrances for people should be emphasized and entrances for cars should be minimized.

A service door may also exist for access to building systems.



Colorwashing a building facade in branded color serves as oversized signage and is not permitted.

### Bulkhead

The bulkhead is the one to two foot high based of the building, upon which the storefront display window is placed. Traditionally, bulkheads are made of painted wood, decorative metal, small ceramic tiles, or masonry. Replacements should match or be compatible with original materials. Bulkheads should be consistent with surrounding buildings in the neighborhood, and are typically between 18 inches and 24 inches.



Transparent display with simple, effective signage on the bulkhead.

### Storefront Displays

Storefront display windows typically consist of large panes of plate glass set in metal or wood frames, with the primary purpose of allowing passerby to see goods or services available inside. Individual panes of a window are separated by mullions, which should be as narrow and as limited in number as possible. This maximizes visibility into interior activity and merchandising.



While the establishment utilizes the corner lot with its entrance, the facade and bulkhead are incompatible with the surrounding buildings.

Photos by Matthew Dito

## PEDESTRIAN ACCESSIBILITY

Ensuring that businesses are easily accessible creates a more inviting environment in commercial neighborhoods. For smaller formula retail establishments, pedestrian accessibility is usually not a problem. Larger formula retail establishments, however, tend to limit and control entrances. A suburban design may cater to those who arrive by car. In order to preserve the City's walkable character, formula retail in particular must be designed for pedestrians. Entrances that are distinguishable from the façade of a building invite and allow pedestrian access. Entrances should be located in a manner that keeps with the rhythm established by surrounding buildings. This consistency creates a familiarity that draws the attention of pedestrians.

Requirements for pedestrian accessibility are as follows:

- All businesses must have an ADA compliant entrance
- Corner lot locations should have at least an entrance on the corner, or one on each street
- Improve the pedestrian environment with clearly visible, easy, safe routes to business entries, including through parking lots and to the public sidewalk and transit stops.
- Provide pedestrian access onto the site from the main street on which the business is located.
- All existing street-facing doors, with the exception of emergency and service entrances, shall remain unlocked and open to the public during regular business hours.



The business entrance is not distinguishable from the corner lot window, and is located in a manner that does not utilize or promote pedestrian access to the building.



Business entrances are distinguishable from the building facade with a consistent rhythm that creates a familiarity to draw attention of pedestrians. Entrances are also visually compatible with the entrances to upper residences.

Photos by Matthew Dito

## LIMITED FINANCIAL SERVICES

Limited Financial Services are defined in Planning Code Sections 102 as a retail use which provides banking services, when not occupying more than 15 feet of linear frontage or 200 square feet of gross floor area. Automated teller machines (ATM), if installed within such a facility or on an exterior wall as a walk-up facility, are included in this category. A Conditional Use authorization is required for all Limited Financial Services that are also a formula retail use, with the exception of single automated teller machines located within another use that are not visible from the street [Sec. 303.1(b)(13)].

When placing an ATM, the feature should be integrated into the overall composition of the storefront, so as to not detract from the architecture or the quality of the pedestrian experience.

A single ATM at a street façade may be permitted without conditional use authorization if the machine meets the Performance-Based Design Guidelines in this document. A single automated teller machine may not be permitted at the street front if it compromises the storefront's ability to meet other Performance-Based Design Guidelines, including visibility and transparency goals.



This illustration represents the design guidelines for ATMs.

### General guidelines for ATMs are as follows:

- Minimize lighting elements and brightness intensity.
- Areas using materials that need to be lit, or backlit, should be minimized.
- ATMs should be proportionate to the storefront or building facade.
- Framing elements should be used, as appropriate, to integrate ATMs into the facade composition.
- Architectural quality should be maximized.

Photos by Matthew Dito



This requires a conditional use permit because there is more than one ATM at the street front.



Colorwashing a building facade in branded color serves as oversized signage and is not permitted.



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PLANNING  
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## San Francisco Planning Code

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**SEC. 303.1. FORMULA RETAIL USES.**

**Publisher's Note:** This section has been **AMENDED** by new legislation (Ord. [205-19](#), approved 9/11/2019, effective 10/12/2019). The text of the amendment will be incorporated under the new section number when the amending legislation is effective.

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**(a) Findings.**

(1) San Francisco is a city of diverse and distinct neighborhoods identified in large part by the character of their commercial areas.

(2) One of the eight Priority Policies of the City's General Plan resolves that "existing neighborhood-serving retail uses be preserved and enhanced and future opportunities for resident employment in and ownership of such businesses enhanced."

(3) Retail uses are the land uses most critical to the success of the City's commercial districts.

(4) Formula Retail businesses are increasing in number in San Francisco, as they are in cities and towns across the country.

(5) San Francisco is one of a very few major urban centers in the State in which housing, shops, work places, schools, parks and civic facilities intimately co-exist to create strong identifiable neighborhoods. The neighborhood streets invite walking and bicycling and the City's mix of architecture contributes to a strong sense of neighborhood community within the larger City community.

(6) Notwithstanding the marketability of a retailer's goods or services or the visual attractiveness of the storefront, the standardized architecture, color schemes, decor and signage of many Formula Retail businesses can detract from the distinctive character and aesthetics of certain Neighborhood Commercial Districts.

(7) The increase of Formula Retail businesses in the City's neighborhood commercial areas, if not monitored and regulated, will hamper the City's goal of a diverse retail base with distinct neighborhood retailing personalities comprised of a mix of businesses. Specifically, the unregulated and unmonitored establishment of additional Formula Retail uses may unduly limit or eliminate business establishment opportunities for smaller or medium-sized businesses, many of which tend to be non-traditional or unique, and unduly skew the mix of businesses towards formula retailers in lieu of unique or start-up retailers, thereby decreasing the diversity of merchandise available to residents and visitors and the diversity of purveyors of merchandise.

(8) If, in the future, neighborhoods determine that the needs of their Neighborhood Commercial Districts are better served by eliminating the notice requirements for proposed Formula Retail uses, by converting Formula Retail uses into conditional uses in their district, or by prohibiting Formula Retail uses in their district, they can propose legislation to do so.

(9) Neighborhood Commercial Districts are intended to preserve the unique qualities of a district while also serving the daily needs of residents living in the immediate neighborhood; however, community members have reported loss of daily needs uses due to inundation of formula retailers that target larger citywide or regional audiences. The City strives to ensure that goods and services that residents require for

daily living are available within walking distance and at an affordable price. Establishments that serve daily needs and Formula Retail establishments are neither mutually exclusive nor completely overlapping.

(10) The San Francisco retail brokers' study of 28 Neighborhood Commercial Districts conducted in 2014 found that the healthiest and most viable retail environments offer a mix of retailers who vary in size and offerings; including a mix of conventional and cutting edge retailers as well as established players and newcomers.

(11) Formula retailers are establishments with multiple locations and standardized features or a recognizable appearance. Recognition is dependent upon the repetition of the same characteristics of one store in multiple locations. The sameness of Formula Retail outlets, while providing clear branding for consumers, counters the general direction of certain land use controls and General Plan Policies which value unique community character and therefore need controls, in certain areas, to maintain neighborhood individuality.

(12) The homogenizing effect of Formula Retail, based on its reliance on standardized branding, is greater if the size of the Formula Retail use, in number of locations or size of use or branded elements, is larger. The increased level of homogeneity distracts from San Francisco's unique neighborhoods, which thrive on a high level of surprise and interest maintained by a balanced mix of uses and services, both independent and standardized.

(13) Due to the distinct impact that Formula Retail uses have on a neighborhood, these uses are evaluated for concentration as well as compatibility within a neighborhood. As neighborhoods naturally evolve over time, changes and intensifications of Formula Retail uses should also be re-evaluated for concentration and compatibility within a neighborhood.

(14) According to an average of ten studies done by the firm Civic Economics and published by the American Independent Business Alliance in October of 2012, spending by independent retailers generated 3.7 times more direct local spending than that of Formula Retail chains.

(15) Money earned by independent businesses is more likely to circulate within the local neighborhood and City economy than the money earned by Formula Retail businesses which often have corporate offices and vendors located outside of San Francisco.

(16) According to a 2014 study by the San Francisco Office of Economic Analysis (OEA) report "Expanding Formula Retail Controls: Economic Impact Report" the uniqueness of San Francisco's neighborhoods is based on a combination of unique visual characteristics and a sense of community fostered by small merchants and resident relationships. A Formula Retail establishment is determined by its recognizable look which is repeated at every location, therefore, detracting from the unique community character.

(17) The OEA Report found that in general, chain stores charge lower prices and provide affordable goods, but may spend less within the local economy, and can be unpopular with some residents because they can be seen to diminish the character of the neighborhood. At the same time, this OEA Report found that excessively limiting chain stores can reduce commercial rents and raise vacancy rates.

(18) Through a 2014 study commissioned by the Planning Department, titled "San Francisco Formula Retail Economic Analysis," staff and consultants conducted one-on-one interviews and worked with small groups including independent retailers, small business owners, merchants associations, formula retailers, commercial brokers, neighborhood representatives and other stakeholders. The Study found that landlords often perceive a benefit in renting to large established chains, which landlords believe typically have better credit and can sign longer leases than local, independent retailers, lowering the risk that the tenant will be unable to pay its rent. The existing land use controls for Formula Retail may create a disincentive for formula retailers to locate where the formula retail controls apply.

(b) **Definition.** A Formula Retail use is hereby defined as a type of retail sales or service activity or retail sales or service establishment that has eleven or more other retail sales establishments in operation, or



with local land use or permit entitlements already approved, located anywhere in the world. In addition to the eleven establishments either in operation or with local land use or permit entitlements approved for operation, the business maintains two or more of the following features: a standardized array of merchandise, a standardized facade, a standardized decor and color scheme, uniform apparel, standardized signage, a trademark or a servicemark.

(1) Standardized array of merchandise shall be defined as 50% or more of in-stock merchandise from a single distributor bearing uniform markings.

(2) Trademark shall be defined as a word, phrase, symbol or design, or a combination of words, phrases, symbols or designs that identifies and distinguishes the source of the goods from one party from those of others.

(3) Servicemark shall be defined as word, phrase, symbol or design, or a combination of words, phrases, symbols or designs that identifies and distinguishes the source of a service from one party from those of others.

(4) Decor shall be defined as the style of interior furnishings, which may include but is not limited to, style of furniture, wall coverings or permanent fixtures.

(5) Color Scheme shall be defined as selection of colors used throughout, such as on the furnishings, permanent fixtures, and wall coverings, or as used on the facade.

(6) Facade shall be defined as the face or front of a building, including awnings, looking onto a street or an open space.

(7) Uniform Apparel shall be defined as standardized items of clothing including but not limited to standardized aprons, pants, shirts, smocks or dresses, hats, and pins (other than name tags) as well as standardized colors of clothing.

(8) Signage shall be defined as business sign pursuant to Section 602.3 of the Planning Code.

(c) **"Retail Sales or Service Activity or Retail Sales or Service Establishment."** For the purposes of this Section 303.1, a retail sales or service activity or retail sales or service establishment shall include the following uses whether functioning as a Principal or Accessory Use, as defined in Articles 1, 2, 7, and 8 of this Code:

- Bar § 102;
- Drive-up Facility §§ 102, 890.30;
- Eating and Drinking Use § 102;
- Liquor Store § 102;
- Sales and Service, Other Retail § 890.102 and Retail Sales and Service, General;
- Restaurant § 102;
- Limited-Restaurant § 102;
- Sales and Service, Retail §§ 102, 890.104;
- Service, Financial §§ 102, 890.110;
- Movie Theater §§ 102, 890.64;
- Amusement Game Arcade §§ 102, 890.4;
- Service, Limited Financial, except single automated teller machines at the street front that meet the Commission's adopted Performance-Based Design Guidelines and automated teller machines located

within another use that are not visible from the street § 102;

- Service, Fringe Financial §§ 102, 890.113;
- Tobacco Paraphernalia Establishment §§ 102, 890.123;
- Massage Establishment §§ 102, 890.60;
- Service, Personal §§ 102, 890.116
- Service, Instructional § 102 ;
- Gym; § 102
- General Grocery § 102;
- Specialty Grocery § 102;
- Pharmacy § 102;
- Jewelry Store §§ 102, 890.51;
- Tourist Oriented Gift Store §§ 102, 890.39;
- Non-Auto Vehicle Sales or Rental §§ 102, 890.69; and
- Cannabis Retail §§ 102, 890.125.

(d) **Conditional Use Criteria.** With regard to a Conditional Use authorization application for a Formula Retail use, the Planning Commission shall consider, in addition to the criteria set forth in Section 303, the criteria below and the Performance-Based Design Guidelines adopted by the Planning Commission to implement the criteria below.

(1) The existing concentrations of Formula Retail uses within the district and within the vicinity of the proposed project. To determine the existing concentration, the Planning Commission shall consider the percentage of the total linear street frontage within a 300-foot radius or a quarter of a mile radius, at the Planning Department's discretion, from the subject property that is occupied by Formula Retail and non-Formula Retail businesses. The Department's review shall include all parcels that are wholly or partially located within the 300-foot radius or quarter-mile radius. If the subject property is a corner parcel, the 300-foot radius or quarter mile radius shall include all corner parcels at the subject intersection. For each property, the Planning Department shall divide the total linear frontage of the lot facing a public-right of way by the number of storefronts, and then calculate the percentage of the total linear frontage for Formula Retail and non-Formula Retail. Half percentage points shall be rounded up.

For the Upper Market Street Neighborhood Commercial District only, if the application would bring the formula retail concentration within a 300-foot radius to a concentration of 20% or above, Planning Department staff shall recommend disapproval of the application to the Planning Commission. If the application would not bring the formula retail concentration within the 300-foot radius to a concentration of 20% or above, Planning Department staff shall assess the application according to all the other criteria listed in this Subsection 303.1(d), and recommend approval or disapproval to the Planning Commission, according to its discretion and professional judgment. In either case, the Planning Commission may approve or reject the application, considering all the criteria listed in this Subsection 303.1(d).

(2) The availability of other similar retail uses within the district and within the vicinity of the proposed project.

(3) The compatibility of the proposed Formula Retail use with the existing architectural and aesthetic character of the district.

(4) The existing retail vacancy rates within the district and within the vicinity of the proposed project.

(5) The existing mix of Citywide-serving retail uses and daily needs-serving retail uses within the district and within the vicinity of the proposed project.

(6) Additional relevant data and analysis set forth in the Performance-Based Design Guidelines adopted by the Planning Commission.

(7) For Formula Retail uses of 20,000 gross square feet or more, except for General or Specialty Grocery stores as defined in Articles 2, 7 and 8 of this Code, the contents of an economic impact study prepared pursuant to Section 303(i) of this Code.

(8) Notwithstanding anything to the contrary contained in Planning Code Article 6 limiting the Planning Department's and Planning Commission's discretion to review signs, the Planning Department and Planning Commission may review and exercise discretion to require changes in the time, place and manner of the proposed signage for the proposed Formula Retail use, applying the Performance-Based Design Guidelines.

(e) **Conditional Use Authorization Required.** A Conditional Use Authorization shall be required for a Formula Retail use in the following zoning districts unless explicitly exempted:

(1) All Neighborhood Commercial Districts in Article 7;

(2) All Mixed Use-General Districts in Section 840;

(3) All Urban Mixed Use Districts in Section 843;

(4) All Residential-Commercial Districts as defined in Section 209.3;

(5) Chinatown Community Business District as defined in Section 810;

(6) Chinatown Residential/Neighborhood Commercial District as defined in 812;

(7) Western SoMa Planning Area Special Use District as defined in 823;

(8) Limited Commercial Uses in RH, RM, RTO, and RED Districts, as permitted by Sections 186, 186.3, and 231;

(9) Third Street Formula Retail Restricted Use District, as defined in Section 786;

(10) The C-3-G District with frontage on Market Street, between 6th Street and the intersection of Market Street, 12th Street and Franklin Street; and

(13)<sup>1</sup> The Central SoMa Special Use District as defined in Section 848, except for those uses not permitted pursuant to subsection (f) below.

(f) **Formula Retail Uses Not Permitted.** Formula Retail uses are not permitted in the following zoning districts:

(1) Hayes-Gough Neighborhood Commercial Transit District;

(2) North Beach Neighborhood Commercial District;

(3) Chinatown Visitor Retail District;

(4) Upper Fillmore District does not permit Formula Retail uses that are also Restaurant or Limited-Restaurant uses;

(5) Broadway Neighborhood Commercial District does not permit Formula Retail uses that are also Restaurant or Limited-Restaurant uses;

(6) Mission Street Formula Retail Restaurant Subdistrict does not permit Formula Retail uses that are also Restaurant or Limited-Restaurant uses;

(7) Geary Boulevard Formula Retail Pet Supply Store and Formula Retail Eating and Drinking Subdistrict does not permit Formula Retail uses that are also either a Retail Pet Supply Store or an Eating and Drinking use as set forth in Section 781.4;

(8) Taraval Street Restaurant Subdistrict does not permit Formula Retail uses that are also Restaurant or Limited-Restaurant uses;

(9) Chinatown Mixed Use Districts do not permit Formula Retail uses that are also Restaurant or Limited-Restaurant uses; and

(10) Central SoMa Special Use District does not permit Formula Retail Uses that are also Bar, Restaurant, or Limited Restaurant Uses as defined in Section 102.

(g) **Neighborhood Notification and Design Review.** Any application for a Formula Retail use as defined in this section shall be subject to the notification and review procedures of Sections 311 or 333, as applicable, of this Code.

(h) **Determination of Formula Retail Use.** In those areas in which Formula Retail uses are prohibited or subject to the provisions of Subsections 303.1(d) or (e), any application for an entitlement or determination determined by the City to be for a Formula Retail use that does not identify the use as a Formula Retail use is incomplete and cannot be processed until the omission is corrected. Any entitlement approved or determination made that is determined by the City to have been, at the time of application, for a Formula Retail use that did not identify the use as a Formula Retail use is subject to revocation at any time. If the City determines that an entitlement or determination, or an application for the same, is for a Formula Retail use, the applicant or holder of the entitlement bears the burden of proving to the City that the proposed or existing use is not a Formula Retail use.

(i) **Performance-Based Design Guidelines.** All new, enlarged, intensified or non-intensified Formula Retail uses or establishments must comply with the Commission's adopted Performance-Based Design Guidelines for Formula Retail, as directed by the Planning Department and Planning Commission.

(j) **Change of Use.** Changes of Formula Retail establishments are generally described below, except that a change of a Formula Retail use that is also a nonconforming use pursuant to Section 182 is prohibited. In all other instances, changes of Formula Retail establishments from one use category to another, including a change from one use to another within the sub-categories of uses set forth in the definition of Retail Sales and Services in Section 102 and in Section 890.102 for Mixed Use Districts, require a new Conditional Use authorization as a new Formula Retail use. Changes of Formula Retail owner or operator within the same use category that are determined to be an enlargement or intensification of use pursuant to subsection 178(c) are required to obtain Conditional Use authorization and shall meet the Commission's adopted Performance-Based Design Guidelines for Formula Retail. In cases determined not to be an enlargement or intensification of use, the Performance-Based Design Guidelines for Formula Retail may be applied and approved administratively by the Planning Department, unless the applicant requests a Conditional Use hearing at the Planning Commission. The applicant shall also pay an administrative fee to compensate Planning Department and City staff for its time reviewing the project under this subsection (j), as set forth in Section 360 of this Code.

(k) **Accessory Uses.** Conditional Use authorization shall be required for all Accessory Uses within those use categories subject to Formula Retail controls as defined in this Section 303.1, except for the following:

(1) Single automated teller machines falling within the definition of Limited Financial Services that are located at the street front that meet the Commission's adopted Performance-Based Design Guidelines for automated teller machines;

(2) Automated teller machines located within another use that are not visible from the street;

(3) Vending machines that do not exceed 15 feet of street frontage or occupy more than 200 square feet of area facing a public right of way.

(Added by Ord. [235-14](#), File No. 140844, App. 11/26/2014, Eff. 12/26/2014; amended by Ord. [22-15](#), File No. 141253, App. 2/20/2015, Eff. 3/22/2015; Ord. [129-17](#), File No. 170203, App. 6/30/2017, Eff. 7/30/2017; Ord. [229-17](#), File No. 171041, App. 12/6/2017, Eff. 1/5/2018; Ord. [202-18](#), File No. 180557, App. 8/10/2018, Eff. 9/10/2018; Ord. [179-18](#), File No. 180423, App. 7/27/2018, Eff. 8/27/2018, Oper. 1/1/2019; Ord. [296-18](#), File No. 180184, App. 12/12/2018, Eff. 1/12/2019)

#### AMENDMENT HISTORY

Divisions (c)(18) and (19) added; Ord. [22-15](#), Eff. 3/22/2015. Division (a)(9) amended; former divisions (c)(1)-(19) merged into division (c) and current division (c) amended; divisions (d) and (e)(4) amended; former divisions (e)(5) and (e)(9) deleted; former divisions (e)(6)-(8) and (e)(10)-(12) redesignated as (e)(5)-(10) and amended; divisions (g), (j), and (k) amended; Ord. [129-17](#), Eff. 7/30/2017. Division (c) amended; Ord. [229-17](#), Eff. 1/5/2018. Divisions (c), (f)(4)-(6), (f)(8)-(9), and (j) amended; Ord. [202-18](#), Eff. 9/10/2018. Division (g) amended; Ord. [179-18](#), Oper. 1/1/2019. Divisions (e)(13)<sup>1</sup> and (f)(10) added; Ord. [296-18](#), Eff. 1/12/2019.

#### CODIFICATION NOTE

1. So in Ord. 296-18.

[Print](#)

## San Francisco Planning Code

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**SEC. 703.4. CONDITIONAL USE AUTHORIZATION FOR  
FORMULA RETAIL USES.**

(a) This Section 703.4 shall be known as the Small Business Protection Act.

(b) Except for those zoning districts where Formula Retail uses are not permitted as set forth in Section 303.1(f), establishment of a Formula Retail use, as defined in Section 303.1, in any Neighborhood Commercial District, as identified in Article 7, shall require Conditional Use authorization pursuant to the criteria of Sections 303(c) and 303.1 and be subject to the terms of Sections 303.1(g) and (h).

(c) Nothing herein shall preclude the Board of Supervisors from adopting more restrictive provisions for Conditional Use authorization of Formula Retail use or prohibiting Formula Retail use in any Neighborhood Commercial District.

(Added by Proposition G, 11/7/2006; amended by Ord. [235-14](#), File No. 140844, App. 11/26/2014, Eff. 12/26/2014; Ord. [129-17](#), File No. 170203, App. 6/30/2017, Eff. 7/30/2017)

**AMENDMENT HISTORY**

Division (b) amended; Ord. [235-14](#), Eff. 12/26/2014. Section amended; Ord. [129-17](#), Eff. 7/30/2017.

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## San Francisco Planning Code

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**SEC. 803.6. FORMULA RETAIL USES IN ARTICLE 8 DISTRICTS.**

The Formula Retail controls set forth in Section 303.1 of this Code apply to Article 8 Districts.

(Added by Ord. 204-06, File No. 060482, App. 7/25/2006; amended by Ord. 269-08, File No. 081234, App. 11/25/2008; Ord. [298-08](#), File No. 081153, App. 12/19/2008; Ord. [140-11](#), File No. 110482, App. 7/5/2011, Eff. 8/4/2011; Ord. [75-12](#), File No. 120084, App. 4/23/2012, Eff. 5/23/2012; Ord. [106-12](#), File No. 120047, App. 6/22/2012, Eff. 7/22/2012; Ord. [42-13](#), File No. 130002, App. 3/28/2013, Eff. 4/27/2013; Ord. [56-13](#), File No. 130062, App. 3/28/2013, Eff. 4/27/2013; Ord. [235-14](#), File No. 140844, App. 11/26/2014, Eff. 12/26/2014)

**AMENDMENT HISTORY**

Section amended in its entirety; Ord. [235-14](#), Eff. 12/26/2014.



# The Impact of Chain Stores on Community

BY STACY MITCHELL | DATE: 18 APR 2000 |    

***A speech by ILSR's Stacy Mitchell delivered at the annual conference of the American Planning Association, April 2000***

Chain store proliferation has weakened local economies, eroded community character, and impoverished civic and cultural life. Moreover, consolidation has reduced competition and may harm consumers over the long-term. Contrary to conventional wisdom, the decline of independent businesses is not inevitable, nor is it simply the result of free market forces. Rather, public policy has played a major role, particularly through tax incentives and other development subsidies that give national chains a significant advantage. Meanwhile, a growing number of communities are taking a different approach. They are adopting land use rules that deter chain stores and actively encourage local ownership.

Let me begin by reading something that Jane Jacobs wrote in her book, *The Death and Life of Great American Cities*, about the relationship between locally owned businesses and community. Community is one of those words so overused that we rarely pause to consider its meaning. For Jacobs, what constitutes community is not any one particular thing, but rather the many small interactions that occur in our everyday lives.

"It grows," she writes, "out of people stopping by the bar for a beer, getting advice from the grocer and giving advice to the newsstand man, comparing opinions with other customers at the bakery and nodding hello to the two boys drinking pop on the stoop . . . hearing about a job from the hardware man and borrowing a dollar from the druggist . . .

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“Most of it is ostensibly utterly trivial, but the sum is not trivial at all. The sum of such casual, public contact at the local level. . . most of it fortuitous, most of it associated with errands . . . is a feeling for the public identity of people, a web of public respect and trust, and a resource in time of personal or neighborhood need. The absence of this trust is a disaster to a city street.” <sup>1</sup>

What Jacobs describes here could be an urban neighborhood or a small town. Its defining feature—and indeed the very foundation of this close-knit community—is a vibrant local retail economy. It is a place of small stores and sidewalks; a place where public and private space overlaps; and a place where we buy goods and services from businesses owned by our neighbors.

Such places are increasingly rare. Small-scale, pedestrian streets are giving way to massive, impersonal shopping centers. Street life has suffered, as our daily errands revolve increasingly around stores accessible only by car. Locally owned businesses are disappearing, displaced by national chains that have limited ties and no long-term commitment to the community.

The loss of locally owned stores and the pace of retail consolidation is staggering. 11,000 independent pharmacies have closed since 1990. Independent bookstores have fallen from 58 percent of book sales in 1972 to just 17 percent today. Local hardware dealers are on the decline, while two companies have captured 30 percent of the market. Blockbuster rents one out of three videos nationwide. Five firms control one-third of the grocery market, up from 19 percent just five years ago. A single firm, Wal-Mart, now accounts for 7 percent of all consumer spending. <sup>2</sup>

If the current trends continue, independent retailers might soon be a thing of the past. But, in the midst of this unprecedented expansion by national retail corporations, another trend is underway: a growing number of communities are rejecting chain stores.

Last summer, residents of Ashland, Virginia mounted a spirited campaign to block a proposed Wal-Mart. In October, the Planning Commission voted unanimously to reject the store. In Chelsea, Michigan, residents organized a picnic to protest plans for a Rite Aid drugstore. The event drew a crowd of 1100 people. Rite Aid quickly backed down. Similar events are occurring across the country.

Indeed, over the past two years, dozens, or perhaps hundreds, of neighborhood groups have sprung up to protect their homegrown businesses. In Lake Placid, New York, a group known as the Residents for Responsible Growth is working with neighboring towns to form a regional response to chain store expansion. In Flagstaff, Arizona, it was the arrival of a Barnes & Noble and a Home Depot that prompted residents to form the Friends of Flagstaff’s Future. In Northfield, Minnesota, the Citizens for Responsible Development is working to defend the town’s historic Main Street and local shops.

## CONSUMERS

The debate over chain stores is often characterized as a struggle between our hearts and wallets. We may mourn the loss of the corner drugstore, a fixture in the neighborhood for three generations, or the local independent bookstore, but ultimately we believe that, as consumers, we are better off. We tend to take as self-evident the chain stores’ claims that they bring us lower prices and wider selection.

Over the long-term, however, consumers are best served when there are numerous competitors in the market. The big retail corporations, like Home Depot, Toys R Us, and Best Buy, are known in the industry as “category killers.” The name is significant. These businesses do not intend to compete with local stores; they aim to be the only game in town.

Typically, a chain store will enter a new market sporting deep discounts. Many chains employ loss leaders to attract customers. Wal-Mart has been known to sell gallons of milk for 25 cents or to price entire departments below its own acquisition costs. This sets up a battle that local merchants cannot win. If they

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don't match the chain's prices, they risk losing customers. If they do match the chain's prices, they will lose money on every sale. While a chain can afford to operate a new outlet at a loss indefinitely, it's only a matter of time before the local business will be forced to close.

Once the chain has eliminated the local competition, prices tend to rise. In Virginia, a survey of several Wal-Mart stores statewide found prices varied by as much as 25 percent. The researchers concluded that prices rose in markets where the retailer faced little competition. A similar conclusion was reached in a survey of Home Depot. Prices were as much as 10 percent higher in Atlanta compared to the more competitive market in Greensboro, North Carolina. <sup>3</sup>

As for wider selection, consumers should be especially wary of the claims made by chain stores. Independent merchants are usually the first to sell products made by small companies. By contrast, most national chains refuse to do business with small and mid-sized companies. They prefer to deal only with large manufacturers. The result is that small manufacturers—even those that make innovative products, publish great books, or distribute ground-breaking films—are having an increasingly difficult time reaching consumers. <sup>4</sup>

Consider the impact of this on book publishing. Borders Books and Barnes & Noble certainly stock a large number of titles under one roof, but these are virtually the same titles found in each of their 2,000 stores. Although local bookstores tend to be smaller, collectively they stock — and promote — far more titles than either of the chains. They take risks on unknown authors and small publishers. A number of best-selling writers, including Barbara Kingsolver and Amy Tan, contend that, without independent booksellers, their first books would have gone quietly out of print.

## LOCAL ECONOMIES

Even if chain stores do save us a few dollars now and again, it comes at a great cost. Chain stores contribute far less to the local economy than independent businesses.

Developers often present new chain store developments as major additions to the local economy. They note the growth in retail sales and shopping options. They tally up the number of new jobs and the added tax revenue that the development will bring.

What is often overlooked is the other side of the balance sheet. Unlike new manufacturing facilities, which do create real economic growth, new retail stores simply shift consumer spending from one area of town to another. A new big box store can only be successful at the expense of existing businesses.

A study in Iowa, for example, found that new Wal-Mart stores derive on average of 84 percent of their sales from existing businesses within the community. <sup>5</sup> Similar conclusions have been reached in studies of big box development in Massachusetts, Maine, Vermont, New York, California, and Virginia.

What all of the studies find is that very little of the sales generated by a new retail store represent new retail spending. Instead these developments simply shift economic activity from one part of town to another. The end result is not economic development, but rather economic displacement.

One study in Greenfield, Massachusetts concluded that a proposed Wal-Mart store would cost existing businesses \$35 million in sales. The 177 jobs expected to be gained by the Wal-Mart would be offset by the loss of 148 jobs at other businesses. <sup>6</sup> A similar study in Saint Albans, Vermont found that a new Wal-Mart would derive 76 percent of its sales from local businesses. Many of these stores would be forced to close, leading to a significant net decline in total retail employment and property tax revenue. <sup>7</sup>

Trading locally owned businesses for chain stores also entails the loss of significant secondary economic benefits.

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Local stores keep profits circulating within the local economy. They also support a variety of other local businesses. They create opportunities for service providers, like accountants and printers. They do business with the community bank. They advertise through independent radio stations and other local media outlets. They purchase goods from local or regional distributors. In this way, a dollar spent at a locally owned businesses sends a ripple of economic benefits through the community.

By contrast, chain stores typically centralize these functions at their head offices. They keep local investment and spending to a minimum. They bank with big national banks. They bypass local radio stations in favor of national advertising. In this way, much of a dollar spent at a chain store leaves the community immediately.

Small, independent stores also create economic diversity and stability. Because they are locally owned, these stores are firmly rooted in the community. They are unlikely to move and will do their best to weather economic hard times.

Chain stores, by contrast, tend to be fair-weather friends. They are highly mobile and will abandon a location if profit margins do not meet their expectations. The worst case scenario is when a big box store builds on the edge of town, destroys the central business district, and, then a few years later, decides that it too will close its doors. The town is left with a dead Main Street and nothing to show for it. Nationwide, there are more than 300 empty Wal-Marts.<sup>8</sup> It's very difficult to find a tenant for these single-purpose buildings and they often remain vacant for many years.

A community that loses its local businesses to national chains also risks losing other economic development opportunities. New technologies have enabled many companies to operate virtually anywhere. When these companies consider location options, towns with a vibrant commercial core and a unique character are often at the top of the list.

## COMMUNITY

From an economic perspective, there is much to suggest that chain stores may not be our best value. But perhaps more significant than any of the economic considerations are the qualitative benefits of local ownership. Locally owned businesses build strong communities. They provide a foundation for the web of connections and trust that Jane Jacobs believed so essential to a healthy neighborhood.

There are several reasons for this. The first is that independent stores tend to be located in humanly-scaled, pedestrian-oriented shopping districts, as opposed to the sprawling, isolated experience of a chain store parking lot.

The second reason is that local stores create a sense of place and community identity. They reflect the local culture. They give neighborhoods their distinct flavor. They are often a source of community pride and an attraction to visitors.

Chain stores, by contrast, are sapping communities of their character and individuality. Even the most famous American cities are losing their unique appeal. Kmart, Costco, and Home Depot are building in Manhattan. Fifth Avenue is home to Starbucks and The Gap. These same stores can be found on Michigan Avenue in Chicago, Market Street in San Francisco, and thousands of other locations worldwide.

The arrival of chain stores may also entail the destruction of important local landmarks. An 1876 Friends Meeting house in Richmond, Indiana, for example, was demolished for a CVS drugstore. In Nashville, the Jacksonian Apartments, eligible for the National Register of Historic Places, were torn down for a Walgreen drugstore.<sup>9</sup>

The third way that independent businesses strengthen community is through their contributions to civic and cultural life. Local merchants are more than providers of goods and services. They often take a

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organize local festivals. According to the U.S. Small Business Administration, small businesses give more time and money to charitable organizations than do their large competitors.<sup>10</sup>

Because they live in the places where they do business, local merchants tend to be far more committed to the community's well-being and long-term stability than distant corporations. This commitment manifests itself in a variety of ways. In St. Paul, Minnesota, for example, the local food cooperative recently opened a new store in a low income neighborhood on a lot that had been vacant for years. As with many construction projects, the coop ran into higher than expected costs. Several independent merchants, including the local bookseller, stepped in and provided a sizable and much-needed loan. Meanwhile, Barnes & Noble and Borders Books, both of which operate stores in the city, were nowhere to be found.

Finally, the shift from local to absentee-owned stores means that business decisions are no longer made locally by members of the community. Who decides whether to close a store in a distressed neighborhood, stock a controversial book, sell produce from local farms, pay a living wage, or contribute to a local charity? In the case of chain stores, these decisions occur in distant boardrooms, where the values of the local community carry little or no weight.

This loss of local decision-making and the growing power of a small number of large corporations has implications for democracy. In 1952, Senator Hubert Humphrey asked, "Do we want an America where the economic market place is filled with a few Frankensteins and giants? Or do we want an America where there are thousands upon thousands of small entrepreneurs, independent businessmen, and landholders who can stand on their own feet and talk back to their Government or to anyone else?"<sup>11</sup>

## NEW RULES

There are tremendous benefits to choosing the latter path. Our ability to do so will depend not only on the decisions we make as consumers, but on the decisions we make as citizens. The actions of policymakers, and, in particular, planners, are critical to reviving the homegrown economy and ensuring that local businesses continue to be a vital part of our communities.

Many contend that public policy should have no role in shaping the retail economy. This is, after all, a free market.

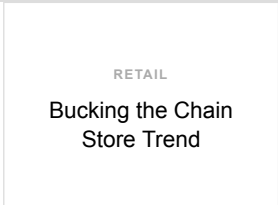
But public policy is never neutral, and has, in fact, played a major role in the expansion of national chain stores. In many ways, public policy has undermined local retailers by giving large retail corporations unfair advantages.

Examples can be found at all levels of government. Congress, for instance, has exempted retailers like Amazon.com and Barnes & Noble from collecting sales tax on internet sales. This effectively gives these companies a 6 to 8 percent price advantage over local stores.

At the city and state level, tax incentives and other kinds of subsidies are routinely made available to chain stores. In Wisconsin, nearly \$20 million was provided a few years ago for a distribution center for Target stores. The city of Rochester, Minnesota spent \$3 million attracting a Barnes & Noble. Long Beach, California waived \$6 million in taxes for a development that included Kmart. In Florida, Walgreens has requested \$4.5 million in state and county tax breaks for the construction of a new warehouse.<sup>12</sup>

Similar examples can be found all over the country. Even if your hometown does not provide such subsidies, the chains that expand there are able to do so in part because of public funding they've received elsewhere. Rarely are tax breaks and subsidies given to locally owned businesses. Instead, they often see their tax dollars used to subsidize a competitor.

In other cases, city governments have evicted local businesses to make room for chain store developments. A proposal currently under consideration in Pittsburgh would level 60 buildings and



three dozen chain stores. The beneficiaries of this plan include The Gap, Borders Books, and FAO Schwartz.<sup>13</sup>

Under these circumstances, even the most competitive, efficient, and popular independent businesses are struggling to stay afloat.

What these examples make clear is that the loss of independent businesses is not inevitable. Rather than undermining the local economy, many communities are taking a different approach. They have made sustaining humanly scaled, unique homegrown businesses a primary focus of planning and economic development decisions.

They are adopting a variety of land use rules that deter chain stores and foster local ownership. Many have restricted the physical size of new stores. Others allow new retail development only if it meets specific criteria defined by the community. Some have banned uniformity, by prohibiting “formula” businesses. Others have barred new retail development outside of the town’s central business district. (Examples of these policies, including the full text of the local ordinance, can be found on the New Rules web site, created by the Institute for Local Self-Reliance, at <http://www.ilsr.org>.)

By designing policies that put community first, local businesses can once again become a key component in a dynamic retail economy and a vibrant community.

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## NOTES

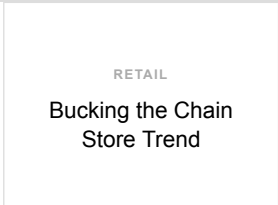
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Stacy Mitchell is a researcher for the Institute for Local Self-Reliance (ILSR), a national nonprofit organization advancing community-oriented economic development through research and educational activities.



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Stacy Mitchell is co-director of the Institute for Local Self-Reliance and directs its Independent Business Initiative, which produces research and designs policy to counter concentrated corporate power and strengthen local economies.

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# Why Care about Independent, Locally Owned Businesses?

BY MARIE DONAHUE | DATE: 23 JUL 2018 | [Facebook] [Twitter] [Reddit] [Email]

Locally owned businesses play a central role in healthy communities and are among the best engines that cities and towns have for advancing economic opportunity and building resilient places. Small business ownership has been a pathway to the middle class for generations of Americans and continues to be a crucial tool for expanding prosperity and community self-determination. Here, we outline five important reasons for local officials to support independent businesses, based on a growing body of research.

## 1 | Local small businesses are linked to higher incomes and less inequality.

Enacting policies that strengthen small businesses and expand opportunities for local entrepreneurs is one of the most effective ways of reducing inequality and expanding the middle class.

In 2013, for example, an economist at the Federal Reserve Bank of Atlanta found that counties with larger shares of local small businesses outperform their peers on three critical economic indicators: they have stronger per capita income growth, faster employment growth, and lower poverty rates.[1] Using two decades of data from a number of countries, another study found that areas with more small and mid-size businesses had lower levels of income inequality.[2]

## 2 | Entrepreneurship fuels job creation.

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Across the country, the rate of new business formation has fallen sharply over the last 20 years, contributing to sluggish job growth and wage stagnation. “New businesses account for nearly all net new job creation,” concludes a Kauffman Foundation research brief.<sup>[3]</sup>

Cities that achieve higher rates of entrepreneurship and new business creation than the national average are better off. They generate more jobs, which in turn lifts wages. While cities may be tempted to focus only on tech startups, expanding opportunities for residents to launch businesses that meet community needs in retail, services, food production, and other sectors can have even greater impact.

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### 3 | Independent businesses generate more tax revenue at lower public cost.

Locally owned businesses in dense, mixed-use commercial districts generate more tax revenue for cities than sprawling shopping centers, while also costing less in public services. An analysis from the Government Finance Review, drawing on data from a sample of 30 cities in 10 states, found that a community earns about \$7 in property taxes per acre on the average big-box retail store, compared to \$287 per acre on a mixed-use, mid-rise business district.<sup>[4]</sup> The compact nature of these districts also means they make more efficient use of public infrastructure and services.

### 4 | Local businesses foster community cohesion and well-being.

The social fabric of a community is tightly coupled with the health of its independent businesses. Research has shown that communities with a larger share of local businesses have more social capital, stronger social ties, higher levels of civic engagement, and better success solving problems.

A 2011 study from the Cambridge Journal of Regions, Economy, and Society, for example, found that areas with a greater concentration of small businesses, all else being equal, have improved public health outcomes than those with fewer small businesses.<sup>[5]</sup> The authors speculate that local ownership of business enhances a community's capacity to solve problems. Other research has found the presence of independent retailers helps communities retain their residents, especially those with college degrees.<sup>[6]</sup>

Taken together, these studies show that cultivating a vibrant independent business sector not only strengthens the economy; doing so can advance social goals as well.

### 5 | Community-scaled businesses reduce pollution and improve environmental sustainability.

Independent businesses help to sustain compact downtown and neighborhood commercial districts, which curb sprawl and automobile use, and enable residents to fulfill more of their daily needs close to home.

Several studies have found that people who live near small stores walk more for errands and, when they do drive, their trips are shorter. That's not all: small retailers also influence how likely people are to take public transit. A study of 3,200 households in King County, Wash. (the Seattle area), for example, found that residents of neighborhoods with the most local businesses logged 26 percent fewer automobile miles than people living in areas with few neighborhood stores, and they were significantly more likely to take public transit to work.<sup>[7]</sup>

### By supporting local retailers, local officials can create a healthier, more sustainable community.

This list is part of our **Local Policy Action Toolkit** for independent businesses and is available to download and share as a **two-page PDF**.





Click to download a two-page PDF version of this "Why Care" resource.

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Find more details about the studies mentioned here, and others, by going to the Institute for Local Self-Reliance's resource page — **Key Studies: Why Local Matters**. Additional resources about the importance of independent businesses to the local economy can be found on our **Why Local** page.

### Notes

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At the Independent Business initiative at the Institute for Local Self-Reliance, we research and advocate for policies that strengthen independent businesses and reduce the power of dominant corporations. **Check out more of our work**, and sign up for our **monthly newsletter** so that you don't miss our latest research.

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Marie Donahue was a Research Associate with the Institute for Local Self-Reliance's Energy Democracy and Independent Business Initiatives in 2018-2019. She analyzed and wrote about the implications of corporate concentration and monopoly in these sectors.

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