

RECEIVED AT
COUNCIL MEETING OF:

JUN 04 2013

23C.08.020 Elimination of Dwelling Units through Demolition

OFFICE OF THE CITY CLERK
CITY OF BERKELEY

- 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 must will be in addition, to the extent legally permitted, to any below-market rate units otherwise included in the project, including, but not limited to: units proposed pursuant to Government Code section 65915; units provided as a condition of any funding; or units provided in lieu of the City's affordable housing mitigation fee 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.

DEMOLITION AND DWELLING UNIT CONTROLS

OFFICE OF THE CITY CLERK
CITY OF BERKELEY

Sections:

- 23C.08.010 Demolition or Elimination of Dwelling Units--General Requirement
- 23C.08.020 Demolitions of Buildings with Residential Uses
- 23C.08.030 Elimination of Dwelling Units and Accessory Dwelling Units (Conversions and Changes of Use)
- 23C.08.040 Elimination of Residential Hotel Rooms
- 23C.08.050 Demolitions of Buildings Used for Commercial, Manufacturing or Community, Institutional or Other Non-residential Uses
- 23C.08.060 Building Relocations
- 23C.08.070 Limitations

Section 23C.08.010 Demolition or Elimination of Dwelling Units--General Requirement

- A. No Dwelling Unit or units may be eliminated or demolished except as authorized by the provisions of this chapter.
- B. The Board may approve a Use Permit for the elimination or demolition of dwelling units only if, in addition to any other findings required by this Ordinance, it finds that 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. (Ord. 6848-NS § 1 (part), 2005; Ord. 6478-NS § 4 (part), 1999)

Section 23C.08.020 Demolitions of Buildings with Residential Uses

- A. The Board may approve a Use Permit to demolish a building containing one or more dwelling units if it makes the findings required by the foregoing section, and that:
 - 1. The demolition will remove a structure that is hazardous, unusable or is infeasible to repair; or
 - 2. The demolition is necessary to permit construction approved pursuant to this Ordinance, of at least the same number of dwelling units as the demolished structure.
- B. Notwithstanding anything 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. (Ord. 6908-NS §§ 1-2 (part), 2006; Ord. 6478-NS § 4 (part), 1999)

Section 23C.08.030 Elimination of Dwelling Units and Accessory Dwelling Units (Conversions and Changes of Use)

- A. The Board may approve a Use Permit for the elimination of a dwelling unit resulting from a residential conversion or a change of use if it finds that:
 - 1. The number of dwelling units to be eliminated, at the time of the application, exceeds the number permitted by the maximum residential density applicable to the District where the subject building is

Chapter 23C.08: Demolition and Dwelling Unit Controls

located; or

2. The conversion will create common space for residents of a co-housing community, as defined in Section 21.28.030 and is in conformance with the regulations of the District in which it is located; or
 3. The proposed changes would not result in a reduction of housing supply essential to the well-being or housing needs of the City or of persons residing in the neighborhood in the vicinity of the building involved; or
 4. Each dwelling unit affected is situated in an environment unsuitable for residential occupancy and suitable housing will be made available to the present occupants.
- B. 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.
- C. 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.
- D. 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.
- E. The Board may approve a Use Permit to eliminate a controlled rental unit if it makes all of the following findings:
1. The dwelling unit to be eliminated is neither occupied nor has a rent set at a level that is affordable by a person or a family of very low income, low income or moderate income, as defined by HUD Section 8 program guidelines;
 2. The elimination of the dwelling unit will not adversely affect the supply of housing in the City;
 3. The applicant cannot make a fair return on investment by maintaining the dwelling unit as a part of the rental housing market;
- F. Notwithstanding the above, the Board shall approve a Use Permit to eliminate a controlled rental unit only when it finds that:
1. The dwelling unit is in a building that is seriously deteriorated beyond the conditions which might reasonably be expected due to normal use in the written determination of the Building Official and will be rehabilitated to meet City housing code requirements;
 2. The replacement dwelling unit shall be available for occupancy to Households for Lower Income or Very Low Income Households;
 3. The elimination of the dwelling unit will not cause displacement of any tenant against that tenant's will, and
 4. A signed statement supporting the application has been filed from of all of the tenants whose units will be physically modified and from all tenants who may be required to move temporarily. (Ord. 6908-NS

Chapter 23C.08: Demolition and Dwelling Unit Controls

§§ 3-4 (part), 2006: Ord. 6848-NS § 2 (part), 2005: Ord. 6478-NS § 4 (part), 1999)

Section 23C.08.040 Elimination of Residential Hotel Rooms

- A. The Board may approve a Use Permit to remove a Residential Hotel Room if it finds that, prior to the removal of any Residential Hotel Rooms, the Residential Hotel owner will 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; and
1. 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;
 2. Prior to 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; or
 3. Residential Hotel Rooms being 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. For purposes of this section, replacement rooms must be substantially comparable in size, location, quality and amenities, and available at comparable rents and total monthly or weekly charges to those being removed. The replacement rooms must also be 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. Comparable rooms may be provided by:
1. Offering the existing tenants of the affected rooms the right-of-first-refusal to occupy the replacement rooms;
 2. Making available comparable rooms, which are not already classified as Residential Hotel Rooms to replace each of the rooms to be removed; or
 3. Paying to the City's Housing Trust Fund an amount sufficient to provide replacement rooms. The amount to be paid to the City shall be the difference between the replacement cost, including land cost, for the rooms and the amount which the City can obtain by getting a mortgage on the anticipated rents from the newly constructed rooms. 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% of such tenant's gross income for rent.
- C. 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 providing that the average number of Residential Hotel Rooms per day in each calendar year is at least 95% of Residential Hotel Rooms established for that particular Residential Hotel. (Ord. 6478-NS § 4 (part), 1999)

Section 23C.08.050 Demolitions of Buildings Used for Commercial, Manufacturing or Community, Institutional or Other Non-residential Uses

- A. A main building used for non-residential purposes may be demolished subject to issuance of a Use

Chapter 23C.08: Demolition and Dwelling Unit Controls

Permit.

- B. A demolition of an accessory building containing less than 300 square feet of floor area is permitted as of right; an accessory building containing 300 square feet or more of floor area may be demolished subject to an AUP.
- C. 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 prior to consideration of the Use Permit or AUP. The LPC may initiate a landmark or structure-of-merit designation or may choose solely to forward to the Board its comments on the application. The Board shall consider the recommendations of the LPC in considering its action on the application.
- D. A Use Permit or an AUP for demolition of a non-residential building or structure may be approved only if the Board or Zoning Officer finds that the demolition will not be materially detrimental to the commercial needs and public interest of any affected neighborhood or the City, and one of the following findings that the demolition:
 - 1. Is required to allow a proposed new building or other proposed new Use;
 - 2. 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;
 - 3. Will remove a structure which represents an unabatable attractive nuisance to the public; or
 - 4. Is required for the furtherance of specific plans or projects sponsored by the City or other local district or authority. In such cases, it shall be demonstrated 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. (Ord. 6478-NS § 4 (part), 1999)

Section 23C.08.060 Building Relocations

- A. The relocation of a building from a lot is considered a demolition for purposes of this Ordinance.
- B. The relocation of a building to a lot is considered new construction and shall be subject to all requirements applicable to new construction.
- C. When a building is relocated to a different lot within the City, the lot from which the building is being 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.
- D. The Board may approve a Use Permit for relocation to a lot if it finds that the building proposed to be relocated is not in conflict with the architectural character, or the building scale of the neighborhood or area in which such building is to be located, and the receiving lot provides adequate separation of buildings, privacy, yards and Usable Open Space. (Ord. 6478-NS §.4 (part), 1999)

Section 23C.08.070 Limitations

- A. 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 the City's Building Official, it may be demolished without a Use Permit. The Building Official's

Chapter 23C.08: Demolition and Dwelling Unit Controls


determination in this matter shall be governed by the standards and criteria set forth in the most recent edition of the California Building Code that is in effect in the City.

- B. 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 state statute known as the Ellis Act. (Ord. 6478-NS § 4 (part), 1999)



Office of the City Manager

ACTION CALENDAR
June 11, 2013
(Continued from 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.

