



Office of the City Manager

ACTION CALENDAR
July 2, 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

At the June 11 meeting the City Council requested that staff present revised language for the ordinance amendments related to Chapter 23C.08. The revisions requested are attached. The revisions are to Section 23C.08.020 A4 and A5 to allow two options:

- 1) Pay a fee for demolished units equal to the Affordable Housing Mitigation Fee; or
- 2) Replace demolished units with rent increase restricted units with an initial rent at 50% AMI or last known rent if vacant for less than 5 years.

Protections for sitting tenants are provided in Section 23C.08.020 C.

BACKGROUND

Please see June 4, 2013 staff report for full background on this issue.

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

Attachments:

1: Ordinance

2: Ordinance with track changes reflecting revisions requested by Council at the June 11, 2013 meeting

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 That Section 23C.08.020 of the Berkeley Municipal Code is repealed and reenacted to read as follows: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 either;
 - a) the developer will pay a fee equal to the Affordable Housing Mitigation Impact Fee in effect at the time the certificate of occupancy is issued; or
 - b) each demolished unit will be replaced with a designated rent increase restricted unit comparable in size to the demolished unit. To the extent legally permitted, these units will be in addition 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. The initial rent of these replacement units shall be set at the last known rent prior to the date the demolished unit became vacant. If the last rent is not known or the unit was vacant for more than five years prior to demolition, the initial rent of the replacement unit shall be set at a level affordable to a tenant at 50% AMI. The replacement units will be designated, and their continuing affordability guaranteed, by deed restriction. Each such replacement unit will have its rent increase restricted to the same amount as the annual general adjustment published by the Berkeley Rent Stabilization Board each year, but shall be subject to vacancy decontrol pursuant to the Costa-Hawkins Rental Housing Act.

5. If the replacement project is built as a condominium project, the requirements of the inclusionary zoning ordinance apply. 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 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 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 shall have the right of first refusal to rent new rent increase restricted units that replace the units that were demolished, at the rent that would have applied if those tenants had remained in place, as long as their tenancy continues, including limitations on rent increases.

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. (Ord. 6908-NS §§ 1-2 (part), 2006: Ord. 6478-NS § 4 (part), 1999)

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 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.

**Chapter 23C.08
DEMOLITION AND DWELLING UNIT CONTROLS**

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

A. No Dwelling Unit or units may be eliminated by demolition or conversion except as authorized by 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 Title, 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)

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 either:

a) the developer will pay a fee equal to the Affordable Housing Mitigation Impact Fee in effect at the time the certificate of occupancy is issued; or

b) each demolished unit will be replaced with a with designated rent increase restricted below-market rate units equal in number and comparable in size to the demolished units. To the extent legally permitted, these units 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 provided to mitigate any other project impacts. —The initial rent of these replacement units shall be set at the last known rent prior to the date the demolished unit became becoming vacant. If the last rent is not known or the unit was been vacant for more than five years prior to demolition, the initial rent of the replacement unit shall be set at a level affordable to a tenant at 50% AMI. The replacement units will be designated, and their continuing affordability guaranteed, by deed restriction. Each such ~~designated-replacement~~ unit will have its rent increase restricted to the same amount as the annual general adjustment increase published by the Berkeley Rent Stabilization Board each year, but shall be subject to vacancy decontrol as pursuant to the —Should any designated unit become vacant, the rent will be set to market rate as required by Costa-Hawkins Rental Housing Act. 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, the requirements of the inclusionary zoning ordinance apply. 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 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.

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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 and~~ shall have the right of first refusal to rent new rent increase restricted ~~below-market-rate~~ units ~~that designated to~~ replace the units that were demolished, at the rent that would have applied if the ~~seey~~ tenants had remained in place, as long as their tenancy continues, including limitations on rent increases. ~~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.

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