



Planning Commission

# AGENDA

## REGULAR MEETING OF THE PLANNING COMMISSION

This meeting is held in a wheelchair accessible location.

Wednesday, December 6, 2023

6:00 PM

North Berkeley Senior Center

1901 Hearst Avenue, Berkeley

See “*MEETING PROCEDURES*” below.

All written materials identified on this agenda are available on the Planning Commission webpage: <https://berkeleyca.gov/your-government/boards-commissions/planning-commission>

### PRELIMINARY MATTERS

- 1. Roll Call:** **Merker, Blaine**, appointed by Councilmember Kesarwani, District 1  
**Vincent, Jeff, Chair**, appointed by Councilmember Taplin, District 2  
**Moore III, John E. “Chip”**, appointed by Councilmember Bartlett, District 3  
**Oatfield, Christina**, appointed by Councilmember Harrison, District 4  
**Mikiten, Elisa**, appointed by Councilmember Hahn, District 5  
**Marthinsen, Emily**, appointed by Councilmember Wengraf, District 6  
**Twu, Alfred**, appointed by Councilmember Robinson, District 7  
**Hauser, Savlan**, appointed by Councilmember Droste, District 8  
**Ghosh, Barnali, Vice Chair**, appointed by Mayor Arreguín
- 2. Land Acknowledgement:** The City of Berkeley recognizes that the community we live in was built on the territory of xučyun (Huchiun (Hooch-yoon)), the ancestral and unceded land of the Chochenyo (Cho-chen-yo)-speaking Ohlone (Oh-low-nee) people, the ancestors and descendants of the sovereign Verona Band of Alameda County. This land was and continues to be of great importance to all of the Ohlone Tribes and descendants of the Verona Band. As we begin our meeting tonight, we acknowledge and honor the original inhabitants of Berkeley, the documented 5,000-year history of a vibrant community at the West Berkeley Shellmound, and the Ohlone people who continue to reside in the East Bay. We recognize that Berkeley’s residents have and continue to benefit from the use and occupation of this unceded stolen land since the City of Berkeley’s incorporation in 1878. As stewards of the laws regulating the City of Berkeley, it is not only vital that we recognize the history of this land, but also recognize that the Ohlone people are present members of Berkeley and other East Bay communities today. The City of Berkeley will continue to build relationships with the Lisjan Tribe and to create meaningful actions that uphold the intention of this land acknowledgement.

- 3. Order of Agenda:** The Commission may rearrange the agenda or place items on the Consent Calendar.
- 4. Public Comment:** Comments on subjects not included on the agenda. Speakers may comment on agenda items when the Commission hears those items. (See “Public Testimony Guidelines” below):
- 5. Planning Staff Report:** In addition to the items below, additional matters may be reported at the meeting. **Next Commission meeting: January 17, 2024.**
- 6. Chairperson’s Report:** Report by Planning Commission Chair.
- 7. Committee Reports:** Reports by Commission committees or liaisons. In addition to the items below, additional matters may be reported at the meeting.
- 8. Approval of Minutes:** Approval of Draft Minutes from the special meeting on November 1, 2023.
- 9. Future Agenda Items and Other Planning-Related Events:** None.

**AGENDA ITEMS:** All agenda items are for discussion and possible action. Public Hearing items require hearing prior to Commission action.

- 10. Action:** **Public Hearing: Demolition Ordinance**
- Recommendation:** Review the proposed zoning ordinance amendments to Berkeley Municipal Code Chapter 23.326 (Demolition and Dwelling Unit Controls). Take public comment, discuss, and make a recommendation to City Council.
- Written Materials:** Attached.
- Presentation:** N/A.

**ADDITIONAL AGENDA ITEMS:** In compliance with Brown Act regulations, no action may be taken on these items. However, discussion may occur at this meeting upon Commissioner request.

**Information Items:**

- *Tuesday, November 21<sup>st</sup>* – City Council heard the first reading of an ordinance with amendments relating to the Southside Zoning Implementation Program of the 2023-2031 Housing Element Update were brought to City Council. The City Council accepted staff’s recommendation, and added provisions regarding prevailing wage for projects in the Southside, consistent with the Planning Commission’s September 15<sup>th</sup>, 2023 letter to the City Council. The City Council also referred to the City Manager related items regarding ground floor pedestrian-oriented open space, green roofs, requiring windows in bedrooms, and citywide prevailing wage requirements.  
<https://berkeleyca.gov/sites/default/files/documents/2023-11->

[14%20Item%2013%20Amendments%20to%20Berkeley%20Municipal%20Code%20Title%2023%20%28Zoning%20Ordinance%29\\_0.pdf](#)

- *Upcoming: Saturday, December 9<sup>th</sup>, 10am-1pm* – The City of Berkeley will be holding a Winter Weather Preparedness Workshop at Berkeley Corporation Yard (1326 Allston Way). Attendees will be able to learn about Berkeley’s winter preparedness efforts, stormwater infrastructure and provide feedback on the 2024 Local Hazard Mitigation Plan:  
<https://berkeleyca.gov/community-recreation/events/hello-winter-weather-preparedness-workshop-strawberry-creek-park>

**Communications:**

- *General*

**Late Communications:** (Received after the packet deadline):

**Late Communications:** (Received and distributed at the meeting):

**ADJOURNMENT**

**Meeting Procedures**

***Public Testimony Guidelines:***

Speakers are customarily allotted up to two minutes each and may not cede their time to another speaker. The Commission Chair may limit the number of speakers and the length of time allowed to each speaker to ensure adequate time for all items on the Agenda. ***To speak during Public Comment or during a Public Hearing, please line up behind the microphone.*** Customarily, speakers are asked to address agenda items when the items are before the Commission rather than during the general public comment period. Speakers are encouraged to submit comments in writing. See “Procedures for Correspondence to the Commissioner’s” below.

***Consent Calendar Guidelines:***

The Consent Calendar allows the Commission to take action with no discussion on projects to which no one objects. The Commission may place items on the Consent Calendar if no one present wishes to testify on an item. Anyone present who wishes to speak on an item should submit a speaker card prior to the start of the meeting, or raise his or her hand and advise the Chairperson, and the item will be pulled from the Consent Calendar for public comment and discussion prior to action.

***Procedures for Correspondence to the Commissioners:***

To distribute correspondence to Commissioners prior to the meeting date, submit comments by 12:00 p.m. (noon), eight days before the meeting day (Tuesday) (email preferred):

- If correspondence is more than 20 pages, requires printing of color pages, or includes pages larger than 8.5x11 inches, please provide 15 copies.
- Any correspondence received after this deadline will be given to Commissioners on the day just prior to the meeting.

- Staff will not deliver to Commissioners any additional written (or emailed) materials received after 12:00 p.m. (noon) on the day of the meeting.
- Members of the public may submit written comments themselves early in the meeting. To distribute correspondence at the meeting, please provide 15 copies and submit to the Planning Commission Secretary just before, or at the beginning of, the meeting.
- Written comments should be directed to the Planning Commission Secretary, at the Land Use Planning Division (Attn: Planning Commission Secretary).

**Communications are Public Records:** Communications to Berkeley boards, commissions, or committees are public records 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 a City board, commission, or committee, 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 Secretary of the relevant board, commission, or committee. 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 Secretary to the relevant board, commission, or committee for further information.

**Written material** may be viewed in advance of the meeting at the Department of Planning & Development, Permit Service Center, **1947 Center Street, 3<sup>rd</sup> Floor**, during regular business hours.

**Note: If you object to a project or to any City action** or procedure relating to a project application, any lawsuit which you may later file may be limited to those issues raised by you or someone else in the public hearing on the project, or in written communication delivered at or prior to the public hearing. The time limit within which to commence any lawsuit or legal challenge related to these applications is governed by Section 1094.6, of the Code of Civil Procedure, unless a shorter limitations period is specified by any other provision. Under Section 1094.6, any lawsuit or legal challenge to any quasi-adjudicative decision made by the City must be filed no later than the 90th day following the date on which such decision becomes final. Any lawsuit or legal challenge, which is not filed within that 90-day period, will be barred.

**Meeting Access:** This meeting is being held in a wheelchair accessible location. To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services Specialist, at 981-6418 (V) or 981-6347 (TDD), at least three business days before the meeting date.

**Please refrain from wearing scented products to public meetings.**



Planning Commission

1                   **DRAFT MINUTES OF THE REGULAR PLANNING COMMISSION MEETING**

2   **November 1, 2023**

3    The meeting was called to order at 5:32 p.m.

4    **Location:** North Berkeley Senior Center, 1901 Hearst Avenue, Berkeley, CA 94709

5    **1. ROLL CALL:**

6       **Commissioners Present:** Blaine Merker, Jeff Vincent, Christina Oatfield, Elisa Mikiten,  
7       Emily Marthinsen, Alfred Twu, and Debra Sanderson (alternate for Savlan Hauser).

8  
9       **Commissioner Absent:** John E. Moore, Savlan Hauser (excused), and Barnali Ghosh  
10       (excused).

11  
12       **Staff Present:** Secretary Alisa Shen, Clerk Zoe Covello, Grace Wu, Justin Horner, Claudia  
13       Garcia, Brian Garvey, and Anne Hersch.

14   **2. LAND ACKNOWLEDGEMENT.**

15       The City of Berkeley recognizes that the community we live in was built on the territory of  
16       xučyun (Huchiun (Hooch-yoon)), the ancestral and unceded land of the Chochenyo (Cho-  
17       chen-yo)-speaking Ohlone (Oh-low-nee) people, the ancestors and descendants of the  
18       sovereign Verona Band of Alameda County. This land was and continues to be of great  
19       importance to all of the Ohlone Tribes and descendants of the Verona Band. As we begin  
20       our meeting tonight, we acknowledge and honor the original inhabitants of Berkeley, the  
21       documented 5,000-year history of a vibrant community at the West Berkeley Shellmound,  
22       and the Ohlone people who continue to reside in the East Bay. We recognize that Berkeley's  
23       residents have and continue to benefit from the use and occupation of this unceded stolen  
24       land since the City of Berkeley's incorporation in 1878. As stewards of the laws regulating  
25       the City of Berkeley, it is not only vital that we recognize the history of this land, but also  
26       recognize that the Ohlone people are present members of Berkeley and other East Bay  
27       communities today. The City of Berkeley will continue to build relationships with the Lisjan  
28       Tribe and to create meaningful actions that uphold the intention of this land  
29       acknowledgement.

30   **3. ORDER OF AGENDA:** No changes.

31   **4. PUBLIC COMMENT PERIOD:** 1.

32   **5. PLANNING STAFF REPORT:**

- 33       • Introduction to the Planning Department Land Use Division's new Planning Manager,  
34       Anne Hersch

- 35 • Please note the informational memo in the agenda packet regarding the San Pablo
- 36 Ave Specific Plan
- 37 • November 14, 2023 - Southside Zoning Amendments will be going to City Council
- 38 • December 12, 2023 – North Berkeley Objective Design Standards will be going to City
- 39 Council
- 40 • December PC Meeting: Demolition Ordinance (Public Hearing)

41 **Information Items:**

- 42 • *San Pablo Specific Plan Information Memo*, dated November 1, 2023 (attached). The
- 43 staff memorandum provides an overview and update of the San Pablo Avenue
- 44 specific planning process and includes a summary of existing condition analysis and
- 45 outreach efforts.
- 46 • *Tuesday, October 10, 2023* – Second Reading of Amendments to Title 23 Relating to
- 47 Accessory Dwelling Units (ADUs) and Repeal of Chapter 12.99 to Conform to State
- 48 Law and Respond to Guidance from the California Department of Housing and
- 49 Community Development (Continued from September 19, 2023),
- 50 [https://berkeleyca.gov/sites/default/files/city-council-meetings/2023-10-](https://berkeleyca.gov/sites/default/files/city-council-meetings/2023-10-03%20Agenda%20Packet%20-%20Council%20%28WEB%29.pdf)
- 51 [03%20Agenda%20Packet%20-%20Council%20%28WEB%29.pdf](https://berkeleyca.gov/sites/default/files/city-council-meetings/2023-10-03%20Agenda%20Packet%20-%20Council%20%28WEB%29.pdf)

52 **Communications:**

- 53 • General.

54 **Late Communications:**

- 55 • Supplemental Packet One.
- 56 • Supplemental Packet Two.

57 **6. CHAIR REPORT:**

- 58 • None.

59 **7. COMMITTEE REPORT:** Reports by Commission committees or liaisons. In addition to the

60 items below, additional matters may be reported at the meeting.

- 61
- 62 • None.

63 **8. APPROVAL OF MINUTES:**

64 Motion/Second/Carried (Twu/Vincent) to approve the Planning Commission Meeting Minutes

65 from October 18, 2023.

66 Ayes: Merker, Vincent, Oatfield, Mikiten, Marthinsen, Twu, Sanderson. Noes: None. Abstain:

67 None. Absent: Moore and Ghosh. (7-0-0-2)

68

69

70 **9. OTHER PLANNING RELATED EVENTS:**

- 71 • None.  
72

73 **AGENDA ITEMS**

74 **10. Public Hearing: Tentative Tract Map #8651**

75 Assistant Planner Brian Garvey presented Tentative Tract Map #8651. A public hearing was  
76 held, the Commissioners asked clarifying questions, and a recommendation to City Council was  
77 made.  
78

79 Motion/Second/Carried (Mikiten/Vincent) to close the public hearing at 6:02pm.

80  
81 Ayes: Merker, Vincent, Oatfield, Mikiten, Marthinsen, Twu, Sanderson. Noes: None. Abstain:  
82 None. Absent: Moore and Ghosh. (7-0-0-2)  
83

84 **Public Comments: 1**

85 Motion/Second/Carried (Mikiten/Merker) to recommend the approval of Tentative Tract Map  
86 #8651 to City Council at 6:03pm.

87  
88 Ayes: Merker, Vincent, Mikiten, Marthinsen, Twu, Sanderson. Noes: None. Abstain: Oatfield.  
89 Absent: Moore and Ghosh. (6-0-1-2)  
90

91 **11. Discussion: Middle Housing Discussion**

92 Associate Planner Justin Horner presented proposed zoning changes to encourage middle  
93 housing in low-density residential districts (R-1, R-1A, R-2, R-2A, and MU-R) and asked the  
94 Commissioners to provide feedback on a series of policy questions related to setback  
95 standards, parking maximums, and by-right demolition of single-family homes in specific  
96 circumstances. Public comment was taken, and the Commissioners asked staff questions and  
97 provided feedback to staff. No action was taken.  
98

99 **Public Comments: 10**

100 **12. Action: Meeting Start and End Time**

101 The Commissioners discussed changing the start time of the meeting to 6:00pm, which was  
102 unanimously approved. The Commissioners also discussed establishing a by-law setting the  
103 adjournment time at 9:00pm, which would require the Commissioners to vote to extend the  
104 meeting if that end time is reached. If Commissioners vote not to extend the meeting past  
105 9:00pm, the item will be continued to the next meeting.

106 Motion/Second/Carried (Vincent/Mikiten) to change the start time of Planning Commission  
107 meetings to 6:00pm, beginning at the December 6, 2023 Planning Commission, at 8:07pm.  
108

109 Ayes: Merker, Vincent, Oatfield, Mikiten, Marthinsen, Twu, Sanderson. Noes: None. Abstain:  
110 None. Absent: Moore and Ghosh. (7-0-0-2)

112 Motion/Second/Carried (Marthinsen/Sanderson) to create a Commission by-law establishing  
113 that the length of the meeting is 3 hours at 8:07pm.

114 Ayes: Merker, Vincent, Oatfield, Marthinsen, Twu, Sanderson. Noes: Mikiten. Abstain: None.  
115 Absent: Moore and Ghosh. (6-1-0-2)

117  
118 **Public Comments: 0**

119 **13. Action: 2024 Planning Commission Calendar**

120 The Commissioners discussed and adopted the 2024 Planning Commission Calendar.

121 **Public Comments: 0**

122 Motion/Second/Carried (Vincent/Mikiten) to approve the 2024 Planning Commission Calendar  
123 as is at 8:14pm.

124  
125 Wednesday, January 17, 2024

126 Wednesday, February 7, 2024

127 Wednesday, March 6, 2024

128 Wednesday, April 3, 2024

129 Wednesday, May 1, 2024

130 Wednesday, June 5, 2024

131 Wednesday, July 17, 2024

132 Wednesday, September 4, 2024

133 Wednesday, October 9, 2024

134 Wednesday, November 6, 2024

135 Wednesday, December 4, 2024

136  
137 Ayes: Merker, Vincent, Oatfield, Mikiten, Marthinsen, Twu, Sanderson. Noes: None. Abstain:  
138 None. Absent: Moore and Ghosh. (7-0-0-2)

139  
140 Motion/Second/Carried (Vincent/Twu) to adjourn the meeting at 8:14pm.

141  
142 Ayes: Merker, Vincent, Oatfield, Mikiten, Marthinsen, Twu, Sanderson. Noes: None. Abstain:  
143 None. Absent: Moore and Ghosh. (7-0-0-2)

144 **Members in the public in attendance: 21**

145 **Public Speakers: 12**

146 **Length of the meeting: 2 hr 42 minutes**





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.

<b>Policy Area</b>	<b>Current Ordinance</b>	<b>Proposed Ordinance</b>	<b>Rationale</b>
<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

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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

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.*

(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.*

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.

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
- 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:

(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:

(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.

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;
  - (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.*

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.*

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).

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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 ~~Eliminating Dwelling Units through Demolition.~~ Demolition of Residential Units.
- 23.326.040 Eliminating Dwelling Units through ~~Conversion and Change of Use.~~ Combination with Other Units.
- 23.326.050 ~~Private Right of Action.~~ Demolition of Accessory Buildings.
- 23.326.060 ~~Elimination of Residential Hotel Rooms.~~ Private Right of Action.
- 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~~ Residential Unit or units may be eliminated or demolished except as authorized by this chapter.

1. ~~Findings.~~ In addition "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.~~

- ~~2. "Residential Unit" includes any Accessory Dwelling Unit or Junior Accessory Dwelling Unit to the requirements below, the Zoning Adjustments Board- (ZAB) may approve an extent that tenant notice, protections for eviction and relocation benefits outlined in this ordinance shall apply to any Accessory Dwelling Unit or Junior Accessory Dwelling Unit that is removed from the rental market.~~
- ~~3. "Residential Unit" includes Dwelling Units created without proper Use Permit(s) to eliminate or demolish a dwelling 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.~~
- ~~4. "Comparable Unit" means a Dwelling Unit would not be materially detrimental to the housing needs and public interest of the affected of similar size (square footage and number of bedrooms), amenities (private open space and common facilities) and location within the city (neighborhood and Berkeley school attendance area).~~

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:

- ~~i.~~ The ~~building~~ Residential Unit (or units) was removed from the rental market ~~under the Ellis Act through a no-fault eviction~~ during the preceding five years; or

2. ~~ii.~~ 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,~~

B. ~~3.~~ Procedure and Findings. ~~The ZAB may approve a~~ A Use Permit is required to eliminate or demolish ~~a building constructed before June 1980 on a property containing two~~ one or more ~~dwelling units~~ Residential Units, except where otherwise provided by the Zoning Ordinance. The Board shall only approve the Use Permit if any one of the following ~~are~~ is true:

1. ~~(a)~~ The building containing the Dwelling Units is hazardous or unusable and is infeasible to repair.
2. ~~(b)~~ The building containing the Dwelling Unit(s) will be moved to a different location within Berkeley with no net loss of units and no change in the affordability rent levels of the unit(s).
3. ~~(c)~~ The demolition is necessary to permit construction of special housing needs facilities such as, but not limited to, childcare centers socially and affordable housing developments/or economically beneficial uses that serve the greater good of the entire community.
4. ~~(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.~~



- ~~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.~~

~~C. *Landmarks and Structures of Merit.* A 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 Residential Unit(s) that will be demolished shall be replaced with equivalent units and comply with applicable 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 replacement 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 unit shall be counted as a Very Low-Income unit for applicable affordability requirements in Chapter 23.328.~~

~~2. In the event of a demolition of a Residential Unit created without proper Use Permit(s) or Building Permit(s), as defined in 23.326.020(A)(3), 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.~~

~~E. *Requirements for Occupied Units.*~~

~~(a) *Applicability.*~~

- ~~i. The requirements in this subsection apply if units to be demolished are~~

~~occupied.~~

1. ~~ii.~~ ~~These~~ 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. ~~(b)~~ ~~Notice~~. The applicant shall provide all sitting tenants and the Rent Stabilization Board notice of the application to demolish the ~~building~~ Residential Unit(s) no later than the date ~~it~~ the application is submitted to the City, including notice of their rights under Municipal Code ~~Section 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. ~~(c)~~ ~~General Requirements~~.
  - i.— The applicant shall provide ~~assistance with~~ moving expenses and relocation assistance equivalent to the requirements set forth in Municipal Code Chapter 13.84 (Relocation Services and Payments for Residential Tenant Households).
  - ii.—Municipal Code Chapter 13.84 or Government Code section 66300(d)(2)(D)(i), 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. Tenants shall have until the date that the new units are ready for occupancy to decide whether to move into the newly constructed building. Funding for the rent differential shall be guaranteed in a manner approved by ~~the~~ 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) ~~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.).

4. ~~(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.~~

~~(a) ii. Tenants of units Any tenant of a Residential Unit that are is permitted to be demolished under this section shall have the right of first refusal to rent new below 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 units designated unit shall be made available to replace the units that were demolished household at the same rent that would have applied as had been previously charged, or a lesser rent if they had remained in place, as long as 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.~~

~~iii. Income restrictions do not apply to displaced tenants.~~

(d) ~~iv.~~ *Exception.*

i. ~~(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~~, the preceding requirements but must comply with the following requirement.

ii. ~~(2)~~— Sitting tenants who are displaced as a result of demolition and who desire to return to the newly constructed building affordable housing project 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~~ 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 ~~a dwelling unit in combination with another dwelling unit used for occupancy one or more Residential Units by a single household combining with another unit only~~ if it finds that:

1. ~~4.~~ The existing number of ~~dwelling Residential U~~ units exceeds ~~the current~~ maximum allowed residential density in the zoning district where the ~~building is units are~~ located; and
2. ~~2.~~ One of the following is true:
  - (a) One of the affected ~~dwelling Residential U~~ 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 Residential U~~ units are being sold by an estate and the decedent occupied the Residential U units as their principal residence for no less than two years before the date of their death.

B. ~~Process for Projects That Restore Original Development Density. The Zoning Officer may issue an Administrative Use Permit (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.~~

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

1. ~~(a)~~ The building was removed from the rental market ~~under the Ellis Act through a no-fault eviction~~ during the preceding five years; or
2. ~~(b)~~ 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. ~~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, whose determination may be appealed to the Rent Stabilization Board.~~

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

1. If a Residential Unit ~~that is~~ eliminated ~~under Subsection A (General) through combination~~ is not occupied by the applicant's household 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 and notice will provide that if the owner's household does not occupy the Residential Unit for at least two years from the date of elimination ~~then~~ the affected Residential Units must either be restored as separate ~~dwelling Residential U~~nits 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 ~~of there is~~ an unforeseeable life change that requires relocation.

~~E. Effect of Eliminating a Dwelling Residential Unit.~~

1. If eliminating a ~~dwelling Residential U~~nit reduces the number of Residential 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:

(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 ~~dwelling~~ Residential Unit upon finding that the conversion will restore or bring the building closer to the original number of ~~dwelling~~ 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. 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.~~

F. Exception. The ZAB may approve a Use Permit to eliminate a ~~dwelling~~ Residential Unit through combination with another ~~dwelling~~ Residential Unit for the purpose of providing private bathrooms, kitchenettes, accessibility upgrades, and/or seismic safety upgrades to single-~~residential~~ resident 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 Demolition of 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 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.

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~~ shall recover reasonable attorney's fees.

~~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;~~
  - ~~(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.~~

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23.326.070 ~~Demolitions~~ Demolition 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 Permit 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 ~~which 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 ~~in~~ when acting on the application.

D. *Findings.* A Use Permit or an AUP for demolition of a main building used for non-residential building or structure 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 ~~inhabitable~~ 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 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 within the city 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.~~
4. Nothing in this subsection shall exempt rental units relocated to the receiving lot from the provisions of BMC Section 13.76 after a building relocation if the rental units located within a building were otherwise subject to BMC Chapter 13.76 in the source lot.

B. *Findings.* The ~~ZAB may~~ Zoning Officer shall approve a ~~Use Permit~~ Zoning Certificate to relocate a building upon finding that ~~The building to be relocated is not in conflict with the architectural character, or resulting development on the building scale of the neighborhood or area to which it will be relocated; and receiving lot provides adequate separation of buildings, privacy, yards, and usable open space.~~ 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).



Planning and Development Department  
Land Use Planning Division

## STAFF REPORT

DATE: February 1, 2023

TO: Members of the Planning Commission

FROM: Steven Buckley, Land Use Planning Manager

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

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### BACKGROUND

The Planning Commission is asked to make a recommendation to the City Council regarding amendments to the demolition ordinance (Berkeley Municipal Code Chapter 23.326). The existing and proposed ordinance are presented in Attachments 1 and 2, respectively. A comparison of the two versions is provided in Attachment 3. Excerpts of relevant State law are provided in Attachment 4.

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 the 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.

The State law provides optional ways to comply depending on whether the units were occupied or vacant, whether those tenants were low income, whether the units were subject to local rent control (in Berkeley, this would be most properties with more than two units built before 1980), and whether the units were removed from the rental market pursuant to the Ellis Act (which allows landlords to “go out of the rental business”). In particular, replacement units required by the Housing Crisis Act of 2019, 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 an affordable rent.

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Density bonus law now mirrors these requirements. This law goes on to specifically address requirements where units are vacant and/or existing tenant incomes are not known, and thus the level of affordability of replacement units must be inferred from HUD data for the community and distributed accordingly.

### **Summary of Existing Demolition Ordinance Provisions**

The existing demolition ordinance addresses issues similar to the new State law, 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, and when units are being merged or converted within an existing building rather than physical demolished.

A Use Permit is required for the demolition or other elimination of a dwelling unit in Berkeley. The Zoning Adjustments Board (ZAB) may issue a Use Permit for the demolition of a dwelling unit for specific enumerated reasons, including in instances where a building is “hazardous or unusable and is infeasible to repair” or “demolition is necessary to permit construction... of at least the same number of dwelling units.” Before permitting the demolition of a dwelling unit, ZAB must also find 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.” Finally, applicants must either provide below-market-rate replacement units to “qualifying household[s]” or pay an in-lieu fee (but the fee has never been set).

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. Most of these provisions are carried forward in the proposed ordinance.

### **Previous Discussions**

Planning Commission. On October 19, 2022, the Planning Commission considered the most recent version of proposed amendments.

Staff provides the following response to questions raised during the Commission's discussion.

- Does this ordinance apply to condominium conversions?
  - The ordinance does not apply to condominium conversions because the housing unit remains physically available as housing. However, a mitigation fee is required upon sale to recoup some of the value

differential, if any, which is placed into the Housing Trust Fund to provide affordable housing elsewhere in the city.

- Would displaced tenants be able to return at the same rent in a “market rate” unit?
  - Yes, for tenants that are not low income, the proposed ordinance requires a form of rent control in a replacement unit that is not designated as one of the below-market-rate (BMR) replacement units equivalent to their prior rent for the duration of their tenancy. The Commission requested clarification of the income restrictions / rent / BMR requirements, which is provided in the revised draft attached to this report.
- Did SB330 override Costa-Hawkins (which prohibits the imposition of rent control on new dwelling units) to allow rent control / BMR units for the new project?
  - Yes, SB330 allows the imposition of rent control if it is required by local ordinance. In Berkeley, the citywide rent control ordinance does not apply to new units, but this demolition ordinance is being drafted to mimic rent control by limiting the annual rent increases for any tenant that returns to a new unit for the duration of that tenancy, in addition to the requirement that all of the demolished units be replaced as BMR units in perpetuity.
- Would there be a “right of return” for existing tenants even if demolition would be for the purpose of constructing a project that contains only affordable units?
  - To the extent a displaced tenant could qualify for one of the replacement units, then they would have a right of first refusal. However, because of how they are funded and operated, 100%-affordable projects would not be required to provide additional units for those tenants that do not income-qualify. However, those displaced tenants would receive all of the specified relocation benefits.
- Is the University of California required to comply with this ordinance?
  - No, but they are subject to applicable State law.
- What applicability would this have to illegal units?
  - The revised draft of the ordinance includes a section that applies the demolition, tenant protection and replacement requirements to illegal units, to the degree those units are recognized in some form as previously rented (registered with the Rent Stabilization Board) and/or there is substantial evidence of landlord-tenant relationship within the past five years.

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Public commenters requested clarity whether the five-year prohibition on demolition of units that were vacated by Ellis Act evictions should apply to the entire building versus each unit. Comments also noted a general desire to replace older, dilapidated housing stock and that the provision of BMR units would be preferable as a long-term solution. Commenters also indicated a desire that the 4x4 Committee be provided an opportunity to review the revised ordinance.

The Commission summarized its recommendations as follows:

- Illegal units should be covered by the ordinance, and an amnesty program should be considered for units that can be made safe to remain occupied.
  - Illegal units are included for the purpose of providing tenant protections. Replacing illegal units is subject to the usual code enforcement, zoning and building code compliance process.
- Focus on like-for-like replacement units – rent control is preferable.
  - Rent control is available as a means of accommodating the return of tenants that don't income qualify for BMR units. for the 4x4 Committee recommended that the ordinance require replacement unit =s to be established as BMR units, which are permanently affordable, while also protecting the rights of existing/returning tenants.
- The exemption for demolitions to create childcare and other public benefit uses is not needed because other buildings are available for those uses.
  - Staff has not received a consensus direction from all policymakers on this topic, so the provision for certain exceptions remains in the draft ordinance.
- No mitigation fee should be allowed – all units should be replaced.
  - Some cases will require that replacement units are not provided, for example when the project results in no new residential development. The existing ordinance has a fee requirement for cases where an owner-occupant eliminates a unit – the same requirement could apply in some other cases, but a nexus and feasibility study would be needed.
- Consider whether the Rent Stabilization Board will administer tenant rights or if another review body is appropriate.
  - The ordinance has been amended to clarify that the Rent Stabilization Board would serve as an appeal body to review any disputes from the Hearing Officer's determination.



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- Evaluate the provisions related to combining units, which address owner-occupancy / relocation and the death of an owner.
  - The 4x4 Committee recommended that these provisions be retained.
- Clarify whether historic resources are affected and how Landmarks Preservation Commission review occurs.

The LPC is only involved in demolitions of non-residential properties, though an historic evaluation is required for all development on properties over 40 years old in order to comply with CEQA.
- Clarify how the local rent stabilization ordinance affects the ability of the City to require rent controlled replacement units.
  - In general, local rent control does not apply to new units that receive a Certificate of Occupancy. However, this ordinance is intended to impose an equivalent of rent control for the returning tenants for the duration of their tenancy, as allowed by SB330 and Density Bonus Law.
- Consider whether tenants may benefit from “market rate” rents if they are less than prior rents.
  - A provision has been added to require the lesser of prior rents or market rents for returning tenants. In practice, “market rents” are difficult to determine or enforce.
- Clarify whether single-family homes are subject to rent control.
  - Single-family homes are not subject to rent control, but tenant protections apply.
- Make sure that the local ordinance is sufficient to address the issues in case State law is amended or sunsets.
  - The intent of this ordinance is to supplement the law, and to incorporate all of the substantive provisions of the law. To the degree the law is amended, the City is required to conform to it, so restating the law in its entirety in our local ordinance would lead to non-conformities that would require further ordinance amendment and potentially lead to unenforceable provisions, so not every provision of the law is restated.

The Commission moved to refer the draft ordinance back to the 4x4 Committee for consideration.

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4x4 Joint Committee on Housing. On December 14, 2022, the 4x4 Committee reviewed a revised version of the ordinance and provided the following comments and recommendations:

- Revise the process regarding the determination of whether harassment has occurred to restate so that the Hearing officer makes the determination and ZAB reviews/confirms. Consider whether a body other than ZAB (i.e., City Council or Rent Board) should make the determination.
  - This amendment has been included in the revised draft ordinance.
- Reconsider applicability to ADUs/JADUs (and review whether it would be allowable under State law). Alternatively, add tenant protections requirements for demolished ADUs/JADUs (as is applied to unpermitted units).
  - This amendment has been included in the revised draft ordinance.
- Reconsider applicability to unpermitted units; consider distinguishing between units that are unsafe and other units.
  - Illegal units are included in the definition of Residential Unit for the purpose of providing tenant protections. Replacing illegal units is subject to the usual code enforcement, zoning and building code compliance process.
- Add definition of "comparable unit" - size, amenities, location (e.g., consider requiring in the same school district).
  - This amendment has been included in the revised draft ordinance.
- Expand noticing requirements for tenants and neighbors.
  - This amendment has been included in the revised draft ordinance.
- Keep section "23.326.040.D. Effect of Eliminating a Dwelling Unit."
  - This section has been reinstated in the revised draft ordinance.
- Reconsider deletion of the non-detriment finding (23.326.030.A).
  - The non-detriment finding is a standard finding for all Use Permits.
- Use definition of harassment from Tenant Protection Ordinance.
  - Reference is made to the other code sections for purposes of addressing tenant rights.

The revised draft ordinance being presented for consideration by the Planning Commission includes revisions reflecting the direction of the Planning Commission, the 4x4 Committee, and additional technical and administrative edits recommended by staff.

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### **Issues for Discussion**

Staff has identified topics for further discussion.

Use Permit. The requirement to obtain a Use Permit may interfere with the trend toward by-right approval of housing development projects. Several policies in the Housing Element and regulations in State law provide for the approval of smaller multi-family housing in lower density zoning districts without public hearings or discretionary permits. In light of State law and the revised demolition ordinance, there are clear mandates for how the effect of removing units and displacing tenants are mitigated. While a Use Permit provides an opportunity for public review and a hearing by the Zoning Adjustments Board, it would not necessarily provide an opportunity to require anything different from the law and ordinance. The revised draft ordinance provides that a Use Permit is required except as otherwise provided by the Zoning Ordinance or State law, i.e. where the City is mandated, or may choose in the future, to approve a project by-right. The City Council adopted the 2023-2031 Housing Element on January 18, 2023, and amended a program specifically related to this topic. The Council action states:

To facilitate the by-right development of Middle Housing, the City will consider eliminating the requirement of a use permit to demolish single-family homes for applications that 1) add net density and 2) have not been occupied by tenants within the past five years and in which Ellis Act eviction did not occur within the preceding five years. This policy will be referred for consideration to the 4x4 Committee of the City Council and Rent Board. Further, explore the effect on local and state laws relating to the demolition of historic resources.

Illegal Units. A clause has been added to the definition section to clarify that illegal units are considered residential units for the purposes of this ordinance and that the tenant protections apply. Whether those units can be removed without being replaced remains a question. In some cases the units can be legalized under the zoning, building and housing codes. In other cases these units are substandard, unsafe, exceed allowable density, or otherwise impermissible such that they should be permanently removed. Tenant protections are provided in these cases, but no replacement units are required. A rent differential cap is established because these tenants will be relocated with no option to return, , so it is advisable to not have an indefinite time and cost to the relocation benefits.

Elimination of Units Through Combination and Conversion to Other Uses. The ordinance addresses several situations in which residential units are combined with other units or converted to another use, such as a daycare center or nursing home. These situations have occasionally occurred in the past and led to the special provisions in the existing ordinance. The intent is to allow conversion of owner-occupied buildings with a lesser standard, i.e. no replacement units are required. However, the

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special provisions related to continued occupancy by the owner, retroactive penalties if the owner moves out, and provisions for inheritances and changes in life circumstances are difficult to interpret and enforce.

The Commission and public commenters in the past have suggested these provisions should be eliminated. One of these circumstances references a mitigation fee, which could be expanded to cover other similar circumstances. For now, Section 23.326.040 remains in the draft ordinance pending clearer direction. A defined relocation benefit could be established for these circumstances, similar to the one established for tenants of illegal units, because these tenants will not have a new unit to return to.

### **Recommendation**

Staff recommends that the Planning Commission conduct a Public Hearing, receive public comment, discuss draft Ordinance amendments, provide direction, and forward a recommendation to City Council, with any changes identified through a vote of the Planning Commission.

### **ATTACHMENTS**

1. Existing Ordinance
2. Revised Draft Ordinance
3. Compare Version of Ordinances
4. State Law Excerpts
5. Public Hearing Notice



# PLANNING COMMISSION

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## Notice of Public Hearing

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### Wednesday, December 6, 2023

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

The Planning Commission of the City of Berkeley will hold a public hearing on the above matter, pursuant to Zoning Ordinance Section 23.412, on **Wednesday, December 6, 2023 at 6:00 p.m.** at the **North Berkeley Senior Center, 1901 Hearst Avenue, Berkeley**). In accordance with the Brown Act, Planning Commission meetings will be held in person only.

The agenda will be posted on the Planning Commission website (<https://berkeleyca.gov/your-government/boards-commissions/planning-commission>) no later than 5pm on December 1, 2023.

#### **PROJECT DESCRIPTION**

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Public hearing to review proposed amendments to the Demolition Ordinance, Berkeley Municipal Code Chapter 23.326, and forward a recommendation to the City Council. The proposed amendments are required 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.

#### **ENVIRONMENTAL REVIEW STATUS**

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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.

#### **PUBLIC COMMENT & FURTHER INFORMATION**

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All persons are welcome to attend the virtual hearing and will be given an opportunity to address the Commission. Comments may be made verbally at the public hearing and/or in writing before the hearing. Written comments must be directed to:

Zoe Covello  
Planning Commission Clerk  
Email: [PlanningPC@berkeleyca.gov](mailto:PlanningPC@berkeleyca.gov)

City of Berkeley, Land Use Planning Division  
1947 Center Street, 2<sup>nd</sup> Floor  
Berkeley, CA 94704

- Correspondence received by **12pm on Monday, December 4, 2023** will be included in a Supplemental Packet, which will be posted to the online agenda as a Late Communication one day before the public hearing.
- Correspondence received by **5pm one day before this public hearing**, will be included in a second Supplemental Packet, which will be posted to the online agenda as a Late Communication by 5pm on the day of the public hearing.
- Correspondence received after 5pm one day before this public hearing will be saved as part of the public record.

Members of the public may submit written comments just before or at the beginning of the meeting by providing 15 printed copies of the correspondence to the Planning Commission Secretary.

### **COMMUNICATION ACCESS**

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To request a meeting agenda in large print, Braille, or on audiocassette, or to request a sign language interpreter for the meeting, call (510) 981-7410 (voice) or 981-6903 (TDD). Notice of at least five (5) business days will ensure availability. All materials will be made available via the Planning Commission agenda page online at <https://berkeleyca.gov/your-government/boards-commissions/planning-commission>.

### **FURTHER INFORMATION**

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Questions should be directed to Justin Horner, at (510) 981-7476 or [jhorner@berkeleyca.gov](mailto:jhorner@berkeleyca.gov).

Current and past agendas are available on the City of Berkeley website at: <https://berkeleyca.gov/your-government/boards-commissions/planning-commission>

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City of Berkeley Presents

# Hello Winter Weather! Preparedness Workshop at Strawberry Creek Park

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Free sandbags! +  
training on how to  
use them

Cocoa and  
cider!



Learn about floods,  
landslides, windstorms,  
and power outages



Family-friendly  
activities

Add your voice to  
the City's 2024  
Mitigation Plan



## Communications

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**From:** Wu, Grace  
**Sent:** Friday, November 17, 2023 3:01 PM  
**To:**  
**Cc:**  
**Subject:** Thank you and Transition

Dear Commissioners,

I wanted to let you know that **Anne Hersch, our new Planning Manager, will be stepping into the role of interim Co-Secretary to the Planning Commission** as of the next meeting on December 6<sup>th</sup>. Alisa Shen and Zoe Covello will continue as Co-Secretary and Clerk, respectively.

My last day with the City of Berkeley is December 1<sup>st</sup> and I want to thank each of you for your support and thoughtfulness over the past year. I have benefited greatly from the collective knowledge and experiences in this talented group.

Look forward to hearing about all the great work to come!

Sincerely,

Grace

---

**Grace Wu**, AICP, LEED AP (she/her)  
Principal Planner, Land Use Planning Division  
1947 Center St., 2<sup>nd</sup> Floor, Berkeley, CA 94704  
**E:** [gwu@berkeleyca.gov](mailto:gwu@berkeleyca.gov) | **P:** 415-961-9518  
<https://berkeleyca.gov/construction-development>  
[Zoning](#) | [Permit Forms](#) | [Boards & Commissions](#)



## Communications

---

**From:** Knox, Kellie

**Sent:** Friday, November 17, 2023 11:55 AM

**To:** Aguilar, Hansel <HAguilar@berkeleyca.gov>; Amnah, Hilary <HAmnah@berkeleyca.gov>; Beasley, Melanie E. <MEBeasley@berkeleyca.gov>; Bondi, James <JBondi@berkeleyca.gov>; Bronson, Darlene <DBronson@berkeleyca.gov>; Bryant, Ginsi <GBryant@berkeleyca.gov>; Budnick, Noah <NBudnick@berkeleyca.gov>; Burns, Anne M <ABurns@berkeleyca.gov>; Campos, Guillermo <GCampos@berkeleyca.gov>; Cash, Anna <ACash@berkeleyca.gov>; Chin, Khin <KChin@berkeleyca.gov>; Cole, Shamika S. <SSCole@berkeleyca.gov>; Crane, Fatema <FCrane@berkeleyca.gov>; Dougherty, Desiree <ddougherty@berkeleyca.gov>; Ernst, Margot <MErnst@berkeleyca.gov>; Franklin, Eve <EFranklin@berkeleyca.gov>; Garcia, Claudia <CGarcia@berkeleyca.gov>; Garvey, Brian <BGarvey@berkeleyca.gov>; Greenbaum, Leah <LGreenbaum@berkeleyca.gov>; Gregory, Thomas <TGregory@berkeleyca.gov>; Harvey, Samuel <SHarvey@berkeleyca.gov>; Heath, Julia <JHeath@berkeleyca.gov>; Hernandez-Gonzalez, Karen <KHernandez-Gonzalez@berkeleyca.gov>; Herrick, Mariela <MHerrick@berkeleyca.gov>; Jacobs, Joshua <JJacobs@berkeleyca.gov>; James, Ashley <AJames@berkeleyca.gov>; Katz, Mary-Claire <MKatz@berkeleyca.gov>; Knox, Kellie <KKnox@berkeleyca.gov>; Kouyoumdjian, Aram <AKouyoumdjian@berkeleyca.gov>; Lewis, Jessica <jelewis@berkeleyca.gov>; Lopes, Bernadette <Blopes@berkeleyca.gov>; Lovvorn, Jennifer <JLovvorn@berkeleyca.gov>; Mariscal, Cecelia <CMariscal@berkeleyca.gov>; May, Keith <KMay@berkeleyca.gov>; Mayer, Tess <tmayer@berkeleyca.gov>; McCoy, Vincent <VMcCoy@berkeleyca.gov>; Miller, Roger <RMiller@berkeleyca.gov>; Milliken, Rebecca <RMilliken@berkeleyca.gov>; Moore, Sarah M. <SMoore@berkeleyca.gov>; Mostowfi, Hamid <HMostowfi@berkeleyca.gov>; Murillo, Jose <JMurillo@berkeleyca.gov>; Nevels, Ronald <RNevels@berkeleyca.gov>; Oehler, Joshua <JOehler@berkeleyca.gov>; Riemer, Allison <ARiemer@berkeleyca.gov>; Romain, Billi <BRomain@berkeleyca.gov>; Rose, Emily <ERose@berkeleyca.gov>; Slaughter, Kieron <kslaughter@berkeleyca.gov>; Terrones, Roberto <RTerrones@berkeleyca.gov>; Updegrave, Samantha <SUpdegrave@berkeleyca.gov>; Vance-Dozier, Okeya <OVance-Dozier@berkeleyca.gov>; Works-Wright, Jamie <JWorks-Wright@berkeleyca.gov>; Wu, Grace <GWu@berkeleyca.gov>

**Subject:** FW: Steering Committee Recruitment

### Internal

Hi Commission Secretaries,

I am forwarding the recruitment email and attached flyer from our consultants for the Steering Committee for our **Berkeley Wellness Blueprint – a community-shaped health equity plan**. This is an important project for the residents of the City of Berkeley.

Please see below and send it out to your commissioners so that we are able to find a diverse pool of applicants.

If you have questions, let me know.

Best,  
Kellie

Kellie Knox, LMFT, she/her/hers  
Future of Public Health Coordinator  
City of Berkeley, HHCS  
2180 Milvia Street, Berkeley, CA 94704  
510-981-5301 kknnox@berkeleyca.gov

Hi everyone!

We are excited to announce the launch of the **Berkeley Wellness Blueprint - a community-shaped health equity plan**.

JSI California, a public health consulting organization located in Berkeley, has been hired by the City of Berkeley to complete a **Community Health Assessment (CHA) and a Community Health Improvement Plan (CHIP)**. Through this process, we aim to *establish a community-shaped vision and action steps to improve health and equity in Berkeley*. This project is called the **Berkeley Wellness Blueprint**.

In order to ensure this is a community-shaped health equity plan, we are looking to develop a Community Steering Committee made up of individuals reflecting diverse identities and experiences, and who are invested in the Berkeley community, to inform the CHA and CHIP. We are actively **recruiting for this group and would love for you to share this with your network!**

If you or anyone you know is interested, please visit this [link](#) (also available on the attached flier) to learn more and to submit an application.

Please share this information and the attached informational flier with the people in your network and communities!

Thank you!

All the best,  
The Berkeley Wellness Blueprint Team

# Berkeley Wellness Blueprint

## A community-shaped health equity plan

To learn more and apply visit  
[tinyurl.com/BerkeleyCSC](https://tinyurl.com/BerkeleyCSC) or  
scan this QR code.

Direct questions to  
[berkeley\\_blueprint@jsi.com](mailto:berkeley_blueprint@jsi.com)



## Apply to be a part of the Community Steering Committee!!

### WHAT WILL I DO?

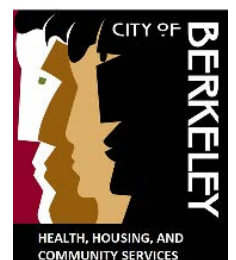
The Community Steering Committee will guide the completion of a health assessment of the Berkeley community, and develop an improvement plan for the city.

### WHO CAN PARTICIPATE?

We are looking for Individuals who live, work, and/or are active in Berkeley communities and would bring diverse perspectives and areas of expertise.

### DO I GET PAID?

Yes! This position will be compensated.



The Berkeley Blueprint is being facilitated by JSI Research & Training Institute with support from the Berkeley Health, Housing, and Community Services Department.

## Communications

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**From:** Nico Calavita <ncalavit@sdsu.edu>  
**Sent:** Tuesday, November 21, 2023 8:30 AM  
**To:** Planning Commission  
**Subject:** Southside Plan  
**Attachments:** Southside short2.docx; WPF copy.pdf

**WARNING:** This is not a City of Berkeley email. Do not click links or attachments unless you trust the sender and know the content is safe.

Hello,

Attached please find a letter regarding the Southside Plan I sent to Mayor and Council yesterday.

Nico Calavita

Subject: Southside Plan and Land Value Capture

November 18, 2023

Dear Mayor and Council,

In 2017 the Berkeley City Council passed a resolution that established a policy “requiring that land value recapture is included in the preparation and implementation of all area plans” (Council’s July 25, 2017 Resolution No. 68,133-N.S). The language could not be more clear, but you are about to approve the Southside Plan without a land value capture mechanism.

Land Value Capture (LVC) works this way: When a locality upzones a property or adopts a plan that increases densities, land values go up - the result of a public action. It is only fair, then, that the public recapture some of those increases in value for public benefit. Several cities in the country are doing it, including Los Angeles, San Francisco, and Santa Monica in California (see attached report: *Public Benefits Zoning*).

LVC is not an additional requirement. Developers can choose to build at base density, or up to the new plan densities - with community benefits; it is an “opt-in” plan. The level of community benefits would be based on economic analyses.

The city has not forgotten about its policy of LVC. In its letter, the Planning Commission wrote that Resolution No. 68,133-N. (the 2017 resolution mentioned above that established LVC) “was referenced in our discussion. The PC did not feel there was enough guidance to propose any additional ‘capture’ provisions, although we agree that they can be beneficial in concert with upzoning. For example, to support community benefits such as parks/open space and/or funding for affordable housing. In general, we do feel that the proposed zoning changes in the Southside may increase property values and that the city should explore ways to capture some of that increase to fund public goods. We encourage Council to consider the feasibility of this approach with regard to Southside.”

Instead of following the Planning Commission’s suggestion to explore the feasibility of LVC, Planning Department’s staff dedicates a paragraph in its report to “Land Value Capture and Community Benefits ” (pages 10 and 11) summarizing the Planning Commission’s position but stating that: **“Staff do not recommend any additional action at this time”** (emphasis added).

That position is surprising at many levels because: 1) The city has an established Land Value Capture policy, 2) There was a Council referral regarding LVC and, 3) The Planning Commission found that LVC “can be beneficial to produce more housing and community benefits.” Staff, inexplicably, has ignored all that.

Councilmember Sophie Hahn’s recent “Proposal for a more friendly Southside Zoning & Housing Plan” speaks to the problem, often referring to how the Southside Plan “bestows significant value to existing property owners – without requiring an increase in housing affordability or other significant community benefits.” Her proposal outlines how, in addition to affordable housing, other public amenities should be provided by property owners through LVC.

Regrettably and surprisingly, it seems that staff is waiting for a “push” from City Council to develop a LVC proposal for Southside. I urge you to do so. It is the obvious thing to do to obtain more public benefits. Please postpone the approval of the Southside Plan and give direction to staff to implement LVC.

Please do not miss a golden opportunity to generate more affordable housing and additional community facilities.

Thank you,

Nico Calavita, Professor Emeritus  
Graduate Program in City Planning  
San Diego State University

1883 San Pedro Av.  
Berkeley, CA 94707

510 898 1736

**November 2014**

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*Prepared for:*

East Bay Housing Organizations (EBHO)  
Association of Bay Area Governments (ABAG)  
Metropolitan Transportation Commission (MTC)

**Nico Calavita**

**Professor Emeritus**

Graduate Program in City Planning  
San Diego State University

**Marian Wolfe, PhD.**

**Principal**

Vernazza Wolfe Associates Inc.

*This White Paper was sponsored by EBHO under a HUD-funded Sustainable Communities Grant provided to ABAG/MTC for the Bay Area Prosperity Plan*

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WHITE PAPER ON THE THEORY, ECONOMICS AND PRACTICE OF

# **PUBLIC BENEFIT ZONING**



# CONTRIBUTORS:

We would like to thank **PYATOK I architecture + urban design** for graciously donating visual design and graphic lay-out services under the expertise of **Jennifer Pechacek-Linares, Kim Suczynski Smith, Hannah R. Howland.**

We would like to thank the following contributors for providing information on the four case studies:

- Jose Campos and Sarah Dennis-Phillips** ..... (City of San Francisco)
- Peter Cohen** ..... (San Francisco Council of Community Housing Organizations)
- Francie Stefan and Jing Yeo** ..... (City of Santa Monica)
- Eileen Fogarty** .....(The Fogarty Group, former Director of Planning, Santa Monica)
- Vivian Kahn** .....(Dyett & Bhatia Urban and Regional Planners)
- William Anderson** .....(AECOM-President of the American Planning Association)
- Debbie Sanderson and Eric Angstadt** .....(City of Berkeley)
- Brad Richter** ..... (Civic San Diego)

## **Disclaimer:**

The research that provided the basis for this publication was supported by funding under an award to the Metropolitan Transportation Commission (MTC) from the U.S. Department of Housing and Urban Development. The substance and findings of the work are dedicated to the public. The author and publisher are solely responsible for the accuracy of the statements and interpretations contained in this publication. Such interpretations do not necessarily reflect the views of the federal government or MTC. For a copy of the full report, please visit [www.ebho.org](http://www.ebho.org).

## **About East Bay Housing Organizations:**

East Bay Housing Organizations (EBHO) is a non-profit membership organization dedicated to working with communities in Alameda and Contra Costa counties to preserve, protect and expand affordable housing opportunities for the lowest income communities through education, advocacy, organizing, and coalition building. Founded in 1984, EBHO is the leading voice for affordable housing in the East Bay.



Source: Metropolitan Transportation Commission

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# EXECUTIVE SUMMARY

The San Francisco Bay Area will add more than two million people by 2040. To accommodate this growth while protecting our quality of life and our environment, the Association of Bay Area Governments (ABAG) and the Metropolitan Transportation Commission (MTC) have adopted a State-mandated Sustainable Communities Strategy—a regional land use and transportation plan called Plan Bay Area. It calls for most new residential development to take place in already built up areas close to public transit. These areas are called Priority Development Areas (PDAs). Part of this strategy is to produce vibrant “complete communities” near major transit stations or hubs with a mix of commercial, civic and residential uses. The challenge is how to ensure that these communities preserve and maintain a diverse mix of residents by income, age, disability, and racial and ethnic backgrounds over the long term.

This approach towards accommodating growth has the potential to make life better and healthier for all of us, but it also has the potential to lead to a significant increase in land values for real estate investors. Compact growth—and the strategies to accommodate it—will increase land values in three ways:

- Regional and local policies that encourage new development in Priority Development Areas at the center of the Bay Area region will make the land located in these areas more valuable.
- The Bay Area region will invest billions of local and federal dollars in transportation improvements—with a significant portion going to mass transit in these central areas—thus increasing the value of properties benefitting from those investments. Economic studies have shown that when property is located near the Bay Area Rapid Transit System (BART), its value increases significantly.
- Many local jurisdictions have or will change their land use plans to accommodate greater densities in the priority areas. Increases in these densities will further increase land values.

Together, these three factors will increase land values substantially. Increased land values can have unintended consequences harmful to low- and moderate-income people living or working in the Priority Development Areas. The benefits of increased land value accrue to the landowners or the developer—who is also the land owner and do not benefit the rest of the community. These market trends can result in displacement, which in turn can mean higher housing and transportation costs, and longer commutes for those families who are forced to move. This has the potential to impact adversely the health and well-being of low-income and working families and communities of color, and minimize any reduction in greenhouse gas emissions these policies were intended to achieve.

But, there are solutions! We can have equitable, compact development, if those who profit from public actions also provide public or community benefits.

The process of requiring community benefits from landowners whose land has increased in value due to government actions is called “Land Value Recapture” (LVR). LVR is also known as Public Benefit Zoning (PBZ), Community Benefits Strategy (CBS), or Public Benefit Bonus (PBB)<sup>1</sup>. This approach has generated great interest in the Bay Area and, to a lesser extent, in the rest of the country in the past few years, stemming from several factors, most importantly the severe fiscal crisis of government at all levels.

With climate change, higher gasoline costs, lifestyle and population changes, we are witnessing a historic shift in how land is used near transit. Public investments in transportation are increasingly moving to non-automobile choices, and land use patterns now emphasize the creation of high-density, mixed use locations and corridors served by mass transit and pedestrian and bicycle paths. All these factors lead to higher land prices.

## The Economics of Public Benefit Zoning

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The economics behind Public Benefit Zoning is straightforward. The easier it is to travel to a location the more desirable that location is for development, which, in turn, makes the land more valuable as well. We should remind ourselves that it has been government investment in transportation projects, from the land grants to railroad companies in the late nineteenth century, to the Federal Highway Act of 1956 to the BART system of the 1970s that improved accessibility, and expanded economic and social opportunities in the Bay Area and the country as a whole.

When land is more desirable, both private developers and public officials generally encourage higher density development which requires a change in zoning regulations. When up-zoning—or an increase in density occurs—commercial and residential land becomes more valuable because more development can occur on the same parcel of land. Some of this increase in value can be spent on public benefits under a PBZ Program.

What are the prospects of a Public Benefits strategy in the Bay Area at this particular time? To succeed, a Public Benefits policy only works in a strong, or at least stable, real estate market. Another necessary condition is that properties have not yet been up-zoned. While land values in central locations, such as PDAs, might increase on the basis of the expectation that densities will be allowed to increase, it is at the time of plan change or up-zoning that those values are solidified.

With up-zoning, the possible revenues—due to the ability to construct additional housing units or additional square feet of office space—go up and with them the value of the land and what a developer can pay for land, assuming that the developer can receive higher sales prices and rents in such a location. A system of community benefits and affordable housing requirements will increase development costs and lower the price the developer can pay for the land. The landowner, in turn, will not be able to raise the price of the land as much as would be possible if the density were simply increased without any community benefit requirements. In the long run, the land market will adjust to the additional regulatory costs. Instead of a windfall to landowners, they get a lesser profit and the community shares some of the benefits.



# Differences between Public Benefit Zoning and Other Value Capture Tools

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This paper focuses on Public Benefit Zoning, but there are additional mechanisms that capture development value, other than PBZ. There are at least five additional value capture mechanisms.

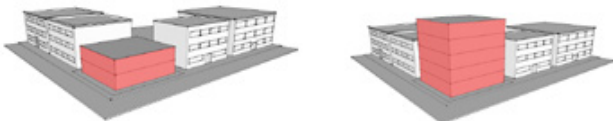
- 1) Incentive Zoning/Density Bonus
- 2) Housing Overlay Zoning
- 3) Tax Increment Financing
- 4) Community Benefits Agreement
- 5) Special Assessment Districts

Of these mechanisms, incentive zoning is the closest to PBZ, and the two are easily confused, but there are important differences. The major difference between PBZ and incentive zoning is that, generally, incentive zoning does not recapture land values but extracts community benefits from the additional density. It is reasonable to assume then, that when the incentive's value is slightly higher than the cost of the community facilities, the value of the land should not be affected. With the exception of Special Assessment Districts – that recapture some of the land value increases resulting from the building of infrastructure – and possibly incentive zoning, all the others capture value resulting from the development process, not necessarily land values.

## Implementation of a Community Benefits Program

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There are two implementation approaches to a Community Benefits Program: (1) Plan-based and (2) Negotiated.



### 1) Plan-based

With a plan-based approach, community benefits are tied to specific increases in the density of development (or land use changes) for a particular area. It is important that these benefits be established before the plan is adopted. The planning activities currently underway for the Priority Development Areas in the Bay Area represent an opportunity to adopt a plan-based Community Benefits requirement. One of the principal advantages of a plan-based approach is certainty for both the landowner/developer and the local jurisdiction.

### 2) Negotiated

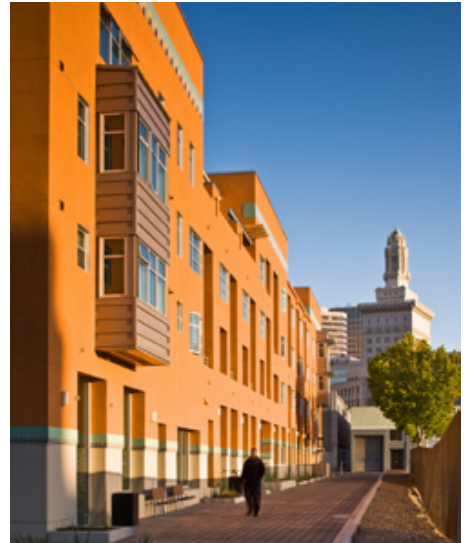
Under a negotiated approach, land use changes and increases in density and community benefits are negotiated between the locality and the landowner/developer. These benefits are spelled out in a signed development agreement. The advantage of this approach is creativity. However, it takes more staff time and usually applies to larger developments.

For smaller tracts of land, both approaches might be too cumbersome. For these parcel sizes, a discretionary approval process that ties increased densities to a point system of benefits or a ministerial approach might be desirable.

Under any of these approaches, several steps are required. These include the following:

- How to determine the increase in land value resulting from plan changes/upzonings.
- How to determine which benefits to require, the “correct” level of benefits, and their potential impact on development financial feasibility.
- How to define options to provide benefits, such as paying fees or dedicating land.
- How to develop administrative procedures to operate a program.

Cities contemplating a Community Benefits Zoning strategy should conduct an economic feasibility study to determine how to structure zoning and development standards to allow community benefits requirements, while taking into account current and anticipated market conditions. EBHO's staff, members, and consultants can provide technical guidance when it comes to creating and implementing a Community Benefits Program.



*Fox Courts: Successful outcome of affordable housing campaign: 80 affordable homes for very low-income families and people with special needs in Oakland developed by Resources for Community Development. Photos Courtesy PYATOK.*

## What Can Be Done When Market Conditions Make Public Benefits Zoning Unfeasible?

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The value of urban land also changes based on the economic cycle. During the most recent cycle, (2008-2011) the value of real estate, particularly residential real estate, declined precipitously in some areas. Land values also declined during this period, as future development plans were put on hold. However, markets have rebounded, and development has revived in Bay Area locations located near job growth, such as Silicon Valley and San Francisco. However, not all submarkets in the San Francisco Bay Area can support higher densities due to market conditions. For those submarkets, options to consider include:

- (1) A jurisdiction can wait for the real estate market to pick up before adopting this strategy.
- (2) A jurisdiction can establish the community benefit levels at the time of plan changes or up-zoning, and wait for the market to improve. Then, these requirements can be phased in over an extended period of time.

## Legal Aspects of Public Benefit Zoning

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Under current state and federal constitutional law, if a city requires a fee or a dedication of land, it must establish through a nexus analysis that the condition's requirements (fees or land) are related and proportional to the impact of the development. If fees are required as part of PBZ, then a proportional nexus needs to be established. The community benefits gained through PBZ should be in addition to those obtained through existing Development Impact Fees, Inclusionary Zoning In-Lieu Fees, or Commercial Linkage Fees.

In most jurisdictions with Development Impact Fees, required fees are not set at the maximum that would be legally justifiable. PBZ fees, then, while "additional," can generally be set within the limits already established under the previous nexus analysis.

In the situation in which a city is already exacting Development Impact Fees that are close to the legal limits established through a nexus analysis, it would be necessary to make the case that higher density generates "additional" burdens making it necessary to require applicants to pay additional fees to mitigate projects impacts.

However, if PBZ requirements are established through development agreements, they may not require a nexus analysis.

# Potential Community Benefits

There are many community benefits that can be funded through a land value recapture approach. Affordable housing is one of the most critical benefits, but others, such as public open space and public facilities, are also important.

## Affordable Housing

One important approach to achieve public benefit zoning is to enhance a community’s existing inclusionary housing program by requiring a higher percentage of inclusionary units than under the existing system. In jurisdictions that already have inclusionary housing policies in place, this new approach could redefine inclusionary housing as a two-tiered process. The first tier would impose inclusionary housing requirements within the existing zoning framework. Thus, if a developer does not receive additional density or a land use change, the existing inclusionary housing policy will apply. The second and higher tier(s) of inclusionary housing beyond the required baseline would be associated with substantive plan changes or up-zonings of either specific parcels or larger areas. This can be accomplished without significant additional costs to the developer and be consistent with the principle of land value recapture<sup>2</sup>.

Similarly, Commercial Linkage Fees and Housing Impact Fees could be based on a two-tiered approach. The first tier would apply to existing zoning, and the second tier would be associated with plan changes/re-zonings. Since a majority of jurisdictions with commercial linkage fees and housing impact fees have adopted fees at levels lower than justified by nexus studies, this approach may not require new nexus studies.

## Additional Community Benefits

New development generates a need for new facilities. To meet that need, developers pay development impact fees that are reasonably related to the impacts created by new development. Community benefits policies represent a creative opportunity to make sure that additional development and increased densities contribute to, not detract, from the community. This becomes imperative in the case of infill and densification. “No densities without amenities” could be the cry of neighborhoods impacted by densification and infill. A community benefits system could go a long way toward providing a portion of the necessary funding to pay for neighborhood improvements that would be in addition to the public benefits obtained through existing impact fee programs.



**NO  
DENSITIES  
WITHOUT  
AMENITIES”**





**VI** | Executive Summary



## Case Studies

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This report covers the experiences of four California cities that adopted a Public Benefit Zoning program. The cities with the most experience so far with LVR are San Francisco and Santa Monica. These case studies are useful since they demonstrate successful approaches in implementing PBZ policies. What follows is a brief description of the PBZ programs in those two cities.

### 1) San Francisco: A Tiered Program of Combined Fees and Housing Options

As part of the preparation of a plan for the Eastern Neighborhoods the City established a “Tier” approach to baseline fees and public benefit fees, to reflect the relationship between higher densities and increased value for land and development.

Baseline impact fees are paid by projects that remain at current height (referred to as Tier 1), because there is no increment in value resulting directly from governmental action.

In existing mixed-use areas, a second and third tier of impact fees are triggered for sites where the Plan grants additional heights. Specifically, Tier 2 applies to an increase of one to two stories, and Tier 3 applies when three or more stories are permitted. The fees for Tiers 2 and 3 constitute baseline fees plus additional public benefit zoning fees.

To fulfill the goal of increased affordable housing production in the Eastern Neighborhoods, the Plan also requires that in areas rezoned from industrial to mixed uses (mostly residential), more affordable housing be produced than is required under the City’s inclusionary program. Within these zones, the Plan provides greater flexibility in the way affordable housing requirements can be met so that higher percentages of affordability are actually achievable. For example, if affordable units are provided on-site, a lower percentage of units need to be affordable. However, if these units are provided off-site, or if land is dedicated, or if affordable rents are targeted at middle incomes, then a higher percentage is required.

To help implement the Plan, the Eastern Neighborhoods Citizen’s Advisory Committee (EN CAC) was established by the City. The EN CAC provides input to City agencies and decision makers with regard to all activities related to the implementation of the Eastern Neighborhoods Area Plans.

## Tier One

Establishes the base height & FAR

## Tier Two

Allows additional height & FAR when community benefits are added

## Tier Three

Even more height & FAR are allowed in exchange for higher levels of community benefits

## 2) Santa Monica: A Flexible, Tiered Approach

Santa Monica has a long-standing tradition of achieving community benefits through development agreements, including parks and park improvements, community health access, and child care centers with subsidies for low-income families. In 2010, after many years of extensive community engagement, the City adopted the Land Use and Circulation Element (LUCE). A fundamental tenet of the LUCE program was that future development should fund a range of measurable public benefits, from open spaces and parks to affordable housing.

As part of the LUCE preparation, preliminary economic studies were undertaken that analyzed the extent of enhanced land value resulting from higher densities. These analyses indicated that projects that would provide community benefits under LUCE were able to achieve financial feasibility.

LUCE established a community benefits tier structure for projects requesting an increase in the base height of 32 feet. There are three tiers.

- Tier 1 establishes the base height and FAR. No community benefits in addition to the existing ones are required, and the approval process is ministerial. Three to seven extra feet are allowed if affordable housing is provided on-site or close to transit corridors.

- Tier 2 allows additional height and FAR when community benefits are provided.
- With Tier 3 even more height and FAR are allowed in exchange for higher levels of community benefits. It is when developers seek Tier 3 density increases that development agreements are required. This process requires additional public review and flexibility and encourages high-quality projects. Tier 3 projects are larger in scale, and development agreements provide developers with a greater degree of entitlement certainty.

Given the high costs of development agreements, the City is now pursuing a ministerial approach as part of its zoning code update. When a developer chooses to exceed densities from Tier 1 up to Tier 2, he or she will be required to provide additional community benefits. The quantity (additional fees or affordable housing units) of these community benefits will be defined in 2014 as part of the Santa Monica Zoning Update, and presumably will be based on an updated nexus analysis.

## Conclusions and Recommendations

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### **FUNDAMENTAL RULE: DO NOT UPZONE WITHOUT TYING GREATER DENSITIES TO COMMUNITY BENEFITS INCLUDING AFFORDABLE HOUSING”**

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At a time when local governments search for ways to pay for needed improvements, services, and affordable housing, there is a valuable tool, Public Benefit Zoning (PBZ), available for many cities to consider. This White Paper describes this tool and provides examples of its use in cities in California. It works as follows:

When land is up-zoned or a plan updated to allow greater intensity of development, the value of the land generally increases. Most of this increase in value is the result of a public action and, for the most part, not due to actions undertaken by the landowner. When understood in this light, a strong argument can be made for the public to receive a reasonable share of the increased land value, to be used for community benefits. The technical planning term for this approach is “Land Value Recapture.”

What should localities do when contemplating Public Benefit Zoning (PBZ)? In short, localities should evaluate their market strength and analyze the value of the land before and after land use/zoning changes. Then it is up to the legislative body to decide how much of the “value enhancement” to recapture with community benefits. For more specific recommendations, see page 11.

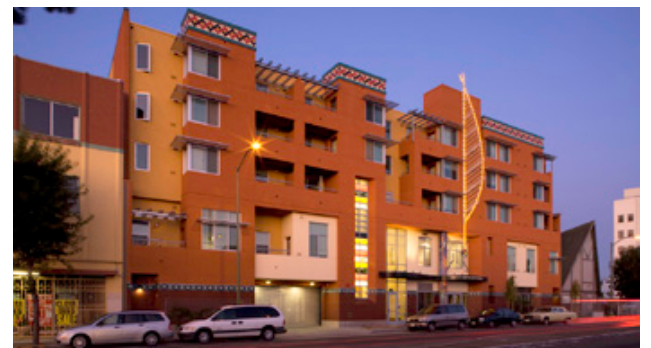
In localities where the market is weak, usually places struggling to attract development, it is very tempting to upzone properties, with the hope that they will become more attractive to developers. While that is understandable, the upzoning would eliminate any possibility for community benefits when the market turns around. Downtown and Chinatown in Oakland are examples of areas where development interest is growing, but upzonings occurred prematurely.

This point warrants repeating: localities—all localities—should delay rezoning until Public Benefit Zoning policies are established. In weak markets, it could be possible to establish a “trigger mechanism” that phases in Public Benefit Zoning (see page 12).

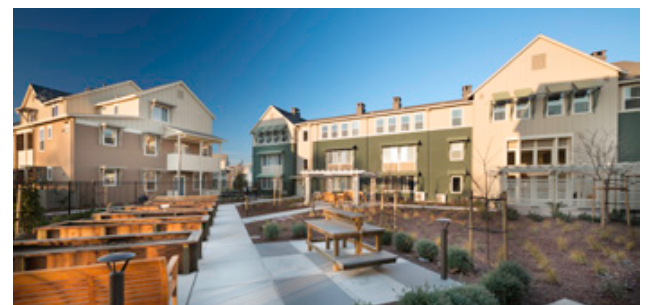
Although PBZ is not as well known in this country as other mechanisms that harness market forces to

bring benefits to the public (incentive zoning, for example), it is the only one that explicitly attempts to recapture land value increases.

PBZ is based on the understanding that in large part the increases in land value are due to the growth of the region, public funded infrastructure and, more specifically, planning decisions—that is, public actions. Seen in this light it is only fair and equitable that landowners should share the benefits that the rest of us have bestowed upon them, by contributing to making the public city better. ❖



*Seven Directions, Oakland, EBALDC.  
Photo courtesy PYATOK*



*Emerald Vista, Dublin. Photo Courtesy Eden Housing*

# WHITE PAPER ON THE THEORY ECONOMICS AND PRACTICE OF PUBLIC BENEFIT ZONING

## Background to Public Benefit Zoning

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According to the Association of Bay Area Governments (ABAG) and the Metropolitan Transportation Commission (MTC), the San Francisco Bay Area will add more than two million people by 2040. To accommodate this growth while protecting our quality of life and our environment, ABAG and MTC have adopted a State-mandated Sustainable Communities Strategy—a regional land use and transportation plan called Plan Bay Area. It calls for most new residential development to take place in already built up areas close to public transit. These areas are called Priority Development Areas (PDAs). Part of this strategy is to produce vibrant “complete communities” near major transit stations or hubs with a mix of commercial, civic and residential uses. The challenge is how to ensure that these communities preserve and maintain a diverse mix of residents by income, age, disability, and racial and ethnic backgrounds over the long term.



**INCREASED LAND VALUES CAN HAVE UNINTENDED CONSEQUENCES HARMFUL TO LOW-INCOME PEOPLE LIVING OR WORKING IN THE PRIORITY DEVELOPMENT AREAS”<sup>4</sup>**

This approach towards accommodating growth has the potential to make life better and healthier for all of us, but it also has the potential to lead to a significant increase in land values for real estate investors. As a result, it will not provide benefits to the wider community unless policies are adopted to mitigate unintended harm, such as displacement.

Compact growth—and the strategy to accommodate it—will increase land values in three ways:

- Regional and local policies and plans that focus new development in Priority Development Areas at the center of the region will make the land located in these areas more valuable.
- The region will invest billions of dollars in transportation improvements—with a significant portion going to mass transit in the central areas—thus increasing the value of properties benefitting from those investments. Economic studies have shown that when property is located near the Bay Area Rapid Transit System (BART), its value increases significantly.<sup>3</sup>
- Many local jurisdictions have or will change their land use plans to accommodate greater densities in the priority areas. Increases in allowable densities will further increase land values.
- Together, these three factors will increase land values substantially.

*These consequences include the following:*

- High land costs make development of affordable housing more difficult. The non-profit housing developers who build housing affordable to low-income working people, seniors, and people with disabilities will have to pay more for land, thereby increasing the cost of development. Since subsidized rents are determined by median income (and not by the market), projects will become infeasible unless additional subsidy dollars are identified. For example, in 2010, San Francisco had to pay double the original value of the long-vacant Hugo Hotel, located in SOMA, to acquire it as a housing development site because the City had rezoned the area and increased the height limit on the site two years earlier.
- Expectations of future development opportunities at high densities could lead to speculation, where land is withdrawn from the market in expectation of even higher land values. The Hugo Hotel described above was held vacant by its owners for twenty-two years waiting for the most profitable time to sell. When supply is restricted by speculative holding of scarce resources like land, prices rise.
- Compact development in transit areas could encourage tearing down older low and medium density housing to allow construction of new, high-end market-rate housing at higher densities. This process eliminates relatively more affordable unsubsidized rentals for lower income people who rely on access to transit to commute to jobs.
- Development of new, high-end housing in the Priority Development Areas will make these areas more attractive to higher-income people. This is likely to raise rents in the existing housing nearby in communities without rent controls. Since a substantial part of the low-income population and communities of color of the Bay Area lives in these areas, these increases have the potential to displace the low-wage workers and communities who are actually the most likely to use mass transit services. Even in communities with rent control, over time, rents will rise to market levels because State law requires that vacated units be “decontrolled” for a new tenant. The result will be the exclusion of lower-income renters and less diverse communities.



**IF GOVERNMENT ACTIONS  
CREATE SUBSTANTIAL  
INCREASES IN LAND VALUES  
FOR PRIVATE INVESTORS,  
THE COMMUNITY SHOULD  
RECEIVE BENEFITS IN RETURN”**

- For those low-income working families who have been living in the Priority Development Areas, these market trends can result in displacement, higher housing and transportation costs, and longer commutes. In the long run, this has the potential to impact adversely the health and well-being of low-income and working families, and minimize any reduction in greenhouse gas emissions these policies were intended to achieve.
- There are solutions. We can have equitable compact development, if those who profit from public actions also provide public benefits. We need to recognize the following key points:
- First, when government directs development to certain areas by changing land use plans to accommodate more density, or when government invests billions of dollars in transportation and other public services in these areas, they often become more attractive and rents and sales prices rise accordingly. One result is that there is an increase in land value. This increase in value is created by the public and not by the private investors who own the land. Since this increase in land value is due to public action and public investments, it represents “unearned” or “windfall” profits for the private investors who own the land.
- Second, it is only fair and equitable for the public to receive a fair share of this unearned increase in land value in order to meet public needs and mitigate the harm that increasing land values cause to people who do not own real estate.

Requiring community benefits from landowners whose land has increased in value due to government actions is called “Land Value Recapture” (LVR). LVR is also known as Public Benefit Zoning (PBZ), Community Benefits Strategy (CBS), or Public Benefit Bonus (PBB).<sup>5</sup> This approach has generated great interest in the Bay Area and, to a lesser extent, in the rest of the country in the past few years, stemming from several factors, most importantly the severe fiscal crisis of government at all levels.

This fiscal crisis is happening at a time when planning for smart growth and climate change is sorely needed. This planning will require that local governments support and provide incentives for private redevelopment and infill development in urbanized communities. The nature of denser development will require significant expenditures in improved and new mass transit systems and enhanced community amenities. These investments in public infrastructure and changes in land use regulations to allow greater densities will also create substantial, additional profits for many landowners, who are benefitting from changes they did not create. In this context it is not surprising that interest in land value recapture is rising rapidly.

A similar approach is already included in California State Law. For example, the State’s “density bonus” law allows residential developers the right to build at higher densities than are allowed by local ordinances in return for providing a percentage of the housing at below-market rents or sales prices.

What is important to understand is that with climate change, higher gasoline costs, lifestyle and demographic changes, and a host of other factors, we are witnessing a historic shift in land use and transportation planning. This shift is based on an increased awareness of the land-use/transportation connection, with public investments in transportation increasingly moving to non-automobile modes and land use patterns now emphasizing the creation of high-density, mixed use nodes and corridors served by mass transit and pedestrian and bicycle paths.

## Economics of Land Valuation

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Generally, the value of urban land is a function of the value of what can be built on it, and that, in turn, is related to its location. The more accessible a location the more desirable it becomes for development, making the underlying land more desirable as well - and more valuable. We should remind ourselves that it has been government investment in transportation infrastructure, from the land grants to railroad companies in the late nineteenth century, to the Federal Highway Act of 1956 to the BART system of the 1970s that improved accessibility, and enhanced the economic and social opportunities of this country. It also increased the value of land served by these networks and nodes of transportation infrastructure.

However, land values do not always increase over time, but can remain flat or decrease, in spite of public action. This is due to market conditions. Again the development of the BART system serves as a good illustration of how public action may not always increase real estate values. While the areas located near some BART stations have experienced higher rents and sales prices for housing, not all BART stations have. For example, a study conducted by a UC Berkeley researcher in 1996 found that one-bedroom apartments located within a quarter-mile of the Pleasant Hill BART Station rented for about 10% higher than comparable units located a little further from BART. However, these same trends were not noted in other Contra Costa County cities, such as Richmond and El Cerrito.<sup>6</sup>

The value of urban land also changes based on the economic cycle. During the most recent cycle, (2008-2011) the value of real estate, particularly residential real estate, declined precipitously in some areas. Land values also declined during this period, as future development plans were put on hold. However, markets behave cyclically, and have now rebounded and development has revived in Bay Area locations located near job growth, such as Silicon Valley and San Francisco. Once again, these areas are experiencing high home prices and rents.

Understanding how developers value land is a complex process that takes into consideration market factors (including risk), other real estate investments within a developer’s portfolio, and the cost and availability of interim financing.



# FINANCIAL FEASIBILITY PROFIT & VALUE ENHANCEMENT

It is important to understand the impacts of public actions, such as rezoning and land use changes, on financial feasibility and value enhancement. There are a number of ways that the development community assesses financial feasibility, but profit is always expected. While developers will not define a maximum level of profit desired, they do define a minimal or threshold level of profit that is required to make a development project worthwhile. Required profit levels need to meet or exceed profit levels provided from other investments, taking into account the risk that accompanies real estate development and costs incurred prior to actual construction. Profit expectations are not static, and instead change over time to reflect overall economic conditions. To illustrate, profit expectations were lower during the great recession than during the boom period prior to 2007. If Land Value Recapture is adopted, then it is important that the level of benefits does not reduce profit such that development is no longer competitive with other investment opportunities which are less risky.

A complicating factor in estimating value enhancement is how land is valued by developers and landowners. If one investor owns the land and a second investor develops the project, then the value of the land could be negotiated between

the landowner and the developer. For example, if the costs of public benefits are added to project entitlements so that the developer has higher costs, the developer may offer a lower amount to the landowner. The landowner may accept a lower amount or decide to wait for a better offer, reducing the availability of land for development.

In order for the development to still yield a “normal” rate of return, the developer can try to charge higher prices (if demand is sufficient to support these prices), or can try to lower construction costs. If these strategies are not sufficient to make the project feasible and if landowners are resolute about their land prices, the developer may abandon the project.

The challenge to public agency staff is to determine the balance between the level of value enhancement, or the gain experienced by the landowner that stems from public actions, and the cost to the developer to provide the required public benefits. The ideal balance point is one at which the level of benefits will not reduce the land value below the point at which a reasonable landowner is interested in selling and which will still allow sufficient financial returns to the developer, while obtaining community benefits that will improve living conditions for current and future residents and businesses.



# Land Value Enhancement and Land Value Recapture

LVR is easily understood as a two-step process - (A) Land Value Enhancement and (B) Land Value Recapture. These steps occur at the same time.

- A) Land Value Enhancement occurs when government increases the intensity/density of a particular land use, or changes the land use designation to a more profitable use—from agricultural or industrial to mixed-use, for example. The value of land can also increase when government builds infrastructure and public facilities including mass transit systems and freeway interchanges (which increase the accessibility of properties), or creates parks and other public facilities (which enhance the livability of an area).
- B) With Land Value Recapture, governments recapture part of the increase in land values through the planning process by requiring community benefits to be agreed upon in conjunction with the entitlement or planning process.

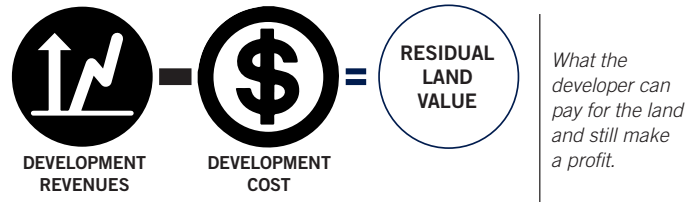


**LAND VALUES AND THE COSTS AND BENEFITS OF REGULATION:**  
 ALLOWING MORE DENSITY CAN INCREASE REVENUES FOR THE DEVELOPER INDUCING LAND OWNERS TO INCREASE THE PRICE OF THE LAND. MANDATING COMMUNITY BENEFITS INCREASES DEVELOPMENT COSTS FOR THE DEVELOPER, LOWERING WHAT SHE CAN PAY FOR THE LAND. SHE WILL BARGAIN FOR A LOWER LAND PRICE.”

As such, LVR is a two-part simultaneous process since the land value enhancement and land value recapture occur at the same time. However, not all land use changes and public facility improvements support an LVR policy. One way to assess when LVR is financially possible is through a “Residual Land Value Analysis.”

With this analysis, total development costs and revenues of a project are established and costs are subtracted from the revenues. A positive figure indicates what the developer can pay for the land and still make a profit. A negative figure indicates that there is no market for the proposed development, since the revenues from selling or renting space are inadequate to provide both a return and cover all development costs.<sup>7</sup>

- **Costs:** While construction costs and the cost of construction financing will probably be very similar within the same region, there might be great variation in terms of governmental fees, such as permits and processing fees, park fees, commercial linkage fees, etc. Construction costs will also vary depending on the type of construction used.
- **Revenues:** In a residual land value analysis, revenues are calculated differently for ownership and rental developments. For ownership projects, the revenues are defined as the sales prices summed over all units less the sales expenses. In the case of rentals, the revenues are defined as the capitalized value of net operating income over a specified holding period, generally 20 or 30 years.<sup>8</sup> These revenues will vary according to the strength of demand for rental housing in a given area over time.



It is also important for localities to pay close attention to how increases in density and height can increase development costs by requiring a change from less expensive to more expensive construction types. For example, an up-zoning that allows greater residential building heights may require use of much more costly materials (such as reinforced concrete or steel construction) than for a lower building which uses wood-frame construction. In order for land values to increase, it is necessary for the local government to provide a sufficiently large enough additional height allowance to make the project profitable, given the higher construction costs of structures in excess of five stories. This can only happen when housing demand is sufficiently strong that prices justify more expensive per unit construction costs.

For an example of Residual Land Value Analysis that compares land values under current and proposed zoning, see Table 3 on page 26. Through application of a residual land value analysis, it is possible for a jurisdiction to estimate the actual value enhancement associated with its public actions. This increase in value can be used to help a jurisdiction determine the level of required community benefits from a new development, while at the same time maintaining the development’s financial feasibility.

# Differences between Public Benefit Zoning and Other Value Capture Tools

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The term “Value Capture” is being utilized with increasing frequency in the planning and redevelopment fields. As the term implies, it refers to various mechanisms that extract some value from the development process. This paper focuses on Public Benefit Zoning, but there are additional mechanisms that capture development value, other than PBZ. In fact, Public Benefit Zoning (technically referred to as Land Value Recapture) is the latest entry in what was defined in 1992 as one of the newest developments in United States land use policies, i.e., “the movement from command-and-control to market-based regulatory strategies.” (Kayden, 1992: 565). Based on the recognition that land use regulations, “confer as well take away property rights, landowners now would be encouraged, rather than commanded, to provide or preserve desired public amenities in their private developments through the powerful force of financial self-interest. Public and private interests would join forces for the common good.” (Kayden, 1992: 568).

There are at least five additional value capture mechanisms.

- 1) Incentive Zoning/Density Bonus
- 2) Housing Overlay Zoning
- 3) Tax Increment Financing
- 4) Community Benefits Agreement
- 5) Special Assessment Districts

## Incentive Zoning/Density Bonus

Incentive Zoning, also known as “Density Bonus,” is very similar to PBZ but with a fundamental difference. It is similar because it grants developers the right to build additional space in exchange for providing community amenities. This will work if the developer calculates that the value of the incentive provided is greater than the cost of providing the amenity. It is, therefore, voluntary. In addition to higher densities, other incentives commonly include reduced parking or modifications to height and setback requirements. It is different because it does not, generally, recapture increases in land value for public benefits.

California State Law mandates that density bonuses be granted for affordable housing, senior housing (whether or not affordable), donations of land for affordable housing, condominium conversions that include affordable housing, and child care facilities. In addition to density bonuses, applicants who provide affordable housing qualify for zoning concessions and for reduced parking standards. The great majority of California cities have shaped these “density bonus” regulations to reflect their unique settings and circumstances. However, thus far, the effectiveness of the density bonus law in producing affordable or senior housing has not been systematically studied.

While this law has the potential to produce affordable housing, it must be observed that it has also the potential, if applied on a large scale, to interfere with local planning processes. Which parcels are developed with higher densities (that can be as high as a 35 percent increase over existing zoning) is not based on a land use plan. The advantage of a land use plan is that it is generally prepared with citizen participation and is presumably based on the capacity of public infrastructure and public facilities to handle more intensive development. Instead, the granting of a density bonus is an ad hoc process based on developers’ decisions. These decisions depend on the characteristics of the market and area at a particular time. Thus, while California’s Density Bonus Law has the potential to produce affordable housing units, it has the drawback of doing so at the expense of the planning process. Ironically, the more units that are produced under a Density Bonus policy, the greater the likelihood of interfering with adopted land use plans.

In addition to state bonus law, incentive zoning is utilized extensively in California, as well as elsewhere in the country to encourage private developers to provide increased public amenities through increased densities. Incentive zoning began in Chicago in the late 1950’s, was adopted in New York City in 1961 to encourage plazas and arcades, and adopted in San Francisco in 1968. In San Francisco, density bonuses were made available to developers in the financial district if they provided any of ten amenities. The choice and type of bonuses were related to the characteristics of the zoning proposals. There were problems with the implementation of the San Francisco program. Following the approval of San Francisco’s Downtown Plan in 1984, the bonus system was eliminated, and mandatory requirements were established.

Most cities in the US, regardless of size, have a provision in their general plans or zoning codes for incentive zoning. For example, the General Plan for the City of Walnut Creek a medium-sized city in California, states the following: “Allow increases in height for developments that provide exceptional public amenities such as accessible roof gardens, ground level public plazas, creek orientation, public courtyards and passage ways, landscaping, public art, and other desired amenities specified during the normal City Review process” (City of Walnut Creek 2006, p. 4-13.3.2).

The first step in establishing an incentive zoning program is to establish the base density, usually calculated as a floor area ratio (FAR) or units/acre. If the base zoning is set too high, developers will not need the bonus. Therefore, it is important to reduce the existing base zoning in many cases (Kelly and Rohen, 2013). Downzoning, however, may be highly controversial with property owners. Next, the amenities need to be identified and prioritized. The amount of the bonus available for providing amenities is calculated. Finally, the award of bonuses is arrived at either by-right or determined through negotiations. A number of cities have employed the by-right approach for minor projects and used a discretionary process for larger ones.

An important example of an incentive zoning program was established in downtown San Diego in 2006. It allowed developers to receive increases in FARs if they provided benefits that could include any of the following: Affordable Housing, Urban Open Space, Three Bedroom Units, Eco-roofs and Employment Uses. The FAR increases are established on the basis of either the percent or quantity increases of the amenities. The value of both is established through economic analysis. According to a Civic San Diego document, the bonus programs “have been attractive to developers and have been successful in increasing densities and have resulted in the provision of public amenities and benefits” (Civic San Diego, 2012, p. 2). Incentive zoning then, benefits the City and the developer, since the value of the bonus is intended to exceed (slightly) the cost to the developer of providing the public benefit. The landowner also benefits because the price of the land should be unaffected, unless the land is downzoned as part of the incentive zoning program.

In sum, both the state density bonus law and incentive zoning are voluntary for the developer. Under state density bonus law the public benefit includes affordable housing, but the process is ad hoc with regards to planning principles. In the second case (incentive zoning) the

benefits to the public are multiple, but affordable housing is not assured. Depending on the cost of the benefit to be provided, developers can choose from a variety of options. The difficulty for the public agency lies in establishing the right “price” for the benefits. As Kayden points out - “The ‘price’ is too low when the city could have obtained more amenities for the same incentive or dispensed less incentive for the same amenity” (Kayden, 1992, p. 570).

## Housing Overlay Zoning

An Overlay Zone is a local planning tool that provides a set of incentives or requirements that apply to an entire area in addition to the underlying or base zoning requirements. Overlay zones give cities flexibility that doesn't exist in the basic zoning requirements themselves. Overlay zones are often used for historic districts, natural resource protection, and other community goals. Housing Overlay Zones focus specifically on affordable housing, and can be used to establish mandatory requirements for inclusion of affordable housing or, similarly to California Density Bonus Law, can provide incentives to encourage production of affordable housing. However, a Housing Overlay Zone is a local tool and not restricted to what state law prescribes. It can provide, for example, more incentives for greater housing affordability. It can allow housing in commercial or industrial districts. Most importantly, its features are established through a process that ensures political buy-in and political support. Such support will be generated when the community feels that: (1) The overlay zoning will not overcome the capacity of the existing infrastructure and public facilities and, (2) They can exert some control of the design and the aesthetic quality of what is built in the district. In comparison to State Density Bonus Law, Housing Overlay Zones are established as part of a planning process. They are an excellent approach that encourages production of affordable housing while maintaining local control on land use.

## Tax Increment Financing

With Tax Increment Financing (TIF) the increment in property tax resulting from an increase in property value is captured to support further redevelopment. It would be erroneous to classify TIF as a land value recapture mechanism. Under the standard redevelopment/TIF scenario, the value of land increases as a result of public financing of infrastructure and subsidies to developers that lead to new private development and increases in the overall attractiveness of the area. Landowners reap windfall profits in those instances when redevelopment is

highly successful. In other words, TIF is set up to work as a land value granting tool and not a mechanism to recapture land values from landowners.

Tax increment financing is still used in other states, but is no longer widely used in California. While TIF benefitted both property owners and local governments, it resulted in a decrease of property tax revenues to the other taxing entities, which in turn put pressure on the State budget. Because of California's budget problems during the Great Recession, Governor Brown dissolved the redevelopment agencies that had used TIF to upgrade areas.

## Community Benefits Agreements

A Community Benefits Agreement (CBA) is a private agreement between a developer and a community coalition. The community benefits are usually obtained in exchange for political support by the coalition of a major project. The benefits are usually jobs and housing, but other benefits are possible. In order for the CBA to work, the community must have enough political pull to possibly block the project. CBAs are problematic to implement for various reasons. Most importantly, it is difficult to create, inform, and manage the complex, multi-interest coalitions necessary to negotiate successfully with the developer to bring about major benefits. What makes CBAs rather unusual in the urban development arena is that they exclude, in most cases, government. They extract community benefits from the development process, but outside the planning/regulatory framework of the public sector. When CBAs are attempted, the developer is most likely already the landowner, and the benefits will be a cost to the developer, not the landowner. Nevertheless, CBAs are a great way to lessen the impacts of major development projects in lower-income communities.

## Special Assessment Districts

Special Assessment Districts have been around, in various incarnations, since the middle of the 19th century. With it, property owners who benefit from a particular infrastructure improvement -from sidewalks to parks to mass transit stations - are required to pay an amount proportional to the benefit resulting from the public work(s) that is financed. Special Assessments Districts are indeed a land value capture mechanism, such as PBZ, but are different in that they extract land value increases resulting from infrastructure and public facilities construction, and not land use changes (as emphasized in this White Paper).

Assessment Districts were used extensively in the early twentieth century and "financed much of the public infrastructure to support urban and suburban development in California and the rest of the country during the nineteen and early twentieth century up to the Great Depression of the 1930s" (Misczynski, 2012, p. 98). Their use declined during the depression and in the post-World War II period. After Proposition 13 was passed in 1978, the use of special assessment districts increased considerably, leading to endless debates about their nature (assessment vs. tax?), several court cases and legislative attempts to both curtail and expand their use, and the passage of the more flexible Mello-Roos Legislation (allowing the costs to be passed onto future homeowners). Finally the passage of Proposition 218 in 1996 raised new requirements, including placing the burden of proof on government to demonstrate that assessments need to be proportional to the special benefits received.

Mass transit, and especially mass transit stations, is one of the numerous public works that special assessments can help finance (Mathur, 2014). Given the importance assigned to the development of Transit Oriented Development in ABAG's Sustainable Communities Strategy, and the need to pay for infrastructure, public facilities and affordable housing in TODs, the use of special assessment districts around transit stations and corridors needs to be employed whenever possible. In California, the California Public Utilities Code, secs33000 et seq. allows the authority to create assessment districts around stations and rail lines.

Probably the most important example of its application is the assessment districts in Los Angeles created in 1985 by the LA County Metropolitan Transportation Authority in downtown and the McArthur Park/Westlake area. It was designed to raise \$130 million to pay for nine percent of the cost of the first segment of the Los Angeles Red Line. Although successful, this was not replicated. Misczynski (cited above) reflects that the lack of replication "may partly reflect the apparent increase in virulence in political opposition to asking anyone to pay anything for public projects." But the attempts at regional planning to produce vibrant "complete communities" near major transit stations – to help implement AB 32 and SB 375 - and other political changes that have occurred in the past few years in California, bode well for a renewed use of special assessments to help finance transit and redevelopment near transit.

## Discussion

This section provides a brief overview of the major value capture mechanisms in California. With the exception of Special Assessment Districts – that recapture some of the land value increases resulting from the building of infrastructure – and possibly incentive zoning, all the others capture value resulting from the development process, not necessarily land values. Incentive zoning is the closest to PBZ, and the two could be easily confused, but there are important differences.

First, when superimposed in an ad-hoc fashion on an existing planning framework incentive zoning can undermine existing regulations, lower the level of services provided by public infrastructure and public facilities and frustrate citizen participation processes (Bucknall 1988; Calavita & Mallach 2009). Second, when applied without adequate economic analysis and policies, it can lead to various inefficiency and fairness problems as was the case in the past in cities such as New York, San Francisco and Santa Monica, to name a few (Kelly 2013).

Third, when the costs to the developer of required community benefits are low compared to expected incentive zoning benefits it can lead to higher land prices. For example, in New York in the 1970s and 1980s, the “anticipation of bonus fed into higher land prices” (Cullingworth and Roger Caves (2003: 118).

Thus, it is probable that incentive zoning does not recapture land values but extracts community benefits from the additional density. It is reasonable then to assume that when the incentive’s value is slighter higher than the cost of the community facilities, the value of the land should not be affected. Additional research would be helpful in establishing under what circumstances a density bonus might be utilized to recapture land values. One way could be to lower the existing base-zoning.

Recapturing land values through public benefit zoning is worth pursuing for two important reasons. First, it can generate more public benefits than incentive zoning. Second, the land value recaptured for public benefits originates from all us -- from the growth of the city, the public goods provided by government, the investment in productive business and public planning and controls. It is only fair that some of the increases in land value be dedicated to the building of the public city.

## How to Assess the Market Potential for Public Benefit Zoning

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What are the prospects of Public Benefit Zoning (PBZ) in the Bay Area at this particular time? To succeed, PBZ works best in a strong, or at least stable, real estate market, making it difficult to implement in many outlying localities. In the central San Francisco Bay Area Region, there are many localities experiencing economic growth and, with it, demand for housing and commercial development. That demand, as we have seen, will be met for the most part in PDAs. It is in these places, then, that PBZ could be applied.



**PUBLIC BENEFIT ZONING  
CAN WORK IN STRONG,  
OR AT LEAST STABLE,  
REAL ESTATE MARKETS”**

Another necessary condition for the successful application of PBZ is that properties in the PDAs have not yet been up-zoned. While land values in PDAs might increase on the basis of the expectation that densities will be allowed to increase, it is at the time of plan change or up-zoning that those values are solidified.

With up-zoning the possible revenues—due to the construction of additional housing units or additional square feet of office space - go up and with them the value of the land and what a developer can pay for it. A system of land value recapture in the form of community benefits and affordable housing will increase development costs and reduce the price the developer can pay for the land, but the higher density of development will still result in reduced, per-unit land costs. If the landowner wants to sell, then he or she will not be able to raise the price of the land as much as would be possible if the density were simply increased without any requirements. While the landowner will not receive the maximum price possible without PBZ, there will still be a sizeable profit (but not as great a windfall profit) due to the public actions of plan changes/up-zoning and transportation improvements. Economists generally agree that, in the long run, the land market will adjust to the additional regulatory costs. In other words, these regulatory costs are likely be borne by landowners, since developers will need to take into account the cost of affordable housing and community benefits when deciding how much to pay for land.

Theoretically, none of this will cost developers more money as long as the requirements are part of the rezoning process or are stipulated when land-use plans are changed. In this way, developers know in advance what the costs are and take them into account when they buy the land. Thus, timing of the implementation of PBZ policies is very important. If there is significant value enhancement, landowners will not be appreciably impacted because the price of the land still goes up, just not as much as it would have if the land had not been subject to public benefit requirements.

## Approaches to the Implementation of Public Benefit Zoning

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There are two typical implementation approaches to Public Benefit Zoning: **(1) Plan-based and (2) Negotiated.**

1) With a plan-based approach, community benefits are tied to specific increases in the intensity of development (or land use changes) for a particular plan area. It is important that these benefits be specified prior to the adoption of the plan. The specific planning processes associated with Priority Development Areas in the nine Bay Area Counties represent an opportunity to adopt plan-based PBZ. In the last few years, the Metropolitan Transportation Commission (MTC) has recognized the importance of planning for these priority areas and has provided funding to local governments to prepare specific plans that establish the framework for higher densities and mixed-use development. Included in this work is the identification of needed improvements to the existing infrastructure and facilities in order to facilitate more intense development in the PDAs. These public improvements would also benefit current residents and businesses in the area by improving neighborhood conditions. At the time of plan adoption or plan change, it is possible to tie community benefits to specific increases in the intensity of development or land use changes. One of the principal advantages of a plan-based approach is certainty for both the landowner/developer and the local jurisdiction. This is also an open process.

As noted earlier, there are two kinds of PDAs—planned and potential. In the planned areas, the planning has already been done. Potential PDAs are still in the planning stage. However, many planned PDAs are planning for a level of development that is not

necessarily feasible right away—especially in the “communities of concern.”<sup>9</sup> Land values have not risen to their maximum potential yet, and are waiting for demand and housing prices to increase further, which means there is still opportunity for PBZ.

A good example of a plan-based approach is that of San Francisco which is based on a tiered fee structure (see page 23). Projects that conform to current zoning (and which do not receive additional height allowances) pay baseline benefits that all developers are required to pay. This is referred to as Tier One. For projects that receive additional height allowances, additional benefits are required by the City. These are referred to as Tier Two and Tier Three benefits, depending on the number of additional stories allowed.

2) Under a negotiated approach, land use changes and increases in density and community benefits are negotiated between the locality and the landowner/developer. These benefits ultimately are specified in a signed development agreement. The advantage of this approach is creativity. For example, benefits to be provided can be tailored to the specific project characteristics. However, there is also some uncertainty about the end result. This approach is more staff-intensive and less transparent and usually applied to large/intense developments. A good example of this is the City of Santa Monica (see page 19). Considerable consultant and staff time is required using a negotiated approach to determine the added value conferred by the up-zoning and to work out the types and levels of community benefits with the affected community.

For smaller tracts of land and when the enhanced value is minor, development agreements might be too cumbersome. An adjudicative discretionary approval such as a conditional use permit process that would tie increased densities to a point system might be desirable. Santa Monica is working now on this and other approaches – including a ministerial entitlement based on compliance determination - as an alternative to development agreements.



### **CAUTIONARY NOTE:**

REGARDLESS OF THE APPROACH CHOSEN TO IMPLEMENT PBZ, LOCALITIES SHOULD ALWAYS KNOW WHAT IS FINANCIALLY AT STAKE AND NEVER ENGAGE IN NEGOTIATIONS OR PREPARE PLANS WITHOUT KNOWING THE COSTS AND BENEFITS OF DEVELOPMENT. MOST IMPORTANTLY, ONCE UPZONINGS HAVE BEEN GRANTED OR LAND USE PLANS CHANGED, THE OPPORTUNITY FOR PBZ DISAPPEARS AND SO DOES THE OPPORTUNITY TO RECAPTURE SOME OF THE INCREASES IN LAND VALUE FOR THE BUILDING OF THE PUBLIC CITY.”

## The Public Benefit Zoning Implementation Process

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In order to implement a PBZ program, several steps are required. These include the following:

- How to determine the increase in land value resulting from plan changes/upzonings.
- How to determine which benefits to require, the “correct” level of benefits, and their potential impact on development financial feasibility.
- How to define options to provide benefits, such as paying fees or dedicating land.
- How to develop administrative procedures to operate a program.

### **1) Determine Additional Value Created by Plan Changes/Up-zoning**

The best way to determine the additional value to land associated with plan changes and up-zoning is the comparison of residual land value analyses of development under existing land use regulations and under proposed land uses/densities. The difference between the existing land value and that resulting from zoning and land uses changes defines value enhancement.

The San Francisco case study on page 19 includes an example of a residual land value analysis that compares current with proposed zoning that was undertaken to assess the viability of PBZ in San Francisco.

### **2) Determine Which Benefits to Require and Impacts on Financial Feasibility**

Community benefits under a PBZ policy are unique because they can reflect community preferences. In comparison, infrastructure and facilities funded by development impact fees are generally defined by public agency staff working in conjunction with public officials and stakeholders. Through community meetings of current residents and businesses, it is possible to develop a list of benefits that are preferred and which can be included in a PBZ program.

Examples of community benefits include affordable housing, open space and parks, child-care facilities, streetscape and pedestrian amenities, and transportation alternatives to the automobile. In San Francisco, all community needs were calculated on the basis of public facilities standards and extensive meetings with the community. Additional benefits could include provision of larger size housing units (e.g., requiring units with three or more bedrooms), funding for local schools, green development, and economic development opportunities. All of these benefits would be in addition to requirements already placed on new development, such as development impact fees, commercial linkage fees, and inclusionary housing requirements. (For a more extensive discussion of Community/Public Benefits see page 15.)

The costs to provide public benefits in a targeted area can be estimated in a fashion similar to estimating costs for a capital improvement plan. First, costs for all improvements are determined. Then, a portion of these costs can be levied on individual projects. The appropriate fee level will, in part, depend on potential financial impacts of the fees (or other options in lieu of paying fees) on development financial feasibility. If the fee is too high, it could lead to a decision not to build or to change the nature of the project. If the developer decides to change the project – for example building luxury condos instead of rentals - it is possible that additional financial analyses will be necessary. The “appropriate” (from a financial standpoint) level of public benefits would be as high as possible while maintaining the financial feasibility of the proposed project.<sup>10</sup>

### 3) Options to Paying Fees

In many cases, landowners/developers prefer to pay fees, since fees provide certainty about the actual costs of complying with a PBZ Program. However, in some cases, it may be more economically advantageous for landowners/developers to meet their obligations through other mechanisms. It is not possible to identify all the creative approaches possible, but two are presented below: Land dedication and partnering (with local government and/or non-profits).

#### *Land Dedication*

In focused growth areas where land prices are likely to increase as development is promoted, affordable housing can be constrained by the high cost of sites. Thus proactively acquiring land to be set aside for affordable housing development will both control costs and ensure a mix of market-rate and affordable housing in these infill areas as they are developed. PBZ can be structured to encourage dedication of privately-held sites by developers in exchange for added value on other development sites through re-zoning and other public actions. In addition, land banking can also be a way to provide land for open space.

#### *Partnering*

Another way that a landowner/developer can provide community benefits, for example in the provision of affordable housing, would be to partner with an affordable housing provider. The landowner/developer provides the land to a nonprofit developer, and in turn, the developer secures affordable housing financing.

### 4) Administrative Procedures

When a jurisdiction adopts a PBZ program, it is necessary to establish administrative procedures to implement the program. These procedures will need to be defined to cover the type(s) of programs to be adopted by a jurisdiction, be it plan based (specific language is adopted in the specific plan or zoning code), adjudicative (if a conditional use permit process is adopted) or legislative (based on a development agreement approach). The principal trade-off in establishing the type of program to be adopted is costs (plan-based approaches are more economical, since less staff time is required) versus flexibility (adjudicative process or developer agreements allow more negotiation, but require more staff and consultant time).

Furthermore, the program must be administered on an ongoing basis after development is completed. Monitoring compliance and assessing results are very important. If funds are collected, but not spent on community benefits in a timely fashion, the residents and businesses that collaborated with the jurisdiction may get discouraged and be less supportive of future civic engagement. A program may sound good on paper, but can only succeed if it is effectively administered. Finally, as is true with any regulatory program, an appeals process needs to be established.

### What Can Be Done When Market Conditions Make Public Benefit Zoning Unfeasible?

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As mentioned above, not all submarkets in the San Francisco Bay Area (1) Have recovered market strength or (2) Experience market demand for high density housing. For those submarkets, there are several options to consider:

- (1) First, it is always possible to wait for the real estate market to pick up before adopting PBZ. However, by the time the market has recovered, land prices may already have increased, reflecting greater market demand. In other words, it could be too late to establish a financially feasible public benefits program.
- (2) Alternatively, a jurisdiction can establish the community benefit levels at the time of plan changes or up-zoning, and wait for the market to improve. Then, when new development becomes feasible these benefits will be required. Through the use of a residual land value analysis, it is possible to define a trigger point or trigger points when community benefits are to be provided.<sup>11</sup> The advantage of this approach is to provide certainty to the developer, landowner, and the community as to when the recapture associated with an up-zoning will be implemented. One of the limitations of this approach is that if the actual dollar amount of the benefits is determined much earlier than when landowners/developers will need to pay for them, the revenues to be received may not cover the full benefit costs due to incorrect estimates of inflation, rising construction costs, or other factors.
- (3) Adopt the requirements, but phase them in over an extended period of time. This approach has the advantage of encouraging early development before new requirements kick in, and if successful, that development in turn could start to stimulate additional projects at a level that supports PBZ.



- (4) Allow landowners/developers a choice between paying the exactions up front or over a reasonable period during which time the market is likely to improve.
- (5) In large developments, phase-in the provision of community benefits. New master planned developments require considerable investment initially and may require several years before profits are realized. If benefits are phased in as development stages are completed, it can be a win-win situation for both the community and the developer. The developer will have greater cash flow to assist in paying for benefits, and therefore, the community can request a higher level of benefits. It is important to understand that realization of both the increases in land value and the community benefits will come later, when enough development to fund the community benefits actually occurs.

## Legal Aspects of Public Benefit Zoning

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With PBZ, community benefits are gained by a locality in exchange for upzonings and plan changes that increase the value of the land. Is it legal? The answer depends on the type of community benefits and how they are required.

Under current state and federal constitutional law, if the requirement is a fee or a dedication of land (including an easement granting a right of access) and is imposed on an ad hoc basis during negotiations over development approval, a proportional nexus to the impact of the development must be established. And, under California’s Mitigation Fee Act, a development impact fee even if generally required for all developments by local law (such as a development impact fee ordinance) also requires the community to establish a proportional nexus. But if the requirement is something else—like Inclusionary Housing or a childcare facility—the relationship shown may only need to be a simple, reasonable relationship between the requirement and the purpose of the requirement. The application of this reasonable relationship test to Inclusionary Housing, however, is currently under review by the State of California Supreme Court in the *California Building Industry Association v. City of San Jose* case.

The courts consider a fee or dedication required as part of the negotiation of the approval of an individual development as having great potential for inappropriate leveraging of conditions by local government. Requiring the proportional nexus guards against this in the view of the courts. Conditions imposed as part of local legislation that apply equally to all developers do not carry the same potential for abuse because they are enacted through the local legislative public process. However, any condition that is imposed legislatively for the purpose of mitigating a development impact must have a nexus to the impact. Consequently, the proportional nexus requirement may apply to a fee or other requirements imposed to mitigate an impact of the development.

If fees are required as part of PBZ—as is the situation for the Eastern Neighborhoods PBZ in San Francisco—then a proportional nexus needs to be established. But, as stated before in this White Paper, the community benefits gained through PBZ should be in addition to those obtained through existing Development Impact Fees, Inclusionary Zoning In-Lieu Fees, or Commercial Linkage Fees. It might be difficult, however, to establish a nexus between additional density and higher fee requirements. But such an analysis would not be necessary in most cases because in most jurisdictions, Development Impact Fee requirements are not set at the maximum that would be legally justifiable. PBZ fees, then, while “additional,” can generally be set within the limits already established under the nexus analysis as the following section explains.

### 1) Development Impact Fees, Commercial and Residential Linkage Fees, Nexus Analyses and Public Benefit Zoning

Development Impact Fees (DIFs) are fees paid by developers to offset the infrastructure and public facilities needs generated by new development. Rare are the localities that charge Development Impact Fees at levels that would mitigate all the costs of growth associated with new projects. In fact, many cities—generally those not experiencing high rates of growth or located in rural areas—do not charge fees at all. Where imposed, impact fees usually represent a fraction of what is legally justifiable. This underpaying is related to the fear that imposing the full costs of growth would discourage development and, in some localities, the political strength of developers in the local decision making process.

This is also true in the case of Commercial Linkage Fees. In the majority of cities with these fees, the fee level chosen by decision makers is usually much lower than what would be legally justifiable, as determined through an analysis of the nexus between lower paying jobs generated by commercial development and the need for affordable housing. Similarly, as many cities have recently chosen to conduct residential nexus analyses to justify fees charged in-lieu of provision of inclusionary housing, it is also true that the housing mitigation fees are generally set at levels lower than would be legally justifiable.

The Eastern Neighborhoods case study in San Francisco (see page 19) is a good example of a city that prepared a nexus study. San Francisco conducted a Citywide Housing Nexus study in 2006. This Study set the upper limits of what can be required through an inclusionary program. San Francisco also prepared a standard-based/quantitative analysis and conducted community meetings to assess the need for community facilities. Based on those studies, the City took the following steps:

- Determined the highest fee level possible.
- Conducted market analyses which concluded that charging those fees would discourage development.
- Determined basic fee levels that were below the maximum allowable and which did not interfere with financial feasibility of new projects.
- Established additional fees, beyond the basic level, but still within the maximum justifiable amount. These additional fees are charged on developments that exceed the basic tier system. Thus, developments that apply for additional height pay additional fees, without requiring the City to conduct a new nexus study.

This approach assumes that the higher level of fees associated with PBZ (which add to development costs) would be offset by a lower land price. Since developers would need to pay the fees, they would not offer as high a price for the land. Therefore, the landowners would receive a lower price for the land than they would otherwise, given higher allowable densities. This process offsets the costs of paying higher fees, while at the same time, it is not likely to discourage development.

In the situation in which a city is already exacting Development Impact Fees that are close to the legal limits established through a nexus analysis, it would be necessary to make the case that higher density generates “additional” burdens making it necessary to require

applicants to pay additional fees to mitigate projects impacts. This is possibly the case in Santa Monica where, when a developer chooses to exceed densities from Tier 1 up to Tier 2, he or she will be required to provide additional community benefits in the following categories: Affordable and Workforce Housing, Trip Reduction and Traffic Management, Community Physical Improvements, and Social and Cultural Facilities. The quantity (additional fees or affordable housing units) of these community benefits will be defined in 2014 as part of the Santa Monica Zoning Update, and presumably will be based on an updated nexus analysis.

As mentioned above, however, localities that charge close to full development costs as Santa Monica does are extremely rare, and the approach taken by San Francisco in the Eastern Neighborhoods would be appropriate in the great majority of cases.



**WITH PBZ COMMUNITY BENEFITS ARE USUALLY IN ADDITION TO DEVELOPMENT IMPACT FEES AND CAN GENERALLY BE SET WITHIN THE LIMITS ALREADY ESTABLISHED UNDER THE PROPORTIONAL NEXUS ANALYSIS OF THE 1) IMPACT OF A DEVELOPMENT AND 2) REQUIREMENTS SUCH AS FEES.”**

## 2) Development Agreements

Development agreements are a contract between a locality and a developer. Based on negotiation and bargaining, they provide certainty and flexibility for both. The problem is that they can be quite expensive for the city (and the developer), both in terms of time and resources. From a PBZ process perspective, the possible benefits are substantial. If conducted correctly on the basis of economic analyses agreed upon by both parties, they have the potential to generate the highest level of community benefits economically possible. In Vancouver, where a negotiation-based approach has been in place for quite sometime, apparently the City is able to recapture approximately 80 percent of what in Vancouver is called the “lift,” or the increase in land value resulting from upzonings.

Santa Monica (see page 28) has used and will continue to use development agreements for larger projects (Tier 3). One of the problems usually associated with development



*Jack Capon Villa, Alameda, SAHA/HCEB. Photo Courtesy Keith Baker photography.*

agreements is that they can limit transparency and accountability. Santa Monica, however, has demonstrated that these problems can be easily overcome with an open process and intensive citizen participation and involvement. Most importantly, with this approach, PBZ is perfectly legal and, from an Inclusionary Housing perspective, rental inclusionary units can be part of a development agreement. This is important because with the Palmer case the court declared rental inclusionary units illegal. However, if the development agreement requirements entail fees or provision of public facilities, required benefit levels would need to be justified by a nexus study.

## Potential Community Benefits

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There are many community benefits that can be funded through land value recapture. Affordable housing is one of the most critical benefits, but others, such as public open space and public facilities, are also important.

### 1) Affordable Housing

These are hard times for affordable housing in California. Increasing numbers of California's residents face greater poverty, instability, and homelessness, yet there are fewer resources to provide affordable housing. We are experiencing a period of time in which wages/incomes are stagnating while housing prices have continued to rise in many market areas. The demise of redevelopment agencies in February 2012 eliminated what was probably the largest and most consistent local source of funding for affordable housing.<sup>12</sup> Combined with the depletion of hundreds of millions of dollars in voter approved bonds of affordable housing development funding from Proposition 1 C (passed in 2006 and already expended) and major cuts to federal funding programs such as the Section 202 Program for seniors and reductions in the Housing Voucher Program, we have lost billions for affordable housing construction and preservation annually in California.



*Harrison Street Senior Homes, Oakland, Christian Church Homes and Oakland Housing Authority. Photo Courtesy PYATOK.*

But the crisis is much more than a loss of financing. Over the years an extensive network of nonprofit affordable housing developers has evolved that has become increasingly sophisticated in the intricate and demanding affordable housing development process. With the loss of financing, this network will be weakened, losing irreplaceable expertise that has taken decades to build. Also, an interruption or reduction in the development pipeline would reduce the flow of developer fees to nonprofits. These fees, available only when new projects are financed, support operations, including asset and property management. The crisis has prompted calls for new, strategic, innovative approaches to finance affordable housing. Public Benefit Zoning is one of these.

One important approach to achieve public benefit zoning is to enhance a community's existing inclusionary housing program by requiring a higher percentage of inclusionary units than under the existing system without significant additional costs to the developer. In jurisdictions that already have inclusionary housing policies in place, this new approach could redefine inclusionary housing as a two-tiered process.

- The first tier would not change the inclusionary housing requirements required under the existing zoning framework. Thus, if a developer does not receive additional density or a land use change, the existing inclusionary housing policy would still apply.
- The second and higher tier(s) of inclusionary zoning would be in addition to the current requirement and would be associated with substantive plan changes or up-zonings of either specific parcels or larger areas. This can be accomplished without significant additional costs to the developer.

Similarly, Commercial Linkage Fees and Housing Impact Fees could be based on a two-tiered approach. The first tier would apply to existing zoning, and the second tier would be associated with plan changes/re-zonings. Since a majority of jurisdictions with commercial linkage fees and housing impact fees have adopted fees at levels lower than justified by nexus studies, this approach should not require new nexus studies and would still be defensible.

## 2) Additional Community Benefits

New development generates a need for new facilities. To meet that need, developers pay development impact fees that are reasonably related to the impacts created by new development. As in the case of traditional inclusionary housing, the development impact fees are not associated with a re-zoning, but generally paid at the time of approval of a subdivision plan, the issuance of building permits, or, in some cases, at the time of issuance of a certificate of occupancy or final completion. These fees generally only partially cover the need for new facilities. This is particularly the case where jurisdictions are concerned about discouraging development.

The result is a tremendous variety of fee levels and types of fees, with many localities charging much less than what is necessary to maintain adequate facility and infrastructure standards in the face of growth. It should be remembered that impact fees need to be reasonably related to the need created by the new development. Ironically, while state law requires that development impact fees be related and proportional to the need for public facilities, there is no state law or agency that addresses the issue of the inadequacy of the development impact fees to fund needed improvements.

Community benefits obtained through LVR, then, represent a creative opportunity to make sure that additional development and increased densities contribute to, not detract, from the community. This becomes imperative in the case of infill and densification. "No densities without amenities" could be the cry of neighborhoods impacted by densification and infill. A PBZ system could go a long way toward providing at least a portion of the necessary funding.

Community benefits obtained through LVR then, are in addition to the ones obtained through existing exactions.

# CASE STUDIES

One of the best ways to understand how PBZ actually works is to study those cities which have already adopted a PBZ strategy. Information on four cities is presented here. San Francisco and Santa Monica are presented first, since these cities developed the most elaborate planning process for PBZ. Culver City is presented next. The City of Berkeley is presented at the end. Also, see Schildt (2012) for brief descriptions of San Diego and Palo Alto. These case studies indicate that there are many ways that cities have defined their policies. So far, there is no example of a PBZ policy adopted by a suburban city transitioning to denser development.

## 1) San Francisco, California (Eastern Neighborhoods)

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It could be argued that Land Value Recapture in the United States was invented in San Francisco in the early part of this century. It came about as a result of the conflicts that arose from the dot.com boom of the late twentieth century, as certain areas east of Market Street – primarily the mostly Latino Mission District - experienced rapid increases in real estate values, gentrification, and displacement of families and businesses. This process was aided by city policies that exempted “live-work” spaces in warehouses and industrial structures from processing and fee requirements.

The story of that struggle has been told elsewhere and will not be repeated here (Fishman, 2006; Marti et. al., 2009, and Cohen & Marti, 2012). In this case study we will briefly explain how PBZ in San Francisco was an outcome of, and shaped by, those conflicts.

### **Public-Benefit Incentive Zoning**

The coalition that formed to fight the changes occurring in their neighborhoods (the Mission Anti-Displacement Coalition - MAC) decided when the city initiated a planning process for those areas, that they would create their own plan, called the People’s Plan for Jobs, Housing, and Community. Instead of reacting to the City’s plans, the neighborhoods decided to establish first “what they wanted” and then “how to get it.”

As part of the People’s Plan preparation, the leaders of MAC came up with the idea of PBZ. They called it “Public Benefit Incentive Zoning” (PBIZ). They argued that increases in density create “greater value for property owners and sales or rental value for developers,” and that PBIZ, could create “a mechanism to capture a portion of this increased land value in the form of Public Benefits that would mitigate the impact of the additional development.” A menu of Public Benefits was included, with affordable housing on top of the list. Additionally, the plan called for

# Eastern Neighborhoods PLAN AREA



SAN FRANCISCO PLANNING DEPARTMENT | APRIL 2008



**The People's Plan  
for Jobs, Housing, and Community**

**The Mission Anti-Displacement Partnership**

**North East Mission Industrial Zone  
Rezoning Goals and Land Use Designations**

DRAFT – Revised 3-22-2005

“a study analyzing the economic benefit conferred to the land as a result of the Mission District rezoning...in order to ascertain the financial feasibility of absorbing the exaction while maintaining an incentive for development” (MAP - The Mission Anti-Displacement Partnership, (33: 2005).

In two pages, the leaders of MAC had set up the rationale for utilizing PBZ to obtain public benefits through the planning process. While it is impressive that community activists could create such a sophisticated proposal for PBZ, it must be remembered that the planning culture and political environment in San Francisco is imbued with the principle that growth should pay for the costs it generates. This policy dates back to commercial linkage fees that were established in San Francisco in the early 1980's as a result of the surge of

office developments that were changing the face of downtown San Francisco. Opponents of the “Manhattanization” of San Francisco and affordable housing advocates found inspiration in the idea of “mitigation” that is an integral part of the California Environmental Quality Act, i.e. that the adverse environmental impact associated with development should be anticipated and mitigated. One adverse impact was that office development job growth resulted in an increased need for affordable housing. The mitigation to this impact were the office linkage fees established in San Francisco in 1985, requiring large office developments to contribute to an affordable housing trust fund that would help finance affordable housing. San Francisco was the first city in the country to adopt these fees.

In 2001, this program was re-named the Jobs-Housing Linkage Program (JHLP) and was revised to require all commercial projects with a net addition of 25,000 gross square feet or more to contribute to the fund. The linkage fees were extended to other commercial uses in 2001. In addition to the linkage fee for jobs and housing, San Francisco currently imposes development impact fees for transit and parks, in-lieu fees for child care facilities and inclusionary housing, and a capacity charge for wastewater treatment.

The idea of PBIZ was at first rejected by the City as anti-development in 2004. In the meantime, the planning department had begun a planning process for an area that included not only the Mission, but also Potrero Hill/Showplace Square, the eastern portion of South of Market and Central Waterfront – the so-called “Eastern Neighborhoods” (ENs). With the planners in charge of the planning process sympathetic to the goals of the MAC, the principle of LVR was eventually embraced by the City. The question remained as to how this recapture would work. The following sections present the process that was followed.

**Needs Assessment**

The first step consisted of assessing the existing and future needs in the ENs. This process would lead to the establishment of a “package” of public benefits. A needs analysis was performed consisting of two approaches. The first was an assessment of current and future needs for some key services and amenities completed by a consultant and based on a land-use scenario prepared by the Planning Department in 2003. A draft of the findings was published in September 2006, and the final consultant report was completed in May 2008. (Seifel Consulting Inc, 2008).



This standard-based/quantitative analysis produced a list of services/amenities that would be needed in the future that included, among others, recreational facilities, public health and human services centers, transportation and transit services and affordable housing. It also included projections for maintenance and operating expenses for parks and recreational facilities. The need for affordable housing was based on ABAG estimates that 64 percent of new housing production in San Francisco needed to be affordable. Within the Eastern Neighborhoods, this translated to 1,901 units affordable to very low-income households, 771 to low-income households and 2,044 to moderate-income households, for a total of 4,716 affordable units, over half of the 7,385 anticipated units.

The second approach was based on a series of meetings with the community. This so-called “Qualitative Analysis” incorporated the community feedback from numerous workshops that took place from September 2006 to March 2007 in various areas of the ENs.

As a result of these needs assessments, two major areas of concern were identified. First was the need for affordable housing in neighborhoods that traditionally had housed people working in the service and manufacturing industries in the ENs. Second was the need to fill the gap in the existing infrastructure and public facilities, and meet the needs generated by new development. The cost of the public benefits was calculated to be approximately \$300 million.

## The Plan

The existing land uses in the Eastern Neighborhoods included for the most part underutilized industrial areas that became very appealing to speculators during the dot.com boom. Because of inadequate land use controls at the time, these developers could turn industrial buildings into “live-work” units, (but actually live-only spaces in the great majority of cases), with a simple conditional use permit, without paying development impact fees. This was potentially very profitable for developers who bought the land at lower, industrial prices, and eventually for landowners because it effectively converted industrial land into more valuable residential land that could command higher prices. The Plan’s main task was to identify the areas that could be changed from these “grey” areas (industrial but easily changeable to residential) to mixed use/residential, and those areas where industrial uses, mainly Production, Distribution and Repair uses (PDR) would remain. Much of the discussion was centered on the determination of how much of San Francisco’s remaining industrial lands should be transitioned to other



*Potrero Launch, San Francisco. Twenty percent of the 196 loft units are affordable to households making between 30 and 50 percent of the Area Median Income. The higher affordability levels were in part the result of the zoning change from industrial to mixed-use which, under the EN plan, called for higher inclusionary housing requirements. Photo courtesy Nico Calavita.*

uses, especially needed residential uses. PDR uses were maintained in the more traditional industrial zones. Also, while allowing density increases in all the ENs, the Plan allowed significant higher densities/height only in areas to the North of the ENs, close to Rincon Hill and the Central Business District.

## Baseline and Bonus/Upzoning Fees

In addition to increases in density

in all Eastern Neighborhoods, the Plan provided additional benefits to land owners and developers, including height increases, removal of conditional use permits for residential uses in all areas—except for PDR preservation districts—and changes in land-use designations from industrial in some areas to residential uses. The Eastern Neighborhoods Plan offered the ability to reduce the need for additional environmental studies by tiering off the EN Plan EIR.

These changes would generally increase the value of land covered by these provisions, since less expensive industrial land is converted to more valuable residential land, which presently is in high demand in San Francisco. In order to learn more about how much these changes enhanced land values, the City hired a consultant to prepare a residual land value analysis to estimate the enhanced value from these upzonings and land use changes. (An example of this residual land value analysis is presented at the end of this section.) It was based on a representative subset of nine prototypes combining different densities/heights and

“  
THE EASTERN  
NEIGHBORHOODS PLAN  
IN SAN FRANCISCO IS A  
GOOD EXAMPLE OF THE  
PLAN-BASED APPROACH”

# Table A-1

FEE SCHEDULE FOR EASTERN NEIGHBORHOODS PLAN AREAS <sup>(1)</sup>

Tier	Description	Residential	Commercial
1	Projects that remain at current height. Projects under increased housing requirements (UMU), Affordable housing or other “protected” development types.	\$8/gsf	\$16/gsf
2	Projects rezoned with minimal (1-2 story) increase in height.	\$12/gsf	\$20/gsf
3	Projects rezoned with significant (3 or more) increase in height; other designated districts.	\$16/gsf	\$24/gsf

(1) It should be noted that all fees are based on net addition of gross square feet (gsf) of any use type.  
Source: City of San Francisco: Materials for Eastern Neighborhoods Area Plans Initiation Hearings, April 17, 2008.

lot sizes. The analysis showed that “residual land values and profitability are generally higher under proposed zonings and requirements than under current zoning,” even though “value increases are offset to some extent by higher development costs associated with taller, denser development types” (Seifel Consulting Inc. 2008b). The question remained as to how, and how much of, this value could be recaptured for public benefits.

The City had two choices: (1) to recapture land values through individual project “deals,” utilizing development agreements or similar instruments or, (2) to establish a priori the level of public benefit to be expected, proportional to the benefit received, exercised through a system of fees. The City chose the second option - what we have labeled the “plan-based” approach. With this approach, the City “aimed to state clearly up front what benefit contributions will be, based on a proxy of benefit gained. The development community gains certainty about what will be required to contribute, and the neighborhood gains certainty about what improvements can be expected” (Seifel Consulting Inc. 2008b). The plan-based approach was especially attractive in a city like San Francisco, where the development process is perceived to be extremely politicized with deals conducted behind closed doors.

The bonus/upzoning fee was only one source of funding for the package of community benefits that had been identified through the needs analyses. Additional revenue sources identified to pay for benefits included the following:

- Baseline Impact Fees
- Assessment Districts
- Regional and State Funding
- General Fund
- Tax Increment<sup>13</sup>
- Grants & Bonds

Baseline impact fees are the fees that can legally be imposed on new development for the needs it creates for capital facilities such as libraries, transportation, recreation and parks and child care facilities. In addition, new development is subject to citywide exactions such as the Citywide Transit Impact Development Fees and the School Impact Fee. In May 2008 a consultant report was released that provided information on the maximum amount that could be charged. Similarly, a citywide housing nexus study prepared in 2006 established the maximum amount that could be required for affordable housing.

### *The Solution: A Tiered Program of Combined Fees and Housing Options*

#### Tiered Approach

To reflect the relationship between higher densities and increased value for land and development, the City established a “Tier” approach to baseline fees and public benefit fees. (See Table 1 Above.)

## Table A-2

### HOUSING REQUIREMENTS FOR THE UMU DISTRICT 12

Tier	Description	On-Site Housing Requirement	Off-Site/ In-Lieu Requirement	Middle Income Alternative	Land Dedication Alternative
A	Projects that remain at current height.	18%	23%	40%	35%
B	Projects in the UMU rezoned with minimal (1-2 story) increase in height.	20%	25%	50%	40%
C	Projects in the UMU rezoned with significant (3 or more) increase in height; other designated districts.	22%	27%	60%	50%

Source: City of San Francisco: Materials for Eastern Neighborhoods Area Plans Initiation Hearings, April 17, 2008 (page 21)

Baseline impact fees are paid by projects that remain at current height (Tier 1), because there is no increment in value resulting directly from governmental action, although values may have increased as housing demand and prices have spiked.

In existing mixed-use areas, a second and third tier of impact fees are triggered where the Plan grants additional heights – specifically, Tier 2 applies to an increase of one to two stories, and Tier 3 applies when three or more stories are permitted. The fees for Tiers 2 and 3 constitute baseline fees plus additional public benefit zoning fees. Exempted from the fees were the following:

- (A) The residential portion of all 100% affordable housing projects, because they already provide affordable housing;
- (B) The residential portion of all projects within the Urban Mixed Use (UMU) district to encourage more mixed use development, and
- (C) All changes of use within existing structures to encourage rehabilitation activity.

The baseline impact fees were set at 85% to 95% of the full costs attributable to new development, to make sure that the fees did not exceed reasonable costs, and to make them “generally feasible under current market conditions.” In reference to the public benefit zoning fees, the EN Implementation document reiterated that the rezonings which allow greater height increase “see a significant increase

#### Notes to Table A-3 See Next Page

(Table A-3)

- a. Ground floor contains parking, entryway/lobby space, and potential neighborhood retail space in the remaining square footage. No costs or revenues are assumed for the ground floor other than those related to parking.
- b. Standard average unit size is 925 sf per recent development proposals. Average unit size increases up to 1,200 sf when density restrictions limit unit count under current zoning
- c. Unit per floor estimates are based on gross unit square footage and estimated floor area; estimates round up when unit calculations are within 0.25 of the next full unit.
- d. Maximum units under current zoning are constrained by density controls rather than building envelope limits.
- e. Onsite Below Market Rate (BMR) units equal 15% of total units, rounded to the nearest whole number.
- f. Parking ratio under current zoning is 1:1 for all units. Parking ratio under proposed zoning reflects 1:1 for 2+ bedroom units (40%) and .75:1 for 0-1 bedroom units (60%).
- g. Market rate sales prices and building costs based on Citywide Inclusionary/KMA building prototypes, adjusted to reflect current market conditions and variations in unit sizes.
- h. Market price of units without a parking space assumed to be \$50,000 less than units with parking. Average market price adjusted in proportion to the building’s parking ratio.
- i. BMR prices based on MOH 2008 sales prices and building unit mix. Actual BMR price adjusted according to MOH unbundled parking policy.
- j. In-Lieu fee \$0, as development is meeting housing requirements with onsite production.
- k. EN Impact Fee to be charged under proposed zoning only. Proposed fee amount is \$8 per gross residential square foot, or \$10 per net residential square foot with 80% efficiency.
- l. Return on net sales targets based on Citywide Inclusionary/KMA building prototypes.

Table A-3

RESIDUAL LAND VALUE  
TIER 1, EXISTING RESIDENTIAL/COMMERCIAL ZONES, ONSITE IH SAN FRANCISCO EASTERN NEIGHBORHOODS

	Current Zoning NC	Proposed Zoning NCT	Difference
<b>Site Area and Zoning</b>			
Lot Size	20,000 Square Feet	20,000 Square Feet	
Lot Acreage	0.46 Acres	0.46 Acres	
Ground Floor Lot Coverage <sup>a</sup>	100%	100%	
Maximum Residential Lot Coverage (Above Ground Floor)	75%	75%	
Maximum Residential Density	600 Lot Sq. Ft. per Unit	N/A	<b>Density Increase</b>
<b>Development Program</b>			
Description	Low Rise Podium	Low Rise Podium	
Maximum Height	50 Feet	55 Feet	<b>5 Feet</b>
Maximum Total Floors	5 Floors	5 Floors	<b>0 Floors</b>
Building Efficiency	80%	80%	
<b>Residential</b>			
Average Unit Size <sup>b</sup>	1,200 Square Feet	925 Square Feet	
Units per Floor <sup>c</sup>	10 Units	13 Units	
Maximum Units <sup>d</sup>	33 Units	52 Units	<b>19 Units</b>
Unit Mix			
	80% 2 BR	30% 2 BR	
	20% 3 BR	10% 3 BR	
Number of Market Rate Units	28 Units	44 Units	<b>16 Units</b>
Number of BMR Units <sup>e</sup>	5 Units	8 Units	<b>3 Units</b>
<b>Parking</b>			
Average Parking Ratio <sup>f</sup>	1 Space per Unit	0.85 Space per Unit	
<b>Revenue</b>			
Market Rate Sales Price <sup>g</sup>	\$717 Per Net Square Foot	\$754 Per Net Square Foot	
Average MR Sales Price Adjusted for Parking <sup>h</sup>	\$859,891 Per MR Unit	\$697,718 Per MR Unit	
Base Price of BMR Units <sup>i</sup>	\$859,891 Per MR Unit	\$690,987 Per MR Unit	
Base Price of BMR Units <sup>i</sup>	\$242,771 Per BMR Unit	\$223,134 Per BMR Unit	
Sales Expense	4.0%	4.0%	
<b>Sales Net of Sales Expense</b>	<b>\$24,413,318</b>	<b>\$31,086,739</b>	<b>\$6,673,421</b>
	<b>\$739,798 Per Unit</b>	<b>\$597,822 Per Unit</b>	
	<b>\$616 Per NSF</b>	<b>\$646 Per NSF</b>	
<b>Building Costs<sup>j</sup></b>			
Hard Construction (incl. parking)	\$276 Per NSF	\$289 Per NSF	
Governmental Fees	\$8 Per NSF	\$19 Per NSF	
Permits and Processing Charges	\$6,000 Per Unit	\$6,000 Per Unit	
Additional 2007 Water and Sewer Impact Fees	\$508 Per Unit	\$508 Per Unit	
Inclusionary Housing In-Lieu Fee <sup>k</sup>	\$0 Per Unit	\$0 Per Unit	
School Impact Fee	\$2.24 Per NSF	\$2.24 Per NSF	
Eastern Neighborhoods Impact Fee <sup>l</sup>	\$0 Per NSF	\$10.00 Per NSF	<b>\$10 Per NSF</b>
Other Soft Costs	\$100 Per NSF	\$100 Per NSF	
Construction Financing	\$28 Per NSF	\$28 Per NSF	
<b>Total Building Costs</b>	<b>\$16,295,730</b>	<b>\$20,941,517</b>	<b>\$4,645,787</b>
	<b>\$493,810 Per Unit</b>	<b>\$402,721 Per Unit</b>	
	<b>\$412 Per NSF</b>	<b>\$435 Per NSF</b>	
<b>Residual Land Value</b>			
Return on Net Sales <sup>l</sup>	15.4%	15.4%	
Developer Margin	\$ 3,759,651	\$ 4,787,358	<b>\$1,027,707</b>
	\$113,929 Per Unit	\$92,065 Per Unit	
<b>Land Value</b>			
Per Unit	\$132,059 Per Unit	\$103,036 Per Unit	-\$29,023 Per Unit
Per Net Residential Square Foot	\$110 Per NRSF	\$111 Per NRSF	\$1 Per NRSF
Per Gross Residential Square Foot	\$88 Per GRSF	\$89 Per GRSF	\$1 Per GRSF
Per Lot Square Foot	\$218 Per LSF	\$268 Per LSF	\$50 Per LSF
Per Acre of Land	\$9,491,587 Per Acre	\$11,669,429 Per Acre	\$2,177,842 Per Acre
Representative Site Land Value	\$4,357,937	\$5,357,865	\$999,928
Site value increase as a percent of current zoning base			22.9%

Source: Eastern Neighborhoods Impact Fee and Affordable Housing Analysis, Prepared by Seifel Consulting for the City of San Francisco (May 22, 2008).

in land value ... resulting in a more profitable project, which is therefore able to pay closer to its full of impact” (City of San Francisco Planning Department, Planning Commission, June 2008).

### Increased Inclusionary Housing Requirements

To fulfill the goal of increased affordable housing production in the ENs, the Plan also requires that in areas rezoned from industrial to mixed, mostly residential uses (UMU), more affordable housing be produced than is required under the City’s inclusionary program. Within these zones, the Plan provides greater flexibility in the way affordable housing requirements can be met so that higher percentages of affordability are actually achievable (see Table 2 page 24). Thus, properties that are rezoned from industrial to mixed land uses are responsible to meet inclusionary housing requirements as well as pay fees under the City’s Program.

### Example of a Residual Land Value Analysis

Table 3 (at right) provides an example of a residual land value analysis that can be used to estimate the value enhancement from proposed zoning. The table is taken from a memorandum prepared for the San Francisco Planning Department by Seifel Consulting Inc. in May 2008: “Eastern Neighborhoods Impact Fee and Affordable Housing Analysis.” The table is one of the tables prepared as part of the financial analyses performed on typical sites in the Eastern Neighborhoods under different heights assumptions. This analysis provided the basis for the decision making process that led to the fee schedule in the Eastern Neighborhoods.

### Implementation

The base public benefit fee of \$8 for residential gsf and \$16 for commercial gsf are dedicated to fund capital infrastructure (open space and recreational facilities, transit, streetscape and public realm improvements). Fees above that base level are also intended for infrastructure funding, but a small percentage of those funds can also be dedicated to community facilities, such as child care and library materials.

To help implement the Plan, the Eastern Neighborhoods Citizen’s Advisory Committee (EN CAC) was established by the City. According to the City’s website - “The EN CAC is the community advisory body charged with providing input to City agencies and decision makers with regard to all activities related to implementation of the Eastern Neighborhoods Area Plans. The CAC is established for the purposes of providing input on the prioritization of

Public Benefits, updating the Public Benefits program, relaying information to community members in each of the four neighborhoods regarding the status of development proposals in the Eastern Neighborhoods, and providing input to plan area monitoring efforts as appropriate.” The CAC’s recommendations are coordinated with the Interagency Planning and Implementation Committee and the Capital Program Committee.

Given the real estate decline that began at the same time the EN Plan was approved, the amount of fees collected thus far has been rather small, generating frustration among CAC members. Additionally, to encourage development, the City established a fee deferral process. However, as of early 2014, market activity has picked up considerably, and developments are now paying Public Benefit fees.

One drawback of this plan, with its emphasis on certainty and legal care, is that there may not be quick responses to changing real estate market conditions. Whereas fees were deferred during a period when the market was slow, they cannot be increased quickly when the market has recovered. Land values are increasing sharply, in spite of the Public Benefits requirements. It is likely that fees could be increased beyond the adopted fee schedule at this time, while maintaining financial feasibility of new projects.



1318 2nd Street in Santa Monica is a mixed use Tier 2 development that was allowed to add additional height in exchange for affordable housing. Rendering Courtesy David Forbes Hibbert, AIA Architects

## 2) Santa Monica, California

Santa Monica has a long-standing tradition of achieving community benefits through development agreements, including parks and park improvements, community health access, and child care centers with subsidies for low-income families.

In 2010, after many years of extensive community engagement, the City adopted the Land Use and Circulation Element (LUCE). The fundamental goal that guided the LUCE process was that additional development and increased densities must contribute to, not detract from, the quality of life in the community. The requirement for new development to provide City-negotiated community benefits stems from this goal. As stated in a City document—“The LUCE ties together land use, market economics and social aspects of the community by requiring that future



**AN ESSENTIAL STEP IN THE NEGOTIATION PROCESS BETWEEN THE CITY AND DEVELOPERS/LAND OWNERS IS THE ESTABLISHMENT OF THE “ENHANCED VALUE” OF THE LAND CREATED BY GREATER HEIGHT AND FAR**

development funds a range of measurable public benefits, from open spaces and parks to affordable housing.”<sup>14</sup>

As part of the LUCE preparation, preliminary economic analyses that evaluated the extent of enhanced land value resulting from higher densities were performed. These analyses indicated that projects that would provide community benefits under LUCE were able to achieve financial feasibility (Keyser Marston Associates, 2010).

LUCE established a community benefits tier structure with



Santa Monica's LUCE Activity Centers

projects requesting an increase in the base height of 32 feet to undergo a discretionary review process. There are three tiers.

- Tier 1 establishes the base height and FAR. No community benefits in addition to the existing ones are required and the approval process is ministerial. Three to seven extra feet are allowed if affordable housing is provided on-site or close to transit corridors.
- Tier 2 allows additional height and FAR when community benefits are provided.
- With Tier 3 even more height and FAR are allowed in exchange for higher levels of community benefits. It is when developers seek tier 3 density increases that development agreements are required. This process requires additional public review and flexibility that, through greater discretion, encourages high-quality projects. Tier 3 projects are larger in scale and development agreements provide developers with a greater degree of entitlement certainty.

### How Do Tiers 2 and 3 Actually Work?

The level of amenities for Tiers 2 and 3 is decided through negotiations at the project level and is based on a financial benefits assessment.

- The first step in the negotiation process is to establish, through economic analyses, the “enhanced value” created by greater height and FAR as well as proformas that identify the “internal rate of return.” Consultants employed by the developer prepare this

analysis that is then reviewed by consultants to the City in a give-and-take process referred to as a peer-review process, that ends when both consultants agree on the soundness of the analysis.

- The second step involves determining the types and levels of community benefits. It should be remembered that there are already “project benefits” requirements in the Municipal Code that are the subject of impact fees or contributions and include the following:<sup>15</sup>

1. Affordable Housing Production Program
2. Childcare Linkage Program
3. Developer Cultural Arts Contribution
4. Parks and Recreation Facilities Tax



**INTERNAL RATE OF RETURN COMPARES THE PRESENT VALUE OF THE EXPECTED FUTURE CASH FLOWS TO THE INITIAL CAPITAL INVESTED. IT IS ONLY ONE WAY TO ANALYZE THE VALUE OF THE INVESTMENT.”**

5. Parks and Housing Fee
6. Transportation Management Ordinance
7. Transportation Impact Fee (to be adopted)

The additional LUCE community benefits, on the other hand, are negotiated on a project-by-project basis, and are based on the five categories that were identified, through intense community involvement leading to the establishment of LUCE. They are as follows:

- New Affordable and Workforce Housing
- GHG Emissions and Future Congestion Reduction Requirement
- Community Physical Improvements
- Social, Cultural, and Educational Facilities
- Historic Preservation

These broad categories, refined during the preparation of Specific Area Plans, guide the initial discussion of the development agreement process. But each project is unique, as is its relationship to the specific neighborhood in which it is located, with its particular characteristics and

needs, providing the opportunity for community residents and interested parties to comment on the project and its potential community benefits.

This early stage in the project review is called the “float-up process” and—in addition to public involvement—includes Planning Commission and City Council input. The resulting list of community benefits is then reviewed by an interdepartmental working group comprised of the department heads responsible for services such as housing, social services, transportation, and parks and open space. Congestion reduction is expected from all projects.

The third step addresses financial feasibility to determine the highest levels of community benefits possible without making the project economically infeasible.

### **Problems with Development Agreements in Santa Monica**

The greatest attraction of development agreements is their flexibility. They provide greater assurance for developers and more regulatory flexibility for the City in achieving policy goals. It “has greater public review and participation, allows more flexibility to create high-quality projects and achieve greater community benefit, providing the greatest discretionary control to the City” (City of Santa Monica, May 2008).

On the other hand, development agreements consume considerable City resources and staff and decision-makers time. In 2012 there were 24 development agreements that had been approved or were pending since the adoption of LUCE in 2010. Most of these projects are located in downtown Santa Monica, Wilshire Boulevard and the former industrial area of Bergamotte. Given the number of development agreements, it is not surprising that Santa Monica is seeking alternatives to development agreements for smaller (mostly Tier 2) projects. In a paper prepared for the City - “Community Benefits and Incentives: Issues, Options, and Case Studies” the consultants, after reviewing the issues for Santa Monica and approaches to community benefits in peer communities, recommended a Conditional Use Permit Process for Tier 2 projects that would have developers either choose benefits from a specific list or propose benefits that would be found to meet LUCE goals. The “bonus value/criteria may be expressed by a points system, based on construction value, or as binary thresholds (e.g. incorporating at least X square feet of publicly accessible open space for every Y square feet of office space). These criteria may be used in combination” (Dyett & Bathia, August 2012).

The city is now considering a “plan-based” approach, as

in San Francisco and a ministerial entitlement based on compliance determination – as an alternative to development agreements.

## **3) Culver City, California**

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### **Background**

Culver City adopted a Community Benefit Incentive Program in connection with revisions to its Zoning Code governing Mixed Use Development Standards in February 2008. The Ordinance replaced an earlier Ordinance that permitted a residential density of up to 65 dwelling units per acre in the Mixed Use Zone.<sup>16</sup> The revised Ordinance reduced this density to 35 dwelling units per acre because there was community concern that the development standards were incompatible with surrounding land uses and generated negative traffic impacts. However, this Mixed-Use Ordinance includes a provision that allows mixed-use development to obtain density increases in return for provision of community benefits. Densities can be increased up to 50 dwelling units per acre in return for the project’s provision of community benefits, such as public parking, open space, streetscape improvements, green building construction meeting LEED Silver energy efficiency standards, or other City identified benefits that serve the immediately impacted neighborhood.<sup>17</sup>

### **Approach Used to Estimate Level of Community Benefits<sup>18</sup>**

The value enhancement related to density increases, e.g. from 35 dwelling units per acre to 50 dwelling units per acre, is calculated using an incremental profit approach. In this way, the increase in value is calculated only on the additional units that are possible and not over the entire project. The calculation of profit is based on collaboration between the developer and the City and is successful in those situations in which the increase in profit is high enough so that the developer concludes that the project is still feasible, given the additional costs of community benefits. A succinct definition of the value enhancement is as follows: the number of additional dwelling units allowed multiplied by the market value sales price of these units multiplied by 15% (assumed developer profit in the Ordinance).<sup>19</sup>



The calculation methodology minimizes the number of subjective assumptions, but still requires staff time in working with the developer. The following steps summarize the way in which value enhancement is calculated.

- Identify the increase in the number of dwelling units.
- Estimate the market value per unit by appraisal or market study.
- Apply an agreed upon threshold profit percentage. (This can be complicated, because the developer and the City may not assume the same profit percentage.)
- The final step is to calculate the community benefits contribution which is equal to 50% of the value enhancement.

The Mixed-Use Ordinance (Section 17.4000.065 of the Zoning Code) specifies the details of the Community Benefits Incentive Program, including a process for establishing benefits related to specific projects. This process includes meetings with community members. The benefits may be provided either on-site and maintained for the life of the project, or the benefit may be part of a public improvement, for which the developer would pay an in-lieu fee. The Ordinance also includes a monitoring process.

## 4) Berkeley, California (Downtown Area Plan)

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### Origins of Plan and Adoption Process

The Downtown Area Plan is designed to revitalize Berkeley's Central Business District which had been in decline for several decades. The current Downtown Area Plan, adopted by the City Council in Spring 2012 replaced the 1990 Downtown Plan. The impetus for replacing the 1990 plan stemmed from a lawsuit (on environmental concerns) in 2002 that the City filed against the University of California's (Berkeley campus) Long Range Development Plan. The new Downtown Area Plan was approved in 2009, but was rescinded in 2010, after a referendum campaign



*Oxford Plaza, Berkeley, Resources for Community Development.  
Photo Courtesy RCD*

received 9,200 signatures to place an opposition measure on the ballot.<sup>20</sup> In its place, voters approved Measure R in 2010. The current Area Plan is consistent with Measure R and was adopted by the City Council in 2012.<sup>21</sup>

### Plan Interpretation

The Downtown Area Plan addresses many issues related to new development, including height limitations, a "Green Pathway" development review process (that provides a streamlined permit process), parking requirements, open space, and impact fees.<sup>22</sup> Impact fees, such as the Streets and Open Space Improvement Plan fees (SOSIP) and housing mitigation fees, are required of all new developments. In addition, developments that request building heights that exceed 75 feet are required to provide additional public benefits. This is the one aspect of the Plan which links higher densities, land value recapture, and public benefits.<sup>23</sup>

*This policy from the Downtown Area Plan is codified in Berkeley's Municipal Ordinance (23E.68.090 Findings):*

E. In order to approve a Use Permit for buildings over 75 feet in height under Section 23E.68.070.B, the Board must find that the project will provide significant community benefits, either directly or by providing funding for such benefits to the satisfaction of the City, beyond what would otherwise be required by the City. These may include, but are not limited to: affordable housing, supportive social services, green features, open space,

transportation demand management features, job training, and/or employment opportunities. The applicable public benefit requirements of this Chapter shall be included as conditions of approval and the owner shall enter into a written agreement that shall be binding on all successors in interest.

As of April 2013, these benefits have not yet been defined, since no project had applied for this height variance. However, The Residences at Berkeley Plaza, a 355-unit, 17-story rental high-rise has now been proposed. This will be the first project required to negotiate public benefits. The responsibility for this will be the Zoning Adjustment Board. This project will take at least 12 to 18 months to get started, since an EIR is being prepared.

### Ongoing Implementation Considerations

Berkeley has not defined a fixed relationship between increased densities or heights and the benefits that would be required. According to Berkeley's Planning Director, the city attorney is concerned that, if this type of "table" were developed, it could be necessary to support requirements through a nexus study. The City wants to avoid this possibility, since it is possible that some benefits could not be justified through a nexus study. One example of this is local hiring on construction projects, required for the Green Pathway development review process. Since this streamlined review is voluntary, a nexus study is not required. Therefore, it is necessary to negotiate the public benefits that will be required each time a development requests heights in excess of 75 feet.

### Conclusions and Recommendations

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At a time when local governments search for ways to pay for needed improvements, services, and affordable housing, there is a valuable tool for many cities to consider is Public Benefit Zoning (PBZ). This White Paper has described this tool and provides examples of its use in cities in California. It works as follows:

When land is up-zoned or a plan updated to allow greater intensity of development, the value of the land generally increases. Most of this increase in value is the result of a public action and, for the most part, not due to actions undertaken by the landowner. When understood in this light, a strong argument can be made for the public to receive a reasonable share of the increased land value, to be used for community benefits. The technical planning

term for this approach is "Land Value Recapture."

The paper has reviewed the economics, types of community benefits and specified the differences between PBZ and other value capture tools. It describes various implementation approaches, what happens when market conditions make it infeasible, and outlines legal considerations. Finally, it provides four extended California case studies – San Francisco, Santa Monica, Culver City, and Berkeley.

A separate final report explores the potential use of PBZ in four East Bay cities – Fremont, El Cerrito, Walnut Creek and Concord.

What lessons does the White Paper provide? What should localities do when contemplating Public Benefit Zoning (PBZ)?

### Recommendations

- Evaluate the locality's market strength through economic development economics, preferably a "Residual Land Value Analysis." Encourage and enlist other neighboring localities to conduct such a study jointly.
- If economic studies indicate a viable market for higher densities, a general policy declaring that the city will pursue community benefits—in addition to existing Development Impact Fees, Inclusionary Housing and Commercial Linkage Fees—should be adopted.
- Establish with the relevant community a preliminary list of desired community benefits.
- Choose the planning approach that works best for the community. For example, in the case of a community-based plan—such as a specific plan—a "plan-based approach" would be desirable. For larger, individual parcels, a negotiated process with the land owner/developer would be best.
- In both cases, economic analyses that establish the value of the land before and after the land use/zoning changes are necessary. Then it is up to the legislative body to decide how much of the "value enhancement," or "lift," to recapture with community benefits.
- Establish the costs of the various community benefits.

- With an understanding of the costs and benefits to the land owner and developer, establish the specific community benefits, based on the recommendations of the community and city staff.
- Set in place an evaluation mechanism to be employed on a regular basis.

In localities where the market is weak, it is very tempting to up-zone properties, with the hope that they will become more attractive to developers. While that is understandable, the upzoning would eliminate any possibility for community benefits when the market improves. Downtown and Chinatown in Oakland are examples of areas where development interest is growing, but upzonings occurred prematurely. Inability to extract some of the land value increases resulting from the improving market will lead to development lacking the community amenities that would make the city even more attractive to buyers and renters. Localities should resist the impulse to up-zone no matter what.

This point warrants repeating: localities—all localities—should delay rezoning until Public Benefit Zoning policies are established. In weak markets, it could be possible to establish a “trigger mechanism” that phases in Public Benefit Zoning (see page 12).

Although PBZ is not as well known in this country as are other mechanisms that harness market forces to bring benefits to the public, such as incentive zoning, it is the only one that explicitly attempts to capture land value increases.

PBZ is based on the understanding, that, in large part, the increases in land value are due to the growth of the region, publicly funded infrastructure and, more specifically, planning decisions—that is, public actions. Seen in this light it is only fair and equitable that landowners should share the benefits that the rest of us have bestowed upon them, by contributing to the betterment of the public city.❖

## Endnotes

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- <sup>1</sup>In this paper we will use these terms interchangeably
- <sup>2</sup>By providing concessions, including increased density, an inclusionary housing mandate would be consistent with California State Law under the Palmer Decision.
- <sup>3</sup>There have been numerous studies documenting the impact of BART on property values. For the most recent study, see the research study prepared by the Center for Neighborhood Technology.
- <sup>4</sup>The great majority of PDAs coincide with “Communities of Concern,” defined as areas of concentrations of socioeconomically disadvantaged or vulnerable populations.
- <sup>5</sup>In this paper we will use these terms interchangeably
- <sup>6</sup>Landis and Cervero.
- <sup>7</sup>It is in those situations (negative residual land values) that government intervention is necessary to subsidize private developers – the situation that had applied to publicly assisted urban redevelopment.
- <sup>8</sup>In real estate investment, rental property’s value is based on net income flows (gross rents minus all operating expenses) that the property can generate over the intended holding period. The potential value is estimated by solving the following equation:
- Property Value = Net Operating Income divided by a Capitalization Rate.**
- The capitalization rate varies by market conditions and may be estimated based on recent sales of income property.
- <sup>9</sup>Communities of concern are defined as areas with low-income and minority populations.
- <sup>10</sup>It should be noted that the level of community benefits desired by community members is almost always greater than the level that is financially feasible for new development.
- <sup>11</sup>One example of a trigger used in an inclusionary housing program is an increase in annual building permits above a defined threshold. The threshold is based on historic building permit data.
- <sup>12</sup>For example, in FY 2009-10, California redevelopment agencies reported that over \$ one billion was available and unencumbered to be spent on affordable housing. These funds are no longer available on an ongoing basis.
- <sup>13</sup>This is no longer an option for California cities.
- <sup>14</sup>City of Santa Monica (2008), p. 3.
- <sup>15</sup>“These fees and contributions represent baseline requirements and constitute a negotiation floor for development agreements” (City of Santa Monica. 2012. p. 14).
- <sup>16</sup>This code applies to specific streets within the City.
- <sup>17</sup>City of Culver City, California, City Council Agenda Item Report February 11, 2008, accessed at <http://www.culvercity.org/sirepub/pubmtgframe.aspx?meetid=273&doctype=Agenda>. Note that affordable housing is not mentioned as a specific benefit.
- <sup>18</sup>This section is based on information provided by Keyser Marston at the Sustainable San Diego Workshop – Crafting the New Normal: Tools for Urban [Re] Investment, December 7, 2012 and from Culver City’s revised Ordinance (Section 17.400.065 of the Zoning Code).
- <sup>19</sup>Since the actual profit could be below or above the 15% benchmark, the actual profit percentage to be used would be negotiated between the developer and the City.
- <sup>20</sup>The City Council rescinded the Plan, so this measure was never placed on the ballot.
- <sup>21</sup>According to Berkeley’s Planning Director, it is possible that a vote would be required to approve any changes to the Downtown Area Plan that would be inconsistent with Measure R. Since most plans are not passed through a vote of the electorate, this makes Berkeley’s Downtown Area Plan somewhat unique.

## Endnotes

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<sup>22</sup>The Green Pathway development review process provides a streamlined permit process in return for requirements to mitigate air quality, noise, and shorter-term construction impacts, as well as possible disturbance of archeological resources. In addition, other benefits are required, including 20% affordable rental housing or payment of a housing fee, and employment of local construction workers. The Green Pathway option would not be considered a value capture policy, because developers do not receive higher densities, and instead benefit from streamlined review.

<sup>23</sup>See Policy LU-2.2: Additional Community Benefits for Buildings Exceeding 75 feet (Downtown Area Plan, page LU-13). This is also cited in the Municipal Ordinance (23E.68.090).

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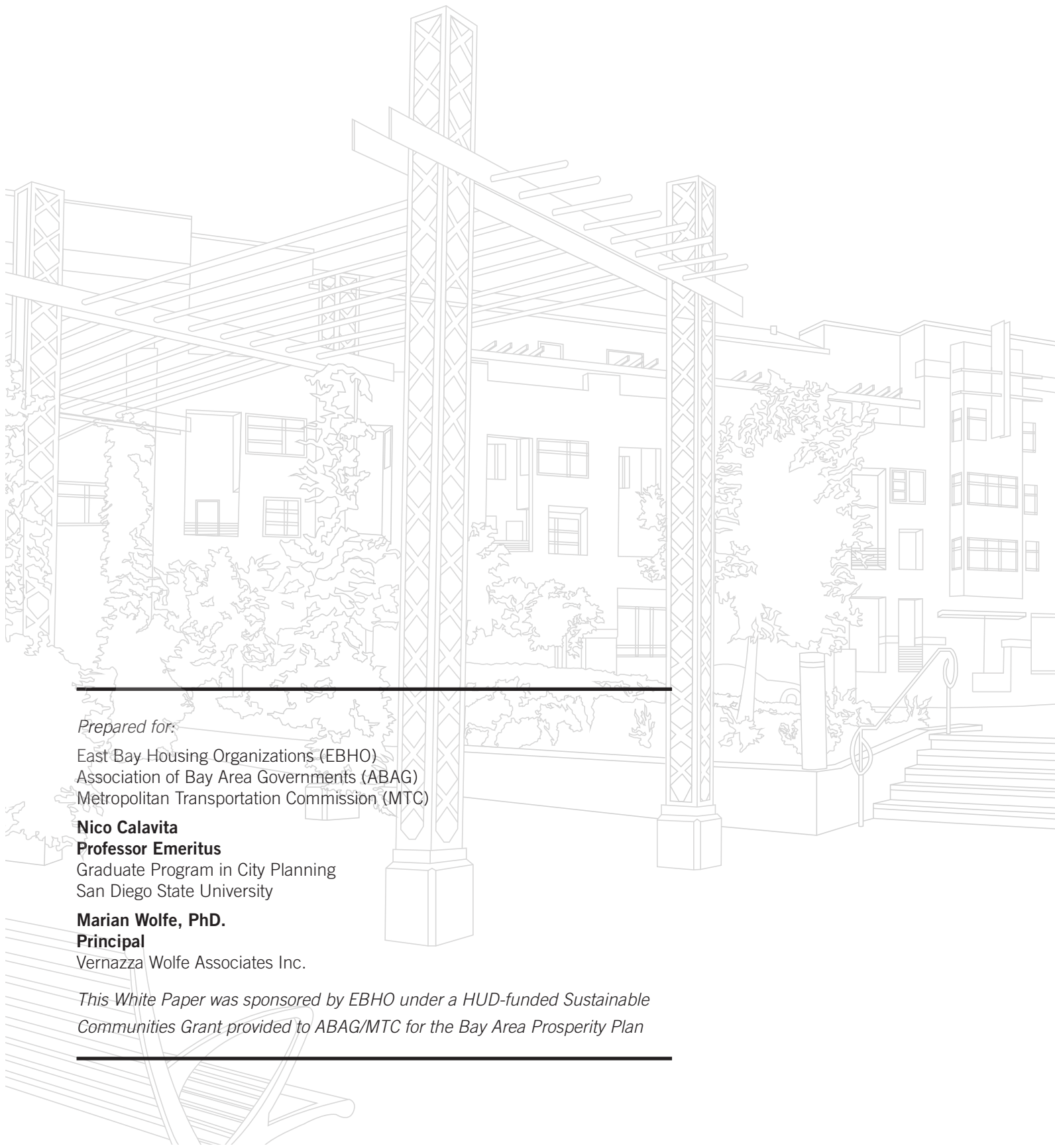
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