



Office of the City Manager

ACTION CALENDAR
June 4, 2013

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

RECOMMENDATION

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

FISCAL IMPACTS OF RECOMMENDATION

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

CURRENT SITUATION AND ITS EFFECTS

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

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

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

BACKGROUND

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

The items in that referral included:

Demo section:

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

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

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

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

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

Elimination Section:

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

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

RATIONALE FOR RECOMMENDATION

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

ALTERNATIVE ACTIONS CONSIDERED

None

CONTACT PERSON

Eric Angstadt, Director, Planning Department, 981-7410

Attachment:

1: Ordinance

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

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

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

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

23C.08.020 Elimination of Dwelling Units through Demolition

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

of area median or sold to people with incomes no greater than 70% of area median, with priority to people who currently live or work in Berkeley, except as provided in Section C.4.

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

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

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

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

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

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

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

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

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

23C.08.035 Private Right of Action

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

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

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

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