

## **RESOLUTION 24-10**

### **AUTHORIZING RENT BOARD CHAIR TO DRAFT LETTER ON BEHALF OF ALL ELECTED RENT BOARD COMMISSIONERS IN SUPPORT OF ADOPTION OF THE PROPOSED DEMOLITION ORDINANCE AMENDMENTS CURRENTLY BEING CONSIDERED BY THE BERKELEY CITY COUNCIL**

BE IT RESOLVED by the Rent Stabilization Board of the City of Berkeley as follows:

WHEREAS, the elected Commissioners have long been concerned that the City do everything within its authority to ensure that existing housing be protected from demolition except when absolutely necessary to ensure the safety of its occupants; and

WHEREAS, the elected Commissioners recognize that old stock housing remains an important source of affordable housing for the community; and

WHEREAS, the elected Commissioners have made clear that they believe any amendments to the existing Demolition Ordinance (Berkeley Municipal Code Chapter 23.326) should preserve affordability to the greatest extent possible under both local and state law; and

WHEREAS, through the efforts of the 4 x 4 Joint Committee on Housing, the Berkeley City Council and Rent Board Commissioners have been working for well over a year to propose amendments to the current Demolition Ordinance that seek to allow for demolition while preserving as much affordability of rental housing as possible; and

WHEREAS, Planning, Rent Board, and City Attorney staff have worked diligently to draft language that reflects the policy goals articulated by the various elected officials who have participated in this process; and

WHEREAS, these amendments have been reviewed several times by the Berkeley Planning Commission and approved as to form; and

WHEREAS, Council will be considering adopting these Demolition Ordinance amendments at its regularly-scheduled March 26, 2024 meeting; and

WHEREAS, the elected Commissioners believe this to be very important legislation that will allow Berkeley to protect rental housing affordability moving forward and wish to express their support for the adoption of the proposed Demolition Ordinance amendments as they currently exist.

NOW THEREFORE, BE IT RESOLVED by the City of Berkeley Rent Stabilization Board that it encourages Council to adopt the current version of the Demolition Ordinance amendments at its March 26, 2024 meeting or whenever it may thereafter be heard; and

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BE IT FURTHER RESOLVED that the elected Commissioners authorize Board Chair Leah Simon-Weisberg to write a letter of support urging Council to adopt the Demolition Ordinance amendments.

Dated: March 21, 2024

Adopted by the Rent Stabilization Board of the City of Berkeley by the following vote:

YES:

NO:

ABSTAIN:

ABSENT:

\_\_\_\_\_  
Leah Simon-Weisberg, Chair  
Rent Stabilization Board

Attest: \_\_\_\_\_  
DéSeana Williams, Executive Director



Rent Stabilization Board  
Rent Board Chair

DATE: March 21, 2024

TO: Honorable Mayor and Members of the City Council

FROM: Leah Simon-Weisberg, Chair, Berkeley Rent Stabilization Board

SUBJECT: Proposed revisions to Berkeley Chapter 23.326: Demolition and Dwelling Unit Controls

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The Rent Stabilization Board (“Board”) urges the City Council to approve the proposed revisions to Berkeley Municipal Code Chapter 23.326 (“Demolition Ordinance”). On March 21, 2024, the Board adopted Resolution 24-10 to express support for the revisions as currently set forth. The proposed Demolition Ordinance reflects a thorough, deliberate, and public process, wherein the Planning Department solicited extensive feedback from various stakeholders, including the Planning Commission, a working sub-group of the Planning Commission, and the 4x4 Joint Committee on Housing. As a result, the proposed Demolition Ordinance strikes an appropriate balance between encouraging residential construction and maintaining sources of affordable housing already in the community by explicitly requiring the replacement of each rental unit subject to rent-control prior to demolition with new rental units affordable to lower-income families.

The purpose of the Rent Stabilization Ordinance includes advancing housing policies of the City with regards to low- and fixed- income residents. Therefore, the members of the Rent Stabilization Board engaged with Planning staff to ensure the Demolition Ordinance addressed the needs of renters in Berkeley, who generally have lower income than homeowners in Berkeley and include some of Berkeley’s most vulnerable residents. The Board believes the proposed Demolition Ordinance reflects these interests.

First, the proposed Demolition Ordinance defines the scope of residential rental units subject to demolition controls in a manner which reflects the reality of how people rent in Berkeley. Section 23.326.020.A(2) includes unpermitted rental units in the definition of residential units. This ensures that all sources of housing in the City are replaced at demolition and that the owner of an unpermitted unit may not seek to avoid the costs of coming into compliance with zoning codes simply by applying to demolish the unit.

Second, the proposed Demolition Ordinance provides protections to tenants residing in units that an owner seeks to demolish. Just as in the current Ordinance, the proposed Demolition Ordinance requires that an applicant for a demolition permit provide a sitting tenant with moving assistance, a replacement rental unit during the construction of the new units, and the right to return to the new units. The proposed Demolition Ordinance expands on these protections by allowing a sitting tenant who does not income-qualify for an affordable unit to return to a new

unit at their prior rent, adjusted annually in the same way the rents in units subject to the Rent Stabilization Ordinance rise. The result of these provisions is that a tenant in a demolished unit is less likely to leave the City as a result of a demolition. Avoiding displacement as an outcome of demolition is all the more vital when viewed against the fact that Berkeley residents of color and Berkeley residents with a disability are more likely to be renters.

Third, the proposed Demolition Ordinance explicitly requires that each demolished deed-restricted affordable unit or unit subject to rent-control is replaced by a deed-restricted affordable unit. The current Demolition Ordinance, does not require replacement of such units. Therefore, right now, Planning staff and the Zoning Adjustment Board are approving Use Permits for large projects that demolish rent controlled residential units and replace them with market rate units. The result is a loss of affordable housing through demolition. The proposed Demolition Ordinance fixes this issue through the specific definition of “protected unit” in Section 23.326.020.A(5) and the explicit requirement that any “protected unit” be replaced with a deed-restricted affordable unit in Section 23.326.030.D.

Throughout the public hearings on the Demolition Ordinance, members of the public raised concerns with the applicability of the Demolition Ordinance to smaller properties, most notably single-family homes with accessory dwelling units. The majority of these concerns appear to arise from a misunderstanding of the applicability of the Rent Stabilization Ordinance. Fully-permitted accessory dwelling units on properties with owner-occupied single-family homes are exempt from the Rent Stabilization Ordinance. Therefore, under both state law and the proposed Demolition Ordinance, these properties are not protected units. A homeowner applying to demolish the accessory dwelling unit in their backyard would not be required to replace that unit with a deed-restricted affordable unit or to provide replacement housing for a sitting tenant.

The proposed Demolition Ordinance is a necessary component of ensuring Berkeley growth in an equitable way, creating sufficient housing for new residents while protecting long-term residents and maintaining housing options for a variety of incomes. The Rent Stabilization Board appreciates the opportunity to help shape the proposed Demolition Ordinance and supports its passage.



Office of the City Manager

PUBLIC HEARING

March 26, 2024

To: Honorable Mayor and Members of the City Council  
 From: Dee Williams-Ridley, City Manager  
 Submitted by: Jordan Klein, Director, Planning and Development  
 Subject: Zoning Ordinance Amendments to Berkeley Municipal Code Chapter 23.326 Demolition and Dwelling Unit Controls

RECOMMENDATION

Conduct a public hearing and upon conclusion, adopt first reading of an Ordinance regarding amendments to Berkeley Municipal Code Chapter 23.326 *Demolition and Dwelling Unit Control Ordinance*.

SUMMARY

State law SB 330 (Housing Crisis Act of 2019) established new provisions related to demolition of residential units, including the rights of sitting tenants and affordability requirements for demolished units. The law provides different options to comply with these requirements.

The proposed ordinance (***Attachment 1 (redlined) and Attachment 2 (clean)***) includes provisions to bring the current Demolition Ordinance (***Attachment 4***) into conformance with SB 330, clarify replacement unit requirements, maximize tenant protections, and preserve the existing affordable housing stock. The proposed ordinance includes a number of new Berkeley-specific provisions as recommended by the 4x4 Joint Task Force Committee on Housing and the Planning Commission, and includes a number of text edits, including grammatical corrections and renumbering.

FISCAL IMPACTS OF RECOMMENDATION

The proposed ordinance is not anticipated to have a noticeable impact on staffing needs or workload, and any fiscal impacts would be minimal.

The proposed ordinance includes the removal of an option to pay a fee for affordable housing in lieu of replacing new units, as State law requires the replacement of demolished units.

## CURRENT SITUATION AND ITS EFFECTS

Revising Berkeley Municipal Code Chapter 23.326 *Demolition and Dwelling Unit Controls* (“the Demolition Ordinance”) supports the City’s Strategic Plan Goal to create affordable housing and housing support services for its most vulnerable community members.

The existing Demolition Ordinance (***Attachment 4***) requires a Use Permit for the demolition or elimination of one or more dwelling units in Berkeley. The Zoning Adjustments Board (ZAB) may issue a Use Permit for the demolition of a dwelling unit for specific listed reasons:

- A building is “hazardous or unusable and is infeasible to repair.”
- “Demolition is necessary to permit construction... of at least the same number of dwelling units.”
- “The elimination of the dwelling units would not be materially detrimental to the housing needs and public interest of the affected neighborhood and the City.”

The existing Demolition Ordinance includes provisions for unit replacement and the rights of sitting tenants, as well as additional situations such as:

- When housing units are demolished and no new housing units are proposed to be developed at the site (e.g., commercial development);
- When tenants have been unlawfully evicted, such as forcing a tenant out of a unit without a court order; and
- When units are being merged or converted within an existing building rather than physically demolished.

The existing Demolition Ordinance includes a provision whereby applicants may pay a fee rather than provide below-market-rate replacement units. However, the amount of that fee has never been established.

Demolition of dwelling units is prohibited where a residential building has been removed from the rental market under the Ellis Act during the preceding five years. Demolition is also prohibited where there have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years. Project applicants are generally required to provide relocation benefits, including moving expenses and differential rent payments to tenants. In addition, displaced tenants are provided a right of first refusal to rent new units after the lot has been redeveloped.

The existing ordinance also includes provisions related to the demolition of non-residential buildings, accessory buildings and building relocations. Changes to these provisions are not proposed.

#### Proposed Demolition Ordinance Provisions

The proposed ordinance includes provisions to bring the Demolition Ordinance into conformance with State law and includes a number of new Berkeley-specific provisions as recommended by the 4x4 Joint Task Force Committee on Housing. The proposed ordinance also includes a number of text edits, including grammatical corrections and renumbering.

The most significant changes are summarized in Table 1 and discussed in detail below. The primary rationales for the proposed changes include clarifying the applicability of the ordinance, expanding tenant protections, bringing the ordinance into conformance with State law, and assigning the Rent Stabilization Board (Rent Board) to administer some aspects of the ordinance rather than the ZAB.

#### *Applicable Unit*

The existing ordinance indicates that it applies to a “dwelling unit or units.” The proposed ordinance includes clarifications that it applies to dwelling units, group living accommodations, residential hotel rooms, certain ADUs and units constructed without a building permit.

Regarding Accessory Dwelling Units (ADUs), the 4x4 Committee proposed incorporating ADUs into the ordinance, subject only to the tenant notice and relocation requirements. This means an ADU wouldn't be obligated to meet replacement or affordability requirements. The Planning Commission expressed concern that applying these requirements to ADUs would discourage their production, specifically in cases where there was one single-family home and one ADU on a lot. However, Planning Commission also determined that ADUs within larger, multi-unit rental properties should be subject to replacement requirements. As a result, the Planning Commission recommended exempting an ADU entirely on lots which include only one single-family dwelling and one ADU. All other ADUs would be treated similarly to other units.

#### *Protected Unit*

SB 330 includes a no net loss provision that requires that a residential development project that includes the demolition of existing units must result in at least as many units as are demolished. In addition, certain types of units—“protected units”—are subject to specific replacement and affordability provisions. The proposed ordinance includes a definition of protected unit consistent with SB 330, and includes units that have been:

- Subject to a low-income deed restriction for any of the previous five years;
- Subject to rent control per Berkeley Municipal Code 13.76; or
- Rented by a household at 50% Area Median Income or lower.

#### *Comparable Unit*

The existing ordinance refers to a “comparable unit” when referring to replacement units, but does not define “comparable unit.” The proposed ordinance includes an explicit definition of “comparable unit,” indicating that it should be of a comparable size, include similar amenities, and be located in a similar area of the city as the demolished unit.

#### *Units Built Without Proper Permits*

The proposed ordinance applies to Dwelling Units, ADUs and JADUs that were created without proper zoning approvals or building permits (i.e. “illegal units”). These units, and the tenants residing in them, would be treated as properly permitted units for the purposes of the proposed ordinance, with the following distinctions:

- For a unit built without proper permits to qualify as a residential unit, it would have to be registered with the Rent Stabilization, or the Rent Stabilization Board must determine that a tenant-landlord relationship existed during the previous five years.
- The proposed ordinance includes a provision that allows the Building Officer, Zoning Officer or Fire Marshal to determine that the replacement of such a unit is not required when the replacement of the unit would be infeasible given existing Zoning, Building or Fire Code requirements.

#### *Prohibited Demolitions*

The existing ordinance prohibits demolition for units that have been removed from the rental stock through the Ellis Act within the past five years, or in cases where there has been substantial evidence of tenant harassment by a rental property owner, or an attempted or actual illegal eviction, within the past three years. In the latter case, the determination of whether harassment has occurred is made by the ZAB.

The proposed ordinance expands tenant protections to include any no fault eviction within the past five years, not just removal of a rental unit from the market through the Ellis Act. A “no fault eviction” is when the property owner or landlord wants to evict a tenant at no fault of the tenant, for example, when the property owner wants to move into the property.



The Rent Stabilization Board is proposed to be the deciding body for questions regarding harassment and illegal eviction, instead of the ZAB.

*Mitigation Fee*

The existing ordinance includes a requirement to pay an in-lieu mitigation fee for every unit demolished, or the option to replace a comparable affordable unit on-site.

State law (SB330) imposes a requirement that any housing development project that requires the demolition of dwelling units must create at least as many residential dwelling units as will be demolished on-site, and requires that the City condition approval on the provision of replacement units. Therefore, an option to “fee out” of the replacement requirement is a violation of State law, because it would not provide replacement units at the sizes and affordability levels required by SB 330. Accordingly, the proposed ordinance removes the mitigation fee section.

*Landmarks and Structures of Merit*

While the provisions of BMC Chapter 3.24 (Landmarks Preservation Commission) apply to units proposed for demolition, the existing ordinance does not explicitly refer to this chapter. Accordingly, the proposed ordinance includes specific language referring to Chapter 3.24.

*Affordability of Replacement Units*

The existing ordinance includes a requirement that any replacement units must be affordable units, and that the income levels of the qualifying households, and rents for the replacement units, shall be set by a resolution of the City Council. The existing ordinance also includes a requirement that the project applicant enter into a regulatory agreement with the City to provide these units.

The proposed ordinance includes more detailed provisions addressing the affordability levels of replacement units that are in concert with the requirements under State law:

- The proposed ordinance requires that any demolished protected unit shall be replaced with equivalent units and comply with the applicable affordability requirements for Affordable Units included in BMC 23.328 (Affordable Housing Requirements) and BMC 23.330 (Density Bonus). Referencing these sections clarifies the appropriate affordability levels for replacement units,<sup>1</sup> and

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<sup>1</sup> BMC Section 23.328.030 requires that development projects subject to Inclusionary Zoning requirement include at least 20% of the units as Affordable Units. At least 50% of required Affordable Units must be offered at a rent that is affordable to Very Low Income Households (50% AMI or lower); the balance of units can be offered at rents affordable to Low Income Households (80% AMI).

establishes consistent requirements across a number of affordable housing-related provisions in the BMC.

- The proposed ordinance includes a provision that if a displaced household has an income below 50% AMI, a comparable replacement unit shall be offered at a rent that is affordable to households at 30% of AMI.
- The proposed ordinance also includes a provision that in cases where the household income of a displaced tenant(s) is unknown, households would be presumed to be low income in proportion to households throughout the city, as calculated using the US Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy (CHAS) database.

**Attachment 3** includes illustrations of how these provisions could be applied.

#### *Sitting Tenants' Rights*

The existing ordinance establishes certain rights for sitting tenants. Sitting tenants in demolished units are entitled to a right of first refusal to move into the new building, have a right of first refusal for any BMR units, and retain those rights even if they have incomes that do not qualify for BMR units.

The proposed ordinance clarifies that tenants who do not qualify for BMR replacement units due to income limits above the area median income must still be provided a market-rate replacement unit at their prior rent. Additionally, the rent for the duration of that tenancy would be subject to Berkeley's rent control regulations. This section was added by the 4x4 Committee to provide additional rights to sitting tenants who may not qualify for BMR units.

The proposed ordinance includes additional provisions related to sitting tenants' rights. The revisions clarify that a sitting tenant's right of first refusal extends to a *comparable* unit (not just any unit) in the building, and includes provisions which set the rent levels for those units. These provisions go beyond what is required under State law. The proposed ordinance also includes a specific timeline by which a displaced tenant must indicate interest in returning to a replacement unit.

#### *Elimination of Units through Combination with Other Units*

The existing ordinance includes provisions regulating the elimination of dwelling units through physical combination with other units. This usually occurs in cases where two units are combined to make a single larger unit. The existing ordinance requires a Use Permit, with specific findings, to move forward with such an elimination. It also prohibits

such an elimination if the building was removed from the rental market through the Ellis Act in the past five years, or if there is evidence of tenant harassment or illegal eviction within the past three years, as determined by the ZAB.

The proposed ordinance permits combined units through an Administrative Use Permit (AUP) approval, if such a combination would return the building to, or move it closer towards, its permitted density. This is a provision to make it easier for units in owner-occupied buildings to be combined. The AUP requirement still includes discretionary review, the ability to set conditions, and an appeal option to the ZAB.

Elimination of a unit for a combination would not be approved if the building was vacated through any no-fault eviction, not just due to the Ellis Act, or if the tenant was subject to landlord harassment or an illegal eviction. The determination of whether landlord harassment or a real or attempted illegal eviction occurred would be made by the Rent Board Hearing Examiner, with an appeal option to the Rent Stabilization Board, instead of by the ZAB.

#### *Demolition of Single-Family Homes*

The existing ordinance requires a Use Permit to demolish a single-family home. The adopted Housing Element Update, Program 19—Middle Housing—includes a requirement that the City Council consider permitting the demolition of single-family homes with a Zoning Certificate (ZC) if the demolition is part of a middle housing project that results in a net increase in density.

The proposed ordinance includes a provision to allow the demolition of a single-family home without sitting tenants with an AUP if it is part of a project that results in a net increase in density. While the Planning Commission understood the rationale for streamlining review of projects that increase density, it concluded an AUP was the more appropriate level of discretion, and that the ordinance should specifically indicate that a single-family home with sitting tenants would not be permitted to be demolished with an AUP. The Planning Commission also acknowledged its intent to reconsider this issue later in 2024 as part of the Middle Housing legislative package.

#### *Demolition of Accessory Buildings*

The existing ordinance includes a provision that permits the demolition of an accessory building that does not contain a dwelling unit, such as garages, carports, and sheds, with a ZC. The proposed ordinance includes additional clarifying language that an accessory building that is occupied by a residential tenant shall be considered a residential unit for the purposes of this chapter.

*Residential Hotel Rooms*

The existing ordinance includes a section regulating the elimination of Residential Hotel Rooms. These provisions include requirements related to monthly and weekly charges, and permit Residential Hotel Rooms to be removed for the purpose of providing common use facilities (such as a kitchen, lounge, or recreation room) for remaining residents or to undertake seismic upgrades or meet the requirements of the Americans with Disabilities Act. They also include a provision allowing an owner to meet the replacement requirements through a payment to the Housing Trust Fund, which, as noted above, is not permitted under State law.

The proposed ordinance removes the Residential Hotel Rooms section entirely. Residential Hotel Rooms would therefore receive the same treatment under the proposed ordinance as other residential units

*Technical Edits, Reorganization and Renumbering*

The proposed ordinance also includes a variety of purely technical edits, and reorganization, retitling, and renumbering of some sections and subsections.

**Table 1. Summary of Revisions to Demolition Ordinance**

<b>Policy Area</b>	<b>Current Ordinance</b>	<b>Proposed Ordinance</b>	<b>Rationale</b>
<b>Applicable Unit</b>	“Dwelling unit or units.”	Dwelling Unit, GLA, ADU, JADU, and units built without permits	Clarification of the types of units covered.
<b>Protected Unit</b>	No definition.	BMR unit, rent controlled unit, or unit occupied by household at 50% AMI.	State Law: protected units are subject to specific replacement requirements.
<b>Comparable Unit</b>	No definition.	“Similar size, amenities and location within the city.”	Clarification by providing a definition.
<b>Units Built Without Proper Permits</b>	Not mentioned.	Includes units built without proper permits if registered with Rent Board or	Clarification of the types of units covered.

Policy Area	Current Ordinance	Proposed Ordinance	Rationale
		landlord-tenant relationship has existed in past five years.	
<b>Demolition Prohibition: Ellis Act</b>	Prohibition applies to any unit removed via Ellis Act within the past 5 years	Prohibition applies to any “no-fault” eviction.	Expansion of tenant protections beyond just one type of no-fault eviction (Ellis Act).
<b>Demolition Prohibition: Tenant Harassment</b>	Determination made by ZAB.	Determination made by Rent Board.	For tenant-landlord issues, the Rent Board is the subject-expert body.
<b>Mitigation Fee</b>	Includes mitigation fee option.	Removes mitigation fee option.	State Law: Demolished units must be replaced (SB 330).
<b>Landmarks and Structures of Merit</b>	No reference to Landmarks Preservation Commission (LPC) procedures.	Includes reference to LPC procedures.	Clarification that LPC procedures apply.
<b>Replacement Units -- Affordability</b>	<ul style="list-style-type: none"> <li>• Replacement unit must be affordable in perpetuity;</li> <li>• Affordability level to be set by Council resolution;</li> <li>• Regulatory agreement with the City required.</li> </ul>	<ul style="list-style-type: none"> <li>• Replacement unit must comply with Chapter 23.328 (Affordability Requirements) and 23.330 (Density Bonus);</li> <li>• For demolished unit with household at 50% AMI or below, replacement unit</li> </ul>	State Law: Existing tenant income levels impact type/affordability of replacement units (SB 330).

Policy Area	Current Ordinance	Proposed Ordinance	Rationale
		must be set at 30% AMI; and <ul style="list-style-type: none"> <li>• Allows Zoning Officer and Fire Marshall to waive replacement of illegal units for health and safety</li> </ul>	
<b>Sitting Tenants Rights</b>	<ul style="list-style-type: none"> <li>• Right of first refusal to move into the building</li> <li>• Right of first refusal for BMR units</li> <li>• Income restrictions do not apply</li> </ul>	<ul style="list-style-type: none"> <li>• Right of first refusal for a comparable unit</li> <li>• For displaced tenants who rent a comparable unit, rent is controlled for duration of tenancy</li> <li>• For households ineligible for BMR units, a replacement unit shall be offered at prior rent, with increases limited equivalent to rent control.</li> </ul>	State Law: Tenant income levels impact type/affordability of replacement units (SB 330).  Additional local requirement: Income restrictions do not apply to displaced households upon their return to the property after completion of the project.
<b>Elimination of Units through Combination with other Units</b>	Use Permit required in all cases, with findings.	AUP to combine units when the combination would return the building to, or move it closer towards, its original density.	Simplification: Allow conversion of owner-occupied buildings with a lesser standard.

Policy Area	Current Ordinance	Proposed Ordinance	Rationale
	Combination not allowed if the building was removed via Ellis Act within the past 5 years	Combination not allowed if vacated through no fault eviction within the past 5 years.	Expansion of tenant protections beyond just one type of no-fault eviction (Ellis Act).
	Combination not allowed if tenant harassment. Determination made by ZAB	Determination made by Rent Board Hearing Examiner, with appeal to Rent Board.	For tenant-landlord issues, the Rent Board is the subject-expert body.
<b>Demolition of Single Family Homes</b>	Requires a Use Permit.	Would be permitted with an AUP if the single family home were not tenant-occupied and the demolition was part of a project that increased density.	Provide streamlined process to encourage middle housing projects.
<b>Demolition of Accessory Buildings</b>	Can be demolished by right.	Added language to clarify that Accessory Buildings that are occupied by residential tenants are considered Residential Units. <i>23.326.050</i>	Expansion of demolition controls and tenant protections.
<b>Elimination of Residential Hotel Rooms</b>	Section 23.326.060 provides specific procedures for removal of residential hotel rooms	Section removed.	Residential Hotel Rooms are considered Residential Units for purpose of ordinance. <i>23.326.010(A)(1)</i>

## BACKGROUND

The impetus for these revisions is recent changes in State law that provide additional requirements for new housing development projects that involve the demolition of existing residential units. These provisions of SB 330 (Housing Crisis Act of 2019), which modified Government Code sections relating to zoning and density bonus, require all new housing development projects to provide replacement units of equivalent size, defined as having the same number of bedrooms as the demolished units.

In early 2022, Planning & Development staff, in consultation with the City Attorney's Office, drafted revisions to the Demolition Ordinance to reflect these changes to State law. The 4x4 Joint Task Force Committee on Housing considered the draft at its meetings in April 2022 and December 2022, and made recommendations pertaining primarily to replacement unit requirements and expanded tenant protections. Staff revised the draft ordinance to incorporate that feedback and advanced the ordinance to Planning Commission for review.

At its meeting of February 1, 2023, the Planning Commission scheduled a public hearing to adopt a recommendation for the City Council of changes to the Demo Ordinance. The Planning Commission deferred a final recommendation pending recommendations from the 4x4 Joint Task Force Committee on Housing. Staff returned to the 4x4 Joint Task Force Committee in September and October 2023 for discussion and recommendations. The Planning Commission conducted a public hearing at its December 6, 2023 meeting and moved to create a Subcommittee to review the proposed ordinance in detail, and to consider suggestions and recommendations made by Commissioners at that meeting. The Subcommittee met on December 20, 2023 and recommended a number of changes to the ordinance. At its meeting of January 17, 2024, the Planning Commission held a public hearing and made a recommendation to the City Council.

## ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

California Public Resource Code Section 21065 defines a "project" under CEQA as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." The proposed ordinance amendments relate only to the requirements to demolish existing structures, and would not result in any physical changes to the environment. The proposed ordinance does not consist of a discretionary action that would permit or cause any direct or indirect change in the environment. The proposed ordinance is therefore not a project under CEQA.



RATIONALE FOR RECOMMENDATION

The proposed ordinance includes changes required by state law, as well as policy changes recommended by the 4x4 Joint Committee Task Force on Housing and the Planning Commission.

ALTERNATIVE ACTIONS CONSIDERED

The December 9, 2023 and January 17, 2024 Planning Commission agenda reports include rationales for the provisions included in the proposed ordinance, and note some of the alternative policies considered. Most notable among these alternative suggestions were the treatment of ADUs similarly to any other residential unit, and permitting the demolition of single-family dwellings with a ZC.

A notable difference between the recommendations from the 4x4 Committee and the Planning Commission was the definition of Comparable Unit. The 4x4 Committee had recommended a definition which included a unit of similar size, in a similar location within the city, with similar amenities, notably private open space. The Planning Commission opted for a slightly different recommendation that included similar shared *indoor* amenities and did not include private open space. The Planning Commission felt that offering comparable private open space after the demolition of, for example, an existing single-family dwelling with a large back yard, could limit the redevelopment potential of single-family parcels.

CONTACT PERSON

Justin Horner, Associate Planner, Planning and Development Department, 510-981-5754.

Attachments:

- 1: Proposed Ordinance, redlined version.
- 2: Proposed Ordinance, clean version.
- 3: Replacement Unit Provisions, Examples
- 4: Existing Demolition Ordinance (BMC 23.326)
- 5: Planning Commission Reports: December 9, 2023 and January 17, 2024.
- 6: Public Hearing Notice

ORDINANCE NO.

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

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

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

**23.326 DEMOLITION AND DWELLING UNIT CONTROL**

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**Sections:**

23.326.010– Chapter Purpose.

23.326.020– General Requirements.

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

23.326.040– Eliminating Dwelling Units through Combination with Other Units.

~~Conversion and Change of Use~~

23.326.050—Demolition of Accessory Buildings.

23.326.0560 – Private Right of Action.

~~23.326.060—Elimination of Residential Hotel Rooms~~

23.326.070– Demolitions of Non-Residential Buildings.

23.326.080– Building Relocations.

23.326.090– Limitations.

23.326.100—Severability.

**23.326.010 – Chapter Purpose**

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

**23.326.020 – General Requirements**

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

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

2. “Residential Unit” includes Dwelling Units, ADUs, or JADUs created without proper zoning approvals or Building Permit(s) if they have been registered

with the Rent Stabilization Board, or the Rent Stabilization Board has otherwise determined that a tenant-landlord relationship existed during the preceding five years.

3. “Residential Unit” does not include a lawfully-permitted ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU, as defined in BMC Chapter 23.306, where the landlord also occupies a unit in the same property as their principal residence. This shall only apply to properties containing a single ADU or JADU, shall only apply to units compliant with all applicable requirements of BMC Chapter 23.306 (“Accessory Dwelling Units”), and shall only apply to tenancies created after November 7, 2018.
4. “Comparable Unit” means a Residential Unit of similar size (square footage and number of bedrooms), common interior amenities, and location within the city (neighborhood and school attendance area). In the case of a Single-Family Dwelling being replaced, a Comparable Unit is not required to have the same or similar square footage or the same number of total rooms, but must provide the same number of bedrooms if the Single-Family Dwelling includes three or fewer bedrooms, or three bedrooms if the Single-Family Dwelling contains four or more bedrooms.
5. “Protected Unit” includes a Residential Unit:
  - a. Subject to a low-income deed restriction for any of the previous five years;
  - b. Subject to rent or price control under BMC Chapter 13.76; or  
Rented by a household at 50% Area Median Income or lower within the previous five years.

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

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

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

- ~~1. **Applicability.** This subsection only applies to building with two or more units constructed before June 1980.~~
- ~~2. **Limitation.**~~

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

1. The ~~building~~ Residential Unit(s) was removed from the rental market under the Ellis Act through a no-fault eviction during the preceding five years; or
2. There ~~have been verified cases~~ is substantial evidence of harassment or threatened or actual illegal eviction during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, whose determination may be appealed to the Rent Stabilization Board.

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

3B. Procedure and Findings.

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

- (a) The building containing the ~~units~~ Residential Unit(s) is hazardous or unusable and is infeasible to repair.
- (b) The building containing the ~~units~~ Residential Units(s) will be moved to a different location within Berkeley with no net loss of units and no change in the affordability levels of the unit(s).
- ~~(c) The demolition is necessary to permit construction of special housing needs facilities such as, but not limited to, childcare centers and affordable housing developments that serve the greater good of the entire community.~~
- ~~(d)~~ (c) The demolition is necessary to permit construction approved pursuant to this chapter of at least the same number of dwelling units.

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

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

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

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

**4. Fee Required.**

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

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

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

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

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

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

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

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

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

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

E. Requirements for Occupied Units.

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

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

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

~~(b)2. **Notice.** The applicant shall provide all sitting tenants notice of the application to demolish the building no later than the date it is submitted to the City, including notice of their rights under Municipal Code Section 13.76 (Rent Stabilization and Eviction for Good Cause Program), Chapter 13.77 (Requirements, Procedures, Restrictions and Mitigations Concerning the Withdrawal of Residential Rental Accommodations from Rent or Lease), 13.79 (Tenant Protections: Automatically Renewing Leases and Buyout Agreements) and 13.84 (Relocation Services and Payments for Residential Tenant Households).~~

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

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

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

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

~~3.(a) *Exception.* An applicant who proposes to construct a 100 percent affordable housing project is not required to comply with this subsection but must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended and the California Relocation Act (Government Code sections 7260 et seq.).~~

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

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

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

~~(b) In the event that a displaced household is ineligible for below-market rate replacement units, a market rate Comparable Unit shall be made available to that household at the same rent as had been previously charged, or a lesser rent if that is the market rate. Tenants of units that are demolished shall have the right of first refusal to rent new below-market rate units designated to replace the units that were demolished,~~



~~at the rent that would have applied if they had remained in place, as long as their tenancy continues.~~

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

~~(d) Exceptions.~~

- ~~i. An applicant who proposes to construct a 100 percent affordable housing project is not required to comply with 23.326.030.A.4.a, b, and c, the preceding requirements but must comply with the following requirement.~~
- ~~ii. Sitting tenants who are displaced as a result of demolition and who desire to return to the newly constructed building will be granted a right of first refusal subject to their ability to meet income qualifications and other applicable eligibility requirements when the new units are ready for occupancy.~~

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

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

### ~~2. Limitation.~~

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

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

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



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

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

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

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

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

1. The building was removed from the rental market ~~under the Ellis Act~~through a no-fault eviction during the preceding five years; or
2. There ~~have been verified cases~~ is substantial evidence of harassment or threatened or actual illegal eviction during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, whose determination may be appealed to the Rent Stabilization Board. ~~The Rent Board Hearing Examiner will provide an assessment of the evidence and all available documentation to the ZAB. The~~

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

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

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

D. Effect of Eliminating a Dwelling Unit.

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

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

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

- ~~1. The ZAB may approve a Use Permit for a change of use to a community care or a child care facility which eliminates a dwelling unit if it finds that such use is in conformance with the regulations of the district in which it is located.~~
- ~~2. The ZAB may approve a Use Permit to eliminate a dwelling unit through combination with another dwelling unit for the purpose of providing private bathrooms, kitchenettes, accessibility upgrades, and/or seismic safety upgrades to single-residential occupancy rooms in residential developments undergoing a publicly-funded rehabilitation.~~
- ~~3. Notwithstanding the general Use Permit requirement under 23.326.020 (General Requirements), a lawfully established accessory dwelling unit that is not a controlled rental unit may be eliminated with a Zoning Certificate if:
  - ~~(a) The re-conversion restores the original single-family use of the main building or lot; and~~
  - ~~(b) No tenant is evicted.~~~~

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

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

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

A. Any affected tenant may bring a private action for injunctive and/or compensatory relief against any applicant and/or owner to prevent or remedy a violation of Sections 23.326.030 (Eliminating Dwelling Units through Demolition) and 23.326.040 (Eliminating Dwelling Units through Conversion and Change of Use). In any such action a prevailing plaintiff shall recover reasonable attorney's fees.

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

- ~~1. The residential hotel owner shall provide or cause to be provided standard housing of at least comparable size and quality, at comparable rents and total monthly or weekly charges to each affected tenant~~

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

- ~~(a) The residential hotel rooms being removed are replaced by a common-use facility, including, but not limited to, a shared kitchen, lounge, or recreation room, that will be available to and primarily of benefit to the existing residents of the residential hotel and that a majority of existing residents give their consent to the removal of the rooms.~~
- ~~(b) Before the date on which the residential hotel rooms are removed, one-for-one replacement of each room to be removed is made, with a comparable room, in one of the methods set forth in this section.~~
- ~~(c) Residential hotel rooms are removed because of building alterations related to seismic upgrade to the building or to improve access to meet the requirements of the American Disabilities Act (ADA).~~

~~**B. Criteria for Replacement Rooms.** For purposes of this section, replacement rooms must be:~~

- ~~1. Substantially comparable in size, location, quality, and amenities;~~
- ~~2. Subject to rent and eviction controls substantially equivalent to those provided by the Rent Stabilization Ordinance or those that applied to the original rooms which are being replaced; and~~
- ~~3. Available at comparable rents and total monthly or weekly charges to those being removed. Comparable rooms may be provided by:~~
  - ~~(a) Offering the existing tenants of the affected rooms the right of first refusal to occupy the replacement rooms;~~
  - ~~(b) Making available comparable rooms, which are not already classified as residential hotel rooms to replace each of the rooms to be removed; or~~
  - ~~(c) Paying to the City of Berkeley's Housing Trust Fund an amount sufficient to provide replacement rooms.
    - ~~1. The amount to be paid to the City of Berkeley shall be the difference between the replacement cost, including land cost, for the rooms and the amount which the City of Berkeley can obtain by getting a mortgage on the anticipated rents from the newly constructed rooms.~~
    - ~~2. The calculations shall assume that rents in the newly constructed rooms shall not exceed the greater of either a level comparable to the weekly or monthly charges for the replaced rooms or the level which would be charged if no current tenant paid more than 30 percent of such tenant's gross income for rent.~~~~

~~**C. Exception for Non-Profit Ownership.** In a residential hotel owned and operated by a non-profit organization, recognized as tax-exempt by either the Franchise Tax~~

~~Board and/or the Internal Revenue Service, residential hotel rooms may be changed to non-residential hotel room uses if the average number of residential hotel rooms per day in each calendar year is at least 95 percent of residential hotel rooms established for that particular residential hotel.~~

### 23.326.070 – Demolitions of Non-Residential Buildings

- A. **Main Non-Residential Buildings.** A Use Permit is required to demolish a main building used for non-residential purposes ~~may be demolished with a Use Permittion any lot.~~
- B. **Accessory Buildings.**
1. Demolishing an accessory building with less than 300 square feet of floor area is permitted as of right.
  2. An accessory building with 300 square feet or more of floor area may be demolished with an AUP.
- C. **Landmarks Preservation Commission Review.**
1. Any application for a Use Permit or AUP to demolish a non-residential building or structure which is 40 or more years old shall be forwarded to the Landmarks Preservation Commission (LPC) for review before consideration of the Use Permit or AUP.
  2. The LPC may initiate a landmark or structure-of-merit designation or may choose solely to forward to the ZAB its comments on the application.
  3. The ZAB or Zoning Officer shall consider the recommendations of the LPC ~~in~~ when acting on the application.
- D. **Findings.** A Use Permit or an AUP for demolition of a non-residential building or structure may be approved only if the ZAB or the Zoning Officer finds that:
1. The demolition will not be materially detrimental to the commercial needs and public interest of any affected neighborhood or the City of Berkeley; and
  2. The demolition:
    - (a) Is required to allow a proposed new building or other proposed new use;
    - (b) Will remove a building which is unusable for activities which are compatible with the purposes of the district in which it is located or which is infeasible to modify for such uses;
    - (c) Will remove a structure which represents an inhabitable attractive nuisance to the public; or
    - (d) Is required for the furtherance of specific plans or projects sponsored by the City of Berkeley or other local district or authority upon a

demonstration that it is infeasible to obtain prior or concurrent approval for the new construction or new use ~~which is contemplated by such specific plans or projects and that adhering to such a requirement would threaten the viability of the plan or project.~~

### 23.326.080 – Building Relocations

#### A. Treatment of Building Relocation.

1. Relocating a building from a lot is considered a demolition for purposes of this chapter.
2. Relocating a building to a lot is considered new construction and is subject to all requirements applicable to new construction.
3. When a building is relocated to a different lot within ~~in~~ Berkeley, the lot from which the building is removed shall be known as the source lot and the lot on which the building is to be sited shall be known as the receiving lot. In such cases all notification requirements apply to both the source and receiving lots.

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

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

### 23.326.090 – Limitations

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

1. Notwithstanding anything to the contrary, if a building or structure is unsafe, presents a public hazard, and is not securable and/or is in imminent danger of collapse so as to endanger persons or property, as determined by the city's ~~building official~~ Building Official, it may be demolished without a Use Permit.
2. The Building Official's determination in this matter shall be governed by the standards and criteria in the most recent edition of the California Building Code that is in effect in the City of Berkeley.

#### B. Ellis Act. This chapter shall be applied only to the extent permitted by state law as to buildings which have been entirely withdrawn from the rental market pursuant to the Ellis Act (California Government Code Chapter 12.75).

**23.326.100 Severability.**

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

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

ORDINANCE NO.

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

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

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

Chapter 23.326 DEMOLITION AND DWELLING UNIT CONTROLS

Sections:

- 23.326.010 Chapter Purpose.
- 23.326.020 General Requirements.
- 23.326.030 Demolition of Residential Units.
- 23.326.040 Eliminating Dwelling Units through Combination with Other Units.
- 23.326.050 Demolition of Accessory Buildings.
- 23.326.060 Private Right of Action.
- 23.326.070 Demolitions of Non-Residential Buildings.
- 23.326.080 Building Relocations.
- 23.326.090 Limitations.
- 23.326.100 Severability

**23.326.010 Chapter Purpose.**

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

**23.326.020 General Requirements.**

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

1. "Residential Unit" means, for purposes of this Chapter, any Dwelling Unit, any Live-Work Unit, any Residential Hotel unit, any bedroom of a Group Living Accommodation (GLA), except a GLA in a University-



recognized fraternity, sorority or co-op, or any lawfully-permitted Accessory Dwelling Unit (“ADU”) or Junior Accessory Dwelling Unit (“JADU”).

2. “Residential Unit” includes Dwelling Units, ADUs, or JADUs created without proper zoning approvals or Building Permit(s) if they have been registered with the Rent Stabilization Board, or the Rent Stabilization Board has otherwise determined that a tenant-landlord relationship existed during the preceding five years.
3. “Residential Unit” does not include a lawfully-permitted ADU or JADU on a residential property containing only a Single-Family Dwelling and one lawfully established and fully permitted ADU or JADU, as defined in BMC Chapter 23.306, where the landlord also occupies a unit in the same property as their principal residence. This shall only apply to properties containing a single ADU or JADU, shall only apply to units compliant with all applicable requirements of BMC Chapter 23.306 (“Accessory Dwelling Units”), and shall only apply to tenancies created after November 7, 2018.
4. “Comparable Unit” means a Residential Unit of similar size (square footage and number of bedrooms), common interior amenities, and location within the city (neighborhood and school attendance area). In the case of a Single-Family Dwelling being replaced, a Comparable Unit is not required to have the same or similar square footage or the same number of total rooms, but must provide the same number of bedrooms if the Single-Family Dwelling includes three or fewer bedrooms, or at least three bedrooms if the Single-Family Dwelling contains four or more bedrooms.
5. “Protected Unit” includes a Residential Unit:
  - a. Subject to a low-income deed restriction for any of the previous five years;
  - b. Subject to rent or price control under BMC Chapter 13.76; or
  - c. Rented by a household at 50% Area Median Income or lower within the previous five years.

**23.326.030 Demolition of Residential Units.**

- A. Demolition is not allowed if:
1. The Residential Unit(s) was removed from the rental market through a no-fault eviction during the preceding five years; or
  2. There is substantial evidence of harassment or threatened or actual illegal eviction during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, whose determination may be appealed to the Rent Stabilization Board.
- B. Procedure and Findings.
1. A Use Permit is required to eliminate or demolish one or more Residential Units, except where otherwise provided by the Zoning Ordinance. The ZAB shall only approve the Use Permit if one of the following is true:
    - (a) The building containing the Residential Unit(s) is hazardous or unusable and is infeasible to repair.
    - (b) The building containing the Residential Unit(s) will be moved to a different location within Berkeley with no net loss of units and no change in the rent levels of the unit(s).
    - (c) The demolition is necessary to permit construction approved pursuant to this Chapter of at least the same number of Dwelling Units.
  2. A Single-Family Dwelling without sitting tenants can be demolished with an AUP, if the demolition is part of a development project that would result in a net increase in residential density.
  3. In the event of a demolition of a Residential Unit created without proper zoning approvals or Building Permit(s), as defined in 23.326.020(A)(2), the Building Official, Zoning Officer or Fire Marshal may determine that the replacement of such a unit is infeasible and not required under this Chapter. Such a determination shall include a finding that the replacement of the unit could not

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

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

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

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

E. *Requirements for Occupied Units.*

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

(a) *Exception.* An applicant who proposes to construct a 100-percent affordable housing project is not required to comply with this subsection but must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended and the California Relocation Act (Government Code sections 7260 et seq.).

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

4. *Sitting Tenants Rights.*

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

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

(c) Where a displaced tenant exercises the right to rent a Comparable Unit, any increase in rent for the Comparable Unit for the duration of their tenancy shall be no greater than the lesser of 65% of the increase in the Consumer Price Index for All Urban Consumers (CPI-U) in the San

Francisco-Oakland-San Jose region (as reported and published by the U.S. Department of Labor, Bureau of Labor Statistics for the twelve-month period ending the previous December 31) or 65% of the corresponding increase in Area Median Income (AMI) for the same calendar year.

(d) *Exceptions.*

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

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

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

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

residence for no less than two years before the date of their death.

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

1. The building was removed from the rental market through a no-fault eviction during the preceding five years; or
2. There is substantial evidence of harassment or threatened or actual illegal eviction during the immediately preceding three years. Where allegations of harassment or threatened or actual illegal eviction are in dispute, either party may request a hearing before a Rent Board Hearing Examiner, whose determination may be appealed to the Rent Stabilization Board.

C. *Two-Year Occupancy Requirement Following Elimination*

1. If a Residential Unit that is eliminated through combination is not owner-occupied for at least two consecutive years from the date of elimination, the affected Residential Unit must be restored to separate status.
2. This requirement shall be implemented by a condition of approval and a notice of limitation on the property, acceptable to the City of Berkeley.
3. The condition of approval and notice will provide that if the Residential Unit is not owner-occupied for at least two years from the date of elimination then the affected Residential Unit(s) must either be restored as separate Residential Unit(s) and the vacant Residential Unit(s) offered for rent within six months or the owner must pay a fee of \$75,000 in 2013 dollars, adjusted in May of each year according to the Consumer Price Index for the San Francisco Bay Area. The fee shall be deposited into the City of Berkeley's Housing Trust Fund.
4. The City of Berkeley may exempt an applicant from the two-year residency requirement if there is an unforeseeable life change that requires relocation.

D. *Effect of Eliminating a Residential Unit.*

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

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

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

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

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

A. Any affected tenant may bring a private action for injunctive and/or compensatory relief



against any applicant and/or owner to prevent or remedy a violation of Sections 23.326.030 (Eliminating Dwelling Units through Demolition) and 23.326.040 (Eliminating Dwelling Units through Conversion and Change of Use). In any such action a prevailing plaintiff shall recover reasonable attorney's fees.

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

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

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

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

C. *Landmarks Preservation Commission Review.*

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

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

1. The demolition will not be materially detrimental to the commercial needs and public interest of any affected neighborhood or the City of Berkeley;

and

2. The demolition:

- (a) Is required to allow a proposed new building or other proposed new use;
- (b) Will remove a building which is unusable for activities which are compatible with the purposes of the district in which it is located or which is infeasible to modify for such uses;
- (c) Will remove a structure which represents an uninhabitable attractive nuisance to the public; or
- (d) Is required for the furtherance of specific plans or projects sponsored by the City of Berkeley or other local district or authority upon a demonstration by the applicant that it would be infeasible to obtain prior or concurrent approval for the new construction or new use.

**23.326.080 Building Relocations.**

*A. Treatment of Building Relocation.*

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

*B. Findings.* The Zoning Officer shall approve Zoning Certificate to relocate a building

upon finding that: the resulting development on the receiving lot is in conformance with applicable zoning code development standards.

**23.326.090 Limitations.**

*A. Unsafe, Hazard, or Danger.*

1. Notwithstanding anything to the contrary, if a building or structure is unsafe, presents a public hazard, and is not securable and/or is in imminent danger of collapse so as to endanger persons or property, as determined by the city's Building Official, it may be demolished without a Use Permit.
2. The Building Official's determination in this matter shall be governed by the standards and criteria in the most recent edition of the California Building Code that is in effect in the City of Berkeley.

*B. Ellis Act.* This chapter shall be applied only to the extent permitted by state law as to buildings which have been entirely withdrawn from the rental market pursuant to the Ellis Act (California Government Code Chapter 12.75).

**23.326.100 Severability.**

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

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

# Demolition of SFH for Fourplex

Household  
Above 50% AMI



Market  
Rate

Market  
Rate

Market  
Rate

Market  
Rate

Right of first refusal  
Rent at prior rent  
Rent controlled for  
*sitting tenancy*

Household  
50% AMI or Below



Market  
Rate

Market  
Rate

**30%  
AMI  
BMR**

Market  
Rate

Right of first refusal  
Permanent BMR unit

### Affordability Requirement

- 30% AMI for each protected unit with 50% AMI household
- Permanently Affordable

# Demolition of SFH + ADU for Fourplex

Households  
Above 50% AMI



Four Market Rate  
Units

Right of first refusal  
for SFH tenant only  
Rent at prior rent  
Rent controlled for  
*sitting* tenancy

Households  
50% AMI or  
Below



Three Market Rate  
Units

30% AMI  
BMR

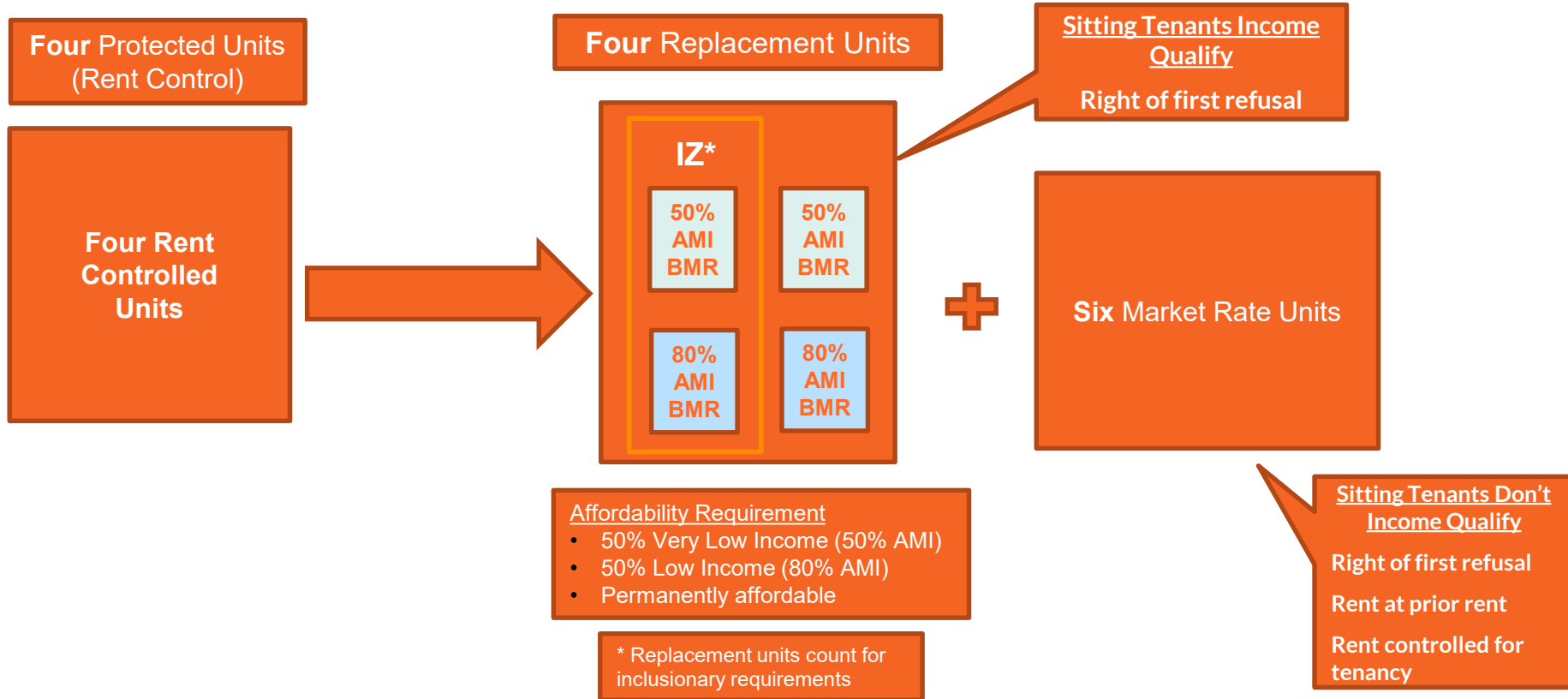
Right of first refusal  
for SFH tenant only  
Permanent BMR  
unit

ADUs are not replaced when there is  
one SFH and one ADU on a lot

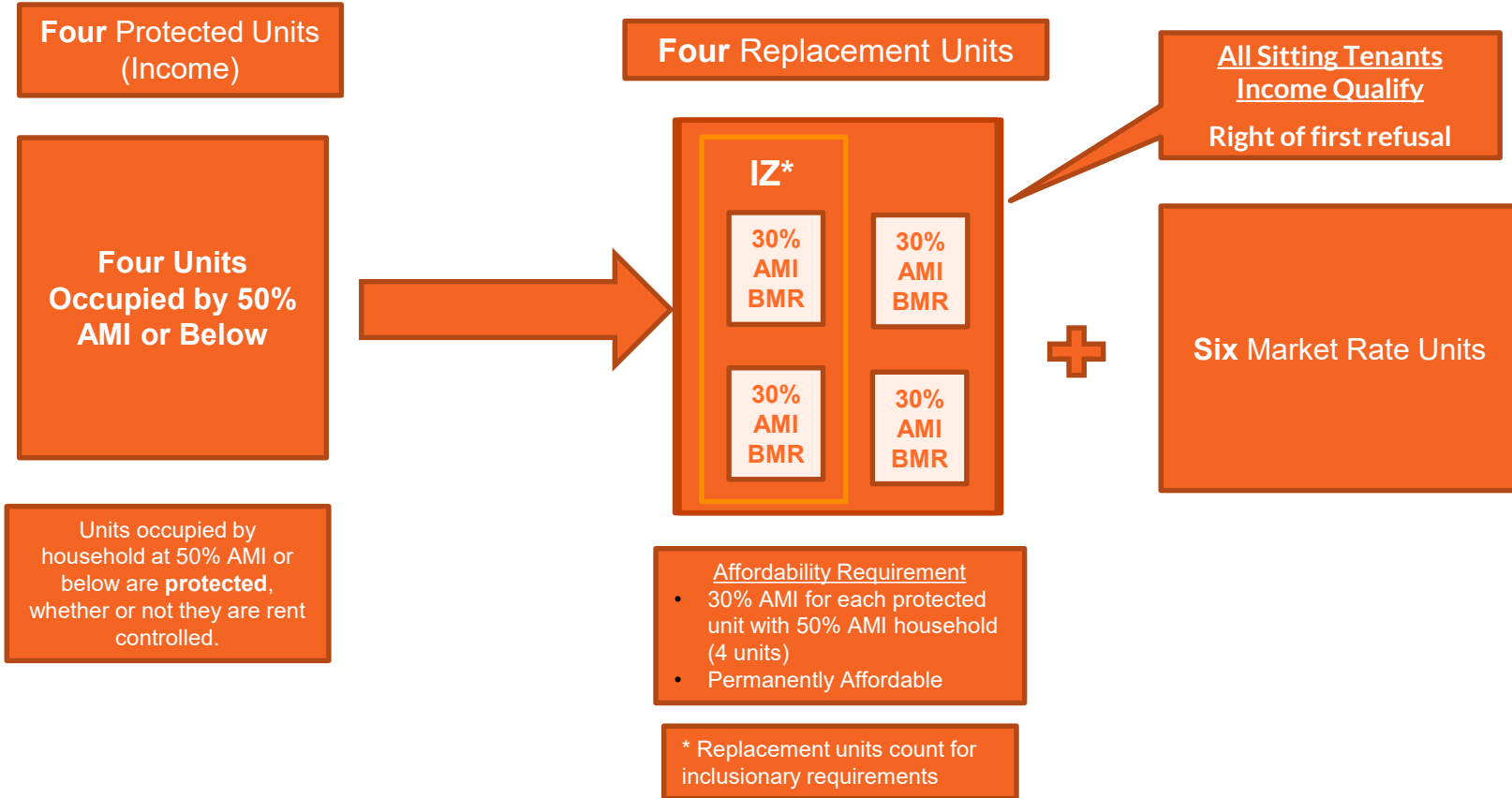
Affordability Requirement

- 30% AMI for each protected unit with 50% AMI household
- Permanently Affordable

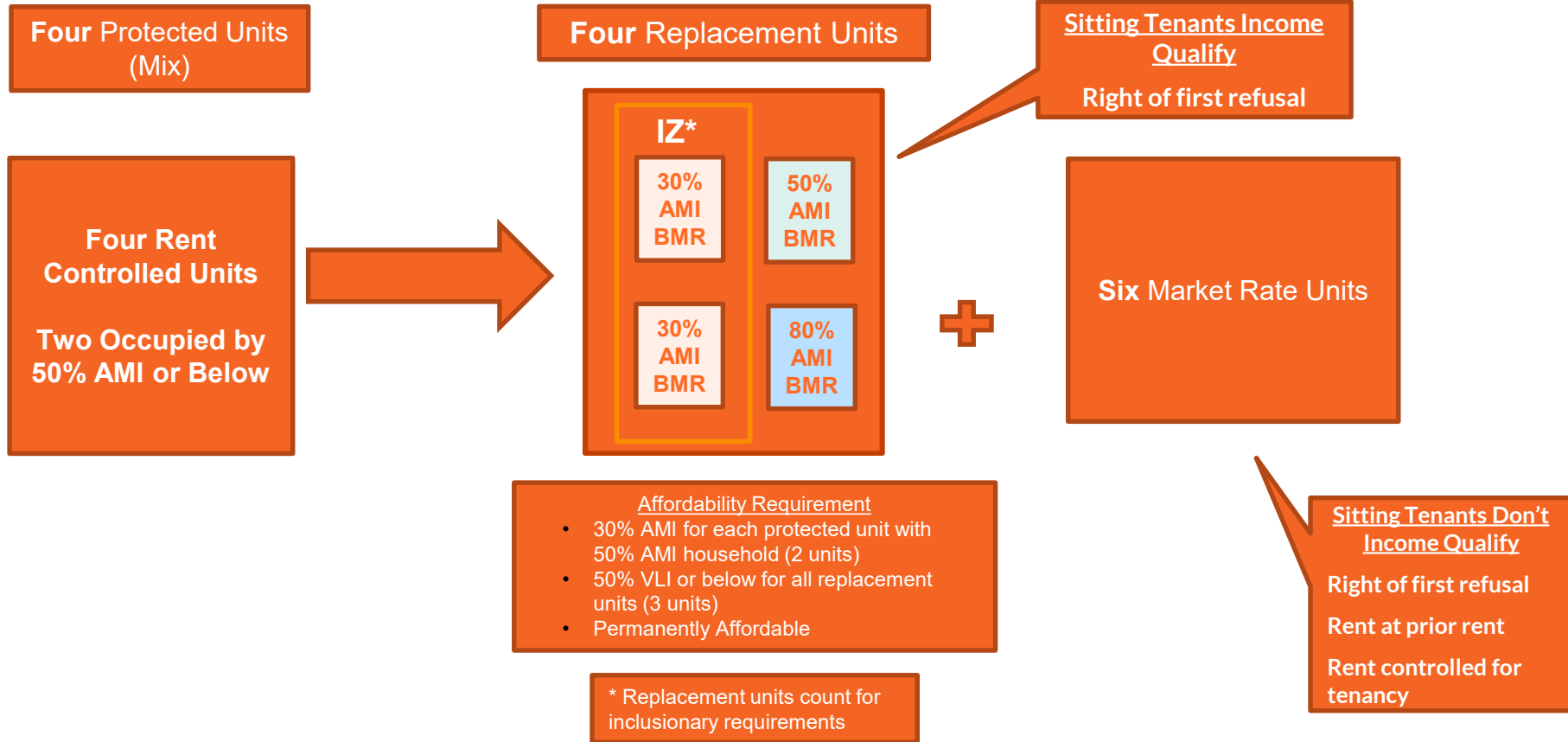
# Demolition of Fourplex for Ten Units



# Demolition of Rent-Controlled Fourplex for Ten Units



# Demolition of Fourplex for Ten Units



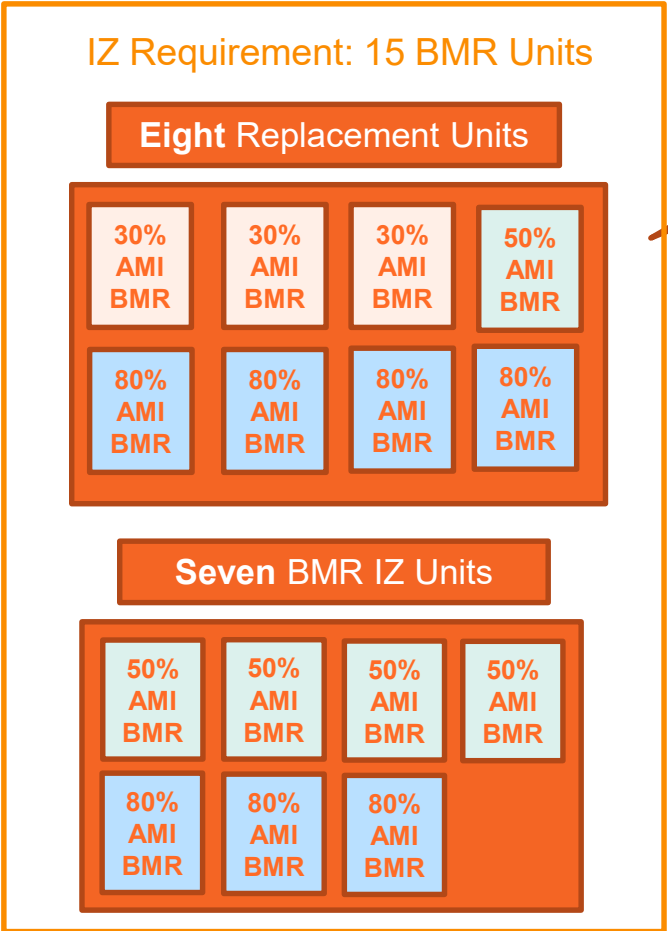
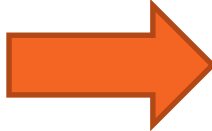


# Demolition of 8 Unit Building for 75 Unit Building

**Eight Protected Units**

**Eight Rent Controlled Units**

**Three Occupied by 50% AMI or Below**



Sitting Tenants Income Qualify  
Right of first refusal



**60 Market Rate Units**

Sitting Tenants Don't Income Qualify  
Right of first refusal  
Rent at prior rent  
Rent controlled for tenancy

- Affordability Requirement
- 30% AMI for each protected unit with 50% AMI household (3 units)
  - 50% AMI or lower for half of all IZ units (8 units)
  - Permanently Affordable

Chapter 23.326  
DEMOLITION AND DWELLING UNIT CONTROL

Sections:

23.326.010	Chapter Purpose.
23.326.020	General Requirements.
23.326.030	Eliminating Dwelling Units through Demolition.
23.326.040	Eliminating Dwelling Units through Conversion and Change of Use.
23.326.050	Private Right of Action.
23.326.060	Elimination of Residential Hotel Rooms.
23.326.070	Demolitions of Non-Residential Buildings.
23.326.080	Building Relocations.
23.326.090	Limitations.

23.326.010 Chapter Purpose.

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

23.326.020 General Requirements.

A. *Applicability.* No dwelling unit or units may be eliminated or demolished except as authorized by this chapter.

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

23.326.030 Eliminating Dwelling Units through Demolition.

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

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

2. *Limitation.*

Attachment 4 – Existing Demolition Ordinance

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(a) Demolition is not allowed if:

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

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

3. *Findings.* The ZAB may approve a Use Permit to demolish a building constructed before June 1980 on a property containing two or more dwelling units if any of the following are true:

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

4. *Fee Required.*

- (a) The applicant shall pay a fee for each unit demolished to mitigate the impact of the loss of affordable housing in Berkeley.
- (b) The amount of the fee shall be set by resolution of the City Council.
- (c) *In Lieu of a Fee.*

Attachment 4 – Existing Demolition Ordinance

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- i. In lieu of paying the impact fee, the applicant may provide a designated unit in the new project at a below market rate to a qualifying household in perpetuity.
- ii. The affordability level of the below market rent and the income level of the qualifying household shall be set by resolution of the City Council.
- iii. The applicant shall enter into a regulatory agreement with the City of Berkeley to provide the in lieu units.

5. *Occupied Units.*

(a) *Applicability.*

- i. The requirements in this subsection apply if units to be demolished are occupied.
- ii. These requirements do not apply to tenants who move in after the application for demolition is submitted to the City if the owner informs each prospective tenant about the proposed demolition and that demolition constitutes good cause for eviction.

(b) *Notice.* The applicant shall provide all sitting tenants notice of the application to demolish the building no later than the date it is submitted to the City, including notice of their rights under Municipal Code Section 13.76 (Rent Stabilization and Eviction for Good Cause Program).

(c) *General Requirements.*

- i. The applicant shall provide assistance with moving expenses equivalent to in Chapter 13.84 (Relocation Services and Payments for Residential Tenant Households).
- ii. The applicant shall subsidize the rent differential for a comparable replacement unit, in the same neighborhood if feasible, until new units are ready for occupancy. Funding for the rent differential shall be guaranteed in a manner approved by the City.

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iii. *Exception.* An applicant who proposes to construct a 100 percent affordable housing project is not required to comply with this subsection but must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended and the California Relocation Act (Government Code sections 7260 et seq.).

(d) *Sitting Tenants Rights.*

i. Sitting tenants who are displaced as a result of demolition shall be provided the right of first refusal to move into the new building.

ii. Tenants of units that are demolished shall have the right of first refusal to rent new below-market rate units designated to replace the units that were demolished, at the rent that would have applied if they had remained in place, as long as their tenancy continues.

iii. Income restrictions do not apply to displaced tenants.

iv. *Exception.*

(1) An applicant who proposes to construct a 100 percent affordable housing project is not required to comply with 23.326.030.A.5.a, b, and c, but must comply with the following requirement.

(2) Sitting tenants who are displaced as a result of demolition and who desire to return to the newly constructed building will be granted a right of first refusal subject to their ability to meet income qualifications and other applicable eligibility requirements when the new units are ready for occupancy.

B. *Buildings with a Single Dwelling Unit.*

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

2. *Limitation.*

(a) Demolition is not allowed if:

i. The building was removed from the rental market under the Ellis Act during the preceding five years; or

Attachment 4 – Existing Demolition Ordinance

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ii. There have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years.

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

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

23.326.040 Eliminating Dwelling Units through Conversion and Change of Use.

A. *General.* The ZAB may approve a Use Permit for the elimination of a dwelling unit in combination with another dwelling unit used for occupancy by a single household if it finds that:

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

B. *Limitations.*

1. Demolition is not allowed if:

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(a) The building was removed from the rental market under the Ellis Act during the preceding five years; or

(b) There have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years.

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

C. *Effect of Noncompliance with the Two-Year Requirement.*

1. If a unit eliminated under Subsection A (General) is not occupied by the applicant's household for at least two consecutive years from the date of elimination, the affected unit must be restored to separate status.

2. This requirement shall be implemented by a condition of approval and a notice of limitation on the property, acceptable to the City of Berkeley.

3. The condition and notice will provide that if the owner's household does not occupy the unit for at least two years from the date of elimination the affected units must either be restored as separate dwelling units and the vacant unit(s) offered for rent within six months or the owner must pay a fee of \$75,000 in 2013 dollars, adjusted in May of each year according to the Consumer Price Index for the San Francisco Bay Area. The fee shall be deposited into the City of Berkeley's Housing Trust Fund.

4. The City of Berkeley may exempt an applicant from the two-year residency requirement if of an unforeseeable life change that requires relocation.

D. *Effect of Eliminating a Dwelling Unit.*

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

Attachment 4 – Existing Demolition Ordinance

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- (a) The building is demolished; or
- (b) Sufficient units are added or restored such that the building contains at least five units.

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

E. *Exceptions.*

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

2. The ZAB may approve a Use Permit to eliminate a dwelling unit through combination with another dwelling unit for the purpose of providing private bathrooms, kitchenettes, accessibility upgrades, and/or seismic safety upgrades to single-residential occupancy rooms in residential developments undergoing a publicly-funded rehabilitation.

3. Notwithstanding the general Use Permit requirement under 23.326.020 (General Requirements), a lawfully established accessory dwelling unit that is not a controlled rental unit may be eliminated with a Zoning Certificate if:

- (a) The re-conversion restores the original single-family use of the main building or lot; and
- (b) No tenant is evicted.

23.326.050 Private Right of Action.

Any affected tenant may bring a private action for injunctive and/or compensatory relief against any applicant and/or owner to prevent or remedy a violation of Sections 23.326.030 (Eliminating Dwelling Units through Demolition) and 23.326.040 (Eliminating Dwelling Units through Conversion and Change of Use). In any such action a prevailing plaintiff may recover reasonable attorney's fees.



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23.326.060 Elimination of Residential Hotel Rooms.

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

1. The residential hotel owner shall provide or cause to be provided standard housing of at least comparable size and quality, at comparable rents and total monthly or weekly charges to each affected tenant.
2. One of the following three requirements shall be met:
  - (a) The residential hotel rooms being removed are replaced by a common use facility, including, but not limited to, a shared kitchen, lounge, or recreation room, that will be available to and primarily of benefit to the existing residents of the residential hotel and that a majority of existing residents give their consent to the removal of the rooms.
  - (b) Before the date on which the residential hotel rooms are removed, one-for-one replacement of each room to be removed is made, with a comparable room, in one of the methods set forth in this section.
  - (c) Residential hotel rooms are removed because of building alterations related to seismic upgrade to the building or to improve access to meet the requirements of the American Disabilities Act (ADA).

B. *Criteria for Replacement Rooms.* For purposes of this section, replacement rooms must be:

1. Substantially comparable in size, location, quality, and amenities;
2. Subject to rent and eviction controls substantially equivalent to those provided by the Rent Stabilization Ordinance or those that applied to the original rooms which are being replaced; and
3. Available at comparable rents and total monthly or weekly charges to those being removed. Comparable rooms may be provided by:
  - (a) Offering the existing tenants of the affected rooms the right of first refusal to occupy the replacement rooms;

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- (b) Making available comparable rooms, which are not already classified as residential hotel rooms to replace each of the rooms to be removed; or
- (c) Paying to the City of Berkeley's Housing Trust Fund an amount sufficient to provide replacement rooms.
  - i. The amount to be paid to the City of Berkeley shall be the difference between the replacement cost, including land cost, for the rooms and the amount which the City of Berkeley can obtain by getting a mortgage on the anticipated rents from the newly constructed rooms.
  - ii. The calculations shall assume that rents in the newly constructed rooms shall not exceed the greater of either a level comparable to the weekly or monthly charges for the replaced rooms or the level which would be charged if no current tenant paid more than 30 percent of such tenant's gross income for rent.

C. *Exception for Non-Profit Ownership.* In a residential hotel owned and operated by a non-profit organization, recognized as tax-exempt by either the Franchise Tax Board and/or the Internal Revenue Service, residential hotel rooms may be changed to non-residential hotel room uses if the average number of residential hotel rooms per day in each calendar year is at least 95 percent of residential hotel rooms established for that particular residential hotel.

23.326.070 Demolitions of Non-Residential Buildings.

A. *Main Non-Residential Buildings.* A main building used for non-residential purposes may be demolished with a Use Permit.

B. *Accessory Buildings.*

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

C. *Landmarks Preservation Commission Review.*

Attachment 4 – Existing Demolition Ordinance

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

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

1. The demolition will not be materially detrimental to the commercial needs and public interest of any affected neighborhood or the City of Berkeley; and
2. The demolition:
  - (a) Is required to allow a proposed new building or other proposed new use;
  - (b) Will remove a building which is unusable for activities which are compatible with the purposes of the district in which it is located or which is infeasible to modify for such uses;
  - (c) Will remove a structure which represents an inhabitable attractive nuisance to the public; or
  - (d) Is required for the furtherance of specific plans or projects sponsored by the City of Berkeley or other local district or authority upon a demonstration that it is infeasible to obtain prior or concurrent approval for the new construction or new use which is contemplated by such specific plans or projects and that adhering to such a requirement would threaten the viability of the plan or project.

23.326.080 Building Relocations.

A. *Treatment of Building Relocation.*

Attachment 4 – Existing Demolition Ordinance

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1. Relocating a building from a lot is considered a demolition for purposes of this chapter.
2. Relocating a building to a lot is considered new construction and is subject to all requirements applicable to new construction.
3. When a building is relocated to a different lot within in Berkeley, the lot from which the building is removed shall be known as the source lot and the lot on which the building is to be sited shall be known as the receiving lot. In such cases all notification requirements apply to both the source and receiving lots.

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

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

23.326.090 Limitations.

A. *Unsafe, Hazard, or Danger.*

1. Notwithstanding anything to the contrary, if a building or structure is unsafe, presents a public hazard, and is not securable and/or is in imminent danger of collapse so as to endanger persons or property, as determined by the city's building official, it may be demolished without a Use Permit.
2. The Building Official's determination in this matter shall be governed by the standards and criteria in the most recent edition of the California Building Code that is in effect in the City of Berkeley.

B. *Ellis Act.* This chapter shall be applied only to the extent permitted by state law as to buildings which have been entirely withdrawn from the rental market pursuant to the Ellis Act (California Government Code Chapter 12.75).



Planning and Development Department  
Land Use Planning Division

STAFF REPORT  
December 6, 2023

TO: Members of the Planning Commission

FROM: Justin Horner, Associate Planner

SUBJECT: Zoning Ordinance Amendments to Berkeley Municipal Code Chapter 23.326 (Demolition and Dwelling Unit Controls)

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#### RECOMMENDATION

Make a recommendation to the City Council regarding amendments to Berkeley Municipal Code Chapter 23.326 (Demo Ordinance). The existing and proposed redlined ordinances are presented in **Attachments 1** and **2**, respectively.

#### SUMMARY

State law SB 330 (Housing Crisis Act of 2019) includes new provisions related to demolition of residential units. SB 330 provides optional ways to comply with these requirements, based on whether the units are occupied or vacant, whether existing tenants are low income, whether the units are subject to local rent control (in Berkeley, this would be most properties with more than two units built before 1980), or whether the units were removed from the rental market pursuant to the Ellis Act.<sup>1</sup> In particular, replacement units required by SB 330 may be deed restricted to low income households or they may be subject to local rent control. The law also addresses the rights of existing tenants that would be displaced by demolition, including relocation benefits and a right of first refusal to return to the new units at below market rate (BMR) rent. Density bonus law now mirrors these requirements.

The proposed ordinance (**Attachment 2**) includes provisions to bring the Demo Ordinance into conformance with State law, and includes a number of new Berkeley-specific provisions as recommended by the 4x4 Joint Task Force Committee on

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<sup>1</sup> Under a state law called the Ellis Act (CA Gov. Code Sec. 7060 et seq.), an owner can evict tenants in order to withdraw a rental property from the rental housing market. A local ordinance, Berkeley Municipal Code Chapter 13.77, establishes specific procedures under the state law.

Housing. The proposed ordinance also includes a number of text edits, including grammatical corrections and renumbering.

#### CURRENT SITUATION AND ITS EFFECTS

The existing Demo Ordinance (Attachment 1) requires a Use Permit for the demolition or elimination of one or more dwelling units in Berkeley. The Zoning Adjustments Board (ZAB) may issue a Use Permit for the demolition of a dwelling unit for specific enumerated reasons:

- A building is “hazardous or unusable and is infeasible to repair”;
- “Demolition is necessary to permit construction... of at least the same number of dwelling units.”
- “The elimination of the dwelling units would not be materially detrimental to the housing needs and public interest of the affected neighborhood and the City.”

The existing ordinance includes provisions for unit replacement and the rights of sitting tenants, as well as additional situations such as:

- When housing units are demolished and no new housing units are being developed at the site (e.g., commercial development);
- When tenants have been unlawfully evicted, such as forcing a tenant out of a unit without a court order; and
- When units are being merged or converted within an existing building rather than physically demolished.

The existing ordinance includes a provision whereby applicants may pay a fee rather than provide below-market-rate replacement units, however the amount of the fee has never been established.

Demolition of dwelling units is prohibited where a building has been removed from the rental market under the Ellis Act during the preceding five years or where there have been verified cases of harassment or threatened or actual illegal eviction during the immediately preceding three years. Applicants are generally required to provide relocation benefits, including moving expenses and differential rent payments. In addition, displaced tenants are provided a right of first refusal to rent new units after the lot has been redeveloped.

#### Proposed Demolition Ordinance Provisions

The proposed ordinance (**Attachment 2**) includes provisions to bring the Demo Ordinance into conformance with State law, and includes a number of new Berkeley-specific provisions as recommended by the 4x4 Joint Task Force Committee on Housing. The proposed ordinance also includes a number of text edits, including grammatical corrections and renumbering.

The most significant changes are summarized below in Table 1, and discussed in more detail below. The primary rationales for the proposed changes include clarifying the applicability of the ordinance, expanding tenant protections, bringing the ordinance into conformance with State law, and assigning the Rent Stabilization Board (Rent Board) to administer some aspects of the ordinance rather than the ZAB.

*Applicable Unit.*

The existing ordinance indicates that it applies to a “dwelling unit or units.” The proposed ordinance includes clarifications that it applies to dwelling units, group living accommodations, residential hotel rooms, accessory dwelling units (ADUs), junior accessory dwelling (JADUs) units, and units built without permits.

*Comparable Unit.*

The existing ordinance refers to a “comparable unit” when referring to replacement units, but does not define “comparable unit.” The proposed ordinance includes an explicit definition of “comparable unit”, indicating that it should be of a comparable size, include similar amenities, and be located in a similar area of the city as the demolished unit.

*Prohibited Demolitions.*

The existing ordinance indicates that demolition is prohibited for units that have been removed from the rental stock through the Ellis Act within the past five years, or in cases where there has been substantial evidence of tenant harassment by a rental property owner, or an attempted or actual illegal eviction, within the past three years. In the latter case, the determination of whether harassment has occurred is made by the ZAB.

The proposed ordinance expands tenant protections to include any no fault eviction within the past five years, not just removal of a rental unit from the market through the Ellis Act. A “no fault eviction” is when the property owner or landlord wants to evict a tenant at no fault of the tenant, for example, when the property owner wants to move into the property.

The Rent Stabilization Board is proposed to be the deciding body for questions regarding harassment and illegal eviction, instead of the ZAB.

*Mitigation Fee.*

The existing ordinance includes a requirement to pay an in-lieu mitigation fee for every unit demolished, or the option to replace a comparable BMR unit on-site.

State law (SB330) imposes a requirement that any housing development project that requires the demolition of dwelling units must create at least as many residential dwelling units as will be demolished on-site, and requires that the City condition

approval on the provision of replacement units. Therefore, an option to “fee out” of the replacement requirement is a violation of State law, because it would not provide replacement units at the sizes and affordability levels required by SB 330. Accordingly, the proposed ordinance removes the mitigation fee section.

*Landmarks and Structures of Merit.*

While the provisions of BMC Chapter 3.24 (Landmarks Preservation Commission) apply to units proposed for demolition, the existing ordinance does not explicitly refer to this chapter. Accordingly, the proposed ordinance includes specific language referring to Chapter 3.24.

*Affordability of Replacement Units.*

The existing ordinance includes a requirement that any replacement units must be BMR units, and that the income levels of the qualifying households, and rents for the replacement units, shall be set by a resolution of the City Council. The existing ordinance also includes a requirement that the project applicant enter into a regulatory agreement with the city to provide these units.

The proposed ordinance includes more detailed provisions addressing the affordability levels of replacement units:

- The proposed ordinance requires that any demolished unit shall be replaced with equivalent units and comply with the applicable affordability requirements included in BMC 23.328 (Affordable Housing Requirements) and BMC 23.330 (Density Bonus). Referencing these sections clarifies the appropriate affordability levels for replacement units, and establishes consistent requirements across a number of affordable housing-related provisions in the BMC.
- The proposed ordinance also includes a provision that if a displaced household has an income below 50% AMI, a comparable replacement unit shall be offered at a rent that is affordable to households at 30% of AMI.

*Sitting Tenants' Rights.*

The existing ordinance establishes certain rights for sitting tenants. Sitting tenants in demolished units are entitled to a right of first refusal to move into the new building, have a right of first refusal for any BMR units, and retain those rights even if they have incomes that do not qualify for BMR units.

The proposed ordinance clarifies that tenants who do not qualify for BMR replacement units due to income limits above the area median income must still be provided a market-rate replacement unit at their prior rent. Additionally, the rent for the duration of that tenancy would be subject to Berkeley's rent control regulations. This section was added by the 4x4 Committee to provide additional rights to sitting tenants who may not qualify for BMR units.



The proposed ordinance includes additional provisions related to sitting tenants' rights. The revisions clarify that a sitting tenant's right of first refusal extends to a *comparable* unit (not just any unit) in the building, and sets the initial rent and subsequent rents for sitting tenant households that are ineligible for BMR units. These provisions go beyond what is required under State law.

*Elimination of Units through Combination with Other Units.*

The existing ordinance includes provisions regulating the elimination of dwelling units through physical combination with other units. This is usually done in cases where two units are combined to make a single larger unit. The existing ordinance requires a Use Permit, with specific findings, to move forward with such an elimination. It also prohibits such an elimination if the building was removed from the rental market through the Ellis Act in the past five years, or if there is evidence of tenant harassment or illegal eviction within the past three years, as determined by the ZAB.

The proposed ordinance permits combined units through an AUP approval if such a combination would return the building to, or move it closer towards, its permitted density. This is a provision to make it easier for units in owner-occupied buildings to be combined. The AUP requirement still includes discretionary review, the ability to set conditions, and an appeal option to the ZAB.

Elimination of a unit for a combination would not be approved if the building was vacated through any no-fault eviction, not just due to the Ellis Act, or if the tenant was subject to landlord harassment or an illegal eviction. The determination of whether landlord harassment or a real or attempted illegal eviction occurred would be made by the Rent Board Hearing Examiner, with an appeal option to the Rent Stabilization Board, instead of by the ZAB.

*Demolition of ADUs that are not Controlled.*

The existing ordinance includes a provision that allows the demolition, with a Zoning Certificate (ZC), of ADUs that are not rent controlled. The proposed ordinance removes this section, and clarifies that ADUs and JADUs are considered residential units for the purposes of the ordinance, and therefore require a Use Permit for demolition or elimination.

*Demolition of Accessory Buildings*

The existing ordinance includes a provision that permits the demolition of an accessory building that does not contain a dwelling unit, such as garages, carports, and sheds, with a ZC. The proposed ordinance includes additional clarifying language that an accessory building that is occupied by a residential tenant shall be considered a residential unit for the purposes of this chapter.

*Residential Hotel Rooms*

The existing ordinance includes a section specifically regulating the elimination of residential hotel rooms. These provisions include specific requirements related to monthly and weekly charges, and permit residential hotel rooms to be removed for the purpose of providing common use facilities (such as a kitchen, lounge, or recreation room) for remaining residents or to undertake seismic upgrades or meet the requirements of the Americans with Disabilities Act. They also include a provision allowing an owner to meet the replacement requirements through a payment to the Housing Trust Fund, which, as noted above, is not permitted under State law. The proposed ordinance removes this section, and includes language indicating that residential hotel rooms are treated as residential units for the purpose of this ordinance.

*Technical Edits, Reorganization and Renumbering*

The proposed ordinance also includes a variety of purely technical edits, and reorganization, retitling, and renumbering of some sections and subsections.

**Table 1. Summary of Revisions to Demolition Ordinance**

<b>Policy Area</b>	<b>Current Ordinance</b>	<b>Proposed Ordinance</b>	<b>Rationale</b>
<b>Applicable unit</b>	“Dwelling unit or units.”	Dwelling Unit, GLA, ADU, JADU, and units built without permits 23.326.010(A)(1) – (3)	Clarification of the types of units covered.
<b>Comparable unit</b>	No definition.	“Similar size, amenities and location within the city.” 23.326.010(A)(4)	Clarification by providing a definition.
<b>Demolition Prohibition: Ellis Act</b>	Prohibition applies to any unit removed via Ellis Act within the past 5 years	Prohibition applies to any “no-fault” eviction. 23.326.030(A)	Expansion of tenant protections beyond just one type of no-fault eviction (Ellis Act).
<b>Demolition Prohibition: Tenant Harassment</b>	Determination made by ZAB.	Determination made by Rent Board. 23.326.030(A)(2)	For tenant-landlord issues, the Rent Board is the subject-expert body.
<b>Mitigation Fee</b>	Includes mitigation fee option.	Removes mitigation fee option.	State Law: Demolished units must be replaced (SB 330).
<b>Landmarks and Structures of Merit</b>	No reference to Landmarks Preservation Commission (LPC) procedures.	Includes reference to LPC procedures. 23.326.030(C)	Clarification that LPC procedures apply.
<b>Replacement Units -- Affordability</b>	<ul style="list-style-type: none"> <li>Replacement unit must be “BMR” in perpetuity;</li> </ul>	<ul style="list-style-type: none"> <li>Replacement unit must comply with Chapter 23.328 (Affordability Requirements) and</li> </ul>	State Law: Existing tenant income levels impact type/affordability of replacement units (SB 330).

Policy Area	Current Ordinance	Proposed Ordinance	Rationale
	<ul style="list-style-type: none"> <li>Affordability level to be set by Council resolution;</li> <li>Regulatory agreement with the City required.</li> </ul>	23.330 (Density Bonus); <ul style="list-style-type: none"> <li>For demolished unit with household at 50% AMI or below, replacement unit must be set at 30% AMI; and</li> <li>Allows Zoning Officer and Fire Marshall to waive replacement for health and safety</li> </ul> 23.326.030(C)	
<b>Sitting Tenants Rights</b>	<ul style="list-style-type: none"> <li>Right of first refusal to move into the building</li> <li>Right of first refusal for BMR units</li> <li>Income restrictions do not apply</li> </ul>	<ul style="list-style-type: none"> <li>Right of first refusal for a comparable unit</li> <li>For displaced tenants who rent a comparable unit, rent is controlled for duration of tenancy</li> <li>For households ineligible for BMR units, a replacement unit shall be offered at prior rent</li> </ul> 23.326.030(E)(4)	State Law: Tenant income levels impact type/affordability of replacement units (SB 330).  Additional local requirement: Income restrictions do not apply to displaced households upon their return to the property after completion of the project.
<b>Elimination of Units through Combination with other Units</b>	Use Permit required in all cases, with findings.	AUP to combine units when the combination would return the building to, or move it closer towards, its original density 23.326.040(B)	Simplification: Allow conversion of owner-occupied buildings with a lesser standard.
	Combination not allowed if the building was removed via Ellis Act within the past 5 years	Combination not allowed if vacated through no fault eviction within the past 5 years 23.326.040(C)	Expansion of tenant protections beyond just one type of no-fault eviction (Ellis Act).
	Combination not allowed if tenant harassment. Determination made by ZAB	Determination made by Rent Board Hearing Examiner, with appeal to Rent Board 23.326.040(C)	For tenant-landlord issues, the Rent Board is the subject-expert body.

Policy Area	Current Ordinance	Proposed Ordinance	Rationale
<b>Demolition of ADUs</b>	Provides path to demolition with ZC for ADUs that are not rent controlled.	Section removed. All ADUs and JADUs, regardless of rent control status, are regulated as a residential unit.	ADUs and JADUs are considered Residential Units for purpose of ordinance. <i>23.326.010(A)(2)</i>
<b>Demolition of Accessory Buildings</b>	Can be demolished by right.	Added language to clarify that Accessory Buildings that are occupied by residential tenants are considered Residential Units. <i>23.326.050</i>	Expansion of demolition controls and tenant protections.
<b>Elimination of Residential Hotel Rooms</b>	Section 23.326.060 provides specific procedures for removal of residential hotel rooms	Section removed.	Residential Hotel Rooms are considered Residential Units for purpose of ordinance. <i>23.326.010(A)(1)</i>

### BACKGROUND

The impetus for these revisions is recent changes in State law that provide additional requirements for new housing development projects that involve the demolition of existing residential units. These provisions of SB 330 (Housing Crisis Act of 2019), which modified Government Code sections relating to zoning and density bonus, require all new housing development projects to provide replacement units of equivalent size, defined as having the same number of bedrooms as the demolished units.

At its meeting of February 1, 2023, the Planning Commission scheduled a public hearing to adopt a recommendation for the City Council of changes to the Demo Ordinance (**Attachment 3**). The Planning Commission deferred a final recommendation pending recommendations from the 4x4 Joint Task Force Committee on Housing. Staff returned to the 4x4 Joint Task Force Committee in September and October of 2023 for discussion and recommendations, which are reflected in **Attachment 2**. The proposed amendments do not include changes in permit requirement for by-right demolition of single-family homes, which will be considered in the future as part of a larger package of 'middle housing' zoning amendments.

### ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

California Public Resource Code Section 21065 defines a "project" under CEQA as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." The proposed ordinance amendments relate only to the requirements to demolish existing structures, and would not result in any physical changes to the environment. The proposed ordinance does not consist of a discretionary action that would permit or cause any

direct or indirect change in the environment. The proposed ordinance is therefore not a project under CEQA.

RATIONALE FOR RECOMMENDATION

The proposed ordinance includes changes required by state law, as well as policy changes recommended by the 4x4 Joint Committee Task Force on Housing.

NEXT STEPS

After the Planning Commission holds a public hearing and makes a recommendation to the City Council, the City Council shall hold a public hearing and vote to adopt the proposed ordinance amendments

CONTACT PERSON

Justin Horner, Associate Planner, Planning and Development, [jhorner@berkeleyca.gov](mailto:jhorner@berkeleyca.gov); 510-981-7476

Attachments:

1. Existing Demolition Ordinance (BMC Chapter 23.326)
2. Proposed Demolition Ordinance – Redlined (BMC Chapter 23.326)
3. Planning Commission Staff Report – Feb 1, 2023.
4. Public Hearing Notice



Planning and Development Department  
Land Use Planning Division

STAFF REPORT  
January 17, 2024

TO: Members of the Planning Commission

FROM: Justin Horner, Associate Planner

SUBJECT: Zoning Ordinance Amendments to Berkeley Municipal Code Chapter 23.326 (Demolition and Dwelling Unit Controls)

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#### RECOMMENDATION

Conduct a public hearing and make a recommendation to the City Council regarding amendments to Berkeley Municipal Code Chapter 23.326 (Demolition and Dwelling Unit Control Ordinance). The existing and proposed redlined ordinances are presented in **Attachments 1** and **2**, respectively.

#### SUMMARY

State law SB 330 (Housing Crisis Act of 2019) established new provisions related to demolition of residential units. SB 330 provides optional ways to comply with these requirements. These include unit occupancy or vacancy, existing tenant income status (ex. low income), local rent control applicability (in Berkeley, this would be most properties with more than two units built before 1980), or if units were removed from the rental market pursuant to the Ellis Act.<sup>1</sup> In particular, replacement units required by SB 330 may be deed restricted to low income households or subject to local rent control. The law also addresses the rights of existing tenants that would be displaced by demolition, including relocation benefits and a right of first refusal to return to the new units at below market rate (BMR) rent. Density bonus law now reflects these requirements.

The proposed ordinance (**Attachment 2**) includes provisions to bring the Demolition Ordinance into conformance with State law, and includes a number of new Berkeley-specific provisions as recommended by the 4x4 Joint Task Force Committee on Housing and the Planning Commission's Subcommittee meeting of December 20, 2023. The proposed ordinance also includes a number of text edits, including grammatical corrections and renumbering.

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<sup>1</sup> Under a state law called the Ellis Act (CA Gov. Code Sec. 7060 et seq.), an owner can evict tenants in order to withdraw a rental property from the rental housing market. A local ordinance, Berkeley Municipal Code Chapter 13.77, establishes specific procedures under the State law.

## REVISIONS TO DECEMBER 6, 2023 PROPOSED ORDINANCE

The proposed ordinance presented to the Planning Commission at its December 2, 2023 meeting was prepared based on multiple Planning Commission meetings and meetings of the 4x4 Joint Task Force Committee on Housing. The staff report for the December 6th 2023 Planning Commission meeting (**Attachment 3**) includes detailed discussion of those meetings, as well as the rationale for the development of the proposed ordinance.

At its December 6, 2023 meeting, the Planning Commission moved to create a Subcommittee to review the proposed ordinance in detail, and to consider suggestions and recommendations made by Commissioners at that meeting. The Subcommittee met on December 20, 2023 and recommended a number of changes to the ordinance presented to the Planning Commission at the December 6, 2023 meeting. These changes are detailed below.

- **Demolition of Single-Family Dwellings with a Zoning Certificate.** The ordinance presented on December 6, 2023 included a provision that requires a Use Permit (UP) to demolish any dwelling unit. *Program 29-Middle Housing* of the recently-adopted Housing Element includes a provision requiring the City Council to consider by-right demolition of single-family homes to encourage the development of middle housing.

**Proposed Modification:** The proposed ordinance includes a provision to allow the demolition of a single-family dwelling with a Zoning Certificate if the demolition is part of a development project that would result in a net increase in residential density. This provision changes the required permit for the demolition from a Use Permit to a Zoning Certificate. All other aspects of the ordinance, including tenant notice, tenant protections, unit replacement requirements and other provisions, would continue to apply to the demolition of single-family dwellings.

- **Demolition of Residential Units for Non-Residential Projects.** The ordinance presented on December 6, 2023 included a provision which would allow the Zoning Adjustments Board (ZAB) to approve the demolition of residential units with a finding that the demolition is necessary to permit construction of “economically beneficial uses;” that is, projects that are non-residential. Residential units demolished under this finding would not have been required to be replaced.

**Proposed Modification:** The Subcommittee recommended removal of this provision. AB 1218,<sup>2</sup> recently signed into law, applies SB 330 residential unit replacement requirements to proposed projects that do not include residential units.

- **“Equivalent” vs. “Comparable” Units.** The ordinance presented to the Planning Commission on December 6, 2023 included a requirement that residential units that are demolished shall be replaced with “equivalent” units.

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<sup>2</sup> <https://legiscan.com/CA/text/AB1218/id/2845253>

**Proposed Modification:** Neither the ordinance, nor Title 23, includes a definition of “equivalent,” for this context. The Subcommittee therefore replaced “equivalent” with “comparable,” which is defined in the proposed ordinance.

- **Tenants’ Intent to Return.** The ordinance presented to the Planning Commission on December 6, 2023 included a provision that “tenants shall have until the date that the new units *are ready* for occupancy to decide whether to move into the newly constructed building.” [emphasis added]

**Proposed Modification:** The Subcommittee recommended more precise language to indicate the timeline by which a tenant should inform an owner of their intent to return to a unit. The proposed ordinance includes new provisions that:

- a) an owner must inform a tenant within five days of the issuance of a Certificate of Occupancy that a new unit will be ready for move in on a specific date; and
- b) tenants are to confirm in writing their intent to lease a replacement unit at any time between learning of a demolition and twenty days after the issuance of a Certificate of Occupancy for a new unit.

- **Combination of Units, Findings.** The ordinance presented to the Planning Commission on December 6, 2023 included a provision that allows the ZAB to approve a UP to eliminate a unit within a single-resident occupancy residential development undergoing a publicly-funded rehabilitation through combination with another unit, for the purposes of providing private bathrooms, kitchenettes, accessibility upgrades, or seismic safety upgrades.

**Proposed Modification:** The Subcommittee recommended additional language to broaden the acceptable purposes to include “other elements required by funding sources or programmatic needs.”

- **Combination of Units, Applicant Requirements.** The ordinance presented to the Planning Commission on December 6, 2023 includes two requirements relating to applicants intending to demolish units through combination. One requirement is that the ZAB must find that the applicant’s household has occupied the affected unit for no less than two years, and the other is that an applicant’s household must occupy the combined unit for at least two years after its completion.

**Proposed Modification:** The proposed ordinance changes this requirement from applying to the “applicant,” to applying to an “owner.” This revision would still require owner-occupancy, maintaining prohibitions on evicting tenants to combine units or immediately renting combined units, but would permit an owner-to-owner sale of a property.



### ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

California Public Resource Code Section 21065 defines a “project” under CEQA as “an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” The proposed ordinance amendments relate only to the requirements to demolish existing structures, and would not result in any physical changes to the environment. The proposed ordinance does not consist of a discretionary action that would permit or cause any direct or indirect change in the environment. The proposed ordinance is therefore not a project under CEQA.

### RATIONALE FOR RECOMMENDATION

The proposed ordinance includes changes required by state law, as well as policy changes recommended by the 4x4 Joint Committee Task Force on Housing and the Planning Commission’s Subcommittee.

### NEXT STEPS

After the Planning Commission holds a public hearing and makes a recommendation to the City Council, the City Council shall hold a public hearing and vote to adopt the proposed ordinance amendments.

### CONTACT PERSON

Justin Horner, Associate Planner, Planning and Development, [jhorner@berkeleyca.gov](mailto:jhorner@berkeleyca.gov); 510-981-7476

### Attachments:

1. Existing Demolition Ordinance (BMC Chapter 23.326)
2. Proposed Demolition Ordinance – Redlined (BMC Chapter 23.326)
3. Planning Commission Staff Report – December 6, 2023.
4. Public Hearing Notice

**NOTICE OF PUBLIC HEARING  
BERKELEY CITY COUNCIL**

**Zoning Ordinance Amendments to Berkeley Municipal Code  
Section 23.326 (Demolition and Dwelling Unit Controls)**

**The public may participate in this hearing by remote video or in-person.**

The Department of Planning and Development is proposing amendments to the Demolition Ordinance, Berkeley Municipal Code Chapter 23.326, that are required or permitted pursuant to recent changes in State law that provide additional requirements for new housing development projects that involve the demolition of existing residential units. The proposed amendments would also detail additional tenant protections and affordability requirements for replacement of demolished units.

The hearing will be held on, **March 26, 2024 at 6:00 p.m.** in the School District Board Room, located at 1231 Addison Street, Berkeley CA 94702.

A copy of the agenda material for this hearing will be available on the City’s website at <https://berkeleyca.gov/> as of March 14, 2024. **Once posted, the agenda for this meeting will include a link for public participation using Zoom video technology, as well as any health and safety requirements for in-person attendance.**

For further information, please contact Justin Horner, Associate Planner at 510-981-7476. Written comments should be mailed or delivered directly to the City Clerk, 2180 Milvia Street, Berkeley, CA 94704, or e-mailed to [council@berkeleyca.gov](mailto:council@berkeleyca.gov) in order to ensure delivery to all Councilmembers and inclusion in the agenda packet.

Communications to the Berkeley City Council are public record and will become part of the City’s electronic records, which are accessible through the City’s website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to the City Council, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service or in person to the City Clerk. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the City Clerk at (510) 981-6900 or [clerk@berkeleyca.gov](mailto:clerk@berkeleyca.gov) for further information.

**Published:** March 15, 2024

**Public Hearing required by BMC 23.412.050 and Govt Code 65853; notice provided according to Govt Code 65090 and BMC 23.404.040.**



I hereby certify that the Notice for this Public Hearing of the Berkeley City Council was posted at the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way, as well as on the City's website, on March 14, 2026.

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Mark Numainville, City Clerk